

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-000669-MR

AWS COMPANY, INC.

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT  
HONORABLE LEWIS D. NICHOLLS, SPECIAL JUDGE  
ACTION NO. 92-CI-000131

ARMCO STEEL COMPANY, L.P.  
(NOW A.K. STEEL CORPORATION)

APPELLEE

OPINION  
DISMISSING

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BEFORE: JOHNSON, KNOX, SCHRODER, JUDGES.

KNOX, JUDGE: AWS Company, Inc. (AWS) appeals an order of the Boyd Circuit Court denying its CR 60.02(b) motion to vacate and set aside a previous order of that court denying CR 60.02(d) relief from a summary judgment in favor of appellee, AK Steel Company, Inc. (f/k/a ARMCO Steel Company, L.P.).

The trial court, on October 1, 1992, granted summary judgment in favor of AK Steel with respect to AWS's claims of breach of contract (the Golf Course Project). The trial court found there was no meeting of the minds as to the termination provision in the contract, concluding any alleged contract would be unenforceable under Kentucky's Statute of Frauds in that it

could not be performed within one (1) year. AWS appealed, and this Court affirmed the trial court's summary judgment on the ground that there was no meeting of the minds on an essential term of the contract, namely the termination provision.<sup>1</sup>

In July 1995, AWS retained its current counsel for the purpose of pursuing the remaining claims not dismissed by summary judgment. While reviewing the record, AWS's new counsel formed the opinion that by way of a revised memorandum supporting its motion for summary judgment, AK Steel had made serious misrepresentations of fact upon which the trial court had relied in granting summary judgment on the Golf Course Project. Consequently, on January 5, 1996, AWS filed a CR 60.02(d) motion to vacate and set aside the trial court's order, alleging AK Steel had engaged in fraud affecting the proceedings.

On October 16, 1996, the trial court<sup>2</sup> entered its order denying AWS CR 60.02(d) relief. The court explained that AWS had failed to establish clear and convincing evidence of fraud. Again, AWS appealed and this Court affirmed.<sup>3</sup>

In September 1997, while conducting discovery in the remaining contract claim, AWS received a typewritten document, on the letterhead of ARMCO Steel Company, styled "Minutes of ARMCO/AWS Meeting 1/3/93." On November 17, 1997, while the prior

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<sup>1</sup> AWS Co., Inc. v. ARMCO Steel Co., L.P., 92-CA-002673-MR, rendered December 17, 1993.

<sup>2</sup> Judge Asbury in the Boyd Circuit Court recused himself and Judge Lewis D. Nicholls of the 20<sup>th</sup> Judicial Circuit was appointed Special Judge on March 22, 1996.

<sup>3</sup> AWS Company, Inc. v. ARMCO Steel Company, L.P. Now AK Steel Corporation, 96-CA-3037-MR, rendered June 26, 1998.

CR 60.02(d) appeal remained pending, AWS filed another motion, this time pursuant to CR 60.02(b),<sup>4</sup> to vacate the order of October 16, 1996. AWS claimed this typewritten document constituted newly discovered evidence warranting CR 60.02(b) relief, as it would prove AK Steel perpetrated fraud, hence, its CR 60.02(d) motion should have been granted. The trial court's order denying CR 60.02(b) relief was entered on March 6, 1998.

While AWS's argument is without merit and procedurally flawed as to proper application of CR 60.02, we need not address it. CR 60.02 empowers the trial court to relieve a party from a final judgment on seven (7) separate and independent bases, including "newly discovered evidence," under subsection (b). However, the rule further provides:

The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken.

The record reflects the order from which AWS sought CR 60.02(b) relief is that of October 16, 1996, denying its prior CR 60.02(d) request. The 60.02(b) motion to set aside the order was filed on November 17, 1997, some thirteen (13) months following entry of that judgment. The one-year limitation contained in CR 60.02 having expired, the court was without jurisdiction to modify the original order. Cline v. Cline, Ky., 324 S.W.2d 390 (1959); Copley v. Whitaker, Ky. App., 609 S.W.2d 940 (1980).

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<sup>4</sup> On January 16, 1998, this Court entered an order of abatement for a period of sixty (60) days to allow the trial court to rule on the CR 60.02(b) motion.

While we are mindful the untimely nature of AWS's CR 60.02(b) motion was never brought before the circuit court, it has been held that a court, on its own initiative, should dismiss an action for lack of jurisdiction despite the failure of opposing counsel to discover the defect and raise it by motion. White v. Commonwealth, Ky., 481 S.W.2d 656 (1972). Moreover, our Supreme Court has opined:

When the facts reveal a fundamental basis for decision not presented by the parties, it is our duty to address the issue to avoid a misleading application of the law. This is such a case.

Mitchell v. Hadl, Ky., 816 S.W.2d 183, 185 (1991).

It is our opinion the circuit court lost jurisdiction of the case when the CR 60.02(b) motion was not brought within the one-year statute of limitation set forth in our Rules of Civil Procedure. In that the circuit court lacked jurisdiction to entertain the motion, its judgment on the matter is void. Accordingly, "[w]e dismiss the appeal[] sua sponte upon the ground that there is no valid judgment from which an appeal can be taken." White, 481 S.W.2d at 656; See also Cann v. Howard, Ky. App., 850 S.W.2d 57, 58 (1993) (holding sua sponte that the trial court lacked subject matter jurisdiction).

For the foregoing reasons the appeal from the Boyd Circuit Court's order denying AWS CR 60.02(b) relief is dismissed.

SCHRODER, JUDGE, CONCURS.

JOHNSON, JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

JOHNSON, JUDGE, DISSENTING. I respectfully dissent. Based on the information that is before the Court, I am inclined to agree with the position taken by the Majority Opinion. However, I cannot agree to this ruling without the benefit of additional input from the parties. Since this Court has sua sponte raised the purportedly dispositive issue of the lack of timeliness of the CR 60.02(b) motion, I would allow the parties the opportunity to file supplemental briefs.

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