

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-001907-MR

DAVID J. PHILLIPS,  
D/B/A T.S.P. COMPANY, INC.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE GARY PAYNE, JUDGE  
ACTION NO. 94-CI-00787

CARWELL E. GARDNER, JR.

APPELLEE

### OPINION AND ORDER DISMISSING APPEAL

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BEFORE: BARBER, GUIDUGLI, JUDGES; MARY COREY, SPECIAL JUDGE.<sup>1</sup>

GUIDUGLI, JUDGE. David J. Phillips ("Phillips") appeals from an order of the Fayette Circuit Court dismissing the action of T.S.P. Company, Inc. ("TSP") for lack of prosecution. For the reasons stated herein, we must dismiss the appeal.

In March, 1994, TSP filed the instant action to enforce a mechanics lien against Carwell E. Gardner, Jr. ("Gardner"). In late 1994, the Commonwealth revoked TSP's corporate charter for failure to file an annual statement and pay the yearly fee. Subsequent to TSP's dissolution, it appears that no further

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<sup>1</sup>Senior Status Judge Mary Corey sitting as Special Judge by assigned of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

action was taken to enforce the mechanics lien against Gardner. The matter was dismissed for lack of prosecution on February 3, 1999.

Phillips was an officer of TSP. On May 21, 1999, he filed a pleading seeking to alter or amend the February 3, 1999 order of dismissal. Rather than moving to substitute himself as a party plaintiff, it appears that Phillips merely substituted his name for that of TSP on the pleadings. Phillips motion was denied, as was his renewed motion. This appeal followed.

Phillips now argues that he should be properly regarded as the appellant herein. He maintains that the circuit court erred in denying his motion to renew TSP's action because the revocation of TSP's charter had the legal effect of making him TSP's "alter ego." He also argues that the circuit court should not have dismissed TSP's action while his personal bankruptcy proceeding was pending. Lastly, he maintains that the action was improperly dismissed because it was pending before the master commissioner. He apparently seeks to have the order of dismissal reversed and the matter remanded for further proceedings.

We have closely studied the facts, the law, and the arguments of counsel, and find no error. We need not enter into a protracted analysis of Phillips' claim of error as it appears that Phillips had no standing either to substitute himself below without leave of court for the defunct TSP, nor to prosecute an appeal on TSP's behalf. We find no legal or factual basis in support of Phillips' assertion that he became the "alter ego" of TSP by virtue of the piercing of TSP's corporate veil, nor that

he is entitled to step into TSP's shoes to prosecute its claim against Gardner.

TSP was a corporate entity operating under charter sanctioned by the Commonwealth when it filed its action against Gardner. Phillips was an officer in that corporation.<sup>2</sup> TSP then ceased to exist as a corporate entity when its charter was revoked, and its action against Gardner went unprosecuted. These uncontested facts do not bolster Phillips' argument that he was entitled to step into TSP's shoes, and we find no basis for concluding that his personal bankruptcy proceeding has any bearing on the issues at bar.

For the foregoing reasons, we must dismiss Phillips' appeal of the Fayette Circuit Court's denial of his motion to alter or amend. Having found that Phillips' appeal was not made in bad faith, we deny Gardner's motion for attorney fees.

CR 73.02(4).

ALL CONCUR.

ENTERED: November 2, 2001

/s/ Daniel T. Guidugli  
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

David M. Kaplan  
Lexington, KY

BRIEF FOR APPELLEE:

E. Douglas Richards  
Lexington, KY

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<sup>2</sup>The record does not reveal whether Phillips was a shareholder.