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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000167-MR

BIG SANDY REGIONAL JAIL AUTHORITY, D/B/A BIG SANDY REGIONAL DETENTION CENTER — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 08-CI-00775

KENAR ARCHITECTURAL & ENGINEERING, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: FORMTEXT LAMBERT AND VANMETER, JUDGES; HARRIS, SENIOR JUDGE.

LAMBERT, JUDGE: Big Sandy Regional Jail Authority d/b/a Big Sandy Regional Detention Center (hereinafter "Jail Authority") appeals from a summary judgment order entered on December 4, 2008, by the Franklin Circuit Court. In this order, the trial court determined that Kenar Architectural & Engineering, Inc.

(hereinafter "Kenar") was entitled, as a matter of law, to the payment of approximately eighty thousand dollars ($80,000) in fees for the design and development of architectural plans reflecting a proposed expansion of the Jail Authority's Paintsville detention facility. After careful review, we affirm.

The Jail Authority is the governing body of the Big Sandy Regional Jail located in Paintsville, Kentucky. This governing body is comprised of members from the following counties: Johnson, Lawrence, Magoffin, and Martin. The jail holds prisoners from the four counties, as well as prisoners who are in state custody. The state prisoners provide additional income to the jail and thereby reduce the financial burden on the counties of maintaining this facility.

In 2006, the Jail Authority conceived a plan to construct a new wing on the jail. This new wing would provide for the holding of more state prisoners and, thus, would increase income to the counties. The Jail Authority advertised for architectural bids. Ultimately, four bids were considered, including one from Kenar. On July 18, 2006, the Jail Authority recorded the following decision in its meeting minutes:

> Architects were asked to give their bid quotes and explain their intentions, estimate construction of a new Class d holding building which will house 80. The four architect bids were: KZF, CMW, Howard Engineering, Kenar Architectural.
>
> Motion made by Grayson Smith, second by Ron Fairchild, to hire Howard Engineering at the lowest rate of 6.5% of the construction cost. Motion carried.

Eventually, the Jail Authority became dissatisfied with Howard Engineering. Nearly a year later, on June 21, 2007, the following decision was recorded in the Jail Authority's meeting minutes:

> The hired architect is not doing his job. Motion made by Tommy Queen, second by Paul Wells, to fire architect and demand money be paid back. Kanar [sic] is to be contracted to get the drawings and permits so the building can be started immediately. The amount to be paid Kanar [sic] is as he previously opted. Motion carried.

Shortly thereafter, the Jail Authority's administrator, Henry "Butch" Williams, met with Kenar and officials of the Kentucky Department of Corrections (DOC) to discuss the scope of the project. Armond Russ, a professional engineer and project manager employed by Kenar, wrote a letter to Williams memorializing the contents of the meeting. A portion of this letter stated as follows:

> 8. BSRDC [Big Sandy Regional Detention Center] has a target budget of $750,000 for the project. Armond advised that this might be possible if the kitchen and visitors waiting room are deleted from the project **and** the structure was constructed with residential grade materials. Kenar recommended that a more sturdy structure be constructed. If a full scale kitchen is required, to include a loading dock and access road, the construction budget could easily reach $1,500,000.
>
> 9. BSRDC desires a swift completion of design. Armond indicated that 6 months would be required at a minimum.
>
> . . .
>
> 11. A follow-up meeting with D.O.C. is scheduled for:
> Thursday, July 12, 2007
> 1:00 PM EDT
> D.O.C. Office in Frankfort

> The meeting attendees will include BSRDC, Kenar, and Tracey Moutardier of D.O.C. The purpose of the meeting is to finalize the scope of the work to include the number of plumbing fixtures for the inmates, size of the laundry and kitchen, outdoor recreation/smoking space, multi-purpose space and provision for direct supervision.

On July 12, 2007, a follow-up meeting was held between Kenar, Jail Authority representatives, and DOC representatives. According to a letter written by Kenar's principal, Harold Fletcher, Jr., to Jail Authority Chairman John Harmon on July 16, 2007, the parties did finalize the scope of the expansion project, which included the construction of a new commercial-grade kitchen. With this kitchen included, the letter indicated that "the construction cost for proposed addition is approximately $1.5 Million . . . ."

That same day, Harmon met with Fletcher at Kenar's office in Frankfort, Kentucky. Harmon signed an architectural services contract dated April 27, 2007.[1] According to Fletcher, this contract reflected the fee terms set forth in the original bid submitted to the Jail Authority.

Pursuant to this contract, Kenar was to receive a fee of 6.5% of the project cost of any project between $1.5 and $1.999 million dollars. Article 1.1.2.5.1 of the contract provided as follows:

> Amount of the Owner's overall budget for the Project for all known cost. *Project cost is estimated at*

[1] According to Kenar, the date discrepancy was due to the fact that Fletcher had prepared and signed this contract on an earlier date. Fletcher received a telephone call from Harmon on or about April 27, 2007. During this conversation, Harmon stated that the Jail Authority had become dissatisfied with the current architect and that it wanted to fire that architect and hire Kenar.

> *approximately: One Million Five hundred and Twenty Thousand ($1,500,000)* [sic]. *This amount reflects a normal design, bid and build project. The cost may vary and is not guaranteed.*

The contract further provided that "[f]ee [is] to be paid in incremental stages (i.e. monthly billing) as work progresses."

Due to the Jail Authority's request that the architectural services be expedited, Kenar moved quickly to prepare the designs and plans for the new wing. According to Fletcher, his team worked with the DOC during the summer of 2007. By late summer, most of the designs and drawings were submitted to the Jail Authority. Kenar submitted three monthly invoices to the Jail Authority in the following amounts: $24,375, $49,026, and $6,987. These invoices total $80,388. According to Fletcher, substantially all of the services contemplated under the contract were performed.

That fall, some members of the Jail Authority's board became concerned about whether a new wing would be profitable. Minutes from a special meeting conducted on September 11, 2007, reflected the following:

> The purpose for the call meeting was to discuss the building addition with the four participating Judge Executives. David L. Compton, Doctor Hardin, Tucker Daniel, and Kelly Callaham was [sic] invited and all attended.
>
> Tucker Daniel told the board he was advised at a training meeting for the addition not to be built. Lengthy discussion on the situation resulted. The board and Judge Executives feels [sic] that Kelly White needs to attend the next meeting and address the situation with all. A new kitchen was also recommended for future. The

> estimate cost of the new expansion would run approximately $1,500,000 which means that the board cannot build without borrowing. Further questions needs [sic] addressed. The Judges are very cautious of putting the counties into debt at this time.

Then, on October 18, 2007, meeting minutes of the Jail Authority reflect as follows: "Attorney Nelson Sparks told the board that he had instructed the architect by letter to stop where they were." Thereafter, the Jail Authority refused to pay the invoices submitted by Kenar. After several unsuccessful attempts to collect its fee, Kenar filed suit in Franklin Circuit Court on April 30, 2008, for breach of contract.

While admitting that it did authorize the hiring of Kenar and that its chairman did in fact sign a contract with Kenar for architectural services, the Jail Authority defended itself by arguing that it was not legally obligated to pay Kenar because the chairman was without authority to enter into the fee provisions set forth in the contract. The Jail Authority also moved for a change of venue from Franklin Circuit Court to Johnson Circuit Court. By order entered on August 11, 2008, the trial court denied the Jail Authority's motion to transfer venue.

Thereafter, an attempt at mediation failed and both parties eventually filed motions for summary judgment. On December 4, 2008, the trial court entered an order of summary judgment in favor of Kenar. This appeal now follows.

In its first assignment of error, the Jail Authority argues that the trial court erred in finding a valid enforceable contract between itself and Kenar. While conceding that it did in fact authorize the hiring of Kenar, the Jail Authority

nevertheless contends that it never publicly authorized or approved the fee provisions set forth in the contract executed by its chairman on July 12, 2007. Without this public authorization, the Jail Authority argues that summary judgment in Kenar's favor was erroneous, as a public record was critical to creating an enforceable contract between the parties.

The Jail Authority's sole authority in support of its first argument is the following well-settled principle of law: "any unit of government speaks only through its official documents." *Miller v. Lexington-Fayette Urban County Gov't.*, 557 S.W.2d 430, 432 (Ky. App. 1977). Pursuant to KRS 441.800, the Jail Authority is a governmental unit authorized, among other things, "to make and execute contracts and other instruments necessary or convenient to the exercise of the powers of the authority . . . ." *Id.* Thus, we agree with the Jail Authority that the determinative question in this case lies in whether there is sufficient public record to demonstrate a valid, enforceable contract between Kenar and the Jail Authority. After careful review, we hold that such a public record exists, and thus, summary judgment in Kenar's favor was appropriate.

The standard of review for summary judgment is "whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law." *Pearson ex rel. Trent v. Nat'l. Feeding Sys., Inc.*, 90 S.W.3d 46, 49 (Ky. 2002). In this case, both parties conceded the lack of any issues of material fact and moved for summary judgment. It was therefore undoubtedly proper for the trial court to enter judgment as the

construction of a contract "is a matter of law for the court to decide." *Id.* Such determinations of law, however, "are subject to independent *de novo* appellate determination." *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky. App. 2005).

As set forth in the trial court's order, the general requirements for a valid and enforceable contract are "offer and acceptance, full and complete terms, and consideration." *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 384 (Ky. App. 2002). "Where a contract is ambiguous or silent on a vital matter, a court may consider parol and extrinsic evidence involving the circumstances surrounding execution of the contract, the subject matter of the contract, the objects to be accomplished, and the conduct of the parties." *Id.* at 385.

In this case, the Jail Authority disputes only one critical aspect of the creation of a valid and enforceable contract between the parties. It argues that it never formally authorized or accepted the fee terms set forth in the July 12, 2007, contract executed by its chairman. To the extent that its chairman signed a contract containing such fee terms, the Jail Authority argues that he was without authority to do so in the absence of such prior authorization or approval.

The trial court rejected this argument, ruling that the case of *Bd. of Educ. of Perry County v. Jones*, 823 S.W.2d 457 (Ky. 1992) was applicable. In *Jones*, the Kentucky Supreme Court addressed a dispute between a teacher and a school board as to the terms of an employment contract. *Id.* at 458. The parties disputed a term which was not set forth in the school board's meeting minutes. *Id.* The Supreme Court held that in cases where a governmental body's meeting

minutes are not dispositive of the controversy, consideration of any and all "formal records" of that body are permissible and not in violation of the general rule that official records "may not be enlarged or restricted by parol evidence." *Id.* at 459. The actual employment contract executed by both the teacher and officials employed by the board was considered by the *Jones* Court to be a "formal record" of the board and, thus, worthy of consideration in determining the contract dispute. *Id.*

In this case, the Jail Authority concedes that it set forth the following authorization in its minutes: "Kanar (sic) is to be contracted to get the drawings and permits so the building can be started immediately." It reasonably follows, in light of the holding set forth in *Jones*, that the contract subsequently entered into by its chairman and Kenar to provide said "drawings and permits" is a formal record of the Jail Authority that is subject to consideration when determining this contract dispute.

The Jail Authority counters, however, that to the extent that the July 12, 2007, contract sets forth the fee to be paid to Kenar for services rendered, its chairman was without authority to execute such a provision. Again, we agree with the trial court that such a contention is not supported by the Jail Authority's minutes and formal records.

No dispute exists that the Jail Authority plainly authorized on June 21, 2007, for a contract to be entered into with Kenar for architectural services. The Jail Authority further authorized the following in its meeting minutes from that

date: "[t]he amount to be paid Kanar [sic] is as he previously opted." In interpreting this authorization, referral to the following excerpt of the Jail Authority's meeting minutes from July 18, 2006, is informative:

> Motion made by Grayson Smith, second by Ron Fairchild, to hire Howard Engineering at the lowest rate of 6.5% of the construction cost. Motion carried.

Thus, a fee to be paid to the architect of "6.5% of the construction cost" was authorized and approved by the Jail Authority on July 18, 2006, with said fee being reauthorized for Kenar on June 21, 2007.

The Jail Authority argues, however, that this percentage fee was based on an estimated construction cost of $750,000[2] and that no official record reflects authorization or approval by the Jail Authority for a construction cost of $1.5 million. Once again, we disagree. Two competent records indicate the Jail Authority's knowledge, approval, and authorization of such an increase in construction costs. First, the contract itself, a formal record, was authorized by the Jail Authority on June 21, 2007, and executed by the Jail Authority's chairman on July 12, 2007. Second, the following excerpt from the Jail Authority's September 11, 2007, meeting minutes provides: "The estimate cost of the new expansion would run approximately $1,500,000 which means that the board cannot build without borrowing."

[2] The Jail Authority has set forth no minutes or formal records of the body which indicate that its authorization of a 6.5% fee was based on an estimated construction cost of $750,000. This is ascertained only by referral to the parol evidence (Howard Engineering's original bid, letter from Kenar employee) which the Jail Authority argues is not admissible.

When viewed in their entirety, we agree with the trial court that the official records and documents of the Jail Authority do evidence a valid and enforceable contract between the parties in this instance. Thus, there was no violation of the well-settled principle of governmental contract law which mandates that "any unit of government speaks only through its official documents." *Miller*, 557 S.W.2d at 432. The official documents of the Jail Authority spoke for themselves in this case and hence, the trial court did not err in ruling that Kenar was entitled to judgment as a matter of law on its breach of contract claim.

The Jail Authority also appeals the trial court's order refusing to transfer venue of the matter to Johnson County. Conceding that venue would have been proper in either Franklin or Johnson county pursuant to KRS 452.450, the Jail Authority argues that transfer was nevertheless required in this case since the more convenient forum would have been Johnson County. *See Dollar General Stores, Ltd. v. Smith*, 237 S.W.3d 162, 166 (Ky. 2007) (when venue lies in more than one county, the case should be heard in county with most convenient forum). Johnson County was the better forum, argues the Jail Authority, because all official documents and records of the Jail Authority were contained in that county.

As held in *Dollar General Stores v. Smith*, such a determination is purely within the discretion of the trial court. *Id.* at 166. Thus, we will set aside these discretionary rulings only when there is an abuse of such discretion. In this

case, most of the architectural services were to be performed in Franklin County. In addition, the contract itself was signed in Franklin County.

Pursuant to KRS 452.010(2), "[a] party to any civil action triable by a jury in a Circuit Court may have a change of venue when it appears that, because of the undue influence of his adversary or the odium that attends the party applying or his cause of action or defense, or because of the circumstances or nature of the case he cannot have a fair and impartial trial in the county." The Jail Authority has alleged nothing of the sort which would justify a change of venue pursuant to KRS 452.010(2). Thus, under these circumstances, we find no abuse of discretion in the trial court's order denying the Jail Authority's motion to transfer venue of this matter to Johnson County.

The Jail Authority having set forth no reversible error before this Court, we hereby affirm the Franklin Circuit Court's orders in favor of Kenar.

ALL CONCUR.

BRIEF FOR APPELLANT:

Nelson T. Sparks
Louisa, Kentucky

BRIEF FOR APPELLEE:

William D. Kirkland
Frankfort, Kentucky