

NO. 08-CI-6323

JEFFERSON CIRCUIT COURT  
DIVISION SIX (6)  
JUDGE OLU A. STEVENS

BADGETT CONSTRUCTORS, LLC

PLAINTIFF

v.

**OPINION AND ORDER**

THE CORDISH COMPANY, et al.

DEFENDANTS

\*\*\*\*\*      \*\*\*\*\*      \*\*\*\*\*

This matter came before the Court for a bench trial. The Court has reviewed the record and the matter now stands submitted.

**FACTS**

The Plaintiff, Badgett Constructors, LLC (“Badgett”) filed suit against the Defendants, The Cordish Company (“Cordish”); Entertainment Concept Investors, LLC (“ECI”); and Louisville Galleria, LLC (“Galleria”) alleging that it had a contract to perform work for the Defendants at 4<sup>th</sup> Street Live. Gary Darnell, a Cordish representative, contacted Dale Lemmel, Badgett’s project supervisor, in February of 2007 and engaged Badgett to do demolition and build-out work at Fourth Street Live. Badgett was to work on the tenant spaces that were to become the Roc Bar and the Mex Bar. Darnell advised Lemmel that the work had to be done in time to allow both businesses to open for Derby, 2007.

Over the next several months, Badgett submitted invoices totaling \$374,972.46 for its work at Fourth Street Live. These invoices were not paid when submitted. In June or early July of 2007, ECI requested that Badgett resubmit an invoice for \$265,940.00 because that was all that Cordish would pay at that time. Badgett did so, believing that

ECI would pay the full amount eventually. The resubmitted invoice stated that it was for "Fourth Street Live, Remodel – Roc Bar/Mex Bar, 2<sup>nd</sup> draw". In mid-August, ECI sent Badgett a check for \$265,940.00. The check had an attachment which contained the words "payment in full/2<sup>nd</sup> dr". At trial, Badgett acknowledged receipt of the payment. Badgett alleges that the Defendants owe an additional \$109,032.46 for work Badgett performed under the contract. The Defendants allege that the contract between them and Badgett was a "not to exceed" contract and the amount sought by Badgett exceeds the limit set in the alleged contract. The Defendants further claim that the payment accepted by Badgett constitutes an accord and satisfaction. Badgett denies ever being advised that there was a "not to exceed" amount in place for its work. There is no written contract memorializing the terms agreed upon by the parties.

### OPINION

The existence of a contract is a question of fact, but the construction and legal effect of a contract are issues of law. *Motorists Mut. Ins. Co. v. Glass*, 996 S.W.2d 437 (Ky.1997). Under contract law, an oral contract is no less binding than one reduced to writing. *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99 (Ky.2003). In matters tried without a jury, CR 52.01 acknowledges the trial court's superior opportunity to observe testifying witnesses and gauge their credibility.

Here, the parties agree that they had a contract but they dispute whether it was a "not to exceed" contract or a "time and materials" contract. Lemmel, testifying on behalf of Badgett, stated that no one from Cordish or ECI showed Badgett a budget for its work until late in June of 2007 or early in July of 2007. By that time, however, the invoices for Badgett's work already exceeded the amount Cordish and ECI alleged they repeatedly

told Badgett they would pay for Badgett's work. If the terms were to be "not to exceed", it is unlikely that Badgett would go over the alleged budget knowing that it would not be paid. Cordish points to an August 20, 2007, email from Lemmel proposing that Badgett do some work at the Starks Building on a "not to exceed" basis as evidence that it knew Cordish preferred that arrangement. However, the email goes on to state: "If that is the problem." The Court finds that this indicates that Badgett was willing to work under that arrangement but it does not prove that Badgett agreed to do the earlier work for Cordish and ECI on that basis. The Court finds that the contract was a "time and materials" contract.

Cordish and ECI also allege that the \$265,940.00 payment operates as an accord and satisfaction. When they sent Badgett a check for \$265,940.00, the attached check stub contained the following: "Payment in full/2<sup>nd</sup> dr". They maintain that when Badgett cashed the check for \$265,940.00 without protest, that operated as an accord and satisfaction.

KRS 355.3-311 governs an accord and satisfaction by the use of a check and provides as follows:

- (1) If a person against whom a claim is asserted proves that:
  - (a) That person in good faith tendered an instrument to the claimant as full satisfaction of the claim;
  - (b) The amount of the claim was unliquidated or subject to a bona fide dispute; and
  - (c) The claimant obtained payment of the instrument, the following subsections apply.
- (2) Unless subsection (3) of this section applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying

written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

\*\*\*\*\*

- (3) (b) The claimant, whether or not an organization, proves that within ninety (90) days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted. . . .

The Court finds that the "Payment in full/2<sup>nd</sup> dr" language is not sufficient to put Badgett on notice that the check was a final payment on all claims. On its face, the memo is ambiguous. It does not clearly indicate that the second draw was the final draw. The Court further finds that Cordish has not demonstrated that there was an accord and satisfaction of any claim by Badgett for the work in question. The parties acknowledge that after all the work in question was performed, Mr. Darnell (on behalf of Cordish) and Mr. Lemmel (on behalf of Badgett) discussed the outstanding amount claimed by Badgett. Although Lemmel admits that Darnell provided him a copy of the budget, such is not sufficient to determine there was a meeting of the minds as to the full satisfaction of the claim.

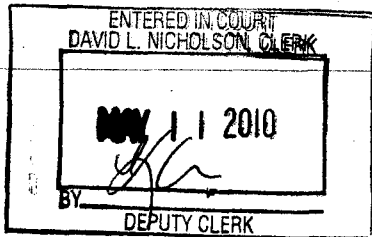
In addition, there was testimony that Badgett believed that Cordish and ECI intended to work out the remaining balance with Badgett by giving them additional work. Cordish claims, and Badgett acknowledges, that it was only when that work did not materialize that Badgett instituted the instant action. If true, this is further indication of Badgett's intention to be compensated for its work under the parties' contract.

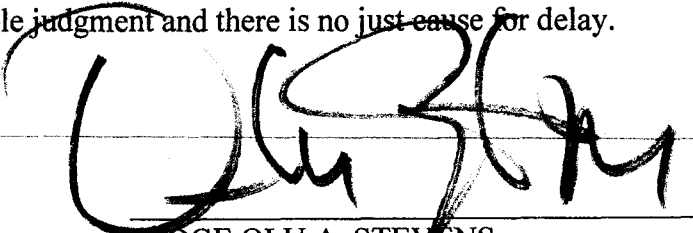
The Court finds that Badgett is entitled to judgment on its claims.

**ORDER**

IT IS HEREBY ORDERED that Badgett shall have judgment against Entertainment Concept Investors, LLC, the Cordish Company, and Louisville Galleria, LLC, jointly and severally, in the amount of \$109,032.46, plus costs and post judgment interest at the rate of 12% per annum until paid in full.

This is a final and appealable judgment and there is no just cause for delay.



  
\_\_\_\_\_  
JUDGE OLU A. STEVENS  
DATE: 5/11/10

Distribution to:

H. Edwin Bornstein, Esq.  
401 W. Main St., Ste. 950  
Louisville, KY 40202

Houston M. Oppenheimer, Esq.  
950 Breckinridge Ln., Ste. 40  
Louisville, KY 40207

Michael M. Hirn, Esq.  
500 W. Jefferson St., Ste 1400  
Louisville, KY 40202