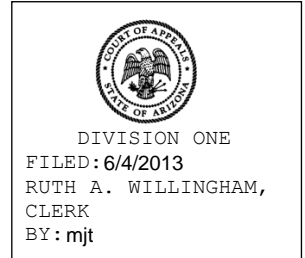


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



CREATIVE INTERNATIONAL, L.L.C.,) 1 CA-CV 12-0192
an Arizona limited liability)
company,) DEPARTMENT A
)
Plaintiff/Counterdefendant/) **MEMORANDUM DECISION**
Appellee,)
) (Not for Publication -
v.) Rule 28, Arizona Rules
) of Civil Appellate
) Procedure)
SHEILA PAPER CORP. dba NEWBROOK)
PAPER, a New Jersey corporation,)
)
Defendant/Counterclaimant/)
Appellant.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-000172

The Honorable Eileen S. Willett, Judge

REVERSED AND REMANDED

Law Offices of Donald W. Hudspeth, P.C. Phoenix
By Brian K Stanley
Rita J. Bustos
Attorneys for Appellant

T H O M P S O N, Judge

¶1 Appellant Sheila Paper Corporation (Sheila) appeals from the trial court's judgment in favor of Creative International (Creative) on all claims and awarding damages in

the amount of \$17,858.40. For the following reasons, we reverse and remand for a new trial.

FACTS AND PROCEDURAL HISTORY

¶2 Creative entered a contract with Sheila for the purchase of approximately five truckloads of # 4 coated web gloss enamel paper for \$41.90 per 100 weight (/cwt). The exact shipped quantity was 206,872 pounds for \$86,679.37. Sheila delivered the paper to Midwest Warehouse, a third-party warehouse in Chicago, Illinois, on December 26, 2007. Creative resold the paper to two printing companies, Transcontinental Printing (Transcontinental) and Hiney Printing (Hiney). Creative sold 144,295 pounds of paper at \$49.50/cwt to Transcontinental for a total price of \$71,426.03. Hiney purchased 43,808 pounds at \$47.75/cwt. The remaining 18,769 pounds remained in the warehouse.

¶3 Sometime after the paper was delivered, Sheila's salesman Martin Minison received notice from other customers who had been sold paper from the same wholesale batch that some of the paper they were receiving was matte and not gloss. Minison called Creative's president, Arthur Desautels, and informed him that the paper might be matte instead of gloss. Desautels contacted Transcontinental and Hiney who confirmed their receipt of matte paper. Transcontinental agreed to keep the matte paper at a discount, paying \$41.95/cwt instead of \$49.50/cwt, at an

ultimate price of \$60,531.79, \$10,894.28 less than the original price. Hiney rejected the paper, causing Creative additional shipping charges and warehouse fees of \$1,801.51.

¶4 On January 10, 2008, Sheila offered to pick up the remaining paper at no charge and issue a credit against Creative's current account. Sheila also offered a discount of \$6/cwt for all of the paper. Creative refused all efforts to resolve the issue and did not return the paper or pay Sheila for the delivered and accepted paper. Sheila had potential offers for the paper from other customers at increased rates that it was unable to realize because of Creative's failure to return the paper.

¶5 Creative sold the paper returned from Hiney plus the remaining 18,769 pounds to Semper Exeter Paper Co. for \$39.50/cwt for a total of \$24,858.93. Semper paid Creative promptly for the paper. Thus, Creative received \$85,390.72 for reselling the paper. Both Transcontinental and Hiney sent complaint e-mails to Creative about the mix-up, but Hiney wrote it would "not charge you back and am still doing business with you [as] this is the first time there has been any issues with your shipments." Desautels testified at trial that Hiney never indicated that it would stop doing business with Creative because of the order mix-up. At one point, Transcontinental indicated that, due to the non-conforming shipment, it would

"not be forwarding any new orders to" Creative. However, the evidence showed that Transcontinental continued to do business with Creative in 2008 and 2009.

¶16 Creative brought suit against Sheila, alleging breach of contract for failure to provide the correct paper and seeking damages in an amount to be proven at trial. Sheila counterclaimed for breach of contract of the contract price, breach of the covenant of good faith and fair dealing, and damages. Sheila filed a motion for summary judgment, arguing that the company was entitled to the contract price because Creative elected to accept the entire shipment of paper and then refused all attempts at remedying the situation. Sheila admitted that the matte paper received by Creative did not conform to the terms of the parties' contract, which called for enamel (glossy) paper. Creative admitted that it accepted the nonconforming paper, but that it was entitled to the difference between the value of the goods accepted and their value had they been as warranted, lost profits, and incidental and consequential damages. The trial court denied the motion, finding that the issue of damages presented a genuine issue of material fact.

¶17 At trial, Creative's claimed damages as a result of Sheila's breach were over \$86,000. Sheila sought \$86,679.37 plus interest at 18% per annum. The trial court found in favor

of Creative on all claims and awarded damages in the amount of \$17,858.40, and attorneys' fees in the amount of \$58,841.00. Sheila filed a motion for new trial, which was denied.

¶8 Sheila timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes (A.R.S.) section 12-2101(A)(1) (Supp. 2012).

DISCUSSION

¶9 On appeal, Sheila argues that: (1) Creative's consequential damages were not recoverable because its special circumstances were not made known to Sheila when the contract was made; (2) Creative must be denied consequential damages because it could have prevented the claimed damage; (3) Creative failed to establish that the claimed lost profits were proximate damages; (4) Creative failed to establish its lost-profits claim; and (5) Creative accepted the paper and was therefore required to pay for the paper at the contract rate minus damages. Sheila seeks a judgment on the counterclaim in the amount of \$86,679.37 plus interest, and urges that Creative be awarded only \$1,801.50 in incidental damages on its complaint.

¶10 Creative has not filed an answering brief. We have previously held that when a party raises "a debatable issue," and the opposing party has not filed a responsive brief, we generally will find a confession of error by the opposing party.

Liberty Mut. Ins. Co. v. MacLeod, 17 Ariz. App. 449, 450, 498 P.2d 523, 524 (1972). Thus, if we determine that a debatable issue exists, Creative's failure to file an answering brief constitutes a concession that the trial court committed reversible error. *Stover v. Kesmar*, 84 Ariz. 387, 388, 329 P.2d 1107, 1108 (1958); *Civil Serv. Emp. Ins. Co. v. Sticht*, 14 Ariz. App. 36, 37, 480 P.2d 373, 374 (1971).

¶11 On the record before us, we cannot affirm all the damages it appears Creative was awarded. Consequential damages for breach of contract are not recoverable unless the claimant's special circumstances were made known when the contract was made. See A.R.S. §§ 47-2714(C), -2715(B)(1) (2005) (consequential damages from seller's breach include "loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise"); *McFadden v. Shanley*, 16 Ariz. 91, 95, 141 P. 732, 733 (1914) (quoting *Hadley v. Baxendale*, 9 Exch. 341 (Court of Exchequer 1854)) ("Damages recoverable on a breach of contract are measured by the actual loss sustained, provided such loss is what would naturally result as the ordinary consequence of the breach, or as a consequence which may, under the circumstances, be presumed to have been in the contemplation of the parties as the probable result of a breach."). Further, "[d]amages which

the plaintiff might have avoided with reasonable effort without undue risk, expense, or humiliation are either not caused by the defendant's wrong or need not have been, and, therefore, are not to be charged against him. The principle has wide application and frequently involves the establishment of a standard of reasonable conduct." *Lewis v. Mobil Oil Corp.*, 438 F.2d 500, 508 (8th Cir. 1971) (quoting 11 S. Williston, *Contracts* § 1353 (Jaeger, 3d ed. 1968)); see A.R.S. § 47-2715(B)(1). In addition, a buyer who retains goods sold "cannot refuse to carry out his part of the agreement, although he may recover the damages caused him by the breach on the part of the seller." *Yancy v. Jeffreys*, 39 Ariz. 563, 566, 8 P.2d 774, 776 (1932); see A.R.S. §§ 47-2606(A), -2714(A) (2005) (a buyer that has accepted goods and given notification may recover damages for any non-conformity, but must pay the contract rate for any goods accepted).

¶12 We conclude that a debatable issue exists over the types and amount of damages awarded, and as to any entitlement Sheila might have regarding its delivery of the paper. Therefore, Creative has conceded that the trial court committed reversible error. Sheila's failure to provide all the transcripts and the trial court's lack of findings makes it difficult for us to assess the proper measure of damages.

Consequently, we find error justifies retrial, but not the direction of judgment for either party.

CONCLUSION

¶13 Based on the foregoing, we reverse and remand to the trial court for a new trial. Sheila requests an award of attorneys' fees and costs on appeal. As there is not yet a successful party, we decline Sheila's request. See A.R.S. § 12-341.01(A) (Supp. 2012).

 /s/
JON W. THOMPSON, Presiding Judge

CONCURRING:

 /s/
PHILIP HALL, Judge

 /s/
KENT E. CATTANI, Judge