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AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

HAYDON BUILDING CORPORATION, an Arizona corporation,
Plaintiff/Appellee,

v.

FACILITEC, INC., an Arizona corporation, *Defendant/Appellant.*

No. 1 CA-CV 12-0693
FILED 11-14-2013

Appeal from the Superior Court in Maricopa County
No. CV2010-028120
The Honorable George H. Foster, Judge

AFFIRMED

COUNSEL

Ryan Rapp & Underwood, PLC, Phoenix
By John G. Ryan and Richard A. Kasper

Counsel for Plaintiff/Appellee

Lorona Mead, PLC, Phoenix
By Jess A. Lorona

Counsel for Defendant/Appellant

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MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Maurice Portley and Judge John C. Gemmill joined.

C A T T A N I, Judge:

¶1 Facilitec, Inc., appeals the superior court's judgment after a bench trial finding Facilitec liable to Haydon Building Corporation for breach of contract. Facilitec argues the superior court erred by relying on a theory of law not introduced by Haydon until after the trial. For reasons that follow, we affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND¹

¶2 In mid-2009, Haydon, a general contractor, received a solicitation to bid on a federal government building project. Because the project included an option to provide furniture according to detailed specifications, Haydon invited bids from Facilitec and other subcontractors for furniture and installation.

¶3 In August 2009, Facilitec submitted to Haydon a signed initial bid to provide all requested furniture and installation for \$169,785. Facilitec revised its bid in September by a signed email with attached amendment to account for additional labor costs of \$33,063. After Haydon was awarded the government contract, Facilitec agreed by signed email with attached amendment to hold its pricing firm through December 2010 to allow time for the government to exercise the furniture option.

¶4 In July 2010, the government issued a formal change order exercising the furniture option. Haydon then sent Facilitec a letter of intent reflecting acceptance of Facilitec's bid and authorizing Facilitec to move forward with the furniture package. Two days later, Facilitec's president signed Haydon's Master General Conditions contract, reflecting

¹ We view the facts in the light most favorable to upholding the superior court's verdict. *Castro v. Ballesteros-Suarez*, 222 Ariz. 48, 51, ¶ 11, 213 P.3d 197, 200 (App. 2009).

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general terms and conditions governing the relationship between Haydon as general contractor and Facilitec as subcontractor.

¶5 Facilitec informed Haydon in early August 2010 that its bid had mistakenly been based on an incomplete review of the furniture specifications and expressed concern that it could not meet all required specifications. By August 24, Facilitec produced three substitute options priced at over \$100,000 more than its original bid. Three days later, Facilitec determined it could “not honor our pricing and proposal and will not be able to sign the contract d[ue] to our mistake.” Facilitec therefore refused to sign the formal integration of the subcontract agreement (based on Facilitec’s 2009 bid) that Haydon had provided in late July.

¶6 Haydon was able to secure substitute performance for a price \$118,526 greater than Facilitec’s agreed price, and brought this lawsuit for, among other claims, breach of contract to recover the difference. Facilitec raised the statute of frauds as a defense, arguing that the parties’ agreement could not be enforced against Facilitec absent a writing signed by Facilitec. *See* Ariz. Rev. Stat. (“A.R.S.”) § 44-101(4).²

¶7 After a two-day bench trial, both parties simultaneously submitted proposed findings of fact and conclusions of law. Haydon’s proposed conclusions included a new legal theory for satisfaction of the statute of frauds: the merchant rule set forth in A.R.S. § 47-2201(B).³ The superior court’s ruling adopted almost wholesale Haydon’s conclusions of law, including the existence of a contract between Haydon and Facilitec, breach by Facilitec, damages in the amount of \$118,526, and three ways (including the merchant rule) by which the parties satisfied or avoided the statute of frauds.

² Absent material revision after the relevant date, we cite a statute’s current version unless otherwise indicated.

³ The merchant rule is an exception to the general requirements for a writing to satisfy the statute of frauds governing sales of goods. A.R.S. § 47-2201. The statute of frauds generally requires a writing “signed by the party against whom enforcement is sought” to enforce a contract for the sale of goods. A.R.S. § 47-2201(A). Under the merchant rule exception, as between merchants, a writing signed by only one party is enforceable even against the non-signing party if the non-signing party fails to object in writing within ten days. A.R.S. § 47-2201(B).

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¶8 Facilitec timely appealed from the entry of judgment. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) and -2101(A)(1).

DISCUSSION

¶9 Facilitec argues that Haydon failed to disclose the merchant rule as its “theory of the case” until after trial and that the superior court erred by relying on the late-disclosed merchant rule in reaching its decision. But Facilitec never raised this claim of error before the superior court and has thus waived the issue on appeal.

¶10 At the close of the two-day bench trial, the superior court instructed both parties to file proposed findings of fact and conclusions of law. The parties thereafter simultaneously filed proposed findings and conclusions; Haydon’s proposal for the first time included a reference to the merchant rule.

¶11 The superior court issued its ruling over eight weeks later. During that time, Facilitec never objected to Haydon’s reference to the merchant rule, either on grounds of timeliness or on the merits. The superior court entered judgment on Haydon’s claim more than eight weeks after the ruling. Over this second eight-week period, Facilitec again failed to object or seek relief from the perceived error through a motion for new trial or otherwise.

¶12 Facilitec now argues it could not have waived its timeliness objection to the merchant rule because it had no opportunity to object either before or during trial. Facilitec offers no explanation, however, for its silence during the more than sixteen weeks after Haydon raised the merchant rule and before the entry of final judgment. These four months—particularly the two months following the superior court’s decision based in part on the merchant rule—provided ample opportunity for Facilitec to raise any objection before the superior court. Thus, Facilitec has waived this issue. *See Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994) (“Because a trial court and opposing counsel should be afforded the opportunity to correct any asserted defects before error may be raised on appeal, absent extraordinary circumstances, errors not raised in the trial court cannot be raised on appeal.”).

¶13 Moreover, the superior court’s analysis does not rely solely on the merchant rule. The court proffered three independent reasons for rejecting Facilitec’s statute of frauds defense: (1) writings signed by Facilitec satisfied the statute of frauds, (2) the merchant rule allowed a

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writing signed by Haydon to satisfy the statute of frauds, and (3) promissory estoppel prevented application of the statute of frauds. Thus, Facilitec is not entitled to relief unless all three reasons are unsupportable.

¶14 Setting aside the merchant rule analysis, which is the only rationale Facilitec challenges, the record supports the superior court's conclusion that Facilitec's signed writings satisfy the statute of frauds, and that the contract is therefore legally enforceable against Facilitec. Arizona's statute of frauds prevents enforcement of a contract for the sale of goods valued at or above \$500 "unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought." A.R.S. § 47-2201(A).⁴ The writing need not be the final, formal integration of the agreement contemplated by the parties, and can in fact consist of several documents. *Custis v. Valley Nat'l Bank of Phx.*, 92 Ariz. 202, 205, 375 P.2d 558, 561 (1962); *Del Rio Land, Inc. v. Haumont*, 118 Ariz. 1, 6, 574 P.2d 469, 474 (App. 1977); *see also* Restatement (Second) of Contracts § 132 (1981). Indeed, the writing need not recite with specificity all material terms of the agreement, but rather must simply describe the subject matter and essential terms to be enforced in a manner sufficient to indicate the existence of an agreement. A.R.S. § 47-2201(A); *Custis*, 92 Ariz. at 205-06, 375 P.2d at 561; *Koenen v. Royal Buick Co.*, 162 Ariz. 376, 380, 783 P.2d 822, 826 (App. 1989); *see also* Restatement (Second) of Contracts § 131.

¶15 Facilitec sent Haydon a signed bid on August 13, 2009, which was modified September 2, 2009. The bid designated the scope of work, the price, and the project specifications. In a signed email and modified bid document, Facilitec then agreed to hold the offer open through December 2010. After Haydon accepted Facilitec's bid, in July 2010 Facilitec signed the Master General Conditions document setting

⁴ As Facilitec points out, one issue at trial was whether the agreement between the parties was predominantly a contract for the sale of goods—to which the statute of frauds applies—or a contract for services—to which the statute of frauds would not apply. *See Double AA Builders, Ltd. v. Grand State Constr. L.L.C.*, 210 Ariz. 503, 509-10, ¶ 33, 114 P.3d 835, 841-42 (App. 2005). The court did not make specific findings as to the predominant purpose of the contract. Because the court analyzed the contract under the statute of frauds, however, we assume the court found the predominant purpose was for the sale of goods. *See John C. Lincoln Hosp. & Health Corp. v. Maricopa County*, 208 Ariz. 532, 540, ¶ 23, 96 P.3d 530, 538 (App. 2004).

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forth background terms and conditions of the relationship between Haydon and Facilitec. Although the parties intended eventually to enter a formal integration of their contract as to price and scope of work in a final “subcontract” document, the writings signed by Facilitec set forth the essential terms of the agreement and thus satisfy the writing requirement of the statute of frauds. Because the superior court’s ruling is supportable on this basis alone, we need not address whether the merchant rule and/or promissory estoppel also establish a basis for rejecting Facilitec’s statute of frauds defense. We therefore affirm.

¶16 Haydon requests its attorney’s fees incurred on appeal pursuant to A.R.S. § 12-341.01(A). In the court’s discretion, we award Haydon its reasonable attorney’s fees upon compliance with ARCAP 21. As the successful party on appeal, Haydon is entitled to its costs upon compliance with ARCAP 21. *See* A.R.S. § 12-341.

CONCLUSION

¶17 For the foregoing reasons, we affirm the judgment.



Ruth A. Willingham · Clerk of the Court
FILED: mjt