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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

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9 Design Trend International Interiors, Ltd.,
10 an Arizona corporation,

No. CV-10-01079-PHX-NVW

11 Appellant,

ORDER

12 vs.

13 Cathay Enterprises, Inc., an Arizona
14 corporation,

15 Appellee.

16 Before the Court is Cathay's "Motion for Rehearing" (Doc. 32). For the reasons
17 stated below, this motion is granted in part and denied in part, and the judgment will be
18 vacated.

19 **I. LEGAL STANDARD**

20 Cathay's motion for rehearing is effectively a motion to reconsider the March 29,
21 2011 Order. A motion to reconsider requires "a showing of manifest error or a showing
22 of new facts or legal authority that could not have been brought to [the Court's] attention
23 earlier with reasonable diligence." LRCiv 7.2(g)(1).

24 **II. ISSUES THAT DO NOT MERIT RECONSIDERATION**

25 **A. Election of Remedies**

26 Cathay principally argues against this Court's conclusion that Cathay elected to
27 permit Design Trend to continue performing the contract. Design Trend made this
28 election-of-remedies argument in its opening appeal brief: "The consequence of Cathay's

1 acceptance of Design Trend’s performance under Arizona law is that Cathay waived any
2 breach. It is fundamental that Cathay could not continue to accept Design Trend’s
3 performance and also refuse to make payment.” (Design Trend Br. 23; Doc. 18 at 29.)
4 Cathay argued in response, “There is substantial evidence supporting [the bankruptcy
5 court’s] finding that Cathay did not waive Design Trend’s untimely performance.”
6 (Cathay Br. 21; Doc. 23 at 21.)

7 This Court recognized that “the bankruptcy court did not express any finding
8 about waiver,” but because “the parties argue as if it did” and

9 because the bankruptcy court could not have ruled in favor of
10 Cathay without rejecting Design Trend’s waiver theory [*i.e.*,
11 election of remedies], the Court will infer a no-waiver finding
12 [*i.e.*, a finding that Cathay did not elect performance over
13 damages] and review it accordingly. *See Vance v. Am.*
14 *Hawaii Cruises, Inc.*, 789 F.2d 790, 792–93 (9th Cir. 1986)
15 (reviewing court may imply findings that necessarily flow
16 lower court’s explicit findings); *Carr v. Yokohama Specie*
17 *Bank, Ltd.*, 200 F.2d 251, 255 (9th Cir. 1953) (“Nor is it
18 necessary that the trial court make findings asserting the
19 negative of each issue of fact raised. It is sufficient if the
20 special affirmative facts found by the court, construed as a
21 whole, negat[e] each rejected contention.”).

22 (Doc. 29 at 12–13.)

23 Cathay now argues that this Court could not legitimately reach this conclusion
24 because Design Trend did not present an election-of-remedies argument until Design
25 Trend appealed to this Court. Therefore, says Cathay, Design Trend waived the
26 argument by not raising it first with the bankruptcy court.

27 This challenge lacks merit because Cathay, ironically, has waived it. Design
28 Trend unequivocally raised an election-of-remedies argument in its opening appeal brief.
If Cathay wanted to object that Design Trend had not raised that argument below, it
should have done so in its response brief. Instead, it attacked the argument on its merits.
This Court was therefore entitled to assume that Design Trend had presented an election-
of-remedies argument below. If that assumption was erroneous, Cathay bears the blame
and cannot now unravel the Court’s analysis on this basis.

1 In any event, although the bankruptcy court did not express any finding regarding
2 election of remedies, the issue permeates the record, including the bankruptcy court’s
3 conclusion: “[Design Trend] breached its amended construction contract with [Cathay]
4 by not completing its work on the project timely per the schedule agreed to by the parties;
5 and [Design Trend] did not complete its work within a reasonable period of time in any
6 event.” (Design Trend Tr. 260.) Mention of “reasonable period of time” is an element of
7 the election-of-remedies principle. *See, e.g.*, Joseph M. Perillo, *Calamari and Perillo on*
8 *Contracts* § 11.33 (6th ed. 2009) (“If . . . the owner allows the contractor to continue and
9 the contractor subsequently finishes within a reasonable time from the time of the
10 election, the owner must pay the price but is still entitled to damages for partial breach
11 because of the late completion.”).

12 In addition, the bankruptcy court’s various statements about Design Trend’s
13 choice not to pursue an unjust enrichment claim show that the bankruptcy court
14 understood the election-of-remedies consequences of its ruling. The bankruptcy court
15 knew that it was excusing Cathay from payment for completed work because Design
16 Trend delayed completion so long that it supposedly amounted to a material breach.
17 Thus, the bankruptcy court knew that it was foreclosing Design Trend’s normal route for
18 getting paid — *i.e.*, as a matter of contract, Cathay having elected to permit Design Trend
19 to finish the job — and leaving Design Trend to an equitable fallback. In short, whether
20 or not Design Trend specifically raised an election-of-remedies argument below, the
21 bankruptcy court understood and considered it. Accordingly, it was not error for this
22 Court to review the argument.

23 **B. Cathay Elected Performance**

24 Cathay not only challenges the appropriateness of reviewing the election-of-
25 remedies argument, but also this Court’s ultimate disposition. Cathay claims that

26 [i]t is in the public interest for citizens to be able to go to the
27 Registrar to compel a licensed contractor to correct work
28 which fails to meet the minimum workmanship standards
without fear of waving substantive legal rights. The Court’s

1 ruling would have a chilling effect on the use of the
2 Registrar's enforcement mechanisms by treating recourse to
3 the Registrar as an election of remedies.

4 (Doc. 32 at 8–9.)

5 Cathay's public policy concerns are misdirected. It has long been the public
6 policy of Arizona contract law, and of Anglo-American contract law generally, that
7 contracting parties get either the performance for which they contracted or damages. If a
8 party gets performance but it comes late, the party can normally sue for damages
9 foreseeably caused by the delay (although Cathay contracted away that right in this case).
10 But the party cannot accept performance and refuse to pay for that performance.

11 Cathay's argument endangers these principles. Cathay would give property
12 owners an incentive to look for workmanship violations and withhold payment while
13 complaining to the Registrar. If the Registrar sustains those complaints, the property
14 owner pays nothing more to the contractor, *even if the contractor fixes the workmanship
violations.*

15 **C. "Within a Reasonable Time"**

16 Cathay also challenges this Court's conclusion that the bankruptcy court clearly
17 erred in concluding that Design Trend did not complete its work within a reasonable
18 period of time from the time Cathay elected to permit performance. Cathay has offered
19 no new argument or evidence here, and no reconsideration is warranted.

20 **D. Contract Price**

21 Cathay next asks this Court to backtrack on its damages calculation because,
22 Cathay argues, the contract price of \$1,209,737.45 (as renegotiated in July 2001) cannot
23 be established by collateral estoppel. Although two Registrar ALJs described the
24 contract price as \$1,209,737.45 in their "Findings of Fact," Cathay claims that these
25 findings do not have collateral estoppel effect because the issue of contract price was not
26 actually litigated.

27 Even if the Registrar proceedings did not establish the contract price, it would
28 have been clear error for the bankruptcy judge to conclude that the renegotiated contract

1 price was anything other than \$1,209,737.45. Cathay twice represented the
2 \$1,209,737.45 figure to the Registrar, the Registrar twice accepted that figure, and
3 Cathay never sought to correct it. *Cf. Hawkins v. State*, 183 Ariz. 100, 104, 900 P.2d
4 1236, 1240 (Ct. App. 1995) (“Arizona case law also makes clear that the failure to seek
5 judicial review of an administrative order precludes attacking the order by means of a
6 separate complaint.” (internal quotation marks omitted)). Further, several other exhibits
7 admitted at trial confirm that Cathay knew that the contract price was \$1,209,737.45.
8 (*See, e.g.*, Doc. 45 at 38, 40, 48, 74 (statements by Cathay or its principal acknowledging
9 that the parties modified the contract price to \$1,209,737.45 in July 2001).)

10 Cathay nonetheless insists that \$1,209,737.45 cannot possibly be the correct
11 contract price because it does not add up correctly when one assumes a cost-plus-9%
12 structure, which it believes it was promised. But the bankruptcy court correctly
13 concluded that Cathay’s contract with Design Trend was a fixed price contract, not a
14 cost-plus contract. This obsession with obtaining the right markup, irrespective of the
15 final price, is baffling. Cathay was not misled as to the final price it would be required to
16 pay. Cathay seems to acknowledge this, but also appears to insist that it did not get the
17 benefit of its bargain unless the final price equals cost-plus-9%. Again, however, Cathay
18 did not bargain for cost-plus-9%. Although Design Trend may have used that as a method
19 of calculating the fixed price, nothing in Cathay’s contracts with Design Trend mention a
20 cost-plus structure, much less guarantee that the fixed price would equal cost-plus-9%.

21 **E. Affirmative Defenses**

22 Cathay argues that the bankruptcy court’s ruling obviated the need to address its
23 affirmative defenses of mistake and unconscionability. Given that this Court has
24 reversed the bankruptcy court, Cathay requests an opportunity to argue those affirmative
25 defenses.

26 The affirmative defenses Cathay relies on are mistake and unconscionability.
27 (Doc. 32 at 15–16.) These “defenses” simply restate Cathay’s untenable cost-plus theory.
28 (*See* Cathay Enterprises Inc.’s Post-Trial Memorandum, No. 2:04-ap-01085-RTB (Bankr.

1 D. Ariz.), Doc. 114 at 13–16.) Accordingly, there is no need for further proceedings
2 regarding Cathay’s mistake and unconscionability defenses.

3 **F. Offsets for Subcontractor Payments**

4 Cathay claims it still deserves “offsets for several subcontractors which Cathay
5 had to pay because Design Trend refused.” (Doc. 57 at 9.) The Court already awarded a
6 \$36,199.58 offset (*see* Doc. 29 at 15:14–20) — which was the total offset Cathay asked
7 for from the bankruptcy court, at least with respect to payments made to Design Trend’s
8 subcontractors (*see* Cathay Enterprises Inc.’s Post-Trial Memorandum, No. 2:04-ap-
9 01085-RTB (Bankr. D. Ariz.), Doc. 114 at 7). Cathay therefore has nothing more to
10 claim in terms of payments it made to subcontractors.

11 **III. ISSUES THAT MAY MERIT RECONSIDERATION**

12 **A. “Items that Were Never Provided to Cathay”**

13 Cathay claims that Design Trend did not provide certain items that it had promised
14 to provide, including headboards, toasters, end tables, vanity lights, and various other
15 items. Cathay bought these items itself for \$20,801.65. (Doc. 57 at 15–16.) Cathay
16 claims this amount as an offset. The briefs currently before the Court do not suffice to
17 resolve this issue. Additional findings and conclusions are therefore necessary.

18 **B. Sales Tax**

19 This Court awarded Design Trend principal damages of \$184,830.07 — the
20 amount Cathay had yet to pay on its reduced obligation of \$1,209,737.45, minus certain
21 offsets. The Court also concluded that Cathay is responsible for sales tax on that amount
22 at 4.875%, for a total of \$9,010.47. Cathay argues that this award of sales tax allows
23 Design Trend to have its cake and eat it too. If the parties originally agreed to a fixed
24 price of \$1,277,000 *inclusive* of sales tax (as Design Trend claims), then why is the
25 reduced fixed price of \$1,209,737.45 *exclusive* of sales tax? To this, Design Trend
26 responds,

27 The revised budget clearly shows that the \$1.209 million
28 figure only included sales tax through April 2001. . . . [T]he
revised contract price of \$1.209 million was conditioned on

1 [Cathay] securing the tax waiver for the balance of the
2 reduced tax yet to be paid. If [it] failed to obtain the waiver,
3 [it] had to pay that additional sales tax as would any other
4 customer.

5 (Doc. 44 at 15.) That contention is not clearly established by the record. Accordingly,
6 additional findings of fact are necessary to determine whether Cathay is liable for the
7 \$9,010.47 in sales tax.¹

8 **C. Procedure for Reconsideration**

9 Cathay's motion for reconsideration will be granted as to the \$20,801.65 in items
10 Cathay allegedly had to buy when Design Trend did not supply them, and the \$9,010.47
11 in sales tax. The Court will withdraw the bankruptcy court reference, *see* 28 U.S.C.
12 § 157(d), and hear oral argument on these two issues. Oral argument should address both
13 the merits of these issues as well as whether Design Trend would simply prefer to
14 conclude these proceedings by permitting the Court to reduce the judgment by
15 \$29,812.12.

16 If oral argument is not sufficient to resolve these issues, the Court will establish a
17 briefing schedule, with the goal of additional findings and conclusions, but based solely
18 on testimony and exhibits admitted at trial.² This procedure will speed up the resolution
19 of this dispute which has now been in litigation for ten years.

20 IT IS THEREFORE ORDERED that Cathay's "Motion for Rehearing" (Doc. 32)
21 is GRANTED with respect to items Cathay allegedly had to buy when Design Trend did
22 not supply them, and with respect to sales tax, and otherwise DENIED.

23 ¹ If Design Trend's tax-waiver argument is correct, Design Trend would
24 theoretically be entitled to more sales tax. Cathay paid Design Trend \$200,000 after
25 April 2001. This \$200,000 was therefore exclusive of sales tax. However, when the
26 Court calculated sales tax, it assumed that Cathay did not owe any tax on that \$200,000
27 payment. Had the Court been informed otherwise, the amount would have increased to
28 \$18,760.47 ($\$384,830.07 * 0.04875$). But Design Trend has not advanced this argument
here, and the Court deems it waived.

² The Court has conferred with Judge Baum, and he agrees to this procedure.

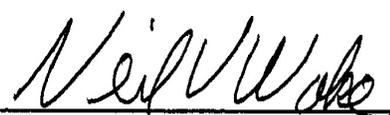
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IT IS FURTHER ORDERED that the Judgment (Doc. 30) is VACATED.

IT IS FURTHER ORDERED that the reference to the bankruptcy court of case number 2:04-ap-01085-RTB is WITHDRAWN pursuant to 28 U.S.C. § 157(d) for purposes of making additional findings of fact and conclusions of law.

IT IS FURTHER ORDERED that the parties shall appear for oral argument on Thursday, November 3, 2011, at 10:00 a.m., at the Sandra Day O'Connor U.S. Courthouse, Courtroom 504, 401 W. Washington Street, Phoenix, Arizona.

Dated this 5th day of October, 2011.



Neil V. Wake
United States District Judge