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April 22, 1999

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

9	In re)	Bankruptcy Case
)	No. 97-32025DM
10	WIN FASHION, INC.,)	
)	Chapter 11
11	Debtor.)	
)	
12	WIN FASHION, INC.,)	Adversary Proceeding
)	No. 98-3143DM
13	Plaintiff,)	
)	
14	v.)	
)	
15	BYER CALIFORNIA, a California)	
	corporation,)	
16)	
	Defendant.)	
17)	

MEMORANDUM DECISION

I. Introduction

In this adversary proceeding the debtor, Win Fashion, Inc. ("Win") seeks to recover \$41,541.50 from the defendant, Byer California, Inc. ("Byer") for breach of twenty five separate contracts. Twelve of these contracts were in writing (collectively "the written agreements") and the remainder were allegedly oral (collectively "the remaining agreements"). A trial was held on March 12 and 24, 1999, Stephen Sherman, Esq. appeared on behalf of Win, and William H. Bassett, Esq. appeared on behalf

1 of Byer. For the reasons that follow, the court will deny
2 recovery as to all twenty five contracts.¹

3 II. Facts²

4 Between April and August, 1996, Win, an outside sewing and
5 clothing assembly contractor, and Byer, a seller of women's
6 clothes, entered into a series of twenty five transactions.
7 Pursuant to these transactions, Win provided sewing, cutting and
8 garment assembly services in exchange for which Byer provided the
9 design, style and fabric and paid the purchase price. The terms
10 and conditions of twelve of these transactions were expressed as
11 the written agreements. The written agreements did not contain
12 integration clauses and the parties' own business practices and
13 course of dealing did not preclude oral modification of these or
14 other agreements.

15 The parties' course of performance and dealing shows that
16 within a few days after each of the written agreements was signed,
17 Win made oral requests for payment at a higher amount than that
18 stated in the writings, that Byer made no meaningful response to
19 any of these requests, and, thereafter, Win proceeded to complete
20 the work as required by the written agreements. Win has demanded
21 payment of the higher requested amounts. Byer paid either the
22 amount reflected on the written agreements, or a higher amount,
23 but never the amount sought by Win. As to these agreements, Win
24 seeks damages totaling \$19,605, representing the difference
25 between the collective amount Byer actually paid and the
26 collective amount Win contends is due pursuant to oral
27 modifications.

28 The remaining agreements were not reduced to writing. They

1 are, however, traceable to a document entitled "Byer Price Request
2 Form." This document shows the amount that Byer was willing to
3 pay Win for the sewing and assembly work associated with the
4 particular garment styles which were the subject of these
5 remaining agreements. The document also shows the amount which
6 Win requested to receive for this work, an amount which was
7 invariably higher than that which Byer was willing to pay.
8 Despite the lack of a clear understanding with respect to price,
9 Win actually performed under the remaining agreements and Byer
10 actually received and made use of the finished garments. Win was
11 paid for each of the remaining agreements, but not at the price it
12 requested to receive. As for these agreements, Win seeks damages
13 in the amount of approximately \$21,000, representing the
14 difference between the collective amount Win was actually paid and
15 the collective amount to which Win alleges the parties agreed.

16 III. Issue

17 The issue is whether Win is entitled to the damages for
18 breach of any of the twenty five agreements.

19 IV. Discussion

20 **A. The California Commercial Code Does Not Apply To This
21 Case**

22 A threshold issue the court must resolve is whether the
23 parties' transactions are governed by the sales division of the
24 California Commercial Code ("UCC").³ The parties have stipulated
25 that the UCC applies but the court disagrees. The UCC governs
26 transactions in goods. Cal.Com.Code § 2102.⁴ Under the UCC goods
27 are generally all things which are movable at the time of
28 identification to the contract for sale, except the money in which

1 the price is to be paid. Cal.Com.Code § 2105(1).⁵

2 Where a transaction has both a goods and a services
3 component, the California courts apply the "essence of the
4 agreement" test to determine whether or not a contract is a
5 transaction in goods and, therefore, subject to the UCC, or an
6 agreement for services. Filmservice Laboratories, Inc. v. Harvey
7 Bernhard Enterprises, Inc., 208 Cal.App.3d 1297, 1305, 256
8 Cal.Rptr. 735, 739 (1989). Pursuant to this test, if service
9 predominates, then the incidental sale of goods does not alter the
10 basic transaction, and the UCC does not apply. Id.

11 While the transactions in this case undoubtedly had a goods
12 component, namely, fabric and garments, the essence of the
13 agreements was the provision by Win of sewing, cutting and garment
14 assembling services from fabric supplied by Byer. Any sale of
15 goods that may have occurred was merely incidental to this
16 purpose. This conclusion is supported by the adversary proceeding
17 complaint, wherein Win describes itself as engaged in the business
18 of providing outside contract sewing and clothing assembly to
19 clothing manufacturers, and prays for damages caused by Byer's
20 breach of clothing assembly and sewing services agreements. That
21 services predominated is also supported by the language of the
22 written agreements. These agreements describe the contracted work
23 as labor, including cutting and sewing. Finally, the parties'
24 conduct shows that the sale of goods was merely incidental to the
25 provision of services in that Byer, not Win, supplied the fabric
26 from which the finished garments were produced.

27 California case law is also in accord. In Filmservice,
28 supra, the defendant produced prints from negatives supplied by

1 the plaintiff. After production, the plaintiff sold the prints to
2 third parties. The court found the UCC inapplicable because the
3 essence of the agreement between the parties was the provision of
4 services, not goods. Here, like Filmservice, Win produced
5 finished garments from fabric provided by Byer, after which Byer
6 sold the garments to third parties. The cases are sufficiently
7 analogous that the court is convinced that the parties
8 transactions are not governed by the UCC.⁶

9
10 **B. The Written Agreements Were Not Breached**

11 Win argues that the price terms of the written agreements
12 were orally modified and that Byer breached these agreements by
13 failing to pay the modified price. The court agrees that the
14 written agreements were modified, but disagrees that this entitles
15 Win to the damages it seeks to recover because the written
16 agreements were modified only to the extent that the oral
17 modifications were executed by the parties.

18 California Civil Code § 1698⁷ provides that a contract in
19 writing may be modified by (1) a contract in writing, (2) an oral
20 agreement to the extent that the oral agreement is executed by the
21 parties, and (3) unless the contract otherwise expressly provides,
22 an oral agreement supported by new consideration. There is no
23 evidence that the written agreements were modified by a subsequent
24 contract in writing or that Win gave any new consideration which
25 would justify it being paid a higher price. The issue then is
26 whether the written agreements were modified by an executed oral
27 agreement and, if so, to what extent.

28 "An executed contract is one, the object of which is fully

1 performed. All others are executory." Cal.Civ.Code § 1661. The
2 evidence shows that after the written agreements were signed Win
3 made oral offers to modify the price term, that Byer never
4 responded to any of these offers, and that Win nonetheless
5 completed the work. The general rule is that silence or inaction
6 will not constitute acceptance of an offer. Golden Eagle Ins. Co.
7 v. Foremost Ins. Co., 20 Cal.App.4th 1372, 1385, 25 Cal.Rptr.2d
8 242, 251 (1993). Thus, Byer's silence cannot be construed as an
9 acceptance. However, Byer's payment pattern establishes that with
10 respect to some of the written agreements, it did agree to pay a
11 higher price than that stated in the writing. When Byer paid Win
12 for its services it paid either a higher price than that stated in
13 the underlying written agreements, or the price stated in the
14 written agreements, but it never paid the amount which Win orally
15 requested to receive. Thus, as for those written agreements that
16 Byer paid a price higher than that stated in the writing, they
17 were modified to the extent that higher prices were paid. To the
18 extent that Byer paid the price stated in the written agreements,
19 there were no modifications. This entitles Win only to the amount
20 it actually received. Accordingly, there was no breach of
21 contract with respect to written agreements and Win is not
22 entitled to damages.

23 **C. The Remaining Agreements Were Not Breached**

24 Win contends that the remaining agreements were express oral
25 agreements, all of which Byer breached by failing to make full
26 payment. Here, the court finds that there were no express oral
27 contracts, but rather that these agreements were implied-in-fact
28 contracts for the reasonable value of Win's services. As

1 explained below, this finding does not entitle Win to the amount
2 it seeks to recover.

3 Under California law contracts are either express and
4 implied. "An express contract is one, the terms of which are
5 stated in words." Cal.Civ.Code § 1620. "An implied contract is
6 one, the existence and terms of which are manifested by conduct."
7 Cal.Civ.Code § 1621. An implied contract consists of obligations
8 arising from a mutual agreement and intent to promise where
9 neither the agreement, nor the promise, have been expressed in
10 words. Varni Bros. Corp. v. Wine World, Inc., 35 Cal.App.4th 880,
11 889, 41 Cal.Rptr.2d 740, 745 (1995), citing 1 Witkin, Summary of
12 Cal. Law (9th ed. 1990) Contracts, § 11, p. 46. There is an
13 implied promise to pay the reasonable value for services rendered
14 when one performs services for another with the other's knowledge,
15 the services are of the type usually charged for, and the other
16 person does not dissent but benefits from the services. See,
17 e.g., Spinelli v. Talcott, 272 Cal.App. 2d 589, 595, 77 Cal.Rptr.
18 481, 485-486 (1969).

19 Here, there is no evidence from which the court can conclude
20 that the parties expressly agreed, either orally or in writing, on
21 the terms of their bargain with respect to the remaining
22 agreements. The Byer Price Request Form, offered as proof of the
23 oral agreements, shows just the opposite. In particular, the
24 document fails to disclose the prices on which the parties agreed
25 and the place, or manner, of delivery. Where the court cannot
26 determine the terms of the contract before it, there is no
27 agreement which it can enforce. California Lettuce Growers, Inc.
28 v. Union Sugar Co., 45 Cal.2d 474, 481, 289 P.2d 785, 790 (1955).

1 However, it is undisputed that the parties reached some
2 agreement with respect to these thirteen sewing jobs. It is also
3 undisputed that Win actually performed the work, delivered the
4 finished garments, and that these garments were received and used
5 by Byer. The only dispute is with respect to the agreed prices.
6 The court is unable to conclude that any agreement was ever
7 reached in this regard. The court does find, however, that once
8 Byer received and accepted the finished garments there was an
9 implied agreement that Byer would pay the reasonable value of the
10 services it received. Spinelli, supra. Win has not argued that
11 the amounts it actually received from Byer were unreasonable in
12 relation to the work it performed. Nor has it produced any
13 evidence to establish the reasonable value of its services. Thus,
14 the court concludes that a reasonable price for the work that Win
15 performed is the amount that it actually received. Therefore,
16 with respect to the remaining agreements, there was no breach and
17 Win has suffered no damages.

18 V. Conclusion

19 In accordance with the above, Win is not entitled to recover
20 damages as to any of the twenty-five contracts. Within twenty
21 (20) days from the date of service of this Memorandum Decision,
22 counsel for Byer should submit a form of judgment consistent with
23 the foregoing. Byer will be entitled to its costs. Counsel for
24 Byer should comply with B.L.R. 9021-1 and B.L.R. 9022-1.

25 Dated: April __, 1999

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27

28

Dennis Montali
United States Bankruptcy Judge

1 1. This conclusion moots Byer's contention that any damages it
2 must pay should be reduced by the amount it voluntarily paid to
Win as a volume bonus.

3 2. The following discussion constitutes the court's findings of
4 fact and conclusions of law. Fed. R. Bankr. P. 7052(a).

5 3. The sales provisions of the UCC are codified in California
Commercial Code §§ 2102-2801.

6 4. California Commercial Code § 2102 provides as follows: "Unless
7 the context otherwise requires, this division applies to
8 transactions in goods; it does not apply to any transaction which
9 although in the form of an unconditional contract to sell or
present is intended to operate only as a security transaction nor
does this division impair or repeal any statute regulating sales
to consumers, farmers or other specified classes of buyers."

10 5. California Commercial Code § 2105(1) defines goods as follows:
11 "(1) 'Goods' means all things (including specially manufactured
12 goods) which are movable at the time of identification to the
13 contract for sale other than the money in which the price is to be
14 paid, investment securities (Division 8) and things in action.
'Goods' also includes the unborn young of animals and growing
crops and other identified things attached to realty as described
in the section on goods to be severed from realty (Section 2107)."

15 6. The court is mindful of the fact that the parties stipulated at
16 trial that the UCC applies to the case. However, the court is not
17 bound the parties' stipulations as to matters of law. See, e.g.,
Caravansary, Inc. v. Passanisi (In re Caravansary, Inc.), 821 F.2d
1413, 1414 n.2 (9th Cir. 1987). In any event the court believes
the result reached here would be the same under the UCC.

18 7. Civil Code § 1698 provides:

19 (a) A contract in writing may be modified by
20 a contract in writing.

21 (b) A contract in writing may be modified by
22 an oral agreement to the extent that the oral
agreement is executed by the parties.

23 (c) Unless the contract otherwise expressly
24 provides, a contract in writing may be
modified by an oral agreement supported by new
25 consideration. The statute of frauds (Section
1624) is required to be satisfied if the
contract as modified is within its provisions.

26 (d) Nothing in this section precludes in an
27 appropriate case the application of rules of
law concerning estoppel, oral novation and
28 substitution of a new agreement, rescission of

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a written contract by an oral agreement,
waiver of a provision of a written contract,
or oral independent collateral contracts."