Filed 12/20/12 Horizon Textiles v. Pandelco CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

HORIZON TEXTILES, INC., Plaintiff and Respondent, v. PANDELCO, INC., Defendant and Appellant.	B226867 (Los Angeles County Super. Ct. No. BC398351)

APPEALS from an order and a judgment of the Superior Court of Los Angeles County. Maureen Duffy-Lewis, Judge. Appeal from order dismissed. Judgment affirmed.

Law Offices of Jacob N. Segura and Jacob N. Segura for Defendant and Appellant.

Law Offices of Steven P. Scandura and Steven P. Scandura for Plaintiff and Respondent.

Pandelco, Inc. (Pandelco), appeals from an order denying its petition to compel arbitration and a judgment in the amount of $74,655.80, entered after a court trial in favor of Horizon Textiles, Inc. (Horizon), on Horizon's claim for breach of contract. Pandelco contends that the trial court erred in denying Pandelco's motion for reconsideration of the court's order denying Pandelco's petition to compel arbitration; Horizon had no standing to sue because Horizon Textiles, Inc., is not a California corporation; the court erred by ignoring Pandelco's request for a statement of decision; the court erred by failing to rule on Pandelco's objections to the proposed statement of decision; the court erred by signing and filing the proposed final statement of decision one day after it had been filed; the trial court directed the falsification of records; the court erred in refusing to stay the matter after Pandelco filed a notice of appeal from the court's order denying Pandelco's petition to compel arbitration; and the judgment was not supported by substantial evidence and the applicable law.

We conclude that Pandelco's motion for reconsideration and its appeal from the trial court's order denying Pandelco's petition to compel arbitration were not filed timely. Therefore, we need not address Pandelco's arguments regarding the court's denial of Pandelco's motion for reconsideration. We also conclude that the use of the name Horizon Textiles, Inc., rather than Horizon Textiles, which is a fictitious firm name of a validly existing California corporation, did not prejudice Pandelco. And we disagree with Pandelco's contentions with respect to the statement of decision and the court's alleged falsification of records. Finally, we conclude that substantial evidence supports the judgment. We dismiss the appeal from the order denying Pandelco's petition to compel arbitration and affirm the judgment.

BACKGROUND

A. The dispute

In June 2007, Pandelco placed purchase orders with Horizon to purchase fabric manufactured by Horizon, to be delivered on August 10, 2007. A dispute arose between the parties regarding Pandelco's approval of dyed fabric samples and timely delivery by Horizon. Pandelco canceled the purchase orders on August 13, 2007, and subsequently

purchased the fabric from another vendor. Horizon filed a complaint against Pandelco for breach of contract, which is not contained in the record on appeal.

B. The petition to compel arbitration

Pandelco filed a petition to compel arbitration on March 10, 2009. On June 15, 2009, Pandelco's petition to compel arbitration was denied by the trial court and the order was entered in the minutes. Pandelco gave notice on July 14, 2009, of the court's ruling on the petition to compel arbitration, among other things.

C. The trial

Trial on the matter commenced on February 10, 2010, and was completed on February 19, 2010.

At trial, the evidence was as follows. In May 2007, Pandelco placed four purchase orders with Horizon to produce 24,500 yards of fabric in various colors at $3.40 per unit. The purchase orders provided that the fabric was to be shipped on or before August 10, 2007.

The production manager of Horizon, Babak Omrany, testified that Horizon produces fabric by ordering yarn, knitting that yarn on machinery specific to the type of fabric, sending the fabric to dye houses, and assembling the fabric. Omrany testified that when it receives an order, Horizon communicates on a daily basis with its customer and requires approvals "each step of the way." Omrany testified it was necessary to get Pandelco's approval of the dyed fabric samples before Horizon could complete production of the fabric. The exact date of delivery cannot be guaranteed because completion dates are based on approval by the customer. It is standard in the industry that orders might be a few days late. If orders are late, the parties may negotiate freight costs or charge-backs.

Around July 14, 2007, Horizon prepared a sample roll to ensure that the texture, quality, weight, and width of the fabric were appropriately manufactured to Pandelco's specifications. The quality of the fabric on the sample roll was approved by Pandelco. Horizon then purchased yarn in the quantity necessary to fill the purchase orders. Pandelco approved the color formulations on the lab dips, which are paper or fabric

swatches prepared by a dye company to match the color requested by the customer. Horizon then prepared the knitted undyed fabric, called greige goods. The greige goods, which did not require approval by Pandelco, were ready to be dyed by the end of July 2007 or beginning of August 2007. Horizon then dyed one lot of each color and delivered the samples to Pandelco for approval.

On July 25, 2007, Pandelco sent an e-mail to Horizon to produce certain colored fabric in priority, stating, "The other colors we have a little more time on! Not much though." By Friday, August 3, 2007, Horizon had prepared and delivered five sample rolls of different colors to Pandelco. Horizon could have prepared an "entire dye lot of finished goods" by August 6, 2007. One dye lot is 16 bolts, or approximately 900 yards. Pandelco did not respond until August 7, 2007.

On August 7, 2007, Pandelco and Horizon exchanged several communications by e-mail. Pandelco made comments on four fabric sample colors, requesting darker, brighter, or more yellow colors. Horizon passed Pandelco's comments to the dye company and informed Pandelco, "We will start to dye 1 lot each with your comments, please be advised color will be 5-10% slight difference." On August 8, 2007, more e-mails were exchanged between Horizon and Pandelco. Pandelco stated, "I understand that you cannot match the lab dips perfectly!!! I need you to get as close as possible!! Anything over 5% variance in color will not be [acceptable]!! Our customer is very very very picky about color!!!!" Horizon replied that it could not guarantee a 100 percent match. Pandelco responded, "I understand you can not match 100%. Please just get as close as possible to the lab dip!!!! I am still waiting for a schedule per color!!! Which ones will be shipped tomorrow as plan??? When can I expect the balance???" Horizon delivered dyed fabric samples to Pandelco on August 9 or 10, 2007.

On Friday, August 10, 2007, Pandelco approved the dyed fabric samples and with respect to one color e-mailed to Horizon, "The color looks good!!! What about a production schedule???? Unless, you will be delivering goods today, you are late. And you will be charged back!!! Please let me know what it is that you will ship per color so I can provide you with extensions!!! Otherwise, after today I will do not will to do

this!!!!" (*Sic*.) (During trial, the trial court commented that it could not conclude that particular August 10, 2007 e-mail was a "rejection" because the last sentence was "ambiguous" and "poorly written.") On August 10, 2007, Horizon informed Pandelco that all the prioritized fabrics (40 percent to 50 percent of the order) were completed and ready for shipment to Pandelco. Horizon told Pandelco it would deliver the prioritized fabrics to Pandelco on Monday, August 13, 2007. Horizon informed Pandelco that the balance of the order would be delivered on August 17, 2007.

Later, on August 10, 2007, at 5:21 p.m., Pandelco sent an e-mail to Horizon, stating, "Sorry, I did not approve any of the samples." Omrany testified, "And I've been doing this for 24 years. And a few days late is acceptable. But on the same date, we did send them fabrics for approval. We did inform them that by Monday morning, we going to have fabrics ready for them. But there was no response." Pandelco did not communicate with Horizon for the rest of that day. Horizon therefore did not schedule production on the balance of the fabrics over the weekend.

Horizon tried to negotiate price reductions with Pandelco, but Pandelco canceled the order on August 13, 2007, without making any comment or informing Horizon that the goods were defective. Horizon had not been informed previously that Pandelco would cancel the order if it was not shipped by August 10, 2007.

Pandelco testified that if Horizon had delivered finished goods to Pandelco by August 17, 2007, or August 24, 2007, Pandelco would have been able to deliver its goods to its customer.

D. The request for statement of decision, objections to statement of decision and judgment, and motion for reconsideration

On March 24, 2010, the trial court issued a minute order entitled, "Tentative Decision Pursuant to California Code of Civil Procedure section 632 and California Rules of Court rule 232," finding in favor of Horizon.[1] On April 12, 2010, Pandelco filed a 29-

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[1] Undesignated statutory references are to the Code of Civil Procedure. Undesignated references to rules are to the California Rules of Court.

page request for a statement of decision, setting forth 121 controverted factual and legal issues. On May 3, 2010, Horizon served Pandelco with a proposed statement of decision.

On May 13, 2010, Pandelco filed objections to Horizon's "purported [Proposed] Judgment served by mail on April 28, 2010 on the grounds that (1) it is prematurely filed, and (2) that it fails to address even one of the 121 controverted factual and legal issues specified in Pandelco's Request for Written Statement of Decision." Horizon's proposed judgment is not contained in the record on appeal.

On May 21, 2010, Pandelco filed objections to Horizon's proposed statement of decision, contending that it failed to address the 121 controverted issues, which Pandelco summarized as follows: Whether Horizon committed fraud upon the trial court in its opposition to Pandelco's petition to compel arbitration; whether Pandelco's purchase orders constituted the exclusive contractual terms between Pandelco and Horizon because Horizon never sent any of its order confirmations to Pandelco; whether Horizon obtained Pandelco's approval of any production samples of the fabric as ordered by Pandelco; whether Pandelco was denied the opportunity to inspect and approve Horizon's fabric because of Horizon's failure to deliver any such fabric to Pandelco; whether Horizon obtained from Pandelco a written extension of the August 10, 2007 fabric shipment completion date; whether Horizon breached the contract by failing to deliver timely all fabric by August 10, 2007; whether Horizon's failure to deliver the fabric by August 10, 2007, gave Pandelco the right to cancel its purchase orders under the terms of the contract and California Uniform Commercial Code sections 2301 and 2711; whether Horizon's breach excused any further performance by Pandelco and barred Horizon's claims against Pandelco; whether Horizon failed to ship any fabric to Pandelco after Pandelco's August 13, 2007 request; and whether Horizon failed to produce any competent evidence that it actually incurred and paid any of its purported costs of fabric production.

Meanwhile, on May 20, 2010, Pandelco filed a motion for "modification of order denying its petition to compel arbitration." Pandelco argued that the arbitration clause in Pandelco's purchase order was binding based on trial testimony that Horizon's "Confirming Orders" had not been sent to Pandelco and were for Horizon's internal use.

Pandelco requested that the trial court vacate its order denying Pandelco's petition to compel arbitration. On June 30, 2010, the court characterized Pandelco's motion as a motion for reconsideration and denied it, stating, "The Code requires that there be not only new evidence but a satisfactory explanation as to why this could not be found before. There is no such explanation provided in counsel's declaration. [¶] The Code also requires that motions for reconsideration be made 10 days from learning new evidence. This motion was filed on 20 May. [¶] The court did not use the alleged perjury. The court used the information provided by [Pandelco], who was the moving party and had the burden. [¶] Finally, there was an evidentiary problem—lack of foundation—which further mandated denial of the motion." On July 1, 2010, the court served notice of entry of order on the parties.

On August 24, 2010, Pandelco filed a notice of appeal from the "Order Denying Petition to Compel Arbitration and to Vacate Prior Denial Order, CCP 1294, 1294.2."

E. The final statement of decision

The trial court ordered Horizon to prepare the final statement of decision. On August 30, 2010, Horizon served and filed a proposed final statement of decision. On August 31, 2010, the trial court signed and filed the final statement of decision. As to the cause of action for breach of contract, the final statement of decision stated as follows.

"1. [Horizon] carried its evidentiary burden of proving, by a preponderance of the evidence, each of the essential elements of its first cause of action for breach of contract. [Horizon] is therefore entitled to a judgment in its favor for breach of contract as a matter of law.

"2. Both [Horizon] and [Pandelco] are merchants with respect to the fabric ordered under [Pandelco's] Purchase Orders within the meaning of California [Uniform] Commercial Code §2104.

"3. Both parties offered sufficient evidence to support that a contract for the manufacture of textiles existed between them. [Horizon] and [Pandelco] entered into a contract by way of purchase orders for the manufacture of textile materials to be used in apparel manufacturing. The terms of the contract were sufficiently definite, including,

inter alia, the terms for quantity and price. The fabric was specifically ordered by and designed only for [Pandelco].

"4. The Court finds no credible evidence that [Horizon] committed a material breach of the contract. Furthermore, the testimony and documents show that [Pandelco] breached the contract by failing to pay pursuant to the contract.

"5. The Court finds by a preponderance of the evidence that [Horizon] did all of the significant things that the contract required it to do. [Horizon] manufactured and produced the fabric. The Court finds no credible evidence that [Horizon] produced fabric that did not meet [Pandelco's] specifications regarding color, texture, and quality. The preponderance of the evidence supports [Horizon's] view that, after obtaining approval of the initial quality samples, [Horizon] produced all of the undyed fabric, or 'greige goods', to complete the orders (see [Horizon's] Exhibit 3) and submitted dyed fabric samples for color that [Pandelco] had approved. Further, the preponderance of the evidence shows that [Horizon] would have completed some of the orders of finished goods by August 10, 2007. Further, evidence was offered that showed that [Pandelco] gave [Horizon] extensions of time on the remaining deliveries (see [Horizon's] Exhibits 1, 11, 12, and 14) under the contract, both orally and in writing.

"6. A dispute arose regarding timely delivery by [Horizon] to [Pandelco] and a subsequent breach of contract arose, with the Court considering a complaint by [Horizon] only. The Court finds by a preponderance of the evidence that [Horizon] was ready to deliver a substantial portion of the 24,500 yards of fabric ordered by August 10, 2007 and the date specified on the purchase orders. Some written and oral communications between [Horizon] and [Pandelco], made during the manufacturing and delivery process, were ambiguous. However, after evaluating all of the evidence, the Court finds by a preponderance of the evidence, that [Horizon] reasonably believed, based on the conduct of [Pandelco], which includes written statements made by [Pandelco], that Pandelco agreed to a later delivery date for some of the goods, and that [Pandelco] had excused [Horizon] from any breach as to delayed delivery (See [Horizon's] Exhibits 1, 11, and 12). Further, the Court finds by a preponderance of the evidence, that [Horizon] was

ready, willing, and able to complete delivery of the balance of the goods by the later delivery dates indicated by [Pandelco]. Both parties presented evidence that [Pandelco] cancelled the purchase orders on August 10, 2007, prior to [Horizon's] delivery of the goods. Therefore, [Pandelco] is estopped under California [Uniform] Commercial Code §1103(b) from claiming that [Horizon] breached the contract by relying on the later delivery dates for a portion of the purchase orders. The Court further finds that [Pandelco] is estopped from claiming that Horizon breach[ed] its contract with [Pandelco] by not completing its shipment on a portion of the 24,500 yards of fabric ordered by Pandelco by August 10, 2007.

"7. No credible evidence was presented that [Horizon] was required under the contract to start shipping goods on August 1, 2007. The preponderance of the evidence shows that the words 'SHIP BY' do not appear on the face of [Pandelco's] purchase orders. Evidence was presented that the words 'CANCEL BY' appear on the face of [Pandelco's] purchase orders, but that the contrary notation 'Comp 8/10/07' also appears on the face of the purchase orders. (Pandelco Exhibit Nos. 4, 5, 6, and 7). Having evaluated all of the evidence, the Court finds by a preponderance of the evidence, that [Horizon] was not contractually obligated to begin shipping goods to [Pandelco] on or before August 1, 2007, and [Horizon] did not breach its contract with [Pandelco] by not starting deliveries of goods by August 1, 2007.

"8. The Court therefore finds, by a preponderance of the evidence, that all conditions required by the contract for [Pandelco's] performance had occurred. However, the preponderance of the evidence, including [Pandelco's] own admission, supports the finding that [Pandelco] failed to accept and pay for the goods. Horizon would have delivered the fabric in the quantity and quality ordered by [Pandelco] but for [Pandelco's] cancellation of the orders.

"9. [Pandelco] was required to accept and pay for the goods under the contract and its failure and refusal to do so constituted a material breach of the contract.

"10. The Court further finds that [Horizon] was harmed by [Pandelco's] breach and that [Horizon] sustained damages under the contract. The Court further finds by a

preponderance of the evidence, that [Horizon] spent $13,500 to store the fabric, $24,543.94 to purchase yarn for the fabric, $14,907.15 to knit the fabric, and $4,000 to dye the fabric.

"11. The Court further finds insufficient evidence to support the following contentions:

"(a) that [Horizon] materially breached any of its contractual obligations to [Pandelco],

"(b) that [Pandelco] had a legal right to cancel its contract with [Horizon];

"(c) that [Horizon] was contractually obligated to complete its shipment of all fabric on or before August 10, 2007, or face cancellation of the subject Purchase Orders by [Pandelco];

"(d) that [Horizon's] internal order confirmations constituted any agreement between the parties;

"(e) that any conduct by [Horizon] excused [Pandelco] from any further performance under the contract."

The trial court determined that Horizon's second cause of action for account stated was moot and ordered Horizon to recover from Pandelco on the breach of contract cause of action in "the amount of $56,951.09, plus interest of $11,875.05 calculated through the end of February 2010, at the rate of 10% per annum. Said damages of $56,951.09 are comprised of $13,500 in storage costs, $24,543.94 in yarn, $14,907.15 for knitting, and $4,000 for dyeing. Interest shall accrue at a daily increment of $15.60." The court also ordered Horizon to recover its costs.

On October 1, 2010, a judgment in favor of Horizon in the amount of $74,655.80, including costs, was filed. At a hearing on an "OSC regarding submission of a judgment for court signature," the judgment was signed by the trial court on October 4, 2010. The court explained that it considered Pandelco's objections when it ordered Horizon to prepare the final statement of decision. On October 4, 2010, the court served notice of entry of judgment on Horizon and Pandelco.

F. The appeals and the petition for a writ of mandate

On October 6, 2010, Pandelco filed a notice of appeal from the October 4, 2010 judgment after court trial. Accordingly, two appeals are before this court, including the appeal filed by Pandelco on August 24, 2010, from the order denying its petition to compel arbitration.

On December 22, 2010, Pandelco filed a petition for a writ of mandate, seeking reversal of the judgment and dismissal of Horizon's complaint. Horizon filed an opposition to the petition and a request for judicial notice. On May 18, 2011, we filed an order granting Horizon's request for judicial notice and denying Pandelco's petition for a writ of mandate. (*Pandelco, Inc. v. Superior Court* (B229635).)

DISCUSSION

A. The May 20, 2010 motion for reconsideration and the August 24, 2010 appeal from the trial court's order denying Pandelco's petition to compel arbitration were not filed timely

Pandelco contends that the trial court erred in denying Pandelco's motion for reconsideration of the court's order denying Pandelco's petition to compel arbitration. But Pandelco's May 20, 2010 motion for reconsideration and August 24, 2010 appeal from the trial court's order denying Pandelco's petition to compel arbitration were not filed timely and therefore we need not address Pandelco's arguments.

Section 1008, subdivision (a) provides, "When an application for an order has been made to a judge, or to a court, and refused in whole or in part, or granted, or granted conditionally, or on terms, any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order. The party making the application shall state by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown."

On May 20, 2010, Pandelco filed a motion for reconsideration of the trial court's June 14, 2009 order denying its petition to compel arbitration. Pandelco captioned its motion a "motion [for] modification of order denying its petition to compel arbitration based upon plaintiff Horizon Textile's fraud upon the court," and now refers to it on appeal as a second petition to compel arbitration. But our examination of the motion shows that Pandelco sought to persuade the court to reconsider its original order based on allegedly "new or different facts" under section 1008, subdivision (a), and therefore the trial court correctly characterized it as a motion for reconsideration. The court denied the motion on June 30, 2010, on the basis Pandelco did not provide an explanation why the purported new evidence could not have been found previously; the court did not use the alleged perjury, but used the information provided by Pandelco; there was an evidentiary problem of lack of foundation; and the motion was not filed timely.

We agree with the trial court. First, section 1008, subdivision (a) requires that when an application for an order has been denied, a party may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, apply to the court to reconsider the matter. Pandelco's motion for reconsideration was not filed within 10 days of the July 14, 2009 service of the written notice of entry of the order, and therefore was not filed timely. Second, Pandelco did not rely on new evidence for which there was a satisfactory reason why it could not have been found earlier. (*New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 212 [party seeking reconsideration must provide satisfactory explanation for failure to produce evidence at an earlier time].)

In addition, Pandelco's August 24, 2010 notice of appeal from the court's order denying the petition to compel arbitration was not filed timely. Rule 8.108(e) provides, "If any party serves and files a *valid motion* to reconsider an appealable order under Code of Civil Procedure section 1008, subdivision (a), the time to appeal from that order is extended for all parties until the earliest of: [¶] (1) 30 days after the superior court clerk or a party serves an order denying the motion or a notice of entry of that order; [¶] (2) 90 days after the first motion to reconsider is filed; or [¶] (3) 180 days after entry of

the appealable order." (Italics added.) Thus, even if Pandelco's untimely motion for reconsideration was valid, its August 24, 2010 notice of appeal was filed more than 30 days after the July 1, 2010 service of notice of entry of the order denying Pandelco's motion for reconsideration and more than 90 days after the May 20, 2010 motion to reconsider. And the August 24, 2010 notice of appeal was filed more than 180 days after the June 15, 2009 minute order entry denying the petition to compel arbitration and the July 14, 2009 notice of ruling.

We conclude Pandelco's motion for reconsideration filed on May 20, 2010, and its appeal filed on August 24, 2010, from the trial court's order denying Pandelco's petition to compel arbitration were not filed timely and therefore we need not address Pandelco's arguments regarding whether the court erred in denying the motion for reconsideration.

Accordingly, the appeal filed on August 24, 2010, from the order denying Pandelco's petition to compel arbitration is dismissed.

B. The use of the name Horizon Textiles, Inc., rather than Horizon Textiles did not prejudice Pandelco

Pandelco contends that Horizon Textiles, Inc., is not a California corporation and has no standing to prosecute this action. We conclude that the use of the name Horizon Textiles, Inc., rather than Horizon Textiles, which is a fictitious firm name of a validly existing California corporation, did not prejudice Pandelco.

"[C]ontentions based on a lack of standing involve jurisdictional challenges and may be raised at any time in the proceeding." (*Common Cause v. Bd. of Supervisors* (1989) 49 Cal.3d 432, 438.) We take judicial notice of Pandelco's petition for a writ of mandate filed on December 22, 2010; Horizon Textile, Inc.'s opposition to the petition filed on March 18, 2011; and the documents attached to Horizon Textiles, Inc.'s request for judicial notice, which we granted (*Pandelco, Inc. v. Superior Court*, *supra*, B229635). (Evid. Code, § 452.)

Pandelco contends that Horizon Textiles, Inc., is not listed by the Secretary of State as a corporation and therefore does not have standing to sue. But, as the documents attached to Horizon Textiles, Inc.'s request for judicial notice show, Horizon Textiles is a

registered fictitious firm name of the California corporation Horizon Tex, Inc. Still, Pandelco contends that Horizon Textiles and not Horizon Textiles, Inc., has standing to sue. But Pandelco cannot show that it has been prejudiced by Horizon Textiles' use of the name Horizon Textiles, Inc., rather than Horizon Textiles or Horizon Tex, Inc. (See § 475 [no judgment shall be reversed based on a defect in the pleadings unless it was prejudicial, the party complaining sustained substantial injury, and a different result would have been probable if the injury had not occurred].) Pandelco proceeded with litigation and went to trial on the issues. (See *Dale v. City of Mountain View* (1976) 55 Cal.App.3d 101, 105 ["court must in every stage of an action disregard any defect in the pleadings that does not affect the substantial rights of the parties"].) And Pandelco complained only of the use of the name Horizon Textiles, Inc., for the first time when it filed the petition for a writ mandate on December 22, 2010, after the judgment was entered in October 2010.

Thus, we conclude that the use of the name Horizon Textiles, Inc., rather than Horizon Textiles, which is a fictitious firm name of a validly existing California corporation, did not prejudice Pandelco.

C. Pandelco's contentions with respect to the statement of decision fail

Pandelco urges that the trial court erred by ignoring its request for a statement of decision; failing to rule on Pandelco's objections to the proposed statement of decision; signing and entering Horizon's proposed final statement of decision one day after it had been filed; directing the falsification of records; and refusing to stay the matter after Pandelco filed a notice of appeal from the court's order denying Pandelco's petition to compel arbitration. We disagree with Pandelco's contentions.

Section 632 provides in pertinent part, "The court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial. The request must be made within 10 days after the court announces a tentative decision." On March 24, 2010, the trial court issued a tentative statement of decision. On April 12,

2010, past the 10-day time limit of section 632, Pandelco filed a 29-page request for a statement of decision, raising 121 controverted factual and legal issues.

Section 634 provides, "When a statement of decision does not resolve a controverted issue, or if the statement is ambiguous and the record shows that the omission or ambiguity was brought to the attention of the trial court either prior to entry of judgment or in conjunction with a motion under Section 657 or 663, it shall not be inferred on appeal or upon a motion under Section 657 or 663 that the trial court decided in favor of the prevailing party as to those facts or on that issue."

The purpose of a party's request for a statement of decision and its objections to a proposed statement of decision is to avoid the application of the doctrine of implied findings. (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 494 (*Ermoian*).) "Ordinarily, when the trial court's statement of decision is ambiguous or omits material factual findings, a reviewing court is required to infer any factual findings necessary to support the judgment. [Citations.] This rule 'is a natural and logical corollary to three fundamental principles of appellate review: (1) a judgment is presumed correct; (2) all intendments and presumptions are indulged in favor of correctness; and (3) the appellant bears the burden of providing an adequate record affirmatively proving error.' [Citation.] [¶] In order to avoid the application of this doctrine of implied findings, an appellant must take two steps. First, the appellant must request a statement of decision pursuant to . . . section 632 . . . ; second, if the trial court issues a statement of decision, 'a party claiming omissions or ambiguities in the factual findings must bring the omissions or ambiguities to the trial court's attention' pursuant to section 634. [Citation.]" (*Ermoian*, at p. 494.)

"[A] trial court is not required to respond point by point to issues posed in a request for a statement of decision." (*Ermoian*, *supra*, 152 Cal.App.4th at p. 500.) "'"The court's statement of decision is sufficient if it fairly discloses the court's determination as to the ultimate facts and material issues in the case." (*Golden Eagle Ins. Co. v. Foremost Ins. Co.*[(1993)] 20 Cal.App.4th [1372,] 1380; see also *Bauer v. Bauer* (1996) 46 Cal.App.4th 1106, 1118 [trial court "is not required to make an express finding

of fact on every factual matter controverted at trial, where the statement of decision sufficiently disposes of all the basic issues in the case"]; *In re Marriage of Garrity & Bishton* (1986) 181 Cal.App.3d 675, 686–687 [trial court's statement of decision is required only to state ultimate rather than evidentiary facts].)' [Citation.]" (*Ermoian*, at p. 500.)

We disagree with Pandelco that the trial court erred by "ignoring and refusing to address, respond to or timely rule upon Pandelco's" request for a statement of decision and objections and by signing and entering Horizon's proposed final statement of decision one day after it had been filed. On March 24, 2010, the trial court issued a tentative decision. On April 12, 2010, Pandelco filed a 29-page request for a statement of decision. On May 3, 2010, Horizon served Pandelco with a proposed statement of decision. On May 21, 2010, Pandelco filed objections to Horizon's proposed statement of decision, contending that Horizon failed to address 121 controverted issues. On August 30, 2010, Horizon filed a proposed final statement of decision, which the court filed on August 31, 2010. Our review of the final statement of decision shows that the court sufficiently responded to the controverted issues that were raised properly by Pandelco.

First, any issues regarding the petition to compel arbitration were not proper subjects of the statement of decision because, as previously discussed, the time for appeal had passed.

Second, the trial court explained that it had considered Pandelco's objections when it ordered Horizon to prepare the final statement of decision. And our review of the final statement of decision shows that the court disposed of all the issues raised in Pandelco's opposition, namely, whether Pandelco and Horizon entered into a contract governed exclusively by Pandelco's purchase orders; whether Horizon breached the contract by failing to give Pandelco the opportunity to inspect and approve Horizon's fabric and failing to obtain Pandelco's approval of the fabric; whether Horizon obtained from Pandelco a written extension of the August 10, 2007 fabric shipment completion date; whether Horizon breached the contract by failing to deliver timely all fabric by

August 10, 2007; and whether Horizon showed that it incurred and paid the costs of fabric production.

That is, the final statement of decision concluded that Horizon and Pandelco had entered into a contract by way of purchase orders for the manufacture of textile materials designed for Pandelco. Horizon performed its side of the contract by obtaining Pandelco's approval of the initial quality samples, manufacturing and producing all the undyed fabric, and obtaining approval from Pandelco of dyed fabric samples. Horizon was ready on August 10, 2007, to deliver a substantial portion of the 24,500 yards of fabric on August 13, 2007. Pandelco gave Horizon written extensions of time by e-mail on the deliveries and excused Horizon from any breach based on delayed delivery. Horizon was ready, willing, and able to complete delivery of the balance of the goods four days later. Because the court determined that Horizon did not breach the contract, the final statement of decision did not address whether Horizon's purported breach excused performance by Pandelco and gave Pandelco the right to cancel the purchase orders. And the court sufficiently stated ultimate facts that Horizon spent $13,500 on storage costs, $24,543.94 on yarn, $14,907.15 on knitting, and $4,000 on dyeing.

Nor are we persuaded by Pandelco's argument that because the trial court signed the proposed final statement of decision one day after Horizon filed and served it, the court denied Pandelco its right to review the proposed final statement of decision and file objections. Pandelco had filed objections after the proposed statement of decision was filed and did not have the unlimited right to continue to file objections. And the resulting final statement of decision fairly disclosed the court's determination as to the ultimate facts and material issues in the case.

In similar fashion, Pandelco urges that "[t]he trial court willfully violated Pandelco's legal rights under [rule 3.1590(j)]" when it signed and entered Horizon's proposed judgment on October 1, 2010, the same day that Horizon filed and served the proposed judgment. But, on May 13, 2010, Pandelco filed objections to the first proposed judgment Horizon had filed on April 28, 2010. Thus, Pandelco cannot argue that it did not have an opportunity to file an objection to the proposed judgment. And

Pandelco did not establish that the trial court violated Pandelco's "legal rights" and "falsified the official record of public court proceedings" when it entered the October 1, 2010 judgment "a second time in open court" on October 4, 2010, at a hearing on an "OSC regarding submission of a judgment for court signature." Nor do we find substantiated Pandelco's charge that "[t]he trial court directed or permitted the falsification of the official court docket in this action by removing the October 1, 2010 Minute Order and Notice of Entry of Judgment from the official docket." Finally, we conclude that the court did not err in failing to stay the matter after Pandelco filed its August 24, 2010 notice of appeal from the court's denial of the motion for reconsideration of the court's order denying Pandelco's petition to compel arbitration because, as previously discussed, the motion for reconsideration filed on May 20, 2010, and the appeal filed on August 24, 2010, from the court's order denying Pandelco's petition to compel arbitration were not filed timely.

We conclude that Pandelco's contentions with respect to the statement of decision fail.

D. Substantial evidence supported the judgment

Pandelco contends that the evidence did not support the judgment. We disagree.

"In both jury and nonjury trials, factual findings made by the trier of fact are generally reviewed for substantial evidence." (*Ermoian, supra*, 152 Cal.App.4th at pp. 500–501.) "Under the substantial evidence standard of review, our review begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the trial court's factual determinations." (*Id*. at p. 501.) "The substantial evidence standard of review applies to both express and implied findings of fact made by the court in its statement of decision." (*Ibid*.)

We conclude that the trial court's final statement of decision was supported by substantial evidence. There is no dispute that this matter is governed by the California Uniform Commercial Code. (Cal. U. Com. Code, § 2102 [Commercial Code applies to "transactions in goods"]; *id.*, § 2104 [a merchant is "a person who deals in goods of the

kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction"].)

Under the California Uniform Commercial Code, course of dealing, course of performance, or usage of trade can be used to explain an agreement between parties. (Cal. U. Com. Code, § 2202; *Balfour, Guthrie & Co. v. Gourmet Farms* (1980) 108 Cal.App.3d 181, 190 [trial court properly admitted expert's evidence of custom and usage to explain and supplement the pricing term of the contract].) Omrany testified it was necessary to get Pandelco's approval of the dyed fabric samples before Horizon could complete production of the fabric. Omrany also testified that "a few days late" on delivery is acceptable in the industry.

The evidence supports the court's determination that Horizon performed its side of the contract by preparing sample rolls, which were approved for quality by Pandelco; preparing greige goods, which did not require approval by Pandelco; preparing lab dips, which were approved by Pandelco; and preparing dyed fabric samples, which were approved by Pandelco. And the evidence supported that Horizon had completed a substantial portion of the order by August 10, 2007, to be delivered on August 13, 2007, and was ready, willing, and able to complete delivery of the balance of the goods by August 17, 2007. Horizon could have processed orders over the weekend of August 10, 2007, but Pandelco did not respond to Horizon's requests for approval to complete production.

And the evidence supported the court's determination that Pandelco gave an extension of time to Horizon to prepare the remaining portion of the order. California Uniform Commercial Code section 2207 provides that between merchants, additional terms may become part of the contract, stating, "(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms. [¶] (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract

unless: [¶] (a) The offer expressly limits acceptance to the terms of the offer; [¶] (b) They materially alter it; or [¶] (c) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received. [¶] (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this code."

The evidence contained several communications between Pandelco and Horizon around August 7, 2007, establishing that Horizon submitted dyed fabric samples to Pandelco by August 3, 2007; Horizon complied with Pandelco's request for reformulation of some of the dyes; and Pandelco acknowledged that the final product would not be a 100 percent match with the lab dips. On August 10, 2007, Pandelco approved the fabric color sample of a particular color, stating, "The color looks good!!!" The evidence supports that Pandelco also assented to an extension of the delivery date, stating, "What about a production schedule???? Unless, you will be delivering goods today, you are late. And you will be charged back!!! Please let me know what it is that you will ship per color so I can provide you with extensions!!! Otherwise, after today I will do not will to do this!!!" (*Sic*.) We agree with the court's determination that the last sentence of that e-mail cannot be construed as a rejection because it was ambiguous. As noted, on August 10, 2007, in response to Pandelco's e-mail, Horizon stated that 40 percent to 50 percent of the fabrics were ready to be delivered; Horizon would deliver the approved fabrics on August 13, 2007; and the balance of the goods would be delivered on August 17, 2007.

Thus, the evidence supports the conclusion that Horizon had 40 percent to 50 percent of the goods ready for delivery, Pandelco had agreed to a later delivery date for some of the goods, and Pandelco had excused Horizon from any breach as to delayed delivery. Therefore, the trial court could conclude that Pandelco was estopped from claiming Horizon breached the contract. (See Cal. U. Com. Code, § 1103, subd. (b)

["Unless displaced by the particular provisions of this code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions."].)

To the extent that Pandelco asks us to reweigh the testimony and evidence, we cannot do so. "In reviewing a challenge to the sufficiency of the evidence, we are bound by the substantial evidence rule. All factual matters must be viewed in favor of the prevailing party and in support of the judgment. All conflicts in the evidence must be resolved in favor of the judgment." (*Turman v. Turning Point of Central California, Inc.* (2010) 191 Cal.App.4th 53, 58.)

We conclude that substantial evidence supported the judgment.

DISPOSITION

The appeal filed August 24, 2010, from the order denying Pandelco's petition to compel arbitration is dismissed. The judgment is affirmed. Horizon is entitled to costs on appeal.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

JOHNSON, J.