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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In Re ORAN DONALD INGRAM, and LINDA JANE INGRAM, Debtors.	Chapter 7 Case No. 03-21972-PHX-SSC Adversary No. 04-1022
ORAN DONALD INGRAM, and LINDA JANE INGRAM, Plaintiffs, v. PERFORMANCE FUNDING, LLC., Defendant.	
PERFORMANCE FUNDING, LLC, Counter Plaintiff, v. ORAN DONALD INGRAM, and LINDA JANE INGRAM, Counter Defendants.	MEMORANDUM DECISION (Opinion to Post)

I. PRELIMINARY STATEMENT

After this Court conducted oral argument on Performance Funding’s Motion for Summary Judgment on its Counterclaims and to dismiss the Debtors’ underlying complaint on April 11, 2005, this Court ruled preliminarily in favor of Performance Funding, but noted that additional documentation would need to be presented by the party on the issue of damages to have a judgment entered in favor of Performance Funding on its Counterclaim. The Court set a briefing deadline for the parties at the April 11, 2005 hearing; however, a number of Motions were subsequently filed by the parties. Performance Funding filed a

1 to guarantee the payment of any obligation that might arise under the Agreement, and the
2 Debtors entered into the Deed of Trust on their residence as collateral for the repayment of
3 the obligations.⁴

4 Under the Agreement, Spec agreed to sell, and Performance Funding agreed
5 to purchase, certain accounts or accounts receivable which were “eligible.” Spec could not
6 sell more than the aggregate amount of \$150,000 in Eligible Accounts.⁵ The nature of this
7 Agreement was to provide immediate funding to Spec to assist it in its cash requirements, but
8 the financing was short-term in nature. In essence, Spec was selling certain assets it held - its
9 accounts or accounts receivable - to Performance Funding, and the customers which owed
10 Spec money for services Spec provided were then to pay Performance Funding instead. If
11 Performance Funding was paid within 90 days of the payment to Spec, Performance Funding
12 charged a standard fee. If Performance Funding did not receive payment from Spec’s
13 customers until day 91 or later, Spec agreed to pay a late charge.⁶

14 The Agreement provided that if Spec received payments from the customers,
15 by mistake or otherwise, on any of the Eligible Accounts, Spec had the obligation to turn over
16 those funds immediately to Performance Funding.⁷ If Spec did not so act, Performance
17 Funding could require Spec to repurchase the unpaid amount, together with any fees or costs,
18 on any previously purchased Eligible Accounts.⁸ Given the broad definition of “Late

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20 ⁴ The only difference between the obligations entered into under the Agreement and the
21 Guarantee was Spec agreed to pay any attorneys’ fees arising in any way under the
22 Agreement (Ex. A, at 12, Paras. 24.0 and 24.15.2), and in the Guarantee, the Debtors only
23 agreed to pay reasonable attorneys’ fees that might be incurred by Performance Funding (Ex.
24 B at Para. 10).

25 ⁵ Performance Funding’s Statement of Facts, Ex. A, at 4, Para. 2.1.3.

26 ⁶ Id., also see the terms defined at 2. In particular, “Factoring Fee Period,” Factoring Fee
27 Rate,” “Factoring Fee” (to be determined by multiplying the Rate by the Face Amount of the
28 Eligible Accounts), and “Late Charge.” Late Charges are further delineated at 5, Para. 4.8.

⁷ Id. at 9, Para. 9.7.

⁸ Id. at 6, Para. 5.1.

1 Charge,” such charges accrued at a higher rate on any obligations that remained unpaid.
2 Moreover, other provisions in the Agreement stated that a failure of Spec to pay the
3 obligations arising under the Agreement constituted an Event of Default,⁹ and late charges
4 were payable, on demand, on any obligations not paid thereunder.¹⁰

5 However, one provision of the Agreement required Performance Funding to
6 provide an “Account Stated,” if it desired to bind Spec to any obligations then due and
7 owing.¹¹

8 Pursuant to this Agreement, Spec sold Server Group Eligible Accounts to
9 Performance Funding on June 14, 2001, and received a cash payment of \$142,037.01. On
10 June 15, 2001, Spec received payment from the Server Group on the same Accounts in the
11 amount of at least \$142,037.01. Performance Funding sent a letter to Spec on August 24,
12 2001, notifying Spec that Performance Funding had just been notified, presumably by the
13 Server Group, that Spec had received payment on the Eligible Accounts on the very same day
14 that Spec had sold the Accounts to Performance Funding.¹²

15 The parties agree that on September 28, 2001, Mr. Ingram and Mr. Wallace
16 had a meeting concerning the unpaid obligations due and owing by Spec to Performance
17 Funding. Because of the Guarantee, the Debtors were also liable to Performance Funding.
18 At the time of the meeting, Mr. Ingram paid the sum of \$140,721.74. In his Affidavit in
19 support of the Motion for Summary Judgment, Mr. Wallace stated that Mr. Ingram wanted a
20 release of the obligation then due and owing by the Debtors, under the Guarantee, to
21 Performance Funding. Mr. Wallace refused the request for a release. Mr. Wallace told Mr.
22 Ingram that the Debtors still owed \$15,731.50. Mr. Wallace apparently did not present any

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24 **9** Id. at 10, Para. 13.12.

25 **10** Id. at 10, Para. 13.14.2.

26 **11** Id. at 11, Para. 14.0

27 **12** Performance Funding’s Statement of Facts, Ex. G. Also, see Lou Wallace’s affidavit in
28 support of Motion.

1 written Account Stated to Mr. Ingram at the time, since there is nothing in the record to reflect
2 as such. Mr. Ingram has provided several affidavits with the Motions recently filed by the
3 Debtors with this Court. However, the Debtors offer no written documentation reflecting that
4 the parties entered into a release that day upon the payment of \$140,721.74 by the Debtors.

5 On December 5, 2001, counsel for Performance Funding sent a demand letter
6 to Spec, stating that as of December 10, 2001, the sum of \$21,213.97 was still due and owing
7 to Performance Funding.¹³ If Performance Funding did not receive payment by that date,
8 Performance Funding intended to proceed against the Debtors with the foreclosure of the
9 Deed of Trust as to the Debtors' residence.¹⁴ Counsel for Performance Funding does not
10 mention any Misdirected Payment Fee then due and owing under the Agreement or the
11 Guarantee.

12 On March 18, 2002, counsel for Performance Funding filed a complaint
13 against the Debtors to foreclose on the Deed of Trust.

14 On April 28, 2002, the sum of \$9,632.97 was paid by Performance
15 Restaurants to Spec and Performance Funding.¹⁵ Performance Funding provided a credit of
16 \$9,632.97 to Spec, and the Debtors and reduced the outstanding obligation as a result of this
17 payment. Spec and the Debtors still owed the amount of \$21,674.85. Again, no Misdirected
18 Payment Fee was requested. Ed Fochtman stated in his affidavit that he met with Mr. Ingram
19 and then with Mr. Hrudka, another principal of Performance Funding, to determine if the
20 services of Mr. Ingram and/or one of his companies might be utilized by Performance
21 Restaurants, a related entity to Performance Funding. Mr. Ingram would be paid for his costs
22 associated with the performance of services for the Restaurant Company, and the profit in the
23 contract, normally paid to Mr. Ingram or his company, would be paid to Performance Funding

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25 ¹³ Performance Funding's Statement of Facts, Ex. H.

26 ¹⁴ Id.

27 ¹⁵ Affidavit of Ed Fochtman in support of Motion for Summary Judgment, Exhibits
28 attached thereto.

1 in reduction of the Debtors' liability under the Guarantee. The Exhibits attached to Mr.
2 Fochtman's Affidavit support his statement of the facts. For instance, the services rendered
3 by Spec are set forth in the attached invoices, and one of the attached checks is made payable
4 to Mr. Ingram, and the other check is a joint check made payable to Spec and Performance
5 Funding. The Debtors have presented no documentation to controvert what Performance
6 Funding has provided.

7 The Debtors filed their bankruptcy petition on December 17, 2003, and they
8 commenced this adversary proceeding on September 8, 2004.

9 After the payment was received from Performance Restaurant on behalf of
10 Mr. Ingram and Spec, Performance Funding dismissed its then pending action to foreclose the
11 lien on the Debtors' residence. The Debtors attempted post petition, in 2004, to settle with
12 Performance Funding upon the payment of \$5,000, but there is no evidence in the record that
13 Performance Funding accepted the settlement.

14 After reviewing all of the documentation submitted by Performance Funding
15 in its original Motion for Summary Judgment and in its subsequent Motions, the only
16 information as to an accounting of the obligations owing by Spec is provided in Exhibit D to
17 the original Motion.¹⁶ However, this accounting of unpaid obligations, and any payments
18 received thereon, was prepared as of November 30, 2004, after the Debtors had filed their
19 bankruptcy petition. The Court has concerns about utilizing this post-petition document, and
20 there is simply nothing in the record which reflects that when Performance Funding originally
21 became aware of the default by Spec, it sent any kind of an Account Stated to Spec.

22 The Debtors' current pleadings focus essentially on one factual point. The
23 Debtors believe that in June or July 2001, Mr. Ingram entered into a separate contract with
24 Mr. Wallace, whereby one of Mr. Ingram's companies, Del Ray Plastering, would perform
25 stucco work on Mr. Wallace's home. The Debtors argue that this contract provided sufficient
26 funding, along with the refinancing that would later occur as to their residence, to pay off any

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28 **16** Performance Funding's Statement of Facts, Ex. D.

1 obligation that Spec or the Debtors owed to Performance Funding. The Debtors state that the
2 consideration under the contract was for \$20,000, of which the sum of \$10,000 was to be
3 credited toward the obligation then due and owing by Spec and the Debtors to Performance
4 Funding. The Debtors have no documentation to support their position - no invoices, no
5 correspondence, no deposit slips or checks, no books and records from Del Ray Plastering.
6 Mr. Wallace has provided his own affidavit to refute the allegations made by the Debtors,
7 insisting that he alone entered into an agreement with Mr. Ingram's company, Del Ray
8 Plastering. Mr. Wallace stated that he contracted, in July 2001, to have stucco placed again
9 on the exterior of his residence, that Performance Funding was not involved in the
10 transaction, that he agreed to pay \$10,000 to \$12,000 for the services to be rendered, that he
11 believed that Del Ray Plastering was a licensed contractor, and that he paid \$5,000 to Spec
12 for the work to be done by Del Ray Plastering, with the balance to be paid upon completion,
13 that Del Ray Plastering did not complete the job, and that Mr. Wallace was required to hire
14 another contractor to complete the work. Mr. Wallace provides no documentation in support
15 of his position.

16 **III. LEGAL DISCUSSION**

17 A. Motion to Extend of the Debtors.

18 The Debtors' Motion to Extend shall be granted. At the April 11 oral
19 argument on Performance Funding's Motion for Summary Judgment, this Court had set the
20 dates to obtain additional information from Performance Funding and the Debtors as to the
21 computation of damages based upon a discussion with counsel. The Court established these
22 dates on relatively short notice. Therefore, the Debtors' request to extend briefly the time
23 period to respond was not unreasonable. Nor is the Court able to perceive any prejudice to
24 Performance Funding if such a brief extension is granted. Ninth Circuit law dictates, under
25 such circumstances, that the brief extension of time be granted. Fed. R. Bankr. P. 9006; In re
26 Sheehan, 253 F.3d 507 (9th Cir. 2001); In re Sonoma V, 703 F.2d 429 (9th Cir. 1983)

1 B. Motion for Attorneys' Fees.

2 The Court has reviewed Performance Funding's Motion for Attorneys' Fees
3 and the response and reply filed and served by the parties with respect thereto. The thrust of
4 the Debtors' responsive pleading is that the Court determine that the attorneys' fees and costs
5 are reasonable. The Debtors also believe that if their argument that Performance Funding was
6 paid in full, as advanced in their Motion to Amend, is accepted by the Court, then the
7 attorneys' fees and costs should be concomitantly reduced as a result of such a finding.

8 There is an ambiguity in the documentation as to the standard that this Court
9 should apply to Performance Funding's request for attorneys' fees and costs. On the one
10 hand, as noted in the factual discussion, supra, the Agreement provides that Performance
11 Funding is entitled to attorneys' fees and costs, in any amount incurred, related in any way to
12 the underlying transaction. However, the Guarantee provides that the Debtors are only
13 responsible for the reasonable attorneys' fees and costs incurred by counsel. In resolving this
14 conflict, the Court will utilize the documentation which specifically pertains to the Debtors -
15 the Guarantee.

16 The Court has now had an opportunity to review the detailed billing
17 statements attached to the Motion. These entries were made on a contemporaneous basis over
18 the years of the dispute between the parties. Unfortunately, because this matter has not been
19 resolved, counsel for Performance Funding continues to incur attorneys' fees and costs.
20 Based upon this Court's thorough review of counsel's invoices, it concludes that the
21 attorneys' fees and costs requested by counsel are reasonable.

22 The Debtors also advance the argument that if this Court grants the Motion to
23 Amend, which will be discussed hereinafter, counsel for Performance Funding should have its
24 attorneys' fees and costs reduced; that is, the lack of success in advancing certain arguments
25 should affect whether counsel's fees and costs are, indeed, reasonable. However, since the
26 Court will not accept most of the Debtors' arguments in the Motion to Amend, the Court sees
27 no basis to reduce the attorneys' fees and costs of Performance Funding's counsel.

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1 C. The Debtors' Motion to Amend.

2 The June/July 2001 Del Ray Plastering Contract is the focus of the Debtors'
3 Motion to Amend. The Debtors argue that this Contract represents a payment by Mr. Wallace
4 to Spec to reduce the payment owing by the Debtors to Performance Funding. There are
5 several problems with the Debtors' argument.

6 In June or July 2001, Spec had just entered into the Agreement with
7 Performance Funding. In fact, although interest was accruing on the funds advanced by
8 Performance Funding to Spec, the Agreement contemplated that the Spec customers might
9 not pay Performance Funding for as long as 90 days. Since the Server Group Eligible
10 Accounts were purchased by Performance Funding on June 15, 2001, only 15 to 30 days had
11 elapsed, at the most, at the time that Mr. Wallace and Mr. Ingram were discussing the terms
12 and conditions of the Contract to re-stucco Mr. Wallace's home. The evidence reflects that
13 Mr. Wallace and Performance Funding did not become aware that there was a problem with
14 the payment of the Server Group Eligible Accounts until the middle of August, when Mr.
15 Wallace sent his letter to Spec, advising Spec of the diversion of the Server Eligible Accounts
16 to Spec rather than Performance Funding. In essence, it was only in August 2001 that
17 Performance Funding was aware of, and focusing on, the misdirection of the customer
18 payments on the Accounts to Spec. There was no payment default yet; the obligation between
19 Performance Funding and Spec was on a current basis, with interest accruing at the contract
20 rate on any obligation then due and owing. Because no Event of Default had been triggered
21 under the Agreement, the Debtors did not yet have any obligation that was due and owing
22 under the Guarantee for which they would need to negotiate with Mr. Wallace as to any
23 payment.

24 Thus, from a factual standpoint, the Debtors' argument makes no sense.
25 Under Ninth Circuit law, if a party is attempting to refute a motion for summary judgment,
26 and the argument presented is implausible, the party must present more persuasive or cogent
27 evidence in support of the party's position California Architectural Bldg. Prods., Inc., v.

1 Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir. 1987) (citing Matsushita Elec.
2 Indus. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 1356 (1986)). The Debtors
3 have failed to present the necessary evidence, other than Mr. Ingram's self-serving affidavit,
4 in support of their implausible argument. As a result, the Court concludes that the Debtors
5 have failed to raise a genuine issue of material fact as to the Del Ray Plastering Contract
6 which would require a further evidentiary hearing before this Court. The Court concludes
7 that Mr. Wallace entered into the Contract with Del Ray Plastering and that there is no
8 competent evidence to support the Debtors' claim that any or all of the proceeds from this
9 Contract were to be utilized to pay the obligation of the Debtors to Performance Funding.

10 The Debtors' Motion to Amend also raises the issue of the Debtors'
11 affirmative defenses and how those should be handled by this Court at the pleading stage.
12 Since the Debtors are presenting the affirmative defenses of payment or satisfaction, they
13 carry the burden of proof on any such defenses. Celotex Corporation v. Catrett, 477 U.S. 317,
14 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) ;Harper v. Delaware Valley Broadcasters, Inc., 743
15 F.Supp. 1076; Pfeil v. Smith, 183 Ariz. 63, (Ariz.App. Div. 1,1995). The Debtors have failed
16 to present any evidence, other than their self-serving affidavits, that the series of payments
17 made by them over the years somehow paid Performance Funding in full or that Performance
18 Funding was satisfied. As noted, this Court has already rejected the Debtors' argument that
19 the Del Ray Plastering Contract could serve as a basis of the repayment of the subsequent
20 obligation of the Debtors under the Guarantee. Performance Funding's Motion for Summary
21 Judgment also includes various letters from the Debtors in 2004 which appear to be the
22 Debtors' attempt to settle what had then become their choate obligation under the Guarantee.
23 Unfortunately, the facts reflect that although the Debtors were able to make a sizeable
24 payment of \$140,721.74 to Performance Funding after refinancing their home mortgage in
25 September 2001, once Performance Funding discovered the diversion of the Server Group
26 Eligible Accounts to Spec, rather than to it, that payment was not enough to pay Performance
27 Funding in full.

1 The Court has analyzed the accounting prepared by Performance Funding in
2 its most recent affidavits filed with the Court, and although Performance Funding must still
3 clarify certain entries with the Court, it is clear that even if this Court accepts the Debtors'
4 accounting of what remained unpaid after the Debtors' September 2001 payment, the Debtors
5 still owed Performance Funding the amount of \$11,754.99.¹⁷ The Debtors have presented no
6 evidence to reflect that they paid that remaining obligation. Under Arizona law, the Debtors
7 must present some evidence to indicate that they have paid an obligation in full or the
8 obligation has been satisfied. Rossi v. Stewart, 90 Ariz. 207 (Ariz. 1961) (court will look to
9 reasonable evidence to determine when a claim has been discharged); Milberger v. Chaney
10 Bldg. Co., Inc., 146 Ariz. 181 (Ariz. App., 1985) (evidence needs to be sufficient to establish
11 valid tender or necessary acceptance to create accord and satisfaction to discharge the debt);
12 Western Coach Corp. v. Rexrode, 130 Ariz. 93 (Ariz.App., 1981) (no right of subrogation to
13 the creditor's rights in the collateral when there is no evidence that the entire debt was paid).
14 The Debtors have not presented such evidence. As noted previously, the Debtors carry the
15 burden of proof on any affirmative defenses which they have alleged. Because the Debtors
16 have failed to meet their burden, the Court must enter judgment in favor of Performance
17 Funding.

18 The final argument advanced by the Debtors is legal. The Debtors argue that
19 they should be able to present evidence on whether Del Ray Plastering was in substantial
20 compliance with the statute governing contractors, so that this Court might allow the Debtors
21 to utilize the consideration received under the Contract entered into between Mr. Wallace and
22 Del Ray Plastering as a setoff of any obligation owed by the Debtors under the Guarantee. As
23 noted previously, this Court need not consider the Contract in its analysis. However, even if
24 this analysis is incorrect, the Court concludes that the Debtors have misinterpreted the
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27 ¹⁷ See Debtors' Response to the Motion for Summary Judgment, Docket Entry No.11,
28 Exhibits attached thereto.

1 decision of Aesthetic Property Maintenance, Inc. v. Capitol Indemnity Corp., 183 Ariz. 74,
2 900 P.2d 1210 (1995) upon which they rely.

3 In the Motion for Summary Judgment, Performance Funding relied on the
4 decision of Crowe v. Hickman's Egg Ranch, Inc., 202 Ariz. 113 (App. 2002) for the
5 proposition that absent a valid license, any contract entered into was not enforceable, even if
6 the party so contracting knew that the contractor did not have a valid license. The Decision
7 was predicated on a strict construction of A.R.S. §32-1153 which states as follows:

8 No contractor as defined in § 32-1101 shall act as agent or commence or maintain any
9 action in any court of the state for collection of compensation for the performance of
10 any act for which a license is required by this chapter without alleging and proving
11 that the contracting party whose contract gives rise to the claim was a duly licensed
contractor when the contract sued upon was entered into and when the alleged cause
of action arose.

12 Performance Funding argued that since the license of Del Ray Plastering was suspended at
13 the time that it entered into the Contract with Mr. Wallace, the Debtors were unable to use
14 any consideration received thereunder as a setoff. The Court agreed with this analysis at the
15 April 11 hearing on the Motion for Summary Judgment.

16 The Debtors now advance the argument that the Aesthetic Property Decision changes
17 this Court's April 11, 2005 ruling. The Arizona statute requires the licensing of contractors
18 which perform construction and related services in Arizona above a certain dollar limitation
19 "to protect the public from incompetent and irresponsible builders." Id., 183 Ariz. at 77,
20 citing Koehler v. Donnelly, 114 N.M. 363, 838 P.2d 980, 982. However, the Arizona
21 Supreme Court set out certain factors in determining whether a contractor with a suspended
22 license was in substantial compliance with the Arizona law so that it could recover under a
23 contract. The factors to be considered are:

24
25 [(1)] Is suspension by operation of law under Section 32-1125(A), or for cause under
Section 32-1154(A)? Did the Registrar's failure contribute to the noncompliance? . . .

26 [(2)] Was the contractor financially responsible while its license was suspended?

27 A contractor does this by maintaining its liability insurance, surety bond, workers'
28 compensation insurance, and any other requirement imposed by the Registrar.

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Failing that, there can be no substantial compliance.
[(3)] Did the contractor knowingly ignore the registration requirements? If so, this is fatal to a claim of substantial compliance. . . .
[(4)] Finally, did the failure to comply with our statute prejudice the party the statute seeks to protect?

Id., 183 Ariz. at 78. The Debtors have failed to present any documentation from Del Ray Plastering which would reflect that there is at least a triable issue of fact on the issue of substantial compliance. This Court is able to conclude, from the several affidavits submitted by the parties from the Arizona Registrar of Contractors, that Del Ray Plastering became a licensed contractor in Arizona in 1999. In April 2001, Del Ray had its license suspended briefly because it did not have the required bond under Arizona law. Even if the Court accepts the Debtors' argument that the Debtors forwarded a check for the renewal fee for Del Ray in June 2001, which the Registrar did not receive, the Debtors were placed on notice in July 2001, by the imposition of a late fee by the Registrar, that there were some problems with the license renewal. The Debtors have not presented any evidence that they resolved those issues with the Registrar. Assuming that the Registrar did make several errors in the license renewal, Del Ray's license was suspended again at the end of 2001 because Del Ray no longer had a responsible party to act on its behalf. Thus, as to factor one, it appears that the suspension in July 2001 by the Registrar was by operation of law.

As to the factor two, the Debtors have presented no evidence to show that Del Ray was financially responsible at the time. Although Del Ray had a bond, there is no information about liability insurance, workers' compensation, or other relevant information on finances to reflect that Del Ray was able to perform under the Contract.

It also appears that once the Debtors were notified, by way of a late fee, that there were problems with the renewal process, the Debtors did not seem to cure the various statutory deficiencies. Counsel for the Debtors stated that the Debtors just decided not to

1 renew Del Ray's license. That inaction is not sufficient. The contractor must not knowingly
2 ignore the registration requirements. The Debtors have not met factor three.

3 Finally, if the Court focuses on Mr. Wallace's affidavit, Del Ray could not
4 perform under the Contract. From Mr. Wallace's standpoint, Del Ray was "incompetent and
5 irresponsible." The statute was enacted to protect the public from such contractors. Since the
6 Debtors are arguing substantial compliance with the statute, they needed to present some
7 evidence that Del Ray performed in a timely, professional, and responsible manner as to the
8 Contract. They have not shown that. Factor four has not been met.

9 Because of the Debtors' failure to create a genuine issue of material fact on the
10 issue of substantial compliance by Del Ray with the Arizona Registrar of Contractors statute,
11 the Court concludes that the Debtors may not use the consideration paid under that Contract
12 as a setoff.

13 D. The Performance Funding Accounting.
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15 The Court does agree with the Debtors that their Motion to Amend should be
16 granted in part, insofar as Performance Funding has not yet presented an accounting that this
17 Court may utilize to enter judgment in its favor.

18 As stated in this Decision, the Court has found no document which is an
19 Account Stated under the Agreement. The only Exhibit which refers to the amount due and
20 owing by the Debtors is a post-petition letter from counsel for Performance Funding to the
21 Debtors. Therefore, the Court agrees with the Debtors that in September 2001, when the
22 Debtors made a payment in excess of \$140,000, they were not being unreasonable in
23 requesting that the invoices be paid in their numerical order since they all had the same date
24 in June 2001. The Court also agrees that there is no provision in the Agreement which
25 requires that the Eligible Accounts be paid and accounted for in any specific manner. As a
26 result, the Debtors owed the sum of \$11,754.99 after making the payment in excess of
27 \$140,000 in September 2001. Moreover, the Late Charges, which accrued thereafter, would
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1 be on the face amount of the last invoice, which was \$52,953.50.¹⁸ Therefore, Performance
2 Funding needs to recompute the amount due and owing by the Debtors, taking into account
3 the credit for services rendered by Mr. Ingram and Spec to Performance Restaurant in 2002.

4 Once Performance Funding recalculates its damages, it may then add its
5 attorneys' fees and costs which have also been approved by this Court.

6 Performance Funding has also requested a Misdirected Payment Fee, but there
7 is nothing in the record from 2001, 2002, or 2003, which reflects that Performance Funding
8 ever requested such a fee. It is only as a part of this post-petition action to receive a portion
9 of the proceeds that the Debtors received from the sale of their residence that the issue has
10 surfaced. The Court will not grant such fee at this time. Performance Funding is requesting
11 that its Motion be granted, and a judgment be entered as to the fee as a matter of law.

12 However, the Court has insufficient information in the record to reflect that this fee has not
13 been waived. Failure to properly raise an issue can result in it being waived. In re Marvin
14 Props., Inc., 854 F.2d 1183, 1187 (9th Cir.1988). Waiver is defined as the voluntary and
15 intentional relinquishment of a known right or such conduct as warrants an inference of
16 relinquishment of such right. City of Tucson v. Koerber, 313 P.2d 411 (Ariz. 1957).

17 Performance Funding may be estopped from now making a claim for the Misdirected
18 Payment Fee. Estoppel arises where one with knowledge of the facts has acted in a particular
19 manner so that he ought not to be allowed to assert a position inconsistent with his former acts
20 to the prejudice of others who have relied thereon. City of Tucson v. Koerber, 313 P.2d 411
21 (Ariz. 1957). As noted, there is no evidence that Performance Funding ever requested the fee
22 prior to this action. As the claimant, it is Performance Fundings burden to prove to this Court
23 that they are entitled to the fee and have not waived their entitlement to such fee. Lundell v
24

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26 **18** The Court has reviewed the Debtors' accounting attached to their Response to the
27 Motion for Summary Judgment. However, that accounting uses an incorrect Late Charge in
28 subsequently computing the amount due and owing by the Debtors.

1 Anchor Const. Specialist, Inc., 223 F.3d 1035 (9th Cir. 2000) (burden rests on the claimant to
2 prove the validity of a claim).

3 **IV. CONCLUSION**

4 Based on the foregoing, the Court concludes that the brief extension requested
5 by the Debtors was not unreasonable, and therefore, the Motion to Extend will be granted.
6 The Court has thoroughly reviewed counsel's for Performance Funding's fee application and
7 invoices, and concluding that the amount requested is reasonable, hereby grants the Motion
8 for Attorneys' Fees. Moreover, the Debtors' Motion to Amend will be granted, in part, and
9 denied, in part for the various reasons set forth by the Court. Performance Funding is directed
10 to submit its calculations regarding damages within 14 days of date of this Decision. If
11 Performance Funding requests that it also receive the Misdirected Payment Fee, it needs to
12 present further evidence to the Court at a hearing.

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14 The Court incorporates its decision on the record on April 11, 2005, as to
15 Performance Funding's Motion for Summary Judgment except as that decision has been
16 modified by this Decision.

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18 DATED this 28th day of September, 2005.

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20 Honorable Sarah Sharer Curley
21 United States Bankruptcy Judge

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24 BNC TO NOTICE
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