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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

AGGREKO ENERGY RENTALS, LLC et al., Defendants, Cross-Plaintiffs and Appellants, v. SADDLEBACK VALLEY COMMUNITY CHURCH, Defendant, Cross-Defendant and Respondent.	B230801 (Los Angeles County Super. Ct. No. VC053322)

APPEAL from the judgment of the Superior Court of Los Angeles County, Raul A. Sahagun, Judge. Reversed and remanded for further proceedings.

Acker & Whipple, Stephen Acker and Laurie N. Stayton for Defendants, Cross-Plaintiffs and Appellants.

Archer Norris, Pamela G. Lacey and Sheldon L. Fuller for Defendant, Cross-Defendant and Respondent.

This is an appeal of a judgment following the trial court's granting of Saddleback Valley Community Church's motion for summary judgment in a cross-complaint by Aggreko, LLC and Aggreko Energy Rental Systems, LLC (Aggreko). Aggreko alleges that triable issues of material fact were raised with respect to the breach of contract and express contractual indemnity claims in the cross-complaint and therefore the trial court erred in granting the motion. We agree and will reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND[1]

In early 2007, Saddleback Valley Community Church (Saddleback Church or the Church), a corporation authorized to do business in California, began making parking improvements to its Lake Forest campus (the project). It contracted with Saddleback Development Corporation (Saddleback Development), a construction general contractor corporation also authorized to do business in California, to do the work. Saddleback Development was created by Saddleback Church to carry out various construction projects for the Church and a few of its congregants.

Saddleback Church previously leased equipment from Aggreko and, as a result, Mike Post (Post), a Saddleback Church employee in charge of maintenance and purchasing, recommended that Aaron Bruno (Bruno), the purchasing manager for Saddleback Development, contact Aggreko regarding the lease of a generator for the project. After negotiations between Aggreko and Bruno, Aggreko sent a proposal, dated March 28, 2007, to "Aaron Bruno [¶] Saddleback Church [¶] 1 Saddle Back Park

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[1] The factual and procedural background is drawn from the record, which includes a five-volume Clerk's Transcript and a one-volume Reporter's Transcript.

Way." The proposal included the terms of the generator's lease and a proposal acceptance form. The generator was delivered to the Church's address and the bill of lading was signed the very next day. Later, Ray Van Wick (Van Wick), Bruno's assistant, signed the acceptance form with his name followed by the handwritten phrase, "FOR AARON BRUNO," on the signature line above the typed name and description, "Aaron Bruno for Saddleback Church." Van Wick dated the document April 3, 2007. This page included the statement, "By executing this Acknowledgement, I certify that I am authorized to enter into this agreement on behalf of Lessee . . . . " The lessee on the face of the contract was Saddleback Church. The acceptance form was faxed back to Aggreko that same day. Invoices for the generator were sent to the Church at its address and were paid.

Richard and Meghan Ruesga, husband and wife,[2] filed a complaint against Aggreko seeking damages and alleging that Mr. Ruesga was severely injured after being electrocuted while in contact with the generator on April 16, 2007.[3] A few months after Mr. Ruesga was allegedly shocked by the generator, a request was made to Aggreko to change the *address* where the invoices were sent from 1 Saddleback Parkway, the Church's address, to 5 Rocky Road, Saddleback Development's address; however, no request was made to change the lessee's name and it remained Saddleback Church.

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[2] The Ruesgas are not parties to this appeal.

[3] The original complaint was filed on April 13, 2009. The Ruesgas amended the complaint on December 31, 2009 to include Saddleback Church.

On November 6, 2009, Aggreko filed a cross-complaint against the Church and Saddleback Development. Aggreko filed a first amended cross-complaint (FACC), the operative complaint, on January 28, 2010. The FACC sought total equitable indemnity, comparative indemnity, equitable contribution, express contractual indemnity, breach of contract and declaratory relief causes of action. Saddleback Church moved for summary judgment against the plaintiffs, the Ruesgas, and, separately, against Aggreko. Both motions were granted by the trial court. After analyzing whether Saddleback Church was liable to the plaintiffs, the trial court concluded that the Church "has demonstrated that it is entitled to judgment on plaintiffs' claims," and then found that, as a result, "Aggreko's cross-complaint fails." It did not include any analysis of whether Saddleback Church was a party to the generator's lease contract, which contained an express indemnity provision. Judgment was entered on January 4, 2011. This appeal followed.

ISSUE ON APPEAL

Aggreko contends that triable issues of material fact were raised as to whether Saddleback Church was bound as the lessee pursuant to the generator lease acceptance form's being signed by Van Wick on behalf of Bruno as an agent of the Church.[4] We agree and will reverse the judgment.

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[4] Aggreko also argued that triable issues of material fact were raised as to whether Saddleback Development was the alter ego of the Church but this issue was not properly raised before the trial court. "[B]ecause the pleadings delimit the scope of the issues in a motion for summary judgment . . . [¶] [a] complaint must set forth the facts with sufficient precision to put the defendant on notice about what the plaintiff is complaining and what remedies are being sought. [Citation.] To recover on an alter

DISCUSSION

1. *Standard of Review*

Code of Civil Procedure section 437c, subdivision (a), states, "Any party may move for summary judgment in any action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding." Section 437c goes on to state in subdivision (c) that a "motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to *any material fact* and that the moving party is entitled to a judgment as a matter of law." (Italics added.) An appellate court reviews a trial court's ruling on a motion for summary judgment de novo. (*Rio Linda Unified School Dist. v. Superior Court* (1997) 52 Cal.App.4th 732, 734-735.)

"We first identify the issues framed by the pleadings since it is these allegations to which the motion must respond. We then determine if the moving party has established a prima facie entitlement to judgment in its behalf. Only if the moving party has satisfied this burden do we consider whether the opposing party has produced evidence demonstrating there is a triable issue of fact with respect to any aspect of the moving party's prima facie case." (*Rio Linda Unified School Dist. v. Superior Court,*

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ego theory, a plaintiff need not use the words 'alter ego,' but must allege sufficient facts to show a unity of interest and ownership, and an unjust result if the corporation is treated as the sole actor. [Citation.]" (*Leek v. Cooper* (2011) 194 Cal.App.4th 399, 415.) Here, Aggreko only briefly mentioned its alter ego argument at the end of the summary judgment hearing and it failed to include any such argument in its cross-complaint or its opposing papers. Nor did Aggreko ever seek leave to amend the cross-complaint to include the alter ego argument. Therefore, our analysis is limited to the issue that was properly before the trial court, i.e., whether triable issues of material fact were raised with respect to the theory of agency.

supra, 52 Cal.App.4th at pp. 734-735.) " 'In making this determination, the moving party's affidavits are strictly construed while those of the opposing party are liberally construed.' [Citations.] We accept as undisputed facts only those portions of the moving party's evidence that are not contradicted by the opposing party's evidence. [Citation.] In other words, the facts alleged in the declarations of the party opposing summary judgment must be accepted as true. [Citation.]" (*Waisbren v. Peppercorn Productions, Inc.* (1995) 41 Cal.App.4th 246, 251-252 (*Waisbren*).)

2. *Triable Issues of Material Fact Were Raised as to Whether Bruno, Through His Assistant Van Wick, Was Acting as Saddleback Church's Actual Agent*

In its FACC, Aggreko sought to enforce the terms of the generator lease agreement whereby Saddleback Church agreed to indemnify and defend Aggreko and pay Aggreko's attorneys' fees in connection with the underlying lawsuit filed by the Ruesgas. The FACC alleged that the Church failed to comply with these terms and to obtain general liability insurance, inter alia, in breach of the generator lease agreement. These claims rely on Aggreko's factual assertion that the Church was the lessee. Aggreko attached a copy of the lease which indisputably shows that Van Wick signed it for Bruno on behalf of the Church.

The Church argued in its motion for summary judgment that neither Van Wick nor Bruno was authorized to sign any agreements on its behalf. To support this argument, the Church cites Bruno's deposition testimony in which he (1) denied ever having been employed by the Church; (2) denied ever having entered into any contracts on behalf of the Church; (3) admitted that the lease agreement stated the Church was the

lessee but that it was incorrect; (4) stated he requested the lessee be changed "several times" prior to its being signed by Van Wick; and (5) denied that Van Wick had authority to sign any contract on behalf of Bruno. This evidence, if uncontradicted, would be sufficient for granting the motion. However, the evidence was not uncontradicted.

Triable issues of material fact were raised by the evidence submitted by Aggreko in response to the motion for summary judgment. Tim Loza (Loza), the former president of Saddleback Development and the current president of subcontractor Loza Waterworks, testified at his deposition on May 13, 2010 that, back in 2007 when the lease generator contract was put in place, Van Wick was authorized to sign contracts on behalf of the Church in certain cases such as for rental equipment when Van Wick was otherwise unable to obtain the signature of either Bruno or Loza. Although Loza later recanted this admission in a declaration signed on June 17, 2010, admissions made during a deposition govern over contrary declarations filed with the court at a summary judgment motion hearing. (*Visueta v. General Motors Corp*. (1991) 234 Cal.App.3d 1609, 1613.) Loza's May testimony clearly creates issues of fact as to whether (1) Bruno was an actual agent who was authorized to sign contracts on behalf of the Church; and (2) Van Wick was authorized to sign contracts for Bruno on behalf of the Church. (See Civil Code, §§ 2295, 2296, 2299 and 2316.)[5] The existence of an agency

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[5] Civil Code section 2295 states, "An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency." Civil Code section 2296 states, "Any person having capacity to contract may appoint an agent, and any person may be an agent." Section 2299 states, "An agency is actual

may be implied from the facts and the extent of an agent's authority may be proved by circumstantial evidence. (*Kelley v. R. F. Jones Co*. (1969) 272 Cal.App.2d 113, 120.)

3. *Triable Issues of Material Fact Were Raised as to Whether Bruno, Through His Assistant Van Wick, Was Acting as Saddleback Church's Ostensible Agent*

Aggreko also contends that triable issues of material fact were raised as to whether Bruno, through his assistant Van Wick, was acting as Saddleback Church's ostensible agent when Van Wick signed the generator lease acceptance form.

"An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." (Civ. Code, § 2300.) The existence of an ostensible agency is a question of fact. (*Kaplan v. Coldwell Banker Residential Affiliates, Inc*. (1997) 59 Cal.App.4th 741, 747.) " ' "It is elementary that there are three requirements necessary before recovery may be had against a principal for the act of an ostensible agent. [(1)] The person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; [(2)] such belief must be generated by some act or neglect of the principal sought to be charged; and [(3)]the third person in relying on the agent's apparent authority must not be guilty of negligence. [Citation.]" ' [Citation.]" (*Kaplan v. Coldwell Banker Residential Affiliates, Inc*., *supra,* 59 Cal.App.4th at p. 747.)

Aggreko has produced evidence demonstrating that there are triable issues of fact as to whether it believed that Bruno had authority to enter into the lease agreement on

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when the agent is really employed by the principal." Section 2316 states, "Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess."

behalf of the Church and whether such belief was reasonable. First, after discussions with Bruno, Aggreko sent a proposal dated March 28, 2007 to him that included the Church as the lessee of the generator. The generator was delivered to the Church the next day. Although Bruno claims he asked Aggreko "several times" to change the lessee's name to Saddleback Development and did not consider the proposal as a result, in direct contradiction of his assertion his assistant, Van Wick, signed the proposal for him *as written* and faxed it back to Aggreko six days later. Loza's admission in his May deposition that Van Wick was authorized to sign contracts for equipment on behalf of both him and Bruno for the Church supports this further. Ironically, the Church produced evidence in further support of Aggreko's belief that the Church was the lessee by citing the deposition testimony of Thomas Sawyer, the salesman at Aggreko who worked with Bruno. In response to the Church's question, "Do you have a recollection as to why the proposal was to Saddleback Church?" he responded, "Only because that's what – I would only put on there what was requested. Meaning that if somebody called me and said that they were with Saddleback Church, that's what I would put it under. . . . " Aggreko also introduced evidence of its prior relationship with the Church demonstrating the reasonableness of its belief. Post had previously rented generators for the Church from Aggreko and he recommended that Bruno contact Aggreko to lease one for the project.

Aggreko also produced evidence demonstrating a triable issue of fact that its belief was generated by the actions or neglect of the Church. " 'Agency may be implied from the facts of a particular case, and . . . a principal by his acts [may lead] others to

believe that he has conferred authority upon an agent.' " (*Correa v. Quality Motor Co.* (1953) 118 Cal.App.2d 246, 252.) A principal's silence in the face of actual knowledge of an alleged agent's actions constitutes sufficient evidence to sustain a finding of ostensible authority. (*Tomerlin v. Canadian Indem. Co.* (1964) 61 Cal.2d 638, 644-645.) Not only was the lease agreement addressed to Saddleback Church as lessee, but also the bill of lading, the location where the generator was delivered and all of the invoices were addressed to Saddleback Church at its address. Despite the receipt of each of these documents and the generator at the Church's address, there is no evidence in the record showing that any Church employee ever contacted Aggreko to assert that neither Bruno nor Van Wick were authorized to bind the Church under the lease or that the lease should not be in its name. The evidence shows instead that the bills, which were sent to the Church at its address, were paid and the generator remained on Church property. Although a request was made sometime in either June or July of 2007 to change the address where invoices were being sent to Saddleback Development's address, no change to the name of the lessee was requested. It can be inferred from the circumstances that the Church had knowledge of the lease and its inclusion as lessee yet it took no action to correct the alleged mistake.

Finally, Aggreko produced evidence demonstrating that there is a triable issue of fact that Aggreko was not guilty of any negligence. Aggreko had a preexisting business relationship with the Church; it's proposal for the lease of the generator to the Church was signed by Van Wick for Bruno, followed by a certification that the signer was authorized to enter into the lease on behalf of the Church; the generator was delivered to

the Church and all of the invoices addressed to the Church as lessee were paid. Although some of Saddleback Church's evidence conflicts with Aggreko's, as noted above, under *Waisbren*, we only accept as true those portions of the Church's evidence that are not contradicted by Aggreko's evidence, while accepting as true *all* of the claimed facts set out in Aggreko's evidence. (*Waisbren v. Peppercorn Productions, Inc.*, *supra*, 41 Cal.App.4th at pp. 251-252.)

Based on the foregoing, we find that Aggreko produced sufficient evidence demonstrating that there were triable issues of material fact as to whether Bruno was the ostensible agent for the Church when his assistant signed the lease agreement on his behalf. "[W]here, as here, [the opposing party] introduces some evidence raising a triable issue of fact on an ostensible agency theory, such is sufficient to withstand summary judgment." (*Kaplan v. Coldwell Banker Residential Affiliates, Inc.*, *supra*, 59 Cal.App.4th at p. 748.)

DISPOSITION

The judgment is reversed and the case remanded for further proceedings. Aggreko shall recover its costs on appeal.

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CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

KITCHING, J.