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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

E.H. SUMMIT, INC., Cross-Complainant and Appellant, v. ADP LLC, et al., Cross-Defendants and Respondents.	B271858 (Los Angeles County Super. Ct. No. BC495214)

APPEAL from a judgment of the Superior Court of Los Angeles County, John Shepard Wiley, Jr., Judge. Affirmed.

Fagelbaum & Heller, Jerold Fagelbaum and Philip Heller, for Cross-Complainant and Appellant.

Jones Day, Matthew J. Silveira, Brian L. Hazen, and Rick Bergstrom, for Cross-Defendants and Respondents.

Cross-complainant and appellant E.H. Summit, Inc. (Summit) is the entity that owns, on behalf of Efrem Harkham (Harkham), a hotel on Sunset Boulevard in Los Angeles. One of the hotel's former employees filed a putative wage and hour class action lawsuit against Summit, and Summit filed a cross-complaint against cross-defendants and respondents ADP LLC, ADP, Inc., and AD Processing LLC (collectively, ADP). Summit settled the wage and hour claims brought by its former employee, but Summit's cross-complaint against ADP alleged ADP was responsible for the asserted employee time calculation errors that were the predicate for the settled claims. The trial court resolved the cross-complaint's allegations on summary judgment, concluding there was no disputing ADP and a representative of the Sunset Boulevard hotel had entered into a written contract, and the existence of that contract, plus the lack of evidence of any other valid contract, defeated any basis for liability on Summit's various claims for breach of contract (written, oral, and implied), as well as its tort and indemnity causes of action. For reasons we shall explain, we conclude summary judgment was properly entered for ADP.

I. BACKGROUND

A. The Parties

Harkham owns and is the Chief Executive Officer of Summit, which in turn owns and operates the Luxe Sunset Boulevard Hotel in Los Angeles (Luxe Sunset). Harkham also owns and is the chief executive officer of Summit Hospitality Corp., which is a general partner of 360 N. Rodeo Dr., LP, which in turn is the owner and operator of the Luxe Rodeo Drive Hotel in Beverly Hills (Luxe Rodeo). Although the two hotels share the

name "Luxe," the two business entities share the name "Summit," and Harkham is the Chief Executive Officer and owner of both business entities, the entities are "separate," meaning neither is the parent or subsidiary of the other. The same controller, however, is responsible for managing the financial affairs of both hotels, the Luxe Sunset and the Luxe Rodeo, as well as four other Harkham-owned hospitality related companies (collectively, the Harkham entities).

ADP is a payroll processing company that has provided services to Summit (the owner of the Luxe Sunset) and the Luxe Rodeo. When ADP first began providing services to Summit, the controller's office—specifically, a person occupying the position of assistant controller—was responsible for manually calculating employee time worked at the Luxe Sunset. This process involved compiling employee time cards, manually calculating the number of hours worked, rounding the amount of time to the nearest quarter of an hour for the pay period, and transmitting the amount of time to ADP.[1] ADP would use the numbers provided by the assistant controller to process the payroll, "which included calculating payroll checks, calculating applicable withholding deductions, sending taxes withheld to the appropriate governmental agencies, and accessing [Summit's] bank account to withdraw sufficient funds to cover the net payroll checks and applicable withholding payments."

Beginning in the late 1990s, ADP provided additional services to the Harkham entities to automate timekeeping tasks

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[1] We state the facts in the light most favorable to Summit. (*O'Riordan v. Federal Kemper Life Assurance Co.* (2005) 36 Cal.4th 281, 284.)

the controller's office previously handled manually. Under the new arrangement, ADP software known as "eTime" would calculate the number of hours employees worked, and the software permitted Summit (and other Harkham entities) to round off the time that employees reported working. The eTime software provided different options for rounding, including on a minute by minute basis, in tenth of an hour segments, or by quarter-hour segments.

Roughly a decade after switching to automated timekeeping, Summit and the other Harkham entities agreed with ADP to move to a new time management system using updated software dubbed "ezLabor." ADP prepared a package of documents that included four "sales orders," including one for the Luxe Sunset and one for the Luxe Rodeo, along with a single "Time & Labor Management Terms and Conditions" document (TLM Agreement) that left blank the space on the form agreement that could be used to designate the parties to whom it applied. The sales orders were nominally addressed to Andrew Wong, the head of the controller's office for the Harkham entities, and ADP representative Christy Hatherley (Hatherley) sent the entire package of documents to an assistant controller in the office, Regina Tanedo (Tanedo).[2] The sales order for the Luxe Rodeo included a billing entry for ezLabor, but the other orders did not include a similar entry.

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[2] Ms. Tanedo died during the litigation in this case, and so far as the record reveals, she never submitted a declaration in connection with summary judgment, nor was she ever deposed. Her predecessor, Estelita Sy, described the position she (Sy) formerly held as "Assistant Controller for the [Luxe Sunset]."

Hatherley's email transmitting the documents to Tanedo noted the "proposals" would "need signatures." Tanedo responded by email the same day, asking Hatherley: "Is Andrew Wong the only person who can sign this? I cannot?" Hatherley's reply was, "You can sign too. Thanks." Tanedo, however, did not immediately return a signed copy of the TLM Agreement transmitted with the sales orders. So later the next month, in April 2011, Hatherley sent Tanedo another email that attached the TLM Agreement and stated, "Please sign and scan back to me the attached document for the ezlabor project." An hour later, in an email with a signature block identifying Tanedo as the "Asst. Controller | Luxe Sunset Hotel," Tanedo returned an executed copy of the TLM Agreement, identifying herself, beneath her signature, as "Asst. Controller."

When implementing the ezLabor system, ADP offered Summit a choice of rounding options, and Summit requested rounding to the quarter hour. According to Summit, its prior policy had been to round employee time once at the end of each pay period, but ADP instead rounded employee time every day, and in every instance in which time was "punched." According to ADP, it implemented quarter-hour rounding each instance in which time was entered because that was what Summit instructed it to do. Specifically, Tanedo at one point complained to ADP that the "clocks for the employees . . . were still not rounded to the nearest quarter," but a short time later confirmed "[t]hey are perfect now."

B. The Lawsuit and Summary Judgment

The year after adoption of ezLabor, one of Summit's former employees filed a putative class action lawsuit alleging Summit's

time rounding practices meant Summit had failed to pay all due wages, including overtime wages, and that paychecks provided to Summit employees did not accurately reflect work time or the correct amount of wages due. Summit filed a cross-complaint against ADP. As ultimately set forth in a Second Amended Cross-Complaint (the operative complaint), Summit asserted seven causes of action against ADP: breach of written contract, breach of oral contract, breach of implied-in-fact contract, negligence, equitable indemnity, failure to defend pursuant to the tort of another doctrine, and declaratory relief. The gist of the operative complaint is that ADP breached a contract with Summit, and certain duties of care allegedly owed to Summit, by providing timekeeping services that used quarter hour rounding and by failing to affirmatively warn Summit of the litigation risks of that practice.

As the litigation progressed, Summit settled the wage and hour claims brought by its former employee. Summit did not admit liability and instead maintained it settled "in order to avoid the risks and costs of litigation." Summit's cross-action, however, remained pending against ADP, and ADP filed a motion for summary judgment or, in the alternative, summary adjudication (the Motion).

The Motion argued that ADP had not breached any terms of the only valid written contract between the parties—the TLM Agreement; that there was no evidence of an oral or implied contract; and that oral or implied contracts would in any case be barred by the terms of the TLM Agreement. ADP also contended Summit's remaining causes of action failed because they were barred by release language included in the TLM Agreement and the economic loss rule. Summit opposed the Motion on a number

of grounds; the most important, for our purposes, was the contention that Summit (as opposed to the Luxe Rodeo, which was owned by a different entity) never assented to the TLM Agreement and was therefore not bound by its terms.

After extensive argument by counsel during a hearing on the Motion, the trial court granted summary judgment for ADP. The court found the TLM Agreement was a valid contract between Summit and ADP, and that finding largely defeated the remainder of Summit's claims. The court determined there was no evidence of a written, oral, or implied contract between Summit and ADP other than the TLM Agreement, and the court additionally concluded an integration clause in the TLM Agreement would preclude recognizing an oral or implied contract even if there were evidence of one. The court further found the TLM Agreement defeated Summit's tort claims, and the claim for equitable indemnity failed in any event because negligent performance of a contract can give rise to only contract damages.

II. DISCUSSION

On this summary judgment record, there is no disputing that the TLM Agreement is a valid contract between ADP and Summit. Tanedo had apparent authority to assent to the TLM Agreement, and her assent indisputably was on behalf of Summit (the owner of the Luxe Sunset), even if it were also true that her assent operated to bind Luxe Rodeo or other Harkham entities to the agreement as well.

As Summit's reply brief implicitly acknowledges, our conclusion that the TLM Agreement is the only valid contract between Summit and ADP has something of a domino effect on

the validity of the causes of action asserted in the operative complaint. That is to say, there is no evidence of another contract with terms ADP is said to have breached, and the TLM Agreement's integration clause in any event defeats any suggestion that a valid oral or implied contract existed between Summit and ADP. Summit's tort claims fail in light of language in the TLM Agreement that establishes ADP owes Summit no duty of care. Summit's equitable indemnity claim fails for the same reason to the extent it sounds in tort (and because contract damages would be recoverable at most), and to the extent it is founded on a contractual obligation, it fails because there is no substantial evidence of a contract that imposes such an obligation. Finally, because there is no basis to award declaratory relief given that no other viable cause of action exists, summary judgment for ADP was proper.

A. The Summary Judgment Standard, in the Trial Court and on Appeal

A defendant may move for summary judgment on the ground the action has no merit. (Code Civ. Proc., § 437c, subd. (a)(1).[3]) A cause of action lacks merit if one or more of its essential elements cannot be established. (§ 437c, subd. (o)(1); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853 (*Aguilar*).)

"The purpose of the summary judgment procedure is to identify those cases in which 'there is no triable issue as to any material fact . . . .' (§ 437c, subd. (c).) For practical purposes, an

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[3] Undesignated statutory references that follow are to the Code of Civil Procedure.

issue of *material* fact is one which, in the context and circumstances of the case, 'warrants the time and cost of factfinding by trial . . . .' [Citation.] In other words, not every issue of fact is worth submission to a jury. The purpose of summary judgment is to separate those cases in which there are *material* issues of fact meriting a trial from those in which there are no such issues." (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 162 (*Sangster*).)

"[F]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar*, *supra*, 25 Cal.4th at 850.) However, once the moving party "make[s] a prima facie showing of the nonexistence of any triable issue of material fact . . . , he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Ibid*.) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Id*. at p. 851.)

Where, as here, the plaintiff would bear the burden of proof at trial by a preponderance of evidence, the defendant moving for summary judgment "must present evidence that would require a reasonable trier of fact *not* to find any underlying material fact more likely than not—otherwise, *he* would not be entitled to judgment *as a matter of law*, but would have to present *his* evidence to a trier of fact." (*Aguilar*, *supra*, 25 Cal.4th at p. 851.) In other words, a triable issue of material fact exists if the evidence allows a reasonable trier of fact to find the disputed fact in favor of the plaintiff by a preponderance of evidence. (*Id*. at pp. 850-851.)

"[W]here the parties have had sufficient opportunity adequately to develop their factual cases through discovery and the defendant has made a sufficient showing to establish a prima facie case in his or her favor, in order to avert summary judgment the plaintiff must produce substantial responsive evidence sufficient to establish a triable issue of material fact on the merits of the defendant's showing. [Citations.] For this purpose, responsive evidence that gives rise to no more than mere speculation cannot be regarded as substantial, and is insufficient to establish a triable issue of material fact. [Citations.]" (*Sangster*, *supra*, 68 Cal.App.4th at pp. 162-163; see also § 437c, subd. (p)(2); *Aguilar*, *supra*, 25 Cal.4th at p. 852; *Granadino v. Wells Fargo Bank, N.A.* (2015) 236 Cal.App.4th 411, 415 ["The plaintiff must produce "'*substantial*'" responsive evidence sufficient to establish a triable issue of fact"] (*Granadino*); *Stewart v. Preston Pipeline Inc.* (2005) 134 Cal.App.4th 1565, 1589 [citing *Ahrens v. Superior Court* (1988) 197 Cal.App.3d 1134 for the proposition that "opposing evidence that is merely equivocal will not suffice to raise a triable fact issue"].)

On appeal from the grant or denial of summary judgment, we review the matter de novo, liberally construing the evidence in support of the party opposing summary judgment and resolving doubts concerning the evidence in favor of that party. (*State of California v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, 1017-1018; see also *Aguilar*, *supra*, 25 Cal.4th at p. 843.)

B. On the Summary Judgment Record, ADP Prevails on the Breach of Contract Claims As a Matter of Law

"'A cause of action for breach of contract requires proof of the following elements: (1) existence of the contract; (2) plaintiff's

performance or excuse for nonperformance; (3) defendant's breach; and (4) damages to plaintiff as a result of the breach.' (*CDF Firefighters v. Maldonado* (2008) 158 Cal.App.4th 1226, 1239, 70 Cal.Rptr.3d 667.)" (*Miles v. Deutsche Bank National Trust Company* (2015) 236 Cal.App.4th 394, 402.) It is the first and third elements—breach of a valid, existing contract—that ADP contends Summit cannot prove. More precisely, ADP argues Summit has failed, after two years of litigation and extensive discovery, to identify a written (or oral or implied) contract with terms that have been breached as alleged in the Second Amended Cross-Complaint. As we explain, that is true and then some—the only valid contract that exists is the TLM Agreement, and that agreement only serves to confirm no other valid contract exists.

1. Summit's breach of contract allegations

In the operative complaint, Summit alleges causes of action for breach of written contract, breach of oral contract, and breach of implied-in-fact contract. Despite the allegations of a written contract, no document purporting to be that contract was attached to the operative complaint. Instead, to use the phrase Summit employs on appeal, Summit asserted there was a "hybrid mélange" of written, oral, and implied-in-fact contracts that ADP allegedly breached by failing to "provide time keeping and payroll . . . services to [Summit]" that "conform[ed] to all federal and state laws and regulations and . . . ensure[d] that [Summit's] employees were properly and accurately paid all wages for time worked."

As the operative complaint's contract breach allegations were later specified (or perhaps more accurately, expanded upon) in Summit's Separate Statement of Undisputed and Disputed

Material Facts In Opposition to ADP's Motion for Summary Judgment (Separate Statement),[4] Summit contended ADP breached its alleged contractual obligations by: (1) "failing to follow Summit's policy in connection with the rounding of employee time at the end of each payroll cycle" which "result[ed] in less than full wages being paid to . . . employees and the provision of inaccurate wage statements to same, all in violation of federal and state law"; (2) "failing to warn [Summit] that time-rounding had been increasingly and successfully challenged in courts of law around the nation" and "failing to advise Summit that the employee time rounding procedure implemented by ADP . . . was in violation of Summit policy"; (3) "failing to memorialize in writing agreements entered into between ADP and Summit" and "[f]ailing to provide Summit copies of written

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[4] On a motion for summary judgment, the parties' separate statements generally define the evidentiary universe that determines whether there are disputed and undisputed facts. (*City of Pasadena v. Superior Court* (2014) 228 Cal.App.4th 1228, 1238, fn. 4; *United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 337 [""This is the Golden Rule of Summary Adjudication: if it is not set forth in the separate statement, *it does not exist*. Both the court and the opposing party are entitled to have all the facts upon which the moving party bases its motion plainly set forth *in the separate statement*""]; see also *North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 30-31 [issue waived on appeal by party's failure to identify in its separate statement the facts material to the issue presented]; but see *Parkview Villas Assn., Inc. v. State Farm Fire and Cas. Co.* (2005) 133 Cal.App.4th 1197 [trial court should give a party that files an inadequate separate statement leave to cure the defect].)

agreements ADP now alleges were entered into between ADP and Summit"; and (4) "failing to audit [Summit]'s time keeping and payroll summaries" and "failing to inform [Summit] it must audit ADP's work product to determine if it was in conformance with the law."

2. ADP demonstrated Summit had no evidence that would allow a jury to find the existence of any contracts with the terms alleged to have been breached

ADP's Motion made a proper prima facie showing that (1) Summit had no evidence of any contract that imposed on ADP the aforementioned obligations Summit alleged ADP breached, and (2) the only valid contract, the TLM Agreement, relieved ADP of those alleged obligations or in fact imposed them on Summit. Summit does not contend otherwise. The burden of production accordingly shifted to Summit, and Summit's Separate Statement identified no evidence on which a jury could rely to find the existence of a contract other than the TLM Agreement.

Most obviously, there is no written contract in the record between Summit and ADP that incorporates the terms that Summit complained ADP breached. Indeed, Summit has been unable to identify such a writing from the outset of the litigation, as no such contract was ever attached to their pleadings. (See *Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, 307 ["If the action is based on alleged breach of a written contract, the terms must be set out verbatim in the body of the complaint or a copy of the written agreement must be attached and incorporated by reference"].)

Nor is there "substantial responsive evidence" (*Granadino*, *supra*, 236 Cal.App.4th at p. 415) of an oral or implied contract. Estelita Sy (Sy) and Tanedo were the only two Summit employees who interacted with ADP in any significant respect. Summit's evidentiary submission was obviously handicapped by the absence (for reasons we have already noted) of any declaration or deposition testimony by Tanedo. And neither the written and oral testimony from Sy, nor any other evidence offered by Summit at summary judgment, was adequate to raise even a disputed factual issue as to whether Summit and ADP had entered into oral or implied contracts that gave rise to obligations of the sort that Summit claimed ADP had agreed to undertake.

3. The TLM Agreement is the sole valid contract between Summit and ADP, and it only serves to confirm there can be no dispute of fact regarding the breach of alleged oral or implied contracts

The TLM Agreement Tanedo signed includes several provisions of particular relevance to the issues on appeal (discussed further, *post*). Paragraph 14 of the TLM Agreement, entitled "Governmental Regulations and Manufacturer Requirements," states: "Client will be responsible (i) for compliance with all laws, governmental regulations and manufacturers' requirements affecting its business, and (ii) for any use Client may make of the TLM Products to assist Client in complying with such laws, governmental regulations, and manufacturers' requirements and ADP shall not have any responsibility relating thereto (including, without limitation, advising Client of Client's responsibilities in complying with any

laws, governmental regulations or manufacturers' requirements affecting Client's business)." Paragraph 15 of the TLM Agreement includes the following language disclaiming the establishment of an agent relationship: "The parties hereto expressly understand and agree that each party is an independent contractor in the performance of each and every part of this agreement, [and] is solely responsible for all of its employees and agents and its labor costs and expenses arising in connection therewith. And paragraph 15 also includes an integration clause that states: "This Agreement contains the entire agreement of the parties as to the TLM Products and such Agreement supersedes all existing agreement[s] and all other oral, written or other communications between them concerning the TLM Products. Client hereby acknowledges that any and all representations made by ADP and its employees, either orally or in writing, which are not specifically included in the terms and conditions of this Agreement or in a written addendum signed by an authorized officer of ADP are not material to this Agreement and are not binding upon ADP. This Agreement shall not be modified in any way except in a writing signed by both parties."

Recognizing the consequences these provisions would have for the viability of the claims asserted in the operative complaint, Summit argues it never validly assented to the TLM Agreement, despite Tanedo's execution of it. Summit's argument is twofold: first, that Tanedo assented to the TLM Agreement only on behalf of Luxe Rodeo, not Luxe Sunset (owned by Summit); and second, that insofar as Tanedo purported to contract on behalf of Summit, she had no authority to do so. We conclude both arguments fail as a matter of law.

a. Summit is a party to the TLM Agreement

As we shall explain, there is no evidence in the record that would permit a jury to conclude the TLM Agreement applies *exclusively* to the Luxe Rodeo and not to the Luxe Sunset owned by Summit. At best (with "best" being evaluated from Summit's perspective), the evidence permits a conclusion that *both* the Luxe Rodeo and Luxe Sunset (or their parent companies) were parties to the TLM Agreement. But a conclusion that both entities were parties to the TLM Agreement still means the agreement is indeed a valid written contract between Summit and ADP.

Several pieces of evidence before the trial court at summary judgment indicate Summit, as the owner of the Luxe Sunset, was a party to the TLM Agreement. Two, in particular, are key. First, when Tanedo signed the TLM Agreement, she did so listing her title as "Asst. Controller." Her email transmitting the signature page to Hatherley at ADP included a signature block that identified Tanedo as "Asst. Controller | Luxe Sunset Hotel"; there was no reference in the signature block, the text of the email, or the text of the TLM Agreement to the Luxe Rodeo. Thus, the email, taken together with the signature page of the TLM Agreement, indicates Tanedo signed the document (at least) in her capacity as a representative of the Luxe Sunset. Second, Summit's response to an ADP interrogatory confirms the Luxe Sunset (i.e., Summit) was a party to the TLM Agreement. ADP asked Summit to identify "each of the written agreements referenced in paragraph 46 of [the Second Amended Complaint] that [Summit] contend[s] constitutes a contract between [Summit] and ADP." Summit's answer admitted the TLM Agreement (along with a number of price quotations and sales

orders) was a document that constituted a contract between ADP and Summit.

Summit did marshal evidence in its Separate Statement to argue the TLM Agreement applied to the Luxe Rodeo, but there is no substantial evidence that the TLM Agreement applied *exclusively* to the Luxe Rodeo. The question of whether Summit assented to the TLM Agreement is, of course, an issue that one would normally expect Summit to readily address by testimony from its own employees. But with no declaration or deposition testimony from Tanedo, Summit instead relied on the deposition testimony of controller Andrew Wong (Wong) and a declaration from CEO Harkham.[5] Neither suffices to raise a triable issue of fact.

We have reviewed the cited portions of Wong's deposition, and none are relevant on this issue; Wong answered "no" when asked whether he had "any idea whether there is a written agreement that governs in part or all of the services that are provided by ADP to any of the [Harkham entities]." Harkham's declaration, on the other hand, does aver Summit "did *not* enter into any written agreement with ADP to lease or acquire [ezLabor], including, but not limited to, the [TLM Agreement]." Putting aside the lack of foundation for this statement, Harkham's declaration cannot be used to contradict Summit's considered admission in its interrogatory response that the TLM Agreement was a written contract between Summit and ADP, or at least part of a written contract. (*Shin v. Ahn* (2007) 42 Cal.4th

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[5] Summit also cited to the declaration of its expert witness, but nothing in that declaration addresses whether Summit was a party to the TLM Agreement.

482, 500, fn. 12 ["[A] party cannot create an issue of fact by a declaration which contradicts his prior discovery responses"]; *Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078, 1087-1088 [trial court correctly gave answers to interrogatories "'special consideration'" and concluded contradictory declaration did not constitute substantial evidence of the existence of a triable fact issue]; *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 593.)

Presumably with no other recourse, Summit's Separate Statement also relied on inferences from the documentary evidence and the testimony of an *ADP witness*, Hatherley,[6] to attempt to raise a dispute of fact as to *Summit's* assent to the TLM Agreement. This evidence, too, is inadequate to permit a jury to conclude only the Luxe Rodeo was a party to the TLM Agreement.

Summit is, of course, correct that the sales order for Luxe Rodeo includes a charge for ezLabor timekeeping (referenced by the program's alternate name, "Workforce Now Essential Time") that, according to Hatherley at deposition, did not appear on the sales order for Luxe Sunset. But Hatherley denied that meant ezLabor was sold to only the Luxe Rodeo; rather, she testified the charge on the Luxe Rodeo sales order "encompass[ed] the other locations," and there is no dispute that ezLabor was in fact used at both Luxe Sunset and Luxe Rodeo (along with other Harkham entities). That Hatherley mistakenly believed the Luxe Rodeo

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[6] Summit also cited the deposition testimony of another ADP employee, Stacy Arrenaga, but her testimony does not even obliquely address whether Summit was a party to the TLM Agreement.

was the parent company of the Luxe Sunset is immaterial—Hatherley's testimony was that the ezLabor sales agreement was for *all* the locations referenced in the four sales orders she transmitted to Tanedo with the TLM Agreement.

In a similar vein, Summit also argues the TLM Agreement "was computer generated to accompany" the Luxe Rodeo sales order specifying the ezLabor charge. There is no evidence, however, that would permit a rational jury to infer the TLM Agreement accompanied only the Luxe Rodeo sales order. All the sales orders, including sales orders for Luxe Sunset and Luxe Rodeo, were transmitted to Tanedo as a package with the TLM Agreement, and there is no dispute that ezLabor was actually provided to Luxe Sunset (i.e., Summit) for use after Hatherley received the executed TLM Agreement from Tanedo. Summit's separate statement additionally points to a technical "configuration report" apparently prepared to implement the ezLabor system. An ADP employee used the report as a guide in a phone call with Tanedo to configure the ezLabor system settings. Only the Luxe Rodeo name (not the Luxe Sunset name) appears on the report, but the ADP employee did not send a copy of the report to Tanedo and he had no reason to believe she had otherwise received a copy of the report. Again, while the configuration report is evidence that the Luxe Rodeo used ezLabor timekeeping services, it is not evidence that the Luxe Sunset did not.

In sum, Summit's interrogatory response admitted it was a party to the TLM Agreement, and that is consistent with the stated capacity in which Tanedo executed and transmitted the document to ADP. While Summit's evidence was unquestionably sufficient to raise a triable issue of fact as to whether the Luxe

Rodeo was also a party to the TLM Agreement, it was just as *in*sufficient to raise a triable issue concerning whether Luxe Rodeo was the *only* party to the TLM Agreement. ADP carried its burden of persuasion to establish a reasonable jury could conclude only that the TLM Agreement is a contract between Summit and ADP (even if there were other parties to the agreement).

b. Tanedo had ostensible authority

Summit's briefs on appeal can be read to suggest that even if Tanedo did purport to assent to the TLM Agreement on behalf of Summit, she had no authority to bind the company. While we agree there was certainly sufficient evidence to warrant a trial on whether Tanedo had *actual* authority to execute the TLM Agreement on Summit's behalf, there is no factual dispute on this summary judgment record that Tanedo had *ostensible* authority to contract with ADP on Summit's behalf.

"Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." (Civ. Code, § 2317.) "[O]stensible authority requires justifiable reliance by a third party. It must be shown that 'the business done by the supposed agent, so far as open to the observation of third parties, is consistent with the existence of an agency, and . . . , as to the transaction in question, the third party was justified in believing that an agency existed. [Citation.]' [Citations.]" (*Snukal v. Flightways Mfg., Inc.* (2000) 23 Cal.4th 754, 779; see also *Preis v. American Indemnity Co.* (1990) 220 Cal.App.3d 752, 761 ["[W]here the principal knows that the agent holds himself out as clothed with certain authority, and remains silent, such conduct on the part of the

principal may give rise to liability"]; *Ripani v. Liberty Loan Corp.* (1979) 95 Cal.App.3d 603, 611 [ostensible authority may be implied from the facts].)

Wong and Harkham testified at deposition that "all communications between the [Harkham entities] and ADP have been [undertaken] by the assistant controllers and individuals that report to the assistant controllers"; that "responsibility for working with . . . ADP on purchases and implementation . . . shifted from Ms. Sy to Ms. Tanedo"; and that Tanedo "was responsible for dealing with ADP" pursuant to a delegation of responsibility from Wong. Wong, Harkham, and others also testified, however, that Summit had an unwritten policy that permitted only Wong, or someone with Wong's express approval, to sign documents purporting to bind any of the Harkham entities to contractual terms—and Wong had not seen the TLM Agreement (before ADP produced it in discovery) and never gave Tanedo approval to sign it. Importantly, however, Summit produced no evidence indicating Wong or anyone else at Summit had communicated this unwritten policy to anyone at ADP; indeed, Wong testified he had not, so far as he could recall.

Thus, on the evidence submitted in connection with summary judgment, there is no dispute that Tanedo had ostensible authority to bind Summit to the TLM Agreement. It is undisputed that Wong did not have any direct communications with ADP after Summit began operating the Luxe Sunset. Furthermore, over the course of the relationship between Summit and ADP, Summit's assistant controllers (Sy and Tanedo) signed various documents on behalf of Summit going as far back as the 1990s. These agreements included the client account agreement authorizing ADP to withdraw money from Summit's bank

account to make payroll and authorizing the implementation of the eTime software that preceded the purchase and implementation of ezLabor. That Summit might contend the execution of all these documents was authorized by Wong is of no moment— it is ADP's perspective that matters for purposes of ostensible authority, and there is no evidence ADP personnel were ever informed of the unwritten Wong pre-approval policy. Thus, someone like ADP employee Hatherley would have no reason to suspect Tanedo lacked authority to sign the TLM Agreement, and justifiable reason to believe the opposite.

c. the TLM Agreement's integration clause

We have concluded there is no disputing that the TLM Agreement is a valid contract between Summit and ADP, and that conclusion only reinforces another we have already reached: there are no valid oral or implied contracts between the two parties.

"The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." (Civ. Code, § 1625; see also § 1856, subd. (a) ["Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to the terms included therein may not be contradicted by evidence of a prior agreement or of a contemporaneous oral agreement"]; *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 346 [alleged oral agreement no longer exists because a written sales contract, as a matter of law, replaced it; "an integrated written agreement *supersedes* any prior or contemporaneous promise at variance with the terms of

that agreement"].) In addition, "'it is well settled that an action based on implied-in-fact or quasi-contract cannot lie where there exists between the parties a valid express contract covering the same subject matter.' [Citations.]" (*Grebow v. Mercury Insurance Company* (2015) 241 Cal.App.4th 564, 580.)

The TLM Agreement's integration clause states, among other things, that the TLM Agreement "supersedes all existing agreement[s] and all other oral, written or other communications" between Summit and ADP concerning ADP equipment, software, and related services; it also states any other oral representations by ADP personnel are non-binding. The TLM Agreement accordingly confirms, even if there were evidence to the contrary, that it is the entire agreement of the parties that supersedes any oral or implied contracts on the same subject matter that Summit would purport to invoke in an attempt to prevail on its breach of contract causes of action.

C. Summit's Other Causes of Action Fail As a Matter of Law

The determination that Summit entered into the TLM Agreement governs our resolution of the remaining causes of action of negligence, equitable indemnity, failure to defend, and declaratory relief. Each fails in light of the conclusions we have already reached.

1. Negligence

Summit argues ADP breached a duty of care it ostensibly owed to Summit in two ways. "First, [according to Summit,] ADP had a duty to perform under its contract with Summit in a non-negligent manner, and breach of this duty gave rise not only to

contract liability, but also, to tort liability in negligence as well." "Second, as Summit's agent, ADP had duties: (1) to perform its obligations related to the scope of its agency with reasonable care, . . . and also, (2) to disclose to Summit any information ADP possessed that might affect Summit's decision-making with respect to matters within the agency . . . ."

Taking the first of these arguments first, we have held that Summit presented no substantial evidence of a valid contract between it and ADP other than the TLM Agreement. Thus, even if Summit were correct that tort damages are available for negligent performance of a contractual obligation (contra *Stop Loss Ins. Brokers, Inc. v. Brown & Toland Medical Group* (2006) 143 Cal.App.4th 1036, 1044 ["negligent performance of a contract gives rise to contract damages only"] (*Stop Loss*)), there is no contract that gives rise to such an obligation. To the contrary, the TLM Agreement in paragraph 14 disclaims the very duties that Summit seeks to foist upon ADP when it states: "Client [i.e., Summit] will be responsible . . . for compliance with all laws, governmental regulations and manufacturers' requirements affecting its business . . . and ADP shall not have any responsibility relating thereto (including, without limitation, advising Client of Client's responsibilities in complying with any laws, governmental regulations or manufacturers' requirements affecting Client's business)." As to Summit's second argument that ADP was its "agent" (by which it appears to mean "fiduciary," even if Summit were correct that such a claim is among the issues framed by the pleadings, the argument still fails in light of paragraph 15 of the TLM Agreement that disclaims the creation of any agency relationship and states Summit and ADP are independent contractors.

Moreover, both in the trial court and on appeal, ADP cited *Benedek v. PLC Santa Monica* (2002) 104 Cal.App.4th 1351 (*Benedek*) for the proposition that the release language in the TLM Agreement necessarily defeated any assertion of negligence. (*Id.* at p. 1356 ["A written release may exculpate a tortfeasor from future negligence or misconduct"].) Summit has never argued otherwise—even now resting its defense solely on the position that it is not a party to the TLM Agreement (or so a reasonable jury could find). We have rejected that argument, and *Benedek* accordingly controls.

2. Equitable indemnity and duty to defend

Our conclusions with respect to the viability of the contractual and negligence causes of action establish Summit's causes of action for equitable indemnity and the duty to defend under Code of Civil Procedure section 1021.6 also fail as a matter of law.

Equitable indemnity requires: (1) a showing of fault on the part of the alleged indemnitor and (2) resulting damage. (*Stockton Mortgage, Inc. v. Tope* (2014) 233 Cal.App.4th 437, 459; *Bailey v. Safeway, Inc.* (2011) 199 Cal.App.4th 206, 217.) Insofar as the claim for equitable indemnity is founded on an assertion of implied contractual indemnity, the claim fails as a matter of law because there is no valid contract that would support such a term. Furthermore, to the extent the claim finds its foundation in tort—i.e., the negligent performance of a contractual obligation—it fails for reasons we have already given, plus the added reason that "negligent performance of a contract . . . will not support a claim for equitable indemnity" (*Stop Loss*, *supra*, 143 Cal.App.4th at p. 1044).

Code of Civil Procedure section 1021.6 authorizes an award of attorney fees under certain circumstances to "a person who prevails on a claim for implied indemnity." Summit's tort claims fail as a matter of law, and that failure likewise dooms the cause of action for failure to defend. (See *Uniroyal Chemical Co. v. American Vanguard Corp.* (1988) 203 Cal.App.3d 285, 296 ["'[S]ection 1021.6 read as a whole, clearly applies only to an *indemnitee* who prevails on a claim against an indemnitor'"].)

3. *Declaratory relief*

Summit's cause of action for declaratory relief was essentially duplicative of the relief requested in its other causes of action. Summit sought a declaration of its contractual rights, and a declaration that ADP owed a defense, indemnity, and damages to Summit. As these matters were properly adjudicated by the trial court, there is no actual controversy to be resolved.

DISPOSITION

The judgment is affirmed. Respondent is to recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

KRIEGLER, Acting P.J.

RAPHAEL, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.