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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

21st CAPITAL CORP.,

Plaintiff and Respondent/
Cross-Appellant,

v.

BAYER BUSINESS AND
TECHNOLOGY SERVICES LLC,

Defendant and Appellant/
Cross-Respondent.

B276105 c/w B279652

(Los Angeles County
Super. Ct. No. BC419481)

APPEAL from a judgment of the Superior Court of Los Angeles County. Josh M. Fredricks, Ret. Judge. Mark. A. Borenstein, Judge. Reversed in part and affirmed in part.

Sidley Austin, Alycia A. Degen, Eric B. Schwartz and Jonathan F. Cohn Defendant, Appellant and Cross-Respondent.

Mendelson Goldman & Schwarz and Martin F. Goldman for Plaintiff, Respondent and Cross-Appellant.

INTRODUCTION

Defendant Bayer U.S. LLC appeals from the summary judgment in favor of plaintiff 21st Capital Corporation. Bayer also appeals from the trial court's denial of its own motion for summary judgment. The underlying contractual dispute arises from Bayer's relationship with a non-party to this case, AGR Premier Consulting, Inc. AGR provided Bayer with information technology services for many years. 21st Capital, a factoring company, in turn bought Bayer's accounts receivable from AGR and then billed Bayer for AGR's services. Each time 21st Capital presented Bayer with an invoice for AGR's services, 21st Capital asked a Bayer representative to confirm on 21st Capital's website the accuracy of the invoice. At the same time, 21st Capital required that the Bayer representative "authenticate" an "Invoice Confirmation Agreement" with a number of provisions, including a waiver of defenses that could be asserted against 21st Capital.

This process was used for several years without apparent controversy. Sometimes 21st Capital waited for Bayer to confirm the accuracy of an invoice before disbursing funds to AGR; more often it did not. Then, in January 2009, and continuing through June 2009, AGR submitted invoices for work it had not performed. 21st Capital purchased those accounts receivable from AGR. Bayer apparently confirmed the accuracy of at least some of those invoices and purportedly authenticated the corresponding agreements, but refused to pay 21st Capital for any of the disputed bills. 21st Capital sued for breach of the Invoice Confirmation Agreements and for the account stated.

The parties filed dueling motions for summary judgment. There was no dispute that AGR had created fraudulent invoices. However, 21st Capital argued that the Invoice Confirmation

Agreements provided that, as to 21st Capital, Bayer had waived its right to assert any defense it had against AGR. Bayer disputed that its employee had, in fact, authenticated some of the agreements at issue. Bayer also disputed whether its employee had the authority to execute the Invoice Confirmation Agreements on Bayer's behalf.

The trial court granted 21st Capital's motion and denied Bayer's motion. Because we find there are triable issues of material fact as to whether Bayer entered into the contracts at issue (the Invoice Confirmation Agreements), we reverse 21st Capital's summary judgment and affirm the court's denial of Bayer's motion.

FACTUAL AND PROCEDURAL BACKGROUND

A. Underlying Relationship Among AGR, Bayer and 21st Capital

In 2004, AGR was providing information technology services to Bayer when it contracted with 21st Capital to finance its accounts receivable.

Under the contract, AGR was required to use 21st Capital's website to create online invoices. The website prompted AGR to provide contact information for an individual authorized to approve invoices on behalf of the account debtor, such as Bayer. Once an invoice was created, the website would send an automatic email to the account debtor's "invoice approver" with a link to 21st Capital's website. The link navigated to an "Invoice Approval Page" which provided the invoice information and an option to either approve or reject the invoice. To finalize the process, the invoice approver was also required to click an "I agree" button indicating that they had "authenticated" an "Invoice Confirmation Agreement." The agreement could be

viewed in a scrolling window or by clicking on another link. Because it is important to our analysis of the summary judgment motions, we underscore there were two steps to the payment authorization: invoice approval and authentication of a related Invoice Confirmation Agreement.

In 2004, AGR added Bayer as a customer on the 21st Capital website, and designated various individuals at Bayer as invoice approvers. In 2006, AGR—not Bayer—designated Karen Moran as an invoice approver. Moran was an invoice auditor at Bayer, not a corporate officer or part of upper management. With each invoice or group of invoices Moran approved, she also clicked a box that “authenticated” an Invoice Confirmation Agreement. The agreement provided: (1) the agreement was entered into between Bayer and AGR with 21st Capital as the intended third-party beneficiary; (2) “Moran shall select the invoices on the Approval Page which he/she intends to Approve and shall Approve them”; and (3) Bayer “agrees not to assert any claim or defense against Factoring Company, the ASSIGNEE [21st Capital], that it may have against AGR”

B. *The Fraudulent Invoices and Current Lawsuit*

Between 2004 and 2009, Bayer paid 21st Capital approximately \$21 million for services rendered by AGR. But between January 15, 2009 and June 11, 2009, AGR created invoices representing work that it had not performed, and sent those invoices to Bayer via 21st Capital’s website. 21st Capital paid AGR based on those invoices, however, Bayer refused to pay 21st Capital. On August 7, 2009, 21st Capital filed the current lawsuit against Bayer. The operative second amended complaint alleged causes of action for breach of contract and account stated.

The breach of contract cause of action alleges that Bayer breached “various Invoice Confirmation Agreements by failing to pay the amounts represented by the invoices.” 21st Capital alleged damages of approximately \$2 million plus interest at the annual rate of 91.25 percent (1/4 of 1% per day). The account stated cause of action sought the same amount.

21st Capital moved for summary judgment and summary adjudication. It did not dispute that the subject invoices were fraudulent but claimed that was a “non-issue.” 21st Capital argued that Moran had authenticated the Invoice Confirmation Agreements on behalf of Bayer, she was authorized to do so, Bayer was indebted to 21st Capital pursuant to those agreements, and Bayer had waived its defenses, including any challenge to the validity of underlying invoices.

21st Capital’s separate statement set forth the following evidence: 21st Capital had asked AGR (not Bayer) to identify a representative at Bayer authorized “to approve and pay” invoices, in response AGR had identified Karen Moran as the “invoice approver” for Bayer. Moran had represented that she was “authorized to electronically approve timesheets on [21st Capital’s site] created by [AGR] representing hourly services performed at Bayer.” Moran had approved the subject invoices and “authenticated” the corresponding Invoice Confirmation Agreements, and those agreements provided that Bayer “would not assert any claim or defense against” 21st Capital that Bayer may have against AGR.¹

¹ Moran was one of several Bayer employees who authorized invoices during the five-year Bayer-21st Capital-AGR relationship. She was the employee who handled the fraudulent invoices involved in this lawsuit.

In opposition, Bayer submitted evidence that, after March 2009, Moran did not approve any of AGR's invoices or authenticate the corresponding Invoice Confirmation Agreements. Bayer argued that Moran was also not authorized to enter into the Invoice Confirmation Agreements on its behalf. Bayer submitted evidence that no one at Bayer ever indicated to 21st Capital that Moran was authorized to enter into a contract on its behalf, and, pursuant to Bayer's corporate policy, Moran was not in fact authorized to enter into contracts on Bayer's behalf. Although 21st Capital had sought a resolution from AGR's board of directors confirming that its CEO had authority to enter into the AGR-21st Capital contract, 21st Capital did not ask for a similar resolution from Bayer to determine Moran's authority because, as 21st Capital's president testified, "I knew I would never get it It's a futile waste of time."

Bayer also moved for summary judgment arguing, *inter alia*, that Moran was not authorized to enter into contracts for Bayer, and the waiver of defenses was invalid. The trial court denied Bayer's motion and granted summary judgment for 21st Capital on the grounds that "this at its essence is a contract case where there are just no material facts in dispute." Judgment was entered for 21st Capital for \$2,156,194.81.

21st Capital sought prejudgment interest at the annual rate of 91.25 percent. Bayer filed a motion to limit prejudgment interest to the statutory rate of ten percent. The trial court granted the motion and awarded accrued interest in the amount of \$1,497,657.73. 21st Capital also moved for \$914,326.74 in attorney's fees. Bayer opposed the motion. The trial court awarded 21st Capital \$153,832.40 in fees.

Both parties appealed. Bayer appealed from the court's rulings on the summary judgment motions. 21st Capital cross-appealed from the reduced awards for prejudgment interest and attorney fees.

DISCUSSION

1. Standard of Review

Summary judgment or summary adjudication is to be granted “when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law.” (*Mills v. U.S. Bank* (2008) 166 Cal.App.4th 871, 894–895.) The “party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, 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.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 861–862.) We review a summary judgment or summary adjudication ruling de novo to determine whether there is a triable issue as to any material fact and whether the moving party is entitled to judgment as a matter of law. [Citation.]” (*Mills* at pp. 894–895.)

2. There Are Triable Issues of Material Fact As to Whether Bayer Entered Into the Invoice Confirmation Agreements

21st Capital's complaint alleged causes of action for breach of contract and account stated against Bayer. We first address breach of contract. The elements of a breach of contract cause of action are “(1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff. [Citation.]” (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.)

The primary issue disputed by the parties is the first element, the existence of the contracts in question—the Invoice Confirmation Agreements. 21st Capital’s complaint alleged that Moran had authenticated the agreements, and had actual or ostensible authority to enter into the agreements on Bayer’s behalf. However, the parties provided conflicting evidence as to whether Moran had, in fact, authenticated all the agreements at issue, and whether she was authorized to contract on Bayer’s behalf.

“At common law, a corporate officer may have express authority to enter into an agreement on behalf of the corporation, granted by the board of directors or the corporate bylaws. [Citations.] In the alternative, a corporate officer may have ostensible authority to enter into an agreement on behalf of the corporation if he or she ‘assumed and exercised the power in the past’ with the apparent consent and acquiescence of the corporation.” (*Snukal v. Flightways Manufacturing, Inc.* (2000) 23 Cal.4th 754, 779.) “The question whether an agent is acting under the actual or ostensible authority of his principal is one of fact which may be covered by direct evidence of the fact or by reasonable inferences drawn from the facts proved.” (*Ghiglione v. American Trust Co.* (1942) 49 Cal.App.2d 633, 637.)

We find a triable issue of material fact on 21st Capital’s claim of a written contract between the parties. The only evidence 21st Capital submitted to show that Bayer had entered into these contracts was that 21st Capital asked AGR to identify a representative at Bayer authorized “to approve and pay” invoices. AGR thereafter identified Moran as the “invoice approver” for Bayer, and Moran stated she was “authorized to electronically approve timesheets on [21st Capital’s site] created

by AGR [] representing hourly services performed at Bayer.”
Moran thereafter approved AGR invoices. She also
“authenticated” a corresponding Invoice Confirmation
Agreement, by clicking an “I agree” box on 21st Capital’s website.

This evidence tended to show that Moran was authorized to
approve invoices; it showed nothing about her authority to bind
Bayer contractually or that Bayer was ever aware that an Invoice
Confirmation Agreement had been triggered by an online click.

At the very least, Bayer met its burden of showing that
triable issues of material fact existed as to whether Bayer had
entered into these contracts. Bayer submitted evidence that,
after March 2009, Moran did not in fact approve any invoices or
agree to the corresponding Invoice Confirmation Agreements.
Bayer also submitted evidence that pursuant to Bayer’s corporate
policy, Moran was not authorized to enter into contracts on behalf
of Bayer. Even 21st Capital’s president testified that (1) no one
at Bayer had ever indicated to 21st Capital that Moran was
authorized to act on behalf of the company, and (2) he had not
sought a resolution from Bayer’s corporate leadership to
determine Moran’s authority because he knew it would be a
waste of time.²

In its appellate brief, 21st Capital disputes Bayer’s
evidence. For example, 21st Capital claims that Moran’s
testimony that she did not approve any Invoice Confirmation
Agreements after March 2009 is “inaccurate” because 21st

² At oral argument, counsel for 21st Capital decried the fact
that Bayer’s counsel did not ask any follow-up questions when
Ford stated that seeking confirmation of Moran’s authority would
have been a “futile waste of time.” We fail to see what follow-up
questions were needed given the statement’s clear import.

Capital’s “database reports” show that she did, in fact, approve the agreements. 21st Capital acknowledges that AGR, *not* Bayer, designated Moran as the invoice approver. However, 21st Capital argues that “it is reasonable to infer” from this evidence that “someone at Bayer” chose Moran for this role and “gave that information” to AGR.

21st Capital’s arguments confirm that these are disputed issues of material fact. On the one hand, 21st Capital provided evidence that Moran approved the agreements and, arguably, had the authority to do so. On the other hand, Bayer presented evidence that Moran did *not* approve at least some of the invoices, and that she did *not* have authority to enter into the agreements on Bayer’s behalf. Because there are disputed issues of material fact—as to whether the subject contracts (and the fraud defense waiver) were entered into by Bayer—summary judgment was not appropriate.

At oral argument, counsel for 21st Capital cited to an email between an invoice approver, Grace Lepore, and AGR’s president, wherein Lepore wrote “I cannot accept any changes to the invoice submittal process from AGR without authorization from Bayer Purchasing and Procurement.” Counsel argued that the evidence shows Lepore began approving invoices again several weeks later which “establishes” she *did* receive authorization from the Procurement department. From this, 21st Capital would ask us to infer that management approved the Invoice Confirmation Agreements. That is not the only reasonable inference to be drawn from this isolated email. It also overly simplifies the communication which refers not only to “labor charges”—the invoices at issue here— but whether Bayer will accept “expense invoices” through 21st Capital’s site, and an insistence that 21st

Capital apply AGR's previous agreement with Bayer to apply a 1 [percent] discount on labor charges. At most this exchange confirms that Lepore and her successors had the authority to approve invoices, not that they had authority to enter into the Invoice Confirmation Agreements.

The same problems plague the account stated cause of action. "The essential elements of an account stated are: (1) previous transactions between the parties establishing the relationship of debtor and creditor; (2) an agreement between the parties, express or implied, on the amount due from the debtor to the creditor; [and] (3) a promise by the debtor, express or implied, to pay the amount due.'" (*Leighton v. Forster* (2017) 8 Cal.App.5th 467, 491.) Here, because Bayer raised triable issues of material fact as to whether it had agreed, through Moran, to pay the amounts represented in the invoices at issue, 21st Capital was not entitled to summary adjudication on this cause of action.

On these grounds, we must reverse the trial court's order granting 21st Capital's motion for summary judgment. Bayer also argues that summary judgment should be entered in its favor, but does not develop any separate argument on this point. "Contentions supported neither by argument nor by citation of authority are deemed to be without foundation and to have been abandoned. [Citations.]" (*Huntington Landmark Adult Community Assn. v. Ross* (1989) 213 Cal.App.3d 1012, 1021.) In any event, as we have found the existence of triable issues of fact, Bayer's motion was properly denied.

On appeal, Bayer suggests that 21st Capital stipulated away its right to bring this action in a related Bankruptcy matter. Bayer did not move for summary judgment on this

ground; therefore, we do not reach this argument. (See *North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 29 [a party may not seek reversal of summary judgment by raising for the first time on appeal an argument not raised in the trial court].) Accordingly, Bayer has not shown that the trial court erred in denying its motion for summary judgment.

Where summary judgment is reversed on appeal, there is no prevailing party and thus no basis for an award of fees or interest. (*Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1056.) Since we reverse the judgment, the award of fees and interest cannot stand.³

DISPOSITION

The judgment is reversed. The order denying Bayer's motion for summary judgment is affirmed. The parties are to bear their own costs on appeal.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.

³ 21st Capital's Request for Judicial notice filed April 26, 2017 is denied.