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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

IV SOLUTIONS, INC., Plaintiff and Appellant, v. BLUE CROSS BLUE SHIELD OF ARIZONA, INC., Defendant and Respondent.	B275376 (Los Angeles County Super. Ct. No. BC527170)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gail R. Feuer, Judge. Affirmed.

Wolf, Rifkin, Shapiro, Schulman & Rabkin, Marc E. Rohatiner and Eric Levinrad for Plaintiff and Appellant.

Manatt, Phelps & Phillips, John M. LeBlanc, Joanna S. McCallum and Luke L. Punnakanta for Defendant and Respondent.

I. INTRODUCTION

Plaintiff IV Solutions, Inc. sought over $350,000 from defendant Blue Cross Blue Shield of Arizona, Inc. (BCBS AZ) for one unit of a drug. It claimed that an agent of the defendant entered into a binding contract obligating defendant to pay that amount. Plaintiff sued for breach of written contract. Defendant moved for summary judgment, asserting no written contract existed and that its agent did not have actual or ostensible authority to enter into the agreement for defendant. The trial court granted the summary judgment motion. We affirm.

II. BACKGROUND

A. Factual Background

Plaintiff is a closed door, home infusion pharmacy operating in Culver City, California. Defendant is a licensed hospital, medical, dental, and optometric service corporation operating in and regulated by Arizona that offers health insurance to Arizona residents. H.P. is a minor who was insured by defendant under an individual benefit plan (the plan). Under the terms of the plan, defendant would pay covered services based on an "allowed amount." For non-emergency claims from noncontracted providers, the allowed amount is the "[l]esser of the provider's billed charges or the applicable BCBS AZ [defendant] fee schedule, with adjustments for certain claim editing procedures[.]" Plaintiff is not a contracted provider with defendant, and is thus considered out-of-network under the plan.

H.P. was prescribed Supprelin, a drug that delays onset of puberty, in 2009. For H.P., Supprelin was not a life-saving drug or provided on an emergency basis. Supprelin is provided in 50 milligram units, and for H.P., one 50 milligram unit is implanted annually. Plaintiff provided H.P. with Supprelin in 2009 and 2010 and submitted claims to defendant for both of those years. Defendant paid the allowed amount less the applicable deductible and coinsurance, which came out to be about $16,000.

In November 2011, plaintiff again provided H.P. with one 50 milligram unit of Supprelin. On November 29, 2011, plaintiff submitted a claim to defendant. Under the field labeled "Days or Units," plaintiff entered the figure "50." A clerical employee of defendant interpreted the form as seeking reimbursement for 50 units of Supprelin. Defendant's 2011 fee schedule for Supprelin listed one unit at $19,356.94. The clerical employee multiplied that amount by 50 and determined the "allowable amount" to be $967,847. Plaintiff's bill charge was $486,848.25. Based on the insurance policy, the employee concluded defendant should reimburse plaintiff for the billed charges.

The high dollar amount resulted in the claim being referred to another of defendant's employees, Ruth Estrada, a provider network contract specialist. One of Estrada's duties is to arrange the terms for a "letter of agreement" with out-of-network medical providers. The letter of agreement's purpose is for defendant to pay a discounted amount on the provider's billed charges that it is not otherwise obligated to pay under an insured's plan. Estrada stated she had authority to discuss terms and draft the letter of agreement, but did not have the authority to bind defendant to any agreement. Defendant asserted only Marcus

Montoya, defendant's vice president of the network management department, had the authority to bind it to an agreement.

On December 8, 2011, Estrada called plaintiff regarding the November 2011 billed charges. She spoke with Sheina Saeger and Andrew Elias, who worked for plaintiff, regarding a discount. Estrada declared she informed Elias that any agreement was subject to approval and written agreement by both parties.

On December 13, 2011, Estrada followed up with Elias regarding the letter of agreement. Elias replied via e-mail: "After speaking to my administrator the only way I can approve this contract is if [plaintiff] is paid 75% of our billed charges." Estrada responded via e-mail and attached as a document the proposed letter of agreement. The document contained two signature lines, one for plaintiff and one for Montoya as defendant's vice president of provider network management.

On December 21, 2011, Estrada e-mailed Angela Furman, an employee of plaintiff's, regarding the letter of agreement. Estrada indicated in her e-mail: "Since this single case agreement has been delayed since 12/8/2011, we have to have the sign [sic] document today . . . ." Elias e-mailed Estrada: "Our understanding of the agreement is as follows: [¶] . . . The total expected payment, pursuant to this agreement, is: $358,961.19, to be paid in 10 business days. [¶] If you are in agreement, please send a return email stating your agreement." Estrada responded: "You are correct." Elias signed the letter of agreement and returned it to Estrada that day. Estrada responded: "I have forwarded the document for counter-signature. As soon as it is fully executed a copy will be faxed to your attention."

On December 22, 2011, Marcus Montoya was informed via e-mail of the letter of agreement that needed to be signed. Montoya informed Estrada and other employees of defendant that he needed to talk to someone about the letter of agreement. Kim Kelley, a licensed pharmacist employed by defendant, was asked to investigate the matter. Kelley indicated it would not make sense for H.P. to receive 50 units of Supprelin. The average wholesale price was approximately $20,000 for one unit of Supprelin. This was in line with defendant's fee of $19,356.94 for one unit of 50 milligrams of Supprelin. After Kelley's assessment, defendant re-adjudicated plaintiff's claim. Defendant processed the claim and paid the bill according to the plan between H.P. and defendant, which amounted to $13,146.94.

On September 24, 2012, Alex Vara, a representative of plaintiff, e-mailed H.P.'s family a release form regarding their confidential information and asked them to sign it. After the family did not respond, Vara sent another e-mail again on October 12, 2012, that said: "I have left you numerous massages [*sic*], with no return calls, if I don't hear from you by Monday Oct[.] 15, 2012 you leave us no choice but to hold you and your family responsible [for] balance owed for emergency services rendered to H.P."

B. Operative Complaint

On November 7, 2013, plaintiff filed its complaint against defendant. Plaintiff filed the operative second amended complaint on September 26, 2014. Plaintiff alleged a written contract existed by which defendant agreed to pay 75 percent of

plaintiff's billed charges.[1] Plaintiff also asserted causes of action for breach of the implied covenant of good faith and fair dealing (implied covenant) and open book account.[2]

C. Summary Judgment Motion

Defendant moved for summary judgment on February 16, 2016. Defendant argued that no written contract existed because Montoya did not sign the December 21, 2011 letter of agreement and because Estrada lacked the authority to bind the company. Defendant also argued the cause of action was barred by the statute of frauds. Defendant asserted the causes of action for breach of implied covenant and open account fail because there was no predicate contract.

Plaintiff argued Estrada had both actual and ostensible authority to bind the company to the letter of agreement. In support, plaintiff cited an e-mail sent by Estrada to Lisa Tipton, an administration department supervisor for defendant, on December 8, 2011, in which Estrada wrote: "I contacted the

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[1] Plaintiff alleged an oral contract existed by which defendant agreed to pay plaintiff the *full amount* of plaintiff's billed charges for the medications provided to H.P. in November 2011. Summary adjudication was granted as to this cause of action based on plaintiff not pleading the existence of such an oral contract. Plaintiff does not appeal summary adjudication of this cause of action, but does request that if its appeal is granted regarding Estrada's authority, it should be granted leave to amend the oral contract cause of action.

[2] Plaintiff also alleged an implied contract existed. However, plaintiff did not oppose summary adjudication as to the implied contract cause of action.

provider and have reached a verbal agreement. As soon as we can get managements [*sic*] approval on the rate, we will send the [letter of agreement] to the provider for signature." Estrada prepared an internal letter of agreement, seeking approval from Norka Carrasquillo, her immediate manager. The internal letter of agreement is marked "FOR INTERNAL USE ONLY." For the section "NEGOTIATED RATE OF LOA," the internal letter of agreement indicated "20% discount off billed charges." Montoya at his deposition indicated that he believed Carrasquillo's signature appeared on the internal letter of agreement for the "Manager Approval signature" portion of the document.

On April 25, 2016, the trial court issued its ruling granting defendant's summary judgment motion. It found defendant had met its initial burden of production regarding the nonexistence of a written contract. The court determined that plaintiff failed to present evidence indicating Estrada had actual or apparent authority. Because the written contact cause of action failed as a matter of law, the court concluded the breach of implied covenant and open account causes of action also failed.[3] Judgment was entered May 12, 2016. This appeal followed.

III. DISCUSSION

A. Summary Judgment Standard of Review

"[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

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[3] Plaintiff does not appeal from summary adjudication of these two causes of action.

judgment as a matter of law. That is because of the general principle that a party who seeks a court's action in his favor bears the burden of persuasion thereon. [Citation.] There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof . . . . [¶] [T]he 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. . . . A prima facie showing is one that is sufficient to support the position of the party in question. [Citation.] [Fns. omitted.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851; see *Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 877-878.)

We review an order granting summary judgment de novo. (*Coral Construction, Inc. v. City and County of San Francisco* (2010) 50 Cal.4th 315, 336; *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65, 67-68.) The trial court's stated reasons for granting summary judgment are not binding because we review its ruling not its rationale. (*Coral Construction, Inc. v. City and County of San Francisco, supra*, 50 Cal.4th at p. 336; *Continental Ins. Co. v. Columbus Line, Inc.* (2003) 107 Cal.App.4th 1190, 1196.) In addition, a summary judgment motion is directed to the issues framed by the pleadings. (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1252; *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673, disapproved on a different point in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527,

fn. 5.) These are the only issues a motion for summary judgment must address. (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1249-1250; *Goehring v. Chapman University* (2004) 121 Cal.App.4th 353, 364.)

B. Agent Authority

Defendant contends there was no written contract because Montoya never signed the letter of agreement. In support, defendant submits the letter of agreement, signed by plaintiff's representative on December 21, 2011. As noted, there was a signature line for Montoya to sign on behalf of defendant. It is undisputed that he did not sign it. Defendant has met its initial burden of production. The burden shifts to plaintiff to demonstrate a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at p. 850.)

Plaintiff argued Estrada had both actual and ostensible authority to bind defendant to the letter of agreement. We will discuss each below.

1. Actual Authority

Civil Code section 2316 provides, "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." In support of its actual authority argument, plaintiff cites Carrasquillo's signature on the letter of agreement as evidence Estrada was authorized to bind defendant.

The letter, dated December 8, 2011, and marked "FOR INTERNAL USE ONLY" does not demonstrate defendant intentionally conferred authority on Estrada to enter into the letter of agreement on behalf of defendant. It referred to a 20 percent discount, not a 25 percent discount, which was the purported agreement between plaintiff and defendant. It contains no signature line for plaintiff and was not signed by Estrada. It is at most indicative of defendant's approval of Estrada's *negotiation* of the rates.

Plaintiff has also not demonstrated defendant acted in such a manner as to cause Estrada to believe she had authority to bind defendant to the letter of agreement. The letter of agreement with the correct terms was signed December 21, 2011 by plaintiff. It contains a signature line for defendant's vice president, Montoya, not any other employee or representative of defendant. Additionally, after Elias returned his signed portion of the letter of agreement, Estrada stated in her e-mail that she had to forward the letter of agreement for a counter-signature. She also declared that she did not have authority to bind defendant to a letter of agreement, only to negotiate terms.

Plaintiff also argues that Estrada had actual authority because in the December 8, 2011 e-mail to Tipton, Estrada indicated: "As soon as we can get managements [*sic*] approval on the rate, we will send the [letter of agreement] to the provider for signature." Plaintiff reasons that because the letter of agreement was sent to plaintiff, defendant's management did approve it, and thus approved Estrada's actual authority. This argument is unavailing. The evidence at most shows Estrada's manager approved the rate negotiated by Estrada. It does not

demonstrate management permitted Estrada to bind defendant without Montoya's signature.

2. Ostensible Authority

Civil Code section 2317 provides, "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." Civil Code section 2334 provides, "A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without want of ordinary care, incurred a liability or parted with value, upon the faith thereof." "Liability of the principal for the acts of an ostensible agent rests on the doctrine of 'estoppel,' the essential elements of which are representations made by the principal, justifiable reliance by a third party, and a change of position from such reliance resulting in injury. [Citation.]" (*Preis v. American Indemnity Co.* (1990) 220 Cal.App.3d 752, 761.)

Plaintiff contends that defendant directed Estrada to negotiate letters of agreement without requiring her to inform others that she did not have the authority to enter into the agreement. Plaintiff asserts this deficient policy was sufficient conduct by defendant to cause plaintiff to believe Estrada had authority to bind defendant. This is not persuasive. As noted, a requirement for ostensible authority such that the principal is liable to a third party requires a showing that: (1) the third party justifiably relied on the principal's representations and (2) the third party changed its position from such reliance, causing injury to the third party. (Civ. Code, § 2334; *Preis v. American Indemnity Co., supra*, 220 Cal.App.3d at p. 761.) Here, plaintiff

had already provided Supprelin to H.P. in November 2011. It was afterwards in December 2011 that defendant and plaintiff entered into negotiations regarding the amount of payment. Plaintiff has not demonstrated how it changed its position causing injury to plaintiff because of defendant's representations. Plaintiff might have a triable issue of material fact demonstrating estoppel if, for example, defendant had failed to provide *any* payment to plaintiff for providing the Supprelin. However, the undisputed facts demonstrate defendant paid plaintiff according to defendant's fee schedule.

Plaintiff argues that it did change its position to its detriment, citing a term in the letter of agreement that plaintiff would give up its claims to recover payment against H.P. The term provides: "Provider [plaintiff] agrees that in no event, including but not limited to non-payment by [defendant] or insolvency of [defendant] or breach of this Agreement shall Provider bill, charge, collect a deposit from, seek compensation, remuneration or reimbursement from, or have any recourse against Subscriber(s) [H.P.] for Covered Services." This argument is also unpersuasive. There is no evidence plaintiff actually gave up its claims against H.P. Indeed, plaintiff's October 12, 2012 e-mail to H.P. indicated plaintiff would possibly pursue its payment claims against H.P. after defendant did not pay the requested amount in the letter of agreement. The term in the letter of agreement at most indicates plaintiff would give up its claims against H.P. *if* the letter of agreement was executed. A conditional change of position does not demonstrate an actual change in position causing injury.

Plaintiff has not met its burden of production to demonstrate a triable issue of material fact as to the existence of

a written contract. Defendant is entitled to judgment as a matter of law for the breach of written contract cause of action, the only cause of action on appeal. We need not address the parties' remaining arguments. (*Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 65; *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 259.)

IV. DISPOSITION

The judgment is affirmed. Defendant, Blue Cross Blue Shield of Arizona, may recover its costs on appeal from plaintiff IV Solutions, Inc.

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LANDIN, J.*

We concur:

KRIEGLER, Acting P.J.

BAKER, 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.