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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

CENTINELA CAPITAL PARTNERS, LLC, Plaintiff and Appellant, v. CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, Defendant and Respondent.	B284595 (Los Angeles County Super. Ct. No. BC504309)

APPEAL from a judgment of the Superior Court of Los Angeles County, Alan S. Rosenfield, Judge. Affirmed.

Esner, Chang & Boyer, Holly N. Boyer, Shea S. Murphy, and Steven T. Swanson for Plaintiff and Appellant.

K&L Gates, Christopher J. Kondon, and Saman M. Rejali for Defendant and Respondent.

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An investment management firm claimed that officials from the California Public Employees' Retirement System (CalPERS) had orally agreed to hire the firm to manage a $100 million fund, and subsequently sued CalPERS for breach of that oral agreement. The trial court granted summary judgment to CalPERS on the ground that the firm and CalPERS had not yet agreed on several essential terms, including the size of the fund. We independently agree with this analysis, and affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

A. *The parties and their prior dealings*

Centinela Capital Partners, LLC (Centinela) is an investment management firm formed in 2006 by Cesar Baez (Baez), Richard Taylor (Taylor) and Fidel Vargas (Vargas). When formed, Centinela was an "emerging [investment] manager[]" because neither it, nor its principals, had much prior investment management experience. CalPERS is a state agency that, among other things, is charged with collecting, investing and distributing the pensions of California state employees.

In 2006 and 2008, CalPERS hired Centinela to manage two CalPERS investment funds. Specifically, in 2006, CalPERS hired Centinela to manage a $500 million investment fund called Capital Link I and, in 2008, CalPERS hired Centinela to manage another $500 million investment fund called Capital Link II. These two agreements were memorialized in 95- and 89-page contracts, respectively.

B. *Capital Link III fund*

1. *Early negotiations*

In 2009, CalPERS and Centinela began discussing the possibility of having Centinela manage a third investment fund called Capital Link III. To facilitate those discussions, CalPERS in late 2010 or early 2011 conducted due diligence on Centinela.

2. *February 2011 term sheet and meeting*

In early February 2011, Centinela sent CalPERS an 11-page "term sheet" proposing the key terms for a Capital Link III fund (February term sheet). Largely modeled on the term sheet underlying the Capital Link II fund, this term sheet proposed that Centinela would manage a fund of up to $500 million, but at least $400 million, for a minimum period of three years.

On Valentine's Day 2011, CalPERS personnel met with Centinela. During that meeting, CalPERS expressed misgivings about awarding Centinela a further investment management contract because CalPERS's due diligence had revealed that one of Centinela's principals, Baez, had relationships with several individuals implicated in a pay-to-play scandal. CalPERS also declined to commit to the $500 million fund proposed in the February term sheet.

3. *May 16, 2011 meeting*

On May 16, 2011, CalPERS Chief Investment Officer Joseph Dear (Dear) spoke with Vargas and Taylor in a "side hall" during a 10-minute "comfort" break in the middle of a CalPERS board meeting. During that conversation, Dear told Vargas and Taylor that CalPERS was willing to award Centinela a $100 million Capital Link III fund if Centinela removed Baez from Centinela's management team. Vargas and Taylor immediately said, "We accept."

4. *June 2011 communications and term sheet*

On June 1, 2011, CalPERS sent Centinela a letter explaining that CalPERS's Investment Committee would need to "make the final decision relating to a commitment to Capital Link III."

In response, Centinela sent CalPERS two documents. On June 7, 2011, Centinela sent a further term sheet (the June term sheet). The June term sheet proposed that Centinela would manage a $200 million fund for a minimum period for 18 months. On June 10, 2011, Taylor sent a letter to CalPERS acknowledging CalPERS's June 1 letter and referring to Capital Link III as Centinela's "investment *proposal*." (Italics added.)

On June 23, 2011, Dear and Taylor spoke on the telephone regarding Centinela's "stalemate with Baez and [the] lack of progress on the [Capital Link] III *negotiations*." (Italics added.)

On July 8, 2011, CalPERS notified Centinela that it would not be awarding Centinela the Capital Link III fund. CalPERS ultimately awarded the fund to another management firm pursuant to a competitive bid.

II. Procedural Background

A. *Complaint*

In March 2013, Centinela filed an action for (1) breach of an oral contract to have Centinela manage a $100 million Capital Link III fund against CalPERS, (2) promissory estoppel against CalPERS, and (3) racial discrimination (because Baez, Taylor and Vargas were denied the Capital Link III fund due to their ethnicities rather than Baez's association with pay-to-players) against CalPERS and Dear.

B. *Demurrers and subsequent pleadings*

The trial court sustained a demurrer without leave to amend on the promissory estoppel and racial discrimination claims, and sustained a demurrer with leave to amend on the breach of oral contract claim. Centinela filed a first amended complaint alleging a breach of contract claim. More specifically, Centinela alleged that CalPERS had breached two oral contracts made on May 16, 2011—namely, (1) to have Centinela manage a $100 million Capital Link III fund, and (2) to give Centinela a "fair chance to compete in an open bid for a larger contract." The trial court sustained a demurrer to both aspects of the breach of contract claim without leave to amend. Centinela appealed the promissory estoppel and breach of contract rulings.[1] We affirmed the dismissal of the promissory estoppel claim and the portion of the breach of contract claim based on CalPERS's alleged promise to give Centinela a "fair chance" to compete on future contracts, but a majority reversed the dismissal of the portion of the breach of contract claim based on CalPERS's alleged agreement to award the $100 million Capital Link III fund even though Centinela would "have a difficult time proving, as a factual matter, that CalPERS agreed to award a $100 million contract with an oral agreement even less formal than something scribbled on the back of a cocktail napkin."

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1 Dear is no longer a party because judgment was entered in his favor following the court's ruling sustaining CalPERS's demurrer to the racial discrimination claim without leave to amend, and Centinela did not appeal that portion of the judgment. Dear passed away in 2014.

C. *Summary judgment*

Following remand, CalPERS moved for summary judgment on the ground, among others, that Centinela and CalPERS did not form an oral contract for Centinela to manage a $100 million Capital Link III fund because the parties had not mutually assented to the essential terms of that management contract. Following further briefing and a hearing, the trial court granted summary judgment for CalPERS. In so concluding, the court noted its "skeptic[ism]" that CalPERS's proposal to award a $100 million contract to Centinela at the May 16, 2011 meeting was anything more than a waypoint along a path of negotiation that continued into June and July 2011. But the court did not rest its ruling on that ground. Instead, the court ruled that "there was no 'meeting of the minds on all material points'" of a Capital Link III contract because the parties never agreed on, among other things, "the amount of the investment," which the court ruled was "the central term of" such an agreement. In support of this ruling, the court pointed to the varying size of the fund—$500 million in February, $100 million in May, and $200 million in June. The court rejected Centinela's responsive argument that the parties had agreed to a $100 million fund whose "amount might change," finding that this argument "strain[ed] credulity."

Following entry of judgment, Centinela filed this timely appeal.

DISCUSSION

Centinela argues that the trial court erred in granting summary judgment.

A motion for summary judgment provides "a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their

dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) Summary judgment is appropriate, and the moving party (typically, the defendant) is entitled to judgment as a matter of law, where (1) the defendant carries its initial burden of showing either the nonexistence of one or more elements of the plaintiff's claim or the existence of an affirmative defense, and (2) the plaintiff thereafter fails to show the "existence of a triable issue of material fact" as to those elements or affirmative defense. (*Aguilar*, at pp. 850, 853; *Huynh v. Ingersoll-Rand* (1993) 16 Cal.App.4th 825, 830; *Bacon v. Southern Cal. Edison Co.* (1997) 53 Cal.App.4th 854, 858; Code Civ. Proc., § 437c, subds. (a), (c), (o)(1), (o)(2), (p)(2). In evaluating whether these standards for granting summary judgment have been satisfied, a court must "strictly construe[]" the moving party's evidence, "liberally construe[]" the opposing party's evidence, and resolve any doubts against summary judgment. (*Miller v. Bechtel Corp.* (1983) 33 Cal.3d 868, 874.) We independently review a trial court's grant of summary judgment. (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347.)

To prevail on a breach of contract claim, a plaintiff must prove "(1) the existence of [a] contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) To establish that a contract exists (the first element), the plaintiff must prove that there has been a "meeting of the [parties'] minds on all material points." (*Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 359; *Cheema v. L.S. Trucking, Inc.* (2019) 39 Cal.App.5th 1142, 1149.) Whether the parties' minds have met is judged "objective[ly]" by looking to "the outward manifestations

or expressions of the parties, . . . and not their unexpressed intentions or understandings." (*Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 141 (*Alexander*), disapproved on another ground in *Reid v. Google* (2010) 50 Cal.4th 512 (*Reid*); *Bustamante v. Intuit, Inc.* (2006) 141 Cal.App.4th 199, 208 (*Bustamante*).) A particular term of a contract is "material" or "essential" if it is necessary (1) in order to "provide a basis for determining the existence of a breach" of that contract, and (2) "for giving an appropriate remedy." (*Bustamante*, at p. 209; *Alexander,* at p. 141.)

As the trial court correctly determined, the undisputed facts establish that Centinela has not raised a triable issue of fact as to whether this is a contract because (1) the objective evidence shows that Centinela and CalPERS did not agree on the size of the Capital Link III fund, and (2) the size of that fund is an essential term of an investment management contract. The undisputed facts show that Centinela, in the June term sheet, proposed a $200 million Capital Link III fund three weeks after CalPERS conditionally offered to Centinela the management of a $100 million fund. What is more, the June term sheet was not an idle musing; to the contrary, and as Baez explained in his deposition, a term sheet is meant to be "the governing document" in an investment fund contract. Thus, there was no meeting of the minds on the size of the Capital Link III fund.

The size of the fund is also a "material" term. The size of the fund meets the generic definition of "materiality" because, without it, it would be impossible (1) to know whether CalPERS breached the Capital Link III contract (because, for instance, if CalPERS permitted Centinela to manage $150 million, that would be a breach of a contract for a $200 million fund, but not a

$100 million fund) and, in any event, (2) to fix the appropriate remedy because Centinela's expected revenue is keyed to the size of the fund. What is more, Centinela alleged in its First Amended Complaint that the size of the Capital Link III fund was one of the "material terms" of the Capital Link III oral contract. This constitutes a judicial admission that establishes the materiality of this term. (E.g. *Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 747 ["a party may rely on the doctrine of judicial admission by utilizing allegations in the opposing party's pleadings to eliminate triable issues of material fact."].) Tayler's deposition testimony that the size of the fund was a term that was in flux and subject to continued negotiations cannot undo this judicial admission that the size of the fund was a material term necessary to form a binding agreement. Further, the size of the investment in an investment management contract is material as a matter of law. (See, e.g., *Sterling v. Taylor* (2007) 40 Cal.4th 757, 772 ["A memorandum of a contract for the sale of real property must identify the buyer, the seller, the price and the property."].)

Centinela resists this conclusion with what boil down to three arguments.

First, Centinela contends that this court already ruled, in its prior appellate ruling reviewing the trial court's sustaining of a demurrer, that the parties' incorporation of the terms of the Capital Link II contract "provide[d] a basis for evaluating a breach of contract and for fixing damages" for any breach of the Capital Link III fund. (*Centinela Capital Partners, LLC v. Cal. Pub. Emples. Ret. Sys.* (May 8, 2015, No. B255256) 2015 Cal.App.Unpub. LEXIS 3219, *7-8.) Thus, Centinela reasons, this court already concluded that there was mutual assent on all

material terms of the Capital Link III oral agreement. This contention misunderstands the nature of the majority's prior ruling. Because a "demurrer challenges the sufficiency of the pleading" (*Del E. Webb v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 599, fn.1), the majority's prior ruling necessarily assumed the truth of Centinela's allegations that the parties had agreed upon a $100 million investment fund and, to effectuate that agreement, had incorporated all of the other pertinent terms of the prior, Capital Link II contract. Because a motion for summary judgment "requires the introduction of evidence to determine whether or not the allegations have any basis in fact" (*ibid.*), we now look beyond the pleadings to the evidence—which, as noted above, shows that the parties had yet to agree on the size of the Capital Link III fund.

Second, Centinela argues that the trial court erred in considering the June term sheet because, in its view, "evidence of conduct following the formation of an agreement which conflicts with the evidence of objective conduct occurring on or before formation *is* not relevant for the purposes of determining whether a meeting of the minds occurred." In support of its argument, Centinela cites *Patel v. Liebermensch* (2008) 45 Cal.4th 344 (*Patel*). To begin, this argument is effectively a relevance-based evidentiary objection. Centinela's failure to make this objection to the trial court precludes it from raising it on appeal. (Code Civ. Proc., § 437c, subds. (b)(5) ["Evidentiary objections not made at the hearing shall be deemed waived."] & (d); *Reid*, *supra,* 50 Cal.4th at pp. 530-532.) More to the point, this argument lacks merit. Although courts necessarily ask whether the parties objectively manifested their mutual assent at the time of contracting, courts examining the parties' intent may conduct a

more searching inquiry that "includ[es] the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; *and the subsequent conduct of the parties*." (*People v. Shelton* (2006) 37 Cal.4th 759, 767, italics added; *Beneficial Fire & Casualty Ins. Co. v. Kurt Hitke & Co.* (1956) 46 Cal.2d 517, 524 [looking to "subsequent acts or declarations of the parties"]; *Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 850 ["mutual assent" may be assessed by the parties' "'course of performance'"]; see *Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc.* (2001) 89 Cal.App.4th 1042, 1050-1051 [looking to post-contract conduct to determine whether the parties "acknowledged the existence of a contract"]; *Markborough Cal. v. Superior Court* (1991) 227 Cal.App.3d 705, 716-717 [same].) Contrary to what Centinela represents, *Patel* is consistent with this solid wall of authority. *Patel* held that courts may not rely on subsequent disputes over the non-essential terms of a contract to conclude that the parties never "reach[ed] a binding agreement" in the first place. (*Patel*, at pp. 346-347, 349-350, 351.) *Patel* does not purport to preclude courts from examining the full spectrum of the parties' dealings in order to determine whether the parties had a meeting of the minds on the material terms of the contract. Indeed, Centinela's *Patel*-based argument is also logically flawed because it assumes its own conclusion: By precluding courts from inquiring into any post-formation conduct in evaluating whether a contract was formed, this argument requires courts to assume that a contract was formed at whatever time the proponent alleges—yet the

whole point of this inquiry is to determine whether and when a contract was formed.

Lastly, Centinela insists that the parties did agree on the size of the Capital Link III fund because they agreed that the fund would be $100 million plus any higher amount that Centinela offered and CalPERS accepted. There is no mutual assent when the size of the fund is *both* $100 million *and* $100 million plus whatever one of the parties proposes and the other agrees to in the future. Rather than an objective manifestation of an agreement, what this represents is the parties' agreement to leave the size of the fund "open to future negotiations and agreement." (*Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 59.) That is because, absent an agreement on the actual size of the fund, a court cannot determine whether there is a breach and how to fix damages. (*Bustamante*, *supra*, 141 Cal.App.4th at p. 209; *Alexander*, *supra*, 104 Cal.App.4th at p. 141.) The trial court came to the same conclusion when it found that Centinela's argument in this regard "strained credulity"; this was not, as Centinela urges, an impermissible weighing of the evidence but rather an acknowledgement that the argument lacked a legal basis.

In light of our analysis, we need not address the parties' other arguments.

DISPOSITION

The judgment is affirmed. CalPERS is entitled to its costs on appeal.

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_____, J.
HOFFSTADT

We concur:

_____, Acting P.J.
ASHMANN-GERST

_____, J.
CHAVEZ