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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

CHRISTOPHER J. DUGGER, Plaintiff and Respondent, v. SUZANNE NATBONY, Defendant and Appellant.	B278089 (Los Angeles County Super. Ct. No. BC575261)

APPEAL from a judgment of the Superior Court of Los Angeles County, John P. Doyle, Judge. Affirmed.

Law Office of John V. Gaule and John V. Gaule, for Defendant and Appellant.

Alleguez & Newman, Carol L. Newman; Kleinberg & Lerner and Michael Hurey for Plaintiff and Respondent.

INTRODUCTION

Christopher Dugger and Suzanne Natbony were engaged to be married, and Natbony and her father paid for most of the wedding expenses. The engagement was called off shortly before the planned wedding. Natbony asked Dugger to repay the incurred wedding expenses. After failing to reach an agreement on the issue, the parties went to mediation, Dugger agreed to repay certain costs, and the parties signed a written settlement agreement that included a mutual release.

Shortly thereafter, Natbony attempted to rescind the settlement agreement. Dugger sued to enforce the agreement. Natbony counter-sued, alleging that she and Dugger had an oral contract under which Natbony would pay for the wedding, and in exchange Dugger would put a down payment on a house. Natbony alleged that Dugger owed Natbony half of the money he would have used as a down payment. Natbony also alleged battery and intentional infliction of emotional distress.

Dugger moved for summary adjudication on his complaint and summary judgment on Natbony's cross-complaint. The court granted both motions, and Dugger dismissed his remaining claims. Natbony appealed, and we affirm. Summary adjudication on Dugger's complaint regarding the settlement agreement was warranted because the parties agreed that they signed the settlement agreement and Natbony did not present evidence to support a triable issue of material fact relevant to Dugger's claims. Summary judgment was warranted on Natbony's claims against Dugger, because the release in the settlement agreement barred the claims that Natbony alleged in her cross-complaint.

FACTUAL AND PROCEDURAL BACKGROUND

A. Dugger's complaint

The following facts were alleged in Dugger's first amended complaint, the operative complaint at the time of summary judgment. Dugger and Natbony were engaged to be married from mid-February 2014 to October 2, 2014. Natbony's father, Michael Natbony,[1] provided $50,000 for the wedding, which Natbony "used to pay for the majority of the expenses for the anticipated wedding."

On October 2, 2014, "the engagement was called off." Natbony "took steps to cancel the planned wedding." After the wedding date passed, Natbony and Michael "began making demands that Dugger reimburse them for losses related to the planned wedding." Natbony sent Dugger a demand letter and a spreadsheet detailing purported wedding expenses. Dugger alleged that the spreadsheet included "some legitimate claims, such as the deposit on the reception venue, but also included many spurious claims relating to multiple bachelorette parties, new dresses, accessories, and other expenses that were not related to the wedding."

Dugger offered to pay for half of the reasonable expenses, but the parties could not reach a resolution. The parties agreed to attend mediation, and through the mediation reached a settlement on January 12, 2015. The written settlement agreement, which was attached to the complaint, stated, "Chris Dugger will pay Suzanne Natbony by check $12,000.00 this

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[1] We refer to Michael by his first name to avoid confusion. Michael was originally named as a defendant in Dugger's complaint and first amended complaint, but the claims against him were later dismissed. He is not a party to the appeal.

evening. In addition, Chris Dugger will pay $18,000.00 over the next 36 months in monthly payments of at least $500.00 each month with no interest payable to Michael Natbony. Chris Dugger, Suzanne Natbony, and Michael Natbony agree to a mutual release of all claims related to, or arising out of, the cancellation of their wedding, relationship, or engagement." Dugger and Natbony agreed to return family heirlooms, and to agree on the language to be included in "a brief email to be sent to the original recipients of the cancellation email rewriting that notice and apologizing." The agreement continued, "Although the parties contemplate signing a long-form settlement agreement incorporating the above terms, the parties agree that this deal memo shall constitute a final, binding and enforceable agreement. It is the intent of the parties . . . that all of the terms of the agreement may be disclosed to a court of law and shall be enforceable and binding upon them." The agreement was signed by Natbony, Dugger, and Natbony on behalf of Michael. Dugger alleged that he gave Natbony a check for $12,000 immediately, and she cashed it.

Dugger alleged that on January 23, 2015, "a lawyer purporting to represent Suzanne Natbony sent a written demand letter to Dugger stating that the Settlement was void and that the Natbonys rescinded it." The letter "threatened to smear Dugger if he did not agree to rescission and continue mediation." The letter, which was also attached to the complaint, stated that if Dugger did not agree to rescind the settlement agreement and return to mediation, "Suzanne will then file a lawsuit and zealously pursue maximum damages at trial for your willful and malicious culpable conduct, including sexual conduct, all of which

resulted in shame, humiliation, mental anguish and financial devastation for Suzanne."

Dugger asserted seven causes of action against Natbony and Michael: breach of contract, fraud by false promise, breach of covenant of good faith and fair dealing, intentional misrepresentation, negligent misrepresentation, declaratory relief, and specific performance. The claims against Michael are not relevant to this appeal, so we focus on the allegations against Natbony.

In the breach of contract and breach of good faith and fair dealing causes of action, Dugger alleged that he complied with the terms of the written settlement agreement, but Natbony had not complied because she failed to return family heirlooms, did not respond to Dugger's communication regarding the apology email and long-form settlement agreement, and continued to threaten additional legal action. In the fraud cause of action, Dugger alleged that Natbony did not intend to perform pursuant to the settlement agreement at the time she signed the agreement. The misrepresentation causes of action related to Natbony's representations regarding her ability to act as Michael's agent in signing the settlement agreement. The declaratory relief cause of action requested a declaration that the settlement agreement was valid and enforceable, and the specific performance cause of action requested that Natbony comply with the terms of the settlement agreement. Dugger asked for damages in excess of $25,000, as well as punitive damages.

B. Natbony's cross-complaint

Natbony filed an answer and a cross-complaint. In a breach of contract cause of action, Natbony alleged that the parties had entered into an oral contract in which Natbony

"agreed to pay for the wedding, and in consideration, [Dugger] agreed to make a $200,000 down payment on a new home" for Natbony and Dugger. Natbony alleged that she "performed all obligations pursuant to the contract," but Dugger "refused and continues to refuse to make payment as agreed." Natbony alleged that as a result, she was damaged in the amount of $200,000. In a cause of action for battery, Natbony alleged that on September 30, 2014, Dugger "had non-consensual sexual intercourse" with Natbony while she was asleep. In a cause of action for negligent infliction of emotional distress, Natbony alleged that Dugger's actions caused her extreme emotional distress. Natbony requested general, special, and exemplary damages according to proof.

C. Dugger's motions for summary judgment

Dugger filed two motions seeking summary judgment or summary adjudication: one addressing the allegations in his complaint, and one addressing the allegations in Natbony's cross-complaint.

In the motion addressing Dugger's claims, Dugger asserted that Natbony is a practicing lawyer with experience negotiating, writing, and reviewing contracts. He reasserted the facts alleged in his complaint about the engagement, wedding planning, cancellation of the engagement, and Natbony's request for reimbursement of wedding costs. Dugger said that he and Michael had several phone conversations in November and December 2014 attempting to settle the claims informally, but after these efforts failed, the parties agreed to mediation. The parties attended mediation sessions on December 19, 2014 and January 12, 2015. Michael, who lives in a different state,

attended by phone, and gave Natbony power to bind him to a settlement agreement.

The parties reached an agreement at the second mediation session and signed the settlement agreement discussed above. Dugger said he complied with all of the terms of the settlement, including giving Natbony a $12,000 check the evening of the settlement, and making payments to Michael. He also said he wrote a proposed apology email and a long-form settlement agreement and sent them to Natbony, but she did not respond.

Dugger argued that this evidence showed Natbony breached the settlement agreement and damaged Dugger in that she did not honor the release of all claims. He also contended that Natbony could not rely on the duress defense she asserted in her answer, because any evidence of what occurred at the mediation was inadmissible under the mediation privilege. (See Evid. Code, § 1119.) Dugger further argued that Natbony, an attorney, could not reasonably argue that she did not understand the settlement agreement or the scope of the release. Dugger asserted that he was entitled to summary adjudication of his causes of action for breach of contract, breach of the covenant of good faith and fair dealing, declaratory relief, and specific performance.

In Dugger's motion for summary judgment relating to Natbony's cross-complaint, Dugger asserted the same facts. He also stated that he "did not promise Ms. Natbony prior to or during our engagement that I would make a $200,000.00 down payment on a house for us." He argued that Natbony's cause of action for breach of contract was barred by the settlement agreement, because that agreement contained a release of all claims "relating to or arising out of the cancellation of their

wedding, relationship, or engagement." Because any promise by Dugger to make a down payment on a house in exchange for Natbony paying for the wedding necessarily arose out of their relationship, such a claim was barred pursuant to the settlement agreement.

Dugger also argued that Natbony's breach of contract claim was barred by the "anti-heart-balm statutes," Civil Code sections 43.4 ("A fraudulent promise to marry or to cohabit after marriage does not give rise to a cause of action for damages.") and 43.5 ("No cause of action arises for: (a) Alienation of affection, (b) Criminal conversation, (c) Seduction of a person over the age of legal consent, (d) Breach of promise of marriage."). Dugger also contended that Natbony's claim was barred by Family Code section 1611, which requires premarital agreements to be in writing. He also contended that the statute of frauds and the uncertainty of the agreement rendered Natbony's claims untenable, and even if he had invested $200,000 in a home before the marriage, it would have been his separate property and therefore Natbony would not have a claim to it.

Dugger also requested summary adjudication of Natbony's cause of action for battery, because the claim "omits the essential allegation that Mr. Dugger intended to harm or offend Ms. Natbony." He requested summary adjudication of the intentional infliction of emotional distress cause of action, because that cause of action may not arise from a contract-based claim. He also argued that both of these causes of action were barred by the settlement agreement, since the claims arose out of their relationship and the settlement agreement barred all such claims.

D. Natbony's first amended cross-complaint

On December 2, 2015, about a week after Dugger filed his motions for summary judgment, Natbony filed a first amended cross-complaint (FACC). The FACC alleged the same three causes of action as the cross-complaint, but included additional factual allegations. For example, Natbony alleged in the FACC that Dugger agreed to "provide the down payment once the parties found a home they wanted to purchase," and they would "co-own" the new home "as joint tenants." Natbony alleged that she was damaged in the amount of $100,000.

E. Natbony's opposition to Dugger's motions for summary judgment

Natbony filed a single opposition to both motions for summary judgment. Her memorandum of points and authorities spanned three pages, recited citations to general summary judgment standards, and stated, "[B]ecause Natbony can establish genuine issues of material fact as to all contested issues, Dugger's motions for summary judgment or adjudication must be denied in their entirety." In her separate statement of material facts, Natbony disputed several of the facts included in Dugger's separate statement, but did not include any additional facts.

The only evidence Natbony submitted in opposition was two declarations, which were identical in many respects; the declaration addressing her cross-complaint included additional information about her claims. Natbony said that although she was an attorney, she was not a litigator and had never before "participated in a mediation or worked on a settlement agreement." She agreed that Michael gave her $50,000 to spend on wedding-related expenses, and said that "[a]ll the money was

spent on the wedding and no expenses were personal." Natbony stated that she and Dugger attended mediation sessions on December 19, 2014 and January 12, 2015. She said that Michael attended the second mediation session by phone, and he "never gave me oral power of attorney to bind him to a settlement agreement."

Natbony said the written settlement agreement "was materially different from the mediator's representations about its content. [Michael] never agreed to the settlement agreement that evening. Thus, no agreement was reached by the parties." She also said, "Although the settlement agreement was signed, it was not binding on the parties and it did [*sic*] cover all issues at hand."

Natbony did not dispute the substance of the settlement agreement, and said Dugger gave her a check for $12,000 that same evening. Natbony used a mobile banking app to deposit the check while still at the mediation. She also stated that Dugger sent Michael checks. Natbony said Dugger attempted to comply with other terms of the settlement agreement, including writing an apology to wedding guests and a long-form settlement agreement, but "Dugger's email was not sent in good faith because it included more than what was agreed to." Natbony said that the long-form settlement agreement "required me to give up far more rights than at issue [*sic*] in the prior mediations, including the battery claim." Natbony said she did not sign the apology letter.

Regarding her cross-claims, Natbony stated in her declaration that Dugger "did promise me prior to and during our engagement that he would make a $200,000.00 down payment on a house for us in consideration for me paying for the wedding."

She also stated, "Mr. Dugger did intend to harm and offend me. He had sex with me while I was sleeping. No reasonable person would think that initiating sexual intercourse with a sleeping person, who could not consent, is appropriate."

Natbony did not file any objections to Dugger's evidence. However, in her separate statements she asserted that some of Dugger's statements violated the mediation privilege.

F. Dugger's replies

Dugger filed two separate replies. In the reply supporting the motion relating to his complaint, Dugger asserted that Natbony had not raised a triable issue of material fact. He asserted that Natbony's representations about what occurred at the mediation, including her claim that the settlement agreement did not comply with what the mediators said, were inadmissible. Dugger also noted that Natbony admitted that she kept the money Dugger paid as part of the settlement agreement, stating that she deposited the check while still at the mediation. Dugger argued that this demonstrated that Natbony agreed to the terms of the settlement agreement. Natbony also confirmed that Dugger complied with the terms of the settlement agreement relating to the apology email and long-form settlement agreement, even though Natbony did not like the content of those documents. Dugger pointed out the signed settlement agreement stated that even in the absence of a long-form settlement, the settlement agreement created at the mediation was enforceable.

In Dugger's reply supporting his motion for summary judgment on the cross-complaint, Dugger also argued that Natbony failed to raise any triable issues of fact as to the allegations in her cross-complaint. He noted that his motion stated that Natbony's claims were barred under several different

statutes, and Natbony did not address any of these arguments. Dugger noted that Natbony had filed the FACC after the motion for summary judgment was filed, but said because the FACC contained the same causes of action as the cross-complaint and Natbony did not assert that summary judgment should be denied based on new allegations in the FACC, the court should decide the motion despite the new pleading.

G. Hearing and ruling

In a tentative ruling, the trial court said it was inclined to grant both motions. The court noted that Dugger "only seeks summary adjudication of [his] contract-based claims," and Dugger would "dismiss the remaining claims if summary adjudication is so granted." The court said Dugger "established that the settlement agreement is valid" and Natbony breached it, and therefore summary judgment was warranted on Dugger's contract-based claims.

The court also stated that Natbony's breach of contract claim, which was based on the alleged promise of a down payment on a house, was a "love-related promise" that was "barred by the anti-heart-balm statutes." The court said Natbony's two other causes of action, battery and intentional infliction of emotional distress, arose out of the parties' relationship, and therefore were barred by the settlement agreement.

At the hearing, following argument by counsel, the court said it intended to adopt the tentative ruling as its final ruling. Dugger's counsel asked the court to confirm that the ruling applied to the FACC, which was filed after Dugger filed his motion for summary judgment on the cross-complaint. Natbony's

counsel said the motion applied only to the original cross-complaint. The court set the issue for a new hearing.

The court granted Dugger's motion for summary adjudication on the contract-based causes of action in the first amended complaint,[2] and dismissed Dugger's remaining causes of action. The court also granted Dugger's motion "as to [Natbony's] cross-complaint."

H. Supplemental briefing

Dugger filed a separate statement and supplemental brief requesting summary judgment on the FACC. He reasserted the substantive arguments in his original motion for summary judgment on Natbony's claims, and said that in light of the court's rulings on his prior motions, summary judgment should be granted.

Natbony filed an opposition, asserting new arguments. She contended that Dugger could not deny that an oral contract existed, since he acknowledged that Natbony paid wedding expenses pursuant to their agreement. She also argued that the anti-heart-balm statutes did not apply because the agreement did not involve a promise to marry, and marriage was not a condition precedent to the contract. Natbony also argued that "virtually the entire declaration" submitted by Dugger was inadmissible under the mediation privilege in Evidence Code section 1119.

Natbony also contended that summary judgment should be denied for her battery claim, because she "submitted a detailed declaration regarding the incident" and Dugger had not submitted any evidence contradicting her claims. Natbony's

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[2] These causes of action were breach of contract, breach of the covenant of good faith and fair dealing, declaratory relief, and specific performance.

declaration, submitted with her supplemental opposition, states, "[Mr. Dugger] had sex with me while I was sleeping," and "I did indicate to Mr. Dugger that he should not touch me in my sleep." No other information about the incident is included in the declaration. Natbony also asserted that the settlement agreement did not bar the battery or intentional infliction of emotional distress causes of action, because neither cause of action arose from the engagement, wedding, or relationship.

Dugger submitted a reply in support of the motion. He argued in part that Natbony's declaration was "almost identical word-for-word to the declaration she previously submitted," and asked that the objections he previously submitted be sustained for the current declaration.

I. Ruling

The court issued a tentative ruling that it later adopted as its final ruling. It stated that "the parties have not submitted any evidence that is substantially factually different from the parties' papers on Dugger's original motion." The court said Natbony's breach of contract cause of action was barred by the anti-heart-balm statutes, because "the agreement specifically concerns [Natbony] making all payments for a wedding such that the agreement contemplates marriage and Dugger's promise was a love-related one." The court also said, "In light of the Court's 3/29/16 ruling establishing the validity of the parties' settlement agreement, [Natbony's] breach of contract claim (as well as the emotional distress claim to the extent based on Dugger's alleged breach of promise . . .) has been released." The court granted summary adjudication of that claim.

Turning to the battery claim, the court said, "Because this conduct occurred during the parties' relationship, [the] battery

claim (as well as the emotional distress claim to the extent based on the alleged sexual battery . . .) has been released by the settlement agreement." The court also said that "[w]hether the alleged sexual battery was consensual relates to the parties' relationship." The court therefore granted summary adjudication of that claim.

The court also ruled on the parties' evidentiary objections, stating, "[T]o the extent [Natbony] objected to portions of Dugger's declaration as violating the mediation privilege, these objections are overruled." The court granted several of Dugger's objections to Natbony's declaration.

The court entered judgment in favor of Dugger and against Natbony. Natbony timely appealed.

DISCUSSION

Natbony asserts that the trial court erred in granting both of Dugger's motions for summary judgment. Summary judgment is appropriate if "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) "We review the trial court's grant of summary judgment de novo and decide independently whether the parties have met their respective burdens and whether facts not subject to triable dispute warrant judgment for the moving party as a matter of law." (*Jessen v. Mentor Corp*. (2008) 158 Cal.App.4th 1480, 1484.) "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." (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850.)

"A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) "An appellant has the burden to demonstrate reversible error with reasoned argument and citation to authority." (*Tellez v. Rich Voss Trucking, Inc*. (2015) 240 Cal.App.4th 1052, 1066.)

A. Summary adjudication of the claims in Dugger's complaint

In the context of the summary adjudication of the causes of action in Dugger's first amended complaint, Natbony asserts two arguments: her declaration established triable issues of material fact, and Dugger's declaration in support of the motion was inadmissible under the mediation privilege. Notably, Natbony has not asserted that the settlement agreement was invalid or unenforceable in the context of Dugger's claims against her. We consider each of Natbony's two assertions of error.

1. *Triable issues of material fact*

Natbony asserts that her opposition to Duggar's motion raised triable issues of material fact. She argues that her opposition "disput[ed] virtually all of Mr. Dugger's claimed undisputed facts." However, in her opening brief she only points to five specific facts she asserts were rebutted, and therefore we address only those facts. Any argument that there were triable issues as to facts not addressed in the appellate briefs has been forfeited. (See *Claudio v. Regents of University of California* (2005) 134 Cal.App.4th 224, 230 ["'[D]e novo review does not obligate us to cull the record for the benefit of the appellant in order to attempt to uncover the requisite triable issues. As with an appeal from any judgment, it is the appellant's responsibility

to affirmatively demonstrate error and, therefore, to point out the triable issues the appellant claims are present by citation to the record and any supporting authority.'"].)

First, Natbony asserts that she disputed Dugger's representation of Natbony's litigation experience. In his declaration Dugger said that Natbony is an attorney who "has considerable experience negotiating, writing, and reviewing contracts." Natbony said in her declaration that she is a part-time attorney and entrepreneur, not a litigator, and she had "never . . . participated in a mediation or worked on a settlement agreement."

This is not necessarily a dispute. Dugger said Natbony had experience reviewing *contracts*, while Natbony said she had not worked specifically on *settlement agreements*. Each statement may be accurate without undermining the other. Nonetheless, even if this could be characterized as a dispute, it does not demonstrate a triable issue of material fact. "'Material facts' are facts that relate to the cause of action, claim for damages, issue of duty, or affirmative defense that is the subject of the motion and that could make a difference in the disposition of the motion." (Cal. Rules of Court, rule 3.1350(a)(2).) Natbony did not assert below that her experience as an attorney had any effect on the validity of the settlement agreement, and she has not made such an argument on appeal with respect to Dugger's claims against her. Whether Natbony's experience involves working with contracts generally or settlement agreements specifically is irrelevant to the disposition of the motion.

Second, Natbony asserts that she rebutted Dugger's statement that Natbony's spreadsheet of wedding-related costs included some unwarranted expenses. Dugger said in his

declaration that the spreadsheet contained "some expenses directly related to the wedding, such as the deposit on the reception venue, but also other expenses that I did not believe were legitimately related to and necessitated by the wedding, such as multiple bachelorette parties, new dresses, and accessories." Natbony said in her declaration, "Every expense was directly related to the proposed wedding and the other agreed upon events arising out of a [sic] wedding. Mr. Dugger agreed to all wedding expenses."

Again, Natbony makes no effort to establish the materiality of this fact, or explain why it warrants reversal of the judgment. It is undisputed that Natbony paid a certain amount of money toward what she considered to be wedding expenses, and that Dugger, pursuant to the settlement agreement, repaid a portion of those expenses. Whether Dugger felt particular expenses were "legitimately related to the wedding" is not relevant to whether summary adjudication was warranted on the causes of action in Dugger's complaint, which arose from the settlement agreement.

Third, Natbony contends that she disputed whether her father, Michael, gave her power of attorney to sign the settlement agreement. Michael also was named as a defendant in Dugger's complaint, and submitted evidence in support of a motion not relevant to the issues on appeal (and not included in the appellate record). In its tentative ruling on Dugger's motions, the trial court noted this paragraph in Natbony's declaration, and said Natbony "asserts that the settlement agreement was never agreed to by Michael. . . . However, this assertion is disputed by Michael." On appeal, Natbony offers no argument or explanation as to why the trial court's conclusion was incorrect. Moreover, she does not assert that Michael's lack of agreement undermines

the enforceability of the settlement agreement. In short, Natbony has not established that this fact warranted denial of the summary adjudication motion.

Fourth, Natbony asserts that she disputed whether Dugger complied with his obligations under the settlement agreement. Natbony said in her declaration that Dugger "did not in good faith comply" with his obligations under the settlement agreement. Dugger objected to this statement in Natbony's declaration on the basis that it called for a legal conclusion, and the trial court sustained the objection.

In reviewing an appeal following a motion for summary adjudication, we consider "all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained.'" (*Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 1037; see also Code Civ. Proc., § 437c, subd. (c) ["In determining if the papers show that there is no triable issue as to any material fact, the court shall consider all of the evidence set forth in the papers, except the evidence to which objections have been made and sustained by the court."].) Natbony does not acknowledge the trial court's ruling on the objection, and she has not asserted that the court's ruling was incorrect. We therefore do not consider this evidence.

Finally, Natbony asserts that she disputed Dugger's statement that he "did not promise to put a down payment on a home in consideration of Ms. Natbony paying for the wedding." This issue relates to the claims in Natbony's cross-complaints, not Dugger's complaint. Natbony cites the declaration she submitted with her opposition to Dugger's supplemental briefing in support of summary judgment on Natbony's FACC, which was filed after the trial court had already granted summary

adjudication relating to Dugger's complaint. This statement therefore could not have established a triable issue of material fact as to the issues in Dugger's complaint, and it cannot support a finding on appeal that the trial court erred in granting the motion for summary adjudication of Dugger's causes of action.

None of the foregoing claims supports a conclusion that the trial court erred by granting summary adjudication of Dugger's claims. Reversal therefore is not warranted on this basis.

2. *Dugger's declaration and the mediation privilege*

Natbony also asserts that "much of Mr. Dugger's declaration . . . is expressly prohibited by the Mediation Privilege, including, but not limited to, whether any agreement was reached and/or false statements about what occurred during the mediation." Natbony cites the declaration Dugger submitted in support of his motion for summary adjudication on his complaint. She points to the statement that Michael gave Natbony power to sign the settlement agreement on his behalf, that Michael agreed to the settlement agreement, and that "the agreement was meant to settle anything more than the claim for $30,000 in wedding expenses." She concludes, "Because Mr. Dugger's summary judgment motion expressly relied upon each of these facts as material, it should have been denied."

Natbony did not file written objections to Dugger's declaration in the trial court, but included some objections in her separate statement. The court said in its ruling, "[To the extent [Natbony] objected to portions of Dugger's declaration as violating the mediation privilege, those objections are overruled.]" On appeal, Natbony does not acknowledge the court's evidentiary ruling or discuss evidentiary standards, but she argues that

Dugger's statements "should not have been considered by the court in ruling on the motion."

Pursuant to the mediation privilege, "No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible." (Evid. Code, § 1119, subd. (a).) "[T]hese confidentiality provisions are clear and absolute." (*Cassel v. Superior Court* (2011) 51 Cal.4th 113, 118.) Thus, "all discussions conducted in preparation for a mediation, as well as all mediation-related communications that take place during the mediation itself, are protected from disclosure." (*Id.* at p. 128.)

However, written agreements created during a mediation are admissible. A document "made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure," as long as the parties "expressly agree in writing" to the disclosure of the document. (Evid. Code, § 1122, subd. (a)(1).) In addition, "[a] written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure" where "[t]he agreement provides that it is enforceable or binding or words to that effect." (*Id.*, § 1123, subd. (b).)

The settlement agreement states, "It is the intent of the parties, pursuant to California Evidence Code §§ 1122(a)(1) and 1123(b) . . . that all of the terms of the agreement may be disclosed to a court of law and shall be enforceable and binding upon them." The parties signed the agreement. Thus, the settlement agreement itself, including all of its terms, is not inadmissible under the mediation privilege.

Natbony argues on appeal that Dugger's declaration "included numerous statements of what occurred at the mediation." She points to Dugger's statement that Michael gave Natbony authority to bind him to an agreement at the second mediation session when the settlement agreement was signed, and that Michael agreed to the settlement agreement. Even if these statements in Dugger's declaration were privileged, the court noted that Michael himself told the court that Natbony had power to bind him to the settlement agreement. Thus, even if we were to assume that the court erred by overruling an objection to this statement in Dugger's declaration, the record does not suggest that the error had any effect on the court's ruling because the court received the same information from a different source. An error does not warrant reversal unless it is "reasonably probable a result more favorable to the appellant would have been reached absent the error. [Citations.] Prejudice from error is never presumed but must be affirmatively demonstrated by the appellant." (*Hernandez v. County of Los Angeles* (2014) 226 Cal.App.4th 1599, 1616.)

Natbony also asserts that the court should have excluded Dugger's assertion that the settlement agreement and release addressed "anything more than the claim for $30,000 in wedding expenses." Dugger's declaration quoted the settlement agreement's statement that the parties agreed to a mutual release of all claims arising out of the cancellation of the wedding, the relationship, or the engagement. Because the settlement agreement itself was admissible, Dugger's quote from it in his declaration was not rendered inadmissible under the mediation privilege.

Natbony has not met her burden on appeal to demonstrate that the trial court erred in granting Dugger's motion for summary adjudication on Dugger's claims against Natbony.

B. Summary judgment of the claims in Natbony's cross-complaint and FACC

Natbony asserts that summary judgment on her FACC should have been denied for several reasons. She argues that the settlement agreement does not bar her claims, there is a triable issue of fact as to the existence of an oral contract, Dugger is estopped from denying the existence of an oral contract, and Natbony's claims are not barred by any statute. We find that the settlement agreement is enforceable and it bars her claims, and therefore do not address her remaining arguments.

1. *The settlement agreement is enforceable*

The settlement agreement said that Dugger and Natbony "agree to a mutual release of all claims related to, or arising out of, the cancellation of their wedding, relationship, or engagement." Dugger asserted in his motion that this release barred the claims Natbony alleged in her cross-complaint and FACC. On appeal, Natbony argues that the settlement agreement does not bar her cross-claims for two reasons: the settlement agreement is void or unenforceable, and the terms of the settlement agreement do not bar her cross-claims.

First, Natbony asserts in her opening brief that the settlement agreement is unenforceable because her attorney was not present when the settlement agreement was signed, and therefore he "did not approve the settlement agreement as required for the settlement agreement to be enforceable." She also asserts that the mediators "improperly continued the mediation and obtained her 'agreement' hours after her attorney

left the mediation without allowing her attorney to review the draft agreement." In her reply brief, Natbony contends that these facts support a finding that Natbony was under duress at the time she signed the settlement agreement, because "it was very late in the evening and long after her attorney had to leave."

Dugger correctly points out that no evidence on this issue was presented to the trial court. Natbony does not cite any evidence in the record supporting these assertions. Her declarations submitted below are silent as to her attorney's presence or absence at the mediation. "A party waives a new theory on appeal when he fails to include the underlying facts in his separate statement of facts in opposing summary judgment. [Citation.] A new theory on appeal is also waived when the new theory involves a controverted factual situation not put in issue below." (*City of San Diego v. Rider* (1996) 47 Cal.App.4th 1473, 1493.) Because there appears to be no record support for this argument, it cannot support a finding that the settlement agreement is unenforceable.

Natbony also contends that the settlement agreement is unenforceable because it was "never finalized." She cites *Levitz v. The Warlocks* (2007) 148 Cal.App.4th 531 (*Levitz*). In that case, the parties told the court that they had a settlement "in principle," but they still had not yet fixed the material terms of the settlement. The parties were ultimately unable to reach a final settlement, and asked the court to set the matter for trial. The court refused to hold a trial setting conference, and instead proceeded with a hearing for an order to show cause re: dismissal. (*Id.* at p. 534.) The court dismissed the case, citing former California Rule of Court 225 (now rule 3.1385(c)), which required parties to dismiss a case within 45 days of settlement or

"a 'conditional settlement,' which the rule defines as a settlement containing 'specified terms' to be performed more than 45 days after the parties enter into their agreement." (*Ibid.*)

The plaintiff appealed, and the Court of Appeal said, "A settlement with open material terms is not a 'conditional settlement.' To the contrary, it is not a settlement at all because, like all contracts, it is not binding until the settling parties agree on all its material terms." (*Levitz, supra*, 148 Cal.App.4th at p. 535.) The court added, "respondents note that no settlement truly existed in this case. A 'conditional settlement,' in contrast, involves a complete meeting of the minds but with some portion of it requiring more than 45 days for its performance. Because the parties never entered into a binding settlement, rule 225 did not apply. The court thus acted beyond its authority when it relied on rule 225, and we therefore reverse the dismissal and order the action's reinstatement." (*Ibid.*)

Natbony argues *Levitz* is like this case, because there was "no agreement at all because the parties had not agreed to all the material terms." However, the evidence, including the signed settlement agreement, does not support this argument. The settlement agreement states that the parties agree that it "shall constitute a final, binding, and enforceable agreement," and all of its terms "shall be enforceable and binding upon" the parties. Thus, the evidence indicates that the parties reached an agreement, even if Natbony challenges the scope of that agreement.

Natbony also argues that the settlement agreement is unenforceable because "there was no meeting of the minds." She asserts that she thought "she was resolving only the wedding expense claims" by signing the settlement agreement, because

she "was informed, before the mediation, that the sexual battery claim . . . would not be addressed." In her reply brief, Natbony states that she received this information during "the mediator's discussion with her prior to the mediation," when the mediator told her that battery was beyond the scope of the applicable mediation policies. In her declarations submitted in the trial court, Natbony said only that "the settlement agreement was materially different from the mediator's representations about its content." She did not expand on this statement or explain what the mediators told her about the settlement agreement.[3]

Again, Natbony's argument is not supported by the evidence. The settlement agreement itself shows that the parties intended to enter into a binding and enforceable agreement, although Natbony challenges the scope of that agreement. Natbony stated in her declaration that Dugger gave her a check pursuant to the agreement and she cashed it, indicating that the parties acted upon the belief that they had reached an agreement. Thus, Natbony has not submitted evidence to support a triable issue of fact as to whether the settlement agreement was void or unenforceable.

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[3] Dugger asserts that Natbony's representation of what happened at the mediation is not admissible pursuant to the mediation privilege. (See Evid. Code, § 1119, subd. (a) ["No evidence of anything said . . . for the purpose of, in the course of, or pursuant to, a mediation . . . is admissible."].) Natbony does not argue to the contrary. The trial court overruled Dugger's objection to this statement in Natbony's declaration. Admissibility issues notwithstanding, this evidence does not demonstrate that the settlement agreement was void or unenforceable.

2. *The settlement agreement bars Natbony's claims*

The settlement agreement stated that it was "a mutual release of all claims related to, or arising out of, the cancellation of [Natbony and Dugger's] wedding, relationship, or engagement." Natbony contends that even if the settlement agreement is enforceable, its terms do not bar her causes of action against Dugger because her causes of action for breach of contract, battery, and intentional infliction of emotional distress "do[ ] not arise out of the cancellation of the wedding, engagement, or relationship." Dugger counters that the settlement agreement "bars all claims relating to or arising out of the parties' relationship—not merely the end of the relationship."

"The fundamental rules of contract interpretation are based on the premise that the interpretation of a contract must give effect to the 'mutual intention' of the parties." (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18.) The parties' intent "'is to be inferred, if possible, solely from the written provisions of the contract. ([Civ. Code,] § 1639.)" (*Ibid.*) "The words of a contract are to be understood in their ordinary and popular sense." (Civ. Code, § 1644.)

Regarding her breach of contract claim, Natbony asserts that Dugger's promise to put a down payment on a house did not arise out of the "end of the relationship," and therefore that claim is not barred by the settlement agreement. Dugger, on the other hand, asserts that the breach of contract claim explicitly arose from the cancelled wedding, since Natbony alleged that she was to pay for the wedding while Dugger was supposed to pay for a down payment on a house.

It is clear that Natbony's breach of contract claim is "related to" the parties' engagement and the cancellation of their

wedding. Natbony alleged that she agreed to pay for the wedding, and in return, Dugger agreed to put a down payment on a house. Dugger's alleged promise and subsequent breach were "related to" the parties' engagement and the cancellation of their wedding, because Natbony's performance was directly tied to the wedding. The written settlement agreement, which released all claims related to the engagement and cancellation of the wedding, bars Natbony's breach of contract claim.

The parties discuss the battery and intentional infliction of emotional distress causes of action together, so we do as well. Natbony argues that the battery and intentional infliction of distress claims arose "before the wedding, relationship, and engagement were cancelled," and therefore those causes of action do not "arise out of" the cancellation of the wedding, relationship, or engagement. In her reply brief, Natbony restates this argument by contending that the battery claim is not barred "because sexual battery does not arise out of the cancellation of a relationship." Dugger asserts that Natbony's interpretation of the settlement agreement does not make sense, because there is no such thing as the "cancellation" of a relationship, and therefore the settlement agreement bars all claims arising out of the relationship.

We agree that Natbony's interpretation is strained. "A fundamental principle of contract interpretation is that words should be given their 'usual and ordinary meaning.'" (*Timed Out LLC v. 13359 Corp.* (2018) 21 Cal.App.5th 933, 943.) The settlement agreement releases all claims related to, or arising out of, the cancellation of [Natbony and Dugger's] wedding, relationship, or engagement." The phrasing of this release—with "engagement" and "relationship" following "cancellation of their

wedding"—is not a model of clarity. However, it is not reasonable to interpret the release as limited to the "cancellation" of the parties' relationship. Natbony has not pointed to any authority suggesting that it is usual or ordinary to refer to the "cancellation" of a personal relationship, and we are aware of no such common usage. Moreover, if the parties intended to release only claims relating to the cancellation of the wedding, there would have been no need to include "engagement" or "relationship" in the release. The usual and ordinary meaning of these words, therefore, does not support Natbony's suggested interpretation.

Natbony stated in her declaration that the alleged battery occurred just before the wedding was called off, while the parties were in a relationship. Therefore, the alleged cause of action was related to or arose out of the parties' relationship. Natbony argues that the trial court was wrong to find that "sexual battery somehow naturally flows from a relationship." That is not what the court found. Rather, the court did not err in finding that when Natbony signed the settlement agreement containing the release language at issue here, she also released any claims she may have had regarding battery and intentional infliction of emotional distress that arose during Natbony and Dugger's relationship.

3. *Natbony's additional arguments*

Natbony asserts a number of additional arguments as to why summary judgment should have been denied. She contends there is a triable issue of fact as to the existence of an oral contract; the terms of the oral contract were sufficiently definite; Dugger is estopped from denying the existence of the oral contract; and that her claims are not barred by the anti-heart-

balm statutes, the statute of frauds, or Family Code sections 1610 or 770.

Because we find the settlement agreement bars Natbony's claims and summary judgment was warranted on that basis, we do not address these arguments. (See, e.g., *Filipino Accountants' Assn. v. State Bd. of Accountancy* (1984) 155 Cal.App.3d 1023, 1029 ["[W]hen an appellate court concludes that affirmance of the judgment is proper on certain grounds it will rest its decision on those grounds and not consider alternative grounds which may be available."].)

DISPOSITION

The judgment is affirmed. Respondent is entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.