NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

A PLUS FABRICS INC., et al.,

Plaintiffs and Appellants,

v.

YATES & ASSOCIATES INSURANCE SERVICES, INC.,

Defendant and Respondent.

B288389 consol. w/B289832

(Los Angeles County Super. Ct. No. BC534483)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joanne O'Donnell, Judge. Affirmed.

WLA Legal Services and Steven Zelig for Plaintiffs and Appellants.

Lewis Brisbois Bisgaard & Smith LLP, Ernest Slome and Joseph C. Campo for Defendant and Respondent.

I. INTRODUCTION

Appellants A Plus Fabrics Inc., Tishbee's LLC, and Elliott Tishbi (collectively, A Plus)[1] contacted their insurance broker, Shana Insurance Services (Shana), to renew insurance coverage on their property. Century Surety Company (Century) provided a quote through its surplus lines broker, Yates & Associates Insurance Services, Inc. (Yates), the only respondent to this appeal.

The quote Shana received, through Yates, stated that Century would bind a policy only upon receipt of favorable financials from A Plus. However, Shana omitted this requirement when it transmitted Century's quote to A Plus. Thus, A Plus believed that by accepting the quote and submitting an application, a "binder"[2] had been executed. Following a significant theft at the property, A Plus learned coverage had not been bound.

A Plus sued Shana, Yates, and Century, alleging five causes of action, including for fraud and negligent misrepresentation. Yates moved for summary judgment, which the trial court granted. A Plus has appealed.

Two issues are dispositive of all causes of action alleged against Yates: (1) whether Yates made a misrepresentation to Shana on which A Plus relied, and (2) whether Shana was an

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[1] Elliott Tishbi was the principal of A Plus Fabrics, Inc. and a member of Tishbee's LLC.

[2] A binder "temporarily obligates the insurer to provide . . . insurance coverage pending issuance of the insurance policy." (Ins. Code, § 382.5, subd. (a).) All further unspecified statutory references are to the Insurance Code.

agent of Yates, so that Shana's misrepresentations to A Plus are imputed to Yates. We conclude the undisputed facts establish that Yates did not make a misrepresentation to Shana, and Shana was not an agent of Yates. We therefore affirm summary judgment for Yates.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Parties

A Plus operated a fabric business at various locations, including 3135 East 12th Street, Los Angeles (the subject property).

Shana is a retail insurance broker that had a relationship with A Plus through its broker, Albert Kevakian. Shana represented and worked directly with A Plus in obtaining insurance coverage.

Century is a nonadmitted[3] surplus lines insurer in California. As a nonadmitted insurer, Century is permitted to transact insurance business in California through a surplus lines broker, but not directly with the insured. (§§ 703, 1761.)

Yates (now known as Scottish American, Inc.) held a registered license in California as, among other things, a surplus lines broker. In that capacity, Yates did not work directly with insureds, but instead transacted business with retail brokers. Caleb Whitehouse was a Yates underwriter.

Century and Yates had entered into a "Producer Agreement," executed in 2007, which appointed Yates (the

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[3] Insurance Code section 700 prohibits a person from transacting any class of insurance business in California without first being "admitted for that class," and "admission is secured by procuring a certificate of authority" from the California insurance commissioner. (§ 700.)

"producer") with authority to "solicit, receive, accept, bind, decline, countersign, and endorse" certain classes of insurance for Century. Yates had authority to bind coverage for risks up to $1.5 million.

B. A Plus Submits Application for Insurance

In October 2012, A Plus contacted Kevakian at Shana to obtain an extension of insurance coverage for its business and properties, including the subject property. A Plus had learned that its prior policy had lapsed, and it was concerned about its warehouse being uninsured. A Plus believed that Shana could enter into binding insurance contracts on behalf of insurers.

On October 9, Shana submitted an application on behalf of A Plus for property and general liability insurance in excess of $3,000,000 to Yates. Yates forwarded the application to Century. Century provided Yates an initial quote on October 11, which it revised twice on October 12 to accommodate A Plus's request for more coverage. All three quotes were on Century's template, addressed to Whitehouse at Yates, and titled "Quote for Insurance." The quotes identified the transaction as "Brokerage" business, and stated they were subject to a number of conditions prior to binding: "**QUOTATION SUBJECT TO THE FOLLOWING**: [¶] Favorable financials PRIOR to binding. [¶] Payment of 2010 premium audit PRIOR to binding. [¶] Details of 2008 water damage claim and verification that all plumbing has been updated prior to binding."[4] Yates forwarded the quotes to Shana.

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[4] Century had written prior policies for A Plus. A Plus had made a water damage claim under Century's 2008 policy, and

Before sending the final quote to A Plus, Shana reformatted it on its own template, which omitted the preconditions to binding that were contained in the original quote from Century to Yates. Shana's fax cover sheet stated: "If you wish to bind coverage, please sign the attached forms and fax back . . . along with a copy of your check." Shana's quote stated: "Coverage is not in effect until an application is signed and payment received."

That same day, October 12, Kevakian called Whitehouse, who directed Kevakian to send all paperwork to Esteban Lopez, another broker at Yates, for binding. Whitehouse reminded Kevakian that favorable financials were required for binding.

At 5:12 p.m., Shana emailed Lopez, requesting that coverage be bound effective that day and that Lopez "advise what type of financial statements [are] required." Attached to the email were the signed application and quote, and a copy of a check made out to Shana for $8,163.23. The check was a down payment on the total premium for the renewed policy and the 2010 premium audit. Shana asked Lopez where to send the money, and also indicated plumbing updates had been made to the property following the 2008 water damage.

After unsuccessfully trying to contact A Plus, Kevakian called Whitehouse again to inform him he could not get the financials that day, but needed coverage to be effective immediately. Whitehouse responded that if the financials were sent by Monday, he did not anticipate any issues binding coverage effective Friday, October 12. Shana emailed the

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owed an additional premium in connection with an audit of the 2010 policy.

application documents to Whitehouse. At 5:27 p.m., Whitehouse forwarded the documents to Century and requested that coverage be bound effective that day.

C. A Plus Suffers $650,000 Loss

The next day, October 13, the subject property suffered a theft of more than $650,000 worth of fabric, which A Plus believed was covered by the new insurance policy.

D. Century Declines to Bind Coverage

On Monday morning, October 15, Kevakian sent Yates a profit and loss statement for A Plus, which Yates forwarded to Century with a request to "please expedite the binder." That afternoon, after reviewing the financials and a business credit report, Century declined to issue the binder. A Century underwriter explained in an email to Whitehouse that Century had concerns about A Plus's "cash flow ratio" because of "heavy borrowing . . . from the principal's personal funds" and "less than favorable" credit report which showed a "history of slow payments." Whitehouse responded, "this is going to absolutely kill us, is there anything we can do?"

E. A Plus Files Complaint

A Plus filed a complaint in January 2014 against Shana, Kevakian, Century, Yates, and other insurance brokers and carriers that are not parties to this appeal. As relevant to this appeal, the operative third amended complaint (TAC) filed in December 2017 asserted five causes of action against Yates: (1) fraud, (2) negligent misrepresentation, (3) procurement of money under false pretenses, (4) negligence, and (5) breach of contract.[5]

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[5] A Plus settled claims against Shana and Kevakian in 2015.

Each of the five causes of action against Yates was based on the following core allegations:

- Yates misrepresented to Shana that it had binding authority for Century and that coverage would be bound on October 12, 2012; and
- Shana was an agent of Yates, so Shana's misrepresentation to A Plus that coverage would be bound on October 12 was imputed to Yates.[6]

F. Prior Appellate Proceedings

After the trial court sustained Yates's demurrer to an earlier complaint, A Plus appealed the judgment of dismissal. In a February 2017 opinion, we reversed, concluding that "agency is an allegation of ultimate fact sufficient to avoid demurrer and [A Plus] sufficiently stated a claim for fraud, negligent misrepresentation, negligence, and breach of contract." (*A Plus Fabrics, Inc. v. Yates & Associates Insurance Services* (Feb. 1, 2017, B260767) [nonpub. opn.].) With regard to the allegation that Shana was an agent of Yates, we noted: "Yates takes the position that the agency allegations are specious. Yates may have a point. In California, an insurance broker, which may include Shana, is 'a person who, for compensation and on behalf of another person, transacts insurance . . . with, but not on behalf

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[6] The claims for procurement of money under false pretenses, negligence, and breach of contract were based on the alleged fraud or negligent misrepresentation. A Plus alleged that Yates, through its agent Shana, fraudulently appropriated money by its false representations. A Plus also alleged that Yates was negligent in making false representations that coverage had been bound on October 12, and that due to these false representations, a binding contract of insurance came into existence.

of, an admitted insurer.' (Ins. Code, § 1623; see also § 33.) The broker is, as a matter of law, not a general agent for the insurer. (*Rios v. Scottsdale Ins. Co.* (2004) 119 Cal.App.4th 1020, 1026 [(*Rios*)].) Depending on the type of licenses held by Shana and Yates, it may well be that Shana cannot be deemed an agent of Yates."

G. Yates Moves for Summary Judgment

In October 2017, Yates moved for summary judgment.[7] Yates argued that: (1) the undisputed evidence established Yates made no misrepresentation because it communicated to Shana that coverage would only be bound upon receipt of favorable financials; and (2) under *Rios*, Yates had no agency relationship with Shana and was not liable for Shana's alleged misrepresentations to A Plus.

In support of its summary judgment motion, Yates submitted the declarations of Kevakian and Whitehouse, parts of the Producer Agreement, the application for insurance, the three quotes from Century, and email correspondence between Shana, Yates, and Century.

1. *Kevakian Declaration and October 12 Email to Yates*

Kevakian declared that Shana represented A Plus, not Yates, in the transaction with Yates and Century. Regarding the events on October 12, Kevakian declared that: (1) Yates

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[7] Yates's motion for summary judgment was based on the second amended complaint (SAC). In November 2017, after Yates had already filed its summary judgment motion, A Plus moved to amend the SAC, arguing A Plus had newly learned that Yates did not have binding authority for the insurance policy at issue. The court granted the motion to amend without moving the hearing date on the summary judgment motion.

forwarded to Shana the quote provided by Century, which stated that favorable financials were required prior to binding; (2) when Kevakian informed Whitehouse that coverage was needed effective immediately, Whitehouse responded that "provided acceptable financials were received, he did not anticipate that the carrier would create any issues in binding coverage" effective that day; and (3) Kevakian "understood that Yates had no binding authority and that it would be Century's decision" to approve the financials for binding.

Attached as an exhibit to the declaration, the October 12 email from Shana to Yates stated: "Please bind effective 10-12-12. . . . [¶] Please advise what type of financial statements required." Shana also asked where to send payment of the 2010 premium audit, and indicated plumbing updates had been made to the property following the 2008 water damage.

2. *Whitehouse Declaration, Producer Agreement, and October 12 Email to Century*

Whitehouse declared that as a surplus lines broker, Yates had no direct dealings or contractual relationship with A Plus, and Shana was not an agent of Yates with respect to the transaction.

Parts of the Producer Agreement between Century and Yates were attached as an exhibit to the Whitehouse declaration. The Producer Agreement stated that if Yates wished to place business that exceeded its authority, it could submit an application to Century for a quote and binder, and such "Brokerage Business" could be "bound only under express written consent" of Century. Whitehouse declared that Yates had no authority to quote or bind insurance exceeding $1.5 million in coverage.

Also attached as an exhibit to the declaration, the October 12 email from Whitehouse to Century requested Century bind coverage "effective 10/12/12" and "contact [Lopez] on Monday with the binder."

H. Opposition to Summary Judgment

A Plus opposed the summary judgment motion, arguing there were triable issues regarding: (1) whether Yates misrepresented to Shana that it had binding authority and would bind coverage effective October 12; and (2) whether Shana was an agent of Yates, such that Shana's alleged misrepresentations to A Plus could be imputed to Yates.

A Plus objected to the Kevakian and Whitehouse declarations on the basis that: (1) the Kevakian declaration contradicted his deposition testimony, and (2) the Whitehouse declaration was made without personal knowledge.

We summarize the relevant evidence A Plus submitted.

1. *Producer Agreement*

A Plus submitted the full Producer Agreement, including a provision that permitted Yates to work with "sub-producers" in placing insurance and manage their compliance with applicable licensing requirements. A Plus argued this provision evidenced an agency relationship between Shana and Yates.

2. *Kevakian Deposition Transcript*

In deposition, Kevakian testified that during his phone call with Whitehouse on Friday afternoon, Whitehouse said: "I'm out of the office but [Lopez] is there. Email [the application documents] to [Lopez] and he will bind it for you."

Kevakian testified he told Whitehouse that A Plus needed the insurance bound the same day. In response, Whitehouse informed Kevakian that favorable financials were required for

binding: "I said[,] I want to make sure this is bound today. [¶] He goes[,] you got the financials[?] I said[,] what financials[?] He said[,] on the quote I said based on [favorable] financials. [¶] I said[,] I thought you guys do that. . . . He said no, you need to get that from the customer."

Kevakian stated he called Whitehouse again late Friday afternoon because he could not obtain the financials: "So I called back [Whitehouse] and I said . . . What do you need from me today[?] Cannot bind this. [¶] And [Whitehouse] goes[,] I don't anticipate any problem. Send it to me Monday. I'll get your binder. [¶] I said[,] I need it effective today. [¶] He goes[,] no problem. I'll get it effective today for you."

When asked whether he knew that Century was "demanding" favorable financials from Shana or A Plus prior to binding, Kevakian testified that: (1) he believed the insurer would "check the binder financials like any other company does" and (2) the "proposal [from Century] . . . says based on favorable financials," but not "prior to binding as far as I remember." When asked again, Kevakian answered, "No, I did not know. I thought they are going to check their own financials."

Kevakian testified he knew Century required payment of the 2010 premium audit prior to binding.

3. *Whitehouse Deposition Transcript*

Whitehouse referred to Shana as a "client," "broker," and "agent." He testified that "[a]s a course of practice," it was Yates's expectation that the retail agent would transmit the entire quote to the client.

Whitehouse was questioned about his email to Century on October 12 asking for a binder effective that day. Whitehouse testified he did not believe coverage was actually bound that day,

and explained that "a binder would be issued . . . by the carrier stating that coverage has been purchased including a policy number and confirmation from the carrier." He also explained that his statement, "this is going to absolutely kill us," reflected his concern about failing to procure coverage for a client.

4. *Other Evidence*

A Plus submitted the declaration of an insurance expert, Richard Masters. Based on his review of the Producer Agreement, Masters believed that Yates was an agent of Century, and Shana was a "sub-producer" and limited agent of Yates and Century.

Lopez testified that Yates had "contract binding authority" from Century.

Matthew Nelsen, an executive of Century's parent company, testified Shana was a "retail agent," and Yates had binding authority as of October 2012.

I. Reply to Opposition to Summary Judgment

In reply, Yates argued that the deposition transcripts established Yates considered Shana a "client" or "retail agent," not an agent "in a legal sense." In addition, Yates argued that the Kevakian declaration did not contradict his deposition testimony as a whole. Other parts of the Kevakian deposition, which Yates attached as an exhibit to its attorney's declaration, established Kevakian's knowledge that Shana "send[s] everything over to the carrier for them to bind coverage" and "[a]ll the quotes are non-binding." Kevakian testified that the proposal Shana sent to A Plus "says clearly if you wish to bind coverage. It doesn't say bound." Shana's role was to receive the paperwork and "request binding" for the client.

J. Order Granting Summary Judgment

At the December 2017 hearing, the court issued a tentative ruling granting summary judgment, which became its final order. The court concluded that the undisputed facts "establish that there was no agency relationship" between Shana and Yates because of the restrictions imposed by the Insurance Code upon retail brokers, surplus lines brokers, and nonadmitted surplus lines insurers. Moreover, the court concluded Yates made no misrepresentation because "the policy documents issued made it clear that before the policy could bind, Century needed to receive and approve financial documents." Thus, "even if Shana misrepresented to [A Plus] when the coverage would bind, [Yates] cannot be liable." Based on these conclusions, the court granted summary judgment.

The court overruled A Plus's evidentiary objections to the Kevakian and Whitehouse declarations. It observed that "[n]othing in Kevakian's declaration testimony clearly contradicts his deposition testimony."

A Plus timely appealed the judgment.[8]

III. DISCUSSION

On appeal, A Plus contends that triable issues of material fact as to two issues require reversal of all causes of action: (1) whether Yates made a misrepresentation to Shana that it had binding authority and would bind coverage on October 12, 2012;

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[8] A Plus attempted to appeal from the order granting summary judgment (Case No. B289832), which is not an appealable order. (See Code Civ. Proc., § 904.1, subd. (a)(2).) The trial court subsequently entered judgment in favor of Yates on February 27, 2018, and A Plus appealed from the judgment on April 30, 2018 (Case No. B288389). We granted the motion to consolidate both appeals.

(2) whether Shana was an agent of Yates, so that Shana's misrepresentations to A Plus are imputed to Yates.

Yates contends that the undisputed evidence establishes: (1) Yates did not represent that it had binding authority and would bind coverage for A Plus on October 12; and (2) Shana was not an agent of Yates. We agree and affirm summary judgment.

A. Standard of Review on Summary Judgment

Summary judgment is proper when all the papers submitted on the motion show there are no triable issues of material fact, and the moving party is entitled to judgment as a matter of law. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*); Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment bears the initial burden of showing that one or more elements of the plaintiff's cause of action cannot be established or there is a complete defense to the cause of action. (*Aguilar*, at p. 849.) If the defendant meets this burden, the plaintiff has the burden to demonstrate one or more triable issues of material fact as to the cause of action or defense. (*Ibid*; Code Civ. Proc., § 437c, subd. (p)(1).) A triable issue of material fact exists if "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion." (*Aguilar*, at p. 850.) The plaintiff must produce "substantial" responsive evidence sufficient to establish a triable issue of fact. (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 163.) "[R]esponsive evidence that gives rise to no more than mere speculation cannot be regarded as substantial, and is insufficient to establish a triable issue of material fact." (*Ibid.*)

Where summary judgment has been granted, we review the trial court's decision de novo, "considering all of the evidence the

parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) We construe the evidence "in support of the party opposing summary judgment and resolving doubts concerning the evidence in favor of that party." (*State of California v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, 1017–1018.)

B. Summary Judgment Was Properly Granted as to Fraud and Negligent Misrepresentation Claims.

1. No Triable Issue Whether Yates Misrepresented It Had Binding Authority and Would Bind Coverage on October 12.

An essential element of both fraud and negligent misrepresentation is that "the defendant made a false representation as to a past or existing material fact."[9] (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 792.) A Plus contends that Yates misrepresented it had binding authority and would bind coverage on Friday, October 12, and A Plus relied on this misrepresentation to its detriment.[10]

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[9] The elements of fraud are "(a) misrepresentation; (b) knowledge of falsity; (c) intent to defraud, i.e., induce reliance; (d) justifiable reliance; and (e) damage." (*Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 892.) Negligent misrepresentation " 'does not require intent to defraud but only the assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true.' " (*Ibid.*)

[10] We disregard A Plus's secondary argument that there is a triable issue of fact as to whether Yates actually had binding authority for the policy A Plus sought. A Plus admitted in its TAC that Yates had no such authority. (4 Witkin, Cal. Proc. (5th

However, as we discuss, the undisputed evidence fails to raise a triable issue that Yates made a misrepresentation.

It is undisputed that three separate times, Yates sent Shana a quote clearly stating favorable financials were required "PRIOR to binding." In plain and visible terms, the documents listed Century's preconditions to binding. Yates submitted declarations from Kevakian and Whitehouse attesting that Yates forwarded to Shana the quotes it received from Century, and A Plus did not dispute this material fact. Moreover, deposition testimony offered by A Plus established that Whitehouse verbally informed Kevakian that favorable financials were required for binding. Kevakian testified regarding his phone call with Whitehouse: "I said[,] I want to make sure this is bound today. [¶] He goes[,] you got the financials[?] I said[,] what financials[?] He said[,] on the quote I said based on [favorable] financials."

Shana's conduct—namely, its attempts to fulfill Century's preconditions to binding—provides further undisputed evidence that Yates did not represent it had authority to bind coverage on October 12. Following Kevakian's phone call with Whitehouse, Shana emailed Yates on October 12 to ask what financial documents were required for binding.[11] In the rest of the email,

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ed. 2008) Pleading, § 454, p. 587 ["The admission of a fact in a pleading is conclusive on the pleader."].)

[11] In response to the statement of undisputed facts, A Plus disputed this fact on the ground that the email, which was attached to the Kevakian declaration, was inadmissible. Specifically, A Plus argued that Kevakian's declaration is inconsistent with his deposition testimony and should be disregarded. The trial court overruled A Plus's evidentiary

Shana addressed Century's other preconditions to binding: Shana asked Yates "where we should send this money" collected for the 2010 premium audit owed to Century,[12] and addressed plumbing updates to the property following the 2008 water damage, as requested by Century. In deposition testimony offered by A Plus, Kevakian testified that when he was unsuccessful in obtaining the required financials on October 12, he called Whitehouse again: "I said . . . What do you need from me today[?] Cannot bind this. [¶] And [Whitehouse] goes[,] I don't anticipate any problem. Send it to me Monday. I'll get your binder." Kevakian's own statement, "Cannot bind this," reflects his understanding that a binder could not be executed without the required financials.

A Plus does not dispute that Shana was aware the binder was contingent on Century's approval of certain conditions prior to binding. As A Plus's own evidence establishes, Kevakian testified he believed Century would "check their own financials" and require payment of the 2010 premium audit prior to binding. A Plus contends, however, there are triable issues whether Yates led Shana, and consequently A Plus, to believe that a binder had been executed on October 12. However, none of the evidence establishes Shana believed a binder had been executed on

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objection, and we find no abuse of discretion, as discussed below (III.D.1, *post*).

[12] Elliott Tishbi and his wife submitted declarations explaining that on October 12, they faxed Shana a copy of the $8,163.23 check (made out to Shana) and a draft check authorization form. Whitehouse declared that Yates never received the payment.

October 12, or communicated to A Plus that coverage had been bound.

To establish Yates' misrepresentation, A Plus offers the deposition testimony of Kevakian, who testified that Whitehouse promised, "I'll get your binder," and "[Lopez] will bind it for you." But " '[p]redictions as to future events, or statements as to future action by some third party, are deemed opinions,' " and are not actionable fraud or misrepresentation. (*Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 158.) Whitehouse's statement that he did not anticipate a problem binding coverage provided favorable financials were received—and that under those conditions, "I'll get your binder"—was not a promise that coverage would be immediately bound. Neither does Kevakian's testimony that Whitehouse instructed him to send application materials to Lopez "and he will bind it for you" establish Yates's misrepresentation as to a *past* or *existing* material fact.[13] (See

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[13] In its reply brief, A Plus contends that an expression of opinion may be actionable misrepresentation under certain exceptions to this general rule, such as if an opinion is "expressed by a party possessing superior knowledge" or "if the opinion is expressed as a fact." However, we do not find these exceptions applicable here. First, Yates's promise to secure a binder provided certain conditions were satisfied was not based on Yates's superior knowledge; as we have discussed, the conditions Century imposed prior to binding were equally known to both Yates and Shana. Second, Yates's promise to secure the binder was not an "opinion stated as fact." Whitehouse knew and informed Shana that favorable financials were required for binding. Although A Plus identifies other circumstances in which an opinion may be actionable, it does not explain how any of

Borba v. Thomas (1977) 70 Cal.App.3d 144, 152–154 [statement that there would be " 'no problem' " getting approval of purchase price was nonactionable expression of opinion, considering relationship of parties and circumstances under which opinion was expressed].)

A Plus argues that Whitehouse's October 12 email to Century requesting a binder effective that day is inconsistent with Yates's position that a binder could not be executed without the required financials. However, in the same email, Whitehouse requested Century contact Yates on Monday "with the binder"—evidence Whitehouse did not believe the attached application documents constituted a binder. (See *Marsh & McLennan of Cal., Inc. v. City of Los Angeles* (1976) 62 Cal.App.3d 108, 118 (*Marsh & McLennan*) ["the agent [with binding authority] is authorized to execute the binder himself"].) In evidence submitted by A Plus, Whitehouse was questioned regarding his email and testified he did not believe coverage was actually bound that day, and it was not until Monday, October 15 that Yates emailed Century with the required financials and requested an expedited binder.

Taken together, the undisputed evidence establishes that Yates believed and informed Shana that, as long as favorable financials were submitted, a binder would be issued on Monday, October 15, with an effective date of October 12. (See *LA Sound USA, Inc. v. St. Paul Fire & Marine Ins. Co.* (2007) 156 Cal.App.4th 1259, 1269 ["[g]iving a retroactive effective date to a policy 'wouldn't be unusual' in the insurance industry"].) We find

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those examples apply to this case and, having reviewed the record, we find no evidence they apply here.

no triable issue that Yates falsely represented it could and would bind coverage for A Plus on October 12.

2. No Triable Issue Whether Shana Was an Agent of Yates

A Plus contends that because Shana was an agent of Yates, Shana's misrepresentations to A Plus are imputed to Yates as a matter of law. (See *Barenborg v. Sigma Alpha Epsilon Fraternity* (2019) 33 Cal.App.5th 70, 85 [" '[A] principal who personally engages in no misconduct may be vicariously liable for the tortious act committed by an agent within the course and scope of the agency.' "].) However, the undisputed evidence establishes Yates never authorized Shana to act as an agent on its behalf.[14]

" ' " 'Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by

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[14] A Plus attempts to impose liability on Yates for alleged misrepresentations to A Plus through several other theories of agency: (1) Shana was a subagent under the Producer Agreement; (2) Shana was an agent of A Plus; and (3) Yates was an agent or ostensible agent of Century. As to the first theory, even if A Plus could establish that Shana was a subagent under the Producer Agreement, that would have the effect of making the principal (Century), not the agent (Yates), liable for Shana's misrepresentations. (See Civ. Code, § 2351; *Hilton v. Oliver* (1928) 204 Cal.535, 539.) The second theory, which reasons that Yates's misrepresentations to Shana are deemed misrepresentations to A Plus, presupposes a misrepresentation by Yates (III.B.1, *ante*). Finally, as to the third theory, A Plus fails to explain how Yates's role as an agent of Century with limited binding authority imposes liability on Yates for Shana's misrepresentations.

the other so to act.' " ' " (*Secci v. United Independent Taxi Drivers, Inc.* (2017) 8 Cal.App.5th 846, 855.) While the existence of an agency relationship is "typically a question of fact, when ' "the evidence is susceptible of but a single inference," ' summary judgment is not precluded." (*Castillo v. Glenair, Inc.* (2018) 23 Cal.App.5th 262, 281 (*Castillo*).)

General rules of agency apply to insurance agency relationships. The Legislature has defined an insurance agent as "a person authorized, by and on behalf of an insurer," to transact certain classes of insurance on behalf of an admitted insurance company. (§ 31.) "The most definitive characteristic of an insurance agent is his authority to bind his principal . . . ." (*Marsh & McLennan, supra,* 62 Cal.App.3d at p. 117.) An insurance broker, by contrast, is one who "on behalf of another person, transacts insurance . . . with, but not on behalf of, an insurer." (§ 33.) Insurance agents and insurance brokers are known generically as "producers." (*Douglas v. Fidelity National Ins. Co.* (2014) 229 Cal.App.4th 392, 410.)

Special rules apply to nonadmitted insurers and surplus lines brokers. In California, except through a licensed surplus lines broker, it is a misdemeanor to act as an agent for a nonadmitted insurer or in any manner to aid the nonadmitted insurer in transacting insurance business. (§§ 703, 1761.) However, "an insurance broker may, on behalf of an insurance company, collect and transmit premium or return premium and deliver policies and other documents evidencing insurance," without being construed as an agent of the insurer. (§ 1732.) *Rios* held that a retail broker in Shana's position was not an agent of the surplus lines broker or insurer, except for "limited purposes" such as transmitting documents and payment; thus,

the retail broker's misrepresentations to the insured could not be imputed to the "blameless" surplus lines broker and carrier. (*Rios, supra*, 119 Cal.App.4th at pp. 1027, 1029.)

The evidence compels the single inference that Shana was an insurance broker representing A Plus, not an insurance agent acting on behalf of Yates. We find no evidence that Yates authorized Shana to act on its behalf, or that Shana was subject to Yates's control in transacting business with Century. Shana had no direct communications with Century, and like the retail broker in *Rios*, "no authority to alter the terms of coverage or to present a policy other than that offered by the insurer." (*Rios, supra*, 119 Cal.App.4th at p. 1029.) Consistent with this, in deposition testimony offered by A Plus, Kevakian testified that Shana's role was only to receive the paperwork and "request binding" for the client. Thus, we find no evidence of the most characteristic indicia of agency, that Shana had authority " ' " 'to act for and in the place of' " ' " Yates in transacting surplus lines business with Century. (*Castillo, supra*, 23 Cal.App.5th at p. 277.) As a matter of law, Shana was precluded from operating as an agent of Yates in conducting surplus lines business (§ 703), and the evidence reflects Kevakian's limited role in the transaction.

A Plus relies on the Producer Agreement, and specifically, its provision regarding "sub-producers," to argue that an agency relationship existed between Shana and Yates, but the Producer Agreement does not support the conclusion that Yates authorized Shana to act on its behalf. The Producer Agreement was between Century and Yates, and permitted Yates to work with "sub-producers" in placing insurance. It further delegated responsibility to Yates for managing sub-producers, with the

expectation that the sub-producer would obtain and maintain proper licensing. However, the Producer Agreement did not assign any substantive obligations as between Shana and Yates, or evidence an agreement that Shana was authorized to act on Yates's behalf. In addition, the provision regarding sub-producers clearly contemplated a sub-producer-producer relationship, not one of agent-principal. As a retail broker without a license to transact surplus lines business, Shana was not the "sub-producer" intended by the Producer Agreement. Thus, we find no triable issue whether an agency relationship existed between Shana and Yates.

A Plus attempts to attribute agency status to Shana by submitting deposition testimony from Whitehouse and Nelsen/Century. Whitehouse referred to Shana as a "client" and "agent", while Nelsen/Century testified Shana was the "retail agent" in the transaction. But colloquial usage of the term "agent" "cannot in any sense be interpreted as a legal admission" that Shana was actually the agent of Yates in a legal sense. (*Loehr v. Great Republic Ins. Co.* (1990) 226 Cal.App.3d 727, 733.) Moreover, as retail brokers generally represent the insured, Nelsen's statement is indicative of Shana's role representing A Plus, not Yates. A Plus does not explain how Whitehouse's references to Shana as a "client" prove—instead of disprove—an agency relationship between them. Thus, none of A Plus's proffered evidence raises a triable issue regarding Shana's role as an agent of Yates in the transaction.

We conclude summary judgment was properly granted as to the fraud and negligent misrepresentation claims.

C. Summary Judgment Was Proper as to All Other Causes of Action.

A Plus alleged other causes of action for procurement of money under false pretenses, negligence, and breach of contract, which were based on the alleged fraud and negligent misrepresentation (fn. 6, *ante*). Because we have determined A Plus did not raise a triable issue of material fact as to the fraud and negligent misrepresentation claims (III.B., *ante*), summary judgment was properly granted as to all causes of action.

D. No Abuse of Discretion in Evidentiary Rulings

Trial court evidentiary rulings on summary judgment are reviewed for abuse of discretion. (*DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 679.)

1. Kevakian Declaration

A Plus contends the Kevakian declaration should have been disregarded because it allegedly contradicts Kevakian's sworn deposition testimony. In light of the entire record, we find nothing in Kevakian's deposition testimony materially inconsistent with his declaration. (See *Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, 482 [admissions used in moving for summary judgment must be examined "in light of the entire record"].) As we have already explained (III.B.1., *ante*), Kevakian did not testify that Yates represented it had binding authority and would bind coverage on October 12, as A Plus claims.

Kevakian's deposition testimony that *as far as he could remember*, the "proposal [from Century] . . . says based on favorable financials," but did not say "prior to binding," was obviously based on Kevakian's recollection at the time of his deposition. The exhibits attached to Kevakian's declaration reflect that the proposal from Century *did* state favorable

financials were required "prior to binding," thus explaining Kevakian's declaration that the proposal from Century required " 'favorable financials PRIOR to binding.' "

Moreover, any inconsistency between Kevakian's deposition testimony and his declaration on this issue was not sufficient to raise a triable issue of fact. In the Response to Yates's Separate Statement of Undisputed Material Facts, A Plus conceded as undisputed the material fact that "Yates forwarded the revised quote [from Century which, as the document reflects, required favorable financials prior to binding] to Shana the same day, October 12, 2012, and after receipt of the quote, Shana requested that coverage be bound." Thus, A Plus cannot challenge this undisputed material fact on appeal.

2. Whitehouse Declaration

Lastly, we decline to consider A Plus's argument, not properly raised in the opening brief, that the Whitehouse declaration should be disregarded because it was not based on personal knowledge and "relat[ed] to documents" that pre-dated his involvement with the transaction and employment with Yates. A Plus does not identify the documents, nor explain how Whitehouse lacked personal knowledge of them simply because they came into existence before his employment with Yates. Matters not properly raised or that lack adequate legal discussion will be deemed forfeited. (*Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 655—656.) Thus, we find no abuse of discretion in the trial court's evidentiary rulings.

IV. DISPOSITION

The judgment for respondent Yates is affirmed. Yates is awarded its appellate costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

EGERTON, J.