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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

RAQUEL C. DUREZA-MUNESES, Plaintiff and Appellant, v. TENET HEALTHSYSTEMS DESERT, INC., Defendant and Respondent.	B184522 (Los Angeles County Super. Ct. No. BC312370)

APPEAL from a judgment of the Superior Court of Los Angeles County. Rolf M. Treu, Judge. Affirmed.

Riley & Reiner, Raymond L. Riley and Douglas D. Winter for Plaintiff and Appellant.

McDermott Will & Emery, Russell Hayman, Thomas A. Ryan and Terrence P. Mann for Defendant and Respondent.

This appeal arises out of claims by Dr. Raquel C. Dureza-Muneses (Dureza-Muneses) against Tenet Healthsystems Desert, Inc. (Tenet) for money owed for medical services provided under a written relocation and medical services agreement (RMS agreement) and an oral emergency room on-call services agreement (oral on-call agreement). The trial court granted summary judgment in favor of Tenet, ruling that the undisputed evidence showed that Dureza-Muneses did not satisfy her obligations under the RMS agreement, and that the oral on-call agreement was barred by the statute of frauds. Dureza-Muneses appeals, contending: (1) There is a triable issue as to whether she substantially performed the RMS agreement. (2) Contrary to Tenet's position, the parties had a meeting of the minds and formed the oral on-call agreement. (3) The oral on-call agreement could have been performed within a year, so it did not fall within the statute of frauds. (4) Even if the statute of frauds applies, Dureza-Muneses has a claim with respect to the part of the oral on-call agreement that was actually performed. (5) Finally, Tenet is equitably estopped from relying on the statute of frauds. After review, we affirm the judgment.

FACTS

The pleading

The second amended complaint alleged: Under the terms of the RMS agreement, Dureza-Muneses agreed to relocate and maintain a medical services practice at Tenet's hospital facilities. In consideration, Tenet agreed that for a two-year period it would pay Dureza-Muneses a monthly salary of $33,333.33 plus $14,821.50 a month to cover office overhead. Also, Tenet promised to provide Dureza-Muneses's moving expenses, benefits, marketing support and sums necessary for insurance coverage. Although Dureza-Muneses performed all the conditions and covenants in the RMS agreement, Tenet breached the RMS agreement by failing to pay Dureza-Muneses the guaranteed monthly salary and expenses.

The parties entered into the oral on-call agreement to set Dureza-Muneses's compensation for emergency room on-call services. Dureza-Muneses agreed to be available on-call to provide neurology medical services for Tenet in exchange for $1,000

per day of on-call services. From September 11, 2002, through April 2004, Dureza-Muneses provided the promised on-call services. Nonetheless, Tenet refused to pay Dureza-Muneses the agreed compensation.

Tenet's motion for summary judgment or adjudication

In support of its motion for summary judgment or adjudication, Tenet argued that Dureza-Muneses could not prove that she performed under the RMS agreement, or that Tenet breached the RMS agreement. Tenet cited the statute of frauds to challenge the oral on-call agreement. Additionally, it contended that the parties never had a meeting of the minds regarding contract formation.

In Tenet's separate statement of undisputed facts,[1] Tenet stated, and cited evidence to support, the following: As a general rule, the relocation and medical services agreements between Tenet and doctors provide a minimum guaranteed income for a doctor who relocates and maintains a full-time practice at a new facility, treats patient, and bill but collects less than the guaranteed amount. It is possible that a minimum guaranteed income will not be paid because the doctor does not perform the conditions, or performs and is paid more than the guaranteed amount by patients or third parties. Under the RMS agreement, Dureza-Muneses was required to relocate to Tenet's service area and maintain a full-time practice for four years, commencing on August 1, 2002. Also, it was her responsibility to bill patients or appropriate third parties within 14 days of rendering medical service, and to diligently pursue collections. By the 10th day of each month, Dureza-Muneses was obligated to provide Tenet with accounts receivable reports and an accounting of operational expenses. Under the RMS agreement, Dureza-Muneses was entitled to receive a collection guarantee of up to $48,154.83 per month (up to $33,333.33 for salary and up to $14,821.50 in office expenses, including insurance, but not more than $1,155,716 in total for two years) if her monthly income without the guarantee fell below $48,154.83.

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1 The separate statement of undisputed facts will be referred to as "separate statement."

Tenet paid Dureza-Muneses $24,077.42 in September 2002, as required by paragraph B-3 of the RMS agreement. The following month, Tenet paid Dureza-Muneses $50,112.76 pursuant to the data she submitted. In March 2003, Tenet paid her $33,762.20 to cover insurance. Subsequently, the parties entered into an amendment that suspended the RMS agreement during the time while Dureza-Muneses was on maternity leave. She went on maternity leave from May 12, 2003, to August 12, 2003.

On June 16, 2003, Tenet asked for collection data for past months. Then, on July 24, 2003, Tenet informed Dureza-Muneses that it was exercising its right to conduct an audit. On September 4, 2003, Dureza-Muneses's office manager canceled the audit, claiming that an employee had run off with documents and money. The missing documents were relevant to the time between September 2002 and January 2003. At that point, Tenet said it would not make any more payments until it received a list of all patients seen by Dureza-Muneses, and a list of collections with respect to those patients. When the audit was completed, Tenet determined that a majority of Dureza-Muneses's patients had not paid for medical services, or had not been billed, and that there were incomplete records due to staffing issues, embezzlement and stolen documents. When asked about the incomplete records, Dureza-Muneses said her brother's administrator had mishandled their joint office and her funds, and that her sister-in-law removed certain funds and documents from the office.

Tenet sent Dureza-Muneses a letter reminding her of her obligation to bill patients and to diligently pursue collections. Also, Tenet gave notice of breach and provided Dureza-Muneses 30 days to cure. She provided some of the requested documentation, but not all of it. Rather than submit the additional documentation, Dureza-Muneses moved out of her office and resigned her privileges at Tenet's facilities.

Tenet offers neurosurgeons with medical staff privileges a written two-year on-call agreement which pays $1,000 per day and requires the doctor to maintain a certain level of insurance. Dureza-Muneses rejected the parties' proposed written two-year on-call agreement because she wanted more than $1,000 a day and did not agree to the insurance requirement.

Dureza-Muneses's opposition

In her opposition, Dureza-Muneses argued that she performed all obligations under the RMS agreement, except those she could not perform due to Tenet's continuing breaches. She claimed that Tenet breached the RMS agreement by refusing to pay money that its own auditor conceded was due. Finally, she argued that there were triable issues regarding the oral on-call agreement because the parties' written correspondence demonstrates that the statute of frauds does not apply and that the parties had a meeting of the minds. In her separate statement, she abandoned the allegation in her complaint that the oral on-call agreement was formed in September 2002. Instead, she stated that the "contract" for on-call services was formed by the parties in March and April 2003.

According to Dureza-Muneses's declaration, the auditor determined that if Dureza-Muneses's records were accurate, Tenet owed her $742,483. Her monthly income was well below the guaranteed minimum. Dureza-Muneses claimed that she provided Tenet with all the documentation it needed regarding accounts receivable, collections and expenses. Although the written on-call agreement was never signed, the parties agreed in correspondence that she would be paid for her emergency room services. She left her office because Tenet evicted her brother, who was the holder of the lease. In March 2004, she resigned her privileges because Tenet refused to pay the money that she was owed.

The trial court's ruling

The trial court granted summary judgment, finding: (1) Tenet showed with competent evidence that Dureza-Muneses cannot prove that she performed under the RMS agreement. (2) Tenet showed with competent evidence that Dureza-Muneses cannot prove that Tenet is guilty of breach. (3) The oral on-call agreement was to be performed over a two-year period. Because it could not be performed within a year, the statute of frauds applies.

This appeal followed.

STANDARD OF REVIEW

We review the grant of summary judgment on an independent basis. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) "We first identify the issues framed by the pleadings, since it is these allegations to which the motion must respond. Secondly, we determine whether the moving party has established facts which negate the opponents' claim and justify a judgment in the movant's favor. Finally, if the summary judgment motion prima facie justifies a judgment, we determine whether the opposition demonstrates the existence of a triable, material factual issue. [Citation.]" (*Torres v. Reardon* (1992) 3 Cal.App.4th 831, 836.) Although our review is de novo, "it is limited to issues which have been adequately raised and supported in plaintiffs' brief." (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.)

"[W]e construe the moving party's affidavits strictly, construe the opponent's affidavits liberally, and resolve doubts about the propriety of granting the motion in favor of the party opposing it." (*Szadolci v. Hollywood Park Operating Co.* (1993) 14 Cal.App.4th 16, 19.)

DISCUSSION

1. *There are no triable issues regarding the cause of action for breach of the RMS agreement.*

Dureza-Muneses contends that there are triable issues as to whether she substantially performed the RMS agreement when she supplied Tenet with information regarding her patients, billings and collections.

We disagree.

a. Applicable contract law.

To recover on a cause of action for breach of contract, the suing party must prove that she performed her contractual obligations. (*Tolstoy Constr. Co. v. Minter* (1978) 78 Cal.App.3d 665, 671 (*Tolstoy*).) What constitutes substantial performance is a question of fact. (*Id*. at p. 672.) But to recover, a plaintiff's performance must meet a reasonable standard. (*Ibid*.) "'[The] performance rendered may be held to be less than substantial

by reason of the accumulation of many defects, any one of which standing alone would be minor in character.' [Citation.]" (*Id*. at p. 673.)

Much of our law on substantial performance comes from building contracts, but that law is easily extrapolated to other contexts. The *Tolstoy* court, for example, noted: "'[It] is settled, especially in the case of building contracts where the owner has taken possession of the building and is enjoying the fruits of the contractor's work in the performance of the contract, that if there has been a substantial performance thereof by the contractor in good faith, where the failure to make full performance can be compensated in damages to be deducted from the price or allowed as a counterclaim, and the omissions and deviations were not willful or fraudulent and do not substantially affect the usefulness of the building for the purposes for which it was intended, the contractor may, in an action upon the contract, recover the amount unpaid of his contract price, less the amount allowed as damages for the failure in strict performance.'" (*Tolstoy*, *supra*, 78 Cal.App.3d at pp. 671-672.) From *Tolstoy*, we glean that a party can show substantial performance if the performance was in good faith, the other party reaped the benefit of the performance, and the omissions were not willful and did not impact the usefulness of the contract. Also, we must inquire as to whether it is possible to set-off the damages suffered by the other party. (See 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 818, pp. 908-909.)

b. <u>Pertinent provisions in the RMS agreement</u>.

Entitled "Guarantee Against Collections," exhibit B to the RMS agreement contains two relevant provisions.

Paragraph B-3 provides that "[Tenet] will advance one-half . . . of the first payment of the Guaranteed Monthly Amount of $48,154.83 payable to [Dureza-Muneses] within ten . . . days of [September 12, 2002]. This advanced amount will be deducted from the first payment of the Guaranteed Monthly Amount in the first month following [September 12, 2002,] in accordance with Paragraph B-4 below. The remaining twenty three . . . monthly guarantee[d] payments, if any, shall be payable in accordance with Paragraph B-4 below."

Pursuant to paragraph B-4, Dureza-Muneses had until the 10th of each month to furnish Tenet "with support for all sources of income, including, but not limited to an accounts receivable report detailing [Dureza-Muneses's collections] for the previous calendar month. In addition, [Dureza-Muneses] shall furnish [Tenet] with a detailed accounting of operational expenses including but not limited to rent, salaries, utilities, medical and non-medical supplies and other office expenses. If the [c]ollections for the prior month are less than the Guaranteed Monthly Amount, [Tenet] shall pay to [Dureza-Muneses], by the fifteenth . . . day of each following month of this guarantee, the difference between the [c]ollections for the previous month and the Guaranteed Monthly Amount. Should [Dureza-Muneses's] [c]ollections exceed the Guaranteed Monthly Amount in any month of the [g]uarantee [p]eriod, such excess shall be carried forward and offset against future months' [c]ollections where such [c]ollections are less than the Guaranteed Monthly Amount."

c. Dureza-Muneses did not substantially perform.

The evidence submitted by the parties demonstrates that Dureza-Muneses did not supply Tenet with sufficient information to determine its obligations under paragraphs B-3 and B-4 of the RMS agreement.

Dureza-Muneses was required to provide Tenet with complete reports of her billing, collections and expenses from September 2002 to May 12, 2003, and from August 12, 2003, through the end of the RMS agreement. She submitted reports for September and October 2002, but then stopped. When Tenet requested the information to which it was entitled, it learned that: (1) documents and money were missing from Dureza-Muneses's office due to theft, (2) the former office manager incorrectly billed under the group name for Dureza-Muneses's brother from September 2002 to the end of January 2003, (3) Dureza-Muneses had appointment schedules, but only from March 2003 through May 2003, (4) many sample patients from appointment schedules and hospital admissions could not be traced to collections, (5) some patients were not on the reports generated by Dureza-Muneses's billing service, (6) the billing service was concerned that it had not received payment notices or documentation from any insurance

payors during Dureza-Muneses's maternity leave, (7) no collections could be traced prior to March 2003, (8) it appeared that Dureza-Muneses had not reported all her collections, and (9) the billing service had continuing problems with receiving complete and accurate billing information.

These problems thwarted Tenet's ability to gain a reasonable understanding of its financial obligations to Dureza-Muneses. Below, we articulate why Tenet's motion eliminated all triable issues.

Evidence relating to the audit

According to the November 7, 2003 interim audit report (audit report), submitted as evidence by Tenet, Dureza-Muneses did not submit collections data after October 2002. The audit report noted: Dureza-Muneses's prior office manager did the billing from September 2002 through the end of January 2003 and billed incorrectly under Dureza-Muneses's brother's name. Beginning in January 2003, Dureza-Muneses hired Compliance Billing Specialist (Compliance). Compliance attempted to recreate the old billings by going through patient charts. Dureza-Muneses informed the auditor that she had collected approximately $11,751. Part of her inability to accurately report collections was due to document theft and embezzlement by her sister-in-law. Dureza-Muneses never recovered the money.

Dureza-Muneses provided names of patients she saw at her office and names of patients she saw at the Mountain View Surgery Center in Redlands. However, when the auditor tried to trace those names backs to the collections reports, more than half did not appear. A showcase report was run on all of Dureza-Muneses's admissions to Desert Regional Medical Center. Out of a sample of 15 patients, the auditor located two on the collections reports. Three others appeared on the collections reports, but no dates were listed for service during inpatient hospital stays. Four others were billed, but nothing had been collected. The auditor discovered that "some patients were not on the report provided by" Compliance. Dureza-Muneses explained that sometimes patients were put on hold until appropriate billing information could be obtained. However, Compliance told the auditor that there were no billings on hold waiting for additional information.

Compliance sent Dureza-Muneses a note stating that it "has not received any payment notices . . . or documentation from any insurance payors during the time [Dureza-Muneses] has been away from the office. There should have been payments received at the office during this time but the information has not been forwarded to [Compliance] for recording." The auditor's contact at Compliance said that "all payments have been posted to date and [Dureza-Muneses] is not holding on to any payments or information."

In conclusion, the audit report stated: "The schedule of payments was completed. To date, Desert Regional Medical Center paid [Dureza-Muneses] a total of $74,190. [Her] total income for the period of [September 12, 2002] through [May 31, 2003] was $50,113. If the collections have been reported correctly then the facility would owe [Dureza-Muneses] $742,483. However, several issues have been identified as a result of the [audit]. With the information provided we are unable to verify that collections have been accurately reported." The auditor could not trace any collections prior to March 2003. According to Compliance, there were continuing problems with getting complete and accurate patient information for billing. The majority of patients selected for tracing did not appear on the collection reports. "Only two out of all the office, surgery center and hospital patients that were selected reported a collection. This is very unusual to have such little collections."[2]

Dureza-Muneses did not object to the audit report, or to the admissibility of any facts set forth in it.

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[2] In her opening brief, Dureza-Muneses essentially concedes that she did not submit complete information. She informs us that during the audit, Tenet obtained and reviewed monthly income collections for September 2002 and October 2002, billing reports prepared by Compliance, appointment schedules from March 2003 through May 2003, regarding Mountain View Surgery Center patients, records of her patient admissions to Desert Regional Medical Center and a log for hospital visits from January 2003 to November 2003, Compliance monthly reports for April and May 2003, and her bank statements for the entire audit period. To show that she submitted this material, she refers to the audit report.

According to Dureza-Muneses, the audit report is important because it states that if the collections have been reported correctly, then Tenet owes her $742,483. But the auditor found that some patients were not on the report provided by Compliance, and that Compliance did not receive any payment notices or documentation from any insurance payors during the time Dureza-Muneses was gone. Compliance believed that payments had probably been received by Dureza-Muneses but not forwarded. None of the collections prior to March 2003 could be traced, and Compliance said there were problems with getting patient information. Also, many of the patients investigated had no collections.

These problems are significant, given the language of the RMS agreement. Paragraph B-2 provides that Dureza-Muneses must bill patients and diligently pursue collections, and that the "[f]ailure of [Dureza-Muneses] to bill as specified herein shall result in said amounts being deemed collected in the month in which the respective services were rendered." The audit revealed names of patients who had not been billed, and names of patients for which there were no collections. Under paragraph B-2, all the charges for those patients would be deemed collected (insofar as there was no showing of diligence in collection attempts). In other words, Tenet was possibly owed a credit for a multitude of uncollected medical fees. Based on Dureza-Muneses's records, Tenet could not calculate its credit.

Paragraph B-4 required support for all sources of income, including accounts receivable reports detailing Dureza-Muneses collections for previous months. She did not provide detailed collections reports for certain periods. Her oral statements regarding collections were insufficient. Those statements did not prove what patients had paid for medical services, and whether those collections were reflected in documentation that she submitted to Tenet. Added to the equation was Compliance's concern over the inexplicable lack of payment notices from insurance companies. The picture painted by Dureza-Muneses's records was incomplete and suspect. She left Tenet in an impossible position. It could not determine whether collections and credits (from deemed

collections), in any particular month, exceeded the guaranteed monthly amount and thereby created a carryover for the next month.

The problem for Dureza-Muneses is that her omissions and deviations from paragraph B-4 rise to such a level that it is impossible to compensate for them by reducing Tenet's obligation. Based on her omissions and deviations, we cannot say that Tenet owes anything. Beyond that, her defaults negatively impact the usefulness of the RMS agreement to Tenet. The RMS agreement is not useful if Tenet cannot keep track of its financial obligations. We are left with the reasonably deducible inference that Dureza-Muneses did not perform in good faith. Without prompting, she submitted data for only two months. After that, she was dilatory. She has not explained her lack of compliance with her obligations. The result was that she lost important documents to theft, and she created a situation where Tenet had to resort to faded memories and partially recreated documents in its audit.

As we have indicated, substantial performance is a question of fact. But that does not preclude summary judgment. "An issue of fact can only be created by a conflict of evidence. It is not created by 'speculation, conjecture, imagination or guess work.' [Citation.] Further, an issue of fact is not raised by 'cryptic, broadly phrased, and conclusory assertions' [citations], or mere possibilities [citations]. 'Thus, while the court in determining a motion for summary judgment does not "try" the case, the court is bound to consider the competency of the evidence presented.'" (*Sinai Memorial Chapel v. Dudler* (1991) 231 Cal.App.3d 190, 196–197.) Simply put, the audit report does not adequately demonstrate substantial performance. It requires speculation, conjecture, imagination and guess work to draw the conclusion that Dureza-Muneses provided sufficient information to Tenet to determine its obligations. Our holding is consistent with cases that recognize that a factual issue can be disposed of on summary judgment if the undisputed facts leave no room for a reasonable difference of opinion. (See *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239 [stating that the issue of reliance in a fraud cause of action is a question of fact unless "reasonable minds can come to only one conclusion based on the facts"].) The audit report does not give rise to a reasonable

difference of opinion about whether Tenet had enough information to trigger payments to Dureza-Muneses.

Evidence of subsequent events

Tenet submitted two letters regarding post-audit events.

On November 13, 2003, Tenet wrote to Dureza-Muneses and informed her that she had "an obligation to bill patients and/or appropriate third party payors within fourteen . . . days of rendering service and to promptly and diligently pursue collections," and that she was required to furnish Tenet "with support for all sources of income, including, but not limited to, an accounts receivable report detailing your collections for the previous calendar month, as well as a detailed accounting of operational expenses for the previous calendar month, by the tenth . . . day of each subsequent month of the [RMS] [a]greement." The author of the letter indicated that he and his staff spoke with Dureza-Muneses over the prior eight to 10 months about her failure to comply with her obligations, concluding that "[a]s of this date, you have still not provided the required documentation and remain in breach of the [RMS] [a]greement." In the last paragraph, Tenet notified Dureza-Muneses that she had 30 days to cure the outlined breaches.

On December 16, 2003, Tenet confirmed by letter that it reviewed documentation Dureza-Muneses provided concerning the RMS agreement. It indicated that it processed payment of $35,032.63 for her malpractice insurance for the premiums paid in March and October 2003. However, the rest of the documentation was deemed inadequate for payment. Based on the audit report, Tenet determined that the "results indicate a very high error rate in charging and billing" and stated that Tenet "cannot subsidize this type of error." Tenet asked Dureza-Muneses to provide "a comprehensive listing of all patients seen from the inception of your practice in Palm Springs through the current date. We will need to impute collections for patients that are unbilled." Dureza-Muneses was supplied with an Excel spreadsheet to list all her patients. Tenet recognized that documents were missing, but it required Dureza-Muneses to provide her "best estimate of the patients seen." Tenet promised to help Dureza-Muneses by supplying her with a copy of its hospital admissions from Tenet's internal system. Regarding expenses, Tenet

explained that it could not determine the business purpose of most of the items listed, such as Dureza-Muneses's purchase of gasoline. According to Tenet, Dureza-Muneses commingled her business and personal expenses. Tenet wanted specific information on how she calculated a payment to her brother for office expenses.

Dureza-Muneses did not object to either of these letters, or to the admissibility of the contents of these letters. These letters demonstrate that Dureza-Muneses did not submit sufficient information to Tenet. We note also that the evidence shows that Tenet was cooperative. It was undisputed that, after Tenet's letters, it attempted to assist Dureza-Muneses in recreating her billing by providing a list of hospitalized patients she may have treated.

This brings us to separate statement fact No. 33.

Separate statement fact No. 33 stated: "Rather than submit the required records, [Dureza-Muneses] moved from her office which she apparently subleased from her brother, and resigned her privileges in March 2004. Nonetheless, on August 13, 2004 at one address and then at a second address on September 16, 2004, [Tenet] continued to provide [Dureza-Muneses] with written notices of breaches and 30 days to cure those breaches. She never did."

In support of separate statement fact No. 33, Tenet offered the declarations of Kathi Sankey-Robinson (Sankey-Robinson) and Truman L. Gates (Gates). Sankey-Robinson and Gates indicated that Dureza-Muneses did not cure her breaches and ultimately resigned her privileges. Tenet shifted the burden to Dureza-Muneses to show a triable issue.

In her opposition separate statement, Dureza-Muneses stated that separate statement fact No. 33 was disputed. But she did not cite any evidence to contradict Tenet's evidence. Her unsupported response violated Code of Civil Procedure section 437c, subdivision (b) and California Rules of Court, rule 342(f) by not citing supporting evidence. Thus, we easily conclude that she did not demonstrate a triable issue on this pivotal point, except insofar as she may have done so with her statement of additional facts.

Dureza-Muneses's additional facts

In additional fact No. 48, Dureza-Muneses stated that Compliance recreated her billings and collections from September 2002 to January 2003, and that she *now* has a patient ledger for the entire period covered by the RMS agreement, earlier versions of which she submitted to Tenet. For support, she cites to a patient ledger printout printed on April 13, 2004. In our view, this patient ledger—which was never provided to Tenet—is irrelevant. To meet her burden, Dureza-Muneses had to demonstrate that she produced documentation to Tenet, then provide copies of that identical documentation. Moreover, Tenet objected to the patient ledger because it was "created in April 2004, long after [Dureza-Muneses] claims to have submitted such documents to [Tenet]. The April 2004 ledger was not made and preserved as a part of the records of a business in the regular[] course of that business, but instead was created for the purpose of this litigation. . . . [T]he ledger should be excluded as inadmissible hearsay." The objection was sustained, and Dureza-Muneses does not argue that the trial court erred.[3]

Though not cited in support of additional fact No. 48, Dureza-Muneses declared that she provided Tenet with "appropriate documentation of income and operational expenses which document[] that my monthly income consistently fell below the Guaranteed Monthly Amount." She also declared that she provided Tenet with documentation prepared by Compliance of her billings and collections. Tenet objected that Dureza-Muneses's declaration was inadmissible to prove the content of unattached documents, and that those documents satisfied the requirements of the RMS agreement. The trial court sustained the objection. Although Dureza-Muneses argues that the trial court erred and that she was permitted to declare that she submitted documents to Tenet,

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3 In her opening brief, Dureza-Muneses argues that the trial court's evidentiary rulings should be reviewed de novo. But she did not discuss the trial court's particular ruling with respect to the patient ledger in an attempt to demonstrate error. We decline to review the evidentiary rulings without assistance. This is because "[i]t is not our responsibility to develop an appellant's argument." (*Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1206, fn. 11.)

her argument misses the mark. The objection was not to the statement that she submitted documents to Tenet, it was to the content of those documents. Having failed to make any argument addressing the actual objection or ruling, we find that Dureza-Muneses waived her contention that the evidentiary ruling was improper. (*Tan v. California Fed. Sav. & Loan Assn.* (1983) 140 Cal.App.3d 800, 811.)

Regardless, Dureza-Muneses's declaration was insufficient to create a triable issue of fact. Her statement that her documentation was appropriate was no more than a conclusory assertion. It was incumbent on Dureza-Muneses to demonstrate that she provided a substantially complete factual picture.

2. *There are no triable issues as to the oral on-call agreement.*

Dureza-Muneses defends her breach of oral contract cause of action by citing Civil Code section 1624 and *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 675 (*Foley*). Both authorities establish that if a contract can be performed within a year, it does not have to be in writing. Contrary to Tenet's position, Dureza-Muneses contends that the oral on-call agreement could be performed within a year. Regarding a point not ruled on by the trial court, Dureza-Muneses contends that the parties had a meeting of the minds sufficient to form an oral agreement. Last, she contends that Tenet is estopped from relying on the statute of frauds.

We turn to these issues.

a. <u>Contract formation.</u>

To rebut the existence of the oral on-call agreement, Tenet offered a series of facts to show that the parties contemplated a written on-call agreement but that they never executed it. Tenet did not seek to negate the allegations in the second amended complaint. However, Dureza-Muneses abandoned the theory set forth in her pleading, effectively negating the allegation that an oral agreement was formed in September 2002. She argued that the parties formed a contract in March and April 2003, but she did not provide adequate evidence to support her new theory, which undermined her opposition. We turn to these issues.

(i) *The pleading.*

The second amended complaint alleged: "On or about September 11, 2002, . . . Dureza-Muneses and Tenet entered into an oral agreement for Emergency Room 'on-call' services, pursuant to which Dureza-Muneses agreed to be available 'on-call' to provide neurology medical services in the Emergency Services Department at Tenet's medical facilities in exchange for monetary compensation from Tenet of $1,000 per day for such services."

(ii) *Dureza-Muneses's new theory*.

In her opposing separate statement, Dureza-Muneses stated that "the contract" was formed in March and April 2003. Her opening brief on appeal glosses over this point. It never takes a position, specifically, on how, when or if the oral on-call agreement was formed. She suggests that the proposed written on-call agreement, which was never signed by the parties, was supposed to be a confirmation of the parties' oral on-call agreement.

(iii) *The interplay between the parties' separate statements.*

The RMS agreement required Dureza-Muneses to "participate in and accept calls from [Tenet's emergency department] call rotation in [neurosurgery]." The phrase "on-call" means that a specialty physician's name is on a list of emergency room personnel to call in case a patient admitted to the emergency room is in need of a particular specialty. If a physician is called, she can bill the patient on the patient's insurance. There are times, however, when emergency room patients have no insurance and cannot pay. Neither the RMS agreement nor the medical staff bylaws provide for the payment of hospital fees to a physician who provides on-call coverage. Even though the RMS agreement and medical staff bylaws required physicians to be on-call, Tenet experienced difficulties in arranging complete coverage by neurosurgeons in the emergency room.[4]

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[4] Dureza-Muneses purported to dispute this fact with paragraph 10 of her declaration. She declared: "In October 2002 I provided neurosurgery on-cal[l] emergency room services, but I shared coverage with my brother. I began to provide neurosurgery on-call emergency room services at [Tenet] in early March 2003. On

As a result, Tenet offered neurosurgeons with medical staff privileges a two-year on-call agreement which would pay the physician the determined fair market price of $1,000 per day for agreeing to provide on-call services.

Gates declared that Tenet offered Dureza-Muneses a written on-call agreement that would pay her $1,000 per day of on-call service and required that she maintain a certain level of insurance. In part 9 of the unsigned written on-call agreement, Dureza-Muneses was required to maintain commercial general liability insurance. Further, she was required to provide workers' compensation insurance, employers' liability insurance and, finally, professional liability insurance. The limits set by Tenet for Dureza-Muneses's comprehensive general liability and professional liability insurance were $1 million per occurrence and $3 million aggregate. According to Gates, Dureza-Muneses refused to agree to either the rate of $1,000 per day or the insurance requirements.

Dureza-Muneses disputed Gates's declaration. She declared: Gates sent her a letter on March 17, 2003, explaining two options for reimbursement. On April 23, 2003, she selected the option in which she would receive a $750 stipend for each day of on-call service and 100 percent Medicare equivalent payments for private pay patients. She then notified Tenet that she wanted to be paid $1,000 per day without private pay reimbursements. On September 2, 2003, Dureza-Muneses received a copy of the unsigned written on-call agreement from Tenet. The parties never executed the written on-call agreement, but they agreed in their correspondence that she would be paid for all emergency room services provided. She attached Gates's March 17, 2003, letter to her declaration. At the end of the letter, he stated: "Please call my office with your option selection [for payment] as soon as possible. I will then forward the appropriate contract for your approval." Also attached to her declaration was a September 2, 2003, letter from Tenet that purported to enclose two original on-call agreements. She was instructed to

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March 17, 2003, I received a letter from [Gates] explaining two (2) available options for reimbursing me for providing on-call emergency room services." Dureza-Muneses did not rebut the evidence that Tenet had trouble arranging for complete coverage for emergency neurosurgery.

sign and return both originals to Tenet so they could be signed by Tenet's chief executive officer.

The trial court sustained a hearsay objection to Dureza-Muneses's declaration regarding the content of the parties' correspondence. She has not challenged that particular ruling on her briefs.[5] Gates's letter demonstrates that the parties did not have a contract on March 17, 2003, and that there would be no contract offer until there was a written agreement. The September 2, 2003, letter confirms that the written on-call agreement had to be signed first by Dureza-Muneses and then by Tenet in order to be operative.

Dureza-Muneses did not support her opposition with evidence of an oral offer and acceptance for the on-call agreement in March and April 2003. Her separate statement negated the theory alleged in the second amended complaint that the oral on-call agreement was formed in September 2002. Though Tenet's separate statement was not sufficient to eliminate this issue because it did not address the allegations in the second amended complaint, Tenet's evidentiary gaps were cured by Dureza-Muneses's opposition separate statement and declaration. (*Villa v. McFerren* (1995) 35 Cal.App.4th 733, 750.) Summary judgment must be granted *if all the papers submitted* show that there are no triable issues. (*Ibid*.) Based on the interplay between the parties' separate statements, there was no triable issue.[6]

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5 In part B.3 of her opening brief, Dureza-Muneses informs us that an appellate court "will independently determine the validity of the objections." Tacitly, Dureza-Muneses invites us to review all the trial court's evidentiary rulings regardless of her lack of argument. The Court of Appeal need not evaluate rulings that have not been directly and cogently attacked.

6 Although the trial court granted summary judgment based on the statute of frauds rather than contract formation, supplemental briefing is not required under Code of Civil Procedure section 437c, subdivision (m)(2) because the grounds on which we rely were raised below and already briefed on appeal. (*Byars v. SCME Mortgage Bankers, Inc.* (2003) 109 Cal.App.4th 1134, 1147, fn. 7.)

b. The remaining issues.

In the absence of an oral on-call agreement, the statute of frauds issue is moot. So, too, is the issue of equitable estoppel.

DISPOSITION

The judgment is affirmed. Tenet shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD