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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MARA GERLONI,

Plaintiff and Appellant,

v.

MAURIZIO ZANETTI,

Defendant and Respondent.

D059695

(Super. Ct. No. GIC868327)

APPEAL from a judgment of the Superior Court of San Diego County, Judith F. Hayes, Judge. Affirmed.

Mara Gerloni appeals a summary judgment for Maurizio Zanetti, M.D., on her complaint for misappropriation or theft of corporate opportunity, breach of fiduciary duty, breach of contract and breach of the implied covenant of good faith and fair dealing, fraud, and constructive trust. The trial court determined the complaint was a corporate derivative action and she lacked standing to pursue the action because she is not a shareholder.

Gerloni concedes she cannot bring corporate claims, but she contends the complaint also sufficiently alleged individual claims for breach of contract and fraud and she raised triable issues of material fact on those claims. Alternatively, she contends the court abused its discretion by denying her leave to amend the complaint.

We find no merit to these contentions and affirm the judgment. Gerloni's individual claims, even if sufficiently alleged in the complaint, are all based on supposed false promises Dr. Zanetti made to her, which she outlined at length in her declaration. In deposition, however, Gerloni contradicted her declaration and testified she could not recall any specific promise he made. The court properly ignored her declaration and she submitted no other evidence to explain the inconsistencies or raise a triable issue of material fact.

FACTUAL AND PROCEDURAL BACKGROUND¹

In 1987 Dr. Zanetti, a native of Italy, became a professor of medicine at the University of California, San Diego (UCSD). At some point he was named director of the Laboratory of Immunology at Moores UCSD Cancer Center. Under UCSD's policy, it owned any patents derived from his work, but he was entitled to 35 percent of any net income from licensing the patents. During the 1990's, UCSD patented eight separate

¹ In discussing the facts, Gerloni block cites the entire 615 pages of her 29 lodged exhibits. We remind her attorneys that a brief must "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." (Cal. Rules of Court, rule 8.204(a)(1)(C).) It is not this court's duty to search through the record unassisted. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115.) To avoid delay, however, we have exercised our discretion to consider her briefing without correction. (Cal. Rules of Court, rule 8.204(e)(2)(C).)

concepts Dr. Zanetti developed, which "form the conception of a universal cancer vaccine."²

In August 1993 Gerloni, also a native Italian, joined Dr. Zanetti's laboratory as a post-doctorate fellow. Gerloni was involved in ongoing experiments on Dr. Zanetti's technology. She was also required to assign any patent rights to UCSD.

In October 1993 Dr. Zanetti was accused of "scientific fraud." UCSD investigated the matter for three years and a hearing was ultimately held before a tenure committee, which exonerated him after determining his accuser had lied. Dr. Zanetti threatened litigation against UCSD, and in 1998 the parties reached a settlement that required UCSD to release its rights to the patents to him.³

The same year, Purdue Pharma (Purdue) approached Dr. Zanetti about using his patented technology for its own project. He was willing to enter into a licensing agreement, in return for Purdue's investment in a prospective company to be called Transgenix, whose purpose would be "to develop genetic immunization against disease exploiting the B cell technology."

² Dr. Zanetti's declaration explains he invented "antigenized antibodies and antigenized genes," "to exploit normal B lymphocytes harboring antigenized antibody genes as a new form of personalized 'live' vaccine. Similar to virus-infected cells, B lymphocytes harboring antigenized antibody genes would generate over and over immunogenic moieties based on information imparted to them by DNA (antigenized antibody genes) without, however, infectious threat. [¶] The new idea would replace conventional vaccines (for example, the inactivated polio vaccine) administered by a shot in the arm."

³ Two of the patents were released to Dr. Zanetti in 2001 because they were inadvertently omitted earlier.

In 1999 Dr. Zanetti incorporated Transgenix in anticipation of a deal with Purdue. That year, he gave a few persons, including Gerloni, written offers for the opportunity to purchase Transgenix stock, dependent on the Purdue deal going forward. He offered her 650,000 shares for \$650, which would be 6.5 percent of the company with a three-year vesting schedule for some of the shares based on her continuing service to the company. The offer stated, "The founders' stock will be accomplished through the execution of a Shareholder Agreement between Transgenix and yourself. The agreement will contain the vesting provisions and other terms that are typical for transactions of this nature." Gerloni did not respond to the offer or tender any payment, and no shareholder agreement was executed.

By October 2000 the Purdue deal appeared doubtful, and an Italian company, Cosmo S.p.A. (Cosmo), expressed interest in Dr. Zanetti's patented technology. On legal advice, to accommodate a deal with Cosmo he formed two holding corporations: Progentec, to hold "the protein part of the B cell technology," and Eurogen, "which would hold the DNA part." Dr. Zanetti assigned his patent rights to these corporations.

In 2001 the Purdue deal finally fell through. That July Dr. Zanetti and Cosmo entered into a licensing agreement for the patents Eurogen held. To accommodate the transaction, Progentec consolidated its patent rights with those of Eurogen. He was reportedly entitled to several million dollars from Cosmo for the licensing of the technology. Cosmo also purchased the shell corporation Transgenix from Dr. Zanetti to use as a vehicle for patient trials at UCSD, and changed the name to Cosmo Bioscience, Inc. (CBI). Dr. Zanetti netted \$18,000 from the sale.

Beginning in 2002, Dr. Zanetti was a consultant for CBI for a Phase I clinical trial. Gerloni began working for CBI part time, and reduced her employment with UCSD to part time. In 2005 Dr. Zanetti and Cosmo had a dispute and parted ways, and Gerloni left UCSD to become CBI's chief executive officer.

In June 2006 Gerloni sued Dr. Zanetti for misappropriation or theft of corporate opportunity, breach of fiduciary duty, breach of contract and breach of the implied covenant of good faith and fair dealing, fraud, and constructive trust. The gist of the complaint was that Gerloni was a co-inventor and co-owner of the patents,⁴ but Dr. Zanetti secretly claimed sole inventor status; he promised to share any net proceeds from licensing the patents with Gerloni and other laboratory team members, and to make them co-owners of Transgenix; they relied on the promises in continuing to work in his laboratory; and he reneged on the promises by transferring the patents to an offshore company he controlled, selling the technology, and keeping all the proceeds for himself. The complaint prayed for compensatory and punitive damages, and a constructive trust over any proceeds from the licensing of the patents.

In August 2008 Dr. Zanetti moved for summary judgment, or in the alternative, summary adjudication. In January 2009 the court stayed the matter pending the resolution of a United States District Court patent suit Gerloni had filed against him. The federal complaint alleged Gerloni co-invented the seventh out of Dr. Zanetti's eight patents, referred to as the "462 Patent," which is for technology based on "Somatic

⁴ As discussed below, however, in a federal court suit Gerloni claimed co-ownership of only one of the eight patents.

Transgene Immunization [STI] and Antigenized Antibodies."⁵ The 462 Patent was issued in October 2007, and it derived from a provisional application filed in 1998, which listed Dr. Zanetti and three of his laboratory members, including Gerloni, as co-applicants. A final application filed in 1999, however, listed Dr. Zanetti as the sole inventor. Dr. Zanetti filed a counterclaim against Gerloni for a declaratory judgment of patent ownership, copyright infringement, and unfair business practices.

Dr. Zanetti moved for summary judgment in the federal suit. To establish co-inventor status, Gerloni was required to prove at trial that she "significantly contributed to conception of the invention of STI/TLI." Her testimony alone would be insufficient; she would have to adduce corroborating evidence. (*Ethicon, Inc. v. U.S.* (Fed. Cir. 1998) 135 F.3d 1456, 1461.) In February 2010 the court granted the motion, terminating Gerloni's claims and granting Dr. Zanetti declaratory relief on the ground there was

⁵ The federal court explained the 462 Patent "relates to a method of stimulating an immune response by administering a lymphoid tissue plasmid DNA which has been genetically engineered to produce one or more epitopes (proteins). The goal of this method is to trick the body's immune system to think it is under attack by a foreign invader to effectively cause the body to produce its own vaccine. This method was coined with the acronyms STI (Somatic Transgene Immunization) and TLI (Transgene Lymphocyte Immunization) ('STI/TLI')." According to Gerloni, the STI and TLI technologies "are different from the antigenized antibodies and telomerase patents. . . . I have never claimed to be a co-inventor of the antigenized antibodies and telomerase patents."

insufficient evidence from which a jury could reasonably find Gerloni was a co-inventor or co-owner of the 462 Patent.⁶ Dr. Zanetti then dismissed his other cross-claims.

The superior court then lifted the stay in this action, and in June 2010 Dr. Zanetti renewed his motion for summary judgment or summary adjudication. He argued the complaint was time-barred; the mutual assent and certainty elements of contract formation were lacking, and thus there was no written or oral contract; the complaint's allegations that Gerloni co-invented or co-owned any of his patents were resolved against her in the federal suit; and the only surviving claims were that his conduct diminished the value of the holdings by Gerloni *and others* in Transgenix, but she was not a shareholder and lacked standing to pursue a shareholder derivative action. As to the lack of mutual assent and certainty, Dr. Zanetti submitted deposition testimony of Gerloni in which she

⁶ The federal court explained: "[T]he evidence demonstrates that Gerloni did not have a broad understanding of the science behind the invention when she joined the UCSD lab in July 1993. Furthermore, the evidence indicates that what she did know, she learned from Zanetti during the course of her employment in the lab. . . . Gerloni provides no evidence to show that, at the time the invention was conceived, she had even a general understanding of the 'definite and permanent idea' of the operative invention, much less the expertise and specialized scientific knowledge necessary to constitute its conception. Gerloni's claim of conception is premised almost entirely on a presentation of her ideas relating to journal articles she presented to the lab. Explaining the current state of art, however, does not make one a co-inventor because it is not a contribution to conception. [Citation.] In addition, Gerloni's evidence of her extensive research on STI/TLI demonstrates only that she assisted Zanetti after the conception of the invention and assisted in reducing the invention to practice. . . . [¶] Additionally, Gerloni does not present any corroborating evidence of her contribution for the conception of the []426 Patent."

We also note that in an October 7, 2003 letter, during the time she worked for both UCSD and CBI, Gerloni responded to a conflict of interest inquiry from UCSD by stating, "I am not an inventor in any intellectual property licensed to Cosmo."

admitted she could not recall him promising her anything in particular, testimony that contradicted her declaration.

In September 2010 the court issued a tentative ruling that denied Dr. Zanetti's summary judgment, but granted him summary adjudication of the complaint's cause of action for misappropriation or theft of corporate opportunity. After a hearing, however, the court took the matter under submission, and on October 7, 2010, the court issued an order granting Dr. Zanetti summary judgment. The court determined that notwithstanding the titles of the complaint's counts, all claims remaining after the federal suit were shareholder derivative claims and as a non-shareholder she lacked standing to bring such an action.

On November 4, 2010, Gerloni moved for leave to amend the complaint. She sought to delete the cause of action for misappropriation or theft of corporate opportunity, delete claims belonging to the corporation, and add allegations about an oral contract. She argued she was "not a shareholder as Zanetti lied to her and never gave her the shares as promised. She does not have to be a shareholder to sue for fraud and breach of contract."

In December 2010 the court issued a tentative ruling that granted Gerloni leave to amend. Again, however, the court reversed itself after the hearing. On February 1, 2011, the court issued an order denying her leave to amend on the ground "the allegations of the proposed amended complaint fail to sufficiently state a personal claim that can be reconciled with the allegations of the original complaint. . . .The gravaman of plaintiff's proposed amended complaint continues to support a claim for the corporation and the

proposed allegations cannot survive over plaintiff's previous allegations, [and] *admissions made in discovery and submitted in summary judgment.* [¶] On the facts of [the] case and *evidence already known*, allowing amendment would be a futile act." (Italics added.)

Gerloni unsuccessfully moved for reconsideration. On March 4, 2011, judgment was entered for Dr. Zanetti.

DISCUSSION

I

Standard of Review

Code of Civil Procedure section 437c, subdivision (c),⁷ provides for summary judgment when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. "The phrase 'as a matter of law' is another way of saying that the evidence available to the parties, and placed before the court in support of and in opposition to the motion, raises no material issue that a trier of fact could resolve in favor of the party opposing the motion. The function of the motion is thus to provide a mechanism, short of trial, for 'cut[ting] through the parties' pleadings in order to determine whether . . . trial is in fact necessary to resolve their dispute.' [Citations.] A moving defendant establishes a right to summary judgment by showing that the plaintiff lacks the evidence to sustain one or more elements of the cause of action pleaded by him

⁷ Future statutory references are also to the Code of Civil Procedure except when otherwise specified.

[or her] or to overcome some defense the defendant is prepared to prove." (*Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 756.)

We review a summary judgment ruling de novo, applying the same standards as the trial court. (*Birschtein v. New United Motor Manufacturing, Inc.* (2001) 92 Cal.App.4th 994, 999.) "In reviewing a motion for summary judgment, we accept as undisputed fact only those portions of the moving party's evidence that are uncontradicted by the opposing party. In other words, the facts alleged in the evidence of the party opposing summary judgment and the reasonable inferences that can be drawn therefrom are accepted as true." (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1001.)

II

Analysis

" "It is a general rule that a corporation which suffers damages through wrongdoing by its officers and directors must itself bring the action to recover the losses thereby occasioned, or if the corporation fails to bring the action, suit may be filed by a stockholder acting derivatively on behalf of the corporation. An individual [stockholder] may not maintain an action in his [or her] own right against the directors for destruction of or diminution in the value of the stock. . . ." " (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 124 (*Nelson*).)

Setting aside allegations Gerloni co-invented and co-owned Dr. Zanetti's patented technology, issues finally decided against her in the federal suit, the theory of her complaint was that he promised her and other laboratory "[t]eam members" Transgenix

stock, and his transfer of the patents to Eurogen, rather than to Transgenix, devalued Transgenix and deprived her and other team members of the value of stock he allegedly promised them. Gerloni does not dispute that the complaint contains corporate claims, and she lacks standing to bring a derivative action on Transgenix's behalf because she is not a shareholder.

Gerloni contends, however, that the complaint sufficiently alleged individual claims, and in opposition to the summary judgment motion she raised triable issues of material fact. She asserts that "although there may have been injuries to the corporation the same set of facts also gave rise to a cause of action for breach of [oral] contract and fraud—claims that belong to [her], not Transgenix." She submits the federal suit is immaterial because her individual claims for breach of contract and fraud are unrelated to the invention or ownership of the patents.

Gerloni cites *Nelson, supra*, 72 Cal.App.4th 111, for the proposition that both corporate and individual claims may be based on the same facts. The opinion states "it is the gravamen of the wrong alleged in the pleadings, not simply the resulting injury, which determines whether an individual action lies. While we agree that in some cases, the same facts regarding injury to the corporation may underlie a personal cause of action, such as intentional infliction of emotional distress, breach of contract, fraud, or defamation, Nelson has not alleged or proved the elements of any such cause of action." (*Id.* at pp. 124-125, fn. omitted.) Even assuming the complaint sufficiently alleged individual claims, however, we conclude Dr. Zanetti was entitled to judgment as a matter of law. "The trial court's stated reasons for granting summary relief are not binding on

the reviewing court, which reviews the trial court's ruling, not its rationale." (*Lidow v. Superior Court* (2012) 206 Cal.App.4th 351, 356.)

Gerloni concedes her "entire complaint is based on the lies [Dr.] Zanetti told her in order to induce [her] to work—and continue working—on the [t]echnology." In a November 7, 2008, declaration Gerloni submitted in opposition to Dr. Zanetti's original summary judgment motion, she detailed Dr. Zanetti's promises. The declaration states he "promised me that I would share in any profits derived from the technology that I assisted in creating"; "agreed that I would share in all profits derived from commercializing the technology"; "told me to be patient because we had brought the technology to the brink of scientific success and soon we were going to share in its commercial success"; "repeatedly told me that I would be a part owner in Transgenix, and that I would share in and benefit from my hard work developing the technology"; and "said that I was a 6.5% owner of Transgenix, which entitled me to 650,000 shares of its stock." The declaration also states, "Dr. Zanetti told me that Transgenix owned the rights to the antigenized antibodies and STI technology," and "I had understood from my conversation with Dr. Zanetti in 1998 that Transgenix owned the technology."

On December 9 and 10, 2008, roughly a month after Gerloni signed the declaration, Dr. Zanetti took her deposition. In support of his 2010 renewed motion for summary judgment, he submitted portions of her testimony in which she denied recalling any specific promise. When asked whether Dr. Zanetti ever told her she would be part owner of Transgenix, she responded, "I don't remember." When asked whether he ever told her she would benefit financially from Transgenix, she responded, "I don't

remember." She also testified she did not recall him telling her they would be partners or she would own 6.5 percent of Transgenix. When asked whether Dr. Zanetti made *any* promise to her between 1993 and 2001, she responded, "Any promises—which kind? Which kind of promises?" Dr. Zanetti's attorney specified, "Any kind of promise to you," and she responded, "Not that I can recall right now." Gerloni also admitted Dr. Zanetti never told her Transgenix owned the patented technology.

Gerloni also testified she did not respond to Dr. Zanetti's written offer on the opportunity to purchase Transgenix stock, "because I don't think there was anything to accept. [¶] I believe this was more like a recognition of my efforts. I believe was like. . . Dr. Zanetti recognizing me for all the efforts that I made and all my work in the laboratory. [¶] So I didn't really think—as I told you, I was very happy and probably—and for sure I thank him about the opportunity that he was giving to me, but I don't think I ever responded formally." She confirmed, "I don't think I saw this letter as an offer but more like a recognition, and for me, it was a good recognition of my effort. I was happy about that."

Gerloni attempts to make light of her deposition testimony, asserting she merely had a memory lapse and could not recall Dr. Zanetti's promises at that particular time. Gerloni, however, is a highly educated and trained scientist and she was deposed just over a month after she signed her declaration. Had Dr. Zanetti made the false promises detailed in her declaration, which according to her declaration left her feeling betrayed, it borders on the absurd that she would forget them within a month's time. Her admissions are not trivial matters; they go to the heart of her case. Notably, at the time of

Dr. Zanetti's renewed summary judgment motion in 2010, Gerloni did not sign a new declaration under oath explaining discrepancies between her original declaration and her deposition testimony or claiming her memory had been restored. Without any recollection of a promise, she had no prospects for trial.

It is axiomatic that the trial court "may disregard a declaration prepared in opposition to a summary judgment motion that conflicts with the declarant's deposition testimony." (*Ericson v. Federal Exp. Corp.* (2008) 162 Cal.App.4th 1291, 1309.) In *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 22 (*D'Amico*), the California Supreme Court recognized "admissions against interest have a very high credibility value. This is especially true when, as in this case, the admission is obtained not in the normal course of human activities and affairs but in the context of an established pretrial procedure whose purpose is to elicit facts. Accordingly, when such an admission becomes relevant to the determination, on motion for summary judgment, of whether or not there exist triable issues of *fact* (as opposed to legal issues) between the parties, it is entitled to and should receive a kind of deference not normally accorded evidentiary allegations in affidavits."

The court was well within its discretion in disregarding Gerloni's declaration. Contrary to her argument, her deposition testimony was not equivocal and taken out of context. As Dr. Zanetti argued, "[t]his is an egregious case of pleadings grossly contradicting the testimony of plaintiff provided under oath."

We acknowledge that appellate court cases have applied *D'Amico* cautiously. (*Scheidung v. Dinwiddie Construction Co.* (1999) 69 Cal.App.4th 64, 77.) In *Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, 484, for instance, the court explained the "holding of *D'Amico* appears entirely sound on its facts; and this court has recently applied the decision where credible admissions on deposition were contradicted only by self-serving declarations of a party. . . . [¶] . . . We do not interpret the decision, however, as saying that admissions should be shielded from careful examination in light of the entire record. A summary judgment should not be based on tacit admissions or fragmentary and equivocal concessions, which are contradicted by *other* credible evidence." (Italics added; *Scalf v. D.B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1524-1525 ["While the *D'Amico* rule permits a trial court to disregard declarations by a party which contradict his or her own discovery responses (absent a reasonable explanation for the discrepancy), it does not countenance ignoring other credible evidence that contradicts or explains that party's answers or otherwise demonstrates there are genuine issues of factual dispute."]; *Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078, 1089 [*D'Amico* "merely reinforces the principle that neither a party's deposition testimony . . . constitute[s] 'incontrovertible judicial admissions' of a fact that bar the party from introducing other evidence that controverts the fact."].)

Contrary to Gerloni's position, her admissions in deposition were not equivocal, fragmentary or taken out of context. Moreover, in asserting she submitted *other* evidence that raised triable issues of fact notwithstanding her admissions, she relies principally on

her declaration. To defeat summary judgment, of course, the "other" evidence had to be something other than her disregarded declaration.

Gerloni also asserts other portions of her deposition testimony show Dr. Zanetti "led [her] to believe" she was a partner and owner of Transgenix. She cites testimony that in 1997 she and Dr. Zanetti began discussing the formation of a company, they looked for laboratory space, and a business plan was drafted that included her as director "in charge of the science," but she did not recall ever discussing the draft with him; in a discussion among her, Dr. Zanetti and another person, "I remember Transgenix being brought up as . . . a collaboration between us as opening the company," but "I don't remember the specific matter of discussion"; "I remember a lot of brainstorming . . . about the future, about the development, about going ahead in a direction, Transgenix was part of it"; she thought she was a founder of Transgenix "because we started Transgenix together"; she did not recall what words he used, but "in some way, he made me believe" "I was the owner of the company"; "he made me believe that we were . . . starting a company together," and in "[m]y opinion, if you start something together from scratch, that could mean that you own part of the company."; he told her that "[i]f the technology would work" they were going to be "billionaires or millionaires"; and she thought she would receive money from him, although she had no idea how much.

Additionally, Gerloni testified she lacked knowledge about intellectual property, and thus she "was thinking [Dr. Zanetti] was taking care of that"; she did not see Transgenix's entire business plan, but she trusted Dr. Zanetti to protect "my absolute best interest"; she had no idea what it would cost to start a company, but she thought funds

would come from "outside investors" rather than herself; Dr. Zanetti went to "a biotech company up in the Bay Area to . . . make a presentation in order to get them interested in putting some money in the company"; and when "Transgenix was . . . started, my understanding was that there was profit for . . . everybody involved in the company," but "I didn't have a quantification, and that was another thing that I thought Dr. Zanetti . . . would take care, and I was trusting that he would have covered my interest."⁸

When a moving defendant has established a prima facie case in his or her favor,⁹ the plaintiff "must produce substantial responsive evidence sufficient to establish a triable issue of material fact on the merits. . . . [Citations.] For this purpose, responsive 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." (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 162-163.) "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." (*Lidow v. Superior Court, supra*, 206 Cal.App.4th at p. 356.)

⁸ Gerloni's first deposition was taken on September 8, 2006. Her separate statement also cites testimony from this session, in which she admitted she did not recall Dr. Zanetti telling her she would be a director of Transgenix, whether she attended any directors' meeting, and even whether there ever was a directors' meeting. She also testified, "Dr. Zanetti mentioned to me that he wanted to open a biotech company and I would have a key role in it."

⁹ Gerloni does not dispute that Dr. Zanetti made a prima facie showing of entitlement to judgment as a matter of law.

"One of the essential elements of an enforceable contract is mutual consent. [Citation.] For consent to be mutual, the *parties must all agree on the same thing in the same sense*. [Citations.] "The existence of mutual consent is determined by objective rather than subjective criteria, the test being what the outward manifestations of consent would lead a reasonable person to believe." [Citation.] "If there is no evidence establishing a manifestation of assent to the "same thing" by both parties, then there is no mutual consent to contract and no contract formation.'" (*Bowers v. Raymond J. Lucia Companies, Inc.* (2012) 206 Cal.App.4th 724, 732-733 (*Bowers*), italics added.)

On these facts, no jury could reasonably find mutual consent. Gerloni's other testimony pertains to her subjective beliefs and thoughts on the matter. In determining the issue of mutual assent, however, "a party's 'subjective intent, or subjective consent, . . . is irrelevant.'" (*Steward v. Preston Pipeline, Inc.* (2005) 134 Cal.App.4th 1565, 1587.)

Moreover, " 'for acceptance of a proposal to result in the formation of a contract, the proposal "must be sufficiently definite, or must call for such definite terms in acceptance, that the performance promised is reasonably certain." [Citation.] A proposal " 'cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain. [¶] . . . The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.' " [Citation.] If, by contrast, a supposed "contract" does not provide a basis for determining what obligations the parties have agreed to, and hence does not make possible a determination of whether those agreed obligations have been breached, there is no

contract.' [Citation.] 'Whether a contract is certain enough to be enforced is a question of law for the court.' " (*Bowers, supra*, 206 Cal.App.4th at p. 734.)

Likewise, a jury could not reasonably find in Gerloni's favor on the certainty element. Her evidence does not suggest any meeting of the minds on the material terms of any agreement, and thus issues of breach and remedy are not capable of proof.¹⁰

The complaint's fraud claim is not for actual fraud, but for constructive fraud based on the breach of a fiduciary duty Dr. Zanetti supposedly owed Gerloni.

"Constructive fraud consists: [¶] 1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; or, [¶] 2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud." (Civ. Code, § 1573.)

Even if there was arguably a fiduciary relationship, which appears doubtful (see *Zumbrun v. University of Southern California* (1972) 25 Cal.App.3d 1, 13 ["The mere placing of a trust in another person does not create a fiduciary relationship."]), the fraud claim is also based on supposed promises Dr. Zanetti made to her, and again, she did not

¹⁰ Gerloni's separate statement also cites the declaration of Thomas Antorietto, Sr. (Antorietto), which he filed in *his* action against Dr. Zanetti. Antorietto's declaration states he was a UCSD employee and involved in Dr. Zanetti's efforts to license his patents. To any extent the declaration was admissible in this action, it does not aver Antorietto had any knowledge of promises Dr. Zanetti made to Gerloni or the material terms of any agreement.

raise a triable issue of material fact on the issue. Summary judgment in his favor was proper.¹¹

III

Leave to Amend

Alternatively, Gerloni contends the court abused its discretion by denying her motion for leave to amend the complaint to strengthen allegations of individual harm caused by Dr. Zanetti's alleged promises. Again, however, her individual claims, no matter how sufficiently alleged, are untenable given her admissions in deposition testimony and the lack of other competent evidence to raise a triable issue of material fact.

DISPOSITION

The judgment is affirmed. Dr. Zanetti is entitled to costs on appeal.

McCONNELL, P. J.

WE CONCUR:

BENKE, J.

HUFFMAN, J.

¹¹ The same conclusion applies to the claims for breach of fiduciary duty and constructive trust. We are not required to consider Dr. Zanetti's argument the complaint was time-barred.