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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

EVELYN ZARATE,

Plaintiff and Appellant,

v.

KATHERINE V. MORGAN et al.,

Defendants and Respondents.

H035253

(Santa Clara County

Super. Ct. No. CV115638)

Plaintiff Evelyn Zarate brought this action seeking damages for personal injuries she alleged were caused by the negligent operation of a vehicle driven by defendant Katherine V. Morgan and owned by defendant Araceli Morgan. Defendants asserted as an affirmative defense that the parties had entered into an enforceable settlement agreement. The trial court sustained that defense after granting defendants' motion to try it separately from the main action. The court entered a judgment directing plaintiff to furnish a signed release upon defendants' furnishing checks in specified amounts. On appeal, plaintiff contends that (1) no enforceable agreement was formed because defendants' insurer did not unconditionally accept plaintiff's settlement offer; (2) no agreement was formed because plaintiff did not furnish the contemplated consideration for defendants' promise to pay; and (3) the trial court violated plaintiff's right to trial by jury when it decided these issues without a jury.

We find no error, and affirm.

BACKGROUND

According to the complaint, plaintiff was injured on August 1, 2007, when a car driven by defendant Katherine V. Morgan struck the car in which plaintiff was riding. The Morgan car was owned by defendant Araceli Morgan and was insured by Farmers Insurance Exchange, or a related entity (Farmers), under a policy affording \$25,000 maximum liability coverage per person. Plaintiff conceded below that this was a “213 case” because she owned the car in which she was riding, and she had not secured liability insurance. This had the effect of precluding the recovery of “non-economic losses.”¹

On August 15, 2007, Attorney Paul Kemp wrote to Farmers informing them that his office had assumed plaintiff’s representation from another law office. The letter stated among other things that plaintiff had been “working as a dental assistant” for a specified employer “for almost three years,” and was now “on disability.” Kemp asked to be apprised of the limits of liability on the applicable policy.

On August 21, Farmers senior adjuster Lisa Le wrote to Kemp advising him that the defendants policy afforded a maximum coverage of \$25,000 per person for bodily injury. She requested various materials including “[p]roof of liability insurance for Prop 213 requirements.” By September 28, plaintiff’s counsel had apparently conceded

¹ Proposition 213, adopted in 1996, enacted Civil Code section 3333.4, which disqualifies the claimant in a vehicular injury case from recovering “non-economic losses” if he or she “was the owner of a vehicle involved in the accident and the vehicle was not insured as required by the financial responsibility laws of this state.” (Civ. Code, § 3333.4, subd. (a)(2).) It further provides that where this disqualification applies, “an insurer shall not be liable, directly or indirectly, under a policy of liability or uninsured motorist insurance to indemnify for non-economic losses of a person injured as described in subdivision (a).” (*Id.*, subd. (b).)

that no such proof could be provided; on that date Le made a notation in her log stating that as to plaintiff, “Prop 213 applies.”

On October 15, Kemp wrote to a Farmers representative, “Our client herein demands the policy limits of your insured, with the provision that your insured sign an Affidavit that she was not covered under any excess or umbrella coverage at the time of the subject accident.” He stated that he was enclosing “copies of Evelyn Zarate’s first set of medical bills, which total \$23,990.95.” He concluded, “We are still waiting for the detailed breakdown of the second set of bills, however we have enclosed the billing statement for this amount which totals \$42,535.15, which is more than sufficient documentation for you to offer your \$25,000 policy limits.” He enclosed a statement from O’Connor Hospital dated August 23, 2007, stating an “amount due” of \$42,535.15.

On October 19, 2007, after independently confirming that plaintiff had an outstanding hospital bill of \$42,535.15,² Le wrote to Kemp, “This will confirm our acceptance of your policy limit demand. This shall include any and all liens, including any hospital lien, Medi-[C]al lien and/or attorney lien. Please confirm in writing that your office will handle all such liens. [¶] I have forwarded your affidavit to my insured to sign confirming there is no excess insurance coverage available. I will send it to you as soon as I receive it. For your convenience, I am including the settlement release with this letter.” The enclosed release included the recital that it was given “[f]or and in consideration of the sum of Twenty Five Thousand Dollars (\$ 25000.00), RECEIPT OF WHICH IS ACKNOWLEDGED.”

² Le’s log includes the following entry dated October 19: “Called Daughters of Charity Health Systems, 1-866-899-9626 and verified that the \$42,535.15 bill is for date of service 8/2/07 - 8/4/07. Confirmed that the hospital bills are outstanding and not paid by any insurance.”

On October 31, 2007, Le mailed Kemp the affidavit he had requested, signed by Katherine Morgan, attesting to the absence of excess liability insurance. Le requested written confirmation concerning the existence or nonexistence of “an attorney lien from your client’s prior attorney.”

A few days later, Farmers received a notice from the Department of Health Care Services (Department) of a Medi-Cal lien in plaintiff’s case. On November 12, 2007, Le wrote to Kemp stating that Farmers had been “placed on notice of a Medi-[C]al lien,” a copy of which she enclosed. She wrote, “We will need to name Medi-[C]al on the settlement check when a settlement is reached. We are still waiting for confirmation from you regarding whether there is an attorney lien from the prior attorney.” Kemp replied on November 16, writing, “we have been working with Medi-Cal in order to determine the amount of their lien Once Medi-Cal provides us with the amount of their lien, we will provide you with written documentation of that amount and request that Farmers issue a separate check to Medi-Cal.”

On November 26, 2007, according to Farmers’ logs, Le spoke to a “Dan,” presumably Attorney Dan Schaar of Kemp’s office, about the potential effects of the Medi-Cal lien. According to her entry, “I told him at the time we tendered the \$25K limit, it was based on my understanding that the bill is in excess of \$60K and cl[ai]m[an]t is responsible for entire bill. Now that we know Medi-[C]al paid bills, we will need to know that [*sic*] the Medi-[C]al lien is. *We do not owe amounts that Medi-[C]al write-off.*^{3]} He agreed although he said she may have out of pocket expenses and ongoing

³ This appears to be the first allusion in the record to the rule of *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635, 641, which holds that a personal injury plaintiff is not entitled to recover for medical bills to the extent the biller plaintiff has discharged the plaintiff from liability as a condition of receiving payment from a third party such as Med-Cal. As will appear, the breakdown that occurred here is at least partly attributable to the failure of Farmers’ agents to distinguish that principle from the quite distinct

treatment. I told him if Medi-[C]al lien comes in at \$25K or above then we're ok with the settlement agreement. But if the lien comes in at less than \$25K, then *I am going to need for him to itemize the out of pocket p[ay]m[en]ts. He agreed.*" (Italics added.) A log entry on January 11, 2008, reports that "Dan" stated he was "working on Medi-[C]al lien issue." An entry by Le of that same date, entitled "Updated Claim Review," includes the statement that at the time she offered the policy limits, plaintiff's attorney had "represented . . . that she has no insurance and her bills are unpaid." Now that Medi-Cal was known to have paid some bills, "[w]e . . . need to document how much the Medi-[C]al lien is and if they will be paying less than \$25K after reduction. *Since this is a Prop 213 case, we only owe the actual amount paid.*" (Italics added; see fn. 3, *ante.*)

On April 22, 2008, Schaar sent an e-mail to Farmers adjuster Kathleen Kealy stating, "Our office is finally at a stage to settle this case. I have been speaking with Medi-Cal about the final lien amount, and they have yet to send me their final lien amount. However, I have spoken to the hospital where treatment occurred and they have informed me of what Medi-Cal has covered. [¶] As such, we will be sending you a signed copy of your release form with a letter on who the settlement check should be made out to."

On May 23, 2008, the Department sent Kemp a message enclosing "[a]n itemization of payments made by the Medi-Cal program for medical services related to the beneficiary's injury." "Paid Services" for plaintiff were reported to total \$2,980.81. The enclosed itemization showed that the Department had paid four providers a total of seven payments, the largest of which was \$2,750.00 to "O'Connor Hosp."

On May 29, 2008, Kemp wrote to a Farmers representative stating that he was enclosing "the final lien amount on Evelyn Zarate from the Department of Health Care

limitation on damages arising from Prop 213 and from the agreed necessity of discharging any "liens" from the settlement amount. (See fn. 1, *ante.*)

Services which totals \$2,980.81.” He requested that Farmers “draw two checks”: One payable to the Department in the amount of \$2,235.61 , which was the lien amount less a 25 percent reduction for attorneys fees; and one for \$22,764.39, representing the remainder of the \$25,000 total settlement amount. He concluded, “If you wish to send the Department of Health Care Services [check] directly to them, please do me the courtesy of sending me a copy of your letter and a copy of your check.”

On June 12, 2008, Farmers adjuster Kathleen Kealy attempted to send two faxes to Kemp. The first was transmitted to a phone number other than Kemp’s, and was presumably not received by him. It stated that she had prepared checks in the amounts requested by him but could not forward them without a signed release from plaintiff, which had not yet been furnished. Another copy of the release form was attached, along with copies of two checks drawn in conformity with Kemp’s May 29 letter. About a half hour later, according to Kealy, she sent the second fax, this time to the correct number.⁴ It stated that the matter appeared to be a “Prop 213” case and that “[b]ased on Prop 213, Ms. Evelyn Zarate’s recovery is \$2,980.81—the Medi-[C]al lien amount.” This message was apparently accompanied by a new release form reciting that it was given for consideration of \$2,980.81, receipt of which was acknowledged.

Not surprisingly, Kemp took exception to this turn of events. On June 17, 2008, he wrote Kealy, declaring the second message of June 12 a “breach of Farmers’ original agreement to pay the policy limits” and “therefore” a “reject[ion]” of plaintiff’s policy limits demand. He wrote that he would file suit forthwith, advising Kealy to notify her

⁴ Kealy testified that she was not aware of the erroneous number on the earlier fax until it was brought to her attention in cross-examination. Although this number supports an inference that the message was misdirected and not received by Kemp, we see no further evidence on that subject.

insured of the suit and “the fact that you rejected the policy limit demand, thus exposing her to personal excess liability.”

On June 20, 2008, Kealy wrote to Kemp asserting that the “previous adjuster[’s]” offer of the policy limits was “based on the O’Connor Hospital billing of \$42,535.25” and “contingent upon any liens associated with your client and this accident.” She suggested that no “final lien amount” had yet been provided, so that the only number Farmers had to work with was \$2,980.81. This amount, she asserted, “supersede[d]” the medical expense documentation originally supplied by Kemp. She stated that in the absence of additional documentation, and in view of Prop 13, “this case has a current value of \$2,980.81.” However she invited him to submit records of any “more specials that need to be considered,” i.e., economic losses not yet documented.

On June 24, 2008, Kemp wrote back to Kealy stating that he “disagree[d] with the contents of your letter, especially your comment, ‘*The offer was contingent upon any liens associated with your client and this accident.*’ ” He went on to assert that her “faxed correspondence dated June 12, 2008, breached Farmers’ agreement to pay the policy limits pursuant to Lisa Le’s letter of October 19, 2007,” a copy of which he enclosed. He stated that “[a] lawsuit ha[d] been filed against your insured” and went on to obliquely threaten Farmers with liability for bringing about a judgment against their insured in excess of policy limits.

Meanwhile, on June 23, plaintiff had filed a complaint. It initially named only Katherine V. Morgan, the driver of the insured vehicle, but was apparently later amended to name Araceli Morgan, the owner. Attorneys employed by Farmers filed an answer on behalf of both defendants. Their sixth affirmative defense asserted that “plaintiff(s) and defendants, on October 19, 2007, entered into a contract to settle the entire action confirmed in writing in a letter dated October 19, 2007. Defendants remain ready to perform their obligations pursuant to the contract. Plaintiff(s) refuses to complete the

contract by dismissing this action and accepting the tender of the settlement proceeds as agreed.”

Each side filed a jury demand.

The matter was apparently scheduled for trial to commence September 28, 2009. Before it was assigned to a trial department, defendants filed a motion under Code of Civil Procedure section 597 (§ 597) to bifurcate their sixth affirmative defense from the main action and try it separately. The matter was assigned to a trial department, where the judge granted the motion to bifurcate. Counsel for plaintiff asserted a right to try the defense to a jury “because I think it's a factual dispute.” The trial court proceeded to try the defense without a jury. At the conclusion of the hearing it found that the parties had entered into an enforceable settlement agreement, and directed defense counsel to prepare a judgment.

Judgment was entered on November 24, 2009. Plaintiff filed a motion for new trial, arguing that (1) she had been entitled to a jury because the defense involved “clear factual disputes”; (2) no settlement agreement was reached because Farmers’ acceptance was contingent upon conditions that were not satisfied; and (3) various items of evidence were inconsistent with a belief by the parties that they had entered a binding agreement. The trial court denied the motion. This timely appeal followed.

DISCUSSION

I. *Jury Trial*

Plaintiff contends that the trial court infringed her right to a jury trial by trying the affirmative defense of settlement without a jury. As defendants point out, this court rejected a very similar contention in *Hastings v. Matlock* (1985) 171 Cal.App.3d 826. That was a suit by prospective buyers under a real estate sales contract that fell through after they discovered alleged defects in the property. The buyers amended their complaint to seek specific performance of a settlement agreement they contended the

parties had reached during pretrial proceedings. After a separate trial of this defense, the trial court decreed specific performance of the settlement agreement. On appeal the defendants charged error in the refusal of their jury demand. This court held that the cause of action seeking to enforce the settlement was in substance a claim for specific performance; as such it was not triable to a jury at common law; therefore it was not triable to a jury, as a matter of right, under the law of our state. (*Id.* at p. 835.) The same conclusion followed, the court held, to the extent that the buyers had sought rescission of the sale contract. (*Id.* at pp. 835-836.) In both respects, “the gist of the action . . . was equitable in nature, and . . . the court committed no error in denying . . . a jury trial.” (*Id.* at p. 836; see also *Walton v. Walton* (1995) 31 Cal.App.4th 277, 287-288; *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 412.)

We see no reason to reach a different conclusion here. Certainly plaintiff offers none. Her argument in this court, like her entire argument below, misapprehends the nature of the governing inquiry, which is whether the *proceeding* before the trial court is in the nature of a matter “in which there was a right to a jury trial at common law at the time the Constitution was first adopted.” (*Crouchman v. Superior Court* (1988) 45 Cal.3d 1167, 1175; see *Jefferson v. County of Kern* (2002) 98 Cal.App.4th 606, 613-614 [jury right exists “when a current case is of the same ‘class’ or ‘nature’ as one which existed in 1850”].) The closest plaintiff comes to acknowledging this test is to emphasize that *her complaint* asserted only a tort claim for damages—a matter, of course, in which the parties were traditionally entitled to trial by jury. (*Windsor Square Homeowners Assn. v. Citation Homes* (1997) 54 Cal.App.4th 547, 551 [“A negligence action for damages is an action at law and is encompassed by the constitutional jury guaranty.”]) But the trial court did not reach plaintiff’s damage claim because it elected to first try defendant’s sixth affirmative defense. This it was certainly empowered to do. (See Code Civ. Proc., § 597; *Kreling v. Walsh* (1947) 77 Cal.App.2d 821, 835-836; *Gregory v.*

Hamilton (1978) 77 Cal.App.3d 213, 217-218.) And if that defense was equitable in nature, so that no jury trial attached at common law, the court was fully entitled to try it without a jury and to render conclusive findings, as trier of fact, on all issues essential to the defense. (*Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665, 671 [“[I]n a case involving both legal and equitable issues, the trial court may proceed to try the equitable issues first, without a jury . . . , and . . . if the court’s determination of those issues is also dispositive of the legal issues, nothing further remains to be tried by a jury.”]; see *Cassin v. Nicholson* (1908) 154 Cal. 497, 500 [occupant’s attempt to secure specific performance of promise to convey occupied land, which had been determined against him in a separate action, could have been pleaded as an affirmative defense in present action by title holder and tried first without a jury]; *Windsor Square Homeowners Assn. v. Citation Homes, supra*, 54 Cal.App.4th 547, 558 [plaintiff’s right to jury on underlying claim did not bar trial court from trying defense of res judicata separately without a jury].)

The question thus becomes whether the sixth affirmative defense sounded in law or equity. The gist of the defense was that plaintiff had agreed to a settlement to which defendants sought to hold her. They alleged that the parties had “entered into a contract to settle the entire action,” that defendants were ready to perform, but that plaintiff “refuse[d] to complete the contract by dismissing this action and accepting the tender of the settlement proceeds as agreed.” They did not explicitly pray for specific performance, but implicit in the foregoing language was the desire that plaintiff be directed to “complete the contract.”⁵ The essence of the defense, in short, was that the settlement agreement should be enforced, obviating further proceedings on plaintiff’s tort claim. This was certainly the tenor of the judgment, which was not merely declaratory

⁵ Nor did defendants pray for damages. Indeed we cannot easily conceive how a compensatory remedy could have been fashioned.

but directory; it directed plaintiff to “execute the release and settlement agreement” and transmit the same to defendants, while defendants were directed to “deliver . . . two settlement checks in the total amount of \$25,000.00,” as further specified. At common law, such a decree was available only in a proceeding in equity, to which no jury right attached. (*Gregory v. Hamilton, supra*, 77 Cal.App.3d 213, 219; see *Massie v. Watts* (1810) 6 Cranch 148, 157 [action to compel conveyance of land; Kentucky practice of “call[ing] a jury to ascertain the facts in chancery [causes]” criticized as “incorrect”].) It thus appears that the sixth affirmative defense was not a matter in which the parties had a right to jury trial.

Plaintiff does not coherently address any of these points. Instead she conflates the issues we have just discussed with the quite distinct question of whether a particular point of controversy constitutes an issue of fact, which must be determined by a trier of fact, or one of law, to be tried in all cases by the court. Thus she asserts, quoting an unidentified source, that her case “involved ‘a genuine dispute about whether a particular act constituted acceptance,’ which is a question for the jury.” Similarly she cites *Guzman v. Visalia Community Bank* (1997) 71 Cal.App.4th 1370, 1376 (*Guzman*), for the proposition that “if there is a genuine dispute about whether a particular act constituted acceptance, the question is for a jury.” That language does not appear in that case, which in any event has nothing to do with the question before us. The court there was concerned with the distinction just noted between questions of law and disputed issues of *fact*, for purposes of which “[t]he interpretation of the purported acceptance or rejection of an offer is a question of fact.” (*Guzman, supra*, at p. 1376, citing 1 Corbin on Contracts (rev.ed.1993) § 3.30, p. 477.) That distinction was relevant there because it determined the applicable *standard of appellate review*—not because it established any party’s right to jury trial. Nothing in the decision supports plaintiff’s claim of error here.

Certainly disputes over contract formation often raise issues of fact. Such issues must indeed be resolved by a jury, if a party so requests, provided they arise in a matter—such as a suit for damages—to which the right of jury trial pertains. But the matter before the court was, as we have said, a proceeding for specific performance. In such a case it is for the court to “determine the existence of the agreement.” (*Gregory v. Hamilton, supra*, 77 Cal.App.3d 213, 220.) The necessity that it do so “ ‘does not itself transform the action into one at law.’ ” (*Rosenthal v. Great Western Fin. Securities Corp., supra*, 14 Cal.4th 394, 412, quoting *Hastings v. Matlock, supra*, 171 Cal.App.3d 826, 835.)

Plaintiff was not entitled to a jury trial on defendant’s affirmative defense seeking to specifically enforce the parties’ settlement agreement.

II. Offer and Acceptance

Plaintiff contends that the trial court erred in concluding that a binding settlement agreement was reached, because the facts before the court did not establish that Farmers effectively accepted plaintiff’s settlement offer. According to plaintiff, Farmers’ response to her settlement offer constituted only “a conditional acceptance, which is considered a counteroffer under California law.” (Citing Civ. Code, § 1585.) This argument is facially inadequate to establish error because even if we accept its premise—that Farmers’ response was a counteroffer—we must infer a finding in support of the judgment that *plaintiff accepted* the counteroffer. Since plaintiff has made no appellate demonstration to the contrary, her argument on this point must fail.

The first principle of appellate review is the presumption of correctness: “ ‘ “[A] judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.” ’ (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Conservatorship of Rand* (1996) 49 Cal.App.4th 835, 841.)” (*In re Guardianship of K.S.* (2009) 177 Cal.App.4th 1525, 1529-1530.) The rule cited by plaintiff—that a

conditional acceptance operates as a counteroffer—cannot by itself establish that no contract was formed. It only means that Farmers’ response was not *by itself* effective to form a contract. But a contract would still arise if the posited counteroffer were accepted by the original offeror, i.e., plaintiff. (*Beatty v. Oakland Sheet Metal Supply Co.* (1952) 111 Cal.App.2d 53, 61 [“if a counter proposal is accepted by the original offeror, a binding contract is concluded”]; *Landberg v. Landberg* (1972) 24 Cal.App.3d 742, 750 [“qualified acceptance . . . is a new proposal or counteroffer which must be accepted by the former offeror now turned offeree before a binding contract results”].)

Plaintiff’s argument thus fails to close the analytical gap between its premise (Farmers’ response was a counteroffer) and its conclusion (the trial court erred by finding a contract). It begs the critical question whether the trial court could properly find that plaintiff accepted the posited counteroffer. The closest plaintiff comes to acknowledging this question is to state, “Because the terms proposed in the offer were not met, *and Mr. Kemp* [plaintiff’s counsel] *did not accept the new-proposal* embodied in [Farmers’] counter-offer, it cannot be said that the fundamental contractual requirements of mutual assent supported by offer and objective manifestations of acceptance took place and resulted in the formation of a binding contract.” (Italics added.)

Plaintiff makes no attempt to substantiate the assertion we have italicized above. Her account of the relevant facts is devoted almost exclusively to the words and deeds of *defendants’* agents. But assuming a counteroffer was made, as plaintiff insists, the focus must shift to the words and conduct of *plaintiff’s* agents. On that subject plaintiff is almost entirely silent.

This silence is sufficient ground, by itself, for rejecting her argument. The presumption of correctness “means that an appellant must do more than assert error and leave it to the appellate court to search the record and the law books to test his claim. The appellant must present an adequate argument including citations to supporting

authorities and to relevant portions of the record. [Citations.]” (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2000) 154 Cal.App.4th 547, 557.) Moreover, in the absence of a contrary indication in the record, we must *infer* in support of the judgment that the trial court *found as a fact* that any counteroffer Farmers made *was* accepted by plaintiff. (See *ibid.* [“where the record is silent the reviewing court will indulge all reasonable inferences in support of the judgment”].) And such inferred findings in turn “must be sustained” on appeal “if they are supported by substantial evidence, even though the evidence could also have justified contrary findings.” (*Ibid.*) Not is it our obligation to trawl the record for relevant evidence. “[A]n appellant who challenges a factual determination in the trial court . . . must marshal *all* of the record evidence relevant to the point in question and affirmatively demonstrate its insufficiency to sustain the challenged finding. [Citation.]” (*Ibid.*; see *Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 738.) Plaintiff’s briefs are facially insufficient to satisfy this requirement.

Under these circumstances it is not our duty to consider the sufficiency of the evidence to sustain the trial court’s implied findings. Nonetheless the record appears to provide ample support for a finding that plaintiff’s counsel accepted the posited counteroffer. According to plaintiff’s argument, Lisa Le’s letter of October 19, 2007, constituted a conditional acceptance—and thus a counteroffer—because “it was subject to the conditions of any hospital, medical, and attorney liens.” (Italics and underlining omitted.) And this was indeed the only arguable condition expressed in that letter: Le wrote, “This will confirm our acceptance of your policy limit demand. *This shall include any and all liens*, including any hospital lien, Medi-[C]al lien and/or attorney lien. Please confirm in writing that *your office will handle all such liens.*” (Italics added.) The question then is whether plaintiff accepted this condition. On November 16, Kemp wrote to Le, “we have been working with Medi-Cal in order to determine the amount of their lien Once Medi-Cal provides us with the amount of their lien, we will provide you

with written documentation of that amount and request that Farmers issue a separate check to Medi-Cal.” This letter is ample evidence that Kemp accepted the condition expressed in Le’s October 19 letter. The trial court was thus entitled to conclude that a contract was formed no later than November 16, 2007. We must therefore reject plaintiff’s contention that the trial court could not find the objective manifestations of mutual assent on which a contract depends.

Plaintiff cites numerous comments by Farmers agents to the effect that the settlement was “contingent” on satisfactory documentation of liens, medical expenses, or other matters. But the trial court was entitled to conclude, and presumptively did conclude, that these comments were immaterial. First, if a contract had already been formed, then later unilateral attempts by either party to vary its terms were ineffectual. At most they might have given rise to an opportunity by one party or the other to declare the contract breached, and to either sue on it or seek its rescission. Second, unilateral statements by Farmers about the effect of the agreement—particularly those found only in its own records, or reflected only in the testimony of its agents—have little if any bearing on the question of contract formation, which depends upon *objective manifestations* of assent, not subjective beliefs and understandings. Subjective beliefs may be relevant to questions of interpretation or to support a claim of mistake or fraud, but they have little if any bearing on the question put forth by plaintiff, which is whether the dealings of the parties amounted to an offer and acceptance. On that question plaintiff has failed to demonstrate error.

III. *Failure of Consideration*

Plaintiff’s second challenge to the finding of a settlement agreement proceeds essentially as follows: (1) A valid contract requires an exchange of consideration; (2) the consideration contemplated here for Farmers was that plaintiff would provide an executed release of liability in the form supplied by Farmers; (3) plaintiff never provided

the requested release; (4) there was thus no exchange of consideration; and (5) therefore no contract was formed.

The fourth of these propositions is erroneous, and fatally infects the conclusion. Plaintiff is of course correct to assert that “the exchange of consideration is an essential prerequisite for the formation of an enforceable contract.” (See Civ. Code, § 1550.) But plaintiff mistakes the nature of “consideration,” essentially conflating it with “performance.” Civil Code section 1605 defines “good consideration” as “[a]ny benefit conferred, or *agreed to be conferred*, upon the promisor . . . or any prejudice suffered, or agreed to be suffered, by [the promisee] . . . as an inducement to the promisor.” A binding contract may thus consist entirely of an exchange of *promises*. Where the consideration for each party’s promise is a promise by the other party, the contract is said to be “bilateral,” and until the promises are performed, they are said to be “executory.” This was the nature of the contract here: Farmers promised to pay an agreed sum, and plaintiff agreed to release Farmers’ insureds from further liability. Each party’s promise undoubtedly furnished good consideration for the other party’s promise. The contract therefore did not fail for want of consideration.

It is true that in an executory bilateral contract, a failure by either party to *perform* its promise, when the time for performance arrives, may constitute a “failure of consideration,” supplying grounds for an affirmative claim for breach, a defense to the nonperforming party’s claim, or rescission. (See Civ. Code, § 1689, subs. (b)(2), (4) [failure of consideration as ground for rescission].) But such a failure does not vitiate the contract *ab initio*. (See *Taliaferro v. Davis* (1963) 216 Cal.App.2d 398, 411 [“Failure of consideration does not . . . vitiate the contract from the beginning; until rescinded or terminated a contract once in effect remains in effect.”].) And it should go without saying that a party cannot rely on his own nonperformance to vitiate an otherwise valid contract. That is essentially what plaintiff seeks to do here.

DISPOSITION

The judgment is affirmed.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.