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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

CIGAL CONCEPTS, INC., an Illinois Corporation,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 17 CH 16546
)	
TRUE RCM SOLUTIONS, INC., an Illinois Corporation,)	Honorable
)	Caroline Kate Moreland,
Defendant-Appellee.)	Judge, presiding.

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* Affirmed in part, reversed in part, remanded. The circuit court properly granted partial summary judgment for defendant to the extent plaintiff sued for breach of a contract to which plaintiff was neither a party nor in privity with a party. However, the circuit court erred in granting summary judgment to the extent plaintiff alleged that defendant breached a new contract to which both plaintiff and defendant were parties.

¶ 2 On December 15, 2017, plaintiff, Cigal Concepts, Inc. (“Cigal”) filed a two-count complaint against defendant, True RCM Solutions, Inc. (“True RCM”). Count I sought a

declaratory judgment that (1) True RCM had agreed in April 2016 to modify a contract originally formed with Cigal in November 2015 to, *inter alia*, extend the agreement through December 2018, and that (2) True RCM was liable to Cigal under a “buy-out” provision for terminating the modified contract early without cause. Alternatively, count II alleged that True RCM’s stated intention not to honor the extended term of the contract amounted to an anticipatory breach. Cigal now appeals from an order of the circuit court granting summary judgment in favor of True RCM on the grounds that the parties were never in privity, and thus no valid contract existed between them. On appeal, Cigal argues that the court erred in granting summary judgment because there was a genuine issue of material fact as to whether the parties were in privity on the November 2015 contract. Alternatively, Cigal argues that summary judgment was improper where Cigal stated a claim that it was in privity with True RCM based on a new contract that was formed in April 2016. For the following reasons, we affirm in part, reverse in part, and remand.

¶ 3

I. BACKGROUND

¶ 4 Mubeen Saleem is the sole owner of True Technologies, Inc. (“True Technologies”), a medical billing and technology company that also does business under the name TrueBilling. Sometime around 2015, True Technologies identified an opportunity to win a contract to service Integrated Rehab Consultants (“IRC”), a large medical care provider. In order to service IRC, Saleem contacted numerous business associates about performing various services for True Technologies as its “vendors/independent contractors.” One such associate was Tracy Bostrom, the owner of Cigal.

¶ 5 In November 2015, Cigal and True Technologies entered into a written contract (“the November 2015 contract”) whereby Cigal would provide services to True Technologies in

connection with the IRC account. In exchange, True Technologies was to pay Cigal 1% of the collections True Technologies received from IRC. The term of the contract was to begin on January 1, 2016 and end on December 31, 2017. The contract provided that True RCM could terminate for cause if, among other reasons, Cigal did not achieve a “minimum Service Level Agreement of 20% revenue increase” for IRC. However, in the event that True Technologies were to terminate the contract without cause, True Technologies was required to pay Cigal a “buy-out” amount equal to the average fee Cigal received during the preceding three months multiplied by the number of months remaining on the contract. Additionally, the contract provided that “[n]either Party shall assign or transfer all or any part of its rights under this Agreement without the consent of the other Party” and that “[t]his Agreement may not be amended for any other reason without the prior written agreement of both Parties.”

¶ 6 On January 27, 2016, about four weeks after Cigal was supposed to begin performance under the November 2015 contract, Saleem incorporated True RCM, which is a separate entity from True Technologies. According to an affidavit submitted by Saleem, True RCM serviced IRC as a “vendor/contractor” of True Technologies but did not have any contractual agreement with either Cigal or IRC. Saleem also averred that Cigal never performed any work for True RCM. He testified consistently to the same at his deposition. Bostrom, on the other hand, claimed that True Technologies told her that True RCM was not a new entity but rather “just a name change,” a representation that Cigal did not learn was incorrect until well after it filed its complaint.

¶ 7 True Technologies became responsible for IRC’s billing on February 1, 2016. Shortly thereafter, True Technologies encountered problems in servicing IRC that resulted in Cigal performing extra work not contemplated in the November 2015 contract. Disputes arose between

the contracting parties, particularly over whether Cigal was entitled to additional compensation for the extra work and whether Cigal could achieve the 20% revenue increase to which it committed in the November 2015 contract. According to Cigal, Bostrom participated in an April 19, 2016 conference call to discuss these issues with True RCM officers Saleem, Mike McCauley, Patricia Kearnan, and Junaid Nawaz. After the call, in the early hours of April 20, 2016, Bostrom sent an email to Saleem and Nawaz stating in pertinent part, “Based on our most recent conversation, your transparency and my relationship with the two of you, I’m ready to meet you on nearly all points, please amend the contract as requested below and I’ll sign it.” Among the amendments Bostrom proposed were (1) an increase of Cigal’s base fee to 1.2% of amounts received from IRC, (2) elimination of the minimum Service Level Agreement, and (3) an extension of the contract for an additional year. On April 22, 2016, Nawaz responded “AGREED. We will update the contract ASAP.” Saleem, Kearnan, and McCauley were copied on Nawaz’s email.

¶ 8 Cigal was never sent a formal agreement memorializing these new terms. However, checks in the record show that Cigal began receiving 1.2% of the IRC collections on April 27, 2016. Saleem testified that, around that time, True RCM began billing IRC directly and paying Cigal its portion of the collections. Consistent with this testimony, the checks show that Cigal was paid by True Technologies from January 2016 to April 2016, but was thereafter paid by True RCM.

¶ 9 In or about July 2017, Nawaz met with Bostrom and informed her that True RCM was unhappy with Cigal’s performance. According to True RCM, Nawaz sent Bostrom a follow-up email on August 1, 2017 in which he further outlined “numerous service issues” and “True RCM’s overall dissatisfaction with Cigal.” On September 6, 2017, True RCM informed Cigal that it would not renew the November 2015 contract once it expired at the end of 2017.

¶ 10 On October 23, 2017, counsel for Cigal sent True RCM a letter alleging that True RCM had anticipatorily repudiated the extended term of the contract and demanding that True RCM submit to mediation as provided for in the contract. In response, counsel for True RCM refused mediation on the grounds that, *inter alia*, Cigal had not alleged a breach of the November 2015 contract. Specifically, True RCM contended that the contract did not contain an extended term because the April 2016 email exchange was insufficient to modify the contract.

¶ 11 On December 15, 2017, Cigal filed a complaint against True RCM in the circuit court seeking a declaratory judgment that “the agreed-upon modifications to the [November 2015 contract] are valid and enforceable, that TrueRCM has terminated the [contract] without cause, and that TrueRCM is obligated to pay Cigal for its early termination pursuant to a buy-out provision contained in the [contract].” Alternatively, Cigal raised a claim for breach of contract, again alleging that True RCM was liable under the buy-out provision for failing to honor the extended term of the contract.

¶ 12 True RCM filed a motion to dismiss on the grounds that, *inter alia*, Nawaz’s email agreeing to the proposed amendments was insufficient to modify the November 2015 contract. The circuit court denied the motion to dismiss, and True RCM then filed an amended answer to the complaint. Relevant here, True RCM admitted the allegations that “True RCM Solutions, Inc., f/k/a Truebilling (‘TrueRCM’), engaged plaintiff, Cigal Concepts, Inc.” to provide certain services and that “[t]he scope of services required from Cigal for that engagement were memorialized in a written Service Agreement” in November 2015. True RCM also admitted that, at some point, it began paying Cigal an increased fee of 1.2% of receipts from IRC. However, True RCM denied that it agreed to formally modify the contract either to increase Cigal’s fee or to extend the term.

Rather, True RCM contended that the April 2016 email exchange merely constituted “preliminary contract negotiations whereby all terms were not agreed to.” True RCM also denied that Nawaz had either actual or apparent authority to bind True RCM.

¶ 13 On September 6, 2018, True RCM filed a counterclaim that Cigal had breached the November 2015 contract by failing to adequately perform certain services and by failing to meet the 20% revenue increase contained in the Service Level Agreement provision. Cigal moved to dismiss the counterclaim on the grounds that True RCM was neither a party to the November 2015 contract nor “in privity with” the contract. In particular, Cigal noted that its contract was with True Technologies, not True RCM, and that it never consented to True Technologies assigning the contract as was required. Thus, Cigal concluded that True RCM lacked standing to bring a breach of contract claim.

¶ 14 True RCM filed a response arguing, among other things, that it was logically inconsistent for Cigal to sue for breach of contract while simultaneously contending that True RCM could not counter-sue because there was no contract between the parties. In reply, Cigal maintained that its position was not inconsistent because (1) True RCM’s counterclaim arose from an alleged breach of the November 2015 contract, to which True RCM was not a party, but (2) Cigal’s claims arose from the breach of a different contract that “consists of the terms of the [November 2015] agreement as adopted and modified by the parties’ email exchange” in April 2016. Following a hearing, the circuit court dismissed True RCM’s counterclaim on the grounds that True RCM was not a party to the November 2015 contract.

¶ 15 Thereafter, True RCM filed a motion for summary judgement, contending that there was no longer any dispute that Cigal and True RCM did not have a contractual relationship of any kind.

Cigal responded, again arguing that, although True RCM was not a party to the November 2015 contract, it was a party to a “new agreement” comprised of the same terms as the November 2015 contract with the amendments laid out in the April 2016 email exchange.

¶ 16 On May 20, 2019, the circuit court issued a written order granting summary judgment for True RCM. In so ruling, the court found that the November 2015 contract was formed between Cigal and True Technologies, not True RCM, and that there was no evidence that True Technologies had assigned the contract to True RCM. The court also found that “Cigal pled no cause of action or theory of recovery on the idea that the [April 2016] e-mails themselves constituted a binding contract between Cigal and True RCM that should be enforced separate and apart from the [November 2015] Agreement.” Rather, the court found that Cigal’s complaint only sought relief under the theory that the emails modified the existing November 2015 contract. Accordingly, the court stated that it would “not deny summary judgment based on the alleged merits of Cigal’s unpled claims or theories.”

¶ 17 Cigal filed a motion to reconsider, which the court denied. This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 On appeal, Cigal first argues that the circuit court erred in granting summary judgment where there was a genuine issue of fact as to whether the parties had a contractual relationship. Summary judgment is a drastic means of disposing of litigation and should be granted only where a party’s right to judgment is clear and free from doubt. *Hubert v. Board of Education of City of Chicago*, 2020 IL App (1st) 190790, ¶ 34. Summary judgment is appropriate only if the pleadings, depositions, admissions, and affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Dynak v. Board of Education of Wood*

Dale School District 7, 2020 IL 125062, ¶ 15. The purpose of summary judgment is not to try issues of fact, but to determine whether a triable issue of fact exists. *Gearhart v. Gearhart*, 2020 IL App (1st) 190042, ¶ 122. In determining whether there is a genuine issue of fact, a court must construe the pleadings and record strictly against the movant and liberally in favor of the nonmoving party. *Shannon Court Condominium Association v. Armada Express, Inc.*, 2020 IL App (1st) 192341, ¶ 11. A circuit court’s grant of summary judgment is reviewed *de novo*. *Dynak*, 2020 IL 125062, ¶ 15.

¶ 20 Here, we find no genuine dispute as to whether True RCM was party to the November 2015 contract, and by extension, any modification of that contract that occurred via the April 2016 email exchange. Notably, the November 2015 contract does not mention True RCM in any way, and instead identifies the parties as “Cigal Concepts, Inc.” and “True Technologies, Inc. (herein ‘Truebilling’).” It is also undisputed that True RCM did not even exist in November 2015, but rather was incorporated in 2016. Contracts formed before the existence of a corporation are not binding on the corporation unless later ratified, which is not what is alleged to have happened here. *Carollo v. Irwin*, 2011 IL App (1st) 102765, ¶ 35. Moreover, as Cigal itself asserted in the circuit court, “True Technologies could not validly assign its rights under the contract without Cigal’s consent. Cigal did not so consent and, therefore, there is no assignment and no privity.”¹ Accordingly, there is no doubt that True RCM was not a party to the November 2015 contract and the circuit court did not err in granting summary judgment to True RCM on that basis.

¹ Despite arguing before the circuit court that there was no assignment, Cigal now asserts in its briefs on appeal that True Technologies assigned the contract to True RCM “[a]t some point.” However, the part of the record Cigal cites for this assertion does not support its position. In any event, there is absolutely no evidence that Cigal gave written approval of the assignment, which was required under the November 2015 contract.

¶ 21 We are not persuaded by Cigal’s argument that a purported judicial admission made in True RCM’s answer to the complaint compels a different conclusion. As a general matter, a statement of fact that is admitted in a party’s pleading becomes a binding judicial admission by that party. *US Bank, National Association v. Avdic*, 2014 IL App (1st) 121759, ¶ 22. A judicial admission has the effect of withdrawing a fact from issue and eliminating the need for additional proof of that fact. *Nissan Motor Acceptance Corp. v Abbas Holding I, Inc.*, 2012 IL App (1st) 111296, ¶ 19. However, the doctrine of judicial admissions is not meant to penalize a party’s confusion or honest mistake. *North Shore Community Bank and Trust Co. v. Sheffield Wellington LLC*, 2014 IL App (1st) 123784, ¶ 126. Thus, a statement will be deemed a judicial admission only where it is a “deliberate, clear, [and] unequivocal statement by a party concerning a concrete fact within that party’s knowledge.” *In re Estate of Ivy*, 2019 IL App (1st) 181691, ¶ 64. Stated another way, a statement will not be considered a judicial admission unless the party making the statement “had no reasonable possibility of being mistaken.” *North Shore*, 2014 IL App (1st) 123784, ¶ 126.

¶ 22 Here, Cigal argues that True RCM admitted to a contractual relationship by admitting the allegation that “Defendant, True RCM Solutions, Inc., f/k/a Truebilling (“True RCM”), engaged plaintiff, Cigal Concepts, Inc. (“Cigal”), to provide certain billing and practice management services,” an arrangement that was “memorialized in a written Service Agreement.” However, we cannot say this “admission” was free from mistake or inadvertence, as it is evident that *both* parties mistakenly treated and referred to True RCM and True Technologies/Truebilling interchangeably in the early stages of this litigation. Indeed, the allegation itself leads to confusion because the record shows that “True RCM Solutions, Inc., f/k/a Truebilling” is not an single entity, but the names of two separate corporations, a distinction that is now at the heart of this case. It is therefore

entirely reasonable, as True RCM claims, that it was simply admitting that Truebilling/True Technologies had “engaged” Cigal to help it service IRC, a fact that has never been in dispute. See *North Shore*, 2014 IL App (1st) 123784, ¶ 126 (finding no judicial admission where the “plaintiffs claim to have made a mistake and we cannot say their claims are not reasonable”); see also *Smith v. Pavlovich*, 394 Ill. App. 3d 458, 468 (2009) (before a statement can be deemed a judicial admission, it must be given a meaning consistent with the context in which it is made and in relation to the other testimony and evidence). This is especially so because, as previously noted, True RCM did not exist when the November 2015 contract was formed. Under these circumstances, we cannot say that True RCM’s answer was a judicial admission that precludes summary judgment.

¶ 23 Next, Cigal argues that the circuit court failed to liberally construe the complaint and record in finding that Cigal had not pled a theory that the April 2016 emails formed a new contract rather than a modification of the original. As previously stated, a court must construe the pleadings and record liberally in favor of the nonmoving party and strictly against the moving party when ruling on a motion for summary judgment. *Shannon Court*, 2020 IL App (1st) 192341, ¶ 11. Here, the circuit court refused to consider Cigal’s “new contract” theory because it found that Cigal’s complaint only characterized the emails as modifying the November 2015 contract. In so ruling, the court relied solely on *Pagano v. Occidental Chemical Corp.*, 257 Ill. App. 3d 905 (1995). Specifically, the circuit court cited *Pagano* for the proposition that “[i]f the defendant is entitled to judgment as a matter of law on the claims as pled by the plaintiff, the motion will be granted without regard to the presence of evidentiary material which might create a right of recovery against the moving defendant on some unpled claim or theory.” *Id.* at 911.

¶ 24 Although we are mindful that we review the circuit court’s conclusion, rather than its reasoning (*Urban Sites of Chicago, LLC v. Crown Castle USA*, 2012 IL App (1st) 111880, ¶ 21), we find it helpful to explain why the court’s (and True RCM’s) reliance on *Pagano* is misplaced. In *Pagano*, the plaintiff was a truck driver who was injured at the defendant chemical company while loading 55-gallon drums onto his truck using a company-provided dolly. *Id.* at 907. In the circuit court, the plaintiff alleged that the company was negligent for failing to help him load the drums, for failing to provide the proper equipment for him to do so himself, and for failing to warn him that the dolly was inadequate to safely load the drums. *Id.* at 907-08. After the company was granted summary judgment, the plaintiff argued for the first time on appeal a theory of premises liability based on the accumulation of snow near the loading dock. *Id.* at 910-11. This court rejected the premises liability argument, stating that (1) the plaintiff failed to include the theory in his complaint, (2) the plaintiff did not raise the theory at any stage of the proceedings before the circuit court, and (3) regardless of forfeiture, the argument was meritless. *Id.* at 911.

¶ 25 Thus, in *Pagano*, the plaintiff raised an entirely new theory for the first time on appeal. Here, in contrast, Cigal repeatedly raised its “new contract” theory in the circuit court. We also note that, unlike the entirely new theory raised in *Pagano*, Cigal’s “new contract” theory is so similar to the “modified contract” theory that all the relevant facts for both theories are pled in the complaint. See *Schwinder v. Austin Bank of Chicago*, 348 Ill. App. 3d 461, 468-69 (2004) (modification and formation of a contract require the same elements of offer, acceptance, and consideration, and the modification of a contract is “regarded as creating a new single contract” consisting of the new terms to which the parties have agreed and those which they have agreed not to change).

¶ 26 We find this case far more like *Feliciano v. Geneva Terrace Estates Homeowners Ass’n*, 2014 IL App (1st) 130269, than *Pagano*. In *Feliciano*, the plaintiffs sued various board members of their neighborhood’s homeowner’s association for breaches of their fiduciary duties related to the plaintiffs’ plan to construct a new home. *Feliciano*, 2014 IL App (1st) 130269, ¶ 15. The defendants moved for summary judgment on some of the counts, arguing that the business judgment rule protected them from liability absent an allegation of bad faith, abuse of discretion, or negligence. *Id.* ¶ 18. In response to the defendants’ motion, the plaintiffs argued for the first time that the defendants acted in bad faith by failing to inform them that the board had decided not to take legal action against them. *Id.* ¶ 19. The circuit court nevertheless granted the defendants partial summary judgment, and the plaintiffs appealed. *Id.* ¶¶ 21-26.

¶ 27 On appeal, the defendants, citing *Pagano*, contended that the plaintiffs forfeited the argument of bad faith because they did not raise it in their complaint. *Id.* ¶ 33. We rejected that contention, distinguishing *Pagano* and reasoning that (1) the plaintiffs did not raise a “whole new theory of liability” but merely an additional basis for finding a breach of fiduciary duty and (2) the defendants did not claim to be surprised by the new allegation. *Id.* ¶ 34.

¶ 28 Here, like in *Feliciano*, Cigal did not raise a “whole new theory of liability,” but merely an additional basis to establish the privity required for its breach of contract claim. Cigal presented this basis before the circuit court both in its motion to dismiss True RCM’s counterclaim and in response to True RCM’s motion for summary judgment. Additionally, True RCM has never argued that it was unfairly surprised by the argument. Nor could it, as it was always clear that Cigal’s claims arose from the alleged breach of the new terms contemplated in the April 2016 emails. We also note True RCM appeared ready to concede the issue of privity until Cigal successfully raised

the lack of privity in obtaining the dismissal of True RCM's counterclaims. Thus, Cigal's position that it was suing under a new contract formed by the April 2016 emails was clear by the time True RCM first raised the lack of privity as a defense. Under these circumstances, the circuit court erred in refusing to consider whether Cigal's "new contract" theory precluded the entry of summary judgment.

¶ 29 We further agree with Cigal that summary judgment was inappropriate, as True RCM's right to judgment is far from clear. See *Hubert*, 2020 IL App (1st) 190790, ¶ 34 (summary judgment should only be granted if the moving party's right to judgment is "clear and free from doubt"). The April 2016 emails show that Cigal proposed to True RCM's officers that Cigal perform work on the IRC account through 2018 in exchange for 1.2% of payments received from IRC. Nawaz, who Cigal alleged had the authority to bind True RCM and who True RCM has admitted was employed as the "Chief Technology Officer/Consultant" at the time, replied "AGREED." Although there was no further written document memorializing the deal, the checks in the record show that Cigal's fee was immediately increased in accordance with Cigal's proposal. The checks also show that, while Cigal was paid by True Technologies prior to the emails, Cigal was thereafter paid by True RCM. Construing this evidence liberally in Cigal's favor, which we must, we conclude that Cigal's "new contract" theory should have survived summary judgment.

¶ 30

III. CONCLUSION

¶ 31 In sum, notwithstanding the purported "judicial admission" in True RCM's answer, the circuit court properly granted partial summary judgment to True RCM to the extent True RCM was not a party to the November 2015 contract between Cigal and True Technologies. However, the circuit court erred in granting summary judgment to the extent that Cigal adequately alleged

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that True RCM was liable for the breach of a new contract formed between Cigal and True RCM by virtue of the April 2016 emails. Accordingly, we affirm in part, reverse in part, and remand for further proceedings consistent with this order.

¶ 32 Affirmed in part; reversed in part; remanded.