Jake Austin <jacobaustinesq@gmail.com>

Re: Follow Up to December 7th Ex Parte Hearings

Michael Weinstein <MWeinstein@ferrisbritton.com> Mon, Mar 12, 2018 at 4:27 PM
To: Jake Austin <jpa@jacobaustinesq.com>

Dear Mr. Austin,

I am glad to hear that you are substituting in as counsel. I look forward to working with you as this matter proceeds to trial. Fyi, the Trial Readiness Conference is April 27, 2018, and Trial Call is May 11, 2018.

You have asked that my client (i) withdraw his "pending motions before the Court for the execution of the proposed judgment you have submitted and renotice the pending motion for a TRO" so that you may substitute in and file an opposition on behalf of Mr. Cotton, and (ii) that we submit a joint request to the Court for a written opinion analyzing the arguments put forward in the motion for a TRO.

My client is unwilling to do so, as further explained below.

As you know, there are two lawsuits between the parties. Mr. Cotton has often confused the different issues and different relief sought in those two cases—and has failed to grasp the procedural differences.

The Geraci Lawsuit. The earlier filed action was filed by my client and is entitled *Larry Geraci v. Darryl Cotton* (hereafter the "Geraci Lawsuit."). Mr. Cotton has filed a cross-complaint in that action against Larry Geraci and Rebecca Berry. Both the complaint and cross-complaint are set for Trial Call on May 11, 2018. Since its inception that case has been before Judge Wohlfeil.

The Writ of Mandate Lawsuit. The later-filed action was filed by your client against the City of San Diego, and my clients were named as Real Parties in Interest (hereafter the "Writ of Mandate Lawsuit"). In that action Mr. Cotton sought specific relief by way of writ of mandate, namely, Mr. Cotton sought the issuance of a writ of mandate compelling the City of San Diego to recognize Mr. Cotton as the sole applicant on my clients' pending CUP Application. Mr. Cotton first sought that relief by ex parte application before Judge Sturgeon (to whom the case was originally assigned); Judge Sturgeon denied the ex parte request and transferred the case to Judge Wohlfeil. Mr. Cotton again sought that same relief by ex parte application before Judge Wohlfeil; Judge Wohlfeil denied the ex parte request but scheduled the petition for a hearing. Mr. Cotton then fired his attorney, Mr. Demian, and sought ex parte reconsideration of the denial of his ex parte application for issuance of a writ of mandate; that motion for reconsideration was denied by Judge Wohlfeil. (Mr. Cotton then appealed the ex parte rulings, which appeals he subsequently abandoned.) Mr. Cotton's petition for writ of mandate was subsequently heard on the papers submitted at a noticed hearing on October 25, 2017, and the court denied Mr. Cotton's petition. I circulated a proposed Judgment to all counsel (Mr. Cotton was pro per) and, thereafter, submitted the proposed

Judgment to Judge Wohlfeil.

Your email asks me to withdraw my pending motion for entry of the proposed Judgment. There is and was no such motion pending (and thus no hearing date). As noted above, the City of San Diego, the Respondent, and my clients, Real Parties in Interest, prevailed in that action. As a matter of course, and after circulating the proposed Judgment to all counsel for review and comment, a proposed Judgment was submitted to Judge Wohlfeil. I checked the Register of Actions today and Judge Wohlfeil signed the proposed Judgment and it was entered on March 7, 2018. Mr. Cotton believes each of the judges (Judge Sturgeon and Judge Wohlfeil) ruled incorrectly the many times he brought the issue before them—my understanding is that his only available recourse now is to appeal the entered Judgment to the Fourth District Court of Appeal.

The Geraci Lawsuit Cont'd.

Although judgment has been entered in the Writ of Mandate Lawsuit, this has no impact on the Geraci Lawsuit, which continues forward.

In the Geraci Lawsuit my client has two pending motions to be heard on October 23, 2018: (1) a motion to compel the deposition of Darryl Cotton and to compel written discovery responses; and (2) a motion for a preliminary injunction or other order to compel access to the subject property for soils testing necessary to obtain approval of the CUP permit.

As to the former motion: Mr. Cotton has known about yet refused to provide written discovery responses that were due on December 29, 2017 (after I granted him a requested extension until that time). The written discovery requests are not voluminous. Mr. Cotton was originally scheduled (by notice and agreement) to have his deposition taken on December 11, 2017. Then he fired his lawyer on approximately December 7 or 8, and would not make himself available for deposition on December 11. I understood those circumstances and took the deposition off calendar. Mr. Cotton thereafter failed to appear twice at noticed depositions—the latter time defying a court order granted after I brought a first motion to compel. This second motion to compel his deposition (and seeking sanctions this time) is scheduled for October 23, 2018. There are no valid grounds for opposing the motion. Mr. Cotton has avoided appearing for his deposition for nearly 3 months so far. This action is going to trial in 60 days, i.e., Trial Call is May 11, 2018. You have given me no valid reason why I should withdraw the motion. If Mr. Cotton wants additional time to file an opposition, then you can seek that relief ex parte. But I do not know why you would do so as there are no grounds for opposing the motion.

As to the latter motion: A CUP runs with the land. Soils testing is necessary to obtain approval of the CUP. Mr. Cotton, realizing that, at one point voluntarily agreed to allow the soils testing but has since reneged. I have no idea why as the soils testing and granting of a CUP will benefit him if he ultimately prevails at trial in two months. Mr. Cotton has constantly harped that he is worried my client will torpedo the CUP process, but he has no evidence that is the case. My client has spent substantial sums during the more than one year the CUP Application has been pending to obtain approval. Now Mr. Cotton appears to himself want to torpedo or at least delay the process—for no apparent rational reason so far as I can discern. If Mr. Cotton wants additional time to file an opposition, then you can also seek that relief ex parte. But, again, I do not know why Mr. Cotton would want to oppose the motion as soils testing is necessary to obtain approval of the CUP. Instead, he should simply

allow the soils testing.

I do not have any reason to doubt that Mr. Cotton is experiencing emotional distress. That happens to litigants to one extent or another in all lawsuits. That undoubtedly explains the many vitriolic and expletive-laced emails that Mr. Cotton has sent me over the last several months (for which Mr. Cotton recently apologized). Much of the emotional distress is his own doing. Instead of submitting to a deposition and undertaking steps to prepare for a trial on the merits in the Geraci Lawsuit, Mr. Cotton has used that time instead, among other things, to pursue ill-advised motions in these two cases. He insists the email he refers to is "dispositive" of all those motions. **That email was submitted by Mr. Cotton (and/or his attorneys) into evidence in support of all of his many ex parte applications for temporary restraining orders/preliminary injunction and in support of his petition for writ of mandate**. Mr. Cotton is entitled to believe the court got those rulings wrong. Despite his beliefs to the contrary, the court did not and should not have viewed the email as dispositive and correctly ruled on those motions. He has also pursued ill-advised appeals of trial court rulings, which he has since abandoned.

Finally, I feel compelled to address your comments about Gina Austin, which are way off base. Ms. Austin has made no misrepresentations to the court. No declaration signed under penalty of perjury by Gina Austin has been submitted as evidence to the Court in any proceeding in any of the two cases. She has appeared as counsel in the Writ of Mandate case and argued with me in opposition to Mr. Cotton's first ex parte application for issuance of a writ of mandate heard by Judge Sturgeon. That is it—legal argument. She will be a witness at trial of the Geraci Lawsuit but so far has not submitted any written or other testimony. So I just do not understand your position in that regard.

If you schedule an ex parte, I authorize you to give me notice of the date and time by email and I authorize you to serve any pleadings by email.

Please feel free to call me if you want to discuss any matter related to the case.

Respectfully,

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From: jacobaustinesq@gmail.com [mailto:jacobaustinesq@gmail.com] **On Behalf Of** Jake Austin
Sent: Monday, March 12, 2018 11:25 AM
To: Michael Weinstein <MWeinstein@ferrisbritton.com>

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