

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON, an individual; JOSE
HURTADO, an individual,

Plaintiff,

v.

LARRY GERACI, an individual;
REBECCA BERRY a/k/a REBECCA
ANN BERRY RUNYAN, an individual;
MICHAEL R. WEINSTEIN, an
individual; SCOTT TOOTHACRE, an
individual; FERRIS & BRITTON APC, a
California corporation; GINA M.
AUSTIN, an individual; AUSTIN LEGAL
GROUP APC, a California corporation;
SEAN MILLER, an individual; FINCH
THORTON & BAIRD, a limited liability
partnership; DAVID DEMIAN, an
individual; ADAM WITT, an individual;
and DOES 1 through 50, inclusive,

Defendants.

Case No.: 18cv2751-GPC(MDD)

**ORDER DISMISSING THE
COMPLAINT WITH PREJUDICE
AND DENYING DEFENDANTS'
MOTIONS TO DISMISS AS MOOT**

[Dkt. Nos. 18, 20, 21.]

Before the Court are Defendants Finch Thornton & Baird LLP, David Demian and
Adam Witt's motion to dismiss pursuant to Federal Rule of Civil Procedure 4, (Dkt. No.

18); Defendants Michael R Weinstein, Scott Toothacre, and Ferris & Britton, APC's motion to dismiss, or in the alternative, motion to stay the case, (Dkt. No. 20); and Defendants Gina M. Austin and Austin Legal Group APC's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), 9(b) and California's anti-SLAPP statute. (Dkt. No. 21.) Oppositions were filed by Plaintiff Darryl Cotton.¹ (Dkt. Nos. 27, 28.) Replies were subsequently filed by all Defendants. (Dkt. Nos. 29-31.)

Based on the reasoning below, the Court DISMISSES the Complaint pursuant to the Court's Order filed on February 28, 2018 in Case No. 18cv325-GPC(MDD) and DENIES Defendants' motions to dismiss as moot.

Discussion

On December 6, 2018, Plaintiffs Darryl Cotton ("Cotton") and Joe Hurtado ("Hurtado"), with counsel, filed the instant Complaint alleging causes of action for fraud, abuse of process, RICO, civil conspiracy, and legal malpractice against Defendant Larry Geraci and a number of other defendants involved in a pending state court case in the Superior Court of San Diego in Case No. 37-2017-00010073-CU-BC-CTL. (Dkt. No. 1.) Pursuant to Local Civil Rule 40.1, the instant Complaint was low-numbered to a prior case in this Court filed by Darryl Cotton against Larry Geraci and numerous defendants in Case No. 18cv325-GPC(MDD) because they are related. (Dkt. No. 3.) On April 19, 2019, Hurtado substituted himself in to proceed in pro per in place of his counsel. (Dkt. No. 26.)

The instant case is based on an alleged real estate purchase and sale contract between Cotton and Geraci that is the subject of the controversy in the state court action and also includes Cotton's claims against individuals involved in the underlying state court case. On March 21, 2017, Geraci filed a state court complaint against Cotton alleging breach of contract, breach of the covenant of good faith and fair dealing, specific

¹ Plaintiff Hurtado, now proceeding pro se, did not file an opposition.

1 performance and declaratory relief concerning a real estate purchase and sale agreement.
 2 (Dkt. No. 20-2, Ds’ RJN², Ex. B, State Court Compl.) According to the state court
 3 complaint, the parties entered into a written agreement for the purchase and sale of
 4 Cotton’s real property located at 6176 Federal Boulevard, San Diego, CA on November
 5 2, 2016. (Id., Compl. ¶ 7.) On that day, Geraci paid Cotton \$10,000 good faith earnest
 6 money to be applied to the sales price of \$800,000 and the sale was subject to approval of
 7 a conditional use permit (“CUP”) by the City of San Diego. (Id. ¶ 8.) Geraci engaged in
 8 efforts and spent money to obtain a CUP including hiring a consultant, Rebecca Berry, to
 9 coordinate the CUP efforts and an architect. (Id. ¶ 9.) The state court complaint claims
 10 that Cotton anticipatorily breached the contract stating he will not perform according to
 11 the terms of the written contract. (Id. ¶ 11.) Specifically, Geraci alleges that Cotton “has
 12 stated that, contrary to the written terms, the parties agreed to a down payment or earnest
 13 money in the amount of \$50,000.00 and that he will not perform unless Geraci makes a
 14 further down payment. Cotton has also stated that, contrary to the written terms, he is
 15 entitled to a 10% ownership interest in the Property and that he will not perform unless
 16 Geraci transfers to him a 10% ownership interest. Cotton also threatened to contact the
 17 City of San Diego to sabotage the CUP process by withdrawing his acknowledgment that
 18 Geraci has a right to possession or control of the Property if Geraci will not accede to his
 19 additional terms and conditions and, on March 21, 2017, Cotton made good on his threat
 20 when he contacted the City of San Diego and attempted to withdraw the CUP
 21 application.” (Id.) On May 12, 2017, Cotton subsequently filed a cross-complaint in
 22 state court against Geraci and Berry for numerous causes of action relating the contract
 23 for the sale of his Property. (Id., Ex. C.)

26
 27 ² The Court grants Defendants Weinstein, Toothacre and Ferris & Britton, APC’s request for judicial
 28 notice of court filings in state court and this Court. (Dkt. No. 20-2.) The Court may take judicial notice
 of court filings and other matters of public record. See Reyn’s Pasta Bella, LLC v. Visa USA, Inc., 442
 F.3d 741, 746 n.6 (9th Cir. 2006).

1 During the pendency of the state court complaint, on February 9, 2018, Cotton,
 2 proceeding *pro se*, filed a Complaint in this Court alleging eighteen causes of action
 3 under federal and state law along with a motion to proceed in forma pauperis. (Case No.
 4 18cv325-GPC(MDD), Dkt. Nos. 1, 2.) Similar to the state court complaint and cross-
 5 complaint, the Complaint concerned the alleged breach of an agreement for the purchase
 6 and sale of Cotton's real property located at 6176 Federal Boulevard, San Diego, CA on
 7 November 2, 2016. (Case No. 18cv325-GPC(MDD), Dkt. No. 1, Compl.³) The
 8 Complaint alleged that Cotton's property at 6176 Federal Boulevard, San Diego, CA,
 9 qualifies for a Conditional Use Permit ("CUP") for the establishment of a Medical
 10 Marijuana Consumer Collective ("MMCC"). (*Id.* ¶ 2.) If the CUP is approved, the value
 11 of the property will potentially be greater than \$100 million. (*Id.* ¶¶ 2, 3.) On November
 12 2, 2016, Cotton and Geraci orally agreed to terms for the sale of Cotton's property. (*Id.* ¶
 13 44.) The oral agreement contained condition precedents prior to closing. (*Id.* ¶ 45.) The
 14 Agreement required that Geraci provide a \$50,000 non-refundable deposit for Cotton to
 15 keep if the CUP was not issued; a total purchase price of \$800,000 if the CUP was issued;
 16 and a 10% equity stake in the MMCC with a guaranteed monthly equity distribution of
 17 \$10,000. (*Id.* ¶ 46.) According to Cotton, Geraci provided Cotton with \$10,000 cash to
 18 be applied toward the non-refundable deposit of \$50,000 and had Cotton execute a
 19 document to record his receipt of the money and promised to have his attorney, Gina
 20 Austin, speedily draft a final, written purchase agreement for the Property that would
 21 memorialize their oral terms. (*Id.* ¶ 47.) They effectively agreed to two written
 22 agreements: the "purchase agreement" for the sale of the property and a "side agreement"
 23 concerning Cotton's equity stake and other provisions. (*Id.* ¶ 48.)

24 Cotton claims he has definitive proof of the terms of their agreement based on a
 25 confirmation email Geraci sent to Cotton stating, "No No problem at all" when Cotton
 26

27
 28 ³ The allegations in the Complaint, in 18cv325, are similar to those in Cotton's cross-complaint in state court. (*See* Dkt. No. 20-2, Ds' RJN, Exs. C and D.)

1 emailed Geraci noting that the 10% equity interest in the dispensary was not added into
2 their purchase agreement of November 2, 2016 and asked that Geraci simply
3 acknowledge that interest in a reply email. (*Id.* ¶ 49.) According to Cotton, Geraci’s
4 response to the email demonstrates that the November 2, 2016 agreement is not the final
5 agreement. (*Id.* ¶ 50.) He also claims that Geraci attached a draft “side agreement”
6 providing for the 10% interest in an email on March 7, 2017. (*Id.* ¶¶ 52-54.) Cotton
7 argues that Geraci breached the agreement by filing the CUP application without first
8 paying the balance of \$40,000, and failed to provide the final agreement as promised.
9 (*Id.* ¶ 56.) Geraci made it clear he would not honor the agreement, and then Cotton
10 responded informing Geraci that he no longer has any interest in his property. (*Id.* ¶ 59.)
11 In desperate need of funds, Cotton entered into a written real estate purchase agreement
12 with a third party. (*Id.*)

13 On February 28, 2018, the Court granted Plaintiff’s motion to proceed IFP and *sua*
14 *sponte* stayed the case until resolution of the parallel state court action pursuant to the
15 Colorado River⁴ doctrine. (Dkt. No. 7.) In its order, the Court conducted a detailed
16 analysis going through the eight factors to determine if the Colorado River abstention
17 doctrine applied. (*Id.* at 6-10.) Of significance, the Court noted that “Plaintiff seeks to
18 litigate the exact same issues that are currently pending in state court in this Court. Not
19 only will both courts consider the same issues but could possibly reach different results.”
20 (*Id.* at 8.) The Court also noted that the state court action was filed first and was in the
21 middle of discovery. (*Id.* at 8.) The Court concluded that Cotton was “clearly forum
22 shopping” and was “dissatisfied with the acts taken by the defendants in the underlying
23 state court case, and dissatisfied with the rulings of the state court.” (*Id.* at 9-10.)
24 Finally, the court concluded that the state court and federal court complaint were
25 substantially similar as the causes of action all arise out of the same November 2, 2016
26

27
28 ⁴ Colorado River Water Dist. v. United States, 424 U.S. 800 (1976).

1 agreement and subsequent disputes. The Court stayed the case on February 28, 2018
2 “until resolution of the parallel state court action.” (Id. at 11.)

3 By filing the instant Complaint on December 6, 2018 alleging causes of action
4 relating to the November 2, 2016 purchase and sale agreement between Cotton and
5 Geraci, Cotton is again improperly attempting to forum shop, and this time, attempting to
6 circumvent the Court’s order staying the issues concerning the real estate purchase and
7 sale agreement of November 2, 2016 pending resolution of the state court action.
8 According to Defendants, the state court action is still pending with a trial date set for
9 June 28, 2019. (Dkt. No. 20-1 at 10.) Instead of filing a new complaint, Plaintiff should
10 have filed a motion to lift the stay in Case No. 18cv325 explaining why the stay should
11 be lifted due to changed circumstances. See Taylor v. Hawley Troxel Ennis & Hawley,
12 LLP, 628 Fed. App’x 490, 491 (9th Cir. 2015) (district court erred in denying motion to
13 lift stay due to changed circumstances).

14 In responding to the motion to dismiss by Weinstein, Toothacre, and Ferris &
15 Britton, Plaintiff appears to justify the filing of the new Complaint or demonstrate
16 changed circumstances by arguing that the stay based on the Colorado River abstention is
17 inapplicable because the state court does not have jurisdiction over the real property at
18 issue because indispensable parties have not been named; therefore, the state action must
19 be dismissed. (Dkt. No. 27 at 6.) He argues that his counsel has an *ex parte* hearing on
20 April 25, 2019 in the state action seeking dismissal for failure to join an “indispensable
21 party” however, he has not updated the Court on the state court’s ruling and based on a
22 review of the Register of Actions on the state court’s website, the case is still pending in
23 state court. Moreover, Defendants explained that the April 25, 2019 *ex parte* hearing
24 never proceeded because Cotton never filed an application. (Dkt. No. 31 at 4.) Cotton
25 then argues that the state court action should be dismissed for failure to join an
26 indispensable party, Richard Martin, the third party who purchased the property on
27 March 22, 2017. However, this issue is not properly before this Court.
28

1 Cotton further argues, without legal authority, that the Colorado River abstention
 2 doctrine is no longer applicable because there are additional parties and an additional
 3 cause of action for legal malpractice.⁵

4 The Colorado River abstention doctrine applies to actions that are “substantially
 5 similar,” and “exact parallelism” is not required. Nakash v. Marciano, 882 F.2d 1411,
 6 1412-13, 1416 (9th Cir. 1989) (The federal action, filed five years after the state action
 7 included slightly different parties and similar, although not identical, causes of action).
 8 In Nakash, the court found that the state and federal actions were substantially similar
 9 because it was merely a “spin-off” of the more comprehensive state litigation.” Id. at
 10 1417; Am. Int’l Underwriters, Inc. v. Continental Ins. Co., 843 F.2d 1253, 1259-60 (9th
 11 Cir. 1988) (after filing in state court, plaintiff brought suit in federal court to avoid the
 12 state court’s unfavorable evidentiary rules); Silvaco Data Sys., Inc. v. Tech. Modeling
 13 Assocs., Inc., 896 F. Supp. 973, 976 (N.D. Cal. 1995) (pointing out that “[t]he mere fact
 14 that the claims in state and federal court are not based on exactly the same laws does not
 15 preclude a finding of substantial similarity” and holding that “[a]lthough the state and
 16 federal actions are not identical, they include extremely similar claims that all arise out of
 17 the long-standing competitive feud between [the parties]”).

18 Here, the instant Complaint adds an additional plaintiff, Joe Hurtado, adds as
 19 defendants his former attorneys representing him in the state court action, Finch Thorton
 20 & Baird, David Demian and Adam Witt as well as adding Sean Miller as a defendant.
 21 According to the Complaint, Joe Hurtado is Cotton’s “transactional advisor” and
 22 “litigation investor” as it relates to the “underlying lawsuit between Cotton and Geraci.”
 23 (Dkt. No. 1, Compl. ¶ 8.) It also adds Sean Miller as a defendant because he threatened
 24

25
 26 ⁵ Cotton also argues that the Colorado River abstention does not apply where monetary damages are
 27 sought under a claim pursuant to 42 U.S.C. § 1983 while state court proceedings are pending. He claims
 28 that Hurtado has stated that he intends to file a separate complaint to include a 42 U.S.C. § 1983 claim
 against the City of San Diego. (Dkt. No. 28 at 16.) Even if Plaintiff’s argument is correct, the argument
 is without merit as the pending complaint does not assert a claim under 42 U.S.C. § 1983.

Hurtado and his family with the purpose of using Hurtado's influence with Cotton to have him forcibly settle with Geraci. (Id. ¶ 21.) Finally, the Complaint adds a legal malpractice claim against Cotton's former counsel in the state court action, Finch Thornton & Baird, Demian and Witt. (Id. ¶¶ 24-37.) However, the naming of additional parties and the addition of the legal malpractice claim that arise out of the state court litigation concerning the November 2, 2016 real estate contract between Cotton and Geraci do not demonstrate changed circumstances sufficient to lift the stay. Plaintiff continues to be dissatisfied with the state court proceedings and the conduct of the named defendants in the state court proceedings. See Nakash, 882 F.2d at 1417 ("We have no interest in encouraging this practice [of forum shopping due to dissatisfaction with the state court]."). Accordingly, because there is a pending case that is currently stayed, the Court DISMISSES the Complaint with prejudice pursuant to the Court's Order staying the action under the Colorado River abstention doctrine, filed on February 29, 2018, in Case No. 18cv325-GPC(MDD).

Plaintiff expressed concern of prejudice if the complaint is dismissed because his legal malpractice claim would be barred because the statute of limitations for legal malpractice not related to fraud is one year.⁶ See Cal. Civ. Proc. Code § 340.6. Plaintiff notes that his attorneys in state court were grossly negligently or purposefully by failing to address factual and legal issues at oral argument on December 7, 2017. (Dkt. No. 27 at 3.) Therefore, the instant Complaint was filed within the one-year limitations period on December 6, 2018. However, Plaintiff indicated that he intends to allege a legal malpractice claim based on fraud where the statute of limitations is four years. (Dkt. No. 27 at 7.) Therefore, Plaintiff will not be prejudiced by the Court's dismissal of this action.

////


⁶ Plaintiff raised the prejudice issue with regards to Defendants Finch Thornton & Baird, Demian and Witt's motion to dismiss for improper service. (Dkt. No. 27 at 6.)

Conclusion

Based on the above, the Court DISMISSES the Complaint with prejudice. Any future filings shall be made in Case No. 18cv325-GPC(MDD). The Court DENIES all Defendants' motions to dismiss as moot. The hearing set for May 24, 2019 shall be **vacated.**

IT IS SO ORDERED.

Dated: May 14, 2019


Hon. Gonzalo P. Curiel
United States District Judge