

ROA 151
8 PPS
ELECTRONICALLY FILED
Superior Court of California,
County of San Diego

04/02/2018 at 10:03:00 AM

Clerk of the Superior Court
By Katelin O'Keefe, Deputy Clerk

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12 Cross-Defendant REBECCA BERRY

13 **SUPERIOR COURT OF CALIFORNIA**

14 **COUNTY OF SAN DIEGO, CENTRAL DIVISION**

15 LARRY GERACI, an individual,

16 Plaintiff,

17 v.

18 DARRYL COTTON, an individual; and
19 DOES 1 through 10, inclusive,

20 Defendants.

21 DARRYL COTTON, an individual,

22 Cross-Complainant,

23 v.

24 LARRY GERACI, an individual, REBECCA
25 BERRY, an individual, and DOES 1
26 THROUGH 10, INCLUSIVE,

27 Cross-Defendants.

Case No. 37-2017-00010073-CU-BC-CTL

Judge: Hon. Joel R. Wohlfeil
Dept.: C-73

**EX PARTE APPLICATION BY
PLAINTIFF/CROSS-DEFENDANT
LARRY GERACI AND CROSS-
DEFENDANT REBECCA BERRY FOR
APPOINTMENT OF COURT CLERK OR
COURT CLERK'S DESIGNEE AS
ELISOR**

[IMAGED FILE]

Hearing Date: April 3, 2018
Hearing Time: 8:30 a.m.

Filed: March 21, 2017
Trial Date: May 11, 2018

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PLEASE TAKE NOTICE THAT, on April 3, 2018, at 8:30 a.m., or as soon thereafter as the matter may be heard in Department C-73 of the above-entitled court, located at 330 West Broadway, San Francisco, California 94101, plaintiff and cross-defendant, LARRY GERACI (hereafter “Geraci”), and cross-defendant, REBECCA BERRY (hereafter “Berry”), will appear *ex parte* to seek an order to appear before the Court, Clerk or the Court Clerk’s Designee, as an elisor for the sole purpose of signing the Property Owner Consent form in the stead of defendant/cross-complainant, DARRYL COTTON (hereafter “Cotton”), as previously ordered by this Court on March 23, 2018.

<u>Parties</u>	<u>Attorneys</u>
Larry Geraci	Michael R. Weinstein FERRIS & BRITTON, APC 501 West Broadway, Suite 1450 San Diego, Ca. 92121 Telephone: (619) 233-3131 Fax: (619) 232-9316
Rebecca Berry	Michael R. Weinstein FERRIS & BRITTON, APC 501 West Broadway, Suite 1450 San Diego, Ca. 92121 Telephone: (619) 233-3131 Fax: (619) 232-9316
Darryl Cotton	Darryl Cotton, In Pro Per 6176 Federal Boulevard San Diego, Ca. 92114 Telephone: (619) 634-1561 and (619) 266-4004 Fax: (619) 229-9387

This Application is made pursuant to California Code of Civil Procedure section 2025.450 and California Rules of Court, rules 3.1200 through 3.1207 and rule 2.5.11. It is based on the attached supporting Memorandum of Points and Authorities and Declaration of Michael R. Weinstein, the

1 concurrently served Notice of Lodgment in Support of Ex Parte Application, and on all pleadings,
2 papers and records in this action, and/or such further oral or documentary evidence or argument
3 presented before or at the hearing. Timely notice for this Application was given by counsel for Geraci
4 and Berry to all parties pursuant to California Rules of Court, rule 3.1203(a). (Declaration of
5 Michael R. Weinstein, ¶ 2.)
6

7 Dated: April 2, 2018

FERRIS & BRITTON,
A Professional Corporation

8
9 By: Michael R. Weinstein
10 Michael R. Weinstein
11 Scott H. Toothacre
12 Attorneys for Plaintiff/Cross-Defendant LARRY GERACI
13 and Cross-Defendant REBECCA BERRY
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. RELIEF REQUESTED**

3 Pursuant to the Superior Court of San Diego County, Local Rules, rule 2.5.11, plaintiff/cross-
4 defendant, Larry Geraci, and cross-defendant, Rebecca Berry, make this Ex Parte Application for
5 appointment of the court clerk, or the court clerk's designee, as an elisor, in the stead of property
6 owner, defendant/cross-complainant Darryl Cotton, for purposes of signing the Property Owner
7 Consent form attached as Exhibit "A" to the Proposed Order filed herewith.

8 **II. RELEVANT BACKGROUND**

9 On March 23, 2018, this Court granted Geraci's Motion for a Mandatory Injunction Requiring
10 Defendant/Cross-Complainant Darryl Cotton to Sign the Property Owner Consent Form Allowing Soils
11 Testing on the Subject Property, and to otherwise allow SCST Engineering unhindered access to the
12 subject property to conduct said soils testing. The Court ruled as follows:

13 The unopposed Motion (ROA # 115) of Plaintiff/Cross-Defendant LARRY
14 GERACI ("Plaintiff" or "Geraci") for a mandatory injunction requiring Defendant/Cross-
15 Complainant DARRYL COTTON ("Defendant" or "Cotton") to Sign the Property
16 Owner Consent Form Allowing Soils Testing on the subject Property, and to Otherwise
Allow SCST Engineering unhindered Access to the Subject Property to Conduct Said
Soils Testing, is GRANTED.

17 Defendant is required to immediately sign the property owner consent form
18 allowing soils testing on the subject property, and to otherwise allow SCST Engineering
19 unhindered access to the subject property to conduct soils testing. Sufficient evidence
20 has been presented demonstrating that the County of San Diego is requiring a soils
sample analysis as a condition precedent to obtaining a CUP to operate a Medical
Marijuana Dispensary. Thus, injunctive relief is necessary to prevent irreparable injury
and waste. Also, there is a reasonable probability that Plaintiff will prevail on the
merits."

21 Notice of that ruling was served later that same day. (Declaration of Michael R. Weinstein, *infra*, ¶¶ 3
22 and 6, and Notice of Ruling attached as Exhibit 2 to the concurrently filed and supporting Notice of
23 Lodgment ("Geraci NOL").

24 **Darryl Cotton has failed and refused to comply with the Court's order to immediately sign**
25 **and return the Property Owner Consent form despite multiple requests that he do so.** His
26 attorney was provided a copy in the hallway immediately following the March 23rd hearing and his
27 attorney represented he would provide it to Mr. Cotton. An email confirming this occurred, along with
28 another copy of the form, was sent to his attorney later that morning at approximately 11:30 a.m.

(Declaration of Michael R. Weinstein, *infra*, ¶ 5, and Exhibit 3 to Geraci NOL.) Finally, on March 27, 2018, another email was sent to both Attorney Austin and Darryl Cotton with yet another copy of the Property Owner Consent form attached and with a request that Mr. Cotton sign and return the form immediately. That email also asked for counsel to be notified if Mr. Cotton intended to refuse to sign the form despite the Court Order. That email also advised that if Mr. Cotton continued to refuse to sign and return the Property Owner Consent form, then notice was given that the instant relief would be sought by ex parte application on April 3, 2018, at 8:30 a.m. in Department C-73. It is now April 2, 2018, and the signed Property Owner Consent form has not been signed and returned by Darryl Cotton. (Declaration of Michael R. Weinstein, *infra*, ¶ 7, and Exhibit 1 to Geraci NOL.)

III. AUTHORITY FOR RELIEF SOUGHT

Where one of the parties will not or cannot execute a document necessary to carry out a court order, the clerk of the court, or his or her authorized representative or designee may be appointed as an elisor to sign the document. An application for appointment of an elisor may be made ex parte. (Local Rule 2.5.11.) An elisor is a person appointed by the court to perform functions like the execution of a deed or document. (*Blueberry Properties, LLC v. Chow* (2014) 230 Cal.App.4th 1017; citing *Rayan v. Dykeman* (1990) 224 Cal.App.3d 1629, 1635, fn. 2.) A court typically appoints an elisor to sign documents on behalf of a recalcitrant party in order to effectuate its judgments or orders, where the party refuses to execute such documents. (*Ibid.*)

Courts use elisors to enforce their orders when a party refuses to carry out the court's order. Under CCP § 128(a)(4), "[e]very court shall have the power ... [¶] ... [¶] [t]o compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding pending therein." This statute has codified the principle of "[t]he inherent power of the trial court to exercise reasonable control over litigation before it, as well as the inherent and equitable power to achieve justice and prevent misuse of processes lawfully issued" (*Venice Canals Resident Home Owners Assn. v. Superior Court* (1977) Cal.App.3d 675, 679.)

In *Rayan v. Dykeman*, *supra*, 224 Cal.App.3d at p. 1635, the Court of Appeal affirmed the appointment of an elisor to sign the plaintiff's name to all documents necessary for a property transfer. There, the trial court issued an order incorporating a stipulation by the parties that the plaintiff would

1 execute a quitclaim deed to the property transferring title to the defendant, yet the plaintiff refused to
2 sign the documents. Citing Code of Civil Procedure section 128(a)(4), the court of appeal explained
3 that, “[a]s to the appointment of [an] elisor, to compel obedience to its order the court is authorized to
4 make such an appointment. [Citations.]” (*Ryan v. Dykeman, supra*, 224 Cal.App.3d at p. 1635,
5 fn. omitted.)

6 **IV. CONCLUSION**

7 An elisor is necessary in the instant case. Cotton has refused, and continues to refuse to comply
8 with this Court’s March 23, 2018 Order requiring him to “immediately” sign the Property Owner
9 Consent form.

10 Dated: April 2, 2018

FERRIS & BRITTON,
A Professional Corporation

12 By: Michael R. Weinstein
13 Michael R. Weinstein
14 Scott H. Toothacre
15 Attorneys for Plaintiff/Cross-Defendant LARRY GERACI
16 and Cross-Defendant REBECCA BERRY
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I, Michael R. Weinstein, declare:

1. I am an attorney with Ferris & Britton, APC, the attorneys for Plaintiff and Cross-Defendant, Larry Geraci, and Cross-Defendant, Rebecca Berry, in this action. I have personal knowledge of the facts stated in this declaration. If called as a witness, I would testify competently thereto. I provide this declaration in support of this ex parte application by Geraci and Berry.

2. Written notice of this ex parte hearing was given to Darryl Cotton and attorney Jacob Austin via email on March 27, 2018 at 9:32 a.m., attached as Exhibit 1 to the concurrently filed and supporting Notice of Lodgment (“Geraci NOL”).

3. On March 23, 2018, the parties appeared on Plaintiff/Cross-Defendant Larry Geraci's Motion for a Mandatory Injunction Requiring Defendant/Cross-Complainant Darryl Cotton to Sign the Property Owner Consent Form Allowing Soils Testing on the Subject Property, and to Otherwise Allow SCST Engineering unhindered Access to the Subject Property to conduct Said Soils Testing. The Court Ruled as follows:

The unopposed Motion (ROA # 115) of Plaintiff/Cross-Defendant LARRY GERACI ("Plaintiff" or "Geraci") for a mandatory injunction requiring Defendant/Cross-Complainant DARRYL COTTON ("Defendant" or "Cotton") to Sign the Property Owner Consent Form Allowing Soils Testing on the subject Property, and to Otherwise Allow SCST Engineering unhindered Access to the Subject Property to Conduct Said Soils Testing, is GRANTED.

Defendant is required to immediately sign the property owner consent form allowing soils testing on the subject property, and to otherwise allow SCST Engineering unhindered access to the subject property to conduct soils testing. Sufficient evidence has been presented demonstrating that the County of San Diego is requiring a soils sample analysis as a condition precedent to obtaining a CUP to operate a Medical Marijuana Dispensary. Thus, injunctive relief is necessary to prevent irreparable injury and waste. Also, there is a reasonable probability that Plaintiff will prevail on the merits.” (Notice of Ruling attached as Exhibit 2 to Geraci NOL.)

4. Attorney Jacob Austin appeared at the above-referenced hearing, and put on the record that he would be substituting into the case on behalf of Defendant Cotton for the sole purpose of appearing on an ex parte request to expunge the lis pendens in this action.

5. In the hallway, immediately after the hearing, I provided Attorney Austin with the Property Owner Consent form, as he said he would provide the form to Defendant Cotton. Later that morning, at approximately 11:30 a.m., I e-mailed Attorney Austin confirming that I had provided him

1 the form for signature by Mr. Cotton, stating: "1) This confirms that following the hearing I handed you
2 a copy of the Property Owner Consent form (copy attached) that Mr. Cotton is required by the court
3 order to immediately sign and return to me. You indicated you would hand it to him and I did not need
4 to provide it directly to him. Please insure that the signed Property Owner Consent form gets back to
5 me as soon as possible." A copy of that confirming email is attached as Exhibit 3 to the Geraci NOL.

6 6. On March 23, 2018, I prepared, served and filed a Notice of Ruling with regard to the
7 Preliminary Injunction requiring Mr. Cotton to immediately sign the Property Owner Consent form
8 allowing soils testing on the subject property and to otherwise allow SCST Engineering unhindered
9 access to the subject property to conduct soils testing. (Notice of Ruling, Exhibit 2 to the Geraci NOL.)

10 7. On March 27, 2018, I sent an additional follow up email to both Attorney Austin and
11 Mr. Cotton and attached another copy of the Property Owner Consent Form and requested Mr. Cotton
12 sign and return the form immediately. I requested that if Mr. Cotton did not intend to sign and return
13 the Property Owner Consent form despite the Court Order to do so, then to please notify me
14 immediately. In that email I also advised that if Mr. Cotton continued to refuse to sign and return the
15 Property Owner Consent form, then my email would constitute notice that I had scheduled an ex parte
16 hearing for Tuesday, April 3, 2018, at 8:30 a.m. in Department C-73 for the hearing of Plaintiff Larry
17 Geraci's ex parte application for an order appointing the Court Clerk, or Court Clerks Designee, as an
18 elisor and directing the Court Clerk, or the Court Clerk's Designee, to sign the Property Owner Consent
19 Form on behalf of Mr. Cotton. (A copy of that March 27, 2018, email is attached as Exhibit 1 to the
20 Geraci NOL, and already mentioned in ¶ 2 above.) It is now April 2, 2018, and I have not yet received
21 a signed Property Owner Consent form from Darryl Cotton.

22 I declare under penalty of perjury under the laws of the State of California that the foregoing is
23 true and correct. Executed this 2nd day of April, 2018, in San Diego, California.

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25 MICHAEL R. WEINSTEIN
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