

ROA 163
12pgs

FERRIS & BRITTON
A Professional Corporation
Michael R. Weinstein (SBN 106464)
Scott H. Toothacre (SBN 146530)
501 West Broadway, Suite 1450
San Diego, California 92101
Telephone: (619) 233-3131
Fax: (619) 232-9316
mweinstein@ferrisbritton.com
stoothacre@ferrisbritton.com

FILED
Clerk of the Superior Court

APR 05 2018

By: A. TAYLOR

Attorneys for Plaintiff/Cross-Defendant LARRY GERACI and
Cross-Defendant REBECCA BERRY

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO, CENTRAL DIVISION

LARRY GERACI, an individual,

Plaintiff,

v.

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

Defendants.

DARRYL COTTON, an individual,

Cross-Complainant,

v.

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

Cross-Defendants.

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

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

**PLAINTIFF LARRY GERACI'S
OPPOSITION TO DEFENDANT DARRYL
COTTON'S EX PARTE APPLICATION
FOR ORDERS: (1) SHORTENING TIME
FOR HEARING ON DARRYL COTTON'S
MOTION TO EXPUNGE NOTICE OF
PENDENCY OF ACTION (LIS
PENDENS); AND (2) COMPELLING THE
ATTENDANCE AND TESTIMONY OF
PLAINTIFF LARRY GERACI**

[IMAGED FILE]

Hearing Date: April 5, 2018
Hearing Time: 8:30 a.m.

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

I. INTRODUCTION

Defendant/Cross-Complainant Darryl Cotton renews the same argument he has been making in numerous and repetitive *ex parte* applications and motions during the many months of this litigation, which is now set for trial in 36 days on May 11, 2018. With this *ex parte* application, he is essentially seeking to have the Court reconsider its prior rulings. There are no new facts and no change in law that warrants the Court's reconsideration of its previous rulings. (C.C.P. §1008.)

1 More specifically, with the April 13, 2018, motion cutoff date looming and trial on the merits a
2 little more than a month away, this application seeks an order shortening time for the hearing of a
3 motion to expunge the *lis pendens* on a mere 8 days' notice. Mr. Cotton makes this request from this
4 Court, while at the same time he continues to "thumb-his-nose" at this Court, refusing to submit to his
5 deposition, refusing to respond to written discovery and refusing to sign the Property Owner Consent
6 form (which the Court Clerk executed as an elisor).

7 Mr. Cotton has failed to show good cause, or any cause, for the relief he is seeking. **He has**
8 **provided no facts explaining why he could not have timely brought this motion at any time**
9 **during the prior 14 months since the filing and recording of the *lis pendens*.** His sole argument on
10 this point in his supporting points and authorities is that he is a pro se litigant whose mental health has
11 been deteriorating due to the stress of the litigation. This does not establish good cause for not bringing
12 the motion at an earlier time. It is also belied by the following:

13 1. Since firing his first attorney (after a December 7, 2017, hearing, Mr. Cotton has had the
14 time and capacity to file numerous *ex parte* applications of his own in this litigation as well as to file a
15 voluminous nearly 70-page (excluding exhibits) federal court complaint making outrageous and
16 unfounded allegations against his adverse parties in this and related litigation (Larry Geraci and
17 Rebecca Berry), their counsel, and the City of San Diego.

18 2. The Register of Actions reveals that Mr. Cotton has contemplated this motion for at least
19 one month as he reserved the April 13, 2018, hearing date on March 8 and since then he has scheduled
20 and rescheduled numerous *ex parte* hearings for a motion to expunge the *lis pendens* but never actually
21 served or filed his papers. (See Declaration of Michael R. Weinstein, paras. 3 and 5.)

22 3. Although Jacob Austin, his lawyer representing him on a limited scope in connection
23 with this motion, did not file the Substitution of Attorney form until yesterday, Mr. Austin has been
24 involved in this case since at least March 12, 2018, and sufficiently in advance of that date to, by his
25 own admission, review all the pleadings and discovery in both related actions and interview
26 17 witnesses. (See Declaration of Michael R. Weinstein, para. 4.)

27 Certainly, Mr. Cotton had time to file a motion to expunge *lis pendens* given he had time to
28 engage in all of this legal maneuvering. Mr. Cotton has failed to demonstrate the reasons he failed to

1 timely file a motion to expunge, or any other circumstances, which would have prevented him from
2 filing a timely motion.

3 Lastly, Mr. Cotton requests this Court clarify whether or not an appeal from the court's
4 March 23rd order prohibiting him from interfering with unhindered access to the property to conduct the
5 soils testing and requiring him to sign the Property Owner Consent form (which he refused to do)
6 would result in an automatic stay of the action. This is an improper request on this ex parte application
7 as Cotton gave no notice that such a request was being made. Nevertheless, it appears that Mr. Cotton
8 filed such a Notice of Appeal yesterday and so the points and authorities below address why the filing
9 of an appeal from that order does not automatically stay either the order itself or the entire action as the
10 order simply maintains the status quo and is prohibitory, rather than mandatory, in nature. In essence,
11 the Order prohibits Mr. Cotton from interfering with the soils testing required by the City of San Diego.
12 The law is clear; most prohibitory injunctions have mandatory aspects to them. Nevertheless, they
13 remain prohibitory in nature and thus, do not stay the action.

14 **II. THE FILING OF THE NOTICE OF APPEAL FROM THE MARCH 23 ORDER DOES**
15 **NOT RESULT IN AN AUTOMATIC STAY OF EITHER THE ORDER OR OF THE**
ENTIRE ACTION

16 Cotton's filing of a Notice of Appeal does not automatically stay the court's ruling granting the
17 preliminary injunction. The Court issued an order granting the motion as follows:

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

26 Although this order has mandatory aspects to it (e.g. ordering Mr. Cotton to sign the Property
27 Owner Consent form), the crux of the order is in the nature of a prohibitory injunction which
28 prevents Mr. Cotton from taking actions to deny or hinder access to the property to conduct soils
testing.

As noted in *URS Corporation v. Atkinson/Walsh Joint Venture* (2017) 15 Cal.App.5th 872: "An
appeal stays a mandatory but not a prohibitory injunction. This rule is clear, but whether a decree is

1 one or the other may be difficult to determine in some situations since an order entirely negative or
2 prohibitory in form may prove upon analysis to be mandatory and affirmative in essence and effect.”
3 (Citing *Kettenhofen v. Superior Court* (1961) 55 Cal2d 189, 191.) Courts are not “bound by the
4 form of the [injunction] order but will look to its substance to determine its real
5 nature.” (*Feinberg v. One Doe Co.* (1939) 14 Cal.2d 24, 28.) This inquiry “does not depend on
6 semantic characterizations.” (*Union Pacific R.R. Co. v. State Bd. of Equalization* (1989) 49 Cal.3d
7 138, 158.)

8 Courts distinguish between mandatory and prohibitory injunctions to preserve the status
9 quo pending appeals. (*Paramount Pictures Corp. v. Davis* (1964) 228 Cal.App.2d 827, 835.) “An
10 order enjoining an action by a party is prohibitory in nature if its effect is to leave the parties in the
11 same position as they were prior to the entry of judgment. On the other hand, it is mandatory in effect
12 if its enforcement would be to change the position of the parties and compel them to act in accordance
13 with the judgment rendered.” (*Musicians Club of L. A. v. Superior Court* (1958) 165 Cal.App.2d 67,
14 71.)

15 In the context of injunctions, the status quo is “the last actual peaceable, uncontested status
16 which preceded the pending controversy.” (*United Railroads v. Superior Court* (1916) 172 Cal.80,
17 87); see *Agricultural Labor Relations Bd. V. Tex-Cal Land Management, Inc.* (1985) 165 Cal.App.3d
18 429, 440.) “An injunction designed to preserve the status quo as between the parties and to restrain
19 illegal conduct is prohibitory, not mandatory....” (*Oiye v. Fox* (2012) 211 Cal.App.4th 10346, 1048.)

20 The order in this case maintains the status quo at the last “peaceable” time between the parties;
21 i.e., after the parties entered into the November 2, 2016 contract and Mr. Geraci was to fulfill the
22 condition precedent of obtaining a CUP on the subject property. The real crux of the injunction is to
23 prohibit Mr. Cotton from continuing his repeated attempts to thwart Mr. Geraci’s efforts to
24 fulfill his obligations under the contract. (It should be noted that even under Cotton’s alleged
25 version of the agreement Mr. Geraci was obligated to apply for and seek approval of a CUP to operate a
26 medical marijuana dispensary.)

27 Thus, although Court’s Order required some affirmative conduct on the part of Mr. Cotton (i.e.,
28 signing the Property Owner Consent form), the affirmative acts required were merely incidental to the

1 order's purpose of prohibiting Mr. Cotton from engaging in conduct to interfere with the obtaining of a
2 CUP. (See, *People ex rel. Brown v. iMergent, Inc.*, (2009) 170 Cal.App.4th 333, 343 [holding that a
3 preliminary injunction was prohibitory even though it ordered a party to stop engaging in "illegal
4 conduct" that it had resumed before the filing of the motion but had previously agreed to cease in a
5 settlement with government official].)

6 Finally, there is the additional question of whether *all* trial court proceedings would be stayed if
7 Mr. Cotton were able to obtain a stay. (§ 916(a) [automatic stay applies not only to enforcement of
8 challenged order (which has already been carried into effect), but to "matters embraced therein or
9 affected thereby"].) "Accepting the premise that the appeal only involves a collateral matter, then by
10 definition the trial is not 'embraced [in] or affected [by]' the order appealed from, within the meaning
11 of section 916, subdivision (a)." (*Reed v. Superior Court* (2001) 92 Cal.App.4th 448, 453.)

12 The soils testing is collateral to the instant action, which presents issues of specific
13 performance, breach of contract, and breach of the covenant of good faith and fair dealing. Thus, an
14 appeal of the court's March 23rd order does not automatically stay either the order itself or the entire
15 underlying proceeding. If Mr. Cotton seeks any type of stay based on this order, then he needs to bring
16 a noticed motion with the trial court seeking such relief.

17 **III. THE REQUEST FOR ORDER SHORTENING TIME TO FILE MOTION TO**
18 **EXPUNGE LIS PENDENS SHOULD BE DENIED**

19 Code Civ. Proc. § 1005 prescribes the times for written notice of motions and for the service
20 and filing of supporting and opposing papers. Code Civ. Proc. § 1005(b), however, provides that "[t]he
21 court, or a judge thereof, may prescribe a shorter time" than otherwise prescribed in § 1005.

22 California Rules of court, Rule 3.1300(b) states:

23 The court, on its own motion or on application for an order shortening time supported by
24 a declaration showing *good cause*, may prescribe shorter times for the filing and service
25 of papers than the time specified in Code of civil Procedure section 1005. (Emphasis
added.)

26 As previously stated, Mr. Cotton has not shown good cause, or any cause, why he failed to
27 timely file the motion to expunge *lis pendens*. His deteriorating mental status from the stress of
28 litigation does not constitute good cause for not filing the motion any time during the last year. The

1 facts belie his claim that he lacked the mental health and capacity to file such a motion in that he has
2 had the time to file numerous other *ex parte* applications in this action as well as a federal lawsuit
3 against Mr. Geraci, Ms. Berry, their attorneys, and the City of San Diego. Moreover, the motion has
4 been contemplated for at least a month and his attorney representing in this motion has been involved
5 in this case since before March 12. (See Declaration of Michael R. Weinstein, para. 4.)

6 **IV. CONCLUSION**

7 The appeal of the court's March 23rd Order does not automatically stay the order or this entire
8 action. Although the order has a mandatory aspect to it (i.e. to sign the Property Owner Consent form),
9 the order is in effect prohibitory in nature because it maintains the status quo. If Mr. Cotton wants to
10 seek a stay, he has to proceed in the normal course by noticed motion.

11 Mr. Cotton has not shown any good cause for an order shortening time to hear his motion to
12 expunge the *lis pendens* on 8 days' notice. With trial only 36 days away and Mr. Cotton's deposition
13 and necessary trial preparation in which to engage, Mr. Geraci would be severely prejudiced by the
14 hearing of this motion. The disputes should and will be determined on the merits at the upcoming trial.

15 The motion is a transparent attempt to seek reconsideration of the court's denial of his motion
16 for a preliminary injunction and the court's granting of Mr. Geraci's motion for an order prohibiting
17 him from hindering access to the subject property by a soils testing company hired to perform soils
18 testing necessary as part of the CUP application process. It should be denied.

19
20 Dated: April 5, 2018

FERRIS & BRITTON,
A Professional Corporation

21
22 By:



Michael R. Weinstein
Scott H. Toothacre

23 Attorneys for Plaintiff/Cross-Defendant LARRY GERACI
24 and Cross-Defendant REBECCA BERRY
25
26
27
28

1 FERRIS & BRITTON
A Professional Corporation
2 Michael R. Weinstein (SBN 106464)
Scott H. Toothacre (SBN 146530)
3 501 West Broadway, Suite 1450
San Diego, California 92101
4 Telephone: (619) 233-3131
Fax: (619) 232-9316
5 mweinstein@ferrisbritton.com
stoothacre@ferrisbritton.com
6

7 Attorneys for Plaintiff/Cross-Defendant LARRY GERACI and
Cross-Defendant REBECCA BERRY

8 SUPERIOR COURT OF CALIFORNIA
9 COUNTY OF SAN DIEGO, CENTRAL DIVISION

10 LARRY GERACI, an individual,

11 Plaintiff,

12 v.

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

14 Defendants.
15

16 DARRYL COTTON, an individual,

17 Cross-Complainant,

18 v.

19 LARRY GERACI, an individual, REBECCA
BERRY, an individual, and DOES 1
20 THROUGH 10, INCLUSIVE,

21 Cross-Defendants.
22

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

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

DECLARATION OF MICHAEL R.
WEINSTEIN IN SUPPORT OF
PLAINTIFF LARRY GERACI'S
OPPOSITION TO DEFENDANT DARRYL
COTTON'S EX PARTE APPLICATION
FOR ORDERS: (1) SHORTENING TIME
FOR HEARING ON DARRYL COTTON'S
MOTION TO EXPUNGE NOTICE OF
PENDENCY OF ACTION (LIS
PENDENS); AND (2) COMPELLING THE
ATTENDANCE AND TESTIMONY OF
PLAINTIFF LARRY GERACI

[IMAGED FILE]

Hearing Date: April 5, 2018
Hearing Time: 8:30 a.m.

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

23
24 I, Michael R. Weinstein, declare:

25 1. I am an attorney with Ferris & Britton, APC, the attorneys for Plaintiff and Cross-
26 Defendant, Larry Geraci, and Cross-Defendant, Rebecca Berry, in this action. I have personal
27 knowledge of the facts stated in this declaration. If called as a witness, I would testify competently
28 thereto. I provide this declaration in support of Mr. Geraci's opposition to Mr. Cotton's instant *ex parte*

FILED
Clerk of the Superior Court

APR 05 2018

By: A. TAYLOR

1 application by Geraci and Berry.

2 2. Darryl Cotton was supposed to file and serve his moving papers for the instant *ex parte*
3 application and hearing by noon on April 4, 2018 per the courtroom rules. As Plaintiff's counsel, I
4 received the voluminous moving papers via email service on April 4, 2018 at 2:26 p.m. Exhibit 1
5 attached hereto is a true and correct copy of that April 4, 2018, at 2:26 p.m. email.

6 3. On March 6, 2018, Mr. Cotton's *ex parte* application for a stay or, alternatively, for
7 judgment on the pleadings was denied (ROA# 129). Later that day Mr. Cotton (or someone acting on
8 his behalf) scheduled with the Calendar Clerk a regular motion hearing date of March 29, 2018 (ROA
9 #130). On March 8, 2018, Mr. Cotton's regular motion hearing date was re-scheduled to April 13,
10 2018 (ROA #131, 132). **That April 13, 2018, hearing date has been on the court's calendar since**
11 **May 8, 2018, and well in advance of the March 21, 2018, deadline for Mr. Cotton to serve and file**
12 **moving papers for such a hearing.**

13 4. Although attorney Jacob Austin did not file a Substitution of Attorney form regarding
14 his limited scope representation of Mr. Cotton until yesterday, April 4, 2018, **he has been involved in**
15 **the case since before March 12, 2018.** By email on March 12, 2018, at 11:25 a.m., attorney Jacob
16 Austin informed me that he "will shortly be substituting in as counsel for Mr. Cotton" In the email
17 he also stated, among other things, that "... in preparation for representing Mr. Cotton I have reviewed
18 (i) every filing in both of Mr. Cotton's actions with Mr. Geraci and the City of San Diego, (ii) every
19 document produced to and from Mr. Cotton via discovery, (iii) every single email to and from
20 Mr. Cotton's professional and personal email accounts between October 16 of 2016 and March of 2017
21 and (iv) interviewed over 17 individuals who were in constant written communications and/or working
22 with Mr. Cotton on a daily basis during the same time period...." Attorney Jacob Austin subsequently
23 attended the March 23, 2018, court hearing and advised the court he would be filing a Substitution of
24 Counsel whereby he would be representing Darryl Cotton on a limited scope in connection with the
25 filing of a motion to expunge the *lis pendens*. Mr. Austin attend court again at the April 3, 2018, *ex*
26 *parte* hearing.

27 5. On March 12, 2018, Mr. Cotton (or someone acting on his behalf) scheduled an *ex parte*
28 hearing date on March 20, 2018 (ROA #133). That *ex parte* hearing date was rescheduled three (3)

1 times before the Court took it off calendar on April 3 because Mr. Cotton did not file any moving
2 papers and then Mr. Cotton scheduled it anew for April 5, 2018. More specifically, the *ex parte*
3 hearing date was rescheduled from March 20 to March 22 (ROA #134, 135), then from March 22 to
4 March 27 (ROA #137, 138), then from March 27 to April 3, 2018 (ROA #146, 147). On April 3, the
5 Court took the scheduled *ex parte* hearing off calendar because Mr. Cotton failed to serve and file any
6 moving papers in support of his *ex parte* application for an order shortening time for a motion to
7 expunge the *lis pendens* (ROA #155). Later that same day, Mr. Cotton scheduled with the Calendar
8 Clerk the instant *ex parte* hearing date of April 5, 2018, for an application for an order shortening time
9 for a motion to expunge the *lis pendens* (ROA #158).

10 6. Mr. Cotton has had more than a year to file a motion to expunge the *lis pendens*.
11 Although he has filed many other motions, he never filed a motion to expunge the *lis pendens*. He
12 could have filed such a motion by March 21, 2018, in time for it to be heard on noticed motion by the
13 April 13, 2018, motion cutoff date (and in fact on March 8 scheduled with the Calendar Clerk a motion
14 hearing date of April 13, 2018), but then did not file the motion.

15 7. Now he wants the court to allow him to have such a motion heard on 8 days' notice. He
16 has not shown any good cause and has done nothing to earn any leeway from the Court. He has failed
17 multiple times over the course of nearly four months to attend his deposition and to respond to written
18 discovery (ROA #149, 150).

19 8. The motion is a transparent attempt to seek reconsideration of the court's denial of his
20 motion for a preliminary injunction (ROA #106, 107, 108) and the court's granting of Mr. Geraci's
21 motion for an order prohibiting him from hindering access to the subject property by a soils testing
22 company hired to perform soils testing necessary as part of the CUP application process (ROA #149,
23 150). In the latter unopposed motion, the Court found, among other things, that "there is a reasonable
24 probability that Plaintiff will prevail on the merits (ROA# 149, 150). This motion to expunge the *lis*
25 *pendens* seeks in effect to get the court to spend its time and resources reconsidering that very issue.
26 However, Mr. Cotton has pointed to no new facts or new law that have arisen since these issues were
27 previously decided in the context of other motions.

28 9. The late-filing of the instant motion to expunge a *lis pendens* (for which this order

1 shortening time is sought) and that could have been filed any time during the preceding approximately
2 12 months severely prejudices Plaintiff Geraci. Trial is only 36 days away. The TRC is on April 27,
3 2018, only 22 days away. Mr. Cotton has still not given his deposition, which I previously noticed
4 again for today, April 5 at 9:00 a.m., and has not yet provided his written discovery responses. Plaintiff
5 should not be distracted from trial preparation to respond to this late-filed motion when, quite frankly,
6 the ultimate disputes and claims in this case will be decided on the merits at trial in a little more than
7 one month. Preliminarily litigating this issue on motion makes no sense when there will be a full
8 consideration of the evidence after cross-examination at trial in a month.

9 I declare under penalty of perjury under the laws of the State of California that the foregoing is
10 true and correct. Executed this 5th day of April, 2018, in San Diego, California.

11 
12

13 MICHAEL R. WEINSTEIN
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT 1


Michael Weinstein

From: Process Server <servethepapersfast@gmail.com>
Sent: Wednesday, April 04, 2018 2:26 PM
To: Michael Weinstein
Subject: Service of Papers re Geraci v. Cotton, et al., SDSC Case No. 37-2017-00010073-CU-BC-CTL
Attachments: 1 - Ex Parte App.pdf; 2 - MPA ISO Ex Parte App.pdf; 3 - Dec Austin ISO EP App.pdf; 4 - NOM & Mtn re Lis Pendens.pdf

Follow Up Flag: Moved to Worldox (Client Files\4892\001\00456186.MSG)


 5 - MPA ISO Mtn re Lis Pendens.pdf


 6 - Dec Cotton ISO Mtn re Lis Pendens.pdf

 7 - RJN ISO Ex Parte & Lis Pendens.pdf

 8 - [Proposed] Ord.pdf

 9 - Sub of Atty.pdf

 10 - Ntc re Ltd Scope of Rep.pdf

 11 - POS.pdf