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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

LARRY GERACI, an individual,

Plaintiff,

vs.

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

Defendants.

AND RELATED CROSS-ACTION.

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

DARRYL COTTON'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS

Date: July 13, 2018
Time:9:00 a.m.
Dept:C-73
Judge:The Hon. Joel R. Wohlfeil

DEFENDANT DARRYL COTTON HEREBY REPLIES TO PLAINTIFF'S OPPOSITION TO HIS MOTION FOR JUDGMENT ON THE PLEADINGS AS FOLLOWS:

I. The Complaint is Premised EXCLUSIVELY on the Allegation the November Document is a Final, Complete Integrated Agreement, which is Directly Contradicted by Plaintiff's Own Sworn Declaration.

In *Cantu v. Resolution Trust Corp.*, (1992) 4 Cal.App.4th 857, appellant sought review of a ruling by the trial court sustaining defendants' demurrers, which the appellate court affirmed. In reaching its decision, the *Cantu* court held that "in the interests of justice, on demurrer, a court will also consider judicially noticeable facts, even if such facts are not set forth in the complaint.... Both trial and appellate courts may properly take judicial notice of a party's earlier pleadings and positions as well as established facts from both the same case and other cases. The complaint should be read as containing the judicially noticeable facts, '**even when the pleading contains an express allegation to the contrary**.' *Chavez v. Times-Mirror Co.* (1921) 185 Cal. 20, 23 [emphasis added]. A plaintiff may not avoid a demurrer by pleading facts or positions in an amended complaint that contradict the facts pleaded in the original complaint or by suppressing facts which prove the pleaded facts false. Likewise, the plaintiff *may not plead facts that contradict the facts or positions that the plaintiff pleaded in earlier actions or suppress facts that prove the pleaded facts false. Id.* at 878-879 (italicized emphasis in original) (some internal quotation and citations omitted)."[1]

Plaintiff's opposition is filled with unfounded attempts at misdirecting this Court from two very simple and contradictory statements. The first, Plaintiff's allegation in his Complaint that the November Document, the sole basis of his Complaint, is a final, complete integrated agreement.[2] The second, his sworn statement in his declaration that specifically confirms he sent the Confirmation Email, at Defendant's request, confirming a future "final agreement" would contain Defendant's bargained-for "10% equity

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[1] *See Rauber v. Herman* (1991) 229 Cal.App.3d 942, 946 ("For the purpose of review of the sustaining of the demurrer without leave to amend, we deem true the factual allegations of the complaint, and determine whether plaintiffs pled facts showing they are entitled to some relief under any legal theory. (*See Amid v. Hawthorne Community Medical Group, Inc.* (1989) 212 Cal.App.3d 1383, 1387.) **Where an allegation is contrary to law or to a fact of which the court may take judicial notice, it is to be treated as a nullity**. (*Ibid.*)").

[2] Complaint at ¶ 7 ("On November 2, 2016, [Plaintiff] and [Defendant] entered into a written agreement for the purchase and sale of the [Property] on the terms and conditions stated therein.")

position."[3] Thus, the November Document is not a final, complete integrated agreement for the Property. The two statements are mutually exclusive, they are impossible to reconcile.

Plaintiff's Confirmation Email clearly and unambiguously reflects that on November 2, 2016, when the parties executed the November Document, neither party ***intended*** it to be a "final agreement" for the sale of the Property. Accordingly, Plaintiff's Complaint fails to state a cause of action because his declaration directly and unambiguously ***contradicts*** his factual allegation in his Complaint that the November Document ***is*** a final, integrated agreement. "'The crucial issue in determining whether there has been an integration is whether the parties ***intended*** their writing to serve as the exclusive embodiment of their agreement.'" *Kanno v. Marwit Capital Partners II, L.P.* (2017) 18 Cal.App.5th 987, 1001 (quoting *Masterson v. Sine* (1968) 68 Cal.2d 222, 225).

The evidence is clear. Plaintiff filed a suit lacking any probable cause relying on the parol evidence rule ("PER") to be used "as a shield to prevent the proof of [his own] fraud." *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (2013) 55 Cal.4th 1169, 1182. It is not until April 10, 2018, ***over a year*** after he filed suit, that Plaintiff raises the alleged "Oral Disavowment" – that Defendant orally agreed on November 3, 2016 that (i) the November Document is a complete integrated agreement for the sale of the Property; (ii) his request for written assurance of performance was actually Defendant ***pretending*** to have reached an oral agreement for a joint-venture with Plaintiff, in which he had been promised an equity position; and (iii) Plaintiff sent the Confirmation Email by *mistake*.

The Court should realize the sheer ridiculousness of this position and sanction opposing counsel accordingly. Plaintiff is manipulating the judicial system and ***fabricating evidence*** as he goes along. The Oral Disavowment allegation is an obvious fabricated lie made in response to Defendant raising, for the first time in this action, the principles in *Riverisland* that would indisputably prevent Plaintiff from using the PER as a shield to prevent the admission of his Confirmation Email.

The law imputes to a person the intention corresponding to the reasonable meaning of his or her language, acts, and conduct. *H.S. Crocker Co., Inc. v. McFaddin* (1957) 148 Cal. App. 2d 639, 643. In construing the mutual intention of the parties to a contract, the objective, outward manifestation of mutual consent governs. *Winet v. Price* (1992) 4 Cal. App. 4th 1159, 1166. If the objective manifestations are

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[3] Geraci Decl. p. 7, ln. 4-5. ("[A]fter 9:00 p.m. [...] I responded from my phone 'No no problem at all.'")

sufficient to establish a contract, the parties' subjective intentions or beliefs are wholly immaterial. "Stated otherwise, when a person with a capacity of reading and understanding an instrument signs it, in the absence of fraud or imposition he is bound by its contents, and he is estopped from saying that its provisions are contrary to his intentions or understanding." *Estate of Wilson* (1976) 64 Cal.App.3d 786, 802 (citing *Palmquist v. Mercer* (1954) 43 Cal.2d 92, 98). Thus, unlike Defendant who executed the November Document believing it to be a receipt, Plaintiff cannot rely on his fabricated Oral Disavowment – supported only by his self-serving declaration – in an attempt to prolong this litigation while he takes extra-judicial actions to intimidate and coerce Defendant and his litigation investor into settling.

II. This Court May and Must Take Judicial Notice of Geraci's Sworn Declaration and the Fact That He Was a Licensed California Real Estate Agent When the November Document Was Executed.

Plaintiff argues in opposition that "Mr. Geraci's statements in his recently field Declaration are consistent with the allegations in his Complaint. Thus, the Court should decline to take judicial notice." Opp. At p.12 lns. 23-24. A factually and legally meritless position. The Complaint states the November Document is a final agreement for the sale of the Property and Plaintiff's declaration specifically confirms that it is "not" a "final agreement" because a final agreement would provide for Defendant's equity position, which was a "factored element" in his decision to sell the Property.

Plaintiff's counsel is an experienced and skilled litigator who is a managing partner at his law firm, he ***knows*** the ***absurdity*** of his position. But he has no choice but to continue to argue this position because by doing so he allows time for his Plaintiff to sabotage the CUP on the Property and he limits his own personal liability and that of his firm. As noted in the moving papers, pursuant to *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, Plaintiff will be exposed to liability for a malicious prosecution action as well as his army of hired specialists – attorneys, political lobbyists, building designers, real estate agents and other third-parties. The Confirmation Email was provided by Defendant to Plaintiff's counsel the very same day that he was served with the Complaint. For all of these reasons, and more, though it is manifestly absurd to argue the two statements are not contradictory, Plaintiff's counsel has no choice - if this court takes judicial notice of Plaintiff's declaration, then Plaintiff's entire Complaint fails. (Defendant notes he has a Federal action before Judge Curiel stayed against Plaintiff and his various agents, including counsel for, *inter-alia,* Civil Conspiracy and RICO charges.)

A trial court must take judicial notice of the matters specified in Evid. Code § 452 if a party requests it to do so (Evid. Code § 453) and does each of the following: (i) gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable him or her to prepare to meet the request (Evid. Code § 453(a)); and (ii) furnishes the court with sufficient information to enable it to take judicial notice of the matter (Evid. Code § 453(b)). See *Four Star Electric, Inc. v. F & H Construction* (1992) 7 Cal.App.4th 1375, 1379 ("[defendant] requested the trial court to take judicial notice of pertinent portions of court files in the prior actions. ***The trial court was required to do so upon request*** (Evid. Code, § 452, subd. (d), 453)[.]") (emphasis added). Defendant has met the requirements and, thus, this court must take judicial notice of Plaintiff's statements in his declaration that make his factual allegations in his Complaint a "***nullity***." *See Rauber v. Herman* (1991) 229 Cal.App.3d 942, 946 ("Where an allegation [in a party's Complaint] is contrary to law or to a fact of which the court may take judicial notice, it is to be treated as a ***nullity***.") (emphasis added). Thus, Plaintiff's Complaint must be dismissed. Additionally, despite opposing counsel's contention, because this Court must take judicial notice of the fact that Plaintiff was a licensed real estate agent at the time of the execution of the November Document,[4] and impute to him knowledge of the statute of frauds as a matter of law, the Complaint must be dismissed with prejudice.[5] This court may consider asking Plaintiff, why, after being licensed for ***over 25 years***, he decided to terminate his real estate license the same month he filed this suit?

III. All of Plaintiff's Arguments in Opposition Fail.

Respectfully noted, although this Court has previously stated that it is personally acquainted with Plaintiff's attorneys (Michael Weinstein and Mrs. Gina Austin), and does not believe they would act unethically, Plaintiff's Oral Disavowment is evidence to the contrary. If Defendant had actually orally disavowed the equity position promised to him by Plaintiff, why did Plaintiff's counsel wait over a year to introduce this statement into evidence? It is not credible. Pursuant to *Masterson*[6], it not *natural* and

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[4] *See Fellom v. Adams* (1969) 274 Cal.App.2d 855, 864 ("The status of a person as a licensed broker or salesman is a matter of public record of which the court can take judicial notice. ")

[5] *See Augustine v. Trucco* (1954) 124 Cal.App.2d 229, 241 ("Every real estate broker knows that his commission contract must be in writing. If he operates without one he assumes the risk and has no cause for complaint if his efforts are unrewarded.")

[6] *Masterson v. Sine* (1968) 68 Cal.2d 222, 227-228 ("Evidence of oral collateral agreements should be excluded only when the fact finder is likely to be misled. The rule must therefore be based on the credibility of the evidence. One such standard, adopted by section 240(1)(b) of the Restatement of Contracts, permits proof of a collateral agreement if it 'is such

cannot be the basis of an affirmative defense for at least two reasons. First, as noted, it is a fact that Plaintiff was a real estate agent and, as a matter of law, cannot claim any form of detrimental reliance on Defendant's alleged Oral Disavowment because the law imputes to him knowledge of the statute of frauds. Second, if Defendant had really agreed the November Document was a final agreement, why did Plaintiff never once seek to memorialize Defendant's understanding of such or of his mistake between November 2, 2016 and before his filing of this suit on March 21, 2017? Because it is a fabrication.

CONCLUSION

In summation, this is a simple case, Plaintiff's Opposition is a smoke screen of copies and pastes of numerous declarations and motions making factual arguments to distract this court ***from*** the only two material statements at issue here. Counsel provides no reasonable alternative interpretation of the PER or answer almost any of the substantive issues raised by Defendant's motion. We urge the court not to be fooled by these tactics nor rely on its familiarity with opposing counsel – it is severely prejudicing Defendant. As noted previously, the law is not a shield for wrongdoing. Plaintiff has backed himself into a corner in which his Complaint simply cannot stand. There was an agreement formed on November 2, 2016 and it is clear the parties did not ***intend*** the November Document to be the final integrated agreement that encompassed all of the terms reached on that day. Ultimately, none of Plaintiff's arguments in the Opposition are persuasive and Plaintiff's Complaint has no probable cause to sustain the Breach of Contract cause of action (or any other cause of action as they all derived therefrom).

DATED: July 5, 2018

THE LAW OFFICE OF JACOB AUSTIN

By _____
JACOB P. AUSTIN
Attorney for Defendant/Cross-Complainant
DARRYL COTTON

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an agreement as might *naturally* be made as a separate agreement by parties situated as were the parties to the written contract.' [Citations.]")