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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 *EX PARTE* APPLICATION FOR AN ORDER (1) CONTINUING TRIAL SCHEDULED FOR AUGUST 17, 2018, AND (2) A STAY OF THIS PROCEEDING

Date: August 2, 2018
Time: 8:30 a.m.
Dept: C-73
Judge: The Hon. Joel R. Wohlfeil

TO ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD:

PLEASE TAKE NOTICE that, on August 2, 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, Defendant/Cross-Complainant DARRYL COTTON ("Defendant") will move this Court *ex parte* for an Order continuing the trial in this matter presently scheduled for August 17, 2018.

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This motion is brought by way of an *ex parte* application pursuant to California Rules of Court ("CRC") Rule 3.1332(b), and on the grounds that continuance of this is necessary and appropriate due to (1) Defendant's excused inability to conduct discovery and obtain other relevant material evidence necessary for him to prepare for trial (CRC 3.1332(c)(6)), and a recent unanticipated events which have operated to significantly change in the status of this case such that it is not, nor can it be, ready for trial (CRC 3.1332(c)(7)).

This motion is based upon this *Ex Parte* Application, the accompanying Memorandum of Points and Authorities, Declaration Jacob P. Austin, the pleadings and papers on file in this action, and upon such other written and/or oral evidence as may be presented at the hearing of this *Ex Parte* Application.

DATED: August 1, 2018

THE LAW OFFICE OF JACOB AUSTIN

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

MEMORANDUM OF POINTS AND AUTHORITIES

A simple single question of law - whether or not a three-sentence document is a complete integrated agreement pursuant to the parol evidence rule ("PER") - determines whether this Petition is meritorious and warrants the issuance of a writ. That single question of law is not only dispositive of both orders Petitioner is seeking review of, it is also the case-dispositive issue in the underlying suit.

Trial is scheduled for August 17, 2018. "Where there is no direct appeal from a trial court's adverse ruling, and the aggrieved party would be compelled to go through a trial and appeal from a final judgment, a petition for writ of mandate is allowed. (*Fogarty v. Superior Court* (1981) 117 Cal. App. 3d 316, 320.)" *Fair Employment & Housing Com. v. Superior Court* (2004) 115 Cal.App.4th 629, 633.

That single question of law based on undisputed facts determines whether the trial court has consistently abused its discretion in finding whether a three-sentence document is or is not a completely integrated agreement. This Court has repeatedly and continuously concluded that it is completely integrated, despite directly contradicting and undisputed evidence. However, this Court has NEVER provided its ***reasoning*** for doing so in contravention of directly applicable and well-established case law.

On July 13, 2018, counsel for Defendant asked this Court to explain its reasoning for reaching the conclusion the document is a completely integrated statement. The Court replied:

> "You know, we've been down this road so many times, counsel. I've explained and reexplained the Court's interpretation of your position. I don't know what more to say."

This is a false statement. *The trial court has never provided its reasoning in any written order or at any hearing at which oral argument has been held.* This Court is clearly exasperated with defendant and, apparently now, counsel for defendant as well. If this Court would simply provide its reasoning for its rulings, then this action could end now as Defendant would even be motivated to settle with Plaintiff if the trial court's order were based on facts and law.

However, the last time this trial court mentioned the three-sentence document at issue here as a basis for denying the relief Defendant requested, the trial court incorrectly stated in its order that the

single most crucial piece of evidence was created after the November 2 document. This is factually untrue. It is untrue because in every moving paper with the Court Mr. Cotton has made it plain and clear by bolding and/ or highlighting that the email sent to Geraci, where he asks for assurances that his bargained for equity position would be included in a final agreement was sent and replied to on that very day, **only hours after the signing of the November 2 document, was not** "created after November 2, 2016" as the Court states in its minute order. (See [ROA 222] Minute order April 13, 2018)

In *King v. Andersen*, 242 Cal. App. 2d 606 (1966), the plaintiff in an assault case admitted at deposition that defendant used "no force." *Id.* at 609. When defendant moved for summary judgment based on plaintiff's deposition concession, plaintiff submitted an affidavit in support of his opposition saying, in fact, defendant had applied unnecessary force. *Id.* at 610. Plaintiff disputed the meaning attributed to his deposition testimony by defendant and argued that the dispute must be submitted to the jury. *Id.* at 609-10. The trial court disagreed and dismissed the case. The Court of Appeal affirmed. *Id.* at 610. Plaintiff could not manufacture a dispute of fact by submitting additional affidavits. "Where, as here, however, there is a clear and unequivocal admission by the plaintiff, himself, in his deposition . . . we are forced to conclude there is no *substantial evidence* of the existence of a triable issue of fact." Id. at 610 (emphasis in original).

Here, Geraci is attempting to do the same. Geraci sent a clear and unequivocal admission that the November Document is not a final agreement on **November 2, 2016**. The procedural history of this action shows that Geraci was relying on the PER/SOF to bar the admission of the Confirmation Email. When confronted with *Riverisland* and *Tenzer*, in **April of 2018**, he submits a declaration saying he sent the Confirmation Email by mistake, that Petitioner orally agreed the November Document is a final agreement and that such dispute should be submitted to the jury. See Declaration of Larry Geraci in Opposition to Defendant Darryl Cotton's Motion to Expunge Lis Pendens [ROA180]). Identical to *King*, ***Geraci's self-serving declaration should not be considered substantial evidence and he should not be allowed to blatantly fabricate a material factual dispute to continue to prosecute a frivolous action.***

The Court may not agree with these facts or the application of law, but if this Court will not provide its reasoning for its decision, it should at least, in the interest of justice, allow the Court of

Appeals to decide the writ to determine its merit. If this Court is wrong, the forced trial of this action constitutes a miscarriage of justice. In *Fair Employment and Housing Commission v. Superior Court* (2004) 115 Cal.App.4th 629, 633 the Court of Appeals stated that "Where there is no direct appeal from a trial court's adverse ruling, and the aggrieved party would be compelled to go through a trial and appeal from a final judgment, a petition for writ of mandate is allowed. Such a situation arises where the trial court has improperly overruled a demurrer." This Court denied Defendant's motion for judgment on the pleadings and, similar to Fair Employment, which recognizes extraordinary relief is required when the trial court errored on a case-dispositive issue, the Court of Appeals will grant the appropriate relief if this trial court has abused its discretion in continuously finding the three-sentence document is a completely integrated agreement.

Again, this Court has never provided its reasoning for its rulings. Respectfully, if this court would simply provide its reasoning, this action could end. If this court is not inclined, in the interest of justice, this court should issue a stay while the Court of Appeals rules on the appropriateness of this trial court's order on a case-dispositive issue.

CONTINUATION OF THE TRIAL IN THIS MATTER IS NECESSARY BECAUSE DEFENDANT WAS DEPRIVED OF SUFFICIENT TIME TO PREPARE FOR TRIAL

When exercising its discretion in determining whether to grant a request to continue a trial, "he court must look beyond the limited facts which cause a litigant to request a last-minute continuance and consider the degree of diligence in his or her efforts to bring the case to trial, including participating in earlier court hearings, conducting discovery, and preparing for trial." (*Link v. Carter* (1998) 60 Cal.App.4th 1315, 1324-1325.)

Although judicial efficiency is achieved by the trial court expediting and balancing its case loads, "efficiency is not an end in itself" and the purpose of doing so is "***to promote the just resolution of cases on their merits***." (*Thatcher v. Lucky Stores* (2000) 79 Cal.App.4th 1081, 1085, *emphasis added.*)

Despite diligent efforts to do so, Defendant and his counsel are not prepared for trial. On April 27, 2018 following the hearing on Plaintiff's Motion for Monetary, Terminating/Escalating Sanctions, ***at the request of Plaintiff***, this Court continued the trial date in this matter from May 11, 2018 until

August 17, 2018, and extended the discovery cutoff to afford ***Plaintiff*** additional time to conduct discovery.

In that same Order, this Court also directed Defendant to provide written responses to Plaintiff's discovery request and to make himself available on a date certain within ***ten days*** of the date of the Order.

Defendant provided full and complete written discovery responses and attended his deposition as ordered. However, even assuming *arguendo* that Defendant would not have been required to spend the next ten days following the April 27, 2018 hearing completing substantial written discovery responses and preparing for and attending his deposition, the new trial date in and of itself effectively precluded him from being afforded any reasonable amount of time to meet the numerous deadlines associated with trial preparation.

The two deadlines which were most critical to Defendant's efforts to properly prepare for trial in this case were those governing the time afforded to file a motion for summary judgment/ adjudication and to propound discovery.

Specifically, Defendant was only afforded two calendar days within which to draft and mail serve a summary judgment/adjudication motion (110 calendar days before trial – CCP §§437c, 1110), and seven calendar days to draft and personally serve the motion (105 calendar days before trial – CCP §437c) - a deadline even the most seasoned attorney with a large staff would have struggled to meet. By being deprived of adequate – or even somewhat reasonable – time to prepare such a motion, Defendant's only avenue was to bring a motion for judgment on the pleadings – an undertaking which ultimately proved futile.

In addition, Defendant's ability to propound and serve written discovery in sufficient time to enable him to file a motion to compel in the event such was necessary (100 calendar days before trial if mail served – CCP §§2024, 2030, 2031, 2019. 1005, 1013) also was impeded since he would have been required to serve the discovery no later than May 9, 2018 – 12 days after entry of the order, five days before Defendant's deposition, and on the same day Defendant served his discovery responses.

Moreover, as the Court and opposing counsel will recall, it was not until April 5, 2018 that Attorney Jacob Austin substituted into this case on a limited representation basis to assist Defendant in

the preparation of a motion to expunge the *lis pendens*, but did not substitute in to fully represent Defendant until May 1, 2018 – four days *after* the order – following which he spent the next two weeks assisting Defendant to complete his discovery responses and prepare him for his deposition.

In addition to the discovery responses and deposition preparation, Attorney Austin also was required to assist Defendant in taking the steps necessary to preserve his appeals, and to prepare and submit relevant, viable law and motion matters to this Court in addition to the motion for judgment on the pleadings.

The Fourth District Court of Appeal in *Oliveros v. County of Los Angeles* (2004) 120 Cal.App.4th 1389 opined that, "[t]he *Link* court concluded that the worthy goal of disposing of cases expeditiously would not be met by 'imposing the ultimate sanction of termination on litigants who, due to unforeseen circumstances and reasonable excuse, fail to appear when so ordered." (*Id.* at 1396; *Link, supra*, at 1326.) This reference to "imposing the ultimate sanction of termination" is directly applicable here based upon the language of this Court's April 27, 2018 Minute Order.

The April 27, 2018 Minute Order at paragraph 1 states that the court granted Plaintiff's request for the imposition of lesser sanctions [rather than terminating sanctions striking Defendant's Answer and Cross-Complaint] to extend the trial and discovery deadlines "to permit Cotton one final chance to provide the written discovery responses and make himself available for deposition on a date certain...." In essence, notwithstanding the fact that Defendant fully complied with all terms of the April 27, 2018 Order, if this Court denies his request to continue the trial, it will effectively impose the ultimate sanction of termination upon him by forcing him to trial without having afforded him the necessary time and opportunity to properly prepare.

For the reasons set forth above and, particularly, because continuing this trial will not operate to prejudice any other party to this action – with the exception of Defendant who will suffer severe prejudice if this the trial is not continued – Defendant respectfully requests that this Court grant its motion and continue the trial for at least 120 days.

DEFENDANT SEEKING A PETITION TO REVIEW THE DENIAL OF THIS MOTION FOR A JUDGMENT ON THE PLEADINGS

The Court should grant Defendant a stay for the Court of Appeals to review this matter for the following reasons:

Petitioner lacks adequate means, such as a direct appeal, by which to attain relief. *See Phelan v. Superior Court* (1950) 35 Cal.2d 363, 370–372. The trial court's order denying Petitioner's MJOP is non-appealable. And, although the denial the *Ex Parte* Application for a Receiver is appealable, Petitioner's extraordinary circumstances warrant extraordinary relief. *See Hogya v. Superior Court* (Ct. App. 1977) 75 Cal.App.3d 122, 128 ("Where there is a right to an immediate review by appeal, that remedy is considered adequate unless petitioner can show some special reason why it is rendered inadequate by the particular circumstances of his case."). Notwithstanding Petitioner's blue-collar background and his lack of legal education, on these undisputed facts, the trial court should have adjudicated this matter on its own when presented with Petitioner's evidence (even if done so in a legally unsophisticated manner). It's continuation is a miscarriage of justice and resolution via the standard appeal process, given the trial court's rulings, is not adequate.

Secondly Petitioner will suffer harm and prejudice in a manner that cannot be corrected on appeal. *Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652. The basis of Petitioner's Ex Parte Application for a Receiver was evidence that Geraci is taking steps to unlawfully sabotage a conditional use permit (the "CUP") that is being processed on the Property by the City of San Diego (the "City"). As more fully described below, by sabotaging the CUP, Geraci is able to exponentially limit his special and consequential damages to Petitioner.

DATED: August 1, 2018

THE LAW OFFICE OF JACOB AUSTIN

By _____

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