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County of San Diego

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LARRY GERACI

**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.

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

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

**CROSS-DEFENDANT LARRY GERACI'S
NOTICE OF DEMURRER AND
DEMURRER TO CROSS-COMPLAINT
BY DARRYL COTTON**

[IMAGED FILE]

DARRYL COTTON, an individual,

Cross-Complainant,

v.

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

Cross-Defendants.

Hearing Date: July 14, 2017
Hearing Time: 9:00 a.m.

Complaint Filed: March 21, 2017
Trial Date: Not Yet Set

TO EACH PARTY AND TO THE ATTORNEY OF THE RECORD FOR EACH PARTY:

PLEASE TAKE NOTICE that, on July 14, 2017, at 9:00 a.m. or as soon thereafter as the matter may be heard in Department C-73 of this Court, located at 330 West Broadway, San Diego, California, 92101, Cross-Defendant, LARRY GERACI (hereafter "Geraci"), will and hereby does move the Court to sustain his demurrer to the Cross-Complaint filed on May 12, 2017, by Defendant and Cross-Complainant, DARRYL COTTON (hereafter "Cotton" or "Cross-Complainant"), on each of

1 the grounds set forth below.

2 **DEMURRER**

3 The Cross-Complaint's alleged first, second, eighth, fifth, sixth, seventh, eighth, ninth, tenth,
4 and eleventh causes of action, and each of them, fail to state facts sufficient to constitute a cause of
5 action against Cross-Defendant Geraci (Code Civ. Proc., § 430.10(e)) on the grounds and for the
6 reasons set forth below:

7 **FIRST CAUSE OF ACTION**

8 1. The first cause of action for quiet title does not state a cause of action against Geraci
9 because the allegations of the first cause of action are not verified under oath and an action to quiet title
10 must be verified. (Code Civ. Proc., § 761.020).

11 2. The first cause of action for quiet title does not state a cause of action against Geraci
12 because it fails to allege he took actions which created a legally adverse interest in the subject property.
13 The Cross-Complaint alleges that Geraci's filing of his Complaint and the related Lis Pendens created
14 the legally adverse interest. (Cross-Complaint ¶ 61) But such actions are absolutely privileged under
15 Civil Code section 47, subdivision (b) and subdivision (b)(4) respectively.

16 **SECOND CAUSE OF ACTION**

17 3. The second cause of action for slander of title does not state a cause of action because it
18 is based on allegations of wrongful acts that are privileged as a matter of law. The elements of a
19 slander of title cause of action are: (1) a publication; (2) which is without privilege or justification;
20 (3) which is false; and (4) which causes direct and immediate pecuniary loss. (*Alpha and Omega*
21 *Development, LP v. Whillock Contracting, Inc.* (2011) 200 Cal.App.4th 656, 664.) The wrongful acts
22 alleged in support of his claim are the filing of the instant Complaint and the attendant filing and
23 recording of a Lis Penden; however, the filing of a Complaint and the filing and recording of a Lis
24 Pendens are each absolutely privileged pursuant to Civil Code section 47, subdivision (b) and
25 subdivision (b)(4) respectively.

26 **FIFTH CAUSE OF ACTION**

27 4. The fifth cause of action for breach of contract does not state a cause of action because
28 Cross-Complainant has failed to allege conduct which would be an actual breach. As the "breach,"

1 Cross-Complainant merely alleges Geraci asserts the written November 2nd Agreement (a copy of
2 which is attached to the Complaint) is the final agreement between the parties for the purchase and sale
3 of the real property. (Cross-Complaint ¶ 98) However, Geraci's assertion that the written
4 November 2nd Agreement is the final agreement between the parties for the purchase and sale of the
5 subject real property cannot by itself be a breach of the differing agreement alleged by Cross-
6 Complainant.

7 SIXTH CAUSE OF ACTION

8 The sixth cause of action for breach of oral contract does not state a cause of action because:
9 a) Cross-Complainant has failed to allege conduct which would be an actual breach; b) there cannot be
10 an oral contract which contradicts a written contract; and c) the alleged oral contract for the purchase
11 and sale of the subject real property violates the Statute of Frauds. A contract coming within the statute
12 of frauds is invalid unless it is memorialized by a writing subscribed by the party to be charged or by
13 the party's agent. (Civ. Code, § 1624; *Secrest v. Security National Mortgage Loan Trust* (2008)
14 167 Cal.App.4th 544) An agreement for the sale of real property or an interest in real property comes
15 within the statute of frauds. (Civ. Code, § 1624(a)(3).)

16 SEVENTH CAUSE OF ACTION

17 The seventh cause of action for breach of the implied contract does not state a cause of action
18 because Cross-Complainant has failed to allege conduct which would be an actual breach; there cannot
19 be an implied contract which contradicts a written contract; and the alleged implied oral contract for the
20 purchase and sale of the subject real property violates the Statute of Frauds. A contract coming within
21 the statute of frauds is invalid unless it is memorialized by a writing subscribed by the party to be
22 charged or by the party's agent. (Civ. Code, § 1624; *Secrest, supra*, 167 Cal.App.4th 544) An
23 agreement for the sale of real property or an interest in real property comes within the statute of frauds.
24 (Civ. Code, § 1624(a)(3).)

25 EIGHTH CAUSE OF ACTION

26 The eighth cause of action for breach of the implied covenant of good faith and fair dealing does
27 not state a cause of action because it must be based on a contract. This claim appears to be based on
28 Cross-Complainant's alleged oral and/or implied-in-fact contract claims which in-and-of-themselves

1 are invalid for reasons stated herein, and therefore, cannot support the covenant claim. Additionally, if
2 the covenant claim alleges nothing more than a breach of contract it is merely superfluous and may be
3 disregarded. Additionally, this cause of action does not support an award of punitive damages as
4 claimed in ¶ 118 of the Cross-Complaint.

5 TENTH CAUSE OF ACTION

6 The tenth cause of action for civil conspiracy fails to state a cause of action because there is no
7 such cause of action in California. (*Moran v. Endres*, (2006) 135 Cal.App.4th 952, 954.) Rather,
8 conspiracy is “a legal doctrine that imposes liability on persons who, although not actually committing
9 a tort themselves, share with the immediate tortfeasors a common plan or design in its preparation.’ ...
10 ‘A conspiracy cannot be alleged as a tort separate from the underlying wrong it is organized to
11 achieve.’ (Citation.)” (*Id.* at 954-955.)

12 ELEVENTH CAUSE OF ACTION

13 The eleventh cause of action for an injunction fails to state a cause of action because there is no
14 such cause of action in California. “Injunctive relief is a remedy and not, in itself, a cause of action,
15 and a cause of action must exist before injunctive relief may be granted. (Citation.)” (*Shell Oil Co. v.*
16 *Richter* (1942) 52 Cal.App.2d 164, 168; see also *County of Del Norte v. City of Crescent City* (1999)
17 71 Cal.App.4th 965, 973 (a permanent injunction is attendant to an underlying cause of action).)

18 For each of such reasons, Cross-Defendant Geraci moves for an order of this Court sustaining
19 the demurrers to the first, second, fifth, sixth, seventh, eighth, tenth and eleventh causes of action
20 without leave to amend unless Plaintiff can make a sufficient offer of proof that he can cure the
21 pleading deficiencies.

22 The demurrers are based upon this Notice of Demurrer and Demurrer, the attached supporting
23 Request for Judicial Notice, the attached supporting Memorandum of Points and Authorities, the
24 records and files in this action, and such further matters that may be properly presented prior to or at the
25 time of hearing on the motion.

26 **NOTICE IS FURTHER GIVEN** that a tentative ruling is issued the day before the date set
27 forth for hearing, this court follows rule 3.1308(a)(2) and no notice of intent to appear is required to
28 appear for argument. The tentative ruling shall be made available at 3:30 p.m. on the court day prior to

1 the scheduled hearing. The tentative ruling may direct the parties to appear for oral argument, and may
2 specify the issues on which the court wishes the parties to provide further argument. The tentative
3 ruling may be obtained by calling the court tentative ruling number at (619) 450-7381 or by navigating
4 to the court's website www.sandiego.courts.ca.gov.

5
6 Dated: June 16, 2017

FERRIS & BRITTON,
A Professional Corporation

7
8 By: 
9 Michael R. Weinstein
10 Scott H. Toothacre

11 Attorneys for Plaintiff and Cross-Defendant
12 LARRY GERACI
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