ROA 498
5 pages

Jacob P. Austin (SBN 290303)
The Law Office of Jacob Austin
P.O. Box 231189
San Diego, CA 92193
Telephone: (619) 357-6850
Facsimile: (888) 357-8501
E-mail:JPA@JacobAustinEsq.com

Attorney for Defendant/Cross-Complainant DARRYL COTTON

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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF REPLY TO MOTION BY DEFENDANT DARRYL COTTON FOR ORDER THAT PLAINTIFF/CROSS-DEFENDANT LARRY GERACI'S INITIAL ANSWERS TO INTERROGATORIES BE DEEMED BINDING

Date: April 26, 2019
Time: 9:00 a.m.
Dept: C-73
Judge: The Hon. Joel R. Wohlfeil

Complaint filed: March 21, 2017
Trial Date: May 31, 2019

Defendant/Cross-complainant Darryl Cotton ("Cotton"), by and through undersigned counsel, hereby files this *Reply to his Motion for Order that Initial Answers to Interrogatories be Deemed Binding* (the "Reply").

A. Reply to Geraci's Opposition to Motion to Bind

California Business & Professions Code § 6128 provides that: "Every attorney is guilty of a misdemeanor who …[i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party…. Any violation of the provisions of this section is punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both."

Plaintiff Larry Geraci ("Geraci") opposes the motion by arguing Cotton is improperly seeking an order to bind "Geraci to interrogatory responses *which have never been amended!*" Opposition ("Opp".) at 1:24 (emphasis in original). Geraci's counsel, Scott Toothacre ("Toothacre"), completely and deceitfully ignores the facts and arguments in the moving papers that demonstrate that the amendments to Form Interrogatories (Set One), which were required to be set forth in Form Interrogatories (Set Two), were unlawfully set forth in Geraci's Responses to Requests for Admissions (Set One).

Geraci admits that on September 25, 2017, he served responses to Form Interrogatories (Set One). Opp. at 2:21-23. As detailed in the moving papers, in response to all questions in the Form Interrogatories (Set One) that required the disclosure of the Disavowment Allegation, Geraci replied "No." (Motion by Defendant Darryl Cotton for Order That Plaintiff/Cross-Defendant Larry Geraci's Initial Answers to Interrogatories Be Deemed Binding, p.11, l. 24-p.12, l. 2.)

On November 21, 2018, Geraci served answers to Form Interrogatories (Set Two). (Opp. at 3: 26-27). Toothacre is 100% correct, and he beats this point to death in his Opposition, that Form Interrogatories (Set Two) contain the same answers to the same questions as Form Interrogatories (Set One). HOWEVER, this is the gravamen of the motion and reflects Toothacre's active attempt to deceive this Court.

Form Interrogatory No. 17.1 requires specific and detailed descriptions of all unqualified admissions in responses to Requests for Admissions "served with these interrogatories." Geraci's Response to Request for Admission No. 22 is unqualified, served with Form Interrogatories (Set Two), and sets forth the Disavowment Allegation: IT WAS REQUIRED TO BE DISCLOSED IN FORM INTERROGATORIES (SET TWO) PER FORM INTERROGATORY 17.1.

Toothacre purposefully and deceitfully does not address this point at all in his Opposition. Form Interrogatories (Set Two) are an amendment to Form Interrogatories (Set One). Toothacre did not even attempt to argue that there is any substantial justification for the amendment because he cannot provide any.

B. Response to Geraci's Objections to Cotton's Request for Judicial Notice

Geraci's and his counsel's objections to Cotton's request for Judicial Notice are without any factual or legal justification. The requests for judicial notice are all judicial and evidentiary admissions by Geraci that contradict his own factual allegations.

People ex rel. Government Employees Ins. Co. v. Cruz (2016) 244 Cal.App.4th 1184 is a recent decision by the Fourth Appellate District, Division One, that addresses an appeal of a Motion to Bind pursuant to CCP § 2030.310 *et seq*. By Toothacre's line of reasoning, attorneys can forgo the legal consequences of perpetuating a fraud upon the Court by failing to name amendments to their original interrogatory responses as "amendments." Further, attorneys can avoid the purpose of CCP § 2030.310 *et seq*. by willfully failing to comply with Form Interrogatory 17.1.

What is taking place here is not difficult to understand. Geraci and his counsel filed a frivolous lawsuit, when confronted with case law that removed their legal justification for filing suit, they manufactured facts to create legal affirmative defenses and purposefully set them forth in their Responses to Requests for Admissions (Set One).

C. Response to Geraci's Evidentiary Objections

All of Geraci's objections are without merit. With the exception of the transcript of Mr. Cotton's deposition, every document set forth has been produced via discovery in this action ***by*** Geraci and his attorneys.

The Court should focus on the fact that Toothacre does NOT argue that at the deposition of Cotton, that lasted over eight hours, neither he nor Weinstein asked Cotton about the alleged November 3, 2016 call (i.e., the "Disavowment Allegation"). This is Geraci's affirmative defense, that he sent the Confirmation Email by mistake and Cotton allegedly agreed with him on November 3, 2016 that he sent it by mistake. Of course, Toothacre objects to this fact, it directly reflects on his knowledge that the Disavowment Allegation is fabricated. But, again, he does not substantively deny it.

Put in other words, if the Disavowment Allegation was true, why would two experienced litigators with 66 years of combined litigation experience not ask a single question upon which their client's affirmative defenses rely upon?

D. Related Federal Action

On December 6, 2018, Cotton and Mr. Joe Hurtado ("Hurtado") filed a Federal complaint against, *inter alia*, Geraci and his attorneys Gina Austin ("Austin"), Michael Weinstein ("Weinstein"), and Toothacre. (U.S.D.C.18-cv-02751). There are various motions by defendants to dismiss or stay the federal action pending resolution of this action before this Court. Due on the same day as this Reply are various oppositions to said motions. Among the oppositions due today, which counsel for Cotton will finish after this Reply, is an opposition to Weinstein, Toothacre and Ferris & Britton's motion to dismiss, or in the alternative, stay the case.

Respectfully noted, Cotton will argue, and it is anticipated that Hurtado will as well, that Judge Curiel should stay this action because of bias on the part of this Court towards Mrs. Gina Austin and Mr. Michael Weinstein.

In Kenneally v. Lungren, 967 F.2d 329 (9th Cir. 1992), the Ninth Circuit discussed the criteria for staying a state court action due to bias:

> "Bias exists where a court has prejudged, or reasonably appears to have prejudged, an issue." [Citation.] In Withrow v. Larkin, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975), the Supreme Court emphasized that one who alleges bias must overcome a presumption of honesty and integrity in those serving as adjudicators; and [he] must convince [the court] that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment

that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

Id. at 333.

This Court has repeatedly stated that it does not believe that Austin or Weinstein are capable of acting unethically, which is exactly the issue again here in this motion. As repeatedly argued by Cotton, Geraci's judicial admissions prove the November Document is not a sales agreement: an argument this Court has consistently rejected for over two years now without ever providing its reasoning therefor.

If this Court allows Geraci and his counsel to violate the discovery process by avoiding the purpose of CCP § 2030.310 *et seq*. by amending their original discovery answers to introduce affirmative defenses that are contradicted by Geraci and his attorneys' judicial admissions, the criteria for bias shall be further met.

Respectfully, counsel for Cotton notes for the record that he does not believe this Court is personally prejudiced against Cotton, however, its bias in favor of Geraci's counsel, especially Weinstein who this Court has stated he has known for over twenty years, is resulting in the same effect.

E. Conclusion

Geraci's opposition (i) does not address the legal effect of Geraci and his attorneys judicial and evidentiary admissions, and (ii) completely ignores the facts and arguments regarding the discovery rules that required the Disavowment Allegation to be set forth in Form Interrogatories (Set Two) and not in the Responses to Requests for Admissions (Set One).

This should concern the Court. Ultimately, the record and communications reflect that Geraci and his attorneys are going to heavily rely on this Court's rulings to exculpate and/or mitigate their damages to Cotton and third-parties for what is blatantly a frivolous action as reflected by their own judicial admissions. The Court should bind Geraci to his original Form Interrogatory answers and sanction his attorneys accordingly.

DATED: April 19, 2019 THE LAW OFFICE OF JACOB AUSTIN

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