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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.

AND RELATED CROSS-ACTION

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

Judge: Hon. Joel R. Wohlfeil

**PLAINTIFF/CROSS-DEFENDANT
LARRY GERACI'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO DEFENDANT/CROSS-
COMPLAINANT DARRYL COTTON'S
MOTION FOR PARTIAL
ADJUDICATION**

[IMAGED FILE]

DATE: May 10, 2019
TIME: 9:00 a.m.
DEPT: C-73

Filed: March 21, 2017
Trial Date: June 28, 2019

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION/SUMMARY OF ARGUMENT

3 Defendant/Cross-Complainant Darryl Cotton ("Cotton"), brings the instant motion for "Partial
4 Adjudication" pursuant to CCP §2030.310.¹ The issue Cotton seeks to have adjudicated is the same
5 issue he has repeatedly raised in numerous motions in this action before this Court, i.e., is the
6 November 2, 2016, document an integrated agreement.

7 The motion must be denied for a variety of reasons, as follows: 1) the Notice of Motion is
8 deficient in that it fails to state the grounds upon which the motion is being made, instead that section is
9 left blank (Cal. Rules of Court Rule 3.1110(a) – notice of motion must state grounds for orders sought
10 and Court may only consider the grounds stated in the notice of motion); 2) the motion purports to be
11 made pursuant to CCP § 2030.310 which provides no legal authority for a "partial adjudication"; 3) in
12 the "Legal Standard" section of Cotton's papers, Cotton refers to a motion for judgment on the
13 pleadings and/or a general demurrer, neither of which provide authority for a "partial adjudication"; 4)
14 this motion appears to be a motion for summary adjudication of issues but is: a) improperly noticed;
15 b) untimely; c) not made on admissible evidence; d) does not contain a separate statement of facts; e)
16 triable issues of fact remain regarding integration and its potential effect on the various claims being
17 made; and f) Cotton has a summary adjudication motion already on calendar for May 23, 2019, which
18 raises this issue yet again.

19 It also appears that Cotton is attempting to have the Court reconsider issues addressed in
20 multiple prior hearings in this case. Cotton extensively cites the Court to statements made by the Court
21 in ruling on other motions. To the extent, this is a motion for reconsideration under CCP § 1008, it is
22 untimely, the Notice is insufficient, and there is no supporting affidavit which would support a motion
23 for reconsideration.

24 Cotton discusses judicial notice in his Memorandum of Points and Authorities (Ps & As, p. 5:5-
25 8; 5:20-23; 6:3-13) but has not filed a written request for judicial notice stating which documents or
26

27 ¹ CCP §2030.310 is a statute permitting the Court to bind a party to a previous discovery response when that party has
28 amended that response in contradiction of the earlier response. That code section provides no authority upon which to base
a "partial adjudication" of issues.

1 evidence for which he seeks judicial notice as required by California Rules of Court 3.1113.(l) and
2 3.1306(c). For these reasons, judicial notice should be denied.

3 Substantively, Cotton devotes considerable argument based on the false premise that Geraci has
4 made "judicial admissions" which prevent him from introducing contradictory evidence. First, Geraci
5 has made no such "judicial admissions"; and second, even if there were judicial admissions, Geraci is
6 not offering contradictory evidence.

7 **II. ARGUMENT**

8 **A. There Is No Legal Authority for the Instant Motion**

9 It is very difficult to ascertain what it is Mr. Cotton is trying to do here as his papers are
10 incoherent, illogical and undecipherable. Although Mr. Cotton cites to judgment on the pleadings and
11 general demurrer law (Ps&As, p. 5:1-4), it appears that this is an impermissible and procedurally inept
12 attempt at a motion for summary adjudication of issues.

13 To the extent Cotton's motion is one for summary adjudication of issues it must be denied as it
14 is irreparably flawed for the following reasons: first, the Notice of Motion fails to identify the specific
15 cause of action, affirmative defense, claims for damages, or issues of duty sought to be adjudicated
16 [Cal. Rules of Court 3.1350(b)]; second, there is no Separate Statement of Undisputed Facts separately
17 identifying each cause of action, claim for damages, or issues which are the subject of the motion [CCP
18 § 437c(b)(1)]; third, the motion is not supported by *evidence* establishing Cotton's right to partial
19 adjudication [*Regents of Univ. Of Calif. v. Sup. Ct.* (1996) 41 Cal.App. 4th 1040, 1044]; and fourth, the
20 motion is untimely as 75 days' notice is required on a motion for summary adjudication [CCP §
21 437c(a)]. Accordingly, the motion must be denied.

22 **B. To The Extent Cotton's Motion is a Motion for Reconsideration it Must Be Denied** 23 **as Untimely and Unsupported By Affidavit**

24 Cotton argues: "This Court mistakenly believes that it has previously addressed the issue of
25 contract integration for the November Document. (Cotton P's & A's, p. 6:15-16) In support of this
26 argument, Cotton asserts that he has filed the Declarations of Darryl Cotton, attorney Jacob Austin and
27 attorney Andrew Flores, and that either Cotton, Austin, or Flores has been at every hearing in this
28 action and that they each swear upon penalty of perjury that at no hearing has this Court ever addressed

1 the issue of contract integration.² (Cotton P's & A's, p. 6:17-25) It appears Cotton is asking the Court
2 for reconsideration of the rulings on those multiple hearings.

3 CCP § 1008(a) provides: "When an application for an order has been made to a judge, or to a
4 court, and refused in whole or in part, or granted conditionally, or on terms, any party affected by the
5 order may, with 10 days after the serve upon the party of written notice of entry of the order and based
6 upon new or different facts, circumstances, or law, make application to the same judge or court that
7 made the order, to reconsider the matter and modify, amend, or revoke the prior order. The party
8 making the application shall state by affidavit what application was made before, when and to what
9 judge, what order or decisions were made, and what new or different facts, circumstances, or law are
10 claimed to be shown." It is self-evident that Cotton has not complied with the 10-day rule, nor has he
11 set forth new facts, law or circumstances which would support a motion for reconsideration. Thus, to
12 the extent this is a motion for reconsideration, it must be denied.

13 **C. To The Extent Cotton's Discussion of Judicial Notice in His Memorandum Can Be**
14 **Construed as a Request For Judicial Notice, it Should Be Denied**

15 Cotton has not properly requested judicial notice. Here, Cotton discusses judicial notice in his
16 Points and Authorities, but has not made an actual request for judicial notice nor has he directed the
17 Court's attention to any particular documents or even more precisely, portions of the documents he
18 would like the Court to judicially notice. It is elemental that in a request for judicial notice the parties
19 are required to furnish the court "with sufficient information to enable it to take judicial notice of the
20 matter." (Evid. Code § 453(b); see 1 Witkin, *California Evidence* (4th Ed. 2000) Judicial Notice § 36,
21 p. 132.) Cotton has also failed to comply with the California Rules of Court. He has not filed a request
22 for judicial notice as required by California Rules of Court Rule 3.1113 (Any request for judicial notice
23 must be made in a separate document listing the specific items for which notice is requested and must
24 comply with rule 3.1306(c).) California Rule of Court 3.1306(c) Provides: "A party requesting judicial
25 notice of material under evidence Code sections 452 or 453 must provide the court and each party with
26 a copy of the material. If the material is part of a file in the court in which the matter is being heard, the
27

28 ² There was no Declaration of Darryl Cotton filed and served with this motion and that fact is confirmed by the fact that
there is no Declaration of Darryl Cotton on the Proof of Service.

1 party must: (1) Specify in writing the part of the court file sought to be judicially noticed; and (2) Either
2 make arrangements with the clerk to have the file in the courtroom at the time of the hearing or confirm
3 with the clerk that the file is electronically accessible to the court.” Cotton has failed to comply with
4 any of the provisions of Rule 3.1306(c). Having failed to comply with the California Rules of Court
5 with regard to judicial notice, the Court should refuse to take judicial notice of any matters raised in
6 Cotton’s instant motion.

7 The Court should also deny judicial notice on substantive grounds. “Judicial notice may not be
8 taken of any matter unless authorized or required by law.” (Evid. Code, § 450.) “Matters that are
9 subject to judicial notice are listed in Evidence Code sections 451 and 452. A matter ordinarily is
10 subject to judicial notice *only if the matter is reasonably beyond dispute*. [Citation.]” (*Fremont*
11 *Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 113, emphasis added)

12 It is impossible to ascertain what it is Cotton is asking the Court to do with regard to judicial
13 notice, however, to the extent it has to do with the “confirmation email” and “disavowment allegation”
14 those matters are hotly contested and not reasonably beyond dispute, which would make judicial notice
15 of those issues improper.

16 **D. It is Clear that Cotton Does Not Understand the Law Regarding Judicial**
17 **Admissions**

18 Judicial admissions may be made in a pleading, by stipulation during trial, or by response to
19 request for admission. (4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 452, p. 585; *Myers v.*
20 *Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 746; *Brigante v. Huang* (1993) 20 Cal.App.4th
21 1569, 1578, disapproved on other grounds in *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977.) Facts
22 established by pleadings as judicial admissions “ ‘are conclusive concessions of the truth of those
23 matters, are effectively removed as issues from the litigation, and may not be contradicted by the party
24 whose pleadings are used against him or her.’ (Weil & Brown, Cal. Practice Guide: Civil Procedure
25 Before Trial (The Rutter Group 2002) ¶ 10:147, p. 10-49; *Foxborough v. Van Atta* (1994) 26
26 Cal.App.4th 217, 222, fn. 3; *Brown v. City of Fremont* (1977) 75 Cal.App.3d 141, 146.) “[A] pleader
27 cannot blow hot and cold as to the facts *positively stated*.” (*Brown v. City of Fremont, supra*, at p. 146;
28 Emphases added.)

1 However, not every document filed by a party constitutes a pleading from which a judicial
2 admission may be extracted. Code of Civil Procedure section 420 explains that pleadings serve the
3 function of setting forth “the formal allegations by the parties of their respective claims and defenses,
4 for the judgment of the Court.” (Code Civ. Proc., § 420,) “The pleadings allowed in civil actions are
5 complaints, demurrers, answers, and cross-complaints.” (Code Civ. Proc., § 422.10.) When these
6 pleadings contain allegations of fact in support of a claim or defense, the opposing party may rely on
7 the factual statements as judicial admissions. (*St Paul Mercury Ins. Co.*, *supra*, 111 Cal.App.4th at
8 1248.)

9 “A judicial admission is a party’s *unequivocal concession of the truth of a matter*, and removes
10 the matter as an issue in the case.” (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 48;
11 Emphasis added.) *Thus, where the admission is not inconsistent and contradicted by the party whose*
12 *pleadings are used against him or her, the matter is not conclusively established.* [See *St. Paul*
13 *Mercury Ins. Co.*, *supra*, judicial admission “may not be contradicted, by the party whose pleadings are
14 used against him or her; *Uhrich v. State Farm Fire & Cas. Co.* (2003) 109 Cal.App.4th 598, 610-12;
15 *Uram v. Abex Corp.* (1990) 217 Cal.App.3d 1425, 1433 [judicial admission removed one factual
16 dispute from issue in case.]

17 Cotton devotes considerable argument asserting that Geraci has made judicial admissions which
18 essentially remove issues from the case. Cotton believes it is a judicial admission by Geraci that
19 “Geraci judicially admits that he *sent* the Confirmation Email and he *did not allege* that he sent the
20 Confirmation Email by mistake or that Cotton orally agreed to disavow any interest in the Property
21 because he allegedly agreed with Geraci that the Confirmation Email was sent by mistake.” (Cotton P’s
22 & A’s, 7:12-15) Cotton believes, without any citation to any case authority that silence on the matter
23 creates a judicial admission. What Geraci admitted was that he *sent* the email. Which is true. He was
24 under no obligation at that point in time to disclose any other facts related to that email. This simply is
25 not a judicial admission which precludes evidence that he sent the email without having read Cotton’s
26 entire email.

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1 **III. CONCLUSION**

2 For all the foregoing reasons, the Court should deny judicial notice, should deny reconsideration
3 of prior motions, and should deny partial adjudication of issues.

4
5 Dated: April 29, 2019

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A Professional Corporation

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