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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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF REPLY TO MOTION BY DEFENDANT DARRYL COTTON FOR PARTIAL ADJUDICATION

Date: May 10, 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 Partial Adjudication* (the "Reply").

A. Weinstein Seeks to Continue to Misdirect This Court With Form Over Substance

Attorney Michael Weinstein ("Weinstein") continues to obfuscate and misdirect this Court from the dispositive, and simple to understand, core issue of contract integration. "'Whether a contract is integrated is a question of law when the evidence of integration is not in dispute.'" Kanno v. Marwit Capital Partners II, L.P., 18 Cal. App. 5th 987, 1001 (quoting Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc., 109 Cal. App. 4th 944, 954; citing EPA Real Estate Partnership v. Kang (1992) 12 Cal.App.4th 171, 176). In this case, that the November Document is not a fully integrated agreement as a matter of law because of, *inter alia*, Geraci's Verified Answer.

"The law respects form less than substance." Civ. Code § 3528. "Substantial compliance expresses a rule of interpretation which derives from general maxims of equity--that substance governs over form, that no one is required to perform an idle act. (Civ. Code, §§ 3528, 3532.) Hence if the essence of a requirement has been met, or if its performance would be superfluous, then the law holds that the requirement has been substantially complied with." People v. Boone (1969) 2 Cal.App.3d 503, 506.

Cotton's counsel admits that there were some typographical errors in his moving papers, however, notice and the substance of the moving papers were substantially complied with and this Court should not elevate form over substance; there is clearly no prejudice and Weinstein is simply seeking to distract this Court from the complete lack of merit to his arguments that reflect he has initiated and is maintaining a malicious prosecution.

B. Geraci Buries His Only Substantive Argument In The Last Paragraph And Feigns Ignorance Of Basic Pleading Requirements to Mitigate His Liability

Geraci concludes his Opposition with the following paragraph.

> Cotton devotes considerable argument asserting that Geraci has made judicial admissions which essentially remove issues from the case. Cotton believes it is a judicial admission by Geraci that "Geraci judicially admits that he ***sent*** the Confirmation Email and he ***did not allege*** that he sent the Confirmation Email by mistake or that Cotton orally agreed to

> disavow any interest in the Property 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 creates a judicial admission. What Geraci admitted was that he ***sent*** the email. Which is true. He was under no obligation at that point in time to disclose any other facts related to that email. This simply is not a judicial admission which precludes evidence that he sent the email without having read Cotton's entire email.

Opp. at 6:17-26.

Weinstein is feigning ignorance so that he can later argue he was incompetent to mitigate his liability for maintaining a malicious prosecution.

Pursuant to CCP § 431.30(b), "[i]n addition to denials, the answer should contain whatever affirmative defenses or objections to the complaint that defendant may have, and that would otherwise not be in issue under a simple denial. Such defenses or objections are referred to as 'new matter.'" Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group) Chapter 6:430.

> "New matter" is any ground urged in ***avoidance*** of the complaint; i.e., some independent reason why plaintiff should be barred from recovery, even if everything alleged in the complaint was true. Such grounds are not in issue under a denial, and, unless specially pleaded in the answer, evidence of such grounds is inadmissible at trial. [See Walsh v. West Valley Mission Comm. College Dist. (1998) 66 CA4th 1532, 1546, 78 CR2d 725, 733-734; see also Advantec Group, Inc. v. Edwin's Plumbing Co., Inc. (2007) 153 CA4th 621, 627, 63 CR3d 195, 200]"

Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group) Chapter 6:430 (emphasis in original).

Here, Geraci's purported call to Cotton on November 3, 2016 is a "new matter," it is the grounds upon which he seeks to ***avoid*** Cotton's Complaint premised on the Confirmation Email which confirmed among other things that (1) there was a "final agreement" forthcoming and (2) that Cotton had negotiated and bargained for a 10% equity position in the joint venture.

Thus, Weinstein's argument is directly contradicted by CCP § 431.30(b). Geraci was required to set forth his "new matter," his factual allegations that Geraci called Cotton on November 3, 2016 and Cotton orally agreed to forgo the equity position promised to him by Geraci in the Confirmation Email. This was statutorily required. As explained by the Fourth District Court of Appeal in State Farm Mut. Auto. Ins. Co. v. Superior Court (1991) 228 Cal.App.3d 721:

> Under Code of Civil Procedure section 431.30, subdivision (b)(2), the answer to a complaint ***must*** include "[a] statement of any new matter constituting a defense." The phrase "new matter" refers to something relied on by a defendant which is not put in issue by the plaintiff. (Shropshire v. Pickwick Stages, Northern Division (1927) 85 Cal.App. 216, 219 [258 P. 1107].) Thus, where matters are not responsive to essential allegations of the complaint, they must be raised in the answer as "new matter." (Rancho Santa Margarita v. Vail (1938) 11 Cal.2d 501, 543 [81 P.2d 533].)

Id. at 725 (emphasis added).

Weinstein presents no legal argument in opposition to this point of law, instead he misdirects this court with the argument that such an allegation was not required to be disclosed because Cotton did not cite to any authority. When Weinstein's communications with counsel and his pleadings are reviewed in the future *in toto*, his sheer manipulativeness and disrespect to this Court will become readily apparent. Which, however, is not his primary concern now as he continues to seek to misdirect this Court because he is more concerned with mitigating his financial liability then with being held accountable to this Court at some later point in time.

Furthermore, Geraci was required to set forth the purported allegation, that he sent the Confirmation Email by mistake, as an affirmative defense, in his Verified Answer. He did not.

> **Affirmative defenses**: In general, any issue on which defendant bears the burden of proof at trial is "new matter" and must be specially pleaded in the answer. [Harris v. City of Santa Monica (2013) 56 C4th 203, 239, 152 CR3d 392, 418—"It has long been held that if the *onus* of proof is thrown upon the defendant, the matter to be proved by him is new matter" (emphasis in original; internal quotes omitted); Mountain Air Enterprises, LLC v. Sundowner Towers, LLC (2017) 3 C5th 744, 755-756, 220 CR3d 650, 659-660 (citing text); California Academy of Sciences v. County of Fresno (1987) 192 CA3d 1436, 1442, 238 CR 154, 157]

Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group) Chapter 6:431.

The burden of proof regarding the purported call on November 3, 2016 - in which Cotton orally agreed with Geraci that the Confirmation Email was sent by mistake - squarely lands on Geraci and required that he plead such an allegation. These alleged facts were not disclosed in the Answer to the Cotton's Complaint in this matter or in the Verified Answer and, therefore, should be deemed waived by this Court because "A party who fails to plead affirmative defenses waives them." California Acad. of Scis. v. Cty. of Fresno, 192 Cal. App. 3d 1436, 1442.

Lastly, in addition to requiring the Disavowment Allegation to be set forth in the Verified Answer as a "New Matter" and as an affirmative defense, Geraci's admission he sent the Confirmation Email is a judicial admission in the form of a "negative pregnant" that the November 3, 2016 call did not take place. (Geraci only alleged the purported November 3, 2016 call after he was confronted with case law that would prevent him from barring the Confirmation Email pursuant to the parol evidence rule.)

"A negative pregnant is such a form of negative expression as may imply or carry with it an affirmative." Huntoon v. Hurley (1955) 137 Cal.App.2d 33, 37. In Yellow Creek Logging Corp. v. Dare (1963) 216 Cal.App.2d 50, the California Supreme Court noted the following in regards to a negative pregnant: "[In] Huntoon v. Hurley (1955) 137 Cal.App.2d 33, 37[,] it was held that a finding that 'none of the allegations in paragraphs [specified] . . . is true' was not in the form of a negative pregnant." Id. at p.58.

Conversely, here, the Verified Answer is not a general denial, it is a specific admission by Geraci that he sent a clear and unambiguous writing promising to later send a "final agreement" (i.e., the Confirmation Email) that would include Cotton's bargained-for 10% equity position in the joint venture. As required by statute, case law and common sense, when Geraci admitted he sent the Confirmation Email, he was required and should have set forth his allegation that he called Cotton the next day and told him he sent the Confirmation Email by mistake. And that Cotton agreed. Again, Geraci did not. Weinstein's arguments are clear efforts to distract this Court undertaking a contract integration analysis pursuant to the parol evidence rule and realizing the November Document is not a sales agreement but was executed intending it to be a receipt.

Respectfully, the Court has made repeated statements to the effect that Weinstein can be trusted. The Court should consider the possibility that even if there were a point in time when Weinstein may actually have been incapable of acting unethically, that such a time may have passed – financial self-preservation is an easy motive to understand for Weinstein's unethical actions in maintained a malicious prosecution action and obfuscating the facts so that this Court does not realize it.

C. Conclusion

Respectfully, counsel for Cotton notes that more in-depth and detailed arguments have previously been made regarding the issue of contract integration as to the November Document, but this Court has denied them all without ever providing its reasoning therefor.

Cotton notes that he does not anticipate that this Court will rule in his favor on this Motion and that he will be requesting a stay of this action so that he may file for an extraordinary writ with the Court of Appeals at the hearing on this motion.

In full disclosure, Cotton also notes that he intends to shortly file a motion in a related federal action asking the federal court to stay this state action due to, *inter alia*, favorable bias towards Weinstein.

Counsel for Cotton respectfully asks this Court to consider why it considers the November Document to be a "final agreement" when Geraci himself has confirmed in writing that it is not? The only evidence that Geraci offers in opposition is his self-serving declaration supported by only his phone call records that he spoke with Cotton on November 3, 2016. If that were truly the standard to reach a jury, contracts would have no meaning as any party could simply allege years after the fact that they signed something by accident and then provide phone records that they spoke with the opposing party, but phone records reveal nothing of the substance of those conversations.

DATED: May 2, 2019

THE LAW OFFICE OF JACOB AUSTIN

By_____
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