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Attorneys for Defendant and Cross-Complainant Darryl Cotton

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE 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

DARRYL COTTON'S OPPOSITION TO
LARRY GERACI'S DEMURRER TO THE
SECOND AMENDED CROSS-COMPLAINT

[IMAGED FILE]

Assigned to:
Hon. Joel R. Wohlfeil, Dept. C-73

Date: November 3, 2017
Time: 9:00 a.m.
Dept.: C-73

Complaint Filed: March 21, 2017
Trial Date: May 11, 2018

AND RELATED CROSS-ACTION.

I

INTRODUCTION

Darryl Cotton's ("Cotton") Second Amended Cross-Complaint ("SACC") alleges Breach of Contract, Intentional Misrepresentation, Negligent Misrepresentation, False Promise, and Declaratory Relief claims against Larry Geraci ("Geraci") stemming from the latter's behavior in a real-estate deal with Cotton. The SACC states facts sufficient to allege each of these causes of action. Geraci's arguments to the contrary lack factual and legal merit.

DARRYL COTTON'S OPPOSITION TO LARRY GERACI'S DEMURRER TO THE SECOND AMENDED CROSS-COMPLAINT

1 Legally, Geraci's reliance on the Statute of Frauds is misguided. The SACC alleges the
2 existence of a written agreement that is not subject to the Statute of Frauds. Factually, Geraci's
3 arguments alternatively ignore and misconstrue allegations in the SACC to suit Geraci's needs.
4 Indeed, some of Geraci's arguments are utterly irrelevant and non-responsive to Cotton's
5 SACC. The Court should deny Geraci's demurrer. Should the Court find merit in any of
6 Geraci's arguments, the Court should grant leave to Cotton to amend.

7 II

8 FACTS

9 In or around August 2016 Geraci approached Cotton and expressed interest in
10 purchasing real property owned by Cotton located at 6176 Federal Boulevard, San Diego,
11 California 92114 ("Property"). (SACC, p. 3, ¶ 8.) Geraci was drawn to the Property because it
12 was potentially eligible to be used as a Medical Marijuana Consumer Cooperative ("MMCC").
13 (*Id.*) For the Property to run as an MMCC, a Conditional Use Permit ("CUP") must be issued
14 by the City. A CUP for an MMCC is only issued to eligible properties following a permitting
15 process which takes several months. (SACC, p. 4, ¶11.) Cotton and Geraci engaged in lengthy
16 negotiations over the terms for potential sale of the Property, and ultimately reached agreement
17 on several key terms. However, these deal points were never reduced to a fully integrated
18 written agreement. Instead, at the prodding of Geraci and based on the representations and
19 promises of Geraci that comprise the fraud related causes of action set forth in the SACC, on
20 November 2, 2017, the parties executed an ambiguous document ("November Document") and
21 exchanged emails which were incorporated into that document ("November Emails").
22 Summarily, Cotton alleges that the November Document and November Emails combine to
23 evidence the following basic terms of agreement, all as alleged in the SACC:

24 (1) creating a record of Geraci having paid \$10,000.00 in earnest money and that
25 Cotton would not enter into an agreement with any third party for the Property pending
26 negotiation of a final agreement;

27 / / / /

1 (2) providing evidence of the parties' agreement on the property's purchase price of
2 \$800,000.00;

3 (3) providing evidence of the agreement for Cotton to receive a ten percent profits
4 interest in the MMCC to be established by Geraci; and

5 (4) providing evidence of the parties' good-faith agreement to negotiate in good
6 faith and to formalize a final, fully integrated document reflecting the material terms of their
7 purchase agreement. (SACC, p. 6, ¶ 18.)

8 Of course, Geraci now disputes Cotton's allegations as to the November Document and
9 the November Emails. Geraci asserts the November Document is, despite numerous verbal
10 and written communications prior to and after the date of the November Document to the
11 contrary, including the November Emails, a final binding real estate purchase agreement
12 pursuant to which Cotton promises to sell the Property. The simple fact is that Cotton alleges
13 otherwise in the SACC and, most importantly at this stage of the case, Cotton's allegations are
14 sufficient to state each of the causes of action alleged in the SACC.

15 III

16 LEGAL STANDARD FOR DEMURRER

17 A demurrer for "failure to state a cause of action" is commonly referred to as a
18 "general" demurrer. (*McKenney v. Purepac Pharmaceutical Co.* (2008) 167 Cal.App.4th 72,
19 77.) When a general demurrer challenges a specific cause of action, the test is whether that
20 cause of action states *any* claim entitling plaintiff to relief. If the essential facts of any valid
21 claim are present, then the cause of action prevails against the general demurrer. (*Quelimane*
22 *Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38-39.) Further, and directly
23 applicable to Geraci's demurrer, "[o]bjections that a complaint is ambiguous or uncertain, or
24 that essential facts appear only inferentially, or as conclusions of law, or by way of recitals,
25 must be raised by *special demurrer*, and cannot be reached on general demurrer." (*Johnson v.*
26 *Mead* (1987) 191 Cal.App.3d 156, 160, original italics.) Lastly, it is well established that if a
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1 demurrer is sustained, "it is an abuse of discretion to sustain a demurrer without leave to
2 amend if there is any reasonable possibility that the defect can be cured by amendment."
3 (*Goodman v. Kennedy* (1976) 18 Cal.App.3d 335, 349.)

4 IV

5 ARGUMENT

6 A. The Statute of Frauds Does Not Apply to Bar the SACC

7 The SACC states facts supporting a claim for breach of a contract. Cotton alleges
8 Geraci has failed to perform the parties' agreement reached in November 2016. Cotton alleges
9 the agreement at issue is an agreement to negotiate in good faith to arrive at a commercially
10 reasonable and fully integrated written agreement or agreements to document the terms for sale
11 of the Property. (SACC, p. 6, ¶ 18.) Cotton alleges this agreement is evidenced by the
12 writings attached to the SACC as Exhibits 1 and 2. (SACC, p. 6, ¶ 18.) Both writings are
13 subscribed to by Geraci and are therefore outside the purview of the statute of frauds.

14 Ultimately, Geraci's demurrer request is irretrievably flawed, as it is based on the
15 mistaken premises that: (1) there is no dispute as to the interpretation of the November
16 Document and the November Emails; and (2) that the \$50,000.00 deposit alleged in the SACC
17 contradicts the November Document's reference to \$10,000.00 of "earnest money." As to the
18 first point, the existence of a dispute over the terms of the parties' agreement is abundantly
19 clear from the allegations of the SACC as compared to the allegations of Geraci in the
20 Complaint. The parties do not agree as to what comprises the terms of this contract. The
21 SACC properly alleges the existence of a written agreement and refers to parole evidence to
22 provide detail as to uncertain terms contained in those writings. Accordingly, the statute of
23 frauds does not apply.

24 Second, the alleged acknowledgement as to payment of \$10,000.00 in the November
25 Document is not in conflict with a \$50,000.00 deposit. \$10,000.00 was paid and an additional
26 \$40,000.00 would be captured in the final agreement which Geraci promised to have his
27 lawyer prepare. (SACC, p. 5, ¶¶ 14(a), 15, and 16; p. 6, ¶ 17.) Cotton agreed to allow a
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1 partial down payment of \$10,000.00 – at Geraci’s insistence, no less – with the balance of the
2 money (\$40,000.00) due at a later date because Geraci needed additional time to come up with
3 the full \$50,000.00 deposit. (SACC, p. 5, ¶¶ 14(a), 16; p. 6, ¶ 17 [“Cotton was hesitant to
4 grant Geraci more time to pay the non-fundable deposit but Geraci offered to pay \$10,000.00
5 towards the \$50,000.00 total deposit immediately as a show of “good-faith,” even though the
6 parties had not reduced their final agreement to writing.”] [emphasis added].) Contrary, then,
7 to Geraci’s assertions, the evidence that Cotton seeks to introduce is consistent with – not
8 contradictory to – the parties written memorandum and is, thus, admissible under *Sterling v.*
9 *Taylor* (2007) 40 Cal.4th at 757, as a parole agreement consistent with the terms of a writing.
10 (*Sterling, supra*, 40 Cal.4th at 771-772 [holding that under the statute of frauds a parole
11 agreement must be “one whose terms are consistent with the terms of the memorandum.”])¹
12 As such, Geraci’s initial attempt to demur Cotton’s First Cause of Action is unavailing.

13 Cotton also states a valid claim for breach of contract for another reason. Under
14 *Copeland v. Baskin Robbins U.S.A.* (2002) 96 Cal.App.4th 1251, 1256, Cotton states a valid
15 breach-of-contract claim if he alleges facts showing that (a) Geraci and he had agreed to
16 negotiate in good faith; and (b) that the failure “to reach ultimate agreement resulted from a
17 breach of that’s party obligation to negotiate or to negotiate in good faith.” (*Id.* at p. 1257,
18 emphasis added.) Cotton does precisely this in the SACC. In fact, the parties’ use of the
19 phrase “earnest money” confirms Cotton’s interpretation of the November Document and the
20 November Emails as providing for further negotiation in good faith to arrive at a final
21 agreement.² (SACC, p. 6, ¶ 18.) Cotton’s SACC alleges that Geraci did not honor this
22 obligation. Cotton, for instance, alleges that Geraci intentionally delayed further negotiations,
23 that Geraci failed to deliver purchase documents, and that Geraci failed to fully pay the agreed-

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26 ¹ Notably, in *Sterling* the Court ruled in the context of a summary judgment motion, not in the context of a
demurrer.

27 ² Black’s Law Dictionary defines “earnest money” as a “deposit paid (often in escrow) by a prospective buyer
28 (esp. of real estate) to show a good-faith intention to complete the transaction, and ordinarily forfeited if the
buyer defaults.”

1 upon \$50,000.00 deposit. (SACC, p. 12, ¶ 36.) If these allegations are assumed as true, as
2 they must be, Geraci's demurrer to the first cause of action of the SACC should be denied.

3 B. The SACC Alleges Actionable Breach

4 Geraci further attempts to demurrer Cotton's First Cause of Action by arguing that
5 Geraci fulfilled all the terms of the November Document and that, in any event, Cotton did not
6 have a duty to act in good faith because the November Document did not contain a good-faith
7 term. (Demurrer, p. 12, Ins. 16-27.) Geraci's first assertion is patently belied by the simple
8 fact that the terms of the November Document fail to reflect all of the parties' material terms.
9 Geraci, thus, is wrong in asserting that he fulfilled all of the terms of the parties' agreement:
10 He breached *at least* one material term of it, *viz.*, the promise to negotiate in good faith to
11 deliver a proposed final agreement, the promise to deliver a 10 percent interest in the property,
12 and failing to pay the amounts due for the \$50,000.00 deposit. (SACC, p.11, ¶ 36.)

13 Geraci's second contention (*i.e.*, that he had no duty to act in good faith) fares no better.
14 The courts have made clear that "[t]here is an implied covenant of good faith and fair dealing
15 in every contract that neither party will do anything which will injure the right of the other to
16 receive the benefits of the agreement." (*Comunale v. Traders & General Ins. Co.* (1958) 50
17 Cal.2d 654, 658.) As Geraci himself points out in quoting verbatim the November Document,
18 the parties agreed to close the sale of the property for \$800,000.00 upon the City of San
19 Diego's future approval of the CUP application. (Demurrer p. 8, Ins. 5-11 [quoting verbatim
20 the parties' November document.]) Even assuming the parties' agreement was captured solely
21 by the November Document, California law bound Geraci to act in good faith. Without
22 question, the SACC alleges just such a breach, namely, that Geraci intentionally delayed
23 further negotiations, that Geraci failed to deliver purchase documents, and that Geraci failed to
24 fully pay the agreed-upon \$50,000 deposit. (SACC, p. 11, ¶ 36.)

25 Simply put, Geraci's attempts to demurrer Cotton's First Cause of Action are
26 unavailing.

27 / / / /

1 C. Cotton's SACC Properly Pleads Causes of Action
2 for Intentional and Negligent Misrepresentation and False Promise

3 1. Cotton Alleges Facts Proving that Geraci
4 Engaged in Intentional Misrepresentation and False Promise

5 To state a claim for intentional misrepresentation, Cotton must allege that Geraci
6 misrepresented a fact he knew was false, Geraci intended to defraud Cotton, and Cotton
7 justifiably relied on Geraci's representations and suffered damage as a result. (*Engalla v.*
8 *Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974). The elements of False Promise
9 are nearly identical. (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1059-1060 ["in a
10 promissory fraud action, to sufficiently allege defendant made a misrepresentation, the
11 complaint must allege (1) the defendant made a representation of intent to perform some future
12 action, i.e., the defendant made a promise, and (2) the defendant did not really have that intent
13 at the time that the promise was made, i.e., the promise was false"]; see also CACI 1902
14 [entitled False Promise])

15 Cotton's SACC pleads facts in support of all these elements on pages 12-13 and on
16 pages 15-16. To summarize, the SACC alleges that Geraci:

- 17 • Falsely represented to Cotton that the November 2, 2016 agreement was not the
18 parties' final, full, and integrated contract between them;
- 19 • Falsely represented to Cotton that he (Geraci) would honor the terms of the
20 parties' agreement by, among other things, memorializing in writing the full scope of the terms
21 of their agreement and by exerting good-faith efforts to close the sale of Cotton's Property;
- 22 • Falsely represented to Cotton that he (Geraci) would remit the balance of the
23 \$50,000.00 non-refundable deposit; and
- 24 • That, as a result of Geraci's representations, Cotton justifiably relied on
25 Geraci's promises, and that Cotton has incurred harm in the form of diminished property value
26 and attorneys' fees. (*Id.*) In fact, Geraci assured Cotton he could be relied upon because as an
27 "Enrolled Agent" he worked in a fiduciary capacity for many high net-worth individuals.

1 (SACC, p.3 ¶ 9(a).)

2 Cotton, in short, has plead his intentional tort claims.

3 2. Cotton Alleges Facts Proving that
4 Geraci Engaged in Negligent Misrepresentation

5 To prevail on the tort of negligent misrepresentation, Cotton must show that Geraci
6 made statement of facts that were false and that no reasonable person would have believed
7 them to be true. (*Tarmann v. State Farm* (1991) 2 Cal.App.4th 153.) Cotton does precisely
8 this in his SACC. For instance, Cotton alleges that, “[o]n multiple occasions, Geraci
9 represented to Cotton that *Geraci had not yet filed* a CUP application with respect to the
10 Property when [in reality] the CUP application had already been filed” and that “[o]n multiple
11 occasions Geraci represented to Cotton that the preliminary work of preparing a *CUP*
12 *application was merely underway, when, in fact, the CUP application had already been filed.*”
13 (SACC, p. 14, ¶ 45(d)-(e) [emphasis added]). Each of these italic statements is a statement of
14 fact that Geraci had no reasonable grounds for believing true: It was Geraci, after all, who
15 controlled the handling of Cotton’s CUP application and who uttered these statements knowing
16 that could not have been true.

17 Accordingly, Cotton has plead his Negligent Misrepresentation cause of action.

18 3. Cotton Alleges Reasonable Reliance on Geraci’s
19 Misrepresentations and Accordingly, Geraci’s Demurrer
20 to the Second, Third, and Fourth Causes of Action Fails

21 Geraci requests dismissal of Cotton’s Intentional Misrepresentation, Negligent
22 Misrepresentation, and False Promise Causes of Action on the grounds that Cotton could not
23 have reasonably relied on Geraci’s representations. He lodges a few arguments in support of
24 this claim; however, none of them are persuasive. In fact, Geraci repeatedly argues the merits
25 of the facts rather than addressing the sufficiency of the allegations. Accordingly, the demurrer
26 request has no merit.

27 Geraci first asserts, that the alleged misrepresentations contradict the terms of the
28 parties’ agreement and therefore “proving justifiable reliance is an uphill battle.” (Demurrer,

1 p. 14, lns. 9-21 [citing a slew of case law to that effect] [emphasis added].) Of course, at the
2 pleading stage the question is not one of proof but of allegations, and here Cotton has met his
3 burden. Further, there is no contradiction between the terms of the agreement alleged by
4 Geraci and the allegations of misrepresentation asserted by Cotton.

5 Geraci also argues that Cotton could not have reasonably relied on Geraci's oral
6 representations because those terms "directly conflict with the clear, unambiguous written
7 agreement signed by Cotton" in November 2016. (Demurrer, p. 14, lns. 22-27.) Yet, Cotton's
8 Intentional Misrepresentation, Negligent Misrepresentation, and False Promise Causes of
9 Action sound in *tort*³ – not contract – and are not even subject to the same confines that the
10 parole evidence rules places on contractual actions. (See, e.g., *Riverisland Cold Storage, Inc.*
11 *v. Fresno-Madera Production Credit Association* (2013) 55 Cal.App.4th 1169, 1172 ["The
12 parole evidence rule protects the integrity of written *contracts* by making their terms the
13 exclusive evidence of the parties' agreement."]) Geraci is simply mistaken in asserting that the
14 strictures of contract law preclude Cotton from reasonably relying on Geraci's oral
15 representations in proving his tort claims.

16 Geraci finally asserts that Cotton could not have reasonably relied on Geraci's
17 representations because Cotton harbored concern that Geraci would breach the parties'
18 agreement. (Demurrer, p. 15, lns. 1-2. [quoting SACC p. 6, ¶ 17.]) Geraci's argument,
19 however, falsely equates fear that a party would breach an agreement with an absence of
20 justifiable reliance. Yet, as everyday life reveals, one can justifiably rely on another's promise
21 while simultaneously harboring concern that the person may not live up to expectations – as,
22 for instance, occurs when a senior lawyer relies on a junior lawyer's promise to meet a
23 pressing deadline.

24
25 ³ Case law confirms this. "Fraud is an intentional *tort*; it is the element of fraudulent intent, or intent to deceive,
26 that distinguishes it from actionable negligent misrepresentation and from nonactionable innocent
27 misrepresentation. It is the element of intent which makes fraud actionable, irrespective of any contractual or
28 fiduciary duty one by party might owe to the other." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner &*
Smith (1998) 68 Cal.App.4th 445, 482.) "Negligent misrepresentation is a separate and distinct *tort*, a species of
the *tort* of deceit." (*Bock v. Hansen* (2014) 225 Cal.App.4th 215, 227–228.) All emphasis in quotes are added.

1 In sum, Geraci's general assault on Cotton's Second, Third, and Fourth Causes of
2 Action fail.

3 D. Geraci's Additional Arguments Directed at
4 Cotton's Third Cause of Action Fare No Better

5 Geraci additionally – and independently – seeks to demurrer Cotton's Third Cause of
6 Action (Negligent Misrepresentation) on two more grounds. Geraci first argues that Cotton's
7 negligence claim is impermissibly based on future promises and not on contemporary
8 representations that Geraci made. (Demurrer, p. 15-16 [quoting *Tarmann v. State Farm* (1991)
9 2 Cal.App.4th 153, 158 for the proposition that “to be actionable, a negligent misrepresentation
10 must ordinarily be as to past or existing material facts. [P]redictions as to future events or
11 statements as to future action by some third party, are deemed opinions, and not actionable
12 fraud.”])

13 Geraci, however, ignores Cotton's allegations that show that Geraci made
14 *contemporary* representations of fact that Geraci had no reasonable grounds for believing true.
15 For instance, Cotton alleges in his SACC that, “[o]n multiple occasions, Geraci represented to
16 Cotton that *Geraci had not yet filed* a CUP application with respect to the Property when [in
17 reality] the CUP application had already been filed” and that “[o]n multiple occasions Geraci
18 represented to Cotton that the preliminary work of preparing a *CUP application was merely*
19 *underway, when, in fact, the CUP application had already been filed.*” (SACC, p. 14, ¶ 45(d)-
20 (e) [emphasis added]). Accordingly, Cotton has alleged facts supportive of his allegation that
21 Geraci negligently misrepresented facts.

22 Geraci also argues that Cotton's negligence claim is demurrable because California law
23 precludes a party from simultaneously pleading a claim for negligent misrepresentation and
24 intentional fraud, but that Cotton has plead both. (Demurrer, p. 15, lns. 9-28.) In support of
25 this argument, Geraci quotes an excerpt of *Tarmann v. State Farm* (1991) 2 Cal.App.4th 153,
26 158-159 that reads, “[t]he specific intent requirement also precludes pleading a false promise
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1 claim as a negligent misrepresentation, i.e., 'the assertion, as a fact, of that which is not true,
2 by one who has no reasonable ground for believing it to be true.'" (italics in Geraci's
3 Demurrer).

4 Geraci, however, misconstrues the excerpted portion of *Tarmann*. The court in
5 *Tarmann* was discussing the *substantive elements* that a party must prove to *prevail* on a
6 negligent misrepresentation claim, and, in the portion of the opinion that Geraci quotes, the
7 court merely was instructing that a party cannot establish a negligent misrepresentation claim
8 by proving the same *mens rea* level – i.e., specific intent – that is required to establish an
9 intentional misrepresentation claim. (*Tarmann, supra*, 2 Cal.App.4th at p. 159.) Critically,
10 the *Tarmann* court did not, nor did it seek to, diminish California's well-known and generally-
11 applicable procedural rule permitting parties to plead inconsistent legal theories. (E.g.: *Lim v.*
12 *The. TV Corp. Internat* (2002) 99 Cal.App.4th 684, 691 [noting that a party may plead
13 inconsistent legal theories based on a common set of operative facts.]) Once again, Geraci's
14 attempt to demurrer Cotton's negligence claim is unavailing.

15 V

16 CONCLUSION

17 For the foregoing reasons, the Court should overrule Geraci's demurrers as to every
18 cause of action contained in Cotton's SACC. Should the Court find merit in any of Geraci's
19 arguments, the Court should grant leave to Cotton to amend.

20 DATED: October 23, 2017

Respectfully submitted,

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