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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.

DARRYL COTTON, an individual,

Cross-Complainant,

v.

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

Cross-Defendants.

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

Judge: Hon. Joel Wohlfeil

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CROSS-DEFENDANT LARRY GERACI'S DEMURRER TO SECOND AMENDED CROSS-COMPLAINT BY DARRYL COTTON

[IMAGED FILE]

DATE: **November 3, 2017**
TIME: **9:00 a.m.**
DEPT: **C-73**

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

Plaintiff and Cross-Defendant LARRY GERACI (hereafter "Geraci" or "Plaintiff") respectfully submits these reply points and authorities in support of his demurrer to Defendant and Cross-Complainant DARRYL COTTON'S (hereafter "Cotton" or "Cross-Complainant") Second Amended Cross-Complaint filed on August 25, 2017 (hereafter "SAXC") and in response to Cotton's opposition arguments.

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I. INTRODUCTION

Cotton's Opposition to Geraci's Demurrer to the Second Amended Cross-Complaint (hereinafter "Opposition") is unpersuasive as to the issues raised in the Demurrer.

Contrary to the allegations in his prior pleadings and, in particular, the subject SAXC, Cotton argues that the agreement between the parties is comprised of the November 2, 2016 written agreement (hereafter "Written Agreement") and certain November emails (hereafter "November Emails") which were *incorporated* into that document and together *evidence* the basic terms of the agreement. (Opposition, 2:17-23.). Cotton's argument fails for a number of reasons: 1) the emails were not integrated into the Written Agreement; 2) even if the November Emails were integrated into the Written Agreement, they are not signed by Geraci, and therefore are barred by the statute of frauds; 3) the November Emails do not in and of themselves evidence an agreement between the parties; and 4) Geraci has done everything required of him under the Written Agreement and therefore has not breached the contract itself nor the implied covenant of good faith and fair dealing.

As to Cotton's causes of action for intentional and negligent misrepresentation and false promise, Cotton cannot overcome his own admissions in his pleadings that he was hesitant and understandably concerned, and despite his hesitation, concerns, and reservations he agreed to Geraci's terms. (SAXC ¶ 17.) Given these admissions, Cotton has failed to allege reasonable and justifiable reliance. At a minimum, he has not pleaded facts which would lead one to conclude he acted in reasonable and justifiable reliance on any statements made by Geraci.

Finally, Cotton argues that the *Tarmann v. State Farm* (1991) 2 Cal.App.4th 153 case cited by Geraci should be disregarded because it discussed the *proof* necessary to prevail on a negligent misrepresentation claim rather than the *pleading requirements* for such a claim. That argument is erroneous. The *Tarmann* case arose on demurrer and the Court specifically stated that "[t]he specific intent requirement [of pleading intentional fraud] precludes pleading a false promise claim as a negligent misrepresentation . . .." Cotton cannot plead intentional fraud and negligent misrepresentation.

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II. LEGAL ANALYSIS

A. No Integration of Emails with Written Contract

"Under California law, parties may validly incorporate by reference into their contract the terms of another document." (*Baker v. Aubry* (1989) 216 Cal.App.3d 1259, 1264.) The reference to the incorporated document must be clear and unequivocal and the terms of the incorporated document must be known or easily available to the contracting parties. (*Spellman v. Securities, Annuities & Ins. Services, Inc.* (1992) 8 CalApp.4th 452, 457; *Chan v. Drexel Burnham Lambert, Inc.* (1986) 178 Cal.App.3d 632, 641; *Baker v. Aubry, supra*, 216 Cal.App.3d at p. 1264; *Slaught v. Bencomo Roofing Co.* (1994) 25 Cal.App.4th 744.)

Neither the actual November 2, 2016 Written Agreement signed by the parties nor the November Emails, which Cotton alleges "*evidence*" the basic terms of the contract, contain any language of incorporation let alone language making a clear and unequivocal reference to the allegedly incorporated document. The Written Agreement signed by the parties does not make any reference to those emails being incorporated into the Written Agreement. Therefore, the emails are not incorporated into the signed contract as a matter of law.

B. Statute of Frauds

Cross-Complainant argues that the SAXC "alleges the existence of a written agreement that is not subject to the Statute of Frauds." (Opposition, 2:1-2.) This argument misses the mark.

A contract coming within the statute of frauds is invalid unless it is memorialized by a writing subscribed by the party to be charged or by the party's agent. (Civ. Code, § 1624.) And it is clear that an agreement for the sale and purchase of real property comes within the statute of frauds. (Civ. Code, § 1624(a)(3).) Cotton's claims alleged in the SAXC unquestionably arises out of an agreement regarding the sale and purchase of real property.

Cross-Complainant further argues that the parties executed an ambiguous document (the Written Agreement) and exchanged emails (the November Emails) which were *incorporated* into that document. Cross-Complainant asserts summarily that the Written Agreement and November Emails "combine to *evidence* the following basic terms of agreement, all as alleged in the SAXC." (Opposition, 2:22-23, emphasis added.) This argument also misses the mark.

First, the terms and conditions of the Written Agreement, a one-page document which is attached to both the underlying Complaint and the SAXC, *are clear and unambiguous*.

Cotton clearly alleges in all of his prior cross-complaints, including the instant SAXC, that "[o]n *November 2, 2016*, Geraci and Cotton met at Geraci's office … [and] the parties reached an agreement on the material terms for the sale of the Property." (SAXC ¶ 13.) At that November 2, 2016 meeting the parties executed the Written Agreement, which states the following material terms and conditions:

> Darryl Cotton has agreed to sell the property located at 6176 Federal Blvd, CA for a sum of $800,000.00 to Larry Geraci or assignee on the approval of a Marijuana Dispensary. (CUP for a dispensary)
>
> Ten Thousand dollars (cash) has been given in good faith earnest money "to be applied to the sales price of $800,000.00 and to remain in effect until license is approved. Darryl Cotton has agreed not to enter into any other contacts on this property.

(SAXC ¶ 18.) These terms and conditions could not be more clear and unambiguous.

Cotton goes on to attempt to allege an oral agreement, or a partly written and partly oral agreement, entered into on that November 2, 2016, date with the alleged oral terms and conditions adding to and/or varying from the terms set forth in the writing in the Written Agreement. Those allegations cannot, as a matter of law, survive the Statute of Frauds.

The Written Agreement is the controlling evidence under the statute of frauds. Cotton alleges, based on extrinsic evidence, that the actual agreement between the parties contains material terms and conditions in addition to those in the written agreement as well as a term (a $50,000 deposit rather than the $10,000 deposit stated in the written agreement) that expressly conflicts with a term of the November 2, 2016 agreement. However, such a claim cannot stand as extrinsic evidence cannot be employed to prove an agreement at odds with the terms of the written memorandum. (*Beazell v. Schrader*, (1963) 59 Cal.2d 577.) Cotton's *argument* that the $10,000 deposit term in the Written Agreement is ambiguous and can be reconciled with his allegation of an agreement for a $50,000 deposit is absurd. Nowhere in his allegations are facts from which it can be inferred that they are anything except conflicting and contradictory terms.

Second, Cross-Complainant asserts that the November Emails ". . . are subscribed to by Geraci and are therefore outside the purview of the statute of frauds." (Opposition, 4:12-13.) Apparently,

Cross-Complainant is arguing that the signature block at the bottom of the emails containing Geraci's name is tantamount to a signed agreement which would satisfy the statute of frauds, i.e., some sort of electronic signature within the meaning of Uniform Electronic Transactions Act ("UETA"), Civil Code section 1633.7. Cross-Complainant is mistaken.

Civil Code section 1633.7(a) provides:

> (a) A record or signature may not be denied legal effect of enforceability solely because it is in electronic form.
> (b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.
> (c) If a law requires a record to be in writing, an electronic record satisfied the law.
> (d) If a law requires a signature, an electronic signature satisfies the law."

"An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner . . .." (Civ. Code, § 1633.9(a); see also *Ni v. Slocum* (2011) 196 Cal.App.4th 1636, 1647 ["the Legislature has, through these provisions, expressed general approval of the use of electronic signature in commercial and governmental transactions"].)

Civil Code section 1633.2(h) defines an electronic signature as "an electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the electronic record." UETA applies, however, only when the parties ***consent to conduct the transaction by electronic means.*** (Civ. Code, § 1633.5(b).) "Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct . . .." (*Ibid.*) "A party that agrees to conduct a transaction by electronic means may refuse to conduct other transactions by electronic means . . .." (Civ. Code, § 1633.5(c).)

However, while attributing the name on an e-mail to a particular person and determining that the printed name is "[t]he act of [this] person" is a necessary prerequisite to considering it a valid signature, it is insufficient, by itself, to establish that it is an "electronic signature." (Civ. Code, § 1633.9(a).) Subdivision (h) of section 1633.2 states that "[e]lectronic signature means an electronic sound, symbol, or process attached to or logically associated with an electronic record and ***executed or adopted by a person with the intent to sign the electronic record.***" (Emphasis added. See also Cal. Civ. Jury Inst. No. 380 [party suing to enforce an agreement formalized by electronic means must

prove "based on the context and surrounding circumstances, including the conduct of the parties, that the parties agreed to use [e.g., e-mail] to formalize their agreement"].) By Cross-Complainant's own allegations, that was not the case. Rather, cotton alleges the parties intended to finalize the entire agreement in a formal, signed agreement, not via emails. And he alleges that never happened because Geraci refused to include in the Written Agreement the additional and varying terms and conditions agreed to orally on November 2, 2016.

"Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct . . .." (Civ. Code, § 1633.5(b).) The absence of an explicit agreement to conduct the transaction by electronic means is not, by itself, determinative, however, it is a relevant factor to consider. (See *JBB Investment Partners, LTD v. Fair* (2014) 232 Cal.App.4th 974.

There is no allegation that there was an express agreement between the parties to conduct negotiations electronically and be bound by electronic signatures. Nothing contained within the emails supports a conclusion that the parties agreed that Geraci's printed name at the bottom of emails was intended to be a legally binding signature. Nor does anything in the November Email exchange indicate that the parties agreed to conduct a transaction by electronic means. Thus, the emails do not amount to an electronic signature under the UETA, and if they are part of the agreement, they violate the statute of frauds.

C. Nor is Geraci's Signature Block on the E-Mails a "Signature" Under Law of Contract

A typed name at the end of an e-mail is not, by itself, a signature under case law. "[I]t is a universal requirement that the statute of frauds is not satisfied unless it is proved that the name relied upon as a signature was placed on the document or adopted by the party to be charged *with the intention of authenticating the writing.*" (*Marks v. Walter McCarty Corp.* (1929) 33 Cal.3d 814, 820.)

There are no factual allegations that directly allege or from which it can be inferred that Geraci intended his brief email statements to be a legally binding contract.

Moreover, Cross-Complainant alleges that "[t]he parties further agreed to cooperate in good faith to properly reduce the complete agreement, including all of the agreed-upon terms [as alleged by

Cotton in ¶ 14], to writing." (SAXC ¶ 13.) The SAXC makes clear this never happened. The only writing signed was the Written Agreement containing the material terms and conditions set forth therein.

D. The SAXC Does Not Allege Actionable Breach

The actionable breach of which Cross-Complainant complains is "He breached *at least* one material term of it, *viz.*, the promise to negotiate in good faith to deliver a proposed final agreement, the promise to deliver a 10 percent interest in the property, and failing to pay the amounts due for the 50,000.00 deposit. (SAXC, p. 11. ¶ 36.)" (Opposition, 6:10-12). Cross-Complainant goes on to assert that "Without question, the SAXC alleges just such a breach, namely, that Geraci intentionally delayed further negotiations, that Geraci failed to deliver purchase documents, and that Geraci failed to full pay the agreed-upon $50,000 deposit. (SAXC, p. 11, ¶36)." (Opposition, 6:21-24.)

The flaw in Cross-Complainant's reasoning is that none of these alleged obligations were contained within the legally binding, signed written contract. Rather, these are terms and conditions that Cross-Complainant would like to have added to the legally binding, signed written contract. Plaintiff has performed everything required of him so far under the Written Agreement and Cross-Complainant cannot and has not alleged otherwise.

E. Cotton Cannot Overcome His Own Admissions That He Acted, Not on Geraci's Representations, But In Spite of His Hesitations and Concerns Over Geraci's Representations – Hence No Reasonable or Justifiable Reliance

As to Cotton's causes of action for intentional and negligent misrepresentation and false promise, Cotton cannot overcome his own *admissions* in his pleadings that he was hesitant, understandably concerned and despite his hesitation, concerns and reservations he agreed to Geraci's terms. (SAXC ¶ 17.) Given these admissions, Cotton has failed to allege reasonable and justified reliance. At a minimum he has not pleaded facts which would lead one to conclude he acted in reasonable and justified reliance on any statements made by Geraci.

F. Cotton Alleges that Geraci Made Numerous *Contemporaneous* Representations of Fact that Geraci Had No Reasonable Ground for Believing True – This Allegations Are Belied by the Fact That They Occurred After the Written Agreement Was Signed.

Cotton argues that Geraci made many contemporaneous representations such as "[o]n multiple

occasions, Geraci represented to Cotton that *Geraci had not yet filed* a CUP application with respect to the Property when [in reality] the CUP application had already been filed" and that "[o]n multiple occasions Geraci represented to Cotton that the preliminary work of preparing a *CUP application was merely underway, when, in fact, the CUP application had already been filed."* (SAXC, p. 14, ¶ 45(d)-(e) [emphasis added.])" (Opposition, 10:15-21.)

With regard to each of these alleged misrepresentations, they all occurred after the Written Agreement was signed by both parties and after the November Emails, which Cotton now claims are part of the agreement between the parties "evidencing' the basic terms of the contract. As such, Cotton has failed to allege that: 1) he reasonably and justifiably relied on these "false representations" as they were not yet made; 2) that these false representations caused harm or damage; and 3) that Cotton's justified and reasonable reliance on these false representations caused him harm or damage, all required to prove Cotton's fraud claims. [CACI 1900, 1902, and 1903.]

III. CONCLUSION

For the foregoing reasons and subject to a sufficient offer of proof, Geraci's demurrers to each of the causes of action should each be sustained without leave to amend.

Dated: October 27, 2017

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