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3 pages

FILED
Clerk of the Superior Court

JUL 03 2019

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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.

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 R. Wohlfeil

**CROSS-DEFENDANT REBECCA BERRY
MOTION FOR NONSUIT AND
SUPPORTING MEMORANDUM OF
POINTS AND AUTHORITES**

[IMAGED FILE]

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

Cross-Defendant, REBECCA BERRY, hereby moves for nonsuit at the close of
Defendant/Cross-Complainant, DARRYL COTTON's, opening statement on the grounds that the
facts alleged by Defendant/Cross-Complainant, even if assumed true, are not sufficient as a matter
of law to prove a prima facie case that Ms. Berry made any misrepresentation to Mr. Cotton. This
Motion is based on the supporting Memorandum of Points and Authorities below, as well as the

argument of counsel presented to the Court.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Cotton has asserted two (2) causes of action against Cross-Defendant Rebecca Berry: (1) Intentional Misrepresentation; and (2) Negligent Misrepresentation. Each cause of action requires as an element that Ms. Berry made either an intentional or negligent misrepresentation of fact to Cotton. (CACI 1900, CACI 1903.) In his opening statement, Cotton has failed to attribute any misrepresentation made by Rebecca Berry. Instead, each of the alleged misrepresentations were allegedly made by Mr. Geraci. Indeed, in the Second Amended Cross-Complaint, Cotton admits that he has never even met Ms. Berry. (SAC ¶ 12) Each of the misrepresentations in the Second Amended Cross-Complaint are alleged to have been made by Mr. Geraci. (SAC ¶40 (a)-(e) and ¶45(a)-(e).)

II. LEGAL ARGUMENT

A motion for judgment of nonsuit is a motion made after the plaintiff's opening statement, or after the plaintiff has presented his or her evidence. (Code Civ. Proc., § 581c, subd. (a).) A trial court may properly grant a motion for nonsuit immediately after the completion of a party's opening statement "where it appears that counsel for [cross-complainant] has stated all the facts that he expects to prove and that these would not make a prima facie case." (*Damesghi v. Texaco Refining & Mktg.* (1992) 3 Cal.App.4th 1262, 1286.) The motion concedes the truth of the facts asserted (if made after the opening statement) or shown (if made after the presentation of the plaintiff's evidence), but claims they fail as a matter of law to support the plaintiff's cause of action. (*Gray v. Kircher* (1987) 193 Cal.App.3d 1069, 1071.; *see also Jensen v. Hewlett-Packard Co.* (1993) 14 Cal.App.4th 958 [affirming nonsuit motion where defendant moved for nonsuit again after supplemental opening statement because plaintiff still failed to state prima facie libel case].)

In the instant case, Cross-Complainant's counsel, Mr. Austin, has failed to state any facts by which Ms. Berry may be liable for either intentional or negligent misrepresentation. All alleged facts made surrounding the parties' negotiation involved Mr. Cotton and Mr. Geraci alone, not Ms. Berry. Mr. Cotton will fail to establish a prima facie case for both intentional and negligent misrepresentation.

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1 **III. CONCLUSION**

2 In conclusion, the court should grant Plaintiff's motion for non-suit as to the intentional and
3 negligent misrepresentation claims alleged against Ms. Berry.

4 FERRIS & BRITTON
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6
7 Dated: July, 3, 2019

8 By:


Michael R. Weinstein

9 Scott H. Toothacre

10 Attorney for Plaintiff/Cross-Defendant LARRY
11 GERACI and Cross-Defendant REBECCA BERRY
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