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By: A. TAYLOR

FERRIS & BRITTON
A Professional Corporation
Michael R. Weinstein (SBN 106464)
Scott H. Toothacre (SBN 146530)
501 West Broadway, Suite 1450
San Diego, California 92101
Telephone: (619) 233-3131
Fax: (619) 232-9316
mweinstein@ferrisbritton.com
stoothacre@ferrisbritton.com

Attorneys for Plaintiff/Cross-Defendant LARRY GERACI and
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

**PLAINTIFF/CROSS-DEFENDANT LARRY
GERACY'S MOTION FOR DIRECTED
VERDICT AND SUPPORTING
MEMORANDUM OF POINTS AND
AUTHORITIES**

[IMAGED FILE]

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

1 Cross-Defendant, LARRY GERACI, hereby moves for directed verdict on each of
2 Defendant/Cross-Complainant, DARRYL COTTON's first and fifth causes of action for breach of
3 contract and declaratory relief, respectively. As discussed further below, disregarding conflicting
4 evidence and giving Mr. Cotton's evidence every legitimate inference which may be drawn therefrom,
5 there is no evidence of sufficient substantiality to support a finding that establishes all elements of each
6 those causes of action. This Motion is based on the supporting Memorandum of Points and
7 Authorities below, as well as the argument of counsel presented to the Court.

8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9 **I. INTRODUCTION**

10 Darryl Cotton has asserted five (5) causes of action against Cross-Defendant Larry Geraci: (1)
11 Breach of Contract; (2) Intentional Misrepresentation; (3) False Promise; (4) Negligent
12 Misrepresentation; and (5) Declaratory Relief.

13 The first cause of action for Breach of Contract fails as a matter of law because Mr. Cotton has
14 failed to establish that Mr. Geraci accepted the additional terms to the November 2, 2016 written
15 agreement ("November 2nd Agreement"). Further Mr. Cotton testified that the parties never reached an
16 agreement at all since he and Mr. Geracie ("the Parties") had continuing negotiations that never came to
17 fruition. The testimony, viewed in the light most favorable to Mr. Cotton, clearly is that there was no
18 contract at any time between Mr. Geraci and Mr. Cotton. As a result, Mr. Cotton has failed to allege a
19 valid and binding contract that Mr. Geraci could have breached.

20 The fifth cause of action for Declaratory Relief fails as a matter of law because it is derivative of
21 the underlying contract claims. Since the Breach of Contract cause of action fails, the Declaratory Relief
22 cause of action also fails as a matter of law.

23 In conclusion, the court should grant Plaintiff's motion for directed verdict.

24 **II. SUMMARY OF TESTIMONY**

25 At trial, Mr. Cotton testified that he read and signed the November 2nd Agreement at the time of
26 execution, and that the terms reflected in the November 2nd Agreement were true, that there was no
27 confusion that the Parties agreed to a \$800,000 purchase price, and Mr. Cotton understood that he
28 would be receiving \$10,000 as a non-refundable deposit. However, he also testified the intention of

1 executing the November 2nd Agreement was to get something in writing that constituted a receipt that
2 gave Mr. Geraci assurances that he was not wasting his time with Mr. Cotton until such time that a final
3 contract was delivered to Mr. Cotton. Mr. Cotton claimed that the November 2nd Agreement was not
4 fully integrated and that as of November 2nd, 2016, he and Mr. Geraci did not have a binding
5 agreement. Mr. Cotton indicated that the November 2nd Agreement was not the agreement that would
6 have incorporated all the additional terms that he and Mr. Geraci had discussed, so there was no
7 agreement until Mr. Cotton had the final executed contract documents. However, after November 2,
8 2016, Mr. Cotton admitted that he had no other agreement with Mr. Cotton because no other documents
9 were ever signed.

10 **III. LEGAL AUTHORITY FOR DIRECTED VERDICT**

11 A motion for directed verdict is a motion made, unless the court specifies an earlier time, after all
12 the parties have completed the presentation of all their evidence in a jury trial. (Code Civ. Proc., § 630(a).
13 The test for directing a verdict is the same as for entering a nonsuit, and “is proper only when,
14 disregarding conflicting evidence and giving the opposing party’s evidence every legitimate inference
15 which may be drawn therefrom, the result is no evidence of sufficient substantiality to support a verdict
16 in favor of the opposing party.” (*Aetna Life & Casualty Co. v. City of Los Angeles* (1985) 170 Cal.App.3d
17 187, 197 [citing *Paulfrey v. Blue Chip Stamps* (1983) 150 Cal.App.3d 187, 197]; *see also Estate of Lances*
18 (1932) 216 Cal. 397 [stating that it has become established law of this state that the power of the court to
19 direct a verdict is absolutely the same as the power of the court to grant a nonsuit].)

20 **IV. LEGAL ARGUMENT**

21 **A. Mr. Cotton Cannot Establish That Mr. Geraci and Mr. Cotton Agreed Orally Agreed** 22 **to any Additional Terms not Reflected in the November 2nd Agreement.**

23 Both an offer and acceptance are required to create a contract. (CACI 309; *See California Civil*
24 *Code* § 1585.) Under basic contract law “[a]n offer must be sufficiently definite, or must call for such
25 definite terms in the acceptance that the performance promised is reasonably certain.” (*Ladas v.*
26 *California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 770 [citing to 1 Witkin, *Summary of Cal. Law*
27 (9th ed. 1987) *Contracts*, § 145, p. 169].) Preliminary negotiations or an agreement for future
28

1 negotiations are not the functional equivalent of a valid, subsisting agreement. (*Kruse v. Bank of America*
2 (1988) 202 Cal.App.3d 38, 59.)

3 Here, Mr. Geraci and Mr. Cotton executed the November 2nd Agreement, which Mr. Cotton
4 testified at trial that he read and signed at the time of execution. Further, Mr. Cotton testified that the
5 terms reflected in the November 2nd Agreement were accurate and agreed upon, but that there also were
6 additional terms the Parties discussed not reflected in that writing. However, by Mr. Cotton's own
7 testimony and viewed in the light most favorable to him, his breach of contract claim fails as a matter of
8 law for a number of reasons: 1) Mr. Geraci never accepted Mr. Cotton's additional terms, whether orally
9 or in writing, and 2) Mr. Cotton's testimony that the parties agreed to put in writing in the future the
10 additional oral terms is not a valid contract.

11 **1. Mr. Geraci's Silence with regards to Mr. Cotton's proposed additional terms is Not**
12 **Acceptance.**

13 Mr. Cotton's testimony was that while the Parties had an agreement, it was not complete because
14 there were many more terms that he wanted added to their contract. If Mr. Cotton's testimony is to be
15 believed by the jury, Mr. Geraci never rejected Mr. Cotton's proposed additional terms, but he also never
16 accepted them. Ordinarily, if a party does not say or do anything in response to another party's offer,
17 then he or she has not accepted the offer. (CACI 310.) However, if the plaintiff proves that he and the
18 defendant understood silence or inaction to mean that the defendant had accepted the plaintiff's offer,
19 then there was an acceptance. (CACI 310; *See California Civil Code § 1565.*) Because acceptance must
20 be communicated, "[s]ilence in the face of an offer is not an acceptance, unless there is a relationship
21 between the parties or a previous course of dealing pursuant to which silence would be understood as
22 acceptance." (*Southern California Acoustics Co., Inc. v. C. V. Holder, Inc.* (1969) 71 Cal.2d 719, 722.)

23 Here, Mr. Cotton testified that at no point after November 2, 2016, did Mr. Geraci accept any of
24 the proposals, terms, or agreements that Mr. Cotton sent to Mr. Geraci. It was Mr. Cotton's belief that
25 the "final contract" would be drafted in writing by Mr. Geraci's attorney. In fact, Mr. Cotton testified
26 at no point after November 2, 2016, did Mr. Geraci sign any other document so no contract was formed.
27 Mr. Geraci was silent with respect to those proposals or terms provided by Mr. Cotton after the November
28 2nd Agreement was executed. Therefore, since silence is not acceptance, Mr. Cotton failed to offer any

1 evidence of terms beyond the November 2nd Agreement that the Parties agreed to.¹ As a result, the
2 breach of contract claim fails as a matter of law because there is no valid or binding contract according
3 to Mr. Cotton.

4 **2. Mr. Cotton's alleged Agreement to Reduce Terms in Writing in the Future is Not a**
5 **Contract Binding on the Parties.**

6 Further, an agreement to reduce a contract to writing in the future is not a contract. "Where ...
7 there is a manifest intention that the formal agreement is not to be complete until reduced to a formal
8 writing to be executed, there is no binding contract until this is done." (*Smissaert v. Chiodo* (1958) 163
9 Cal.App.2d 827, 830-831.) "[W]here it is part of the understanding between the parties that the terms of
10 their contract are to be reduced to writing and signed by the parties, the assent to its terms must be
11 evidenced in the manner agreed upon or it does not become a binding or completed contract." (*Beck v.*
12 *American Health Group Internat., Inc.* (1989) 211 Cal.App.3d 1555 [citing to *Kruse v. Bank of America*
13 (1988) 202 Cal.App.3d 38, 59].]

14 Mr. Cotton testified that the November 2nd Agreement was not a contract because the Parties were
15 still discussing additional terms (which the Parties never agreed to), and that the Parties had an
16 understanding that the additional terms the Parties allegedly agreed to would not be binding unless and
17 until Mr. Geraci's attorney reduced this to a "final" agreement that was signed by the parties. An
18 intention that a formal agreement is not to be complete until reduced to a formal writing to be executed
19 is not a binding contract. Additionally, based on Mr. Cotton's argument, if the Parties actually agreed at
20 a later time to reduce the contract, including the 10% equity position, to writing, then similarly the parties
21 would accept those contractual terms in writing as well. While Ms. Austin testified that she or someone
22 at her office drafted several agreements for Mr. Geraci in or about February/March 2017, both Mr. Geraci
23 and Mr. Cotton testified that none these agreements were executed. Therefore, not only is the intent to
24 reduce an agreement to a formal writing does not create a binding contract between Mr. Geraci and Mr.
25 Cotton, and there was no assent to those intended terms. As a result, Mr. Cotton's breach of contract
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27
28 ¹ It should be noted that the evidence supports Plaintiff's argument that the November 2nd Agreement is a valid and enforceable
agreement between Mr. Geraci and Mr. Cotton. The evidence does not support the conclusion that there was any manifest
intention that the agreement between the Parties is not to be complete until reduced to a formal writing.

1 claim fails as a matter of law.²

2 **B. Declaratory Relief**

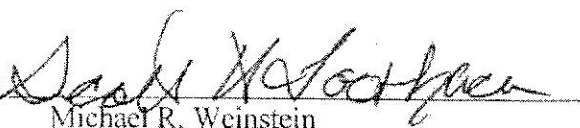
3 For the reasons stated above in Section A, Mr. Cotton's breach of contract cause of action fails
4 based on his own testimony and interpretation of the facts. As a result, the declaratory relief cause of
5 action is derivative and also fails as a matter of law.

6 **V. CONCLUSION**

7 In conclusion, the court should grant Cross-Defendant Geraci's motion for directed verdict as to
8 Mr. Cotton's first and fifth causes of action.

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10 FERRIS & BRITTON
A Professional Corporation

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12 Dated: July 10, 2019

13 By: 
14 Michael R. Weinstein
15 Scott H. Tothacre
16 Attorneys for Plaintiff/Cross-Defendant
17 LARRY GERACI
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28 ² Even if the Court finds that there was an acceptance of Mr. Cotton's proposed additional terms, Mr. Cotton's contract claim fails as a matter of law because it does not satisfy the Statute of Frauds for the purchase and sale of real property. (Cal. Civ. Code § 1624; *Sterling v. Taylor* (2007) 40 Cal.4th 757, 766.)