

FILED
Clerk of the Superior Court

DEC -7 2017

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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
Dept.: C-73

**PLAINTIFF AND CROSS-DEFENDANT,
LARRY GERACI, AND CROSS-
DEFENDANT, REBECCA BERRY,
MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO EX
PARTE APPLICATION FOR A
TEMPORARY RESTRAINING ORDER
AND ORDER TO SHOW CAUSE RE
PRELIMINARY INJUNCTION**

[IMAGED FILE]

DATE: December 7, 2017
TIME: 8:30 a.m.
DEPT: C-73

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

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1 Plaintiff and Cross-Defendant, LARRY GERACI (hereafter "Geraci"), and Cross-Defendant,
2 REBECCA BERRY (hereafter "Berry"), submit these points and authorities in opposition to the ex
3 parte application filed by Defendant and Cross-Complainant, DARRYL COTTON (hereafter "Cotton")
4 for issuance of a temporary restraining order and order to show cause re preliminary injunction.

5 **I. INTRODUCTION**

6 This civil action has been pending since March 21, 2017. Discovery is ongoing with
7 depositions of all the parties—Darryl Cotton, Rebecca Berry, and Larry Geraci—scheduled to be taken
8 next week. Trial is May 11, 2018.

9 On October 6, 2017, after this action had been pending for more than six (6) months, Defendant
10 Cotton filed a related action, a Petition for Writ of Mandate (Case No. 37-2017-00037675) (the "Writ
11 of Mandate Action") seeking a writ of mandate *compelling the City of San Diego* to recognize him as
12 the true applicant in place of Berry on the CUP Application submitted by Berry, as Geraci's agent, for a
13 Conditional Use Permit for operation of a medical marijuana dispensary. Cotton thereafter filed a first
14 ex parte application seeking, among other things, the issuance of an alternative writ of mandate
15 *compelling the City of San Diego* to recognize Cotton as the true applicant in place of Berry in
16 connection with the subject CUP Application. *After extensive briefing and oral argument* on
17 October 31, 2017, and on November 2, 2017, the Hon. Judge Edward Sturgeon *denied the ex parte*
18 *request for issuance of an alternative writ* and transferred the action to this court where the instant
19 earlier-filed, related action was pending. A copy of the transcript of the November 2, 2017, hearing
20 before Judge Sturgeon and of his Minute Order denying the ex parte application makes clear that the
21 denial was on the merits rather than without prejudice. (See Exhibits 8 and 9 to the concurrently filed
22 Opposition Notice of Lodgment.)

23 Having had his request for immediate issuance of an alternative writ denied on the merits by
24 Judge Sturgeon, Cotton now attempts by this ex parte application to obtain a temporary restraining
25 order ("TRO") and order to show cause ("OSC") re preliminary injunction ("PI") to effectively obtain
26 the same relief. He asks this Court to issue a "mandatory" injunction, namely, a TRO *compelling Larry*
27 *Geraci and Rebecca Berry* to recognize Cotton as a co-applicant on the pending CUP Application
28 submitted by applicant Berry and that is currently being processed by the City of San Diego.

1 This ex parte application for a TRO is a thinly disguised attempt to achieve the nearly identical
2 relief that was denied by Judge Sturgeon in connection with his first ex parte application in Cotton's
3 related Writ of Mandate Action. This ex parte application should be denied for a whole host of reasons
4 set forth below. There is simply no basis for the Court issuing a TRO or PI to compel Geraci and Berry
5 to recognize him as co-applicant on the CUP Application. All of the issues central to this action, the
6 Petition, and the relief requested herein depend on the resolution of disputed facts which must be
7 decided by jury after trial, which is already set for May 11, 2018.

8 Section II, *supra*, sets forth the relevant Procedural Background.

9 Section III, *supra*, sets forth the numerous reasons why his court should deny this ex parte
10 request for a TRO and OSC re PI.

11 **II. PROCEDURAL BACKGROUND**

12 On March 21, 2017, Larry Geraci filed the instant action against Darryl Cotton asserting causes
13 of action for breach of contract and specific performance of a written agreement entered into between
14 them on November 2, 2016 for the purchase and sale from Cotton to Geraci of the Property (the "Nov
15 2nd Written Agreement"). Cotton has cross-complained against Geraci and Berry; his operative
16 Second Amended Cross-Complaint, dated August 25, 2017, asserts damage claims against Geraci for
17 breach of contract, intentional misrepresentation, negligent misrepresentation; false promise
18 (promissory fraud) as well as a declaratory relief claim against both Geraci and Berry. Neither Geraci,
19 in his complaint, nor Cotton, in his cross-complaint, seek any injunctive relief.

20 This action is already set for trial on May 11, 2018, and the central issue in that case is the
21 validity and enforceability of that Nov 2nd Written Agreement. That is also the central issue in
22 the related writ of mandate proceeding discussed below as it provides the basis for the
23 Geraci/Berry's contention that Berry is an "other person who can demonstrate a legal right,
24 interest, or entitlement to the use of the real property subject to the [CUP] application." (SDMC,
25 §§ 112.0102, subd. (a)(3), 113.0103 [defining applicant].)

26 On October 6, 2017, Cotton filed a verified Petition for Writ of Mandate pursuant to Code of
27 Civil Procedure section 1085 seeking an alternative writ of mandate and a peremptory writ of mandate
28 directing respondent City of San Diego, to: (1) recognize Cotton as the sole applicant with respect to

1 Conditional Use Permit Application—Project No. 52066 (the “CUP Application”¹) for a Conditional
2 Use Permit (“CUP”) to operate a Medical Marijuana Consumer Cooperative (“MMCC”) at 6176
3 Federal Boulevard, San Diego, California 92105 (the “Property”); and (2) process the CUP
4 Application with Cotton as the sole applicant. In the alternative, Cotton seeks an order to show cause
5 directed to the City of San Diego as to why the Court should not issue such a writ. In his petition
6 Cotton named Larry Geraci and Rebecca Berry as Real Parties in Interest. The Writ of Mandate
7 Action was assigned to the Hon. Eddie C. Sturgeon in Department C-67. Cotton did not file a Notice
8 of Related Action advising the court that this prior-related action (*Larry Geraci v. Darryl Cotton*, Case
9 No. 37-2017-00010073-CU-BC-CTL) was pending before Judge Wohlfeil. The writ petition is an
10 attempt to hijack the CUP Application validly and properly submitted by Berry, on behalf of Geraci, to
11 the City of San Diego, which application has been in process for more than twelve (12) months already
12 and for which Geraci has already incurred expenses in excess of \$150,000. It is also an attempt to
13 circumvent this earlier-filed instant action set for trial on May 11, 2018.

14 On October 30, 2017, Cotton filed his first ex parte application in this later-filed, Writ of
15 Mandate Action, seeking the ex parte issuance of an alternative writ of mandate or for an order setting
16 an expedited hearing date and briefing schedule on the petition. The ex parte hearing was set for
17 October 31, 2017. On October 31, 2017, at the hearing, Real Parties in Interest filed their opposition
18 papers. (Oppo NOL, Ex. 1-7; Oppo RFN, paras. 1-9.) Judge Sturgeon heard oral argument on October
19 31 and then continued the matter until November 2, 2017, so he could consider the moving papers and
20 opposition papers and hear additional argument. On November 2, 2017, Judge Sturgeon heard
21 additional argument and then ruled on the merits, denying the first ex parte application. Judge Sturgeon
22 also ordered the action transferred to Judge Wohlfeil in light of the instant, earlier-filed, related action.
23 (See Transcript of November 2, 2017 Ex Parte Hearing, Ex. 8 to the Oppo NOL; see Minute Order
24

25 ¹ In his petition Cotton refers to the CUP Application as the “Cotton Application.” This misleading reference is consistent
26 with his wrongful attempt to hijack the application. Berry was the Applicant. Cotton and Berry did not have a principal-
27 agent relationship and Berry did not submit the CUP Application on his behalf. Rather, Berry had a principal-agent
28 relationship *with Geraci*. Berry submitted the CUP Application on behalf of Geraci who had entered into a written
agreement with Cotton for the purchase of the Property. Thus, Berry was and is a “person who can demonstrate a legal
right, interest, or entitlement to the use of the real property” within the meaning of the Municipal Code. (SDMC, §§
112.0102, subd. (a), 113.0103 [defining applicant].)

1 dated November 2, 2017, denying the ex parte application, Ex. 9 to the Oppo NOL.)

2 A mere thirty-five (35) days have transpired since Judge Sturgeon denied Cotton's ex parte
3 application, and now Cotton has filed the instant ex parte application seeking nearly identical relief, but
4 against Geraci and Berry rather than against the City of San Diego. Cotton seeks to backdoor the ruling
5 in the related Writ of Mandate Action for which he cannot seek reconsideration and seek a second bite
6 at the apple in the instant, earlier-filed related action.

7 **III. OPPOSITION ARGUMENT**

8 **A. This ex parte application is a de facto motion for reconsideration of Judge**
9 **Sturgeon's prior ruling in the related Writ of Mandate Action and should be**
10 **denied for the reasons set forth in the opposition papers submitted therein and the**
reasons supporting Judge Sturgeon's denial of that ex parte application

11 This ex parte application is a *de facto* motion for reconsideration under Code of Civil Procedure
12 section 1008 of Judge Sturgeon's prior ruling only thirty-five (35) days ago denying his first ex parte
13 application seeking the nearly identical relief in connection with Cotton's Petition for Writ of Mandate
14 (the Related Action). The following is obvious: Cotton recognizes that he cannot again seek this relief
15 against the City of San Diego in the Writ of Mandate Action because he cannot comply with the Code
16 of Civil Procedure section 1008 requirements for motions for reconsideration in that he cannot make a
17 showing of any new facts, circumstances, or law during the last 35 days (since the first ex parte
18 hearing) justifying the renewed ex parte application. (*Even Zohar Construction & Remodeling, Inc., v.*
19 *Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830.) If he sought such ex parte relief again against the
20 City in the Writ of Mandate Action, the court would be required to deny such an ex parte application
21 because it lacks jurisdiction to hear the renewed motion. So instead, Cotton attempts to get around this
22 by seeking substantially similar relief against Geraci and Berry in the instant related action.

23 However, the same reasons supporting denial of that ex parte application seeking to compel the
24 City of San Diego to recognize Cotton as the true applicant on the CUP Application also support denial
25 of an order compelling Geraci and Berry to recognize Cotton as a co-applicant. Cotton cannot
26 establish he has any right to be recognized by Geraci/Berry as a co-applicant on the CUP Application
27 for the same reasons as were set forth in detail in the opposition papers to the first ex parte application
28 in the Writ of Mandate Action, which are fully incorporated herein by reference. (See Plaintiff and

1 Cross-Defendant, Larry Geraci, and Cross-Defendant, Rebecca Berry, Request for Judicial Notice in
2 Opposition to Ex Parte Application for Temporary Restraining Order and Order to Show Cause
3 Regarding Preliminary Injunction dated December 7, 2017 and filed concurrently herewith (hereafter
4 "Oppo RFJN"), paragraphs 1 thru 7; Plaintiff and Cross-Defendant, Larry Geraci, and Cross-
5 Defendant, Rebecca Berry, Notice of Lodgment in Opposition to Ex Parte Application for Temporary
6 Restraining Order and Order to Show Cause Regarding Preliminary Injunction dated December 7, 2017
7 and filed concurrently herewith (hereafter "Oppo NOL"), Exhibits 1 thru 9.)

8 **B. Cotton cannot establish he is entitled to a TRO**

9 An injunction is an extraordinary remedy use to require a defendant [or cross-defendant] to take,
10 or refrain from taking, a specified action *when necessary to protect a legal right being pursued by the*
11 *plaintiff [or cross-complainant]*. Thus, a party seeking a temporary restraining order or preliminary
12 *injunction must show that the relief sought in the underlying lawsuit depends, in whole or in part, on*
13 *restraining the commission or continuance of an act that would cause irreparable injury.* Here,
14 Cotton's operative Second Amended Cross-Complaint has not plead that he is entitled to and seeks
15 injunctive relief on any of his claim; rather, as plead his cross-complaint seeks damages only. Cotton
16 cannot establish that the requested TRO (and preliminary injunction) is necessary to protect the damage
17 claims he is pursuing.

18 In addition, to be entitled to a TRO, Cotton must establish that unless the status quo is preserved
19 he will suffer "great or irreparable injury" before the matter can be determined at a preliminary
20 injunction hearing. (Code Civ. Proc., §§ 526(a)(2), 527(a).) Cotton has not done so.

21 First, Cotton seeks a mandatory, not prohibitory injunction. He is not asking the court *to*
22 *preserve* the status quo pending the preliminary injunction hearing; rather, Cotton is asking the court *to*
23 *disturb* the status quo by compelling Geraci and Berry to recognize him as a co-applicant on a CUP
24 Application for which Berry has been the sole applicant during the more than one year that CUP
25 Application has been submitted to and processed by the City of San Diego at which the City of San
26 Diego. On November 2, 2016, Cotton and Geraci signed a written agreement for the sale of the
27 subject Property to Geraci. A condition of the sale is Geraci's obtaining approval of a CUP for the
28 operation of a medical marijuana dispensary at the Property. As Cotton, admits, Geraci, through his

1 agent and the CUP applicant, Berry, has been pursuing the CUP Application for more than a year.
2 Geraci has incurred expenses of over \$150,000 in this endeavor. That has been the status quo for more
3 than a year. Cotton now seeks to disturb (not preserve) the status quo on an emergency basis but can
4 point to no emergency that necessitates this be done pending a hearing on the request for a PI.

5 Second, Cotton has made no showing of any irreparable harm that would accrue to him if the
6 TRO is denied pending a hearing on the request for a PI. He suggests in his declaration that he needs
7 immediate relief because he understands a dedication is supposed to occur any day now. (See Cotton
8 Decl, para. 21.) However, that argument reflects a misunderstanding of the dedication process.
9 Irrespective of when an "offer of dedication" is made, the City cannot and will not accept any "offer of
10 dedication" until a public hearing, which is not imminent.

11 Third, as shown in the opposition to the first ex parte application, Cotton indicated to the City
12 as far back as May 15, 2017, that he intended to seek relief in connection with the CUP Application.
13 (See 5/15/17 email from Cotton to Firouzeh Tirandazi at the City, Oppo NOL, Ex. 6 (the Opposition
14 NOL to the first ex parte application, Ex. 8 ["Please consider this record of our conversation on Friday
15 of my attempt to have the Ownership Disclosure Statement updated *and my notice of my intent to seek*
16 *the Court's help.*"]). **And then he waited five (5) months to do so by filing the writ petition and**
17 **first ex parte application in the Writ of Mandate Action.** Any harm Cotton claims to be at risk of
18 suffering, if any, is a result of his failure to act in a timely fashion, not from any actions by either
19 Geraci/Berry or the City of San Diego.

20 **C. Cotton cannot establish that he is entitled to a preliminary injunction (PI)**

21 Cotton cannot establish that he is entitled to a PI under the standards by which Court's make
22 such determinations. When deciding whether to issue a preliminary injunction, a trial court will
23 evaluate two interrelated factors: 1) the likelihood that the moving party will prevail on the merits at
24 trial [*Langford v. Superior Court* (1987) 43 Cal. 3d 21, 28]; and (2) the interim harm that the plaintiff is
25 likely to sustain if the injunction were denied, as compared to the harm that the defendant is likely to
26 suffer if the preliminary injunction were issued [*Common Cause v. Board of Supervisors* (1989) 49 Cal.
27 3d 432, 442]. An order for a preliminary injunction is based on a showing that it is desirable to
28 maintain the status quo pending a determination of the merits of the litigation. (*Continental Baking Co.*

1 v. *Katz* (1968) 68 Cal. 2d 512, 528; *Cox Cable San Diego, Inc. v. Bookspan* (1987) 195 Cal. App. 3d
2 22, 25.) The more likely it is that plaintiff will ultimately prevail; the less severe must be the harm that
3 plaintiff alleges will occur if the injunction does not issue. (*King v. Meese* (1987) 43 Cal. 3d 1217.)
4 Cotton fails on all counts.

5 First, Cotton cannot show a reasonable probability of prevailing on the merits at trial. In the
6 related Writ of Mandate Action, Judge Sturgeon rejected the argument that the City of San Diego had a
7 clear, ministerial duty to process the CUP Application with Cotton as the sole applicant and, thus, to
8 replace Berry with Cotton as the applicant him or otherwise recognize him as the sole applicant on the
9 CUP Application. Cotton's argument was and is flawed because Cotton cannot demonstrate that he
10 was the only person who possessed the right to use the Property. The City's ordinances provide that the
11 persons "deemed to have the authority to file an application [are]: [¶] (1) The record owner of the real
12 property that is the subject of the permit, map, or other matter; [¶] (2) The property owner's authorized
13 agent; or [¶] (3) **Any other person who can demonstrate a legal right, interest, or entitlement to**
14 **the use of the real property subject to the application.**" (SDMC, §§ 112.0102, subd. (a), 113.0103
15 [defining applicant].) Thus, the Municipal Code makes clear that the "record owner" is not the only
16 person deemed to have authority to file a CUP application.

17 It is undisputed that Cotton and Berry did *not* have a principal-agent relationship and Berry did
18 not submit the CUP Application on his behalf. Rather, as conceded by Cotton in his moving papers,
19 *Berry had a principal-agent relationship with Geraci*. Berry submitted the CUP Application as an
20 agent on behalf of Geraci, who had entered into a written agreement with Cotton for the purchase of the
21 Property. In other words, Berry can demonstrate a "legal right, interest, or entitlement to the use of the
22 real property subject to the application" (SDMC, § 112.0102, subd. (a)(3).) Berry was and is entitled to
23 pursue the CUP Application on behalf of her principal, Geraci, who has a contractual interest in the
24 Property by virtue of his agreement with Cotton to purchase the Property. The municipal code does not
25 give rise to any obligation by Geraci/Berry to recognize Cotton as a co-applicant let alone supply the
26 basis for a clear, ministerial duty by the City to recognize Cotton as the true applicant in place of Berry.

27 Second, Cotton cannot show he is likely to sustain interim harm pending the May 11, 2018, trial
28 if the preliminary injunction is denied that exceeds the harm that Geraci/Berry are likely to suffer if the

1 preliminary injunction is issued. In other words, the balancing of the harms does not favor Cotton.

2 ——— If the TRO (and PI) are denied, pending trial on May 11, 2018, Geraci/Berry will continue to
3 pursue approval of the CUP Application. The evidence presented demonstrates due diligence by
4 Geraci/Berry in pursuing approval for over a year and at an expense to date of over \$150,000. Cotton
5 has provided no evidence that Geraci/Berry are not pursuing approval diligently or have taken any
6 adverse, harmful action to interfere with obtaining CUP approval. And why would they? Geraci/Berry
7 have every incentive to do so as approval of a CUP to operate a dispensary is a condition that must be
8 satisfied for Geraci to consummate the purchase of the Property. Moreover, as all the parties concede,
9 a CUP runs with the land. If the CUP Application submitted by Berry is ultimately approved, *then that*
10 *will benefit, not harm, Cotton, should Cotton ultimately prevail on the merits regarding Nov 2nd*
11 *Written Agreement that is being litigated in the instant action.* In other words, if Cotton is denied his
12 TRO and PI but prevails at trial, he will remain owner of the Property to which the approved CUP
13 attaches. Thus, Cotton can point to no irreparable harm he will suffer if Geraci and/or Berry are not
14 compelled to recognize him as a co-applicant on Berry's CUP Application pending the May 11, 2018,
15 trial.

16 On the other hand, if Cotton is granted his TRO or PI, then he has every incentive as a co-
17 applicant to torpedo the CUP approval process so that the condition required for Geraci to
18 acquire the Property is not satisfied and Cotton can instead sell the Property to another buyer he
19 has lined up for a purchase price of \$2,000,000 (compared to the \$800,000 purchase price he will
20 receive from Geraci). In other words, if Cotton is granted his TRO and/or PI but Geraci prevails at
21 trial, Geraci's victory may be a pyrrhic one as Cotton would have a \$1.2 million reason to destroy the
22 CUP approval process in order to free Cotton to close the more lucrative deal he has made with
23 another buyer, Richard Martin II, for the purchase and sale of the Property.

24 **D. Cotton is blatantly attempting to substantially deprive Geraci/Berry of due process.**

25 Cotton's moving papers are 129 pages, including exhibits. (The moving papers for his
26 concurrently filed ex parte application in the Writ of Mandate Action exceed 200 pages, including
27 exhibits.) The Register of Actions reveals that Cotton scheduled an ex parte hearing in the Writ of
28 Mandate Action for November 16, then rescheduled it for November 21, rescheduled it for November

22, and rescheduled it again for December 7. Yet notice that Cotton was going to seek this ex parte relief for a TRO and OSC re Preliminary Injunction in the instant action was not given by Cotton's counsel to Geraci/Berry's counsel until the last possible moment- namely, by email at 7:19 p.m. the evening of December 5. That notice gave generic notice that the ex parte application would seek a TRO and OSC but it did not state the precise relief being sought- in other words, it did not state what actions by Geraci and/or Cotton it was going to seek to restrain or enjoin.² The precise relief to be sought was not known until the ex parte moving papers were served at 10:47 a.m. yesterday, December 6.

California Rules of Court, rule 3.1206, requires service of the moving papers at the "first reasonable opportunity." Cotton has known he was going to bring these ex parte applications for many weeks yet Cotton did not give notice to the last possible minute of the precise relief that would be requested or the basis for that relief and did not serve moving papers until it was strategically advantageous, and clearly not at his "first reasonable opportunity." It is fair to say this was all done to disadvantage Plaintiff/Cross-Defendants in preparing a substantive opposition.

IV. CONCLUSION

For the foregoing reasons this Court should deny Cotton's ex parte attempt to obtain the requested relief—a TRO compelling Geraci and Berry to recognize Cotton as a co-applicant. Moreover, it is worth repeating that, as conceded by Cotton, a CUP runs with the land. If the CUP Application submitted by Berry is ultimately approved, *then that will benefit, not harm, Cotton, should Cotton ultimately prevail on the merits regarding Nov 2nd Written Agreement that is being litigated in the instant lawsuit set for trial on May 11, 2018.* What Cotton really seeks by this ex parte application is a TRO (and later a PI) that will enable him to prevent Geraci/Berry from obtaining approval of a CUP and thereby prevent satisfaction of the condition precedent to Geraci acquiring the Property from

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² California Rules of Court, rule 3.1203 requires notice by 10 a.m. the day before the hearing, so Petitioner gave notice a mere "23 minutes" before the deadline.

1 Cotton, which will free up Cotton to close the more lucrative deal he has made with another buyer,
2 Richard Martin II, for the purchase and sale of the Property for a purchase price of \$2 million.
3

4 Dated: December 7, 2017

FERRIS & BRITTON,
A Professional Corporation

6
7 By: Michael R. Weinstein
8 Michael R. Weinstein
9 Scott H. Toothacre
10 Attorneys for
11 Plaintiff and Cross-Defendant LARRY GERACI and
12 Cross-Defendant REBECCA BERRY
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