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Attorney for Defendant/Cross-Complainant DARRYL COTTON

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

LARRY GERACI, an individual,

Plaintiff,

vs.

DARRYL COTTON, an individual; and DOES 1 through 10, inclusive,

Defendants.

AND RELATED CROSS-ACTION.

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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT/ CROSS-COMPLAINANT DARRYL COTTON'S MOTION FOR PARTIAL ADJUDICATION

Date: May 10, 2019
Time: 9:00 a.m.
Dept: C-73
Judge: The Hon. Joel R. Wohlfeil

Defendant/Cross-complainant Darryl Cotton ("Cotton"), by and through undersigned counsel, hereby files this *Motion for Partial Adjudication* (the "Motion").

Darryl Cotton is the owner-of-record of the real property (the "Property") that is the subject of this action. The Property qualified for a highly valuable Marijuana Outlet conditional use permit ("CUP"). The successful acquisition at the Property of a CUP to allow the operations of a Marijuana Outlet was a condition precedent for the closing of the sale of the Property.

The Property no longer qualifies for a CUP because another property within 1,000 feet was issued a CUP. Thus, this action as currently pled before this Court is now solely about damages. If Cotton is correct and plaintiff/cross-defendant and his counsel knowingly filed and maintained a frivolous lawsuit, then they are legally liable for consequential damages.

This Motion seeks partial adjudication of one issue, an element of plaintiff's breach of contract claim, whether a three-sentence document executed on November 2, 2016 is or is not a fully integrated sales agreement for the Property from Cotton to Geraci as Geraci alleges in his Complaint.

MATERIAL FACTUAL AND PROCEDURAL BACKGROUND

I. Geraci's Judicial Admissions Regarding Negotiations for the Property in his Verified Answer on November 30, 2017.

On October 6, 2017, Cotton filed a Verified Petition for Writ of Mandate. Declaration of Jacob Austin Ex. 8. "[I]n or around mid-2016, Geraci contacted Cotton and expressed his interest to Cotton in acquiring the Property if further investigation satisfied him that the Property might meet the requirements for [a Marijuana Outlet] site." Austin Ex. 1 (Geraci Verified Answer to Cotton's Petition for Writ of Mandate) ¶ 13. "Geraci believed at that time that a limited number of properties located in San Diego City Council District 4 might potentially satisfy the CUP requirements for a [Marijuana Outlet]. Id. "Geraci and Cotton negotiated regarding the terms of the potential sale of the Property." Id. ¶ 14. "[O]n November 2, 2016, Geraci and Cotton met at Geraci's office[.]" Id. ¶ 17.

Neither party disputes they reached an agreement on November 2, 2016 when they met at Geraci's or that they executed the November Document. However, Geraci alleges the November Document is a sales agreement. Cotton alleges the parties reached a joint venture agreement and the November Document is a receipt meant to memorialize his acceptance of $10,000 in cash.

II. Geraci's Judicial Admissions Regarding Communications on November 2, 2016 in his Verified Answer on November 30, 2017.

On November 2, 2016, at 3:11 p.m., Geraci emailed Cotton a copy of the November Document. Austin Decl. Ex. 2 (Geraci Email)(the "November Document").

At 6:55 PM, Cotton replied to the same email as follows:

> Hi Larry, [¶] Thank you for meeting today. Since we executed the Purchase Agreement in your office for the sale price of the property I just noticed the 10% equity position in the dispensary was not language added into that document. I just want to make sure that we're not missing that language in any final agreement as it is a factored element in my decision to sell the property, ***I'll be fine if you would simply acknowledge that here in a reply***.

Austin Decl. Ex. 3 (emphasis added).

At 9:13 p.m., Geraci replied: "***No no problem at all***" (the "Confirmation Email"). Id.

III. Geraci's Production of his Phone Records And Emails in Discovery For November 3, 2016.

At 12:38 PM, Cotton called Geraci, who did not pick up. Austin Declaration ("Dec.") Ex. 4 (Cotton Phone Records).

At 12:40 PM, Geraci called Cotton back and they spoke for three minutes. Id.

At 1:41 PM, Cotton emailed Geraci:

> Larry, [¶] Per our phone call the name 151 AmeriMeds has not been taken nor has there been any business entity formed from it. If you see this as an opportunity to piggyback some of the work I've done and will continue to do as 151 Farmers with further opportunities as a potential franchise for your dispensary I'd like for you to consider that as the process evolves. [¶] We'll firm it up as you see fit.

Austin Dec. Ex. 5.

IV. Geraci's Judicial Admissions in his April 9, 2018 Declaration.

On **April 9, 2018**, Geraci alleged for the first time the Disavowment Allegation. Specifically, Geraci's declaration alleges that (i) Cotton's Request for Confirmation Email is Cotton *pretending* that earlier that day they reached a joint-venture agreement and is, in fact, an attempt at renegotiating the agreement reflected in the November Document; (ii) Geraci sent the Confirmation Email by *mistake*; and (iii) Geraci called Cotton on November 3, 2016 and Cotton *orally* agreed there was no JVA and he

was not entitled to the 10% equity position in the Marijuana Outlet promised to him by Geraci in the Confirmation Email (the "Disavowment Allegation"). Id. at ¶10.

V. This Court's Statements on July 13, 2018.

On July 13, 2018, this Court held oral argument on Cotton's Motion for Judgment on the Pleadings. At the hearing, the Court made the following material exchange took place between counsel for Cotton and this Court:

> MR. AUSTIN: Well, I was just wondering if you could explain to me, if you believe as a matter of law, the three-sentence contracts that plaintiff claims is an integrated contract. If you believe that to actually be a fully integrated contract.
>
> THE COURT: You know, we've been down this road so many times, counsel. I've explained and reexplained the court's interpretation of your position. I don't know what more to say. Is there anything else, counsel?
>
> MR. FLORES: Your Honor, if I may, I'm co-counsel on behalf of Mr. Cotton. Your Honor, the only thing we really want clarification is the matter whether or not the court deems the contract an integrated contract or not.
>
> THE COURT: Again, we've addressed that in multiple motions. I'm not going to go back over it again at this point in time. Anything else, counsel?
>
> MR. FLORES: That's it.

Austin Decl. Ex. 6.

IV. This Court's Statements on February 8, 2019.

On February 8, 2019, at oral hearing dealing with various discovery motions, this Court made the following material comments:

> THE COURT: Well, but that's credibility. And you're not going to get me -- in discovery, you're not going to get me weighing in on that. The Court's job is to make sure that responses are served, credible or not, and then ultimately you make your pitch to the jury and they decide credibility…

Austin Decl. Ex. 7.

LEGAL STANDARD

"[A] motion for judgment on the pleadings is the equivalent of a general demurrer. [Citation.] This motion tests whether the allegations of the pleading under attack support the pleader's cause if they are true. [Citation.]" Columbia Casualty Co. v. Northwestern Nat. Ins. Co. (1991) 231 Cal.App.3d 457, 468. "[I]n order for judicial notice to support a motion for judgment on the pleadings by negating an express allegation of the pleading, the notice must be of something that ***cannot reasonably be controverted***. [Citations.] The same is true of evidentiary admissions or concessions." Id. (emphasis added).

"The courts... will not close their eyes to situations where a complaint contains allegations of fact inconsistent with attached documents, or allegations contrary to facts which are judicially noticed. (Alphonzo E. Bell Corp. v. Bell View Oil Syndicate (1941) 46 Cal.App.2d 684 [116 P.2d 786]; Chavez v. Times-Mirror Co. (1921) 185 Cal. 20 [195 P. 666].) Thus, a pleading valid on its face may nevertheless be subject to demurrer when matters judicially noticed by the court render the complaint meritless. In this regard the court passing upon the question of the demurrer may look to affidavits filed on behalf of plaintiff, and the plaintiff's answers to interrogatories (Dwan v. Dixon (1963) 216 Cal.App.2d 260 [30 Cal.Rptr. 749]), as well as to the plaintiff's response to request for admissions. (Stencel Aero Engineering Corp. v. Superior Court (1976) 56 Cal.App.3d 978 [128 Cal.Rptr. 691]; Able v. Van Der Zee (1967) 256 Cal.App.2d 728 [64 Cal.Rptr. 481].)" Del E. Webb Corp. v. Structural Materials Co., 123 Cal. App. 3d 593, 604-605.

"The court will take judicial notice of records such as admissions, answers to interrogatories, affidavits, and the like, when considering a demurrer, ***only where they contain statements of the plaintiff or his agent which are inconsistent with the allegations of the pleading before the court.***" Id.

ARGUMENT

Cotton notes that pending before the Court is a Motion to Bind that discussed in detail the judicial and evidentiary admissions made by Geraci in this action. That motion is focused on having this Court bar the Disavowment Allegation. This Motion is focused on Geraci being unable to establish that the November Document is an integrated contract. Cotton notes that while there are a great deal of additional

judicial and evidentiary admissions, to keep it simple for this Court, this Motion focuses on Geraci's Verified Answer as it alone is dispositive on the issue.

A. Request For Judicial Notice Is Proper To Determine Whether The November Document Is Or Is Not An Integrated Contract.

"'Whether a contract is integrated is a question of law when the evidence of integration is not in dispute.'" Kanno v. Marwit Capital Partners II, L.P., 18 Cal. App. 5th 987, 1001 (quoting Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc., 109 Cal. App. 4th 944, 954; citing EPA Real Estate Partnership v. Kang (1992) 12 Cal.App.4th 171, 176).

The evidence being put forth in this Motion are Geraci's own judicial admissions as to facts and documents he has admitted as being true. Thus, the question of whether the November Document is integrated as alleged in Geraci's Complaint is purely a question of law. "On a pure question of law, trial courts have no discretion. They must, without choice, apply the law correctly." Ludgate Ins. Co. v. Lockheed Martin Corp., 82 Cal. App. 4th 592, 603.

B. This Court has Not Addressed the Threshold Issue of Contract Integration for the November Document.

This Court mistakenly believes that it has previously addressed the issue of contract integration for the November Document.

Filed in support of this Motion are the declarations of plaintiff Darryl Cotton, attorney Jacob Austin, and attorney Andrew Flores. Cotton, Austin and Flores each declare under penalty of perjury that they have each reviewed every document filed in this action and every document produced by each side via discovery and no order or ruling or document reflects that this Court has ever undertaken the issue of contract integration for the November Document.

Additionally, with the exception of one hearing, either Cotton, Austin, or Flores has been at *every* hearing held in this action before this Court. They each swear upon penalty of perjury that at no hearing has this Court ever addressed the issue of contract integration.

C. Pursuant to the Parol Evidence Rule the November Document is not a Sales Contract.

"The parol evidence rule is codified in Code of Civil Procedure section 1856 and Civil Code section 1625. It provides that when parties enter an integrated written agreement, extrinsic evidence may

not be relied upon to alter or add to the terms of the writing. (Casa Herrera, Inc. v. Beydoun (2004) 32 Cal.4th 336, 343 [9 Cal. Rptr. 3d 97, 83 P.3d 497] (Casa Herrera).) "'An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement.' (Rest.2d Contracts, § 209, subd. (1); see Alling v. Universal Manufacturing Corp. (1992) 5 Cal.App.4th 1412, 1433 [7 Cal. Rptr. 2d 718].)'" Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn. ("Riverisland") 55 Cal. 4th 1169, 1174.

Factually, the issue is straightforward. On November 2, 2016, the parties executed the November Document and Geraci admits in the Confirmation Email that the November Document is not a sales agreement for the Property. Thus, the November Document and the Confirmation Email reflect the parties reached an agreement and that one of the final integrated terms was for Cotton to have a 10% equity position in the contemplated Marijuana Outlet. This is straightforward and simple.

Legally, on November 30, 2017, in his Verified Answer, Geraci judicially admits that he sent the Confirmation Email and he did not allege that he sent the Confirmation Email by mistake or that Cotton orally agreed to disavow any interest in the Property because he allegedly agreed with Geraci that the Confirmation Email was sent by mistake.

As made explicitly clear by the California Supreme Court in Meyer v. State Board of Equalization (1954) 42 Cal.2d 376: "[P] leadings in prior actions or in others which are pending may be considered either as evidence or for the purpose of impeachment. (Duff v. Duff, 71 Cal. 513, 522 [12 P. 570]; Kamm v. Bank of California, 74 Cal. 191, 197 [15 P. 765]; Coward v. Clanton, 79 Cal. 23, 28 [21 P. 359]; Mellor v.Rideout, 83 Cal.App. 621, 626 [257 P. 173]; Estate of McCarthy, 127 Cal.App. 80, 87 [15 P.2d 223]; Tieman v. Red Top Cab Co., 117 Cal.App. 40, 45 [3 P.2d 381]; Ocean View Memorial Park v. Caminetti, 59 Cal.App.2d 703, 711 [139 P.2d 674]; Dolinar v. Bedone, 63 Cal.App.2d 169, 176 [146 P.2d 237]; Jones v. Tierney-Sinclair, 71 Cal.App.2d 366, 373-374 [162 P.2d 669]; McNeil v. Dow, 89 Cal.App.2d 370, 373 [200 P.2d 859].)" Id. at 385.

"[A] judicial admission cannot be rebutted: It estops the maker." Uhrich v. State Farm Fire & Casualty Co. (2003) 109 Cal.App.4th 598, 613; see Kurinij v. Hanna & Morton (1997) 55 Cal.App.4th 853, 871 (judicial admissions in a complaint overcome evidence even if the opposing party seeks to contradict the prior admission). Here, Geraci did not contradict his judicial admission and raise the

Disavowment Allegation until April of 2018. "'While inconsistent theories of recovery are permitted [citation], a pleader cannot blow hot and cold as to the facts positively stated.'" Brown v. City of Fremont (1977) 75 Cal. App. 3d 141, 146; see Cantu v. Resolution Trust Corp. (1992) 4 Cal.App.4th 857, 877 (one may not contradict facts asserted in one's pleadings).

In other words, "A judicial admission is a party's unequivocal concession of the truth of a matter, and removes the matter as an issue in the case. [Citations.] This principle has particular force when the admission hurts the conceder's case. An express concession against one's interest is regarded as highly competent, credible evidence. [Citation.]" Gelfo v. Lockheed Martin Corp. (2006) 140 Cal.App.4th 34, 48. The Disavowment Allegation is contradicted by Geraci's judicial admission in his Verified Answer and, consequently, cannot be rebutted by Geraci. Period. Uhrich v. State Farm Fire & Casualty Co. (2003) 109 Cal.App.4th 598, 613 ("[A] judicial admission cannot be rebutted: It estops the maker.").

If the Court decides to allow Geraci to contradict his judicial admission in his Verified Answer, Cotton respectfully requests that the Court issue a ruling or at oral hearing to please present its line of reasoning for reaching such a decision as counsel for Cotton intends to file an immediate appeal.

CONCLUSION

The November Document is not an integrated agreement. Other than Geraci's own self-serving declaration, submitted by his attorneys who will be liable for malicious prosecution if Cotton prevails, there is no credible evidence that the November Document was executed by the parties intending it to be a sales agreement.

DATED: April 18, 2019 THE LAW OFFICE OF JACOB AUSTIN

By_____
JACOB P. AUSTIN
Attorney for Defendant/Cross-Complainant DARRYL COTTON