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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/CROSS-DEFENDANTS' OPPOSITION TO DEFENDANT/CROSS-COMPLAINANT DARRYL C OTTON'S MOTION IN LIMINE NO. 1 OF 1 TO EXCLUDE GERACI'S NOVEMBER 3RD FACTUAL ALLEGATIONS

[DEFENDANT MIL NO. 1 OF 1]

[IMAGED FILE]

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

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant/Cross-Complainant Darryl Cotton's Motion in Limine [1 of 1] to exclude Geraci's November 3rd factual allegations, is the same tired motion he has been bringing before the Court for the past year. The motion concerns what Cotton's counsel has coined the "Disavowment Allegation" (a term never used by Cotton or Geraci)— which refers to Geraci testimony concerning a November 2nd email response to Cotton and a November 3rd telephone call. The most succinct recitation

of the "Disavowment Allegation" was stated in Cotton's Motion for Summary Judgment, as referring to November 3, 2016 when "(i) [Geraci] called Cotton and explained that he sent the Confirmation Email by mistake and (ii) Cotton orally agreed the November Document is a fully integrated agreement and he is not entitled to the 10% equity position in the Business promised to him in writing by Geraci in the Conformation Email (the "Disavowment Allegation")." (Cotton MSJ Ps& As at 6:25-7:3)

It appears that Cotton seeks to exclude this evidence on the following grounds: (1) the November 3rd factual allegations are barred because it operates as an unpled Affirmative Defense; (2) Geraci's November 3rd factual allegations are barred by the parol evidence rule; (3) Geraci's November 3rd factual allegation are barred by the statute of frauds; (4) Geraci's November 3rd factual allegations have no probative value and is outweighed by the prejudicial affect [sic]. The argument should be rejected, again, and the motion denied.

II. LEGAL ARGUMENT

A. The Pleadings

On March 21, 2017, Plaintiff Geraci filed his Complaint alleging four causes of action for: (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; (3) specific performance; and (4) declaratory relief. Geraci recently dismissed the specific performance and declaratory relief causes of action and released the lis pendens after the condition precedent of obtaining a CUP on the property failed to be fulfilled. As a result, only the causes for breach of contract and breach of the covenant of good faith and fair dealing remain.

On May 8, 2017, Defendant Cotton filed his Answer to Geraci's Complaint consisting of a General Denial pursuant to CCP §431.30 and sixteen (16) Affirmative Defenses. Notably none of the affirmative defenses raised by Mr. Cotton assert the statute of frauds as an affirmative contractual defense. Mr. Cotton never sought leave of Court to amend his Answer to assert an affirmative defense of statute of frauds, and as such, he should be barred from raising the statute of frauds at this late juncture. Nevertheless, the statute of frauds, as described below, is inapplicable on the facts and theory espoused by Mr. Cotton.

Mr. Cotton alleged that he sent an email on November 2, 2016, after signing the November

2, 2016 Agreement ("November Written Agreement") stating:

> "Hi Larry, [¶] Thank you for meeting me 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 would simply acknowledge that here in a reply." (Cottons Motion in Limine [1 of 1], p. 3:14-18)
>
> Mr. Geraci sent a reply email in which he said "No, no problem at all." (Cotton's Motion In Limine [1 of 1] p. 3:19.)

In response to Cotton's Second Amended Complaint, Larry Geraci filed a General Denial pursuant to Section 431.30 of the California Code of Civil Procedure, in which he denied, generally and specifically, each and every allegation in the Second Amended Cross-Compliant, including each and every purported cause of action contained therein, and denied that Cross-Complainant suffered any damages.

As an affirmative defense, Geraci alleged that each of Mr. Cotton's causes of action in the Second Amended Cross-Complaint failed to state a cause of action, and that Cotton's alleged contract cause of action violated the statute of frauds. Further, Geraci alleged that the contract causes of action failed to state a claim under *Copeland v. Baskin Robbins USA*, 96 Cal.App.4th 1251 (2002); (i.e., where any of the essential elements of a promise are reserved for the future agreement of both parties, no legal obligation arises until such future agreement is made.)

Mr. Cotton now contends that Mr. Geraci should have raised as an affirmative defense that he only read the first line of the Cotton's email before replying to the email. Mr. Cotton has misread *State Farm Mut. Auto Ins. Co. v. Superior* Court (1991) 228 Cal.App.3d 721, which he cites as support for his contention. In reality, as discussed below, that decision actually supports Mr. Geraci's case and defeats Mr. Cotton's argument.

Moreover, Mr. Cotton cannot now claim prejudice as to Mr. Geraci's testimony concerning these facts. Mr. Geraci testified to these facts in his April 10, 2018 Declaration in Opposition to Defendant Darryl Cotton's Motion to Expunge Lis Pendens, ¶10, p. 6:21-7:16 (ROA #108) And, this same testimony was raised in the May 9, 2019 Declaration of Larry Geraci in Opposition to

Defendant Darryl Cotton's Motion for Summary Judgment or, Alternatively, Summary Adjudication. (¶13, p. 4:4-28; ROA #518) Indeed, this testimony has been at the heart several of Mr. Cotton's motions, including his "motion to bind" and his "motion for partial adjudication." Inexplicably, Mr. Geraci's deposition was never taken by Attorney Austin. Any prejudice this evidence may cause, is solely borne by Attorney Austin's failure to take the plaintiff's deposition. Mr. Geraci cannot be faulted for Attorney Austin's neglect.

B. The November 3rd Allegations are Not Barred as an Unpled Affirmative Defense

In this motion, Mr. Cotton contends that the November 3rd allegation is a "new matter" which should have been raised as an affirmative defense (not fraud this time but mistake). (Cotton's P's&A's, p. 5:1-23.) Cotton raised this very issue in his Motion for Summary Judgment, only in that motion he couched his argument in the context of fraud, asserting that his own client was defrauding Mr. Geraci and that therefore Mr. Geraci should have plead mistake in sending the November 2, 2016 email as an affirmative defense to fraud. That argument was as nonsensical as the argument he now makes, wherein he now couches the argument in terms of an affirmative defense of mistake. Mr. Geraci has never claimed an affirmative defense based on fraud or mistake.

Mr. Cotton is mistaken that the November 3rd allegation is an affirmative defense that must be raised independently as a new matter because Mr. Geraci's Answer to the Second Amended Cross-Complaint puts Mr. Cotton's breach of oral agreement allegations directly in issue. "Under a general denial, the defendant may urge any defense tending to show that the plaintiff has no right to recover or no right to recover to the extent that he or she claims. [Fn. 3.]" (49A Cal.Jur.3d (2002) Pleading, § 186, citing in fn. 3 *Aetna Carpet Co. v. Penzner* (1951) 102 Cal.App.2d 859, 960.) As previously stated, Mr. Cotton filed a General Denial to the Second Amended Cross-Complaint and is therefore entitled to urge any factual defense tending to show that Mr. Geraci has no right to recover.

Mistakenly, Mr. Cotton relies on CCP § 431.30(b)(2) to support his assertion that Mr. Geraci's November 3rd allegations should be barred. Under Code of Civil Procedure section 431.30(b)(2), the answer to a complaint must include "[a] statement of any new matter constituting

a defense." The phrase "new matter" refers to something relied on by a defendant which is not put in issue by the plaintiff. (*Shropshire v. Pickwick Stages, Northern Division* (1927) 85 Cal.App. 216, 219.) Thus, where matters are ***not responsive*** to essential allegations of the complaint, they must be raised in the answer as "new matter." (*State Farm Mutual Automobile Insurance Co. v. Superior Court*, (1991) 228 Cal.App.3d 721, 725; citing *Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 543.) Where, however, the answer sets forth facts showing some essential allegation of the complaint is not true, such facts are not 'new matter," but only a traverse. (*Goddard v. Fulton* (1963) 21 Cal. 430, 436.)

In the instant case, the fact that Mr. Geraci was only responding to the first sentence of Mr. Cotton's email ***is responsive*** to Mr. Cotton's assertion that he has an oral contract based on the additional facts raised in his email; thus, it is not a new matter and was not required to be set forth in an affirmative defense. (Accord *State Farm Mutual Automobile Insurance Co. v. Superior Court*, *supra* 228 Cal.App.3d at 725-726 – defense of advice of counsel in bad faith insurance case is directed to an essential element of a plaintiff's cause of action, it does not constitute new matter and need not be specifically alleged.) Mr. Cotton's motion must denied on this ground alone.

C. The November 3rd Factual Allegations Are Not Barred by the Parol Evidence Rule.

Mr. Cotton continues to misconstrue and misapply the Parol Evidence Rule and seemingly alleges that Cotton's email to Geraci asking about a 10% equity interest in and of itself uproots the November Written Agreement and makes it a receipt. He leaps to a legal conclusion that the November Written Agreement is not a purchase and sale agreement for the property because of the email that Cotton sent. (Cotton MIL #1, 7:18-21, ROA #551.) Regardless of whether or not the November 2,, 2016 contract is integrated (which Geraci agrees the Court must decide as a preliminary matter), a contract can still be valid, binding, and satisfy the Statute of Frauds even if it is not fully integrated. (See *Kanno v. Marwit Capital Partners II, L.P.* (2017) 18 Cal.App.5th 987.) The question of integration simply affects what the court admits as parol evidence of additional and consistent terms to the written agreement. (*Id.*)

Even assuming Cotton's argument that the parties entered into a Joint Venture Agreement as to

the 10% equity interest, (a matter never raised in Cotton's Cross-Complaint, First Amended Cross-Complaint or Second Amended Cross-Complaint (see Geraci Motion In Limine No. 12 of 15, ROA #566), the Parol Evidence Rule does not preclude Geraci from admitting evidence pertaining to offer and acceptance. Evidence of a ***prior or contemporaneous agreement*** is precluded by the Parol Evidence Rule, not subsequent evidence of failing to accept an additional term. (*Kanno v. Marwit Capital Partners II, L.P.* (2017) 18 Cal.App.5th 987.) Geraci does not intend to admit evidence of the November 3rd Factual Allegations in order to add or supplement any existing terms, but rather to show that there was no acceptance of Cotton's proposed 10% equity position and there was no meeting of the minds as to that term.

Potentially, Cotton can use his email to Geraci on November 2 addressing the 10% equity interest in two ways: 1) as evidence that the parties negotiated and agreed to the 10% equity interest prior to executing the November Written Agreement, or 2) as evidence that the parties subsequently negotiated and agreed to the 10% equity interest after executing the November Written Agreement. Option 1 represents classic parol evidence of a prior or contemporaneous statement that Geraci asks this Court to exclude from evidence in its own Motion in Limine No. 12 of 15. Under option 2, (assuming it does not violate the statute of frauds-see below), Geraci may be entitled to admit evidence pertaining to the offer and acceptance of the proposed oral contract terms. Both an offer and acceptance are required to create a contract. (CACI 309; *See* California Civil Code § 1585.)

D. The November 3rd Factual Allegations are Not Barred by the Statute of Frauds.

Cotton conflates the Parol Evidence Rule with the Statute of Frauds and suggests that evidence of "contradicting" terms are not admissible to satisfy the Statute of Frauds; the Statute of Frauds does not necessarily establish the terms of the parties' contract, but rather determines enforceability based on essential written terms being present. (*Sterling v. Taylor* (2007) 40 Cal.4th 757, 766.) "A memorandum satisfies the statute of frauds if it identifies the subject of the parties' agreement, shows that they made a contract, and states the essential contract terms with reasonable certainty." (*Id.*) Extrinsic evidence only comes into play if the parties reached an agreement on all essential terms. (See *Sterling, supra,* 40 Cal.4th at pp. 766, 775.) Therefore, Cotton's argument that the November 3rd Factual Allegations are inadmissible under the Statute of Frauds is inappropriate,

particularly where Geraci intends to use this evidence to demonstrate that the parties did not have an oral agreement to the 10% equity position.

Cotton erroneously argues that the November Written Agreement, coupled with the Request for Confirmation and Confirmation Email are writings that satisfy the Statute of Frauds. (Cotton MIL #1, 8:171-8, ROA #551.) However, the four corners of a memorandum itself must include the essential contractual terms, and extrinsic evidence cannot supply those required terms to satisfy the Statute of Frauds. (See, e.g., *Friedman v. Bergin* (1943) 22 Cal.2d 535, 537–539.) Three documents together, as Cotton alleges, cannot collectively satisfy the Statute of Frauds; in other words, the 10% equity interest alleged in the "Request for Confirmation" email cannot supply that term to the November Written Agreement, and as an essential term, must satisfy the Statute of Frauds.

Additionally, as mentioned in Geraci's MIL No. 12 of 15, the November 2, 2016 purchase and sale agreement cannot be construed as a JVA falling outside of the Statute of Frauds, i.e., a joint venture "requires an agreement under which the parties have (1) a joint interest in a common business, (2) an understanding that profits and losses will be shared, and (3) a right to joint control. [Citations.]: (*Ramirez v. Long Beach Unified School District* (2002) 105 Cal.App.4th 182, 193.) Mr. Cotton failed to plead a joint venture agreement.

Moreover, nowhere in his Answer to Geraci's Complaint, or anytime thereafter, does Cotton assert the Statute of Frauds as an affirmative defense. Therefore, Cotton cannot now claim that a factual scenario set forth by Plaintiffs is barred. (See Code Civ. Proc. § 431.30(b).)

E. The Evidence Is Not Inflammatory and Prejudicial and Should Not be Barred Under Cal. Evid. Code § 352

In this section of his Motion in Limine, Cotton again attempts to breathe life into his previous argument made on motion for summary judgment, mentioned above, that Mr. Geraci should have "plead fraud with specificity in his Complaint." (Cotton P's&A's, p. 9:7-13) Mr. Cotton's convoluted reasoning on this issue, to the extent it can be understood, is that Mr. Cotton was attempting to fraudulently deprive Mr. Geraci out of the contract, and therefore, it was incumbent upon Mr. Geraci to plead a fraud cause of action against Mr. Cotton. As stated in the opposition to MSJ, the problem with this argument is that it is Attorney Austin that is claiming his own client

acted fraudulently, and therefore, Attorney Austin asserts that Geraci should have plead a fraud cause of action against his client. Absurd! Mr. Geraci has never contended that Mr. Cotton engaged in fraudulent conduct. To plead such a cause of action, therefore, would have been frivolous and not based on the facts.

Next, Mr. Cotton attempts to resurrect his ill-fated "motion to bind" upon which he was sanctioned $1500. Specifically, he contends that if Mr. Geraci is not bound by his prior admission and omission, then Cotton will be severely prejudiced in defending against a sham cause of action and affirmative defense based on factual allegations that are clearly contradicted by Geraci's previous judicial and evidentiary admissions and which were required to be pled with specificity." (Cotton P's&A's p. 9:14-17)

If Mr. Cotton will be prejudiced as a result of this evidence, he has nobody to blame but his own attorney who failed to take Mr. Geraci's deposition over the course of the past two years-even after learning of these facts in Mr. Geraci's April 10, 2018 Declaration. Had he done so, this issue would not even be before the Court. If the evidence were excluded, Plaintiff would be prejudiced because Mr. Austin inexcusably failed to take the deposition of Plaintiff Geraci.

Clearly, this evidence is probative as to Mr. Geraci's state of mind. If Mr. Cotton is able to admit his November 2, 2016 email into evidence over the statute of frauds and parol evidence, which is hotly contested, then the jury is entitled to hear the evidence regarding Mr. Geraci's response to that email to determine what the parties agreed to.

III. CONCLUSION

For all of the foregoing reasons, individually or collectively, Defendant Cotton's Motion in Limine No. 1 of 1, to preclude evidence of Mr. Geraci's November 3, 2016 allegations must be denied.

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Dated: June 25, 2019

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