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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

TRIAL BRIEF BY PLAINTIFF/CROSS-DEFENDANTS LARRY GERACI AND REBECCA BERRY

[IMAGED FILE]

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

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PLAINTIFFS' TRIAL BRIEF

Plaintiff/Cross Defendant Larry Geraci ("Geraci") and Cross-Defendant, Rebecca Berry ("Berry") submit this Trial Brief in support of their claims against and in defense of the claims of Defendant/Cross Complainant, Darryl Cotton ("Cotton").

I. INTRODUCTION

In the operative Complaint, Plaintiff Geraci allege two remaining causes of action against Cotton for: 1) breach of contract; and 2) breach of the covenant of good faith and fair dealing. In the operative Second Amended Cross-Complaint ("SAXC"), Cross-Complainant Cotton alleges five causes of action against Geraci for: 1) breach of contract; 2) intentional misrepresentation; 3) negligent misrepresentation; 4) false promise; and 5) declaratory relief (the sole claim asserted against Cross-Defendant Berry).

II. FACTUAL BACKGROUND

In and after September of 2015, Geraci began lining up a team to assist him in his efforts to develop and operate a Medical Marijuana Consumer Cooperative ("MMCC") business (aka a medical marijuana dispensary) in San Diego County. First he hired a public affairs and relations consultant, Jim Bartell of Bartell & Associates. He subsequently hired, among others, a design professional, Abhay Schweitzer of TECHNE to help with the CUP process, and a land use attorney, Gina Austin, to handle the legalities of any potential land use issues.

In mid-2016, a property owned by Darryl Cotton and located at 6176 Federal Blvd, San Diego, California, was identified as a potentially suitable site for such a business. While exploring the feasibility of the site Geraci approached Cotton to discuss the possibility of purchasing the property. Geraci was interested in purchasing the property from Cotton contingent upon his obtaining approval of a Conditional Use Permit ("CUP") for use as a MMCC. As the potential purchaser of the property, Geraci was willing to bear the substantial expense of applying for and obtaining CUP approval and understood that if he did not obtain CUP approval then he would not close the purchase and he would lose his investment. Geraci was willing to pay a price for the property based on what he anticipated it might be worth if he obtained CUP approval. Cotton told Geraci that he was willing to make the sale of the property conditional upon CUP approval because if the condition was satisfied he would be receiving a much higher price than the property would be worth in the absence of its approval for use as a medical marijuana dispensary.

Prior to entering into a written agreement on November 2, 2016, Geraci and Cotton discussed the CUP application and approval process and that Cotton's consent as property owner would be needed to submit with the CUP application. Geraci told Cotton that his assistant, Rebecca Berry, would act as his authorized agent to apply for the CUP on his behalf. Cotton agreed to Ms. Berry serving as the Applicant on Geraci's behalf as an agent and employee of Geraci to attempt to obtain approval of a CUP for the operation of a MMCC or marijuana dispensary on the property.

On October 31, 2016, as owner of the property, Cotton signed Form DS-318, the Ownership Disclosure Statement for a Conditional Use Permit, by which he acknowledged that an application for a permit (CUP) would be filed with the City of San Diego on the subject property with the intent to record an encumbrance on the property. The Ownership Disclosure Statement was also signed by Rebecca Berry as the CUP applicant on Geraci's behalf.

On November 2, 2016, Geraci and Cotton met in Geraci's office to negotiate the final terms of the sale of the property and reach an agreement on the final terms. Geraci and Cotton put their agreement in writing in a simple agreement which was signed by each of them before a notary. Both parties participated in the drafting of the agreement. Geraci tendered the $10,000.00 deposit to Cotton. Specifically, the November 2, 2016, written agreement ("November Written Agreement") states:

> 11/02/2016
> Agreement between Larry Geraci or assignee and Darryl Cotton:
>
> Darryl Cotton has agreed to sell the property located at 6176 Federal Blvd., CA for a sum of $800,000 to Larry Geraci or assignee on the approval of a Marijuana Dispensary. (CUP for a dispensary.)
>
> Ten Thousand dollars (cash) has been given in good faith earnest money to be applied to the sales price of $800,000.00 and to remain in effect until the license is approved. Darryl Cotton has agreed to not enter into any other contracts [sic] on this property.
>
> __________________ __________________
> Larry Geraci Darryl Cotton

After signing the November Written Agreement, Cotton immediately began attempting to renegotiate the deal for the purchase of the property. This occurred the evening of the day he signed the November Written Agreement. That evening on November 2, 2016, Cotton sent an email stating:

> 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 simply acknowledge that here in a reply.

Geraci received that email on his cell phone. It was after 9:00 p.m. when he glanced at his phone and read the first sentence of Cotton's email, "Thank you for meeting with me today." Geraci responded from his phone "No no problem at all." Geraci was responding to Cotton thanking him for the meeting.

The next day Geraci read the entire email and he telephoned Cotton. That phone call lasted approximately 3 minutes and is reflected on Geraci's phone bill. During the November 3, 2016, phone call, Geraci told Cotton that a 10% equity position in the dispensary was <u>not</u> part of the agreement and that he never agreed to pay him more than $800,000.00. Cotton responded something to the effect of "well you don't get what you don't ask for." According to Geraci, Cotton was not upset and Cotton commented that things are "looking pretty good- we all should make some money here;" that was the end of their discussion.

Prior to signing the November Written Agreement, Geraci and Cotton had preliminary discussions related to Cotton's desire to be involved in the operation of the business (unrelated to the purchase of the Property) and they discussed the possibility of compensation to Cotton (e.g., a percent of the net profits) in exchange for his providing various services to the business by an agreement which was never reached related to those matters. Those discussions were not related to the purchase and sale of the property, which the parties never agreed to amend or modify.

Contrary to Geraci, Cotton alleges that on November 2, 2016 the parties reached an oral agreement, wherein, subject to the CUP being issued, Cotton's consideration for the property included (i) $800,000, (ii) on a monthly basis, the greater of $10,000 or 10% of the net profits, and (iii) a $50,000 non-refundable deposit. In all of his testimony and declarations submitted throughout the course of the present litigation, Cotton has referred to the 10% equity interest as a term of the purchase and sale agreement. However, Cotton's attorney now attempts to characterize the alleged additional oral terms as an oral joint venture agreement to develop and operate a medical marijuana dispensary at the property and the written November Written Agreement as a receipt to memorialize Cotton's alleged acceptance of the $10,000 towards a $50,000 non-refundable deposit.

Geraci never agreed to pay Cotton a $50,000.00 non-refundable deposit. If Geraci had agreed to pay a $50,000.00 non-refundable deposit, he would have included that term in the written agreement. Geraci never agreed to pay Cotton a 10% equity stake in the marijuana dispensary and never agreed to pay Cotton a minimum monthly equity distribution of $10,000.00. If those terms were agreed to, Geraci would have included those terms in the written agreement. Geraci did agree to pay Cotton a total purchase price of $800,000.00, with the balance of $790,000 due upon approval of a CUP. If the CUP was not approved, then Cotton would keep the property and the $10,000.

Beginning about mid-February 2017, **and after Cotton learned from Geraci that critical zoning issues had been resolved**, Cotton began making demands for additional compensation in connection with the sale of the property. At that time Geraci was several months into the CUP process with many more months until completion. He had already committed substantial resources to the project and he was very concerned that Cotton was going to interfere with the completion of the CUP Application process to his detriment. So Geraci tried to work out some further compensation arrangement with Cotton in order to try to avoid the risk that Cotton might interfere with the CUP process and find another buyer for the property.

Attempting to appease Cotton's demands, Geraci asked his attorney to draft written agreements that contained terms that Geraci believed he could live with and hoped would be sufficient to satisfy Cotton's demands, but Cotton rejected each draft agreement as not satisfactory. Cotton continued to insist on, among other things, a 10% equity position, to which Geraci was unwilling to agree, as well as a minimum monthly distribution in amounts, which Geraci thought were unreasonable and was unwilling to agree. Despite Geraci and Cotton's back and forth communications during the period of approximately mid-February 2017 through approximately mid-March 2017, the parties were unable to re-negotiate terms for the purchase of the property to which both parties were willing to agree. The November Written Agreement was neither amended nor modified nor did the parties separately agree to any terms beyond the November Written Agreement. Geraci did not promise to have Attorney Gina Austin reduce any oral agreement to written agreements for execution.

Cotton was unhappy with Geraci's refusal to accede to his demands for additional compensation, Geraci's refusal to reach agreement regarding Cotton's possible involvement with the operation of the business at the property, and Geraci's refusal to modify or amend the terms and conditions agreed to in the November Written Agreement regarding Geraci's purchase of the property from Cotton. Cotton made clear that he had no intention of living up to and performing his obligations under the Agreement and affirmatively threatened to take action to halt the CUP application process.

On March 21, 2017, Cotton took his first of many steps to interfere with Geraci's attempts to navigate the CUP process and obtain the necessary CUP; Cotton had a conversation with Firouzeh Tirandazi at the City of San Diego, who was in charge of processing the CUP Application, regarding Cotton's interest in withdrawing the CUP Application. Later that same day, Cotton emailed Geraci reinforcing that he would not be honoring the November Written Agreement and stated that Cotton will be entering into an agreement with a third party to sell the property. Four minutes later that same day, Cotton emailed Ms. Tirandazi at the City, with a cc to both Geraci and Rebecca Berry, stating falsely to Ms. Tirandazi: " ... the potential buyer, Larry Gerasi [sic] (cc'ed herein), and I have failed to finalize the purchase of my property. As of today, there are no third-parties that have any direct, indirect or contingent interests in my property. The application currently pending on my property should be denied because the applicants have no legal access to my property." Due to Cotton's clearly stated intention not to perform his obligations under the November Written Agreement and in light of his affirmative steps taken to attempt to withdraw the CUP application, Geraci filed the instant lawsuit on March 21, 2017, to enforce the November Written Agreement. It also turns out that well before March 21, 2017, Cotton had been negotiating with other potential buyers of the property to see if he could get a better deal than he and Geraci had agreed to. And on March 21, 2017, Cotton had entered into a real estate purchase and sale agreement with Richard John Martin II.

Both prior to and since March 21, 2017, the filing of the instant lawsuit, Geraci and his team diligently pursued the CUP Application and approval.

The initial CUP Application was submitted to the City on October 31, 2016, for completeness review. The application process had to overcome an initial roadblock—a zoning issue—that substantially delayed the processing of the application by approximately four months. Specifically, the property was located in an area zoned "CO-2-1." City of San Diego Development Services Info Bulletin 170, Medical Marijuana Consumer Cooperative, expressly provided that operation of a medical marijuana dispensary was an allowable use in that zone. However, the City's zoning ordinance did not specifically provide that was an allowable use in zone CO-2-1 and was in conflict with Info Bulletin 170. Efforts were undertaken by Jim Bartell to clear up the zoning issues. Ultimately, Ordinance Number O-20793 was introduced on January 31, 2017, and passed by the City Council on February 22, 2017, amending the zoning ordinance to clarify that operating a medical marijuana dispensary was a permitted use in areas zoned "CO-2-1." After March 12, 2017, when that ordinance became effective, the City resumed processing the CUP Application and, on March 13, 2017, the initial completeness review phase was completed when the CUP Application was "deemed complete" (although not yet approved) by the City.

Geraci alleges that Cotton breached the implied covenant of good faith and fair dealing by engaging in conduct which attempted to interfere with and actually did interfere with efforts to obtain approval of the CUP. This started with Cotton's attempt in March 2017 to withdraw the CUP Application. It included, among other things, preventing access to the premises for required soils testing which directly resulted in several months of delay in the CUP process while Mr. Geraci had to resort to the courts to gain access to the property. As a result of the delays caused by Cotton's interference, a competing CUP Application for a nearby property owner located at 6220 Federal Boulevard was able to beat Geraci to the finish line and obtain approval of a CUP first. In December 2018, the Geraci team appealed the granting of that competing CUP to the Planning Commission, but the appeal was denied. The CUP at the competing property received final approval thereby rendering the Geraci project moot as there cannot be two MMCC's located within 1000 feet of one another. Geraci claims reliance damages of approximately $300,000 incurred in the failed CUP Application process as a result of Cotton's interference in breach of the implied covenant of good faith and fair dealing.

III. <u>LEGAL AUTHORITY FOR A VALID AND ENFORCEABLE CONTRACT</u>

Geraci alleges that all of the terms of the agreement between Geraci and Cotton are reflected in the November Written Agreement. Cotton alleges that they orally agreed to additional, contradictory terms. Because the contract at issue pertains to the purchase and sale of property, specific legal principles regarding the Statute of Frauds and the Parol Evidence Rule are applicable.

A. <u>Validity of the Contract</u>

1. Offer and Acceptance

Both an offer and acceptance are required to create a contract. (CACI 309; *See* California Civil Code § 1585.) Under basic contract law "[a]n offer must be sufficiently definite, or must call for such definite terms in the acceptance that the performance promised is reasonably certain." (*Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 770 [citing to 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 145, p. 169].) Preliminary negotiations or an agreement for future negotiations are not the functional equivalent of a valid, subsisting agreement. (*Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 59.) The jury's factual finding of the existence of an oral agreement is binding on the court. (*Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 159.).

2. Statute of Frauds

A contract for the purchase and sale of real property is invalid unless it is in writing, signed by the parties, and contains all essential terms. (Cal. Civ. Code § 1624; *Sterling v. Taylor* (2007) 40 Cal.4th 757, 766.) The writing requirement of the statute of frauds "serves only to prevent the contract from being unenforceable; it does not necessarily establish the terms of the parties' contract." (*Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 345.) The "preeminent qualification of a memorandum under the statute of frauds is that it must contain the essential terms of the contract, expressed with such a degree of certainty that it may be understood without recourse to parol evidence to show the intention of the parties." (*Sterling, supra,* 40 Cal.4th at p. 769.) Because the memorandum itself must include the essential contractual terms, it is clear that extrinsic evidence cannot supply those required terms. (See, e.g., *Friedman v. Bergin* (1943) 22 Cal.2d 535, 537–539.) It can, however, be used to explain essential terms that were understood by the parties but would otherwise be unintelligible to others. (*Sterling, supra,* 40 Cal.4th at p. 767.)

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.) Whether all essential terms are present and "sufficiently definite" to create an enforceable contract, is a question of law for the court. (*Ladas, supra,* 19 Cal.App.4th at p. 770.) The essential terms of a real estate purchase and sale agreement are the parties, the price, the time and manner of payment, and a description of the property to be transferred so that it may be identified. (*King v. Stanley* (1948) 32 Cal.2d 584; *see also Patel v. Liebermensch* (2008) 45 Cal.4th 344, 349) "Only the essential terms must be stated, details or particulars need not be." (*Sterling, supra*, 40 Cal.4th at p. 766.) A term is essential if the inability to enforce that term strictly would make the enforcement of the remainder of the agreement unfair. (*City of Los Angeles v. Superior Court* (1959) 51 Cal.2d 423, 433.) What is essential depends on the agreement and its context and also on the subsequent conduct of the parties." (*Sterling, supra,* 40 Cal.4th at p. 766.)

B. <u>Terms of the Contract</u>

As mentioned above, the first step in determining whether extrinsic evidence of prior or contemporaneous oral agreements is admitted is if the parties reached an agreement on all essential terms. (See *Sterling, supra,* 40 Cal.4th at pp. 766, 775.) If they did, then the next question is to determine whether the written agreement was a complete and exclusive statement (fully integrated) or a final expression (partially integrated). (*See Kanno v. Marwit Capital Partners II, L.P.* (2017) 18 Cal.App.5th 987, 1000.) The Parol Evidence Rule determines the enforceable and incontrovertible terms of an agreement based on the premise that written terms supersede statements made during negotiations. (*Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (2013) 55 Cal.4th 1169, 1174.)

1. Additional or Contradicting Terms

California's Parol Evidence Rule is codified in section 1856 of the California Code of Civil Procedure. Subdivision (a) of section 1856 provides: "Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to the terms included therein may not be contradicted by evidence of a prior agreement or of a contemporaneous oral agreement." Subdivision (b) of section 1856 provides: "The terms set forth in a writing described in subdivision (a) may be explained or supplemented by evidence of consistent additional terms unless the writing is intended also as a complete and exclusive statement of the terms of the agreement."

Section 1856 creates two levels of contract integration or finality: (1) the parties intended the writing to be the final expression of their agreement; and (2) the parties intended the writing to be the complete and exclusive statement of the terms of their agreement. (*Kanno, supra*, 18 Cal.App.5th at p. 1001.) If a writing falls within level 1 (the writing is a final expression) then a prior or contemporaneous oral agreement is admissible if it does not contradict the writing, and evidence of consistent additional terms may be used to explain or supplement the writing. (*Id.* at p. 1000, citing to Code Civ. Proc. § 1856, subd. (a).) "If a writing falls within level 2 (complete and exclusive statement) then evidence of consistent additional terms may not be used to explain or supplement the writing. (*Id.* citing to Code Civ. Proc. § 1856, subd. (b).)

The central question in determining whether there has been an integration, and thus whether the parol evidence doctrine applies, is "whether" the parties intended their writing to serve as the exclusive embodiment of their agreement." (*Masterson v. Sine* (1968) 68 Cal.2d 222, 225.) In determining the issue of integration, the collateral agreement will be examined only insofar as it does not directly contradict an express term of the written agreement. (*EPA Real Estate Partnership v. Kang* (1992) 12 Cal.App.4th 171.) In considering whether a writing is integrated, "the court must consider the writing itself, including whether the written agreement appears to be complete on its face; whether the agreement contains an integration clause; whether the alleged parol understanding on the subject matter at issue might naturally be made as a separate agreement; and the circumstances at the time of the writing." (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 953-54.) However, the parol evidence rule does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, or to explain an extrinsic ambiguity or otherwise interpret the terms of the agreement, or to establish illegality or fraud. (Code Civ. Proc. § 1856(g).)

2. Ambiguity

When ambiguous terms in a memorandum are disputed, extrinsic evidence is admissible to resolve the uncertainty regardless of integration. (*Sterling, supra,* 40 Cal.4th at p. 767.) The trial court's determination of whether an ambiguity exists is a question of law. (*WYDA Associates v. Merner* (1996) 42 Cal.App.4th 1702, 1710.) Extrinsic evidence may be introduced to explain the meaning of a written contract and the test for admissibility is whether the meaning urged is one to which the written contract terms are reasonably susceptible. (*BMW of North America, Inc. v. New Motor Vehicle Bd.* (1984) 162 Cal.App.3d 980, 990, fn. 4.) The assumption is that written evidence is more reliable than human memory. (*Banco Do Brasil, S.A. v. Latian, Inc.* (1991) 234 Cal.App.3d 973, 1002.) Interpretation of a written instrument is solely a judicial function when it is based on the words of the instrument alone, when there is no conflict in the extrinsic evidence, or a determination was made based on incompetent evidence. (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375.) When ascertaining the intent of the parties at the time the contract was executed depends on the credibility of extrinsic evidence, that credibility determination and the interpretation of the contract are questions of fact that may properly be resolved by the jury." (*Id.*)

3. Fraud Exception to Parol Evidence Rule

Evidence to prove that the instrument is void or voidable for mistake, fraud, duress, illegality, or any other invalidating cause is admissible, and this evidence does not contradict the terms of an effective integration because it shows that the purported agreement has no legal effect. (*Riverisland, supra,* 55 Cal.4th at p. 1175.) However, such evidence of fraud is merely admissible to void the contract, not to add additional terms to the contract. (Code Civ. Proc. § 1856(g).) If a plaintiff offers "no further evidence of fraudulent intent than proof of nonperformance of an oral promise, he will never reach a jury." (*Id.* at p. 1183 [citing to *Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18, 30-31].)

C. <u>Breach of Contract</u>

To prove a claim for breach of a written contract the plaintiff must prove (1) the existence of a written contract; (2) that plaintiff did all or substantially all, of the significant things that the contract required of him; (3) that all conditions required for defendant's performance were met or excused; (4) that defendant failed to do something that the contract required; (5) that plaintiff was harmed; and (6) that defendant's breach of contract was a substantial factor in causing plaintiff harm. [CACI 303-Breach of Contract – Essential Factual Elements] A fully integrated agreement simply is not a required element of a breach of contract action.

"Repudiation of a contract, also known as 'anticipatory breach,' occurs when a party announces an intention not to perform prior to the time due for performance." (*Stephens & Stephens XII, LLC v. Fireman's Fund Ins. Co.* (2014) 231 Cal.App.4th 1131, 1150.) "An anticipatory breach of contract occurs on the part of one of the parties to the instrument when he positively repudiates the contract by acts or statements indicating that he will not or cannot substantially perform essential terms thereof, or by voluntarily transferring to a third person the property rights which are essential to a substantial performance of the previous agreement, or by a voluntary act which renders substantial performance of the contract impossible or apparently impossible." (*C. A. Crane v. East Side Canal & Irrigation Co*. (1935) 6 Cal.App.2d 361, 367.)

IV. PLAINTIFFS/CROSS-DEFENDANTS' CLAIMS

Geraci asserts claims against Cotton for Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing. (Geraci has dismissed his claims for specific performance and declaratory relief.)

A. Breach of Contract

The parties do not contest that they entered in to a valid November 2nd Written Agreement nor do they contest that the November Written Agreement satisfied the Statute of Frauds, but rather they dispute the additional or contradictory terms to that agreement and the existence of a joint venture agreement as urged by Cotton.

Geraci alleges in the Complaint that Cotton anticipatorily breached the contract by failing to perform the written agreement according to its terms. Namely, as early as February 2017 Cotton was entertaining other offers to purchase his property and on March 21, 2017, Cotton entered into a purchase and sale agreement with another party, Richard John Martin II. Cotton also contacted the City of San Diego and attempted to withdraw the CUP Application. In addition, Cotton asserted additional, contradictory terms after executing the November Written Agreement and after Geraci had expended significant expenses in attempting to obtain a CUP. Cotton specifically stated that he would not perform unless Geraci increased the monetary consideration for the purchase of the property; among other things, he demanded that Geraci make a further, non-refundable deposit (i.e., an additional $40,000 so that the non-refundable deposit was $50,000.00, not $10,000.00), and he demanded that in addition to a total payment of $800,000 that he received a 10% equity stake in the medical marijuana dispensary with payments of minimum distributions of $10,000 per month. Cotton also attempted to sabotage the CUP process on numerous instances, including withdrawing his acknowledgment that Geraci had a right to possession or control of the property, refusing access to the property to post required notices of the intended project, and later refusing access to the property to perform necessary soils testing, necessitating resorting to the court to get access and resulting in a delay of many months in the processing of the CUP Application.

The evidence will show that Cotton interfered with Geraci's benefits under the November Written Agreement and that Cotton failed to perform his obligations under the contract. Further, the evidence will show not only that the November Written Agreement is the extent of the parties' contract, but also that at no future point in time did the parties agree to the additional or contradictory terms proposed by Cotton.

Cotton alleges that he and Geraci entered in to an agreement to negotiate and collaborate in good faith on mutually acceptable purchase and sale documents reflecting the terms for a purchase and sale of the property and a side agreement for Cotton to obtain an equity position in the dispensary. The November 2, 2016 email exchange between Geraci and Cotton referenced a 10% equity position in the dispensary. Cotton also alleges that as of November 2, 2016, the parties had orally agreed to additional and different terms than those reflected in the signed written agreement, including but not limited to a $50,000 non-refundable deposit and a 10% equity position with minimum monthly distributions of $10,000 per month. There are a number of issues with Cotton's alleged terms. Namely, (1) there was no offer and acceptance of those additional terms; (2) Cotton's alleged agreement does not satisfy the Statute of Frauds; (3) the Court should not admit evidence to interpret "earnest money"; and (4) parol evidence of those additional and different terms cannot be admitted.

1. *Cotton cannot establish that Geraci accepted his additional terms at any point in time.*

As indicated in Section III(A)(1), Cotton must first establish that these additional terms were not only discussed during negotiations, but actually agreed to by both parties. The evidence supports the conclusion that if the parties had agreed to those additional terms, it would have been in writing. Importantly, in September 2016 prior to the November Written Agreement, Cotton sent Geraci a draft Purchase and Sale Agreement, which Cotton will testify contained the terms and conditions for the purchase and sale of the property that had been orally agreed to as of November 2, 2016. Therefore, if the terms contained within Cotton's draft agreement had actually been orally agreed to on November 2, 2016, as Cotton suggests, why would the parties not execute that draft agreement instead of drafting the November Written Agreement containing different and more limited terms? At no time subsequent to the November Written Agreement did the parties agree orally or in writing to Cotton's list of additional terms. Lastly, preliminary negotiations and agreements for future negotiations are not valid and binding contracts, so Cotton's proposition that he and Geraci agreed to agree in the future to those additional terms is not binding on the parties.

2. <u>*The alleged additional terms to the purchase and sale of the property are essential and thereby must be in writing to satisfy the Statute of Frauds.*</u>

Assuming that Cotton can establish that all the additional terms beyond the November Written Agreement were orally agreed to by Geraci, the essential terms of the purchase and sale of the property must be in writing to satisfy the Statute of Frauds. The parties do not contest that the November Written Agreement in and of itself satisfies the Statute of Frauds. However, if the parties orally agreed to a $50,000 non-refundable deposit or a 10% equity interest with minimum distributions of $10,000 per month as alleged by Cotton, these are essential terms that must be in writing to be enforceable. Because whether all essential terms are present and sufficiently definite is a question of law for the court, the Court should find that the $50,000 non-refundable deposit, the 10% equity stake, and the greater of 10% of the MMCC's monthly profits or $10,000 are essential because they drastically increase the purchase price for the property beyond the purchase price term stated in the November Written Agreement. Because essential terms cannot be established by parol evidence, Cotton's version of the contract with additional terms not reflected in the November Written Agreement is unenforceable.

In his Cross-Complaint, in his First Amended Cross-Complaint, in his operative Second Amended Cross-Complaint, and in his discovery responses as well as Declarations submitted throughout the course of this litigation, Cotton has repeatedly alleged that the $50,000 non-refundable deposit, the 10% equity stake, and the greater of 10% of the MMCC's monthly profits or $10,000 was consideration for the <u>purchase</u> of the property. Cotton is now attempting to characterize the 10% equity stake as a joint venture agreement or a side agreement. These arguments do not hold water if they were an element of the purchase price in exchange for the property, and thereby essential terms that must satisfy the Statute of Frauds. 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.) By contrast an "equity stake" is "[t]he percentage of a business owned by the holder of some number of shares of stock in that company. Shareholders of a significant equity stake in a company may exercise some level of control, influence, or participation in the activities of the company." (Business Dictionary .com.) Cotton now argues an oral joint venture agreement to develop and operate a medical marijuana dispensary at the property to circumvent the Statute of Frauds. However, nowhere in the pleading does Mr. Cotton allege that there was an agreement to share profits and losses, nor does he allege a right to joint control of the business. Even assuming Cotton's recent joint venture spin on the facts, he will be unable to establish that even a joint venture agreement was formed between the parties.

The conduct of the parties supports the conclusion that the $50,000 non-refundable deposit was essential. If Cotton's position is to be believed, he was seriously concerned that Geraci would not pay the remaining $40,000 deposit prior to submission of the CUP application, yet failed to include such a provision in the November Written Agreement. Moreover, ***2 days*** before he executed the November Written Agreement on November 2, 2016, Cotton signed Form DS-318, the Ownership Disclosure Statement for a Conditional Use Permit on October 31, 2016, thereby acknowledging that he was aware that the CUP Application would be filed with the City of San Diego. If the $50,000 non-refundable deposit was actually agreed to and Cotton was actually concerned about receiving the outstanding $40,000 beyond the $10,000 cash in "good faith earnest money," the conduct of the parties supports the conclusion that this would have been an essential term of the agreement, particularly giving the timing of the events that transpired.

More significantly, the 10% equity interest and 10% of monthly profits/$10,000 ***in addition to*** $800,000 in consideration for the sale of the property is well above the consideration reflection in the November Written Agreement. To enforce a 10% equity position that was allegedly agreed to orally as an element of the purchase price would be unfair, outside, and well beyond the purchase price in the November Written Agreement. The purchase price for the purchase and sale of real property indisputably is an essential term; therefore, Cotton's unilateral increase of the purchase price from $800,000 to $800,000 plus 10% equity interest and 10% gross profits in the underlying MMCC must be in writing to be enforceable. By Cotton's own statements under oath, these additional terms were not a separate joint venture agreement but rather were in consideration for the purchase and sale of the property in dispute.

Consequently, the $50,000 non-refundable deposit, the 10% equity stake, and greater of 10% of the MMCC's monthly profits or $10,000, are essential terms to the purchase and sale agreement that must be in writing to be enforceable.

3. *The interpretation of "earnest money" proffered by Cotton is inappropriate and is not in line with the contract.*

A trial court's determination of whether an ambiguity exists is a question of law. (See Section III(B)(2).) First, the term "good faith earnest money" is not ambiguous or subject to interpretation. Black's Law Dictionary defines the term "earnest money" as "a deposit paid (often in escrow) by a prospective buyer (esp. of real estate) to show a good-faith intention to complete the transaction, and ordinarily forfeited if the buyer default." (Black's Law Dict. (11th ed. 2019).) Webster's Dictionary defines "earnest" as something of value given by a buyer to a seller to bind a bargain. (Merriam-Webster Online Dict. (April 23, 2019) entry 3 of 3.) The term earnest money is not at odds with Cotton's understanding of a non-refundable deposit. The parties do not dispute that whatever deposit Geraci paid Cotton was non-refundable. However, what is in dispute is the ***amount*** of the non-refundable deposit. Therefore, it would be inappropriate to admit evidence to interpret a term that is not ambiguous to the parties.

While the court may admit evidence to help explain the terms contained within a writing, the meaning suggested must be reasonably plausible given the written contract terms. (See Section III(B)(2).) Interpreting "$10,000 cash in good faith earnest money" cannot plausibly be interpreted to increase the non-refundable deposit to $50,000. Because written evidence is more reliable than human memory, and because Cotton's proffered reading of the contract is not reasonably susceptible given the written contract terms, the allegedly orally agreed to $50,000 non-refundable deposit cannot be read into the November Written Agreement.

4. *Even if Cotton's proposed terms are not essential and not required to be in writing, evidence of prior or contemporaneous statements to the November Written Agreement must be excluded.*

Cotton consistently asserts that the additional terms were negotiated, discussed and agreed to prior to or at the November 2, 2016, meeting where he and Geraci executed the November Written Agreement. Clearly any evidence Cotton seeks to admit pertaining to the additional terms are evidence of the prior or contemporaneous agreements and subject to the Parol Evidence Rule. (See Section

III(B)(1).)

The Court must make a determination on the integration of the November Written Agreement to rule on what evidence of Cotton's additional and contradicting terms come in. As set forth in Section III(B)(1), evidence of contradicting or additional terms cannot come in to evidence if the agreement is fully integrated, but evidence of additional and not contradicting terms can come in if the agreement is partially integrated.

Here, the evidence suggests that the parties intended the November Written Agreement to be a complete and exclusive statement of the terms of the purchase and sale agreement. Geraci does not dispute the testimony that the parties discussed certain terms related to the operation of the MMCC ***after*** they executed the November Written Agreement. Evidence of these future discussions, which will demonstrate that an agreement as never reached, is not barred by the Parol Evidence Rule. These subsequent negotiations demonstrate that while other terms may have been contemplated and negotiated between the parties prior to or on November 2, 2016, no agreement was reached and the parties intentionally excluded these terms from the purchase and sale agreement. However, evidence that attempts to demonstrate that at the time the parties entered in to the November Written Agreement, these additional terms were orally agreed as consideration for the purchase and sale of the property fall squarely within the Parol Evidence Rule and should be excluded. The November Written Agreement is a fully integrated agreement, and as a result, evidence of additional and contradicting terms must be excluded.

Even if the November Written Agreement is partially integrated, the additional terms that Cotton asserts are directly contradictory and must be excluded. First, as analyzed in Section IV(A)(3), the non-refundable deposit is not in dispute between the parties, but rather the amount of the deposit is in dispute. It is readily apparent that a $50,000 deposit directly contradicts the $10,000 deposit that is contained in the written agreement. To find that increasing a non-refundable deposit obligation by $40,000 is not a contradictory term would be directly at odds with the purpose of the Parol Evidence Rule: to ensure that the parties' understanding, deliberately expressed in writing, is not subject to change. (*Riverisland, supra,* 55 Cal.4th at p. 1174.)

Next, both the 10% equity position and the 10% of monthly profits/$10,000 ***in addition to***

$800,000 in consideration for the sale of the property is directly contradictory to the $800,000 purchase price reflected in the November Written Agreement. Identical to the $50,000 non-refundable deposit, the Court should not admit evidence that substantially increases Geraci's financial responsibility under the contract as doing so contradicts what is in writing and uproots the purpose of the Parol Evidence Rule.

B. Breach of the Covenant of Good Faith and Fair Dealing

To prove a claim for breach of the covenant of good faith and fair dealing, a plaintiff must prove: (1) the existence of a contract; (2) its own performance or a valid excuse for not performing; (3) the defendant's breach of the implied covenant, i.e., that the defendant unfairly interfered with the plaintiff's right to receive the benefits of the contract; and (4) that plaintiff was harmed by the defendant's conduct. [CACI 325 – Breach of Implied Covenant of Good Faith and Fair Dealing-Essential Factual Elements]

For similar reasons stated in Section IV(A) above, Cotton breached the implied covenant of good faith and fair dealing by depriving Geraci of the benefits of the November Written Agreement. Geraci was unable to perform under the contract because of the failed condition of obtaining the CUP, which occurred because of Cotton's repeated efforts to thwart Geraci's ability to obtain the CUP. Because of Cotton's wrongful actions preventing Geraci from obtaining the CUP, the condition of the November Written Agreement failed and he lost his interest in the property.

V. DEFENDANT/CROSS-COMPLAINANT'S CLAIMS

A. Breach of Contract

In his Second Amended Cross-Complaint, Cotton alleges that he and Geraci entered in to an agreement to negotiate and collaborate in good faith on mutually acceptable purchase and sale documents reflecting the terms for a purchase and sale of the property and a side agreement for Cotton to obtain an equity position in the MMCC to operate at the property. This agreement allegedly is comprised of 1) the November Written Agreement and 2) the November 2, 2016 email exchange between Geraci and Cotton referencing the 10% equity position and drafting future documents, and a number of other conversations that addressed additional terms including a $50,000 non-refundable deposit. Cotton alleges all these terms and conditions were orally agreed to as of November 2, 2016. For the same reasons mentioned above in Section IV(A)(1)-(4), not only will Cotton be unable to establish that the parties agreed to these additional and contradicting terms, but they must be in writing and are inadmissible pursuant to the Parol Evidence Rule.

Cotton's attorney has previously asserted the argument that the fraud exception to the Parol Evidence Rule makes evidence of these additional and contradicting terms admissible. It is true that there is a fraud exception to the Parol Evidence Rule that would permit Cotton to admit such testimony, however, doing so would render the November Written Agreement unenforceable. (See Section III(B)(3).) At no point in time has Cotton argued that he cannot be bound by the contract because it is unenforceable. Therefore, this argument is nonsensical in the present case.

B. <u>Intentional Misrepresentation</u>

To prove an intentional misrepresentation claim, a plaintiff must establish the following elements: 1) that defendant made a representation of fact to plaintiff; 2) that the representation was false; 3) that defendant made the false representation either knowing it was false or with a reckless disregard for its truth; 4) that defendant intended the plaintiff rely on the representation; 5) that plaintiff actually and reasonably relied on the representation; 6) that plaintiff was harmed; and 7) that plaintiffs reliance was a substantial factor in causing the harm. (See CACI 1900; *Daniels v. Select Portfolio Servicing, Inc. v. Bank of America, N.A. et al.*, (2016) 246 Cal.App.4th 1150.)

Cotton is expected to argue to the jury that Geraci fraudulently induced Cotton to execute the Ownership Disclosure Statement, to execute the November Written Agreement, informed Cotton that Geraci did not file the CUP Application when it was actually filed, and represented to Cotton that the CUP Application could not be submitted until an existing zoning issue was resolved. The evidence will show that these allegations are false.

However, to assert valid claims for negligent and intentional misrepresentation, a plaintiff must also establish that the plaintiff was harmed, and that the plaintiff's reliance on the defendant's representation was a substantial factor in causing the harm. (See CACI 1903 and 1900.) Assuming that a plaintiff relied on an actionable misrepresentation, no liability attaches if the damages sustained were otherwise inevitable or due to unrelated causes. (*See Orcilla v. Big Sur, Inc.,* 244 Cal. App. 4th 982, 1008 (2016).) Cotton alleges that as a result of Geraci's alleged misrepresentations, the value of the property diminished and the price Cotton was able to receive for the property reduced. However, Cotton had already sold the property to a third party and interfered with the CUP application process. Cotton's property value increasing was contingent on obtaining a CUP for the property, but he cannot establish that he would have obtained approval of a CUP Application had he sold to another purchaser (and before the competing CUP Application was approved and a CUP granted to that competing applicant). Therefore, Cotton cannot establish that he suffered damages.

C. Negligent Misrepresentation

To prove a negligent misrepresentation claim, a plaintiff must establish the following elements: 1) that defendant made a representation of fact to plaintiff; 2) that the representation was false; 3) that even though defendant may have honestly believed that the representation was true, defendant had no reasonable grounds for believing the representation was true when he made it; 4) that defendant intended that plaintiff rely on this representation; 5) that plaintiff actually and reasonably relied on the representation; 6) that plaintiff was harmed; and 7) that plaintiffs reliance on the representation was a substantial factor in causing the harm. (See CACI 1903; *Ragland v. U.S. Bank National Assn*. (2012) 209 Cal.App.4th 182, 196.)

In his Second Amended Cross-Complaint, Cotton asserts, alternatively, that the false representations were made negligently rather than intentionally. Again, the evidence will not establish that any false representations were made. In addition, for the same reasons as apply to the Intentional Misrepresentation claim, Cotton will be unable to establish that he would have otherwise obtained a CUP application from another purchaser and was thereby harmed by Geraci, that Cotton's reliance Geraci's alleged misrepresentations was reasonable and that Cotton's reliance was a substantial factor in causing his harm.

D. False Promise

The intent element of promissory fraud entails more than proof of an unkept promise or a subsequent failure of performance, but rather requires proof of intent not to perform. (*Riverisland, supra,* 55 Cal.4th at p. 1183.) Promissory fraud, like all forms of fraud, requires a showing of justifiable reliance on the defendant's misrepresentation. (*Id.*)

In his Second Amended Cross-Complaint, Cotton alleges that Geraci falsely promised with no intent of fulfilling the following promises: (a) Geraci would pay Cotton the remaining $40,000 of the non-refundable deposit prior to filing a CUP application; (b) Geraci would cause his attorney to promptly draft the final integrated agreements to document the agreed-upon deal between the parties; (c) Geraci would pay Cotton the greater of $ 10,000 per month or 10% of the monthly profits for the MMCC at the Property if the CUP was granted; and (d) Cotton would be a 10% owner of the MMCC business operating at Property if the CUP was granted.

These are disputed facts that Cotton will be unable to establish at trial, and for those reasons his False Promise claim will fail.

E. <u>Declaratory Relief</u>

Declaratory relief may be sought by any person under a contract, who desires a declaration of his rights or duties with respect to property in cases of actual controversy relating to the legal rights and duties of the respective parties, and who may bring an original action or cross-complaint in the superior court for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under the instrument or contract. (See Code Civ. Pro., § 1062.5.)

Here, since the condition of the underlying contract failed because a competing CUP applicant obtained the CUP, precluding Cotton from obtaining a CUP on his property, declaratory relief is inappropriate.

VI. <u>REMEDIES</u>

Plaintiff is entitled to recover contract damages, including reliance damages spent in preparing for contract performance, in an amount in the approximate amount of $300,000.00, according to proof at trial. (*See Sutherland v. Barclays American/Mortgage Corp.* (1997) 53 Cal.App.4th 299, 314.)

VII. <u>CONCLUSION</u>

Based on the foregoing, Plaintiff will ask the jury to find the Defendant liable on both causes of action. Plaintiff will ask the court to apply the Statute of Frauds as well as the Parol Evidence rule in interpreting the contract and precluding evidence. Plaintiff will also ask the jury to award reliance damages on both causes of action, and to find that the parties did not agree to any terms beyond those written in the November 2, 2016, agreement.

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FERRIS & BRITTON
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Dated: June 26, 2019 By: Mich R Weinstein

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