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11 Attorneys for Plaintiff and Cross-Defendant
12 LARRY GERACI

13 **SUPERIOR COURT OF CALIFORNIA**
14 **COUNTY OF SAN DIEGO, CENTRAL DIVISION**

15 LARRY GERACI, an individual,
16
17 Plaintiff,

18 v.

19 DARRYL COTTON, an individual; and
20 DOES 1 through 10, inclusive,
21 Defendants.

22 DARRYL COTTON, an individual,
23
24 Cross-Complainant,

25 v.

26 LARRY GERACI, an individual, REBECCA
27 BERRY, an individual, and DOES 1
28 THROUGH 10, INCLUSIVE,
Cross-Defendants.

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

Judge: Hon. Joel R. Wohlfeil

**DECLARATION OF MICHAEL R.
WEINSTEIN IN SUPPORT OF
CROSS-DEFENDANT LARRY GERACI'S
DEMURRER TO CROSS-COMPLAINANT
DARRYL COTTON'S SECOND AMENDED
CROSS-COMPLAINT**

[IMAGED FILE]

DATE: November 3, 2017
TIME: 9:00 a.m.
DEPT: C-73

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

I, Michael R. Weinstein, declare:

1. I am an adult individual residing in the County of San Diego, State of California, and I am the attorney in this action for Plaintiff and Cross-Defendant, LARRY GERACI. I have personal knowledge of the foregoing facts and if called as a witness could and would so testify.

2. The purpose of this declaration is to advise the Court that the attorneys for each party have satisfied the meet and confer requirements of Code of Civil Procedure section 430.41. (Code Civ.

1 Proc., §430.41(a)(3).)

2 3. On September 13, 2017, I emailed David Demian, attorney for Defendant and Cross-
3 Complainant, DARRYL COTTON, a meet and confer letter pursuant to the requirements of Code of
4 Civil Procedure section 430.41 advising him that Mr. Geraci had objections to the Second Amended
5 Cross-Complaint and intended to file a demurrer objecting to the first through fourth causes of action
6 asserted in the Second Amended Cross-Complaint. This meet and confer letter confirmed a prior
7 telephonic meet and confer engaged in by the attorneys regarding Mr. Geraci's intended demurrer. A
8 true and correct copy of my September 13, 2017, meet and confer letter is attached as Exhibit A to this
9 declaration. The attorneys/parties have not been able to resolve the objections to the Second Amended
10 Cross-Complaint that are the subject of the Demurrer being filed on behalf of Cross-Defendant, Mr.
11 Geraci.

12 I declare under penalty of perjury under the laws of the State of California, that the foregoing is
13 true and correct of my personal knowledge. Executed this 28th day of September, 2017, in San Diego,
14 California.

15
16 
17 MICHAEL R. WEINSTEIN

EXHIBIT A

GE4892.001

September 13, 2017

Via E-Mail and U.S. Mail

David S. Demian, Esq.
Adam C. Witt, Esq.
Finch, Thornton & Baird, LLP
4747 Executive Drive - Suite 700
San Diego, CA 92121-3107 Steven Cash

Re: Larry Geraci v. Darryl Cotton
San Diego Superior Court Case No. 37-2017-00010073

Dear Mr. Demian and Mr. Witt:

David, as I mentioned in our Monday telephone call, we will be filing a demurrer by Larry Geraci to the Second Amended Cross-Complaint. By my calculation, that responsive pleading is due on or before September 29, 2017. Please let me know if you believe the deadline is other than September 29, 2017.

The purpose of this letter is to satisfy the meet and confer requirement of California Code of Civil Procedure section 430.41. This letter confirms that we have already met and conferred about these matters but I invite you to further communicate with me regarding these issues if, after review of the discussion below, you believe further communication would be helpful and might resolve some or all of the issues prior to the filing and hearing of the demurrer.

Mr. Geraci's demurrer will be directed at the first cause of action for breach of contract and the second, third and fourth causes of action for intentional misrepresentation, negligent misrepresentation, and false promise, respectively.

First Cause of Action for Breach of Contract

The first cause of action for breach of contract fails to state facts sufficient to constitute a cause of action because it is barred by the applicable Statute of Frauds. The relevant law is found in *Sterling v. Taylor* (2007), 40 Cal.4th 757, which makes clear that the memorandum itself must include the essential contractual terms and extrinsic evidence cannot supply those required terms:

We emphasize that a memorandum of the parties' agreement is controlling evidence under the statute of frauds. Thus, extrinsic evidence cannot be employed to prove an agreement at odds with the terms of the memorandum.

This point was made in *Bezell v. Schrader* (1963) 59 Cal.2d 577, 30 Cal.Rptr. 534, 381 P.2d 390. There, the plaintiff sought to recover a 5 percent real estate broker's commission under an oral agreement. (*Id.* at p. 579, 30 Cal.Rptr. 534, 381 P.2d 390.) The escrow instructions, which specified a 1.25 percent commission, were the "memorandum" on which the plaintiff relied to comply with the statute. However, he contended the instructions incorrectly reflected the parties' actual agreement, as shown by extrinsic evidence. (*Id.* at p. 580, 30 Cal.Rptr. 534, 381 P.2d 390.) The *Bezell* court rejected this argument, holding that under the statute of frauds, "the parol agreement of which the writing is a memorandum must be one whose terms are consistent with the terms of the memorandum." (*Id.* at p. 582, 30 Cal.Rptr. 534, 381 P.2d 390.) Thus, in determining whether extrinsic evidence provides the certainty required by the statute, courts must bear in mind that the evidence cannot contradict the terms of the writing.

Sterling v. Taylor (2007), *supra*, 40 Cal.4th at 771-772. See, *Ukkestad v. RBS Asset Finance, Inc.* 235 Cal.App.4th 156 (2015) ["In the context of a case arising from a dispute over the certainty of the terms of sale of real property, our Supreme Court recently endorsed a "flexible, pragmatic view," under which uncertain written contractual terms comply with the statute of frauds as long as they can be made certain by reference to extrinsic evidence, **and as long as that evidence is not used to contradict the written terms.** (*Sterling, supra*, 40 Cal.4th at p. 771, fn. 13, 55 Cal.Rptr.3d 116, 152 P.3d 420.).] See also, *Jacobs v. Locatelli* (2017), 8 Cal.App. 5th 317, 325 ["As a result of *Sterling*, it is indisputably the law that "when ambiguous terms in a memorandum are disputed, extrinsic evidence is admissible to resolve the uncertainty." (*Sterling, supra*, 40 Cal.4th at p. 767, 55 Cal.Rptr.3d 116, 152 P.3d 420.) The agreement must still provide the essential terms, and it is "clear that extrinsic evidence cannot supply those required terms." (*Ibid.*)]

Here, the only writing signed by both parties is the November 2, 2016 written agreement, which explicitly provides for a \$10,000 down payment ("earnest money to be applied to the sales price"); in fact, the agreement acknowledges receipt of that down payment. Mr. Cotton is alleging that the oral agreement provided for a down payment of \$50,000, which is in direct contradiction of the written term of a \$10,000 down payment.

Second, Third and Fourth Causes of Action for Intentional Misrepresentation, Negligent Misrepresentation, and False Promise

Each of these causes of action fails to state facts sufficient to constitute a cause of action because Mr. Cotton has not and cannot allege reasonable and justifiable reliance.

No Reasonable Reliance

A necessary element of each of these causes of action is reasonable reliance on the

alleged false representation. [See CACI 1900, 1902, and 1903]

“[T]here are two causation elements in a fraud cause of action. First, the plaintiff’s actual and justifiable reliance on the defendant’s misrepresentation must have caused him to take a detrimental course of action. Second, the detrimental action taken by the plaintiff must have caused his alleged damage.” (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039,1062.)

“Actual reliance occurs when a misrepresentation is “an immediate cause of [a plaintiff’s] conduct, which alters his legal relations,” and when, absent such representation, “he would not, in all reasonable probability, have entered into the contract or other transaction.” (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 976-977.)

“Besides actual reliance, [a] plaintiff must also show “justifiable” reliance, i.e., circumstances were such to make it *reasonable* for [the] defendant’s statements without an independent inquiry or investigation.’ [Citation.] The reasonableness of the plaintiff’s reliance is judged by reference to the plaintiff’s knowledge and experience. (5 Witkin, summary of Cal. Law, Torts, § 808, p. 1164.) “Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff’s reliance is reasonable is a question of fact.” [Citations.]’ [Citation.” (*OCM Principal Opportunities Fund, L.P. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 864-865.)

When a promise contradicts the express terms of the contract, proving justifiable reliance is an uphill battle. (*Pacific State Bank v. Greene* (2003) 110 Cal.App.4th 375, at 393.) This is because of the general principle that a party who signs a contract “cannot complain of unfamiliarity with the language of the instrument” (*Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 710), the defrauded party must show a reasonable reliance on the misrepresentation that excuses the failure to familiarize himself with the contents of the document. (Rest.2d Contracts, §§ 164, 166; *California Trust Co. v. Cohn* (1932) 214 Cal. 619.) For instance, a “party’s *unreasonable* reliance on the other’s misrepresentations, resulting in a failure to read a written agreement before signing it, is an insufficient basis, under the doctrine of fraud in the execution ...” for permitting that party to void the agreement. (*Rosenthal v. Great Western Fin. Securities Corp.* 14 Cal.4th at p. 423) Thus, the particular circumstances of the contract’s execution, including the prominent and discernible provisions of the contents of the writing in issue, must make it reasonable for the party claiming fraud to have nonetheless relied on the mischaracterization. This is not an easily met burden of proof.

More importantly for purposes of this demurrer, Mr. Cotton has not alleged facts which, if true, are sufficient to support a finding of reasonable reliance. In addition, considering that the misrepresentations Mr. Cotton is claiming are in direct conflict with the clear, unambiguous written agreement signed by Mr. Cotton, it does not appear Mr. Cotton can amend to allege a factual scenario by which Mr. Cotton would be able to establish reasonable reliance on alleged misrepresentations made by Mr. Geraci.

LAW OFFICES
**FERRIS
& BRITTON**

A Professional Corporation

Adam Witt and David Demian

July 27, 2017

Page 4 of 4

If you wish to discuss this matter further please do so by September 21, 2017. I intend to file the demurrer by September 25, 2017, as the next day I am heading out of the country for two weeks.

Thank you.

Respectfully,



MICHAEL R. WEINSTEIN, for
Ferris & Britton, APC

MRW/

cc: Larry Geraci