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F I L E D
Clerk of the Superior Court
NOV 10 2016
By: S. Klais-Trent, Deputy

5 Attorneys for Defendant DARRYL COTTON
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8 **SUPERIOR COURT OF CALIFORNIA**
9 **COUNTY OF SAN DIEGO, CENTRAL DIVISION**

10 CITY OF SAN DIEGO,) Case No.: 37-2016-00005526-CU-MC-CTL
11)
Plaintiff,) **OPPOSITION TO MOTION FOR**
12 vs.) **SUMMARY JUDGMENT OF DARRYL**
13) **COTTON**
DARRYL COTTON in individual; and DOES)
14 1 through 50, inclusive,) **IMAGED FILE**
15)
Defendants.)
16)
17) Date: December 2, 2016
18) Time: 10:30 a.m.
19) Dept.: C-61
20) Judge: Hon. John S. Meyer
21) Cmpl. Filed: February 18, 2016
22) Trial Date: Not Set
23)
24)

21 **I.**

22 **INTRODUCTION**

23 By virtue of the current Motion for Summary Judgment, Plaintiff, City of San Diego ("City") is
24 attempting to procure a Permanent Injunction against Defendant DARRYL COTTON ("Cotton") the
land owner of the property located at 6176 Federal Blvd., San Diego ("Property"). As will be set forth

1 more fully below, the need for a Permanent Injunction is moot because the alleged violations occurring
2 at the Property have ceased and have not reoccurred since June 15, 2016, and furthermore, Cotton is no
3 longer the owner of the Property.

4 Additionally, the City has provided no evidence that Cotton has anything to do with the alleged
5 operations of the business at the Property. Furthermore, at the time Cotton leased the Property, the
6 Property was zoned to Southeastern San Diego Planned District Industrial zone (SESDPD-I-1). At that
7 time, the zone allowed for Medical Marijuana Consumer Cooperative (MMCC) with a Conditional Use
8 Permit.

9 Because at the time Cotton leased the Property MMCC's were a permissible use at the Property
10 and because Cotton has no involvement with the operation of the alleged MMCC at the Property, Cotton
11 has not violated the San Diego Municipal Code (SDMC), he is not the Responsible Party for the alleged
12 use at the Property and he should not be permanently enjoined for committing a perfectly legal act.

13 **II.**

14 **POINTS AND AUTHORITIES**

15 **A. Legal Standard for Summary Judgment Motions.**

16 "Summary Judgment is a drastic remedy which should be used with caution." (*Mann v.*
17 *Cracchiolo*, (1985) 38 Cal.3d 18.) Should any doubts exists with regards to the summary judgment
18 motion, the "motion should be resolved in favor of the party opposing the motion." (*Sprecher v.*
19 *Adamson Companies*, (1981) 30 Cal. 3d 358.) A party may only move for a Motion for Summary
20 Judgment if a party can prove that a cause of action has no merit or no affirmative defense exists. (Cal.
21 Code Civ. Pro. §437c(f)(1).) All evidence set forth in the moving papers must show that there is no
22 triable issue of material fact before a court can grant a motion for summary judgment. (*Montgomery v.*
23 *Cal Accountants Mutual Ins. Co.*, (1998) 61 Cal. App. 4th854, 859.) The Court must consider all
24 evidence set forth in the moving papers. (Cal. Code Civ. Pro. §437c(c) see also *Quintilliani v.*

1 *Mannerino*, (1998) 62 Cal. App. 4th 54, 58.) A moving party must support its motion with a Separate
2 Statement of Material Facts, which references supporting evidence and “plainly and concisely” sets
3 forth all “material facts which the moving party contends are undisputed.” (Cal. Code Civ. Pro.
4 §437c(b)(1).) The purpose of the trial court in a summary judgment motion is to determine whether
5 issues of fact exist, “not the merits of the issues...” (*G.E. Hetrick & Associates, Inc. v. Summit*
6 *Construction & Maintenance Co.*, (1992) Cal. App.4th 318.). "A plaintiff ... has met his or her burden of
7 showing that there is no defense to a cause of action if that party has proved each element of the cause
8 of action entitling the party to judgment on that cause of action." (Code Civ. Proc., § 437c, (p)(l).)

9 **B. Plaintiff's Motion for Summary Judgment is Moot.**

10 It is not accurate to state that the law only requires proof of a violation of zoning law in order to
11 issue a permanent injunction. Rather, “[t]o qualify for a permanent injunction, the plaintiff must prove
12 (1) the elements of a cause of action involving the wrongful act sought to be enjoined and (2) the grounds
13 for equitable relief, such as, inadequacy of the remedy at law.” (*City of South Pasadena v. Department*
14 *of Transportation* (1994) 29 Cal.App.4th 1280, 1293, citing 5 Witkin, Cal. Procedure (3d ed. 1985)
15 Pleading, § 774, p. 218.) Indeed, a permanent injunction should only issue if the court determines that
16 “equitable relief is appropriate.” (*Art Movers, Inc. v. Ni West, Inc.* (1992) 3 Cal.App.4th 640, 646.)

17 Ordinarily, injunctive relief is available to prevent threatened injury and is not a remedy
18 designed to right completed wrongs. [Citations.] “It should neither serve as punishment
19 for past acts, nor be exercised in the absence of any evidence establishing *the*
20 *reasonable probability the acts will be repeated in the future. Indeed, a change in*
21 *circumstances at the time of the hearing, rendering injunctive relief moot or*
22 *unnecessary, justifies denial of the request. [Citation.]” Unless there is a showing*
23 *that the challenged action is being continued or repeated, an injunction should be*
24 *denied.* (Emphasis added).

(*Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1403, fn. 6, italics added, citing *Gold*
v. Los Angeles Democratic League (1975) 49 Cal.App.3d 365, 372; and then citing *Scripps Health v.*
Marin (1999) 72 Cal.App.4th 324, 332-333; and then citing *Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d
129, 132-133.)

1 In the present case, on June 15, 2016 (nearly 6 months ago) the City confirmed the alleged
2 marijuana business at the Property “had ceased operating” and “All of the marijuana dispensary fixtures
3 and the marijuana products had been removed.” (See Plaintiff’s Undisputed Material Fact No. 29).

4 **C. Defendant is Not Responsible for the Alleged SDMC Violations as a Matter of Law.**

5 In its Motion, the City argues that Cotton is strictly liable for a tenant’s zoning violation under
6 the SDMC. The City’s theory mixes various sections of the SDMC that cannot be combined to reach
7 the desired conclusion. For instance, during the litigation of this case the City refers to the term
8 “Responsible Person,” but such reference is a red herring. “Responsible Person” is defined in SDMC
9 section 11.0210:

10 “Responsible Person” means a person who a Director determines is responsible for causing
11 or maintaining a public nuisance or a violation of the Municipal Code or applicable state
12 codes. The term “Responsible Person” includes but is not limited to a property owner,
13 tenant, person with a Legal Interest in real property or person in possession of real property.

14 Fatal to the City’s argument is the fact that the particular term “Responsible Person” is not used
15 in the other SDMC sections cited by the City, and thus, the term has no impact on the court’s analysis
16 of Defendants’ culpability or liability. Moreover, “[t]he general duty of care owed by a landowner in
17 the management of his or her property is attenuated when the premises are let because the landlord is
18 not in possession, and usually lacks the right to control the tenant and the tenant’s use of the property.”
19 *Chee v. Amanda Goldt Property Management* (2006) 143 Cal.app.4th 1360, 1369; *Alcaraz v. Vece*
20 (1997) 14 Cal.4th 1149, 1157-1158 (“[T]he duties owed in connection with the condition of land are not
21 invariably placed on the person [holding title] but, rather, are owed by the person in possession of the
22 land because [of the possessor’s] supervisory control over the activities conducted upon, and the
23 condition of, the land.”)

24 Thus, landlords are not liable for injuries from conditions that arise after the tenant has taken
control of leased property, and over which the property owner has no control. *Alcaraz*, 14 Cal.4th at
1157-1159; *Uccello v. Laudenslayer* (1975) 44 Cal.App.3d 504, 510-511. Such is the case here. When
Cotton leased the Property he had no idea the tenant intended to operate a business in violation of the
SDMC. Cotton did not contribute to the alleged violations; those violations arose solely from the tenant’s

1 actions and inactions. Where the nuisance is attributable solely to the tenant's improper acts, the landlord
2 or property owner is not liable. *Lucid v. Citizens Inv. Co.* (1920) 49 Cal.App. 257, 260; *Resolution Trust*
3 *Corp. v. Rossmoor Corp.* (1995) 34 Cal.App.4th 93, 100, (commercial lessors were not liable to
4 adjoining landowners for continuing nuisance or continuing trespass caused by fuel leaks from gas
5 station on lessors' property, where lessors had not actively caused or contributed to fuel contamination).

6 The City's argument that the SDMC imposes strict vicarious liability on landlords is unfounded.
7 The cases cited by the City for the argument that Defendants are somehow responsible for the
8 surreptitious acts of the tenants are inapposite. Those cases involve fundamentally different facts and
9 statutes that the City convolutes to support its argument against Defendants. *See, e.g., Leslie Salt Co. v.*
10 *San Francisco Bay Conservation etc.* (1984) 153 Cal.App.3d 605 (A property owner is responsible for
11 cleaning up hazardous waste on their property, whether or not the property owner was the one who put
12 the hazardous waste on the property; however, the court noted that Leslie Salt was in possession and
13 control of the property at all times.); *see also People v. Bachrach*, 114 Cal.App.3d Supp. 8, 11 (1980)
14 (landlord liable for violation of public safety and fire prevention violations regardless of a showing of
15 intent because the landlord was responsible for the prevention of the violations).

16 The cases cited are markedly different from the facts of this case because in those cases the
17 property owner/landlord maintained a possessory interest and responsibility for the violations at the time
18 they occurred. Here, on the other hand, Cotton had no control over how the tenant used (or misused) the
19 property. As such, Cotton is not the Responsible Party for any alleged use violations at the Property and
20 Plaintiff's motion for Summary Judgment should be denied.

21 **D. Plaintiff's Request for Civil Penalties Creates Triable Issues of Material Facts.**

22 In the present case, the City vaguely states that Cotton has allowed or maintained a continuous
23 violation of the SDMC from sometime in February of 2016 to June 15, 2016. However, other than **one**
24 **alleged undercover buy in February of 2016**, it is impossible for Plaintiff to establish exactly how
long a dispensary was allegedly being operated at the Property prior to June 15, 2106.

Where civil penalties are concerned, the date of commencement and ending of the infraction is
not only crucial, but also material, insofar as the penalties being calculated on a daily basis. Nevertheless,

1 Plaintiff's motion seeks \$2,500 in civil penalties for each day during which Defendants allegedly
2 committed, continued, allowed or maintained a violation of the Municipal Code for a total of 113
3 consecutive days totaling \$282,500.00.

4 *Assuming Arguendo* that the court finds that civil penalties may be assessed against Cotton as a
5 responsible party in this case, the amount of the penalty depends in the first instance on the number of
6 violations committed. (*People ex rel. Kennedy v. Beaumont Inv., Ltd.*, (2003) 111 Cal.App.4th 102,
7 127.) In "determining what qualifies as a single violation "depends on the type of violation involved,
8 the number of victims and the repetition of the conduct constituting the violation—in brief, the
9 circumstances of the case.'" (*Id.* at 129 citing *People v. Witzerman* (1972) 29 Cal.App.3d 169, 180.)

10 In *Beaumont Inv.*, the question was whether a violation, for purposes of imposing civil penalties
11 should have been calculated on a per person basis or a per act basis. The court found through evidence
12 presented at trial, over 14,000 distinct, "separate and discreet" acts were committed and based the civil
13 penalties on a per act basis. (*People ex. Rel. Kennedy v. Beaumont Inv., Ltd.*, supra 111 Cal. App. 4th
14 102, 128-130.) As such, any civil penalties the City seeks pursuant to the SDMC must be proven beyond
15 a preponderance of the evidence for each and every day as separate and distinct violations of the
16 Municipal Code. (See SDMC §12.0803(b)). Furthermore, in determining the amount of the civil
17 penalty, if any, to be assessed on a daily rate, eleven (11) separate factors must be considered (See
18 SDMC §12.0805(c)). These factors are subjective and therefore by definition are triable issues of
19 material fact. (See Cal. Code Civ. Pro. §437c(b)(3).)

20 It is anticipated that the City will rely on the recent case of *The People v. The Superior Court of*
21 *Los Angeles, Cahuenga's The Spot* (2015) 234 CalApp4th 1360 to stand for the proposition that civil
22 penalties are not elements of a cause of action for equitable relief but rather may be determined as a
23 matter of post judgment relief. Based upon the ruling in *Cahuenga's the Spot* should this court grant the
24 City's request for a permanent injunction in this case, it is appropriate that "The trial judge may need to

1 hear additional evidence that, while not relevant to proof of the elements of the offenses, is relevant to
2 the proper exercise of her or his equitable powers in fashioning terms of injunctions and abatement
3 orders, as well as in assessing appropriate amounts of civil penalties.” (See *Cahuenga’s the Spot supra*).

4 Should this honorable court allow for the potential issuance of civil penalties, the amount of said
5 penalties, if any, must be determined at a trial of this matter or via a post judgment motion wherein the
6 City must prove each separate and distinct violation and the court must consider all of the relevant
7 factors associated with the potential issuance of civil penalties.

8 **III.**

9 **CONCLUSION**

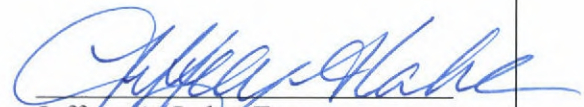
10 For the reasons set forth above Plaintiff’s motion for Summary Judgment should be denied.

11 Respectfully submitted,

12 Dated: 11/9/16

13 JEFFREY A. LAKE, A.P.C.

14 By:

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16 Jeffrey A. Lake, Esq.
17 Attorneys for Defendant
18 DARRYL COTTON