

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL**

MINUTE ORDER

DATE: 01/25/2018

TIME: 09:00:00 AM

DEPT: C-73

JUDICIAL OFFICER PRESIDING: Joel R. Wohlfeil

CLERK: Juanita Cerda

REPORTER/ERM: Not Reported

BAILIFF/COURT ATTENDANT: R. Camberos

CASE NO: **37-2017-00037675-CU-WM-CTL** CASE INIT.DATE: 10/06/2017

CASE TITLE: **Cotton vs City of San Diego [IMAGED]**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Writ of Mandate

EVENT TYPE: Hearing on Petition

EVENT TYPE: Motion Hearing (Civil)

MOVING PARTY: Larry Geraci, Rebecca Berry

CAUSAL DOCUMENT/DATE FILED: Notice of Hearing, 01/09/2018

APPEARANCES

DARRYL COTTON, self represented Petitioner, present.

M. Travis Phelps, counsel, present for Respondent on Appeal, Respondent(s).

Michael R Weinstein, counsel, present for Respondent on Appeal, Real Party In Interest (RpII)(s).

The Court hears oral argument and confirms / modifies the tentative ruling as follows: The Court hears oral argument and confirms / modifies the tentative ruling as follows:

The Motion (ROA # 60, 61) of Real Parties in Interest LARRY GERACI and REBECCA BERRY, to (1) compel the deposition of Petitioner / Plaintiff DARRYL COTTON ("Plaintiff"), and (2) continue the January 25, 2018, hearing on Plaintiff's Motion for issuance of a peremptory writ of mandate, is **GRANTED IN PART AND DENIED IN PART.**

The Motion to compel Plaintiff to submit to a deposition is **GRANTED.** Plaintiff shall submit to a deposition within twenty (20) days of the hearing of this Motion.

The Motion to continue the hearing of Plaintiff's Motion for issuance of a peremptory writ of mandate, is **DENIED.**

Clerk's Note: As modified, Petitioner/Plaintiff Darryl Cotton to submit to a deposition within 20 days of today. Mr. Cotton is to provide Attorney Weinstein two (2) days in which he is available for deposition before 4:00 PM on 1/26/2018. Per Attorney Weinstein estimate of deposition is one day. Deposition to start at 9:00 AM until 5:00 PM. Attorney Weinstein to provide location of deposition.

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Calendar No. 6

The Petition (ROA # 38, 42) of Plaintiff / Petitioner DARRYL COTTON ("Plaintiff") for writ of mandate, is DENIED.

The Court initially notes that its December 7, 2017 order denying the ex parte application for an order shortening time to hear this Motion (ROA # 42) invited the filing of moving and opposition papers per Code. However, no additional papers were filed. As a result, this ruling is premised the original Petition for writ of mandate, and briefing and evidence presented to the Court prior to both ex parte hearings.

A traditional writ of mandate under Code of Civil Procedure section 10858 is a method for compelling a public entity to perform a legal and usually ministerial duty. Klajic v. Castaic Lake Water Agency (2001) 90 Cal. App. 4th 987, 995. The Court reviews an administrative action, pursuant to Code of Civil Procedure section 1085, to determine whether the agency's action was arbitrary, capricious, or entirely lacking in evidentiary support, contrary to established public policy, unlawful, procedurally unfair, or whether the agency failed to follow the procedure and give the notices the law requires. Id.

A record owner, or "[a]ny person who can demonstrate a legal right, interest, or entitlement to the use of the real property subject to the application" may submit an application for a permit. SDMC 112.0102. Plaintiff argues that the City has a ministerial duty to process the CUP Application with Petitioner as the sole applicant; however, Petitioner cannot demonstrate that he was the only person who possessed the right to use the subject property. Whether someone other than the "record owner" possesses a valid right to apply for and obtain the CUP is disputed. Evidence exists demonstrating an agreement for the purchase and sale of the subject property, which could confer a legal right and entitlement to the use of the property.

In addition, Plaintiff has not exhausted his administrative remedy by submitting his own separate CUP application. He cannot be recognized as the "sole applicant" (see Petition at page 10, line 5) when he has not, in fact, submitted a separate application. The City may very well have a ministerial duty to accept and process Petitioner's CUP application in lieu of any competing application, but this duty does not arise in the absence of the filing of such an application.

The Motion (ROA # 94, 95) of Plaintiff and Cross-Defendant LARRY GERACI and Cross-Defendant REBECCA BERRY ("Cross-Defendants") to (1) compel the deposition of Defendant and Cross-Complainant DARRYL COTTON ("Defendant"), and (2) continue the January 25, 2018, hearing on Defendant's Motion for a preliminary injunction, is GRANTED IN PART AND DENIED IN PART.

The Motion to compel Defendant to submit to a deposition is GRANTED. Defendant shall submit to a deposition within twenty (20) days of the hearing of this Motion.

The Motion to continue the hearing of Defendant's Motion for a preliminary injunction, is DENIED.

Clerk's Note: As modified, Petitioner/Plaintiff Darryl Cotton to submit to a deposition within 20 days of today. Mr. Cotton is to provide Attorney Weinstein two (2) days in which he is available for deposition before 4:00 PM on 1/26/2018. Per Attorney Weinstein estimate of deposition is one day. Deposition to start at 9:00 AM until 5:00 PM. Attorney Weinstein to provide location of deposition.

Defendant and Cross-Complainant DARRYL COTTON'S Motion for a preliminary injunction is DENIED.

The Court initially notes that its December 7, 2017 order denying the ex parte application for a TRO and setting this hearing (ROA # 72) invited the filing of moving and opposition papers. However, no additional papers were filed. As a result, this ruling is premised on the briefing and evidence presented to the Court prior to the ex parte hearing.

The Court considers two interrelated questions in deciding whether to issue a preliminary injunction: (1) is Plaintiff likely to suffer greater injury from a denial of the injunction than Defendant is likely to suffer from its grant; and (2) is there a reasonable probability that Plaintiff will prevail on the merits. Robbins v. Superior Court (1985) 38 Cal.3d 199, 206; Code Civ. Proc. 526(a). The Court's determination must be guided by a "mix" of the potential-merit and interim-harm factors. Butt v. State of California (1992) 4 Cal. 4th 668, 678. A preliminary injunction is appropriate when pecuniary compensation would not afford adequate relief; or where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief. Code Civ. Proc. 526(a). The burden is on the moving party to show all elements necessary to support issuance of a preliminary injunction. O'Connell v. Superior Court (2006) 141 Cal. App. 4th 1452, 1481. A preliminary injunction amounts to a mere interlocutory order to maintain the status quo pending a determination of the action on its merits. Varian Medical Systems, Inc. v. Delfino (2005) 35 Cal. 4th 180, 191.

Regarding the probability of prevailing, a record owner, or "[a]ny person who can demonstrate a legal right, interest, or entitlement to the use of the real property subject to the application" may submit an application for a permit. SDMC §112.0102. Defendant and Cross-Complainant Cotton argues that the City must process the CUP Application with him as the sole applicant. However, disputed evidence exists suggesting that Cotton was not the only person who possesses the right to use the subject property. Whether someone other than the "record owner" possesses a valid right to apply for and obtain the CUP is disputed. Evidence exists demonstrating an agreement for the purchase and sale of the subject property, which could confer a legal right and entitlement to the use of the property.

In addition, Defendant and Cross-Complainant Cotton is not likely to prevail because the evidence demonstrates that he has not submitted his own separate and competing CUP application. He cannot be recognized as the sole applicant when he has not, in fact, submitted an application. A determination regarding the City's obligation to accept and process Cotton's CUP application in lieu of any competing application cannot be made in the absence of the filing of such an application.

Finally, Defendant and Cross-Complainant Cotton is unlikely to sustain irreparable harm because pecuniary compensation would afford adequate relief. Plaintiff can prosecute a claim premised on the lost revenue from operation of a medical marijuana dispensary. Although calculating such revenue may be somewhat complicated and require an expert opinion, this is far from an impossible task.

Clerk's Note: The Court directs Attorney Weinstein to serve notice.

Joel R. Wohlfeil

Judge Joel R. Wohlfeil