

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 78

19STCV10603

January 27, 2021

**THE PEOPLE OF THE STATE OF CALIFORNIA, EX REL.
MICHAEL N. FEUER, AS CITY ATTORNEY OF THE CITY
OF LOS ANGELES vs JAMES SMITH, et al.**

8:30 AM

Judge: Honorable Robert S. Draper
Judicial Assistant: Patricia Salcido
Courtroom Assistant: Sky SoYeon Hahn

CSR: Wil S. Wilcox, CSR #9178 (Video)
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): SUZANNE SPILLANE

For Defendant(s): Rafael Bernardino (Telephonic); William Wesley Carter (Telephonic); Priya Sopori (Video) and James Hills (Telephonic)

NATURE OF PROCEEDINGS: Hearing on Motion for Summary Judgment; Hearing on Motion for Summary Judgment

Pursuant to Government Code Sections 68086, 70044 and California Rules of Court, rule 2.956, Wil S. Wilcox, CSR #9178, certified shorthand reporter is appointed as an official Court Reporter Pro Tempore in these proceedings, and is ordered to comply with the terms of the Court Reporter Agreement. The Order is signed and filed this date.

The Court's tentative ruling is electronically posted on the Court's website before the hearing is held.

The matters are called for hearing and argued.

After argument, the Court's tentative ruling becomes the final ruling of the Court as indicated below and as more fully reflected in the written ruling, which is amended by interlineation, signed and filed this date and incorporated herein by reference to the Court file.

The Motion for Summary Judgment filed by D/AQ CORPORATION, a California corporation doing business as DAUM COMMERCIAL REAL ESTATE on 11/09/2020 is Granted.

The Joinder to Motion for Summary Judgment / Adjudication filed by Benjamin Robert Spinner on 11/09/2020 is Granted.

FACTUAL BACKGROUND

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This is unlicensed commercial cannabis activity action. The First Amended Complaint (“FAC”) alleges as follows. Plaintiff, The People of the State of California (“the People”) bring this action to enjoin the unlawful conduct of Defendants High Spirit Enterprises, LLC, d/b/a Kush Club 20 and/or Kush Club.20; James Smith as individual and organizer of High Spirit Enterprises, LLC; Kush Club 20 a/k/a Kush Club.20; Amy Sahadi Diaz (collectively, the “Business Defendants”); 5527 S. Central LLC and Michael Lender (collectively, the “Property Owner Defendants”); D/AQ Corporation d/b/a Daum Commercial Real Estate; Benjamin Robert Spinner a/k/a Benjamin R. Spinner; James Huy Vu a/k/a James Vu (collectively, the “Realtor Defendants”). (Compl. ¶ 1.)

The People allege that the Defendants are violating Los Angeles Municipal Code section 104.15, subsections (a) and (b) prohibiting unlicensed and/or unlawful commercial cannabis activity and medical marijuana cooperatives and collectives, and renting, leasing to, or otherwise allowing the use of any building for such activity in the City of Los Angeles (the “City”); and various other laws. (Compl. ¶ 1.)

PROCEDURAL BACKGROUND

The People filed the Complaint on March 27, 2019, alleging six causes of action:

1. Complaint for abatement, injunctive relief, and civil penalties
2. Engaging in unlicensed commercial cannabis activity in violation of LAMC § 104.15
3. Engaging in unlicensed commercial cannabis activity in violation of B&P §§ 17200 et seq.
4. Selling cannabis containing paclobutrazol in violation of B&P §§17200 et seq.
5. Violation of Health & Safety Code §§11570 et seq.
6. Violation of LAMC §12.21.A.1(a)

On April 15, 2019, the People filed the FAC, alleging five causes of action:

1. Engaging in unlicensed commercial cannabis activity in violation of LAMC § 104.15
2. Engaging in unlicensed commercial cannabis activity in violation of B&P §§ 17200 et seq.
3. Selling cannabis containing paclobutrazol in violation of B&P §§17200 et seq.
4. Violation of Health & Safety Code §§11570 et seq.
5. Violation of LAMC §12.21.A.1(a)

On May 6, 2019, the People filed a Notice of Related Case, Brooks v. 5527 S. Central LLC, Case

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No. BC696967.

On November 9, 2020, Defendants D/AQ Corporation d/b/a Daum Commercial Real Estate Services (“Daum”) & James Huy Vu a/k/a James Vu (“Vu”) filed the instant Motion for Summary Judgment.

On November 9, 2020, Defendant Benjamin Spinner (“Spinner”) filed a Joinder to the instant Motion.

On November 13, 2020, Spinner filed a separate Motion for Summary Judgment.

On January 8, 2021, the People filed an Opposition to Vu and Daum’s Motions.

On January 13, 2021, the People filed an Opposition to Spinner’s Motion.

On January 20, 2021, Daum and Vu filed a Reply.

On January 20, 2021, Spinner filed a Joinder to the Reply.

DISCUSSION

I. JUDICIAL NOTICE

The court may take judicial notice of “(b) Regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States. (c) Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States. (d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States [...] (g) Facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute. (h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.” (Evid. Code § 452.)

The Realtor Defendants seek judicial notice of: (1) a Los Angeles City Council legislative history document; (2) Los Angeles Ordinance No. 185,343; (3) The California Bureau of Cannabis Control’s “Guidance on Commercial Cannabis Activity;” (4) Select pages of the

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California Department of Real Estate's ("DRE") Official Reference Book, Chapter 10 on "Agency," available on the DRE's website; (5) a grant deed; (6) a copy of the brokerage licensee information for Daum on the DRE's "Public License Information" database; (7) a copy of the Articles of Organization for defendant 5527 S. Central LLC, on file with the California Secretary of State; (8) the complaint; (9) a copy of select pages of the Rules and Regulations for Cannabis Procedures, effective as revised June 23, 2019, maintained by the City of Los Angeles Department of Cannabis Regulation.

The Court GRANTS these requests.

II. MOTIONS FOR SUMMARY JUDGMENT

A party may move for summary judgment "if it is contended that the action has no merit or that there is no defense to the action or proceeding." (Code Civ. Proc. § 437c, subd. (a).) "[I]f all the evidence submitted, and all inferences reasonably deducible from the evidence and uncontradicted by other inferences or evidence, show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law," the moving party will be entitled to summary judgment. (Adler v. Manor Healthcare Corp. (1992) 7 Cal.App.4th 1110, 1119.) A motion for summary adjudication may be made by itself or as an alternative to a motion for summary judgment and shall proceed in all procedural respects as a motion for summary judgment. (Code Civ. Proc. § 437c, subd. (f)(2).)

The moving party bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact, and if he does so, the burden shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 850; accord Code Civ. Proc. § 437c, subd. (p)(2).) To establish a triable issue of material fact, the party opposing the motion must produce substantial responsive evidence. (Sangster v. Paetkau (1998) 68 Cal.App.4th 151, 166.)

Neither a moving or responding party may rely on the mere allegations or denials of its pleadings. A moving party must submit specific admissible evidence showing that the responding party cannot establish at least one element of his, her or its cause of action or defense. The responding party, to defeat the motion, must submit specific admissible evidence showing that a triable issue of material fact does exist as to that element of the cause of action or defense. (Sangster v. Paetkau (1998) 68 Cal.App.4th 151, 166.)

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Defendants Daum and Vu seek summary judgment in their favor, or in the alternative summary adjudication of the First and/or Second Causes of Action. (Motion, Notice, at p. 1.) Further Defendant Spinner (collectively with Daum and Vu, the “Realtor Defendants”) seeks summary judgment in his favor, or in the alternative summary adjudication of the First and/or Second Causes of Action. (Spinner Motion at p. 17.)

1. Engaging in Unlicensed Commercial Cannabis Activity in violation of: LAMC § 104.15 (First Cause of Action) and Bus. & Prof. Code § 17200 et seq. (Second Cause of Action)

The FAC alleges that since April 4, 2018, the defendants including the Realtor Defendants have “established, operated, or participated as employees, contractors, agents or volunteers, in unlicensed commercial cannabis activity and/or they have owned or operated an unlawful establishment in violation of LAMC section 104.15, subsections (a) and (b).” (FAC ¶ 44.)

Specifically, as to the Realtor Defendants, the FAC alleges that the Realtor Defendants “prepared the lease” for the property-owning defendants. (FAC ¶ 17.) The lease stated that the property was to be used for “Church and other legal related used” although the Realtor Defendants knew that the property was to be used as marijuana dispensary. (FAC ¶¶ 19-20.)

Los Angeles Municipal Code (“LAMC”) section 104.15 states: “Starting on January 1, 2018, it is unlawful to:

1. Own or operate an Unlawful Establishment;
2. Participate as an Employee, contractor, agent or volunteer or in any other capacity in an Unlawful Establishment;
3. Use any portion of any parcel of land as an Unlawful Establishment; or
4. Lease, rent to, or otherwise allow an Unlawful Establishment to occupy any portion of parcel of land.” (LAMC § 104.15(b).)

The Realtor Defendants argue that they are entitled to summary judgment because they did not own or operate a cannabis business and were not the owner or lessor of property engaged in a cannabis business. (Daum and Vu Motion at pp. 4-7; Spinner Motion at p. 9.) The Realtor Defendants contend that they served as “brokers” in the lease of the property and did not lease or rent any property of their own. (Daum and Vu Motion at pp. 5-6; Spinner Motion at p. 10.)

Daum presents evidence that Daum “is a commercial real estate brokerage, maintaining a

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broker's license with the California Dept. of Real Estate No. 01129558," and that Vu and Spinner were real estate salespersons employed by Daum in 2018 and operating under Daum's corporate broker's license. (UMF ¶¶ 1-4.) These facts are undisputed by Plaintiff.

In Opposition, the People argue that the Realtor Defendants nonetheless violated section 104.15 because "Moving defendants marketed the Property listed the Property and ultimately leased the Property to Diaz. SSUF 5-8." (Oppo. at p. 4.)

The People do not cite any legal authority to support their argument that a real estate agent/broker's action in listing a property for lease is equivalent to "leasing" a property. The People also do not dispute that Defendant "Diaz was the Lessor and 5527 was the Lessor in the Lease." (UMF ¶ 8.) Based on evidence provided by the Realtor Defendants, the Court finds that the Realtor Defendants brokers are not lessors and thus section 104.15 is not applicable. The recorded grant deed for the property dated December 16, 2016 indicates that Defendant 5527 S Central LLC holds the deed. (Def. RJN, Exh. H.)

"It is hornbook law that a 'lessee has a present possessory interest in the premises, [while] the lessor has a future reversionary interest and retains fee title.' [...] A "possessory interest consists of a right to the possession of real property for a period less than perpetuity by one party, the holder of the possessory interest, while another party, the fee simple owner, retains the right to regain possession of the real property at a future date." (California State Teachers' Retirement System v. County of Los Angeles (2013) 216 Cal.App.4th 41, 55.) Therefore, the Realtor Defendants cannot be the "Lessors" because there is no evidence that they hold any possessory interest (fee simple or leasehold) in the property.

The People assert that the terms "leased to or rent to" in 104.15, subsections (a) and (b) should be interpreted to include a broker who offers the property for lease or solicits offers for a lease. It should be noted that when the city wishes to include this language in a municipal ordinance it has done so specifically.¹ Additionally, in the present case, holding that brokers who offer the property for lease are alleged violators of section 104.15 would actually lead to absurd results.

Spinner, who solicited leases of the property on behalf of Daum, testified that he was aware the ultimate lessee intended to engage in the cannabis business. He also testified that he believed the property in question was within the boundaries where the cannabis business could be conducted.² The evidence shows that a party engaging in the sale of cannabis must have a license to sell cannabis at a specific location and cannot obtain a license before he or she has a

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lease on the premises on which the business will be conducted.³ In these circumstances, the only two parties with any control over whether the lessee subsequently obtains the required license and lawfully conducts the cannabis business are the lessee and the lessor. To hold to the broker responsible for the lessee not subsequently obtaining a proper license would be nonsensical.

The People have failed to provide any authority establishing that the Realtor defendants may be held liable for the act of “leasing,” as a real estate agent or broker, property that is owned by another person. The Court finds that there is no triable issue of material fact as to whether the Realtor Defendants violated LAMC § 104.15 subsections (a) and (b) and that they did not violate this code section.

Lastly, the People argue that granting these Motions is against the public interest because real estate agents are governed by the California Department of Real Estate, and holders of real estate licenses. (Oppo. at p. 8.) The People cite to Code of Regulations section 2910 to support their argument. This section specifies the circumstances under which the Real Estate Commissioner should revoke the license of a real estate agent. (See, 10 C.C.R. § 2910; Oppo. at p. 8.) However, the People do not provide any argument or legal authority making this section relevant to the present motions.

Accordingly, the Motions for Summary Adjudication on the First Cause of Action are GRANTED.

With respect to the Second Cause of Action for Violation of the Unfair Competition Law (Bus. & Prof. §§ 17200 et seq.) the People cannot prevail against the Realtor Defendants as to this cause of action is also based on the allegations that the Realtor Defendants’ violated LAMC section 104.15 subsections (a) and (b). (FAC ¶ 49.) Unfair competition includes “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising[.]” (Bus. & Prof. Code, § 17200.)⁴The UCL “provides that an individual may not prosecute a UCL claim unless the individual “has suffered injury in fact and has lost money or property as a result of the unfair competition.” (Schwartz v. Provident Life & Accident Ins. Co. (2013) 216 Cal.App.4th 607, 611.)⁵Section 17200’s ‘unlawful’ prong ‘borrows violations of other laws ... and makes those unlawful practices actionable under the UCL.’ (Klein v. Chevron U.S.A., Inc. (2012) 202 Cal.App.4th 1342, 1383, as modified on denial of reh’g (Feb. 24, 2012).)⁶ Here there is no unlawful practice for the same reasons stated above with respect to the First Cause of Action cause of action.

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Accordingly, since this disposes of both Causes of Action, the Motions for Summary Judgment are GRANTED.

Counsel for D/AQ Corporation d/b/a Daum Commercial Real Estate Services is to give notice.

FOOTNOTES:

1 In other Los Angeles Municipal Code sections, the section specifically lists “offering to lease or rent, or soliciting a lease or rental,” in addition to “leasing or renting” among the acts which triggers application of the code (General Motors Corp. v. City of Los Angeles (1971) 5 Cal.3d 229, 238, fn. 10.) In these sections the City of Los Angeles obviously considers the act of “offering to lease or rent, or soliciting a lease or rental” to be a different act from the act of “leasing or renting.”

2 Deposition of Benjamin Spinner, pp. 73-7.

3 Defendants’ Memorandum in support of their Motion for Summary Adjudication/Summary Judgment, pp. 15- 16.