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10 a California corporation

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13
14 IN AND FOR THE COUNTY OF LOS ANGELES

15 Coordination Proceeding Special Title
16 (Rule 1550 (b))

Judicial Council Coordination No. 4408

17 ANTELOPE VALLEY GROUNDWATER
18 CASES

Case No.: 1-05-CV-049053

19 Included actions:

**DIAMOND FARMING'S OPPOSITION
TO CROSS-COMPLAINANTS'
MOTION FOR APPOINTMENT OF
BILL B. DENDY AS MANDATORY
SETTLEMENT CONFERENCE
REFEREE**

20 Los Angeles County Waterworks District No.
21 40 vs. Diamond Farming Company
22 Los Angeles Superior Court
23 Case No. BC 325201

24 Los Angeles County Waterworks District No.
25 40 vs. Diamond Farming Company
26 Kern County Superior Court
27 Case No. S-1500-CV 254348 NFT

28 Diamond Farming Company vs. City of
Lancaster
Riverside County Superior Court
Lead Case No. RIC 344436 [Consolidated
w/Case Nos. 344668 & 353840]

Date: August 20, 2007
Time: 9:00 a.m.
Dept: 1

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I.

INTRODUCTION

Cross-Complainants, Rosamond Community Services District and Los Angeles County Waterworks District No. 40, are attempting to take a voluntary agreement, made only by specific parties, to reach a negotiated resolution of this matter and twist it into a mandatory mediation that will be compulsory and binding on all parties to the action regardless of whether they have been served and appeared in this action.

In making this request, cross-complainants attempt to distort the agreement between the parties. While Diamond has agreed to undertake negotiations through Mr. Dendy, Diamond did not agree to have Mr. Dendy appointed as a referee. Further, the parties did not discuss and have not agreed, to forced settlement conference in which Mr. Dendy would be authorized to communicate the sum and substance of the negotiations to the court. Diamond did not agree to permit Mr. Dendy to have any contact with or communications with this court, and does hereby object to any authorized or ex parte communications between Mr. Dendy and this court. For these reasons and the reasons set forth, cross-complainants' Motion must be denied as it is seeking to distort the parties' private agreement and twist a voluntary mediation into a mandatory mediation, and by the proposed order vitiates the confidential characteristics implicit within the voluntary mediation statutory process.

II.

ARGUMENT

In support of their Motion, cross-complainants cite to Code of Civil Procedure sections 187, 639 and Rules of Court 3.920 and 3.1380. As shown below, these statutes do not authorize the court to undertake the action requested by cross-complainants.

A. Code of Civil Procedure Section 187

Section 187 is a catch all provision that provides:

"When jurisdiction is, by the constitution or this code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code."

1 Under this rule, courts have the statutory power to adopt any suitable method of practice, both
2 in ordinary actions and special proceedings, if the procedure is not specified by statute or by rules
3 adopted by the Judicial Council. (*Tide Water Associated Oil Co. v. Superior Court of Los Angeles*
4 *County* (1955) 43 Cal.2d 815, 825.)

5 The settlement procedure sought to be implemented by cross-complainants is governed by
6 specific statutes contained in Code of Civil Procedure section 1775 *et seq.* entitled Civil Action
7 Mediation. As evidenced by the moving papers, some of the parties have agreed to voluntarily
8 participate in mediation, which is defined by the Code of Civil Procedure as "the process by which a
9 neutral person or persons facilitate communication between the disputants to assist them in reaching a
10 mutually acceptable agreement. (Code Civ. Proc., § 1775.1(a).) Under these statutes, mediation is
11 voluntary and any party may withdraw from the process at any time for any reason. (Rule of Court
12 3.853.) Due to the voluntary nature of mediation, the court has no power to order mediation without the
13 parties' stipulation. (*Kirschenman v. Superior Court* (1994) 30 Cal.App.4th 832, 835.)

14 It was determined in *Jeld-Wen, Inc. v. Superior Court* (2007) 146 Cal.App.4th 536, 543, that the
15 a statutory scheme for mediation is specified in the Code of Civil Procedure. That a Case Management
16 Conference Order requiring that parties in complex cases attend and pay for mediation is not authorized
17 by the statutory scheme and is therefore contrary to the voluntary nature of mediation. The court
18 recognized that the essence of mediation is its voluntariness and rejected the suggestion that is being
19 made by cross-complainants here, that the trial court presiding over complex cases has the inherent
20 authority to force a party into mediation when they did not previously agree to participate in the dispute
21 resolution process.

22 Cross-Complainants are seeking a court order that essentially ignores the Code of Civil
23 Procedure and will make the mediation mandatory and binding on litigants who never agreed to
24 participate in the settlement process. They also seek to circumvent Rule of Court 3.854 which requires
25 confidentiality by mediators by requesting that the court order Mr. Dendy to provide status reports on
26 the negotiations. Diamond objects to any communications to this court by Mr. Dendy that discloses the
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1 substance of any communications by any party, or any substantive factual or legal matter, or any personal
2 observations or recommendations.

3 **B. Code of Civil Procedure Section 639 and Rule of Court 3.920**

4 Code of Civil Procedure section 639 provides the statutory scheme through which the court can
5 appoint a referee in the absence of consent to such an appointment. Said appointment must comply with
6 Code of Civil Procedure section 640(b), which provides:

7 " If the parties do not agree on the selection of the referee or referees, each party shall
8 submit to the court up to three nominees for appointment as referee and the court shall
9 appoint one or more referees, not exceeding three, from among the nominees against
10 whom there is no legal objection. If no nominations are received from any of the parties,
the court shall appoint one or more referees, not exceeding three, against whom there is
no legal objection, or the court may appoint a court commissioner of the county where
the cause is pending as a referee."

11 Cross-Complainant's Motion fails to allege compliance with Section 640 and any appointment
12 of Mr. Dendy as referee would not allow the non-consenting parties the right to submit nominees of their
13 own choosing.

14 Further, Rule of Court 3.920 limits the appointment of a referee to the purposes specified in
15 Section 639. These purposes are as follows:

16 "(1) When the trial of an issue of fact requires the examination of a long account on
17 either side; in which case the referees may be directed to hear and decide the whole issue,
or report upon any specific question of fact involved therein.

18 (2) When the taking of an account is necessary for the information of the court before
19 judgment, or for carrying a judgment or order into effect.

20 (3) When a question of fact, other than upon the pleadings, arises upon motion or
otherwise, in any stage of the action.

21 (4) When it is necessary for the information of the court in a special proceeding.

22 (5) When the court in any pending action determines that it is necessary for the court to appoint
23 a referee to hear and determine any and all discovery motions and disputes relevant to discovery
in the action and to report findings and make a recommendation thereon."

24
25 There are no provisions in Section 639 that authorize the court to unilaterally appoint Mr. Dendy
26 as a referee to conduct a forced mediation, even if it is called a Mandatory Settlement Conference.
27 Subsection (b) of Rule 3.920, specifically addresses this issue by stating that "A court must not use the
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1 reference procedure under Code of Civil Procedure section 639 to appoint a person to conduct a
2 mediation."

3 We take note of *Lu v. Superior Court* (1997) 55 Cal.App.4th 1264 (*Lu*), cited by cross-
4 complainants, which held that the trial court in complex litigation has the authority to order the parties
5 involuntarily to utilize and pay for the services of a private referee to conduct a settlement conference.
6 (Id. at pp. 1271-1272 at pp. 1271-1272.) The *Lu* case differs in one key aspect, the referee therein was
7 appointed as a discovery referee under Section 639 and as a mediator and declared that all mediations
8 were to be deemed Mandatory Settlement Conferences. The *Lu* court expressly recognized that Section
9 639 does not empower the court to appoint a referee to conduct settlement conferences, but nonetheless
10 found the authority to do just that under Code of Civil Procedure section 187. Nor did the court in *Lu*
11 address the Rules of Court governing appointment of referees. To the extent *Lu* suggests the court may
12 appoint a referee to preside over a settlement mediation without the parties' stipulation based on Section
13 187, it has since been disproved by *Jeld-Wen, Inc. v. Superior Court* (2007) 146 Cal.App.4th 536. (See
14 above.)

15 In the event the court rejects these arguments and appoints Mr. Dendy as a referee, Section 639
16 and Rule of Court 3.922, mandate that when the court makes such a reference order, it must do so in
17 writing setting forth, inter alia, a statement of reasons for the appointment. Diamond Farming hereby
18 requests that the court provide this writing with its ruling. Additionally, any such order must prohibit
19 any substantive communications by Mr. Dendy with the court.

20 **C. Rule of Court 1380**

21 This Rule simply provides the court with the authority to set a Mandatory Settlement Conference
22 and the procedures related there to and does not provide any additional authority upon which the court
23 may transform a few litigants' agreement to explore a negotiated settlement into a mandatory mediation.
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III.

CONCLUSION

For the foregoing reasons, cross-complainants' Motion must be denied.

Dated: August 3, 2007

LeBEAU • THELEN, LLP

By: 

BOB H. JOYCE

Attorneys for DIAMOND FARMING COMPANY,
a California corporation

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PROOF OF SERVICE

ANTELOPE VALLEY GROUNDWATER CASES
JUDICIAL COUNCIL PROCEEDING NO. 4408
CASE NO.: 1-05-CV-049053

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within action; my business address is: 5001 E. Commercenter Drive, Suite 300, Bakersfield, California 93309. On August 3, 2007, I served the within **DIAMOND FARMING'S OPPOSITION TO CROSS-COMPLAINANTS' MOTION FOR APPOINTMENT OF BILL B. DENDY AS MANDATORY SETTLEMENT CONFERENCE REFEREE**

☒ **(BY POSTING)** I am "readily familiar" with the Court's Clarification Order. Electronic service and electronic posting completed through www.scefiling.org ; All papers filed in Los Angeles County Superior Court and copy sent to trial judge and Chair of Judicial Council.

Los Angeles County Superior Court
111 North Hill Street
Los Angeles, CA 90012
Attn: **Department 1**
(213) 893-1014

Chair, Judicial Council of California
Administrative Office of the Courts
Attn: Appellate & Trial Court Judicial Services
(Civil Case Coordinator)
Carlotta Tillman
455 Golden Gate Avenue
San Francisco, CA 94102-3688
Fax (415) 865-4315

☐ **(BY MAIL)** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Bakersfield, California, in the ordinary course of business.

☐ **(OVERNIGHT/EXPRESS MAIL)** By enclosing a true copy thereof in a sealed envelope designated by United States Postal Service (Overnight Mail)/Federal Express/United Parcel Service ("UPS") addressed as shown on the above by placing said envelope(s) for ordinary business practices from Kern County. I am readily familiar with this business' practice of collecting and processing correspondence for overnight/express/UPS mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service/Federal Express/UPS in a sealed envelope with delivery fees paid/provided for at the facility regularly maintained by United States Postal Service (Overnight Mail/Federal Express/United Postal Service [or by delivering the documents to an authorized courier or driver authorized by United States Postal Service (Overnight Mail)/Federal Express/United Postal Service to receive documents].

☒ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct, and that the foregoing was executed on August 3, 2007, in Bakersfield, California.



DONNA M. LUIS