

**SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA**

Department 3

Honorable William J. Monahan, Presiding

Allison Croft, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2130

DATE: 3/12/2024 TIME: 9:00 A.M.

TO CONTEST THE RULING: Before 4:00 p.m. today (3/11/2024) you must notify the:

- (1) Court by calling (408) 808-6856 and
- (2) Other side by phone or email that you plan to appear and contest the ruling
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court prefers in person appearances. If you must appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to **Department 3**.

https://www.sccscourt.org/general_info/ra_teams/video_hearings_teams.shtml

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. Phone lines are now open for you to call and reserve a date before you file your motion. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Where to call for your hearing date: **408-882-2430** When you can call: **Monday to Friday, 8:30 am to 12:30 pm**

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.) **Please Note:** Any proposed orders must be submitted with the Judicial Council Form EFS-020 Proposed Order (Cover Sheet). Please include the date, time, dept. and line number.

COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

LINE #	CASE #	CASE TITLE	RULING
LINE 1	20CV366698	Lee Harris vs Joseph Nader et al	Hearing: Order of Examination of Joseph Nader, individually & dba Greenlight Motors C/F 6-15-23, 7/25/23, 8-24-23, 10-12-23 **c/f 2/13/2024 minute order** APPEAR.

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LINE 2	23CV420875	CAPITAL ONE, N.A. vs KIMBERLEY HANARAY	Motion: Admissions Deemed Admitted to defendant Kimberly Hanaray of all matters set forth in plaintiff's request for admissions, set one, filed by plaintiff Capital One, N.A. Unopposed and GRANTED. Plaintiff to prepare order.
LINE 3	21CV390387	Lisa Vanderpool vs Kenneth McCandless et al	Motion: Withdraw as attorney by John J. Garvey, III for Plaintiff Lisa Vanderpool Unopposed and GRANTED. Please update proposed order to show the next CMC is May 14, 2024, at 10:00 a.m. in Department 3. John J. Garvey, III to submit updated order.
LINE 4	22CV398371	CKS Prime Investments LLC vs Olga Dunster	Motion: Set Aside Default/Judgment and Dismiss case by Defendant Olga Dunster (In Pro Per) *continued from 2-1-24* Ctrl Click (or scroll down) on Line 4 for tentative ruling. The court will prepare the order.
LINE 5	22CV405270	Venkata Chandra vs Prophecy Technologies Corporation et al	Motion: Withdraw as attorney by Michael M. Ahmadshahi for defendant Prophecy Technology Corp. OFF CALENDAR. See Substitution of Attorney filed 10/24/2024 substituting Anthony Cartee in place of Michael Ahmadshahi as attorney for defendant Prophecy Technology Corp.

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LINE 6	23CV417074	FENGLIN LIU et al vs KENNETH GAE et al	Hearing: Motion Request for restricted access to court records by Plaintiffs Fenglin Liu (pro per) and Yue Ma (pro per) (“Moving Parties”). DENIED WITHOUT PREJUDICE. Moving Parties failed to comply with California Rules of Court Rules 2.550 to 2.551. The motion does <i>not</i> have a supporting declaration nor a proposed order that complies with those Rules. The Moving Parties must also provide a redacted copy of their complaint for the public record that complies with those Rules. All portions of their complaint (that are not placed under seal) must be in the public record. The court will prepare the order.
LINE 7	23CV427526	Swift Financial, LLC as Servicing Agent for WebBank vs Atlantis Glass, Inc., a California Corporation	Hearing: Confirm Arbitration Award by Petitioner Swift Financial OFF CALENDAR. No proof of service.
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LINE 12			

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Case Name: *CKS Prime Investments v Olga Dunster*

Case No.: 22CV398377

Defendant Olga Dunster (“Defendant”)’s motion to set aside default and requesting to dismiss case, due to statute of limitations is DENIED.

Defendant’s moving papers fail to cite any statutes or case law.

The Court, on its own volition, may take judicial notice of documents on file with the Court. (See *Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 752 [“the court may take judicial notice on its own volition”]; *Stepan v. Garcia* (1974) 43 Cal.App.3d 497, 500 [the court may take judicial notice of its own file].) Accordingly, the court takes judicial notice of its own file in this matter.

Plaintiff’s moving papers filed 10/10/2023 and on 2/1/2024 show her address is: 2694 GLEN DOON CT, SAN JOSE, CA 95148.

Here, the proof of service filed 6/29/2022 shows that Defendant was served by *substitute service*. It states that the summons and complaint (and other documents) were delivered to Jane Doe, an individual who refused to give their name who indicated they were a co-resident at the correct address for Defendant on 06/28/2022. There is a declaration of reasonable diligence and a declaration of mailing attached. The declaration of mailing states the documents were mailed, postage prepaid, to the same correct address for Defendant on 6/29/2022:

Olga Dunster, an individual
2694 GLEN DOON CT
SAN JOSE, CA 95148-4100.

Defendant admits in her motion that she “found these lawsuit documents outside my home on Friday, 10/07/22”, but does *not* explain why Defendant waited *over a year later* until 10/10/2023 to file this motion.¹ This is *not* reasonable diligence.

On 12/21/202, counsel for Plaintiff’s counsel mailed Defendant a demand letter for \$33,302.84 to this same address. (Ex. B to Plaintiff’s Opp.)

On 5/17/2022, the complaint was filed against Defendant for breach of contract and open book account for \$33,302.84, plus attorney’s fees and costs. (Ex. D to Plaintiff’s Opp.)

On 6/29/2022, the summons and complaint (and other documents) were mailed to Defendant at this same address. (See Declaration of Mailing attached to the Proof of Service filed 6/29/2022 in the court’s file.)

On 1/19/2023, Plaintiff’s counsel mailed Defendant a letter to the same address that: “THIS OFFICE HAS REQUESTED A JUDGMENT BE ENTERED AGAINST YOU.” (Ex. E to Plaintiff’s Opp.)

On 5/5/2023 Plaintiff’s counsel mailed Defendant a letter at the same address that: “A JUDGMENT HAS BEEN ENTERED AGAINST YOU.” (Ex. F to Plaintiff’s Opp.)

¹ The court assumes the lawsuit documents given by the process server to Jane Doe on 6/28/2022 are the ones that Defendant claims she found on Friday, 10/07/2022. However, Defendant’s motion does not talk about the same documents that were mailed by the process server to Defendant at the same address on 6/29/2022 or any of the other papers that Plaintiff shows were mailed to her correct address.

Despite all this mail, Defendant waited until 10/10/2023 to file this motion.

The court agrees with Plaintiff's argument that Defendant failed to act with due diligence to contest the case and Defendant's neglect was inexcusable.

As the court explained in *Price v. Hibbs* (1964) 225 Cal.App.2d 209, 215:

[T]he moving party must show 'mistake, inadvertence, surprise or excusable neglect.'

As was said in *Elms v. Elms*, 72 Cal.App.2d 508, 513 [164 P.2d 936]: 'It is the duty of every party desiring to resist an action or to participate in a judicial proceeding to take timely and adequate steps to retain counsel or to act in his own person to avoid an undesirable judgment. Unless in arranging for his defense he shows that he has exercised such reasonable diligence as a man of ordinary prudence usually bestows upon important business his motion for relief under section 473 will be denied . . .

(*Price, supra*, 225 Cal.App.2d at 215.) "The party seeking relief must show that he acted in good faith and that his [or her] neglect was *excusable*." (*H. A. Pulaski, Inc. v. Abbey Contractor Specialties, Inc.* (1969) 268 Cal.App.2d 883, 886.) "The neglect to be excusable must be an act or omission which might have been committed by a reasonably prudent person under the same circumstances." (*Transit Ads, Inc. v. Tanner Motor Livery, Ltd.* (1969) 270 Cal.App.2d 275, 279.)

"While this section [Code Civ. Proc., § 473] is remedial and to be liberally construed [citations] the moving party must show 'mistake, inadvertence, surprise or excusable neglect.' . . . The burden of proof on such a motion is on the moving party who must establish his position by a preponderance of the evidence." [Citation.]

(*Transit Ads, Inc., supra*, 270 Cal.App.2d at 279.)

Defendant contends that the amount in the complaint/default judgment is incorrect. Plaintiff contends it is correct. Plaintiff's demand letter mailed to Defendant *before* the lawsuit was filed was for \$33,302.84. (Ex. B to Plaintiff's Opp.) The amount requested in the complaint is \$33,302.84, plus attorney's fees and costs. The default judgment filed 4/14/2023 in the court's file is for \$33,302.84, plus attorney's fees and costs. Plaintiff has failed to show that the amount is incorrect.

Defendant contends that she does not have the ability to pay. However, Defendant has cited no authority showing that inability to pay is a defense. Defendant has failed to show that her inability to pay is a defense.

Defendant's motion to set aside the DEFAULT is DENIED.

Defendant contends that she made her last payment on 11/23/2018, and Plaintiff claims it was received on 11/28/2018. Either date is within 4 years of the date the complaint was filed on 5/17/2022. The statute of limitations for breach of written contract and upon a book account in Code of Civil Procedure section 337 is 4 years. "In ordinary . . . contract actions, the statute of limitations, it is true, begins to run upon the occurrence of the last element essential to the cause of action. (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 187.) Here, the complaint was filed within 4 years of the date of last payment.

Defendant's request to dismiss the case due to statute of limitations is DENIED.

Accordingly, Defendant's motion and request is DENIED.

The court will prepare the order.

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