

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

(Dept 16 is now hearing cases that were formerly in Dept 2)

Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 12-14-23 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear by video.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.

Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.

The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

TO CONTEST THE RULING: Before 4:00 p.m. today 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 strongly 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 16.

https://www.scsccourt.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.)

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.

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3.1312.)**

LINE #	CASE #	CASE TITLE	RULING
LINE 1	19CV356647 Motion: Summary Judgment/Adjudication	LEAL & TREJO, APC et al vs ALUM ROCK UNION ELEMENTARY SCHOOL DISTRICT	See Tentative Ruling. Court will prepare the final order.
LINE 2	20CV373069 Motion: Compel	Paul Battaglia vs Nilufer Koechlin	Continued to 3-14-24 at 9am in department 16.
LINE 3	20CV373069 Motion: Compel	Paul Battaglia vs Nilufer Koechlin	Continued to 3-14-24 at 9am in department 16.
LINE 4	20CV373069 Motion: Compel	Paul Battaglia vs Nilufer Koechlin	Continued to 3-14-24 at 9am in department 16.
LINE 5	20CV373069 Motion: Compel	Paul Battaglia vs Nilufer Koechlin	Continued to 3-14-24 at 9am in department 16.
LINE 6	18CV336508 Hearing: Motion for Purposes of providing Damages	Dominic Dunning et al vs Scott Taylor	Given that the default was set aside by agreement of both parties, this motion is taken off calendar.

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LINE 7	22CV400604 Motion: Tax Cost	Yuannan Cai vs Xianzhi Ruan	The Court agrees that because it has already ordered Plaintiff to pay \$1500 in sanctions to Defendant, that amount should not be part of Defendant's costs. To this extent, Plaintiff's motion to tax costs is GRANTED. The Court agrees that a judgment awarding both the costs of \$1,029.32 and the amount of \$1500 in sanctions, as ordered by the Court on August 31, 2023 is proper. Defendant shall submit the final order and judgment.
LINE 8	23CV415894 Hearing: Pro Hac Vice Counsel	Khayti Sheth et al vs Geralyn Glowinski et al	It does not appear notice was proper. The moving party shall notify all other parties and all parties shall appear at the hearing and if the motion is unopposed it shall be granted. Otherwise the motion will need to be continued to allow for proper notice. If the moving party fails to appear, the motion will go off calendar.
LINE 9			
LINE 10			
LINE 11			
LINE 12			

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Calendar Line 1

Case Name: *Leal & Trejo, APC. v. Alum Rock Union Elementary School District*

Case No.: 19CV356647

This is a fee dispute. According to the allegations of the first amended complaint (“FAC”), on February 8, 2019, plaintiff Leal & Trejo, APC (“Plaintiff”) entered into a written agreement with defendant Alum Rock Union Elementary School District (“Defendant” or “District”) in which Plaintiff agreed to provide legal services as General Counsel for District and District agreed to pay Plaintiff for such services. (See FAC, ¶ 7.) Plaintiff provided legal services and advanced costs and expenses for District and invoiced District for those services, costs and expenses. (See FAC, ¶ 8.) District has failed to pay the remaining balance of Plaintiff’s legal invoices, totaling \$336,016.42 in unpaid legal fees and costs, as well as the contractually agreed service charge and interest. (See FAC, ¶ 9.) On May 1, 2019, Plaintiff served District with a claim for damages pursuant to Government Code § 910, et seq., to which District did not respond. (See FAC, ¶ 10.) On September 4, 2019, Plaintiff served District with the State Bar Approved Form Notice of Client’s Right to Arbitration setting forth District’s right to arbitration as set out in Business & Professions Code sections 6200-6206. (See FAC, ¶ 11.) Plaintiff has not received any response from District to the Notice. (*Id.*)

On January 6, 2020, Plaintiff filed the FAC against District, asserting a single cause of action for breach of contract.

District moves for summary judgment, arguing that the breach of contract cause of action lacks merit because: Plaintiff breached the agreement and the Rules of Professional Conduct when it concurrently defended and represented Board Member Dolores Marquez in the SEC investigation; Plaintiff breached the agreement by billing the District for paralegal services by its employee Savannah Skelton who was not actually a paralegal; and, Plaintiff cannot recover fees for the unauthorized FPPC Complaint and appeal, and the petition and complaint against the Santa Clara County Office of Education and the Leal declaration.

I. DEFENDANT DISTRICT’S MOTION FOR SUMMARY JUDGMENT

Defendant’s burden on summary judgment

“A defendant seeking summary judgment must show that at least one element of the plaintiff’s cause of action cannot be established, or that there is a complete defense to the cause of action. ... The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue.” (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72; internal citations omitted; emphasis added.)

“The ‘tried and true’ way for defendants to meet their burden of proof on summary judgment motions is to present affirmative evidence (declarations, etc.) negating, as a matter of law, an essential element of plaintiff’s claim.” (Weil et al., Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2007) ¶ 10:241, p.10-91, *citing* *Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 334; emphasis original.) “The moving party’s declarations and evidence will be strictly construed in determining whether they negate (disprove) an essential element of plaintiff’s claim ‘in order to avoid unjustly depriving the plaintiff of a trial.’” (*Id.* at § 10:241.20, p.10-91, *citing* *Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.)

“Another way for a defendant to obtain summary judgment is to ‘show’ that an essential element of plaintiff’s claim cannot be established. Defendant does so by presenting evidence that plaintiff ‘does not possess and cannot reasonably obtain, needed evidence’ (because plaintiff must be allowed a reasonable opportunity to oppose the motion.) Such evidence usually consists of admissions by plaintiff following extensive discovery to the effect that he or she has discovered nothing to support an essential element of the cause of action.” (*Id.* at ¶ 10:242, p.10-92, *citing Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854-855.)

District’s request for judicial notice

In support of its motion, District requests judicial notice of the following documents:

- 1) The 1992 California Rules of Professional Conduct, effective from September 14, 1992 to October 31, 2018 (attached as Exhibit 1);
- 2) The October 29, 2018 Leal declaration submitted by H. Francisco Leal in the civil harassment restraining order proceeding *Bauer v. Tran* (Super. Ct. Santa Clara County, 2018, No. 18CV008305) (attached as Exhibit 2);
- 3) The October 29, 2018 minute order after hearing in the civil harassment restraining order proceeding *Bauer v. Tran* (Super. Ct. Santa Clara County, 2018, No. 18CV008305), showing that Tran submitted Leal’s declaration in support of his opposition to Superintendent Bauer’s application for a restraining order (attached as Exhibit 3); and,
- 4) The October 31, 2018 restraining order after hearing in the civil harassment restraining order proceeding *Bauer v. Tran* (Super. Ct. Santa Clara County, 2018, No. 18CV008305) (attached as Exhibit 4).

The request for judicial notice of the Rules of Professional Conduct is GRANTED. (See Evid. Code § 451, subd. (c); see also *Day v. Rosenthal* (1985) 170 Cal.App.3d 1125, 1147 (stating that “the trial court was compelled to notice... professional standards... [t]he standards governing an attorney’s ethical duties are conclusively established by the Rules of Professional Conduct”).) The request for judicial notice of the existence of the Leal declaration is GRANTED. (Evid. Code § 452, subd. (d); see also *Richtek USA, Inc. v. uPI Semiconductor Corp.* (2015) 242 Cal.App.4th 651, 658 (stating that “while courts are free to take judicial notice of the *existence* of each document in a court file, including the truth of results reached, they may not take judicial notice of the truth of hearsay statements in decisions and court files”).) The request for judicial notice of the orders is also GRANTED. (Evid. Code § 452, subd. (d); see also *Richtek USA, supra*, 242 Cal.App.4th at p.658 (stating that “[t]he court may in its discretion take judicial notice of any court record in the United States... includ[ing] any orders”).)

There is a triable issue as to whether Plaintiff concurrently represented Board Member Dolores Marquez in the SEC investigation

In support of District’s assertion that Plaintiff violated the Rules of Professional Conduct—and by extension, breached the contract—by concurrently defending and representing Board Member Dolores Marquez in the SEC investigation, District presents the following material facts: from December 2008 to December 17, 2020, Dolores Marquez was a

member of the District's Board of Trustees (Pl.'s separate statement of undisputed material facts in opposition to motion for summary judgment, no. ("UMF") 13); on September 27, 2017, the United States Securities and Exchange Commission ("SEC") issued its non-public "Order Directing Private Investigation and Designating Officers to Take Testimony" ("the SEC order") in *In the matter of Alum Rock Union Elementary School District* (SF-4170) ("the SEC investigation") (UMF 14); the SEC order specified that the SEC had "information that tends to show that from at least March 2013" the District and its "officers," "Board of Trustees members," and others "directly or indirectly, in the offer or sale or in connection with the purchase or sale of certain securities, may have been or may be employing devices, schemes, or artifices to defraud, obtaining money or property by means of untrue statements of material fact or omitting to state material facts necessary in order to make the statements made, in light of the circumstances under which they were or are made, not misleading, or engaging in transactions, acts, practices or courses of business which operated, operate, or would operate as a fraud or deceit upon any person," and that "[a]s a part of or in connection with these activities, such persons or entities, directly or indirectly, may have been or may be, among other things, making false statements of material fact or failing to disclose material facts concerning, among other things, Alum Rock's ability to make payments due to investors who purchased certain of its securities, and conflicts of interest related to the district's securities program" (UMF 15); as a member of the Board of Trustees at the time the SEC Order was issued, District asserts that Dolores Marquez was a person who was under investigation by the SEC (UMF 16); Plaintiff advised District's Board of Trustees that the SEC investigation was a "federal criminal investigation" (UMF 17); the SEC issued a subpoena to Board Members Dolores Marquez dated September 26, 2018, which required Marquez to testify under oath before the SEC and to produce her and her husband's personal financial information (UMF 18); District asserts that Plaintiff represented and defended Dolores Marquez in connection with the SEC investigation and appeared with Marquez and defended Marquez in connection with her testimony to the SEC (UMF 19); District asserts that as a part of its representation and defense of Dolores Marquez, Plaintiff reviewed and produced the personal, private and confidential banking and financial information of Dolores Marques (UMF 20); District asserts that the interests of the District and the interests of Dolores Marquez in the SEC investigation potentially or actually conflicted since the District and Dolores Marquez were each subjects of the SEC investigation pursuant to the SEC order (UMF 21); Plaintiff did not inform District of any actual or potential conflict of interest arising from its representation of Dolores Marquez in the SEC investigation (UMFs 22-23); Plaintiff did not obtain the informed written consent of the District's Board of Trustees to represent Dolores Marquez in the SEC investigation (UMF 24); Plaintiff asserts that District's Board of Trustees did not authorize Plaintiff to represent Dolores Marquez in connection with the SEC investigation (UMF 25); and, District asserts that Plaintiff billed District and is seeking to recover in this action more than \$8,000 in legal fees for its unauthorized representation and defense of Dolores Marquez in connection with the SEC investigation (UMF 26).

District cites to Rule of Professional Conduct 3-310, which "prohibits the concurrent representation of clients in certain circumstances without the informed written consent of each client." (*Gong v. RFG Oil, Inc.* (2008) 166 Cal.App.4th 209, 214 (also noting that the rule provides that "[a] member shall not, without the informed written consent of each client: [¶] (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or [¶] (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict").)

Here, the primary issue is whether Plaintiff represented Marquez. In support of their assertion in UMF 19 that Plaintiff “represented and defended Dolores Marquez in connection with the SEC investigation,” District presents deposition testimony of Maribel Medina, invoices for October 2018, and a discovery response in which Plaintiff admits providing legal representation to Dolores Marquez in connection with the subpoena issued to her by the SEC. District does not point to any specific line items in the invoices in either the separate statement or its supporting memorandum of points and authorities. The deposition testimony cited in the separate statement also does not indicate that Plaintiff represented Marquez in her individual capacity. Rather, when asked if she defended Marquez, Medina responds that she accompanied Marquez to give testimony and it was a subpoena to give testimony, not a deposition, so there was no defense. Nevertheless, if District met its initial burden to demonstrate that Plaintiff concurrently represented Marquez, Plaintiff presents Medina’s declaration which explains that neither she nor Plaintiff represented Marquez in her individual capacity, and when Medina attended the SEC interview of Marquez, she was there to represent District and to report back to District about the interview. (See Medina decl. in support of District’s motion for summary judgment, ¶ 21.) Further, Plaintiff never signed a retainer with Marquez and the only “representation issues” discussed with Marquez was that Medina was representing District at the interview. (*Id.*) The SEC investigation was titled *In the Matter of Alum Rock Union Elementary School District* (SF-4170) and there was never an investigation titled *In the matter of Dolores Marquez* or any investigation into Marquez as an individual. (*Id.* at ¶ 22.) Marquez claimed that she did nothing wrong and that District did nothing wrong—thus, there was no possibility of a conflict. (*Id.*) Here, it is clear that there is at least a triable issue of material fact as to whether Plaintiff represented Marquez and thus violated Rule of Professional Conduct 3-310(C).

As the motion may not be granted on this basis, it is unnecessary to address Plaintiff’s remaining arguments in opposition that: District authorized Plaintiff’s attendance at the SEC interviews including the Marquez interview; Plaintiff advised the Board on the SEC interviews and investigation; the entirety of all legal fees would not be forfeited, if at all; any breach relating to conflict was waived; and, District is estopped from claiming that the work done by Plaintiff renders the entire contract null and void since it knew and authorized Plaintiff to do the work.

District’s objections numbers 13-18 to the Medina declaration are OVERRULED.

District fails to meet its initial burden as to the billing regarding Savannah Skelton

District argues that the “nearly \$50,000” was billed to it from plaintiff for paralegal services by Plaintiff’s employee, Savannah Skelton, who was never a qualified paralegal. (See District’s memo, p.13:18-21.) District cites to Business and Professions Code section 6450, subdivision (c), which states:

A paralegal shall possess at least one of the following:

- (1) A certificate of completion of a paralegal program approved by the American Bar Association.
- (2) A certificate of completion of a paralegal program at, or a degree from, a postsecondary institution that requires the successful completion of a minimum of 24 semester, or

equivalent, units in law-related courses and that has been accredited by a national or regional accrediting organization or approved by the Bureau for Private Postsecondary and Vocational Education.

(3) A baccalaureate degree or an advanced degree in any subject, a minimum of one year of law-related experience under the supervision of an attorney who has been an active member of the State Bar of California for at least the preceding three years or who has practiced in the federal courts of this state for at least the preceding three years, and a written declaration from this attorney stating that the person is qualified to perform paralegal tasks.

(4) A high school diploma or general equivalency diploma, a minimum of three years of law-related experience under the supervision of an attorney who has been an active member of the State Bar of California for at least the preceding three years or who has practiced in the federal courts of this state for at least the preceding three years, and a written declaration from this attorney stating that the person is qualified to perform paralegal tasks. This experience and training shall be completed no later than December 31, 2003.

(Bus. & Prof. Code, § 6450, subd. (c).)

District contends that “[t]he evidence in this case plainly establishes that Ms. Skelton was never a qualified paralegal... never possessed the certifications or declarations of supervising attorneys specified in Business and Professions Code section 6450... [t]herefore, all of Plaintiff’s nearly \$50,000 in billings for Ms. Skelton’s time were not only unauthorized but false.” (District’s memo, p.14:17-20.) However, even if true, this argument does not address the remainder of the alleged legal fees owed to Plaintiff. “If a cause of action is not shown to be barred in its entirety, no order for summary judgment—or adjudication—can be entered.” (*Palm Springs Villas II Homeowners Assn., Inc. v. Parth* (2016) 248 Cal.App.4th 268, 288.) District fails to meet its initial burden on summary judgment with respect to its argument regarding the billing of Savannah Skelton.

District likewise fails to meet its initial burden as to purportedly unauthorized billings for the FPPC complaint and the appeal, the petition and complaint against the Santa Clara County Office of Education, and the Leal declaration.

District also argues that Plaintiff cannot recover fees regarding the FPPC complaint and the appeal, the petition and complaint against the Santa Clara County Office of Education, and the Leal declaration because they were not authorized by District. (See District’s memo, pp.14:21-27, 15:1-5.) However, like the argument regarding Ms. Skelton’s work, the work for these filings are only as to portions of the damages sought by Plaintiff for the alleged breach of the legal services contract. Therefore, as with the prior argument, District fails to meet its initial burden on summary judgment with respect to its argument regarding the purportedly unauthorized billings.

The Court does not consider District's new argument in reply

District newly argues in its reply brief heading that the “unauthorized charges of nearly \$50,000 for an unqualified paralegal was a serious violation of Plaintiff’s [sic] fiduciary duties and the only appropriate remedy for Plaintiff’s breaches is forfeiture.” (District’s reply brief in support of motion for summary judgment, p.10:5-8.) To the extent that District intended to argue that the charging of fees for Ms. Skelton should result in a complete forfeiture of all fees charged by Plaintiff, this is an argument raised for the first time in reply and is not considered. (See *Raceway Ford Cases* (2016) 2 Cal.5th 161, 178 (stating that “[w]e generally do not consider arguments raised for the first time in a reply brief”); see also *REO Broad. Consultants v. Martin* (1999) 69 Cal.App.4th 489, 500 (stating that “[t]his court will not consider points raised for the first time in a reply brief for the obvious reason that opposing counsel has not been given the opportunity to address those points”); see also *People ex rel. Feuer v. Super. Ct. (Cahuenga’s the Spot)* (2015) 234 Cal.App.4th 1360, 1384 (stating that “raising arguments for the first time in a reply brief is unfair to the other parties, who lack an opportunity to respond”); see also *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 (stating that “[p]oints raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument... [o]bvious reasons of fairness militate against consideration of an issue raised initially in the reply brief”).) Moreover, the argument in the heading is not supported by any reasoning or argument in the paragraph below. Accordingly, even if the argument were to be considered, it is without merit.

Accordingly, District’s motion for summary judgment is DENIED in its entirety.

Plaintiff’s objections to the Cheng, Bauer, Quintero, and Ruiz declarations and District’s objections in reply numbers 1-12 and 19-37 to the Medina declaration and the declarations of Leal and Marquez are not the basis for the Court’s ruling.

The Court will prepare the Order.