

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

Department 16

(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: 03-19-24 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear in person or by video. Parties are asked NOT to appear by telephone only.

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.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.)

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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LINE #	CASE #	CASE TITLE	RULING
LINE 1	23CV419416 Motion: Strike	George Leanos vs City of Mountain View et al	Notice appearing proper and good cause appearing, Defendant CA DOT's unopposed demurrer to the FAC is SUSTAINED without leave to amend. The failure to file an opposition "creates an inference that the motion or demurrer is meritorious." <i>Sexton v. Superior Court</i> (1997) 58 Cal.App.4th 1403, 1410. Because the demurrer is sustained, the motion to strike is moot. CA DOT shall submit the final order.
LINE 2	23CV419416 Hearing: Demurrer	George Leanos vs City of Mountain View et al	Notice appearing proper and good cause appearing, Defendant CA DOT's unopposed demurrer to the FAC is SUSTAINED without leave to amend. The failure to file an opposition "creates an inference that the motion or demurrer is meritorious." <i>Sexton v. Superior Court</i> (1997) 58 Cal.App.4th 1403, 1410. Because the demurrer is sustained, the motion to strike is moot. CA DOT shall submit the final order.

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<u>LINE 3</u>	23CV426021 Motion: Strike	Austin de Tagle vs Elizabeth Sanchez	Notice appearing proper and good cause appearing, Defendant's anti-slap motion is GRANTED. The failure to file an opposition "creates an inference that the motion or demurrer is meritorious." <i>Sexton v. Superior Court</i> (1997) 58 Cal.App.4th 1403, 1410. Moreover, Plaintiff's filing of an amended complaint does not moot the motion. See <i>Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.</i> (2004) 122 Cal.App.4th 1049, 1052. Plaintiff is required to pay Defendant's counsel attorney fees in the amount of \$3600 (for 8 hours). No sanctions are imposed. Defendant shall submit the final order.
<u>LINE 4</u>	20CV366503 Hearing: Motion Summary Judgment	Spartan Tank Lines, Inc vs Anna Le et al	See Tentative Ruling. Court will issue final order.

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

LINE 5	21CV385112 Motion: Compel	Quintara Biosciences, Inc. vs Gangyou Wang et al	Notice appearing proper and good cause appearing, Defendant's motion to compel (admissions from Wang) is GRANTED. The failure to file an opposition ""creates an inference that the motion or demurrer is meritorious."" <i>Sexton v. Superior Court</i> (1997) 58 Cal.App.4th 1403, 1410. Sanctions are granted in the amount of \$1500. Plaintiff shall provide code compliant responses and sanctions within 20 days of final order. Defendant shall submit the final order within 10 days.
LINE 6	21CV385112 Motion: Compel	Quintara Biosciences, Inc. vs Gangyou Wang et al	Notice appearing proper and good cause appearing, Defendant's motion to compel (FROGS from Wang) is GRANTED. The failure to file an opposition ""creates an inference that the motion or demurrer is meritorious."" <i>Sexton v. Superior Court</i> (1997) 58 Cal.App.4th 1403, 1410. Sanctions are granted in the amount of \$1500. Plaintiff shall provide code compliant responses and sanctions within 20 days of final order. Defendant shall submit the final order within 10 days.

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

LINE 7	21CV385112 Motion: Compel	Quintara Biosciences, Inc. vs Gangyou Wang et al	Notice appearing proper and good cause appearing, Defendant's motion to compel (special interrogatories from Wang) is GRANTED. The failure to file an opposition "creates an inference that the motion or demurrer is meritorious." <i>Sexton v. Superior Court</i> (1997) 58 Cal.App.4th 1403, 1410. Sanctions are granted in the amount of \$1500. Plaintiff shall provide code compliant responses and sanctions within 20 days of final order. Defendant shall submit the final order within 10 days.
LINE 8	20CV368897 Motion to Amend Judgment	Hoge, Fenton, Jones & Appel, Inc. et al vs G9 Smart Solutions LLC	Case has been reassigned to D3 and a new hearing date set.
LINE 9	21CV389919 Motion: Set Aside Default/Judgment	Grantham Winfrey vs Michelle McIntyre	See Tentative Ruling. Plaintiff shall submit the final order.
LINE 10			
LINE 11			
LINE 12			
LINE 13			
LINE 14			
LINE 15			

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LINE 16			
LINE 17			

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Calendar Line 4

Case Name: *Spartan Tank Lines, Inc. v. American Gas & Oil Corp., et al.*

Case No.: 20CV366503

According to the allegations of the fourth amended complaint (“4AC”), on December 30, 2009, Spartan Tank Lines, Inc. (“Spartan”) entered into a written agreement for the sale of petroleum products at prices set by Spartan on the date of delivery of each shipment delivered to defendant American Gas & Oil Corporation (“AGOC”). (See 4AC, first cause of action, ¶ BC-1.) AGOC failed to pay and Spartan sought damages in the amount of \$31,945.19 plus finance charges and interest and attorney’s fees of \$2,058.00. (See 4AC, first cause of action, ¶¶ BC-2-6.) Defendant Annie Kim Le, aka Annie Le, aka Annie K. Le, Annie A. Le, aka Anh Le, aka Kim Le, aka, Kim A. Le, aka Annie Le Anna, aka K. Le Anna, aka K. Leannie, aka K. L. Leannie dba American Gas & Oil Corporation and dba Philip, LLC (“Le”) personally guaranteed and promised to pay Spartan upon Spartan’s demand of any indebtedness of AGOC. (See 4AC, third cause of action, ¶¶ 11-17.)

On June 30, 2022, plaintiff Tom Lopes Distributing, Inc., assignee of Spartan Tank Lines, Inc. (“Plaintiff”) filed the 4AC against defendants AGOC, Le, B&R Gasoline Corporation, Suong Phung aka Suong Thao Phung, Tra My Nguyen aka Tramy Nguyen, Philip, LLC, and K&S Realty, Inc. (collectively, “Defendants”)¹ asserting causes of action² for:

- 1) Breach of contract;
- 2) Common counts;
- 3) Breach of personal guarantee;
- 4) Avoid fraudulent transfers;
- 5) Avoid fraudulent transfers; and,
- 6) Fraud.

On February 28, 2023, the Court [Hon. Deen] filed its order granting that facts be deemed admitted as true and monetary sanctions against Le. On April 20, 2023, the Court filed its order granting Plaintiff’s motion to compel further responses to requests for production of documents, set one and monetary sanctions against defendant Suong Thao Phung (“Phung”). On July 19, 2023, the Court filed its order granting monetary sanctions in the amount of \$4,420 against Le. On August 3, 2023, the Court filed its order granting Plaintiff’s motion for issue sanctions against Phung. On December 13, 2023, the Court filed its order granting Plaintiff’s motion for issue sanctions against Le.

Plaintiff moves for summary judgment against defendants Le, Phung dba B&R Gasoline Corporation, dba KS & Associates, Inc., dba K&S Realty, Inc., and dba K&S Realty, LLC. Defendants did not file any opposition to the motion.

¹ The 4AC also named defendants Anna Ngoc Le and Nhan Tran Nguyen. However, on December 16, 2022, the Court [Hon. Takaichi] filed an order sustaining Anna Ngoc Le and Nhan Tran Nguyen’s demurrer to the 4AC without leave to amend.

² The 4AC identifies Tom Lopes Distributing, Inc., assignee of Spartan Tank Lines, Inc. as the plaintiff for the sixth cause of action for fraud; however, the 4AC otherwise identifies the plaintiff elsewhere as Spartan Tank Lines, Inc.

I. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff's burden on summary judgment

The moving party bears the initial burden of production to make a prima facie showing that there are no triable issues of material fact—one sufficient to support the position of the party in question that no more is called for. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851.) Plaintiffs moving for summary judgment bear the burden of persuasion that each element of the cause of action in question has been proved, entitling the party to judgment. (Code Civ. Proc. § 437c, subd.(p)(1).) Plaintiffs, who bear the burden of proof at trial by preponderance of evidence, therefore “must present evidence that would require a reasonable trier of fact to find the underlying material fact more likely than not—otherwise he would not be entitled to judgment as a matter of law, but would have to present his evidence to a trier of fact.” (*Aguilar, supra*, 25 Cal.4th at p.851.) “Once the plaintiff... has met that burden, the burden shifts to the defendant... to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto.” (*Thompson v. Ioane* (2017) 11 Cal.App.5th 1180, 1195 (Sixth District case), quoting Code Civ. Proc. § 437c, subd. (p)(1).)

Plaintiff fails to meet its initial burden as to KS & Associates, Inc. and K&S Realty, LLC

Plaintiff moves for summary judgment against Phung dba B&R Gasoline Corporation, dba KS & Associates, Inc., dba K&S Realty, Inc., and dba K&S Realty, LLC. However, neither KS & Associates, Inc. nor K&S Realty, LLC are parties or named as dbas in this action. As such, Plaintiff fails to meet its initial burden as to these entities.

Plaintiff fails to meet its initial burden as to the amount of damages.

Plaintiff seeks recovery for damages for breach of contract and breach of the personal guarantee in the amount of \$34,195.19, plus \$24,549.00 in finance charges. (See Pl.'s separate statement of undisputed material facts, nos. (“UMFs”) 1-4.) Plaintiff also seeks damages for fraud in the amount of \$31,945.19, plus finance charges, costs of suit and reasonable attorney's fees. (See UMFs 5-15.) However, the separate statement fails to set forth the amount of attorney's fees sought. (See UMFs 1-15.) “Both the court and the opposing party are entitled to have all the facts upon which the moving party bases its motion plainly set forth in the separate statement.” (*California-American Water Co. v. Marina Coast Water Dist.* (2022) 86 Cal.App.5th 1272, 1296.) “And if the separate statement does not contain all material facts on which the motion is based, the moving party has failed to meet its initial burden of production and is ‘not entitled to summary adjudication as a matter of law.’” (*Id.*) The amount of damages is a necessary element of either a breach of contract (or guarantee) cause of action or a fraud cause of action. (See *Acoustics, Inc. v. Trepte Construction Co.* (1971) 14 Cal.App.3d 887, 913 (stating that damages is an element of a breach of contract cause of action); see also *Lazar v. Super. Ct. (Rykoff-Sexton, Inc.)* (1996) 12 Cal. 4th 631, 638 (stating that resulting damages is an element for a fraud cause of action); see also *Pajaro Valley Water Management Agency v. McGrath* (2005) 128 Cal.App.4th 1093, 1106 (stating that “the Agency could not establish a prima facie entitlement to summary judgment without showing both the fact *and the amount* of damages”) (emphasis original), citing Code Civ. Proc. § 437c, subd.(p)(1) (stating that “[a] plaintiff... has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on the cause of action”); see also *CDF Firefighters v. Maldonado* (2008) 158

Cal.App.4th 1226, 1239 (stating same).) Accordingly, to the extent that Plaintiff seeks summary judgment inclusive of the amount of attorney's fees, it fails to meet its initial burden. (See *California-American Water Co.*, *supra*, 86 Cal.App.5th at p.1296.)

Subsequent to filing its motion, Plaintiff then filed additional documents: a supplemental declaration of Joseph P. Thompson seeking further attorney's fees, filed on February 26, 2024; and, a second supplemental declaration of Joseph P. Thomson, seeking even further attorney's fees, filed on March 1, 2024. As a preliminary matter, evidence submitted for the first time in reply in support of a motion for summary judgment cannot be considered as it violates the opposing party's due process rights. (See *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316 (stating that "[i]n considering this evidence... not filed until after assignee had responded to the issues raised in the separate statement... the court violated assignee's due process rights"); see also *Maleti v. Wickers* (2022) 82 Cal.App.5th 181, 227 (stating that "[t]he general rule of motion practice... is that new evidence is not permitted with reply papers"); see also *Moore v. William Jessup University* (2015) 243 Cal.App.4th 427, 432, fn. 3 (stating that "[g]enerally, a party moving for summary judgment may not rely on new evidence filed with its reply papers"); see also *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537 (stating that "[t]he general rule of motion practice, which applies here, is that new evidence is not permitted with reply papers"); see also *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 252 (stating that "[n]o such evidence... [submitted] in support of reply... is generally allowed").) Moreover, this evidence highlights the fact that Plaintiff did not demonstrate an amount of damages. (See Code Civ. Proc. § 437c, subds. (a)(2) (stating that "supporting papers shall be served on all other parties to the action at least 75 days before the time appointed for hearing"), (b)(1) (stating that "[t]he motion shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken"); see also Cal. Rule of Court 3.1350, subd. (c)(4) (requiring evidence in support of motion for summary judgment to be submitted with motion).)

Accordingly, Plaintiff's motion for summary judgment is DENIED in its entirety. The Court will prepare the Order.

Calendar line 9

Case Name: Grantham Winfrey v. Michelle McIntyre

Case No: 21CV389919

Defendant Michelle McIntyre moves to set aside the default and default judgment against her under CCP 437(b) and 473.5, claiming mistake, inadvertence, surprise, or excusable neglect.

Defendant claims that the default should be set aside because she did not receive actual notice of the amended complaint, such that her failure to file an answer is excusable. In fact, Defendant did receive legal and sufficient notice of the amended complaint. The summons and first amended complaint were served by substitute service on Defendant's husband at Defendant's address. See Exh. G to Dutra Decl. Under Evidence Code Section 647, there is a presumption that the POS is accurate. Defendant does not assert any facts to suggest that the address was inaccurate or that the person served was not a proper person for substitute service. As such, and under CCP 415.20(b), the service was proper. Defendant fails to offer any basis for why she did not receive service of the amended complaint that would excuse her failure to answer the complaint.

Defendant's additional claims (i.e. that Plaintiff failed to tell her, that Plaintiff waited four months to file, etc.) do not constitute excusable neglect on her part. Plaintiff had no obligation other than through proper service to notify her. And in any event, Plaintiff did in fact say that it was planning to file an action, such that Defendant was aware an amended complaint could be expected. Because Defendant has failed to assert any basis for a finding of mistake, inadvertence, surprise, or excusable neglect, the motion is DENIED.

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