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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JOSEPH ANDERSON, Plaintiff and Appellant, v. WILLIAM GLANTZ et al., Defendants and Respondents.	B294112 (Los Angeles County Super. Ct. No. BC568443)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert B. Broadbelt, Judge. Affirmed.

Rovens Lamb and Douglas J. Rovens for Plaintiff and Appellant.

Hanger Steinberg Shapiro & Ash, Jody Steinberg and Nicholas S. Walls for Defendants and Respondents.

INTRODUCTION

On September 7, 2018 the trial court granted a motion by William Glantz, Phyllis Glantz, and the Glantz Family Trust for summary judgment on the complaint by Joseph and Kathleen Anderson for trespass, negligence, private nuisance, and nuisance based on construction of a spite fence. Joseph Anderson (Anderson) argues the trial court abused its discretion in denying the Andersons' request to continue the hearing on the motion to allow them to correct the evidentiary defects in their opposition papers. Anderson also argues the court should have exercised its discretion to deny the Glantzes' motion for summary adjudication on the Andersons' spite fence cause of action under Code of Civil Procedure section 437c, subdivision (e),[1] which gives the court discretion to deny a motion for summary judgment or summary adjudication where the motion is based on the credibility of a statement by the defendant about his or her state of mind. Finally, Anderson contends the court erred in ruling the statute of limitations barred the Andersons' other causes of action.

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[1] Undesignated statutory references are to the Code of Civil Procedure.

We conclude the trial court did not abuse its discretion in denying the Andersons' request for a continuance under section 437, subdivision (h), or in declining to deny the Glantzes' motion for summary adjudication on the Andersons' spite fence cause of action under section 437c, subdivision (e). We also conclude the trial court did not err in granting summary adjudication on the Andersons' remaining causes of action and in granting summary judgment. Therefore, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Andersons Discover Water from the Glantzes' Property Damaged Their Property*

The Andersons and the Glantzes owned neighboring residential properties in Rancho Palos Verdes, with the Andersons' property directly west of the Glantzes' property. The Andersons moved into their property between 1984 and 1986. After they moved in, Anderson and his wife Kathleen smelled fungus in the master bathroom. "[W]ith a flashlight and getting a little bit unusual in position," Kathleen saw "mildew" in the "tub area of a wall." Kathleen cleaned the area with bleach every few weeks, but the smell always returned. Anderson hired a "leak company" to investigate the source of the moisture responsible for the fungus, but the company could not locate any moisture and concluded there was no leak. Concerned for their family (Kathleen was pregnant), the Andersons moved out of the property in 1988.

The Andersons did not sell the property, and they occasionally visited it with their children. In 2002 they moved back into the house. The Andersons continued to smell fungus. Thinking an irrigation problem might be the cause of the smell, Anderson hired a contractor to dig up and recoat a planter box and to "completely waterproof[ ] that area." But the situation worsened. In 2011 Anderson noticed the smell had spread to the library next to the bathroom, although Kathleen had noticed the smell there years earlier.

In 2010 or 2012 Anderson dug trenches along the east side of his property near some broken concrete.[2] The trenches filled with water, which caused Anderson to believe that water was migrating from the Glantzes' property to his property and that the water was causing mold, mildew, and termite damage.

B. *The Glantzes Plant Ficus Trees*

The Andersons' property has south- and west-facing views of the ocean. In January 2014 the Glantzes replaced a row of 30-foot palm trees on the western boundary of their property with ficus trees. The ficus trees, which are 20 feet tall and border the eastern edge of Anderson's property, are visible from the Andersons' media room, which has a view of the ocean. According to Anderson, the row of ficus trees obstructs his landscape view and "some of" the ocean view. According to William Glantz, he and his wife planted the ficus trees primarily to give themselves some privacy and to beautify their property, not to annoy the Andersons or block their view.

C. *The Andersons File This Action, and the Glantzes Move for Summary Judgment*

The Andersons filed their initial complaint on January 13, 2015. They alleged causes of action for trespass and negligence based on the water migration, trespass based on a masonry wall the Andersons claimed encroached on their property, and

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[2] Anderson testified at his deposition he dug the trenches in 2010, but submitted a declaration in opposition to the motion for summary judgment stating he dug them in 2012. This conflict gives rise to one of the issues in this appeal.

construction of a spite fence and private nuisance based on the planting of the ficus trees.

On February 21, 2018 the Glantzes filed a motion for summary judgment or in the alternative for summary adjudication, reserving August 2, 2018 for the hearing on the motion. Among the evidence the Glantzes submitted in support of their motion were excerpts of Anderson's deposition testimony in which Anderson testified he dug the trenches on his property, saw them fill up with "[l]ots of water," and became aware water was migrating from the Glantzes' property in 2010.

The Andersons' opposition was due July 19, 2018, but counsel for the Andersons did not timely file it. Instead, on July 25, 2018 counsel for the Andersons filed an ex parte application to continue the hearing on the motion for summary judgment, claiming he had experienced turnover in his staff and made a scheduling error. The trial court, over the Glantzes' objection, granted the ex parte application and continued the hearing to August 23, 2018, giving counsel for the Andersons until August 9, 2018 to file his opposition to the motion, with the Glantzes' reply due by August 17, 2018.

The Andersons filed their opposition papers on August 9, 2018. In his declaration, Anderson stated that, although he testified in his deposition he dug the trenches on his property in 2010, he actually dug them in 2012. The Andersons also submitted unauthenticated expert reports. The Andersons did not file a notice of errata or any corrections to Anderson's deposition testimony, nor did the Andersons file declarations from the experts who had prepared the reports. On August 17, 2018 the Glantzes filed their reply and objected to the Andersons'

expert reports and other evidence the Andersons submitted in opposition to the motion.

D. *The Trial Court Grants the Glantzes' Motion for Summary Judgment*

At the August 23, 2018 hearing on the Glantzes' motion, counsel for the Andersons asked for another continuance of the hearing for one day to allow him to authenticate the expert reports and to submit corrected deposition pages. Counsel did not bring the corrected pages of the deposition transcript to the hearing, but told the court he remembered Anderson mailed the corrections to an address in New York. When the court observed the Andersons' opposition papers did not include any corrections to Anderson's deposition testimony, counsel for the Andersons stated, "That slipped through my cracks as well." Counsel for Anderson explained it was only when his client "took a look at the reply and the tentative [ruling] did he indicate to me that he had indeed submitted his corrections to a New York address that came with his deposition . . . ."

The trial court denied the Andersons' request for a continuance of the hearing, finding counsel for the Andersons had not satisfied the requirements of section 437c, subdivision (h), for a continuance. The court stated that the case was three and a half years old and that the Andersons "had plenty of time to conduct discovery and obtain evidence to oppose the motion for summary judgment." The trial court also observed it had previously granted an ex parte application by the Andersons to continue the hearing.

The trial court sustained the Glantzes' objections to Anderson's declaration because it conflicted with his deposition

testimony. The trial court also sustained the Glantzes' hearsay and foundation objections to the expert reports. And the trial court excluded as inadmissible hearsay the alleged statement of an unnamed landscaper who, according to the Andersons, planted the Glantzes' ficus trees and said the Glantzes planted them maliciously to block the views from the Andersons' property.

The court granted the Glantzes' motion for summary adjudication on the Andersons' causes of action for trespass and negligence, ruling the applicable three-year statutes of limitations barred those causes of action, which accrued in 2010, more than three years before the Andersons filed this action in 2015. The court ruled that the statement in Anderson's declaration he first saw water in the trenches in 2012 contradicted his deposition testimony he first saw water in the trenches in 2010 and that the Andersons could "not create a triable issue of fact by presenting a declaration which directly contradicts [Anderson's] earlier testimony during his deposition." The court also ruled that the Andersons "failed to submit competent evidence to support the trespass cause of action based on the alleged encroachment of [the Glantzes'] masonry wall" and that, although the Andersons "submitted a narrative from a surveyor," the "evidence is inadmissible because it lacks foundation and is hearsay." The court also granted the Glantzes' motion for summary adjudication on the Andersons' nuisance cause of action based on view obstruction because the Glantzes "presented facts supported with competent evidence to show" the Andersons "have no right to a view over [the Glantzes'] property from their adjoining property." Finally, the court granted the Glantzes' motion for summary adjudication on the Andersons' cause of action for nuisance based on the spite fence, ruling the

Andersons did "not submit[ ] any competent evidence to show that the dominant purpose of planting the trees was to annoy" the Andersons.

The trial court entered judgment on September 7, 2018. The Glantzes gave notice of entry of judgment on September 28, 2018, and Anderson timely appealed on November 21, 2018. On December 17, 2018 Anderson filed in the trial court a motion to set aside the judgment. The trial court has not heard that motion.

DISCUSSION

A. *The Trial Court Did Not Abuse Its Discretion in Denying the Andersons' Request for a Continuance To Correct the Defects in Their Opposition Papers*

Anderson argues the trial court abused its discretion in denying the Andersons' request to continue the hearing on the Glantzes' motion for summary judgment (again) to allow the Andersons' attorney to correct the procedural and evidentiary defects in their opposition papers. Anderson argues he did not discover that the Glantzes' motion relied on the original, uncorrected deposition transcripts or that his expert reports were not admissible until the August 23, 2018 hearing on the motion.

Section 437c, subdivision (h), provides that the trial court shall deny a "motion [for summary judgment], order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just" if "it appears from the affidavits submitted in opposition to [the] motion . . . that facts essential to justify opposition may exist but cannot, for reasons stated, be presented." To obtain a continuance under section 437c, subdivision (h), "the party seeking a continuance

must submit an affidavit or declaration showing that "'(1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts.'" (*Jade Fashion & Co., Inc. v. Harkham Industries, Inc.* (2014) 229 Cal.App.4th 635, 656.) "When a party makes a good faith showing by affidavit demonstrating that a continuance is necessary to obtain essential facts to oppose a motion for summary judgment, the trial court must grant the continuance request. [Citation.] 'Continuance of a summary judgment hearing is not mandatory, however, when no affidavit is submitted or when the submitted affidavit fails to make the necessary showing under . . . section 437c, subdivision (h). [Citations.] Thus, in the absence of an affidavit that requires a continuance under section 437c, subdivision (h), we review the trial court's denial of appellant's request for a continuance for abuse of discretion.'" (*Park v. First American Title Co.* (2011) 201 Cal.App.4th 1418, 1428; see *Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 254.)

The trial court did not abuse its discretion in denying the Andersons' request for a second continuance. First, the request was untimely because section 437c, subdivision (h), requires counsel for the party requesting the continuance to make the request in writing and before the date the opposition is due. (See *Levingston v. Kaiser Foundation Health Plan, Inc.* (2018) 26 Cal.App.5th 309, 315 ["any request for such a continuance must be submitted on or before the opposition is due"].) Counsel for the Andersons, however, never made a written request, never submitted a declaration as required by section 437c, subdivision (h), and did not even make an oral request until the hearing on the motion. (See *Ambrose v. Michelin North America, Inc.* (2005)

134 Cal.App.4th 1350, 1353 [trial court did not abuse its discretion in denying a request for a continuance under section 437c, subdivision (h), where the plaintiff "failed to request a continuance of the summary judgment motion hearing at any time prior to the hearing itself, not to mention prior to the deadline for opposing the motion"].)

Second, the Andersons and their attorney had three years to conduct discovery and obtain admissible evidence to oppose the motion. (See *Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 102 [trial court did not abuse its discretion in denying a request for a continuance under section 437c, subdivision (h), where the plaintiffs "could have easily requested this information through basic discovery at the commencement of the case" and "provided no explanation for not having done so"].) Indeed, the Andersons did not argue in the trial court, and Anderson does not argue on appeal, they needed more time to conduct discovery or obtain any additional evidence to oppose the motion. (See *Rodriguez v. Oto* (2013) 212 Cal.App.4th 1020, 1038 [trial court did not abuse its discretion in denying a request for a continuance under section 437c, subdivision (h), where the plaintiff "offered no cogent justification for the extreme tardiness of his attempts to gather evidence"]; *Cooksey v. Alexakis*, *supra*, 123 Cal.App.4th at p. 255 [trial court did not abuse its discretion in denying a request for a continuance under section 437c, subdivision (h), where counsel's declaration "failed to explain how the outstanding discovery was necessary for [the plaintiff's] opposition"].) The Andersons asked for a continuance not to take more discovery or to obtain more evidence, but to re-submit the same evidence in admissible form.

Third, the trial court, at the Andersons' request, had already continued the hearing once, from August 2, 2018 to

August 23, 2018. The Andersons and their attorney had an additional three weeks to discover and submit any additional evidence they believed they needed to oppose the motion or to submit expert declarations and corrected deposition transcripts. They did not. The trial court did not abuse its discretion in declining to continue the hearing again. (See *Oldcastle Precast, Inc. v. Lumbermens Mutual Casualty Co.* (2009) 170 Cal.App.4th 554, 576 (*Oldcastle Precast*) ["Under . . . section 437c, a party opposing summary judgment does not have an automatic right for a second chance to . . . present evidence."].)

The cases Anderson cites are distinguishable. In *Security Pacific Nat. Bank v. Bradley* (1992) 4 Cal.App.4th 89 the court held the trial court abused its discretion in allowing counsel for the defendant to re-file a defective summary judgment motion and then granting the motion because the self-represented plaintiff, who did not "understand the summary judgment," did not file a separate statement. (*Id.* at pp. 92, 95.) In *Kalivas v. Barry Controls Corp.* (1996) 49 Cal.App.4th 1152 the court held a "courtroom local rule" that required parties to file a joint statement of disputed and undisputed facts conflicted with section 437c, subdivision (b). (*Id.* at p. 1160.) In *Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156 the court reversed an order granting summary judgment because the defendants' motion did not address one of the plaintiff's material allegations. And in *Parkview Villas Assn., Inc. v. State Farm Fire & Casualty Co.* (2005) 133 Cal.App.4th 1197 this court reversed an order granting summary judgment where the plaintiff, although it submitted evidence in opposition to the motion, filed a defective separate statement, and the trial court did not give the plaintiff "an opportunity to file a proper separate statement rather than

entering judgment against that party based on its procedural error." (*Id.* at pp. 1204, 1211.) None of these cases involved a failure by the party opposing a motion for summary judgment to submit admissible evidence. None of these cases suggests a party is entitled to a continuance to correct substantive deficiencies in its evidentiary submissions. (See *Oldcastle Precast*, *supra*, 170 Cal.App.4th at p. 557 ["Parties opposing a motion for summary judgment are not entitled to an automatic do-over of their opposition to the motion."].)

Anderson argues the trial court should have granted counsel for the Andersons' request for a one-day continuance under the discretionary provision of section 473, subdivision (b), because counsel's errors were "the result of mistake, inadvertence, and excusable neglect." But at no time prior to the hearing on the motion for summary judgment did the Andersons ever make, or did the trial court ever rule on, a motion for relief under section 473, subdivision (b).

In any event, the neglect by counsel for the Andersons was hardly excusable. "[T]he law is clear that attorney conduct falling below the professional standard of care is not excusable. [Citation.] '"To hold otherwise would be to eliminate the express statutory requirement of excusability and effectively eviscerate the concept of attorney malpractice."'" (*Jackson v. Kaiser Foundation Hospitals, Inc.* (2019) 32 Cal.App.5th 166, 174.) Although counsel for the Andersons claimed he "discovered" his error for the first time at the hearing, counsel should have discovered it long before that. Putting aside counsel for the Andersons' (inexcusable) failure to review and understand the rules of evidence, counsel ignored that the Glantzes' moving papers (filed five months before the hearing on the motion)

included the original pages of Anderson's deposition transcript and that the Glantzes' reply papers also relied on the original deposition pages. Section 473, subdivision (b), does not apply to these kinds of mistakes. (See *Younessi v. Woolf* (2016) 244 Cal.App.4th 1137, 1146 ["'an attorney acting within his or her professional capacity . . . may not be excused by section 473 from errors occurring during the discharge of strictly professional duties'"]; *Toho-Towa Co., Ltd. v. Morgan Creek Productions, Inc.* (2013) 217 Cal.App.4th 1096, 1111-1112 [trial court did not abuse its discretion in denying relief under section 473, subdivision (b), where counsel mistakenly believed his client did not have the burden to rebut the other side's evidence and did not anticipate "the trial court would decide the case based on the evidence presented to it"]; *Henderson v. Pacific Gas & Electric Co.* (2010) 187 Cal.App.4th 215, 229 ["'[m]istake is not a ground for relief under section 473, subdivision (b), when "the court finds that the 'mistake' is simply the result of professional incompetence, general ignorance of the law, or unjustifiable negligence in discovering the law"'"].) And even a "severely understaffed" attorney, as counsel for the Andersons claimed to be, must still meet deadlines. (See *Henderson*, at p. 231 [trial court did not err in denying relief under section 473, subdivision (b), because her attorney was responsible for his paralegal's "failure to have the opposition filed on time"].)

B. *The Trial Court Properly Granted Summary Adjudication on the Trespass, Negligence, and Nuisance Causes of Action*

The Andersons based their causes of action for trespass and negligence on the water intrusion and the encroaching masonry wall. The trial court ruled that the water from the Glantzes' property was not a continuing trespass because the Andersons did not "present[ ] any competent evidence to show that the trespass is reasonably abatable" and that therefore the statute of limitations barred the Andersons' causes of action for trespass and negligence. The trial court granted summary adjudication on the Andersons' cause of action for private nuisance based on the ficus trees because the Glantzes "presented facts supported with competent evidence to show" the Andersons had "no right to a view over [the Glantzes'] property from their adjoining property." Anderson argues the trial court erred in ruling the trespass and nuisance were not continuing.[3]

1. *The Causes of Action for Trespass and Negligence Are Barred by the Statutes of Limitations*

Under section 338, subdivision (b), an action for "trespass upon or injury to real property" must be brought within three years of accrual. (See § 338, subd. (b).) However, where "a trespass is continuing, but not necessarily permanent, the statute does not bar an action until three years after the last act of

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[3] Anderson does not challenge the trial court's ruling on the masonry wall claim.

trespass." (*Baugh v. Garl* (2006) 137 Cal.App.4th 737, 747.) The statute of limitations for negligence causing injury to real property is also three years. (See § 338, subd. (b); *Landale-Cameron Court, Inc. v. Ahonen* (2007) 155 Cal.App.4th 1401, 1407; *Angeles Chemical Co. v. Spencer & Jones* (1996) 44 Cal.App.4th 112, 119.) Anderson relies on the continuing trespass doctrine and the evidence the court excluded to avoid the statute of limitations bar.[4] Anderson does not deny that, if the trespass is not a continuing one, his trespass and negligence causes of action are barred.

There are three tests to determine if a trespass (or a nuisance) is continuing: "'[W]hether (1) the offense activity is currently continuing, which indicates that the nuisance is continuing, (2) the impact of the condition will vary over time, indicating a continuing nuisance, or (3) the nuisance can be abated at any time, in a reasonable manner and for reasonable cost, and is feasible by comparison of the benefits and detriments

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[4] We do not consider the evidence the trial court excluded, and Anderson does not argue in his opening brief the trial court abused its discretion in excluding it. To the extent Anderson suggests in his reply brief the court's evidentiary rulings were an abuse of discretion, we do not consider that argument. (See *Raceway Ford Cases* (2016) 2 Cal.5th 161, 178 ["We generally do not consider arguments raised for the first time in a reply brief."]; *Sweetwater Union High School Dist. v. Julian Union Elementary School Dist.* (2019) 36 Cal.App.5th 970, 987 ["Generally, arguments raised for the first time in a reply brief are forfeited."]; *Mansur v. Ford Motor Co.* (2011) 197 Cal.App.4th 1365, 1387-1388 [in general, "[w]e will not consider arguments raised for the first time in a reply brief, because it deprives [respondents] of the opportunity to respond to the argument"].)

to be gained by abatement.'" (*Starrh & Starrh Cotton Growers v. Aera Energy LLC* (2007) 153 Cal.App.4th 583, 594.) A trespass or nuisance is abatable if it "can be remedied at a reasonable cost by reasonable means." (*Mangini v. Aerojet-General Corp.* (1996) 12 Cal.4th 1087, 1103.)

Anderson argues the evidence he submitted, including his experts' reports, shows the water intrusion is a continuing trespass. The trial court, however, excluded all of this evidence, and as stated, Anderson does not in his opening brief challenge the court's evidentiary rulings. Therefore, Anderson cannot show error. (See *Hernandez v. First Student, Inc.* (2019) 37 Cal.App.5th 270, 277-278 [""Fairness militates against allowing an appellant to raise an issue for the first time in a reply brief because consideration of the issue deprives the respondent of the opportunity to counter the appellant by raising opposing arguments about the new issue.""].)

2. *The Trial Court Did Not Err in Granting the Glantzes' Motion for Summary Adjudication on the Private Nuisance Cause of Action*

Anderson argues the statute of limitations does not bar his cause of action for private nuisance. But the trial court did not rule the statute of limitations barred the Andersons' private nuisance cause of action. The court granted summary adjudication on the Andersons' private nuisance cause of action because they failed to rebut the Glantzes' "facts supported with competent evidence" that showed the Andersons did not have a right to an unobstructed view over the Glantzes' property. Anderson does not challenge that ruling.

C. *The Trial Court Did Not Abuse Its Discretion in Granting Summary Adjudication on the Spite Fence Cause of Action*

The Andersons based their cause of action under Civil Code section 841.4 (for constructing a spite fence) on the allegation the ficus trees obstructed their ocean views. The trial court granted summary adjudication on this cause of action because "[t]he only evidence in support of" the Glantzes' malicious intent, as required for the spite fence cause of action, was "the alleged statements of a landscaper," which the court ruled were "inadmissible hearsay." Anderson argues the trial court erred in granting summary adjudication because the only element the Andersons failed to show was the requisite state of mind, and section 437c, subdivision (e), allows a trial court to deny a motion for summary judgment or summary adjudication if an individual's state of mind is at issue and the only evidence of that state of mind is his or her declaration.

Civil Code section 841.4, California's spite fence statute, provides: "Any fence or other structure in the nature of a fence unnecessarily exceeding 10 feet in height maliciously erected or maintained for the purpose of annoying the owner or occupant of adjoining property is a private nuisance." Spite fence statutes like Civil Code section 841.4 "grew out of an increasing awareness in the late 1800's that a property owner's right to use his or her land was not unlimited. Various states enacted such statutes to prevent an owner from building a structure or fence that was unnecessarily high and that needlessly interfered with his or her neighbor's light and air. [Citation.] Our Legislature in the early 1900's 'joined a growing number of states and adopted the current spite fence statute . . . declaring it a private nuisance

to maliciously erect or maintain "[a]ny fence or other structure in the nature of a fence, unnecessarily exceeding ten feet in height . . . for the purpose of annoying the owner or occupants of adjoining property . . . ."'" (*Vanderpol v. Starr* (2011) 194 Cal.App.4th 385, 393.)

Under Civil Code section 841.4, malice "'must be the dominant motive[ ]—a motive without which the fence would not have been built or maintained. A man cannot be punished for malevolently maintaining a fence for the purpose of annoying his neighbor merely because he feels pleasure at the thought he is giving annoyance, if that pleasure alone would not induce him to maintain it, or if he would maintain it for other reasons, even if that pleasure should be denied him.'" (*Wilson v. Handley* (2002) 97 Cal.App.4th 1301, 1312.)

Section 437c, subdivision (e), provides: "If a party is otherwise entitled to summary judgment . . . [the motion] may be denied in the discretion of the court if . . . a material fact is an individual's state of mind, or lack thereof, and that fact is sought to be established solely by the individual's affirmation thereof." (See *Ayon v. Esquire Deposition Solutions, LLC* (2018) 27 Cal.App.5th 487, 497 ["section 437c, subdivision (e), specifically permits a court, in its discretion, to deny summary judgment where the only issue is the credibility of a witness making a statement about state of mind"].) We review the trial court's exercise of discretion under section 437c, subdivision (e), for abuse of discretion. (See *Trujillo v. First American Registry, Inc.* (2007) 157 Cal.App.4th 628, 636 [trial court has discretion to grant a motion for summary adjudication where a witness's statement is the only evidence of his or her state of mind, disapproved on another ground in *Connor v. First Student, Inc.*

(2018) 5 Cal.5th 1026, 1038]; *Chee v. Amanda Goldt Property Management* (2006) 143 Cal.App.4th 1360, 1370, fn. 3 [trial court "retains the discretion to grant the motion even when the moving party relies solely upon a declarant's statement concerning his or her state of mind"].)

William Glantz submitted a declaration stating he and his wife planted the trees to beautify his property and to enhance their privacy, not to annoy the Andersons. As the trial court stated, the Andersons did not submit any admissible evidence to contradict or cast doubt on William Glantz's declaration. While the trial court had discretion to deny the Glantzes' motion for summary adjudication on this cause of action under section 437c, subdivision (e), the court also had discretion to grant it. The trial court did not abuse its discretion by granting the motion for summary adjudication, particularly where the Andersons did not submit any admissible evidence, circumstantial or otherwise, to suggest the Glantzes' acted with malice. (See *Kojababian v. Genuine Home Loans, Inc.* (2009) 174 Cal.App.4th 408, 417 ["[a]lthough section 437c, subdivision (e) contains an exception to th[e] rule when the declarant is the sole witness to a fact or testifies as to his or her state of mind, the trial court retains discretion to grant the motion based on such declarations"]; *Sheeler v. Greystone Homes, Inc.* (2003) 113 Cal.App.4th 908, 917, fn.3 [under section 437c, subdivision (e), "the trial court may properly grant summary judgment on the basis of a single witness's testimony, in the absence of conflicting evidence or inferences"].)

Citing *Wilson v. Handley*, *supra*, 97 Cal.App.4th 1301, Anderson argues the trial court should have left the issue of the Glantzes' state of mind for the jury. But the court in *Wilson* held

only that a row of trees can constitute a "fence" under Civil Code section 841.4. (*Wilson,* at p. 1311.) In fact, *Wilson* supports the Glantzes. The court in *Wilson* stated that, "[i]f the trial court finds the [defendants] planted the trees primarily for reasons other than to annoy plaintiffs—for example, to 'beautify' their property or to protect their privacy . . .—then annoyance was not the dominant purpose of the row of trees and the 'malice' element of [Civil Code] section 841.4 is not satisfied." (*Wilson*, at p. 1313.) That is precisely the reason the trial court granted summary adjudication here.

Anderson argues for the first time in his reply brief the trial court erred in excluding the statement of the unidentified landscaper that supposedly confirmed the Glantzes planted the ficus trees out of animus toward the Andersons. Again, we do not consider arguments made for the first time on reply. (See *High Sierra Rural Alliance v. County of Plumas* (2018) 29 Cal.App.5th 102, 111, fn. 2 ["New arguments may not be raised for the first time in an appellant's reply brief."]; *Telish v. State Personnel Bd.* (2015) 234 Cal.App.4th 1479, 1487, fn. 4 ["An appellant's failure to raise an argument in the opening brief waives the issue on appeal."].) Moreover, the statement was hearsay, and the exception on the hearsay rule on which Anderson relies (in his reply brief), Evidence Code section 1222, does not apply because there was no evidence the Andersons authorized the landscaper to make the statement. (See Evid. Code, § 1222, subd. (a).)

D. *Anderson's Motion for Judicial Notice of Documents That Were Not Before the Trial Court Is Denied, as Is the Glantzes' Moot Motion To Strike*

Anderson included in his appellant's appendix documents he submitted in support of his motion to set aside the judgment, which he filed on December 17, 2018, and asks us to take judicial notice of them. The Glantzes move to strike them.

We deny Anderson's motion to take judicial notice of the portions of the record that were not before the trial court on summary judgment. (See *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3 ["normally 'when reviewing the correctness of a trial court's judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered'"]; *Weiss v. City of Del Mar* (2019) 39 Cal.App.5th 609, 625 [same].) The documents and evidence filed in connection with the motion to set aside the judgment are also irrelevant to our analysis. (See *Jenni Rivera Enterprises, LLC v. Latin World Entertainment Holdings, Inc.* (2019) 36 Cal.App.5th 766, 775, fn. 4 [motion for judicial notice denied because "documents [were] not relevant to resolving the . . . appeal"].) Therefore, Anderson's request for judicial notice is denied, and the Glantzes' motion to strike is denied as moot.

DISPOSITION

The judgment is affirmed. Anderson's motion for judicial notice and the Glantzes' motion to strike are denied. The Glantzes are to recover their costs on appeal.

SEGAL, J.

We concur:

PERLUSS, P.J.

ZELON, J.