SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 16, Honorable Roberta S. Hayashi, Presiding

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LAW AND MOTION TENTATIVE RULINGS

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

DATE: WEDNESDAY, JANUARY 29, 2025
TIME: 9:00 A.M.
Please Read Carefully As Some of Our Protocols Have Changed.

All Courts of California celebrate the diversity of the attorneys and the litigants who appear in our Courts. Do not hesitate to correct the Court or Court Staff concerning the pronunciation of any name or how anyone prefers to be addressed or referred to. All persons should spell their names for the benefit of Court Staff.

Appearances.

Personal appearances in the courtroom are strongly encouraged. If you must appear remotely, you must use the MS Teams link from a device with a camera. Please "name" yourself when you log in, as: Line #/name/party. Remote appearances should be made from a quiet location with no background noise (and not from a moving vehicle). IT IS ABSOLUTELY NECESSARY FOR ALL INDIVIDUALS TO SPEAK SLOWLY, AND NOT TO INTERRUPT WHEN SOMEONE ELSE IS SPEAKING.

Please notify this Court immediately if the matter will not be heard on the scheduled date. ***California Rules of Court***, rule 3.1304(b). If a party fails to appear at a law and motion hearing without having given notice, this Court may take the matter off calendar, to be reset only upon motion, or may rule on the matter. ***California Rules of Court***, rule 3.1304(d).

This Court expects all counsel and litigants to comply with the Tentative Rulings Procedures that are outlined in Local Civil Rule 7(E) and ***California Rules of Court***, rule 3.1308. If the Court has not directed argument, oral argument must be permitted only if a party notifies all other parties and the court by 4:00 p.m. on the court day before the hearing of the party's intention to appear. A party must notify all other parties by telephone or in person. A failure to timely notify this Court and/or the opposing parties may result in the tentative ruling being the final order in the matter.

A party may give notice that he or she will not appear at a law and motion hearing and submit the matter without an appearance unless this Court orders otherwise. This Court will rule on the motion as if the party had appeared. ***California Rules of Court***, rule 3.1304(c).

Court Reporters.

This Court does not appoint Court Reporters in civil actions except in limited circumstances. If you wish to arrange for a private court reporter, please use Local Form #CV-5100.

No electronic recordings, video, still photography or audio capture of this live stream is allowed without the expressed, written permission of the Superior Court of California, County of Santa Clara. Use of the Court's Electronic Recording (ER) system is limited to proceedings permitted by statute or General Order of the Court. State and Local Court rules prohibit photographing or recording of court proceedings whether in the courtroom or while listening on the Public Access Line or other virtual platform, without a Court Order. See Local General Rule 2(A) and 2(B); ***California Rules of Court***, rule 1.150.

Orders After Hearing

The Court will prepare the Final Order unless stated otherwise below or at the hearing. Counsel are to comply with ***California Rules of Court***, rule 3.1312.

TROUBLESHOOTING TENTATIVE RULINGS

If you see last week's tentative rulings, you have checked prior to the posting of the current week's tentative rulings. You will need to either "REFRESH" or "QUIT" your browser and reopen it. If you fail to do either of these, your browser may pull up old information from old cookies even after the tentative rulings have been posted.

Tentative Rulings Are Continued Below. Full Orders Are on The Following Pages.

LINE #	CASE #	CASE TITLE	RULING
LINE 1	23CV424776	Bickmore Building Supply, LLC v. Sandie Fisher	Hearing: Order of Examination. No Tentative Ruling

LINE #	CASE #	CASE TITLE	RULING
LINE 2	22CV397498	BDC Cupertino, L.P. v. Hongyun Art, etc., et al.	Plaintiff's Motion for Summary Judgment/Summary Adjudication are DENIED as there are triable issues of material fact with regard to the reasonability of Plaintiff's efforts to minimize or mitigate its damages, rendering the fourth element of a cause of action for breach of contract (damages) uncertain and not capable of determination by the undisputed evidence. See below for full tentative ruling. Order to be prepared by the Court.
LINE 3	23CV415280	Carla Gardner et al. v. BMW of North America, LLC, et al.	The Court notes that this matter is set for hearing on Defendants Motion for Summary Judgment/Summary Adjudication on March 7, 2025. Defendants' Motion to Compel Plaintiffs and each of them to respond (either admit/deny) Request for Admissions 2-7 and Form Interrogatory 17.1 with regard to their responses to said Requests for Admission (where the response was anything other than an unqualified admission), filed on August 26, 2024, is GRANTED. Plaintiffs shall provide their responses either admitting or denying the requests for admission and their interrogatories stating facts which support their denial of any request for admission within on or before **March 1, 2025** (regardless of when the written order is served on them) and moving party may have leave to supplement their Separate Statement of Material Facts to include the responses to Requests for Admission based on such responses, at any time up to the filing of their reply to any opposition filed by Plaintiffs. The Court further orders that Plaintiffs pay sanctions in the amount of $2,370. (6 hours of attorney time to prepare motion prepare order consistent with this tentative, plus $60. Filing fee) within 60 days. Said payment to be made to counsel for Defendants. Order to be prepared by Moving Party.

LINE #	CASE #	CASE TITLE	RULING
LINE 4	21CV383282	Gregory Mitton v. Taco Bell Corp., et al.	Defendants Sunil & Radhika, 123 Harman Management and Coria's Motion to file a Cross Complaint against Jose Huerta Plumbing (the installer of the sink that allegedly fell off the wall on Defendants' premises, causing injury to Plaintiff was filed on 9/9/2024. Plaintiff oppose the motion on the grounds that matter is set for trial on May 19, 2025 (over eight months after the motion was filed, and over 90 days from now). The law favors just one trial on the merits, particularly as it relates to comparative fault and liability. It appears to the Court that Plaintiff waited almost two years from the date of injury to commence this action, and identified the sink falling off the wall as the cause of the alleged injury. It further appears that the identity of the proposed Cross-Defendant who installed the sink was known to both Parties for several months. Thus Plaintiff could have sought to amend the Complaint to name the proposed Cross-Defendant as a Doe Defendant, and did not have to wait for him to be brought in as Cross Defendant to avoid any prejudice to Plaintiff. It also appears that the Parties could have simply stipulated to the filing of the Cross-Complaint in September 2024 when this motion was filed. Further, the motion is being heard more than 90 days before trial. Depositions of Plaintiff are only occurring now. Given the nature of claims, that alleged defect was that a newly installed sink that fell off the wall, it appears that the Cross-Complaint is not just necessary to resolve indemnity but also apportionment of fault (if any) of the Defendants. Accordingly, motion to file the Cross-Complaint is granted. Defendants shall file their Cross-Complaint within 10 days of today's hearing, and shall diligently seek to serve the Cross-Complaint prior to the next Case Management Conference. Case management conference is set for March 5, 2025 at 10 a.m. in Dept. 64. Order to be prepared by Moving Party.

LINE #	CASE #	CASE TITLE	RULING
LINE 5	23CV414590	Kristin Tsai et al. v. Alice Chang, et al.	Defendants' Motion (filed 11/5/2024) to compel payment of $1,125 sanctions ordered for successfully opposing Plaintiffs' motion to compel production of 3294 information of Defendants, is denied. The previously ordered sanctions have been paid. The request for an additional $2,400 in sanctions for having to file the current motion is DENIED, as the court does not find good cause to order sanctions on this basis, especially as the underlying sanctions order was satisfied before it was necessary to file a reply or bring the matter on for hearing. Order to be prepared by the Court. The Court notes that there are three upcoming hearings relating to discovery in this matter: March 12, 2025, April 4, 2025, and April 11, 2025. The Court also notes that Plaintiff's are seeking to amend their Complaint to add a cause of action for conversion against the Defendants, which may prompt further discovery. In an attempt to minimize further misuse of the Court's limited resources, the Court will set an IDC in this matter to occur during the week of March 26, 2025. Parties are ordered to meet and confer with regard to their availability during that week and to appear on 1/29/2025 for setting of IDC. The March 12, 2025 and April 4, 2025 hearing dates shall be continued to April 11, 2025 (or other date after the IDC).
LINE 6	23CV427209	Trang Vu v. Macy's Valley Fair Mall	Plaintiff's Motion to Amend Complaint (filed 9/13/2024) is DENIED WITHOUT PREJUDICE as it does not appear that the Motion was ever served on the Defendant Macy's Retail Holdings, LLC who had appeared in this action prior to the filing of the motion to amend, and because it appears to the Court that Plaintiff has since filed another action (Case #24CV439681) against this same Defendant. Order to be prepared by Court.
LINE 7	17CV309346	Debt Resolve, LLC v. Jason Allen	Judgment Debtor's Request for Claim of Exemption is granted and a wage garnishment in the amount of $100. per month (as offered by Defendant) is ordered.
LINE 8	20FL00236	Unifund CCR, LLC v. X. Le	Judgment Debtor's Request for Claim of Exemption is denied without prejudice pending hearing or amended Claim. Court was not provided with sufficient evidence of the nature of the income and expenses; further it appears that Defendant receives income but there is no offer for wage garnishment in any amount.

LINE #	CASE #	CASE TITLE	RULING
LINE 9	2014-1-CV-263300	HGST, Inc. v. County of Santa Clara	Court finds that it has reserved jurisdiction under the Stipulation and Order filed 1/5/2021, to determine if the AAB has "made any findings required under Revenue and Taxation Code section 531.4 to determine interest on any escape assessments." There appears to be a dispute as to whether the Court's reserved jurisdiction is limited to confirming that the AAB has made findings following the remand, or whether the Court should review the findings to determine if they are in fact supported by substantial evidence. It also appears that there is a dispute about what evidence the AAB could consider in making its determination of interest. Accordingly, before undertaking any review of the administrative record (which was lodged with the Court on 1/15/2025), the Court believes that the foregoing issues need to be determined by the Court. There is no tentative and Parties are ordered to appear to address the foregoing issues before the Court undertakes review of the administrative record.
LINE 10			

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Calendar Line 1

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Calendar Line 2

22CV397498
BDC Cupertino, L.P. v. Hongyun Art, A Partnership et al.
Plaintiff BDC Cupertino, L.P.'s Motion for Summary Judgment is DENIED because a triable issue of fact exists as to whether Plaintiff reasonably mitigated its damages, rendering uncertain the damages element of its claims for breach of contract.

As alleged in the complaint, Plaintiff BDC Cupertino, L.P. ("Plaintiff") entered into a lease agreement with Defendants Hongyun Art, a Partnership and Tommy Suriwong, an individual (collectively "Defendants") on July 8, 2014 for the rental property located at 10457 South De Anza Boulevard in Cupertino, California 95014 (the "Property" or "Premises"). (Complaint at ¶¶ 6, 13.)

Plaintiff alleges Defendants had certain responsibilities to pay rent and maintain the common areas per the terms of the lease agreement and amendments. (Complaint at ¶ 7.) Plaintiff alleges that although it satisfied all terms of the lease agreement, Defendants breached the terms and conditions of the lease agreement by failing to pay rent and common area maintenance charges starting April 1, 2020. (Id. at ¶¶ 8, 9, 15, 16.) Plaintiff alleges Defendant further breached the lease agreement by abandoning the property. (Id. at ¶¶ 9, 16.) The complaint alleges the nonpayment of rent during this period for a total of $550,335.41. (Ibid.)

Plaintiff sued on April 26, 2022, asserting two separate causes of action for breach of contract. (Complaint.) The first cause of action for breach of contract is asserted against both Defendants in their capacities as lessees. (Complaint at ¶ 6.) The second cause of action for breach of contract is asserted against Defendant Tommy Suriwong in his capacity as guarantor of the lease agreement. (Complaint at ¶ 14.) The complaint also asserted a third cause of action for open book account; which was dismissed without prejudice on September 13, 2024. (See Complaint; Request for Dismissal filed September 13, 2024.)

Plaintiff moves for summary judgment and/or summary adjudication on the grounds that "no material facts exists and Plaintiff is entitled to judgment as a matter of law on Plaintiff's first cause of action for breach of contract and second cause of action for breach of contract concerning the personal guarantee of Defendant Tommy Suriwong." (Notice of Motion for Summary Judgment and/or Summary Adjudication ["MSJ/MSA"] at p. 2:25.) Plaintiff maintains the total amount of damages sought in the subject motion amount to $495,030.96. (Id. at p. 2:5-6.)

The pleadings limit the issues presented for summary judgment or adjudication and such a motion may not be granted or denied based on issues not raised by the pleadings. (See Laabs v. City of Victorville (2008) 163 Cal.App.4th 1242, 1258; Nieto v. Blue Shield of Calif. Life & Health Ins. (2010) 181 Cal.App.4th 60, 73 ["the pleadings determine the scope of relevant issues on a summary judgment motion."].)

The moving party bears the initial burden of production to make a prima facie showing that there are no triable issues of material fact. (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 850 (Aguilar).) A motion for summary judgment or adjudication shall be granted only if it completely disposes of an entire cause of action, an affirmative defense, a claim for damages, or an "issue of duty." (See Code Civ. Proc., § 437c, subd. (f)(1); McClasky v. California State Auto. Ass'n (2010) 189 Cal.App.4th 947, 975 ["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 Spring Villas II Homeowners Association, Inc. v. Parth (2016) 248 Cal.App.4th 268, 288.) Summary adjudication of general "issues" or of facts is not permitted. (See Raghavan v. The Boeing Company (2005) 133 Cal.App.4th 1120, 1136.) Code of Civil Procedure section 437c, subdivision (t) makes clear that the only means by which a party may seek summary adjudication of only part of a cause of action or of an issue other than an "issue of duty" is by submitting a joint stipulation of the parties to the court, specifying the issue or issues to be adjudicated which the court must then approve before the motion can be filed.

While the same standards of admissibility govern both, the opposition declarations are liberally construed while the moving party's evidence is strictly scrutinized. (Saelzler v. Advanced Group 400 (2001) 25 Cal.4th 763, 768.) The evidence must be liberally construed in support of the opposing party, resolving any doubts in favor of that party. (Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal.4th 1028, 1037.) "Where a declaration submitted in opposition to a motion for summary judgment clearly contradicts the declarant's earlier deposition testimony or discovery responses, the trial court may fairly disregard the declaration and 'conclude there is no substantial evidence of the existence of a triable issue of fact.'" (Whitmire v. Ingersoll-Rand Co. (2010) 184 Cal.App.4th 1078, 1087, citing D'Amico v. Board of Medical Examiners (1974) 11 Cal.3d 1, 21.)

Where a plaintiff or cross-complainant has moved for summary judgment or adjudication, it has the burden of showing there is no defense to a cause of action. (Code Civ. Proc., § 437c, subd. (a).) That burden can be met if the plaintiff "has proved each element of the cause of action entitling it to judgment on that cause of action. If the plaintiff meets this burden, it is up to the defendant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(1); See Professional Collection Consultants v. Lauron (2017) 8 Cal.App.5th 958, 965.) "A plaintiff moving for summary adjudication meets its burden if it proves each element of the cause of action." (Quidel Corp. v. Super. Ct. (2020) 57 Cal.App.5th 155, 163.) "If the plaintiff meets its burden, the defendant must set forth specific facts showing a triable issue of material facts exist. (Id. at p. 164.)

Defendants' evidentiary objections 2-14 are not material, and objection 1 is OVERRULED

Defendants raise several objections to the Declaration of Brian Aita ("Aita Declaration"). (See Defendants Objections to Evidence ["OTE"].) Defendants' objections primarily concern the computation of damages in the Aita Declaration. (Defendants' OTE Nos. 2-14.) As the Court does not reach the amount of damages due as addressed below, the Court declines to rule on objection numbers two to fourteen as they are not material to the disposition of this motion. (Ibid.) "In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review." (Code Civ. Proc., § 437c, subd. (q).)

However, the Court considers objection number one to the Aita Declaration challenging the contention that "[s]ince April of 2020, Defendants have not made any rental payments owed under the Contract, despite frequent and timely demands by Plaintiff." (Aita Decl. at p. 2:24-25.) Defendants object to this assertion for lack of foundation under Evidence Code section 403 and under the best evidence rule pursuant to Evidence Code sections 1520-1523. (Defendants' OTE No. 1.) Defendants provide, "[d]eclarant is offering testimony about the contents of a writing. The best evidence pertaining to Defendants' delinquent account(s) are the account ledgers themselves and not the declarant's testimony alone." (Ibid.)

In his declaration, Brian Aita ("Mr. Aita") attests that he has personal knowledge of the matters set forth, and that he is one of the custodian of records for Plaintiff in this action. (Declaration of Brian Aita ["Aita Decl."] at ¶ 1.) He states that he has gained knowledge of the facts attested to from Plaintiff's books and records maintained in the ordinary course of business including the lease agreement, payments, amounts owed, and balance sheets. (Ibid.) Mr. Aita states that he has personally worked on Plaintiff's file concerning this matter. (Ibid.) He attaches the lease agreement and personal guarantee signed by Defendant Tommy Suriwong as exhibits to his declaration. (Aita Decl., Exs. A & B.)

Mr. Aita's assertion that Defendants have not made rental payments is based on his own personal knowledge from working on this matter as well as the lease agreement attached to his declaration. Defendants have notably failed to dispute this same assertion in Plaintiff's Separate Statement of Undisputed Material Facts relying on the same paragraph in Mr. Aita's declaration as evidence thereto. (See Plaintiff's Separate State of Undisputed Material Facts ["SSUMF"] No. 7.) Accordingly, the Court OVERRULES Defendants' objection number one to the Aita Declaration.

Plaintiff's Motion for Summary Judgment is DENIED

Plaintiff argues summary judgment is proper as to both causes of action for breach of contract because the undisputed material facts establish that all elements have been met. (MSJ/MSA at p. 4:11-19.) "[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonpeformance, (3) defendant's breach, and (4) the resulting damages to plaintiff." (Oasis West Realty, LLC v. Goldman (2011) 51 Cal.4th 811, 821.) While the first thee elements of the breach of contract claim are not disputed; the fourth element of damages is disputed.

It is undisputed that the parties entered into a lease agreement concerning the commercial space on or about July 8, 2014. (Aita Decl. at ¶ 3; Declaration of Tommy Suriwong ["Suriwong Decl.'] at ¶ 5.) It is further undisputed that Defendant Tommy Suirwong signed a personal guarantee in connection with the lease agreement. (Aita Decl., Ex. B: Personal Guarantee.) The parties do not dispute the duration of the lease or rental value of the property under the lease agreement. (Aita Decl. at ¶ 4, Ex. A: Lease Agreement; Suriwong Decl. at ¶ 5.) As noted above, Defendants do not dispute Plaintiff's assertion that they have failed to make any rental payments, common area maintenance charges, or late fees due under the lease agreement since April 2020. (Aita Decl. at ¶ 6; SSUMF No. 7.) Thus, the existence of the contract, Plaintiff's performance, and defendant's breach are not materially in dispute.

While Plaintiff anticipated Defendants would raise a "force majeure" defense (MSJ/MSA at p. 4:20-5:15), Defendants did not respond to this argument. Instead, Defendants oppose Plaintiff's motion with two primary arguments: (1) Plaintiff failed to mitigate its damages and did not act in a reasonable manner to relet the premises, rendering damages uncertain; and (2) Plaintiff has not proven the "damages" element for the breach of contract claims. (Opposition at p. 1:5-10.)

Defendants have raised a triable issue of fact exists as to whether Plaintiff's efforts to mitigate its damages were reasonable

Defendants argue that Plaintiff failed to mitigate damages, and that the success of this defense will rest on a jury's determination that (1) Plaintiff repeatedly ignored Defendants' requests to surrender the keys from April to September 2020; (2) Plaintiff overpriced the asking price of the rental premises since September 2020; and (3) Plaintiff undertook ineffective methods to relet the premises. (Opposition at pp. 5:11-10:17.)

California Civil Code section 1951.2 provides for the recovery of damages to the extent unpaid rent exceeds "the amount of such rental loss that the lessee proves could have been reasonably avoided . . ." (Cal. Civ. Code, § 1915.2, subds. (a)(2), (a)(3), (c)(1).)

"The doctrine of mitigation holds that '[a] plaintiff who suffers damage as a result of either a breach of contract or tort has a duty to take reasonable steps to mitigate those damages and will not be able to recover for any losses which could have thus been avoided.' [Citations.] A plaintiff may not recover for damages avoidable through ordinary care and reasonable exertion. [Citation.] The duty to mitigate does not require an injured party to do what is unreasonable or impracticable. [Citation.] 'The rule of mitigation of damages has no application where its effect would be to require the innocent party to sacrifice and surrender important and valuable rights.' [Citation.]" (Valle De Oro Bank v. Gamboa (1994) 26 Cal.App.4th 1686, 1691 (Valle De Oro Bank).)

The rule of mitigation also does not require the injured party to take measures "which would involve expenditures disproportionate to the loss sought to be avoided or which may be beyond his financial means. The fact that reasonable measures other than the one taken would have avoided damages is not, in and of itself, proof of the fact that the one taken, though unsuccessful, was reasonable. The standard by which the reasonableness of the injured party's efforts is to be measured is not as high as the standard required in other areas of law. It is sufficient if he acts reasonably and with due diligence, in good faith." (Green v. Smith (1968) 261 Cal.App.2d 392, 396-397.)

"Typically, the rule of mitigation of damages comes into play when the event producing injury or damage has already occurred and it then has become the obligation of the injured or damaged party to avoid continuing or enhanced damages through reasonable efforts." (Valle De Oro Bank, supra, 26 Cal.App.4th at p. 1691.)

"[T]he defendant bears the burden of establishing the amount of the loss that could have been reasonably avoided. [Citations.] On a motion for summary judgment, such evidence should at least raise a factual question of whether the plaintiff made any effort whatsoever to mitigate or whether the effort made was reasonable under the circumstances." (Sebastian Int'l v. Peck (1987) 195 Cal.App.3d 803, 810.)

Plaintiff does not dispute any of Defendant's Additional Material Facts ("AMF") on reply. The parties agree about the specific efforts Plaintiff undertook to mitigate damages but disagree as to whether these efforts were reasonable under the circumstances. It is undisputed that Plaintiffs stopped paying rent, common maintenance area charges, and late fee charges by April 2020. (Aita Decl. at ¶ 6; SSUMF No. 7.) For five months between May 2020 to September 2020, Defendants contacted Plaintiff multiple times to obtain instructions for returning the keys, but their requests were ignored. (Suriwong Decl. at ¶ 7; Plaintiff's Response to Defendants' Additional Material Facts ["AMFs"] No. 7.) On September 25, 2020, Mr. Aita instructed Defendant Suriwong to place the keys in a lockbox in the front of Premises, which he did. (Suriwong Decl. at ¶ 10, Ex.A; AMF No. 8.) Defendant Suriwong notified Plaintiff that the keys had been dropped off on September 27, 2020 and received an e-mail acknowledgment from Mr. Aita the next day. (Suriwong Decl. at ¶¶ 11, 12, Ex. A; AMF Nos. 9, 10.) However, on March 11, 2021, Defendant Suriwong received an e-mail from Brian Aita requesting that he leave the keys in the lockbox once again, even though he had already done so on September 25, 2020. (Suriwong Decl. at ¶ 13, Ex. B; AMF No. 11.) Defendants contend Plaintiff could have been more diligent in reletting the space by providing instructions to collect the keys sooner and immediately showing the property thereafter. (See Opposition at p. 6:5-17.) Defendants maintain the delay in providing instructions and subsequent request for keys demonstrates a lack of due diligence and good faith in mitigating damages. (Ibid.)

Defendants also contend that Plaintiff overpriced the asking price of the rental premises. Defendants' monthly rent in 2020 was $4.02 per square foot. (Suriwong Decl. at ¶ 5; AMF No. 12.) Plaintiff does not dispute that it first attempted to relet the Premises in August 2020 for $4.25 per square foot. (Plaintiff's Response to Special Interrogatory ["SROG"] Set 2 Nos. 1 and 2; Plaintiff's Response to Requests for Admission ["RFAs"] Set 2 Nos. 1 and 2; AMF No. 13 .) Plaintiff also does not dispute that the asking price for retail spaces decreased significantly by 10-20% as a result of COVID-19. (Declaration of James Kilpatrick ["Kilpatrick Decl."] at ¶ 6; AMF Nos. 15, 16.) Plaintiff also does not dispute that the average asking price for comparable retail spaces was approximately $2.54 per square foot, and that nothing about the property supported a higher rent value during this time. (Kilpatrick Decl. at ¶ 5; AMF Nos. 17, 20.) Plaintiff was not able to relet the premises until July 14, 2022 after it had dropped the price to $3.95 per square foot. (Plaintiff's Response to SROGs Set 2 Nos. 1, 2, 3, and 4; Plaintiff's Response to RFA Set 2 Nos. 2 and 3; AMF Nos. 21, 22.) Defendants maintain that the asking price was unreasonable under the circumstances. (See Opposition at p. 7:17-26.)

Defendants argue that Plaintiff's advertising efforts to relet the premises were unreasonable. Plaintiff attempted to relet the premises by contacting existing tenants, posting an ad on LoopNet, posting an ad on Costar, and utilizing RedSquared. (Plaintiff's Amended Response to SROGs Set 1 Nos. 2, 15, 16, 22, and 28; AMF No. 23.) Defendant maintains these efforts were ineffective. (Opposition at p. 8:3-26.) Although Plaintiff contends that the alternative measures proposed by Defendants and their expert are irrelevant, Plaintiff does not dispute or object to these measures. (See AMF Nos. 24, 25.) For example, Defendants' expert provides that the proper way to lease a retail space requires social media promotion and cross-promotion to websites like Craigslist in addition to the advertisements Plaintiff made. (Kilpatrick Decl. at ¶¶ 9, 16; AMF No. 24.) Plaintiff did not post online advertisements elsewhere including on social media platforms or niche real estate listing websites. (Plaintiff's Amended Response to SROG Nos. 2, 15, 16, 22, 28; AMF No. 25.)

Finally, Plaintiff's discovery responses show that it did not engage an outside real estate brokerage firm to assist with reletting the Premises and relied exclusively on in-house personnel. (Plaintiff's Amended SROGs Set 1 Nos. 20 and 21; Plaintiff's Amended RFAs Set 1 Nos. 5, 6, 7, and 8; AMF No. 29.) The in-house personnel only relied on in-network tenants and did not reach out to prospective tenants outside its portfolio. (Plaintiff's Amended Response to SROGs Set 1 Nos. 2, 15, 16, 22, 28; AMF No. 32.) Plaintiff also did not respond to all inquiries from LoopNet. (Plaintiff's Response to RFA Set 2 Nos. 5 and 6; AMF No. 33.) Plaintiff also failed to put a "For Lease" sign in the window of the premises. (Suriwong Decl. at ¶¶ 14, 15; Plaintiff's Amended Response to SROG Set 1 Nos. 2, 15, 16, 22, 28; AMF No. 37.) Again, while Plaintiff does not find the expert's assertions material, it does not dispute or object to the notion that retaining a local retail leasing brokerage firm is effective during a depressed market as they maintain a close portfolio of prospective tenants. (Kilpatrick Decl. at ¶ 9; AMF No. 27.) Defendant maintains these in-house efforts to relet the premises were ineffective and unreasonable. (Opposition at p. 10:9-16.)

While Defendants' evidence confirms that Plaintiff put forth some effort to mitigate damages, at issue is whether those efforts were reasonable under the circumstances. As stated above, "[t]he fact that reasonable measures other than the one taken would have avoided damage is not, in and of itself, proof of the fact that the one taken, though unsuccessful, was unreasonable." (Green, supra, 261 Cal.App.2d at p. 396.) Defendants provide several alternatives Plaintiff could have taken with respect to advertising or hiring a brokerage firm. Although Plaintiff is not required to undertake expenditures that may be beyond its financial means, it does not dispute or object to the alternatives offered by Defendants' expert.

In any event, "[i]t has been held that the question whether an injured party acted reasonably to mitigate damages is a matter to be determined by the trier of fact and that the scope of review on appeal is circumscribed by the 'any substantial evidence' rule." (Green, supra, 261 Cal.App.2d at p. 397.) Whether these alternatives were viable is a question of fact for the jury, as is whether Plaintiff unreasonably delayed in collecting Defendants' keys to show the property to prospective tenants, and whether Plaintiff's asking price was unreasonable under the circumstances and deterred prospective tenants from leasing the premises. Accordingly, Defendant Tommy Suriwong's affidavit, the expert declaration of James Kilpatrick, and Plaintiff's discovery responses offered by Defendants raise a triable issue of fact as to whether Plaintiff reasonably mitigated its damages under these circumstances.

The Court need not determine the amount of damages as a matter of law

Separately, Defendants argue Plaintiff cannot prove the essential element of damages as a matter of law because they are impermissible, inconsistent, and uncertain. For example, in connection with the failure to mitigate damages, Defendants argue Plaintiff cannot prove damages because it impermissibly seeks to pay its own employees a "broker's commission" of $21,348. (Opposition at p. 14:13-25.) As noted above, Plaintiff does not dispute that it only consulted its employees and did not hire brokerage firm to market the premises. (Plaintiff's Amended SROGs Set 1 Nos. 21 and 21; Plaintiff's Amended RFAs Set 1 Nos. 5, 6, 7, and 8; AMF Nos. 29, 31.) Defendants argue that the "broker's commission" is in fact a bonus to its employees and cannot be charged to Defendants. (Ibid.)

Defendants make several other arguments challenging the total damages amount. For example, Defendants argue Mr. Aita's declaration is not coupled with exhibits to support his calculations and therefore lacks foundation and includes inadmissible hearsay. (Opposition at p. 11:5-24.) Defendants also note several erroneous and inconsistent calculations with respect to the total number of months of unpaid rent that Defendants may be responsible for. (Id. at p. 11:26-12:23.) In addition, Defendants note the inconsistencies between the calculations provided by Mr. Aita respect to the free rent period granted to the new tenant and the figures referenced in Plaintiff's discovery responses. For example, Mr. Aita's Declaration states that Plaintiff provided six months of free rent and CAM charges through June 2023; whereas, Plaintiff's discovery responses indicate that free rent was afforded to the new tenant from April 2020 through June 2023 as Defendant's unpaid rent, which exceeds Mr. Aita's six month calculation. (Id. at p. 12:26-13:20.) Defendants also argue Plaintiff failed to account for an amortization schedule in calculating the new tenant improvement allowance and maintain they are only responsible for two out of the five years of the allowance for a five-year lease. (Id. at p. 13:23-14:10.)

While the amounts due under the lease agreement can be determined, the measure of damages for breach of contract is the unpaid rent as well as the amounts reasonably incurred to re-lease the property, reduced by the amounts Plaintiff received or should have received through reasonable efforts to mitigate. Thus, the amount of damages is inevitably impacted by the reasonableness of Plaintiff's efforts to mitigate. The Court has already determined a triable issue of material fact exists with respect to the mitigation of damages and need not determine the amount of damages as a matter of law or resolve the issues raised by Defendants.

Summary adjudication as to both claims for breach of contract is DENIED because Plaintiff cannot prove the element of damages

Although liability is undisputed between the parties, the Court cannot grant summary adjudication as to these elements alone. The amount of damages is a necessary element for a breach of contract cause of action. (See Rutherford Holdings, LLC v. Plaza Del Rey (2014) 223 Cal.App.4th 221, 228 [noting that "[a] cause of action for damages for breach of contract is comprised of the following elements: (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff"].)

One cannot grant summary judgment or summary adjudication of a breach of contract cause of action if there is a triable issue of material fact as to the amount of damages. (See Paramount Petroleum Corp. v. Super. Ct. (Building Materials Corp. of America) (2014) 227 Cal.App.4th 226, 241 [stating that "[a]s damages are an element of a breach of contract cause of action (citation), a plaintiff cannot obtain judgment on a breach of contract cause of action in an amount of damages to be determined later"]; see also Code Civ. Proc. § 437c, subd. (f)(1) [stating that "[a] motion for summary adjudication shall be granted only if it completely disposes of a cause of action"].)

A moving plaintiff establishes threshold entitlement to summary judgment if it "prove[s] each element of the cause of action entitling the party to judgment on that cause of action." (Code Civ. Proc. § 437c, subd. (p)(1); see Pajaro Valley Water Management Agency v. McGrath (2005) 128 Cal.App.4th 1093, 1106.) Here, Plaintiff has not proved every element of its causes of action. The Court cannot grant summary adjudication since there is a triable issue of

fact as to damages generally. Therefore, summary adjudication is denied as to both causes of action for breach of contract.

Accordingly, Plaintiff's Motion for Summary Judgment is DENIED.

The Court will prepare the Order.

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Case No.: 20FL000236
Case Name: *Marriage of Tran & Nguyen*
Hearing Date: January 24, 2025
Event(s): By Petitioner Tam Tran,

- Motion for New Trial

I. Introduction and Relevant Background

Petitioner Tam Tran (Husband) moves for a new trial. Respondent Diana Nguyen (Wife) opposes Husband's motion.[1] The following summary of the background is drawn from the Court's records and was also summarized at length in the Court's Statement of Decision.

Husband filed his Petition for dissolution of marriage on January 23, 2020. It is undisputed the parties were married on June 11, 2000 and separated in January 2020. Following delays caused by the COVID pandemic and Husband's delays in exchanging information and complying with discovery, trial was set for January 2024. However, that trial date was continued to a status conference/trial setting conference on February 27, 2024 at the request of Husband's counsel, Michael Vu, due to Mr. Vu's health. Mr. Vu substituted out of the case via a substitution of attorney signed by Husband and Mr. Vu on February 13, 2024 (filed on March 11, 2024). At the February 27, 2024 Status/Trial Setting Conference, neither Husband nor his counsel appeared, and the matter was continued to April 2, 2024 in view of the recent substitution of counsel and representation by Wife's counsel that Husband was seeking new counsel. On April 2, 2024, Wife's counsel appeared but Husband did not. The Court again continued the Status/Trial Setting Conference (over the objection of Wife) to April 30, 2024. At the April 30, 2024 Status/Trial Setting Conference, again, Wife's counsel appeared, but there was no appearance by Husband nor any counsel for Husband. Having given multiple opportunities for Petitioner/Husband or his new counsel to appear, the case was set for a mandatory settlement conference on August 1, 2024, and for trial on August 12–13, 2024. No further substitution of attorney was filed, and Husband continued to represent himself.

Although required by standing orders of the Court to exchange lists of proposed witnesses and exhibits, and to provide to the opposing party copies of any proposed exhibits not previously produced in discovery, Husband did none of those actions.

On August 12, 2024, the first day of trial, Husband appeared via Microsoft Teams with attorney Phuc Dinh Do (who had not filed a written substitution of attorney) to request a trial continuance based on the fact Mr. Do had only recently been retained. The Court tentative ruling was to deny the continuance request and grant Wife's written motion in limine to preclude Husband from introducing any evidence because of the failure to comply with discovery and pretrial disclosure requirements. The Court ordered Husband and his attorney to immediately appear in the courtroom. Mr. Do promptly reported to the courtroom; Husband did not appear until almost two hours after the case was called for trial.

The trial commenced two hours late on August 12, 2024. The Court denied Husband's request to continue the trial for the following reasons: 1) the case had originally been set for trial in January 2024; 2) Husband had been self-represented since mid-February 2024 and had almost six months to find new counsel; 3) during the time he became self-represented and the time of trial, Husband did not comply with his obligation to produce documents, failed to appear at status conferences set by the court, failed to file a mandatory settlement conference (MSC) statement, and did not engage in good faith negotiations at the MSC; 4) In late 2023, after the case was first set to be tried in January 2024, Husband stopped paying the mortgage on the Beaver Creek property and Wife's credit card invoices pursuant to a stipulation reached in 2020, such that Husband left Wife and three minor children without monetary support to meet

[1] Wife also asks the Court to reserve jurisdiction over her request for an award of fees, costs, and sanctions in connection with responding to the motion for new trial.

the basic necessities of life; and 5) Husband's day-of-trial request for continuance to allow newly-obtained counsel to "come up to speed" was not in good faith in view of the record of this case.

The Court proposed that it determine temporary child and spousal support on August 12, 2024, to be effective immediately but grant Husband a brief continuance (30–60 days) on the issue of property division. This proposal would have afford Husband the requested continuance, but mitigated the harm to Wife and the Minor Children by Husband's continuing delay. Husband rejected this proposal, whereupon Mr. Do declined to substitute into the case.

Husband's renewed request for continuance on the ground that he was without counsel was denied and the trial proceeded. The Court made findings and orders regarding child support, temporary child support, and need-based attorney's fees and costs, and granted Wife's Motion in Limine to preclude Husband from introducing into evidence any documents that he should have produced in response to discovery demands or disclosed pre-trial, any testimony from third party witnesses (as none were disclosed) and reserving any objections to Husband's testimony based on failure to comply with pre-trial discovery or disclosure obligations.

On August 16, 2024, trial resumed and on the second day of trial, Husband requested a Vietnamese language interpreter. The Court noted Husband had appeared in court several times, both with and without counsel, including just four days earlier, and had never requested an interpreter. The Court then voir dired Husband regarding his English proficiency. The Court found Husband's ability to communicate in English, both verbally and in writing, was "more than proficient" and that his belated request for an interpreter was made in bad faith and for purposes of delaying the trial. The Court denied the request for an interpreter and the trial proceeded. At the end of trial, the Court took the matter under submission.

After the Court took the matter under submission, Husband attempted to send a letter to the Judge asking that the Court consider additional information. Husband did not copy Wife or her counsel with the letter, and it was only discovered in the Court file as the Court was preparing the Tentative Decision. The Court sent notice to all Parties of the attempted ex parte communication, and ordered the matter resubmitted for decision as of October 31, 2024. Thereafter, the Court received and sustained Wife's objections to the Court's consideration of any additional material that had been proferred ex parte.

The Court's "Tentative Decision and Proposed Statement of Decision" was filed November 12, 2024 and served on the parties the following day. Husband filed written objections to the proposed statement of decision, which are essentially the same as proffered in support of the current motion for new trial. At the December 17, 2024 Status Conference, Husband appeared with counsel and made an oral request that the Court re-open evidence in light of Husband's objections to the Statement of Decision. The Court stated that it would be overruling the objections, and after the appropriate time passed the preliminary statement of decision would become the ruling of the Court. The instant motion for new trial was filed on December 9, 2024. Wife's opposition thereto was filed on January 9, 2025.

II. New Trial

A. Legal Standard for Motion for New Trial

Pursuant to Code of Civil Procedure section 657, a decision made by a court "may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues on the application of the party aggrieved" on any of the seven grounds enumerated in that statute.[2] The court cannot grant a motion for a new trial on any other basis. (*Marriage of Herr* (2009) 174 Cal.App.4th 1462, 1471.)

The seven statutory grounds for a motion for new trial are as follows: (1) irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial; (2) misconduct of the jury; (3) accident or surprise that ordinary prudence could not have guarded against; (4) newly discovered evidence, material for the party making the application, which he or she could not with reasonable diligence have discovered and produced at trial; (5) excessive or inadequate damages; (6) insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against the law; and (7) error in law, occurring at the trial and excepted to by the party making the application. (Code. Civ. Proc., § 657.)

In ruling on a motion for new trial, the court must decide whether one or more of the grounds for new trial has been established; and if so, whether that ground "materially affect[s] the substantial rights" of the moving party. (Code Civ. Proc., § 657.)

B. Discussion

1. Irregularity of the Proceedings.

Husband moves for mistrial on grounds of irregularity in the proceedings and insufficiency of evidence.With respect to irregularity of proceedings, in Husband's papers, he describes the circumstances leading up to trial from his perspective. In essence, he claims Mr. Vu's illness and the Court's denial of his request to continue trial were irregularities in the proceedings.

Turning to Wife's position, she describes various instances in which Husband caused delays in this matter, refused to cooperate, and did not comply with court orders, claiming Husband did everything in his power to prevent her from obtaining the information he had in his possession. Wife also offers an example of Husband's dishonesty, explaining that his claim he was in Vietnam and unavailable for the August 1, 2024 settlement conference was untrue. Wife's attorney, Walter Pierce Hammon, states this information was verified by his legal assistant, who, per his instructions, confirmed Husband was at his residence in San Jose, California at the time of the hearing, not in Vietnam as he claimed (Wife's papers include a declaration signed by the legal assistant attesting to this fact).

Wife argues Husband had approximately five years to prepare for trial after the filing of the petition, and approximately six months to prepare for trial after becoming self-represented, such that the continuance request was properly denied. She argues a fair and impartial trial

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[2] In Husband's memorandum of points and authorities, he also cites Code of Civil Procedure section 1094.5 (regarding inquiry into validity of administrative order or decision) but does not offer any substantive discussion of that statute.

occurred based on admissible evidence, such that Husband's motion for new trial should be denied.

Husband's focus on Mr. Vu's illness as the event or circumstance that caused an irregularity in proceedings is misplaced. Although counsel having to withdraw due to illness is not necessarily typical, it is, in general, not uncommon for a party to have to obtain new counsel, for whatever reason, during the course of a dissolution proceeding. Mr. Vu withdrew as Husband's counsel in February 2024, approximately six months before the August 2024 trial. Mr. Vu appeared before this Court on both criminal and family law matters in the early months of 2024, and the Court is familiar with his diligent efforts to transition his clients to other attorneys or assist them in resolving their cases while he was closing his practice due to his advancing ill health. While Husband insists Mr. Vu's illness is the reason he was purportedly unable to obtain his file from Mr. Vu's office after Mr. Vu withdrew as his counsel, given Husband's history of causing delay in this action, the Court finds his attempts to blame Mr. Vu to be not credible.

Case law provides the alleged impropriety of a discretionary order denying a trial continuance is a ground for new trial. (*Henderson v. Drake* (1953) 118 Cal.App.2d 777, 780–781, 788.) The trial court may review its factual determination on which it originally predicated its discretionary order denying a continuance, and if it determines the motion for continuance should have been granted, grant the request for a new trial. (See *ibid.*)

Requests to continue trial are governed by California Rules of Court, rule 3.1332. A party seeking a continuance of trial must make the request for a continuance by a noticed motion or an ex parte application, with supporting declarations. (Cal. Rules of Court, rule 3.1332(b).) The party seeking a continuance must make the motion "as soon as reasonably practical once the necessity for the continuance is discovered." (*Ibid.*) Although continuances of trial are disfavored, each request must be considered on its own merits. (Cal. Rules of Court, rule 3.1332(c).) The court may grant a continuance only on an "affirmative showing of good cause." (*Ibid.*) California Rules of Court, rule 3.1332(c) lists various circumstances that may indicate good cause, including "[t]he unavailability of trial counsel because of death, illness, or other excusable circumstances" and "[t]he substitution of trial counsel, but only where there is an affirmative showing that the substitution is required in the interests of justice." (Cal. Rules of Court, rule 3.1332(c)(3), (c)(4).) Although the list contained in that rule is not exhaustive, the circumstances described therein suggest a trial continuance is appropriate only when circumstances allegedly warranting continuance are beyond the moving party's control.

In ruling on a motion or application for continuance, the court must consider all relevant facts and circumstances, which may include: (1) the proximity of the trial date; (2) whether there was any previous continuance, extension of time, or delay of trial due to any party; (3) the length of the continuance requested; (4) the availability of alternative means to address the problem that gave rise to the motion or application for continuance; (5) the prejudice parties or witnesses will suffer as a result of the continuance; (6) if the case is entitled to a preferential trial setting, the reasons for that status, and whether the need for a continuance outweighs the need to avoid delay; (7) the court's calendar and the impact of granting a continuance on other pending trials; (8) whether trial counsel is engaged in another trial; (9) whether all parties have stipulated to a continuance; (10) whether the interests of justice are best served by a continuance, the trial of the matter, or imposing conditions on the continuance; and (11) any

other fact or circumstance relevant to the fair determination of the motion or application. (Cal. Rules of Court, rule 3.1332(d).)

"[T]here is no policy in [California] of indulgence or liberality in favor of parties seeking continuances. Rather, such parties must make a proper showing of good cause . . . ." (*County of San Bernardino v. Doria Mining & Engineering Corp.* (1977) 72 Cal.App.3d 776, 781.) "[T]he court must look beyond the limited facts which cause a litigant to request a last-minute continuance and consider the degree of diligence in his or her efforts to bring the case to trial, including participating in earlier court hearings, conducting discovery, and preparing for trial." (*Oliveros v. County of Los Angeles* (2004) 120 Cal.App.4th 1389, 1396.)

Obtaining new counsel or losing counsel before trial does not *require* the court to grant a request for a continuance. In *Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 823, the trial court denied the wife's request for continuance of a contempt hearing after the contempt motion had been pending for seven months. The trial court found that the wife had known for over a month that she might not have an attorney at the hearing but waited until the day of the hearing to request a continuance, which was unfair to the other side. (*Marriage of Falcone & Fyke*, *supra*, 164 Cal.App.4th at p. 823.) The Court further noted the trial court found that the wife had been closely involved in drafting her moving papers, implying that the wife had already exercised significant direct control over the litigation and that the request was a delay tactic. (*Ibid.*) Indeed, the wife had filed three other contempt motions without the assistance of counsel. (*Ibid.*) For these reasons, the Court of Appeal found that the wife did not show good cause for the continuance, such that the trial court acted within its discretion in denying her request. (*Ibid.*)

In *County of San Bernardino v. Doria Mining & Engineering Corp.*, in an action by a county against a corporation to recover delinquent property taxes, Mr. Larry Sackey, an attorney who was not the defendant's attorney of record, appeared on the date set for trial and requested a continuance. (72 Cal.App.3d at p. 782.) Mr. Sackey related that eight days earlier, the president of the defendant corporation told him their current counsel no longer wished to represent the defendant. (*Ibid.*) He stated that if the continuance was granted, he would become the attorney of record and would need one or two weeks to prepare for trial. (*Ibid.*) County counsel indicated he had his witness present and was prepared to try the case. (*Ibid.*) In response to a question by the judge, county counsel further indicated he had been willing to agree to a short continuance but was unwilling to see the matter go off calendar (which is what the presiding judge (a different judge) indicated would happen if the parties were not ready for trial). (*Ibid*.) Mr. Sackey was then called to the phone, and on his return, stated he had spoken to a member of defendant's current counsel team, who had informed him that if the matter were continued until the afternoon, a member of the firm would appear for defendant. (*Ibid.*) The trial judge then announced the motion for continuance was denied. (*Ibid.*)

The Court of Appeal held there was no abuse of discretion in denying the request for continuance of trial. (*County of San Bernardino v. Doria Mining & Engineering Corp*, *supra*, 72 Cal.App.3d at p. 784.) The Court explained (discussing the former rule for trial continuances): "The motion by Mr. Sackey falls far short of the requirements of rule 224. There was no noticed motion; rather, the matter was raised orally on the date set for trial. The motion was not made 'promptly upon the necessity for the continuance being ascertained,' as the problem had been apparent for over a week. Finally, there was no affirmative showing of good cause. [¶] There was no showing concerning when the attorney of record indicated to his

client a wish to withdraw. Thus, we do not know whether defendant used due diligence to obtain a new attorney. There was no showing that the substitution was necessary, i.e., that the attorney of record was unable or absolutely unwilling to represent defendant. Indeed, at the time of the motion there had been no substitution, so that the motion was premised on a hypothetical rather than actual dilemma. Finally, the trial judge could properly consider that the case had been pending for over four years, the motion was not supported by written declarations, neither an officer of defendant corporation nor defendant's attorney of record appeared, and the motion was made on the very day set for trial, while the county had brought a witness and was ready to proceed." (*Id.* at p. 783.)

From a procedural standpoint, Husband's request for continuance was improperly made and could have been denied outright. It was not made by noticed motion or ex parte motion but instead was made orally on the first day of trial. (See *Reales Investment, LLC v. Johnson* (2020) 55 Cal.App.5th 463, 469 [trial court did not abuse its discretion in denying a request for continuance made orally on the first day of trial and without any supporting evidence in violation of California Rules of Court, rule 3.1332(b)].)

With respect to the merits, the Court was within its discretion to deny Husband's last-minute continuance requests. The Court made an evaluation of the specific request based on the circumstances existing at that time. The Court considered Husband's history of causing delays (describing, in detail Husband's failure to comply with court procedures, his failure to respond to discovery, and his failure to appear at hearings), that Wife did not agree to an additional continuance, and that Wife would suffer as a result of a further delay. As was the case in *County of Bernardino v. Doria Mining & Engineering Corp.*, Wife was prepared to proceed with trial at the time of Husband's request, which, again, was made on the first day of trial, nearly eight months after the trial was initially scheduled to begin.

Importantly, the Court also considered that Husband knew he was self-represented in mid-February 2024 but failed to retain counsel over the next approximately six months. On this point, it is worth noting that despite Husband's claims he spoke to many attorneys about representing him, in his November 27, 2024 declaration objecting to the Court's tentative decision, he states he consulted *three* attorneys that declined to represent him. Given the significant amount of time Husband had before trial, contacting only three attorneys does not demonstrate diligence in attempting to obtain new counsel.

Finally, as in *Marriage of Falcone & Fyke*, the Court determined that in light of the history of this case, the continuance request was not made in good faith. The fact Husband refused the Court's proposal to issue support orders and continue the issue of property division provides further support for the finding that Husband's request was not made in good faith, as does the fact Mr. Do declined to represent him after Husband refused the Court's proposal. Given the Court's findings regarding Husband's conduct, the Court's determination that requesting a continuance on the first day of trial was another delay tactic was reasonable. The circumstances Husband found himself in on the first day of trial were *not* beyond his control, such that denial of his continuance request seems to have been appropriate.

For the above reasons, the denial of the request for continuance was within the Court's discretion, such that the decision was not an irregularity in the proceeding warranting a new trial.

2. Insufficiency of the Evidence**.**

Pursuant to Code of Civil Procedure section 657, subdivision (6), the Court may grant a new trial on the ground of insufficiency of evidence to justify the decision. "A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision . . . unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision." (Code Civ. Proc., § 657.)

Here, Husband argues the evidence was insufficient because it was "one-sided." He asserts the Court relied exclusively on Wife's submissions because he "was unable to present key financial documents withheld by his prior counsel's office." Husband also argues the record was "incomplete" regarding his "obligations and financial capacity" because the records had been submitted to Mr. Vu. Again, Husband argues he was unable to obtain these records from Mr. Vu's office. Husband goes on to argue the merits of the Court's findings and the various findings that should have been made instead.

Husband ignores that he was the Petitioner and that he had over four years to produce in discovery the evidence he now seeks to introduce after trial. He failed to produce documents at a deposition in 2023, failed to cooperate with Wife's expert witness in providing documents despite court orders that he do so, produced bank statements for his business accounts that showed greatly reduced balances (which balances were restored shortly after Husband's deposition), and failed to make any pre-trial disclosures. He overlooks the fact that this case had been set for trial in January 2024 – when he was represented by counsel, and the representation was made that the case was ready to be tried.

In view of the foregoing, **Husband's motion for new trial is DENIED on all grounds**.

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