No. S210804

In the Supreme Court of California

Even Zohar Construction & Remodeling, Inc.,

Plaintiff and Appellant,

vs.

Bellaire Townhouses, LLC, et al.,

Defendants and Respondents.

REPLY TO ANSWER TO PETITION FOR REVIEW

From A Published Opinion Reversing An Order Vacating
Defaults And A Default Judgment
Court of Appeal, Second Appellate District, Division Four, No. B239928

Appeal From An Order Vacating Defaults And A Default Judgment
Los Angeles Superior Court, No. BC458347
The Honorable Ralph Dau

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I.
INTRODUCTION

In the petition for review, defendants showed that this Court should:

> Grant review to resolve the direct and irreconcilable conflict between the opinion of the Court of Appeal here and *Standard Microsystems Corp. v. Winbond Electronics Corp.*, 179 Cal.App.4th 868 (2009), on the important question involving the interplay between sections 473(b) and 1008(b) of the Code of Civil Procedure;
>
> Adopt *Standard Microsystems*' correct holding that section 473(b) prevails over section 1008(b) and reject the Court of Appeal's erroneous contrary holding; and
>
> Reverse the Court of Appeal's judgment reversing the trial court, which is based solely on the Court of Appeal's erroneous holding.

In the answer, plaintiff and appellant Even Zohar Construction & Remodeling, Inc. (EZ) argues that this Court should deny review, and claims that: (1) there is no conflict between *Standard Microsystems* and the Court of Appeal opinion on the

interplay between sections 473(b) and 1008(b); (2) section 1008(b) prevails over section 473(b); and (3) the Court of Appeal's judgment is correct because the trial court's order is incorrect.

EZ's argument against review is meritless because each of its claims lacks merit.

II.

REVIEW IS NEEDED TO RESOLVE THE CONFLICT BETWEEN *STANDARD MICROSYSTEMS* AND THE OPINION BELOW ON THE INTERPLAY BETWEEN SECTIONS 473(b) AND 1008(b)

A. EZ Is Wrong: *Standard Microsystems* And The Court Of Appeal Opinion Here Conflict On The Interplay Between Sections 473(b) And 1008(b)

EZ claims that *Standard Microsystems* and the Court of Appeal's opinion here do not conflict on the interplay between sections 473(b) and 1008(b). (Ans. 1-7, 16-27) EZ is wrong: there is a direct and irreconcilable conflict.

Section 473(b) requires a court to grant a timely application for relief from a default or default judgment "whenever" the application is accompanied by an attorney affidavit of fault that attests that the attorney's mistake, inadvertence, surprise, or neglect was a cause of the default or default judgment, unless the court finds that the default or default judgment "was not in fact

caused by the attorney's mistake, inadvertence, surprise, or neglect." *Id.*

For its part, section 1008(b) provides that a party who renews an application for an order that was refused in whole or part, or granted conditionally or on terms, may do so only with new or different facts, circumstances, or law. Section 1008(b) "specifies the court's jurisdiction with regard to applications for ... renewals of previous motions, and applies to all applications ... for the renewal of a previous motion, whether the order deciding the ... motion is interim or final. § 1008(e). Section 1008(e) thus prohibits a judge from considering an "application ... for the renewal of a previous motion" unless the motion is "made according to" section 1008(b).

There is a direct and irreconcilable conflict on the interplay between sections 473(b) and 1008(b). Consider the following scenario, reflected in the facts of this case: A party unsuccessfully applies for section 473(b) mandatory relief from a default or default judgment based on attorney fault. The party then makes what would otherwise be a successful application for the same relief on the same basis under section 473(b), but without showing new or different facts, circumstances, or law under section 1008(b). Must the court grant the second application notwithstanding section 1008(b)? Or does section 1008(e) deprive the court of jurisdiction to consider the second application? In other words, does section 473(b) prevail over section 1008(b)? Or does section 1008(b) prevail over section 473(b)? While *Standard Microsystems* holds that section 473(b)

prevails over section 1008(b), the Court of Appeal opinion holds that section 1008(b) prevails over section 473(b).

EZ nevertheless claims there is no conflict. But the Court of Appeal here stated, both at the beginning and at the end of its discussion, and in its analysis and in its conclusion: "[W]e decline to follow *Standard Microsystems*." (Opn. 3, 21) If the Court of Appeal believed there was no conflict, it would have said so. That the Court of Appeal expressly declined to follow *Standard Microsystems* is proof that it found a direct and irreconcilable conflict.

EZ claims *Standard Microsystems* does *not* hold that section 473(b) prevails over section 1008(b) and that the Court of Appeal opinion does *not* hold that section 1008(b) prevails over section 473(b). EZ is wrong.

The Court of Appeal opinion agreed with EZ's contention that " '[d]efendants' failure to comply with Section 1008 deprived the lower court of jurisdiction to reach the merits of their renewed Section 473(b) motion as a matter of law.' " (Opn. 13) This agreement means that, no matter how meritorious a court might find a party's section 473(b) application for mandatory relief from a default or default judgment based on attorney fault, the court may not consider the application under section 1008(b) because section 1008(e) states that it lacks jurisdiction. That means that, in the

Court of Appeal's view, section 1008(b) prevails over section 473(b).

Similarly, *Standard Microsystems* does hold that section 473(b) prevails over section 1008(b). To quote *Standard Microsystems*: "Insofar as ... a conflict actually exists, it must be resolved in favor of allowing relief under section 473(b), not denying it under section 1008." 179 Cal.App.4th at 894. Section 1008(b), the court said, "inflicts a procedural forfeiture, such that uncertainties should be resolved *against* its application." *Id.* (ital. orig.). Section 473(b), in contrast, is a *remedial* statute, and as such is construed liberally, i.e., expansively, "to favor its object that cases be adjudicated on the merits rather than determined by default." *Id.* (citations omitted). "The same result follows from the familiar principle that in the event of conflict, specific provisions must prevail over more general ones." *Id.* at 895 (citations omitted). "Section 1008 deals with the general subject of ... renewals of previous motions. Section 473(b) deals with applications for relief from a default or default judgment entered through the fault of the defendant's attorney. As the latter subject is considerably narrower and more specific than the former, the latter provision will, absent some countervailing consideration, govern in any conflict." *Id.*

According to EZ, however, *Standard Microsystems*' language is mere dictum. What matters, EZ maintains, is not what *Standard Microsystems* said, but what it did. But what *Standard*

Microsystems did shows that its language is not dictum. There, the Court reversed an order denying a section 473(b) application for mandatory relief from a default and default judgment based on attorney fault on the ground the application was meritorious, even though the application "may have been, in part, a renewal of" a previous application without a showing of new or different facts, circumstances, or law under section 1008(b). *Id.* at 873. The Court did not decide whether the application was in fact a partial renewal of the previous application. Rather, it concluded that, even if the application *was* a partial renewal, section 473(b) "must prevail" over section 1008(b). *Id.*

EZ then asserts that, whatever *Standard Microsystems* and the Court of Appeal opinion might each hold with respect to the interplay between sections 473(b) and 1008(b), the two statutes, in fact, do not conflict. To support that assertion, EZ first quotes from the Court of Appeal opinion:

> [T]he statues [*sic*] are complimentary [*sic*]. Section 473, subdivision (b) states the requirements of making a motion for relief from default in the first instance. It says nothing about second or subsequent motions made on the same grounds. That situation is governed by section 1008 for *all* renewed motions of every type, without exception.

(Opn. 19 (ital. orig.))

Section 473(b), however, does *not* "state the requirements for making a motion for relief from default *in the first instance.*" Rather, section 473(b) states the requirements for making such a motion *whenever* it is made—the first time or thereafter. Indeed, section 473(b) *requires* relief from default "*whenever* an application for relief is made no more than six months after entry of judgment" and is in the proper form and is accompanied by the proper affidavit. (Ital. added) As noted in the petition, "Whenever" means "as often as," "at any time," "at any time when," "at whatever time," "at whatever time it shall happen," and "at what time soever." *Morse v. Custis*, 38 Cal.App.2d 573, 576-77 (1940) (internal quotation marks omitted). Thus, by requiring relief "whenever" the party properly applies for relief within six months, section 473(b) requires relief notwithstanding the absence of new or different facts, circumstances, or law.

To support its claim that sections 473(b) and 1008(b) do not conflict, EZ then states that a "second 473(b) motion that at best may be deemed a renewed motion only in part as to a collateral matter is not barred by section 1008." (Ans. 25) EZ seems to mean that a second motion under section 473 need not show new or different facts, circumstances, or law if it is similar to the second motion in *Standard Microsystems*—a motion that seeks to vacate a default and a default judgment after an initial motion to vacate only the default. But review would be warranted even if a conflict between sections 473(b) and 1008(b) could be avoided in the case of a "second 473(b) motion that at best may be deemed a renewed

motion only in part as to a collateral matter." Courts and litigants would still be forced to guess whether section 473(b) or section 1008(b) governed, by being forced to guess whether a second section 473(b) motion was a renewed motion "in part" and, if so, whether it would be deemed to involve a "collateral matter."

In an apparent effort to claim that the conflict is not yet ripe for resolution, EZ then claims the conflict between *Standard Microsystems* and the Court of Appeal opinion is reflected in only five decisions: (1) the Court of Appeal's; (2) *Standard Microsystems*; (3) *Gilberd v. AC Transit*, 32 Cal.App.4th 1494 (1995); (4) *Lee v. Wells Fargo Bank, N.A.*, 88 Cal.App.4th 1187 (2001); and (5) *Wozniak v. Lucutz*, 102 Cal.App.4th 1031 (2002), *disapproved on another point in Le Francois v. Goel*, 35 Cal.4th 1094, 1107 n.5 (2005). In fact, there is a sixth decision, *Ron Burns Construction Co., Inc. v. Moore*, 184 Cal.App.4th 1406 (2010). But the number is hardly important, since even *two* decisions in conflict warrant review. *See, e.g., People v. Leiva*, 56 Cal.4th 498, 506 (2013) (granting review to "resolve [the] conflict" between the decision of the Court of Appeal below and *People v. Tapia*, 91 Cal.App.4th 738 (2001)). Five or six decisions is an embarrassment of riches.

EZ also asserts that the facts of this case and the facts of *Standard Microsystems* are "different." (Ans. 2) But no two cases have identical facts—and even different facts can give rise legal conflicts, as they have here. So, too, with EZ's claim that the facts

of this case are "unique." (Ans. 27) If a case's unique facts precluded review, review could never be granted.

B. EZ Is Wrong: *Standard Microsystems* Properly Construes, While The Court Of Appeal Opinion Here Erroneously Construes, The Interplay Between Sections 473(b) And 1008(b)

EZ next claims that, even if *Standard Microsystems* and the opinion of the Court of Appeal here conflict on the interplay between sections 473(b) and 1008(b), the Court of Appeal opinion correctly holds that section 1008(b) prevails over section 473(b). (Ans. 27-32) EZ is wrong.

Two rules of statutory construction compel the conclusion that section 473(b) prevails over section 1008(b). One is that a more specific statute prevails over a more general one. *See, e.g., Wells v. One2One Learning Foundation*, 39 Cal.4th 1164, 1208 (2006). Section 1008(b) is the more general statute, dealing with all applications for renewal of all previous motions in all kinds of cases. In contrast, section 473(b) is the more specific statute, dealing in pertinent part solely with applications for mandatory relief from a default or default judgment based on attorney fault.

The other rule is that a remedial statute prevails over a statute that effects a procedural forfeiture. *See, e.g., Rodrigues v. Superior Court*, 127 Cal.App.4th 1027, 1036-37 (2005). Section 1008(b) falls into the latter category. *California Correctional Peace Officers*

Assn. v. Virga, 181 Cal.App.4th 30, 48 (2010) (section 1008 " 'effect[s] ... procedural forfeiture.' "). It aims " 'to reduce the number of ... renewals of previous motions heard by judges' " in order " 'to conserve the court's resources by constraining litigants who would attempt to bring the same motion over and over.' " *Le Francois v. Goel*, 35 Cal.4th 1094, 1098, 1100 (2005). Section 473(b), on the other hand, is a "remedial" statute. *Rodrigues*, 127 Cal.App.4th at 1036. It aims to relieve the innocent client of the consequences of its errant attorney's fault, to place the burden on the attorney rather than the client, and to nip a potential legal malpractice action in the bud. *Metropolitan Service Corp. v. Casa de Palms, Ltd.*, 31 Cal.App.4th 1481, 1487 (1995).

As defendants established in the petition, none of the five reasons the Court of Appeal gave for its conclusion that section 1008(b) prevails over section 473(b) supports that conclusion. (Petn. 23-27) Rather than attempting to defend any of those reasons, EZ implies that this Court's opinion in *Le Francois v. Goel*, 35 Cal.4th 1094 held that section 1008(b) prevails over section 473(b). (Ans. 28) EZ is wrong.

Le Francois did not consider the interplay of sections 473(b) and 1008(b). Indeed, it did not even refer to section 473(b). As a result, it did not hold, and could not have held, that section 1008(b) prevails over section 473(b). " 'It is axiomatic,' of course, 'that cases are not authority for propositions not considered.' " *People v.*

Jones, 11 Cal.4th 118, 123 n.2 (1995), quoting *People v. Gilbert*, 1 Cal.3d 475, 482 n.7 (1969).

EZ also asserts that, in showing that section 473(b) prevails over section 1008(b), defendants "completely ignor[e]" section 1008(b). (Ans. 29) Wrong again. Rather, *EZ* completely ignores section 473(b), by ignoring that it requires relief from a default or default judgment based on attorney fault "whenever" the party properly and timely applies for relief. EZ also ignores section 473(b)'s purpose—to save an innocent client from a default or default judgment entered because of an errant attorney.

In the petition, defendants acknowledged both section 1008(b)'s and section 473(b)'s language and purpose. (Petn. 11-15) That acknowledgement compelled the conclusion that the statutes are in direct and irreconcilable conflict. As a result, both cannot operate without one prevailing over the other. It is section 473(b), which favors litigants, that must prevail over section 1008(e), which favors courts. The reason is simple: As this Court held in *Neary v. Regents of University of California*, 3 Cal.4th 273, 280 (1992), "[t]he courts exist for litigants. Litigants do not exist for courts."

C. EZ Is Wrong: In Erroneously Construing The Interplay Between Sections 473(b) And 1008(b), The Court Of Appeal Erroneously Reversed The Trial Court's Order

Lastly, EZ claims that, even if the Court of Appeal erroneously held that section 1008(b) prevails over section 473(b),

that Court correctly reversed the order setting aside the default and default judgment. (Ans. 32-34) EZ is wrong.

As noted, if a party files a timely and proper motion for mandatory relief, the trial court may deny that motion only if the "court finds that the default ... was not in fact caused by the attorney's" fault.

EZ does not, and cannot, dispute that defendants' renewed motion for mandatory relief satisfied each of the statute's conditions: (1) the motion was made on January 18, 2012, well within six months after entry of judgment on December 8, 2011; (2) it was in proper form; and (3) it was accompanied by a declaration under penalty of perjury in which attorney Daniel Gibalevich attested to his fault. 2AA/342-57. Instead, EZ claims that defendants' motion came within the exception because the default and default judgment were not caused by Gibalevich's fault. EZ is wrong.

The trial court made no such finding. Rather, in setting the default and default judgment aside, it indisputably found credible a declaration submitted by defendant Samuel Fersht, the president of defendant Bellaire Townhouses, denying complicity in the defaults and the default judgment. 3AA/548-49. After all, the court found that "no part of the fault is shown to be attributable to the defendant clients." 3AA/555.

According to EZ, the trial court *should have* found to the contrary—i.e., that Dr. Fersht's declaration was not credible. EZ's attack on Dr. Fersht is not only unseemly—directed against a man of advanced years—but also unsuccessful.

As EZ recognizes, "[c]redibility is an issue for the fact finder," *Johnson v. Pratt & Whitney Canada, Inc.*, 28 Cal.App.4th 613, 622 (1994), which in this case was the trial court. The trial court's finding that Dr. Fersht's declaration was credible must stand if supported by substantial evidence. *See Shamblin v. Brattain*, 44 Cal.3d 474, 479 (1988). It is. The evidence established, and EZ does not dispute, that the defaults and the default judgment burdened Dr. Fersht with an obligation to pay EZ $1.7 million—an obligation he believed he should not have. 1AA/178-79; 3AA/549. The evidence also established, and EZ does not dispute, that, although of advanced years, Dr. Fersht was rational. 3AA/549. Therefore, the evidence established that Dr. Fersht *could not* have been complicit in the defaults and the default judgment.

Finally, EZ implies that *Standard Microsystems* "*expressly* carved out of [its] ambit" a case such as this (Ans. 20 (ital. orig.)) by stating that the case before it did not involve a party who "invokes the mandatory provisions of section 473(b) unsuccessfully, and then seeks to invoke them again." 179 Cal.App.4th at 895. EZ's implication is false. The relevant passage from *Standard Microsystems* states: "We observe that this is not a case where a party invokes the mandatory provisions of section 473(b)

unsuccessfully, and then seeks to invoke them again. We doubt that any categorical rule could govern such situations, for in some cases the second motion may be only a rehash of the first, while in others it might assert attorney mistakes directly involved in *bringing about the first denial.*" *Id.* (ital. orig.). In this case, however, defendants' renewed motion was *not* a mere "rehash" of the original motion, but instead, it "asserted mistakes" by attorney Gibalevich that had caused the denial of the first motion. (*See* Petn. 2-5)

III.
CONCLUSION

Defendants showed in the petition that the conflict between *Standard Microsystems* and the Court of Appeal's opinion here has produced a direct and irreconcilable conflict. That conflict leaves litigants and trial courts without clear direction whether a party may obtain section 473(b) mandatory relief from a default or default judgment based on attorney fault if the party unsuccessfully sought the same relief previously. EZ has not defeated defendants' showing.

Because the conflict warrants this Court's plenary attention and *Standard Microsystems* correctly holds that section 473(b) prevails over section 1008(b), the Court should grant review and reverse the Court of Appeal's judgment.

DATED: June 11, 2013.

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WORD COUNT CERTIFICATE

This Reply to the Answer to Petition for Review contains 3,445 words (including footnotes, but excluding cover, tables, the signature block, and this certificate). In so stating, I have relied on the word count of Microsoft Office Word 2010, the computer program used to prepare the petition.

Executed on June 11, 2013, at San Francisco, California.

Dennis Peter Maio

Dennis Peter Maio

PROOF OF SERVICE

Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC, et al.
California Supreme Court No. S210804;
Second Appellate District, Division Four, No. B239928;
Los Angeles County Superior Court No. BC458347

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is REED SMITH LLP, 101 Second Street, Suite 1800, San Francisco, California 94105-3659. On June 11, 2013, I served the following document(s) by the method indicated below:

REPLY TO ANSWER TO PETITION FOR REVIEW

☑ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Declaration.

☑ by transmitting via email to the party whose email address is listed below:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on June 11, 2013, at San Francisco, California.

Eileen Kroll