

No. S210804

SUPREME COURT
FILED

OCT - 1 2013

In the Supreme Court of California

Frank A. McGuire Clerk

Even Zohar Construction & Remodeling, Inc., Deputy
Plaintiff and Appellant,

vs.

Bellaire Townhouses, LLC, et al.,
Defendants and Respondents.

MOTION FOR JUDICIAL NOTICE

On 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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Samuel Fersht, Individually and as Trustee of the Fersht Family Living Trust*

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MOTION

Pursuant to Evidence Code sections 452 and 459 and California Rule of Court 8.252(a), defendants and respondents Bellaire Townhouses, LLC, and Samuel Fersht, Individually and as Trustee of the Fersht Family Living Trust (defendants) move this Court to take judicial notice of the legislative history of the 1992 amendment of Code of Civil Procedure section 1008 (all unspecified statutory references are to the Code of Civil Procedure), as embodied in:

1. Legislative materials relating to Assembly Bill No. 2616, 1991-92 Regular Session, Chapter 1348, Statutes of 1992, amending section 1008 (Assembly Bill No. 2616) (attached to First Decl. of Jan S. Raymond); and

2. Legislative materials relating to Senate Bill No. 1805, 1991-92 Regular Session, Chapter 460, Statutes of 1992, amending section 1008 (Senate Bill No. 1805) (attached to Second Decl. of Jan S. Raymond).

Good cause exists for taking judicial notice of these materials, as shown in the attached Memorandum of Points and Authorities and the Declarations of Paul D. Fogel and Jan S. Raymond. A Proposed Order is attached.

DATED: September 30, 2013.

Respectfully Submitted,

GIBALEVICH AND ASSOCIATES

JAMES S. LINK

REED SMITH LLP

By: 

Paul D. Fogel

Attorneys for Defendants and Respondents
Bellaire Townhouses, LLC, and Samuel
Fersht, Individually and as Trustee of the
Fersht Family Living Trust

MEMORANDUM OF POINTS AND AUTHORITIES

I

ISSUE PRESENTED

The issue on review involves the interplay between section 473(b) and section 1008(b) and hence the proper construction of each statute.

Section 1008 requires a court to deny a renewed motion—i.e., one that seeks an order that a prior motion unsuccessfully sought—unless the renewed motion is based on new or different facts, circumstances, or law. For its part, section 473(b) requires a court to grant a motion for relief from a dismissal, default, or default

judgment “*whenever* an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney’s sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect ... unless the court finds that the default or dismissal was not in fact caused by the attorney’s mistake, inadvertence, surprise, or neglect.” (Ital. added.)

The precise issue before this Court is as follows: When a defendant (1) has previously but unsuccessfully moved to vacate a default or default judgment under section 473(b), and (2) files a subsequent and proper motion for mandatory relief from the default or default judgment under section 473(b) based on his or her attorney’s admission of fault, but (3) does not present new or different facts, circumstances, or law under section 1008(b):

— must the trial court grant that motion, as the Sixth District held in *Standard Microsystems Corp. v. Winbond Electronics Corp.*, 179 Cal.App.4th 868 (2009)?

— or must the court deny that motion, as the Second District, Division Four here held, disagreeing with and refusing to follow *Standard Microsystems*?

II

**GOOD CAUSE EXISTS TO JUDICIALLY NOTICE THE
LEGISLATIVE MATERIALS RELATING TO
ASSEMBLY BILL NO. 2616 AND SENATE BILL NO. 1805**

Evidence Code section 451(a) permits a court to take judicial notice of the “public statutory law of this state,” while Evidence Code section 452(c) permits a court to take judicial notice of “[o]fficial acts of” this state’s “legislative ... department[]” This Court may therefore take judicial notice of the legislative materials relating to Assembly Bill No. 2616 and Senate Bill No. 1805 as reflective of the public statutory law and official legislative acts surrounding section 1008. *See, e.g., Evans v. City of Berkeley*, 38 Cal. 4th 1, 7 n.2 (2006) (taking judicial notice of “legislative history”); *Koebke v. Bernardo Heights Country Club*, 36 Cal. 4th 824, 848 n.6 (2005) (same).

Good cause exists for this Court to take judicial notice of these materials. That is because, to determine whether, in case of conflict, section 473(b) or section 1008(b) prevails over the other, this Court must construe the two statutes—i.e., it must perform the “fundamental task” of “ascertain[ing] the intent of the Legislature” to “effectuate” the statute’s “purpose.” *Cummins, Inc. v. Superior Court*, 36 Cal.4th 478, 487 (2005); *Day v. City of Fontana*, 25 Cal.4th 268, 272 (2001). Doing so requires “ascertain[ing] and declar[ing] what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted”

Manufacturers Life Ins. Co. v. Superior Court, 10 Cal.4th 257, 274 (1995); § 1858. When the statute's words are "clear and unambiguous," the task begins and ends with its words. *Solberg v. Superior Court*, 19 Cal.3d 182, 198 (1977). When the statute's words are otherwise, the task may extend to the statute's "legislative history." *Avila v. Citrus Community College Dist.*, 38 Cal.4th 148, 155 (2006).

The legislative materials that accompanied the enactment of section 1008(b) are helpful in properly construing that statute. In their Opening Brief on the Merits (OBOM), defendants argue that section 1008(b)'s unambiguous language establishes that, in case of conflict, section 473(b) prevails over section 1008(b). OBOM/38-40. The legislative materials are nevertheless helpful, since they confirm that conclusion. OBOM/40.

Defendants did not present the legislative materials relating to Assembly Bill No. 2616 and Senate Bill No. 1805 to the trial court or to the Court of Appeal. But this Court has the power under Evidence Code section 459 to take judicial notice of them, especially given that they do not relate to proceedings that occurred after entry of the order setting aside the default and default judgment, which order the Court of Appeal reversed.

III
CONCLUSION

The legislative materials here are the proper subject of judicial notice and there is good cause for this Court to consider them. Accordingly, the Court should grant this motion.

DATED: September 30, 2013.

Respectfully Submitted,

GIBALEVICH AND ASSOCIATES

JAMES S. LINK

REED SMITH LLP

By: _____


Paul D. Fogel

Attorneys for Defendants and Respondents
Bellaire Townhouses, LLC, and Samuel
Fersht, Individually and as Trustee of the
Fersht Family Living Trust

DECLARATION OF PAUL D. FOGEL

I, Paul D. Fogel, declare:

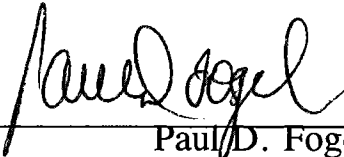
1. I am an attorney at law, admitted to practice before all courts of the State of California, and am a partner in Reed Smith LLP, one of the law firms representing defendants and respondents Bellaire Townhouses, LLC, and Samuel Fersht, Individually and as Trustee of the Fersht Family Living Trust. I make this declaration of my own personal knowledge. If called as a witness, I could and would testify competently to the facts stated.

2. My firm purchased the legislative history of the 1992 amendment of section 1008 as embodied in the legislative materials relating to Assembly Bill No. 2616 and Senate Bill No. 1805 from Jan S. Raymond, of Legislative History and Intent. Mr. Raymond and his staff compiled the legislative materials relating to Assembly Bill No. 2616 and Senate Bill No. 1805; Mr. Raymond executed declarations authenticating those materials; and Mr. Raymond and his staff posted true and correct copies of the materials and declarations to a website to which I was given access. I downloaded the legislative materials relating to Assembly Bill No. 2616 and Senate Bill No. 1805 and Mr. Raymond's declarations and caused them to be printed and bound, with the legislative materials relating to Assembly Bill No. 2616 attached to his First Declaration and the

legislative materials relating to Senate Bill No. 1805 attached to his Second Declaration.

3. I have reviewed the legislative history of the 1992 amendment of section 1008 as embodied in the legislative materials relating to Assembly Bill No. 2616 and Senate Bill No. 1805. I believe that that history is relevant to the proper construction of section 1008(b), which is implicated in the issue on review—whether, in case of conflict, section 473(b) or section 1008(b) prevails over the other.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on September 30, 2013, in San Francisco, California.



Paul D. Fogel

PROPOSED ORDER

GOOD CAUSE APPEARING, the Motion for Judicial Notice filed by defendants and respondents Bellaire Townhouses, LLC, and Samuel Fersht, Individually and as Trustee of the Fersht Family Living Trust is granted. The Court takes judicial notice of the legislative history of the 1992 amendment of Code of Civil Procedure section 1008, as follows: (1) legislative materials relating to Assembly Bill No. 2616, 1991-92 Regular Session, Chapter 1348, Statutes of 1992, amending section 1008, which are attached to the First Declaration of Jan S. Raymond; and (2) legislative materials relating to Senate Bill No. 1805, 1991-92 Regular Session, Chapter 460, Statutes of 1992, amending section 1008, which are attached to the Second Declaration of Jan S. Raymond.

DATED: _____

CHIEF JUSTICE

PROOF OF SERVICE

Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC, et al.
California Supreme Court No. S210804;
Second District, Div. Four, No. B239928; Los Angeles Super. Ct. 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 October 1, 2013, I served the following document(s) by the method indicated below:

OPENING BRIEF ON THE MERITS;

MOTION FOR JUDICIAL NOTICE;

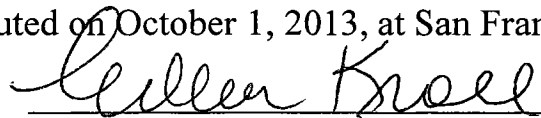
**FIRST DECLARATION OF JAN S. RAYMOND IN SUPPORT OF
MOTION FOR JUDICIAL NOTICE; AND**

**SECOND DECLARATION OF JAN S. RAYMOND IN SUPPORT OF
MOTION FOR JUDICIAL NOTICE**

- 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.

Daniel B. Harris, Esq. 3450 Sacramento Street, Suite 108 San Francisco, CA 94118	Attorneys for Plaintiff and Appellant Even Zohar Construction & Remodeling, Inc. Tel: 415.994.1727 Fax: 415.723.7411 dbh2007@sbcglobal.net
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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 October 1, 2013, at San Francisco, California.



Eileen Kroll