

No. S210804

In the Supreme Court of California

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

SUPREME COURT  
FILED

vs.

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

MAR - 2 2015

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SUPPLEMENTAL BRIEF RE NEW  
AUTHORITY (CAL. R. CT. 8.520(d))

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

\*Paul D. Fogel (SBN 70859)  
Dennis Peter Maio (SBN 99894)  
REED SMITH LLP  
101 Second Street, Suite 1800  
San Francisco, CA 94105-3659  
Telephone: 415.543.8700  
Facsimile: 415.391.8269

Daniel Andrew Gibalevich (SBN 217116)  
GIBALEVICH & ASSOCIATES  
Law Office of Daniel A. Gibalevich  
6300 Wilshire Blvd., Suite 1440  
Los Angeles, CA 90048  
Telephone: 323.930.2020  
Facsimile: 323.930.2225

James S. Link (SBN 94280)  
COUNSELOR AND ADVOCATE AT LAW  
215 N. Marengo, 3<sup>rd</sup> Floor  
Pasadena, CA 91101-1504  
Telephone: 626.793.9570  
Facsimile: 626.356.7414

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

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## I.

### INTRODUCTION

California Rule of Court 8.520(d) provides that a “party may file a supplemental brief limited to new authorities, new legislation, or other matters that were not available in time to be included in the party’s brief on the merits.” Pursuant to that rule, defendants Bellaire Townhouses, LLC, et al. (defendants) file this brief to address the effect on this case of this Court’s decision last week in *State Department of Public Health v. Superior Court*, \_\_\_ Cal.4th \_\_\_ (Feb. 19, 2015; No. S214679). (Citations to *State Department of Public Health* are to the slip opinion (Slip Opn.)) As shown below, *State Department of Public Health* illustrates why the Court of Appeal’s analysis of the two statutes at issue here—Code of Civil Procedure sections 473(b) and 1008(b)—was erroneous and that the Court of Appeal’s reversal of the order at issue was error.

## II.

### ARGUMENT

#### **A. Defendants Have Shown That The Court Of Appeal Erroneously Concluded That, In The Event Of A Conflict, Code Of Civil Procedure Section 1008(b) Prevails Over Section 473 (b)**

This case presents the issue of whether, in the event of a conflict, the specific mandatory relief-from-default requirement of section 473(b) prevails over the general prohibition in section 1008(b) on granting renewed motions unless the moving party offers

“new or different facts, circumstances, or law.” Put another way, the issue is whether a trial court must grant a timely and proper renewed motion for mandatory relief from default when that motion is unaccompanied by new or different facts, circumstances, or law.

In their Opening and Reply Briefs on the Merits, defendants have shown that, when they conflict, section 473(b) prevails over section 1008(b), thus requiring a court to grant a mandatory relief-from-default motion when, as here, the moving party has complied with section 473(b)’s other conditions. Defendants have also shown that, although the trial court erred in denying their first motion for mandatory relief, it properly granted their renewed motion and set aside the defaults and default judgment such that the Court of Appeal erred in reversing the order granting that motion.

The Court of Appeal rested its decision on two principal conclusions. One was that section 473(b) and section 1008(b) were *not* “in conflict.” (*Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC, et al.*, Opn. at 19 (*Zohar Opn.*)) The other was that, if they *were* in conflict, section 1008(b) would prevail over section 473(b). (*Id.* at 19-21) Among other things, the Court of Appeal believed that section 1008(b) was the later-enacted statute and section 473(b) was the earlier-enacted one. (*Id.* at 18-19)

In addressing these conclusions, defendants have shown that they were erroneous, on at least two grounds. (Opening Brief on Merits (OBM) 34-36, 44-47)

First, section 473(b) and section 1008(b) may indeed conflict: Section 1008(b) *prohibits* a court from granting what section 473(b) *requires* a court to grant—i.e., a renewed but timely and proper motion for mandatory relief from a dismissal, default, or default judgment even without new or different facts, circumstances, or law. (OBM/34-36)

Second, in case of conflict, section 473(b) prevails over section 1008(b). Section 473(b) is the more specific statute: It specifies conditions under which a court must grant *any* motion for mandatory relief from a dismissal, default, or default judgment, whether original or renewed, as long as the statute's other requirements are met: i.e., (1) the moving party makes the motion "no more than six months after entry of judgment," (2) the motion is "in proper form," and "accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect," and (3) the dismissal, default, or default judgment in question must "in fact [have been] caused by the attorney's mistake, inadvertence, surprise, or neglect." *Id.* (See OBM/28-29)

In contrast, section 1008(b) is the more general statute: It addresses the conditions under which a court may grant a renewed motion of *any* kind (i.e., it is not limited to mandatory relief-from-default motions), and requires the moving party to show that there are "new or different facts, circumstances, or law." *Id.* (See OBM/31)

**B. *State Department of Public Health v. Superior Court Provides The Governing Analysis For Determining Whether Statutes Conflict And If So, Which Statute Prevails Over The Other***

On February 19, 2015, this Court decided *State Department of Public Health*. There, this Court addressed the interplay of the Long-Term Care, Health, Safety, and Security Act of 1973, Health & Saf. Code § 1417 et seq. (the Long-Term Care Act), and Welfare and Institutions Code section 5328 (section 5328). The Long-Term Care Act “lays out in detail the information that must be included in citations” that the Department of Public Health (DPH) issues to state-owned long-term health care facilities for mentally ill and developmentally disabled individuals. The Long-Term Care Act “expressly states that the citations are public records, but that the names of the affected [individuals] must be redacted from the publicly available version of the citation.” (Slip Opn. at 1-2) In contrast, section 5328 obligates the DPH “not to release confidential information obtained ‘in the course of providing services’ ” to such individuals. (*Id.* at 2)

In resolving the interplay between the Long-Term Care Act and section 5328, this Court first asked whether the statutes could conflict. (*Id.* at 15-22) It concluded that they could. (*Id.*) Although courts must “harmonize potentially inconsistent statutes when possible,” they do not have a “license to redraft the statutes to strike a compromise that the Legislature did not reach.” (*Id.* at 16) The attempt to harmonize must be “[b]egin[ ] with the text of the

statutes” in question, and may end there. (*Id.* at 17) So it is with the Long-Term Care Act and section 5328: section 5328 “prohibits disclosure of information that the Long-Term Care Act deems public.” (*Id.* at 19)

This Court next asked whether, in case of conflict, the Long-Term Care Act prevailed over section 5328. (*Id.* at 22-28) It concluded that it did. (*Id.*) “ ‘If conflicting statutes cannot be reconciled, later enactments supersede earlier ones [citation], and more specific provisions take precedence over more general ones [citation].’... But when these two rules are in conflict, the rule that specific provisions take precedence over more general ones trumps the rule that later-enacted statutes have precedence.” (*Id.* at 22) A statute is more specific when its “discussion” of a subject is “particularly detailed,” whereas a statute is more general when it “addresses” the subject “at a high level of generality.” (*Id.*)

By this measure, this Court held, the Long-Term Care Act is the more specific statute and section 5328 is the more general one: “The particularly detailed nature of the Long-Term Care Act’s discussion of DPH citations demonstrates that the Legislature thought carefully and specifically about the importance of publishing citations and concluded that patients’ and residents’ confidentiality was adequately protected by redacting the names of the victims of a violation. [Section 5328], by contrast, addresses the confidentiality of records obtained in the course of treating mentally ill and developmentally disabled individuals at a high level of generality.”



(*Id.* at 23). The “conclusion” that the Long-Term Care Act prevails over section 5328 “is buttressed by the fact that the Long-Term Care Act is the later-enacted statute.” (*Id.* at 24)

**C. *State Department of Public Health* Confirms That The Court Of Appeal’s Conclusions Here Were Erroneous**

*State Department of Public Health* confirms that the Court of Appeal’s two conclusions in this case were erroneous.

If the Long-Term Care Act may conflict with section 5328, how could section 473(b) *never* conflict with section 1008(b)? Just as section 5328 “prohibits disclosure of information that the Long-Term Care Act deems public” [Slip Opn. at 19], section 1008(b) *prohibits* a court from granting what section 473(b) *requires* a court to grant—i.e., a renewed but timely and proper motion for mandatory relief from a dismissal, default, or default judgment even without new or different facts, circumstances, or law.

And, when they conflict, if the Long-Term Care Act prevails over section 5328, how could section 473(b) *not* prevail over section 1008(b)? Just as the Long-Term Care Act’s “discussion of DPH citations” affecting the confidentiality of records of mentally ill and developmentally disabled individuals in state-owned long term health care facilities is “particularly detailed” [Slip Opn. at 23], section 473(b) is “particularly detailed” in setting forth the conditions under a court must grant *any* motion for mandatory relief from a dismissal, default, or default judgment, if the moving party complies with the

statute's other conditions. And just as section 5328 addresses "at a high level of generality" the confidentiality of records of mentally ill and developmentally disabled individuals [Slip Opn. at 23], section 1008(b) address at the same "high level" the conditions under which a court may grant a renewed motion of any kind.

It is true that the Court of Appeal here believed that section 1008(b) was the later-enacted statute and section 473(b) was the earlier-enacted one. (*Zohar* Opn. at 18-19) But defendants have shown that that belief was incorrect: The Legislature amended section 473(b) into its present form in 1992 [*see* Stats. 1992, c. 876, § 4], *after* it had amended section 1008(b) into its present form that same year [*see* Stats. 1992, c. 460, § 4]. Thus, section 473(b) was the later-enacted statute such that if that is a relevant consideration, section 473(b) trumps section 1008(b).

But even if the Court of Appeal's belief on which was the later statute had been correct, it would not have mattered. In *State Department of Public Health*, this Court held that, when there is a clash between, on the one hand, the rule that a later-enacted statute prevails over an earlier-enacted one and, on the other hand, the rule that a more specific statute prevails over a more general one, the latter rule "trumps" the former rule. (Slip Opn. at 22) Therefore, even if section 1008(b) *had* been the later-enacted statute, section 473(b) would have prevailed as the more specific one.

**III.**  
**CONCLUSION**

The reasoning in *State Department of Public Health* confirms that, in case of a conflict, section 473(b) prevails over section 1008(b). Because the Court of Appeal erroneously held otherwise, this Court should reverse its judgment.

DATED: February 25, 2015.

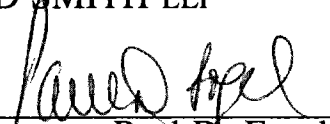
Respectfully Submitted,

GIBALEVICH AND ASSOCIATES

JAMES S. LINK

REED SMITH LLP

By: \_\_\_\_\_

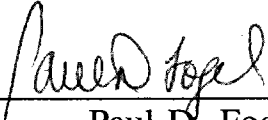
  
Paul D. Fogel

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

## WORD COUNT CERTIFICATE

This Supplemental Brief contains 1,699 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 brief.

Executed on February 25, 2015, at San Francisco, California.

  
\_\_\_\_\_  
Paul D. Fogel

## 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 February 25, 2015, I served the following document(s) by the method indicated below:

### SUPPLEMENTAL BRIEF RE NEW AUTHORITY (CAL. R. CT. 8.520(d))

- 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
Dan Sharp, Esq. Crowell & Moring, LLP 275 Battery Street, 23 <sup>rd</sup> Floor San Francisco, CA 94111	Attorneys for Plaintiff and Appellant Even Zohar Construction & Remodeling, Inc.  Tel: 415.986.2800 Fax: 415.986.2827
Second Appellate District, Div. Four North Tower, 2d Floor 300 S. Spring Street Los Angeles, CA 90013-1213	

Los Angeles Superior Court 111 N. Hill Street Los Angeles, CA 90012-3014	
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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 February 25, 2015, at San Francisco, California.

  
\_\_\_\_\_  
Myra Taylor