No. S210804

IN THE SUPREME COURT OF

THE STATE OF CALIFORNIA

EVEN ZOHAR CONSTRUCTION & REMODELING, INC.,
Plaintiff and Appellant,

vs.

BELLAIRE TOWNHOUSES, LLC, et al.,

Defendants and Respondents,

SUPPLEMENTAL BRIEF RE: NEW AUTHORITY

After A Decision By the Court of Appeal,
Second Appellate District, Division Four, No. B239928
Los Angeles County Superior Court, No. BC458347
(Hon. Ralph W. Dau, Judge)

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Plaintiff Even Zohar Construction & Remodeling, Inc. ("EZ") submits this supplemental brief pursuant to California Rule of Court 8.520(d) in response to the supplemental brief filed by Defendants Bellaire Townhouses and Samuel N. Fersht ("defendants") regarding this Court's recent decision in *State Department of Public Health v. Superior Court*, __ Cal.4th__ (Feb. 19, 2015; No. S214679).

INTRODUCTION

This Court's recent decision in *State Department of Public Health v. Superior Court*, __ Cal.4th__ (Feb. 19, 2015; No. S214679) (cited herein as "Slip op.") reaffirms the cardinal rule of statutory construction that, where reasonably possible, a court must harmonize potentially inconsistent statutes and construe them to give force and effect to all of their provisions. Application of this harmonization rule compels the conclusion that the Court of Appeal's ruling in this case was correct and should be affirmed. Defendants ignored the harmonization rule in their opening brief on the merits. In their reply, defendants mention the rule only to make the conclusory assertion that Code of Civil Procedure sections 473(b) and 1008(b) are irreconcilable. Defendants sidestep the harmonization rule again in their supplemental brief even though it is a critical feature of *State Department of Public Health.*

Defendants' failure to demonstrate that it is not reasonably possible to harmonize Sections 473(b) and 1008(b) condemns both their reliance on *State Department of Public Health* and their position on this appeal. Even assuming Sections 473(b) and 1008(b) are potentially inconsistent, which the Court of Appeal correctly ruled they are not, the two statutes easily may be harmonized, as the Court of Appeal found, and plaintiff EZ demonstrated in its answering brief on the merits.

In any event, the secondary rules of interpretation applied in *State Department of Public Health* favor plaintiff EZ and not defendants.

ARGUMENT

A. The Court's Decision In State Department of Public Health Turned On Its Finding That It Was Not Reasonably Possible To Harmonize The Two Statutes At Issue In That Case.

State Department of Public Health concerned a news organization's Public Records Act request for copies of citations that the Department of Public Health (the "DPH") issued to state-owned long-term care facilities. (Slip Op. at 1.) The Long-Term Care, Health, Safety, and Security Act of 1973, Health & Saf. Code § 1417, *et seq.* (the "Long-Term Care Act") "states that citations are public records, but that the names of the affected patients or residents must be redacted from the publicly available versions of the citation." (*Id.*). A second statute, the Lanterman-Petris-Short Act, Welfare and Institutions Code § 5328 (the "Lanterman Act" or "Section

5328"), however, "provides that '[a]ll information and records obtained in the course of providing services under' enumerated statutory divisions addressing services provided to mentally ill individuals 'to either voluntary or involuntary recipients of services shall be confidential.'" (*Id.* at 6.)

Relying on the Lanterman Act, DPH disclosed "heavily redacted" citations that shielded more than just the names of patients and residents. The news organization argued that the redactions violated the Long-Term Care Act. (*Id.* at 3.) The trial court found "that the two statutes could not be reconciled," and "determined that the Long-Term Care Act was the more specific and later-enacted statute, and thus trumped section 5328." (*Id.* at 1, 3.)

The Court of Appeal acknowledged the conflict but found the statutes could be harmonized. (*Id.* at 3.) It ordered the DPH "to disclose such information as the Court of Appeal deemed consistent with the common purposes of both statutes while permitting [the] DPH to redact such information as the Court of Appeal deemed inconsistent with that common purpose." (*Id.* at 1, 3.)

This Court reversed and instructed the Court of Appeal to deny the DPH's petition. It stated that it had "recently emphasized the importance of harmonizing potentially inconsistent statutes:"

> "'A court must, where reasonably possible, harmonize statutes, reconcile seeming inconsistencies in them, and construe them to give force and effect to all of their provisions. [Citations.] This rule

> applies although one of the statutes involved deals generally with a subject and another relates specifically to particular aspects of the subject.' [Citation.] Thus, when " 'two codes are to be construed, they 'must be regarded as blending into each other and forming a single statute .' [Citation.] Accordingly, they 'must be read together and so construed as to give effect, when possible, to all the provisions thereof.' [Citation.]'" (Slip Op. at 9.)

The Court found, however, that the Court of Appeal "misapplied the harmonization rule:"

> It did not interpret either the Lanterman Act or the Long–Term Care Act in a way that rendered the text of the two acts consistent. Instead, its harmonization analysis began by considering the "common purpose" of the two acts, i.e., "to promote and protect the health and safety of mental health patients." It then harmonized the statutes by considering, in its own independent judgment, whether disclosure of the various types of information listed as public records in the Long–Term Care Act would serve this common purpose. This approach was well intentioned but erroneous. (*Id.*)

"Instead of starting with the statutes' purposes, the Court of Appeal should have started with their respective texts." (*Id.* at 10.)

This Court's analysis of the texts showed that "[t]he Court of Appeal's harmonization effort results in a disclosure scheme that is inconsistent with the requirements of either statute." (*Id.* at 11). It thus concluded that "it is not 'reasonably possible' to harmonize these provisions 'without distorting their apparent meaning,'" (*id.* at 12). The Court then invoked secondary rules of statutory construction that "we must apply when faced with two irreconcilable statutes," (*id.* at 13), and ultimately held that "[b]ecause it is the more specific and the later-enacted statute, the Long-Term Care Act is properly construed as a limited

exception to section 5328's general rule of patient and resident confidentiality." (*See id.* at 1, 13-16.)

B. In Contrast To The Statutes In *State Department of Public Health*, Code Of Civil Procedure Sections 473(b) and 1008(b) Easily May Be Harmonized

In contrast to the two statutes at issue in *State Department of Public Health*, the two statutes in this case, Code of Civil Procedure sections 473(b) and 1008(b), easily may be harmonized. After examining the texts of the statutes, the Court of Appeal here noted that "subdivision (e) provides that section 1008's provisions 'appl[y] to *all* applications . . . for the renewal of a previous motion' and that '*[n]o application* . . . for the renewal of a previous motion may be considered by any judge or court unless made according to this section.'" (Court of Appeal op. 18) (citing Civ. Pro. § 1008, subd. (e); italics added by Court of Appeal).) It also observed that "Section 473, subdivision (b) states the requirements of making a motion for relief from default in the first instance" and "says nothing about second or subsequent motions made on the same grounds." (*Id.* at 19.)

The Court of Appeal found that Sections 473(b) and 1008(b) "are compl[e]mentary" and could be harmonized: "That a second motion for relief from default based on attorney fault under section 473, subdivision (b) cannot be granted unless the requirements for renewed motions set forth

in section 1008 are met does not mean that the statutes are in fatal conflict. That is simply the result of the statutes working together as the Legislature intended." (*Id.*)

In its answering brief, plaintiff EZ demonstrated that the application of the harmonization rule confirmed that the Court of Appeal was correct. (ABM 19, 28-32.) EZ showed that Section 473(b) can be given full effect, and there is no obstacle to a party filing a second or renewed motion for relief from default under its attorney fault provisions, so long as the party complies with the jurisdictional requirements of Section 1008 and the generally applicable provisions of the Code of Civil Procedure that govern *all* motions. (*Id.* at 38-41.)

C. Defendants Sidestep The Rule Of Statutory Construction That Potentially Inconsistent Statutes Be Construed To Give Force And Effect To All Of Their Provisions

As in their merits briefs, defendants in their supplemental brief assert without reason or analysis that the statutes in this case are in irreconcilable conflict. Defendants then jump to and focus exclusively on secondary rules of statutory construction. Such rules, however, are triggered *only* if conflicting statutes "cannot be reconciled," as this Court reaffirmed in *State Department of Public Health.* (Slip op. at 13.) Defendants contend incorrectly that such secondary rules come into play not just where there is an "irreconcilable" conflict, but whenever there is merely a *potential* for

inconsistency between two statutes that "*may* conflict." (Bellaire Supp. Mem. at 6, emphasis added; *see id.* at 3 [statutes "may indeed conflict"].) This contention is at odds with *State Department of Public Health*. (*See* Slip op. at 9 (a court must "reconcile seeming inconsistencies" in "potentially inconsistent statutes").) If the secondary rules were triggered just in the face of a "potential inconsistency" between statutes, the overriding harmonization rule would be rendered superfluous.

D. The Secondary Rules of Interpretation Applied in *State Department of Public Health* Support the Decision of the Court of Appeal

In any event, application of the secondary rules of statutory construction discussed in *State Department of Public Health*, even if triggered here, do not advance defendants' position. Defendants rely on the secondary rules that (i) a more specific statute trumps a general one, and (ii) a later-enacted statute trumps an earlier one.

As set forth in EZ's merits brief, Sections 473(b) and 1008(b) address different subject areas, which defendants concede, and neither statute is significantly more specific than the other. (ABM 31.) One statute addresses motions for relief from default, without specifically addressing renewed motions. The other addresses all renewed motions, without specifically addressing motions for relief from default.

Defendants contend that Section 473(b) is the "later-enacted" statute. (Bellaire Supp. Mem. at 7) But both statutes were amended during the 1992 legislative session with the amendments effective January 1, 1993. Stats. 1992, c. 460 § 4; Stats. 1992, c. 876, § 4. These 1992 amendments should fairly be regarded as simultaneous. And the Legislature amended Section 1008 again in 2011 without further amendment of Section 473. *See* 2011 Cal. Stats. c. 78, § 1 (reenacting all of Section 1008 to add subsection (g)). Under the reenactment rule of Article IV, section 9 of the California Constitution, Section 1008 is the later-enacted statute. Cal. Const. Art. IV, § 9; *see People v. Western Fruit Growers* (1943) 22 Cal.2d 494, 500-501.

As to the key language requiring interpretation, the legislative record is that Section 1008 was amended to add its unequivocal jurisdictional language *after* Section 473(b) was amended to add the "whenever" and timing language on which defendants rely. *Compare* Stats. 1991, c. 1003, § 1 (amending Section 473(b) to add "whenever" language [cited at OBM 28; RBM 14] *with* Stats. 1992, c. 460 § 4 (amending Section 1008 so that it "specifies the court's jurisdiction" regarding reconsideration and renewal of motions). In other words, with respect to the critical interpretation issue here, Section 1008 has the "later-enacted" statutory language.

CONCLUSION

State Department of Public Health reiterates the importance of the rule of statutory construction requiring potentially conflicting statutes to be harmonized where reasonably possible. Unlike the statutes in *State Department of Public Health*, Sections 473(b) and 1008(b) are readily harmonized, as the Court of Appeal found. This case does not pose an irreconcilable conflict that mandates resort to secondary rules of statutory construction, which rules, in any event, support plaintiff's position, not defendants'.

Dated: March 16, 2015

CROWELL & MORING LLP

Respectfully submitted,

By 

J. Daniel Sharp
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Even Zohar Construction & Remodeling, Inc.
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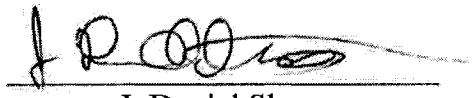
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.520(c) of the California Rules of Court, I certify that this Supplemental Brief contains 1,919 words (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 March 16, 2015, at San Francisco, California.



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PROOF OF SERVICE

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Kimberly M. Harris

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