Filed 4/10/13

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

EVEN ZOHAR CONSTRUCTION & REMODELING, INC., Plaintiff and Appellant, v. BELLAIRE TOWNHOUSES, LLC et al., Defendants and Respondents.	B239928 (Los Angeles County Super. Ct. No. BC458347)

APPEAL from an order of the Superior Court of Los Angeles County, Ralph W. Dau, Judge. Reversed.

Daniel B. Harris for Plaintiff and Appellant.

Gibalevich & Associates and Daniel Andrew Gibalevich; James S. Link for Defendants and Respondents.

INTRODUCTION

Plaintiff Even Zohar Construction & Remodeling, Inc. sued Bellaire Townhouses, LLC and Samuel N. Fersht, individually and as trustee of the Fersht Family Living Trust (collectively defendants), in a dispute regarding development and construction of a condominium project.

After the trial court denied defendants' motion to compel arbitration, defendants failed to file a responsive pleading to plaintiff's complaint. Pursuant to plaintiff's requests, the trial court ultimately entered a $1.7 million default judgment against defendants.

Citing section 473, subdivision (b),[1] defendants moved for mandatory relief, relying upon an affidavit of fault executed by their attorney. The trial court denied the motion, finding the attorney affidavit "not credible" and "too general."

Several weeks later, defendants filed a motion to renew their request for relief, supported by a more detailed attorney affidavit of fault. Plaintiff opposed the motion on multiple grounds, including defendants' failure to satisfactorily explain why they had not presented the evidence contained in the more detailed affidavit in their first motion for relief. On several separate occasions, the trial court stated that it did not find the attorney's second affidavit credible and that defendants had failed to meet the foundational requirements for a motion to renew found in section 1008, subdivision (b). Nonetheless, the trial court felt bound by *Standard Microsystems Corp. v. Winbond Electronics Corp.* (2009) 179 Cal.App.4th 868 (*Standard Microsystems*), a decision that held that section 1008, subdivision (b) does not apply to a renewed section 473, subdivision (b) motion for mandatory relief based upon an affidavit of attorney fault. As a result, the trial court granted defendants' motion and set aside the defaults and default judgment.

---

[1] All statutory references are to the Code of Civil Procedure.

We reverse. First, we find that the trial court correctly concluded that defendants did not satisfactorily explain their failure to present earlier the evidence proffered in their attorney's second affidavit of fault. Second, we decline to follow *Standard Microsystems*. Its conclusion that section 1008's requirements do not apply to a renewed motion for mandatory relief from default based upon an affidavit of attorney fault ignores section 1008's clear and unambiguous language that it applies to *all* renewal motions and undermines the Legislature's goal to limit repetitive motions based upon facts that, with the exercise of due diligence, could have been but were not presented at the first hearing. We therefore conclude that the trial court lacked jurisdiction to consider the renewed motion. On that basis, we reverse and direct the trial court to reinstate the defaults and default judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Lawsuit and Entry of the Default Judgment*

In March 2011, plaintiff filed and served its lawsuit.

In May 2011, defendants filed a petition to compel arbitration.

On August 29, 2011, the trial court denied the petition to compel arbitration. On August 31, 2011, plaintiff properly served defendants by mail with notice of entry of that order. As a result, defendants had until September 20, 2011 to respond to plaintiff's complaint. (§§ 1281.7, 1013, subd. (a).) Defendants did not file any responsive pleading.

On September 23, 2011, plaintiff notified defendants' attorney Daniel Andrew Gibalevich (Gibalevich) by email and FAX that it would request entry of default the following week unless a responsive pleading was filed immediately. No pleading was forthcoming.

On September 29, 2011 and October 4, 2011, at plaintiff's requests, the clerk of the superior court entered defendants' defaults.

On November 22, 2011, plaintiff moved for entry of a default judgment.

On December 8, 2011, the trial court, after conducting a prove-up hearing, entered a $1,701,116.70 default judgment (plus interest) against defendants.

2. *Defendants' First Motion for Relief*

On December 16, 2011, defendants moved for relief. Their pleading is entitled "Notice of Motion for Mandatory Relief Under C.C.P. § 473 to Vacate Defaults and Default Judgments." Notwithstanding the reference in the motion's caption to mandatory relief, the body of the motion argued that Gibalevich had committed both excusable neglect and inexcusable neglect. Gibalevich's declaration, offered in support of the motion, also improperly conflated the two concepts. He averred:

> "3. Beginning the end of August and through the first part of November of 2011, I had to spend substantial amounts of time away from the office. *I had to attend to certain personal issues that required my undivided attention. I believed that I had sufficient staff to assure competent handling of client files*. My associates were instructed to notify me immediately of issues that would require my personal attention. *It appears that my staff failed to maintain this file in accordance with this firm's policies and procedures*.
>
> "4. *Due to my frequent absences, I failed to file and serve the responsive pleading.* Since the responsive pleading was never filed or served, defaults were taken against the Defendants. Had I filed the responsive pleading on time, prior to defaults being taken, the defaults and possible default judgments would have been avoided. *It is clear that my mistake and excusable neglect resulted in the entry of defaults and default judgments against the Defendants*." (Italics added.)

Plaintiff opposed the defense request for relief. Essentially, plaintiff urged that Gibalevich was not credible to the extent that his declaration suggested that he was unaware of the deadline to file a responsive pleading. Plaintiff submitted

multiple documents (court orders, emails, FAXes) to establish: (1) Gibalevich had been aware that his clients' response to the complaint was due by September 20; and (2) when defendants failed to file a pleading by September 20, plaintiff informed Gibalevich that it intended to request entry of a default unless the deficiency was cured immediately.

Further, plaintiff noted that Gibalevich's claim of inattentiveness was not credible given that his mother is married to defendant Fersht. Plaintiff opined that the defaults "were part of a concerted plan in which [defendants] engaged with Mr. Gibalevich to delay this matter and drive up the attorney's fees and costs for plaintiff."

In addition, a declaration from Even Zohar, plaintiff's sole owner, impeached Gibalevich's claim that, during the relevant time period, he had spent substantial time away from his law practice. Zohar averred that during his "numerous communications . . . in the fall of 2011," defendant Fersht "repeatedly told [him] that during this period that Mr. Gibalevich was very successful, busy in his law practice and frequently in court."

On January 9, 2012, the trial court conducted a hearing on the motion. It noted that while the motion was predicated upon the mandatory relief section of section 473, Gibalevich's declaration "fuzzes up the issue by referring to his mistake and excusable neglect in paragraph 4. [¶] . . . As far as the mandatory relief aspect, it's entirely too vague and conclusory."

In regard to the language about excusable neglect in his declaration, Gibalevich told the court: "[T]hat was a mistake in the language, because there was no intent on my behalf to ask for any kind of discretionary relief, it was always under mandatory relief." Although Gibalevich asked if he could file "an additional declaration outlining the extent of the personal problems [he] was having and what mandated [his] absence . . . from the office and [his] failure to follow up on this

matter," he made no offer of proof as to what that declaration would aver. The court rejected Gibalevich's request, stating it would rule upon the motion as submitted.

The trial court denied the motion. Its order explains:

> "Defendants . . . have moved for mandatory relief under Code of Civil Procedure section 473.
>
> "The motion is denied. The Gibalevich declaration is not credible, in light of the showing made by plaintiff, and it is entirely too general. It does not show attorney Gibalevich is solely at fault in not filing a timely responsive pleading. Moreover, attorney Gibalevich tries to have it both ways: see paragraph 4 of his declaration, which claims he has demonstrated 'excusable neglect.' He has not demonstrated excusable neglect."

3. *Defendants' Second Motion for Relief*

On January 18, 2012, defendants filed their second motion, entitled, as was their earlier unsuccessful motion, "Notice of Motion for Mandatory Relief under C.C.P. § 473 to Vacate Defaults and Default Judgments." The motion contained no reference to the statutory provision governing renewals of previously denied motions: section 1008, subdivision (b). Instead, the motion simply explained that during the hearing on the first motion, "the [trial] Court made an observation that although in his motion, defense counsel was requesting mandatory relief under C.C.P. section 473(b), defense counsel's declaration was not sufficiently clear and made contentions under the discretionary portion of section 473(b). Despite [defense] counsel's argument, the Court denied the motion. [¶] In order to address Court's concerns regarding the perceived generality of defense counsel's declaration, and to avoid harm to the defendants, at the hands of their attorney, this motion follows."

To support the claim for mandatory relief, defendants offered another declaration from Gibalevich in which he averred the following:

> "On August 25, 2011, investigators with the Los Angeles District Attorney's office served [a] search warrant . . . at my office . . . . The investigation focused on medical providers and not on me or my practice. . . . [O]ne of my associates, Mr. Savransky, resigned his position right after the search. That left me and Ms. Gina Akselrud as [the] only attorneys [in my office]. . . .
>
> "In my effort to secure the return of my client files, I engaged Mr. Shkolnikov, a criminal defense attorney. I volunteered to assist him in his research and drafting efforts. . . .
>
> ". . . . *I spent all of my time on efforts to return my client's files.* I researched and wrote many drafts of the motions that were filed. *This consumed me. I was working on this most of the day, every day*. When I wasn't in front of the computer, I thought of nothing else.
>
> "I began to obsess over my reputation and the disclosures that I had to make to Judges and opposing counsel alike [about the search]. . . . ***I have to confess that this feeling of embarrassment is the reason why I failed to set out these facts in the declaration previously filed.*** I will never forget that day or the hell that followed. . . . *I did experience a period of time, from middle of September through October of 2011, where I stayed away from the office, for days at a time.* . . . I was ashamed and embarrassed. I was embarrassed in front of my employees, opposing counsel and judges that I had to face. This feeling of embarrassment is still with me.
>
> "*Due to my frequent absences, my state of mind and obsession with getting my client files back, I neglected this matter. I failed to enter a responsive pleading and did not respond to [plaintiff's] emails notifying me of the default*. Since the responsive pleading was never entered, defaults and default judgments were taken against my clients, the Defendants.
>
> "Had I filed the responsive pleading on time, prior to defaults being taken, the defaults and default judgments would have been

> avoided. *It is clear that my mistake, inadvertence and neglect resulted in the entry of defaults and default judgments against my clients, the Defendants herein*." (Italics and boldface added.)

Defendants' motion included two additional declarations.

The first declaration was from Akselrud, Gibalevich's associate. She confirmed the execution of the search warrant on August 25, 2011 and Savransky's resignation the following day. In addition, Akselrud averred that Gibalevich was "frequently absent" from the office from the end of August through November 2011 and that "approximately in the middle of September of 2011, [she] noticed that the stress of the situation was taking its toll on Mr. Gibalevich. . . . He stayed away from the office preferring to work at home. *It seemed that he only worked on getting his client files back. All else took a back seat*. He began to obsess over it. He didn't answer his phone nor respond to email." (Italics added.) However, the next portion of Akselrud's declaration contradicted her claim (as well as that made by Gibalevich in his declaration) that Gibalevich worked *only* on the search warrant issue. She explained: "Because so many of the files taken [when the search warrant was executed] were active litigation files, Mr. *Gibalevich and I, had to make many appearances, in the civil matters, to continue hearings and trials. Much of my and his time was spent in attempts to recreate files and throw ourselves on the sword by explaining what transpired to clients, opposing counsel and judges*." (Italics added.)

The second declaration was from Shkolnikov, the attorney representing Gibalevich "in a matter of In Re Search Warrant." Shkolnikov averred, as had Akselrud, that Gibalevich was "frequently absent" from his office through November 2011. In addition, Shkolnikov made the same contradictory averments that Akselrud and Gibalevich had made as to what Gibalevich did and did not do.

On the one hand, Shkolnikov declared that Gibalevich "devoted all of his time and effort to getting the files and his property back" but, on the other hand, Shkolnikov declared that Gibalevich and Akselrud "had to make all appearances to continue hearings and trials," many "on shortened notice or on ex parte basis."

On January 30, 2012, defendants filed an ex parte application seeking an order to stay plaintiff's execution on its $1.7 million default judgment pending a ruling on its renewed motion for relief. The motion's caption[2] as well as a declaration from Gibalevich[3] acknowledged, for the first time, that the second motion for relief was brought pursuant to section 1008, subdivision (b).[4]

On January 31, 2012, the court conducted a hearing on the defense application. It granted the application to stay execution on the judgment and continued the matter for a hearing on the merits of the renewed motion for relief.

---

[2] The motion is entitled, in pertinent part: "*Ex Parte* Application for an Order on a Renewed Motion (C.C.P. 1008(b)) for Mandatory Relief under C.C.P. 473(b) Vacating Defaults and Default Judgments."

[3] Gibalevich's declaration averred, in part: "On January 9, 2012, a motion for mandatory relief under C.C.P. section 473(b) came regularly on calendar before this Court. The Court found that my declaration was not credible, in light of the showing made by the plaintiff, and that my declaration was too general. *The different facts, in accordance with C.C.P. section 1008(b),* set forth below deal with the circumstances surrounding my failure to file a responsive pleading in this matter." (Italics added.) The remainder of Gibalevich' s declaration: (1) repeated the averments found in his declaration filed earlier in support of the second motion for relief and (2) included additional averments relating to the defense request to stay plaintiff's execution on the judgment.

[4] At the hearing conducted on the ex parte motion, Gibalevich reiterated that the second request for relief complied with section 1008, subdivision (b). He stated: "As far as the procedural issues with this motion, I've complied with [section] 1008 (b) in all respects. We notified the court of the previous motion made. We provided the court with the previous order. I set forth what additional facts we're providing in my declaration, which fully complies with the jurisdictional requirements of [section] 1008 (b)."

In the course of the hearing, the court stated that the facts contained in Gibalevich's second declaration "are not new facts." "You could have presented all of that with your original [motion]." The court further indicated that it did not find Gibalevich's new declaration credible. The court told Gibalevich: "[Y]ou are presenting an entirely different story with this application than you have presented to the court originally. [¶] . . . [In your first declaration,] [y]ou tried to blame it on a miscalendaring when the evidence is that your office received multiple, multiple notices before the defaults were entered in all different kinds of ways. [¶] *And, frankly, your story about being obsessed with this search warrant for the entire period of time is just not credible*. You originally told the court you had to be out of the office for substantial periods of time. Now you're saying you're conducting all kinds of research on your computer in your office. [¶] *You're not credible, Mr. Gibalevich.*" (Italics added.) Gibalevich responded: "[D]uring the original hearing [on the first motion], Your Honor, I did not blame it on a miscalendaring. . . . [¶] . . . At no time am I placing blame on anybody else." The court replied: "That's directly contrary to your [first] declaration."

Plaintiff's opposition to the renewed motion made several arguments. First, it argued that defendants had failed to comply with section 1008, subdivision (b) because they had failed to demonstrate why the new information (Gibalevich's stress caused by the execution of the search warrant) had not been presented in the first motion. Next, it argued that Gibalevich's latest explanation was not credible. Lastly, it claimed that the decision not to file a responsive pleading to the complaint "was a deliberate choice [defendants and Gibalevich] made together as part and parcel of their continuing gambit of delay."

Defendants' reply to plaintiff's opposition cited, for the first time, *Standard Microsystems, supra*, 179 Cal.App.4th 868, a case decided more than two years earlier. Essentially, *Standard Microsystems* held that section 1008, subdivision (b)

does not apply to renewed motions for mandatory relief brought pursuant to section 473 subdivision (b). (We will discuss the opinion in detail when evaluating plaintiff's contention.) Defendants' reply also included a declaration from Fersht denying any complicity in Gibalevich's failure to file a responsive pleading.[5]

At the hearing on the renewed motion, the trial court again expressed its disbelief of Gibalevich.[6] Gibalevich argued that the "only difference between [his first and second] declarations . . . was that [he] provided additional facts to [the court] setting the background as to why [he] was unavailable and why [he] did not file it." Gibalevich claimed that "[t]he story never changed." The trial court responded: "It changed every time you presented it, Mr. Gibalevich. [¶] . . . You do not have a footing in reality, sir."

As to whether defendants were complicit in Gibalevich's failure to respond to the complaint, plaintiff argued the court should find that Fersht's declaration denying any such complicity not to be credible because it had not been filed earlier. That is, plaintiff suggested that were Fersht telling the truth, defendants would have proffered his declaration at the outset of the section 473 litigation. In regard to its theory that defendants were involved in the decision to let the matter

---

[5] Fersht averred:

"It is important to state that I have never advised, counseled, conspired, contemplated, ordered, suggested or even thought of not filing a responsive pleading in this case timely. I never directed anyone, especially Mr. Gibalevich, to avoid filing an answer in this matter.

"I would never contemplate or agree to allow Even Zohar to take my default and default judgment. I always believed and continue to believe that I am right and my cause is just. I want my day in Court and would not do anything to jeopardize an opportunity to prove my position."

[6] The trial court's tentative ruling indicated that it lacked jurisdiction to consider the renewal motion because, as the judge explained later at the hearing, "[t]here's been a failure to make a 1008 (b) proper showing."

go to default, plaintiff relied upon defendants' actions and statements, from both before and after the complaint was filed, that plaintiff believed indicated a defense intent to thwart any effort by plaintiff to recover any money from defendants.

In an order filed after the hearing, the trial court granted the motion. In relevant part, the order explains:

> "Before the court is the second attempt by Daniel A. Gibalevich, attorney at law, to obtain vacation of his clients' default (entered September 29, 2011) and default judgment (filed December 8, 2011).
>
> "Attorney Gibalevich first blamed the default and default judgment entered against defendants . . . on the lawyers he employed in his office. . . . In this first motion, attorney Gibalevich argued both that he was entitled to mandatory relief on the ground of attorney fault and on the ground of excusable neglect on his part.
>
> "When he lost the first motion, attorney Gibalevich filed another motion. *The second motion fails to comply with the requirements of section 1008(b). In this motion, attorney Gibalevich changed his story and blamed the default and default judgment on his having become obsessed with the consequences of a search warrant executed on his office* by the Los Angeles County District Attorney. (Neither the search warrant nor its consequences concerned the files of the defendants in this action.) . . . .
>
> "The associate [Akselrud] in Mr. Gibalevich's office did not support the claim in attorney Gibalevich's December 15, 2011 declaration that she failed to maintain the [case] file or notify Mr. Gibalevich of the entry of default and default judgment against [defendants].
>
> "[D]efendants cite *Standard Microsystems Corp. v. Winbond Electronics Corp.*, 179 Cal.App.4th 868, 893-894, which holds that insofar as any conflict actually exists between section 1008 and section 473(b), it must be resolved in favor of section 473(b). Plaintiff argues that this case is an outlier, but the court does not agree. *The decision seems correct, and this court is bound to follow*

> *it.* The legislature has determined that even in cases involving conduct such as that demonstrated by attorney Gibalevich, where no part of the fault is shown to be attributable to the defendant clients, relief is mandatory." (Italics added.)

The court vacated the defaults and default judgment, directed the clerk to file defendants' proposed answer, and ordered Gibalevich to pay to plaintiff the attorney fees ($30,940) and costs ($2,961.62) it had incurred "in connection with the default[s] and default judgment and defendants' attempts to have [them] vacated."

This appeal by plaintiff follows.

DISCUSSION

Plaintiff contends: "Defendants' 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. (Cal.Civ.Pro. § 1008(e).)" We agree.

Section 473, subdivision (b) provides for *mandatory* relief from default if the moving party's request is supported by "an attorney's sworn affidavit attesting to his . . . mistake, inadvertence, surprise, or neglect . . . unless the court finds that the default . . . was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." (§ 473, subd. (b).) The purpose of the mandatory relief provision is "'to alleviate the hardship on parties who *lose their day in court* due solely to an inexcusable failure to act on the part of their attorneys.' [Citation.] Thus, the Legislature created a narrow exception to the discretionary relief provision for default judgments. . . . [Citation.]" (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 257.) "The range of attorney conduct for which relief can be granted in the mandatory provision is broader than that in the discretionary provision, and includes inexcusable neglect." (*Leader v.*

Health Industries of America, Inc. (2001) 89 Cal.App.4th 603, 616.) But if the default occurred as a result of "an 'intentional strategic decision'" by defense counsel, relief is not available. (*Jerry's Shell v. Equilon Enterprises, LLC* (2005) 134 Cal.App.4th 1058, 1073.)

Here, the trial court denied defendants' first motion for relief because it found that Gibalevich's declaration was far too conclusory to require the grant of relief based upon a theory of attorney fault. This ruling was not an abuse of discretion. In order to obtain relief, the moving party must submit an affidavit from the attorney containing a straightforward admission of fault. (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 609-610.) Gibalevich's first declaration did not meet that test.

Defendants' second motion proffered a declaration from Gibalevich that purported to explain his fault as an inattentiveness caused by an obsessive reaction to the execution of a search warrant at his office. But, as Gibalevich later acknowledged, because the motion sought to renew the previously denied motion, the motion was governed by section 1008, subdivision (b).[7]

"Section 1008 is designed to conserve the court's resources by constraining litigants who would attempt to bring the same motion over and over." (*Darling, Hall & Rae v. Kritt* (1999) 75 Cal.App.4th 1148, 1157.) To that end, subdivision (b) of section 1008, as amended in 1992,[8] provides, in relevant part: "A party who originally made an application for an order which was refused . . . may make a subsequent application for the same order upon new or different facts [or]

---

[7] Defendants' reply to plaintiff's opposition to their second motion conceded: "[D]efendants herein are making a motion for an order that was exactly the same as the one that was requested in the first motion to vacate the default and default judgment."

[8] Statutes of 1992, chapter 460, section 4, pages 1832-1833.

circumstances . . . in which case it shall be shown by affidavit . . . what new or different facts [or] circumstances . . . are claimed to be shown." Case law has included the additional requirement that the party seeking to renew a previously denied motion based upon new or different facts "must provide a satisfactory explanation for the failure to produce the evidence at an earlier time." (*New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 212; see also *California Correctional Peace Officers Assn. v. Virga* (2010) 181 Cal.App.4th 30, 46-47, fn. 15, and 6 Witkin, Cal. Procedure (5th ed. 2008) Proceedings Without Trial, § 47, pp. 470-471.) The trial court's finding that the moving party did not establish the predicate facts for a section 1008 motion is reviewed for abuse of discretion. (*Lucas v. Santa Maria Public Airport Dist.* (1995) 39 Cal.App.4th 1017, 1027-1028.)

Subdivision (e) was added to section 1008 in 1992 at the same time subdivision (b) was amended. (Stats. 1992, ch. 460, § 4, pp. 1832-1833.) Subdivision (e) provides: "This section specifies the court's jurisdiction with regard to . . . renewals of previous motions, *and applies to all applications . . . for the renewal of a previous motion*. . . . *No application . . . for the renewal of a previous motion may be considered* by any judge or court *unless made according to this section*." (Italics added.) If the predicate requirements set forth in subdivision (b) are not met, the trial court lacks jurisdiction to consider the renewal motion. (See, e.g., *Kerns v. CSE Ins. Group* (2003) 106 Cal.App.4th 368, 383-391.)

These 1992 amendments were intended to clarify that no renewal motion can be heard "unless the motion is based on new or different facts, circumstances, or law" because the Legislature sought "to reduce the number of . . . renewals of previous motions heard by judges in this state." (Stats. 1992, ch. 460, § 1.)

In this instance, Gibalevich's declaration failed to adequately explain why he had not included the facts about the search warrant execution and his response thereto in his first declaration. These events took place from September to November 2011. Information about them was obviously in Gibalevich's possession when he filed the first motion in December 2011 and the relevance of the events (if true) was patent. Gibalevich's only explanation for not having presented this information earlier was that he was embarrassed. The trial court did not find this explanation credible. That finding—a finding defendants do not contest—is binding upon us. (*Johnson v. Pratt & Whitney Canada, Inc.* (1994) 28 Cal.App.4th 613, 622-623.) Given the inadequacy of the defense showing, the trial court did not abuse its discretion in finding that defendants had failed to establish the predicates for relief under section 1008, subdivision (b). However, rather than denying the renewed motion, the trial court proceeded to address the motion on its merits and grant relief, finding it was bound by *Standard Microsystems.*

The relevant facts in *Standard Microsystems*, *supra*, 179 Cal.App.4th 868 are the following. Attorney A advised the defendants that they did not have to answer the plaintiff's complaint because he believed that the plaintiff's attempt to serve them by mail was ineffective. (*Id*. at pp. 874-876.) Defendants followed that advice and no responsive pleading was filed. (*Id*. at p. 880.) As a result, plaintiff took their default. (*Id*. at p. 876.) The defendants, still represented by Attorney A, then filed a motion for *discretionary* relief under section 473, subdivision (b) to set aside the default. The motion claimed excusable neglect and mistake of law (the defendants' erroneous belief that the service by mail had been ineffective). (*Id*. at pp. 877-878.) The trial court denied the motion and proceeded to enter a default judgment. The defendants discharged Attorney A and hired Attorney B. (*Id*. at p. 895.) Attorney B moved to set aside the default and the default judgment based upon the *mandatory* relief provision of section 473, subdivision (b). The motion,

supported by an affidavit from Attorney A, relied upon the theory that Attorney A's fault (failure to provide proper legal advice and to take steps to avoid the entry of default) directly led to the default and default judgment. (*Id*. at p. 880.) The trial court denied the motion, finding, in part, that it was an improper motion for reconsideration.

The Court of Appeal reversed the trial court. First, it found that the second motion was not a motion for reconsideration because it "rested on an entirely different legal theory, invoked a different statutory ground, and relied in very substantial part on markedly different facts." (*Standard Microsystems*, *supra*, 179 Cal.App.4th at p. 891.) Next, it stated that it was reluctant to conclude that the second motion was a renewal motion because it sought relief different from that requested in the first motion (set aside the default *and* the default judgment versus moving only to set aside the default) and relied upon a different theory (mandatory relief relying upon an affidavit of attorney fault versus discretionary relief based upon a claim of excusable neglect). (*Id*. at pp. 892-893.) Lastly, it found—and this is the portion of the opinion upon which the trial court in this case relied—that even if the second motion was construed to be a renewal motion, to the extent that section 1008 conflicts with section 473, section 473 must prevail because it is a "remedial statute" whereas section 1008 "inflicts a procedural forfeiture." (*Id*. at p. 894.) In addition, the court held that section 473, as a more specific statute, must take precedence over the more general provisions of section 1008. (*Id*. at p. 895.)

For several reasons, we do not find *Standard Microsystems* persuasive.

First, the language of section 1008 is clear and unambiguous. A court must construe a statute so as to give effect to the Legislature's intention. (§ 1859; *Landrum v. Superior Court* (1981) 30 Cal.3d 1, 12.) In order to do so, we look first to the words of the statute. (*Moyers v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230.) The statutory language used is to be given its usual, ordinary

meaning and, where possible, significance should be given to every word and phrase. (*Ibid*.) "The words must be construed in context in light of the nature and obvious purpose of the statute where they appear." (*Decker v. City of Imperial Beach* (1989) 209 Cal.App.3d 349, 354.)

In that regard, 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." (§ 1008, subd. (e), italics added.) """If the plain, commonsense meaning of a statute's words is unambiguous, the plain meaning controls."" (*Catlin v. Superior Court* (2011) 51 Cal.4th 300, 304.)

"All" and "no" are clear and unambiguous words. "'All' means everyone or the whole number [citation], and it does not 'admit of an exception or exclusion not specified' [citation]." (*Stewart Title Co. v. Herbert* (1970) 6 Cal.App.3d 957, 962.) "No," used as an adjective, means "Not any; not one." (American Heritage Dictionary (1985 2d. ed.), p. 844.) Taken together, the use of "all" and "no" in section 1008 conveys the clear meaning that every renewal motion, without exception and not excluding one for mandatory relief from default based upon an affidavit of attorney fault, is governed by section 1008's requirements. Unless the moving party meets those criteria, the trial court lacks jurisdiction to consider the motion. This conclusion supports the legislative goal to impose "a limitation on the parties' ability to file repetitive motions." (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1105.)

Second, the Legislature authorized section 473, subdivision (b) motions for relief based upon attorney fault through a statutory amendment enacted in 1988 (*Rodrigues v. Superior Court* (2005) 127 Cal.App.4th 1027, 1032-1033), four years *before* the Legislature enacted the relevant amendments to section 1008 in

1992. The Legislature is deemed to be aware of existing statutes. (*Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, 212.) Had the Legislature intended to exempt renewed motions for mandatory relief based upon attorney fault from the requirements of section 1008, it could have done so through appropriate language in either statute. But it did not. "'It is . . . against all settled rules of statutory construction that courts should write into a statute by implication express requirements which the Legislature itself has not seen fit to place in the statute.' [Citations.] The court must follow the language used in a statute and give it its plain meaning.'" (*In re Rudy L.* (1994) 29 Cal.App.4th 1007, 1011.)

Third, we disagree with *Standard Microsystems's* conclusion that sections 473, subdivision (b), and 1008 are in conflict. To the contrary, the statues are complimentary. 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. That a second or subsequent 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. Therefore, the conclusion of *Standard Microsystems*' that the purported conflict must be resolved by giving effect to section 473, subdivision (b), as the more specific statute, is incorrect.

Fourth, in similar fashion, we are not persuaded by *Standard Microsystems*' conclusion that to resolve the purported conflict, section 473 must prevail over section 1008, because the former is a remedial statute whereas the latter creates a procedural forfeiture. The Legislature's 1992 amendments to section 1008 defined the class of parties entitled to seek relief in a renewed motion, namely, those who

can show new or different facts. Case law has added the requirement that the moving party show that the evidence could not have been presented previously.[9] These mandatory conditions do not work a forfeiture for parties who bring second or successive motions, but rather simply state the conditions under which second or successive motions can be granted, in addition to the specific requirements of section 473, subdivision (b). "[I]f a statute announces a general rule and makes no exception thereto, the courts can make none. [Citation.] A court may not insert into a statute qualifying provisions not intended by the Legislature and may not rewrite a statute to conform to an assumed legislative intent not apparent. [Citation.]" (*Burnsed v. State Bd. of Control* (1987) 189 Cal.App.3d 213, 217.)

Finally, we agree with plaintiff that *Standard Microsystems*' remedial/forfeiture analysis, if accepted, "would create a proverbial 'slippery slope' and foment even more litigation concerning what is in fact 'remedial.'" As a matter of fact, this process has begun. *Ron Burns Construction Co., Inc. v. Moore* (2010) 184 Cal.App.4th 1406, 1418-1420, without significant discussion or analysis, applied *Standard Microsystems'* reasoning to a section 473 motion for *discretionary* relief based upon a claim that counsel had committed excusable neglect, holding that "to the extent that section 473 conflicts with section 1008, section 473 must prevail." (*Id*. at p. 1420; see also *California Correctional Peace Officers Assn. v. Virga, supra,* 181 Cal.App.4th at p. 48 [apparently agreeing with *Standard Microsystems'* "forfeiture" analysis but declining to apply it to two

---

[9] *Standard Microsystems* declined to follow the requirement created by case law that the moving party in a section 1008 motion must provide a satisfactory explanation for failing to present the evidence earlier (*Standard Microsystems, supra,* 179 Cal.App.4th at pp. 895-896) and criticized the concept that the moving party's failure to comply with section 1008 deprived the trial court of jurisdiction to rule upon the motion (*id.* at p. 889). Needless to say, we also disagree with *Standard Microsystems* on those points.

repetitive motions for attorney fees because each motion relied upon a different statute authorizing recovery of attorney fees].) Carried to its logical conclusion, *Standard Microsystems*' analysis would exclude from the reach of section 1008 any renewal motion claimed to be remedial, thereby nullifying the plain language of section 1008 that it applies to *all* renewal motions and thwarting the Legislature's intent to limit repetitive motions.[10]

For the reasons stated above, we decline to follow *Standard Microsystems*.[11] Its conclusion undermines the Legislature's goal to limit repetitive motions and to provide "an important incentive for parties to efficiently marshall their evidence" in the first instance. (*Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 689.) As explained earlier, the trial court did not abuse its discretion in finding that defendants failed to meet section 1008's predicate requirements. Based upon that finding, the trial court should have denied defendants' renewal motion for lack of

---

[10] *Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494 stated: "To hold, under the circumstances presented in this case, that the general relief mechanism provided in section 473 could be used to circumvent the jurisdictional requirements for reconsideration found in section 1008 would undermine the intent of the Legislature as specifically expressed in section 1008, subdivision (e): 'No application to reconsider any order . . . may be considered by any judge or court unless made according to this section.' Therefore, we decline to so hold." (*Id*. at p. 1501.)

[11] Defendants also cite *Wozniak v. Lucutz* (2002) 102 Cal.App.4th 1031 (disapproved on another ground in *Le Francois v. Goel*, *supra*, 35 Cal.4th at p. 1107, fn. 5), a pre-*Standard Microsystems* case, to support the trial court's order granting their renewal motion. *Wozniak* stated: "If the requirements for relief under section 473 are met, the viability of relief under section 473 cannot be defeated because the requirements for relief under section 1008 may not also have been met." (*Id*. at p. 1043.) The court cited no pertinent authority for its conclusion. In any event, as explained above, we do not agree with it. Further, that holding was rendered in circumstances clearly distinguishable from this case. It did not arise in the context of a renewed motion for relief under section 473, subdivision (b) but, instead, involved a motion brought for the first time under the excusable neglect or surprise provisions of section 473. Second, it did not involve repetitive motions seeking identical relief but adding new facts.

jurisdiction. We will direct the trial court to set aside its order granting the motion and to reinstate the defaults and default judgment.

DISPOSITION

The trial court's March 2, 2012 order is reversed and the trial court is directed to reinstate the previously entered defaults and default judgment. Appellant is to recover its costs on appeal.

CERTIFIED FOR PUBLICATION

WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.