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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

OLIVIA LAY, Plaintiff and Appellant, v. SIAMAK SHEMIRANI, Defendant and Respondent.	A156961 (Contra Costa County Super. Ct. No. C1701607)

Appellant Olivia Lay bought a home she sought to remodel. In November 2014, she was introduced to Hossam Nasser, with whom she signed a contract, and thereafter Lay was introduced to, and/or had work done by, several other persons or entities. The work was unsatisfactory and in 2015 Lay hired another contractor to rectify the problem.

In August 2017, represented by attorney John W. Schlit, Lay filed suit against four defendants, one of whom was respondent Siamak Shemirani. Shemirani was served by substitute service on his estranged wife, at a home where he no longer resided. By the time Shemirani received to complaint, his time to respond had already run—and within weeks thereafter Mr. Schlit took Shemirani's default. Mr. Schlit advised Shemirani of an upcoming case management conference, and Shemirani appeared, to learn of the default. Following his participation in that conference, Shemirani attended the next

case management conference as well, in the meanwhile communicating with Mr. Schlit (and/or his paralegal). Those communications continued following the second case management conference, at one point involving a one and one-half hour meeting with Mr. Schlit and his paralegal at the courthouse. Mr. Schlit wanted information from Shemirani about the details involving other defendants, which Shemirani provided. Shemirani attempted to follow up on several occasions, without success, only to learn that—without notice or warning of any kind—Mr. Schlit had obtained a default judgment for $275,366.04, an amount nowhere supported in the record.

Shemirani immediately hired counsel to seek relief, paying him a retainer, but counsel did little, and nothing to seek relief from default. Shemirani quickly hired a second lawyer who on shortened time filed a motion to set aside the default and default judgment. The trial court wrote a lengthy tentative ruling granting the motion, which tentative ruling was amended to add this entry: "As above, however, the parties sent a joint letter to the court via fax on 1/8/19 indicating that the parties agree with the tentative and that the defendant agrees to pay $5,000 to [plaintiff] for attorney fees within 10 days. An order will be presented to the court. [¶] Motion to set aside default granted."

Mr. Schlit apparently had second thoughts and filed a motion for reconsideration. That motion was denied, in a thoughtful, comprehensive order. Lay appeals, attacking both orders, that granting the set aside and that denying reconsideration. We reject the attacks, and we affirm.

BACKGROUND

The General Setting

Lay bought a home in Rodeo in October 2014, planning not only to live there, but to remodel it to accommodate the elderly and disabled. As Lay

would come to allege in her complaint, shortly after acquiring the property she contacted Hossam Nasser who "held himself out" to her as a professional engineer, and entered into a contract with him to provide engineering services in connection with the remodeling, specifically "regarding the design of a support beam." Then, in "approximately November 2014," Nasser told Lay he knew of a "licensed contractor" who was qualified to do the remodeling, specifically mentioning Hasan Redzic, who he represented to be "a licensed general contractor who was affiliated with 'Evra Construction' and 'Caspian Enterprise, Inc.' " and Redzic "repeatedly represented" that he was "operating under a valid California contractor's license by virtue of his relationship with Evra and Caspian."

At this point the general allegations in Lay's complaint turn to Shemirani, alleging as follows:

"15. Also, in November 2014 REDZIC introduced [Lay] to co-defendant SHEMIRANI. SHEMIRANI represented to [Lay] that he was also affiliated with EVRA and CASPIAN and that he was operating under a California contractors license by virtue of his relationship with EVRA and CASPIAN.

"16. During November and December 2014, SHEMIRANI assisted REDZIC with preparations for the remodeling of the property. Throughout November and December 2014, REDZIC and SHEMIRANI repeatedly told [Lay] that they were licensed general contractors, that they were affiliated with EVRA and CASPIAN, and that they were qualified to perform the remodeling at the [p]roperty.

"17. In November and December 2014, SHEMIRANI and REDZIC also repeatedly told [Lay] they would obtain the necessary permits for the project.

"18. Based on the recommendation of NASSER and on the promises made by SHEMIRANI and REDZIC to the effect that they were operating under EVRA's general contractor's license, [Lay] signed a written agreement, which she understood was with EVRA and/or CASPIAN, for the remodeling of the [p]roperty. The contract amount was approximately $46,095."

According to Lay's allegations, work under her written agreement began in November 2014 and continued to January 2015. During that time Shemirani and Redzic "requested periodic payments," and Lay paid "approximately $70,741.76 to defendants."

After alleging (on information and belief) that Nasser's plans "were defective," and that Shemirani and Redzic "failed to follow the plans," Lay's general allegations ended with this:

"24. In approximately January 2015, [Lay] hired an inspector to review the project. As a result of the inspection, [Lay] learned that despite the promise that all necessary permits would be obtained for the project, defendants, in fact, had obtained no permits. [Lay] also learned that substantial portions of the work performed by defendants were defective.

"25. Following the inspection, [Lay] contacted SHEMIRANI and REDZIC to address the lack of permits and defective construction. At some point in approximately January 2015, SHEMIRANI and REDZIC abandoned the project and stopped communicating with [Lay.]

"26. In an effort to address the problems, [Lay] contacted EVRA's office. It was then that [Lay] learned, for the first time, that EVRA denied any affiliation with SHEMIRANI or REDZIC.

"27. As a result of the above-described misfeasance of defendants, [Lay] was forced to seek a new contractor. [Lay] learned that substantial portions of the work done by defendants [would] have to be demolished and

replaced. All of this ha[d] increased the cost to complete the project, substantially. [Lay] underst[ood] that she [would] have to pay approximately an additional $83,075 for the demolition and replacement of defective construction, in order to complete the remodeling of the [p]roperty pursuant to the original plans.

"28. [Lay] has subsequently learned that during the relevant time period, **neither SHEMIRANI, REDZIC, nor CASPIAN was working on the [p]roperty or operating under a valid California contractor's license.**"

The Proceedings Below

On August 22, 2017, represented by Mr. Schlit, Lay filed suit, naming four defendants: Shemirani individually and dba Caspian Enterprise, Inc., Redzic individually and dba Caspian Enterprise, Inc., Nasser, and ICG Engineering, Inc. (ICG). The complaint purported to allege seven causes of action, for: 1. breach of contract, 2. fraud, 3. unjust enrichment, 4. unfair business practices, 5. professional negligence, 6. breach of covenant of good faith and fair dealing, and 7. promissory estoppel. Six of the seven causes of action were against Shemirani, all but professional negligence.

On October 17, 2017, Shemirani was served with the complaint via substitute service, as a packet of documents, including the complaint, was served on Shemirani's estranged wife at her home, a home where Shemirani did not live. Shemirani's wife did not understand the documents, and Shemirani first saw them in "late November or early December."

As described by Shemirani in his declaration, after Shemirani received the documents from his wife, he reviewed them and saw not only that he was being sued individually and dba Caspian Enterprise, Inc., but also that there was a January 9, 2018 case management conference scheduled, which

subjected him to sanctions if he failed to attend. Indeed, in December 2017, Shemirani received a case management conference statement from Mr. Schlit, which confirmed the January date. On December 27, Shemirani telephoned Mr. Schlit, but could only reach a paralegal, "Jeff," who turned out to be Jeff Schoefer. Shemirani told Mr. Schoefer that he had been wrongly sued; he replied that the firm did not represent Shemirani, could not give legal advice, and recommended that if Shemirani received a notice to appear in court he should do so.

But whatever else Mr. Schoefer said, he did not advise Shemirani that Mr. Schlit's office had already filed a request for entry of default against him. That is, the register of actions reflects that on December 19, Mr. Schlit filed three documents: proof of substituted service on Shemirani on October 17, and two requests for defaults, those of Shemirani and Redzic.[1]

On January 4, Shemirani again called Mr. Schlit's office, but was again able to speak only with Mr. Schoefer, who would not allow Shemirani to speak directly with Mr. Schlit.[2] Shemirani told the paralegal he would send Mr. Schlit a letter with documents showing he had done nothing wrong.

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[1] These were the third and fourth defaults entered by Mr. Schlit, all entered shortly after the defendant's time to respond had run, as the register of actions reflects that on November 27 Mr. Schlit had filed requests for default against Nasser and ICG.

[2] We generally set forth the facts as testified to by Shemirani, the successful party below. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 787; *Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053.)

We acknowledge that Lay disputes some of Shemirani's facts, going so far in Lay's reply brief to assert that some of the facts are "flatly contradicted" by Mr. Schlit's declaration. That said, the reply brief also asserts that the key facts are undisputed.

Shemirani appeared at the January 9 case management conference, held in open court before the Honorable Judith Craddick. Mr. Schlit appeared by telephone. The conference was unreported. Shemirani told Judge Craddick he was wrongfully sued and was there to defend himself as he understood by the notice. Judge Craddick said that a default had been entered against him but, in Shemirani's words, "before she could finish the conversation," Mr. Schlit interrupted and requested that the court continue the matter. Judge Craddick did so and ordered Shemirani to appear on February 23. No one explained to him that he needed to hire a lawyer. As Shemirani expressly testified, he understood that all he needed to do in order to defend himself was to appear on February 23. He did not understand the significance of the default against him or that he needed to set it aside.[3]

On February 23, another case management conference was held, again before Judge Craddick, again unreported. Shemirani appeared, as did an attorney for Nasser and ICG. Mr. Schlit appeared by telephone. Shemirani explained to Judge Craddick that he had paperwork and proof regarding his "innocence" and was wrongfully sued. Judge Craddick requested that Shemirani contact Schlit to discuss the matter and, Shemirani testified, he "received a commitment from Mr. Schlit over the phone" that he would work with him to prove that he, Shemirani, was not responsible. Judge Craddick noted that the hearing was continued to June 28. Again, no one explained to Shemirani that he needed to hire an attorney, and Shemirani understood that what he had to do to defend himself was to meet with Mr. Schlit and see if he could prove that he was not responsible. And the minutes for the

[3] At the January 9 case management conference, Mr. Schlit stipulated to set aside the defaults he had taken against Nasser and ICG. And an order to that effect was entered January 12.

February 23 conference confirm this, stating that "Shemirani is currently in default and will be consulting with [Lay's] attorney regarding setting it aside or settlement."

On February 26, Shemirani called Mr. Schlit to speak with him about the case as Judge Craddick had directed, but Mr. Schlit was unavailable, so Shemirani left a message. Paralegal Schoefer returned Shemirani's call the next day and asked that Shemirani mail all his documents, which included pay stub documents, to Mr. Schlit's office.

Later that day, Shemirani spoke with Andrew Gabriel, another paralegal of Mr. Schlit, about setting up a meeting for the purpose of providing information to prove that he was not responsible. And on February 28, Mr. Gabriel wrote Shemirani a letter memorializing their agreement that a meeting was set to take place on March 15 at 1:00 p.m. at the Solano County Courthouse.

Sometime in early March, Shemirani sent his pay stubs to Mr. Schlit's office via first class certified mail to prove that he was an employee of Evra Construction and not a partner. Mr. Schlit's paralegal Schoefer signed a return receipt for the documents.

On March 15, Shemirani appeared at the basement of the Solano County Courthouse and met with Mr. Schlit and paralegal Schoefer. The meeting lasted approximately one and one-half hours. Mr. Schlit wanted information from Shemirani about the details of all job locations where Redzic and ICG worked as unlicensed contractors, and wanted any photographs, names of other individuals, contact information, and other addresses. In exchange for giving this information, Mr. Schlit led Shemirani to believe he would come up with a fair resolution if Shemirani was truthful and provided all the information requested, explaining that he would either

require Shemirani to testify against the other defendants or dismiss the case against him. Shemirani was satisfied with Mr. Schlit's request and believed all he needed to do was cooperate with him to assist him in furtherance of his case and investigation against the other defendants. At no point was there any discussion regarding setting aside the default or that Shemirani needed to hire an attorney.

A few days later paralegal Schoefer called Shemirani to get the addresses, information, and photographs. Shemirani explained to Schoefer that he was at work and that he would call him back. Shemirani asked if Mr. Schlit had decided what his destiny was going to be with the case and he was told no, they needed the information first.

Over the next several weeks Shemirani called Mr. Schlit's office on numerous occasions, including three or four times trying to speak with paralegal Schoefer and three or four times trying to speak with Mr. Schlit about sending over the requested documents and to discuss his involvement. No one ever returned his phone calls. Shemirani heard nothing from them and assumed that he did not need to do anything further until he heard back from them on whether they wanted him to provide more information or whether they were going to want him to testify against the other defendants.

On June 28, Judge Craddick held a further case management conference. Shemirani did not appear because he never received anything in the mail from Mr. Schlit's office as he had the previous two times for the upcoming hearing, and since he never heard back from Mr. Schlit, he assumed that this hearing was not going to happen and therefore did not appear.

In late July, Shemirani received a request for entry of default from Mr. Schlit's office, requesting that a default judgment be entered against him for

over $275,000. Shemirani was shocked, as he thought Mr. Schlit was going to contact him, to advise him of Mr. Schlit's plan for him. Shemirani immediately tried to contact Mr. Schlit, who did not return his call.[4]

On August 9, Mr. Schlit filed a request for court judgment, seeking judgment as follows:

"Judgment to be entered	Amount	Credits acknowledged	Balance
"a. Demand of Complaint	$201,161.80	0.00	$201,161.80
"b. Statement of damages			
(1) Special			
(2) General			
"c. Interest	$73,520.50	0.00	$73,520.50
"d. Costs (*see reverse*)	$687.50	0.00	$687.50
"e. Attorney fees			
"f. TOTALS	$275,369.80	0.00	$275,369.80."

On August 15, the court entered Judgment by Court "By Default," checking boxes that it was entering a "Court Judgment" based on "Plaintiff's written declaration." Lay's "written declaration" referred to is nowhere in the

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[4] This is how Lay's opening brief blissfully describes the few months following the March 15 meeting:

"By March 22, 2018, a week after the meeting, Lay's counsel had received nothing from Shemirani. Mr. Schoefer followed up with Shemirani in a short phone call to ask if he was going to supply any information or documents. Shemirani replied, 'In time.' This vague response, together with a lack of any substantive evidence from Shemirani, rekindled Lay's counsel's previous concerns about Shemirani. Lay's counsel ceased all communication with Shemirani from that point forward."

"Ceased all communications" indeed—including ignoring Shemirani's numerous attempts to contact them.

record on appeal, and as best we can tell from the register of actions was not filed below. Moreover, the $201,161.80 amount referred to as the "Demand of Complaint" is nowhere in the complaint. And we do not understand how there can be "prejudgment interest" of $73,520, as the maximum amount paid by Lay was $153,546: $70,471 "paid to defendants" and $83,075 for demolition and replacement of defective construction.[5]

After one last attempt, on July 31, to communicate with Mr. Schlit to ask what happened, Shemirani began looking for an attorney, and days later he hired Daniel Beaver to set aside the default judgment, paying him a $3,000 retainer to do so. On August 8, Mr. Beaver left a telephone message with, and sent an email to, Mr. Schlit asking among other things, that the default be set aside. Two days later Mr. Schlit wrote back, stating that he was unwilling to set aside the default since it had been entered seven months earlier.

Shemirani thereafter tried several times by email and telephone to contact Mr. Beaver, with limited success, ultimately to be told that he was working on it and all was good. Then, in mid-October, Shemirani was served with an order to appear for examination. He called Mr. Beaver, who acknowledged that he had not filed any motion to set aside, but would try to obtain a continuance of the examination, and two days later Mr. Beaver told Shemirani he had obtained a later examination date of November 29. Mr. Beaver told Shemirani he needed assistance with the matter and that

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[5] In light of this, it would appear that the default judgment is not supported in the record, as a result of which it would be void, and thus subject to be set aside under Code of Civil Procedure section 473, subdivision (d). (See generally *Grappo v. McMills* (2017) 11 Cal.App.5th 996, 1004.) This, of course, is a separate basis on which the judgment could be set aside. However, Shemirani does not address the issue, and neither will we.

Shemirani should contact attorney David Sternberg, whom Mr. Beaver had contacted the day before.

Shemirani did, and on shortened notice, Mr. Sternberg filed a motion, and then an amended motion, seeking to set aside the default and the default judgment, set for hearing on January 9, 2019. The motion was based on "the combination of Shemirani's initial excusable neglect, [Lay's] counsel's subsequent extrinsic fraud perpetrated on Shemirani in being lulled into refraining from taking any action until after the six month period to set aside the default had run and Shemirani's prior attorney's positive misconduct in not filing a motion to set aside a default on behalf of Shemirani prior to the entry of the default judgment." And the first two arguments in the points and authorities in support of the motion cited to, and relied on, the equitable grounds of extrinsic fraud and extrinsic mistake.

Lay filed opposition, which included objection to Mr. Beaver's declaration in support of Shemirani's motion. Shemirani filed reply papers, including a declaration from Shemirani that attached copies of several documents from the California Secretary of State's office showing Caspian's status as a valid California corporation. Shemirani's declaration also pointed out that Lay's opposing papers did not include the construction contract, which was between Lay and Evra, but merely a construction funds administration statement prepared by Caspian showing work performed and amounts distributed by Evra as the contractor.

On December 11, the matter had been reassigned for all purposes to the Honorable Jill Fannin, who on January 8 issued a lengthy tentative ruling granting the motion. Mr. Schlit did not contest, and the lengthy minute order for January 9 was amended to add this entry at the end:

"There being no Opposition to the Court's Tentative Ruling, same is adopted as follows: AS ABOVE, HOWEVER, THE PARTIES SENT A JOINT LETTER TO THE COURT VIA FAX ON 1/8/19 INDICATING THAT THE PARTIES AGREE WITH THE TENTATIVE AND THAT THE DEFENDANT AGREES TO PAY $5,000 TO PLTF FOR ATTORNEY FEES WITHIN 10 DAYS. AN ORDER WILL BE PRESENTED TO THE COURT. [¶] MOTION TO SET ASIDE DEFAULT GRANTED."

A formal order granting the motion was filed February 6.

Lay and Mr. Schlit apparently changed their minds, and on January 22 filed a motion for reconsideration. In claimed support, Lay pointed to the exhibits to Shemirani's reply declaration in support of his motion that included several documents from the California Secretary of State's office showing that Shemirani had been agent for service of process for Caspian since 2008. The motion also claimed that criminal charges were brought against Shemirani for fraudulent use of contractor's license information. Finally, Lay argued that relief from default and default judgment had to be based on *Rappleyea v. Campbell* (1994) 8 Cal.4th 975 (*Rappleyea*) and *Pulte Homes Corp. v. Williams Mechanical, Inc.* (2016) 2 Cal.App.5th 267.

The reconsideration motion came on for hearing before Judge Fannin, who had also issued a lengthy, five-page tentative opinion denying the motion. Following argument, Judge Fannin confirmed the tentative ruling, and entered an order denying the motion on the grounds that the claimed "new or different facts" Lay submitted were neither new nor different, as the information had been a matter of public record for years by the time Shemirani filed his motion to set aside, and Lay provided no explanation why she could not have provided that information at the time. Judge Fannin also found that the authorities Lay relied on in her motion were also available as

of the time Shemirani filed his motion to set aside and that Lay failed to provide any explanation for not raising these authorities earlier. Finally, Judge Fannin clarified that Shemirani's relief from default was based on equitable grounds.

On April 5, Judge Fannin entered a formal order denying the motion for reconsideration, and on that same day Lay filed a notice of appeal.

DISCUSSION

Introduction

The notice of appeal itself presents issues, as it states that it is from an order after judgment, specifically the order entered on "3/6/19." As indicated above, no order was entered that day: the order granting the set aside motion was entered on February 6, the order denying reconsideration on April 5. That said, Lay's appeal argues that both orders were error, arguments to which Shemirani responds. Thus, and because we review notices of appeal liberally, we address both of Lay's arguments. And find them wanting.

The Set Aside Motion was Properly Granted

As noted above, Shemirani's set aside motion was based in part on equitable grounds, the first two arguments in his moving papers asserting "extrinsic fraud" and "extrinsic mistake." Such equitable relief is available apart from any statutory authority, the cases recognizing that a court has inherent equitable power to set aside a judgment on the ground of extrinsic fraud or mistake. (*Olivera v. Grace* (1942) 19 Cal.2d 570, 576–578; *Bae v. T.D. Service Co. of Arizona* (2016) 245 Cal.App.4th 89, 97; *Sporn v. Home Depot USA, Inc.* (2005) 126 Cal.App.4th 1294, 1300.)

As to what those terms entail, our Supreme Court has described extrinsic fraud as a "broad meaning [that] 'tend[s] to encompass almost any

set of extrinsic circumstances which deprive a party of a fair adversary hearing.' " (*In re Marriage of Park* (1980) 27 Cal.3d 337, 342; *Estate of Sanders* (1985) 40 Cal.3d 607, 614.)

And as to "extrinsic mistake," that Court describes it this way: "a term broadly applied when circumstances extrinsic to the litigation have unfairly cost a party a hearing on the merits." (*Rappleyea*, *supra*, 8 Cal.4th at p. 981.) It "exists when the ground of relief is not so much the fraud or other misconduct of one of the parties as it is the excusable neglect of the defaulting party to appear and present his claim or defense. If that neglect results in an unjust judgment, without a fair adversary hearing, the basis for equitable relief on the ground of extrinsic mistake is present." (*Manson, Iver & York v. Black* (2009) 176 Cal.App.4th 36, 47.) As the leading practice treatise describes it, "extrinsic fraud or mistake" are given "a broad interpretation and cover almost any circumstance by which a party has been deprived of a fair hearing. There need be no actual 'fraud' or 'mistake' in the strict sense." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2019) ¶ 5:438, p. 5-125.)

As Lay points out, Judge Fannin's explanation in her tentative ruling on the set aside motion is less than precise. For example, she explained that "notwithstanding the untimeliness of the motion," she found that Shemirani "met his burden to prove excusable neglect." However, Judge Fannin also held that "Shemirani's testimony illustrate[d] that he participated in the litigation notwithstanding the default, believing that his cooperation with plaintiff was sufficient to comply with his responsibilities in the litigation." While Judge Fannin did not say as much, such observation could support relief based on extrinsic fraud, as it did, for example, in *Aheroni v. Maxwell* (1988) 205 Cal.App.3d 284, 292 (equitable relief appropriate where party has

been induced not to appear or contest the action by misrepresentations of fact or false promises to dismiss or to compromise the claim). In any event, as Judge Fannin's order denying reconsideration made clear, she granted relief on equitable grounds.

On top of all that, it would not matter as "There is perhaps no rule of review more firmly established than the principle that a ruling or decision correct in law will not be disturbed on appeal merely because it was given for the wrong reason. If correct upon any theory of law applicable to the case, the judgment will be sustained regardless of the considerations that moved the lower court to its conclusion." (*Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal.3d 550, 568.) Or put slightly differently, a fundamental principle of appellate review is that "A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of correctness." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133; accord, *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140.) And we will uphold the decision of the trial court if it is correct on any ground. (*Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 769.)

In light of those principles and presumptions, the burden is on Lay to demonstrate error, and also "prejudice arising from" that error. (*Gould v. Corinthian Colleges, Inc.* (2011) 192 Cal.App.4th 1176, 1181.) She has done neither.

A ruling granting relief from a default or default judgment is reviewed for abuse of discretion. (*Rappleyea*, *supra*, 8 Cal.4th at p. 981.) This means, as the Supreme Court has described it, that Judge Fannin's ruling had to be one "that is 'so irrational or arbitrary that no reasonable person could agree with it. [Citation.]' " (*Sargon Enterprises, Inc. v. University of Southern*

California (2012) 55 Cal.4th 747, 773.) That hardly describes Judge Fannin's ruling here—especially as Shemirani's motion was fully supported.

In order to prevail for equitable relief, Shemirani had to show three things: (1) a meritorious defense; (2) a satisfactory excuse for not presenting it; and (3) diligence. (*Rappleyea*, *supra*, 8 Cal.4th at p. 983; *Sporn v. Home Depot USA, Inc.*, *supra*, 126 Cal.App.4th at p. 1301.) All three are present here.

As to the first, Shemirani's moving papers included a proposed answer. They also included his declaration, which testified not only to his explanation that he was not acting as an unlicensed contractor, but also vouched for the good faith of and merit in the motion to set aside.

And the discussion above, setting forth in detail Shemirani's experience vis-à-vis the court and, more importantly, Mr. Schlit, demonstrates element two. To briefly recap, following the February 23 case management conference Shemirani took additional steps that he believed complied with his litigation responsibilities. As he put it, "following instructions from Schlit's office [he] sent documents, including paystubs to Schlit's office and set up a meeting with Schlit to show he was not responsible." They met for 90 minutes, where Shemirani answered all of Mr. Schlit's questions. Mr. Schlit told Shemirani he wanted more information, and details of all job locations where codefendants Redzic and ICG worked, including photographs and addresses, and he told Shemirani he might need him to come to court and testify against the other defendants. Shemirani asked Schlit what he would receive in return, and Mr. Schlit responded that if Shemirani was truthful and provided all the information, he would come up with a fair resolution. The discussion never included any talk about setting aside the default or the default that Shemirani would need to hire an attorney. Thereafter, Shemirani attempted

to follow up. And nothing—until the default judgment, obtained without any warning whatsoever.

As to element three, the above discussion demonstrates Shemirani's diligence, beginning with his retention of Mr. Beaver, and then Mr. Sternberg, and his fast action.

Over the years our Supreme Court has set forth the guiding principles to be applied involving default situations. And among the most significant is this: " 'The policy of the law is to have every litigated case tried upon its merits, and it looks with disfavor upon a party, who, regardless of the merits of the case, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary.' " (*Au-Yang v. Barton* (1999) 21 Cal.4th 958, 963, quoting *Weitz v. Yankosky* (1966) 63 Cal.2d 849, 855.)

The most recent default case was filed just months ago: *Lasalle v. Vogel* (2019) 36 Cal.App.5th 127 (*Lasalle*). There, in a beautifully crafted opinion that began with a reminder of the need for civility in litigation (*id.*, at pp. 132–135), the court went on to reverse the order denying the defendant attorney relief from default taken against her—indeed, despite that a warning was given. Doing so, the opinion began with this distillation of default-related law:

"We acknowledge the standard of review for an order denying a set-aside motion is abuse of discretion. [Citation.] But there is an important distinction in the way that discretion is measured in [Code of Civil Procedure] section 473 cases. The law favors judgments based on the merits, not procedural missteps. Our Supreme Court has repeatedly reminded us that in this area doubts must be resolved *in favor of relief*, with an order denying relief scrutinized more carefully than an order granting it. As Justice Mosk put it in *Rappleyea*, 'Because the law favors disposing of cases on their

merits, "any doubts in applying [Code of Civil Procedure] section 473 must be resolved in favor of the party seeking relief from default [citations.] Therefore, a trial court order denying relief is scrutinized more carefully than an order permitting trial on the merits." [Citations.]'

"Warning and notice play a major role in this scrutiny. Six decades ago, when bench and bar conducted themselves as a profession, another appellate court, in language both apropos to our case and indicative of how law ought to be practiced, said, 'The quiet speed of plaintiffs' attorney in seeking a default judgment without the knowledge of defendants' counsel is not to be commended.' (*Smith v. Los Angeles Bookbinders Union* (1955) 133 Cal.App.2d 486, 500.)

"In contrast to the stealth and speed condemned in *Bookbinders*, courts and the State Bar emphasize warning and deliberate speed. The State Bar Civility Guidelines deplore the conduct of an attorney who races opposing counsel to the courthouse to enter a default before a responsive pleading can be filed. (*Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 702, quoting Cal. State Bar, California Attorney Guidelines of Civility and Professionalism (2007) § 15.) Accordingly, it is now well acknowledged that an attorney has an *ethical* obligation to warn opposing counsel that the attorney is about to take an adversary's default. (*Fasuyi*, *supra*, at pp.701–702.)" (*Lasalle*, *supra*, 36 Cal.App.5th at pp. 134–135, fns. omitted.)

Later commenting on the duty to warn, *Lasalle* went on to say this:

"So to the extent it was possible for a party seeking a default with unseemly haste to commit an *ethical* breach without creating a *legal* issue, that distinction was erased by [Code of Civil Procedure] section 583.130. The ethical obligation to warn opposing counsel of an intent to take a default is now reinforced by a statutory policy that all parties 'cooperate in bringing the

action to trial or other disposition.' ([Code Civ. Proc.,] § 583.130.) Quiet speed and unreasonable deadlines do not qualify as 'cooperation' and cannot be accepted by the courts. [¶] We cannot accept it because it is contrary to legislative policy and because it is destructive of the legal system and the people who work within it. Allowing it to flourish has been counterproductive and corrosive.' (*Lasalle* at p. 137.)"[6]

The set aside motion was properly granted, and Lay's three arguments on the issue are easily rejected.

The first argument, all of one page, is that Judge Fannin "exceeded her jurisdiction" by granting relief because the motion was brought after six months. As noted above, Judge Fannin granted the motion on equitable grounds, which has no time restrictions. The above discussion also disposes of Lay's second argument, that there was no evidence of extrinsic mistake or fraud. And Lay's third argument, that Judge Fannin used a more lenient equitable standard to justify setting aside the default and default judgment than set forth in *Rappleyea*, was expressly rejected by Judge Fannin who, in pointing to her inherent equitable authority to set aside the default, specifically cited *Rappleyea* as follows: "When 'a default judgment has been

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[6] After five paragraphs describing the law, Weil & Brown ends with this advice to counsel:

"PRACTICE POINTER: If you're representing plaintiff, and have had *any* contact with a lawyer representing defendant, don't even *attempt* to get a default entered without first giving such lawyer *written* notice of your intent to request entry of default, and a *reasonable time* within which defendant's pleading must be filed to prevent your doing so. (*Fasuyi v. Permatex, Inc.*, *supra*, 167 [Cal.App.4th] at [p.] 701 . . . [quoting text].") (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2019) ¶¶ 5:68–5:71, pp. 5-18 to 5-19.)

obtained, equitable relief may be given only in *exceptional* circumstances (emphasis added).' (*Rappleyea*, [*supra*,] 8 Cal.4th at [p.] 981.)"

The Motion for Reconsideration was Properly Denied

As noted, apparently having reneged on Mr. Schlit's letter that he was not contesting the motion for relief, Lay moved for reconsideration under Code of Civil Procedure section 1008. Judge Fannin denied it, another order we review for abuse of discretion. (*Farmers Ins. Exchange v. Superior Court* (2013) 218 Cal.App.4th 96, 106; *Lucas v. Santa Maria Public Airport Dist.* (1995) 39 Cal.App.4th 1017, 1027; *Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494, 1500, fn. 2.)

Lay argues that Judge Fannin erred in holding that evidence submitted by Shemirani in his reply declaration supporting his set aside motion did not comprise "new or different facts" pursuant to Code of Civil Procedure section 1008. Those documents showed that since 2008 Shemirani had been an agent for service of process of a corporation first named Caspian Enterprise, Inc., later renamed Cynergi Construction, Inc. The earliest of these documents was dated June 12, 2008, the most recent June 25, 2018.

This information failed to comprise new or different facts on several levels. All were on file with the Secretary of State's office well before Lay filed her opposition to the set aside motion. It was hardly new or different. And as Judge Fannin expressly recognized, Lay failed to show why this information could not have been ascertained before the ruling on the set aside motion. In any event, the relevance of this information is unclear.

Finally, to the extent that Lay cited two cases to support her arguments that these long available documents were "new or different," those authorities were available for citation long before Lay filed her motion for reconsideration.

Lay's final argument is that she alleged that Shemirani was an unlicensed contractor. And, the argument apparently runs, since Shemirani defaulted in responding to the complaint, Shemirani is bound by those allegations, and under Business & Professions Code section 7031 a person acting as a contractor without a license cannot seek relief of any kind, presumably including equitable relief from default. We disagree.

To begin with, as part of his moving papers Shemirani included an answer that denied every allegation made by Lay, including those accusing him of improperly acting without a contractor's license. Shemirani also provided written evidence that he was not acting as a contractor, but merely as a project manager, making sure that payments were properly applied for the proper work—and indeed, that he, like Lay, was defrauded by one of the codefendants, Redzic.

Beyond that, Lay is apparently arguing that an unlicensed contractor has no rights whatsoever. Or, to put it otherwise, that being an unlicensed contractor is apparently unclean hands as a matter of law. Such a position is contradicted by cases recognizing that even unlicensed contractors have rights—and, in fact, can themselves bring lawsuits. (See, for example, *Grant v. Weatherholt* (1954) 123 Cal.App.2d 34, 43 [unlicensed contractor could not sue for compensation for performance but could for deceit]; *Holland v. Morse Diesel Internat., Inc.* (2001) 86 Cal.App.4th 1443, 1449 [unlicensed contractor could sue for racial discrimination during cleanup services]; *Epstein v. Stahl* (1959) 176 Cal.App.2d 53, 63 [action to dissolve joint venture].)

DISPOSTION

The orders are affirmed. Shemirani shall recover his costs on appeal.

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Richman, J.

We concur:

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Kline, P.J.

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Miller, J.

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