order to defend himself. He did not understand about the default against him or that he needed to set it aside (CT 106:17-19).

SHEMIRANI again appeared in court on February 23, 2018 (CT 106:22). Schilt again appeared by telephone. Brian Miles appeared for ICG Engineering. 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 in more detail. SHEMIRANI received a commitment from Mr. Schlit over the phone that he would work with him to prove that he, SHEMIRANI, was not responsible. The Court noted that the hearing was continued to June 28, 2018. However, no one explained to SHEMIRANI at the time that he needed to hire an attorney (CT 106:22-28). SHEMIRANI understood that all he had to do to defend himself was to meet with Mr. Schilt and see if he could prove that he was not responsible (CT 106:28-107:2).

LAY argued that under Pulte Homes, Corp. v. Williams Mech., Inc. (2016) 2 Cal.App.5th 267 that SHEMIRANI did not identify any statements or promises that SHEMIRANI relied on that prevented him from appearing in the proceedings (AOB at p. 20). LAY is mistaken. The Trial Court pointed to paragraphs 13 and 15 of SHEMIRANI’s declaration, which

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1 24

Appellant OLIVIA LAY's (hereafter LAY) appeal from the grant of Respondent SIAMAK SHEMIRANI's (hereafter SHEMIRANI) motion to set aside default and default judgment and denial of LAY's motion for reconsideration runs afoul of one of the most basic concepts of appellate litigation that an appealed judgment or order will be upheld if it is correct *on any grounds*, **even if different from that given by the trial court. Here, while the Trial Court was vague on the basis on which it initially granted relief from default, even while acknowledging that relief under California Code of Civil Procedure § 473(b) was untimely, relief from default was proper under the Trial Court's inherent equitable authority.[1] In its order denying LAY's motion for reconsideration, the Trial Court recognized and applied the three part test set forth in** *Stiles v. Wallis* **(19 3) 147 Cal.App.3d 1143 and found equitable grounds justifying relief for SHEMIRANI. SHEMIRANI sought relief on a variety of grounds, including equitable relief, when making his motion for relief.**

LAY argues that the de novo standard of review applies in this case, since she claims that the Trial Court applied the standard governing relief

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[1] All further references to California's Code of Civil Procedure shall be to CCP.

under CCP § 473(b) even though more than six months passed from entry of default and the Trial Court entered a default judgment against SHEMIRANI. Even assuming *arguendo* that the Trial Court used the wrong test initially, the same standard of review applies to appeals from orders on motions to set aside defaults and default judgments, whether based on CCP § 473(b), or on equitable grounds abuse of discretion. In addition, the Trial Court in explaining its denial of LAY's motion for reconsideration, did so using the more demanding three part *Stiles* test, showing that it acted within its discretion in granting relief SHEMIRANI on equitable grounds.

The Trial Court also acted well within its discretion in denying LAY's motion for reconsideration. The fact that LAY wanted to point out to the Trial Court, that SHEMIRANI had been an agent since 2 or f service of process of the corporation that employed him, had been a matter of public record for years before SHEMIRANI's motion to set side had been filed, let alone LAY's motion for reconsideration. LAY failed to explain why she did not have this information earlier. The same defect befell LAY's claims of new or different law. Both cases LAY pointed to had been available for review for years. The need for strict diligence in explaining why a case or statute was not available previously subject to

the same diligence as required for new or different facts on reconsideration.

LAY's final argument fares no better. LAY alleges that SHEMIRANI acted as an unlicensed contractor, meaning that under California Business Professions Code § 7 31 SHEMIRANI had unclean hands and because he had defaulted, was not entitled to equitable relief from default.[2] LAY fares no better on this argument. The first prong of the ***Stiles*** **test for equitable relief from default requires that the party seeking relief from default have a meritorious case. SHEMIRANI as part of his moving papers to set aside the default and default judgment included an answer that denied every allegation made against him by LAY, including those accusing him of improperly acting without a contractor's license. SHEMIRANI also provided written evidence as part of his moving papers that he was not acting as a contractor, but was merely a project manager, making sure that payments were properly applied for the proper work, and that SHEMIRANI, like LAY, was defrauded by one of the co defendants, HASAN RED IC.**

There is no prejudice to LAY from granting relief from the default and default judgment. LAY and SHEMIRANI will have the opportunity

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[2] All further references to California's Business Professions Code shall hereafter be to B P.

resolve this case on the merits, along with the other defendants, avoiding the need for any separate lawsuits for indemnity.

The Trial Court acted within its discretion in granting SHEMIRANI relief from default and default judgment. Accordingly both the Trial Court order granting relief from default and default judgment in SHEMIRANI's favor and the order denying LAY's motion for reconsideration must be affirmed.

On August 22, 2017, LAY filed suit in Contra Costa County Superior Court against Defendants SHEMIRANI, individually and doing business as CASPIAN ENTERPRISE, INC., HASAN RED IC individually and dba CASPIAN ENTERPRISE, INC., HOSSAM NASSER, and ICG ENGINEERING, INC. (Clerk's Transcript on Appeal, page 27, lines [3] 17).

The complaint alleged that LAY purchased her property in Rodeo, California in October 2014 (CT 27 22 24, 2 27). A residence was already on the property. LAY intended to live there and remodel the property to include a residential facility to accommodate elderly and disabled patients (CT 2 27 29 2).[4]

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[3] All further references to the Clerk's Transcript on Appeal shall be to CT, followed by the page number (and line number if the page is on pleading paper).

LAY shortly thereafter contacted defendant NASSER, who held himself out as a professional engineer. LAY and NASSER contracted for NASSER to provide engineering services relating to the remodel (CT 29 3). LAY further alleged that in approximately November 2 14 NASSER approached her and told her about a licensed contractor he knew, recommending co defendant RED IC (CT 29 7 1). NASSER told LAY that RED IC was a licensed contractor affiliated with Evra Construction and CASPIAN and that RED IC and CASPIAN were qualified to perform the remodeling work (CT 29 1 12). LAY expressed interest in NASSER's recommended contractors and NASSER contacted RED IC and asked RED IC to prepare an estimate for the remodeling (CT 29 12 14).

RED IC provided the estimate for the remodeling. LAY alleged that RED IC also represented to LAY that RED IC was affiliated with CASPIAN and Evra Construction, and the truck used by RED IC and his workers also bore the name Evra Construction, with a CSLB number that was assigned to Evra (CT 29 1 22).

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[4] Unless otherwise indicated, the facts related to the merits of LAY's claims are from the allegations contained in LAY's complaint.

Also in November 2 14, according to the complaint, RED IC introduced LAY to SHEMIRANI (CT 29 27). LAY's complaint alleged that SHEMIRANI represented to LAY that he was also affiliated with Evra and CASPIAN and that he was working under a California contractor's license via his relationship with Evra and CASPIAN (CT 29 2 3 2). The complaint also alleged that in November and December 2 14 that RED IC and SHEMIRANI represented to LAY that they were qualifed and able to perform the work on this remodel and would obtain all necessary permits for the work (CT 3 3 9).

The complaint alleged that based on these representations that LAY entered into a contract with Evra and CASPIAN to perform the work for a contract price of about 4 , 9 (CT 3 1 13). Work allegedly began in approximately November 2 14 and continued into January 2 1 (CT 3 19 2). Over the course of construction LAY paid 7 ,471.7 to the defendants (CT 3 22 23).

LAY alleged, based on information and belief, that NASSER's plans were defective and that the other defendants failed to follow the plans. LAY hired an inspector, who discovered a lack of necessary permits and that substantial portions of the performed work was defective (CT 3 27

31 7). In approximately January 2 1 RED IC and SHEMIRANI abandoned the project, according to LAY's allegations (CT 31 1). LAY alleged that she contacted Evra's offices, which denied affiliation with RED IC and SHEMIRANI (CT 31 11 13). LAY allegedly learned that much of the work would need to be demolished and reperformed, at a cost of an additional 3, (CT 31 14 19).

LAY sued the above defendants for breach of contract, fraud, unjust enrichment, unfair business practices, professional negligence, breach of the implied covenant of good faith and fair dealing, and for promissory estoppel (CT 27 13 17). LAY seeks at least 2 , in compensatory damages according to proof, prejudgment interest, and punitive damages (CT 32 2 27, 34 3 , 3 1, 3 1 , 37 12 3 13).

In October 2 17 SHEMIRANI's wife was served at home with a packet of documents, including the complaint (CT 1 9 1). His wife did not understand the documents. Due to marital issues at the time SHEMIRANI did not reside there. SHEMIRANI did not see the documents until late November or early December 2 17 (CT 1 1 13).

After SHEMIRANI received the documents from his wife, he skimmed them and saw not only that he was being sued individually and dba Caspian Enterprise, Inc., but also that there was a January 9, 2 1 Case Management Conference to attend, which subjected him to sanctions if he failed to attend (CT 1 14 19). He understood his need to attend the January 9, 2 1 Case Management Conference (CT 1 19 2). In December 2 17 SHEMIRANI received a Case Management Conference Statement from Plaintiff's counsel, which reiterated the January 9, 2 1 date (CT 1 21 22). On December 27, 2 17, SHEMIRANI telephoned LAY's attorney Mr. Schilt, but could only reach a paralegal named Jeff. SHEMIRANI told Jeff that he had been wrongfully sued, but was told that the firm did not represent him and could not give him legal advice. Jeff recommended that if he, SHEMIRANI, received a notice to appear in court that he should do so (CT 1 23 27).

On January 4, 2 1 , SHEMIRANI again called Mr. Schilt's office to try to explain that he, SHEMIRANI, was innocent and wrongfully sued.

Again, SHEMIRANI spoke with the same paralegal, Jeff, who did not allow SHEMIRANI to speak with Mr. Schilt. SHEMIRANI explained that he would send Mr. Schilt a letter with documents showing he did nothing wrong (CT 1 1 4). SHEMIRANI followed through with a letter to Schilt that day explaining his innocence and his company's role concerning the lawsuit (CT 1 7, 112).

SHEMIRANI appeared at the January 9, 2 1 Case Management Conference. Judge Craddick was on the bench. Mr. Schilt appeared by telephone (CT 1 12). SHEMIRANI informed the court that he was wrongfully sued and was there to defend himself as he understood by the notice. Judge Craddick stated that a default had been entered against him but before she could finish the conversation, Mr. Schilt interrupted and requested that the court continue the hearing until February 23, 2 1 (CT 1 12 1). Judge Craddick did so and ordered that SHEMIRANI appear again on February 23, 2 1 but no one explained to him that he needed to hire a lawyer (CT 1 1 1). The Court's minutes for this Case Management Conference show its recognition that SHEMIRANI is currently in default and will be consulting with Pltf's attorney regarding setting it aside or settlement. (CT 1)

When SHEMIRANI left the courtroom on January 9, 2 1 , he

understood that all he needed to do was to appear February 23, 2 1 in order to defend himself. He did not understand about the default against him or that he needed to set it aside (CT 1 17 19).

SHEMIRANI again appeared in court on February 23, 2 1 (CT 1 22). Schilt again appeared by telephone. Counsel appeared for ICG Engineering. 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 in more detail. SHEMIRANI received a commitment from Mr. Schlit over the phone that he would work with him to prove that he,

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At the same January 9, 2 1 case management conference, LAY, through her counsel, stipulated to set aside the defaults against NASSER and ICG ENGINEERING, INC. (CT 9). That order was entered three days later (CT 9). Those defendants then demurred to LAY's complaint (CT 11 12). The demurrer was sustained with leave to amend but LAY chose to dismiss the action without prejudice and judgment entered against LAY (CT 12). LAY then refiled against ICG and NASSER in Contra Costa County Superior Court Case No. MSC1 19 (CT 1 9 24 17 1). On October 29, 2 19, that case was consolidated with this one, MSC17 1 7, pursuant to an order to show cause, a month before LAY's Opening Brief was filed in her appeal (Exh. A, SHEMIRANI Request for Judicial Notice).

SHEMIRANI, was not responsible. The Court noted that the hearing was continued to June 2 , 2 1 . However, no one explained to SHEMIRANI at the time that he needed to hire an attorney (CT 1 22 2). SHEMIRANI understood that all he had to do to defend himself was to meet with Mr. Schilt and see if he could prove that he was not responsible (CT 1 2 1 7 2).

Following up on the February 23, 2 1 hearing, SHEMIRANI took additional steps that he believed complied with his litigation responsibilities. *Based on instructions from Schilt's office*, SHEMIRANI sent his documents, including his paystubs, to Schilt's office. SHEMIRANI set up a meeting with Schilt to prove he was not responsible (CT 1 7 3 1 , 113 114). SHEMIRANI and Schilt met March 1 , 2 1 in the basement of the Solano County Courthouse. Schlit's paralegal Jeff was also present (CT 1 7 17 1). During the approximately 9 minute meeting, SHEMIRANI answered all of Schlit's many questions. Schlit told SHEMIRANI that he wanted more information, and details of all job locations where co defendants Red ic and ICG Engineering worked, including photographs and addresses (CT 1 7 1 22). Schlit told SHEMIRANI that he might need to come to court and testify against the other defendants.

SHEMIRANI asked Schilt what he would receive in return. Schilt responded that if SHEMIRANI was truthful and provided all the information, he would come up with a fair resolution. During the discussion there was no talk about setting aside the default nor that SHEMIRANI would need to hire an attorney. SHEMIRANI understood that he was in compliance with his responsibilities in the court case (CT 1 7 22 27).

Instead of further communications with Mr. Schilt's office, however, SHEMIRANI was met with silence. SHEMIRANI did not hear anything more from that office until on or about July 27, 2 1 , when he received a Request for Entry of Default Judgment to be entered against him for over 27 , (CT 49, 1 1 2 , 11). SHEMIRANI was shocked. This was contrary to his understanding with Schilt's office (CT 1 23 2). SHEMIRANI was led on, intentionally or not, by Schilt, to cooperate and

delayed hiring his own attorney to address this matter as a result.

After one last attempt on July 31, 2 1 to communicate with Schilts to ask what happened, SHEMIRANI began looking for an attorney (CT 1 27 1 9). Just over a week later, on August , 2 1 , after searching for attorneys, he hired Daniel Beaver in Walnut Creek to set aside the default judgment and paid a 3, retainer to Mr. Beaver to do so (CT 1 9 1).

Mr. Beaver failed to follow through on his assignment. On August , 2 1 , Beaver left a telephone message with and sent an email to LAY's attorney asking that the default be set aside and that the naming of the defendants be corrected so that defendant CASPIAN was not a dba of any defendant, including RED IC (CT 93 9, 9 9). Two days later, LAY's counsel Schilt wrote back stating that he was unwilling to set aside the default, since it had been entered seven months earlier (CT 93 1 13, 97 1).

After August , 2 1 , SHEMIRANI tried several times by email and phone to contact Mr. Beaver and had limited contact with him (CT 1 9 11 12). When Beaver got in touch with SHEMIRANI he told SHEMIRANI

that he was working on it and all was good (CT 1 9 12 13).

Then on or about October 14, SHEMIRANI was served with an Order to Appear for Examination. He called Beaver, who acknowledged that he had not filed any motion to set aside but would try to obtain a continuance of the Order of Examination (CT 1 9 14 1).

Two days later Beaver informed SHEMIRANI that he had contacted Schilt's office to continue the OE   and that Schilt had obtained a later examination date of November 29, 2 1   (CT 1 9 17 19). Beaver told SHEMIRANI that he needed assistance with this matter and that SHEMIRANI should contact David Sternberg, whom Beaver had contacted the day before (CT 94 2 4).

A week later, Sternberg's office filed the motion to set aside default and default judgment on shortened time (CT 1 , 74 12 , 221 222).

SHEMIRANI moved for relief from default based in part on equitable grounds (CT 7   14 2 , 3 24   7 12, 9   9   2 , 1 4 11 , 124 2   2). He included a proposed answer with his motion (CT 11   123).

He also sought relief based on CCP § 473(b) grounds and attorney abandonment by Mr. Beaver (CT 7 13 9 7). LAY opposed, including an objection to Daniel Beaver's declaration in support of SHEMIRANI's motion for relief (CT 12 194). SHEMIRANI filed reply papers, including a declaration from SHEMIRANI that attached copies of several documents from California's Secretary of State's office showing CASPIAN's status as a valid California corporation (CT 2 2 214). SHEMIRANI's declaration also pointed out that LAY's opposing papers did not include the construction contract, which was between LAY and Evra (CT 2 3 24 2). The document attached to Ms. LAY's opposing declaration was not a contract, merely a construction funds administration statement prepared by CASPIAN showing work performed and amounts distributed to Evra as the contractor (CT 2 3 2 2 4 2).

The Trial Court granted SHEMIRANI's motion for relief from default and default judgment but did not specify the precise basis for granting the motion, though it's tentative ruling acknowledged that the time had passed for bringing a motion pursuant to CCP § 473(b)(CT 247 24 ,

2 2 9). The parties agreed not to contest the tentative ruling in exchange for SHEMIRANI paying LAY , (CT 27 4 9, 2 2, 291).

Several days later, LAY and her counsel changed their minds and moved for reconsideration, rejecting the , payment from SHEMIRANI (CT 294 29 , 224 2 9). LAY pointed to the exhibits to SHEMIRANI's reply declaration in support of his motion to set aside, which showed the several documents from the California Secretary of State's office showing SHEMIRANI's corporation CASPIAN, that SHEMIRANI had been agent of service of process for his company since 2 (CT 231 14 1). LAY asserted that criminal charges were brought against SHEMIRANI for fraudulent use of contractor's license information (CT 234 7 1). Finally LAY argued that relief from default and default judgment had to be based on *Rappleyea v. Campbell* **(1994) Cal.4th 97 and** *Pulte Homes, Corp. v. Williams Mech., Inc.* **(2 1) 2 Cal.App. th 2 7 (CT 239 24 11).**

The Trial Court denied LAY's motion for reconsideration (CT 3 9

313, Reporter's Transcript pp. 1 11). In doing so the Trial Court denied LAY's request for judicial notice of purported criminal charges brought against RED IC and SHEMIRANI, as LAY did not provide any case number or other identifying information (CT 312).

The Trial Court denied the motion on the grounds that the new or different facts LAY submitted under CCP § 1 , evidence that SHEMIRANI had been an agent of service of process for defendant CASPIAN ENTERPRISES since 2 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 that time (CT 312).

The Trial Court 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 (CT 312 313).

The Trial Court also provided a holding, clarifying that SHEMIRANI's relief from default was based on equitable grounds,

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All further references to the Reporter's Transcript of this appeal shall be to RT.

employing the three part *Stiles* test (CT 313).[7]

LAY filed her notice of appeal on April , 2 19, the same day as entry of the order denying her motion to reconsider (CT 3 9, 31).

The most fundamental rule of appellate review is that an appealed judgment or order is *presumed to be correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.’ Eisenberg, *Cal. Prac. Guide: Civil Appeals and Writs* (The Rutter Group 2 19), Ch. B, Presumptions of Correctness, 1 (emphasis original)(Citations omitted). Any ambiguity in the record is resolved *in favor* of the appealed judgment or order. *Civ. Appeals and Writs*, *supra*, 1 (emphasis original).

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[7] While LAY acknowledged at the hearing on reconsideration that SHEMIRANI would not be prejudiced by the default, in that he could still seek indemnity against other parties, which the Trial Court acknowledged (RT 9 23 27), LAY’s recitation of the exchange fails to show that the Trial Court also pointed out that SHEMIRANI is hoping that there is nothing he needs to indemnify (RT 1 1 2).

LAY argues that de novo review applies in this appeal. She is mistaken. An order vacating a default on equitable grounds is reviewed under the abuse of discretion standard. *York v. Black* **(2 9) 17 Cal.App.4th 3 , 42. Review of an order on a motion for reconsideration pursuant to CCP § 1 is likewise subject to the abuse of discretion standard.** *Lucas v. Santa Maria Pub. Airport Dist.* **(199) 39 Cal.App.4th 1 17, 1 27.**

Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.' *Denham v. Superior Court* **(197) 2 Cal.3d 7, . The showing on appeal is wholly insufficient if it presents a state of facts ...which...merely affords an opportunity for a difference in opinion. An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'** *Marriage of Varner* **(1997) Cal.App.4th 12 , 13 (citation omitted).**

arguendo

LAY's first argument on appeal (AOB at pp. 17 19) focuses on how setting aside the default and default judgment was improper under CCP § 473(b) based on the passage of the six ( ) month deadline from entry of default for filing such a motion. Her argument runs afoul of one of the basic principles of appellate jurisprudence The appealed judgment will be affirmed if it is correct on *any* **theory, even if different from that asserted by the trial court, even if it was not raised in the trial court.** *Davey v. Southern Pacific Co.* **(1 97) 11 Cal. 32 , 329 33 . The rationale for this principle is twofold (a) an appellate court reviews the action of the lower court and not the reasons given for its action and (b) there can be no prejudicial error from erroneous logic or reasoning if the decision itself is correct.** *Mike Davidov Co. v. Issod* **(2) 7 Cal.App.4th 97, 1 .**

SHEMIRANI moved for relief from default based in part on equitable grounds (CT 7 14 2 , 3 24 7 12, 9 9 2 , 1 4 11). Here, as shown in Section C, *infra*, **the Trial Court properly set aside the default and default judgment against SHEMIRANI based on equitable grounds.**

The Trial Court described why relief was available based on

equitable grounds in its ruling denying LAY's motion for reconsideration (CT 313 314). Therefore whether the Trial Court also pointed to CCP § 473(b) or not as a basis for granting relief from default is not a source of reversible error in this case.

The Trial Court had the inherent power to vacate a default judgment based on equitable grounds even after the time passed to move to vacate pursuant to CCP § 473(b). *Rappleyea v. Campbell* **(1994) Cal.4th 97 , 9 1. One basis for such equitable relief is extrinsic mistake a term broadly applied when circumstances extrinsic to the litigation have unfairly cost a party a hearing on the merits.** *Rappleyea*, *supra*. **Extrinsic mistake 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.** *York*, **17 Cal. App. 4th at 47.**

The Trial Court in denying LAY's motion to reconsider properly pointed out that

> **To qualify for equitable relief based on extrinsic mistake, the defendant must demonstrate (1) a meritorious case (2) a satisfactory excuse for not presenting a defense to the original action and (3) diligence in seeking to set aside the default once the fraud or mistake had been discovered.** *In re Marriage of Stevenot* **(19 4) 1 4 Cal.App.3d 1   1, 1 71 see** *Rappleyea*, *supra*, **Cal.4th at 9 2. (CT 313)**

The record shows that SHEMIRANI met that test.

In this context a defendant need only make a minimal showing that he or she has a meritorious case. While ordinarily a verified answer shows merit (*Stiles v. Wallis* **(19 3) 147 Cal.App.3d 1143, 114), in** *Rappleyea* **an unverified answer showed the necessary merit when the complaint was also unverified.** *Rappleyea*, **Cal.4th at 9 3.**

Here the proposed answer was unverified, as was LAY's complaint, as in *Rappleyea*. *Rappleyea*, *supra*. **(CT 27 3 , 11   123). SHEMIRANI's trial court counsel, Mssrs. Sternberg and Barlev, prepared the proposed pleading and motion to set aside, including SHEMIRANI's declaration, which also explained why he was not acting as an unlicensed contractor, in the process vouching for the good faith and merit of the motion to set aside, including the proposed answer they prepared as part of the motion (CT 1 9 27 11   1 , 11   123). See CCP § 12 . (a),(b)(1),(2).**

SHEMIRANI also provided a satisfactory excuse for not originally providing a defense to the action. In October 2 17 his wife was served at home with a packet of documents, including the complaint (CT 1 9 1). His wife did not understand the documents. Marital issues at the time meant that SHEMIRANI was not residing there then, and did not see the documents until late November or early December 2 17 (CT 1 1 13).

After SHEMIRANI received the documents, he skimmed them and saw not only that he was sued individually and dba Caspian Enterprise, Inc., but also that there was a January 9 2 1 Case Management Conference to attend, which subjected him to sanctions if he failed to attend (CT 1 14 19). He understood his need to attend the January 9 2 1 Case Management Conference (CT 1 19 2). In December 2 17 SHEMIRANI received a Case Management Conference Statement from Plaintiff's counsel, which reiterated the January 9 2 1 date (CT 1 21 22). SHEMIRANI then, on December 27, 2 17, telephoned LAY's attorney Mr. Schilt, but could only reach a paralegal named Jeff. SHEMIRANI told Jeff that he had been wrongfully sued, but was told that the firm did not represent him and could not give him legal advice, and Jeff recommended that if he, SHEMIRANI, received a notice to appear in court that he should do so (CT 1 23 27).

On January 4, 2 1 , SHEMIRANI again called Mr. Schilt's office to try to explain that he, SHEMIRANI, was innocent and wrongfully sued. Again, SHEMIRANI spoke with the same paralegal, Jeff, who did not allow SHEMIRANI to speak with Mr. Schilt. SHEMIRANI explained that he would send Mr. Schilt a letter with documents showing he did nothing wrong (CT 1 1 4). SHEMIRANI sent a letter to Schilt that day explaining his innocence and his company's role concerning the lawsuit (CT 1 7, 112).

SHEMIRANI appeared at the January 9, 2 1 Case Management Conference as directed. Judge Craddick was on the bench and Mr. Schilt appeared by telephone (CT 1 12). SHEMIRANI informed the court that he was wrongfully sued and was there to defend himself as he understood by the notice. Judge Craddick stated that a default had been entered against him. Before she could finish the conversation, Mr. Schilt interrupted and requested that the court continue the hearing until February 23, 2 1 (CT 1 12 1). Judge Craddick did so and ordered that SHEMIRANI appear again on February 23, 2 1 , but no one explained to him that he needed to hire a lawyer (CT 1 1 1).

When SHEMIRANI left the courtroom on January 9, 2 1 , he understood that all he needed to do was to appear February 23, 2 1 in order to defend himself. He did not understand about the default against him or that he needed to set it aside (CT 1 17 19).

SHEMIRANI again appeared in court on February 23, 2 1 (CT 1 22). Schilt again appeared by telephone. Brian Miles appeared of ICG Engineering. 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 in more detail. SHEMIRANI received a commitment from Mr. Schlit over the phone that he would work with him to prove that he, SHEMIRANI, was not responsible. The Court noted that the hearing was continued to June 2 , 2 1 . However, no one explained to SHEMIRANI at the time that he needed to hire an attorney (CT 1 22 2). SHEMIRANI understood that all he had to do to defend himself was to meet with Mr. Schilt and see if he could prove that he was not responsible (CT 1 2 1 7 2).

LAY argued that under *Pulte Homes, Corp. v. Williams Mech., Inc.* (2 1) 2 Cal.App. th 2 7 that SHEMIRANI did not identify any statements or promises that SHEMIRANI relied on that prevented him from appearing in the proceedings (AOB at p. 2). LAY is mistaken. The Trial Court pointed to paragraphs 13 and 1 of SHEMIRANI's declaration, which

pointed to his participation at the January and February 2 1 hearings, as well as Schilt's representations to SHEMIRANI at the February 23, 2 1 hearing that he would work with SHEMIRANI as his satisfactory excuse for not moving to set aside the default, that his participation in the case as he understood it was sufficient to comply with his responsibilities in the litigation (CT 313).

Pursuant to the February 23, 2 1 hearing, SHEMIRANI took additional steps that he believed complied with his litigation responsibilities. *Following instructions from Schilt's office*, **SHEMIRANI sent documents, including paystubs, to Schilt's office and set up a meeting with Schilt to show he was not responsible (CT 1 7 3 1 , 113 114). SHEMIRANI and Schilt met March 1 , 2 1 in the basement of the Solano County Courthouse. Schlit's paralegal Jeff was also present (CT 1 7 17 1). During the approximately 9 minute meeting, SHEMIRANI answered all of Schlit's many questions. Schlit told SHEMIRANI that he wanted more information, and details of all job locations where co defendants RED IC and ICG Engineering worked, including photographs and addresses (CT 1 7 1 22). Schlit told SHEMIRANI that he might need to come to court and testify against the other defendants. SHEMIRANI asked Schilt what he would receive in return. Schilt responded that if**

SHEMIRANI was truthful and provided all the information, he would come up with a fair resolution. The discussion never included a talk about setting aside the default or the default or that SHEMIRANI would need to hire an attorney. SHEMIRANI understood that he was in compliance with his responsibilities in court (CT 1 7 22 27).

However, SHEMIRANI was met with silence. Instead of further communications with Mr. Schilt's office, SHEMIRANI did not hear anything from Schilt's office until on or about July 27, 2 1 , when SHEMIRANI received a Request for Entry of Default Judgment to be entered against him for over 27 , (CT 49 , 1 1 2 , 11). SHEMIRANI was shocked. This conflicted with his understanding with Schilt's office (CT 1 23 2). SHEMIRANI was led on, intentionally or not, by Schilt to cooperate and delayed hiring his own attorney to address this matter as a result.

In *Rappleyea* **the parties who eventually sought to vacate default were given incorrect information by the clerk's office about the amount of the filing fee for an answer. The clerk's office then rejected the answer submitted with the incorrect amount. Defendants were later misinformed by the plaintiffs that they would not be able to set aside the default.** *Rappleyea*, **Cal.4th at 9 3 9 4.**

SHEMIRANI's experience was similar to that of the defendant in *Rapplyea* **in that neither the court nor LAY's counsel provided any information, let alone correct information, about his litigation obligations (CT 1 17 19, 1 22 1 7 2, 1 7 17 27, 1 23 2). As in** *Rappleyea*, **SHEMIRANI was one of numerous defendants (CT 27 13 1).** *Rappleyea*, **Cal.4th at 9 4.**

Pulte, **on which LAY relied, is inapposite. There, the plaintiff, who obtained service of process on an attorney serving as agent for service of process of a dissolved corporate defendant, had no other contact with that agent. Unlike the present case, the agent's declaration in** *Pulte* **in support of relief showed nothing indicating anything done by plaintiff or its attorney from dissuading or preventing the agent from doing anything .to locate anyone associated with the dissolved corporation.** *Pulte,* **2 Cal.App. th at 277. The defendant's insurance company adjuster claimed that she was led to believe that the underlying litigation involved only one home, not twenty six (2), but not why this would matter.** *Pulte*, **2 Cal.App. th at 27 .**

Equitable relief from extrinsic fraud or mistake requires that the moving party show diligence in seeking to set aside the default once it was

discovered. *York*, 17 Cal.App.4th at 49. Once he received the July 27, 2 1 Request for Entry of Default Judgment SHEMIRANI was shocked, then acted promptly (CT 1 23 1 9).

SHEMIRANI made one last attempt on July 31, 2 1 to communicate with Schilt to ask what happened, then began looking for an attorney (CT 1 27 1 9). Just over a week later, on August , 2 1 , SHEMIRANI hired Daniel Beaver in Walnut Creek to set aside the default judgment and paid Mr. Beaver a 3, retainer to do so (CT 1 9 1). Mr. Beaver failed to follow through on his assignment.

Normally an attorney's negligence is imputed to the client. However, in situations like this one, the client is relieved from the attorney's inattention or procrastination as to a matter. *Daley v. County of Butte* (19 4) 227 Cal.App.2d 3 , 391. Relief on this ground is also available in situations in which the trial court relies on its inherent equity power to grant relief from default. *Aldrich v. San Leandro Lumber Co.* (19) 17 Cal.App.3d 72 , 73 .

Despite the reason for his hiring, Mr. Beaver did not move to set aside the default. On August , 2 1 , he left a telephone message with and sent an email to LAY's attorney asking that the default be set aside and that the naming of the defendants be corrected so that defendant Caspian Enterprises, Inc. was not a dba of any defendant, including Hassan Red ic (CT 93 9, 9 9). Two days later, LAY's counsel Schilt wrote back stating that he was unwilling to set aside the default, since it had been entered seven months earlier (CT 93 1 13, 97 1).

After August , 2 1 , SHEMIRANI tried to contact Mr. Beaver several times by email and phone had limited contact doing so (CT 1 9 11 12). When Beaver contacted SHEMIRANI he told SHEMIRANI that he was working on it and all was good (CT 1 9 12 13).

Then on or about October 14, SHEMIRANI was served with an Order to Appear for Examination (OE). He called Beaver, who acknowledged that he had not filed a motion to set aside, but would that he would try to obtain a continuance of the Order of Examination (CT 1 9 14 1).

Two days later Beaver told SHEMIRANI that he had contacted Schilt's office to continue the OE and that Schilt had obtained a later examination date of November 29, 2 1 (CT 1 9 17 19). Beaver told SHEMIRANI that he needed assistance with this matter and that SHEMIRANI should contact David Sternberg, whom Beaver had contacted the day before (CT 94 2 4). SHEMIRANI did so on November 3 , 2 1 (CT 1 9 2 23). Beaver specially appeared at the November 29, 2 1 Order of Examination and informed the court that new counsel, Mr. Sternberg, would be substituting in, and obtained a continuance of the OE until December 11, 2 1 (CT 94 7).

A week later, Sternberg's office filed the motion to set aside default and default judgment (CT 74 12). The Trial Court pointed to SHEMIRANI's diligent retention of Beaver after receiving the Request for Entry of Default (CT 313, last two). Where a client is unknowingly deprived of effective representation by counsel the client will not be charged with responsibility for misconduct if the client acts with due diligence in moving for relief after discovering the attorney's neglect and if the other side will not be prejudiced by the delay. *Aldrich*. 17 Cal.App.3d at 739 (Citiation omitted). In *Aldrich* the Court held that a 21 day delay between the time the client learned his attorney was suspended and when the client filed their motion with replacement counsel was not unreasonable. *Aldrich,* 17 Cal.App.3d at 74 .

Here, Sternberg filed the motion to set aside on shortened time, in less time than the 21 day period that the Court in *Aldrich* held was acceptable (CT 1 , 7). The Trial Court pointed to Sternberg's prompt

motion as evidence of SHEMIRANI's diligence in bringing this motion in light of Beaver's failure to do so (CT 313, last). The Trial Court also relied in part on *Aldrich* in explaining why it granted relief on an equitable basis (CT 313).

Stiles

LAY argues that the Trial Court somehow used a more lenient equitable standard to justify setting aside SHEMIRANI's default and default judgment than that set forth in *Rappleyea*. LAY's argument again misses the mark. In pointing to its inherent equitable authority to set aside a default, the Trial Court specifically cited *Rappleyea*, which described the three part *Stiles* test used by the Trial Court here as stringent *Rappleyea*, Cal.4th at 9 2. (CT 313) The Trial Court here even quoted *Rappleyea* as follows When a default judgment has been obtained, equitable relief may be given only in *exceptional* circumstances (emphasis added).' *Rappleyea*, Cal.4th at 9 1. (CT 313) The Trial Court, even belatedly, recognized the nature of the test required by its inherent equitable authority, possessed discretion to act within those parameters, and properly exercised that discretion. (CT 313)

LAY argues that the Trial Court erred in holding that evidence submitted by SHEMIRANI in his reply declaration supporting his motion to set aside comprised new or different facts pursuant to CCP § 1 that would justify granting her motion for reconsideration. Those documents showed that SHEMIRANI had been an agent for service of process of a corporation first named CASPIAN ENTERPRISE, Inc., later renamed Cynergi Construction, Inc., since 2 (CT 2 2 2 4, 2 , 2 , 21 , 212, 214). The earliest of these documents was dated June 12, 2 (CT 2). The most recent was dated June 2 , 2 1 (CT 214).

This information failed to comprise new or different facts on several levels All were on file with California's Secretary of State's office well *before* **LAY filed her motion for reconsideration on January 22, 2 19 (CT 224). The information was hardly new or different for purposes of CCP § 1 . As the Trial Court recognized, LAY failed to show why this information could not have been ascertained before the ruling on the motion to set aside default (CT 24 1 , 2 2 1, 312). In so doing the Trial Court cited** *Garcia v. Hejmadi* **(1997) Cal.App.4th 74 (CT 312).** *Garcia* **holds a party moving for reconsideration to a strict requirement of**

diligence. *Garcia*, Cal.App.4th at 9 .

The relevance of this information to the issues surrounding equitable relief from default is also unclear, as the Trial Court recognized (CT 312). Whether SHEMIRANI was an agent of service of process for Caspian or Cynergi seems unimportant when LAY sought entry of default against SHEMIRANI personally, SHEMIRANI moved for relief as an individual, and LAY sought reconsideration only against SHEMIRANI (CT 4 , 7 , 3 9 1 , 224 23 2). The proffered new facts must relate to the merits of the motion. *Gilberd v. A.C. Transit* (199) 32 Cal.App.4th 1494, 1 .

Finally, to the extent that LAY relied on *Pulte* and *Rappleyea* to support its arguments that these long available documents were new or different under CCP § 1 , those authorities were available for citation long before LAY filed her motion for reconsideration in January 2 19 (CT 224). The diligence requirement also compels a moving party to explain why that law was not provided earlier otherwise, the number of times an attorney could try a new legal argument would be limited only by their imagination. *Baldwin v. Home Savings of America* (1997) 9 Cal.App.4th 1192, 1199.

LAY's final argument on appeal is that LAY alleged that SHEMIRANI was an unlicensed contractor on the project on LAY's property According to LAY, since SHEMIRANI defaulted in responding to the complaint, SHEMIRANI is bound by those allegations and under Business Professions Code § 7 31 a person acting as a contractor without a license cannot seek equitable relief of any kind, presumably including equitable relief from default. LAY's argument fails on multiple levels.

In arguing that a defaulting party is subject to allegations of unclean hands, requiring rebuttal of those allegations, LAY ignores the initial part of the three part *Stiles v. Wallis* **test for equitable relief, which requires that the party seeking such relief has a meritorious defense.** *Stiles*, **147 Cal.App.3d at 114 . LAY'S unverified complaint alleges that SHEMIRANI either represented that he was operating under a California contractor's license via his relationship with co defendants CASPIAN and E RA CONSTRUCTION or that SHEMIRANI told LAY that he was a licensed general contractor (CT 29 27 3 7, 31 2 22, 32 23 24, 33 1 11, 33 1 24, 34 1 3 4, 3 4 37 14). SHEMIRANI denied all the allegations against him, including these allegations, in his proposed answer (CT 11 2 119 2).**

SHEMIRANI's declarations in support of his motion to set aside the default and default judgment likewise rebut LAY's accusations of unclean

hands. Bus. Prof. § 7 2 defines a Contractor within the meaning of the same chapter as § 7 31, as follows

> Contractor, for the purposes of this chapter, is synonymous with builder and, within the meaning of this chapter, a contractor is any person who undertakes to or offers to undertake to, or purports to have the capacity to undertake to, or submits a bid to, or does himself or herself or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, parking facility, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith, or the cleaning of grounds or structures in connection therewith, or the preparation and removal of roadway construction zones, lane closures, flagging, or traffic diversions, or the installation, repair, maintenance, or calibration of monitoring equipment for underground storage tanks, and whether or not the performance of work herein described involves the addition to, or fabrication into, any structure, project, development or improvement herein described of any material or article of merchandise. Contractor includes subcontractor and specialty contractor. Roadway includes, but is not limited to, public or city streets, highways, or any public conveyance.

Here, SHEMIRANI did not act as a contractor under the definition set forth in B P § 7 31.

SHEMIRANI did not act as a builder but instead served as a project manager for the project working for Evra Construction, which was represented to both LAY and SHEMIRANI by defaulting defendant HASSAN RED IC as RED IC's licensed company (CT 1 9 27 11 2).

SHEMIRANI's role as project manager was for the sole purpose of making sure that the project materials were on schedule and disbursing funds to the aappropriate vendors (CT 11 3). In doing so SHEMIRANI worked for his corporation, CASPIAN, now known as CYNERGY CORPORATION, which was also misled by RED IC. CASPIAN's role was to handle the construction funds (CT 11). SHEMIRANI and CASPIAN played no part in whatever misconduct was carried out by RED IC and played no role in whatever damages may have been suffered by LAY (CT 11 1).

SHEMIRANI's duties were akin to those of a construction manager found not to be a contractor in *The Fifth Day v. Bolotin* **(2 9) 172 Cal.App.4th 939. In** *The Fifth Day* **the construction manager's duties were**

LAY might refer to a grainy photograph that purports to show SHEMIRANI working on the property to rebut this point (CT 1 7). However, the photograph neither showed SHEMIRANI's face, nor showed that, assuming *arguendo* **that the photo was of SHEMIRANI, that his purported activity in the photo was that of a man regularly engaged in construction work at LAY's property (CT 1 7). The Trial Court was free to give the photo whatever weight, if any, it deemed appropriate. When, as here, the evidence gives rise to conflicting reasonable inferences, one of which supports the findings of the trial court, the trial court's finding is conclusive on appeal.** *Johnson v. Pratt Whitney Canada, Inc.* **(1994) 2 Cal.App.4th 13, 23 (Citation omitted). We have no power to judge of the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom. Citations.** *Johnson*, **2 Cal.App.4th at 22 23 (Citation omitted).**

> To assist, on behalf of the Owner, in coordinating the activities of the various workers to enable them to complete their assigned tasks in an organized and efficient manner, on time and on budget to maintain records such as insurance certificates, as well as the financial books and records of the project to keep the Owner apprised of the status of the project to be the on site point person to respond to issues as they arose and generally to act as the Owners agent with respect to the various parties connected with the development of the project. Plaintiff had no responsibility or authority to perform any construction work on the project, or to enter into any contract or subcontract of the performance of such work.
> *The Fifth Day*, 172 Cal.App.4th at 94 .

Considering the similarities between the situation in *The Fifth Day* and those here, the Trial Court had ample basis for deciding as it did.

For all of the above stated reasons, relief from default based on the equitable grounds set forth in *Rapplyea* and *Stiles* was well within the Trial Court's discretion. The Trial Court's grant of relief from default and default judgment must be affirmed, as must the denial of LAY's motion for reconsideration.

Dated January 29, 2 2

Respectfully submitted,

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ATTORNEY AT LAW

By s/________________________
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SHEMIRANI

CERTIFICATE OF WORD COUNT

The text of this brief contains 8,242 words as counted by the Corel WordPerfect version X7 word-processing software program used to generate this brief. CRC 8.204(c)(1).

Dated: January 24, 2020

/s/
John T. Schreiber

Re: Lay v. Shemirani,
First District Court of Appeal, Div. 5, Case No. A156961
Contra Costa County Superior Court Case No. MSC17-01607

PROOF OF SERVICE

I, John T. Schreiber, declare:

I declare that I am a citizen of the United States and employed in Contra Costa County, State of California, over the age of eighteen years, and not a party to the within action. My business address is 2127 Goldenhill Way, Benicia, California 94510. I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service. On January 29, 2020, I served the within:

RESPONDENT'S BRIEF

on the parties in this action by placing a true copy thereof in a sealed envelope, and each envelope addressed as follows:

The Honorable Jill Fannin, Judge
Department 21
Contra Costa County Superior Court
P.O. Box 911
Martinez, CA 94553

[xx] (By Mail) I caused each such envelope to be served by depositing same, with postage thereon fully prepaid, to be placed in the United States Postal Service in the ordinary course of business at Walnut Creek, California. Said envelope was placed for collection and mailing on that date following ordinary business practices.

[ ] (By Personal Service) I caused each such envelope to be delivered by hand to the address(es) listed above.

[ ] (By Facsimile) I caused the said document to be transmitted by Facsimile machine to the address(es) whose fax number is indicated above.

Executed at Benicia, California on January 29, 2020. I declare under penalty of perjury that the foregoing is true and correct.

/s/
John T. Schreiber