

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DEREK HICKENBOTTOM,

Plaintiff and Respondent,

v.

MEDICAL SOLUTIONS LLC,

Defendant and Appellant.

D086542

(San Diego Super. Ct. No.
37-2023-00046181-CU-OE-CTL)

APPEAL from a judgment of the Superior Court of San Diego County,
Carolyn M. Caietti, Judge. Appeal dismissed.

Grove Law, Sarah Kroll-Rosenbaum, Anthony D. Sbardellati and
Jade T. White, for Defendant and Appellant.

Aegis Law Firm, Samuel A. Wong, Jessica L. Cambell and Ali S.
Carlsen, for Plaintiff and Respondent.

Code of Civil Procedure¹ section 1008, which governs both motions for reconsideration and renewed motions, was “ ‘designed to conserve the court’s resources by constraining litigants who would attempt to bring the same motion over and over.’ ” (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1100, quoting *Darling v. Kritt* (1999) 75 Cal.App.4th 1148, 1157.) Accordingly, any such motion filed by a party must be accompanied by an affidavit “show[ing] diligence with a satisfactory explanation for not having presented the new or different information earlier.” (*Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 839 (*Zohar*).) Indeed, the Legislature felt so strongly about this purpose that it made the statute jurisdictional, specifying that “[n]o application to reconsider any order or for the renewal of a previous motion may be considered by any judge or court unless made according to this section.” (§ 1008(e).)

In this case, defendant Medical Solutions LLC (MedSol) filed successive motions to compel arbitration of wage and hour claims brought by plaintiff and former employee Derek Hickenbottom. Each was based on a different arbitration provision in a different agreement. After the first motion was denied, MedSol admittedly made no attempt to comply with section 1008. It submitted no affidavit and made no showing of diligence because it did not believe its second motion qualified as a “renewal” of its first motion to compel arbitration. When the trial court concluded that the second motion was indeed a renewed motion governed by section 1008, and that it lacked jurisdiction to entertain the motion, MedSol filed this appeal.

¹ Subsequent undesignated statutory references are to the Code of Civil Procedure. For brevity, we omit the word “subdivision” when referring to any subdivision of section 1008.

We conclude that both motions to compel arbitration filed by MedSol sought identical relief—a court order forcing Hickenbottom to arbitrate rather than litigate his wage and hour claims. The fact that the two motions were based on different provisions in different contracts does not change the fact that both asked the court for the same thing. As a result, the trial court properly determined it lacked jurisdiction to consider MedSol’s second motion. And because the denial of a renewed motion is not an appealable order, we must dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

MedSol is a healthcare staffing business that places its employees—healthcare professionals—in temporary assignments at healthcare facilities. In May 2022, MedSol hired Hickenbottom as a travel nurse. As part of the initial onboarding process, Hickenbottom signed various documents including an employee handbook acknowledgment (Handbook) and an Employee Agreement. Both the Handbook and the Employee Agreement included arbitration provisions, although the language of each was different. The Employee Agreement explained that the employee would be required to sign a separate Travel Assignment Agreement for each temporary assignment, which “may include provisions, terms and/or conditions that supersede specific provisions, terms and/or conditions contained within this agreement.”

In February 2023, Hickenbottom accepted a temporary assignment at Palomar Medical Center, for which he signed a Travel Assignment Agreement. This agreement incorporated by reference the “Generally Applicable Policies” of MedSol, which included what the parties refer to as the “2023 Arbitration Agreement.” Again, the specific terms of this agreement differed in certain respects from the language of the earlier arbitration provisions.

A. *The Lawsuit and the First Motion to Compel Arbitration*

The Palomar Medical assignment was Hickenbottom's last with MedSol. In March 2024, he filed a class action lawsuit alleging a variety of wage and hour claims against his former employer. MedSol responded with a motion to compel arbitration of Hickenbottom's claims, relying on the arbitration provision contained in the Handbook. In opposition to the motion, Hickenbottom pointed out that the general arbitration provision in the Handbook had been superseded by the 2023 Arbitration Agreement incorporated into the Travel Assignment Agreement for his Palomar Medical assignment. MedSol's reply acknowledged there were a series of agreements to arbitrate, suggested that the differences were largely "immaterial," and contended that "irrespective of which arbitration agreement applies," the motion to compel arbitration should be granted.

The trial court provided the parties with a tentative ruling to deny the motion to compel. Arguing at the hearing, counsel for MedSol conceded that "the opposition makes helpful points" and "the tentative is well-taken in the sense that the Court identifies that the arbitration agreement that we submitted with the motion was superceded [*sic*] by subsequent agreements." Counsel proposed "to file another motion to compel moving on the correct arbitration agreement."

Hickenbottom's lawyer foresaw problems with that approach: "Any subsequent motion would be just an improper motion for reconsideration. This arbitration agreement obviously was known to defendant. They've had months and months to do this. It should have been filed at the time. I don't know why they're bringing this up." The court responded, "Because they realize they made a mistake, it sounds like. They said it was an omission." The court then confirmed the tentative to deny the motion, noting that

MedSol “moved to compel on an arbitration agreement that has been superceded [*sic*] without question.” Commenting to defense counsel, the judge added, “[I]t sounds like you are going to *attempt to file* another motion.” (Italics added.)

B. *The Second Motion to Compel Arbitration*

Roughly one month later, MedSol filed a second motion to compel arbitration of the claims alleged in the complaint, this time relying on the 2023 Arbitration Agreement incorporated by reference into Hickenbottom’s Palomar Medical Travel Assignment Agreement.² Despite the comments of Hickenbottom’s counsel at the prior hearing, this new filing did not address whether it was either a motion for reconsideration or a renewed motion under section 1008(a) and (b). Nor did it attach an affidavit explaining any “new or different facts, circumstances, or law” that would justify a second motion. (§ 1008(a) & (b).)

In response, Hickenbottom maintained that the motion was “properly considered a renewed motion and subject to the provisions of ... [section] 1008(b)” because it sought “the same relief as [the] prior motion—to compel Plaintiff to individually arbitrate his claims and dismiss his class claims.” He argued the court lacked jurisdiction to entertain the motion because MedSol “[did] not comply in any respect with the provisions of Section 1008.” Not surprisingly, MedSol disagreed, asserting that section 1008 was simply “inapplicable.” In its view, it was “not renewi[ng] a prior motion.” Rather, it was “seek[ing] to enforce an entirely different contract than the motion to compel arbitration filed earlier in [the] case.” (Italics omitted.)

² Needless to say, perhaps, MedSol did not appeal from the denial of its first motion.

The trial court agreed with Hickenbottom, concluding that it lacked jurisdiction to rule on the renewed motion because MedSol made no attempt to comply with section 1008(b). It found that MedSol’s second motion sought “‘the same order and relief’ ” as the first—to compel Hickenbottom to arbitrate his claims. As a result, absent adequate justification presented in an accompanying affidavit (which MedSol did not provide), it was limited to “asking for the same relief only one time.”

MedSol has attempted to appeal from the order denying its second motion to compel arbitration.

DISCUSSION

The resolution of this appeal turns largely on the proper interpretation of section 1008, which “limit[s] the parties’ ability to file repetitive motions.” (*Le Francois, supra*, 35 Cal.4th at p. 1104.) The statute has two related but independent components. Section 1008(a) applies to motions for “reconsideration” that “seek ... to ‘modify, amend, or revoke [a] previous order.’ ” (*California Correctional Peace Officers Assn. v. Virga* (2010) 181 Cal.App.4th 30, 43 (*Virga*)). Section 1008(b) concerns the “renewal” of a prior motion that requests the same relief previously denied but asserts a different factual or legal basis for that relief. (*Virga*, at p. 42; accord *Zohar, supra*, 61 Cal.4th at p. 833 [section 1008(b) “imposes special requirements on renewed applications for orders a court has previously refused”].) If either subdivision applies, the motion must be accompanied by an affidavit stating “what new or different facts, circumstances, or law are claimed to be shown” that justify the motion. (§ 1008(a) & (b).) Both types of motions require a showing of diligence “with a satisfactory explanation for not having presented the new or different information earlier.” (*Zohar*, at p. 839.) Failure to comply with

the requirements of the statute means the court has no jurisdiction to consider the motion. (See § 1008(e); *Zohar*, at p. 840.)

Hickenbottom contends that MedSol’s second motion to compel arbitration was a “renewal” of a motion within the meaning of section 1008(b).³ In his view, both motions requested the same relief—an order compelling him to arbitrate the claims alleged in his complaint.

MedSol makes no effort to argue that it complied with section 1008. Rather, it contests Hickenbottom’s characterization of the second motion to compel as a renewed motion for the same relief. It suggests that the relief it sought in the second motion was an order enforcing a *different* contract, i.e., the 2023 Arbitration Agreement made part of Hickenbottom’s Palomar Medical Travel Assignment Agreement.⁴

³ Section 1008(b) provides in relevant part: “A party who originally made an application for an order which was refused in whole or part, or granted conditionally or on terms, may make a subsequent application for the same order upon new or different facts, circumstances, or law, in which case it shall be shown by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown.”

⁴ Although there is no developed argument to this effect, one line of the opening brief suggests that in response to its request at the hearing on the first motion, the trial court “permitted” MedSol to file a second motion, rejecting Hickenbottom’s argument that “[a]ny subsequent motion would [just be] an improper motion for reconsideration.” Although the court did not have the benefit of a transcript, the trial judge did not recall the first hearing in the same way, commenting that she “[did] not have an independent recollection of that.” Having reviewed the transcript, we see nothing to indicate the trial court did anything other than acknowledge that MedSol would “attempt to file” a second motion, and it certainly said nothing to imply that such a motion would not require compliance with section 1008.

But MedSol did not file a motion to enforce a contract. Indeed, there is no such thing in California legal procedure.⁵ Instead, Hickenbottom filed an action asserting various wage and hour claims, and MedSol responded with two successive *motions* to compel arbitration of “the individual claims alleged in” his complaint pursuant to both section 1281.2 and the Federal Arbitration Act (FAA). Both motions sought an identical order “(1) compelling arbitration of Plaintiff’s individual claims, and (2) dismissing Plaintiff’s class claims.” By its terms, MedSol’s second motion was governed by section 1008(b) because it was a “renewed application[] for [an] order [the] court has previously refused.” (*Zohar, supra*, 61 Cal.4th at p. 833; see *Deauville Restaurant, Inc. v. Superior Court* (2001) 90 Cal.App.4th 843, 849 [“second application ... based on additional evidence and new circumstances not presented in connection with the first application” was a renewed motion within the meaning of section 1008].)

The court reached a similar conclusion in *Virga, supra*, 181 Cal.App.4th 30, which involved successive motions for attorney’s fees by the plaintiffs in that case. The first motion relied on a state statute, section 1038, whereas the second was based on a federal statute, section 1988 of title 42 of the United States Code. (*Virga*, at p. 35.) After denying the first motion, the

⁵ On occasion, a request for the court’s assistance in enforcing an arbitration agreement can be the basis for an independent action. In this limited context, the Supreme Court has explained that “[a]n action to compel arbitration ‘is in essence a suit in equity to compel specific performance of a contract.’” (*Spear v. California State Auto. Assn.* (1992) 2 Cal.4th 1035, 1040 [independent action by insured against insurer to compel arbitration of an uninsured motorist claim].) This case does not involve any such independent action.

trial court denied the second as well, finding that the plaintiffs failed to comply with section 1008. (*Virga*, at p. 36.)

The *Virga* court concluded that the second motion for attorney’s fees was a renewed motion subject to the requirements of section 1008(b). Like MedSol, the plaintiffs in *Virga* argued that section 1008 did not apply because the basis for their second motion (a federal statute) was different than that of their first motion (a state statute).⁶ (*Virga, supra*, 181 Cal.App.4th at p. 43.) The appellate court disagreed, finding it “beyond dispute” that both motions “sought identical relief.” (*Ibid.*) The court explained that regardless “[w]hether [plaintiffs’] motions relied on two different grounds, the fact remains that both sought an order from the court directing respondents to pay their attorney fees.” (*Ibid.*) As a result, plaintiffs were obligated to comply with the requirements of section 1008(b). Absent adequate justification, it was their responsibility “to advance all correct legal theories for an award of attorney fees in their original motion, so as not to burden the trial court with repeated motions for the same relief.” (*Virga*, at p. 47.)

In an attempt to distinguish *Virga*, MedSol relies on the *Virga* court’s observation that the plaintiffs in that case “sought the identical amount[s]” of attorney’s fees in each of the two motions. (*Virga, supra*, 181 Cal.App.4th at p. 43.) It points to another attorney’s fee case in which different amounts were claimed—*Doe v. Westmont College* (2021) 60 Cal.App.5th 753, 761 (*Westmont*)—as support for the proposition that any variation in the relief

⁶ To frame the argument in the same terms MedSol employs, the first motion in *Virga* sought to enforce a right created by a state statute whereas the second attempted to enforce a federal statutory right.

requested renders section 1008 inapplicable.⁷ The short answer is that the relief requested in MedSol’s two motions *is* identical: an order compelling arbitration of the individual claims in Hickenbottom’s complaint and dismissing his class claims. Even if *Virga* and *Westmont* are read to mean that a second attorney’s fee motion is not a “renewal” unless it requests the identical amount of fees, it would in no way suggest that the second motion to compel arbitration in this case is not a renewed motion.⁸

MedSol also cites *Westlands Water Dist. v. All Persons Interested* (2023) 95 Cal.App.5th 98 (*Westlands*) but it, likewise, arises in a very different procedural context and does not suggest, let alone compel, a different result. Indeed, the decision in the case did not really turn on whether section 1008(b) applied. *Westlands* was a special validation action (§ 860 et seq.; Gov. Code, § 53511; Water Code, § 35855) filed by a water district that sought to validate a public water contract. (*Westlands*, at p. 113.) The district first filed a “‘Motion for Validation of Contract’ ” based on an unexecuted draft of an

⁷ *Westmont* also involves a significantly different procedural context. In an administrative mandate proceeding, the trial court granted the petition but denied the petitioner’s request for attorney’s fees. The respondent appealed; the petitioner did not. The appellate court affirmed the granting of the petition in a published opinion. On remand, the petitioner made a new request for attorney’s fees under section 1021.5 based on the published appellate opinion that had not been written at the time of the original fee motion.

⁸ To see why we have difficulty accepting MedSol’s expansive interpretation of *Virga* and *Westmont*, consider the following: A party brings a motion for attorney’s fees based on a provision in a contract. The motion is denied. The same party then files a second attorney’s fee motion based on a different contract, but also includes an additional hour of attorney time inadvertently omitted from the first motion. MedSol would apparently assert that the second motion was not a renewal of the first, and subject to section 1008(b), simply because the *amount* of fees requested was not identical.

“anticipated” contract, and that motion was denied. (*Id.* at pp. 114; see *id.* at p. 118.) It later filed a “Renewed Motion for Validation Judgment,” accompanied by an affidavit pursuant to section 1008(b) that attached a later-executed contract with material differences. (*Westlands*, at p. 120; see *id.* pp. 113, 133–134.) The second motion was also denied (*id.* at p. 133), and the Court of Appeal affirmed the resulting judgment. In doing so, it cited both *Virga* and *Westmont* in concluding that the district’s second “motion” was not really a renewed motion because it sought fundamentally different relief—the validation of a different contract than was the subject of the first motion. (*Westmont*, at p. 134.)

The nature of the relief requested in a motion to compel arbitration is fundamentally different from that sought in a validation action. A validation action asks that a particular contract be approved. If the contract changes, the request for relief changes as well. In contrast, a motion to compel arbitration seeks to transfer a set of legal claims from the public court system to a private arbitration system. Here, both of MedSol’s motions sought the same relief—an order compelling arbitration of the same claims. The second motion was, accordingly, a renewal of the first and subject to the requirements of section 1008(b).

In a last-ditch assault on the trial court’s ruling, MedSol suggests that if section 1008 is interpreted as applying to the second and renewed motion to compel, it is preempted by the FAA because such an interpretation would “single[] out arbitration agreements” for special adverse treatment that operates to “disfavor[] arbitration.” (See, e.g., *Kindred Nursing Centers Ltd. Partnership v. Clark* (2017) 581 U.S. 246, 248 [FAA “requires courts to place arbitration agreements ‘on equal footing with all other contracts’ ”]; *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. 639, 650 [“FAA ‘preempts any

state rule discriminating on its face against arbitration’ ”].) But as we have explained, our construction of section 1008 does not single out arbitration agreements for different treatment. Rather, it applies a reasoned interpretation of the statute to motions to compel arbitration in the same way as it is applied to all other motions. Indeed, our rationale has nothing to do with arbitration and everything to do with the nature of the requested relief as distinguished from the basis for the request.

Our reliance on the attorney’s fee motions in *Virga* sufficiently illustrates the point. Assume that instead of a motion for attorney’s fees based on a *statute*, the plaintiff in *Virga* filed the first motion relying on a fee provision in a *contract*. After that motion was denied, the plaintiff filed a second motion seeking the same fees but relying on a different fee clause in a different contract. The second motion would be a renewal of the first motion and subject to the requirements of section 1008(b) notwithstanding that it had nothing to do with arbitration. In short, not only does the FAA *not* require that we create an exception to the general application of section 1008; it would prohibit us from doing so. (*Morgan v. Sundance, Inc.* (2022) 596 U.S. 411, 418 [“federal policy is about treating arbitration contracts like all others”]; *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972 [“arbitration agreement[s] must be enforced on the basis of state law standards that apply to contracts in general”].)

Because MedSol failed to comply with section 1008(b)—in particular the requirement that a renewed motion be accompanied by an affidavit explaining “what new or different facts, circumstances, or law” are claimed to justify the motion—the trial court had no jurisdiction to entertain its second motion to compel arbitration. (*Ibid.*; § 1008(e).) As a result, the court’s order denying the second motion is not appealable and we have no choice but to

dismiss the appeal.⁹ (*Chango Coffee, Inc. v. Applied Underwriters, Inc.* (2017) 11 Cal.App.5th 1247, 1249.)

DISPOSITION

The appeal is dismissed. Hickenbottom shall recover his costs on appeal.

DATO, Acting P. J.

WE CONCUR:

BUCHANAN, J.

CASTILLO, J.

⁹ MedSol suggests we should exercise our discretion to treat its purported appeal as a petition for writ of mandate and address the merits of the underlying motion to compel arbitration. That might be possible had MedSol followed the dictates of section 1008 in filing its renewed motion and merely argued that the court erred in denying it. But MedSol's suggestion that we treat the faulty appeal as a writ petition ignores the fact that its failure to comply with section 1008 deprived the trial court of jurisdiction to entertain the second motion. If we issued a peremptory writ directing the trial court to grant the motion to compel arbitration, as MedSol would have us do, we would be directing something the trial court had no power to order. Although we may have the discretion to treat an attempted appeal as a mandate petition in appropriate circumstances, we cannot confer jurisdiction where it does not exist.