LYNNE CAREY, Plaintiff and Respondent,

v.

MONIQUE DAHLQUIST, et al. Defendants and Appellants.

A117398

California Court of Appeal, First District, Second Division

December 28, 2007

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

Marin County Super. Ct. No. 065454; 065453

Haerle, Acting P.J.

I. INTRODUCTION

In these consolidated appeals, defendants and appellants, Monique Dahlquist and Jeff Zube, who live next door to plaintiff and respondent Lynne Carey, appeal from the issuance of a restraining order against them under Code of Civil Procedure section 527.6.[1] Appellants contend that (1) substantial evidence does not support the granting of the order; (2) the trial court failed to find future danger; (3) the preliminary injunction had expired and, therefore, the hearing on the permanent injunction was invalid; and (4) as to Jeff Zube, the trial court erred in denying him a continuance. We reject each of these claims and affirm the order.

II. FACTUAL AND PROCEDURAL BACKGROUND

Dahlquist and Carey live next door to each other in Sausalito, California. Zube, who is nineteen years old, is Dahlquist's son, and lives with her.

On December 19, 2006, Carey filed a section 527.6 petition alleging that, among other things, her neighbor Monique Dahlquist had screamed obscenities at her and used "constant foul language, verbal comments ('this is war') and written threats." Apparently, Dahlquist had also "ordered tree people onto my property and cut down (removed two 30 ft high trees)." Carey provided a copy of a letter from Dahlquist dated November 14, 2006, in which Dahlquist told Carey that because she was no longer a "good neighbor," she would have to remove a mailbox Dahlquist believed was on her property or pay Dahlquist $200 a month.

Carey requested an order that Dahlquist stay away from her, and that "she not be able to come out on her deck and scream obsenities [sic] at me or my husband as I go up and down my stairs." In addition, Carey asked the court to order that Dahlquist "not hire workmen to come onto my property and destroy my property" and that she "pay for the survey and replace the trees she removed."

Carey also filed a declaration from a neighbor in which the neighbor reported that when he asked Dahlquist to move a stone post the neighbor believed encroached over the street curb, Dahlquist telephoned him "to call me a 'son of a bitch' along with a string of other epithets on two occasions."

On the same day, Carey also filed an application for a temporary restraining order against Jeff Zube. In her application, she alleged that Zube threw a lighted cigarette onto her wooden stairs, and spit on the stairs. In a two-page list of "confrontations" with Zube, Carey describes broken eggs thrown from Zube's balcony, obscenities shouted at her husband as he came up the stairs, a lighted cigarette thrown on his car cover, poppers thrown by Zube and his friends onto the stairs while Carey and her husband were walking up the stairs, "exceptional noise" coming from Zube's stereo, and multiple occasions when lighted cigarette butts were found on the wooden stairs at Carey's house, below Zube's deck. In many cases, Carey reported these incidents to the police.

In support of her application, Carey filed a declaration of a neighbor who described several incidents involving Zube and "requests for cooperation and consideration [that] were met with belligerence and later threats." One neighbor stated that she was becoming "increasingly distressed" by "acts of vandalism including objects shot and thrown onto our property: pellets, paint balls, eggs, shoes, trash (cans, bottles, cups) and cigarettes." This neighbor also described "[u]se of unprovoked abusive, obscene language and vulgar gestures" by Zube which as of September 2006 had largely ended. Another neighbor filed a declaration stating that Zube threw a lit cigarette on him from his balcony overlooking the street.

Yet another neighbor filed a declaration describing Zube's behavior. In addition to witnessing Zube "being rude, taunting and verbally abusive to neighbors," the neighbor had also "seen cigarette butts sitting on roofs of cars that have been parked below his carport and balcony."

Carey also filed photographs showing the "unusual proximity" of Dahlquist and Zube's deck to her own house, lighted cigarettes on her stairs and her husband's car cover, as well as "poppers" and spit on the stairs to her house.

The record contains a declaration from Jeff Zube's father. In it, the father states that "Carey has made it her

goal to harass Jeff by constantly calling the police on matters that would not upset a reasonable person and accusing him of activities he has not done, and if he did do something, it was legal." He described Carey and her husband as "chronic complainers." He also stated that he believed Carey's motivation for filing a request for a temporary restraining order was "partly due to a problem involving the property line" between the two properties "and the removal of two Acacia trees that Ms. Carey claims belonged to her." Finally, Zube's father stated that "Jeff will be moving to Santa Barbara County in February 2007 to attend college."

On January 4, 2007, a hearing was held on Carey's request for a permanent restraining order. The clerk's "Register of Actions" reflects that the matter was sent to Judge Lynn Duryee after the commissioner to whom it was originally assigned recused himself. Dahlquist requested a continuance and both matters (which were consolidated for hearing) were set for hearing on January 18, 2007. There was no objection to this continuance.

At the January 18, 2007, hearing, Zube requested a continuance, stating that, "your honor, at your suggestion I retained an attorney for my help and unfortunately he wasn't able to be here today. So I request a continuance." The court, after noting that "these matters are entitled to priority on the court's calendar" and the case had been continued once already, refused the request for a continuance.

At the evidentiary hearing, the court first considered the petition, answers and declarations that had been submitted. Carey testified that "we have 42 very steep and winding stairs to navigate from our front door to our cars. Our heads are within inches of the Zube deck."

She stated that Dahlquist had "allowed spit, eggs, burning cigarettes, cigarette butts, cigarettes boxes, poppers, gum, banana chips and pepperoni slices to be thrown from her property, by whomever, onto our property." She stated that the police had determined from "the direction that the egg splattered onto the driveway . . . that it came from the court where the Zubes live."

Carey provided the court with physical evidence of cigarettes that had been thrown on their stairs or on the car, gum, noisemakers called "poppers" that had been thrown at her and her husband when they were walking up the stairs. These things were found beginning in November 2005. Carey said that "it comes and goes. It's greatly accelerated in the last couple of months as far as the verbal harassment."

Carey stated that Zube had spit toward her when she walked up the stairs, and described another occasion when she was walking down the stairs, and Zube shook the trees and said, "Whoo, it's the scary neighbor that calls the police."

Carey's husband stated that they had not done anything to make the issues worse. He also stated that he had seen the various things on the stairs. He testified that "I was the one who came down in the morning and turned on one of the flights of steps and there was the egg. And if I had not been watching with my flashlight I would have slipped on that egg." He also stated that no one else had access to the stairs. He also described walking down the steps when poppers were thrown at him.

A neighbor named James Delano testified that he lives across the street from Dahlquist, Zube and Carey. He described an incident in which he had signed a petition asking Dahlquist to observe a setback. She "came down and . . . came pounding on our door, . . . asked if we had signed the petition. We said yes. And she then went forward saying that this represents war. If we wanted war we would have war." He described a second incident when Dahlquist falsely accused his wife of leaving an obscene message on her answering machine. With regard to Zube, Delano stated that Zube said an "obscene provocative thing" to his wife. When Delano spoke to Zube about it, Zube said, "if she ever comes on my property I will beat the shit out of her." On another occasion, he described Zube making an obscene finger gesture at him and his wife. Each of these incidents had occurred in the last year. He also stated that when he parks his car in the area directly in front of Zube's house, there are "almost daily" cigarette butts either on the car or on the street adjacent to the car.

Delano's wife described an incident in which Zube drove by, rolled down his window and made vulgar comments to her, including calling her a "mother fucking bitch," and telling her that "[y]ou and everyone else you know can suck my dick." She was frightened. She also stated that since July 2006, "we have had no untoward exchanges with Miss Dahlquist and it's been greatly appreciated."

Zube denied spitting, throwing eggs or doing any of the things he had been accused of. He admitted "yelling obscenities at" his neighbors. He also stated that he would be moving to Santa Barbara before February.

Dahlquist testified that she had lived in the neighborhood for 19 years and had never had any problem with her neighbors. She denied harassing anyone. She believed the complaints were motivated by a dispute about cutting down some trees.

The trial court granted Carey's petition as to both Zube and Dahlquist. In so doing, the court stated, "Well it sounds like you live in close quarters. It sounds like everybody wants the same thing, which is to feel safe in their own home. [¶] And Mr. Zube, I'm sure that you do have a good side to you that some of the neighbors appreciate, but you also have an out of control and extremely disrespectful side of you and I've seen it in court, and I've heard it from the testimony. [¶] So I do find by clear and convincing evidence that there has been

harassment and I will issue a three-year restraining order." The court also found that Carey and her witnesses were credible and that the testimony of Dahlquist and Zube was not.

The court ordered Dahlquist and Zube not to harass the neighbors, not to have any contact with them, to stay at least seven yards away from them (later reduced to five yards) and not to have any verbal contact with the neighbors while then neighbors used their steps. This timely appeal followed.

III. DISCUSSION

A. *Substantial Evidence*

In accordance with established rules of appellate procedure, the issuance of a section 527.6 injunction is reviewed for substantial evidence. We view the facts in the light most favorable to the prevailing party. (*Schild v. Rubin* (1991) 232 Cal.App.3d 755, 762; Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group, 2001) ¶ 8:74.) In addition, "'[w]hen appellants challenge the sufficiency of the evidence, all material evidence on the point must be set forth and not merely their own evidence. [Citation.] Failure to do so amounts to waiver of the alleged error and we may presume that the record contains evidence to sustain every finding of fact. [Citation.]'" (*Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309, 317; see also Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶ 8:70, p. 8-30.) Counsel's duty of candor requires presentation of the whole picture regarding facts claimed to be decisive. (Rules Prof. Conduct, rule 5-200.)

Despite these well established rules, appellants have here presented a version of the facts that largely ignores the evidence favorable to the respondent. Dahlquist's statement of facts completely omits any reference to the evidence at the hearing, and simply repeats the claim she made at the hearing that Carey's concerns were with the loss of some trees on her property. Dahlquist states that "[r]espondent also called as witnesses two other neighbors who testified as to what they learned from respondent and her husband, but they had no first hand independent knowledge of any interaction between appellant and respondent." She does not, however, acknowledge any of the evidence before the court of her harassing behavior, including the fact that Carey stated that Dahlquist had screamed obscenities at her and used "constant foul language, verbal comments ('this is war') and written threats." By failing to set forth the material evidence, Dahlquist has waived her substantial evidence claim.

Zube's factual statement is similarly deficient. His summary of Carey's testimony regarding his behavior consists of a single sentence: "[r]espondent stated she had concerns about slipping on eggs or being hit with spit, and that she has heard (what she thinks) was spit hitting the ground behind her." This falls far short of the requirement that an appellant must present "all material evidence."

Although we conclude that both Dahlquist and Zube have waived this issue, even had they not, we would still find substantial evidence supports the judgment.

1. *Monique Dahlquist*

Section 527.6 provides in pertinent part as follows: "(a) A person who has suffered harassment as defined in subdivision (b) may seek a temporary restraining order and an injunction prohibiting harassment as provided in this section. [¶] (b) For the purposes of this section, 'harassment' is unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the plaintiff. [¶] As used in this subdivision: [¶] . . . [¶] (3) 'Course of conduct' is a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including following or stalking an individual, making harassing telephone calls to an individual, or sending harassing correspondence to an individual by any means, including, but not limited to, the use of public or private mails, interoffice mail, fax, or computer e-mail. Constitutionally protected activity is not included within the meaning of 'course of conduct.'"

Carey provided clear and convincing evidence of a knowing and willful course of conduct by Dahlquist. She described confrontations with Dahlquist in which Dahlquist threatened legal action against her, and shouted obscenities at her husband as he came up the stairs. Carey testified that she found Dahlquist's behavior threatening. Carey's neighbor, Delano, testified that he, too, had been on the receiving end of threatening and harassing behavior from Dahlquist, including her falsely accusing his wife of leaving an obscene message on her voice mail. The trial court had substantial evidence on which the base the issuance of a permanent injunction.

2. *Jeff Zube*

The evidence at the hearing established that Zube had thrown lighted cigarettes on the wooden stairs leading to Carey's home, that he had spit on the deck, and had thrown poppers on the stairs while Carey was walking up them and also shouted obscenities at Carey. Neighbors confirmed that this sort of behavior had been directed at them as well. Substantial evidence, therefore, supports the trial court's issuance of the permanent injunction.

B. *Finding of Future Harm*

Zube and Dahlquist argue that the trial court failed to find a threat of future harm to Carey and her husband. We disagree.

In *Russell v. Douvan* (2003) 112 Cal.App.4th 399, 401, 404, the court concluded that the trial court construed its role too narrowly when issuing an injunction under section 527.6 based on a single act of unlawful violence. Here, however, the court based its injunction on more than a single harassing act. The evidence before the court showed a course of harassing conduct by both Zube and Dahlquist that left both Carey and her husband fearful and distressed. This showing was sufficient to indicate a reasonable probability that the course of conduct would continue into the future.

Nor is it of any moment that Zube testified he would be leaving the area to attend college. The trial court explicitly found Zube's testimony lacked credibility and therefore was entitled to disregard this statement. In addition, even if Zube would be attending college in Santa Barbara, the court could still find it reasonably probable that on visits home he would continue the course of harassing conduct described in the evidence.

C. *Scheduling of Hearing*

Zube and Dahlquist contend that the deadlines set out in section 527.6, subdivision (d), were not observed and, therefore, the preliminary injunction issued on December 19, 2006, was no longer in effect when the court issued the permanent injunction. We disagree.

Section 527.6, subdivision (d), states: "Within 15 days, or, if good cause appears to the court, 22 days from the date the temporary restraining order is issued, a hearing shall be held on the petition for the injunction." The hearing on the petition for the permanent injunction was held on January 4, 2007, 16 days after the preliminary injunction was issued. Even if such a hearing fell outside the deadlines set forth in section 527.6, subdivision (d),[2] the failure to do so does not invalidate the injunction. Appellants have pointed to nothing about the statute that evidences any intent to make the time limit set out in section 527.6, subdivision (d), mandatory. Certainly, nothing about the statute even remotely suggests that the consequence of failing to schedule a hearing within either 15 or 22 days has the effect of invalidating the injunction. (*California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1145.) Appellants, of course, are not without any recourse in the event of a trial court's failure to timely set a hearing. Had they believed the scheduling of this hearing – during a period which, we note, occurred during the Christmas and New Year holidays – was untimely and resulted in some prejudice to them, they could have, if they wished, sought relief in mandamus.

E. *Continuance*

Zube argues that the trial court's denial of his oral request for a continuance at the time of the hearing denied him his due process right to be represented by counsel. We disagree.

The constitutionally-guaranteed right to due process in civil litigation includes the right to be represented by retained counsel. (*Roa v. Lodi Medical Group, Inc.* (1985) 37 Cal.3d 920, 925.) However, Zube was not denied the right to be represented when the court denied his request for a continuance.

First, there is nothing in the record that corroborates Zube's representation to the court that he had in fact retained counsel. He appeared before the court in pro per on January 4, 2007, and did not request any continuance in order to obtain representation. Nor did counsel for Zube file the required request for continuance by a noticed motion or make an ex parte application with supporting declarations as required under California Rules of Court, rule 3.1332(b). Zube did not object to the court's denial of his request for continuance and chose to represent himself. This does not amount to a denial of Zube's right to counsel.

Nor did the court abuse its discretion by denying Zube's request for a continuance. (*Foster v. Civil Service Com.* (1983) 142 Cal.App.3d 444, 448.) Zube bears the burden of demonstrating that such an abuse occurred and has failed to meet this burden. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) The court had previously granted a continuance of the hearing, and as it pointed out, the matter was statutorily entitled to priority. Zube's request did not comply with California Rules of Court, rule 3.1332(b) and, moreover, his request was made as the hearing was commencing. Under these circumstances, we conclude that no error occurred.

IV. DISPOSITION

The order is affirmed. Costs on appeal to respondent.

We concur: Lambden, J., Richman, J.

Notes:

[1] All further statutory references are to the Code of Civil Procedure, unless otherwise noted.

[2] We do not necessarily conclude the hearing was untimely. The hearing was scheduled within the 22 day window for good cause, and we have little trouble implying a finding that the trial court had good cause for such scheduling, given that two holidays – Christmas and New Year's Day – fell within this time period.
