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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

SANDRA RAYE MITCHELL, Plaintiff and Respondent, v. MARIO JUAREZ, Defendant and Appellant.	A130584 (Alameda County Super. Ct. No. RG10537688)

Attorney Sandra Raye Mitchell (Mitchell) sought an injunction prohibiting harassment (Code Civ. Proc., § 527.6),[1] based on allegations that appellant Mario Juarez (Juarez) physically assaulted her in the course of his ongoing dispute with her client over possession of certain commercial property. The trial court declined to grant relief under section 527.6 but issued an order enjoining Juarez's conduct towards Mitchell. Juarez appeals from the trial court's order, contending the trial court denied him a fair hearing and due process of law. We agree and vacate the injunction.

FACTUAL AND PROCEDURAL BACKGROUND

The Petitions

On September 22, 2010, Mitchell filed a form "request for orders to stop harassment (Civil Harassment)," seeking protection from Juarez under section 527.6. In this petition, Mitchell alleged as follows: She represents Boyd Real Property LLC (Boyd), the owner of commercial property at 4030 International Boulevard in Oakland,

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

which consists of 4030A, 4030B, and a shared "warehouse/ parking lot area" in back. Boyd was pursuing litigation against Juarez relating to 4030A, including an unlawful detainer suit and a federal action alleging that he was part of a fraudulent scheme. On the evening of September 21, 2010, Mitchell "was visiting the property of [her] clients and conducting business related to the property and the litigation." Juarez trespassed upon 4030B and the warehouse area and pushed her, hit her in the side, arm, and face, and tore her clothes "by ripping open the front and ripping off the buttons." Mitchell was afraid to return to the property, and this "severely limits [her] ability to service [her] clients." Juarez intended to intimidate her because the litigation was "enter[ing] another phase of contentiousness," and it was time for several key filings. After the incident, she received harassing phone calls from Juarez's associates.

Earlier that day, Juarez had filed a similar petition seeking protection from Mitchell.[2] His petition alleged as follows: On September 21, 2010, the back door to 4030A leading to the warehouse was blocked, so he accessed the warehouse through 4030B and saw that the door had been boarded over. He had the boards removed but the door was blocked again a few minutes later. Juarez went through 4030B and saw Mitchell "in my warehouse area," a few feet from the doorway. He walked into the warehouse, and Mitchell started screaming that he was trespassing. When he tried to walk around her, she stepped towards him and hit his forehead with her fist.

The trial court granted each party a temporary restraining order (TRO) under section 527.6, and set the cases for hearing on October 12, 2010. The hearing was

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[2] Juarez's request for judicial notice of the court file in *Juarez v. Mitchell* (RG10537626) is granted. (Evid. Code, §§ 459, subd. (a)(2), 452, subd. (d) ["Records of . . . any court of this state"].) As both petitions were heard together, this court file permits us to consider the trial court's order in the context in which it was made. Mitchell opposes Juarez's request, contending these materials were not before the trial court because "[t]he dockets indicates [sic] that the documents filed from October 26, 2010 were never served upon any party. . . ." She also contends the declarations in support of Juarez's petition were never filed. She does not provide a record citation to support these assertions, and the *Juarez* court file appears to contradict them.

continued to November 2, 2010, and the trial court reissued TROs extending to that date. The trial court indicated that the cases would be heard together.

On October 28, 2010, Juarez filed an unsigned declaration stating that, during the litigation, Mitchell had attempted several improper lockouts and that she hit him in the head with a closed fist during the lockout attempt on September 21, 2010. He denied hitting Mitchell. He attached the results of a polygraph test purporting to confirm that Mitchell struck him on September 21, 2010, and that he never struck, pushed, or had any physical contact with her. In addition, he submitted a declaration from Jennifer Juarez, who works for his company, indicating that she heard loud noise from the warehouse area and called "Cecilia" to walk to the back with her. She and Cecilia saw Juarez walking away from Mitchell who was yelling into the phone "'Mario hit me and ripped my clothes off" as she was "ripping her own cloths [sic] off and hitting herself."

The Hearing

At the hearing on November 2, 2010, Juarez was represented by counsel, Erika Jordening (Jordening), and Mitchell appeared in propria persona. A minute order indicates that both Mitchell and Juarez were sworn as witnesses, but the hearing transcript shows no formal testimony was taken. The trial court questioned Mitchell about the basis for her petition and discussed the propriety of relief under section 527.6 with her and Jordening. In the course of this discussion, Jordening provided "background," explaining her "understanding [of events] from [Juarez] and from the witnesses that were there." She pointed out witnesses in the courtroom: "I believe this gentleman . . . was present back there with them. She came with Cecelia . . . [¶]. . . [¶]. . . and they observed some things at this point." In addition, Jordening noted: "[Juarez] has a lie detector test. He's offered to prove his point." When the trial court rejected this evidence, Jordening responded: "Okay. So he just wants to prove the veracity of his side of the story . . . . [¶]. . . [¶] He wants to prove the veracity of his side, so here we stand in the court."

While responding to the trial court, Mitchell made factual statements about Juarez's conduct, noting, for example: "He hit me in a manner that was disturbing,

ripped my clothes and caused physical threats subsequent to that. The problem continues. . . ." The trial court declined to address the underlying property dispute, but said: "[A]bout the hitting, it seems to me that ought to be curtailed." Jordening pointed out: "So [Mitchell] has one version of the facts. [Juarez] has another version . . . . Yeah, there was hitting, but it wasn't him hitting her. It was her hitting him . . . . I believe he has a witness to corroborate that . . . I believe this young lady, which is his sister. She is the receptionist there at that office. [She and] Cecelia went back, observed [Mitchell] tearing her own clothes off in the back while she is on the phone with the police . . . ."

The trial court questioned Mitchell about Juarez's contention that she attacked him and asked "[h]ow long is it going to take you to do whatever job you've been hired to do . . . ?" Then, without questioning Juarez or hearing from his witnesses, the trial court said: "I am willing to indicate Mr. Juarez should [not] be within a hundred yards but I am not willing to make it a CLETS order. I don't see that in this kind of environment. It seems to me I can restrict access. I think any kind of statewide distribution would be unfair, given the allegations, and we haven't had a full hearing, nor do I think it's appropriate. So I will create a different order that will not be a CLETS order, but will restrict access or interaction between you and him." After allowing response from Jordening and Mitchell, the trial court said: "I'm going to ask one last question then I am going to decide this. How does it harm him? What's the down side of, not a CLETS order, but an order? How does it harm him?" Jordening said requiring Juarez to remain 100 yards away from Mitchell would force him to leave his job whenever Mitchell came to the property.

The trial court told Mitchell: "I think I can restrict his conduct toward you without the distance thing, and then that seems to me to be as far as we need to go under this circumstance. I think that what we should do is make it a no HAM order and not subject to CLETS yet . . . ." Turning to Jordening, the trial court said: "[B]ut I think that any kind of confrontation that occurs subsequently physically I will have to restrict your client's proximity to her. . . . I don't believe that he would do it again or he is one of the dumbest clients you ever had because I tell you right now if she were to come here and

actually complain and be able to prove another physical–she hasn't proved the first one, but if she were able . . . to prove some kind of physical confrontation, I'd have to do something severe." The trial court said it would "give [Mitchell] an order," and the clerk replied, . . . "No HAM, right?"

The trial court's minute order states: "[Juarez] must not do the following things to [Mitchell]: Harass, attack, strike, threaten, assault (sexually or otherwise), hit, follow, stalk, destroy personal property, keep under surveillance, or block movements. [¶] Contact (directly or indirectly), telephone, send messages, mail, or e-mail. [¶] Take any action, directly or through others, to obtain the addresses or location of this person. [¶] Peaceful written contact through a lawyer or a process server or other person for service of legal papers related to a court case does not violate these orders. [¶] Petition for Injunction Prohibiting Harassment dismissed by Court without Prejudice." [3]

Juarez filed a timely notice of appeal from the trial court's order.[4]

DISCUSSION

We review the trial court's order for abuse of discretion. (*Salazar v. Eastin* (1995) 9 Cal.4th 836, 849-850.) The scope of that discretion is defined by the governing legal principles, which we consider independently. (*Nakamura v. Parker* (2007) 156 Cal.App.4th 327, 337; *Thayer v. Wells Fargo Bank* (2001) 92 Cal.App.4th 819, 833; *Yu v. University of La Verne* (2011) 196 Cal.App.4th 779, 787.)

A. The Trial Court's Order

Section 527.6 allows "a person who has suffered harassment" to seek expedited injunctive relief against the person who inflicts it. (*Schraer v. Berkeley Property*

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[3] A minute order in *Juarez v. Mitchell* (RG 10537626), also dated November 2, 2010, indicates that Juarez's petition was dismissed without prejudice, noting, in apparent contradiction to the record, that the parties did not appear. Mitchell claims Juarez's case was not heard because he failed to properly serve her with "the original TRO and the Reissued TRO and Notice of Hearing."

[4] "[A]n order granting . . . an injunction" is appealable. (§ 904.1, subd. (a)(6); see § 525 ["An injunction is [an] . . . order requiring a person to refrain from a particular act . . ."].)

Owners' Assn. (1989) 207 Cal.App.3d 719, 730 (*Schraer*).) "Harassment" includes "unlawful violence," such as assault or battery, and "a credible threat of violence." (527.6, subd. (b).) "[A]lthough the procedures set forth in the harassment statute are expedited, they contain certain important due process safeguards. Most notably, a person charged with harassment is given a full opportunity to present his . . . case, with the judge required to receive relevant testimony . . . ." (*Schraer*, p. 730, italics omitted; see § 527.6, subd. (d) ["At the hearing, the judge shall receive any testimony that is relevant, and may make an independent inquiry"].) "If the judge finds by clear and convincing evidence that unlawful harassment exists, an injunction shall issue prohibiting the harassment." (§ 527.6, subd. (d).)

Juarez contends the trial court's abbreviated hearing violated section 527.6 and denied him due process of law. The record establishes that the trial court did not hear testimony from available witnesses, as required by section 527.6. (*Schraer*, *supra*, 207 Cal.App.3d at p. 733 ["[I]f it is offered, relevant oral testimony must be taken from available witnesses . . ."].) The record also demonstrates, however, that the trial court did not grant Mitchell's request for relief under section 527.6. The trial court's comments indicate that it found section 527.6 inapplicable, but was concerned that Juarez had hit Mitchell and wanted to restrain his conduct to allow her to enter the property safely and do her job. Claiming it could otherwise "restrict access," the trial court fashioned a remedy apart from section 527.6 and dismissed Mitchell's petition without prejudice.[5]

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[5] "Nothing in [section 527.6] indicates that it was intended to supplant normal injunctive procedures applicable to cases concerning issues other than 'harassment' as statutorily defined." (*Byers v. Cathcart* (1997) 57 Cal.App.4th 805, 811 (*Byers*); see § 527.6, subd. (*l*) [" This section does not preclude a plaintiff from using other existing civil remedies"].) As the trial court did not identify the legal authority on which it relied in ordering injunctive relief, it is not clear that the remedy it ordered was grounded in "normal injunctive procedures," and the procedural requirements for such relief do not appear to have been satisfied in this expedited proceeding in any event. (See *Byers*, at p. 811 ["Normal injunctive procedures allow time for research and investigation, pleading and other motions if necessary, discovery and preparation, etc., followed by opportunity for a full trial"].) Juarez also argues that the injunction order fashioned by the trial court was beyond the scope of the proceeding and its authority. (See *Marquez-*

We conclude, in any event, that Juarez's challenge to the proceedings below has merit on due process grounds. (U.S. Const., 14th Amend., Sec. 1; Cal. Const., art. I, § 7.) "Ordinarily, parties have the right to testify in their own behalf [citation], and a party's opportunity to call witnesses to testify and to proffer admissible evidence is central to having his or her day in court. [Citation.]" (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1357 (*Elkins*); accord, *In re Marriage of Carlsson* (2008) 163 Cal.App.4th 281, 292 (*Carlsson*).) The right to offer relevant and competent evidence on a material issue is one of the elements of a fair trial, and a party has a "fundamental right to present evidence at trial in a civil case." (*Elkins*, at p. 1357.) In *Schraer*, the court held that in proceedings under section 527.6, due process requires that the defendant be afforded the right to present evidence and conduct cross-examination because "[t]here is no full trial on the merits following the issuance of the injunction after the hearing" and "[t]hat hearing therefore provides the only forum the defendant . . . will have to present his . . . case." (*Schraer*, *supra*, 207 Cal.App.3d at pp. 732-733; accord, *Nora v. Kaddo* (2004) 116 Cal.App.4th 1026, 1029.) Although the trial court in this case did not order relief under section 527.6, the same principles apply. The relief available under that section is analogous to a permanent injunction (*Schraer*, at p. 732), which the trial court effectively ordered here, with no contemplation of further evidentiary proceedings.

The trial court did not afford Juarez these basic due process protections. The trial court recognized that resolution of the issue before it required a credibility determination, noting: "There are only two people in the courtroom who know what happened, her and him." Nonetheless, it did not question Juarez directly, provide him an opportunity to testify in his own defense, or hear from his witnesses, who, Jordening made clear, were present in the courtroom and prepared to testify. In addition, the trial court effectively

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Luque v. Marquez (1987) 192 Cal.App.3d 1513, 1517-1518 [reversing a harassment order that included a provision evicting the defendant from his residence, concluding the court lacked a pending cause on which to proceed because the only proceeding on file was the harassment proceeding, which was limited in scope to enjoining action constituting harassment].) We do not decide whether the trial court had authority to issue the injunction at issue here, as we conclude the order must be reversed in any case.

received testimony from Mitchell that was never subject to cross-examination.[6] Thus, Juarez was subjected to court-ordered restriction of his conduct without an opportunity to present evidence in his defense or rebut adverse testimony. Such an order does not comport with due process standards and must be reversed. (See *Elkins*, *supra*, 41 Cal.4th at p. 1357 [denial of the fundamental right to present evidence is almost always reversible error]; *Carlsson*, *supra*, 163 Cal.App.4th at p. 291 [" 'Denying a party the right to testify or to offer evidence is reversible per se' "]; *Fewel v. Fewel* (1943) 23 Cal.2d 431, 433 [reversal required where the trial court denied a party the right to have material evidence considered and precluded her from cross-examining adverse witnesses].)[7]

Mitchell contends that "[a] full-fledged evidentiary hearing with oral testimony is not necessary, unless requested by a party" and that "[t]he trial court granted Juarez repeated opportunity to tender evidence in defense of the application for restraining order," but he failed to do so. She maintains he "never attempted to testify on his [own] behalf," and cannot provide a record citation showing he attempted to call a witness and was prevented from doing so. She asserts that Jordening opted instead to "interject[] herself into the case as if she were a competent witness" and "shield" Juarez from testifying under oath and from cross-examination. The record establishes, however, that on more than one occasion Jordening asked the trial court to hear Juarez's witnesses, who were waiting to testify on his behalf, but the trial court decided, nonetheless, not to hold an evidentiary hearing.

Mitchell argues that Juarez has waived his due process argument, in any case, by failing to assert it below. She notes that when the trial court said it would not hold a full hearing, Jordening did not "object, seek a full evidentiary hearing, seek to call further witnesses, [or] seek to cross examine [her] . . . ." Mitchell does not provide any authority

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[6] Although the trial court formally acknowledged that Mitchell had not proven a physical altercation with Juarez, its comments suggest that, in ordering an injunction, it simply assumed the truth of Mitchell's allegations, relying largely on her attorney status.

[7] In light of our conclusion in this regard, we do not consider Juarez's remaining arguments, and we deny his second, third, and fourth requests for judicial notice, which relate to these arguments and are not relevant to our analysis.

requiring Jordening to take such action when the trial court knew of Juarez's witnesses but expressly declined to hold an evidentiary hearing. Indeed, the record suggests that any further efforts to obtain such a hearing would have been futile, and, as the trial court did not receive formal testimony from Mitchell, it was unlikely to allow cross-examination. (See *City of Long Beach v. Farmers & Merchants Bank* (2000) 81 Cal.App.4th 780, 784-785.) In any event, we have discretion to consider Juarez's due process argument, as it presents a question of law based upon undisputed facts. (See *Martorana v. Marlin & Saltzman* (2009) 175 Cal.App.4th 685, 699; *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 24.)

B. Juarez's Request to Disqualify the Trial Judge

Juarez asks this court to direct that further proceedings be heard before a different judge (§ 170.1, subd. (c)), contending "fairness and the appearance of fairness" cannot otherwise be achieved. (*In re Marriage of Tharp* (2010) 188 Cal.App.4th 1295, 1327-1328.) He maintains the judge "made credibility determinations and entered an injunction without observing [his] witnesses and the evidence—thereby suggesting actual bias." The authority to disqualify a judge should " 'be used sparingly and only where the interests of justice require it.' " (*Kent v. Superior Court* (1992) 2 Cal.App.4th 1392, 1395.) No such showing has been made here.

C. The Parties' Requests for Attorney Fees

Juarez also seeks attorney fees incurred in this appeal and in the trial court proceedings. (See § 527.6, subd. (i) ["The prevailing party in any action brought under this section may be awarded court costs and attorney's fees, if any"]; *Byers, supra*, 57 Cal.App.4th at p. 813 ["Authorization for the recovery of attorney fees [under this section] includes authorization for recovery of attorney fees incurred on appeal"].) To the extent Juarez may be deemed "[t]he prevailing party in [an] action brought under section 527.6," we deny his request for attorney fees, as such an award is discretionary and not merited here. The trial court in this case did not grant Mitchell's petition under section 527.6, and our decision on appeal does not turn on the application of that section.

(Compare *Byers*, at p. 813 [deeming appellant the prevailing party "since she has achieved what she sought by the appeal"—a ruling that the trial court erred in proceeding under section 527.6].)

As we find merit in Juarez's appeal, we also deny Mitchell's request for an order to show cause for an attorney fee award as sanctions for a frivolous appeal.

DISPOSITION

The trial court's order is reversed, with costs to Juarez. The matter is remanded for further proceedings consistent with this opinion.

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Jenkins, J.

We concur:

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McGuiness, P. J.

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Pollak, J.