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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

CITY AND COUNTY OF SAN  
FRANCISCO,

Plaintiff and Respondent,

v.

ANN TREBOUX,

Defendant and Appellant.

A145905

(San Francisco City and County  
Super. Ct. No. CCH 15-576914)

Barbara Sklar is a commissioner on the San Francisco Arts Commission. The City and County of San Francisco (City) filed a petition on Sklar’s behalf seeking a workplace violence restraining order against appellant Ann Treboux pursuant to Code of Civil Procedure section 527.8.<sup>1</sup> Following a hearing, at which Treboux appeared and testified, the court granted the restraining order.<sup>2</sup> We find the City petitioned under the wrong statute, and we are required to reverse.

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<sup>1</sup> Undesignated statutory references are to the Code of Civil Procedure. Sklar qualifies as an employee of the City for purposes of the statute. (§ 527.8, subd. (b)(3).)

<sup>2</sup> The petition filed by the City was supported with a sworn declaration by Sklar. Sklar appeared at the hearing on the petition and confirmed the contents of her declaration to be true and correct.

## I. BACKGROUND AND PROCEDURAL HISTORY<sup>3</sup>

In addition to her position as a commissioner, Sklar chairs the Arts Commission's street artists committee. At the time of the petition, she was 77 years old and lived alone. In March 2015, Sklar began receiving daily phone calls at her home from Treboux, apparently a street artist, complaining about the Arts Commission, its staff, and other street artists.<sup>4</sup> Calls were "at all times of day," including calls after 11:30 p.m. and before 7:00 a.m., and sometimes multiple calls were received in a day. Sklar characterized most of the calls as "incomprehensible," and she could hear only breathing on some calls received late at night. After Sklar blocked Treboux's number, Treboux began calling from regularly changing unlisted or unidentified numbers. Sklar received a letter from Treboux at her home address, which Treboux inexplicably sent in a San Francisco Police Department envelope. She declared that Treboux's "tone, in addition to the frequency, incomprehensibility, and scope of her harassment have caused me great concern and personal distress." Sklar indicated that her emotional distress was based in part on the fact that Treboux "does not appear to have a complete grasp on reality." In her declaration, Sklar stated that Treboux had "not threatened [her] with violence," but that Treboux's "tenacity and apparent breaks from reality scare[d]" her and that she was

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<sup>3</sup> The trial court record provided is limited. On December 30, 2015, Treboux requested judicial notice of several documents. Only one, a four-page unverified statement by Treboux entitled "Request for continuance until the end of August 2015" is possibly relevant. " 'Although a court may judicially notice a variety of matters [citation], only *relevant* material may be noticed.' " (*Aquila, Inc. v. Superior Court* (2007) 148 Cal.App.4th 556, 569.) Treboux indicates the unverified document was her response to the petition in the trial court. However, she provides no verification of this claim and no explanation of why it was not included with the clerk's transcript or the augmentation to the clerk's transcript filed on January 6, 2016. Treboux's December 2015 request for judicial notice is therefore denied. On June 21, 2016, she submitted a request to augment the record. While some documents are duplicative of those in the appellate record, all appear to be copies of matters before the trial court, including the "Request for continuance until the end of August 2015." (Cal. Rules of Court, rule 8.155(a)(1)(A).) We therefore grant Treboux's June 2016 motion to augment.

<sup>4</sup> Sklar's declaration refers to Treboux as "Paula Datesh," an apparent pseudonym for Treboux. Sklar identified Treboux at the hearing as the person she knew as Datesh.

“concerned for [her] safety and the safety of [her] family members.” Sklar further testified at the hearing that she continued to receive calls from Treboux even after a temporary restraining order was issued against Treboux, and Treboux also had begun calling Sklar’s son in Washington, D.C.

Treboux’s testimony at the hearing can be fairly described as rambling and focused on grievances with individuals other than Sklar. Treboux did not deny making the phone calls, but she denied harassing Sklar and said she called Sklar after issuance of the temporary restraining order only to “apologize.”

The court found clear and convincing evidence of a course of conduct by Treboux that would cause a reasonable person to suffer substantial emotional distress, and that Sklar had actually suffered substantial emotional distress. The court issued the restraining order as requested. Treboux filed a timely notice of appeal.

## **II. DISCUSSION**

We normally review the issuance of a protective order for abuse of discretion, and we review the factual findings necessary to support the protective order for substantial evidence. (*Gdowski v. Gdowski* (2009) 175 Cal.App.4th 128, 135 [restraining order under the Elder Abuse Act]; *USS-Posco Industries v. Edwards* (2003) 111 Cal.App.4th 436, 444.) “We resolve all conflicts in the evidence in favor of respondent, the prevailing party, and indulge all legitimate and reasonable inferences in favor of upholding the trial court’s findings. [Citation.] Declarations favoring the prevailing party’s contentions are deemed to establish the facts stated in the declarations, as well as all facts which may reasonably be inferred from the declarations; if there is a substantial conflict in the facts included in the competing declarations, the trial court’s determination of the controverted facts will not be disturbed on appeal.” (*Bookout v. Nielsen* (2007) 155 Cal.App.4th 1131, 1137–1138.)

The difficulty here is not in determining the sufficiency of evidence to support issuance of a restraining order for harassment. Were that the only question, we would readily conclude that Treboux failed to meet her burden of demonstrating error, and

affirm.<sup>5</sup> A more fundamental problem, however, is apparent from even a cursory examination of the trial court record—a problem we are unable to ignore. We find the evidence would support a restraining order, but not pursuant to the statute under which the petition was brought.<sup>6</sup>

The City sought a restraining order pursuant to section 527.8. The court issued the restraining order under authority of that statute. Section 527.8 “enables an employer to seek an injunction to prevent violence or threatened violence against its employees.” (*City of San Jose v. Garbett* (2010) 190 Cal.App.4th 526, 536.) Specifically, section 527.8 provides: “Any employer, whose employee has suffered unlawful violence or a credible threat of violence from any individual, that can reasonably be construed to be carried out or to have been carried out at the workplace, may seek a [restraining order] on behalf of the employee and, at the discretion of the court, any number of other employees at the workplace . . . .” (§ 527.8, subd. (a); see *id.*, subd. (b)(6).) At a section 527.8 hearing, the court shall “receive any testimony that is relevant and may make an

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<sup>5</sup> Treboux suggests we should conduct a de novo review of the court’s grant of “summary judgment.” She misapprehends what occurred. Injunctive proceedings under section 527.8 “are procedurally truncated, expedited, and intended to provide quick relief to victims of civil harassment.” (*Kaiser Foundation Hospitals v. Wilson* (2011) 201 Cal.App.4th 550, 557.) She also appears to complain that hearsay evidence was considered at the hearing, but a trial court is not limited to nonhearsay evidence in support of its ruling on a section 527.8 petition. (*Kaiser*, at p. 558.)

<sup>6</sup> Based on our initial review of the record, we requested supplemental briefing on four issues. (1) Did Treboux’s conduct, as set forth in Sklar’s declaration and testimony, fall within Penal Code section 646.9’s definition of stalking? (2) Did evidence presented to the court establish a credible threat of violence as defined by section 527.8, subdivision (b)(2)? (3) Does the trial court’s findings—i.e., that there was clear and convincing evidence Treboux engaged in a course of conduct that would cause a reasonable person, and did in fact cause Sklar, to suffer substantial emotional distress—suggest application of section 527.6 standards? And, if so, is reversal required on that basis? (4) If Treboux’s conduct fell within section 527.6’s prohibitions, did the City have standing to bring such a claim on Sklar’s behalf? With regard to the final question, the City asserts it has standing because it has a right to protect the City’s interests by acting on behalf of its officials. (See S.F. Charter, § 6.102 [City attorney may represent City’s interests in legal proceedings].) Since we conclude reversal is otherwise required, we need not reach the standing issue and express no opinion on it.

independent inquiry. . . . If the judge finds by clear and convincing evidence that the [defendant] engaged in unlawful violence or made a credible threat of violence, an order shall issue prohibiting further unlawful violence or threats of violence.” (§ 527.8, subd. (j).) “ ‘Unlawful violence’ is any assault or battery, or stalking as prohibited in Section 646.9 of the Penal Code, but shall not include lawful acts of self-defense or defense of others.” (§ 527.8, subd. (b)(7).) “ ‘Clear and convincing evidence’ requires a finding of high probability.” (*In re Angelia P.* (1981) 28 Cal.3d 908, 919.)

No allegation was made that Treboux committed an assault or battery. The question is then whether there was substantial evidence of either stalking or a credible threat of violence by Treboux. For the purposes of section 527.8, stalking is defined as “willfully, maliciously, and repeatedly following or willfully and maliciously harassing another person” and making “a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family . . . .” (Pen. Code, § 646.9, subd. (a).) And a “ ‘credible threat’ means a verbal or written threat . . . , or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, made *with the intent to place the person that is the target of the threat in reasonable fear for his or her safety* or the safety of his or her family, and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family. It is not necessary to prove that the defendant had the intent to actually carry out the threat. . . .” (*Id.*, § 646.9, subd. (g), italics added.)

The City contends substantial evidence supports an implied finding that Treboux engaged in stalking. We disagree. As Sklar acknowledged, Treboux made no express threats of violence. The City cites *People v. Lopez* (2015) 240 Cal.App.4th 436 for the proposition that the court may look to the totality of circumstances to determine a defendant’s intent to cause fear. *Lopez*, however, presented dramatically different facts, with evidence demonstrating the defendant was obsessed with the victim “over a period of many years, contacted her repeatedly despite her efforts to stop him directly and through involving the police, and made clear both that he knew where she lived and

where she went, and that he would not accept her ending what he perceived to be their relationship.” (*Id.* at p. 452.) The difficulty with the City’s argument is that, when Treboux disclaimed in her testimony any intention to frighten Sklar, the court responded “I appreciate what you’re telling me your intentions were. I really do, and I believe you.” At a later point the court told Treboux, “Your intentions are not in dispute.” Far from making implied findings of an intent to instill fear, the court made explicit findings to the contrary.<sup>7</sup>

Those explicit findings take us to our second question to the parties: Did the evidence presented to the trial court establish a credible threat of violence as defined by section 527.8, subdivision (b)(2)? The City, in a cursory paragraph, asserts it does. A credible threat of violence under section 527.8 is “a knowing and willful statement or course of conduct that would place a reasonable person in fear for his or her safety, or the safety of his or her immediate family, and that serves no legitimate purpose.” (§ 527.8, subd. (b)(2).) To obtain an injunction pursuant to section 527.8, “ ‘a plaintiff must establish by clear and convincing evidence not only that a defendant engaged in unlawful violence or made credible threats of violence, but also that great or irreparable harm would result to an employee if a prohibitory injunction were not issued due to the reasonable probability unlawful violence will occur in the future.’ ” (*City of San Jose v. Garbett, supra*, 190 Cal.App.4th at pp. 537–538; *Scripps Health v. Marin* (1999) 72 Cal.App.4th 324, 335.)

The City focuses on Treboux’s course of conduct in her harassing telephone calls, and appears to conflate the statutory definition of “course of conduct”<sup>8</sup> with

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<sup>7</sup> The intent to instill fear is an element of the crime of stalking, but it is not a separate requirement under section 527.8. A 1998 amendment to section 527.8 deleted language requiring that the defendant intend to cause the person to believe that he or she had been threatened with death or serious injury. (*City of San Jose v. Garbett, supra*, 190 Cal.App.4th at pp. 538–539.)

<sup>8</sup> “ ‘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 employee to or from the place of work; entering the workplace; following an

section 527.8's additional requirement that the course of conduct be such as to create a credible threat of violence. We do not doubt that Treboux's obsessive behavior and "apparent breaks from reality" were extremely disquieting and distressing to Sklar. However, nothing in Sklar's declaration or testimony evidenced any type of direct or implied threat, and no showing was made of physically aggressive behavior by Treboux. The court found, by clear and convincing evidence, that Treboux's course of conduct would cause a reasonable person to suffer substantial emotional distress, and that Sklar had actually suffered substantial emotional distress. The court did not find that Treboux's course of conduct created reasonable cause for Sklar to fear for her safety.

The trial court's explicit findings regarding emotional distress prompted our third question—did the court improperly apply the standard for issuance of a restraining order under section 527.6? Actionable harassment under section 527.6 includes not only "unlawful violence" and "a credible threat of violence," but also "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." (§ 527.6, subd. (b)(3).) "The elements of unlawful harassment, as defined by the language in section 527.6, are as follows: (1) 'a knowing and willful course of conduct' entailing a 'pattern' of 'a series of acts over a period of time, however short, evidencing a continuity of purpose'; (2) 'directed at a specific person'; (3) 'which seriously alarms, annoys, or harasses the person'; (4) 'which serves no legitimate purpose'; (5) which 'would cause a reasonable person to suffer substantial emotional distress' and 'actually cause[s] substantial emotional distress to the plaintiff'; and (6) which is not a '[c]onstitutionally protected activity.'" (*Schild v. Rubin* (1991) 232 Cal.App.3d 755, 762.) This is the standard embodied in the court's articulation of its findings.

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employee during hours of employment; making telephone calls to an employee; or sending correspondence to an employee by any means, including, but not limited to, the use of the public or private mails, interoffice mail, facsimile, or computer email." (§ 527.8, subd. (b)(1).)

While the trial court acknowledged at the hearing's outset that the petition alleged "workplace harassment," the court also said to Treboux "[t]he real question here, you know, is whether you've been engaging in a course of conduct against Commissioner Sklar that would cause a reasonable person to be disturbed and has actually caused her to be disturbed, and it certainly seems that way to me." Later addressing Treboux in response to her disclaimers of intent to threaten, the court again said: "But the issue is whether there's been a knowing, willful course of conduct directed at Commissioner Sklar that seriously alarmed, annoyed, or harassed her and served no legitimate purpose. And I find that clearly happened." Not once did the court refer to the credible threat of violence required by section 527.8. We cannot, as the City urges, simply imply different findings to support the order. While we normally indulge in all presumptions in support of the trial court's rulings, "[w]hen the record clearly demonstrates what the trial court did, we will not presume it did something different." (*Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 39 Cal.App.4th 1379, 1384, superseded by statute on another ground as stated in *Kearney v. Foley & Lardner* (S.D.Cal. 2008) 553 F.Supp.2d 1178, 1183–1184.)

We also asked the parties if reversal would be required if we found that the court applied the standards of section 527.6, rather than section 527.8, in issuing the restraining order. " " "A trial court abuses its discretion when it applies the wrong legal standards applicable to the issue at hand." ' ' ' (*Zurich American Ins. Co. v. Superior Court* (2007) 155 Cal.App.4th 1485, 1493.) The City suggests we should nevertheless affirm because substantial evidence supports issuance of a restraining order under both statutes, and we may affirm on any basis supported by the record. The City points to the parallel standards for issuance of a restraining order for a credible threat of violence under sections 527.6, subdivision (b)(2) and 527.8, subdivision (b)(2).

The City's argument is correct as far as it goes. Section 527.8 was enacted to allow employers to seek protections comparable to those offered under section 527.6 for natural persons. (See *Robinzine v. Vicory* (2006) 143 Cal.App.4th 1416, 1423–1424 & fns. 7 & 8; *Scripps Health v. Marin, supra*, 72 Cal.App.4th at pp. 333–334.)

Section 527.6 also defines a credible threat of violence in a similar fashion to section 527.8, as a “knowing and willful statement or course of conduct that would place a reasonable person in fear for his or her safety, or the safety of his or her immediate family, and that serves no legitimate purpose.” (§ 527.6, subd. (b)(2).) Like section 527.8, section 527.6 requires “clear and convincing evidence that unlawful harassment exists.” (§ 527.6, subd. (i).) But as we have discussed, and as the City acknowledges, section 527.6 includes a definition of “harassment” not present in section 527.8: “a course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose” and “that would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress.” (§ 527.6, subd. (b)(3).) The findings the trial court made are consistent with only this last definition.

The City essentially argues that we should affirm the result, even though a different target was hit than the one it aimed for. We have some difficulty with this argument, and the City blithely ignores what seems to be a rather evident due process issue. For due process purposes, the relevant inquiry is whether a respondent was afforded notice and an opportunity to defend. (*Faton v. Ahmedo* (2015) 236 Cal.App.4th 1160, 1172.) A formal petition is required before the court may issue what amounts to a permanent injunction. (See *Nora v. Kaddo* (2004) 116 Cal.App.4th 1026, 1029 [formality of a cross-complaint required under § 527.6 before mutual restraining orders could be issued]; *Kobey v. Morton* (1991) 228 Cal.App.3d 1055, 1060.) The petition filed in this matter was brought by the City pursuant to section 527.8, and specifically alleged that Treboux had made a credible threat of violence as defined in that statute. Treboux had no notice that she would be required to defend different allegations under a different provision of a different statute. That seems to us a definitional violation of due

process, notwithstanding the ultimate sufficiency of the evidence under section 527.6. Reversal is therefore required.<sup>9</sup>

### **III. DISPOSITION**

The restraining order issued in favor of the City and County of San Francisco against appellant Anne Treboux pursuant to section 527.8 is reversed and vacated. The parties shall bear their own costs on appeal.

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<sup>9</sup> Nothing in our opinion precludes Sklar from seeking relief under the proper statute.

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BRUINIERS, J.

WE CONCUR:

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SIMONS, Acting P. J.

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NEEDHAM, J.

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