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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

GATEWAY UNIFIED SCHOOL DISTRICT,

Plaintiff and Respondent,

v.

KENDALL LYNN et al.,

Defendants and Appellants.

C068746

(Super. Ct. No. 170167)

In yet another appeal featuring the e-mails defendant Kendall Lynn (Lynn) purloined from the Gateway Unified School District (District), we are asked to reverse the trial court's refusal to modify its preliminary injunction to exclude 115 of the e-mails he would like to use in his federal lawsuit for wrongful termination. Lynn failed to appeal the order granting the injunction and presented no new facts in his motion to modify. This appeal, therefore, must be dismissed.

FACTS

Few facts are relevant to the dismissal. After his position as director of technology was eliminated and while he was on medical leave, Lynn, without

authorization or permission, accessed the District's computer server and copied 39,312 e-mails onto a flash drive. His lawyer, Robert Thurbon, copied the e-mails onto his office computer to allow Jody Thulin, another former District employee, to review the e-mails in preparation for her wrongful termination case. The District did not learn of the wrongful appropriation until a few days before the discovery cutoff in the Thulin case. (*Lynn v. Gateway Unified School Dist.* (E.D.Cal., Dec. 15, 2011, No. 2:10-CV-00981-JAM-CMK) 2011 WL 6260362 *1-2, *4.)

The District filed a new lawsuit against Lynn, Thurbon, and Thulin seeking return of the e-mails. (*Gateway Unified School Dist. v. Lynn* (Super. Ct. Shasta County, filed Sept. 1, 2010, No. 170167.) In their opposition to the request for injunctive relief, defendants asserted: "The documents from Gateway are public documents. There is no evidence (Gateway has not attached one e-mail for review) that any of the documents are privileged or confidential. . . . Until a determination has been made that specific documents are privileged or confidential, these documents are discoverable as public records and therefore the District can suffer no harm as a result of their production." They further argued: "There is no legal authority that prohibits a person from discussing public documents or their contents. Regardless of whether or not the documents were legally obtained, the nature of these documents does not change. They are public documents and as such these Defendants are each entitled to speak about them under their Constitutional rights."

The trial court rejected defendants' self-serving assumption that the e-mails constituted exempt, nonprivileged public documents and that the manner of acquisition was irrelevant to the request for injunctive relief. The court issued an injunctive order that all e-mails, whether in electronic or paper format, taken by Lynn had to be returned to the District. Defendants were "prohibited from the use, dissemination, and disclosure of the contents of the emails." In granting this motion, the court once again found Lynn had not obtained the emails through a lawful process. Defendants did not appeal.

Almost five months later, Lynn filed a motion to lift and/or modify the preliminary injunction. In the notice of motion, Lynn stated that the motion “will be made on the grounds that Defendant’s right to possess, use and disseminate public records is statutorily guaranteed by the California Public Records Act, Government Code §6250 et. sec. [*sic*] and constitutionally protected by California Constitution Art. I, Section 3. To the extent Gateway’s preliminary order required Defendant’s [*sic*] to return copies of public records and prohibits Defendant’s [*sic*] from possessing, using or disseminating public records such order is contrary to law and prohibited by the Public Records Act and the California Constitution.”

In its tentative ruling denying the motion, the court explained: “There has been no change in the facts that led to the injunction, no change in the law, and the ends of justice would not be served by lifting or modifying the injunction. Granting the motion would interfere with the orderly administration of justice. Defendants are attempting to secure from this Court a ruling on a public records request not yet made as of the time of the filing of the motion. Defendants state, without citing any authority, that no specific procedure is required to obtain copies of public records. Defendants ignore the simple, common sense fact that a request for public records must start with just that — a request. If a request is denied, an orderly court process is in place to secure a determination of whether the records are subject to disclosure. The court process accommodates the need to address what constitutes a ‘public record’ and whether a public record is exempt from the public records act. Defendants state in conclusionary fashion that the documents are not exempt and not privileged, apparently overlooking the fact that this is for the Court to determine. Following proper procedures, starting with a request to review records, relieves the Court of the necessity to review voluminous documents about which there might well be agreement regarding disclosure. The Court has the inherent power to control proceedings before it, insist upon an orderly process, and use the utmost care in

assuring that issues that can be resolved informally are not brought before the Court needlessly.” This time, Lynn appeals the order.

DISCUSSION

The District urges us to dismiss the appeal of what it perceives to be a nonappealable order. We agree with the District that Lynn’s appeal is a thinly veiled attempt to evade the statutory limitations on appealability in what is nothing more than a belated and hopeless motion for reconsideration.

An order granting or dissolving an injunction or refusing to grant or dissolve an injunction is appealable. (Code Civ. Proc., § 904.1, subd. (a)(6).) Lynn insists that the refusal to modify is analogous to a refusal to partially dissolve an injunction and therefore appealable pursuant to section 904.1, subdivision (a)(6). *Malatka v. Helm* (2010) 188 Cal.App.4th 1074 (*Malatka*) holds to the contrary.

In *Malatka*, the plaintiff obtained a restraining order against a neighbor. The neighbor did not appeal, but moved to modify the order. The court modified the order, allowing the neighbor to get within 10 rather than 25 feet of the plaintiff. The neighbor appealed. (*Malatka, supra*, 188 Cal.App.4th at pp. 1079-1081.)

“[T]o prevent both circumvention of time limits for appealing and duplicative appeals from essentially the same ruling . . . on an appeal from an appealable ruling, an appellate court will not review earlier appealable rulings.” (*Malatka, supra*, 188 Cal.App.4th at p. 1082.) Thus, courts have allowed an appeal of a modification of an injunction, but only insofar as it raises issues that could not have been raised in an earlier appeal. (*Id.* at p. 1083.) For example, in *Chico Feminist Women’s Health Center v. Scully* (1989) 208 Cal.App.3d 230 (*Scully*), the appellants sought to challenge not only the modifications of the injunction, but the unmodified parts of the injunction as well. The court concluded, “We perceive no reason why defendants should be able to use the order of April 25, amending the injunction, as an artificial springboard from which to launch an appeal that could have been taken earlier.” (*Id.* at p. 251.)

Similarly, in *Malatka*, the defendant asserted that an order refusing to dissolve an injunction is appealable. The trial court rejected such an obvious subterfuge, explaining: “Without conflating restrictions on appealability and reviewability, we conclude that, to the extent the current appeal from an order implicitly refusing to dissolve a restraining order presents issues that could have been raised in an appeal from the original restraining order, those issues are not reviewable in this appeal. On the other hand, to the extent the motion to dissolve was dependent on new facts and law, such issues are reviewable.” (*Malatka, supra*, 188 Cal.App.4th at p. 1084.)

Lynn presents absolutely no new facts or new law. Here, unlike *Malatka*, there is not even a plausible ground for review because the court did not modify the injunction. Before us is the very same injunction Lynn could have appealed almost five months earlier. As set forth in our brief recitation of the facts, he opposed the issuance of the injunction because, in his view, the e-mails are nonexempt, nonprivileged public records. He insists now, as he did then, that he has a constitutional right to possession of the public records. These are not new facts, his arguments are not based on any new law, and he is simply trying to assert the very same arguments he would have, and could have, made if he had filed a timely appeal. Thus he, like the litigants in *Scully* and *Malatka*, merely seeks to circumvent the time limits for appealing the injunction.

Lynn tortures the meaning of “new facts” in a vain attempt to apply the logic of an inapposite case. In *Jeneski v. Myers* (1984) 163 Cal.App.3d 18 (*Jeneski*), the Legislature deleted some drugs from the list of those for which Medi-Cal would reimburse and put other drugs on a list that required prior approval. (*Id.* at p. 22.) Medi-Cal recipients sought a second extension of the injunction they obtained restraining the Department of Health Services from implementing the statute and regulations. (*Id.* at p. 23.) The trial court denied the motion to modify the injunction a second time. (*Ibid.*) The Court of Appeal pointed out that the trial court did not dissolve the injunction; rather, the injunction expired by its own terms. (*Id.* at pp. 28-29.)

Lynn misreads the holding, misunderstands the analysis, and misapplies the case to the facts before us. He argues that the Medi-Cal recipients in *Jeneski* “were entitled to a modification of the injunction because they established that the actions of the state implementing certain regulations violated other laws.” Utilizing an appropriately restrained analysis of the necessity for injunctive relief, the court merely assessed the likelihood the recipients would prevail on the merits and weighed the relative hardships the parties would suffer if implementation had not been enjoined. (*Jeneski, supra*, 163 Cal.App.3d at pp. 30-33.) The court concluded that some Medi-Cal recipients would suffer irreparable harm if denied their medication and their arguments were likely to prevail at trial. (*Id.* at p. 29, fn. 8.) Thus, the court enjoined the Department of Health Services, not, as Lynn contends, because it found either the law or the regulations violated other laws, but to preserve the status quo until trial.

In essence, Lynn argues that the application of the terms of the injunction constitutes “new facts” justifying modification of its terms. In other words, the injunction was subject to modification each time it was used to enjoin any of the nearly 40,000 e-mails Lynn copied from the District’s server and thereby permitted piecemeal appeals of its terms. His argument distorts the clear meaning of the type of new facts or change of circumstances necessary to justify a modification and an ensuing appeal.

Here there are no new facts. His argument in opposition to injunctive relief has been consistent, and neither the facts nor the law has changed. He insists he is constitutionally entitled to possession of public documents he characterizes as nonexempt and nonprivileged. He made the argument in opposition to the District’s request for a preliminary injunction, he repeated that argument in attempting to convince the court to modify the injunction, and he repeats the same argument on appeal. But what he did not do was appeal from the order granting the preliminary injunction where he could have, and did not, make the argument he now attempts to assert in his appeal of the denial of

the modification request. But the argument itself is certainly not new, nor is there any new fact upon which the well-worn argument might be revamped or reasserted.

We reject the notion that the enforcement of the injunction triggers a right to modify its terms. This appeal is nothing more than a camouflage of the appeal Lynn should have brought and did not. We therefore must dismiss the appeal.

DISPOSITION

The appeal is dismissed. Respondent shall recover costs on appeal.

RAYE, P. J.

We concur:

BUTZ, J.

MAURO, J.