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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MAURA K. FINIGAN,

Plaintiff and Respondent,

v.

BENJAMIN C. WEINBERG,

Defendant and Appellant.

D061629

(Super. Ct. No. 37-2011-00102313-
CU-HR-CTL)

APPEAL from an order of the Superior Court of San Diego County, William H. Kronberger , Judge. Affirmed.

Law Office of Marc S. Kohnen and Marc S. Kohnen for Defendant and Appellant.

Maura K. Finigan, in pro. per., for Plaintiff and Respondent.

Benjamin C. Weinberg appeals from a civil harassment restraining order issued pursuant to Code of Civil Procedure section 527.6 (section 527.6) that Maura K. Finigan obtained against him after he sent her sexually explicit texts and Facebook messages. Weinberg contends the (1) the trial court's order is void because the court held a hearing

on the permanent restraining order outside of the time frame specified in section 527.6, subdivision (g); and (2) the restraining order is not supported by substantial evidence. We conclude that Weinberg's contentions lack merit, and we accordingly affirm the order.

I

FACTUAL AND PROCEDURAL BACKGROUND

Finigan filed a petition for a civil harassment restraining order against Weinberg on December 9, 2011. The petition was supported by a declaration which explains Finigan's contact with Weinberg, and which provides the basis for our recitation of the facts.

During the relevant time period, Finigan worked for the Navy as a Judge Advocate General officer, and Weinberg was a Navy lieutenant. Weinberg met briefly with Finigan one time in July 2011 to obtain legal advice.

On August 1, 2011, Weinberg sent Finigan a Facebook message, which stated, "I didn't want to say it at the time, but you're gorgeous." Finigan did not see the message in her spam folder until November 16, when she responded with "a very-overdue thanks for the compliment." Weinberg sent Finigan a friend request on Facebook around November 24, 2011, which she accepted. Weinberg then sent three short innocuous Facebook messages between November 24 and 26, to which Finigan did not respond.

On December 3, 2011, Finigan received 11 text messages from a number she did not recognize, but which she confirmed days later through her client database to belong to Weinberg. The first text message stated "dtf?" which Finigan understood as an

abbreviation for "down to fuck?" The second text message stated, "I want to go down on you." Some of the other text messages referenced oral sex, and another asked, "Do you want a rim job?" Finigan asked who was sending the texts, and received a reply, "You don't know me to [*sic*] well, but i really want to hook up with you. are you dtf?" Finigan responded, "not if I don't know who you are and not if you can't spell." The text messages stopped around 6:30 p.m. or 7:00 p.m. on December 3, 2011, and then Finigan received two more text messages on December 4, 2011.

On the morning of December 5, 2011, Finigan woke up to see a long and sexually explicit Facebook message from Weinberg. In the message, Weinberg described graphic details of a sexual fantasy of engaging in oral sex with Finigan. Because of the similarity in content with the text messages, Finigan realized that Weinberg had been sending her the sexually explicit text messages. She then blocked Weinberg's number from her phone and blocked him from her Facebook account.

As a result of Weinberg's conduct, Finigan became upset and scared. Finigan stated that her fear was caused by the "highly graphic nature of the message coupled with the fact that I have had very limited interaction with Mr. Weinberg prior to receipt of these messages (and that nearly all that interaction was on a professional, not personal, level)." According to Finigan's declaration, Weinberg's texts and Facebook messages "seem like erratic and unstable behavior, particularly for someone I met in a professional and highly limited context."

The trial court issued a temporary restraining order on December 9, 2011. The hearing on the permanent restraining order was originally set for December 23, 2011, but

ended up taking place on January 26, 2012, with counsel appearing for Weinberg, who was not present. The record does not indicate the reason that the hearing was moved to January 26.

At the January 26, 2012 hearing, the trial court issued a restraining order against Weinberg that prevented him from (1) coming within 100 yards of Finigan; (2) contacting or otherwise harassing Finigan; and (3) possessing firearms.

Weinberg filed a notice of appeal.

II

DISCUSSION

A. *Applicable Law*

Section 527.6 provides the authority for the trial court to issue a temporary restraining order and an injunction prohibiting "harassment." The term "harassment" is defined as "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 petitioner."¹ (§ 527.6, subd. (b)(3).)

¹ "Course of conduct" is defined as "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, facsimile, or computer email." (§ 527.6, subd. (b)(1).)

B. *The Order Granting the Injunction Is Not Void on the Ground That the Hearing Was Held Outside of the Statutory Timeframe*

Weinberg's first contention is that the trial court's order is void because it was made outside of the statutory timeframe for holding a hearing on a permanent restraining order under section 527.6.

The applicable timeframe is set forth in section 527.6, subdivision (g), which states: "Within 21 days, or, if good cause appears to the court, 25 days from the date that a petition for a temporary order is granted or denied, a hearing shall be held on the petition for the injunction. If no request for temporary orders is made, the hearing shall be held within 21 days, or, if good cause appears to the court, 25 days, from the date that the petition is filed."

Here, it is undisputed that the trial court held the hearing on the permanent injunction 57 days after it granted the temporary injunction, which is outside of the timeframe set forth in section 527.6, subdivision (g).

According to Weinberg, because the statutory language states that a hearing "shall" be held within a specific timeframe (§ 527.6, subd. (g)), the trial court lacked jurisdiction to issue a permanent injunction outside of the statutory timeframe. Weinberg contends that the injunction is accordingly void and must be reversed. As we will explain, we disagree.

Certain statutory time limits for governmental action are "mandatory," meaning that "the failure to comply with a particular procedural step will . . . have the effect of invalidating the governmental action to which the procedural requirement relates."

(*Morris v. County of Marin* (1977) 18 Cal.3d 901, 908 (*Morris*)).) Otherwise, a time limit is "directory," meaning that noncompliance "does not invalidate the action ultimately taken." (*Edwards v. Steele* (1979) 25 Cal.3d 406, 410 (*Edwards*)).)

"[G]enerally, requirements relating to the time within which an act must be done are directory rather than mandatory or jurisdictional, unless a contrary intent is clearly expressed." (*Edwards, supra*, 25 Cal.3d at p. 410.) The mandatory and directory distinction applies to actions statutorily required of the trial court for the purpose of deciding whether the trial court had jurisdiction to take a specific action. (*In re Richard H.* (1991) 234 Cal.App.3d 1351, 1362 [time limits applicable to the trial court in juvenile dependency proceedings was directory, not mandatory, and therefore not jurisdictional].)

"Whether a particular statute is intended to impose a mandatory duty is a question of interpretation for the courts.'" (*People v. Allen* (2007) 42 Cal.4th 91, 101-102.) "In order to determine whether a particular statutory provision . . . is mandatory or directory, the court, as in all cases of statutory construction and interpretation, must ascertain the legislative intent. In the absence of express language, the intent must be gathered from the terms of the statute construed as a whole, from the nature and character of the act to be done, and from the consequences which would follow the doing or failure to do the particular act at the required time. [Citation.] When the object is to subserve some public purpose, the provision may be held directory or mandatory as will best accomplish that purpose" (*Morris, supra*, 18 Cal.3d at p. 910.) As we will explain, we

conclude from the purpose underlying section 527.6 that the Legislature could not have intended the time frame set forth in section 527.6, subdivision (g) to be mandatory.

The general purpose of section 527.6 is to provide expedited injunctive relief to victims of harassment. (*Adler v. Vaicius* (1993) 21 Cal.App.4th 1770, 1775.) A rule invalidating a permanent injunction against harassment — based on the *trial court's delay* in acting on a petition within the statutory time limits — would unreasonably hurt the *victim* who would be left without needed protection from harassing conduct. (See *Edwards, supra*, 25 Cal.3d at p. 410 [requirement that administrative board act on an administrative appeal within a specific time period was directive rather than mandatory because the "probable intent underlying the ordinance was to assure to the aggrieved party a reasonably timely hearing of, and decision on, his administrative appeal" (italics omitted) and to "hold that the provisions are mandatory and jurisdictional under the circumstances of the present case would seemingly defeat the foregoing purpose by depriving the aggrieved party of his appeal through no fault of his own"].)²

For these reasons, it would be contrary to the purpose of the statute to protect victims of harassment if we were to interpret the statutory time limit as mandatory. We therefore conclude that the trial court's permanent restraining order was not invalidated by the fact that the hearing was held outside of the statutory time limits.

² Further, if the statutory time limit for holding a hearing on a permanent injunction were mandatory, a respondent could avoid a permanent injunction by evading personal service until the court's jurisdiction evaporates. (See § 527.6, subd. (m) [requiring personal service].)

C. *The Trial Court's Ruling Was Supported by Substantial Evidence*

We next consider Weinberg's contention that insufficient evidence supports the trial court's implicit finding that Weinberg engaged in a course of conduct that "serv[ed] no legitimate purpose," "seriously alarm[ed], annoy[ed], or harass[ed]" Finigan, and that was "such as would cause a reasonable person to suffer substantial emotional distress." (§ 527.6, subd. (b)(3).)

We review the trial court's finding under a substantial evidence standard of review. (*Duronslet v. Kamps* (2012) 203 Cal.App.4th 717, 725.) The substantial evidence standard applies on appeal even where — as here — the trial court was required to make its findings under the clear and convincing evidence standard. (*Ensworth v. Mullvain* (1990) 224 Cal.App.3d 1105, 1111, fn.2 ["Where the trial court has determined that a party has met the 'clear and convincing' burden, that heavy evidentiary standard then disappears."].)

The crux of Weinberg's argument is that his conduct was nothing more than "crude behavior" in the context of asking Finigan to "date" him. He contends that "these types of contacts between men and women are not at all uncommon" and that Finigan was merely a typical woman who received "unwanted attention" from a "Casanova cad." According to Weinberg, his conduct had the legitimate purpose of trying to ask Finigan to date him, a *reasonable* person would not suffer substantial emotional distress at being pursued for a date, and Finigan should not have continued to fear him, as he ceased contacting her.

Weinberg's characterization of his conduct as harmless dating activity is not supported by the evidence. Instead, Weinberg's actions were bizarre and extreme, and — most significantly — raised reasonable concerns about his mental stability. It is far from normal, socially acceptable dating behavior to (1) send sexually explicit, anonymous text messages to someone and to refuse to reveal your identity when asked; and (2) write a long *extremely graphic* Facebook message describing an imagined sexual encounter with a person you have only met for 15 minutes in a professional setting and with whom you otherwise have no personal relationship. A woman receiving such communications would be reasonably distressed and fearful for her physical safety because she has become the subject of the apparent obsessive attention of someone who appears to be mentally unstable and has fantasies involving sexual physical contact with her. Further, the fact that the contact from Weinberg stopped after the last Facebook message does not make Finigan's fear unreasonable, as she could reasonably conclude that the contact ceased only because she blocked him from her phone and Facebook account.

Thus, substantial evidence supports a finding that a reasonable person would suffer substantial emotional distress after being subjected to Weinberg's conduct, which had no legitimate purpose.

DISPOSITION

The order is affirmed.

IRION, J.

WE CONCUR:

NARES, Acting P. J.

MCDONALD, J.