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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of CORINNE NICOLE
BRAUN and KIRBY FACIANE.

CORINNE NICOLE BRAUN,

Respondent,

v.

KIRBY FACIANE,

Appellant.

D065568

(Super. Ct. No. DN171322)

APPEAL from orders of the Superior Court of San Diego County,
Margo L. Lewis, Judge. Reversed in part and remanded with directions.

Slattery Law Firm and Thomas W. Slattery for Appellant.

No appearance for Respondent.

The trial court granted Corinne Nicole Braun's request to permanently renew a domestic violence restraining order against her ex-husband, Kirby Faciane, and made an order regarding Faciane's visitation with the parties' daughter. Faciane appeals from

these orders, arguing the trial court (1) utilized an improper subjective standard to renew the restraining order rather than the proper objective test, (2) should not have renewed the restraining order against him because he was not properly served, and (3) erred in basing its visitation order on the parties' agreement. We conclude the trial court applied an incorrect standard in renewing the restraining order. Thus, we reverse and remand for the trial court to reconsider its decision to grant a permanent extension of the restraining order. In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2012, the trial court granted Braun's request for a temporary restraining order against Faciane. Later that year, the trial court granted Braun a restraining order for a period of one year. Approximately one year later, Braun requested that the court permanently renew the restraining order.

On December 30, 2013, Faciane responded to Braun's request to renew the restraining order. He argued Braun's alleged apprehension of future abuse was not reasonable. He also raised various objections, including an objection regarding improper service.

Faciane was served with Braun's request to renew the restraining order against him on January 7, 2014. The court held a hearing on the matter three days later. Braun's counsel argued Faciane had engaged in "stalker-type behavior" and a pattern of harassment through excessive court filings that led to Faciane being declared a vexatious litigant. Braun's counsel also argued Faciane was mentally unstable and had substance abuse problems. Faciane's counsel argued the court should not renew the restraining

order because, by being declared a vexatious litigant, Faciane was already prevented from harassing Braun through court filings and there had been no violence in the case.

Faciane's counsel also argued Braun's fear was not reasonable because Faciane lived in northern California.

After hearing arguments, the trial court granted Braun's request to permanently renew the restraining order against Faciane. In making its ruling, the trial court stated, "[Braun] doesn't even need new facts to ask for [the restraining order] to be renewed. But, quite frankly, I find that there are some additional pieces of information and facts that would continue to cause her some alarm and that would continue to cause her some fear. [¶] It's her fear. It's her subjective fear. Whether you think it's reasonable or somebody else thinks it's reasonable is really not important. But the code, under [Family Code section] 6345, [Braun] has met her burden, and the court is going to renew the restraining order." (Undesignated statutory references are to the Family Code.)

DISCUSSION

I. *Judicial Notice*

Braun requested that we take judicial notice of a letter ruling from the trial court granting her request to declare Faciane a vexatious litigant. We grant Braun's request for judicial notice of that document and also take judicial notice of the superior court file in this case. (See Evid. Code, §§ 452, subd. (d) [court may take judicial notice of records of any court of this state], 459 [reviewing court may take judicial notice of any matter specified in Evidence Code section 452].)

II. *Standard to Renew Restraining Order*

Faciane contends the trial court utilized an improper subjective standard to renew the restraining order rather than the proper objective test. We agree.

"The trial court's ruling on a request to renew a domestic violence prevention restraining order is reviewed for an abuse of discretion. [Citation.] An abuse of discretion occurs when the ruling exceeds the bounds of reason. [Citation.] But, the exercise of discretion is not unfettered in such cases. [Citation.] 'All exercises of discretion must be guided by applicable legal principles, however, which are derived from the statute under which discretion is conferred. [Citations.] If the court's decision is influenced by an erroneous understanding of applicable law or reflects an unawareness of the full scope of its discretion, the court has not properly exercised its discretion under the law. [Citation.] Therefore, a discretionary order based on an application of improper criteria or incorrect legal assumptions is not an exercise of informed discretion and is subject to reversal. [Citation.]' [Citation.] The question of whether a trial court applied the correct legal standard to an issue in exercising its discretion is a question of law [citation] requiring de novo review. [Citation.]" (*Eneaji v. Ubboe* (2014) 229 Cal.App.4th 1457, 1463.)

Under section 6345, subdivision (a), a domestic violence restraining order "may be renewed, upon the request of a party, either for five years or permanently, without a showing of any further abuse since the issuance of the original order, subject to termination or modification by further order of the court either on written stipulation filed with the court or on the motion of a party."

In the case of a contested request to renew a restraining order, "[i]t is not enough [that the protected] party entertain a subjective fear the party to be restrained will commit abusive acts in the future." (*Ritchie v. Konrad* (2004) 115 Cal.App.4th 1275, 1288 (*Ritchie*)). Rather, "in California, as in the rest of the country, an objective test must be satisfied before a protective order is renewed in contested cases." (*Id.* at p. 1290.) "A trial court should renew the protective order, if, and only if, it finds by a preponderance of the evidence that the protected party entertains a 'reasonable apprehension' of future abuse. So there should be no misunderstanding, this does not mean the court must find it is more likely than not future abuse will occur if the protective order is not renewed. It only means the evidence demonstrates it is more probable than not there is a sufficient risk of future abuse to find the protected party's apprehension is genuine and reasonable." (*Ibid.*)

"In assessing the risk of future abuse, the trial court 'ordinarily should consider the evidence and findings on which [the] initial order was based.' [Citation.] The existence of the order and its underlying findings and facts 'often will be enough in themselves to provide the necessary proof to satisfy that test.' [Citation.] In addition, the trial court should consider any significant change in circumstances such as whether the parties have moved on with their lives. [Citation.] The trial court should also consider whether the circumstances have enhanced the opportunity and possibility of future abuse. [Citation.] The burdens imposed on the restrained party do not 'justify denial of a renewed protective order where the "reasonable apprehension" is of future acts of *physical violence*.' [Citation.]" (*Eneaji v. Ubboe, supra*, 229 Cal.App.4th at p. 1463.)

Here, while the trial court properly recognized that Braun did not need to present evidence of "any further abuse since the issuance of the original order" (§ 6345), it incorrectly applied a subjective test to make its ruling. The court explained that the relevant inquiry was Braun's subjective fear, not whether the fear was reasonable. As we explained, this standard was improper. In considering Braun's request to permanently renew the restraining order against Faciane, the trial court should have determined whether "by a preponderance of the evidence [Braun] entertains a 'reasonable apprehension' of future abuse." (*Ritchie, supra*, 115 Cal.App.4th at p. 1290.)

"In some cases it might be possible for an appellate court to conclude the trial court's error in failing to apply the 'reasonable apprehension of future abuse' test represents 'harmless error.'" (*Ritchie, supra*, 115 Cal.App.4th at p. 1292.) Based on the appellate record before us, however, we cannot make this determination. The appellate record contains Braun's initial application for a temporary restraining order and supporting declarations; but, it does not contain Faciane's response or the trial court's findings supporting the original order. Moreover, it is unclear whether the record before us contains all relevant information. The evidence and findings before us are insufficient for us to determine whether Braun entertained a reasonable apprehension of future abuse. Thus, this is a determination left for the trial court.

Based on the foregoing, we are compelled to reverse the renewed restraining order. On remand, the trial court should apply the proper test to determine whether Braun had a "reasonable apprehension of future abuse" such that it warrants a lengthy or permanent renewal of the restraining order against Faciane. To be clear, we express no

view as to the appropriate outcome after the trial court's reconsideration under the proper standard.

III. *Service*

Faciane argues he was "deprived of his due process right to notice and a reasonable opportunity to object to Braun's request for renewal of the restraining order" because he was served only three days before the hearing on the matter. We reject this argument.

"It is well settled that the appearance of a party at the hearing of a motion and his or her opposition to the motion on its merits is a waiver of any defects or irregularities in the notice of the motion. [Citations.] This rule applies even when no notice was given at all. [Citations.] Accordingly, a party who appears and contests a motion in the court below cannot object on appeal or by seeking extraordinary relief in the appellate court that he had no notice of the motion or that the notice was insufficient or defective." (*Tate v. Superior Court* (1975) 45 Cal.App.3d 925, 930.) "The general rule is that one who has been notified to attend a certain proceeding and does do so, cannot be heard to complain of alleged insufficiency of the notice; it has in such instance served its purpose. This rule applies to one who appears in a lawsuit after defective service of process upon him [citation], to one who responds to a notice of motion without adequate notice [citation]." (*De Luca v. Board of Supervisors* (1955) 134 Cal.App.2d 606, 609.)

Despite Faciane's claim that he was prejudiced by the alleged inadequate service, he filed a response to Braun's request to renew the restraining order even before he was purportedly served. Moreover, his counsel appeared and argued at the hearing, never

requested a continuance of the hearing, and never claimed prejudice based on the alleged insufficient notice. Under these circumstances, we conclude Faciane waived his claim of improper service.

IV. *Visitation Order*

In conjunction with the permanent restraining order in January 2014, the trial court also entered a custody and visitation order giving Faciane supervised visits with his daughter "during days and times agreed upon by the two parties." Based on our review of the voluminous superior court file, we note that in June 2014, the parties stipulated to terms regarding custody and visitation of their daughter. In September 2014, the court issued a subsequent child custody and visitation order. That order was largely consistent with the parties' stipulation.

Faciane argues the trial court erred in basing its January 2014 child visitation order on the parties' agreement. We reject this argument as moot based on the trial court's subsequent order regarding child custody and visitation. Regardless of whether the trial court erred in basing its January 2014 visitation order on the parties' agreement, no effective relief can be afforded to Faciane because subsequent events in this matter make Faciane's argument moot. (*In re Jessica K.* (2000) 79 Cal.App.4th 1313, 1315-1316.)

V. *Sanctions Motion*

Faciane filed a motion for monetary sanctions against Braun and her counsel. Faciane contends sanctions are warranted because: (1) Braun's counsel has not treated Faciane, his counsel and the Court with respect and courtesy; (2) Braun did not file a respondent's brief after requesting and obtaining an extension from this Court, which

Faciane contends demonstrates the request was frivolous and intended to cause delay; (3) Braun's counsel did not update his address with the Court; and (4) Braun's counsel directly contacted Faciane attempting to negotiate an agreed statement or joint appendix.

Braun's counsel opposed the sanctions motion. He explains that while he did request an extension of time to file a respondent's brief and did not ultimately file one, his request for an extension was not frivolous or intended to cause delay. Instead, he states he was unaware that an opening brief had been filed until more than two weeks after its filing. As such, he needed time to review the record and court filings to determine if a response was necessary.

In regard to updating his address with the Court, Braun's counsel states that his office moved in December 2014, and at that time, he was not active in this case. He further states that his failure to update his address with the Court was unintentional. On the issue of his direct contact with Faciane, Braun's counsel indicates that whether Faciane was represented was unclear based on the pleadings in the case. Braun's counsel also clarifies that he did not attempt to "negotiate, bully, leverage or harass a party that was represented by counsel." To the contrary, he "simply served documents on a party that [he] believed to be *in pro per* at the time."

Lastly, based on Braun's opposition to the sanctions motion and the documents submitted therewith, it appears that Braun's counsel attempted to contact Faciane's counsel numerous times without getting a response. The correspondence includes several requests for copies of filings in this Court and clarification regarding whether Faciane

was represented. We see no evidence of disrespect or discourtesy to Faciane, his counsel or this Court.

Sanctions are to be used sparingly, only to deter the most egregious conduct, "so as to avoid a serious chilling effect on the assertion of litigants' rights on appeal." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) Based on our review of Faciane's sanctions motion and the appellate record, we conclude Faciane has not met his burden to show grounds for imposing sanctions against Braun or her counsel.

DISPOSITION

The restraining order, dated January 16, 2014, is reversed and the matter is remanded with instructions that the trial court reconsider Braun's request to renew the restraining order. In doing so, the trial court should apply the "reasonable apprehension of future abuse" standard as set forth in this opinion. In all other respects, we affirm. Each party shall bear their own costs on appeal.

MCINTYRE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

IRION, J.