

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re Finding of

EUGENE FORTE

as a Vexatious Litigant.

F066514

**OPINION AND ORDER
DECLARING
EUGENE FORTE A
VEXATIOUS LITIGANT**

THE COURT*

ORIGINAL PROCEEDING to determine whether Eugene Forte is a vexatious litigant.

Eugene Forte, in pro. per.

-ooOoo-

* Before Kane, Acting P.J., Poochigian, J. and Detjen, J.

Over the last seven years, Eugene Forte, in propria persona, has filed, prosecuted or maintained at least five appeals or writ petitions that have been finally determined against him. Accordingly, this court concludes on its own motion that Mr. Forte is a vexatious litigant within the meaning of Code of Civil Procedure section 391, subdivision (b)(1),¹ and should be subject to a prefiling order under section 391.7. We hereby issue that prefiling order.

PROCEDURAL HISTORY

On January 25, 2013,² this court served its “Notice of Hearing to Determine Vexatious Litigant and Enter Prefiling Order” (Notice) to Mr. Forte. The Notice informed Mr. Forte that this court was considering declaring him a vexatious litigant as defined by section 391, subdivision (b)(1), and prohibiting him from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding judge or justice of the court where the litigation is proposed to be filed. (§ 391.7.) The Notice invited Mr. Forte to file evidence and argument on or before February 6 on the question of whether this court should declare him a vexatious litigant subject to a prefiling order. The Notice stated the matter was set for oral argument on February 13 at 2:00 p.m. The Notice specifically listed the litigations filed in this court and another Court of Appeal that appeared to qualify Mr. Forte for vexatious litigant treatment.

On January 31, Mr. Forte filed papers requesting that this court continue the hearing to March 15 and the time within which to file opposition to March 8. Included in his papers were arguments in opposition to the motion. On February 4 this court denied

¹ Further statutory references are to the Code of Civil Procedure unless otherwise indicated.

² All references to dates are to 2013 unless otherwise noted.

both requests but granted Mr. Forte until 12:00 noon on Monday, February 11, within which to file his opposition.

On February 11, in the afternoon, Mr. Forte emailed his objection and opposition to this court. This court accepted and reviewed said opposition papers which consisted of 31 pages plus 46 pages of exhibits.³

On February 13, Mr. Forte appeared and presented oral argument in opposition to the court's motion.

DISCUSSION

Vexatious Litigant Law

The vexatious litigant statutes were created to curb misuse of the court system by those acting in propria persona who repeatedly file groundless lawsuits or attempt to relitigate issues previously determined against them. (§§ 391-391.7; *Shalant v. Girardi* (2011) 51 Cal.4th 1164, 1169 [the statutes protect courts and litigants from such misuse by “persistent and obsessive” pro. per. litigants]; *Bravo v. Ismaj* (2002) 99 Cal.App.4th 211, 222-223; for an overview of the vexatious litigant statutory scheme see Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2012) ¶ 1:914 et seq., pp. 216-222 et. seq. or 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 365 et seq., pp. 470-478.)

The statutory definition of “[v]exatious litigant” includes a litigant who: “[i]n the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations ... that have been (i) finally determined adversely to the person” (§ 391, subd. (b)(1).) “Litigation” is defined as “any civil

³ Between 1:00 and 2:00 a.m. on the date of the February 13 hearing, Mr. Forte emailed to the clerk's office a document entitled “Amended Objection and Opposition ...,” consisting of 167 pages. This document was submitted past the February 11 deadline for filing opposition. Mr. Forte did not seek court permission to file this document. Thus, while the clerk's office has “received” it, the document will not be deemed “filed.” It has not and will not be read or considered by this court.

action or proceeding, commenced, maintained or pending in any state or federal court.” (*Id.*, subd. (a).) ““Litigation”” for purposes of vexatious litigant requirements “includes proceedings initiated in the Courts of Appeal by notice of appeal or by writ petitions other than habeas corpus or other criminal matters.” (*McColm v. Westwood Park Assn.* (1998) 62 Cal.App.4th 1211, 1219.)

The prefiling order provision curbs misuse by prohibiting a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding judge or justice of the court where the litigation is proposed to be filed. (§ 391.7, subd. (a); *In re R.H.* (2009) 170 Cal.App.4th 678, 690-692; *Wolfgram v. Wells Fargo Bank* (1997) 53 Cal.App.4th 43, 59-61 [rejecting constitutional challenges to § 391.7].)

A court on its own motion may declare a party a vexatious litigant and enter a prefiling order. (§ 391.7, subd. (a).) There need not be pending litigation for a court to move to declare an individual a vexatious litigant and subject him to a prefiling order. (*Bravo v. Ismaj, supra*, 99 Cal.App.4th at pp. 222-223.) For example, in *In re Lockett* (1991) 232 Cal.App.3d 107, the Court of Appeal issued a written order notifying Lockett that it appeared he was a vexatious litigant based on his having filed 43 different appeals and writs as well as unmeritorious motions, pleadings, and other papers. The order notified Lockett the court was considering entering a prefiling order declaring him a vexatious litigant and prohibiting him from filing any new litigation without first obtaining leave of the presiding judge. (*Id.* at p. 108.) The order directed the clerk to set the matter for hearing on a given date, advised Lockett of his right to appear before the court at that time and present argument and evidence on whether he was a vexatious litigant and whether the court should enter the proposed prefiling order. (*Ibid.*) Lockett submitted written materials disputing whether he met the criteria to be declared a vexatious litigant but did not appear at the scheduled hearing. (*Id.* at p. 109.) The court considered Lockett’s written arguments, found him to be a vexatious litigant within the

meaning of the statute, and entered a prefiling order barring him from filing new litigation without the permission of the presiding judge. (*Id.* at p. 110.)

In *In re Whitaker* (1992) 6 Cal.App.4th 54, 57, the Court of Appeal declared Whitaker a vexatious litigant after ordering him to show cause why a prefiling order should not be granted. The matter was set for hearing, Whitaker appeared and presented arguments, and the court issued a written opinion declaring him a vexatious litigant subject to a prefiling order.

In *Andrisani v. Hoodack* (1992) 9 Cal.App.4th 279, 281, Andrisani had been found to be a vexatious litigant on two occasions in published Court of Appeal decisions. When Andrisani filed an application for a waiver of court fees and costs in anticipation of filing a new appeal, the court issued an order requesting the parties to file memoranda addressing whether the court should issue a prefiling order that would prohibit him from filing new litigation. (*Id.* at pp. 280-281.) Based on those responses, the court found no sound reason to preclude it from issuing a prefiling order and did so. (*Id.* at p. 281.)

Notice and Hearing Requirements

Although the statute is silent on the subject, an individual may not be declared a vexatious litigant without a noticed motion and hearing, which includes the right to oral argument and presentation of evidence. (*Bravo v. Ismaj, supra*, 99 Cal. App. 4th at p. 225.) However, failure to hold oral argument or a hearing does not necessarily constitute prejudicial error. If the litigant is afforded a full and fair opportunity to litigate the issues in the documents he or she files, the error may be harmless. (*Id.* at pp. 225-227.)

Application to Mr. Forte

Mr. Forte meets the definition of a vexatious litigant provided in section 391, subdivision (b)(1), in that in the immediately preceding seven-year period he has commenced, prosecuted, or maintained in propria persona at least five litigations that have been finally determined adversely to him. The following is a list of those five cases:

1. In H029909, *Forte v. O'Farrell*, Mr. Forte appealed from the trial court's judgment of dismissal. The Sixth District Court of Appeal affirmed the judgment of the lower court on August 30, 2007.
2. In F055229, *Forte v. Albov*, Mr. Forte appealed from the trial court's order granting summary judgment based on the expiration of the one-year statute of limitations. This court affirmed the judgment of the lower court on November 3, 2008.
3. In F058335, *Forte v. Tetra Tech, Inc.*, Mr. Forte filed a petition for writ of mandate, challenging an order on a disqualification motion under section 170.6. This court denied Mr. Forte's petition by order filed August 28, 2009.⁴
4. In F057677, *Forte v. Lichtenegger*, Mr. Forte appealed from the trial court's judgment of dismissal. This court affirmed the judgment of the lower court on February 3, 2011.
5. In F062558, *Forte v. Lichtenegger*, Mr. Forte appealed from the trial court's judgment granting nonsuit. This court affirmed the judgment of the lower court on November 1, 2012.

Forte's Contentions

In his opposition papers and at oral argument, Mr. Forte claimed that the vexatious litigant statutes are unconstitutional. We disagree. A number of appellate courts have addressed and rejected the same contentions. (See, e.g., *Fink v. Shemtov*, *supra*, 180

⁴ Appeals and writ petitions filed in the Courts of Appeal are litigations for purposes of the vexatious litigant statute. (*McColm v. Westwood Park Assn.*, *supra*, 62 Cal.App.4th at p. 1219.) The denial of a writ of mandate petition filed in the Court of Appeal challenging the outcome of trial court proceedings to disqualify a judge under section 170.3 or section 170.6 is a final determination thereof for purposes of the vexatious litigant statute. (*Fink v. Shemtov* (2010) 180 Cal.App.4th 1160, 1172-1173.)

Cal.App.4th at p. 1170; *In re R.H.*, *supra*, 170 Cal.App.4th at p. 704 [“Neither section 391.7 nor our prefiling order violates due process because R.H. as the vexatious litigant has the right to seek the permission of the presiding judge or justice to file future litigation.”]; *Bravo v. Ismaj*, *supra*, 99 Cal.App.4th at p. 222; *Wolfgram v. Wells Fargo Bank*, *supra*, 53 Cal.App.4th at pp. 60-61; *Wolfe v. George* (9th Cir. 2007) 486 F.3d 1120, 1124-1127.) We agree with the reasoning and conclusions of these cases, and therefore we reject Mr. Forte’s challenge to the constitutionality of the statutes.

Additionally, Mr. Forte argues that the five litigations listed above were not shown to be frivolous or completely lacking in merit, and therefore it would be improper to brand him as a vexatious litigant.⁵ His opposition argues: “The above litigations, though lost, do not example any vexatious nature by Forte” Mr. Forte’s argument confuses section 391, subdivision (b)(1) with section 391, subdivision (b)(3). The proceedings before us are to determine whether Mr. Forte is a vexatious litigant as defined under section 391, subdivision (b)(1). Subdivision (b)(1) requires that the five litigations were “finally determined adversely to the person,” not that they be found to be frivolous.

Finally, Mr. Forte argues we should have granted his request for a continuance. We disagree. Mr. Forte was provided reasonable notice and was given a fair and adequate opportunity to respond; he did, in fact, file extensive opposition and presented oral argument at the hearing.

⁵ At oral argument, Mr. Forte was under the impression that losing an appeal from a final judgment should not count in the tally under section 391, subdivision (b)(1) if, earlier in the same case, he successfully challenged on appeal an erroneous ruling by the trial court. Mr. Forte is mistaken, since it is the ultimate loss that matters. To the extent his argument is an effort to show a lack of frivolousness, we reiterate that section 391, subdivision (b)(1), merely requires the five litigations were finally determined adversely to the person.

DISPOSITION

This court finds that Eugene Forte is a vexatious litigant within the meaning of section 391. Henceforth, pursuant to section 391.7, Eugene Forte may not file “any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding justice or presiding judge of the court where the litigation is proposed to be filed.” (§ 391.7, subd. (a).) Disobedience of this order may be punished as a contempt of court. (*Ibid.*) “The presiding justice or presiding judge shall permit the filing of that litigation only if it appears that the litigation has merit and has not been filed for the purposes of harassment or delay. The presiding justice or presiding judge may condition the filing of the litigation upon the furnishing of security for the benefit of the defendants as provided in Section 391.3.” (*Id.*, subd. (b).)

The clerk of this court is directed to provide a copy of this opinion and order to the Judicial Council. (§ 391.7, subd. (f).)