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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

IRINA MALILAY,

Plaintiff and Appellant,

v.

JENNIFER DUVERGLAS,

Defendant and Respondent.

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JENNIFER DUVERGLAS,

Plaintiff and Respondent,

v.

IRINA MALILAY,

Defendant and Appellant.

G046779

(Super. Ct. No. 30-2012-00552852)

O P I N I O N

G046847

(Super. Ct. No. 30-2012-00554517)

Appeal from orders of the Superior Court of Orange County, Julian Bailey,  
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Tina M. Abernethy for Plaintiff and Appellant and for Defendant and  
Appellant.

No appearance for Defendant and Respondent and for Plaintiff and Respondent.

\* \* \*

The trial court issued a civil harassment restraining order pursuant to Code of Civil Procedure section 527.6 (section 527.6) to protect Jennifer Duverglas and her children, ages five to nine, from Irina Malilay. The court denied Malilay’s petition for a restraining order against Duverglas. On appeal, Malilay complains Duverglas failed to serve her with a copy of the petition as required by section 527.6, subdivision (m), and the failure deprived her of notice and the opportunity to prepare a defense to Duverglas’s allegations. Malilay also attacks the evidence supporting both orders. For the reasons expressed below, we affirm both orders.

## I

### FACTUAL AND PROCEDURAL BACKGROUND

On March 12, 2012, Malilay filed a petition for a civil harassment restraining order. Malilay asserted she, her roommate, and their neighbors were having “tremendous problems” with the current tenants of unit #342, including Duverglas, who she described as a “wall neighbor” at Malilay’s Anaheim townhouse. Malilay cited “noise, fighting, having parties, drinking and smoking pot” in the building’s public areas. She claimed Duverglas and her friends had threatened and harassed her roommates and her. On March 9 or 10, 2012, Malilay claimed Duverglas violently “pushed” Malilay and scratched her hand. Malilay complained to the police, claiming to have “prove [sic] on my camera,” but according to Malilay the “police didn’t care.”

After the pushing incident, Malilay was arrested and taken to jail. Malilay noticed her hand was bleeding, but admitted to the police she did not have any witnesses

to the assault. After her release she asked for a police escort home. While she was waiting for the officers at a store, a Black man “jumped on” her and told her “‘careful beatch [*sic*] we will get you.’” Malilay turned and saw Duverglas standing with the man.

Malilay also claimed Duverglas and her associates trespassed on Malilay’s property several times. Additionally, sometime in the previous year, Malilay observed several cars parked next to her home around 3:00 a.m. She heard gunshots, and Duverglas yelled, “‘Gangsters Gangsters they will kill him.’” That night someone threw trash on the street in front of Malilay’s garage.

Malilay’s roommate of seven years feared going out of the house and moved out in February 2012. Malilay had relied on the roommate to help pay the mortgage. Malilay stated “this [*sic*, these] people are drag [*sic*, drug] dealers” and she was “afraid for her life.” The attorneys for Malilay’s homeowner’s association (HOA) were “working on that issue” after receiving Malilay’s complaints, but neither the HOA nor the police had taken any action. The police told Malilay she should move out. Malilay claimed Duverglas’s harassment had been ongoing since April 2011.

In addition to a stay-away order, Malilay asked the court to “lift” a battery charge (Pen. Code, § 242) pending against her based on false accusations by Duverglas’s children. The trial court issued a temporary restraining order against Duverglas protecting Malilay and her roommate. The court scheduled a hearing on Malilay’s petition for April 2, 2012.

Meanwhile, on March 16, Duverglas filed a petition for a restraining order against Malilay on behalf of herself and her children. Duverglas asserted Malilay videotaped her children, and took video of the inside of Duverglas’s home from a walkway. Duverglas claimed Malilay twice pulled down her pants and exposed herself to

Duverglas's young children. Malilay did "not allow [Duverglas's children] to play freely without terrorizing them," and the police had arrested Malilay for spitting in Duverglas's seven-year-old son's face. Malilay had threatened to make Duverglas's "'life a living hell,'" called her a "'black ass bitch,'" and stated she could not wait until Duverglas disappeared. Malilay called the police several times a day making up stories and complaining about "regular day to day living." On one occasion, Malilay pushed Duverglas. On another, Malilay opened Duverglas's garage door without permission to look inside. According to Duverglas, these problems had been "ongoing . . . for almost a year" and Malilay's "behavior has escalated to the point of violence and assault on my children and after [Malilay's] arrest her attitude has become that of retaliation."

The court issued a temporary restraining order against Malilay and scheduled a hearing on Duverglas's petition for April 2, 2012, the same day the court was scheduled to hear Malilay's petition for a restraining order.

At the April 2 hearing, Malilay and Duverglas appeared without legal representation and provided testimony under oath in response to the court's questioning. The court began with Malilay and immediately focused on Malilay's arrest for spitting on Duverglas's son. Malilay admitted she had been arrested, but denied the accusation. Malilay explained she was a flight attendant for the Department of Defense working in Afghanistan. After returning from a trip, her roommates complained they felt unsafe, and eventually one moved out. Malilay stated she "was afraid to go home because they threaten me many times and they threaten my roommate." She stated "every time . . . when I'm not flying . . . when I'm at home, they make a huge noise and they party all night, and I'm afraid to go out to the garbage can, or wherever, because they threaten me."

The court went through Malilay's petition and questioned her about her assertions. She stated Duverglas's friends were "drug dealers, that they make noise fighting and they have parties and . . . smoke pot in areas that are classified as public areas," and claimed to have witnessed "these things" herself. Malilay supplied pictures and videos, and also offered police reports and letters from a tenant and others. The court noted the police reports "really don't help" because "that's just what a police officer wrote down." The court also noted the letters, dated the previous July and September, were also "not much help."

Malilay repeated her claim about being harassed by Duverglas and "one of her husbands" at a liquor store after Malilay's release from jail. "So I'm standing at the liquor store. She's at the store with one of these ladies, and the Black male, he just jumped on me and pushed me and said, 'Bitch, be careful.' That was like the third time he threatened me." Malilay claimed Duverglas witnessed the incident, which occurred either March 4 or March 9, 2012.

The court also reviewed records Malilay provided listing her numerous service calls to the HOA security company between July 2011 and March 9, 2012. Her calls included a complaint "a group of kids . . . bouncing a ball against [Malilay's] garage" and a gas pipe that could "blow up [the whole house] some day," "two juveniles [] riding pocket motorcycles throughout the community," "three small kids being loud and unattended in the common area," and "children are playing in the fire lane blocking [Malilay's] garage." Malilay asserted Duverglas's "kids are maybe like five or seven years," and they were "unattended all the time." Malilay believed the incidents involving the children constituted harassment by Duverglas because "the kids are bouncing the ball against the garage door" and Malilay's "wall [was] starting to get cracked." The court

noted that “children outside might well be expected to make some noise.”

Duverglas asked the court to protect her “mostly it’s from the harassment of the videotaping,” explaining she took action “now because it’s escalating with . . . her spitting in my kid’s face.” Malilay pulled down her pants in front of Duverglas and her children after Duverglas asked Malilay “why she opened my garage without permission” a week before Malilay was arrested. Duverglas explained “in regards to the videotaping . . . she is coming up to my window and videotaping inside. She comes along the side – I live on the end, and there’s only bushes on my side, and she’s on the other side of the wall. She comes around from that side of the bushes and video tapes in the house all the time. [¶] When she’s videotaping [the children], it’s not just—it’s coming up to them and putting it this far away from their face (indicating).” Malilay took the videos to the HOA president, who told Malilay the children are “okay to play there.” Malilay “gets frustrated . . . pulls her car out of her garage and parks . . . where the fire lane is . . . to prevent my kids from playing.”

Addressing the spitting incident, Duverglas stated the children were playing outside when Malilay came around the bushes to videotape them. Duverglas’s son, Jalen, exclaimed, “Mom, she just spit on me.” Duverglas ran outside to confront Malilay, who claimed Jalen lied, but the other children corroborated Jalen. Malilay tried to “walk into” Duverglas to get away, then claimed Duverglas touched her and stated she was calling the police. Malilay pushed Duverglas out of the way to go by, and Duverglas pushed her back, explaining “I shouldn’t have pushed her back . . . .” She told Malilay to “go ahead and call the police.” Malilay got into her car and drove off. The police questioned the children, and when Malilay returned, Duverglas asked the officers to arrest her. Malilay yelled at Duverglas from the back of the police car “nodding her head

like, you're going to get it.”

Duverglas denied she had ever threatened Malilay or Malilay's roommate. Duverglas testified Malilay approached her one morning to complain that “her roommate had been here for seven years and now she's leaving because of me.” Malilay called Duverglas a ““Stupid Black-A[ss] B[itch],”” and threatened to ““make [her] life a living hell.””

The court turned again to Malilay and asked when Duverglas had threatened her. Malilay stated, “It's all the time when I'm coming home from my work. . . . [¶] I was threatened every day when I come home.” The last threat occurred before “they took [Malilay] to jail,” and Duverglas pushed her, scratched her, and said, ““Bitch, you're going to remember what they're going to do to you.”” When the police came to arrest Malilay, “one of the Black males in her party, he came to me and he said, ‘Bitch, be careful. I'll get you.’” Duverglas also threatened her in February. Duverglas told Malilay she was ““harassing my kids by taping them”” and said ““be careful. I'm going to make your life miserable.””

Malilay claimed Duverglas's husband broke her door and window after Malilay had obtained the temporary restraining order. Malilay had been “running in the morning. When I came back, the door was open, and she threw the paperwork three times.” Malilay claimed to have videotaped the incident on her cell phone. The court reviewed Malilay's video, remarking Malilay's trespass allegations appeared unfounded because “they're allowed to cross the property . . . to serve papers.”

The court denied Malilay's request for a restraining order, but granted Duverglas's request, “particularly with regard to the spitting on a child,” and noted Malilay's irrational concerns “about the behavior of these children. [¶] Bouncing a ball

by a gas meter is what I take to be an irrational concern. These are small children. They're going to be outside and they're going to be making noise. That's part of living in a congested area." The court directed Malilay "not to harass, not to intimidate, not to molest, attack, strike, stalk, threaten, assault, sexually or otherwise, hit, abuse, destroy personal property of, disturb the peace of, or videotape" Duverglas or her children. It also directed her "not to contact any of those persons directly or indirectly, in any way, including through third persons, but not limited to in person, by telephone, in writing, by public or private mail, interoffice mail, e-mail, text message, fax or electronic means and/or social media." Peaceful written contact through a lawyer or process server for service of legal papers related to a court case was permissible. The court also directed Malilay to stay at least five yards away from the protected persons, their home, workplace, school, child care facility and vehicle. The buffer zone did not apply when Malilay was within her own home, and it did not prevent her from going to and from work. The court also barred her from owning or possessing firearms or ammunition. The order expires April 2, 2015.

## II

### DISCUSSION

#### *A. Duverglas's Apparent Failure to Serve the Petition in Case No. 30-2012-00554517 Does Not Require Reversal*

In G046847, Malilay contends she "was never served with a copy of [Duverglas's] petition, temporary restraining order or notice of hearing" and "only became aware of the petition . . . during the hearing and, due to her language barrier, did not understand what was happening until [the court] issued the injunction . . . . Appellant was never even given a copy of the [petition] so she had no information on why Respondent was requesting a restraining order in the first place."

Section 527.6 provides, “A person who has suffered harassment as defined in subdivision (b) may seek a temporary restraining order and an injunction prohibiting harassment as provided in this section.” (§ 527.6, subd. (a)(1).) Subdivision (m) provides, “Upon the filing of a petition for an injunction under this section, the respondent shall be personally served with a copy of the petition, temporary restraining order, if any, and notice of hearing of the petition. Service shall be made at least five days before the hearing. The court may for good cause, on motion of the petitioner or on its own motion, shorten the time for service on the respondent.”

Here, nothing in the record reflects Duverglas served the petition as required by section 527.6, subdivision (m),<sup>1</sup> nor does the record contain evidence Malilay received the petition before the hearing. Accordingly, we accept Malilay’s unrebutted representations in her opening brief that Malilay only became aware of the petition, and its specific allegations, during the hearing. (*County of Yuba v. Savedra* (2000) 78 Cal.App.4th 1311, 1315.)

Nevertheless, Malilay waived the issue of defective notice when she appeared at the hearing and opposed Duverglas’s petition on the merits. It is well settled that opposition on the 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.” (*Tate v. Superior Court* (1975) 45 Cal.App.3d 925, 930.) Malilay failed to raise the issue of defective notice in the trial court, but even if she had, her failure to request a continuance

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<sup>1</sup> On the day she filed her petition, Duverglas filed a declaration stating she had been “unable to give notice to the Plaintiff/Petitioner or Defendant/Respondent for the following reasons: Defendant has become violent and threatening and I am in fear for my life. The police have advised me to keep away from her and completely ignore her.” Duverglas used a now-superseded Judicial Council form (L-0889) approved for optional use in other types of harassment cases.

or demonstrate prejudice from the defective notice constitutes a waiver. (*Carlton v. Quint* (2000) 77 Cal.App.4th 690, 697 [appellant’s failure to request continuance or claim prejudice from insufficient notice or services waives claim of inadequate service].)

Aside from the waiver issue, Malilay fails to affirmatively demonstrate she suffered any prejudice. (See *Reedy v. Bussell* (2007) 148 Cal.App.4th 1272, 1289 [“appellant must demonstrate not only that the notice was defective, but that he or she was *prejudiced*”].) Malilay asserts she would have prepared a defense and called witnesses on her behalf, but fails to identify what defense she would have presented or the witnesses she would have called. Because both petitions involved generally the same facts, it appears the same witnesses supporting Malilay’s petition would have supported a defense to Duverglas’s petition. Based on our review of the record, we cannot say Malilay has shown a reasonable probability of obtaining a more favorable result, a necessary requirement for a reversal of the judgment. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800.)

We also conclude the evidence was sufficient to support the issuance of an injunction. (See *Scripps Health v. Marin* (1999) 72 Cal.App.4th 324 [permanent injunction can only issue if the evidentiary record established the reasonable probability that defendant’s wrongful acts would be repeated in the future].) The evidence reflected Malilay engaged in a pattern of harassing behavior, culminating in the battery on Duverglas’s child. We cannot say the trial court erred in determining there was a reasonable probability Malilay’s wrongful acts would be repeated in the future. We are also unimpressed by Malilay’s argument “no charges were ever filed” arising out of the spitting incident. The fact is not in the appellate record. In any event, assuming authorities did not pursue criminal charges, the trial court was entitled to accept

Duverglas's characterization of the incident, which amply supported the restraining order.

*B. Sufficient Evidence Supports Denial of an Injunction Against Duverglas in Case No. 30-2012-00552852*

In G046779, Malilay contends the trial court erred because substantial evidence supported issuance of a restraining order in her favor. The issue on appeal, however, is not whether substantial evidence would have supported the issuance of a civil harassment restraining order. Rather, the issue is whether substantial evidence supports the trial court's determination. If it does, we may not substitute our judgment and second-guess the trial court, even if substantial evidence exists to support a contrary conclusion.

A person who has suffered harassment may seek a temporary restraining order and an injunction prohibiting harassment. (§ 527.6.) 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." (§ 527.6, subd. (b)(3).) "Unlawful violence" means "any assault or battery, or stalking." (§ 527.6, subd. (b)(1); Pen. Code, § 646.9.) "Credible threat of violence" is defined 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).) "'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 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 e-mail. Constitutionally protected activity is not included within the meaning of ‘course of conduct.’” (§ 527.6, subd. (b)(1).)

We review an order granting an injunction under section 527.6 for substantial evidence. (*Duronslet v. Kamps* (2012) 203 Cal.App.4th 717, 725 (*Duronslet*.) “In assessing whether substantial evidence supports the requisite elements of willful harassment, as defined in . . . section 527.6, we review the evidence before the trial court in accordance with the customary rules of appellate review. We resolve all factual conflicts and questions of credibility in favor of the prevailing party and indulge in all legitimate and reasonable inferences to uphold the finding of the trial court if it is supported by substantial evidence which is reasonable, credible and of solid value. [Citations.]” (*Schild v. Rubin* (1991) 232 Cal.App.3d 755, 762.)

Here, the court conducted a hearing on Malilay’s petition, received testimony from Malilay and Duverglas, reviewed documents and photographic evidence submitted by Malilay, and independently inquired concerning Malilay’s allegations. (See *Duronslet, supra*, 203 Cal.App.4th at pp. 728-729 [section 527.6 requires the court at the hearing on the injunction to receive any testimony that is relevant and authorizes the court to make an independent inquiry; court may consider hearsay evidence].) The court found Malilay had not shown by clear and convincing evidence that unlawful harassment existed. The trial court reasonably could conclude Malilay’s assertions of multiple prior threats appeared exaggerated and lacked corroboration. Based on the evidence presented, the trial court could view her claims concerning Duverglas’s social activities and her children’s behavior as involving neighborhood squabbling, not harassing conduct. The trial court, which reviewed Malilay’s exhibits, did not believe Duverglas trespassed on, or damaged, Malilay’s property. Concerning the incident occurring March 9 or 10, 2012,

Duverglas provided a plausible and exonerating explanation. Each woman shoved the other, and police officers investigating the incident took no action. Finally, no disinterested witness or other evidence corroborated Malilay's testimony that Duverglas's companion "jumped on" or threatened Malilay after Malilay's release from jail. Malilay apparently did not report this incident to the police, nor did she seek to question or cross-examine Duverglas about this or any of the prior alleged threats or incidents. We are in no position to second-guess the trial court's implied credibility findings against Malilay. Substantial evidence supports the trial court's order denying Malilay's request for a civil harassment restraining order against Duverglas.

### III

#### DISPOSITION

The orders granting an injunction in case No. 30-2012-00554517 and denying an injunction in case No. 30-2012-00552852 are affirmed. Respondent is entitled to any costs on appeal.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.