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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

BJ DAVIS, Plaintiff and Appellant, v. HOWARD COHEN, Defendant and Respondent.	B255873 (Los Angeles County Super. Ct. No. ES 016929)

APPEAL from orders of the Superior Court of Los Angeles County. Donna Fields Goldstein, Judge. Affirmed.

BJ Davis, in pro. per., for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

BJ Davis, acting in propria persona, appeals from two orders in which the trial court (1) terminated a restraining order Davis previously obtained against his opponent and (2) declared Davis to be a vexatious litigant. We affirm.

FACTS

Appellant BJ Davis petitioned for a restraining order against respondent Howard Cohen, on the grounds of harassment. In August 2013, the trial court conducted a hearing and issued a restraining order against Cohen. Cohen was ordered not to contact or harass appellant, or engage in "cyberstalking."

Cohen sought to vacate the restraining order, have appellant declared a vexatious litigant, and the issuance of a restraining order against appellant. Appellant returned the favor and asked to have Cohen declared a vexatious litigant.

The court heard Cohen's motion to have appellant declared a vexatious litigant on January 8, 2014. It determined that appellant was "found a vexatious litigant in federal court" in 2009, and is the subject of a federal prefiling order. In addition, appellant has filed "at least five dismissed actions in the past seven years" (citing seven dismissals); appellant filed 15 other cases that were dismissed before 2006, which the court did not consider because they are outdated. Appellant failed to counter Cohen's evidence by showing that the seven actions were not decided adversely to him or "offer any grounds to refute the evidence that he meets the definition of [a] vexatious litigant." Instead, appellant simply stated that the motion was "preposterous" and "mind-boggling." The court declared appellant to be a vexatious litigant and imposed a prefiling order.

The court clerk served appellant with the court's decision on January 14, 2014. A vexatious litigant prefiling order was entered on January 21, 2014.

On January 24, 2014, appellant moved for reconsideration, raising a procedural challenge to Cohen's motion, and arguing that he did not engage in vexatious behavior in state court, only in federal court. Appellant also claimed he was represented by counsel or prevailed in some of the litigation. He did not submit evidence regarding the federal order declaring him a vexatious litigant. The trial court signaled its intent to deny the

motion. Without leave from the court, appellant resubmitted his motion, bolstered by an affidavit signed under penalty of perjury.

On February 26, 2014, the court ruled that the motion for reconsideration lacked substance and proper procedure. Appellant did not identify new or different facts, circumstances or law, and offered no explanation for his failure to provide evidence regarding his litigation history. By contrast, Cohen gave supplemental information showing 11 additional meritless litigations to buttress the court's findings. The court refused to reopen the hearing because appellant did not comply with the legal requirements for reconsideration. The court denied the motion for reconsideration and denied appellant's request to have Cohen declared a vexatious litigant because there is no evidence to support such a finding.

On March 3, 2014, the trial court issued an order to show cause (OSC) why the restraining order appellant obtained against Cohen should not be terminated for lack of ongoing threats. At the OSC hearing on April 11, 2014, the court terminated the restraining order. We did not receive a reporter's transcript of the hearing.[1]

On April 22, 2014, Davis filed two notices of appeal. The first is from the order of February 26, 2014, which denied appellant's motion for reconsideration. The second is from the order of April 11, 2014, terminating Davis's restraining order against Cohen. On September 17, 2014, this Court gave appellant permission to proceed with his appeals.

DISCUSSION

1. Termination of Restraining Order

Appeal may be taken from an order dissolving an injunction, including civil restraining orders to prevent harassment. (Code Civ. Proc., §§ 527.6, 904.1, subd. (a)(6); *R.D. v. P.M.* (2011) 202 Cal.App.4th 181, 187.) A ruling vacating an injunction "'"rests

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[1] In his designation of the record on appeal, appellant checked a box stating that he elects to proceed "WITHOUT a record of the oral proceedings in the superior court. I understand that without a record of the oral proceedings in the superior court, the Court of Appeal will not be able to consider what was said during those proceedings in determining whether an error was made in the superior court proceedings."

in the sound discretion of the trial court upon a consideration of all the particular circumstances of each individual case"' and 'will not be modified or dissolved on appeal except for an abuse of discretion.'" (*Salazar v. Eastin* (1995) 9 Cal.4th 836, 849-850; *Union Interchange, Inc. v. Savage* (1959) 52 Cal.2d 601, 606; *Froomer v. Drollinger* (1960) 183 Cal.App.2d 787, 788-789.)

Appellant writes that "there is no OSC on file within the Clerk's Transcript" and he "was not served with any notice of the upcoming OSC" to terminate the restraining order against Cohen. He is mistaken: pages 271-272 of the clerk's transcript contain an OSC setting a hearing on April 11, 2014, and directing appellant to show cause why his restraining order "should not be terminated for lack of ongoing threats." The court clerk served the OSC on appellant on March 14, 2014. Appellant had nearly one month to prepare for the hearing, and to submit evidence of ongoing threats.

At the OSC hearing on April 11, 2014, appellant and Cohen appeared and argued the case. The court specifically found that appellant "was served with notice of this Order to Show Cause." Appellant's claim that he had no notice of the OSC is belied by the record, and by the fact that he participated in the proceeding.

Appellant incorrectly asserts that the trial court lacked legal authority to terminate the restraining order. "In any action, the court may on notice modify or dissolve an injunction or temporary restraining order upon a showing that there has been a material change in the facts upon which the injunction or temporary restraining order was granted . . . or that the ends of justice would be served by the modification or dissolution of the injunction or temporary restraining order." (Code Civ. Proc., § 533.) The court retains "inherent power" to modify or revoke an injunction: it "had jurisdiction to . . . determine whether there has been a change in the controlling factors upon which the injunction rested or whether the ends of justice would be served by modification of the order." (*Union Interchange, Inc. v. Savage, supra,* 52 Cal.2d at pp. 605-606.)

Appellant does not cite to a reporter's transcript of the OSC hearing on April 11, 2014. We cannot tell whether the parties offered sworn testimony or other evidence in support of their respective positions. It is appellant's burden to provide an adequate

record to demonstrate error and his failure to do so results in affirmance of the trial court's determination. (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1200-1201.)

Appellant elected not to provide this Court with a transcript, which would shed light on the trial court's decision to terminate the injunction, and he did not attempt to settle the record with the trial court. Appellant's claim that he "formally objected to the court's intent to dismiss the Restraining Order" and "submitted extensive evidence of Appellee Howard Cohen's harassment, stalking and threats of violence" is unsupported by evidence presented at the hearing on April 11, 2014. In fact, the trial court's minute order states that the restraining order is terminated "[t]here being no objections on file."

In light of the deficient appellate record, we are precluded from overturning the judgment. Without a transcript of testimony, a reviewing court cannot determine if appellant proved the existence of an ongoing threat. (See *Stephens v. Aviation Research etc. Corp.* (1966) 243 Cal.App.2d 349, 351-352; *C.H. Duell v. Metro-Goldwyn-Mayer Corp.* (1932) 128 Cal.App. 376, 378 [when the record is incomplete and does not contain all evidence, an appellate court cannot determine if the claimed error resulted in a miscarriage of justice].) We must presume that the trial court heard sufficient evidence to support its findings and determination. (*Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.* (2014) 226 Cal.App.4th 26, 43 [it is presumed that there was evidence to sustain the trial court's findings, and appellant is required to demonstrate the contrary].)

2. <u>Order Declaring Appellant to Be a Vexatious Litigant</u>

Appellant challenges the court order declaring him to be a vexatious litigant. The notice of appeal lists the order denying reconsideration, a nonappealable order. (*Powell v. County of Orange* (2011) 197 Cal.App.4th 1573, 1576-1577.) We deem the appeal to have been taken from the prefiling order entered on January 21, 2014. (*Luckett v. Panos* (2008) 161 Cal.App.4th 77, 84-85, 90 [a prefiling order is an appealable injunction].)

The vexatious litigant statutes "are designed to curb misuse of the court system by those persistent and obsessive litigants who, repeatedly litigating the same issues through groundless actions, waste the time and resources of the court system and other litigants." (*Shalant v. Girardi* (2011) 51 Cal.4th 1164, 1169; *In re Kinney* (2011) 201 Cal.App.4th

951, 957-958.) When a court declares someone to be a vexatious litigant, "[w]e uphold the court's ruling if it is supported by substantial evidence [and] presume the order declaring a litigant vexatious is correct and imply findings necessary to support the judgment." (*Bravo v. Ismaj* (2002) 99 Cal.App.4th 211, 219; *In re Marriage of Rifkin & Carty* (2015) 234 Cal.App.4th 1339, 1346.)

Code of Civil Procedure section 391 lists the factors leading to vexatious litigant status.[2] A person "who does *any*" of the listed factors is a vexatious litigant. (Code Civ. Proc., § 391, subd. (b), italics added.) Here, the court declared appellant to be a vexatious litigant on two grounds.

First, the court determined that appellant was declared a vexatious litigant in federal court. (Code Civ. Proc., § 391, subd. (b)(4).) Appellant gives short shrift to this finding. Without citing any evidence in the record on appeal, appellant asserts that there are no similarities between the federal litigation and the current litigation. Without a complete record of evidence, we must presume that the court heard sufficient evidence to supporting its findings. (*Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.*, *supra*, 226 Cal.App.4th at p. 43.)

In the trial court, appellant failed to provide substantive opposition to Cohen's vexatious litigant motion, to refute Cohen's evidence. Instead, appellant informed the trial court that the motion was "preposterous" and "mind-boggling." He has repeated the error in this court. Because the trial court could declare appellant a vexatious litigant based on *any one* of the four factors listed in Code of Civil Procedure section 391, we affirm the order because appellant was undisputedly declared a vexatious litigant in

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[2] The factors are: (1) commencing, prosecuting or maintaining in propria persona at least five litigations that end adversely during the preceding seven-year period; (2) while in propria persona, repeatedly relitigating or attempting to relitigate matters decided adversely to the litigant; (3) repeatedly filing unmeritorious motions, pleadings or other papers, conducting unnecessary discovery or engaging in tactics that are frivolous or designed to cause delay; or (4) being declared a vexatious litigant by any state or federal court in any action or proceeding based upon the same or substantially similar facts, transactions, or occurrences. (Code Civ. Proc., § 391, subd. (b)(1)-(4).)

federal court, and he does not cite any evidence refuting that dispositive fact on appeal. We need not address the trial court's alternative grounds for declaring appellant a vexatious litigant.

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

CHAVEZ, J.

HOFFSTADT, J.