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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff and Respondent,

v.

ISAAC GABRIEL,

Defendant and Appellant.

B258138

(Los Angeles County
Super. Ct. No. SC089233)

APPEAL from an order of the Superior Court of Los Angeles County, Lisa Hart Cole, Judge. Petition granted, order vacated, and matter remanded with directions.

Champ & Associates, Michael W. Champ; and Isaac Gabriel, in pro. per., for Defendant and Appellant.

Marsha Jones Moutrie, City Attorney, Gary Rhoades, Deputy City Attorney, for Plaintiff and Respondent.

Defendant Isaac Gabriel appeals from a contempt order issued after the trial court found he had violated a permanent injunction sought by the City of Santa Monica, on behalf of the People of the State of California (the People), enjoining him from coming within 10 yards of any tenant at his two rental properties in Santa Monica, from entering any tenant's unit, and from performing any management or repair at the rental properties, and requiring him to hire a reputable professional management company to manage the rental properties. As explained below, we treat his appeal from a nonappealable order as a petition for an extraordinary writ. Gabriel represented himself at the contempt hearing, and we agree with his contention the trial court did not adequately advise him regarding self-representation in this criminal proceeding. Accordingly we grant the writ, vacate the contempt order, and remand the matter for a new evidentiary hearing on the order to show cause regarding contempt.

BACKGROUND

As set forth in our prior published opinion in this matter, since 1995, when Gabriel bought two multi-unit residential properties in Santa Monica, he has had multiple judgments (both criminal and civil) entered against him regarding his management of those properties. (*People ex rel. City of Santa Monica v. Gabriel* (2010) 186 Cal.App.4th 882, 884-885.)

The People filed the present civil action against Gabriel in April 2006, asserting one cause of action under the Unfair Competition Law (UCL; Bus. & Prof. Code, § 17200 et seq.). The People alleged Gabriel sexually harassed a tenant, entered tenants' units without permission, and rented uninhabitable space as living quarters. (*People ex rel. City of Santa Monica v. Gabriel, supra*, 186 Cal.App.4th at p. 884.) After a trial, at which the People presented testimony from four of Gabriel's tenants, the trial court found the People proved Gabriel committed the unlawful acts listed above, as alleged in the unfair competition cause of action. (*Id.* at pp. 885-886.) The court entered a judgment requiring Gabriel to pay \$7,500 in civil penalties and enjoining him for five years from coming within 10 yards of any tenant at his two rental properties, from entering any tenant's unit, and from performing any management or repair at the rental properties, and

requiring him to hire a reputable professional management company to manage the rental properties. The court also ordered Gabriel to pay the People's attorney fees.

Gabriel appealed the judgment. He did not challenge the trial court's findings he sexually harassed a tenant, entered tenants' units without permission, and rented uninhabitable space as living quarters. He contended (1) the trial court erred in admitting evidence of past interactions with tenants as uncharged bad acts, (2) sexual harassment is not a business practice within the meaning of the UCL, and (3) the award of attorney fees was improper under the UCL. We reversed the award of attorney fees, agreeing with Gabriel that the UCL does not authorize an award of such fees, and affirmed the judgment in all other respects, rejecting Gabriel's other contentions. (*People ex rel. City of Santa Monica v. Gabriel, supra*, 186 Cal.App.4th at pp. 886-892.) On November 9, 2010, the trial court issued an amended judgment, omitting the attorney fees award and retaining the other terms, including the permanent injunction. On November 11, 2010, the People served on both Gabriel and his attorney a notice of entry of judgment with the amended judgment attached.

On October 31, 2013, the People filed an ex parte application for an order to show cause regarding contempt. The People asserted Gabriel had "willfully and repeatedly violated" the November 9, 2010 permanent injunction, "by coming within ten yards of tenants; by willfully refusing to hire a management company for either property; and by continuing to perform acts of management." Attached to the supporting declaration of Deputy City Attorney Gary Rhoades, the People submitted a transcript from an August 8, 2013 hearing before the Santa Monica Rent Control Board, in which Gabriel testified he continued to manage one of the Santa Monica rental properties (1035 5th Street), and visited the property on a daily or weekly basis as part of his management duties. The People also submitted correspondence from Rhoades to Gabriel's attorney requesting proof that Gabriel had hired a professional management company for the rental properties as required under the permanent injunction. In his declaration, Rhoades stated his office had not received such proof.

The People also attached to the ex parte application the supporting declarations of Mitchel Resnick and Stephen Murnane, two of Gabriel's tenants. Resnick, a tenant at 1035 5th Street, stated in his October 21, 2013 declaration, that Gabriel continued to manage the rental property, visited the property at least several times per week during September and October 2013, and had come within 10 yards of Resnick on numerous occasions between June and October 2013.

Murnane, a tenant at 1007 1/2 16th Street, stated in his October 28, 2013 declaration, that Gabriel and his wife continued to manage the rental property and all management notices Murnane received, including two in 2013, came from Gabriel's wife. Murnane also stated that on October 27, 2013, Gabriel attacked him with a baseball bat at the rental property, striking him four or five times on the arms, causing redness and bruising. According to Murnane's declaration, police officers responded and arrested Gabriel.

The trial court granted the ex parte application and set the matter for a hearing for "Gabriel to show cause why he should not be adjudged in contempt for disobeying" the November 9, 2010 amended judgment.

The trial court held the contempt hearing on March 25, 2014. Gabriel appeared and represented himself. Deputy City Attorney Gary Rhoades represented the People. Gabriel stipulated he had actual notice of the November 9, 2010 amended judgment/permanent injunction. The trial court took judicial notice of the transcript from the August 8, 2013 hearing before the Santa Monica Rent Control Board (discussed above), with no objection from Gabriel. Mitchel Resnick and Stephen Murnane testified for the People.

Resnick testified that Gabriel continued to manage the rental property at 1035 5th Street after the trial court issued the November 9, 2010 injunction. For example, it was Gabriel, acting as manager, who took away Resnick's parking space, the precipitating event which led to the August 8, 2013 hearing before the Santa Monica Rent Control Board, at which Gabriel admitted he still managed the rental property. Resnick personally observed Gabriel respond to repair requests at the property. For example,

Resnick was inside another tenant's unit examining a leak in the ceiling when Gabriel arrived and entered the unit, passing within 10 yards of Resnick and the other tenant. Resnick mailed his rent checks to Gabriel. Resnick maintained a ledger in which he documented that Gabriel had come within 10 yards of him 36 times since October 2013.

Murnane testified that Gabriel lived at the rental property where Murnane lived. On October 27, 2013, Murnane was kneeling down outside Gabriel's unit, trying to restore power to his unit by flipping a switch, when Gabriel approached and struck him four or five times on the arms with a baseball bat. Murnane called the police. Officers responded and handcuffed and arrested Gabriel and took Gabriel away.

At the conclusion of the hearing, the trial stated it found Gabriel in contempt of court for failure to obey the November 9, 2010 amended judgment. On April 3, 2014, the court issued a contempt order consistent with its oral ruling. The court found Gabriel had committed at least 24 acts in violation of the amended judgment (actively managing the rental properties since at least August 2013, including sending a notice in August 2013 requesting rent checks be sent to him, coming within 10 yards of Resnick at least 36 times since October 2013, attacking Murnane with a baseball bat, failing to have a professional property management company for at least 30 weeks since August 2013), and fined him \$1,000 for each of those acts for a total fine of \$24,000. The court also ordered Gabriel to serve five days in jail, but stayed that part of the order until April 29, 2014, to allow Gabriel to provide proof that he was no longer managing the properties and had taken steps to comply with the November 9, 2010 amended judgment. After a hearing on June 19, 2014, the trial court lifted the stay and ordered Gabriel to surrender to the county jail because Gabriel had not obtained an approved management company and stated he had "no intention of doing so," as set forth in the court's June 19, 2014 minute order. On August 7, 2014, Gabriel filed a notice of appeal from the contempt order.

DISCUSSION

Contempt Defined

“Disobedience of any lawful judgment, order, or process of the court” constitutes “contempt[] of the authority of the court.” (Code Civ. Proc., § 1209, subd. (a)(5).)¹ “When the contempt is not committed in the immediate view and presence of the court . . . an affidavit shall be presented to the court or judge of the facts constituting the contempt.” (§ 1211, subd. (a).) To prove contempt, the moving party must establish (1) the existence of a valid court order, (2) the defendant’s actual notice of the order, (3) the defendant’s ability to comply with the order, (4) the defendant’s willful disobedience of the order. (*Conn v. Superior Court* (1987) 196 Cal.App.3d 774, 784.) The court may impose a fine not exceeding \$1,000 and a jail term of five days for each act of contempt. (§ 1218, subd. (a).)

“The judgment and orders of the court or judge, made in cases of contempt, are final and conclusive.” (§ 1222.) A “judgment of contempt that is made final and conclusive by Section 1222” is not an appealable order. (§ 904.1, subd. (a)(1).) “Because no appeal lies from a judgment in civil contempt proceedings, review by extraordinary writ is appropriate in such cases.” (*Conn v. Superior Court, supra*, 196 Cal.App.3d at p. 784.) Although Gabriel has appealed from a nonappealable order, and already has served his jail sentence, we will exercise our discretion and treat the appeal as a petition for an extraordinary writ.

Gabriel’s Contentions Challenging the Legality of the Contempt Order

Gabriel challenges the contempt order, contending (1) the People’s affidavits presented in support of the ex parte application for an order to show cause regarding contempt were insufficient for the trial court to set the matter for a hearing, (2) the trial court failed to advise Gabriel properly regarding self-representation and his right to remain silent, (3) the term of the injunction requiring him to hire a management company

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

violates the Takings Clause of the Fifth Amendment, and (4) the contempt order violates the Double Jeopardy Clause.

Constitutional Issues

Gabriel contends the term of the permanent injunction requiring him to hire a management company violates the Takings Clause of the Fifth Amendment because the “properties are located in a rent control district, and the cost of retaining the management company cannot be passed on to the tenants without prior permission of the rent control department.” Gabriel did not challenge the injunction on this basis in his appeal and the time to raise this issue has long passed.

Gabriel also contends the contempt order violates the Double Jeopardy Clause because the People filed a prior ex parte application for an order to show cause regarding contempt in April 2011. The Double Jeopardy Clause is inapplicable here, and Gabriel cites no authority demonstrating otherwise.

The Sufficiency of the Factual Showing in the People’s Affidavits

The People’s affidavits presented in support of the ex parte application for an order to show cause regarding contempt set forth sufficient facts for the trial court to set the matter for hearing. First, the November 9, 2010 amended judgment/permanent injunction is a valid court order. Gabriel challenged the injunction on appeal and was unsuccessful. The People attached the amended judgment/permanent injunction to the Declaration of Gary Rhoades submitted in support of the ex parte application. Second, Gabriel had actual notice of the November 9, 2010 amended judgment/permanent injunction (a fact to which he stipulated during the contempt proceedings). The proof of personal service of the amended judgment/permanent injunction on both Gabriel and his attorney is attached to the declaration of Gary Rhoades. Third, the People set forth facts indicating Gabriel had the ability to comply with the terms of the permanent injunction. For example, the People attached to the Declaration of Gary Rhoades the transcript from the August 8, 2013 hearing before the Santa Monica Rent Control Board, in which Gabriel testified he owned the rental property at 1035 5th Street, continued to manage that property, and visited the property on a daily or weekly basis as part of his

management duties. Moreover, the Declaration of Stephen Murnane submitted in support of the ex parte application states Gabriel and his wife continued to manage the rental property at 1007 1/2 16th Street. Fourth, the declarations from tenants Mitchel Resnick and Murnane set forth facts constituting numerous acts of willful disobedience of the permanent injunction, including, but not limited to, actively managing both rental properties, coming within 10 yards of Resnick on numerous occasions, and attacking Murnane with a baseball bat, as summarized in more detail above. Thus, the People set forth sufficient facts in the affidavits to establish a prima facie case demonstrating Gabriel's contempt. The trial court properly set the matter for hearing.

The Trial Court's Advisement of Gabriel's Rights

Gabriel represented himself at the contempt hearing and now contends the trial court did not protect his rights by adequately advising him regarding self-representation and his right to remain silent.

After the People had made an opening statement and Gabriel had begun his opening statement, the trial court interrupted Gabriel, and the following exchange occurred:

"THE COURT: -- Mr. Gabriel, excuse me for one moment.

"MR. GABRIEL: Yes.

"THE COURT: I just want to advise you that this is a quasi-criminal proceeding, so when you represent yourself, you are not testifying under oath but you are making an admission that may affect your case and therefore, why don't I advise you of your rights.

"You have a right to remain silent. No one can make you say anything against your own self interest. You have a right to hire a lawyer and anything you say can be used against you.

"MR. GABRIEL: Yes.

"THE COURT: Do you understand all that, sir?

"MR. GABRIEL: Yes, I understand.

"THE COURT: Do you still wish to proceed?

“MR. GABRIEL: Yes.

“THE COURT: All right. Go ahead.”

The contempt hearing resumed with Mr. Gabriel completing his opening statement.

We agree with Gabriel’s contention on appeal that the trial court did not adequately advise him regarding self-representation. Gabriel was facing a loss of his liberty (jail time) as punishment for contempt, and had the right to have an attorney represent him in this criminal proceeding. (*County of Santa Clara v. Superior Court* (1992) 2 Cal.App.4th 1686, 1697.) The court was required to inform appellant that if he was indigent, he had the right to have counsel appointed for him. The trial court failed to advise him of his right to appointment of counsel. (*Id.* at pp. 1694-1695.) The court also had a duty to apprise Gabriel of the dangers of self-representation and to ensure Gabriel was knowingly and intelligently waiving his right to counsel. (*People v. Welch* (1999) 20 Cal.4th 701, 729; *Faretta v. California* (1975) 422 U.S. 806, 835.) In advising Gabriel about his rights, the trial court emphasized his right to remain silent, but did not advise him about the dangers of self-representation. The court’s admonition was insufficient for us to find Gabriel knowingly and intelligently waived his right to counsel.

Accordingly, we grant the writ, vacate the contempt order, and remand the matter for a new evidentiary hearing on the order to show cause regarding contempt.

DISPOSITION

The petition for an extraordinary writ is granted and the contempt order is vacated. The matter is remanded for a new evidentiary hearing on the order to show cause regarding contempt.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

MOOR, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.