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Court of Appeal,
First District, Division 5, California.

PEOPLE of the State of California, acting BY AND THROUGH San Francisco City Attorney Dennis J. HERRERA, Plaintiff and Appellant,
v.
CORRECTIVE EDUCATION COMPANY, et al., Defendants and Respondents.

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(San Francisco County Super. Ct. No. CGC–15–549094)

Attorneys and Law Firms

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Opinion

SIMONS, J.

***1** The People of the State of California, acting by and through San Francisco City Attorney Dennis J. Herrera (the People), appeal the trial court's denial of their motion for a preliminary injunction. We reverse and remand to the trial court for further proceedings.

BACKGROUND

Defendant Corrective Education Company (the Company) contracts with retailers in California and nationwide to provide a private program for processing suspected shoplifters in which the retailer does not report the incident to law enforcement if the suspected shoplifter takes, and pays for, an "education course" provided by the Company. The People sued the Company under Business and Professions Code section 17200, alleging the Company's business practices were unlawful (constituting extortion and false imprisonment), fraudulent, and unfair. The People moved for a preliminary injunction to restrain the Company from doing the following in California: "(1) requesting or accepting any money from suspected shoplifters to take the program, including from those who have already signed a contract with [the Company] but have not yet paid in full; (2) retaining any money from those who have signed a contract with [the Company] but not yet completed the program; (3) taking any action to enforce an existing contract against a suspected shoplifter, or entering into any new contracts for the program; (4) providing police or prosecutors with any confession obtained from suspected shoplifters as a condition of their participation in the program; (5) detaining, through its retailer partners, suspected shoplifters for the purpose of showing them [the Company's] video or otherwise offering them the program; and (6) showing the video to suspected shoplifters."

According to the evidence submitted in connection with the preliminary injunction motion, the Company provides tools and training to retailers that want to use its program. When the retailer's security guard apprehends a suspect determined to be a first-time offender, the guard informs the suspect of "an alternative option to traditional shoplifting consequences." If the suspect is interested in learning more, he or she is shown a video produced by the Company. Prior to the People's lawsuit, the video informed the suspect: "you have been detained by this company for a serious crime with very serious criminal consequences. This establishment is giving you the chance to avoid these serious criminal charges" with "the

resolution option," which "avoids the criminal and civil consequences and enrolls you in a life skills program. If you choose the resolution option, you won't have to wait for the police, you won't have to go to jail, and you won't have a criminal record of this incident." The video concludes: "If you understand anything from this video, it should be this. This crime is serious. But this establishment is giving you a choice to avoid criminal charges and to learn from your experiences rather than suffer the consequences." As of the week of July 14—the week the Company's preliminary injunction opposition papers were due—this video was no longer in use in California. The new, shorter video states: "You are watching this message because you have been detained by this company for a crime with potential criminal consequences. This establishment is giving you a chance to avoid these criminal charges" with a program called "the Restorative Justice Option"; if this option is successfully completed, "the retailer will not pursue this matter with law enforcement" and "no criminal or arrest record related to this incident will be associated with you."

***2** If, after watching the video, the suspect agrees to participate in the program, he or she signs a contract with the Company. As of March 2016, more than 8,000 Californians—approximately 90 percent of the suspects who watched the Company's video—had signed such a contract. Pursuant to the contract, the suspect agrees to pay the Company $500 (if paid in full within three days the amount is reduced to $400) and to complete the Company's educational program. Prior to August 1, 2016 (shortly after the Company's preliminary injunction opposition papers were due), the contract also required the suspect to sign a written confession.

The People submitted recordings (and transcripts) of conversations between suspects and Company employees referred to as "coaches." In these calls, some suspects spoke about the difficulty they have paying the Company. As one suspect told a coach, "I know that $50 [as an initial payment] doesn't seem like a lot of money for some people but it is for me right now." This sentiment was repeated by other suspects: "I'm on social services. I can't even afford 50 [dollars], but I'll do what I have to do to get that"; "I'm trying to work with you guys .... but I don't get a lot of money every month. I'm on a fixed income"; "I have like 5 kids and like 50 dollars to my name. I don't have 50 to give you guys"; "I don't have a job and I don't have any source of income right now." In these conversations, coaches warned suspects that if they fail to pay the amount owed, the suspect's "information would end up being sent back to [the retailer], who would then file charges for the incident," or the suspect's "account would be red-flagged which means it would run the risk of being sent back to the retailer who would then file charges."[1]

The Company's videos and their contract with suspects fail to mention pretrial diversion programs that California municipalities are authorized to adopt for first-time offenders accused of most misdemeanors. (See Pen. Code, § 1001.50 et seq.) The People submitted evidence that at least 12 counties in California, including San Francisco, offer such programs to first-time petty theft offenders. For example, San Francisco's "Neighborhood Court" program operates before arraignment; enables people who complete the program to avoid prosecution and say they have never been arrested; and, though it has a sliding scale fee of up to $125, most participants pay nothing.

With respect to irreparable harm, the People pointed to the "fear and distress" caused by the threats of criminal prosecution, as evidenced by the high enrollment rate after watching the Company's video (approximately 90 percent) and the suspects' statements during the telephone calls with Company coaches. The Company submitted evidence the requested injunction would "shut-down" the Company's California operations, resulting in the loss of 20 percent of the Company's gross revenue and damaging its reputation nationwide. The Company has no operating profit and argued an injunction would harm its ability to become profitable.

The trial court denied the People's motion for a preliminary injunction. The trial court "[a]ssum[ed] without deciding that [the People] might prevail at trial." So assuming, the court found the Company "has shown that its harm from the preliminary injunction in the interim would be irreparable—loss of its California business," and noted the People, "unlike a private-sector litigant, would post no undertaking to compensate defendant for its losses should defendant win the case." The court found the People's asserted harm "undercut by the absence of any declaration or testimony from a 'victim' as well as [the People's] failure to seek a preliminary injunction until now, after suing in November 2015."

DISCUSSION

***3** " '[W]hether a preliminary injunction should be granted involves two interrelated factors: (1) the likelihood that the plaintiff will prevail on the merits, and (2) the relative balance of harms that is likely to result from the granting or denial of interim injunctive relief.' [Citation.] When the plaintiff is a governmental entity seeking to enjoin illegal activity, a more deferential standard applies: 'Where a governmental entity seeking to enjoin the alleged violation of an ordinance which specifically provides for injunctive relief establishes that it is reasonably probable it will prevail on the merits, a rebuttable presumption arises that the potential harm to the public outweighs the potential harm to the defendant. If the defendant shows that it would suffer grave or irreparable harm from the issuance of the preliminary injunction, the court must then examine the relative actual harms to the parties.' " (*People ex rel. Feuer v. FXS Management, Inc.* (2016) 2 Cal.App.5th 1154, 1158–1159 (*FXS Management*); see also *IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 72 (*IT Corp.*).)[2]

If the defendant makes such a showing, "an injunction should issue only if—after consideration of both (1) the degree of certainty of the outcome on the merits, and (2) the consequences to each of the parties of granting or denying interim relief—the trial court concludes that an injunction is proper.... [I]f it appears fairly clear that the plaintiff will prevail on the merits, a trial court might legitimately decide that an injunction should issue even though the plaintiff is unable to prevail in a balancing of the probable harms. On the other hand, the harm which the defendant might suffer if an injunction were issued may so outweigh that which the plaintiff might suffer in the absence of an injunction that the injunction should be denied even though the plaintiff appears likely to prevail on the merits." (*IT Corp.,* at pp. 72–73.) "The trial court's determination must be guided by a 'mix' of the potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction." (*Butt v. State of California* (1992) 4 Cal.4th 668, 678.)

"On review, a trial court's order with regard to a preliminary injunction may be affirmed if either the balance-of-hardships analysis or plaintiffs' likelihood of success considerations would alone support the ruling. [Citation.] However, if the trial court relies on but one of the foregoing, the reviewing court must determine whether that reliance conclusively supports the trial court's determination regardless of the remaining considerations." (*King v. Meese* (1987) 43 Cal.3d 1217, 1227–1228.) Where "the trial court refused to consider the 'likelihood of prevailing on the merits' factor, we do not review the trial court's ruling under the deferential abuse of discretion standard." (*Right Site Coalition v. Los Angeles Unified School Dist.* (2008) 160 Cal.App.4th 336, 344–345 (*Right Site Coalition*).) An order denying preliminary injunctive relief based solely on the balance of the hardships will not be affirmed where "the balance of hardships favors defendants ... [but does not] tilt[ ] so sharply in their favor that it supports the trial court's order irrespective of the likelihood of plaintiffs' success on the merits." (*King,* at p. 1228.)

The People argue the trial court failed to consider the likelihood of success. The Company contends the trial court did consider the likelihood of success and simply concluded *any* likelihood of success was outweighed by the harm to the Company. We agree with the People. The trial court's written order assumes only that the People "*might* prevail at trial" (emphasis added), in other words, that it is possible the People will prevail. The court made neither a finding nor an assumption about the likelihood of that possibility. This is insufficient in light of the significance of the *degree* of likelihood of success to the trial court's analysis. " '*[T]he more likely it is that plaintiffs will ultimately prevail, the less severe must be the harm that they allege will occur if the injunction does not issue*.... [I]t is the mix of these factors that guides the trial court in its exercise of discretion.' [Citations.] The presence or absence of these interrelated factors 'is usually a matter of degree ....' " (*Right Site Coalition, supra,* 160 Cal.App.4th at p. 342.)

***4** We thus turn to whether the balance of the hardships "conclusively supports the trial court's determination regardless of the remaining considerations." (*King v. Meese, supra,* 43 Cal.3d at p. 1228.) As the trial court found, the Company's loss of its California business—20 percent of its gross revenue—is an irreparable harm. The Company also argues an injunction would cause reputational harm and would threaten its ability to become profitable. The trial court did not find, however, that an injunction would put the Company out of business entirely. We note also the Company has not responded to the People's argument, made below and repeated in this court, that the Company could apply to California district attorneys' offices to be an approved provider of pretrial diversion services.

As for the harm asserted by the People, the trial court discounted the injury to those suspected of shoplifting because of "the absence of any declaration or testimony from a 'victim' ...."[3] Although there are no declarations from suspected shoplifters, the transcripts of telephone calls between suspects and Company coaches provide evidence of the emotional distress suffered by suspects who are unable to pay the Company and anxious about the consequences. Suspects asked: "So if I don't have the money, what's going to happen? Cause I don't want to go to jail"; "So basically if I can't come up with $100 by tomorrow, I'll end up with [a] criminal record ..."; and "if I don't have any money, I have to go to court?" One suspect who was "on a fixed income" with "50 dollars to [their] name" asked the Company coach, "What would happen if I can't make the $50 payment? Then how does that go?" The coach responded: "Then what would happen is that your information would end up being sent back to [the retailer], who would then file charges for the incident." Another suspect said, "I don't have a job and I don't have any source of income right now so I'm going to have to wait a little bit." The coach warned that delaying payment would result in the account being "red-flagged which means it would run the risk of being sent back to the retailer who would then file charges."

In addition, as noted above, " '[w]here a governmental entity seeking to enjoin the alleged violation of an ordinance which specifically provides for injunctive relief establishes that it is reasonably probable it will prevail on the merits, a rebuttable presumption arises that the potential harm to the public outweighs the potential harm to the defendant.' " (*FXS Management, supra,* 2 Cal.App.5th at pp. 1158–1159.) Our Supreme Court explained the reasoning underlying this presumption: "Where a legislative body has enacted a statutory provision proscribing a certain activity, it has already determined that such activity is contrary to the public interest. Further, where the legislative body has specifically authorized injunctive relief against the violation of such a law, it has already determined (1) that significant public harm will result from the proscribed activity, and (2) that injunctive relief may be the most appropriate way to protect against that harm." (*IT Corp., supra,* 35 Cal.3d at p. 70.) Therefore, if the People demonstrate a reasonable probability of prevailing on the merits, they will have established that significant public harm will result absent a preliminary injunction.

***5** We conclude that the balance of hardships does not "tilt[ ] so sharply in [the Company's] favor that it supports the trial court's order irrespective of the likelihood of [the People's] success on the merits." (*King v. Meese, supra,* 43 Cal.3d at p. 1228.) Accordingly, we will "remand the case to the trial court for consideration of the latter question." (*Ibid.*) "We decline to address the potential merits or to determine whether a preliminary injunction should issue because it is the role of this court to review the trial court's exercise of its discretion in applying and weighing the two interrelated factors, rather than to exercise discretion in the first instance.' " (*Right Site Coalition, supra,* 160 Cal.App.4th at pp. 345.)[4]

DISPOSITION

The order denying a preliminary injunction is reversed and the matter is remanded for proceedings not inconsistent with this opinion. The People shall recover their costs on appeal.

We concur.

JONES, P.J.

BRUINIERS, J.

All Citations

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Footnotes

1 The People also submitted letters the Company sent to suspects who were behind in their payments. In their opposition papers, the Company submitted evidence that it ceased sending letters to suspects as of July 2014—more than a year before this lawsuit was filed—because "they almost never responded to the letters" and "we lost money sending them."

2 The Company does not dispute this more deferential standard applies here. (See Bus. & Prof. Code, § 17203 ["Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction."].)

3 The trial court also relied on the People's "failure to seek a preliminary injunction until now, after suing in November 2015." The People submitted undisputed evidence they served discovery just over two weeks after the Company filed its answer, to get up to date information about the Company's business practices, and filed their preliminary injunction motion promptly after the Company responded. Trial courts are entitled to consider "delay as merely one of many factors bearing on irreparable injury," and may discount delay where, for example, "substantial time was devoted to discovery." (*Nutro Products, Inc. v. Cole Grain Co.* (1992) 3 Cal.App.4th 860, 866.) The People's delay, occasioned by the desire to serve discovery relevant to the preliminary injunction motion, does not render unnecessary any consideration of the likelihood of success.

4 We note that we could affirm the trial court's order if we determined the People were not likely to prevail at trial. (*King v. Meese, supra,* 43 Cal.3d at p. 1235 [affirming denial of preliminary injunction motion which trial court based solely on the balance of the hardships, after Supreme Court concluded plaintiffs were not likely to prevail on the merits].) While we decline to determine the degree of the People's probability of prevailing, we cannot say that, at least with respect to the People's extortion claim, it is clearly unlikely. (See Pen. Code, § 519 ["Fear, such as will constitute extortion, may be induced by a threat ... [t]o accuse the individual threatened ... of a crime."]; *Flatley v. Mauro* (2006) 39 Cal.4th 299, 327 ["[T]hreats to do the acts that constitute extortion under Penal Code section 519 are extortionate whether or not the victim committed the crime or indiscretion upon which the threat is based and whether or not the person making the threat could have reported the victim to the authorities or arrested the victim."].)