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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

STUTZ ARTIANO SHINOFF & HOLTZ,

Plaintiff and Respondent,

v.

MAURA LARKINS,

Defendant and Appellant.

D057190

(Super. Ct. No.
37-2007-00076218-CU-DF-CTL)

APPEAL from an order of the Superior Court of San Diego County, Judith F. Hayes, Judge. Reversed and remanded.

I.

INTRODUCTION

The law firm of Stutz Artiano Shinoff & Holtz (the Stutz Firm) filed a complaint against Maura Larkins alleging that Larkins had published several defamatory statements

about the firm and its lawyers on several Web sites that Larkins maintained.¹ The trial court granted the Stutz Firm's motion for summary adjudication, finding that the statements at issue were defamatory as a matter of law.

Prior to a trial on the issue of damages, the parties reached a settlement. Pursuant to that settlement, the trial court entered a stipulated permanent injunction that prohibited Larkins from publishing statements accusing the Stutz Firm or its lawyers of illegal conduct or violations of law, unethical conduct, lack of professional competence, or intimidation. A few months later, in response to a motion filed by the Stutz Firm, the trial court ordered Larkins to remove from her Web sites several statements that the court found to be in violation of the injunction. A couple of months later, the Stutz Firm filed another motion claiming that Larkins was continuing to publish statements that violated the terms of the stipulated injunction. The trial court found that Larkins had continued to violate the stipulated injunction, and that she was unwilling to modify her Web sites in good faith. The trial court modified the stipulated injunction sua sponte to prevent "[Larkins] from making any mention of [the Stutz Firm] or any of its attorneys, past or present."

On appeal, Larkins contends that the trial court's modified injunction constitutes an unconstitutional prior restraint, in violation of her constitutional right to free speech

¹ Although the Stutz Firm's complaint referred to a single Web site, the firm later clarified that Larkins's "Web site" actually comprised "multiple Web sites." Because the issue of whether a statement appeared on one Web site, or instead multiple Web sites, is not material to the issues raised in this appeal, for purposes of clarity we refer to Larkins's "Web sites" throughout this opinion.

under both the state and federal Constitutions.² We agree that the modified injunction is clearly an unconstitutional prior restraint and that it must be reversed. We remand the matter to the trial court to allow the court to consider whether to exercise its authority to coerce compliance with the stipulated injunction and/or to punish Larkins for her failure to comply with the stipulated injunction, in a manner consistent with the law and the views expressed in this opinion.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Stutz Firm's first amended complaint*

In July 2008, the Stutz Firm filed a first amended complaint against Larkins that contained causes of action for defamation per se, declaratory relief, and injunctive relief. The Stutz Firm alleged that Larkins had created a Web site known as the "San Diego Education Report," on which Larkins had made numerous specific defamatory statements concerning the Stutz Firm and its attorneys. The Stutz Firm sought damages, including punitive damages, a declaration that Larkins had published defamatory statements concerning the Stutz Firm, and a "preliminary and/or permanent injunction preventing [Larkins] from continuing to publish or republishing those statements which the court declares to be defamatory."

² Larkins does not challenge the trial court's findings that she violated the stipulated injunction and the court's prior order to comply with the stipulated injunction.

B. *The trial court grants the Stutz Firm's motion for summary adjudication*

In October 2008, the Stutz Firm filed a motion for summary adjudication in which it argued that various statements on Larkins's Web sites were defamatory as a matter of law. The Stutz Firm requested that the court "declare that certain statements on [Larkins's] [Web sites] are defamatory and enjoin [Larkins] from publishing these statements."

In March 2009, the trial court entered an order granting the Stutz Firm's motion for summary adjudication. In its order, the court found that the Stutz Firm had established its claim for defamation per se as a matter of law, noting that the Stutz Firm had established that none of the statements on Larkins's Web sites concerning the Stutz Firm were true. The court also ruled that the Stutz Firm was entitled to an injunction precluding Larkins from publishing "the defamatory statements alleged in [the Stutz Firm's] first amended complaint." The court stated that "the case [would] proceed to trial on the amounts of compensatory and punitive damages to be awarded to [the Stutz Firm] according to proof."

C. *The stipulated injunction*

On April 6, 2009, the day set for the trial on damages, the parties reached a settlement of the case. Pursuant to the parties' stipulation, the court entered a permanent injunction that states in relevant part:

"1. . . . [The Stutz Firm][³] is entitled to an injunction enjoining and restraining [Larkins] from continuing to publish or republishing by any method or media, including but not limited to all electronic data, Web sites and Web pages, the defamatory statements alleged in [the Stutz Firm's] first amended complaint pertaining to [the Stutz Firm] and any of its lawyers past or present, and future publication of statements with regard to [the Stutz Firm] and its lawyers accusing illegal conduct or violations of law, unethical conduct, lack of professional competence or intimidation.

"2. [Larkins] shall comply with, complete the removal of, and/or undertake all necessary steps for the removal of the defamatory statements as specified above no later than ten (10) days from the date of this order."

D. *The trial court grants the Stutz Firm's motion to enforce the stipulated injunction*

In July 2009, the Stutz Firm filed a motion to enforce the permanent injunction. In its brief, the Stutz Firm claimed that Larkins continued to display on her Web sites numerous statements that were in violation of the April 6 injunction. Among the statements on Larkins's Web sites that the Stutz Firm claimed violated the injunction was, " 'One of Daniel Shinoff's [an attorney at the Stutz Firm] specialties is destroying the lives of parents who complain that their kids aren't getting the right education.' " The Stutz Firm also claimed that Larkins violated the injunction by posting the following statements on her Web sites: " 'Attorneys who have helped cover up events in schools are in charge of training both new board members and new school attorneys,' " and,

³ Although the order states "Defendant," it is clear that the court intended to refer to the Stutz Firm.

" 'Dan Shinoff trains board members and employees.' Larkins filed an opposition in which she argued that the statements at issue did not violate the terms of the injunction.⁴

On August 7, the trial court held a hearing on the Stutz Firm's motion. At the hearing, Larkins stated that the intent of the parties in entering into the stipulated injunction was that, "I would still be able to report the facts, such as [the Stutz Firm] did this action. I would simply not be able to opine that that action was illegal, unethical, incompetent or intimidating." Larkins stated that she needed "clarification" of the scope of the injunction as to "where the limit is." The Stutz Firm's attorney argued, "[T]he stipulated injunction prohibits accusations of certain types of conduct. It's not just magic words. You can't replace one word with the other, and the court correctly grasped that."

Near the conclusion of the hearing, the trial court stated:

"Okay. Let me make it clear for you. You can't use language that states or implies illegal, unethical, incompetent, or intimidating tactics on the part of the law firm. [¶] Now, I know what you're asking me to do, and that is give to you a shopping list of what you can say and what you can't say. Listen to me. No, I know you're shaking your head, but you have to listen because we're at the point where I'm going to rule. [¶] . . . If you have questions about what you can or cannot say, I can only suggest that you run them past the

⁴ Larkins expressed her interpretation of the injunction in part as follows:

"The injunction does not allow [the Stutz Firm] to completely silence [Larkins]. For example, if a Stutz lawyer were to come to [Larkins's] house and shoot her dog, the injunction would prevent her from saying, 'A Stutz lawyer committed a crime.' However, the injunction would not prevent her from saying, 'A Stutz lawyer shot my dog.' [The Stutz Firm] wants the court to rule that [Larkins] could not even say, 'A Stutz lawyer shot my dog.' Such a ruling would violate the [C]onstitutions of California and the United States."

filter of perhaps someone who can give you guidance in this area"

On August 7, 2009, the trial court granted the Stutz Firm's motion to enforce the April 6 injunction. The court found that "the disputed statements are in violation of the permanent injunction entered on April 6, 2009. [Larkins] is ordered to remove all the disputed statements from her [Web sites] within 48 hours."

E. *The trial court's modification of the injunction*

In October 2009, the Stutz Firm filed a motion to strike Larkins's answer and enter a default. In its motion, the Stutz Firm maintained that Larkins was continuing to publish statements that violated the stipulated injunction and the court's August 7 order. For example, the Stutz Firm noted that the following statement appeared on Larkins's Web sites: " 'One of Daniel Shinoff's specialties is planning legal tactics against parents who complain that their kids aren't getting the right education.' "⁵ The Stutz Firm also claimed that Larkins violated the injunction by posting on her Web sites, " 'Attorneys who have helped schools avoid revealing events in schools are in charge of training both new board members and new school attorneys,' " in conjunction with the statement,

⁵ Prior to the entry of the August 7 order, Larkins had stated on her Web site, " 'One of Daniel Shinoff's specialties is *destroying the lives of* parents who complain that their kids aren't getting the right education.' " (Italics added.)

" 'Dan Shinoff trains board members and employees.' "⁶ Larkins opposed the motion, again contending that the statements at issue did not violate the stipulated injunction.

The trial court held a hearing on October 30 at which the court explained that it intended to modify the stipulated injunction to prevent Larkins from making "any mention" of the Stutz Firm on her Web sites. The court reasoned:

"In formulating this injunction, it was the court's intention to eliminate reference to accusations of illegal, unethical, incompetent or intimidating conduct on the part of [the Stutz Firm] from any [Web site] maintained by [Larkins].

"We've been back in court several times on the language that still appears on the [Web sites]. And unfortunately, I feel like I'm chasing something that I can't get my hands around, because every time I rule that [Larkins] shouldn't use one phraseology, she simply switches to another in an . . . apparent attempt to circumvent the Court's order.

"And it comes to a point where we really have to stop this and get to the meat of the allegations.

"You can't imply or insinuate any of these things. And what I have seen is the continued attempt to do just that.

"So what I intend to do is modify the injunction to prevent any mention of [the Stutz Firm] on [Larkins's] [Web sites].

"And I'm doing that not in an attempt to foreclose or eliminate [Larkins's] right to free speech, but because it is crystal clear to me at this point that she is unable or unwilling to modify her [Web sites] in any good-faith attempt to remove reference to that law firm.

⁶ Prior to the August 7 order, Larkins had stated on her Web sites, " 'Attorneys who have helped *cover up* events in schools are in charge of training both new board members and new school attorneys,' " and " 'Dan Shinoff trains board members and employees.' " (Italics added.)

"So we're cutting it off at this point. No more reference to the law firm.

"What I'm trying to do is not get to the point where I have to enter default and strike an answer and award damages, assuming they're proved up, in the default process. But right now, what I'm trying to do is make a bright-line rule that there's no way anybody can misinterpret.

"Just don't mention them. They're out of it. And if you can't do that, then I'll look at it again, but this is the last time I'm coming back on this."

On December 11, 2009, the trial court entered the following order, based on the October 30th hearing:

"1. The Court's April 6, 2009 Order on Permanent Injunction ('Injunction'), stipulated to by the parties . . . enjoined and restrained [Larkins] from publishing accusations of illegal conduct or violations of law, unethical conduct, lack of professional competence or intimidation pertaining to [the Stutz Firm] and any of its lawyers, past or present.

"2. On August 7, 2009, at 10:30 a.m., [the Stutz Firm's] Motion to Enforce Permanent Injunction Against [Larkins] came on regularly for hearing before this Court. The Court granted [the Stutz Firm's] motion, finding that the disputed statements challenged therein were in violation of the Injunction and ordering [Larkins] to remove all the disputed statements from her [Web sites] within 48 hours.

"3. The Court finds that [Larkins] has not complied with the Injunction or this Court's orders and continues to attempt to circumvent the Injunction. The Court further finds that [Larkins] has been unwilling to modify her [Web sites] in good faith.

"4. Due to [Larkins's] continued circumvention of this Court's orders, the Court hereby modifies the Injunction to prevent [Larkins] from making any mention of [the Stutz Firm] or any of its attorneys, past or present. [Larkins] is enjoined and restrained from continuing to publish or republishing, by any method or media, including but not limited to all electronic data, [Web sites] and Web pages, any statements pertaining to [the Stutz Firm] and any of its lawyers, past

or present, and future publication of statements with regard to [the Stutz Firm] and any of its lawyers. [Larkins] is ordered to remove all mention of [the Stutz Firm] and any of its lawyers, past or present, from her [Web sites] or [Web sites] under her control within twenty days."

F. *The trial court's order holding Larkins in contempt and requiring her to pay \$3,000 in sanctions*

In January 2010, the Stutz Firm filed an ex parte application to enforce the modified injunction, to hold Larkins in contempt, and to impose sanctions. Larkins filed an opposition. On January 21, the court entered an order to show cause as to why Larkins should not be held in contempt, and set a hearing date of March 5, 2010.

In February 2010, the Stutz Firm filed a motion and brief in support of the order to show cause. In its brief, the Stutz Firm argued that Larkins was in contempt of the court's modified injunction in that numerous references to the Stutz Firm and its attorneys remained posted on Larkins's Web sites. The Stutz Firm requested that the court "take some action [against Larkins], including sanctions, a daily fee, an appropriate contempt punishment (including jail time), striking her answer, or any combination of these, for willfully violating the Court's orders." (Fn. omitted.) The Stutz Firm requested that the court award it \$6,547.50 in attorney fees that it incurred in connection with its ex parte application and motion. Larkins filed an opposition to the motion in which she argued that the court should not enforce the modified injunction because the injunction was "vastly unconstitutional."

On March 5, the court heard argument on the order to show cause.⁷ On March 10, the trial court found Larkins in contempt and ordered her to pay \$3,000 in sanctions. The trial court reasoned:

"The Court finds defendant Maura Larkins has continued to violate the Court's order resulting from the parties' stipulation of April 6, 2009. The Court finds [Larkins] is currently in violation of the Court's further order of December 11, 2009. [Larkins] implicitly concedes she is in violation of the Court's orders. [Larkins] argues the orders are unconstitutional, illegal and impossible to comply with. [Larkins's] position is based in part, on her misunderstanding of constitutional law. Nonetheless, [Larkins][⁸] failed to timely challenge those orders, and despite the fact that the April order resulted from the parties' stipulation, [Larkins] continues to refuse to comply with the order."

The trial court ordered Larkins to pay \$3,000 in sanctions to the Stutz Firm for fees and costs incurred in "enforcing the injunction."⁹ In addition, the court stated:

"If [Larkins] does not bring her Web site[s] into compliance with the Court's previous orders by April 9, 2010 and/or fails to timely pay the sanctions ordered, the Court will be forced to strike [Larkins's] answer and take her default. In which case, [the Stutz Firm] will be free to obtain a judgment against [Larkins] for damages incurred as a result of [Larkins's] violations of the injunctions."¹⁰

⁷ On the day of the contempt hearing, Larkins filed a petition for writ of mandate and a request to stay the hearing in this court. This court summarily denied the petition. (*Larkins v. Superior Court* (Mar. 5, 2010, D056899).)

⁸ Although the court referred to "plaintiff" in this portion of its order, it is clear that the court intended to refer to Larkins.

⁹ The court did not specify whether it was referring to the April 6 stipulated injunction or the December 11 modified injunction.

¹⁰ Larkins does not raise any challenge to this order on appeal.

G. *Larkins's appeal from the trial court's order modifying the injunction*

On March 18, 2010, Larkins timely appealed from the trial court's December 11, 2009 order.

III.

DISCUSSION

A. *The Stutz Firm's motion to dismiss the appeal is denied*

The Stutz Firm filed a motion to dismiss Larkins's appeal on the ground that Larkins had repeatedly willfully disobeyed the trial court's orders in this case, including the order at issue in this appeal.

In support of its request, the Stutz Firm noted that the Supreme Court stated in *MacPherson v. MacPherson* (1939) 13 Cal.2d 271, 277 that "[a] party to an action cannot, with right or reason, ask the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt to legal orders and processes of the courts of this state. [Citations.]" The Stutz Firm also cited *TMS, Inc. v. Aihara* (1999) 71 Cal.App.4th 377, 378-379, in which the Court of Appeal dismissed an appeal based on the appellant's unabated willful failure to comply with a court order to answer postjudgment interrogatories, and *Alioto Fish Co. v. Alioto* (1994) 27 Cal.App.4th 1669, 1685, in which the Court of Appeal stayed an appeal for 30 days to allow the appellants to demonstrate that they had complied with a trial court's postjudgment order. The *Alioto* court also indicated that the appeal would be dismissed if the appellants failed to timely demonstrate compliance with the trial court's order. (*Id.* at p. 1691.)

We deny the Stutz Firm's motion to dismiss, for two reasons. To begin with, all of the cases that the Stutz Firm cites involve litigants who *remained* in contempt of orders issued by a trial court. The Stutz Firm does not argue in its motion that Larkins remains in contempt of the trial court's order.¹¹ Thus, even under the cases that the Stutz Firm cites, there is no basis to dismiss Larkins's appeal.

Second, even assuming that Larkins remains in contempt of the trial court's modified injunction, we decline to dismiss her appeal since Larkins is challenging the constitutional validity of that injunction in this appeal from the trial court's order modifying the injunction. Such a dismissal would be wholly inconsistent with the fact that in California a party may raise a challenge to the validity of an injunction for the first time in a contempt proceeding to enforce the injunction. (*People v. Gonzalez* (1996) 12 Cal.4th 804, 818-819 (*Gonzalez*)). California's law concerning challenges to injunctive orders grew "out of a concern to protect the constitutional rights of those affected by invalid injunctive orders" (*Id.* at p. 818.) Larkins has brought a direct challenge to the validity of the trial court's order on the ground that it violates her right to free speech under the federal and state Constitutions. Her failure to comply with that same order cannot serve as a basis for dismissing the very appeal in which she seeks to vindicate her constitutional rights.

¹¹ In her opposition to the Stutz Firm's motion to dismiss, Larkins states that "she promptly paid the full of amount of the . . . [March 10, 2010] sanction (\$3,000) to [Stutz]."

B. *We reject the Stutz Firm's contention that this court should not consider the merits of Larkins's constitutional claim*

The Stutz Firm contends that Larkins forfeited her right to object to the December 11 modified injunction by failing to raise an objection at the October 30 hearing at which the trial court indicated that it intended to order such a modification. We disagree.

The trial court indicated its intent to modify the injunction for the first time, sua sponte, at the October 30 hearing. Larkins thus could not have anticipated prior to the hearing that the trial court would modify the injunction. Further, before the trial court entered the December 11 order modifying the injunction, Larkins filed a written objection in which she claimed that the proposed modification would violate her constitutional right to free speech. Accordingly, we reject the Stutz Firm's contention that Larkins has forfeited her right to object to the December 11 modified injunction.

Further, in light of the circumstances of the trial court's sua sponte modification of the injunction and the important constitutional right at stake, even assuming that Larkins forfeited her claim, we would exercise our discretion to consider it on the merits. (See *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6 [appellate court has discretion to consider claims that are not properly preserved for review].) In addition to the circumstances described above that support our exercise of discretion under *Williams* to consider Larkins's claim, we note that Larkins also challenged the constitutionality of the modified injunction in opposing the Stutz Firm's motion to hold her in contempt of court for violating that injunction. (See *Gonzalez, supra*, 12 Cal.4th at p. 818 ["out of a concern to protect the constitutional rights of those affected by invalid injunctive orders,

and to avoid forcing citizens to obey void injunctive orders on pain of punishment for contempt, this court has firmly established that a person subject to a court's injunction may elect whether to challenge the constitutional validity of the injunction when it is issued, or to reserve that claim until a violation of the injunction is charged as a contempt of court".)

Accordingly, we reject the Stutz Firm's argument that this court should not consider the merits of Larkins's constitutional claim.

C. *The December 11 modified injunction is an unconstitutional prior restraint*

Larkins claims that the December 11 modified injunction is unconstitutional in that it violates her right to free speech under both the federal and state Constitutions. We conclude that the injunction is unconstitutional as an invalid prior restraint.

1. *Standard of review*

Larkins's claim "depends on a determination of the constitutionality of the injunction, [and therefore] we independently review the question whether the trial court correctly interpreted and applied the applicable constitutional principles. [Citation.]"

*(Evans v. Evans (2008) 162 Cal.App.4th 1157, 1166 (Evans).)*¹²

¹² The Stutz Firm claims that the abuse of discretion standard of review applies in this case. The Stutz Firm reasons that the trial court issued the December 11 modified injunction as a sanction, and that both sanction orders and injunctions are reviewed under the abuse of discretion standard. Even assuming that all of this is correct, a trial court must exercise its discretion "guided by principles and legal policies appropriate to the particular matter at issue," and "in conformity with the spirit of the law." (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.) As noted in the text, we review de novo whether Larkins is correct in asserting that the trial court's order constitutes an unconstitutional prior restraint. To the extent that Larkins demonstrates that the trial

2. *Governing law*

In *Evans, supra*, 162 Cal.App.4th at pages 1166-1167, this court outlined the relevant constitutional law:

"The right to free speech is . . . one of the cornerstones of our society,' and is protected under the First Amendment of the United States Constitution and under an 'even broader' provision of the California Constitution. [Citation.] An injunction that forbids a citizen from speaking in advance of the time the communication is to occur is known as a 'prior restraint.' [Citation.] A prior restraint is 'the most serious and the least tolerable infringement on First Amendment rights.'" [Citations.] Prior restraints are highly disfavored and presumptively violate the First Amendment. [Citations.] This is true even when the speech is expected to be of the type that is not constitutionally protected. [Citation.]

"To establish a valid prior restraint under the federal Constitution, a proponent has a heavy burden to show the countervailing interest is compelling, the prior restraint is necessary and would be effective in promoting this interest, and less extreme measures are unavailable. [Citations.] Further, any permissible order 'must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order. . . .' [Citation.]"

"An order prohibiting a party from making or publishing false statements is a classic type of an unconstitutional prior restraint." (*Evans, supra*, 162 Cal.App.4th at p. 1167.) The *Evans* court held that the rule of law that prevents the issuance of orders forbidding a party from making false statements "does not apply to an order issued after a trial prohibiting the defendant from *repeating specific statements found at trial to be defamatory*." (*Id.* at p. 1168, citing *Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141, 1155-1156.)

court's order constitutes an unlawful prior restraint, she also will have necessarily demonstrated that the trial court abused its discretion in issuing such an order.

Applying these principles, the *Evans* court concluded that a preliminary injunction that prohibits the defendant "from publishing any 'false and defamatory' statements on the Internet [about the plaintiff] is constitutionally invalid." (*Evans, supra*, 162 Cal.App.4th at p. 1169.) In reaching this conclusion, the *Evans* court reasoned, "Because there has been no trial and no determination on the merits that any statement made by [defendant] was defamatory, the court cannot prohibit her from making statements characterized only as 'false and defamatory.'" (*Ibid.*) The *Evans* court also held that the injunction in that case, which the court characterized as a "sweeping prohibition," was constitutionally overbroad in that it "broadly prohibited [defendant] from publishing any defamatory comments about [plaintiff]." (*Ibid.*)

3. *Application*

"An injunction that forbids a citizen from speaking in advance of the time the communication is to occur is known as a 'prior restraint.'" (*Evans, supra*, 162 Cal.App.4th at p. 1166.) The trial court's modified injunction prohibits Larkins from "making any mention of [the Stutz Firm] or any of its attorneys, past, or present." As such, the injunction plainly constitutes a prior restraint.¹³ As a prior restraint, this portion of the court's order is "presumptively unconstitutional." We must therefore determine whether the Stutz Firm has carried the "heavy burden," of showing that this "highly disfavored" form of injunction is constitutionally valid. (*Ibid.*) We conclude that the Stutz Firm clearly has not demonstrated the constitutionality of the injunction.

¹³ The Stutz Firm does not dispute in its briefing on appeal that the trial court's order constitutes a prior restraint.

To begin with, the reason for the trial court's modification of the injunction—to ensure Larkins's full compliance with the provision of the injunction prohibiting her from publishing certain negative statements about the Stutz Firm—is a far less compelling interest than those that have been found *insufficient* to justify a prior restraint. (See, e.g., *Gilbert v. National Enquirer, Inc.* (1996) 43 Cal.App.4th 1135, 1144 ["even the publication of the purloined Pentagon Papers concerning matters of national security could not be restrained," citing *New York Times Co. v. United States* (1971) 403 U.S. 713].) Nor is there anything in the record that demonstrates that "less extreme measures are unavailable" to ensure Larkins's compliance with the stipulated injunction. (*Evans, supra*, 162 Cal.App.4th at p. 1167.) On the contrary, the record indicates that the trial court had not imposed *any* monetary sanctions on Larkins prior to entering the modified injunction.¹⁴ In addition, the exceedingly broad injunction—barring *all* speech by Larkins concerning the Stutz Firm—is clearly not "'couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order. . . ." [Citation.]" (*Id.* at p. 1167; see also p. 1169 [concluding injunction prohibiting all *defamatory* speech is overbroad].) Application of the analysis for judging the constitutionality of such injunctions delineated by this court

¹⁴ The trial court had previously granted the Stutz Firm's motion to enforce the stipulated injunction. However, the court merely ordered Larkins to remove from her Web sites certain statements that the court found to be in violation of the stipulated injunction. The court did not grant the Stutz Firm's request for attorney fees and costs, nor did the court impose any other sanctions on Larkins.

in *Evans* demonstrates that the trial court's modified injunction is plainly unconstitutional.

The Stutz Firm does not attempt to defend the injunction's constitutionality by making the required showing under *Evans*. Rather, it contends that the injunction is constitutional as a sanction for Larkins's past contemptuous behavior.¹⁵ In support of this contention, the Stutz Firm relies primarily on three cases that are wholly distinguishable—*Marin Independent Journal v. Municipal Court* (1993) 12 Cal.App.4th 1712 (*Marin*); *Krontz v. City of San Diego* (2006) 136 Cal.App.4th 1126, 1135 (*Krontz*); and *Admiral Theatre v. City of Chicago* (D. Ill. 1993) 832 F. Supp. 1195 (*Admiral Theatre*)—and none of which supports the conclusion that the modified injunction entered in this case is constitutional.

In *Marin*, the Court of Appeal held that the trial court had not violated the first amendment by seizing photographic negatives of a criminal defendant that were taken during a criminal trial, in violation of a rule of court. (*Marin, supra*, 12 Cal.App.4th at p. 1715.) The court reasoned:

"The seizure of the film simply enforced [California Rules of Court,] rule 980 by precluding publication of photographs that should never have been taken and which were obtained without permission. Qualitatively, the seizure is little different than a refusal of permission to photograph in the first instance. Since courtroom photography can be completely banned by a trial court, we seriously question whether

¹⁵ The Stutz Firm also argues that "the [trial] court had no intention of impeding Larkins's speech rights," and that "the court was specifically trying to avoid ordering Larkins to pay monetary sanctions." While the record supports both contentions as a factual matter, the trial court's benevolent subjective intentions in issuing the modified injunction do not diminish its unconstitutionality.

confiscation of photographs which should never have been taken and which could have been, as they were in this case, totally disallowed, is a prior restraint of protected speech." (*Id.* at pp. 1718-1719.)

The *Marin* court also stated, "Assuming, however, that the seizure is a prior restraint, we conclude it is justified because the photographs were obtained unlawfully in a deliberate violation of a rule of court." (*Marin, supra*, 12 Cal.App.4th at p. 1719.)

Unlike *Marin*, in which the court prohibited the publication of speech that had previously been judicially determined to have been unlawfully obtained, in this case, the trial court's order broadly precludes Larkins from ever uttering *any* speech—even legal and truthful speech—about the Stutz Firm. Thus, while *Marin* may be viewed as an instance in which a court upheld a narrow prior restraint in order to preserve the fairness of a criminal trial, it clearly does not stand for the proposition that a trial court may issue an injunction barring a defendant from making "any mention" of the plaintiff, even if the defendant has previously defamed the plaintiff.

Krontz, supra, 136 Cal.App.4th 1126, and *Admiral Theatre, supra*, 832 F. Supp. 1195, on which the Stutz Firm relies, both involved efforts on the part of municipalities to revoke the licenses of adult entertainment businesses that had allegedly violated various municipal code provisions. Neither case is factually similar to this case, and neither is legally apposite. In addition, neither supports the proposition that it is constitutional for a court to enjoin *all* speech by a defendant concerning a plaintiff, merely because the plaintiff has previously uttered certain defamatory statements about the defendant.

Accordingly, we conclude that paragraph four of the December 11 order modifying the permanent injunction is unconstitutional as an invalid prior restraint.¹⁶

C. *Proceedings on remand*

On appeal, Larkins does not challenge the trial court's finding that she failed to comply with the April 6 stipulated injunction, or the court's August 7 order enforcing the stipulated injunction.¹⁷ On remand, the trial court may consider whether to exercise its statutory and inherent authority to coerce compliance with the April 6 or August 7 orders and/or to punish Larkins for her failure to comply with said orders, in a manner consistent with the law and the views expressed in this opinion.¹⁸

¹⁶ In light of our reversal of the December 11, 2009 modified injunction, we need not consider the Stutz Firm's contention that the trial court provided Larkins with "sufficient due process" when the trial court modified the injunction sua sponte at the October 30, 2009 hearing so as "to prevent any mention of [the Stutz Firm] on [Larkins's] Web sites."

¹⁷ As noted in part II.D., *ante*, in its December 11 order, the trial court stated: "The court finds that [Larkins] has not complied with the [April 6, 2009 stipulated] Injunction or this Court's orders and continues to attempt to circumvent the [April 6, 2009 stipulated] Injunction. The Court further finds that [Larkins] has been unwilling to modify her Web sites in good faith." Larkins does not raise any challenge to these findings on appeal.

¹⁸ Larkins also acknowledges in her briefing on appeal that she "may be fined, ordered to pay damages and fees, and even imprisoned were she found to continue impermissibly her alleged defamation of [the Stutz firm]."

IV.

DISPOSITION

Paragraph four of the December 11, 2009 order modifying the permanent injunction is reversed. The matter is remanded to the trial court for further proceedings as described in part III.C., *ante*. Each party is to bear its own costs on appeal.

AARON, J.

WE CONCUR:

HALLER, Acting P. J.

McDONALD, J.