SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3421-15T3

J.R.,

Plaintiff-Appellant,

v.

Y.L.,

Defendant-Respondent.

Submitted August 30, 2017 – Decided November 2, 2017

Before Judges Alvarez and Gooden Brown.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Monmouth County, Docket No. FV-13-0683-13.

J.R., appellant pro se.

Respondent has not filed a brief.

PER CURIAM

Plaintiff requests our review of a March 2, 2016 Family Part order, which denied his application to reinstate a final restraining order (FRO) entered against defendant on his behalf, pursuant to the Prevention of Domestic Violence Act of 1991 (PDVA),

N.J.S.A. 2C:25-17 to -35. Previously, we reversed the dissolution of the FRO and remanded for further proceedings. Based on our review of the record in the prior appeal, we noted "[t]he certification submitted by defendant in support of her motion to dissolve the FRO was inadequate to explain either the parties' history relative to the FRO, or her reasons for seeking its dissolution[,]" and "[w]e s[aw] no sworn testimony from plaintiff explaining his reasons for objecting to the dismissal of the FRO." J.R. v. Y.R., No. A-2464-14T3 (App. Div. Feb. 9, 2016) (slip op. at 4).

We determined that "[a]lthough the judge in his written statement of reasons cited to Carfagno [v. Carfagno, 288 N.J. Super. 424 (Ch. Div. 1995)] as a touchstone, his discussion was minimal." J.R. v. Y.R., No. A-2464-14T3 (App. Div. Feb. 9, 2016) (slip op. at 5). We concluded "[t]he judge lacked enough information to even make any findings of fact, much less to draw his somewhat subjective conclusions from the facts, such as that plaintiff was not in fear, or that neither party was acting in good faith." Ibid. "Because of the scant record," we remanded "for further proceedings so that the issues [could] be fully developed in compliance with due process and Rule 1:7-4(a)." J.R. v. Y.R., No. A-2464-14T3 (App. Div. Feb. 9, 2016) (slip op. at 5). On remand, the trial court conducted a plenary hearing and entered

an order denying reinstatement of the FRO. For the reasons that follow, we affirm.

At the remand hearing before the same judge,[1] plaintiff testified that he and defendant were unmarried but lived together in a romantic relationship for four years. They had a child who was five years old at the time of the hearing. After plaintiff moved out in February 2012, the parties shared joint legal and physical custody of their daughter based on an order issued in ongoing domestic relations proceedings under a non-dissolution or FD docket.[2] Pursuant to that order, they followed a parenting time schedule with weekly custody exchanges occurring at the Monmouth County Courthouse, despite the fact that plaintiff resided in Elizabeth and defendant resided in Toms River.

Plaintiff testified about domestic violence incidents that occurred during their cohabitation and continued after he moved out. Specifically, plaintiff testified that defendant "stalked"

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[1] We note that although the judge characterized the remand proceeding as "essentially, a motion to reinstate the restraining order that [plaintiff] formerly had," because we reversed the judge's order dissolving the FRO, procedurally, the FRO was reinstated by virtue of our reversal, and the hearing was actually a motion to dissolve the FRO ab initio.

[2] The non-dissolution or FD docket provides a mechanism for parents not married to each other to seek custody, parenting time, paternity, and child support. R.K. v. D.L., 434 N.J. Super. 113, 131 (App. Div. 2014).

him and "assaulted" him on two occasions. The second assault occurred in the police station during a custody exchange and ultimately led to the issuance of the FRO on November 9, 2012, by a different judge. Plaintiff explained that the FRO hearing was adjourned twice at defendant's request. When defendant failed to appear on the rescheduled date, the FRO was issued in her absence. Over the next two years, defendant filed two motions for reconsideration, both of which were denied. According to plaintiff, defendant provided conflicting testimony during the motions for reconsideration and accused him of committing acts of domestic violence against her. Defendant also filed four motions to vacate the FRO with four different judges, until the FRO was eventually vacated on December 19, 2014, prompting plaintiff's first appeal.

According to plaintiff, after the FRO was vacated, there were two incidents that occurred in November and December 2015, during which defendant "showed up at [his] residence twice, unannounced[.]" Although plaintiff initially testified that defendant had "no reason to be there[,]" he later explained that "[s]he actually dropped off [their] daughter, unannounced, . . . off of the schedule," and at the wrong drop-off location. Although "there was no contact" between the parties on either occasion, plaintiff explained he still did not "feel comfortable" with "her

just popping up to [his] residence[,]" given their history. Plaintiff confirmed that since December 2015, their only contact has been e-mail exchanges regarding their daughter.

Plaintiff also testified that defendant suffers from "bipolar disorder, and she frequently goes off her psychotropic medications[.]" According to plaintiff, "given the history," "her propensities for going off of her medication," and "the ongoing custody litigation," he needed the restraining order for his protection because he is afraid that if "[they] get a result from the custody litigation that's not in her favor[,] she's going to launch another attack against [him]." Otherwise, "if [they] didn't have a daughter together [he] would be fine living out of state, and vacating the restraining order[.]"

Defendant testified there was "no need for a restraining order" because "[plaintiff] is not afraid" of her. She believed "everything was fine." She admitted dropping their daughter off at plaintiff's house but explained she was in Elizabeth caring for her sick mother. She denied that the drop-off was unannounced because she would normally send an e-mail, but sometimes the e-mails would "bounce back." She testified that since December 2014, when the FRO was vacated, they had been exchanging custody "without any supervision" at locations other than the courthouse, such as the Home Depot in Toms River and the police station in

Elizabeth. In addition, they had been discussing everything regarding their daughter "over e-mails."

Defendant testified that plaintiff has abused her "mentally, physically, [and] emotionally," and has "also abused [her] children[.]" However, she "put that away to the side," for the sake of their daughter. Defendant got married, had a baby, has undergone domestic violence counseling for three years, attends her appointments "to meet the criteria" for continued services, and has "moved on" with her life. Defendant explained, "[t]his is not about him fearing me, this is really about custody[.]" Defendant accused plaintiff of using the restraining order "to dig [her] in[to] a hole so that way he can have a higher hand with a restraining order," but "restraining orders should be for people whose rights have been violated."

At the conclusion of the hearing, the judge applied the Carfagno factors and vacated the FRO. In analyzing the factors, the judge found no evidence of contempt convictions resulting from any FRO violations, no evidence of drug or alcohol abuse by defendant, and no evidence of violent acts against other persons or orders of protection entered by other jurisdictions. The judge acknowledged defendant's mental health issues, as well as the fact that she has engaged in counseling. In evaluating the current nature of the relationship between the parties, the judge observed:

> The parties seem as if . . . they have been cooperating . . . since this [c]ourt's involvement in 2014, where they appeared before me on a number of occasions, and they've . . . appeared before . . . a lot of other judges earlier . . . on similar type matters, that the pickup and drop off, essentially, has been working. . . .
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> . . . They are communicating with regard to the child by e-mail as to the child's . . . activities . . . . [I]t seems as if [there is] ultimately going to be a custody contest . . . .
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> To me, it seems as if the parties, since this [c]ourt entered the order dismissing the . . . restraining order, back on December 19[], 2014, the parties have been existing . . . . I have not been presented with any police reports indicating that one side or the other was involved in an assault. . . . [T]here w[ere] two occasions that [plaintiff] testified . . . that [defendant] came to [his] house to drop off the child. That probably was . . . not a good idea as an alternative as to where the pickup and drop[-]off should be. If [it is] agreed upon at a police station, or . . . the [H]ome [D]epot where the . . . child[,] who is now five[,] can get out of a car and get into another car, I don't think . . . [that is] an issue, but going to someone's house when there was a restraining order for a number of years can be alarming. I would admit that. So, . . . that should not be done, because that will just result . . . in . . . the police being called again.

The judge focused on "the good faith of the victim" in opposing the dissolution and "in requesting, again, for the [c]ourt to reinstate the . . . [FRO.]" The judge also carefully scrutinized the testimony regarding "the victim's fear of the

defendant[.]" The judge noted that "the primary factor that [plaintiff] is relying upon is that he is in fear of [defendant], and that he believes that if the restraining order is not entered that he would be subject to, essentially, violence as he had earlier when the restraining order was entered[.]" However, the judge concluded:

> I . . . really believe that the real issue here is more FD issues. [They are] custody issues, and if the parties are going to go through a custody trial . . . then a court . . . will make a decision. Clearly there will still be parenting time. [That is] never going to change. [They have] been having parenting time since the child was born, and that part will always be in effect. But I do not believe that . . . [plaintiff] has a good faith based fear of this defendant. I think that he is trying to use this as an upper hand in a custody battle, and I will not reinstate the restraining order.

On appeal, plaintiff argues the judge "erred by converting the appellate remand into a motion for reconsideration by [p]laintiff[,]" which "put an enormous and unfair burden on [p]laintiff[.]" Plaintiff also argues the judge "failed to make any factual findings to support [his] conclusions[,]" made "unsupported conclusions with no factual basis[,]" and "failed to make any factual findings or assessment of credibility of the parties[']' testimony, to determine what credible testimony, if any, should add weight to the factors outlined in Carfagno."

We do not disturb a trial court's factual findings unless unsupported by "adequate, substantial[,] and credible evidence," Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am., 65 N.J. 474, 484 (1974), and we pay particular deference to the Family Part's expertise. Cesare v. Cesare, 154 N.J. 394, 412-13 (1998). Deference is also appropriate "when the evidence is largely testimonial and involves questions of credibility." Id. at 411 (quoting In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997)). On the other hand, the appropriate standard of review for conclusions of law is de novo. S.D. v. M.J.R., 415 N.J. Super. 417, 430 (App. Div. 2010) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

"[T]he Legislature did not intend that every [FRO] issued pursuant to the [PDVA] be forever etched in judicial stone." A.B. v. L.M., 289 N.J. Super. 125, 128 (App. Div. 1996). Pursuant to the PDVA, a court may vacate an FRO upon good cause shown. N.J.S.A. 2C:25-29(d). "The linchpin in any motion addressed to dismissal of a [FRO] should be whether there have been substantial changed circumstances since its entry that constitute good cause for consideration of dismissal." Kanaszka v. Kunen, 313 N.J. Super. 600, 609 (App. Div. 1998). "With protection of the victim the primary objective, the court must carefully scrutinize the record

and carefully consider the totality of the circumstances before removing the protective shield." Id. at 605.

In Kanaszka, supra, 313 N.J. Super. at 607, we adopted Carfagno's non-exclusive list of eleven factors a trial court should consider when determining whether good cause to dissolve an FRO has been shown. Those factors, which are to be weighed "qualitatively, and not quantitatively," Carfagno, supra, 288 N.J. Super. at 442, include:

> (1) whether the victim consented to lift the restraining order; (2) whether the victim fears the defendant; (3) the nature of the relationship between the parties today; (4) the number of times that the defendant has been convicted of contempt for violating the order; (5) whether the defendant has a continuing involvement with drug or alcohol abuse; (6) whether the defendant has been involved in other violent acts with other persons; (7) whether the defendant has engaged in counseling; (8) the age and health of the defendant; (9) whether the victim is acting in good faith when opposing the defendant's request; (10) whether another jurisdiction has entered a restraining order protecting the victim from the defendant; and (11) other factors deemed relevant by the court.
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> [Id. at 435.]

Additionally, a court must consider whether the continuation of the FRO "prejudices defendant" because that "is what good cause is all about." Sweeney v. Honachefsky, 313 N.J. Super. 443, 448 (App. Div. 1998).

When considering whether the victim fears the defendant, the court must look at objective fear, not subjective fear. Carfagno, supra, 288 N.J. Super. at 437-38. "Objective fear is that fear which a reasonable victim similarly situated would have under the circumstances." Id. at 437. The standard is objective fear because "[t]he duration of an injunctive order should be no longer than is reasonably required to protect the interest of the injured party." Id. at 438 (emphasis omitted) (quoting Trans Am. Trucking Serv., Inc. v. Ruane, 273 N.J. Super. 130, 133 (App. Div. 1994)). If the court applied a subjective standard, the scope of the injunction might be broader than reasonably necessary to protect the victim and would unnecessarily infringe on the defendant's rights. Ibid.

Additionally, the court must "fully explore[]" the "previous history of domestic violence between the parties . . . to understand the totality of the circumstances . . . and to fully evaluate the reasonableness of the victim's continued fear of the perpetrator." Kanaszka, supra, 313 N.J. Super. at 607. This exploration can include "incidents that were not testified to at the final hearing." Ibid.

Here, reviewing the judge's findings with the deference accorded to findings made by a Family Part judge, we find no reason to interfere with the decision. The judge was satisfied that

defendant demonstrated substantial changed circumstances since the entry of the FRO, constituting good cause for its dismissal. Indeed, substantial change was evident from defendant's testimony that she had undergone counseling and "moved on" with her life. In addition, the FRO prejudiced defendant in the parties' ongoing custody litigation. See Sweeney, supra, 313 N.J. Super. at 446-47. The judge also determined that plaintiff's fear of defendant was not objectively reasonable. While not explicit, we can certainly glean the judge's credibility assessment of plaintiff's testimony regarding his fear from the following statement: "I do not believe that . . . [plaintiff] has a good faith based fear of this defendant. I think that he is trying to use this as an upper hand in a custody battle[.]" Contrary to plaintiff's argument, the judge's findings are supported by adequate, substantial, and credible evidence in the record.

Plaintiff also argues for the first time on appeal that the judge failed to provide proper notice of the hearing by including the "wrong case caption and docket number" in the notice to appear. However, we "decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest." Zaman v. Felton, 219 N.J. 199, 226-27

(2014) (quoting State v. Robinson, 200 N.J. 1, 20 (2009)). Neither exception is implicated here.

Affirmed.