

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3558-15T3

L.N.,

Plaintiff-Appellant,

v.

G.D.,

Defendant-Respondent.

Submitted June 6, 2017 – Decided December 6, 2017

Before Judges Fisher and Ostrer.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Mercer County,
Docket No. FV-11-1014-16.

Ulrichsen Rosen & Freed LLC, attorneys for
appellant (Rebecca Day, of counsel and on the
briefs).

David P. Schroth, attorney for respondent.

The opinion of the court was delivered by

OSTRER, J.A.D.

Plaintiff L.N. appeals from the trial court's order, after an evidentiary hearing, dismissing her domestic violence complaint against her husband, G.D., and vacating a temporary restraining

order. The court found that defendant committed predicate acts of domestic violence, but a final restraining order was not necessary to protect plaintiff. As we are not satisfied that the court made sufficient findings as to material issues in dispute, we vacate the court's order and remand for further proceedings.

The parties shared a home with their two daughters, but had been estranged for many years and used separate bedrooms. They had been unsuccessfully negotiating a divorce. An argument over the parties' scheduled time with their daughters led to the altercation that prompted plaintiff's complaint. Defendant contended that plaintiff had limited his time with the children during a holiday weekend. Plaintiff denied she had done so. Defendant called plaintiff a "fucking bitch." Despite defendant's anger, plaintiff re-entered the parties' master bedroom, defendant's bedroom, to retrieve her things for bed. Defendant suspected plaintiff was recording him, so he forcibly wrested her phone away. In doing so, he caused her injuries. However, the parties disputed the nature of those injuries and how he caused them.

Plaintiff asserted that defendant banged her head against the wall, causing a bump on her head. She claimed she also suffered scratches to her hand and bruising. Defendant admitted only that he caused a minor scratch to plaintiff's hand (which is depicted

in a police photograph in evidence). The injuries to plaintiff's hand made it into the police report, but she did not complain of any injuries to her head and back, claiming they did not appear for two or three days after the incident.

The court found, by a preponderance of the evidence, that defendant committed three predicate acts of domestic violence. The court found that defendant committed simple assault. The court stated the "bodily injury was minimal" without explicitly finding the precise nature of defendant's actions, or plaintiff's injury.¹ The court held that "for purposes of the statute itself, the scope of the injury is really not that significant." The court acknowledged that defendant felt "baited for lack of a better word," however, the court rejected his assertion that he was "set up," and found his reaction to his wife was "essentially not justified." The court also noted that the parties were under stress over financial matters, but that did not excuse his actions.

¹ The court stated that the friend "testified credibly that she was concerned with respect to her friend, the plaintiff, because she saw the — she testified anyway, that she saw the defendant banging the plaintiff's head against the wall." (Emphasis added). We interpret this sentence to mean that the court credited the friend's expression of concern, but only acknowledged without crediting, the friend's assertion about the head-banging. Notably, during her 911 call to police, the friend answered "I don't know," when asked how defendant attacked plaintiff.

The court found that the destruction of plaintiff's phone constituted criminal mischief. Finally, the court found that defendant harassed plaintiff, because he offensively touched plaintiff, or threatened to do so, with the purpose to harass.

The court reviewed, but did not resolve, many of plaintiff's disputed claims that defendant committed prior acts of domestic violence. Plaintiff claimed that defendant once slammed her head against a car window when she misread a map. Defendant responded that she reached for the steering wheel while he was driving, and he pushed her away. She claimed that on another occasion, defendant, upset with the outcome of a baseball game on television, took issue with something plaintiff said, slammed her against the wall, and stated "I can smash your fucking face." He denied it happened. She recalled another incident in which he grabbed her by the neck, which he also denied, and other occasions when he used coarse and demeaning language to her, and threw or broke items in anger, which he explained away. However, he admitted that a few days before the parties' altercation, he patted his wife down when he suspected she was surreptitiously recording him. She claimed he also pulled at her robe.

Notwithstanding its finding that defendant committed predicate acts of domestic violence, the court concluded that a final restraining order was not needed "to protect" or "prevent

further abuse." The judge placed great weight on the fact that plaintiff had remained in the marital home and had not previously sought a restraining order:

The Court is struggling with this at this point in time and the reason I'm struggling with it is that both parties have lived together in an estranged environment for approximately 11 to 11 and a half years according to the defendant. The parties, although they have a series of issues with respect to domestic contretemps, based upon the bickering, the arguing that's going back and forth, this apparently is one of the first times, based upon the testimony of the plaintiff alone, that she has gone forward and actually filed for a temporary restraining order notwithstanding the fact that she has testified that there have been numerous allegations, anyway, of domestic violence relating back as far as six plus years and notwithstanding that, has stayed in the house and although there have been numerous arguments, the question there is, is it just arguments or is there really a need to protect the victim or prevent further abuse.

The court noted that the parties were "in the midst or, perhaps, contemplating filing for divorce," and there were "suggestions . . . [of] settlement of their marital problems" The court concluded that "the fact that the domestic issues have been going on for a significant period of time, again, raises the issue of whether, in fact, there's a need to protect. So I find that there is not a need to protect at this point in

time." The court nonetheless advised defendant to get anger management counseling.

Plaintiff contends the court erred in finding that a final restraining order was not needed to protect her. She argues that the court gave inadequate weight to the violent nature of the predicate acts. Defendant urges us to defer to, and affirm, the trial court's judgment that a final restraining order was not needed.

We will not disturb trial court findings that are adequately supported by substantial, credible evidence, Cesare v. Cesare, 154 N.J. 394, 411-12 (1998), but we must intervene when the trial court fails to apply applicable standards, Gotlib v. Gotlib, 399 N.J. Super. 295, 309 (App. Div. 2008).

In adjudicating a domestic violence case, the trial judge has the dual task of determining whether predicate acts of domestic violence occurred, and, if so, "whether the court should enter a restraining order that provides protection for the victim." Silver v. Silver, 387 N.J. Super. 112, 126 (App. Div. 2006). In making this second determination, the trial court is guided by "an evaluation of the factors set forth in N.J.S.A. 2C:25-29a(1) to 29a(6)" Id. at 127. These six factors include:

- (1) The previous history of domestic violence between the plaintiff and defendant, including threats, harassment and physical abuse;

- (2) The existence of immediate danger to person or property;
- (3) The financial circumstances of the plaintiff and defendant;
- (4) The best interests of the victim and any child;
- (5) In determining custody and parenting time the protection of the victim's safety; and
- (6) The existence of a verifiable order of protection from another jurisdiction.

[N.J.S.A. 2C:25-29(a).]

It was incumbent upon the court to make essential findings as to material issues in dispute. See Gac v. Gac, 351 N.J. Super. 54, 64 (App. Div. 2002) (citing R. 1:7-4), rev'd on other grounds, 186 N.J. 535 (2006). "Because a particular history can greatly affect the context of a domestic violence dispute, trial courts must weigh the entire relationship between the parties and must specifically set forth their findings of fact in that regard." Cesare, 154 N.J. at 405.

As for the first prong, the court found that defendant caused plaintiff minimal bodily injuries, but failed to resolve how he did it. It was not enough to characterize defendant's actions as a simple assault. It is one thing to wrest a cell phone in a fit of anger, incidentally scratching another person's hand, and then smashing the phone. It is far more egregious when the wresting also involves banging a person's head against the wall. The court did not decide between these two extremes.

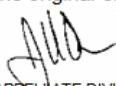
As to the second prong, the court essentially found that there was no immediate danger to plaintiff, N.J.S.A. 2C:25-29(a)(2), but the court did so without assessing the remaining factors, in particular the prior history of domestic violence, N.J.S.A. 2C:25-29(a)(1). Yet, "[e]vidence [of a prior history of domestic violence] is often essential to provide background and context for the acts charged in the complaint itself" H.E.S. v. J.C.S., 349 N.J. Super. 332, 341 (App. Div. 2002), aff'd in part and rev'd in part on other grounds, 175 N.J. 309 (2003). Such evidence "permit[s] an inference to be drawn respecting the purposeful state of mind of the defendant; and . . . allow[s] the trial judge to weigh the seriousness of the risk of future acts of violence and craft appropriate terms of any restraining order." Ibid.; see also J.D. v. M.D.F., 207 N.J. 458, 483 (2011) ("A history of domestic violence may serve to give content to otherwise ambiguous behavior and support entry of a restraining order."). Here, the claimed prior acts of domestic violence – if believed – should have had a significant impact on the court's need-for-protection decision.

Finally, the court placed undue weight on the fact that plaintiff had not previously sought a restraining order, and remained in the household, despite her prior claims of domestic violence. We have recognized that a person's failure to seek the

intervention of judicial authority may be yet another sign of victimization. "Indeed, it is somewhat typical in domestic abuse situations that a victim will try to avoid signing a complaint under the Act, hoping the perpetrator will just leave her alone, and then, after a cumulation of incidents, the victim takes the necessary legal action." Tribuzio v. Roder, 356 N.J. Super. 590, 597 (App. Div. 2003). A person "should not be placed at a disadvantage in availing herself" of protection after failing to do so in response to prior incidents. Ibid.

In sum, we are constrained to vacate the court's order and remand for reconsideration in light of additional and essential findings of fact. The temporary restraining order is reinstated. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION