SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4392-15T1

A.W.,

Plaintiff-Appellant,

v.

N.M.,

Defendant-Respondent.

Submitted September 14, 2017 – Decided October 12, 2017

Before Judges Nugent and Currier.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Union County, Docket No. FV-20-1208-16.

Ziegler & Zemsky, LLC, attorneys for appellant (Steven M. Resnick, on the briefs).

Ronald A. Cohen, attorney for respondent.

PER CURIAM

Plaintiff A.W.[1] appeals from the denial of his application for a final restraining order (FRO). Because the trial judge erred in her determination that a finding of harassment under domestic violence law requires an instance of abuse or violence, we reverse.

We derive the facts from the evidence presented at trial. While married to other people, the parties engaged in an affair for approximately five months. Plaintiff alleges that he ended the relationship, telling defendant N.M. that he did not want any further contact with her and he intended to tell his wife about the affair. In the days following that conversation, plaintiff stated that defendant made hundreds of phone calls to his home, work, and cell phone. In one phone call, defendant impersonated a day care worker calling about plaintiff's child so he would answer the phone. Defendant also came to plaintiff's home, demanding to speak to his wife, and she sent his wife offensive text messages.

Plaintiff reported two incidents to the police when he observed defendant following him and his family in her car. At

[1] We use initials to refer to the individuals in this case for the purpose of confidentiality.

one point, when plaintiff stopped at a red light, defendant got out of her vehicle and ran to plaintiff's car, pounding on the window and yelling. The following day, plaintiff saw defendant in her car near his home and then observed her following his family to the daycare center where plaintiff parked his car. Later that day, he found his tire slashed.

As a result of these events, plaintiff applied for, and was granted, a temporary restraining order (TRO). Although the TRO was served on defendant, plaintiff stated she continued to call him at work.[2]

When the parties appeared for trial accompanied by counsel in January 2016, they agreed to enter into a comprehensive consent agreement. The agreement prevented defendant from having any form of contact with plaintiff and his immediate and extended family. It further specified that defendant was restricted from coming within 100 feet of plaintiff and his family and from going to certain places.

Despite the agreement, defendant continued calling plaintiff's workplace using "*67" so he could not recognize the incoming number. The phone calls included heavy breathing, silence upon answering, and hang-ups. Within two weeks of the entry of

[2] Plaintiff changed his cell phone number shortly after the multitude of phone calls began.

the agreement, defendant sent a bikini-clad photograph of herself to plaintiff's work email address. She sent Valentine's Day cards and packets of hot chocolate to his work as well. After each of these events, plaintiff's counsel sent a letter to defendant's counsel warning that if defendant continued to violate the agreement, plaintiff would apply for a TRO.

The phone calls and communications did not stop, however, and plaintiff obtained a second TRO on February 24, 2016, on the grounds of harassment and stalking. Nevertheless, defendant continued calling plaintiff at work and sending him packages and letters. Within days of the entry of the TRO, defendant was observed on a store's surveillance footage purchasing a TracFone[3] that she subsequently used to call plaintiff's workplace more than fifty times. Plaintiff reported these violations of the TRO, and defendant was arrested and charged with contempt, N.J.S.A. 2C:29-9(b), and harassment, N.J.S.A. 2C:33-4(a).[4]

Trial took place on several days in March and May 2016. Plaintiff presented defendant's phone records corroborating

[3] "TracFone" is a cell phone company that sells prepaid cell phones that can be loaded with prepurchased blocks of minutes. TracFone Wireless, https://en.wikipedia.org/wiki/TracFone_Wireless (last visited Sept. 27, 2017).

[4] Defendant pled guilty to harassment and was sentenced to one year of probation.

hundreds of phone calls made prior to and after the entry of the no-contact agreement, as well as the offensive text messages sent to his wife. He also presented a witness who observed defendant in the daycare center parking lot bending near plaintiff's car on the day his tire was slashed, surveillance footage from the post office showing defendant mailing packages, and the video showing the purchase of the TracFone.

Plaintiff requested the trial judge grant the FRO because he was scared and feared for the safety of himself and his family.

Defendant admitted to making the multitude of phone calls and sending the text messages. She also stated she had sent some of the packages and cards to plaintiff's office. Although defendant conceded she bought the TracFone, she denied using it to call plaintiff, stating that other people living in her house had access to her phones. She admitted to being in the parking lot on the day plaintiff's tire was slashed but denied damaging the tire.

In an oral decision, delivered on May 25, 2016, the trial judge stated that, despite her determination that neither party was entirely credible in their respective testimony, she found that defendant had made hundreds of phone calls to plaintiff on his cell phone, to his office and home, and sent several of the packages he received at his office. She also determined that

defendant's actions were a violation of the civil no-contact agreement.

However, in considering the harassment statute, N.J.S.A. 2C:33-4, and several published and unpublished cases, the judge concluded that she could not find that defendant had a purpose to annoy or alarm plaintiff with her actions because she had not threatened plaintiff or his family. She stated:

> this [c]ourt cannot find hangups without anything more, without voicemail messages making any threats, without [defendant] after the civil restraint order showing up at [plaintiff's] place of business or at his house, or if she made any threats to his wife or his family or anything like that, this record is completely devoid of that.
>
> What this [c]ourt has before it is hangups and a Valentine's Day gift and a birthday gift without anything more. And this [c]ourt cannot find in evaluating the totality of the circumstances that that, in fact, was anything more than a disappointed suitor trying to repair a romantic relationship. The [c]ourt finds nothing in the conduct that's violent or abusive or threatening.

Plaintiff appeals from the denial of the FRO, reiterating the plethora of evidence presented at trial and arguing that the judge erred in her finding that plaintiff failed to prove the predicate act of harassment. We agree.

We are mindful that our scope of review of the trial judge's factual findings is limited. Cesare v. Cesare, 154 N.J. 394, 411

(1998). We are generally bound by the trial judge's findings of fact "when supported by adequate, substantial, credible evidence." Id. at 411-12. This is especially true when questions of credibility are involved. Id. at 412. We are not, however, bound by the trial judge's interpretations of the legal consequences that flow from established facts. Manalapan Realty, L.P. v. Twp. Comm., 140 N.J. 366, 378 (1995).

Before entering an FRO, a trial judge must find, by a preponderance of the evidence, that a defendant engaged in conduct that would fit the definition of one or more criminal statutes, including harassment as defined by N.J.S.A. 2C:33-4, and that the entry of an FRO is required for the victim's protection. Silver v. Silver, 387 N.J. Super. 112, 125-126 (App. Div. 2006).

Plaintiff asserts that defendant harassed him pursuant to N.J.S.A. 2C:33-4(a), which provides that a person is guilty of harassment if, with purpose to harass another, he "[m]akes, or causes to be made, a communication or communications anonymously or at extremely inconvenient hours, or in offensively coarse language, or any other manner likely to cause annoyance or alarm."

In State v. Hoffman, 149 N.J. 564 (1997), our Supreme Court stated the following elements are required to establish such a violation:

> (1) defendant made or caused to be made a communication;
>
> (2) defendant's purpose in making or causing the communication to be made was to harass another person; and
>
> (3) the communication was in one of the specified manners or any other manner similarly likely to cause annoyance or alarm to its intended recipient.
>
> [Id. at 576.]

The Court instructed that "the term 'annoyance' should derive its meaning from the conduct being scrutinized. . . . [S]ubsection (a) proscribes a single act of communicative conduct when its purpose is to harass. Under that subsection, annoyance means to disturb, irritate, or bother." Id. at 580.

The judge erred in her determination that the statute and the governing case law required a finding of abusive or violent conduct or that defendant must threaten the victim in order to satisfy the predicate act of harassment. Plaintiff presented overwhelming evidence of actions taken by defendant that were not only annoying and irritating, but also intended to intimidate and scare plaintiff and his family.

The multitude of phone calls, offensive text messages, sending of packages and letters, appearing at plaintiff's home and following plaintiff and his family are more than sufficient to meet the statutory definition of harassment. See Hoffman, supra,

149 N.J. at 583 (finding that anonymous calls and letters are invasive of the recipient's privacy and meet the definition of harassment under the pertinent statute).

As the Court stated in Hoffman, "[c]ommon sense and experience" are sufficient to lead to a finding of a purpose to harass. Supra, 149 N.J. at 577. Defendant admitted to most of the described actions. The trial judge erred in concluding that defendant's behavior was not intended to annoy and harass plaintiff.

We also note that defendant was charged with contempt for violating the TRO during the pendency of the FRO trial. The judge stated several times that there was "no doubt in [her] mind that . . . [defendant had] violat[ed] [the] civil restraining order." A finding of prior violations of previous restraints is relevant to a judge's determination as to whether defendant has engaged in harassing conduct. N.B. v. S.K., 435 N.J. Super. 298, 307-08 (App. Div. 2014).

Furthermore, in 2015, the Legislature amended the Domestic Violence Act, N.J.S.A. 2C:25-19(a)(17), to include contempt of a domestic violence order as a predicate act of domestic violence.

Although we are satisfied that the totality of the circumstances warranted a finding that the harassment statute was violated, we must still consider whether the second prong of the

Silver test has been met: was there sufficient evidence that an FRO was necessary to protect plaintiff from future acts of domestic violence. See Silver, supra, 387 N.J. Super. at 127. The need for an FRO is not limited to protection from physical harm. This factor is also satisfied by showing that an FRO would "prevent further abuse." Ibid. Since harassment is one of the enumerated predicate acts of domestic violence, the need to prevent further harassment will suffice. Although the court should assess the factors set forth in N.J.S.A. 2C:25-29(a)(1)—(6), to determine if the protection of a FRO is necessary, Silver, supra, 387 N.J. Super. at 127, we note the statute does not limit the court's analysis to those factors. See N.J.S.A. 2C:25-29(a) (listing the factors a "court shall consider but not be limited to").

Based on her conclusion that plaintiff had not proven the predicate act of harassment, the trial judge did not make any findings of whether an FRO was required for plaintiff's protection. While ordinarily we would remand for such findings, we are confident that applying the law to the facts as found by the trial judge will result in the conclusion that an FRO is necessary under these circumstances. Despite the entry of civil restraints and several TROs, defendant continued to repeatedly call plaintiff and send him packages and letters. She was not deterred by any of the prior court orders but rather attempted to communicate with

plaintiff by more anonymous means such as using a blocked call feature and a TracFone.

We, therefore, reverse and remand to the trial court for the entry of an FRO with appropriate protections.

Reversed and remanded. We do not retain jurisdiction.