SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0326-16T3

O.A.,

Plaintiff-Appellant,

v.

J.V.,

Defendant-Respondent.

Argued November 28, 2017 – Decided January 25, 2018

Before Judges Fasciale and Moynihan.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Hudson County, Docket No. FV-09-2638-16.

Dianna Fuller argued the cause for appellant (Northeast New Jersey Legal Services, attorneys; Morgan Fletcher, of counsel and on the brief).

Respondent has not filed a brief.

PER CURIAM

Plaintiff appeals from an August 12, 2016 order denying her request for a final restraining order (FRO) and dismissing a temporary restraining order (TRO) entered in her favor pursuant

to the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35; and an August 22, 2016 order awarding defendant counsel fees in the amount of $450. She contends:

> I. THE TRIAL COURT ABUSED ITS DISCRETION BY NOT CONSIDERING AN AMENDMENT TO THE [TRO] THAT PLAINTIFF PROPERLY FILED.
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> A. STANDARD OF REVIEW.
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> B. THE TRIAL COURT HAD AN OBLIGATION TO CONSIDER PLAINTIFF'S AMENDMENT TO THE DOMESTIC VIOLENCE COMPLAINT.
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> C. THE TRIAL COURT HAD A SEPARATE OBLIGATION TO ENSURE THE PROCEDURES FOR SERVICE OF PROCESS WERE EFFECTUATED AS TO THE AMENDED COMPLAINT.
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> D. THE 2015 STATUTORY AMENDMENT TO THE PDVA SPECIFICALLY INCLUDES CONTEMPT AS AN INDEPENDENT DOMESTIC VIOLENCE OFFENSE.
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> II. THE TRIAL COURT ERRED BY FINDING THAT AN ACT OF HARASSMENT DID NOT OCCUR BECAUSE THE ACT OF THE DEFENDANT WAS A "SINGLE COMMUNICATION."
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> III. THE TRIAL COURT ERRED BY FAILING TO FIND A NEED FOR A [FRO] BASED ON THE PLAINTIFF BEING A "STRONG WILLED AND OPINIONATED PERSON."
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> IV. THE TRIAL COURT ABUSED ITS DISCRETION BY AWARDING COUNSEL FEES TO THE DEFENDANT AS A SANCTION FOR PLAINTIFF'S [NON-APPEARANCE].

We are bound by the trial court's factual findings if they are "supported by adequate, substantial, [and] credible evidence." Cesare v. Cesare, 154 N.J. 394, 411-12 (1998) (citing Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 484 (1974)). Such

deference is "especially appropriate when the evidence is largely testimonial and involves questions of credibility." In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997). Moreover, a greater degree of deference is to be accorded to the Family Part as it possesses "special jurisdiction and expertise," and we "should accord deference to the family court factfinding." Cesare, 154 N.J. at 413. We are not, however, bound by the judge's interpretations of the legal consequences that flow from established facts. Manalapan Realty, LP v. Twp. Comm., 140 N.J. 366, 378 (1995).

A judge must apply the dual-element test set forth in Silver v. Silver, 387 N.J. Super. 112 (App. Div. 2006), in determining whether to grant a FRO pursuant to the PDVA. "First, the judge must determine whether the plaintiff has proven, by a preponderance of the credible evidence, that one or more of the predicate acts set forth in N.J.S.A. 2C:25-19(a) has occurred." Id. at 125. If the judge finds plaintiff did not meet the burden of proof, the judge must dismiss the complaint; but if the court finds a defendant committed one or more of the predicate acts listed under N.J.S.A. 2C:25-19(a), the judge must determine whether a restraining order is required to protect the plaintiff from future acts or threats of violence. Id. at 126. The latter determination is "most often perfunctory and self-evident," id. at 127, but the

guiding standard is whether a restraining order is necessary, upon an evaluation of:

> (1) The previous history of domestic violence between the plaintiff and defendant, including threats, harassment and physical abuse;
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> (2) The existence of immediate danger to person or property;
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> (3) The financial circumstances of the plaintiff and defendant;
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> (4) The best interests of the victim and any child;
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> (5) In determining custody and parenting time the protection of the victim's safety; and
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> (6) The existence of a verifiable order of protection from another jurisdiction.
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> [N.J.S.A. 2C:25-29(a); see also Cesare, 154 N.J. at 401.]

The judge must also consider whether a restraining order is necessary to protect the victim from an immediate danger or to prevent further abuse. Silver, 387 N.J. Super. at 127.

The judge perpended a May 9, 2016 incident that was set forth in the complaint alleging defendant emailed plaintiff a picture of her place of employment; plaintiff had never disclosed her workplace location to defendant. Finding defendant's explanation for sending the email unbelievable, the judge found that defendant's purpose in

> sending that [email] can only have been to let her know that he knew where she worked and in light of the prior history of his showing up at her work place and at her home, is a communication that was made for the purpose of annoying or alarming her but was a single communication.

The judge, in dismissing the complaint and vacating the previously-entered TRO, reasoned:

> The requirements for the issuance of a restraining order are that the evidence demonstrate by a preponderance of the credible evidence the commission of an act of domestic violence, that defined as one of the criminal offenses set forth in the domestic violence act and that it constitutes a part of pattern or course of controlling or abusive behavior by one party toward another.
>
> Here[,] there is a course of hostile behavior by both parties toward the other concerning their daughter, concerning the child support and the visitation. That's not domestic violence.

We conclude the judge found all the necessary elements of harassment under N.J.S.A. 2C:33-4(a), but mistakenly held that more than one communication was necessary to establish the predicate act, conflating some of the elements of N.J.S.A. 2C:33-4(c) in analyzing the first of the Silver factors.[1] Subsection

[1] The pertinent sections of N.J.S.A. 2C:33-4 (emphasis added) provide:

(a) "proscribes a single act of communicative conduct when its purpose is to harass," as opposed to subsection (c) which "proscribes a course of alarming conduct or repeated acts with a purpose to alarm or seriously annoy an intended victim." State v. Hoffman, 149 N.J. 564, 580 (1997). Although the judge did not explicitly find that defendant's purpose was to harass, we apprehend he found that purpose from his conclusion that "in light of the prior history of [defendant] showing up at [plaintiff's] [workplace] and at her home, [his was] a communication that was made for the purpose of annoying or alarming her." We are therefore constrained to remand the case for the trial judge to

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> [A] person commits a petty disorderly persons offense if, with purpose to harass another, he:
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> > a. Makes, 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; [or]
> >
> > . . . .
> >
> > c. Engages in any other course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person.

consider whether a restraining order is necessary to protect plaintiff from future acts or threats of domestic violence.[2]

We also direct the judge, during the remand proceedings, to consider the June 23, 2016 allegations set forth in plaintiff's second amended complaint of June 27, 2016;[3] the judge declined plaintiff's request to consider evidence related to that incident. If true, defendant's alleged conduct in following plaintiff in his car may have violated the TRO. Contempt of a PDVA restraining order, N.J.S.A. 2C:29-9(b), is a predicate offense. N.J.S.A. 2C:25-19(a)(17).

The law recognizes the dangers of requiring a plaintiff to effect service on a defendant, see N.J.S.A. 2C:25-28(l) ("At no time shall the plaintiff be asked or required to serve any order on the defendant."). Consequently, an amended complaint must be

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[2] The judge did say that "the evidence does not demonstrate that [plaintiff] need[ed] a restraining order for her protection," but it seems from the cold record that his comment pertained to "statements that [may be] ambiguous and could be interpreted one way or another" or to discussions between the parties about child support. Because the incident that constituted the predicate act involved neither of those types of communication, we cannot conclude the judge made a finding regarding the second prong of Silver as it related to the email sent to plaintiff by defendant.

[3] The complaint read: "06/23/2016: A LITTLE WHILE AFTER COURT, AS [PLAINTIFF] WAS DRIVING WITH HER MOTHER AND DAUGHTER IN HER CAR, [DEFENDANT] WAS FOLLOWING [PLAINTIFF] IN HIS CAR."

personally served by law enforcement personnel.[4] In that requests to amend pleadings are liberally granted, N.J. Div. of Youth & Family Servs. v. M.W., 398 N.J. Super. 266, 288 (App. Div. 2008); see also Kernan v. One Washington Park, 154 N.J. 437, 457 (1998) (recognizing that "the granting of a motion to file an amended complaint always rests in the court's sound discretion"), the judge abused his discretion when, after determining defendant had not been served with the complaint, he refused to consider the

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[4] The N.J. Domestic Violence Procedures Manual §4.5.7 (amended 2008) provides:

> If after the entry of a TRO, the plaintiff returns to court to amend the TRO/Complaint, an amended complaint containing the additional allegation(s) should be taken. The defendant shall be served with the amended TRO complaint in accordance with the procedures in section 4.6. If the defendant has not been served with the amended complaint prior to the Final hearing[,] an adjournment may be granted and a continuance order or amended TRO be issued if defendant needs additional time to prepare.

Section 4.6 states, in pertinent part:

> 4.6.1 The Complaint/TRO shall be served on the defendant by personal service, immediately following the entering of such order. This service is effectuated by the procedures outlined in each county, through the Municipal or State police, Sheriff's Department or both. Substituted service is permitted only by specific court order.

most recent allegations, summarily stating "[n]o, there was already one set of amendments, this was another one after the last court appearance. No." The judge "had an obligation to determine what caused [the] violations of law and Supreme Court policy. The failure to carry out these procedural requirements compromises the safety of domestic violence victims and undermines defendants' constitutionally guaranteed right to due process of law." A.M.C. v. P.B., 447 N.J. Super. 402, 406 (App. Div. 2016).

Further, the judge did not ascertain if defendant was prepared to meet the new allegations – a single incident. See J.D. v. M.D.F., 207 N.J. 458, 479-80 (2011) (recognizing, in the context of an expansion of the prior history set forth in a complaint, "some defendants will know full well the history that plaintiff recites and some parties will be well-prepared regardless of whether the testimony technically expands upon the allegations of the complaint"). And the judge disregarded plaintiff's suggestion that the case be adjourned if defendant needed time to meet the new allegations. "A due process violation can easily be avoided by granting a party a reasonable adjournment if confronted by new allegations at the time of trial in order to afford the party an ample opportunity to meet the charges." Pazienza v. Camarata, 381 N.J. Super. 173, 185 (App. Div. 2005); see also H.E.S. v. J.C.S.,

175 N.J. 309, 324 (2003) (finding no prejudice if "the trial court granted either of defendant's requests for a continuance").

Indeed, the N.J. Domestic Violence Procedures Manual §4.12 (emphasis added), provides:

> When the allegations in the plaintiff's complaint are incomplete and/or it becomes evident at the final hearing that the plaintiff is seeking a restraining order based upon acts outside the complaint, the court, either on its own motion or on a party's motion, shall amend the complaint to include those acts, which motion shall be freely granted. Due process requires that the judge make an inquiry as to whether the defendant needs additional time to prepare in light of the amended complaint. A brief adjournment may be required if the judge determines that the defendant did not have adequate notice and needs time to prepare. If an adjournment is granted, a continuance order or an amended TRO shall be entered.

We thus require the allegations in the amended complaint be considered, after service – if not already made on defendant – is affected.

We affirm the sanction the judge imposed when plaintiff failed to appear in court on the date set by the court. A judge's decision to sanction someone who disobeys the court order is addressed to the judge's discretion. See Gonzalez v. Safe & Sound Sec. Corp., 185 N.J. 100, 115 (2005). While dismissal of a complaint due to nonappearance is an extreme remedy that should be used as a "last resort," payment of costs is considered a

"lesser sanction[]." Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 1:2-4 (2018). We have found the imposition of costs and attorney's fees is an appropriate remedy for a party's failure to appear at a judicial proceeding. See Bayne v. Johnson, 403 N.J. Super. 125, 145 (App. Div. 2008) (holding it was not an abuse of discretion to award attorney's fees as a sanction for non-appearance); see also Oliviero v. Porter Hayden Co., 241 N.J. Super. 381, 390-91 (App. Div. 1990) (affirming use of lesser sanctions than dismissal to deal with unjustifiable waste of judicial resources by plaintiff's counsel). Notwithstanding plaintiff's advisement that she would be out of the country on the date set by the court, we do not conclude the sanction imposed was an abuse of discretion.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.