SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1636-16T1

J.L.O.,

Plaintiff-Respondent,

v.

L.E.G.,

Defendant-Appellant.

Submitted January 22, 2018 – Decided February 14, 2018

Before Judges Messano and Vernoia.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Atlantic County, Docket No. FV-01-0773-16.

Brian F. O'Malley, attorney for appellant.

Respondent has not filed a brief.

PER CURIAM

Plaintiff J.L.O. and defendant L.E.G. were once married. In August 1994, plaintiff obtained a temporary restraining order (TRO) pursuant to the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35, based upon a complaint that defendant assaulted and harassed her. The TRO was issued in Essex County,

apparently shortly before, or contemporaneously with, the commencement of the parties' divorce action. The March 13, 1995 final judgment of divorce (JOD) reflects a continued contentious relationship. It provided that defendant was permitted to have a "blood relative" accompany him during "supervised visitation" with his infant daughter outside plaintiff's presence.[1] The JOD also provided that the court was assuming jurisdiction of the pending domestic violence matter (DV matter).

On July 5, 1995, the same judge entered a final restraining order (FRO) in the DV matter that referenced the JOD and provided "all issues were settled on 11/10/94. It was agreed that the restraining order would continue [and] that defendant would have no contact with [plaintiff and] would stay at least [two] blocks away, except for purposes of visitation." There is no indication in the "Return of Service" portion of the FRO that defendant was served with the FRO, and he subsequently denied that he was.

In June 2015, defendant moved to vacate the FRO in Essex County. See N.J.S.A. 2C:25-29d (permitting dissolution or modification of an FRO upon a showing of good cause). The court refused to hear the application because plaintiff now resided in Atlantic County, and transferred venue in January 2016. For

[1] The JOD also ordered the parties and the child to submit to DNA testing because defendant did not acknowledge paternity.

reasons unexplained by the record, defendant then filed a new motion in September 2016 seeking the same relief.

Defendant certified that he became aware of the FRO when he applied for a "pistol permit," which was denied because of the FRO.[2] He claimed that he had no contact with plaintiff for "roughly eighteen years" and was unable to accept a job as a private security agent because he could not obtain the permit. Defendant also demonstrated that he could not furnish transcripts from the 1994 or 1995 court proceedings because the "tapes [and] logs were purged."

Plaintiff's certification in opposition included attachments from the 1990s that she claimed demonstrated defendant's violation of conditions regarding visitation and his knowledge of the FRO's existence. Plaintiff also claimed there were "pending criminal charges" against defendant.

Plaintiff certified that she had no contact with defendant for eighteen years, until 2014, when defendant contacted the parties' daughter, in alleged violation of the FRO. Plaintiff also claimed defendant and his attorney made false allegations in court documents in an attempt to recoup past child support

[2] Defendant also claimed that he held a firearms purchaser identification card that was confiscated when he filed his original motion to dissolve the FRO.

payments. Plaintiff asserted that "[d]efendant's actions over the last sixteen months" made it "obvious that [he] still poses a threat to me and my family." We need not discuss the reply filed by defense counsel.

A hearing on defendant's motion took place on November 7, 2016. Defendant was represented by counsel and plaintiff appeared pro se. After both parties were sworn, the judge heard legal argument from defense counsel regarding the factors identified in Carfagno v. Carfagno, 288 N.J. Super. 424 (Ch. Div. 1995), as guideposts for the exercise of the court's discretion in dissolving or modifying an FRO. Defendant did not testify, except to answer an occasional question posed by the judge.

Plaintiff, however, testified at length, first, by reading a prepared written statement, because she was "really scared," and then in response to the judge's questioning. Plaintiff accused defendant of "repeatedly" lying "to the police, the [c]ourt and his own attorneys" over the prior twenty years. Plaintiff claimed she was "still afraid" of defendant and, contrary to her certification, said defendant had contacted her after the FRO was issued, but she never called the police. The judge asked directly how defendant's contact with his adult daughter was making plaintiff fearful, and plaintiff responded: "I believe he's using her to get information and to compile stuff to harass me through

these courts." Plaintiff claimed she was "working" on an unspecified criminal complaint against defendant.

Although defense counsel responded to plaintiff's testimony with further argument, he never asked to cross-examine plaintiff or to have defendant testify.

The judge noted that although there had been no contact between the parties for at least a decade, plaintiff was "shaking" during her testimony. Turning to the Carfagno factors, the judge found there were no violations of the FRO, no contempt complaints filed since the FRO issued and no restraining orders issued in other jurisdictions. The judge also concluded "there [was] not a valid basis to find that [defendant was] abusing the legal process," because requesting emancipation of the parties' daughter was "not a matter of harassment."

The judge concluded plaintiff still had

> a deep-seeded concern . . . based upon what she alleges the actions of [defendant] back when the restraining order was [issued], whether he had a knife, whether he shook the child, whether he pushed her in the face, are all significant matters that do[] still reside in [plaintiff's] mind and in her belief that she has a fear [of defendant].
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> And I do find that for whatever reasons, although it . . . ought to perhaps have been negated by the ten-year period of time that they had no contact, it's apparent that that's still something that is affecting [plaintiff].

> So for those reasons[,] I find that [plaintiff's] fear or her concern for her safety still exists, and so for those reasons[,] I am going to deny [defendant's] request to vacate the [FRO].

Noting plaintiff's claim that she intended to file charges against defendant, the judge said she was denying defendant's request "at least until the time that that matter is resolved." However, she also told plaintiff that once that "legal issue is over," the court might

> very well be in a position to grant [defendant's] request because at some point . . . you just have to live your own lives . . . and it's getting to that point soon, except that you're saying there might be some litigation, and so for that period of time I'm going to leave the restraint in place.

Citing Bresocnik v. Gallegos, 367 N.J. Super. 178 (App. Div. 2004), defense counsel asked if the judge was finding plaintiff's fear was "rational." The judge said she was making such a finding, "based upon the fact . . . that . . . I'm observing [plaintiff]. . . . [A]t least at this point in her mind . . . there is a rational basis for it." (emphasis added). The judge entered an order denying defendant's motion, and this appeal followed.

We defer to the trial judge's factual findings when supported by "adequate, substantial, credible evidence," particularly when

those findings are based upon the judge's opportunity to observe the witnesses. Cesare v. Cesare, 154 N.J. 394, 411-12 (1998). We do not defer, however, to the judge's legal conclusions if they are based upon a misunderstanding of applicable legal principles. T.M.S. v. W.C.P., 450 N.J. Super. 499, 502 (App. Div. 2017) (citations omitted).

A judge should consider the Carfagno factors in determining whether good cause supports a request to modify or dissolve an FRO. Sweeney v. Honachefsky, 313 N.J. Super. 443, 447-48 (App. Div. 1998). Those factors are:

> (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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> [Carfagno, 288 N.J. Super. at 435.]

Here, the judge recognized that plaintiff did not consent to vacating the FRO but then found several other Carfagno factors

weighed in defendant's favor. Indeed, the only factor the judge considered in deciding not to dissolve the FRO was plaintiff's professed fear of defendant.

Defendant argues that the judge erred, because she based her decision solely on plaintiff's subjective fear of defendant, which lacked any rational basis. See Bresocnik, 367 N.J. Super. at 182-84 (reversing FRO because the plaintiff's fear lacked any rational basis). We agree.

The Carfagno court emphasized that while the plaintiff's fear is an important consideration, "courts should focus on objective fear." 288 N.J. Super. at 437. "Objective fear is that fear which a reasonable victim similarly situated would have under the circumstances." Ibid.

Here, although she found that plaintiff's fear was rational, the judge qualified that finding by stating it was rational "at this point in [plaintiff's] mind." In this regard, the judge applied the wrong legal standard.

We note some other concerns. N.J.S.A. 2C:25-29d provides that an FRO may be dissolved or modified upon a showing of good cause, "but only if the judge who dissolves or modifies the order is the same judge who entered the order, or has available a complete record of the hearing or hearings on which the order was

based." In Kanaszka v. Kunen, 313 N.J. Super. 600, 606 (App. Div. 1998), we held:

> In cases where the motion judge did not enter the final restraining order, . . . the "complete record" requirement of the statute includes, at a minimum, all pleadings and orders, the court file, and a complete transcript of the final restraining order hearing. Without the ability to review the transcript, the motion judge is unable to properly evaluate the application for dismissal.

We further held that the moving party seeking modification or dissolution must first establish a prima facie case showing good cause prior to the judge "fully considering the application for dismissal. If that burden is met, the court should then determine whether there are facts in dispute material to a resolution of the motion prior to ordering a plenary hearing." Id. at 608. The failure to furnish "the final hearing transcript" was "fatal" to the defendant's appeal. Id. at 607.

We took a step back from that position recently in G.M. v. C.V., ___ N.J. Super. ___ (App. Div. Jan. 17, 2018). There, the trial judge denied the defendant's motion because she could not produce a copy of the FRO transcript due to the passage of time. (slip op. at 6). We reversed and held:

> If the judge is satisfied that reconstruction of the record is not feasible, the judge must make specific findings describing the reasons for this conclusion. In such a case, we hold

> that where a party requesting to modify or dissolve a FRO has shown prima facie evidence of changed circumstances and where the audio record of the FRO hearing is no longer able to be transcribed, in whole or in part, without the fault of the moving party, the judge may conduct a plenary hearing to determine whether the party seeking modification or dissolution of the FRO is entitled to any relief.
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> [(slip op. at 20).]

Here, defendant demonstrated that no transcripts of the 1994 and 1995 court hearings could be produced because the tapes had been purged. Defendant was not at fault. Further, from the record before us, it appears there never was a hearing on the FRO. Instead, the matrimonial judge took jurisdiction of the DV matter and entered the FRO based on terms settled upon by the parties as part of the matrimonial case.[3] It certainly appears that reconstruction is not feasible. We also conclude that defendant made a prima facie showing of good cause for modification. Ibid. We therefore vacate the order under review and remand the matter for a plenary hearing consistent with this opinion and our holding in G.M., at which the judge shall apply the appropriate legal standard as to whether plaintiff has an "objective fear" of

[3] In J.S. v. D.S., 448 N.J. Super. 17, 22 (App. Div. 2016), we disapproved such a procedure by noting, "[p]ublic policy precludes the entry, continuation, or dismissal of an FRO as a bargaining chip in the settlement of other disputes."

defendant, i.e., "fear which a reasonable victim similarly situated would have under the circumstances." Carfagno, 288 N.J. Super. at 437.

One other issue bears comment. In reaching her conclusion, the judge referenced some of plaintiff's allegations regarding the alleged 1994 incident of domestic violence that led to the issuance of the TRO. The judge based her ultimate decision almost exclusively on plaintiff's demeanor during her testimony.

However, defense counsel never cross-examined plaintiff nor did defendant ever testify. We find no particular fault with the judge in this regard because counsel never specifically asked for the opportunity to have his client testify or to cross-examine plaintiff. However, at the plenary hearing, the court must give defendant an opportunity to present his own proofs and cross-examine plaintiff.

Vacated and remanded. We do not retain jurisdiction.