

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2217-17T1

T.H.,

Plaintiff-Respondent,

v.

C.B.,

Defendant-Appellant.

Submitted May 16, 2018 – Decided May 31, 2018

Before Judges Currier and Geiger.

On appeal from Superior Court of New Jersey,
Chancery Division, Middlesex County, Docket
No. FV-12-1861-16.

Jabin & Fleming, LLC, attorneys for appellant
(Christian P. Fleming, on the brief).

Respondent has not filed a brief.

PER CURIAM

Defendant C.B. appeals from a December 7, 2017 final
restraining order (FRO) entered in favor of plaintiff T.H.,
pursuant to the Prevention of Domestic Violence Act (the Act),

N.J.S.A. 2C:25-17 to -35. For the reasons that follow, we vacate the FRO and remand for further proceedings.

We discern these facts from the trial of April 27, 2016, and the remand hearing of December 7, 2017, at which only plaintiff and defendant testified. They had formerly resided together.

Plaintiff commenced this action pursuant to the Act, alleging defendant harassed her on April 19, 2016, as they ended their two-and-one-half-year dating relationship. Defendant also filed a domestic violence complaint, and the two matters were the subject of a single final hearing on April 27, 2016. Both parties were unrepresented. At the hearing's conclusion, the trial judge granted an FRO in favor of plaintiff; defendant's action was dismissed.

In support of her complaint, plaintiff alleged that on the date in question, defendant called her fifty-one times, showed up at her home threatening to reveal photographs of her unless she spoke to him, accused her of infidelity, and was otherwise verbally abusive. Plaintiff also alleged defendant had engaged in a prior history of domestic violence by verbally abusing her for the year preceding their breakup in approximately August 2015. A prior domestic violence complaint had been filed, but the temporary restraining order (TRO) was dismissed.

As we recounted in our prior opinion in this matter:

Plaintiff answered only one of these calls; that caller was defendant. The judge, however, found the evidence was insufficient to support a finding that defendant made the many other calls that day. Instead, the judge found that defendant harassed plaintiff with regard to what he said and did when he arrived at plaintiff's residence at 3:30 p.m. on the same day. Having found plaintiff to be a credible witness, the judge determined that when defendant appeared at plaintiff's residence he "threatened to show pictures" of plaintiff "to people if [she] did not speak to him," and he accused her of "sleeping around." The judge also found that, on an occasion a week earlier, defendant "got upset" and called plaintiff "bitch, whore, et cetera."

[T.H. v. C.B., No. A-4858-15 (App. Div. July 13, 2017) (slip op. at 2-3).]

The photographs of plaintiff that defendant threatened to show others were intimate. Id. at 3 n.2.

During the presentation of her evidence, plaintiff indicated she had taken a video of what transpired. Without objection, plaintiff attempted to show the judge the video that was accessible from her smartphone. The judge did not permit a showing of the video. Defendant later moved for reconsideration, arguing in part that the video would have supported his factual contentions. The judge denied the motion, finding "no foundation was laid."

Defendant appealed from the entry of the FRO in plaintiff's favor. He did not appeal the order dismissing his domestic violence action. On appeal, defendant argued the trial court

erred by finding the alleged conduct constituted harassment and by improperly denying admission of video evidence. The judge denied admission of the video without offering either party an opportunity to authenticate it. We held the judge mistakenly denied admission of the video evidence, an error we found was prejudicial. We vacated the FRO, and remanded the matter "to allow for the submission of the video and for a reconsideration or reexamination of the evidence previously adduced in light of the additional evidence." Id. at 6.

On remand, both parties were represented by counsel. The trial court heard argument and viewed the video. The judge found plaintiff's testimony to be credible. Based on the testimony, the judge determined defendant had committed the following acts, which amounted to harassment: threatening to release intimate photographs of plaintiff; calling her on the phone "like a bill collector" when trying to get his clothing back; admitting to prior domestic violence in the form of being so enraged he broke the bed while plaintiff and her daughter were in it; within earshot of plaintiff's daughter, yelling up to plaintiff in her apartment from the courtyard "[y]ou were with another guy, you keep sleeping around, that's your business. You want to sleep around, that's your business"; and threatening plaintiff with the release of intimate photographs of her unless she spoke to him, saying "you

know exactly what's going to happen; all right?" The judge found that defendant was referring to the intimate photographs in the video. The judge also found defendant's conduct was offensive and alarming, and thus, met the statutory definition. The court entered an FRO in favor of plaintiff. This appeal followed.

In this appeal, defendant argues the trial court erred in entering the FRO because the court improperly determined that his conduct constituted harassment, the court failed to make findings as to whether a FRO was necessary to prevent future harm, and the court made contradictory findings of fact.

When reviewing "a trial court's order entered following trial in a domestic violence matter, we grant substantial deference to the trial court's findings of fact and the legal conclusions based upon those findings." D.N. v. K.M., 429 N.J. Super. 592, 596 (App. Div. 2013) (citing Cesare v. Cesare, 154 N.J. 394, 411-12 (1998)). We do not disturb the "factual findings and legal conclusions of the trial judge unless [we are] convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Cesare, 154 N.J. at 412 (quoting Rova Farms Resort, Inc. v. Inv'rs Ins., Inc., 65 N.J. 474, 484 (1974)). Deference is particularly appropriate when the evidence is testimonial and involves credibility issues because the judge who

observes the witnesses and hears the testimony has a perspective the reviewing court does not enjoy. Pascale v. Pascale, 113 N.J. 20, 33 (1988) (citing Gallo v. Gallo, 66 N.J. Super. 1, 5 (App. Div. 1961)).

The Act defines domestic violence by referring to a list of predicate offenses found within the New Jersey Criminal Code. J.D. v. M.D.F., 207 N.J. 458, 473 (2011) (citing N.J.S.A. 2C:25-19(a)). "[T]he commission of a predicate act, if the plaintiff meets the definition of a 'victim of domestic violence,' N.J.S.A. 2C:25-19(d), constitutes domestic violence" Ibid. Harassment is a predicate offense under the Act. N.J.S.A. 2C:25-19(a)(13).

The entry of a final restraining order requires the trial court to make certain findings. See Silver v. Silver, 387 N.J. Super. 112, 125-27 (App. Div. 2006). The court "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 (citing N.J.S.A. 2C:25-29(a)). Next, the court must determine whether a restraining order is required to protect the party seeking restraints from future acts or threats of violence. Id. at 126-27. That means there must "be a finding that 'relief is necessary to prevent further abuse.'" J.D., 207 N.J. at 476 (quoting N.J.S.A. 2C:25-29(b)).

Here, the judge concluded defendant committed harassment. A person commits the petty disorderly persons offense of harassment if, with purpose to harass another, he or she:

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;

b. Subjects another to striking, kicking, shoving, or other offensive touching, or threatens to do so; 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.

[N.J.S.A. 2C:33-4.]

For a finding of harassment under N.J.S.A. 2C:33-4, the actor must have the purpose to harass. Corrente v. Corrente, 281 N.J. Super. 243, 249 (App. Div. 1995) (citing D.C. v. T.H., 269 N.J. Super. 458, 461-62 (App. Div. 1994); E.K. v. G.K., 241 N.J. Super. 567, 570 (App. Div. 1990)). Finding a party had the purpose to harass must be supported by "some evidence that the actor's conscious object was to alarm or annoy; mere awareness that someone might be alarmed or annoyed is insufficient." J.D., 207 N.J. at 487 (citing State v. Fuchs, 230 N.J. Super. 420, 428 (App. Div. 1989)). A "purpose to harass may be inferred from the evidence presented." State v. Hoffman, 149 N.J. 564, 577 (1997) (citing

State v. McDougald, 120 N.J. 523, 566-67 (1990); State v. Avena, 281 N.J. Super. 327, 340 (App. Div. 1995)). "Common sense and experience may inform that determination." Ibid. (citing State v. Richards, 155 N.J. Super. 106, 118 (App. Div. 1978)).

The commission of the predicate act of harassment does not automatically warrant the issuance of an FRO. Corrente, 281 N.J. Super. at 248. Defendant's conduct "must be evaluated in light of the previous history of domestic violence between the plaintiff and defendant including previous threats, harassment and physical abuse and in light of whether immediate danger to the person or property is present." Ibid. (citing N.J.S.A. 2C:25-29(a)(1) and (2)).

Defendant argues the court's finding that plaintiff's daughter could hear defendant shouting from the courtyard is inconsistent with the court's finding that plaintiff's daughter was asleep while defendant was shouting at plaintiff. We are unpersuaded by this argument. The record reflects the judge found plaintiff's daughter could have heard his comments, but was sleeping, not that she actually heard defendant. Moreover, defendant's inappropriate statements to plaintiff within earshot of her daughter were patently offensive and annoying.

We are satisfied there is substantial credible evidence in the record supporting the trial court's credibility

determinations, factual findings, and legal conclusions with respect to the commission of the predicate act of harassment. Thus, the first prong of the Silver analysis was satisfied.

Defendant argues the trial court did not address the second prong of the Silver analysis. We agree. The trial court did not evaluate the statutory factors and made no findings as to whether an FRO was necessary to provide protection for "the victim from an immediate danger or to prevent further abuse." Silver, 387 N.J. Super. at 127 (citing N.J.S.A. 2C:25-29(b)). Consequently, we are constrained to vacate the FRO, reinstate the TRO, and remand the matter for a further hearing focusing on the second prong of the Silver analysis. Specifically, having found defendant committed the predicate act of harassment, the trial court shall "determine whether a domestic violence restraining order is necessary to protect plaintiff from immediate danger or further acts of domestic violence." Id. at 128.

Vacated and remanded for further proceeding consistent with this opinion. 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