

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2486-16T1

C.M.K.,

Plaintiff-Respondent,

v.

S.K.,

Defendant-Appellant.

Submitted February 7, 2018 – Decided March 9, 2018

Before Judges Alvarez and Geiger.

On appeal from Superior Court of New Jersey,
Chancery Division, Somerset County, Docket No.
FV-18-0364-17.

Keith, Winters & Wenning, LLC, attorneys for
appellant (Michael J. Wenning, on the brief).

Florio, Perrucci, Steinhardt & Fader, LLC,
attorneys for respondent (Kerry Cahill, of
counsel and on the brief).

PER CURIAM

Defendant S.K. appeals the entry of a January 12, 2017 final restraining order (FRO) pursuant to the Prevention of Domestic Violence Act (the Act), N.J.S.A. 2C:25-17 to -35. The FRO was

issued based upon a finding that defendant committed the predicate act of harassment, N.J.S.A. 2C:33-4. We affirm.

We discern these facts from the trial record. Plaintiff C.M.K. and defendant, both followers of the Orthodox Jewish faith, have been married for over sixteen years and have six children together, then ages seven to fourteen. The parties jointly operated a Chabad, with defendant acting as the Rabbi. However, defendant was subsequently forced to resign his position as Rabbi amid allegations of sexual misconduct. Plaintiff filed a complaint for divorce on August 10, 2016. The parties, through counsel, reached a verbal agreement to cease marital relations and sleep in separate areas of the marital residence.

On October 5, 2016, plaintiff sought and obtained a temporary restraining order against defendant as a result of three alleged acts of domestic violence, occurring on September 7, September 29, and September 30, 2016. Plaintiff alleged defendant harassed and falsely imprisoned her. Because the trial court found defendant did not commit a predicate act of domestic violence on September 29, 2016, this opinion will focus on the other two alleged incidents.

An FRO hearing was conducted on January 5 and January 12, 2017. The court heard testimony from four witnesses: plaintiff;

plaintiff's friend, M.A.O.; defendant; and defendant's mother. The circumstances of the events are generally undisputed.

Plaintiff first testified that on September 30, 2016, defendant invited his parents over on a Friday evening, shortly before the start of the Sabbath. As practicing Orthodox Jews, the parties do not drive or make phone calls after Sabbath starts. When plaintiff learned of her in-laws arrival, she advised the children to prepare to leave. Plaintiff further testified this was the first time her in-laws had been to the house in years and her desire to leave was rooted in her in-laws abusive behavior leading up to this incident. Upon learning of his wife and children's intent to leave, plaintiff testified defendant came "running up the stairs and said threateningly, 'You are not going anywhere. You are not going anywhere.'" Plaintiff also testified defendant had pinned one of the children up against the wall while shouting, "You are not going anywhere."

Plaintiff testified she then ran downstairs and attempted to leave through the mudroom door but was blocked by her husband. She next ran towards an exterior door but was blocked by her mother-in-law. A physical struggled ensued where it is alleged plaintiff assaulted her mother-in-law. After making her way out the back patio door, plaintiff and her children entered a family car in the driveway and began to drive to her friend's, M.A.O.'s,

house. Defendant attempted to prevent them from leaving by hanging onto a rear door as plaintiff drove away. Defendant eventually let go of the vehicle and plaintiff drove to M.A.O's house. En route to her house, plaintiff had her son call the police to report the incident.

Plaintiff next testified that during September 2016, the parties were not sleeping in the same bed and had agreed to sleep in separate rooms in the house. Plaintiff further asserted there was a verbal agreement between the parties, negotiated by their respective attorneys, prohibiting defendant from entering plaintiff's room. On September 7, 2016, despite the agreement to sleep in separate rooms and respect each other's space, defendant continued to enter plaintiff's room. Plaintiff asked him to leave the room and respect her space, but defendant would get very close to plaintiff's face and say, in a threatening undertone, "You can't tell me what to do," and "you know, no, they never agreed to anything like that."

Plaintiff further alleged defendant had engaged in the following prior acts of domestic violence: since March 2016, defendant repeatedly threatened to show up at events planned by plaintiff for her job, causing her to have to cancel further events; in July 2016, defendant threatened to embarrass plaintiff at their son's Bar Mitzvah and then did so through his family;

during the summer of 2016, plaintiff awoke to defendant touching her sexually under a blanket; since August 2016, defendant has stood near or inside plaintiff's bedroom contrary to their verbal agreement; in September 2016, defendant told plaintiff he was recording everything that happened in the home; and on numerous occasions, defendant has gotten close to plaintiff's face during arguments.

Following the conclusion of the proofs, the trial court issued an oral opinion, entering the FRO against defendant. The judge noted defendant's testimony regarding these events was different but found his testimony not to be credible. The judge rendered the following additional credibility findings:

In assessing which version of events to believe the court looks to the credibility of the witnesses. The plaintiff presented her testimony credibly, maintaining good eye contact with the court and not wavering about her description of the escalating harassment from the defendant.

The court's impression of the defendant was different. Although he appeared calm at trial, the court observed his failure to maintain eye contact, especially when asked about the September 30th incident, and has found his version of the escape from the marital residence not to be credible.

To the court it is unfathomable that plaintiff would violate the strict rules regarding [S]habbat and purposely drive away without her shoes on, without properly clothing the children and enter a secular home

unless she felt threatened in the marital residence.

Except for plaintiff's description of her contact with defendant's mother, the trial court found

plaintiff's description of the September 30th, 2016 incident to be highly credible; specifically, that when she tried to leave the house with her children before [S]habbat, the defendant ran up the stairs and shouted "You're not going anywhere," and that the defendant pinned one child to the wall and again shouted, "you [a]re not going anywhere."

The trial court found plaintiff had not proven defendant falsely imprisoned her but had proven predicate acts of harassment on September 7 and September 30, 2016. The trial court further found "[d]efendant committed this alarming conduct with a specific intent to harass the plaintiff."

As to the September 7, 2016 incident, the trial court found defendant harassed plaintiff when he stepped into her bedroom in violation of their verbal agreement to respect each other's private space. The trial court explained:

The defendant, himself, testified that there was this agreement and that after the time when they had marital strife the plaintiff spent private time with herself and her kids in the bedroom excluding the defendant.

Again, this agreement is evidenced also by the plaintiff's testimony and the fact that the parties had been sleeping in separate parts of the marital residence for some time.

The court finds that plaintiff's testimony that on September 7th, 2016 the defendant stepped into her bedroom in a brazen and threatening manner and yelled, "You can't tell me what to do."

That act caused alarm and annoyance to plaintiff, which the court finds was done to harass her.

There is no legitimate reason for the defendant to enter plaintiff's bedroom in light of their agreement and the parties' course of conduct.

The defendant testified that he had kept a log and that he believed that for a time period in May of 2016, and for some period of time after, he had sexual relations with the plaintiff at least five times. I find that testimony to be not credible.

The plaintiff clearly testified she had no interest in having sexual relations with the defendant and the defendant had no right to be in her bedroom in light of their agreement.

The defendant's defiance of the agreement to respect that private space clearly constitutes harassment.

The trial court then analyzed whether there was a need to protect plaintiff from immediate danger or to prevent further abuse. Relying primarily on plaintiff's testimony describing defendant's conduct, the court determined defendant had engaged in a steady progression of domestic violence, which had escalated

and caused plaintiff to be fearful of him. The court found there was a need for an FRO to prevent further abuse.

On appeal, defendant contends the trial court erred in its findings that defendant harassed plaintiff on September 7 and September 30, 2016. He also argues the trial court erred in concluding an FRO was necessary to protect plaintiff from an immediate danger or to prevent further abuse.

"In our review of 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 should 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 entry of an FRO 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. The court should make this determination "in light of the previous history of violence between the parties." Ibid. (quoting Cesare, 154 N.J. at 402). Next, the court must determine "whether a restraining order is necessary, upon an evaluation of the factors set forth in N.J.S.A. 2C:25-29(a)(1) to -29(a)(6), to protect the victim from an immediate danger or to prevent further abuse." Id. at 127 (citing N.J.S.A. 2C:25-29(b)); see also J.D. v. M.D.F., 207 N.J. 458, 476 (2011).

The trial court determined defendant committed harassment, one of the predicate acts set forth in the Act. N.J.S.A. 2C:25-19(a)(13). 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 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. McDougald, 120 N.J. 523, 566-67 (1990). Common sense and experience may also inform a determination or finding of purpose. State v. Hoffman, 149 N.J. 564, 577 (1997) (citing State v. Richards, 155 N.J. Super. 106, 118 (App. Div. 1978)).

The trial court concluded the credible evidence, including the prior history of harassing conduct, defendant's conduct on September 7, 2016, and his running upstairs screaming, "You are

not going anywhere[,]" on September 30, 2016, established the purpose of defendant's conduct was to alarm or severely annoy plaintiff.

The trial court must also determine that an FRO is necessary to provide protection for "the victim from an immediate danger or to prevent further abuse." Silver, 387 N.J. Super. at 127. Since harassment is one of the enumerated predicate acts of domestic violence, the need to prevent further harassment will suffice. The trial court found defendant's steadily escalating harassment of plaintiff, causing her to be fearful of him, established an FRO was necessary to prevent further abuse.

Applying these standards, we are satisfied the record supports the trial court's credibility and factual findings. There was substantial credible evidence defendant harassed plaintiff and that the FRO was necessary to protect plaintiff from further acts of abuse.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION