SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5500-15T4

A.B.A.,[1]

Plaintiff-Respondent,

v.

T.A.,

Defendant-Appellant.

Argued October 24, 2017 – Decided January 26, 2018

Before Judges Fasciale and Sumners.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Essex County, Docket No. FV-07-3677-16.

Keith G. Oliver argued the cause for appellant (Marshall, Bonus, Proetta & Oliver, attorneys; Keith G. Oliver, on the brief; Jeff Thakker, of counsel and on the brief).

Daniel M. Serviss argued the cause for respondent (Greenbaum, Rowe, Smith & Davis, LLP, attorneys; Daniel M. Serviss, of counsel and on the brief).

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[1] We use the parties' initials because this case concerns domestic violence.

PER CURIAM

Following a hearing in which both parties testified, the Family court granted plaintiff's application for a final restraining order (FRO) against defendant, his former spouse, under the Prevention of Domestic Violence Act of 1991 (PDVA), N.J.S.A. 2C:25-17 to -35. The court found that, following the parties' divorce, defendant committed two predicate acts of domestic violence (DV), criminal coercion and harassment, against plaintiff in repeatedly sending him text messages and emails threatening to jeopardize his employment by releasing to his employer videotapes of plaintiff engaging in sex with defendant and other women. The court also granted plaintiff's request to transfer copyrights to the tape from defendant to plaintiff.

On appeal, defendant argues the court lacked jurisdiction to determine ownership of the videotapes. Defendant contends the court erred in issuing a FRO because there was no proof that plaintiff had committed criminal coercion and harassment, and her due process rights were violated. Defendant further argues the entire controversy doctrine should have barred plaintiff's DV complaint, as ownership of the videotapes was previously litigated at the parties' divorce proceedings. We affirm as to the issuance of the FRO, but reverse regarding the transfer of defendant's copyrights to the videotapes.

I

Approximately nine years prior to the parties' divorce, they made an intimate video of themselves engaging in sex. Without plaintiff's knowledge, defendant also surreptitiously recorded plaintiff engaging in sex with her and other women in their marital home. Defendant testified that she made at least one hundred recordings, which she kept on approximately five or six videotapes. Although defendant explained she never "released" or published the videos, she stated that she gave several copies of the recordings to an undetermined number of friends to hold for her "protection."

Plaintiff testified that beginning in August 2014, prior to entry of their final judgment of divorce (FJOD), defendant began threatening him with the release of the videos in response to their disagreements over parenting of their two children. As proof, plaintiff presented several text message exchanges and email conversations between the parties.

For example, defendant texted plaintiff, stating, "I am happy to give your sex record to your president. Screw[] you." Ten minutes later, defendant texted, "[r]emember,[ ]I have your sex internet record.[ ]I am not the [only one who] has it, there are [a] few people [who have it]. . . . It shows your face." Three minutes later, defendant texted, "[y]our sex internet stuff, I think your one of top guy care! [sic] Ha! You [cannot] work there.

If your [employer[2]] don't care maybe broadcasting care." Plaintiff testified that defendant's reference to "broadcasting" meant that she would contact a Wall Street Journal reporter, whom she admittedly referenced in a subsequent text, to distribute the explicit videotapes in the event his employer did not take interest in her proposal.

Plaintiff also testified regarding a text defendant sent him a year and a half later stating, "[d]id [your attorney] tell you I contact FBI[?] I know exactly who you are. Remember, you started this. You kill, we kill. You do, I do." Plaintiff testified he believed these words to be a threat of violence unless he cooperated with defendant.

Plaintiff further presented an email he received from defendant less than two months later, which provided, "[p]ick up the [sic] my kids camp check[.] [D]eposit the 31k thousand [sic] dollars, if you don't[,] we will publish your dam[n] sex tape." The money was in reference to an unsatisfied court order requiring plaintiff to pay defendant approximately $30,000 in attorney's fees. Plaintiff testified he felt threatened and reported this email to the police because his employment required a background

[2] To protect the parties' identities we do not disclose plaintiff's employer.

check due to his access to "confidential supervisory information," in order to avoid being targeted in a blackmail scheme.

In its oral decision, the court found plaintiff proved by a preponderance of the evidence that defendant committed predicate acts of domestic violence, criminal coercion and harassment, under N.J.S.A. 2C:25-19(a)(15) and -19(a)(13), and issued a FRO. In support, the court determined plaintiff's testimony was credible because he had a reasonable and realistic concern for his job security in light of defendant's threats to release the videotapes. Conversely, when evaluating defendant's testimony, the judge explained:

> I think [defendant] has a very, very good command of the English language, except when she doesn't want to answer a question.[3] That's the only time when she's evasive. I didn't find her testimony to be credible at all. I don't know what her story is with the tape. I am absolutely positive in my mind that she knows exactly how many tapes and exactly what the numbers are and knows exactly when they were made and knows all about that and knows whose got them and knows where she sent them. This isn't something that you use repeatedly over a course of years and then, oh, I don't

[3] Defendant became a naturalized United States' citizen approximately four years prior to the FRO hearing. The court explained to her the potential immigration implications of a FRO. The court also informed her that she maintained a right to counsel; however, as this was not a criminal matter, she was not entitled to appointed counsel. Defendant indicated that she understood this right, yet wished to represent herself.

> know how many tapes or what I have. I mean, I . . . think that's, you know, ridiculous.

Finally, the court reasoned defendant utilized the videotapes in an effort to coerce plaintiff to pay her the $30,000 court ordered attorney's fees, as opposed to filing "a simple post judgment motion to enforce" the court's order. Highlighting defendant's continued reference to the $30,000 in her testimony, along with her explicit verbal threats contained in the texts and emails, the court found her conduct constituted repeated acts. While the court did not think the release of the videotapes would result in plaintiff losing his job, it commented, "there are subtle ways where embarrassing situations . . . may place you in a position where promotion, improvements, and other . . . benefits of the job can be extremely limited."

In addition to placing restrictions on defendant's contacts with plaintiff, the court, citing N.J.S.A. 2C:25-29(b), ordered that copyrights to the videotapes be transferred to plaintiff, and the videotapes possessed by defendant or her friends be immediately returned to plaintiff's counsel for proper destruction.

II

Defendant contends the trial court erred as a matter of law because it did not have jurisdiction under N.J.S.A. 2C:25-29(b)

to order assignment of copyrights to the videotapes as such authority is limited to the federal courts. We agree and reverse.

We owe no special deference to the trial court's "interpretation of the law and the legal consequences that flow from established facts." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Here, the Copyright Act of 1976, 17 U.S.C. § 301, guides us:

> (a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 [17 USCS § 106] in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103 [17 USCS §§ 102 and 103], whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.
>
> [(emphasis added).]

The intent of the law "is to preempt and abolish any rights under the common law or statutes of a state that are equivalent to copyright and that extend to works within the scope of the Federal copyright law." Harper & Row, Publishers, Inc. v. Nation Enters., 501 F. Supp. 848, 850 (S.D.N.Y. 1980) (quoting H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. at 130 (1976)) aff'd 723 F.2d 195 (2d

Cir. 1983), rev'd on other grounds, 471 U.S. 539 (1985). A state court action will be preempted by the Copyright Act where: (1) the nature of the work of authorship in which rights are claimed come within the subject matter of copyright as defined in §§ 102 and 103; and (2) the rights granted under state law are equivalent to any of the exclusive rights within the general scope of copyright as specified by § 106. Ibid.

In this matter, the first prong is met because under 17 U.S.C. § 102, the Copyright Act governs motion pictures and other audiovisual works. Likewise, the second prong is satisfied because 17 U.S.C. § 201 states:

> (d) Transfer of ownership.
>
> (1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.
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> (2) Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106 [17 USCS § 106], may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

Here, without any reference to the Copyright Act, the court ordered transfer of defendant's copyright in the videotapes.

Although N.J.S.A. 2C:25-29(b) allows a court evaluating a DV claim to grant any relief necessary to prevent further abuse, it does not expressly deal with the transfer of copyrights, which is controlled by the Copyright Act. Therefore, the transfer of copyrights to the videotapes was beyond the court's jurisdiction. However, for the reasons expressed later, we do not disturb any order barring defendant's release of the videotapes to harass or coerce plaintiff.

III

Defendant argues that the FRO hearing violated her due process rights to a fair hearing. In particular, she contends: (1) the DV complaint did not sufficiently apprise defendant of what was being alleged and the trial court did not ascertain whether defendant understood what was being alleged; (2) the second amended complaint was not served properly and harassment was not a predicate offense alleged in the third amended complaint; (3) the court erred in not asking defendant if she needed a translator; (4) the court erroneously permitted plaintiff's counsel to testify in the FRO proceeding; and (5) defendant was not afforded the same rights at the FRO hearing as plaintiff. We conclude there is no merit to these contentions.

Although there may have been some confusion due to the three amendments to the DV complaint and the Temporary Restraining Order

(TRO), the record evinces defendant was well aware of the allegations she faced at the FRO hearing. It is apparent there was a clerical error when plaintiff attempted to amend the TRO to include the predicate offense of harassment and to provide further details regarding the parties' prior DV history. These errors resulted in the issuance of a second TRO. When plaintiff realized the second TRO failed to include the intended details about the parties' prior history, he asked the court to issue a third TRO with the appropriate corrections. However, in doing so, the court mistakenly failed to check the box in the third TRO indicating "harassment" as a predicate offense as was checked in the second TRO. Nevertheless, the third TRO did provide that there was "[p]rior history of criminal coercion/harassment," and the complaint specified dates of the numerous text messages and emails exchanged between defendant and plaintiff to support the allegations of the predicate offenses-harassment and criminal coercion.

Moreover, at the outset of the FRO hearing, plaintiff's counsel established the basis for the FRO complaint and referenced the alleged predicate offenses, along with mention of defendant's text messaging and emailing. For example, counsel declared, "[t]his is a pattern by this defendant, a course of annoying and alarming conduct. There's only one purpose, [it] is to annoy or

alarm him. Under harassment, Judge, respectfully, plaintiff is entitled to a restraining order, also under criminal coercion." At no point did defendant object, express surprise, or question counsel's comments regarding the allegations against her. Since defendant raises this argument for the first time on appeal, we reverse only if the unchallenged error was "clearly capable of producing an unjust result." R. 2:10-2.

Based upon the totality of circumstances - the clerical error of the court, the specific assertions in the final amended complaint and TRO, and counsel's comments at the FRO hearing - there is no question that defendant was adequately apprised of the allegations made against her and that despite the court's clerical error, the outcome would have remained the same. Meaning, even if harassment was not adequately pled, there was still sufficient findings for the predicate offense of criminal coercion for the reasons we discuss later.

Defendant next argues that the trial court erred in not asking her if she needed a translator. Again, we view her contention under the lens of plain error, as she did not raise this argument at the initial protective order hearing or the FRO hearing.

We must initially point out that the record does not demonstrate that defendant asked the court for a translator. As noted earlier, the court in assessing defendant's credibility

determined she had sufficient command of English to understand the proceedings. The record further reveals that during the nineteen-day divorce hearing in which defendant's request for a translator was honored, the judge there stated she did not need a translator because

> [s]he has a strong command of English and an articulate, easy to understand speaking voice. . . . She would often answer before the interpreter spoke. The interpreter's presence allowed her to hear questions twice before answering if she chose to wait before answering. When rattled or angry, she reflexively spoke English.

Significantly, given that the divorce court honored defendant's request for a translator during the divorce proceedings, and she did not request one for the proceedings at issue, her argument before us that she needed a translator is disingenuous, at best. Hence, there was no unjust result in defendant not having a translator.

Defendant's remaining due process arguments that plaintiff's counsel improperly testified by commenting on her credibility by comparing her demeanor at the divorce trial and the FRO trial, and that she was not afforded the same rights as plaintiff, are without sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

IV

Defendant attacks the court's issuance of the FRO on several grounds. She argues the court did not make findings of any prior history of abuse. She also asserts that the only predicate DV offense alleged in the third amended complaint is criminal coercion under N.J.S.A. 2C:25-19(a)(15), which was not proven. Finally, assuming a harassment claim was pled, defendant contends there was no legal and factual support for harassment. We disagree.

We begin with a review of the applicable legal principles that guide our analysis. We limit our review when considering a FRO issued by the family court following a bench trial. A trial court's findings are binding on appeal "when supported by adequate, substantial, and credible evidence." N.J. Div. of Youth & Family Servs. v. R.G., 217 N.J. 527, 552 (2014) (citation omitted). This deference is particularly appropriate where the evidence at trial is largely testimonial and hinges upon a court's ability to assess credibility. Gnall v. Gnall, 222 N.J. 414, 428 (2015). We also keep in mind the expertise of judges who routinely hear domestic violence cases in the family court. J.D. v. M.D.F., 207 N.J. 458, 482 (2011). Consequently, we will 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 v. Cesare, 154 N.J. 394, 412 (1998) (quoting Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 484 (1974)); see also S.D. v. M.J.R., 415 N.J. Super. 417, 429 (App. Div. 2010).

Domestic violence occurs when an adult commits one or more acts upon a person covered by the PDVA. N.J.S.A. 2C:25-19(a). When determining whether to grant a FRO, a trial judge must engage in a two-step analysis. Silver v. Silver, 387 N.J. Super. 112, 125-27 (App. Div. 2006). "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; see also N.J.S.A. 2C:25-29(a) (providing that a FRO may only be granted "after a finding or an admission is made that an act of domestic violence was committed"). Second, the court must determine that a restraining order is necessary to provide protection for the victim. Silver, 387 N.J. Super. at 126. As part of that second step, the judge must assess "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.

Applying these principles, we are convinced that the court properly issued a FRO based upon predicate acts of criminal coercion and harassment.

In August 2015, our Legislature amended the PDVA to include coercion as defined by N.J.S.A. 2C:13-5(a), as a predicate act of domestic violence. Among the categories of threats defined as criminal coercion is a threat made to unlawfully restrict freedom of action, with a purpose to coerce a course of conduct from a victim which defendant has no legal right to require, by threatening to "[e]xpose any secret which would tend to subject any person to hatred, contempt or ridicule, or to impair credit or business repute." N.J.S.A. 2C:13-5(a)(3).

The court correctly found that plaintiff proved defendant criminally coerced him when she threatened to release the videotapes of his sexual activities to his employer in order to embarrass him and to jeopardize his employment if he did not pay her the court ordered attorney's fees totaling $30,000. The court noted the proper course of action was to file a post-judgement motion to enforce the order. Furthermore, and for the same reasons, defendant committed coercion under N.J.S.A. 2C:13-5(a)(7), by threatening an "act which would not in itself substantially benefit the [defendant] but which is calculated to substantially harm another person with respect to his health,

safety, business, calling, career, financial condition, reputation or personal relationships."

Turning to the predicate act of harassment, which as mentioned earlier was properly pled, the court determined that two provisions of the harassment statute were satisfied. N.J.S.A. 2C:33-4 provides:

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

The court's finding of harassment based upon subsections (a) and (c) is well supported by credible evidence in the record. Defendant's numerous text messages and emails sent before and after the divorce proceedings supported plaintiff's testimony that the communications caused him to fear physical harm and that the release of the videotapes could jeopardize his employment. Moreover, the communications were unilaterally initiated by defendant and were not responsive to any combative messages from

plaintiff. See R.G. v. R.G., 449 N.J. Super. 208, 225 (App. Div. 2017). Thus, defendant's actions show a "pattern of abusive and controlling behavior" of the kind intended to be prevented by the PDVA. Peranio v. Peranio, 280 N.J. Super. 47, 52 (App. Div. 1995); see also Cesare, 154 N.J. at 397.

We next address defendant's contention that the court failed to make any specific findings as to the parties' previous DV history. We disagree. Defendant's texts and emails to plaintiff, which span approximately two years, are relevant not only with defendant's intent, but also pertain to their prior DV history. See Cesare, 154 N.J. at 401-02 (finding a defendant's past history is relevant in a DV proceeding regarding the nature of parties' relationship).

Defendant makes no argument concerning the second prong of Silver. Nonetheless, we see no reason to disturb the court's finding that a FRO was necessary to protect plaintiff from immediate danger or to prevent further abuse.

V.

Lastly, defendant argues that her ownership of the videotapes were implicitly addressed in the FJOD and therefore plaintiff's DV complaint concerning the release of the videotapes was barred by the entire controversy doctrine under Rule 4:30A. This argument is without sufficient merit to warrant discussion. R. 2:11-

3(e)(1)(E). We only add that defendant's threats to release the videotapes came after the divorce hearing and entry of the FJOD.

Affirmed as to the issuance of the FRO, but reversed as to the transfer of copyrights to the videotapes.