RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0862-20

E.N.P.,

Plaintiff-Respondent,

v.

L.F.,[1]

Defendant-Appellant.

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Argued March 22, 2022 – Decided April 19, 2022

Before Judges DeAlmeida and Smith.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Essex County, Docket No. FV-07-2574-20.

Anthony J. Pope Jr. argued the cause for appellant (Pope and Hascup Law Group, attorneys; Annette Verdesco, on the briefs).

Gregory A. Pasler argued the cause for respondent (DeTommaso Law Group, attorneys; Gregory A. Pasler and Grace Eisenberg, on the brief).

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[1] Pursuant to Rule 1:38-3(d)(9), we use initials to protect the parties' confidentiality.

PER CURIAM

Defendant appeals from a final restraining order (FRO) entered against him, as well as a subsequent order awarding counsel fees to plaintiff. Defendant argues the court erred by finding that: the parties' relationship fell within the ambit of the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35; defendant committed the predicate offenses of harassment, N.J.S.A. 2C:33-4, and cyber-harassment, N.J.S.A. 2C:33-4.1(a)(2); and that the FRO was necessary to protect plaintiff from future domestic violence. He also argues the trial court erred by awarding counsel fees. After examining the record, we affirm in part and reverse in part.

I.

The FRO trial took place over seven days. The court heard testimony from multiple witnesses, including plaintiff, defendant, defendant's neighbor, mother, father, cousin, and fiancée. The factual summary is derived from the evidence adduced at trial.

The parties began dating shortly after meeting at plaintiff's party in June 2019. They went to dinner several times, spoke often on the phone, and vacationed together in Cape May, Atlantic City, and at a local resort. That year, the parties also spent Thanksgiving, Christmas Eve, Christmas, and New Year's

Eve together. As their relationship grew, the parties became more involved in each other's personal lives. When defendant's stepfather fell ill, plaintiff assisted defendant's family in his daily care. Defendant reciprocated by accompanying plaintiff to therapy sessions and supporting her daily therapy regimen.

The relationship took a negative turn in January 2019 when defendant began displaying violent characteristics. At trial, plaintiff testified about an incident in August 2019 where defendant pushed her against the bedroom wall and called her a "bitch." In addition to his periodic violent outbursts, defendant used plaintiff's cellphone to send threatening and degrading text messages to plaintiff's relatives and acquaintances. He also attempted to isolate plaintiff by blocking the phone numbers and social media accounts of her family and friends on plaintiff's cellphone.

When plaintiff ended the relationship, defendant belittled and berated plaintiff and left crude voice messages for plaintiff on her phone. He constantly sent her text messages, as well as Facebook messages, emails, and greeting cards, all stating that he missed her and wanted her back. Plaintiff spurned his overtures and repeatedly informed defendant that she had no interest in rekindling their relationship. She deleted him as a Facebook "friend" and told him to cease all communications with her.

Shortly thereafter, defendant circumvented plaintiff's cellphone blocks by using unblocked devices. Plaintiff testified defendant left long voice messages and constantly called her a "cunt" and "ugly big cunt." Defendant then posted an image of plaintiff in her nightgown on his Facebook profile. Although plaintiff initially consented to having this picture taken, defendant posted it online without plaintiff's knowledge or consent. Two days later, defendant posted another picture of plaintiff in a red wig. Defendant posted these pictures and attached negative commentary to the pictures about their former relationship and plaintiff's appearance, which in turn led to hundreds of demeaning comments from third parties being attached to his posts. Plaintiff subsequently filed and obtained a temporary restraining order (TRO).

At the FRO hearing, defendant produced nude and explicit photographs of plaintiff and circulated them to counsel and the court. Defendant contended the images were material to his defense because the pictures were sent by plaintiff to "lure [his] attention." On cross-examination, however, defendant failed to establish that plaintiff sent those images.

In his oral decision granting plaintiff an FRO, the trial judge made specific credibility determinations, finding plaintiff credible and defendant and his witnesses not credible. In finding that a dating relationship existed, the judge

noted that "the parties traveled [and] dined together," and became "emotionally involved." The judge highlighted that plaintiff met defendant's immediate family and assisted them when defendant's stepfather felt ill as evidence that the parties were "emotionally involved." He also found there was "minimal social interpersonal bonding" that extended beyond "mere casual fraternization," as shown by the hundreds of text messages exchanged by the parties. The judge found that the parties spent time together during the holidays, which "demonstrated an affirmation of their relationship." He concluded plaintiff "satisfied her burden . . . [showing] . . . there was an emotional, if not physical, attachment between the parties that she . . . rel[ied] upon."

After finding the parties had a dating relationship, the judge next analyzed whether defendant's actions constituted harassment and cyber-harassment. He concluded that they did. He found defendant caused plaintiff annoyance and alarm by calling plaintiff multiple times a day after she told him to stop, and that he made those calls with the intent to harass. The judge determined that defendant's name-calling and social media posts "served no legitimate purpose other than to vent his anger, [which constitutes] harassment." The judge found "the posting of the photographs referenced constitutes a posting in a social media setting . . . as indicated in the statute with the intent to emotionally harm a

reasonable person. Accordingly, the [c]ourt finds that by a preponderance of the evidence, not only has the plaintiff established . . . harassment but cyber harassment as well."

The trial judge finally addressed whether plaintiff required the protection of an FRO. He found plaintiff's continued fear of defendant to be reasonable in light of the continuous messaging and phone calls. Ultimately, he decided that an FRO was necessary to protect plaintiff and "prevent the occurrence and reoccurrence of domestic violence."

In addition to granting the FRO, the judge awarded $20,955.50 in counsel fees to plaintiff, making findings and citing McGowan v. O'Rourke, 391 N.J. Super. 502 (App. Div. 2007). In denying defendant's motion to stay the counsel fees, the judge analyzed the Crowe[2] factors, finding no irreparable harm and no likelihood of success on the merits.

On appeal, defendant argues the following:

> I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN RULING THAT THE PARTIES WERE IN A "DATING RELATIONSHIP" WITHIN THE MEANING OF THE PREVENTION OF DOMESTIC VIOLENCE ACT N.J.S.A. 2C:25-17.

[2] Crowe v. De Gioia, 90 N.J. 126, 132-34 (1982).

II. THE TRIAL COURT ABUSED IT'S [SIC] DISCRETION IN ENTERING A FINAL RESTRAINING ORDER AGAINST APPELLANT.

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THE STAY OF AN AWARD OF COUNSEL FEES [AND] THE AWARD OF COUNSEL FEES.

II.

A.

We accord "great deference to discretionary decisions of Family Part judges[,]" Milne v. Goldenberg, 428 N.J. Super. 184, 197 (App. Div. 2012), in recognition of "family courts' special jurisdiction and expertise in family matters . . . ." N.J. Div. of Youth & Fam. Servs. v. M.C. III, 201 N.J. 328, 343 (2010) (quoting Cesare v. Cesare, 154 N.J. 394, 413 (1998)). "[F]indings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence." Cesare, 154 N.J. at 411-12 (citing Rova Farms Resort, Inc. v. Invs. Ins. Co., 65 N.J. 474, 484 (1974)). "Deference is especially appropriate 'when the evidence is largely testimonial and involves questions of credibility.'" Id. at 412 (quoting In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997)). Therefore, "an appellate court should not disturb the 'factual findings and legal conclusions of the trial judge unless [it is] 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.'" Ibid. (alteration in original) (quoting Rova Farms, 65 N.J. at 484). However, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

B.

The PDVA protects victims of domestic violence by permitting the entry of restraining orders. N.J.S.A. 2C:25-29. A "victim of domestic violence" includes, among others, "any person who has been subjected to domestic violence by a person with whom the victim has had a dating relationship." N.J.S.A. 2C:25-19(d). The term "dating relationship" is not, however, defined in the PDVA and our legislature left it to the courts to determine what relationships might be properly characterized as such. Ibid.

Where, as here, the nature of the parties' relationship is a prerequisite to jurisdiction under the PDVA, the trial judge should consider the factors identified in Andrews v. Rutherford, 363 N.J. Super. 252, 260 (Ch. Div. 2003), as adopted by this court in S.K. v. J.H., 426 N.J. Super. 230, 235 (App. Div. 2012). Those factors are:

> 1. Was there a minimal social interpersonal bonding of the parties over and above a mere casual fraternization?

> 2. How long did the alleged dating activities continue prior to the acts of domestic violence alleged?
>
> 3. What were the nature and frequency of the parties' interactions?
>
> 4. What were the parties' ongoing expectations with respect to the relationship, either individually or jointly?
>
> 5. Did the parties demonstrate an affirmation of their relationship before others by statement or conduct?
>
> 6. Are there any other reasons unique to the case that support or detract from a finding that a "dating relationship" exists?
>
> [S.K., 426 N.J. Super. at 234 (quoting Andrews, 363 N.J. Super. at 260).]

None of the factors is determinative, however, and other factors may warrant consideration. J.S. v. J.F., 410 N.J. Super. 611, 614 (App. Div. 2009). When deciding whether the parties had a "dating relationship," the court must view the facts through the prism of the State's strong public policy against domestic violence. Ibid.

Upon finding jurisdiction, a trial judge adjudicating a domestic violence case has a "two-fold" task. Silver v. Silver, 387 N.J. Super. 112, 125 (App. Div. 2006). The judge must first determine whether the plaintiff has proven, by a preponderance of credible evidence, that the defendant committed one of the

predicate acts referenced in N.J.S.A. 2C:25-19(a), which incorporates harassment and cyber-harassment as conduct constituting domestic violence. Silver, 387 N.J. Super. at 125-26. The judge must construe any such acts in light of the parties' history to better "understand the totality of the circumstances of the relationship and to fully evaluate the reasonableness of the victim's continued fear of the perpetrator." Kanaszka v. Kunen, 313 N.J. Super. 600, 607 (App. Div. 1998); see N.J.S.A. 2C:25-29(a)(1).

If the court finds the defendant committed a predicate act of domestic violence, then the second inquiry "is whether the court should enter a restraining order that provides protection for the victim." Silver, 387 N.J. Super. at 126. While the second inquiry "is most often perfunctory and self-evident, the guiding standard is 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.

C.

A finding of harassment requires proof that the defendant acted "with [the] purpose to harass . . . . " N.J.S.A. 2C:33-4. Its establishment requires proof that it was the actor's "conscious object to engage in conduct of that nature or to cause [the intended] result." N.J.S.A. 2C:2-2(b)(1). A plaintiff's mere assertion

and their "subjective reaction alone will not suffice; there must be evidence of the improper purpose." J.D. v. M.D.F., 207 N.J. 458, 487 (2011).

Similarly, cyber harassment occurs when a person,

> while making one or more communications in an online capacity via any electronic device or through a social networking site and with the purpose to harass another, the person:
>
> (1) threatens to inflict injury or physical harm to any person or the property of any person;
>
> (2) knowingly sends, posts, comments, requests, suggests, or proposes any lewd, indecent, or obscene material to or about a person with the intent to emotionally harm a reasonable person or place a reasonable person in fear of physical or emotional harm to his [or her] person; or
>
> (3) threatens to commit any crime against the person or the person's property.
>
> [N.J.S.A. 2C:33-4.1(a)(1) to (3).]

"The cyber-harassment statute limits the [regulation] of speech mostly to those communications that threaten to cause physical or emotional harm or damage." State v. Burkert, 231 N.J. 257, 274 (2017).

III.

Defendant argues that the trial judge erred by finding a "dating relationship." We disagree. The record contains sufficient credible evidence to

support the judge's finding that the parties were involved in a dating relationship. Among myriad findings on this issue, the judge found the parties regularly engaged in intimate communications, evidenced by the many calls and texts between them. The record amply supports the judge's determination that the parties had engaged in a dating relationship.

Defendant next argues the judge lacked sufficient evidence in the record to find plaintiff met her burden to prove the predicate acts of harassment and cyber-harassment. We do not agree. The entirety of the record, including the unwanted calls and texts, the social media postings, and defendant's verbal abuse of plaintiff, supports the trial judge's finding that defendant had an intent to harass. We conclude plaintiff met her burden under N.J.S.A. 2C:33-4.

Turning to the predicate act of cyber-harassment, we find that there is insufficient credible evidence in the record to affirm the trial court. The online posts were indisputably coarse and insulting. However, our review of the record does not reveal electronic posts which constituted "lewd . . . or obscene material." N.J.S.A. 2C:33-4.1(a)(2). The Criminal Code (Code) defines "lewd acts" as including "the exposing of the genitals for the purpose of arousing or gratifying the sexual desire of the actor or of any other person." N.J.S.A. 2C:14-4(c). Similarly, the Code defines obscene material as material which "depicts

or describes in a patently offensive way, ultimate sexual acts, normal or perverted, actual or simulated, masturbation, excretory functions, or lewd exhibition of the genitals . . . ." N.J.S.A. 2C:34-2(a)(1)(a). Because the alleged "lewd . . . or obscene material[s]," the nightgown photo and the wig photo, were not "patently offensive" or expose "genitals for the purpose of arousing[,]" we do not find defendant committed cyber-harassment under N.J.S.A. 2C:33-4.1(a)(2), and reverse that portion of the order.

On the second Silver prong, we find sufficient credible evidence in the record to support the judge's finding that an FRO was needed to protect plaintiff going forward. Based on defendant's history of manipulative and controlling behavior, and his lack of remorse or insight, the judge found there was a reasonable basis for concern over plaintiff's safety and well-being. The judge found defendant's conduct also stemmed from his anger that the relationship was over, a situation likely to give rise to future domestic violence. We find there is enough evidence in the record to support the judge's determination that an FRO is "necessary . . . to protect the [plaintiff] from an immediate danger or to prevent further abuse." Silver, 387 N.J. Super. at 127.

Finally, defendant contends the trial judge abused his discretion in awarding counsel fees in the amount of $20,955.50. Defendant also argues the judge erred in denying his motion to stay payment of counsel fees.

The PDVA expressly includes reasonable attorney's fees as compensatory damages available to victims of domestic violence. N.J.S.A. 2C:25-29(b)(4). "The reasonableness of attorney's fees is determined by the court considering the factors enumerated in R[ule] 4:42-9(b)." McGowan, 391 N.J. Super. at 508. "If, after considering those factors, the court finds that the domestic violence victim's attorney's fees are reasonable, and they are incurred as a direct result of domestic violence, then a court, in an exercise of its discretion, may award those fees." Ibid. "[A]n award of attorney's fees continues to rest within the discretion of the trial judge." Ibid. (citing Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 443-44 (2001)). Any "determinations by trial courts [regarding legal fees] will be disturbed only on the rarest of occasions, and then only because of a clear abuse of discretion." Ibid. (alteration in original) (quoting Rendine v. Pantzer, 141 N.J. 292, 317 (1995)).

We find defendant's argument lacks merit. The judge made findings and determined counsel fees were the result of domestic violence, that plaintiff was the prevailing party, and that the fee award was appropriate pursuant to N.J.S.A.

2C:25-29(b)(4). Pursuant to Rule 4:42-9(b), the judge made detailed findings as to the amount of the award, including the hourly rates charged and time spent by plaintiff's counsel. We defer to the judge's meticulous findings in the record and conclude that there was no abuse of discretion. We have also considered defendant's arguments for a stay of payment. We conclude there is no basis whatsoever to stay payment of the award under Crowe. Any remaining arguments by defendant not addressed lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed in part, reversed in part.