SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3501-20

N.R.,

Plaintiff-Respondent,

v.

D.D.,

Defendant-Appellant.

Submitted April 28, 2022 – Decided May 6, 2022

Before Judges Mawla and Alvarez.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Passaic County, Docket No. FV-16-1070-21.

Lindabury, McCormick, Estabrook & Cooper, PC, attorneys for appellant (Anne Marie Bramnick, of counsel and on the brief).

Respondent did not file a brief.

PER CURIAM

D.D. appeals from a June 21, 2021 final restraining order (FRO) prohibiting her from contact with N.R., her sister, under the Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17 to -35. We now reverse and vacate the order.

The decision was made after a days-long hearing at which D.D. and N.R. testified. The two have had an acrimonious relationship for years. D.D. resides with her children in Rhode Island, and on the date of the incident, they were visiting her mother's home in New Jersey. N.R. resides with her children on the first floor of the split-level structure.

When the patrolman who responded to the 911 call arrived at the property, he saw D.D. crying and upset, with visible redness on her neck and chest area. D.D.'s husband was bleeding from the face, and his shirt was torn. The officer placed N.R. under arrest, as she was identified as the aggressor.

The incident occurred outside the home. During D.D.'s visit, N.R. had texted her mother that she wanted "everyone" to leave—meaning D.D., her husband, and their children. D.D. began to load the car, while her husband tried to quiet the children, who did not want to stop playing with their cousins, N.R.'s children.

D.D. testified that as she was packing her vehicle, N.R. ran outside and attacked her. D.D.'s husband was injured when he attempted to insert himself between the two women.

N.R. testified that she was downstairs on the first floor when she came to realize that D.D.'s husband was upstairs along with D.D. She testified that she asked D.D. and her husband to leave because the spouses—who were separated—had a tumultuous relationship. N.R. explained that D.D. and her husband were arguing outside, and that she tried to stop them so her children would not see. N.R. claimed D.D.'s husband grabbed her after N.R. and D.D. began pushing and shoving each other. She denied instigating, asserting that D.D.'s husband had attacked her.

The parties' mother, an understandably reluctant witness, testified she watched N.R. attack and choke D.D. She acknowledged that N.R. went outside after D.D. had already begun packing her car to leave.

The incident occurred on September 8, 2020. In November 2020, D.D. learned that N.R. had filed a municipal court citizen's complaint against her for assault, but that N.R. would drop the complaint if D.D. would consent to the State dismissing its assault complaint against N.R. and to entering mutual

restraints. At that juncture, D.D. decided to apply for a temporary restraining order (TRO).

In the trial judge's oral opinion, recorded over twenty-eight pages of transcript, he asks rhetorically if N.R. would have come out of the house and assaulted D.D. "had she not felt that her sister was harassing her?" He answered his own rhetorical question by saying it was "very unlikely." The judge found N.R.'s testimony that she was assaulted by D.D. "not supported by the evidence." Although he expressed skepticism about some of the details of the incident, he was satisfied that N.R. had assaulted D.D., and issued an FRO barring N.R. from contact with D.D. He characterized D.D.'s "stomp[ing]" on the floor above N.R.'s first-floor residence as "a little retribution . . . a little response" to being asked to leave.

The judge goes on to state that N.R. would not have attacked D.D. but for "[feeling] that her sister was harassing her[.]" Because he found the "stomp[ing]" was meant to harass N.R., he issued the domestic violence order in light of the sisters' significant history of conflict, physical and otherwise. The judge found, by a preponderance of the evidence, a restraining order was necessary to protect N.R. from future acts of domestic violence:

> And given the long term dysfunction . . . in the relationship between the two parties, one would wonder

> how it is that you can grant one for [D.D.] and not for [N.R.]
>
> [N.R.] testifies that [D.D.] has in the past put hands on her, that she has been injured by her. And given what occurred on the 8th of September, I find it more likely than not that that's true, that [N.R.] would have the same reason to believe that absent a restraining order that she would, that merry-go-round would just continue to cycle and she would continue to experience harassing conduct at the hands, maybe literally, of her sister.

The judge said N.R. had reason "to believe that in the absence of the restraining order she is . . . going to suffer harassment, whether there is an [offensive] touching or whether it's just repetitive conduct designed to annoy or seriously alarm . . . ." He added:

> The issue today is whether [N.R.] has proven that during the course of that incident at the home, [D.D.'s] behavior was designed to annoy or alarm her, harass her, the reasons I stated that the record supports that finding. And assault and harassment by [N.R.] against [D.D.] on that same day. So, that will conclude the matter.

Now on appeal, D.D. raises the following points:

> POINT 1
>
> THE TRIAL COURT COMMIT[T]ED LEGAL ERROR BY MISINTERPRETING THE HARASSMENT STATU[T]E AND THEREFORE ERRED IN ISSUING A[N] [FRO] AGAINST [D.D.]

POINT 2

N.J.S.A. 2C:33-4(A) DOES NOT APPLY TO THE FACTS HEREIN TO SUPPORT A FINDING OF HARASSMENT BY [D.D.] AS DETERMINED BY THE TRIAL COURT.

POINT 3

N.J.S.A. 2C:33-4(C) DOES NOT APPLY TO THE FACTS HEREIN TO SUPPORT A FINDING OF HARASSMENT BY [D.D.] AS DETERMINED BY THE TRIAL COURT.

POINT 4

THE RECORD BELOW DOES NOT SUPPORT THE TRIAL COURT'S FINDINGS OF "STOMPING," NOR DO THE FACTS IN THE RECORD SUPPORT A FINDING OF GUILTY FOR HARASSMENT.

To obtain an FRO, a complainant must establish that (1) the defendant has committed one of the predicate acts identified in N.J.S.A. 2C:25-19(a)(1) to (19), and (2) an FRO is necessary for the plaintiff's protection. Silver v. Silver, 387 N.J. Super. 112, 125-28 (App. Div. 2006). In this case, the alleged predicate act was harassment, N.J.S.A. 2C:33-4(a).

The judge should have identified the applicable subsection and detailed the specific acts he found harassing—not just N.R.'s emotions. It is D.D.'s motivation for her conduct, and the conduct itself, that is relevant. See J.D. v. M.D.F., 207 N.J. 458, 486 (2011). Since D.D., her husband, and children were

outside preparing to leave, and N.R. left the house in order to attack her, the finding that D.D.'s stomping constituted harassment is inexplicable.

The judge's focus seemed to be maintaining reciprocity. Unfortunately, this does not suffice to establish a predicate act, much less that N.R. needed protection. Common sense and experience tell us that when a person is angry—as was D.D. after being told to leave while her children were playing peaceably with their cousins and her mother was preparing dinner—"stomp[ing]" may express frustration, not an intent to harass.

We simply do not agree that N.R. proved harassment by a preponderance of the evidence. Even considering the parties' prior history, the "stomp[ing]" N.R. heard was a far stretch from harassment. Thus, without addressing D.D.'s points specifically, we conclude that the judge's purpose of maintaining a sort of equilibrium such that N.R. would not feel bested by D.D. did not warrant issuing the restraining order. There is no substitute for a Silver analysis identifying a predicate act and a need to protect. The restraining order issued against D.D. is hereby vacated.

Reversed.