RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2038-22

K.S.,[1]

Plaintiff-Respondent,

v.

S.H.,

Defendant-Appellant.

Submitted May 7, 2024 – Decided May 31, 2024

Before Judges Rose and Smith.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Gloucester County, Docket No. FV-08-0302-22.

J Moore Law LLC, attorneys for appellant (Justin N. Moore, on the brief).

K.S., respondent pro se.

PER CURIAM

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[1] Consistent with our prior opinion, we use initials in accordance with Rule 1:38-3(d)(10).

In this domestic violence matter, defendant S.H. appeals from a February 1, 2023 Family Part order, granting plaintiff K.S.'s motion for counsel fees. Defendant raises procedural and substantive challenges to the trial judge's decision, contending he was not afforded an opportunity to oppose the certifications of counsel supporting plaintiff's motion, and the fees awarded to plaintiff's first attorney "were not a direct result of domestic violence." Unpersuaded, we affirm.

I.

The facts and procedural history are set forth at length in our prior opinion, vacating the September 30, 2021 order that denied plaintiff's application for a final restraining order (FRO) under the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35, and continued civil restraints pursuant to the parties' October 2018 consent order. K.S. v. S.H., No. A-0650-21 (App. Div. Oct. 20, 2022) (slip op. 3-11). Following the three-day retrial before a different judge, an FRO was entered in favor of plaintiff and against defendant.

Before us, defendant does not challenge issuance of the FRO. Accordingly, the facts giving rise to the acts of domestic violence are not material to our opinion and need not be reiterated. Suffice it to say, the trial judge found defendant harassed plaintiff on various occasions, via multiple texts

using foul language, and that restraints were necessary to protect plaintiff from future harm. See Silver v. Silver, 387 N.J. Super. 112, 125-27 (App. Div. 2006).

More significant is the procedural history underscoring plaintiff's fee application, which we summarize as follows. During the first FRO trial, plaintiff was represented by Eric R. Foley, Esq. Plaintiff was the only trial witness; both parties moved into evidence several exhibits. K.S., slip op. at 8.

After plaintiff's application for an FRO was denied, Foley filed an appeal on plaintiff's behalf, contending the judge misapplied the governing legal principles, necessitating reversal. Id. at 2. In the alternative, Foley sought a remand, asserting the judge failed to consider the documentary evidence admitted at trial. Ibid.

Following oral argument, we issued a seventeen-page opinion. Id. at 1-17. Persuaded a new trial was warranted, we vacated the dismissal of plaintiff's domestic violence complaint, reinstated temporary restraints, and ordered a new trial before another judge. Id. at 17.

On remand, plaintiff was represented by Amy Smith, Esq. Prior to the retrial, plaintiff filed an amended restraining order. Both parties testified at the January 2023 retrial. Following summations, the trial judge issued an oral decision, granting the FRO.

Pertinent to this appeal, at the conclusion of the hearing, Smith inquired whether plaintiff could submit a certification in support of counsel fees incurred. Acknowledging plaintiff was permitted to do so, the judge noted: "I leave here February 1st; you had better do it quickly because I am not doing anything left behind."[2]

Plaintiff thereafter filed certifications of Foley and Smith, both dated January 26, 2023. In his merits brief, defendant asserts Smith's certification was filed on January 26 and Foley's certification was filed the following day.[3]

In his certification, Foley summarized his educational background and legal employment history, noting: "A large percentage of [his] practice focuse[d] on family law matters." Admitted to the New Jersey Bar in 2003, Foley stated his hourly fee was $400.

Foley detailed the services performed for plaintiff and attested his fees for: participation in the first trial were $4,840; and preparation of plaintiff's appeal were $5,840. Foley also paid a filing fee of $250. Accordingly, Foley

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[2] Pursuant to N.J.R.E. 202(b) and N.J.R.E. 201(b)(2), we take judicial notice of the judge's assignment to another division in the same vicinage, effective February 1, 2023.

[3] The copies of the certifications provided in defendant's appendix are not date stamped.

certified plaintiff incurred $10,930 in counsel fees and costs for his participation in her initial trial and appeal.

Smith similarly summarized her educational and professional background, and that of her partner, Dawn Kaplan, Esq, with whom she conferred on one occasion during Smith's representation of plaintiff, and the firm's associate, Jill Dell-Aquilo, Esq., who assisted Smith in the remanded matter. Smith attested plaintiff agreed to pay her and Kaplan $375 per hour, and Dell-Aquilo $275 per hour.

Smith detailed the services performed by her, Kaplan, and Dell-Aquilo and averred the fees totaled $7,325. Noting: "Plaintiff does not have the financial means to finance this litigation, which was caused by [d]efendant's repeated acts of domestic violence against her," Smith's firm afforded $852.50 in "professional discounts."

On February 1, 2023, the trial judge issued a written decision and memorializing order, awarding plaintiff $18,005 in counsel fees as compensatory damages, which represented the total amounts itemized in both certifications. The judge thoroughly addressed plaintiff's fee application in view of the PDVA and the case law interpreting counsel fees under the act and RPC 1.5(a).

Scrutinizing Foley's certification, the judge noted Foley represented plaintiff at the initial trial "and was successful on appeal in having the matter remanded." Citing Foley's qualifications and legal expertise, the judge was convinced his $400 hourly rate was "reasonable and comparable to similarly situated attorneys in the Gloucester County area." Further, "the amount of time expended in preparation for trial and the appellate brief precluded other employment." Recognizing "at least one thousand pages of documents were submitted" in support of plaintiff's application for an FRO, the judge found "[t]he issues were not unique but . . . require[d] a level of expertise in such matters and there certainly is expertise in the preparation and argument before the Appellate Division." Finding "the fee request [wa]s reasonable in both the time expended and the hourly rate," the judge awarded the $10,680 billed.

The trial judge similarly analyzed Smith's certification, noting Smith "was successful and obtained the restraining order." The judge found Smith and the two other attorneys who assisted in plaintiff's cases were "well versed in the practice of [f]amily [l]aw and domestic violence." Recognizing the total time billed "included significant preparation of documents and trial time," the judge found Smith's "fee request [wa]s reasonable in both the time expended and the hourly rate[s]." The judge awarded the $7,325 billed. This appeal followed.

II.

We begin by recognizing the limited nature of our review. In considering the grant or denial of a counsel fee award, we accord significant deference to the trial judge's determinations. McGowan v. O'Rourke, 391 N.J. Super. 502, 508 (App. Div. 2007). A trial judge's "fee determinations . . . will be disturbed only on the rarest of occasions, and then only because of a clear abuse of discretion." Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001) (quoting Rendine v. Pantzer, 141 N.J. 292, 317(1995)). When a trial judge's determination of fees was based on "irrelevant or inappropriate factors, or amounts to a clear error in judgment," however, we must intervene. Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005); see also Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002).

A trial judge is specifically authorized by the PDVA to award as damages the reasonable counsel fees and costs incurred by a victim of domestic violence. Under the PDVA, a judge may enter an order "requiring the defendant to pay to the victim monetary compensation for losses suffered as a direct result of the act of domestic violence," which includes "reasonable attorney's fees [and] court costs." N.J.S.A. 2C:25-29(b)(4). The award is designed "to make the victim whole." Wine v. Quezada, 379 N.J. Super. 287, 292 (Ch. Div. 2005).

Because fees and costs in a domestic violence action are awarded as damages, an award is "not subject to the traditional analysis" for an award of fees in family-type claims pursuant to N.J.S.A. 2A:34-23, and the court is not obliged to consider the parties' financial circumstances. McGowan, 391 N.J. Super. at 507 (quoting Schmidt v. Schmidt, 262 N.J. Super. 451, 453 (Ch. Div. 1992)); see also Wine, 379 N.J. Super. at 292. Rather, under the PDVA, counsel fees maybe be awarded if the fees are: (1) "a direct result of the domestic violence"; (2) reasonable; and (3) presented via affidavit pursuant to Rule 4:42-9(b). McGowan, 391 N.J. Super. at 507 (quoting Schmidt, 262 N.J. Super. at 454); see also Wine, 379 N.J. Super. at 291.

A.

We first address defendant's contention that the trial judge issued his decision without affording a meaningful opportunity to respond to plaintiff's counsel fees application, thereby denying his right to due process. Represented by the same attorney before the trial court and on appeal, defendant claims before receiving the court's decision and order "via email late on Thursday[,] February 2, 2023," defense counsel "had reached out to the court via email to clarify that [defendant] was indeed objecting to the award of counsel fees and to clarify when a response must be submitted by." Defendant claims the court

failed to respond to his attorney's email. Notably, however, neither email is included in defendant's appendix.

"The minimum requirements of due process of law are notice and an opportunity to be heard." Klier v. Sordoni Skanska Const. Co., 337 N.J. Super. 76, 84 (App. Div. 2001) (citing Doe v. Poritz, 142 N.J. 1, 106 (1995)). "The opportunity to be heard contemplated by the concept of due process means an opportunity to be heard at a meaningful time and in a meaningful manner." Ibid.

Although it is unclear when plaintiff filed and served her certifications of counsel, we recognize the judge issued his decision less than one week thereafter. Ordinarily, we might conclude defendant was not afforded a meaningful opportunity to respond to plaintiff's fee request, vacate the award, and remand the matter for the trial court to permit defendant to file opposition. We need not do so for the following reasons.

There is no hearing required for a counsel fee award either under the Rules of Court, "which merely require submission of an affidavit of service, R. 4:42-9(b), or in the case law." Elizabeth Bd. of Educ. v. N.J. Transit Corp., 342 N.J. Super. 262, 271 (App. Div. 2001). Defendant's contention that Rule 4:42-9(b)

provides "a fee application shall be made on notice to all parties," is belied by the rule's plain language. Instead, Rule 4:42-9(b) provides, in full:

> Affidavit of Service. Except in tax and mortgage foreclosure actions, all applications for the allowance of fees shall be supported by an affidavit of services addressing the factors enumerated by RPC 1.5(a). The affidavit shall also include a recitation of other factors pertinent in the evaluation of the services rendered, the amount of the allowance applied for, and an itemization of disbursements for which reimbursement is sought. If the court is requested to consider the rendition of paraprofessional services in making a fee allowance, the affidavit shall include a detailed statement of the time spent and services rendered by paraprofessionals, a summary of the paraprofessionals' qualifications, and the attorney's billing rate for paraprofessional services to clients generally. No portion of any fee allowance claimed for attorneys' services shall duplicate in any way the fees claimed by the attorney for paraprofessional services rendered to the client. For purposes of this rule, "paraprofessional services" shall mean those services rendered by individuals who are qualified through education, work experience or training who perform specifically delegated tasks which are legal in nature under the direction and supervision of attorneys and which tasks an attorney would otherwise be obliged to perform.

Further, at the conclusion of trial, plaintiff's counsel expressly stated she would submit a certification of services and the court responded her application must be submitted before February 1. While we recognize a judge's reassignment to another Division does not take priority over a party's right to

due process, defense counsel neither objected to the timeframe nor requested a scheduling order.

Moreover, defendant does not claim plaintiff's counsel fees were (1) not the direct result of his domestic violence; (2) unreasonable; nor (3) unsupported by affidavits. We therefore conclude under the circumstances presented in this matter, defendant was not denied his right to due process. See City of East Orange v. Kynor, 383 N.J. Super. 639, 648 (App. Div. 2006) ("Due process is 'a flexible [concept] that depends on the particular circumstances.'" (alteration in original) (quoting Doe, 142 N.J. at 106)).

B.

We turn to defendant's substantive challenge to the fee award, noting he only challenges the fees awarded for Foley's services. Defendant argues because the first trial judge denied plaintiff's application for an FRO, she was not a "prevailing" party within the meaning of the PDVA, and the fees for Foley's services were not incurred as a "direct result" of defendant's domestic violence.

Defendant's argument mistakenly presupposes plaintiff only was statutorily entitled to fees incurred in the successful prosecution of her domestic violence complaint in the second trial. To support his contention,

defendant cites our decision in M.W. v. R.L., 286 N.J. Super. 408, 411 (App. Div. 1995), where we recognized that "the Legislature only made provision [in the PDVA] for counsel fees for victims, and not for prevailing parties." In M.W. we interpreted the PDVA in a way intended to avoid "chilling" domestic violence claimants from bringing suit out of fear that a claim's failure would generate a fee award for the alleged abuser. Id. at 411-12.

Nor are we persuaded by defendant's suggestion that an award of counsel fees only applies when an FRO applicant successfully defends an appeal brought by the abuser. Grandovic v. Labrie, 348 N.J. Super. 193, 197 (App. Div. 2022) (holding "[i]t would be inimical to the [PDVA] to deny a victim an award of reasonable attorney's fees and costs incurred in successfully defending against a challenge to a final restraining order issued by the trial court").

We adhere to the views espoused in M.W. and Grandovic, but we find our prior decisions inapposite to what occurred in the present matter, where plaintiff was called upon to fend off her abuser's meritless domestic violence. We discern nothing about the language or intent of N.J.S.A. 2C:25-29(b)(4) precluding a counsel fee award for the proceedings that occurred before plaintiff ultimately was issued final restraints. We conclude the fees claimed

in Foley's certification were incurred as a "direct result" of defendant's domestic violence. To determine otherwise would be inconsistent with the purpose of a fee award under the PDVA, i.e., "to make the victim whole." Wine, 379 N.J. Super. at 292.

Affirmed.