

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2095-22

T.S.,

Plaintiff-Respondent,

v.

G.K.,

Defendant-Appellant.

Argued May 13, 2024 – Decided June 14, 2024

Before Judges DeAlmeida and Berdote Byrne.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Monmouth County,
Docket No. FV-13-0771-20.

Louis J. Keleher argued the cause for appellant (The
Tormey Law Firm, attorneys; Louis J. Keleher, on the
briefs).

James M. Curran argued the cause for respondent (Law
Office of James M. Curran, PC, attorneys; James M.
Curran, on the brief).

PER CURIAM

Defendant, G.K.,¹ appeals from the February 3, 2023 Family Part order denying his motion to dissolve a domestic violence final restraining order (FRO) pursuant to Carfagno v. Carfagno, 288 N.J. Super. 424 (Ch. Div. 1995). The FRO was entered in favor of plaintiff, T.S., in 2020 based on the predicate act of harassment after defendant stipulated to sending plaintiff fifty-five text messages in a short span of time with the intention to harass her. After carefully reviewing the record in view of the governing principles of law, we reverse and remand to the Family Part.

I.

We glean the following facts from the record. Plaintiff and defendant were in a dating relationship for two and a half years before the parties parted ways in October 2019. In December 2019, plaintiff obtained a temporary restraining order (TRO) against defendant alleging that defendant physically assaulted her with his car in October, sent her multiple voicemails, and sent her fifty-five text messages in the month of December, which left her in fear of him. She claimed that between December 5 and 16, defendant's actions and messages were getting "more aggressive" as he continued to repeatedly text her, leave her

¹ We use initials throughout this opinion because the case involves domestic violence litigation. R. 1:38-3(d)(9).

voice messages, and send her packages mailed to her sister's residence, despite plaintiff's lack of any response. With respect to the prior history of domestic violence, her TRO alleged that during an October 2019 physical altercation, defendant ran over her left foot causing her to "fall and receive multiple injuries," including a broken toe, stitches to her upper right eye, and multiple bruises.

In February 2020, the case was scheduled to proceed to a hearing on plaintiff's FRO application. Both parties appeared, represented by counsel. Prior to the commencement of a hearing, defendant stipulated to the predicate act of harassment. Specifically, he stipulated he texted plaintiff approximately fifty-five times "in a very short period of time" with the intent to harass her, but did not stipulate to the contents of any of the text messages. He did not stipulate to any other allegation in the TRO. The trial court entered a FRO in favor of plaintiff based upon defendant's stipulations.

Defendant moved to dissolve the FRO on November 18, 2022, submitting a certification that asserted changed circumstances warranted dissolution of the restraints. In particular, he asserted the parties had not seen each other or communicated since the issuance of the FRO, the FRO negatively affected his business, his ability to sponsor his wife's citizenship, and his ability to own a

gun. Plaintiff filed opposition to the application, providing a certification where she asserted, she "remained fearful" of defendant, and attached photographs of herself - bloodied and bruised - allegedly depicting her physical condition after defendant injured her with his car in October of 2019. She also attached the emails defendant sent to her in December 2019.

After a review of the parties' submissions, the same trial judge who presided over defendant's original stipulation denied the motion to dissolve restraints. Without taking testimony from either party, the court referred to the factors set out in Carfagno, 288 N.J. Super. at 434-35, and made several findings regarding the content of the text messages, the photographs plaintiff attached to her opposition, and the allegations of physical violence in the former TRO to deny the motion.

II.

Our review of a motion to dissolve an FRO is limited. See G.M. v. C.V., 453 N.J. Super. 1, 11-12 (App. Div. 2018). The denial of a motion without a plenary hearing is reviewed for an abuse of discretion. Id. at 11. We give "substantial deference" to the trial court's factual findings and legal conclusions in a domestic violence matter, C.C. v. J.A.H., 463 N.J. Super. 419, 428 (App. Div. 2020), due to the Family Part's "special jurisdiction and expertise in family

matters," G.M., 453 N.J. Super. at 11 (quoting N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 343 (2010)). We are bound by the trial court's findings if they are supported by adequate, substantial, credible evidence. G.M., 453 N.J. Super. at 11 (quoting Cesare v. Cesare, 154 N.J. 394, 413 (1998)).

On a showing of good cause, an FRO may be dissolved upon application to the court. N.J.S.A. 2C:25-29(d). In determining whether a defendant has shown good cause, the court considers:

- (1) whether the victim consented to lift the restraining order;
- (2) whether the victim fears the defendant;
- (3) the nature of the relationship between the parties today;
- (4) the number of times that the defendant has been convicted of contempt for violating the order;
- (5) whether the defendant has a continuing involvement with drug or alcohol abuse;
- (6) whether the defendant has been involved in other violent acts with other persons;
- (7) whether the defendant has engaged in counseling;
- (8) the age and health of the defendant;
- (9) whether the victim is acting in good faith when opposing the defendant's request;
- (10) whether another jurisdiction has entered a restraining order protecting the victim from the defendant; and
- (11) other factors deemed relevant by the court.

[G.M., 453 N.J. Super. at 13 (quoting Carfagno, 288 N.J. Super. at 435).]

Importantly, the Carfagno factors are weighed qualitatively, not quantitatively. 288 N.J. Super. at 442. Courts "must carefully scrutinize the record and carefully consider the totality of the circumstances" before dissolving an FRO.

G.M., 453 N.J. Super. at 14 (quoting Kanaszka v. Kunen, 313 N.J. Super. 600, 605 (App. Div. 1998)).

III.

On appeal, defendant primarily argues (1) the trial court abused its discretion in denying his motion to dismiss the FRO without holding a plenary hearing; and (2) the trial judge should have sua sponte recused herself.

An FRO "can be modified or dissolved only by court order upon a showing of good cause." G.M., 453 N.J. Super. at 12; see also N.J.S.A. 2C:25-29(d). The party requesting the dissolution "has the 'burden to make a prima facie showing [that] good cause exists for dissolution of the [FRO] prior to the judge considering the application for dismissal." Id. at 12-13 (first alteration in original) (quoting Kanaszka, 313 N.J. Super. at 608). To sustain that burden, the party seeking dissolution of the FRO "must show 'substantial changes in the circumstances' from what existed at the final hearing for the court to 'entertain the application for dismissal.'" Id. at 13 (quoting Kanaszka, 313 N.J. Super. at 608).

Like the overall inquiry, the court considers the Carfagno factors at the prima facie stage. Id. at 14. Conclusory allegations are disregarded. Id. at 13 (quoting Kanaszka, 313 N.J. Super. at 608). Only when a substantial change in

circumstances is shown and there exists a genuine dispute of material fact should a plenary hearing be ordered. Ibid. (quoting Kanaszka, 313 N.J. Super. at 608); Bermeo v. Bermeo, 457 N.J. Super. 77, 83 (App. Div. 2018).

In the present matter, the court did not make the threshold determination of whether defendant set forth a prima facie case of changed circumstances. Instead, it denied the motion substantively. We conclude the trial court erred when it considered facts outside the record in denying defendant's application. The trial court was limited to proceeding in one of two ways: 1) it could have found defendant failed to make a prima facie case of changed circumstances and denied the Carfagno motion; or 2) it could have proceeded to a plenary hearing and taken testimony regarding the Carfagno factors. The court did neither. Instead, it considered facts outside of the record in substantively denying defendant's motion without a hearing, even though the material facts as to the ongoing need for restraints and the underlying conduct that gave rise to the FRO were sharply disputed by the parties. Although a Carfagno application is not an instrument in which to relitigate the FRO hearing, Kanaszka, 313 N.J. Super. at 608, the record before the court was limited to only defendant's stipulation of sending fifty-five text messages, not including the content of those messages. Instead, the court relied upon the October 2019 physical altercation alleged in

plaintiff's TRO but never proven at trial. Similarly, it made references to the content of the text messages, which defendant did not stipulate to, and were not part of the FRO findings.

Accordingly, the trial court's denial of defendant's motion to dismiss the FRO is reversed, and the matter is remanded to the presiding judge of the Family Part for assignment to a different Family Part judge, because credibility determinations were made by the trial judge. See Freedman v. Freedman, 474 N.J. Super. 291, 308 (App. Div. 2023) (first citing J.L. v. J.F., 317 N.J. Super. 418, 438 (App. Div. 1999); and then citing P.T. v. M.S., 325 N.J. Super. 193, 220-21 (App. Div. 1999)). We express no opinion regarding whether defendant set forth a prima facie case of changed circumstances or as to the ultimate merits of defendant's motion to dissolve the FRO.

To the extent we have not specifically addressed defendant's remaining arguments, we conclude they are either mooted by our reversal and remand, or lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Reversed and remanded. We do not retain jurisdiction.

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


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