RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1835-15T1

K.J.M.,

Plaintiff-Respondent,

v.

J.M.M.,

Defendant-Appellant.

Argued November 30, 2016 – Decided April 27, 2017

Before Judges Alvarez and Accurso.[1]

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Cape May County, Docket No. FV-05-0256-16.

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[1] Hon. Carol E. Higbee was a member of the panel before whom this case was argued. The opinion was not approved for filing prior to Judge Higbee's death on January 3, 2017. Pursuant to R. 2:13-2(b), "Appeals shall be decided by panels of 2 judges designated by the presiding judge of the part except when the presiding judge determines that an appeal should be determined by a panel of 3 judges." The presiding judge has determined that this appeal remains one that shall be decided by two judges. Counsel has agreed to the substitution and participation of another judge from the part and to waive reargument.

Louis M. Barbone argued the cause for appellant (Jacobs & Barbone, attorneys; Mr. Barbone and John R. Stein, on the brief).

Respondent has not filed a brief.

PER CURIAM

Defendant J.M.M. appeals from a final restraining order entered against him pursuant to the Prevention of Domestic Violence Act (Act), N.J.S.A. 2C:25-17 to -35. Because the judge failed to find either a violation of a prior Pennsylvania final protection from abuse order or that a restraining order was necessary to protect the victim from immediate danger or further acts of domestic violence, we vacate the final restraining order and remand for re-hearing.

We take the facts from the documents in the record and the trial court's findings. When plaintiff filed her domestic violence complaint alleging harassment by defendant on December 5, 2015, their marriage was ending. They were in the midst of hearings in Pennsylvania involving enforcement of a prenuptial agreement and custody of their thirteen-year-old son. Plaintiff was also in possession of a final protection from abuse order entered in Pennsylvania against defendant on January 29, 2015, which was scheduled to expire by its own terms on December 31, 2015. In her complaint, she alleged defendant "purposely or knowingly" violated that order, by "repeatedly call[ing] her

cell phone," on December 5, demanding to know her location, and calling her a "whore," which violation also constituted the offense of harassment.

At the hearing, plaintiff testified that she and her son were in Stone Harbor on December 5, 2015. Her son was not feeling well and called his father at 10:30 p.m. on the cell phone she provided for his use. According to her, defendant immediately began asking the boy where his mother was, at which point he handed the phone to her. Plaintiff testified defendant "said that he wanted to see where [she] was, he wanted to talk to [their son], and he was — he kept asking [her] to put [their son] back on the phone." In response to the court's question as to how that call ended, plaintiff testified, "[w]ell, after [their son] got back on the phone [defendant] asked again where I was, what I was doing. And I — [their son] was just too upset, so we hung up the phone call."

According to plaintiff's phone records, defendant dialed his son back, on the son's phone, twice within the next ten minutes. Plaintiff testified there was no conversation between the parties on either call as "we just hung up on him." Plaintiff answered the call defendant made at 10:45 p.m., part of which she recorded. She testified defendant began the conversation by asking that plaintiff put their son back on the

phone. In that recording, which was played in court, plaintiff responds that the boy was resting. When defendant protests that they were having a conversation, plaintiff states, "Wrong. You were asking him 14 times where I was and what I'm doing." The conversation continued:

> Defendant: No.
>
> Plaintiff: And then, you proceeded to call me names.
>
> Defendant: No, —
>
> Plaintiff: We all —
>
> Defendant: (inaudible) being taken care of appropriately.
>
> Plaintiff: We all heard him.
>
> Defendant: Please, please get over it.
>
> Plaintiff: We all heard him and we all heard you, what you were saying about me.
>
> Defendant: (inaudible)
>
> Plaintiff: And, he's sitting here listening to you, and everything that you were calling me. All the names, all the derogatories, and that's fact. And, all you want to know is where I am and what I'm doing. So, you need to stop asking him 12,000 questions.
>
> Defendant: You're a whore. You're a whore. It's very, very — it's way documented.
>
> Plaintiff: Everybody doesn't need to hear your insults.
>
> Defendant: What —

Plaintiff: To a 13 year-old.

Defendant: (inaudible) It's well-documented you've been (inaudible) with all these guys. It's well-documented. I have plenty of proof.

Plaintiff: I don't care what you think you have. Your 13 year-old needs to have a childhood.

Defendant: Oh, —

Plaintiff: And, you need to leave him out of your —

Defendant: (inaudible)

Plaintiff: — nonsense. Leave us alone. You —

Defendant: (inaudible)

Plaintiff: — want to talk to him about how he's feeling, then you talk to him about how he's feeling.

Defendant: Let me understand. If I understand your (inaudible), listen, get over it, you are a whore.

(Audio recording ended.)

On cross-examination, plaintiff acknowledged that defendant was permitted by the parties' custody order to speak with the parties' son each day by telephone, and that defendant used only the boy's cell phone on the night in question and did not call her on her cell phone. She also admitted that the initial conversation between father and son was not outside the scope of

the parties' custody order, saying, "I believe at 10 o'clock at night, [the parties' son] should be able to reach out to his father . . . if he's sick and he feels he wants to . . . talk to him." Defendant did not testify.

After noting that the parties' relationship brought the complained of conduct within the scope of the Act, and the phone calls into New Jersey established jurisdiction here, the judge turned to the issue to be decided, "whether [defendant] committed an act of domestic violence, and whether [plaintiff] needs a restraining order to . . . protect her from him." The court noted it had declined to enter in evidence several emails exchanged between the parties in October.[2] It noted, however,

> that, even assuming that I were to admit them, that given the context in which they

[2] The emails were exchanged on a site called "Our Family Wizard" which the Pennsylvania court directed they use to communicate regarding their son. Among the emails referred to by the court was one sent by defendant to plaintiff on October 29th, which read:

> Being the slut sociopath that you are, you have upset [the parties' son] unbelievably. First, you told him you should be the only one receiving love letters. You are sick. You have also told all his friends not to have [the son] over for Halloween because I'm with him. He is at his wit's end with all your games. I hope one day the judge sees through your games.

Judging from the emails the court read into the record, we assume this is the one to which the court referred in its decision.

> occurred, that type of name-calling, although it's not pretty, in New Jersey is not harassment, but rather people who are having a difficult time in custody litigation or what's otherwise called "domestic contretemps," people fussing and fighting.
>
> And, it's clear that there's plenty of that in this particular case.

After reviewing the testimony, including the recording entered into evidence, the court summarized its findings and conclusions.

> The uncontroverted testimony is that the first call was from [the parties' son] to his father, but that [defendant] used that as an opportunity to find out — with regard to where his mother was and what his mother was doing.
>
> His mother, either because he handed her the phone or because she grabbed the phone, ended that conversation.
>
> There were two more calls, which were ignored.
>
> The fourth call was picked up, and [plaintiff] tried to use that as an opportunity to tell [defendant] to call — to knock it off, and given the context of this particular case where there's a protection from abuse order from the Commonwealth of Pennsylvania that indicates, among other things, that the defendant shall not abuse, harass, stalk, or threaten any of the persons in any place that they may be found, and that references the plaintiff.
>
> That once he found himself talking to the plaintiff, and she had a different view

of what the conversation between him and [the parties' son] was, that, especially given the fact that she had sought out and obtained the protection from abuse order in the Commonwealth of Pennsylvania, that those words were going to be annoying or alarming.

And, although he may not have — well, I do find that she having terminated the first phone call because she thought that it had taken a turn, and [plaintiff], she's credible.

She, at some points, had difficulty with counsel's questions and sometimes had difficulty just in terms of her presentation, but when the questions were asked point-blank, she didn't — she didn't manufacture. She didn't embellish. She played the phone call.

She played it several times.

The phone call's less than a minute, I believe, because I was looking at the timing on CourtSmart.

But, and [defendant] should have known that, especially after the first phone call when [plaintiff] — which [plaintiff] terminated because, in her view, [the parties' son] wasn't being asked about his illness, but where [plaintiff] was, that when he called back that he might very well be talking to [plaintiff] and that she might get annoyed or alarmed, given the history of this particular case.

And, once she was on the phone, he tried to talk past her, and then, again, when she indicated that the phone call before wasn't about [the son's] welfare, it was about where she was and what she was doing, he called her a "whore."

> And, he didn't call her a "whore" once, he called her a "whore" four times.
>
> He said that "it's well-documented."
>
> And, those are typically domestic contretemps, but in the context of this particular case, especially where the first phone call had been terminated by [plaintiff] and where [plaintiff] does have a protection from abuse order, that's harassment.

The court did not address or make any findings as to whether defendant's conduct constituted a violation of the Pennsylvania order[3] or plaintiff's need for the restraining order.

A final restraining order may issue only if the judge finds that the parties have a relationship bringing the complained of conduct within the Act, N.J.S.A. 2C:25-19d; the defendant committed an act designated as domestic violence, N.J.S.A. 2C:25-19a; and the "restraining order is necessary, upon an evaluation of the factors set forth in N.J.S.A. 2C:25-29a(1) to -29a(6), to protect the victim from an immediate danger or to prevent further abuse." Silver v. Silver, 387 N.J. Super. 112, 125-27 (App. Div. 2006).

[3] Defendant has provided us with an order entered on February 4, 2016, after the final restraining order in this matter, but signed by the same judge, whereby the State, on its own motion, dismissed the criminal charge against defendant for violating a domestic violence restraining order.

We are mindful of the deference owed to the determinations made by family judges hearing domestic violence cases. Cesare v. Cesare, 154 N.J. 394, 411-12 (l998). Thus, we would not ordinarily question the judge's determination that the name calling in the final phone conversation between the parties on December 5 constituted harassment and not domestic contretemps, see J.D. v. M.D.F., 207 N.J. 458, 475 (2011); Corrente v. Corrente, 281 N.J. Super. 243, 249-50 (App. Div. 1995), notwithstanding that the Supreme Court has cautioned that, when evaluating whether an individual acted with the requisite purpose to harass, courts are to be especially vigilant in cases involving the interactions of a couple in the midst of a breakup of their relationship, J.D., supra, 207 N.J. at 487. The problem here is that the court did not find defendant acted with a purpose to harass, a finding necessary to support the entry of a final restraining order.

To the contrary, the court found that defendant should have been aware after plaintiff ended the call between him and his son, "that when he called back that he might very well be talking to [plaintiff] and that she might get annoyed or alarmed, given the history of this particular case." The Court has emphasized, however, that "[a] lthough a purpose to harass can be inferred from a history between the parties, . . . that

finding must be supported by some evidence that the actor's conscious object was to alarm or annoy; mere awareness that someone might be alarmed or annoyed is insufficient." Ibid. (citations omitted).

Given the circumstances attendant to the call and the parties' history, whether defendant acted with a purpose to harass would be an exceedingly close question on this record. Defendant did not initiate the first call, never dialed plaintiff's phone, and when he found himself speaking to her, repeatedly asked that she put their son on the line. We are in no position to infer from the evidence that defendant acted with an improper purpose in the absence of an express finding of his intent by the trial court. Accordingly, because the trial court failed to make the finding, its determination that defendant's conduct constituted harassment, and thus a predicate act of domestic violence, cannot stand. See State v. Hoffman, 149 N.J. 564, 576-77 (1997).

The entry of the final restraining order must also be reversed for a completely independent reason. A judge's finding of an act of domestic violence is only the first of a two-step process; the second step requires a finding that a restraining order "is necessary . . . to protect the victim from an immediate danger or to prevent further abuse." Silver, supra,

387 N.J. Super. at 127. Here, the judge made no finding that the entry of a restraining order was necessary to protect plaintiff. Although there was an existing domestic violence order in Pennsylvania, that order was about to expire on its own terms. More important, the court made no finding that defendant's conduct was in violation of that order. As we noted, the State dismissed its complaint contending defendant violated a restraining order.

Given the lack of any finding as to a violation of the existing order, the obvious acrimony of the parties' divorce action and the circumstances, content and duration of the phone calls they had on the night in question, our review of the cold record does not allow us to conclude the evidence was sufficient to support a separate finding that final restraints were necessary for plaintiff's immediate protection or to prevent further abuse. See J.D., supra, 207 N.J. at 488. Accordingly, we are constrained to vacate the final restraining order and remand this matter to the trial court to permit it to take new testimony, if necessary, and evaluate the evidence for entry of a final restraining order under the two-step process required under the Act.

Vacated and remanded for further proceedings not inconsistent with this opinion. The temporary restraining order remains in place. We do not retain jurisdiction.