SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2917-15T3

J.L.M.,

Plaintiff-Respondent,

v.

J.W.,

Defendant-Appellant.

Submitted April 25, 2017 - Decided May 8, 2017

Before Judges Koblitz and Mayer.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Hunterdon County, Docket No. FV-10-271-16.

Broscious, Fischer & Zaiter, attorneys for appellant (Thomas P. Fischer, on the brief).

Weinberger Law Group, LLC, attorneys for respondent (Gregory A. Pasler, of counsel and on the brief).

PER CURIAM

Defendant J.W. appeals the family court's entry of a final restraining order (FRO) entered on February 25, 2016 in favor of

plaintiff J.L.M. In granting the FRO, the family court found defendant committed the predicate act of harassment against plaintiff. Defendant argues the family court's decision is not supported by adequate, substantial or credible evidence. Additionally, defendant argues the family court's finding was contrary to controlling legal principles. We agree and reverse.

The facts in this matter are undisputed. Plaintiff and defendant were married for several years. The parties divorced in September 2015. They ceased living under the same roof in November 2015. The parties had no children together, although plaintiff had children from a prior marriage. The parties had no significant assets divided as part of the divorce action. After the divorce, the parties had some property that remained to be returned to each other, including a used car, motorcycle, trailer, antique dresser and other incidental items. It is the return of the incidental property items that led to the family court's entry of an FRO against defendant.

Plaintiff initially applied for, and received, a temporary restraining order (TRO) against defendant on February 4, 2016. In the TRO, plaintiff alleged defendant engaged in harassing conduct under the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35 by sending over 200 e-mails and text messages over the course of two months. Defendant's e-mails and text messages

addressed the return of the parties' property. The e-mails and text messages also revealed defendant's continued feelings for plaintiff and expressed defendant's desire to reconcile.

On February 11, 2016, the family court conducted an FRO trial. Neither party was represented by counsel at that FRO trial. The family court took testimony from the parties and reviewed the e-mails and texts between the parties. At the conclusion of this FRO trial, the family court ruled that while defendant's e-mails and texts did not:

> rise[] to the level of domestic violence. . . . [I]t certainly sits right on the borderline of it. And the only thing that genuinely saves it from that . . . is that a good deal of the e-mails . . . do deal with end of marriage issues and property returns, et cetera.

The family court noted defendant's behavior was inappropriate but acknowledged the difference between domestic violence and inappropriate behavior. The family court concluded defendant's e-mails and texts were not sent with the intent to harass plaintiff as required by the PDVA. However, the family court cautioned defendant to cease communicating with plaintiff as plaintiff perceived his communications to be harassing.

The family court dismissed the TRO, finding plaintiff's allegation of domestic violence was not substantiated. After

dismissing the TRO, the family court had a colloquy with the parties regarding the return of various personal property.

The family court then entered a handwritten order under the FM docket number assigned to the parties' divorce action. The family court allowed defendant to pick up a car, motorcycle and trailer at plaintiff's house on February 19, 2016. The family court's February 11 order contained sparse details as to the mechanics for return of the items.

During the colloquy with the family court, defendant advised that the dresser was in Maine and he would not be able to retrieve the dresser until the snow melted. Given the delay in retrieving and returning plaintiff's dresser until the springtime, the family court's order provided "[d]efendant will return plaintiff's dresser as soon as possible. Defendant may send an e-mail to plaintiff indicating when it is available. Defendant will have no other contact with plaintiff." The family court concluded the proceeding by admonishing defendant to limit his communications regarding the return of the dresser and not to get "smart" or "creative" and stated defendant was "not to have any contact with [plaintiff] other than when the dresser is ready to be delivered."

On the same day that the family court dismissed plaintiff's TRO, approximately two hours after the parties left the courthouse, defendant sent an e-mail to plaintiff requesting modification of

the February 19 date designated for the exchange of personal items. Defendant forgot he would be away on a business trip on that date and unable to pick up his items. In his February 11 e-mail, defendant also expressed to plaintiff that he would take the car on the same date he returned plaintiff's dresser and wanted to retrieve his ping-pong table when he went to Maine to get plaintiff's dresser.

On February 12, 2016, based upon defendant's February 11 e-mail, plaintiff obtained a second TRO. Plaintiff alleged defendant's conduct in sending the February 11 e-mail constituted harassment under the PDVA.

On February 15, 2016, despite obtaining another TRO against defendant three days earlier, plaintiff responded to defendant's February 11 e-mail. Plaintiff expressed her appreciation on delaying the exchange of the car until the return of the dresser because plaintiff's daughter was using the car and a replacement car would not be ready for another week. Defendant continued the e-mail exchange related to the return of the parties' items. Plaintiff eventually ended her communication with defendant in a February 15 e-mail stating that defendant's only communication options as of that date would either be through her brother or the "court [on] Thursday." We note the return date of plaintiff's second TRO was Thursday, February 25. Despite plaintiff obtaining

a TRO on February 12, plaintiff exchanged e-mails with defendant on February 15. We further note that nothing in the February 11-15 e-mail exchange was annoying, alarming or sent at an inconvenient hour.

The trial on the second FRO application was conducted on February 25, 2016. At this trial, defendant had an attorney. Plaintiff was self-represented.

The same family court judge presided at the second FRO trial as presided at the first FRO trial. Because she was familiar with the parties from the prior FRO trial, the family court judge took judicial notice of the hundreds of e-mails and texts she reviewed as part of the earlier trial.

During the second FRO trial, the family court focused on the February 11 e-mail from defendant to plaintiff. At the conclusion of plaintiff's testimony, defendant's counsel moved to dismiss plaintiff's PDVA complaint based upon plaintiff's failure to prove the elements of harassment stemming from the February 11 e-mail. Defense counsel argued defendant's e-mail pertained to the family court's order dated February 11 and the exchange of personal property. Counsel claimed that defendant sent the e-mail to effect the transfer of property under the parties' divorce docket number. Defense counsel also argued the requisite intent to harass was absent from defendant's February 11 e-mail.

The family court denied defendant's motion to dismiss at the close of plaintiff's testimony. The family court agreed, "that simply on its face the one e-mail does not appear to be anything other than a scheduling issue." However, the family court stated, "that in the context of the prior history and what had occurred in court that day, it could possibly rise to the level of harassment."

At the conclusion of the second trial, the family court rendered an oral decision. In the ruling, the family court stated, "by itself this e-mail would be meaningless." The family court found:

> [I]n light of the prior history of violence, domestic violence, in terms of the harassing e-mails, in light of my very explicit direction to the defendant and in light of fact that he was dishonest under oath during this proceeding, I am going to find that this, in fact, was sent with the intent to harass, annoy or alarm the plaintiff.

On February 25, 2016, the family court entered an FRO against defendant. This appeal followed.

The scope of appellate review from a decision by a judge assigned to the Family Part is limited. Cesare v. Cesare, 154 N.J. 394, 411 (1998). A trial judge's findings should be affirmed if supported by "adequate, substantial, [and] credible evidence." Id. at 411-12 (citing Rova Farms Resort, Inc. v. Investors Ins.

Co., 65 N.J. 474, 484 (1974)). "Because of the family courts' special jurisdiction and expertise in family matters, appellate courts should accord deference to family court fact[-]finding." Id. at 413. However, if a judge makes a discretionary decision under a legal misconception, the appellate court need not accord the usual deference. State v. Steele, 92 N.J. Super. 498, 507 (App. Div. 1966). Rather, the appellate court must adjudicate the controversy in light of the applicable law to avoid a manifest denial of justice. Ibid.; see also Gotlib v. Gotlib, 399 N.J. Super. 295, 309 (App. Div. 2008)(compelling reversal if the court "ignores applicable standards").

On appeal, defendant argues the family court erred in granting the FRO by finding his February 11 e-mail "harassing." Harassment can constitute a basis for the issuance of a restraining order if the statutory elements are satisfied. See N.J.S.A. 2C:33-4. The statute defines harassment as follows:

> Except as provided in subsection e., a person commits a petty disorderly persons offense if, with purpose to harass another, he:
>
> a. Makes, or causes to be made, a communication or communications anonymously or at extremely inconvenient hours, or in offensively coarse language, or any other manner likely to cause annoyance or alarm;
>
> b. Subjects another to striking, kicking, shoving, or other offensive touching, or threatens to do so; or

> c. Engages in any other course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person.
>
> [N.J.S.A. 2c:33-4 (emphasis added).]

As provided by the statute, a finding of harassment requires proof of an intent or purpose to harass. See State v. Hoffman, 149 N.J. 564, 576-77 (1997). An assertion by a plaintiff that he or she felt harassed is a subjective belief and insufficient to prove a purpose or intent to harass. See J.D. v. M.D.F., 207 N.J. 458, 484 (2011). The family court failed to specify what portion of the harassment statute was violated by defendant. The family court did not find defendant's e-mail to be coarse, anonymous or made at an extremely inconvenient hour. Nor did the family court find defendant's February 11 e-mail amounted to a "course of alarming conduct" or "repeatedly committed acts with the purpose to alarm or seriously annoy" plaintiff.

Courts must not "trivialize" the offense of harassment and therefore must scrutinize the evidence so as not to overlook the statutory requirement that "relief is necessary to prevent further abuse," before making a finding of harassment. J.D., supra, 207 N.J. at 476 (first quoting Corrente v. Corrente, 281 N.J. Super. 243, 250 (App. Div. 1995); and then quoting N.J.S.A. 2C:25-29(b)). Trial courts must exercise the utmost care in determining whether

an act is simply an ordinary domestic dispute or disagreement or whether the act crosses the line into domestic violence. Id. at 475. Given the potential law enforcement consequences and criminal prosecutions that may result from a violation of an FRO, entry of an FRO requires family court judges to consider the evidence carefully and apply the required legal principles properly. J.S. v. D.S., 448 N.J. Super. 17, 22-23 (App. Div. 2016)(vacating FRO where the trial judge failed to elicit a factual foundation, failed to find occurrence of domestic violence, and failed to determine that plaintiff required protection resulting from defendant's conduct).

The analysis to be conducted by the family court does not end with a finding of harassment. The family court must then determine whether the plaintiff needs the protection of a restraining order. See Silver v. Silver, 387 N.J. Super. 112, 126 (App. Div. 2006). While the second part of the analysis for entry of a restraining order is "most often perfunctory and self-evident, the guiding standard is whether a restraining order is necessary . . . to protect the victim from an immediate danger or prevent further abuse." Id. at 127. "Merely concluding that plaintiff has described acts that qualify as harassment and omitting this added inquiry opens the door to potential abuse of the important purposes that the Act is designed to serve and threatens to 'trivialize the

plight of true victims,' in the process." J.D., supra, 207 N.J. at 476 (internal citations omitted)(quoting Corrente v. Corrente, 281 N.J. Super. 243, 250 (App. Div. 1995)).

Applying these legal principles, the record does not support a finding of the predicate act of harassment. Nor did the family court judge find the FRO was necessary to protect plaintiff from further abuse.

Plaintiff did not testify that she feared defendant. At best, plaintiff expressed exasperation related to defendant's written communications. The family court's February 11 order expressly permitted defendant to contact plaintiff regarding the dresser and exchange of property.

Based solely on the February 11 e-mail, the family court entered the FRO. However, the family court failed to substantiate an intent to harass on the part of defendant. Nor did the family court articulate which section of the harassment statute defendant was guilty of violating. Even if the family court found the predicate act of harassment had been demonstrated, the FRO must be vacated as there was no evidence that the FRO was necessary to prevent future domestic abuse. The February 11 e-mail contained no coarse language, was not sent at an inconvenient hour and, more importantly, plaintiff responded to defendant's e-mail four days

later despite having obtained a TRO on February 12 alleging defendant's February 11 e-mail constituted harassment.

Plaintiff focuses on the trial court's credibility findings as justification for the entry of the FRO. Credibility findings are immaterial if plaintiff is unable to satisfy the statutory requirements for finding the predicate act of harassment in violation of the PDVA. Here, plaintiff did not satisfy the requirements to establish harassment. Therefore, the family court's finding that defendant lacked candor before the court is irrelevant.

We vacate the FRO entered against defendant and require that defendant's name be removed from the Central Registry.

Reversed.