RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5739-14T4

C.L.,

Plaintiff-Respondent,

v.

R.L.,

Defendant-Appellant.

Argued March 7, 2017 – Decided April 3, 2017

Before Judges Reisner, Koblitz and Sumners.

On appeal from Superior of New Jersey, Chancery Division, Family Part, Morris County, Docket No. FV-14-899-15.

Erik E. Sardiña argued the cause for appellant (Kaufman, Dolowich & Voluck, LLP, attorneys; Bruce D. Greenberg and Cecilia Sardiña Guzman, of counsel; Mr. Sardiña, on the briefs).

Francis W. Donahue argued the cause for respondent (Donahue, Hagan, Klein & Weisberg, LLC, attorneys; Mr. Donahue, of counsel and on the brief; Alex M. Miller, on the brief).

PER CURIAM

Defendant R.L. appeals from a July 8, 2015 final restraining order (FRO), entered after an eight-day trial, as well as an October 6, 2015 order granting $47,972.54 in attorney fees.

The Family Part judge found that defendant harassed plaintiff over a period of three days, during which defendant directed crude language at plaintiff and took plaintiff's phone, leading to a "scuffle." Defendant argues that the court improperly relied on prior incidents of past disputes not pled in the complaint to support the finding of an FRO. He also argues that he had no intention to harass. Giving appropriate deference to the findings of the Family Part judge, we affirm.[1]

The parties were married and have twins, who were born in April 2014. Plaintiff also has a daughter from a previous marriage. On April 21, 2015, plaintiff obtained a temporary restraining order (TRO) against defendant. The TRO, completed by the police officer, describes the current allegations as follows:

> SEVERAL INCIDENTS IN PAST MONTH WITH HUSBAND [R.], SOME REPORTED AND SOME NOT. PHYSICAL THREATS OF VIOLENCE, MOST RECENTLY SUNDAY APRIL 19, 2015 STATED, "I'M GOING TO KILL YOU, YOU CUNT BITCH", WHILE HE WAS UNDER THE INFLUENCE OF ANTI DEPRESSANTS, ALCOHOL AND MARUUANA [SIC], AS WELL AS, FALLING ASLEEP WHILE THE TWINS WERE STRAPPED IN THEIR HI [SIC] CHAIRS WHILE THE STOVE WAS ON AND NO ONE

[1] We remand only for the correction of a mathematical error in the award of lawyer's fees, as conceded by plaintiff's counsel at oral argument.

ELSE WAS HOME. IN ADDITION, [R.'S] BEHAVIOR IS VIOLENT AND UNPREDICTABLE.

Plaintiff alleged defendant had committed the offenses of "Terroristic Threats" and "Harassment." In the section of the form that asked for any prior history of domestic violence, the TRO states "multiple reports of domestic disputes and violence in past, no restraining orders or arrests."

The eight-day trial occurred over June and July 2015. Both parties testified. The parties' nanny, plaintiff's sister's husband, and two of plaintiff's friends testified on her behalf. Defendant's mother and one of his friends testified for defendant.

During the contentious trial, plaintiff described defendant as prone to violent outbursts, often calling her crude names, and with a history of drinking and drug problems.[2] Defendant portrayed plaintiff as abusive, claimed she was suffering from postpartum depression, and maintained that she had a drinking problem.

Plaintiff presented evidence of three prior domestic violence incidents that occurred earlier in 2015: in January at the twins' christening, in March when defendant left the twins in their "bouncy chairs" and in early April during a trip to Florida. They all involved defendant losing his temper.

[2] Defendant admitted to smoking marijuana and conceded that he had been on medication for anxiety during the time of the altercations.

The predicate acts for the issuance of the TRO began on the morning of April 19, 2015, when defendant took plaintiff's cellphone, refusing to return it. A scuffle ensued in the presence of plaintiff's older child, during which both parties ended up on the floor. Defendant is 6'3" while plaintiff is 5'5". When the police came to the scene, the parties gave different versions of the incident, but neither party filed a domestic violence complaint. That night the conflict continued, with defendant cursing at plaintiff and breaking a child safety gate in anger. The following evening defendant again screamed and cursed at plaintiff when she arrived home from work to pick up her older daughter for an appointment.

The next day, April 21, the parties continued to exchange angry text messages. After speaking to her therapist, plaintiff left her work and picked up the twins from the family home. She then told defendant electronically that she had the children and that she would speak with him the next day. Defendant began calling plaintiff's friends, cursing and calling plaintiff crude names. Plaintiff testified that her former husband told her defendant had called, threatening, "to kill" plaintiff. After hearing of these calls, plaintiff filed her domestic violence complaint.

The trial judge began his opinion by noting that "this case does come down to credibility" and that the benefit of the long hearing was that he was able "to observe witnesses not just on the stand, but in other scenarios." The judge found that the allegation of a terroristic threat was not substantiated. The judge did find, however, that defendant committed the predicate act of harassment. The trial judge found defendant guilty of harassment under both prongs (a) and (b) of N.J.S.A. 2C:33-4. He stated:

> And while I indicated I thought some of the reactions of the plaintiff a little bit out of character from what I normally see. Nevertheless, her testimony is clear. Her testimony was in many ways corroborated by all of the witnesses.
>
> . . . .
>
> All corroborated that the defendant uses offensively coarse language; that he engaged in alarming — a course of alarming conduct and repeatedly committed acts with purpose to alarm or seriously annoy such other person.
>
> I listened to the testimony and even the defendant agreed they got into an altercation. He took her phone. There's no doubt. Why else do you take a person's phone if not to annoy them, if not to upset them, not to create an argument.
>
> I don't know who kicked whose feet out, who slipped or who fell, but they both were struggling. It was a confrontation that the defendant caused. I do believe that he called her all of those names. I heard it repeatedly

> throughout this, the F-ing C, the whore, the every other word.
>
> . . . .
>
> [R.L.]'s extremely emotional. He makes outbursts. He gets excited. So much so that listening to his testimony and the testimony of every other witness, I believe that that's what he did. I believe that's what he did in Florida, that he came into the house and he made comments that were totally harassing.
>
> There's no other reason. No other purpose for what you do this for. You call your own wife, you know, an F-ing cunt. Not only to her face, but you do it to her sister, her brother-in-law, to little children? . . . [T]he babysitter, notes you've got a violent temper.
>
> I think it's exacerbated because of alcohol and perhaps marijuana. I don't think you're a bad person, but I think your actions clearly here were harassing. I think the weight of the testimony shows that and your demeanor particularly here in court where on one occasion you failed a drug test while you were here.
>
> I think even your mother indicated while he was on his meds which were off, she said he was acting odd or different. It wasn't him.

The trial judge acknowledged plaintiff's feeling that she was harassed was not enough to satisfy the statute; however, he found that the "days from 19th to the . . . 21st" created a "course of conduct, alarming conduct [using] offensive language." The judge found defendant's purpose in angrily using coarse language and taking plaintiff's phone was harassment.

The judge relied on Silver v. Silver, 387 N.J. Super. 112, 127 (App. Div. 2006), for the guiding standard that "whether a restraining order is necessary" depends on if it is required "to protect the victim from immediate danger or to prevent further abuse." The judge stated that "based on all of the past history[,] defendant's actions at the christening, at his brother-in-law[']s, to the police when they came all suggest that this kind of behavior, harassing behavior is likely to continue and that [an FRO]'s necessary . . . to prevent further abuse."

In domestic violence cases, "review of a trial court's factual findings is limited." J.D. v. M.A.D., 429 N.J. Super. 34, 42 (App. Div. 2012) (citing Cesare v. Cesare, 154 N.J. 394, 411 (1998)). Family Part judges "have been specially trained to detect the difference between domestic violence and more ordinary differences that arise between couples." J.D. v. M.D.F., 207 N.J. 458, 482 (2011). The reviewing court, therefore, "grant[s] substantial deference to the trial court's findings of fact and the legal conclusions based upon those findings." N.T.B. v. D.D.B., 442 N.J. Super. 205, 215 (App. Div. 2015) (quoting D.N. v. K.M., 429 N.J. Super. 592, 596 (App. Div. 2013), certif. denied, 216 N.J. 587 (2014)).

For a court to find that a FRO under the Prevention of Domestic Violence Act (Act) is warranted, it must find that the

plaintiff established by a preponderance of the evidence that the defendant committed one of the crimes enumerated in N.J.S.A. 2C:25-19(a) as an act of domestic violence. Franklin v. Sloskey, 385 N.J. Super. 534, 542 (App. Div. 2006).

Harassment is committed when a person, with purpose to harass:

> a. Makes, or causes to be made, a communication or communications anonymously or at extremely inconvenient hours, or in offensively coarse language, or in 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.]

Defendant argues that the trial court violated his due process rights by relying on testimony about events that were not part of the TRO. See M.D.F., supra, 207 N.J. at 478 (quoting H.E.S. v. J.C.S., 175 N.J. 309, 322 (2003)), (supporting of the conclusion that "due process forbids the trial court 'to convert a hearing on a complaint alleging one act of domestic violence into a hearing on other acts of domestic violence which are not even alleged in the complaint.'"). Defendant asserts that plaintiff listed only two allegations of violence in her complaint - the April 19 predicate act and the March bouncy chair incident. Defendant

argues that he was not properly notified of the contents of his brother in-law's testimony on the first day of trial concerning the April Florida and the January christening anger incidents. He claims the judge improperly relied on these two prior events to make his determination that a predicate act had occurred on April 19 to 21.

Plaintiff responds that defendant was on notice that more than two incidents had occurred, noting that the TRO included references to "[s]everal incidents in the past month with husband . . . some reported some not. . . ." She also argues that the trial judge used her brother-in-law's testimony as evidence of a prior history of domestic violence, which is consistent with the Act and M.D.F., supra, 207 N.J. at 479-80. We agree.

In M.D.F., a pro se defendant was required to respond to incidents of prior acts of domestic violence not indicated on the TRO the day they were raised in court, despite his assertion that he needed time to prepare. Id. at 465-70. The defendant was also denied the chance to cross-examine plaintiff's boyfriend who had testified for plaintiff. Ibid. Our Supreme Court stated, "[a]lthough defendant's assertion that he needed time to prepare was not cloaked in the lawyer-like language of an adjournment request and was made as part of a longer response to a question,

it was sufficient to raise the due process question for the trial court and it should have been granted." Id. at 480.

The Court also stated that "[t]he fact remains, however, that plaintiffs seeking protection under the Act often file complaints that reveal limited information about the prior history between the parties, only to expand upon that history of prior disputes when appearing in open court." Id. at 479. The Court acknowledged that a trial court may "attempt to elicit a fuller picture of the circumstances" under N.J.S.A. 2C:25-29(a)(1), which states that previous history of violence should be considered in the entry of a FRO. Ibid.; see also Cesare, supra, 154 N.J. at 402 (indicating that the Act requires a court to consider the prior history of domestic violence).

The due process concerns in M.D.F. are not present here. Although the TRO complaint did not specifically list the incidents of the Florida trip or the christening as prior acts, defendant was informed on the first day of trial that these incidents would be presented by plaintiff. Unlike in M.D.F., defendant was represented by counsel and had plenty of time to prepare. He did not request an adjournment. The trial began on May 6, 2015 and did not conclude until July 8, 2015.

Although the trial judge mentioned the Florida incident when making credibility determinations, his findings regarding the

predicate act were based on what happened from March 19 to 21, when defendant grabbed plaintiff's cell phone and repeatedly used vulgar and coarse language toward plaintiff.

Defendant claims he did not have the required "purpose to harass" plaintiff. See Silver, supra, 387 N.J. Super. at 124. "A finding of a purpose to harass may be inferred from the evidence presented," and "[c]ommon sense and experience may inform that determination." State v. Hoffman, 149 N.J. 564, 577 (1997) (citations omitted). While using crude language is not itself enough to establish harassment, a showing that anger motivates a verbal attack does not negate the defendant's "intent to harass" pursuant to N.J.S.A. 2C:33-4(a). C.M.F. v. R.G.F., 418 N.J. Super. 396, 404 (App. Div. 2011).

The trial judge made clear in his opinion that defendant's actions did not constitute "ordinary domestic contretemps." Corrente v. Corrente, 281 N.J. Super. 243, 250 (App. Div. 1995). Rather, defendant intended to harass plaintiff and she needed the protection of an FRO. We defer to the judge's findings, which were based on substantial credible evidence.

Under N.J.S.A. 2C:25-29(b)(4), the court may issue an order "requiring the defendant to pay the victim monetary compensation for losses suffered as a direct result of the act of domestic violence . . . includ[ing] but not . . . limited to, . . .

reasonable attorney's fees." Because the Act treats attorney's fees as an element of compensatory damages, the traditional analysis employed in family matter claims is not used. McGowan v. O'Rourke, 391 N.J. Super. 502, 507-08 (App. Div. 2007).

Defendant argues that the judge's improper admission of testimony concerning incidents not stated in the TRO extended the trial to eight days, "thereby forcing the parties to incur unnecessary fees." We reject this reasoning as the judge heard relevant testimony presented by both parties.

Plaintiff concedes that the counsel fee award should be reduced by an additional $2,000 to conform to the judge's determination in his written statement of reasons that defendant should have to pay for only one of plaintiff's lawyers in court. The judge also wrote that the plaintiff's lawyers' time spent on issues of equitable distribution, child support, custody, and parenting time were not "directly related to domestic violence" and thus removed these expenses from the award. The trial judge did not abuse his discretion in awarding counsel fees of $45,972.54, the amount after the consensual adjustment.

Affirmed. We remand only to correct the attorney fee award. We do not retain jurisdiction.