SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1912-16T4

B.K.,

Plaintiff-Respondent,

v.

R.G.,

Defendant-Appellant.

Submitted April 12, 2018 – Decided June 4, 2018

Before Judges Simonelli and Gooden Brown.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Monmouth County, Docket No. FV-13-0532-17.

R.G., appellant pro se (R.G. and Steven Garfinkle, on the brief).

B.K., respondent pro se.

PER CURIAM

Defendant appeals from a December 7, 2016 final restraining order (FRO) entered against him in favor of plaintiff pursuant to the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35. We affirm.

We summarize the relevant facts. The parties were involved in a dating relationship from May 2015 to September 2016. When the parties started dating in May 2015, plaintiff was going through a divorce with her now ex-husband.[1] After three months of dating, disagreements and domestic problems arose, causing the couple to separate for three months. In December 2015, the parties reconciled, and lived together at plaintiff's home in Manalapan, New Jersey, from February until September of 2016, when they separated for the second and final time.

On October 11, 2016, plaintiff filed a complaint against defendant seeking injunctive relief under the PDVA and alleging that defendant had committed acts of domestic violence, specifically harassment, N.J.S.A. 2C:33-4, by verbally harassing her during an October 10, 2016 phone call. Additionally, plaintiff alleged defendant had "continually harassed her on social media," "regularly post[ed] negative things about her," had "threatened to send out inappropriate recordings of them together and post them on [social] media," and "harassed [her] via email." In the complaint, plaintiff reported a prior history of domestic violence, recounting that approximately one year earlier, she and

[1] Plaintiff has a teenage daughter from a prior relationship.

defendant had a verbal altercation during which he "grabbed her arms" and said, "I should jus[t] throw you down the stairs."

On October 24, 2016, plaintiff amended her complaint. First, she clarified that "the officer" inadvertently wrote that the harassing phone call occurred on October 10, 2016, when it actually occurred on September 16, 2016. Next, she explained that on October 10, 2016, defendant harassed her "by sending a text message to [her] friend" stating "I'm just letting you know that I[']m going to Long Island [to] meet my friend Lou[2] and making sure I go straight to his wife after. . . . This piece of shit ruined enough relationships. . . . Make sure you tell pretty girl."

According to plaintiff, on the same date, defendant threatened to create "a fake profile of [plaintiff] on a dating website." The following day, he carried out his threat by creating multiple fake accounts on Plenty of Fish[3] (POF) that were "sexual and malicious in nature." In an October 11, 2016 email, defendant allegedly told plaintiff to "enjoy [her] stay on POF" because he had "a few female friends putting up [her] photo on [their] page with plenty of info." Plaintiff alleged that two POF employees

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[2] Lou or the Long Island married male defendant referenced was apparently plaintiff's ex-boyfriend, with whom she kept in contact, despite the fact that it infuriated defendant.

[3] Plenty of Fish is a dating website where users create a profile to meet people for the purpose of dating.

confirmed the existence of two POF accounts that were impersonating her.

In her amended complaint, plaintiff also alleged that defendant sent text messages, emails, and correspondence to her friends and family members "to ruin [her] reputation." Specifically, on October 7, 2016, defendant allegedly "sent text messages to [plaintiff's] friend's husband" and "copied and pasted conversation/arguments/fights between both parties." Defendant also allegedly sent her a threatening email that said, "I want you to think about this all night . . . letters in the mail with flash [drives]." Further, plaintiff alleged that defendant "had been recording intimate conversations [between them] without [her] consent." She claimed he had warned her in another email that he was "sending a copy [of an audio recording] to that [douchebag's] wife in Long [Island,] . . . to [plaintiff's] ex[-]husband and online."

Additionally, plaintiff amended the prior history of domestic violence to add that in 2015, defendant had grabbed her by the arms and pushed her towards a door while calling her a "cunt," put a tracking device on her car, and recorded her conversations about her sexual history. Then, in 2016, defendant allegedly "verbally harassed" her on her work phone, posted "very damaging information" about her sexual history on Facebook, called her derogatory names

such as "[douchebag], piece of shit and bipolar," and tried to access confidential records using plaintiff's name. Plaintiff also added that, in the summer of 2016, she saw defendant place a gun, which she claimed belonged to him, "in a sock."

The Family Part judge conducted a final hearing on December 7, 2016, during which defendant was represented by counsel and plaintiff was self-represented. During the hearing, plaintiff testified about the parties' tumultuous dating relationship. She testified that they initially broke up after three months of dating because "there was a lot of control and emotional abuse" and because he "put a tracking device in [her] car" and "monitored [her] for a week" before he "confessed to it and took it out." During their "first big fight" over her telephone, defendant "grabbed [her] arms" and tried "to throw [her] out of his home" in New York. While they were at the top of the staircase, defendant called her a "cunt" and said "he should just kick [her] down the stairs." This altercation led to the couple separating for three months, during which plaintiff underwent counseling.

According to plaintiff, they reconciled in December 2015, after defendant "swore up and down that all the things that he demonstrated, the behaviors and the insecurities and the control and the anger . . . would not happen" again. However, when they broke up for the second time in September 2016, defendant "became

a complete monster." The verbal altercation that precipitated the second break up stemmed from plaintiff maintaining contact with an old boyfriend. After the fight, while he removed his belongings, including their "joint dog," from plaintiff's house, defendant shouted that she "should increase [her] . . . medication," and called her a "cunt" and a "filthy pig." Three days later, defendant discovered that plaintiff had a POF account. Although plaintiff testified that the account had been dormant, defendant apparently believed it was active. As a result, defendant called her at work to continue his verbal onslaught and name-calling.

Later that day, defendant posted pictures of plaintiff on Facebook along with her phone number, so others could "just call her direct[ly]." In the post, defendant ranted that he and plaintiff had argued two days earlier over plaintiff "keeping in contact" with an ex-boyfriend from ten years prior and that he had "put [his] foot down over it." Defendant called plaintiff "a douche bag," "a piece of shit," and "a waste of [his] time." He also listed the names of people he claimed plaintiff had "slept with" in the past. Plaintiff testified that because he had "tagged" her in the post, everyone on her Facebook page, including her sixteen-year-old daughter, could see "these vicious things . . . that [were] untrue."

Plaintiff further testified that over the next couple of weeks, defendant "started showing up in places where [she] was" and began "to contact [her] friends' husbands and various people" with whom she associated. Then, at 1:30 a.m. on October 11, 2016, she received the following text message from defendant:

> Just so you know, I'm going to fuck you where you breathe. Remember that audio, I'm sending a copy to that douche bag's wife in Long Island, to your ex[-]husband, and [o]nline. You want to play this sex game with me, now you're really fucked. Goodnight and I hope you choke on that because it's already a done deal. Going on a dating site one day after we argue over that scumbag, after I see him, his wife will hear your confession. Make sure you call him and warn him about the storm that's on its way, you filthy pig.

According to plaintiff, she pleaded with defendant to leave her alone, but he responded that she was "going to see the horns come out." He warned that there were "letters in the mail with flash drives" and told her to "[e]njoy [her] stay on POF" because he had "a few friends putting up [her] photo on their page with plenty of information." The following morning, "several different men" contacted plaintiff "basically soliciting [her] for sex." The men sent her "screenshots of the [POF] website that [defendant] created with [her] pictures." Defendant had labeled her profile "Sex in New Jersey, BJ69." Plaintiff immediately contacted POF

representatives, and they removed the fake profiles from the dating website.

During cross-examination, plaintiff admitted that, with defendant residing in New York, the parties no longer shared a residence or intertwined finances, and they did not have a child in common. However, plaintiff testified that she needed a restraining order against defendant because he was "a very dangerous person." According to plaintiff, defendant "had a gun," which she had seen "in a sock in [her] bedroom." Plaintiff also testified that she could not tolerate men "soliciting [her] for sex" because it was "putting [her] in harm[']s way and danger."

In an oral opinion rendered immediately after the hearing, the judge found that the entry of an FRO was justified. The judge determined that the parties were subject to the jurisdiction of the PDVA by virtue of their dating relationship. Applying the two-prong Silver[4] analysis, the judge found, by a preponderance of the evidence, that defendant committed the predicate act of harassment, pursuant to N.J.S.A. 2C:33-4, based on the "communications that defendant put out there on the Internet" and on POF.

[4] Silver v. Silver, 387 N.J. Super. 112 (App. Div. 2006).

Finding plaintiff's testimony "very credible" and "sincere" and "[h]er demeanor . . . appropriate for someone who [had] been embarrassed and humiliated," the judge made factual findings consistent with plaintiff's testimony. The judge took note of plaintiff's uncontroverted testimony that "[s]he had that POF website profile before the parties got together." However, it "was dormant on her phone" and, after defendant moved out, "she did not immediately . . . go right to [POF] to look for new . . . sources of love or affection." Nonetheless,

> immediately after all of this, there's . . . profiles on POF and [she was] being contacted and the contacts, without getting into what they are, alarm[ed] [her]. And the [c]ourt has to decide, well, who . . . did that? . . . Plaintiff [said] . . . there [were] profiles about [her] popping up on the Internet soliciting [her] for all kinds of sex and [she] didn't do it. So someone had to[.]

The judge found "by a preponderance of credible evidence [that] it was . . . defendant[.]" Based on "plaintiff's testimony about . . . defendant's behavior from the moment he walked out the door in September [2016] from the home that they shared, and even prior to that[,]" the judge determined that defendant's purpose was "to cause [plaintiff] alarm and annoyance[.]"

Turning to the second Silver prong, the judge found that a FRO was necessary to protect plaintiff and prevent further abuse.

The judge posited whether, "in light of the prior history," there was enough evidence to justify an FRO, "even though there's never been any physical violence documented and there [was] probably not a lot of potential for the parties to see one another in person in the future." After distinguishing A.M.C. v. P.B., 447 N.J. Super. 402 (App. Div. 2016), the judge concluded that a final restraining order was in fact necessary based on the "significant prior history" and the "content" of the messages. The judge explained:

> [H]ere there [was] no lack of evidence demonstrating a history of domestic violence or abuse. This [was] a bad break up, but [it was] . . . much worse than a bad break up. . . .
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> . . . .
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> Even though the prong two analysis would require [the court] to consider the existence of . . . a gun[,] . . . this [was] about whether or not without [an FRO,] [defendant] would continue to find ways on the Internet to demean and control and insult . . . plaintiff again. . . .
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> . . . .
>
> . . . [P]laintiff [was] sincere. She [was] fearful. She [was] frightened . . . .
>
> Sometimes things are sufficiently egregious in and of themselves to warrant a restraining order and this [was] one of those cases.

This appeal followed.

On appeal, defendant raises the following contentions for our consideration:

> [I.] THE LOWER COURT ERRED BY HOLDING THE ALLEGED OFFENSE OF HARASSMENT OCCURRED WITHOUT A SUFFICIENT EVIDENTIARY BASIS, AND SOLELY ON HEARSAY TESTIMONY.
>
> [II.] THE LOWER COURT FAILED TO PROPERLY VOIR DIRE [DEFENDANT] PRIOR TO HIS STIPULATING TO COMMITTING AN ACT OF HARASSMENT, AND THE LOWER COURT FURTHER FAILED TO VOIR DIRE [DEFENDANT] ABOUT WHICH SPECIFIC ALLEGED ACTS OF HARASSMENT HE WAS STIPULATING TO.
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> [III.] THE LOWER COURT ERRED BY FINDING THAT THE PREDICATE ACT OF HARASSMENT (CREATING TWO FAKE DATING SITE PROFILES), TO BE SUFFICIENTLY EGREGIOUS TO WARRANT A PERMANENT ORDER OF PROTECTION.
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> [IV.] THE LOWER COURT ERRED BY DECLARING THE NEED FOR AN FRO "SELF-EVIDENT" BY MISAPPLICATION OF [A.M.C. V. P.B.] TO THE SITUATION AT HAND.

We will not disturb the factual findings of the trial court unless they "are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Cesare v. Cesare, 154 N.J. 394, 412 (1998) (quoting Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974)). Deference to the trial court's factual findings "is especially appropriate 'when the evidence is largely testimonial and involves questions of credibility,'" and "[b]ecause of the family courts' special jurisdiction and

expertise in family matters." Id. at 412-13 (quoting In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997)). Reversal is warranted only "if the court ignores applicable standards." Gotlib v. Gotlib, 399 N.J. Super. 295, 309 (App. Div. 2008).

The PDVA provides that an FRO may be issued if the court determines "by a preponderance of the evidence," N.J.S.A. 2C:25-29(a), that the defendant has committed an act of domestic violence "upon a person protected under" the Act, N.J.S.A. 2C:25-19(a). A person protected under the PDVA includes "any person who has been subjected to domestic violence by a person with whom the victim has had a dating relationship." N.J.S.A. 2C:25-19(d). The PDVA defines "domestic violence" as "the occurrence of one or more" predicate acts, including harassment. N.J.S.A. 2C:25-19(a)(13).

Pursuant to Silver, 387 N.J. Super. at 125-26, when determining whether to grant an FRO under the PDVA, the judge must make two determinations. Under the first Silver prong, the judge "must determine whether the plaintiff has proven, by a preponderance of the credible evidence, that one or more of the predicate acts set forth in [N.J.S.A. 2C:25-19(a)] has occurred." Id. at 125.

> Although a court is not obligated to find a past history of abuse before determining that an act of domestic violence has been committed in a particular situation, a court must at least consider that factor in the course of

> its analysis. Therefore, not only may one sufficiently egregious action constitute domestic violence under the Act, even with no history of abuse between the parties, but a court may also determine that an ambiguous incident qualifies as prohibited conduct, based on a finding of [abuse] in the parties' past.
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> [Cesare, 154 N.J. at 402.]

Under the second Silver prong, a judge must also determine whether a restraining order is required to protect the plaintiff from future acts or threats of violence. Silver, 387 N.J. Super. at 126-27. Although the latter determination "is most often perfunctory and self-evident, the guiding standard is whether a restraining order is necessary, upon an evaluation of the factors set forth in [N.J.S.A.] 2C:25-29(a)(1) to -29(a)(6), to protect the victim from an immediate danger or to prevent further abuse." A.M.C., 447 N.J. Super. at 414 (quoting Silver, 387 N.J. Super. at 127).

Here, we are satisfied there is sufficient credible evidence in the record to support the judge's finding that defendant committed acts of harassment under N.J.S.A. 2C:33-4(a) and (c). A person commits the offense of harassment if, "with purpose to harass another," he or she

> 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; [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(a), (c).]

Harassment requires that the defendant act with the purpose of harassing the victim, and judges must be mindful that "a party may mask an intent to harass with what could otherwise be an innocent act." J.D. v. M.D.F., 207 N.J. 458, 488 (2011). "A finding of a purpose to harass may be inferred from the evidence presented," and a judge may use "[c]ommon sense and experience" to determine a defendant's intent. State v. Hoffman, 149 N.J. 564, 577 (1997). To that end, judges should consider the totality of the circumstances to determine whether an underlying act of harassment in the context of domestic violence has occurred. Id. at 584-85.

Here, the record clearly supports the judge's determination that defendant's vile communications on the internet and creation of the fake POF profiles, which resulted in men soliciting plaintiff for sex, constituted harassment. We are also convinced that the record amply supports the judge's determination that an FRO was necessary to protect plaintiff and prevent further acts

of domestic violence. Defendant's argument that the evidence was insufficient to sustain a finding of a violation of the PDVA under Silver is belied by the record. Equally unavailing is defendant's contention that it was error for the judge to rely on his stipulation to the predicate acts without confirming that defendant understood the consequences of his stipulation and without eliciting a factual basis directly from defendant, rather than through his attorney, to ascertain the specific acts encompassed in defendant's stipulation.

At the beginning of the hearing, defendant, through his attorney, agreed, "[W]e are not going to contest the first prong of Silver. Our issue is the second prong of Silver. So I don't believe that any of this evidence is going to be necessary from [plaintiff]." After confirming that defendant was "going to stipulate to acts of harassment," the judge then inquired whether defense counsel fully explained "the consequences of a final restraining order" in the following colloquy:

> THE COURT: But [defendant] knows what the consequences are[?]
>
> [DEFENSE COUNSEL]: Yes, he does.
>
> THE COURT: If a final restraining order is entered, he will be fingerprinted, he will be photographed, his name will be placed on a national registry of domestic violence violators. He may or may not have

difficulties in obtaining or maintaining particular types of employment.

[DEFENSE COUNSEL]: Yes, . . . he is aware.

THE COURT: He understands all of that[?]

[DEFENSE COUNSEL]: Yes.

THE COURT: It's very important. Because yesterday the Appellate Division, if we didn't already know it was important, made it abundantly clear that it's important that I make sure he knows that.

[DEFENSE COUNSEL]: Understood, Your Honor.

THE COURT: He's willing to acknowledge and stipulate that on October 10th, 11th, and 7th he harassed [plaintiff], in accordance with the legal definition of harassment.

Correct?

[DEFENSE COUNSEL]: Correct.

Following this exchange, the judge read the predicate acts contained in the amended complaint into the record, after which defense counsel agreed that defendant committed the predicate act of harassment because the communications were intended to "annoy and harass" plaintiff. In addition to the stipulation, the judge elicited detailed testimony from plaintiff, which testimony formed the basis for the judge's finding that defendant had committed an act of domestic violence.

Defendant relies on Franklin v. Sloskey, 385 N.J. Super. 534 (App. Div. 2006), to support his argument that the procedural infirmities in this case deprived him of due process. However, his reliance is misplaced because this case has none of the due process or other procedural infirmities that prompted our reversal in Franklin. In Franklin, the plaintiff appeared without counsel at a final hearing as the putative victim, intending to proceed on his complaint for an FRO against his former girlfriend. Id. at 540. However, he left the hearing having consented to the entry of an FRO against himself without a domestic violence complaint ever having been filed against him, without admitting any act of domestic violence had occurred, without the court making a factual finding that an act of domestic violence occurred, and without being advised by the court of the serious consequences associated with the entry of an FRO. Id. at 542-44.

Here, defendant was aware, from the temporary restraining order the court entered against him over a month before the hearing, that he faced adverse consequences as a defendant in a domestic violence proceeding. He appeared with counsel, who advised him of the nature and consequences of the proceeding, and, when he indicated his intention to stipulate to the predicate acts, the court also advised him of the consequences associated with the entry of an FRO. Most critically, defendant made no

statements to the court to indicate that he disagreed with his attorney's representations or that he was confused by the process. The court's only omission, which we perceive to be harmless error under the circumstances of this case, was in not eliciting a factual basis from defendant to support his admission that an act of domestic violence had occurred. See N.J.S.A. 2C:25-29(a) (providing that a domestic violence restraining order may be issued against an individual "only after a finding or an admission is made that an act of domestic violence was committed by that person."); R. 5:7A; Domestic Violence Procedures Manual-Revised Edition, § 4.13.2 (2008) ("The court only has jurisdiction to enter restraints against a defendant after a finding by the court or an admission by the defendant that the defendant has committed an act(s) of domestic violence. . . . The defendant must provide a factual basis for the admission that an act of domestic violence has occurred.").

However, because plaintiff's testimony, rather than defendant's stipulation, formed the basis for the judge's finding that defendant committed acts of domestic violence, the judge's omission was of no moment. In fact, at the end of the hearing, the judge told defendant, "I appreciate your willingness to stipulate to . . . the predicate act, but . . . in all candor, even if you didn't stipulate and it came in through testimony, the

result would be the same." Although the conduct of the proceedings did not exquisitely track the contours of a perfect trial, unlike Franklin, defendant received a robust process that fell squarely within the mainstream of fair adjudication.

Affirmed.