

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-2971-22

S.H.,¹

Plaintiff-Appellant,

v.

E.H.,

Defendant-Respondent.

Submitted May 21, 2024 – Decided June 27, 2024

Before Judges Natali and Haas.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Somerset County,
Docket No. FV-18-0506-23.

Berse Law, LLC, attorneys for appellant (Samuel J.
Berse, on the briefs).

Ulrichsen Rosen & Freed LLC, attorneys for
respondent (Derek M. Freed, of counsel and on the
brief).

PER CURIAM

¹ We use initials to protect the privacy of the parties. R. 1:38-3(d)(10).

Plaintiff commenced this action pursuant to the Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17 to -35 (PDVA), based on allegations that defendant, her estranged husband, committed the predicate acts of burglary, harassment, stalking, and trespass. Her recent complaint followed two earlier actions wherein the court granted her temporary restraining orders (TROs), which she ultimately dismissed in lieu of two orders granting the parties' civil restraints. As relevant here, one of those orders granted defendant "sole and exclusive use and possession" of the parties' beach house in Seaside Heights and plaintiff "sole and exclusive use and possession" of the parties' former marital residence in Somerset. Each party was prohibited from returning to the property awarded the other absent written consent.

Plaintiff alleged on November 25, 2022, while she was out of state visiting her family, defendant entered the Somerset property in violation of the civil restraint order and removed personal property, including documents pertaining to the home, an asset at issue in the parties' contentious divorce, and jewelry provided to plaintiff by defendant during the course of the marriage. Plaintiff witnessed defendant's entering her home from a home security video which she was able to remotely access while out of state the following morning. She testified when she saw the video of defendant entering her home, she was

"shocked," her "knees buckled" and she "had to sit down." Alarmed by defendant's behavior, she returned home immediately and contacted her attorney and the police.

Plaintiff asserted defendant's actions in entering her home and removing her personal items, particularly in light of the parties' history and the civil restraint orders, warranted the entry of a final restraining order (FRO). She maintained she was "terrified" of defendant and feared for her safety particularly because defendant had physically assaulted, threatened, and made offensive online posts about her in the past. In support, plaintiff submitted photos depicting bruises on her arms, which she contended were caused by defendant.

On cross-examination, defendant's counsel sought to undermine plaintiff's credibility. Plaintiff admitted she mistakenly listed the time of the events on November 25, 2022 as 5:50 a.m. rather than p.m., which she did not correct until after the first day of her testimony despite filing two amendments. She also conceded "at no point on any of the three TROs [the original complaint or subsequent amendments] did [she] tell the court that there was a pending divorce," stating she "didn't knowingly lie" and believed she only had to disclose

pending criminal proceedings.² Finally, plaintiff admitted she had not alleged any jewelry was stolen in her original TRO complaint or subsequent amendments.

At the conclusion of plaintiff's proofs at the final hearing in which she and a representative of Verizon testified,³ the court granted defendant's application under Rule 4:37-2(b) for a directed verdict with respect to the predicate acts of stalking, harassment, and burglary, but denied his request with respect to the trespass claim. As the court explained, even accepting plaintiff's testimony as true as required at that stage, it could not find she had met her burden to prove defendant committed the predicate acts of stalking, harassment, or burglary.⁴

² Although the second and third amendments mentioned "[defendant] sent multiple texts to [plaintiff] telling her to contact anyone she told about the divorce," in response to the question "[a]ny prior or pending court proceedings involving parties?" plaintiff checked the box for "[n]o" on all three TROs.

³ The Verizon representative testified with respect to cell phone location data. The court found the testimony of the parties "essentially alleviated or negated any testimony [of the representative], because . . . defendant . . . admitted he was at the [home]."

⁴ Plaintiff does not specifically challenge the court's order with respect to the dismissal of the stalking or burglary predicate acts, and accordingly, we do not address either. See Green Knight Capital, LLC v. Calderon, 469 N.J. Super. 390, 396 (App. Div. 2021) (holding "[a]n issue not briefed on appeal is deemed waived" (quoting Woodlands Cmty. Ass'n v. Mitchell, 450 N.J. Super. 310, 319 (App. Div. 2017))). Nevertheless, even assuming the court erred in finding

As to harassment, the court found "no proof that the defendant intended to harass." It explained there was "no physical danger" nor "physical alarm," and defendant "allegedly took his own property and . . . the jewelry, but out of his real property." Although recognizing that "plaintiff thinks that the defendant had some type of purpose," the court concluded plaintiff had not shown defendant acted with a purpose to harass.

The matter then proceeded where defendant testified in response to the sole remaining predicate act of trespass. In sum, he contended he entered the Somerset home solely to obtain his personal documents necessary to establish certain assets, including the Somerset property, were premarital. Defendant testified he could not obtain the documents elsewhere, noting many of them were so old as to no longer be kept by third parties, or one of a kind. He denied taking any of plaintiff's jewelry.

Defendant also characterized all of plaintiff's allegations of a history of domestic violence as "fairy tales." He admitted having verbal arguments including name-calling with plaintiff, but denied having a "physical altercation . . . strik[ing] her . . . threaten[ing] her . . . [or making] [a]ny threats of physical

plaintiff failed to prove these predicate acts, we are satisfied such error had no effect on the outcome of the proceedings, for the reasons detailed infra.

violence." He also explained he posted "a personal blog . . . on the internet telling [his] side of the story" in response to plaintiff's "going out and disparaging [his] character" to defendant's friends. Plaintiff testified in rebuttal defendant "never" asked her for any specific documents, but she would have—and had in the past—given him any items he requested from the home.

At the conclusion of the hearing the trial judge rendered findings of fact and conclusions of law and denied plaintiff's request for an FRO. The court found plaintiff's testimony on direct examination "came across" as credible and she appeared "emotional" and "willing to answer." On cross-examination, however, it found she "wavered . . . [and] fell apart actually at times." It noted "when asked when she was telling the truth, she did hesitate." While plaintiff "said she did not intentionally lie," the court inferred "she inadvertently lied." The court found plaintiff's "admit[ting] she was untruthful in the certification she made on the complaint . . . troubling." It also highlighted plaintiff's two amendments, each of which "seemed to heap or pile on more," while neglecting to correct errors in the time of the events, to disclose the pending divorce, or to include the missing jewelry, which it found "troublesome."

Therefore, the court concluded it did not "find the plaintiff's testimony to be credible." The court also found "troubling" plaintiff's testimony that "there

are millions of dollars at stake in the divorce proceeding," demonstrating, in the court's view, "she in fact did have a motive" to use the FRO to "gain leverage in the [divorce] matter."

Contrariwise, the court concluded defendant "testified with credibility" and was "believable." It reasoned he "addressed each question . . . gave prompt answers . . . did not have to sit there and think about things . . . provided good explanations . . . [and did not] contradict[] himself." It did not find "many, if any contradictions in his testimony." The court found defendant "testified forthrightly that he went to the property . . . with one intent . . . to get documents" and not "to harass anybody."

With respect to plaintiff's jewelry, the court found "really no proof" that defendant had taken it. It noted defendant testified "he did not in fact take the jewelry," plaintiff had not made an insurance claim,⁵ and the jewelry was not mentioned in plaintiff's initial restraining order application nor amendments.

As to whether defendant committed the predicate act of trespass, the court found it "uncontroverted that the defendant did in fact appear at the property" and the civil restraints "depict[ed] that in fact the defendant should not have

⁵ Plaintiff testified she did file a "criminal report" regarding the jewelry, which does not appear in the record before us.

been there." What was "questionable," the court noted, was "the fact that he is the owner of the property," as "both parties admitted he's the only one on the deed." Still, it reasoned, the civil restraints represented an agreement and defendant "knew not to be there." Therefore, the court found defendant had trespassed.

Relying upon Kamen v. Egan, 322 N.J. Super. 222, 228-29 (App. Div. 1999), however, the court found the trespass, unaccompanied by any threats of violence or communication between the parties at all, "d[id] not rise to the level of domestic violence." Based on its credibility findings, the court stated it would not "consider the prior history [testified to by plaintiff] because before the court, there's testimony from the defendant," which it credited, "whereby he in fact testified that none of that occurred."

The court also found plaintiff failed to meet her burden as to the second Silver⁶ prong, explaining "based upon the evidence provided to it and the credibility or lack of credibility of the witnesses, . . . prong two has not been met." Specifically, it reiterated it was unable to find a previous history of domestic violence because it expressly did not find plaintiff credible.

⁶ Silver v. Silver, 387 N.J. Super. 112 (App. Div. 2006).

Additionally, the court did not "believe there's any, any immediate danger" to plaintiff because there was "no proof provided to [it], via testimony or documentation that there's an immediate danger and that she should fear for her safety or well-being . . . except that the defendant had guns at some time, which was on the record, [but] he was never asked about it." It found defendant "didn't appear to be a violent person on the stand" but rather "appeared to be frankly a person of even keel, good temperament." The court concluded "as a matter of fact . . . plaintiff indicated that she was not truthful and for those reasons [it] can't find that the prior history that she testified to has any bearing on this case," particularly where "defendant testified credibly that he did not commit any acts of domestic violence."

The court noted plaintiff could seek redress for any violation of the civil restraints through the divorce proceeding, and "a violation of that agreement or order does not rise to an automatic granting of a final restraining order." In sum, the court concluded it could not find "any threat to the plaintiff, clearly nothing immediate" nor that "the entry of an FRO would be needed to prevent any other acts." Instead, it found "the only motive in this matter was that of the plaintiff to gain an advantage."

On appeal, plaintiff argues that the judge erred in dismissing the predicate act of harassment pursuant to Rule 4:37-2(b), improperly discrediting her testimony, and finding insufficient evidence to support her need for an FRO. We affirm and add the following brief comments.

Ordinarily our review of a trial judge's fact-finding function is limited. Cesare v. Cesare, 154 N.J. 394, 411 (1998). A judge's findings of fact are "binding on appeal when supported by adequate, substantial, credible evidence." Id. at 411-12. Deference is particularly warranted where, as here, "the evidence is largely testimonial and involves questions of credibility." Ibid. (quoting In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997)). This is because "the trial judge 'hears the case, sees and observes the witnesses, and hears them testify,' affording it 'a better perspective than a reviewing court in evaluating the veracity of a witness.'" Gnall v. Gnall, 222 N.J. 414, 428 (2015) (quoting Cesare, 154 N.J. at 412). Further, we accord particular deference to family court fact-finding "[b]ecause of the family courts' special jurisdiction and expertise in family matters." Cesare, 154 N.J. at 413.

Therefore, we will not disturb the court's factual findings unless convinced they are "so manifestly unsupported by or inconsistent with the competent, relevant[,] and reasonably credible evidence as to offend the

interests of justice." Allstate Ins. Co. v. Northfield Med. Ctr., P.C., 228 N.J. 596, 619 (2017) (quoting Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 484 (1974)). This is true even if we "might have reached a different conclusion were [we] the trial tribunal." Llewelyn v. Shewchuk, 440 N.J. Super. 207, 213-14 (App. Div. 2015) (quoting Beck v. Beck, 86 N.J. 480, 496 (1981)).

"It is well settled that to obtain an FRO under the [PDVA], a plaintiff must not only demonstrate defendant has committed a predicate act of domestic violence as defined in N.J.S.A. 2C:25-19(a)(1) to (19), but also that a restraining order is necessary for his or her protection." C.C. v. J.A.H., 463 N.J. Super. 419, 429 (App. Div. 2020). N.J.S.A. 2C:25-19 defines domestic violence under the PDVA as the infliction of one or more of the enumerated predicate acts upon a protected person, and harassment, N.J.S.A. 2C:33-4, and trespass, N.J.S.A. 2C:18-3, are among the predicate acts listed.

As relevant here, a person commits harassment "if, with purpose to harass another," he or she "[e]ngages 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(c). A person commits trespass "if, knowing that he [or she] is not licensed or privileged to do so, he [or she] enters . . . any . . . structure," but the statute provides an affirmative defense where the person

"reasonably believed that the owner of the structure, or other person empowered to license access thereto, would have licensed him [or her] to enter." N.J.S.A. 2C:18-3(a), (d)(3).

The plaintiff must prove defendant committed a predicate act by a preponderance of the evidence. N.J.S.A. 2C:25-29(a); Cesare, 154 N.J. at 401. Although violations of civil restraints are not "per se 'acts of domestic violence,'" they may inform the defendant's intention or the plaintiff's need for an FRO. N.B. v. S.K., 435 N.J. Super. 298, 307-08 (App. Div. 2014) (finding defendant's past violations of matrimonial restraints barring contact with plaintiff supported claim that defendant engaged in harassment by continuing to call her). Additionally, while a single action may constitute domestic violence even without a history of abuse, that action must be "sufficiently egregious." Cesare, 154 N.J. at 402; see, e.g., Silver v. Silver, 387 N.J. Super. 112, 128 (App. Div. 2006) (holding trial court erred in denying FRO for lack of "pattern of abuse" where defendant refused to exit plaintiff's car and parties engaged in a physical altercation involving scratching, biting, and punching); C.C., 463 N.J. Super. at 426, 434-35 (rejecting defendant's argument that FRO was not necessary to protect plaintiff because there was no history of domestic violence where defendant sent "a barrage" of "vulgar, insulting, and threatening" text messages

over approximately twelve hours and was previously convicted of harassment and stalking); McGowan v. O'Rourke, 391 N.J. Super. 502, 506 (App. Div. 2007) (affirming FRO where defendant mailed graphic sexual photos of plaintiff to plaintiff's sister and implied he would send the photos to plaintiff's workplace and child, even without history of domestic violence).

Upon finding a predicate act of domestic violence occurred, the court next considers if "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." J.D. v M.D.F., 207 N.J. 458, 475-76 (2011) (quoting Silver, 387 N.J. Super. at 126-27). Specifically, factors the court should consider include, but are not limited to:

- (1) The previous history of domestic violence between the plaintiff and defendant, including threats, harassment and physical abuse;
- (2) The existence of immediate danger to person or property;
- (3) The financial circumstances of the plaintiff and defendant;
- (4) The best interests of the victim and any child;
- (5) In determining custody and parenting time the protection of the victim's safety; and

(6) The existence of a verifiable order of protection from another jurisdiction.

[N.J.S.A. 2C:25-29(a).]

Applying these principles under our deferential standard of review, we are satisfied the court's findings were "supported by adequate, substantial, credible evidence." Gnall, 222 N.J. at 428. After considering the parties' testimony and the evidence presented, the court found plaintiff was not credible because she "wavered" and "hesitated," admitted to being untruthful, even inadvertently, and the court believed she had an ulterior motive to seek an advantage in the divorce. It noted plaintiff filed two amendments, each of which "seemed to heap or pile on more," while neglecting to correct errors in the time of the events, to disclose the pending divorce, or to mention the missing jewelry.

On the other hand, the court determined defendant testified credibly because his answers were prompt and "provided good explanations," and he did not contradict himself. It pointed out defendant admitted to "post[ing] things on a blog" about plaintiff, but explained "it was in response to her having gone to his friends and told them things that were untrue." The court made detailed credibility findings based on its perception of the parties' testimony and the evidence submitted, which we discern no reason to disturb.

As noted, we defer to these credibility determinations supporting the court's conclusion that a restraining order was not necessary to protect plaintiff from further acts of domestic violence, even if we "might have reached a different conclusion were [we] the trial tribunal." Llewelyn, 440 N.J. Super. at 213-14 (quoting Beck, 86 N.J. at 496). We will not substitute our view of the evidence for the trial judge's because we conclude that the court adequately considered the evidence before it in light of the statutory factors set forth in N.J.S.A. 2C:25-29(a). Specifically, the court expressly considered and rejected plaintiff's testimony regarding the parties' history and whether plaintiff faced immediate danger. The court also considered the parties' financial circumstances and the ongoing divorce proceedings. Additionally, contrary to plaintiff's contention, we cannot reach the conclusion that the trespass warranted an FRO under Cesare, because of the court's specific factual findings regarding the parties' prior history and its general and specific adverse credibility findings as to plaintiff's testimony.


Even if we were to agree with plaintiff the court erred in dismissing the predicate act of harassment under Rule 4:37-2(b), we are convinced any such error had no effect upon the ultimate outcome. Specifically, as noted, the court concluded defendant had committed the predicate act of trespass, the basis of

which was the same underlying facts as those supporting the predicate act of harassment, but found plaintiff failed to meet the second Silver prong based primarily on its finding her testimony was not credible. Stated differently, the court's decision to deny plaintiff an FRO was rooted in the second Silver prong and her failure to demonstrate to the court an FRO was necessary to protect her. Plaintiff proffers no evidence she would have presented if her harassment claim had proceeded that would have led to a different outcome on those grounds.

In the end, this case, like most FRO proceedings pursuant to the PDVA, rested upon the court's assessment of the witnesses' credibility. Here, the court made specific and supported findings in which it determined defendant was more credible than plaintiff on critical issues, most notably the facts underlying the second Silver prong. Those findings are entitled to our deference.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION