

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3670-10T1

C.C.,

Plaintiff-Respondent,

v.

T.R.,

Defendant-Appellant.

Submitted January 18, 2012 - Decided February 3, 2012

Before Judges Carchman, Baxter and Nugent.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Ocean County, Docket No. FV-15-1618-11.

Jef Henninger, attorney for appellant.

Perrotta, Fraser & Forrester, L.L.C.,
attorneys for respondent (Donald B. Fraser,
Jr., of counsel and on the brief).

PER CURIAM

Defendant T.R. appeals from the final restraining order (FRO) entered against him on February 24, 2011, pursuant to the Prevention of Domestic Violence Act (Act), N.J.S.A. 2C:25-17 to -35. The order barred him from having any contact with his estranged wife, plaintiff C.C., and directed him to stay away

from her home and her place of employment. We reject defendant's contentions that: 1) the issuance of the FRO was error, as the conduct in question constituted merely "domestic contretemps" within the meaning of Corrente v. Corrente, 281 N.J. Super. 243 (App. Div. 1995), and Peranio v. Peranio, 280 N.J. Super. 47 (App. Div. 1995); 2) he was denied due process because the hearing on the FRO took place only two days after he was served with a temporary restraining order (TRO); and 3) the judge erred by failing to advise him of his right to counsel. We affirm.

I.

After twenty-two years of marriage, the parties separated in August 2010. Plaintiff remained in the former marital home, and defendant moved to Pennsylvania. In the middle of November 2010, plaintiff changed the locks. To the best of her knowledge at that time, defendant had not entered the home in her absence, and had certainly not entered the home while she was present. After the parties separated, or slightly before, plaintiff established a relationship with another man.¹ On February 6, 2011, defendant sent plaintiff a text message that led her to

¹ The record is not clear on when this occurred, but the timing of that relationship is not germane to the issues on appeal.

conclude defendant had been "spying on [her]." The text message said:

I guess you were with him before you made me leave and you put blame on me. You know what, I'm coming home to my kids and home today to stay.

Plaintiff believed that defendant's reference to her boyfriend was the result of defendant following her or observing her surreptitiously.

On Friday, February 18, 2011, plaintiff received the first of approximately thirty text messages sent by defendant over the course of that weekend. The first message referred to defendant having entered the former marital home, without plaintiff's knowledge or permission, and having found roses in the house plaintiff's boyfriend had sent her. Plaintiff emphasized that she had not given defendant permission to enter the house, and she had no idea how he would have been able to do so. Defendant's text message stated:

I don't want to fight. I threw roses out, house cleaned, liquor, and you're sick. I left medical card on counter and going through mail. Your \$13,000 account was there. Why you -- why you doing this? Don't want to come around the house and find someone. If you don't have any feelings or love for me after all we've been through tell me, but don't leave me thinking we can be as one again. . . . No man gifts or anything construed as you with another man in this house.

Over the next three and one-half hours, among other messages, defendant sent these:

All is gone, all your money and mine will be with lawyers.

That \$13,000 we have you can use five for your lawyer. Enjoy weekend with him.

Plaintiff testified that she interpreted the phrase "[e]njoy weekend with him" as a reference to her boyfriend. She did not respond to those text messages.

A little while later, defendant sent plaintiff another text message that "really disturbed [her]." At 4:11 p.m. he wrote:

Instead of f--king² this weekend, think about our family and say goodbye to him. You won't X [sic] him. You have thirty minutes to say goodbye to him.

Plaintiff testified that that particular text message made her "afraid, very afraid." Nine minutes later, at 4:20 p.m., defendant sent another message:

Detective worth every cent, name, address, work.

Plaintiff interpreted that message to mean that defendant had hired a detective to follow her and her boyfriend.

The 4:20 p.m. text message caused plaintiff to respond. She wrote, in reference to the medication prescribed to defendant for his manic-depressive disorder:

² The text message contained the entire word.

Take your meds. Goodbye Tom. Sorry you don't give money to [our] kids and waste it on a detective. Leave me alone, you're now harassing me.

Rather than leave plaintiff alone, as she had requested, ten minutes later, defendant sent another text, this one even more alarming:

I'm moving back Monday on advice of attorney. I'll be in [our daughter's] room and house going on sale.

Over the next half-hour, defendant sent additional messages proposing various distributions of the parties' financial assets. Plaintiff responded to one of defendant's messages, telling him to "stop texting and driving." He wrote back:

Good thing I have time to stop to do things, not like leaving kids alone home to f--k with your alcohol problem.

Plaintiff testified she never had an alcohol problem, had never been diagnosed with an alcohol problem, and had never had "any type of alcohol-related incident. Never."

After a few more text messages from defendant, he sent plaintiff another at 5:52 p.m., which was his thirteenth message that afternoon. The text message stated:

And home alone with liquor and you're a nurse. Licensing board and DYFS might not like. Took pics. I assume your debit card will reflect it. Don't make it ugly. Think about it.

Plaintiff, a registered nurse, testified that she interpreted defendant's reference to "licensing board" as "a threat to [her] profession and [her] license, and [her]self." A few minutes later, defendant sent his final text message for that day, Friday, February 18, 2011.

In light of one of the text messages, in which defendant warned plaintiff that he intended to return to the marital home and resume living there, plaintiff called the police "to see if it was true that he could return to the home." The police advised her that law enforcement lacked the authority to prevent him from returning because, in the absence of a court order to the contrary, defendant "had a right to return to the home." Fearing what defendant might do, plaintiff left for the weekend because she "was afraid to return [home]."

Although defendant sent no text messages on Saturday, February 19, his text messages resumed on Sunday, February 20, 2011. At 9:58 a.m., defendant sent a text message stating:

It's going to cost you everything you have
or ever will. Have a nice day.

Four minutes later, he sent another text message referring to information that was stored on plaintiff's laptop. Plaintiff had not given him permission to enter the home, much less to scroll through files stored on her laptop. Defendant's text message at 10:02 a.m. read:

One of the disks from laptop has email confirmation from Florida and graphic emails of adulterous affair. Hope he's worth it. . . .

Eleven minutes later, defendant sent yet another message, stating:

Also recorded video with kids saying you're never home and there's never food for them. You need to get help for your alcohol problems. Kids mentioned the problem. Also on vid[eo]. I have more also.

Nine minutes later, he sent a text with the acronym, "LMAO," which meant, according to plaintiff, "laughing my a-s off." Twenty minutes later, another text message arrived. This one said:

By the way, our daughter will be there as well, she is also witness and [has] seen and experienced firsthand the mental abuse we have endured because of you and med [sic]. Docs confirm that. Once school done, house will be foreclosed and kids will be [in] another school.

Four minutes later, at 10:46 a.m., he wrote:

Enjoy your hypnotic³ drink this morning with your pills. So sad.

That message was followed at 10:57 a.m. with yet another, stating:

Please remove your stuff out of my closet and chest.

³ The spelling "hypnotic" may be a transcription error, as the liqueur "Hpnoti^q" is pronounced the same way.

Plaintiff testified that after defendant moved out of the marital home, she had indeed moved some of her clothing into what had been defendant's closet. For that reason, defendant's reference to her clothing being in his closet meant that he had again been in the home without her permission. Over the next five hours, defendant sent four text messages proposing various settlements of the terms of the parties' divorce; one of the text messages referred to the parties' daughter having a fever. Defendant's last text message arrived at 4:29 p.m., telling plaintiff he hoped the children would be unaffected by their divorce.

On Monday, February 21, 2011, after sending several innocuous text messages concerning the children, defendant wrote at 1:37 p.m.:

Okay, I will be sleeping in our bedroom and [L.]⁴ in hers.

Plaintiff was particularly alarmed by the latter message in light of defendant's remark that he intended to come back, in plaintiff's words, "not only into the home but [also] into [her] bedroom." Defendant's next text messages caused plaintiff to realize that defendant had indeed moved back into the former marital home. At 2:01 p.m., he wrote:

⁴ The text message contains the full name of the parties' daughter.

Think about [my] offer or this divorce will be nasty and family will know and see everything.

Plaintiff interpreted this remark "as a threat." A little while later, defendant advised plaintiff that she was welcome to "come by and pick up [her] clothes today before a restraining order gets put into effect[.]" An hour later, defendant notified plaintiff by text message that he had provided his accountant with copies "of all W-2 and bank statements," and warned her that she should not "bother to file" or she "may have issues with IRS."

On Monday night, February 21, 2011, plaintiff wanted to return home to see her children, as the children had spent parenting time with defendant over that weekend; however, she was frightened to return to the house because defendant was there, and she asked for, and received, a police escort.

The next morning, when the courthouse reopened after the President's Day holiday, plaintiff sought, and was granted, a TRO under the Act. The TRO was served on defendant on February 22, 2011. The TRO contained a "Notice to Appear," which specified that the hearing on the FRO would take place nine days later on March 1, 2011. Rather than wait until the March 1 court date, defendant instead filed an "Application for Appeal" on February 22. Rather than schedule the appeal for March 1, so

that it would be heard at the same time as the hearing on plaintiff's request for an FRO, the judge scheduled defendant's appeal for February 24, 2011, which was two days later.

Plaintiff's testimony at the February 24, 2011 hearing described the text messages that defendant had sent over the past weekend. She also described the history of domestic violence that she had included in her complaint seeking the TRO. The complaint alleged, in the "Prior History of Domestic Violence" section, that:

Def has grabbed, bumped Plf w/his chest, spit on & strangled, told Plf "watch yourself," thrown things around, threatened to kill self & [was] verbally abusive.

In her testimony, plaintiff elaborated on those prior incidents, explaining that she interpreted as a threat his statement that she should "watch [her]self." She also explained that in July 2010, defendant threatened to kill himself, going so far as to place a knife in his mouth, and then threw the knife across the room. Plaintiff's testimony closed with her statement that defendant had been "very aggressive" with her, constantly spoke in "a loud tone of voice" that she found "threatening," and frequently made intimidating remarks such as "you're f--king making me angry." She testified that she was requesting the FRO for her own safety as she was "afraid of the defendant."

In his testimony, defendant admitted sending all of the text messages that plaintiff had described. He also admitted that he entered the former marital home unannounced and discarded the vase of roses, which he believed had been given to plaintiff by "her lover." He also acknowledged that because plaintiff had not given him a key to the house after she changed the locks, plaintiff likely believed "there was an agreement" that he would not have a key and would not enter the home. Defendant asserted that he had legitimate concerns that plaintiff was neglecting the children by leaving them home alone and not providing sufficient food for them.

At the conclusion of the testimonial phase of the hearing, which covers ninety transcript pages, the judge specifically noted that he found plaintiff's testimony credible. The judge further found that over the course of the weekend of February 18, 2011, defendant sent plaintiff "over 30 or 40 text messages." The judge observed that although plaintiff had responded to some of the text messages, her responses were low key in nature and "responsive . . . to some of the more coherent texts" that defendant was sending. Judge Blaney concluded that defendant sent the text messages for the purpose of harassing plaintiff, and that the messages were repetitive and alarming. The judge stated:

The texts the defendant was sending to the plaintiff were in fact harassing. They indicated on different occasions that . . . he found out . . . her whereabouts, that he had a detective employed by him, that he had found out her -- the party that she was going out with, his name, address, and work. He used the term, "instead of f--king him," referring to the boyfriend.

The court finds that this . . . use of obscene [language] . . . led the plaintiff to believe that the . . . defendant was not acting in a rational manner and was . . . us[ing] terms like that in a threatening manner, in a harassing manner.

The court also finds that [defendant] was indicating . . . to the plaintiff, that he was going to use information against her, that he referred to her using alcohol[.] . . . [H]e was using those kinds of things in order to place a thought in the plaintiff's mind that she was in fact being watched, that she was in fact being harassed, and that he was in control of her life and what was going to happen to her and her job, and that he was using that for the purpose of intimidating the plaintiff.

And clearly, the court feels that that type of behavior clearly fits within the Domestic Violence Act. . . .

. . . .

And the court also finds that while [defendant] may have still had the legal right to enter the house even though the locks had been changed, . . . the intent was clear by the plaintiff to the defendant that he was not supposed to be entering the house. And the actions that he did when he did enter the house, which he admits, to taking roses that were in the house and throwing them into the garbage, was a clear

threat to her, a clear harassing type of behavior towards her by the defendant.

. . . .

[T]he court finds that the [past] history . . . involves physical abuse that was testified to by the plaintiff. The defendant called the [parties'] daughter who indicated she did not witness personally any abuse, however, that testimony really only goes as far as her being able to testify as to what she observed while she was in the presence of . . . her parents. And, of course, that she was not there 24 hours a day.

So the court finds that plaintiff's testimony with respect to the past history of abuse, both physical and also mental abuse, abuse by way of threats, abuse by way of abusive verbal behavior, and abuse by means by physical behavior. The court feels that this is a classic case of the defendant being taken out of her life, that someone else replacing him, and that the defendant acted in a way that clearly is harassing behavior on his part. And hopefully this behavior will not continue, and hopefully the defendant will honor the Domestic Violence Restraining Order that the court is going to make [a] Final Restraining Order.

On appeal, defendant raises the following claims: 1) the conduct complained of constitutes merely "domestic contretemps" and did not rise to the level warranting the issuance of an FRO; 2) he was denied his right to due process because he was served with the TRO only two days before the final hearing took place; and 3) the judge erred by failing to advise him of his right to counsel.

II.

In Cesare v. Cesare, 154 N.J. 394 (1998), which was a domestic violence appeal, the Court emphasized that "[t]he scope of appellate review of a trial court's fact-finding function is limited." Id. at 411. "The general rule is that findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence." Id. at 411-12. Furthermore, "[b]ecause of the family courts' special jurisdiction and expertise in family matters, appellate courts should accord deference to family court factfinding." Id. at 413. We grant substantial deference to a trial court's findings of fact and conclusions of law, which will only be disturbed if they are "'manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence[.]'" Id. at 412 (quoting Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974)).

A plaintiff seeking an FRO under the Act must establish that the defendant committed an act of domestic violence. The Act defines domestic violence as the commission of any one of the fourteen crimes and offenses that are enumerated in N.J.S.A. 2C:25-19(a). Harassment, N.J.S.A. 2C:33-4, is among the fourteen predicate offenses, which, if proven, entitles a plaintiff to the entry of an FRO. N.J.S.A. 2C:25-19(a).

In relevant part, the offense of harassment is committed when a person "with purpose to harass another . . . [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). The word "harass" must be given its ordinary meaning, namely, to annoy, torment, wear out or exhaust the intended victim. State v. Castagna, 387 N.J. Super. 598, 607 (App. Div.), certif. denied, 188 N.J. 577 (2006). Two distinct elements must be established to prove the offense of harassment: a purpose to harass and an action under subsection (a), (b) or (c). Grant v. Wright, 222 N.J. Super. 191, 196 (App. Div.), certif. denied, 111 N.J. 562 (1988). A specific finding of purpose to harass is necessary for a conviction. It is not sufficient for the plaintiff to merely prove that the conduct in question had that effect; the plaintiff must prove that the defendant engaged in the conduct in question for the specific purpose of harassment. State v. Hoffman, 149 N.J. 564, 576-77 (1997).

Even though the Act is remedial legislation that must be construed broadly, see N.J.S.A. 2C:25-18 ("encourag[ing] the broad application of the remedies available under th[e] [A]ct"), we have recognized that expanding the concept of harassment beyond its statutory definition could afford matrimonial

litigants an unwarranted advantage, namely, the bringing of charges under the domestic violence statute, contrary to legislative intent. Corrente, supra, 281 N.J. Super. at 250; Peranio, supra, 280 N.J. Super. at 55-57. We recognized in both Corrente and Peranio that the process of separation and divorce frequently triggers heated emotions and the uttering of vague threats that do not rise to the level of harassment under N.J.S.A. 2C:33-4.

With these principles in mind, we first address the claim defendant advances in his first point, namely, that the text messages he sent plaintiff were for the purpose of trying to protect his children and amicably resolve the financial issues of the parties' pending divorce, and to the extent any of his remarks might have created a certain degree of apprehension in plaintiff's mind, such remarks were merely "domestic contretemps" that we held in Corrente and Peranio do not constitute acts of domestic violence.

Defendant's argument is unconvincing. As Judge Blaney correctly observed, defendant's threats to report plaintiff to the Internal Revenue Service, the Division of Youth and Family Services, and the licensing board for nurses, could have been intended for but one purpose: to alarm and harass plaintiff, his estranged wife. Defendant also notified her that he had

hired a detective to follow her. As if this were not enough, he also invaded her privacy by reading the email and other files she had stored on her laptop. We have been presented with no meritorious basis to disturb Judge Blaney's conclusion that all of this behavior, when taken together, constituted a menacing and frightening course of conduct, the purpose of which was to retaliate against plaintiff for having started a relationship with another man. Although there were certainly some text messages defendant sent over the weekend of February 18, 2011 that were relatively innocuous, the vast majority of the text messages unambiguously conveyed to plaintiff that if she did not break off her relationship with her boyfriend, there would be consequences, and those consequences would not be pleasant.

The record amply supports the judge's conclusion that defendant's conduct -- sending an onslaught of alarming text messages within a brief period of time, entering plaintiff's home without her permission or knowledge, threatening to report her to the IRS, DYFS and her licensing board, accessing the material on her laptop, and hiring a detective to surveil her -- was for one purpose, "intimidating" and "harassing" plaintiff.

If there were any doubt about the purpose of defendant's actions on the weekend in question, such doubts were laid to rest by plaintiff's account of defendant's past acts of domestic

violence, an account that the judge specifically found credible. Past history of domestic violence is relevant to a judge's consideration of whether a plaintiff presently requires an FRO for his or her protection. N.J.S.A. 2C:25-29(a)(1); Pazienza v. Camarata, 381 N.J. Super. 173, 183 (App. Div. 2005).

The judge's issuance of the FRO was well-supported by the facts in the record and represents a wholly proper application of the provisions of the Act. We have no occasion to disturb the judge's findings, and reject the claim defendant advances in his first point.

III.


In his second point, defendant maintains that the scheduling of the FRO hearing two days after he was served with the TRO denied him an opportunity to adequately prepare for the hearing. What he fails to note, however, is that when he filed an appeal from the entry of the TRO, the hearing on the FRO, which was originally scheduled for March 1, was re-scheduled to February 24, 2011. Notably, when the judge asked him at the beginning of the hearing on February 24 whether he was ready to proceed, he said yes. He neither asked for an adjournment nor objected to the hearing being held on such short notice. We reject the claim defendant advances in point two.

IV.

As his third claim of error, defendant maintains that the judge erred by failing to advise him that he had a right to an attorney to represent him during the FRO hearing. This claim lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(A) and (E). There is no right to counsel in a civil proceeding. In re Estate of Schiffner, 385 N.J. Super. 37, 44-45 (App. Div.), certif. denied, 188 N.J. 356 (2006).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION