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A.S.,	SUPERIOR COURT OF NEW JERSEY OCEAN COUNTY
Plaintiff,	CHANCERY DIVISION FAMILY PART
v.	DOCKET NO. FV-15-923-17
V.S.,	CIVIL ACTION
Defendant.	OPINION

Plaintiff, pro se
Defendant, pro se

L.R. Jones, J.S.C

Decided: December 15, 2016

This case presents evidentiary issues in a domestic violence proceeding, when a complaint is filed on or about the same time that collateral family court litigation between the same parties has been filed, or is about to be filed, on issues involving child custody, parenting time, support, separation, divorce, or

other related issues. For the reasons set forth herein, the court holds the following:

1) Under the "Murray" principle set forth in Murray v. Murray, 267 N.J. Super 406, 410 (App. Div. 1993), when a domestic violence complaint is filed on or about the same time as the commencement of other family court litigation, a court may appropriately consider, as potentially relevant, the proximity of the filings as relevant on issues of credibility, motivation, bias, and the possibility that a plaintiff filed the domestic violence application for the purpose of gaining a legal advantage on rulings regarding custody, support, or other similar issues. As an evidentiary matter, however, Murray does not create any inference or presumption that a domestic violence complaint filed at the same time as ongoing or anticipated companion family court litigation is not valid. Rather, while it is possible in a given case that a party has filed a domestic violence complaint to gain an advantage in other litigation, it may be equally plausible in a given case that as a direct result of such other litigation, defendant improperly committed domestic violence against plaintiff.

2) Based upon the specific nature of domestic violence, a domestic violence complaint may be substantiated upon a party's testimonial evidence, without independently corroborating evidence such as eyewitnesses or videotapes;

3) While a past history of domestic violence by defendant against plaintiff is a relevant consideration under. N.J.S.A. 2C:25-29(a) and Cesare v. Cesare, 154 N.J. 394 (1998), such history is not a mandatory requirement for a court to find, under the circumstances of a case, that both prongs of the two-part test in Silver v. Silver, 387 N.J. Super 112

(App. Div. 2006), have been satisfied by a preponderance of the evidence to warrant entry of a final restraining order.

FACTUAL BACKGROUND

Plaintiff-mother and defendant-father are estranged and separated parents of two minor children. On or about October 31, 2016, the parties appeared in family court under the domestic relations (FD) docket to address legal custody, residential custody, parenting time and support. The court entered an interim order and pending receipt of further information, carried the proceedings to December 14, 2016.

On or about December 9, 2016, five days before the continuance of the FD proceedings, plaintiff filed a domestic violence complaint against defendant, asserting that defendant had, in the course of a domestic dispute and argument regarding the children, slapped her in the face.[1] She proceeded to file a domestic violence complaint against defendant , in which she asserted her belief that he "is not going to stop harassing her." The court granted plaintiff a temporary restraining order, and set a final hearing for December 15, 2016. In view of the December 15th FV proceedings, the court cancelled and adjourned the

[1] . Plaintiff also asserted that defendant recently sent her harassing text messages which caused her emotional harm. The alleged slap, however, is the act which is most central to the disposition of this matter.

previously scheduled FD proceedings of December 14th , pending disposition of the FV matter.

On December 15, 2016, the parties appeared in court for a domestic violence final hearing. During these proceedings, the court took testimony from both parties regarding their version of events, Plaintiff described defendant slapping her in the face in her home, with defendant essentially denying same.

As is common with many domestic violence case, the matter involved a "plaintiff said vs. defendant said" situation, and a credibility determination between the parties.

LEGAL ANALYSIS

Evidence: Plaintiff's Word vs Defendant's Word

Initially, the court notes that it is not at all uncommon for domestic violence cases to comes down to plaintiff's word against defendant's word, with no corroborating evidence either way. While some acts of alleged domestic violence may occur in public places where collateral evidence, such as eyewitnesses or videos, may possibly be available, a vast number of other cases inherently involve no evidence besides each party's own sworn testimony. This type of situation, however, does not mean that a plaintiff 's case is inherently flawed, or that he/she cannot meet the requisite burden of proof and obtain a final

restraining order through testimonial evidence alone. To the contrary, the fundamental nature of domestic violence itself often creates a seriously enhanced likelihood that such action, when perpetrated by a defendant, occurs in a private household setting behind closed doors, where no eyewitnesses, videotapes, or other forms of objective evidence are available.

As noted by the New Jersey Supreme Court, the Prevention of Domestic Violence Act is remedial in nature, and is to be liberally construed to achieve its salutary purpose. Cesare v. Cesare, 154 N.J. 394, 400 (1998). If eyewitnesses and videos were absolutely required in order for a plaintiff to prove a case of domestic violence in one's own home and receive a restraining order, then countless abusive violent individuals could easily inflict all types of violent harm upon spouses, dating partners and family relatives in a private household setting without any accountability, while crippling the ability of a victim to seek and obtain a protective order for safety reasons. Such a process would clearly and completely undermine the very protective purpose of the Domestic Violence Act itself.

That being stated, however, it is equally important to recognize that a "plaintiff said vs. defendant said" case involves two parties, not just one. While in any given fact pattern, a plaintiff may have been victimized by a violent

defendant, it is also conceivable in a given case that a plaintiff is either fabricating or unreasonably exaggerating a situation to build a case of domestic violence when one does not actually exist. A hypothetical litigant may take such an inappropriate for various self-serving reasons, such as attempting to gain a strategic advantage over the other party in ongoing collateral litigation, seeking payback and revenge for some prior, non-violent but negative or subjectively upsetting or disappointing development in the parties' prior domestic relationship. Theoretically, anything is possible in any given case. Therefore, at the outset of a contested matter involving a "plaintiff said vs. defendant said" situation, the court must start with an evidentiary blank slate, with no predeterminations for or against the credibility of either party.

The burden of proof and persuasion, however, rests with a plaintiff to prove his or her case for entry of a final restraining order against a defendant. Whether there are or are not eyewitnesses or videos, the evidentiary burden technically remains the same, and there are no presumptions or inferences of guilt against defendant. Therefore, in cases where the only evidence is the testimony of the parties themselves, plaintiff carries the burden of convincing the court through the persuasive credibility of his or her own testimony that an act of domestic violence occurred, and that a restraining order is appropriate. While a court may

find that a plaintiff has met such burden based solely upon his or her own testimony, the burden is logically more challenging to carry in such a case than, for example, a case where there is taped evidence of an act of violence, or multiple credible eyewitnesses, or a written admission by a defendant.

Nonetheless, a plaintiff may meet the burden of proof based upon persuasive testimony alone. The requisite burden of proof is not the heightened criminal standard of "beyond a reasonable doubt," but the lower civil standard of "preponderance of the evidence." N.J.S.A. 2C:25-29. This standard, often known as the "more likely than not" standard, applies to two prongs of the analysis, commonly known as the "Silver" criteria, as established in the case of Silver v. Silver, 387 N.J. Super 112 (App. Div. 2006). Under the first prong, the trial court considers whether a predicate act of violence has occurred. Id. at 125-26. Under the second prong, even if a predicate act of violence has occurred, the court must next decide whether there is a danger to person or property warranting entry of an FRO to prevent further abuse. Id. at 126. In some cases, the determination of the second prong is self-evident, Ibid. (quoting N.J.S.A 2C:25-29(b), stating that the court shall grant any relief necessary to prevent further abuse). See A.M.C. v. P.B, ___ N.J. Super ___ (App. Div. 2016) (significantly liberalizing proofs for

meeting the second prong, when the nature of defendant's domestic violence against plaintiff inherently meets and satisfies same).

In a "plaintiff's word vs. defendant's word" situation, a court determines which party's version is more accurate and credible as to what actually occurred. Sometimes, the differences between the parties' respective versions are black and white, i.e., plaintiff claiming the defendant committed an act of physical violence, and defendant flatly denying that any such action occurred. In other circumstances, the testimony between the parties appears to more accurately involve a difference in perception of the same event. In either instance, a court may find that one party's version is more credible, or may in fact conclude that neither party's version is particularly convincing, and that the truth may possibly fall somewhere in the middle.

Sometimes, a party's credibility is impaired by demeanor, inconsistent statements and bias, and the court finds that a litigant is simply being untruthful. On other occasions, such as when both parties are describing a verbal argument and alleged verbal harassment, a court may possibly find that neither party is intentionally lying, and both parties are in fact telling the truth as to their respective perceptions of what did or did not happen. Indeed, it is not uncommon

for multiple people to witness the same situation and, while attempting to be totally truthful, have very different views of what occurred.

Ultimately, the issue before the domestic violence court in a "plaintiff 's word vs. defendant's word" case is to gauge credibility, and then, assuming arguendo that the court finds plaintiff's version of events to be more credible, to then determine whether defendant's actions constitute domestic violence and warrant the issuance of a restraining order under Silver.

A court may consider demeanor of testifying witnesses. See State v Locruto 157 N.J. 463, 475 (1999. In a case involving alleged harassment, and where the evidence is solely testimonial in nature between two parties, the court may gauge credibility of each testifying party by listening to the specifics of what he/she is saying, the consistency or inconsistency of same, and further considering the testifying party's demeanor, eye contact, and body language, and actions and reactions during the proceedings. A trial court develops what historically was called the "feel of the case," and determines whether the testimony of plaintiff, as compared to any responsive testimony by defendant, more likely than not accurately reflects the actual events.

Further, in a domestic violence case involving alleged harassment, the question of whether an act does or does not constitute harassment requires a fact-sensitive

analysis. See State v. Hoffman, 149 N.J. 564, 580-81 (1997). A court may glean intentional harassment from attendant circumstances. See C.M.F. v. R.G.F, 418 N.J. Super 396, 404-405 (App Div. 2011), and may consider the totality of such circumstances in determining whether the harassment statute has been violated. Cesare, supra, 154 N.J, at 404; State v. Hoffman, 149 N.J. 564, 585 (1997); H.E.S. v. J.C.S. 175 N.J. 309, 326 (2001). A finding of a defendant's purpose to harass may be inferred from the evidence presented, and from common sense and experience. H.E.S., supra, 175 N.J. at 327; State v Hoffman, supra, 149 N.J. at 577.

In this particular case, while there are no coroorborating witnesses, the court has observed both parties carefully in court. Plaintiff contends that defendant, while in the midst of other family court litigation, slapped her in the face in her home. In providing this testimony, she had direct eye contact, and appeared emotional, consistent, and truthful in her testimony. Her credibility was not in any way impeached, or her version impaired or rendered suspect, by any cross examination. She further did not appear to be embellishing or exaggerating her testimony. Further, when defendant testified, his denial of striking plaintiff appeared hesitant and less than convincing. In fact, he described that he himself was upset or angry at the time, and claimed that he had essentially grabbed plaintiff's face, but did not strike her. He provided no reasonable explanation,

however, why he put his hands on plaintiff's face at all, at a time when he was admittedly angry.

In short, whether there were or were not any corroborating witnesses, the court found that plaintiff's testimony was persuasive and rang true as, more likely than not, what actually occurred between the parties.

Evidentiary Relevancy of Pending Family Court Action

Very often, a domestic violence complaint is filed at approximately the same time that another family court matter has either been filed or is about to be filed, under either the divorce ("FM") docket, or the domestic relations ("FD") docket. When this scenario occurs, a question often arises as to whether the plaintiff in the domestic violence proceeding has filed the domestic violence complaint not because of an act of violence actually occurred, or because of fear of defendant, but rather in furtherance of an agenda and motivation to utilize the protections of a domestic violence order in order to gain an advantageous upper hand on certain issues in the FM or FD litigation.

The legal underpinning of this issue was enunciated by the New Jersey appellate court over twenty years ago in the matter of Murray v. Murray, 267 N.J. Super 406 (App. Div. 1993). In Murray, the appellate court overturned a trial court's decision to grant a final restraining order in favor of plaintiff-wife,

against defendant-husband, who, while still living with plaintiff on the eve of the parties' divorce, called his wife unattractive and insulted her regarding her physical appearance. In response to the insult, plaintiff-wife filed a domestic violence complaint on the grounds of harassment, seeking a restraining order removing defendant from the joint marital home, granting plaintiff exclusive interim possession, of same and granting plaintiff interim custody of the parties' children, and interim support. While the trial court granted a final restraining order, the appellate court reversed, finding that that defendant's statements, though insulting were not acts of domestic violence, and more along the line of disagreements or domestic contretemps, as subsequently characterized in Peranio v. Peranio, 280 N.J. Super 47, 56 (App. Div. 1995) and Corrente v. Corrente, 281 N.J. Super 243, 250 (App. Div. 1995).

The Murray court set forth its concern over possible misuse by a litigant of the Domestic Violence Act for strategic purposes. The court expressly instructed trial courts that in cases where a domestic violence complaint is filed shortly before or after, or concurrent with, the commencement of another family court proceeding, the court must be mindful of the possibility that a party may have filed a domestic violence complaint for the improper purpose of gaining a starting advantage or "leg up" in the companion case on critical and often-disputed

issues such as child custody, and support, and exclusive possession of a joint residence. The "Murray" court stated the following:

> We are concerned, too, with the serious policy implications of permitting allegations of this nature to be branded as domestic violence and used by either spouse to secure rulings on critical issues such as support, exclusion from marital residence and property disposition, particularly when aware that a matrimonial action is pending or about to begin. Id. at 410.

The "critical" issues alluded to in Murray arise from N.J.S.A. 2C:25-29 of the Domestic Violence Act. Indeed, under the Act, a plaintiff who obtains a final restraining order against a defendant may seek and potentially obtain ancillary relief under N.J.S.A. 2C:25-29, including when but not limited to, when applicable, exclusive temporary possession of the marital home, (N.J.S.A. 2C:25-29(b)(2), support (N.J.S.A 2C:25-29(b)(4) and other emergent financial relief (N.J.S.A. 2C:25-29(b) 10). Moreover, with reference to custody, a plaintiff who receives a restraining order may receive temporary custody of the children, (N.J.S.A 2C:25-29(b)(11)). In fact, there is a presumption that the best interests of a child are served by an award of temporary custody to the non-abusive parent. Ibid. While ultimately an award of temporary custody under a final

restraining order is subject to a de novo review in custody proceedings under all of the statutory criteria set forth in N.J.S.A 9:2-4 (see R.K. v. F.K., 437 N.J. Super. 58 (App. Div. 2014)), the issuance of a restraining order can establish an initial custodial arrangement pending any further rulings by the family court.

The language in Murray reflects that when a domestic violence complaint and a companion family court action are filed in relatively close proximity to each other, it is appropriate to consider as relevant , among other factors in the case, whether there is a connection between the two, and whether the domestic violence complaint was in any fashion filed for strategic reasons relative to the second action. It is critical to note, however, that the mere fact that a domestic violence complaint and family court action are filed close in time to each other does not give rise to any legal presumption or inference that the domestic violence complaint is not credible on its face.

Pursuant to N.J.R.E. 301, except as otherwise provided by law, a presumption discharges the burden of producing evidence as to a fact (the presumed fact) when another fact (the basic fact) has been established. The reason why there is no basis for a presumption or inference is straightforward. While it is possible that a person who files for a restraining order might be attempting to do so to gain leverage in a newly or recently instituted family court action, it is equally

plausible that, at the time people engage in disputes over custody, support, or other family court litigation, the likelihood of domestic violence may logically increase. Pursuant to N.J.R.E. 201(b), the court may take judicial notice that a contested family court proceeding often constitutes one of the most stressful and emotionally traumatic events in a person's life. There are many people who, in the context of a marital collapse or broken relationship, impulsively act in a manner that is not only inappropriate, but violent under one or more of the multiple definitions of domestic violence set forth in New Jersey's Prevention of Domestic Violence Act, N.J.S.A. 2C:25-19(a). For this reason, it is far from extraordinary or unique when an act of domestic violence allegedly occurs at about the same time that other litigation between the parties commences.[2]

It is not so uncommon for a court case to involve a defendant who, while having never previously committed domestic violence, wrongfully commits such act as a result of being angry, upset, impulsive or stressed as the result of contentious litigation with the other party in family court. In short, when a domestic violence complaint is filed close in time, the start or continuance of another family court action between the same parties, there is no basis to

[2] Further, while the filing of a divorce complaint may institute domestic violence, there are also other cases where the reverse is true, i.e., an act of domestic violence is in fact what instigates a victim to file for divorce shortly thereafter.

presume that plaintiff's domestic violence complaint lacks credibility. Rather, a fact-finding analysis must take place in a wholly balanced and equally fair manner, free of any preliminary inferences for or against the legitimacy of the application.

Issuance of Restraining Order

In this specific case, the court finds by a preponderance of the credible evidence that defendant did in fact commit domestic violence against plaintiff by striking her in the face with his hand. Further, more likely than not, defendant's actions directly arose out of anger or animosity toward plaintiff as a result of their ongoing custody and parenting disputes which have in fact been the subject of ongoing domestic relations proceedings under a separate "FD" docket. The court finds defendant's version of events, i.e, that he grabbed plaintiff's face with his hand in a non-violent manner, to be less credible than plaintiff's version of what actually occurred. Moreover, even if defendant's version was in fact correct, he simply had no right to put his hands on plaintiff's face or any other part of her person in an angry manner. Plaintiff, as well as defendant and all other individuals, have a right to basic body space, free from violation by angry ex-partners or anyone else.

Applying the two-pronged Silver analysis to the present case, the court finds by a preponderance of the persuasive testimonial present evidence, even without corroboration, that defendant violated plaintiff's rights by hitting her in the face with his hand. His action was generated by anger, and was intentional, and constituted both assault and harassment. Under New Jersey's Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17, et. seq., actions constituting domestic violence include, but are not limited to, assault (N.J.S.A 2C:25-19(a)(2), and harassment, (N.J.S.A. 2C:25-19(a)(13). Pursuant to N.J.S.A 2C:12-1(a), simple assault occurs when one attempts to cause or purposely, knowingly, or recklessly causes bodily injury to another. Under N.J.S.A 2C:11-1a, bodily injury is defined as physical pain, illness or any impairment of physical condition. As noted by our appellate court, even the stinging sensation of a slap may be sufficient to support the bodily injury aspect of the assault statute in a particular case. See N.B. v. T.B., 297 N.J. Super 35, 43 (App. Div. 1997).

Pursuant to N.J.S.A. 2C:33-4(b) one commits harassment under if, with, purpose to harass another, hits subjects another to striking, kicking, shoving or other offensive touching, or threatens to do so. The court finds from plaintiff's persuasive testimony that such an act did occur, and based upon defendant's

anger over child-related as well as the existing custody litigation, same took place with purpose to harass and hurt plaintiff, at least emotionally if not physically.

As regarding the second prong of Silver, the court finds that same exists as well in that a restraining order is necessary to reasonably protect plaintiff in this matter. It is true that a court may consider, as part of the overall analysis any prior history of domestic violence between the parties. See N.J.S.A. 2C:25-29(a); Cesare v. Cesare, 154 N.J. 394 (1998). The right of a victim to seek a restraining order based upon domestic violence, however, does not require, as a mandatory prerequisite, a showing of prior repeated acts of violence. New Jersey's domestic violence statute is called the Prevention of Domestic Violence Act for a reason. These parties are still in the midst of ongoing contested litigation, which may well continue to cause anger and hostilities. The fact that the parties may not have had a past violent history with each other, when their relationship was more positive and less litigious, is not necessarily a reliable indicator that similar or increased violence will not continue to occur in this now-adversarial phase of the parties' relationship. Meanwhile, plaintiff should not have to endure multiple additional hits in the face, or worse, during the companion litigation before she is entitled to protection. Once is more than enough.

The basic protection which the law seeks to assure victims is the right to be left alone. See State v. Hoffman, 149 N.J. 564, 584-85 (1997). The scales of justice remind us that the public as well as this victim have a right to feel safe when alone in their own homes. Ibid. As noted by our appellate court in P.J.G. v. P.S.S. 297 N.J. Super 468, 472 (App. Div. 1997) an order restraining contact or communication is a valid exercise of inherent power and of the general authority conferred by the statute if, for example, there is a basis for apprehending incidents of future violence. The Legislature encourages broad application of the Act to confront the problem of domestic violence. State v Harris, 211 N.J 566, 579 (2012). The the court will appropriately apply the Act in this case.

CONCLUSION

For all of the foregoing reasons, the court find that under the two pronged Silver test, as by a preponderance of the credible evidence, plaintiff is entitled to entry of a final restraining order against defendant.