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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1442-14T2

B.R.,

Plaintiff-Respondent,

v.

J.A.,

Defendant-Appellant.

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Submitted October 5, 2015 – Decided April 15, 2016

Before Judges Fasciale and Higbee.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Hudson County, Docket No. FV-09-2624-04.

Adrienne D. Edward, attorney for appellant.

Respondent has not filed a brief.

PER CURIAM

Defendant J.A. appeals from an October 3, 2014 order denying his motion to vacate a final restraining order (FRO) entered pursuant to the Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17 to -35. For the reasons that follow, we reverse and remand for a plenary hearing.

The court entered a final restraining order against J.A. on March 24, 2004, prohibiting him from having any contact with B.R. or her family household members, from going to B.R.'s residence or place of employment, and from possessing firearms.

On August 11, 2014, J.A. filed an application requesting the court vacate the final restraining order. In support of his application, J.A. claimed he completed probation and had no contact or communication with B.R. for almost ten years. On September 9, 2014, both parties appeared before the first judge to hear the motion, but the motion was adjourned until October 3, 2014. The first judge entered an amended FRO which excused B.R. from attending the scheduled hearing and acknowledged her request to continue the restraints in place and not vacate the FRO. The provisions of the FRO otherwise remained unchanged.

J.A. subsequently retained an attorney who submitted a certification claiming J.A. did not have contact with B.R. for ten years, does not possess any weapons, and successfully completed his probation for a criminal contempt conviction related to a violation of the underlying FRO which occurred no

later than 2005. The certification continued that J.A. works as a gasoline tanker driver, is married, and has four children.[1]

At the hearing on October 3, 2014, only J.A. and his counsel were present. The matter was before a new judge who was unfamiliar with the events that took place on September 9, 2014. However, the same court clerk was present on both days. The judge did not require the clerk to be put under oath but nonetheless allowed her to speak.[2]

The clerk stated that B.R. was present on the last court date, and she was "very upset, and crying, and shaking and expressed her concern not to vacate the restraining order." The clerk further advised the judge that B.R. "did not want to come back and be in the presence of the defendant." J.A.'s counsel objected to the court's reliance on the court clerk's unsworn testimony. Additionally, he objected to the court making a decision without him having the opportunity to cross-examine B.R., who was not present. At the urging of the clerk, the court listened to a recording of the September 9, 2014

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[1] J.A. also submitted a letter from his employer stating he works as a gasoline tanker driver, along with three character reference letters.

[2] All witnesses who testify must be "sworn or affirmed." State v. Caraballo, 330 N.J. Super. 545, 554 (App. Div. 2000). See also N.J.R.E. 603.

conference. Afterwards, the judge stated "that playback speaks for itself."

The judge denied J.A.'s motion without prejudice, finding he did not show good cause and change of circumstances as required by N.J.S.A. 2C:25-29(d) and did not meet the Carfagno[3] factors for dismissal of the FRO. The judge made the following findings of fact: B.R. did not consent to vacating the restraining order; B.R. feared J.A.; J.A. was convicted once of contempt for violating the FRO; J.A. did not attend counseling (despite never being ordered to do so in family or criminal court); and J.A. was not elderly.

He also found J.A. had no restraining orders from other jurisdictions, no drug or alcohol abuse problems, no involvement in violent acts with other persons, and that no relationship existed between the parties at the time of the hearing. Based on a review of the transcript from the FRO hearing, the judge found the underlying incident was "more of an alleged harassment, stalking kind of allegation." However, the judge determined there was no "reason to think that [B.R. was] not acting in good faith."

[3] State v. Carfagno, 288 N.J. Super. 424 (Ch. Div. 1995).

In denying J.A.'s motion, the judge stated he "weigh[ed] . . . very heavily" the following factors: B.R.'s lack of consent to vacate the FRO, B.R.'s fear of J.A., the violation of the FRO, and that B.R. was acting in good faith. The clerk's "assessment of the victim's appearance, and the [prior] Judge's obvious interest in her not having to come back because of what [B.R.] expressed" was also weighed "most heavily." The judge further considered that J.A. did not seek out counseling.

The judge subsequently supplemented his opinion pursuant to Rule 2:5-1(b). He found J.A. did not make a prima facie showing requiring a hearing. He found B.R. was "terrified" of "merely sitting in the same room" as J.A. based on the recording from the September 9, 2014 conference, although the judge was not present on that day to evaluate her and she had not been subject to cross-examination.

In his modified opinion the judge retracted his reliance on the clerk's unsworn testimony and based his determination on a "review of the complete record including the prior acts of domestic violence documented in the case file, the final restraining order hearing, the contempt complaints for violations of the final restraining order, and the record of the September 9, 2014 hearing." Although we do not have a

transcript of the September 2014 conference, the judge recounted B.R.'s prior statement before the first judge as follows:

> [B.R.]: Ah yes your honor I um, my restraining order um, I will never drop it. I am terrified of this man, okay, um, I am so afraid of this man. Just sitting here terrifies me. Um, this man has caused a lot of harm, when we were together.
>
> THE COURT: Let me stop you. So you don't consent to vacating of the restraining order correct?
>
> [B.R.]: Correct[.]

The judge noted physical altercations from 1998 through 2003 where J.A. "slapped" B.R., "chased her to the bus, accosted her at her job, and grabbed her hand and took her cellphone." In that time frame, J.A. also "threatened to break [B.R.]'s jaw" and "told [B.R.] to watch herself because he had someone to beat her up and he was going to get her." The judge also found that J.A. was convicted of contempt twice, once in 2004 and again in 2005.

He concluded B.R. "objectively and subjectively" feared J.A. The judge also found that "further testimony and cross-examination of [B.R.] was not necessary to make a determination as to whether she feared [J.A.]." Without giving J.A. an opportunity to cross-examine B.R., the judge found there was no "demonstrable proof to challenge the credibility" of B.R. with respect to J.A.'s assertion that B.R. opposed vacating the FRO

in bad faith. The judge also retracted his earlier determination that the events underlying the FRO were "an alleged harassment, stalking kind of allegation." The judge's reasoning for denying J.A.'s motion otherwise remained largely consistent with his oral decision.

J.A. appeals from the October 3, 2014 order, asserting the judge committed reversible error when he improperly relied on the court clerk's statements describing the prior proceeding and good cause existed to vacate his final restraining order.

We uphold a trial court's factual findings if they are supported by "adequate, substantial and credible evidence." Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974). Pursuant to N.J.S.A. 2C:25-29(d):

> Upon good cause shown, any final [restraining] order may be dissolved or modified upon application to the Family Part of the Chancery Division of the Superior Court, but only if the judge who dissolves or modifies the order is the same judge who entered the order, or has available a complete record of the hearing or hearings on which the order was based.

In Kanaszka v. Kunen, 313 N.J. Super. 600, 607 (App. Div. 1998), we adopted a non-exclusive list of factors set forth in Carfagno, supra, 288 N.J. Super. at 434-35 to determine whether there is good cause. Those factors include:

> (1) whether the victim consented to lift the restraining order; (2) whether the victim fears the defendant; (3) the nature of the relationship between the parties today; (4) the number of times that the defendant has been convicted of contempt for violating the order; (5) whether the defendant has a continuing involvement with drug or alcohol abuse; (6) whether the defendant has been involved in other violent acts with other persons; (7) whether the defendant has engaged in counseling; (8) the age and health of the defendant; (9) whether the victim is acting in good faith when opposing the defendant's request; (10) whether another jurisdiction has entered a restraining order protecting the victim from the defendant; and (11) other factors deemed relevant by the court.
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> [Id. at 435.]

Additionally, the court must "fully explore[]" the "previous history of domestic violence between the parties . . . to understand the totality of the circumstances . . . and to fully evaluate the reasonableness of the victim's continued fear of the perpetrator." Kanaszka, supra, 313 N.J. Super. at 607. This exploration can include "incidents that were not testified to at the final hearing." Ibid.

"[T]he moving party has the burden to make a prima facie showing good cause exists . . . ." Id. at 608. Only then is the court required to "determine whether there are facts in dispute material to a resolution of the motion prior to ordering a plenary hearing." Ibid. If there are material factual

disputes, a plenary hearing will be required. Conforti v. Guliadis, 128 N.J. 318, 322 (1992).

We note that, in reviewing Carfagno factor two, the victim's fear of the defendant, the test is whether the victim has an objective fear. Carfagno, supra, 288 N.J. Super. at 437-38. "Objective fear is that fear which a reasonable victim similarly situated would have under the circumstances." Id. at 437. The standard is objective fear because "[t]he duration of an injunctive order should be no longer than is reasonably required to protect the interest of the injured party." Id. at 438 (quoting Trans Am. Trucking Serv., Inc. v. Ruane, 273 N.J. Super. 130, 133 (App. Div. 1994)). If a subjective standard were to be applied, the scope of the injunction might be broader than reasonably necessary to protect the victim and would unnecessarily infringe on the defendant's rights. Ibid.

Furthermore, "[t]he linchpin in any motion addressed to dismissal of a final restraining order should be where there have been substantial changed circumstances since its entry that constitute good cause for consideration of dismissal." Kanaszka, supra, 313 N.J. Super. at 609.

Here, the parties did not have a relationship at the time of the hearing and had not been in contact for over nine years. J.A. had no record of violent acts with other persons and did

not have any problems with drug or alcohol abuse. Nor did J.A. possess any firearms. J.A. did have two earlier contempt convictions, but the most recent one occurred approximately nine years prior to the October 2014 motion hearing. Additionally, J.A. is now married to another woman and has four children. He works as a gasoline tanker driver and claims having an FRO entered against him inhibits his ability to advance his career.

In his supplemental opinion, the judge relied on the audio recording from the September 9, 2014 conference to determine B.R. both objectively and subjectively feared J.A. and that B.R. was acting in good faith by opposing his application.[4] Given the judge was unable to observe B.R.'s demeanor on September 9, 2014, and nothing in the record suggests the parties had any contact since 2005, we conclude whether B.R. had an objectively reasonable fear of J.A. or was acting in bad faith was a material fact in dispute.

Based on the foregoing, J.A. has clearly demonstrated a prima facie case of good cause and changed circumstances to warrant a plenary hearing. B.R. should be advised of the

[4] Although the trial judge relied on the unsworn testimony of the clerk in his oral decision, we note the judge retracted that reliance in his supplemental opinion. However, he still relied on what seem to be unsworn statements of B.R. on the recording to determine her assertions of continuing fear of J.A. were made in good faith.

hearing date and advised that she should attend if she objects to the application. For those reasons, we vacate the order denying J.A.'s motion and remand for a plenary hearing on J.A.'s motion. We provide no opinion on the merits of J.A.'s motion and whether he is entitled to the relief requested.

Remanded for a plenary hearing consistent with this decision. We do not retain jurisdiction.