19-P-290 Appeals Court

NOELLE N. vs. FRASIER F.

No. 19-P-290.

Norfolk. November 6, 2019. - June 12, 2020.

Present: Hanlon, Lemire, & Shin, JJ.

Abuse Prevention. Protective Order.

Complaint for protection from abuse filed in the Brookline Division of the District Court Department on September 21, 2018.

A motion to extend a protective order was heard by Mary E. Dacey White, J.

Susan E. Stenger for the defendant.
Dana Alan Curhan for the plaintiff.

HANLON, J. After a hearing, a judge of the District Court issued an ex parte abuse prevention order, pursuant to G. L. c. 209A (restraining order), ordering the defendant not to abuse the plaintiff; not to contact her directly or indirectly and to stay 100 yards away from her; and also to stay away from her

home and her workplace.[1] The order contained a provision awarding custody of the parties' minor children to the plaintiff and ordering the defendant not to contact the children and to stay away from their day care center.

At the subsequent hearing after notice, both parties appeared and were represented by counsel; each of them testified at the hearing and various documents were offered in evidence. After hearing arguments, the judge extended the ex parte order as it related to the plaintiff, but amended it to permit the defendant to have contact with the parties' two children, as provided by the parties' earlier divorce judgment. The defendant appeals, arguing that the evidence was insufficient to support either the ex parte order or the order after notice. We affirm.

Ex parte order. The defendant argues that the ex parte order should not have issued because the plaintiff did not "meet her burden of proof that she was objectively reasonably in fear of imminent serious physical harm." We do not address that issue because it is moot. As we said in C.R.S. v. J.M.S., 92 Mass. App. Ct. 561, 565 (2017), "the defendant had the right -- and an opportunity -- to be heard in the trial court about the

[1] The defendant also was ordered to surrender any guns, gun licenses, and ammunition to the "serving [police] dept."

extension of the ex parte order and, when it was extended, he had the right to be heard in this court on the issue whether that decision was proper. What he does not have is the right to relitigate the issuance of the ex parte order itself, because that matter is moot: the ex parte order has been superseded by the order after notice." See V.M. v. R.B., 94 Mass. App. Ct. 522, 524 (2018) ("Nor is a defendant entitled to appellate review of an ex parte abuse prevention order if the order is extended in the trial court at the hearing after notice").

Order issued after notice. Background. The judge received the following evidence.[2] The parties met in 2012; at some point later, they were married and had two children, twin daughters born in 2014. They were divorced in February of 2018 in Maine, where they were then living. The divorce judgment essentially

[2] We note that the judge excluded evidence offered by both parties that she considered hearsay. When counsel argued that such evidence was admissible in a hearing pursuant to G. L. c. 209A, she responded, "Still hearsay, and yes, you are bound by the rules. I [have] counsel in front of me. . . . We're not two pro-se litigants." In fact, as § 5:03 of the Guidelines for Judicial Practice: Abuse Prevention Proceedings (2011) (Guidelines) makes clear, in a c. 209A proceeding, "[t]he common law rules of evidence, e.g., those regarding hearsay, authentication, and best evidence, should be applied with flexibility, subject to considerations of fundamental fairness." Section 5:03 has been cited approvingly, see Frizado v. Frizado, 420 Mass. 592, 598 n.5 (1995) (previous version); F.A.P. v. J.E.S., 87 Mass. App. Ct. 595, 602 (2015), and has been reiterated many times, frequently in decisions issued pursuant to our rule 1:28. Neither party addresses the issue on appeal.

incorporated the parenting plan set out in the parties' marital settlement agreement, and provided that the children were to live with the plaintiff, and that the defendant was to "have reasonable rights of contact with the children." Shortly after the divorce, the defendant moved to Florida.

In September, 2018, the plaintiff, then living in Massachusetts, applied for this restraining order. In her affidavit, she described an escalating series of incidents with the defendant. Although none of the incidents involved an act of physical or sexual violence or an explicit threat to hurt her or the children physically, she testified at the ex parte hearing that, because the defendant's pattern of behavior was "escalating," she felt unsafe "now that there are allusions to guns and mentions of my life, accidentally being killed."

The plaintiff's testimony at the hearing after notice supplemented her earlier affidavit. Specifically, she alleged a series of incidents involving the defendant. On May 1, 2018, she called the Bangor, Maine police to enforce a "no trespass" order that her mother had obtained against the defendant because he told her that he was going to her mother's house to take the children. Four days later, the defendant told her, "this is war," and that he would "stop at nothing to get his children." In the past, the defendant had told the plaintiff that, "if his enemies were in his vicinity, he would physically harm them."

On May 18, 2018, during a telephone conversation, "without provocation," the defendant told the plaintiff, "I sleep with my gun out. It's quite legal to have a gun in Florida. I just applied to carry it concealed." This alarmed her "[b]ecause it was out of context; there was no reason" to tell her that.

On September 8, 2018, during a FaceTime[3] call with the children, "he turned his camera to focus on his gun which was placed on his bedside table." The plaintiff stated that she was outraged for her children, who she believed had never seen a gun, and also for herself; she also stated that, "[i]n all the years we were together, I never saw his gun; it was always kept locked away." On September 19, 2018, in an e-mail, the defendant stated, "[S]hould you have a heart attack, accidentally get killed god forbid, I will not know who has my children."

During this time, the affidavit recited, the defendant also threatened various actions against the plaintiff as well as against her family and friends. For example, he threatened to have her brother court-martialed from the United States Marine Corps, and he threatened to bring a civil action against her mother for obtaining the no-trespass order. Finally, days

[3] FaceTime is a type of "face-to-face video technology." Commonwealth v. Almonor, 482 Mass. 35, 68 (2019) (Lenk, J., concurring).

before the plaintiff sought the restraining order, the defendant sent private, embarrassing, and untrue accusations about her mental and physical health to her employer.[4]

At the hearing, the plaintiff also testified that the defendant had not seen the children since July 2018 because "[h]e finds the terms of the divorce decree too restrictive."[5] After a disagreement about the terms of a visit, the defendant told her that "[she]'d be sorry if [she] called the police." She also said that, before she obtained the restraining order, she received many text messages from the defendant, despite her request that he contact her by e-mail.

The plaintiff testified that she was particularly alarmed because the defendant's behavior had escalated from threatening to make false claims about her and her family and friends; "[he] ha[d] started to execute on his threats, from sending the letter to [her] employer to reporting [her friend] to the National Security Council, to -- and possibly interfering with [her] brother's Marine Corps career." She described the defendant's behavior as "erratic and . . . escalating," and said it made her

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[4] The letter was sent anonymously, but the plaintiff recognized the handwriting on the envelope; she also maintained that the letter contained facts that only the defendant would know.

[5] The defendant was living in Florida. The divorce judgment permitted him two three-night visits per month. According to the plaintiff, he sought "six night visits"; she did not agree.

afraid for her physical safety. One example was a recent, unannounced trip to Massachusetts from Florida. Despite the fact that the plaintiff had offered repeatedly for the defendant to see the children in Massachusetts, he had consistently refused. The week before the hearing after notice, she learned that he had come to Massachusetts when she "noticed three missed calls from the [local] [p]olice [d]epartment on my cell phone towards the end of the workday." She returned one of the calls and learned that the defendant had gone to the police department at 10:30 in the morning. This shocked her because she had heard from him daily and he had never told her he was coming to Massachusetts. Finally, on cross-examination, the plaintiff testified that the defendant told her, "If you go to the police, you'll be sorry."

The defendant testified that he came to this country as an immigrant when he was fourteen years old and served thirty-four years in the United States Marine Corps, rising to a very high rank. He retired from the military in 2007 and worked for a large corporation for eight years until he retired and became involved in politics; he was later appointed to a significant position in the United States State Department.

The defendant also testified regarding the incident involving the Bangor police. He explained that he first went to the police because he was concerned about his children, and that

he was told by a police officer that he could go to the plaintiff's mother's house where the plaintiff had said the children were. After he arrived at the house, other police officers arrived. He denied threatening the plaintiff with physical harm, but agreed that he had continued to send e-mails and text messages to her despite her requests to stop.

Discussion. A plaintiff who seeks a restraining order under G. L. c. 209A, whether the initial, ex parte order, or its extension, carries the burden of proving by a preponderance of the evidence that she is suffering from abuse. See Frizado v. Frizado, 420 Mass. 592, 596 (1995). "Abuse" is defined as, inter alia, "placing another in fear of imminent serious physical harm." G. L. c. 209A, § 1. "When a person seeks to prove abuse by fear of imminent serious physical harm, our cases have required in addition that the fear be reasonable" (quotation omitted). Iamele v. Asselin, 444 Mass. 734, 737 (2005).

"'We review . . . for an abuse of discretion or other error of law.' E.C.O. v. Compton, 464 Mass. 558, 561-562 (2013). 'We accord the credibility determinations of the judge who "heard the testimony of the parties . . . [and] observed their demeanor" . . . the utmost deference.' Ginsberg v. Blacker, 67 Mass. App. Ct. 139, 140 n.3 (2006), quoting Pike v. Maguire, 47

Mass. App. Ct. 929, 929 (1999)." Yahna Y. v. Sylvester S., 97 Mass. App. Ct. 184, 185 (2020).

"In determining whether an apprehension of anticipated physical force is reasonable, a court will look to the actions and words of the defendant in light of the attendant circumstances." Ginsberg, 67 Mass. App. Ct. at 143, quoting Commonwealth v. Gordon, 407 Mass. 340, 349 (1990). "A central feature of c. 209A 'abuse' is that the victim's fear or apprehension caused by the defendant's words or conduct 'must be more than subjective and unspecified; viewed objectively . . . the plaintiff's apprehension that force may be used [must] be reasonable'" (internal quotation and citation omitted). Ginsberg, supra, quoting Vittone v. Clairmont, 64 Mass. App. Ct. 479, 486 (2005).

On the other hand, we also said in Ginsberg that, for the plaintiff's fear of imminent serious physical harm to be reasonable, it is not necessary that there be a history -- or even a specific incident of physical violence. 67 Mass. App. Ct. at 145. We recently reiterated this principle. See G.B. v. C.A., 94 Mass. App. Ct. 389, 393 (2018) ("Our cases are clear that '[i]n evaluating whether a plaintiff has met her burden, a judge must consider the totality of the circumstances of the parties' relationship.' Iamele, 444 Mass. at 740. This is so because '[s]uch consideration furthers the Legislature's purpose

to establish a statutory framework "to preserv[e] . . . the fundamental human right to be protected from the devastating impact of family violence."' Id., quoting Champagne v. Champagne, 429 Mass. 324, 327 [1999]. Indeed, in evaluating whether an initial 209A order or its extension should issue, the judge must 'examine the words and conduct "in the context of the entire history of the parties' hostile relationship."' [Vittone, 64 Mass. App. Ct. at 487], quoting [Pike, 47 Mass. App. Ct. at 930]"). See also Parreira v. Commonwealth, 462 Mass. 667, 673 (2012) ("'In determining whether an apprehension of anticipated physical force is reasonable, a court will look to the actions and words of the defendant in light of the attendant circumstances.' [Gordon, 407 Mass. at 349]. As has been indicated before, erratic and unstable behavior, in the context of an escalating and emotional argument, can create a reasonable apprehension that 'force might be used.' Commonwealth v. Robicheau, 421 Mass. 176, 181-182 [1995]. See, e.g., [Ginsberg, 67 Mass. App. Ct. at 143-144]").

In this case, it is clear that the judge found the plaintiff's testimony credible, including her testimony that the defendant's erratic and escalating behavior caused her to be afraid for her safety; we defer to that determination. The question remaining is whether her fear was objectively reasonable, and, on this record, we cannot say that the judge

erred in concluding that it was. See G.B., 94 Mass. App. Ct. at 396 ("where we are able to discern a reasonable basis for the order in the judge's rulings and order, no specific findings are required").

We have in mind particularly the defendant's references to his purchase of a gun and his statement that he was sleeping with it and seeking a permit to carry it concealed. We also consider significant the defendant's inexplicable, but apparently deliberate, decision to display the weapon to his very young children on FaceTime (as well as to the plaintiff, who "was holding the phone as [she] usually do[es], so that [the defendant] could see [their] daughters"). Further, this unusual behavior arose in the context of a vigorous dispute over parenting time with the minor children. See Pike, 47 Mass. App. Ct. at 930 (acknowledging and approving consideration of "the notoriously volatile nature of child custody and visitation battles"). Finally, the defendant's expressed concern about the fact that the plaintiff might die unexpectedly, while perhaps understandable in isolation, also can reasonably be considered disturbing, when taken in the context of everything else that was happening.

The defendant examines each of the plaintiff's other allegations and contends that none of them support the issuance of the order. He is correct that no one allegation, not the

threats to bring legal process, the repeated e-mails or text messages, the sudden and unannounced trip from Florida to Massachusetts, or the anonymous letter to the plaintiff's employer would, by itself, support the issuance of the order.

Nonetheless, the evidence was properly admitted and considered to give the judge a complete history of the progression of the relationship. We are satisfied that "[t]hese factors, taken together, in the context of the entire history of the parties' hostile relationship, provided sufficient basis for the . . . extension of the protective order." Pike, 47 Mass. App. Ct. at 930. See C.R.S., 92 Mass. App. Ct. at 563 ("'In acting on an original G. L. c. 209A application or an application for an extension, a judge has wide discretion, . . . and can properly take into account the entire history of the parties' relationship, see [Pike, supra at 930. . . .' Smith v. Jones, 75 Mass. App. Ct. 540, 544 [2009]").

Order dated October 17, 2018, affirmed.