COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-759

A.C.

vs.

S.W.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following a hearing, a District Court judge denied the plaintiff's request to enter a permanent abuse prevention order under G. L. c. 209A (209A order). He also terminated the 209A order which had been in effect since 2017. The plaintiff appeals claiming that the judge erred by basing his decision solely on the defendant's compliance with the terms of the 209A order, and failing to adequately consider that the defendant's prior physical abuse supported the conclusion that she had a reasonable fear of imminent serious physical harm. She further claims that the judge was unable to assess the totality of the circumstances because the hearing was conducted by telephone. We affirm.

Background. The plaintiff and the defendant dated for approximately eleven years. The plaintiff alleged that

throughout the relationship the defendant hurt her "too many [times] to count." The plaintiff sought a 209A order after the defendant assaulted her in their home on March 21, 2017. The plaintiff called the police and when they arrived, she reported that the defendant had hit her multiple times and strangled her.[1] Although not present when the police arrived, the defendant was eventually charged with assault and battery. He was placed on and successfully completed a period of pretrial probation, resulting in dismissal of the criminal case.

The plaintiff applied for and received an ex parte 209A order on April 6, 2017, with a return date of April 18, 2017. After that hearing, at which both parties appeared, the order was extended until April 17, 2018. It was thereafter extended for additional one-year terms in 2018 and 2019. At the hearing at issue here, which occurred on May 5, 2020, the plaintiff asked that the 209A order be made permanent or extended for a period of five years. After a telephonic hearing at which both parties testified, the judge denied the plaintiff's request and terminated the order. This appeal followed.

Discussion. We review the judge's decision whether to extend a 209A order for an abuse of discretion or other error of law. See Crenshaw v. Macklin, 430 Mass. 633, 636 (2000). To

[1] The police report noted bruising on the plaintiff's arms and legs.]

the extent that the judge's order depended on assessments of the weight and credibility of the parties and their evidence, "[w]e accord the credibility determinations of the judge who 'heard the testimony of the parties . . . [and] observed their demeanor' . . . the utmost deference." Noelle N. v. Frasier F., 97 Mass. App. Ct. 660, 664 (2020), quoting Ginsberg v. Blacker, 67 Mass. App. Ct. 139, 140 n.3 (2006).

"At a hearing to extend a 209A order, the burden is on the plaintiff to establish facts justifying the extension by a preponderance of the evidence. . . . The standard for obtaining an extension of an abuse prevention order is the same as for an initial order -- most commonly, the plaintiff will need to show a reasonable fear of imminent serious physical harm. . . . It is the totality of the conditions that exist at the time that the plaintiff seeks the extension, viewed in the light of the initial abuse prevention order, that govern" (quotations and citations omitted). S.V. v. R.V., 94 Mass. App. Ct. 811, 813 (2019).

"If the extension request is based on past physical abuse, . . ., 'the failure of the plaintiff to have an objectively reasonable fear of imminent serious physical harm does not by itself preclude extension of an abuse prevention order. Faced with an extension request in such a circumstance, the judge must make a discerning appraisal of the continued need for an abuse

prevention order to protect the plaintiff from the impact of the violence already inflicted.'" Id., quoting Callahan v. Callahan, 85 Mass. App. Ct. 369, 374 (2014). "The infliction of some wounds may be so traumatic that the passage of time does not mitigate the victim's fear of the perpetrator." Id., quoting Vittone v. Clairmont, 64 Mass. App. Ct. 479, 489 (2005).

In considering a request for an extension of a 209A order, the judge should consider, among other things, "the defendant's violations of protective orders, ongoing child custody or other litigation that engenders or is likely to engender hostility, the parties' demeanor in court, the likelihood that the parties will encounter one another in the course of their usual activities (e.g., residential or workplace proximity, attendance at the same place of worship), and significant changes in the circumstances of the parties." Iamele v. Asselin, 444 Mass. 734, 740 (2005). "No one factor is likely to be determinative." Id.

In this case, in addition to hearing from both parties, the judge had the plaintiff's affidavit filed in connection with her initial complaint, her supplemental affidavit dated April 16, 2019, with attachments,[2] and her affidavit dated May 4, 2020.

[2] The attachments included a police report, photographs, and a letter from the plaintiff's treatment provider indicating that she suffers from "[posttraumatic stress disorder], anxiety[,]

It was also undisputed that the parties had no contact with one another throughout the over three-year duration of the 209A orders. The plaintiff testified that the defendant "continuously references [her] on his social media." The only evidence of such references, however, came when the plaintiff's attorney read into the record a post on the defendant's Facebook page dated January 1, 2020.[3] The plaintiff's attorney agreed that the post did not mention the plaintiff by name and did not contain a "true threat," however she argued that the post is evidence that the defendant is not "fully over this relationship." The judge gave no weight to the post and confirmed with the plaintiff that the defendant did not send any messages directly to her.

Based on the foregoing, the judge found that "[t]here's no doubt that the plaintiff is in some sort of a subjective fear but that is not the standard." He correctly noted that the question presented was whether "given the present circumstances, is there an objectively reasonable basis for that fear going forward." Contrary to the plaintiff's contention, the judge

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and depression associated with having been in a long-term abusive relationship."

[3] The defendant testified that he believed the parties had each "blocked" one another such that they would be unable to see each other's Facebook posts. In order to see the post at issue here, the defendant testified that because of this, the plaintiff would have had to intentionally navigate to his Facebook page.

considered the basis for the original 209A order, the three one-year extensions of the 209A order, the resolution of the criminal case, and the lack of contact between the parties. We discern no error in the judge's conclusion that there was no evidence of a continuing need for the order.[4] See Iamele, 444 Mass. at 739. See also S.V., 94 Mass. App. Ct. at 813-814.

Finally, the plaintiff asserts error in the manner in which the hearing was conducted. She claims that a telephone hearing did not allow the judge to consider the totality of the circumstances, including assessing the parties' demeanor. However, this claim is waived because the plaintiff did not object to a telephone hearing in the lower court. See G.B. v. C.A., 94 Mass. App. Ct. 389, 397 (2018) ("An issue not raised or argued below may not be argued for the first time on appeal" [citation omitted]).

We note however, that the hearing, which occurred during the height of the COVID-19 pandemic, was held in accordance with protocols set forth in orders promulgated by the Supreme Judicial Court and the Chief Justice of the District Court.

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[4] The judge issued written findings on what appears to be a preprinted form entitled "Findings and Order re: Request for Issuance Or Extension Of An Abuse Prevention Order Pursuant to G. L. C. 209A" used in the Gloucester division of the District Court. Although the written findings, considered together with the judge's oral findings following the hearing, support his decision, we note that the (preprinted) language does not track the standard as set forth in Callahan, 85 Mass. App. Ct. at 374.

More specifically, at the time of the hearing, District Court Standing Order 5-20 (April 28, 2020), allowed 209A hearings to be conducted by telephone.

Order dated May 5, 2020, terminating G. L. c. 209A order affirmed.

By the Court (Vuono, Blake & Englander, JJ.[5]),

Joseph F. Stanton

Clerk

Entered: October 13, 2021.

[5] The panelists are listed in order of seniority.