COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-795

K.M.

vs.

M.S.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant appeals from a Probate and Family Court judge's issuance of a series of abuse prevention orders prohibiting, inter alia, contact between the defendant and the parties' two minor children.[1] For the reasons that follow, we affirm.

Background. 1. The proceedings. The defendant does not dispute the following facts, which we draw from the record, reserving some for later discussion. On December 23, 2020, the plaintiff filed a complaint for protection from abuse against the defendant, her former husband. The plaintiff filed an affidavit in support of the complaint.[2] The judge issued an ex

[1] The plaintiff, K.M., has not appeared in this appeal.

[2] The copy of the affidavit included in the record on appeal appears to be incomplete.

parte order; its provisions included the requirement that the defendant stay away from the plaintiff and the children and have no contact with any of them.[3] The judge scheduled the case for a January 7, 2021 hearing after notice to be held "via [Z]oom."[4]

Both parties appeared for the January 7, 2021 hearing represented by counsel. The defendant requested an evidentiary hearing, which the judge scheduled for January 26, 2021. The judge then issued an order (January 7 order) mirroring the terms of the ex parte order, keeping those terms in place until the evidentiary hearing date, which the judge set for January 26, 2021. After the hearing on January 26, at which both parties appeared with counsel, the judge issued another order, on the same terms as the preceding orders, to expire in one year (January 26 order).

The defendant filed a motion for relief from judgment, and, five days later, filed a notice of appeal of the two orders after notice.[5]

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[3] The defendant has not provided us with transcripts of any of the relevant proceedings.

[4] "'Zoom' refers to [an] Internet-based video conferencing platform, Zoom Video Communications, Inc." Committee for Pub. Counsel Servs. v. Barnstable County Sheriff's Office, 488 Mass. 460, 473 n.16 (2021), citing Vazquez Diaz v. Commonwealth, 487 Mass. 336, 336, 338-340 (2021).

[5] The record does not reflect whether the judge ruled on the defendant's motion for relief from judgment. In this circumstance, we consider the notice of appeal as to the orders after notice to have been timely and the appeal properly before us. But see Mass. R. A. P. 4 (a) (3), as appearing in 481 Mass.

2. The judge's findings. In concluding that the plaintiff met her burden, the judge found that as of the January 7, 2021 extension hearing, the defendant had "exhibited a . . . pattern of threatening behavior for several years," including "openly express[ing] suicidal threats," telling the plaintiff that "he was researching hiring an assassin," "express[ing] homicidal ideations towards the [p]laintiff's family," and making threats to kill the plaintiff's husband.

In addition to this history of concerning behavior, the judge credited the plaintiff's testimony that after a September 2020 dispute about visits with the children, the defendant sent a message to the plaintiff that included a video recording of a song entitled, "Order of Death," the lyrics of which described "stalking someone outside their window with a knife" and which stated that "this is what you want/this is what you get." The judge also noted that the defendant did not request that the order allow contact with the children.

Discussion. 1. Standard of review. As relevant here, a judge may issue a temporary order under G. L. c. 209A "if the plaintiff proves, by a preponderance of the evidence, that the defendant has . . . placed the plaintiff in reasonable fear of

1606 (2019) ("A notice of appeal filed before the disposition of a [rule 60] motion . . . shall have no effect"); Eyster v. Pechenik, 71 Mass. App. Ct. 773, 779-780 (2008).

imminent serious physical harm," MacDonald v. Caruso, 467 Mass. 382, 386 (2014), citing G. L. c. 209A, § 3, and may extend an ex parte order on a finding that the plaintiff continues to require protection from abuse. See Iamele v. Asselin, 444 Mass. 734, 739 (2005). We review the issuance of a 209A order "for an abuse of discretion or other error of law" (citation omitted). Noelle N. v. Frasier F., 97 Mass. App. Ct. 660, 664 (2020).

2. Ex parte order. To the extent that the defendant challenges the propriety of the ex parte order, that order was superseded by the January 7 and January 26 orders, each of which issued after notice. Accordingly, an appeal of the ex parte order is moot and the defendant is not entitled to further review. See C.R.S. v. J.M.S., 92 Mass. App. Ct. 561, 563-564 (2017).

3. January 7 order. The defendant's challenge to the January 7 order -- which, as we have noted, merely kept in place the terms of the ex parte order pending the January 26 evidentiary hearing -- fares no better. Without a transcript, we are unable to assess what evidence the judge considered before issuing the order or whether the defendant acquiesced to continuation of the ex parte order's terms. To the extent that the judge abused her discretion in continuing the order (a conclusion we do not reach), there is at least some doubt

concerning whether the January 7 order is separately reviewable.[6] If so, it would presumably still be moot in light of the judge's issuance of a subsequent order, after a hearing and with notice, on January 26. See C.R.S., 92 Mass. App. Ct. at 564-565.

Additionally, in the absence of a transcript of the January 7 hearing, we lack the record necessary to assess the defendant's challenges to the sufficiency of the plaintiff's showing of both "reasonable fear" or "imminent serious physical harm." MacDonald, 467 Mass. at 386. See G. L. c. 209A, §§ 1, 3; Cameron v. Carelli, 39 Mass. App. Ct. 81, 84 (1995) (lacking an adequate transcript, "we are unable to address the issue of the sufficiency of evidence"); Shawmut Community Bank, N.A. v. Zagami, 30 Mass. App. Ct. 371, 372-373 (1991), S.C., 411 Mass. 807 (1992) ("It is the obligation of the appellants to include in the appendix those parts of the [lower court proceedings] . . . which are essential for review of the issues raised on appeal").

4. January 26 order. The January 26 order, while plainly reviewable, ultimately fails based on the deficient record on appeal. Here, again, we lack a transcript of the relevant hearing. While we do have the benefit of the judge's findings, the findings are not a substitute for the complete record of the

[6] As we have noted, the January 7 order was merely a continuation of the ex parte order.

evidence presented at the hearing; without a transcript of the hearing, we are unable to assess whether the evidence supported the judge's conclusion that the plaintiff and the parties' children suffered or required protection from "abuse" resulting from the defendant's conduct. See G. L. c. 209A, §§ 1, 3. We are likewise unable to determine what evidence, other than the plaintiff's testimony, was offered at the hearing and whether, as the defendant contends, the judge considered evidence outside the hearing record;[7] whether the defendant objected to any evidence that was offered and that he now challenges on appeal; or what arguments the parties made to the judge. See Cameron, 39 Mass. App. Ct. at 84; Shawmut Community Bank, N.A., 30 Mass. App. Ct. at 372–373. Based on these limitations, the

[7] Specifically, the defendant objects to the consideration of certain pleadings in the parties' divorce action. Although it has no impact on our assessment of his arguments, we note that the defendant's shorthand for "outside the hearing record" is not acceptable and should not be repeated.

defendant's challenge to the January 26 order fails.[8]

Conclusion. The extension orders dated January 7, 2021, and January 26, 2021, are affirmed.

So ordered.

By the Court (Milkey, Hand & Brennan, JJ.[9]),

Joseph F. Stanton

Clerk

Entered: May 25, 2022.

[8] For the sake of completeness, we note that the findings the judge made indicate that there was a sound and adequate basis for issuance of that order. See MacDonald, 467 Mass. at 386, citing G. L. c. 209A, § 3 (order proper under G. L. c. 209A "if the plaintiff proves, by a preponderance of the evidence, that the defendant has . . . placed the plaintiff in reasonable fear of imminent serious physical harm"); Iamele, 444 Mass. at 739-740 (judge considers "totality of the circumstances of the parties' relationship" in assessing reasonable fear of "imminent serious physical harm" [citation omitted]); Smith v. Joyce, 421 Mass. 520, 523 (1995) (independent support required to justify G. L. c. 209A order requiring parent to stay away from and have no contact with own minor children).

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