

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. KEN SANDERS

CASE NO. [REDACTED]
[REDACTED]

COURT REPORTER: Digitally Recorded
Courtroom - 774

DATE: June 01, 2017

[REDACTED]
Plaintiff

Edina A. Strum, Esq. counsel for Plaintiff

and

[REDACTED]
Defendant

Jacob M Amaru, Esq. counsel for Defendant

MINUTE ENTRY

CONTESTED ORDER OF PROTECTION (CONTINUED)

Both parties are present.

Plaintiff's exhibit 24, being a copy of the petition for Dissolution of Marriage with minor children for cause number [REDACTED], is identified.

Defendant's exhibits AH through AJ are identified as follows:

AH. Multiple copies of email correspondence

AI. Copy of email correspondence

AJ. Copy of email correspondence

The Court notes the purpose of today's hearing.

Mr. Amaru requests to re-open his examination of the Defendant to which Ms. Strum states no objection.

The Court advises the parties that they are still under oath.

FOR THE DEFENDANT (CONTINUED):

[REDACTED] previously sworn, resumes the witness stand, is further examined, further cross-examined

Defendant's exhibits AJ, AH, AI, and G, previously identified, are admitted.

Plaintiff's exhibit 24, previously identified, is admitted

Defendant rests.

IN REBUTTAL:

Desirree Carlin-Rosales
Deputy Clerk

MINUTE ENTRY

[REDACTED] previously sworn, is further examined, and further cross-examined.

Both sides rests.

The Court takes a brief recess.

The hearing resumes.

Same parties and counsel are present. The hearing is digitally recorded.

Counsel make closing arguments.

The Court defers ruling on the Order of Protection until later this date.

LATER SAME DATE:

THE COURT FINDS as follows:

1. The sole legal basis alleged by the Plaintiff for the Order of Protection is threatening or intimidating pursuant to A.R.S. § 13-1202.
2. Threatening or Intimidating can be committed through word or conduct.
3. Pursuant to A.R.S. § 13-1202(A), a person commits threatening or intimidating if, through his words or conduct, the person threatens or intimidates:
 - a. To cause physical injury or serious property damage to another
 - b. To cause serious public inconvenience (i.e. evacuation of building)
 - c. To cause physical injury or serious property damage to another in the context of a criminal gang
4. Plaintiff alleges that Defendant threatened or intimidated to cause physical injury to her.

To prove threatening or intimidating there must be a “true threat” requiring proof that a “reasonable person” would perceive the statement or conduct “as a genuine threat to inflict harm.” *In re Ryan A.*, 202 Ariz. 19, 22, ¶ 11, 39, P.3d 543, 546 (App. 2002).

5. Plaintiff claims that Defendant’s demeanor at mediation on March 9, 2017, made her feel threatened or intimidated. Victor Bowleg, the mediator, testified that Defendant might have been difficult during mediation, but Defendant did not threaten anyone or exhibit any concerning behaviors during the session. Mr. Bowleg also testified that Defendant was not “verbally aggressive” during mediation. While Mr. Bowleg did testify that he required Defendant to wait for ten minutes after Plaintiff left mediation, he also testified that such a precaution was fairly typical. In short, Mr. Bowleg testified that nothing out of the ordinary occurred at the parties’ mediation.

MINUTE ENTRY

6. Nonetheless, Plaintiff testified that she was frightened of Defendant due to his behaviors during mediation. Plaintiff described Defendant as having “palpable rage” that “seethes from his skin.” She testified that she was frightened by Defendant’s insistence that he be allowed to leave mediation first, speculating that he wanted to do so in order to lay in wait for the Plaintiff outside of the mediation building.
7. Plaintiff argues that the Court must evaluate her allegations regarding Defendant’s behavior at mediation through the lens of Defendant’s history and pattern of coercive control and “gas lighting” of Plaintiff. Little evidence, however, was presented of any alleged coercive control by Defendant. As for evidence of “gas lighting”, Plaintiff points to incidents that occurred in 2014. In neither instance did the events that occurred give this Court reason to believe that Defendant has history of controlling, “gas lighting”, or otherwise victimizing Plaintiff. Rather, the instances reveal the level of mistrust and gamesmanship exhibited by each party.
8. Plaintiff also argued that the Court should consider Defendant’s behavior immediately after mediation, as well as his unrelated criminal history as context for her fear of Defendant. Defendant did behave angrily at the children’s school immediately following mediation. However, there is no clear correlation between what happened at mediation and what happened at the school. In fact, there is evidence to suggest that Defendant had independent reasons for being frustrated with the school due to its failure to provide him with requested documents. As for Defendant’s criminal history, it is true that Defendant has demonstrated extremely poor judgment in the past couple of years, all directly related to Defendant’s excessive drinking. None of his arrests or other contacts with law enforcement, however, involved Plaintiff and the Court does not find that such unrelated instances would cause a reasonable person to feel threatened or intimidated by Defendant.
9. Plaintiff points to Defendant’s reaction to her request to modify parenting time as context for her fear of Defendant. To the extent the letters and emails sent to Plaintiff’s attorney could be perceived as threatening, they were sent by Defendant’s attorney, not Defendant. The Court is not aware of any legal authority that allows the actions of another to be imputed to a party for the purpose of establishing threatening or intimidation.

MINUTE ENTRY

10. For the foregoing reasons, Plaintiff has not proven by a preponderance of the evidence that Defendant either committed an act of domestic violence against Plaintiff in the last 12 months, or that he may commit such an act against Plaintiff.

IT IS THEREFORE ORDERED that the Order of Protection issued March 16, 2017 is hereby DISMISSED

HEARING ORDER SIGNED.

Each party signs an Acceptance of Service and receives a copy of the Hearing Order in open court this date.

FILED IN COURT: Hearing Order, Acceptance of Service (2)

As to attorney's fees,

THE COURT FINDS as follows:

1. Both parties requested an award of attorney's fees. As the prevailing party, Defendant is eligible for such an award. Rule 39(b), Ariz.R.Protect.Ord.Pro, in determining whether to award attorney's fees, the Court may consider the following factors:
 - a. The merits of the claim asserted by the unsuccessful party
 - b. Whether an award would pose an extreme financial hardship on unsuccessful party
 - c. Whether the award may deter others from making valid claims
2. While the Court has dismissed the Order of Protection, which does not necessarily mean that Plaintiff's claims were meritless. The Court does not find, as Defendant suggests, that Plaintiff filed for an Order of Protection in bad faith or in retaliation against Defendant for not acquiescing to her demands in mediation. The Court finds that the parties have a dysfunctional and toxic relationship as evidenced by their surreptitious recordings of each other. Plaintiff's Order of Protection is but the latest example of the parties' ongoing dysfunction.
3. Moreover, as both parties' attorneys remarked, this hearing took an inordinately long time. Both parties bear some responsibility for the length and expense of these contested proceedings. As such, it would not be proper to make one party bear the sole brunt of the expenses.

IT IS THEREFORE ORDERED that Defendant's request for attorney's fees is denied. Each side shall bear its own costs and fees.

The Court notes that this is a final and appealable order and in the event either party wishes to appeal this order, he/she shall file a Notice of Appeal within 30 days of this date.

Desirree Carlin-Rosales
Deputy Clerk

MINUTE ENTRY

Page 5

Date: June 01, 2017

Case No.: [REDACTED]

cc: Hon. Ken Sanders
Edina A. Strum, Esq.
Jacob M Amaru, Esq.

Desirree Carlin-Rosales
Deputy Clerk