STATE OF MICHIGAN

COURT OF APPEALS

TAMMY YNETTE BAKER, Petitioner-Appellee,	UNPUBLISHED January 26, 2010
v	No. 288606 Kent Circuit Court
THERRESA HOLLOWAY, Respondent-Appellant.	LC No. 08-007173-PH

Before: Murphy, C.J., and Jansen and Zahra, JJ.

PER CURIAM.

Respondent, acting in propria persona, appeals as of right the trial court's order denying her motion to terminate petitioner's ex parte personal protection order (PPO). In lieu of receiving a hearing on the merits of whether the PPO should have been terminated, respondent was ordered to mediate her dispute with petitioner. On appeal, respondent claims the circuit court reversibly erred by requiring her to enter mediation because she was entitled to a prompt hearing on the merits of the PPO. We hold that mediation may not be imposed as a condition to having a hearing on the merits of a PPO. We vacate the order denying respondent's motion to terminate the PPO and remand for an evidentiary hearing to determine whether the PPO should be terminated.

I. Basic Facts and Procedure

The parties have been neighbors for decades. In July 2008, petitioner was granted an ex parte PPO, based in part on her allegation that respondent threatened to harm her with a gun. Respondent alleged that petitioner lied, timely objected to the issuance of the PPO and invoked her statutory right to a hearing on the merits. MCL 2950a (11). The matter came to a hearing before a referee on August 12, 2008. The referee began by inviting petitioner to state why she thought the PPO should remain in place. Petitioner said that respondent was "going around her neighborhood talking about me, you know, trying to get other people mad at me, it is childish. It needs to stop today." Thereafter, the referee noted that the parties should be able to figure out how to get along. The referee without hearing from respondent informed the litigants that he wanted them to mediate their dispute:

> Referee: [Respondent,] I don't mean to not hear from you this morning; but the two of you are going to continue to reside in your homes for a long period of time

> and you are going to have to find a way to mutually co-exist peacefully in your neighborhood with one another . . . .
>
> What . . . I would like to do is send you to the Dispute Resolution Center. It is free, it is mediation, you meet with a mediator, [and] you reach an agreement between yourselves. You sign a contract of how you are going to peacefully co-exist. I have sent multiple PPOs to the Dispute Resolution Center, all but one have come back with an agreement. I am confident that two mature women will be able to sit down and talk with a trained mediator and reach an agreement.

The referee asked respondent how she felt about mediation, and the following exchange occurred:

> Respondent: I am fine with it. But, your honor, my thing is I don't talk to her . . . so therefore, there is not a problem. All I need for her to do is stay out of my business.
>
> Referee: Well, you know, take that up with the mediator. And run that by the mediator and if you two can, you know, agree to do that and abide by those terms, you guys will get along just fine.

Thereafter, the referee brought the hearing to a close:

> Referee: [Respondent,] the PPO is still technically in place until we get a signed mediation agreement.
>
> Respondent: Is there a way that we can resolve this today though, your honor?
>
> Referee: I am not going to do that.
>
> * * *
>
> Respondent: I wish you would have let me talk, sir. You have no idea what I have to deal with.

The parties did not mediate. Respondent immediately filed a motion seeking de novo review by the circuit court of the referee's decision. Respondent stated that the PPO should not have been issued because petitioner's allegations were false.

Respondent's motion for review of the referee's decision was heard on August 29, 2008. The circuit court refused to rule on the merits of the PPO. The circuit court observed that the litigants had been ordered to mediate and they had not done so. Respondent asserted that she was objecting to being ordered to mediate, to which the circuit court replied, "[y]ou're going to mediation." Respondent refused to mediate, indicating, there was "nothing to mediate." The circuit court replied, "Okay, fine. Then the PPO stays in force."

II. Analysis

A PPO is an injunctive order. MCL 600.2950a(29)(c). The grant of an injunctive order "is within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion." *Pickering v Pickering*, 253 Mich App 694, 700; 659 NW2d 649 (2002). An abuse of discretion occurs when the trial court's decision results in an outcome falling outside the principled range of outcomes. *Radeljak v DaimlerChrysler Corp*, 475 Mich 598, 603; 719 NW2d 40 (2006).

When seeking an ex parte PPO, the petitioner must show "specific facts shown by verified complaint, written motion, or affidavit that immediate and irreparable injury, loss, or damage will result from the delay required to effectuate notice or that the notice will precipitate adverse action before a personal protection order can be issued." MCL 600.2950a(9); see also MCR 3.703(G) and MCR 3.705(A)(2). Here, the allegations sworn by petitioner were sufficient for the ex parte PPO to issue. According to the affidavit, respondent had threatened petitioner with a gun.

However, within 14 days of being served with the PPO, respondent timely filed a motion to terminate the PPO, as it was her right to do. MCL 600.2950a(10). When such a motion is filed, the circuit court must schedule and conduct a hearing on the merits of the PPO. MCL 600.2950a(11); MCR 3.707(A)(2). "[T]he burden of justifying continuation of a PPO granted ex parte is on the applicant for the restraining order." *Pickering, supra* at 699, citing MCR 3.310(B)(5).

Here, while a hearing was held on respondent's motion to terminate the PPO, respondent correctly points out that the hearing referee did not hear her defense. We note that prior to ordering mediation, the hearing referee arguably sought respondent's consent to mediation. Thus, we must determine whether the referee solicited and obtained a valid waiver from respondent of her statutory right to a hearing on the merits of the PPO. We conclude that the hearing referee did not obtain from respondent a valid waiver of her right to a hearing on the merits of the PPO. The hearing referee failed to inform respondent, who was without legal counsel, that the PPO would remain in effect during the mediation process. It is clear from the record that respondent objected to mediation upon learning that the PPO would remain in effect pending mediation. By immediately filing a motion for review of the order of the referee, it is clear that respondent did not intend to acquiesce the continuance of the PPO while mediation was pending. Significantly, the circuit court, on review of the referee's order, did not conclude that respondent waived her right to a hearing on the merits. Instead, it appears the circuit court concluded that court ordered mediation is reason enough not to rule on the merits of the PPO.

Having concluded that respondent did not waive her right to a hearing on the merits of the PPO, we must next determine whether anything presented to the hearing referee or the circuit court would support the continuance of the PPO. On the record before this Court there exists nothing that would justify the continuance of the PPO. Rather than hearing and deciding whether the PPO was properly issued, the referee cut short the proofs presented by petitioner, declined to take proofs from respondent and entered an order requiring mediation. The circuit court upheld that order, declining to address the merits of the PPO until mediation had been attempted.

The procedure applicable to PPO hearings is governed by MCR 3.707(A)(2), which provides in pertinent part that "[t]he court *must schedule and hold a hearing* on a motion to modify or terminate a personal protection order within 14 days of the filing of the motion . . ." (emphasis added). Implicit in the court rule and the PPO statute is the notion that the court will promptly determine whether the PPO was properly issued. Based on the proofs presented, a court may continue, modify or terminate the PPO. However, a court may not set a matter for hearing only to notify the litigants that they must submit their dispute to mediation.

Here, by requiring mediation and keeping the PPO in place, the trial court effectively denied respondent her statutory right to a prompt and timely review of the PPO. This amounted to an abuse of discretion. We recognize that "[f]ailure of a party or the party's attorney or other representative to attend a scheduled ADR proceeding, as directed by the court, *may* constitute a default to which MCR 2.603 is applicable or a ground for dismissal under MCR 2.504(B)." MCR 2.410(D)(3)(a) (emphasis added). However, most instances where ADR is attempted or appropriate do not occur in cases where there exists a specific right to a prompt hearing on the merits of the dispute. Further, we note that court imposed ADR will rarely be suitable in PPO cases, where domestic violence or stalking is alleged to have occurred. Accordingly, we vacate the order denying respondent's motion to rescind the PPO and we remand for an evidentiary hearing to determine whether the PPO should be terminated.

Vacated and remanded. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Brian K. Zahra