

APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT

Saldivar v. Cabrera

109 A.D.3d 831 (N.Y. App. Div. 2d Dep't 2013) · Decided September 11, 2013

SUMMARY

The Appellate Division affirmed orders dismissing Cesar Alfonso Saldivar’s family offense petition and issuing an order of protection after finding that he committed disorderly conduct and second-degree harassment. The court held that the finding was supported by a fair preponderance of the credible evidence, deferred to the Family Court’s credibility determinations, and concluded that the appeal from the expired order of protection remained justiciable because of its potential enduring consequences.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, Second Department
WRITING FOR THE COURT	Rivera, J.R.; Balkin, J.; Leventhal, J.; Cohen, J.
JURISDICTION	New York
DECIDED	September 11, 2013
DISPOSITION	affirmed
PROCEDURAL POSTURE	Cesar Alfonso Saldivar appealed from a Family Court order dismissing his family offense petition and from an order of protection issued after the court found that he committed disorderly conduct and second-degree harassment.
STANDARD OF REVIEW	A Family Court determination that a family offense was committed is reviewed as a factual determination. The Family Court's credibility findings are entitled to great weight on appeal and will not be disturbed unless clearly unsupported by the record. The family offense must be established by a fair preponderance of the evidence.
PRECEDENTIAL VALUE	published and precedential
PARTIES	Cesar Alfonso Saldivar v. Nikens Cabrera

TOPICS

- domestic violence
- family law procedure
- appellate procedure
- standard of review
- evidence

PRACTICE AREAS

family law

domestic violence

appellate procedure

evidence

QUESTIONS PRESENTED

1. Whether the appeal from the expired order of protection was rendered academic.
2. Whether a fair preponderance of the credible evidence supported the Family Court's finding that Saldivar committed disorderly conduct and harassment in the second degree.
3. Whether the Family Court improperly resolved sharply conflicting testimony by crediting Cabrera.
4. Whether Saldivar's remaining appellate contention was properly before the Appellate Division.

HOLDINGS

1. The expiration of the order of protection did not render the appeal academic because enduring consequences could potentially flow from the finding that Saldivar committed the family offenses.
2. A family offense must be established by a fair preponderance of the evidence, and the credible evidence supported the Family Court's determination that Saldivar committed disorderly conduct and harassment in the second degree.
3. The Appellate Division will give great weight to the Family Court's credibility determinations and will not disturb them unless clearly unsupported by the record.
4. The appellant's remaining contention was not properly before the Appellate Division because it raised an issue not determined by the orders appealed from.

KEY QUOTATIONS

“Although the order of protection expired by its own terms on March 20, 2013, the appeal therefrom has not been rendered academic in light of the enduring consequences which may potentially flow from a finding that the appellant committed the subject family offenses” (109 A.D.3d at 831)

“A family offense must be established by a fair preponderance of the evidence” (109 A.D.3d at 831)

“The determination of whether a family offense was committed is a factual issue to be resolved by the Family Court, and that court’s determination regarding the credibility of witnesses is entitled to great weight on appeal unless clearly unsupported by the record” (109 A.D.3d at 831-832)

FACTUAL BACKGROUND

The proceedings arose from alleged family offenses committed by Cesar Alfonso Saldivar against Nikens Cabrera. After a hearing, the Family Court found that Saldivar committed disorderly conduct and harassment in the second degree and issued an order of protection. The parties gave sharply conflicting accounts of the events, and the Family Court credited Cabrera's testimony.

PROCEDURAL HISTORY

In two related Family Court Act article 8 proceedings, the Family Court, Queens County, held hearings, dismissed Saldivar's petition, and issued an order of protection directing him, among other things, to refrain from harassing Cabrera. Saldivar appealed both orders. The Appellate Division held that the appeal from the expired order of protection was not academic, reviewed the family offense determinations, and affirmed both orders.

DISPOSITION

affirmed

CASES CITED

- Matter of Hohn v. Guirand, 97 A.D.3d 578 (N.Y. App. Div. 2012)
- Matter of Scioscia v. Scioscia, 89 A.D.3d 739, 740 (N.Y. App. Div. 2011)
- Matter of Bazante v. Bazante, 107 A.D.3d 707 (N.Y. App. Div. 2013)
- Matter of Salazar v. Melendez, 97 A.D.3d 754, 755 (N.Y. App. Div. 2012)
- Matter of Winfield v. Gammons, 105 A.D.3d 753 (N.Y. App. Div. 2013)
- Matter of Jackson v. Idlett, 103 A.D.3d 723 (N.Y. App. Div. 2013)
- Matter of Kanterakis v. Kanterakis, 102 A.D.3d 784, 785 (N.Y. App. Div. 2013)
- Matter of Cabeza v. Cabeza, 107 A.D.3d 793 (N.Y. App. Div. 2013)
- Matter of McCauley v. Galante, 106 A.D.3d 1089 (N.Y. App. Div. 2013)
- Matter of Baginski v. Rostkowski, 96 A.D.3d 1051 (N.Y. App. Div. 2012)
- Matter of Miriam M. v. Warren M., 51 A.D.3d 581 (N.Y. App. Div. 2008)
- Matter of Amato v. Amato, 100 A.D.3d 988, 989 (N.Y. App. Div. 2012)
- Matter of Padin v. Padin, 103 A.D.3d 729, 730 (N.Y. App. Div. 2013)
- Matter of Joseph A. [Fausat O.], 78 A.D.3d 826, 827 (N.Y. App. Div. 2010)
- Matter of Tishauna Patricia N. [Tee Tee Ann W.], 68 A.D.3d 1119, 1120 (N.Y. App. Div. 2009)

OPINION

PER CURIAM.

In two related family offense proceedings pursuant to Family Court Act article 8, Cesar Alfonso Saldivar appeals from (1) an order of the Family Court, Queens County (Lebwohl, J.), dated March 20, 2012, which, after a hearing, dismissed his petition, and (2) an order of protection of the same court dated March 30, 2012, which, after a hearing, and upon a finding that he committed the family offenses of disorderly conduct and harassment in the second degree, directed him, *inter alia*, to refrain from harassing Nikens Cabrera.

Ordered that the order and the order of protection are affirmed, without costs or disbursements. Although the order of protection expired by its own terms on March 20, 2013, the appeal therefrom has not been rendered academic in light of the enduring consequences which may potentially flow from a finding that the appellant committed the subject family offenses (see

Matter of Hohn v Guirand, 97 AD3d 578 [2012]; Matter of Scioscia v Scioscia, 89 AD3d 739, 740 [2011]).

A family offense must be established by a fair preponderance of the evidence (see Family Ct Act § 832; Matter of Bazante v Bazante, 107 AD3d 707 [2013]; Matter of Salazar v Melendez, 97 *832AD3d 754, 755 [2012]). The determination of whether a family offense was committed is a factual issue to be resolved by the Family Court, and that court's determination regarding the credibility of witnesses is entitled to great weight on appeal unless clearly unsupported by the record (see Matter of Winfield v Gammons, 105 AD3d 753 [2013]; Matter of Jackson v Idlett, 103 AD3d 723 [2013]; Matter of Kanterakis v Kanterakis, 102 AD3d 784, 785 [2013]).

Contrary to the appellant's contention, a fair preponderance of the credible evidence supports the Family Court's determination that he committed acts constituting the subject family offenses (see Family Ct Act § 812 [1]; Penal Law §§ 240.20 [1]; 240.26 [1]; Matter of Cabeza v Cabeza, 107 AD3d 793 [2013]; Matter of McCauley v Galante, 106 AD3d 1089 [2013]; Matter of Kanterakis v Kanterakis, 102 AD3d at 785; Matter of Baginski v Rostkowski, 96 AD3d 1051 [2012]; Matter of Miriam M. v Warren M., 51 AD3d 581 [2008]).

Moreover, the Family Court was presented with sharply conflicting accounts by the parties regarding the subject events, and chose to credit the testimony of the complainant, Nikens Cabrera (see Matter of Amato v Amato, 100 AD3d 988, 989 [2012]).

We discern no basis to disturb the Family Court's determination to dismiss the appellant's family offense petition. The appellant's remaining contention is not properly before this Court, as it raises an issue not determined by the orders appealed from (see Matter of Padin v Padin, 103 AD3d 729, 730 [2013]; Matter of Joseph A. [Fausat O.], 78 AD3d 826, 827 [2010]; Matter of Tishauna Patricia N. [Tee Tee Ann W], 68 AD3d 1119, 1120 [2009]).

Rivera, J.R, Balkin, Leventhal and Cohen, JJ., concur.