THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2011-0648, Tamara Ann Tello v. John Thomas Tello, the court on May 4, 2012, issued the following order:

Having considered the briefs and record submitted on appeal, we conclude that oral argument is unnecessary in this case. See Sup. Ct. R. 18(1). We affirm.

The defendant, John Tello, appeals the final order of protection issued by the Milford District Court, arguing that the district court lacked subject matter and personal jurisdiction. He also argues that he was not afforded adequate notice or a meaningful opportunity to be heard and that the judge was biased against him.

The defendant first argues that the district court lacked subject matter jurisdiction pursuant to RSA 490-D:2 (2010), asserting that only the family division has jurisdiction to issue final protective orders. RSA 490-D:2 provides that "following implementation of the [family] division at a division site in accordance with RSA 490-D:5," jurisdiction over actions under RSA chapter 173-B shall be exclusively exercised through the family division, except for concurrent jurisdiction with the superior and district courts to enter temporary protective orders under RSA 173-B:4. See RSA 490-D:2, VI. Family division sites are made operational by supreme court order. See RSA 490-D:5 (2010). The family division has not been made operational for the Town of Milford, as specifically stated in this court's December 9, 2010 order. See Supreme Court Order dated December 9, 2010. Until additional family division sites are made operational, domestic relations matters (i.e., divorce/parenting case types) emanating from the Town of Milford are heard at the Merrimack Family Division, while certain family division case types are heard at the Milford District Court. That all cases within the jurisdiction of the family division emanating from the Town of Milford were not assigned to the Merrimack Family Division demonstrates that the family division had not been made operational for the Town of Milford. See Supreme Court Order dated November 3, 2011. Accordingly, we conclude that the district court had jurisdiction over this matter. See RSA 173-B:2, I (2002) (granting all district courts concurrent jurisdiction with the superior court over all proceedings under RSA chapter 173-B). Copies of the Supreme Court Orders dated December 9, 2010 and November 3, 2011 are being provided to the parties with this order.

The defendant also argues that the court lacked subject matter jurisdiction pursuant to the doctrines of res judicata and collateral estoppel. Collateral estoppel bars a party to a prior action, or a person in privity with such a party, from relitigating any issue or fact actually litigated and determined in a prior action. McNair v. McNair, 151 N.H. 343, 352 (2004). Res judicata, or claim preclusion, is a broader remedy and bars relitigation of any issue that was, or might have been, raised in respect to the subject matter of the prior litigation. Id. at 352-53. The defendant argues that the court lacked subject matter jurisdiction because it dismissed the domestic violence petition filed by his son based upon the same set of facts. A review of both pleadings shows that the allegations in the plaintiff's petition are substantially different from the allegations in the son's petition. Accordingly, we reject the defendant's argument that the court lacked subject matter jurisdiction as a result of its dismissal of the son's petition.

The defendant also argues that the court lacked subject matter jurisdiction because the plaintiff failed to allege facts sufficient to support the issuance of a domestic violence protective order. Any person may seek relief pursuant to RSA 173-B:5 by filing a petition alleging abuse by the defendant. See RSA 173-B:3, I (2002). "Abuse," as defined in RSA chapter 173-B, means "the commission or attempted commission" of certain enumerated acts, such as assault, criminal threatening or harassment, by a spouse or former spouse where such conduct constitutes a credible threat to the plaintiff's safety. In the Matter of Sawyer & Sawyer, 161 N.H. 11, 15 (2010); RSA 173-B:1, I (Supp. 2011). A person has committed criminal threatening when, by physical conduct, he purposely places or attempts to place another in fear of imminent bodily injury or physical contact. See RSA 631:4, I(a) (2007). The petitioner alleged that the defendant threatened to kill her and the children, and that he will be coming to New Hampshire to try to get his children. She alleged that while the defendant was in prison, he sent a package to his daughter, who was living with the plaintiff in New Hampshire, in violation of a Texas protective order, and that they thought it was a bomb. We conclude that the petition contains sufficient allegations to support a final protective order. Accordingly, we reject the defendant's argument that the court lacked subject matter jurisdiction on this basis.

The defendant next argues that the trial court lacked personal jurisdiction over him. We conclude that the defendant waived this issue by filing responsive pleadings in the trial court contesting the issues on their merits and requesting continuances. See Barton v. Hayes, 141 N.H. 118, 120 (1996) (general appearance and motion to strike default judgment deemed waiver of personal jurisdiction argument); Lachapelle v. Town of Goffstown, 134 N.H. 478, 480 (1991) (motion for late entry of appearance and motion to strike default constitute voluntary submission to court's jurisdiction); Mauzy v. Mauzy, 97 N.H. 514, 515 (1952) (request for continuance constitutes general appearance). The defendant also waived this issue by failing to include it in his

notice of appeal. See Progressive N. Ins. Co. v. Argonaut Ins. Co., 161 N.H. 778, 784 (2011) (issues not raised in notice of appeal are waived); see also Town of Nottingham v. Newman, 147 N.H. 131, 137 (2001) (rules of appellate practice not relaxed for pro se litigants); Bean v. Red Oak Prop. Mgmt., 151 N.H. 248, 250 (2004) (court may consider appellant's failure to comply with preservation requirements regardless of whether opposing party objects on such grounds).

We note that even if the defendant had not waived the issue, we would find that the court had personal jurisdiction over him. We have held that the State's long-arm statute, RSA 510:4, I (2010), authorizes jurisdiction over a non-resident defendant who directs threats to a plaintiff in this State and that such contacts are sufficient to exercise personal jurisdiction over the defendant. See McNair v. McNair, 151 N.H. at 343, 349-52 (2004). In this case, the plaintiff alleged in her petition that the defendant, while in prison, sent a package to his daughter, who was living with the plaintiff in New Hampshire, in violation of a Texas protective order, and that they thought it was a bomb. These allegations are sufficient to establish personal jurisdiction over the defendant.

The defendant next argues that he was not afforded adequate notice and a meaningful opportunity to be heard. Although the defendant failed to cite any authorities in his trial court pleadings to support a due process claim, we will assume, without deciding, that he preserved a due process claim under the Federal Constitution. Parties whose rights are to be affected are entitled to be heard, and to enjoy that right, they must first be notified. Petition of Kilton, 156 N.H. 632, 638 (2007). Due process, however, does not require perfect notice, but only notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Id. at 638-39. Our inquiry focuses upon whether notice was fair and reasonable under the facts and circumstances of the case. Id.

In his June 16, 2011 written response to the trial court, the defendant acknowledged having received notice of the June 20, 2011 hearing and requested a continuance to enable him to attend on a date after July 7, 2011, his scheduled date of release from prison. The court did not receive the defendant's response until June 24, 2011, after the hearing was held as scheduled. In its June 20, 2011 final order, the court noted that it would schedule a further hearing upon the defendant's request. After receiving the defendant's request, the court scheduled a hearing on July 25, 2011. The copy of the hearing notice appended to the defendant's brief bears a handwritten notation, apparently initialed by the defendant, acknowledging receipt on July 1, 2011. In his July 22, 2011 motion for a continuance, the defendant acknowledged having received copies of the plaintiff's petition and the temporary order on July 21, 2011; he argues that this gave him an inadequate

opportunity to prepare a response. Although he had been released from prison by the time he completed his motion, he notified that court that it was "very unlikely" that he would be able to attend any court session in person. There is nothing in the record to support his assertion that he was not allowed to participate by telephone. See Bean, 151 N.H. at 250 (noting that appellant bears the burden to provide this court with a record sufficient to decide his issues on appeal). The defendant did not attend the July 25, 2011 hearing, and the court did not receive his motion for a continuance until the day after the hearing. Under these circumstances, we conclude that the defendant received notice reasonably calculated to apprise him of the pendency of the action and an opportunity to present his objections.

The defendant's remaining arguments warrant no extended consideration. On appeal, we consider only evidence and documents presented to the trial court. Flaherty v. Dixey, 158 N.H. 385, 387 (2009); see Sup. Ct. R. 13. The defendant concedes that if the district court had subject matter jurisdiction to issue the final order, then this court has jurisdiction over the appeal. See RSA 490:4 (2010) (supreme court jurisdiction). There is no basis for an objection to "non-judicial decision-making," as Justice Crocker is a district court judge. We reject the defendant's argument that the judge was biased against him; assuming, without deciding, that he preserved this issue, see Bean, 151 N.H. at 250-51, we conclude, based upon our review of the record, that no reasonable person would have questioned the judge's impartiality and that no factors were present that would have per se disqualified her from participating in this case. See State v. Bader, 148 N.H. 265, 268-71 (2002) (adverse rulings do not render the judge biased).

Affirmed.

Dalianis, C.J., and Hicks, Conboy and Lynn, JJ., concurred.

Eileen Fox,
Clerk

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