FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

- X

In the Matter of a Family Offense Proceeding	File #: 553318 Docket #: O-00073-08
KEVIN D., Petitioner,	Hon. Conrad D. Singer, JFC
vs.	
WENDY D., Respondent.	**AFFIRMATION IN SUPPORT OF MOTION TO DISMISS**

- X

ROBERT N. NELSON, an attorney duly licensed to practice law in the State of New York, affirms the following under penalty of perjury:

FIRST. I represent the Respondent, WENDY D., in the above-captioned action. As such, I am fully familiar with the facts and circumstances herein.

SECOND. I make this affidavit in support of the Respondent's application to this Court to dismiss the petition pursuant to Civil Practice Law and Rules section 3211(a)(7), for failure to state a cause of action and for such other and further relief as the Court may deem just and proper. In short, even if the allegations were proven true, they fail to set forth the specificity required to state a valid cause of action, and moreover, the acts alleged fail to constitute crimes or violations that can form the basis of an order of protection.

THIRD. The temporary *ex parte* order of protection currently in place prevents the Respondent from returning home where she resides with the Petitioner (her husband), and her son. On information and belief, it appears that the Petitioner is using the order of protection to leverage a position in custody litigation and a potential divorce proceeding.

THE PETITION

FOURTH. On or about January 4, 2008, the Petitioner filed a petition in the Nassau County Family Court and obtained an *ex parte* temporary order of protection. The petition alleges that on or about December 24, 2007, at 11:30 p.m., the Respondent committed an act or acts that constitute aggravated harassment in the second degree, reckless endangerment, menacing, or disorderly conduct toward the Petitioner. The summons, temporary order of protection, and petition are annexed hereto as Exhibit "A."

FIFTH. The petition alleges that on December 24, 2007, the Respondent was intoxicated and she "vomited over [the Petitioner and their son], he became hysterical crying because he thought it was blood. She then went into the bathroom and passed out. When the Police arrived she refused medical attention." The Respondent denies the allegations. Nevertheless, it is acknowledged that the allegations are to be deemed true for the purpose of this motion.

SIXTH. The petition contains no further specific description of any other event occurring at that time. The petition only asserts in general terms that the Respondent has abused prescribed medication, cocaine, marijuana and alcohol; asks that she be mandated to enter a long-term substance abuse facility; and alleges that she refuses help. The petition also alleges, without specificity, that the Respondent takes the parties' son on drug runs to purchase illegal drugs, and purportedly has been found smoking marijuana while driving children in the car.

SEVENTH. The only act alleged with specificity, *i.e.*, that the Respondent vomited and was intoxicated in her own home on December 24, 2007, does not constitute aggravated harassment in the second degree, reckless endangerment, menacing, or

Law Offices of Robert N. Nelson • 2249 Derby Road • Baldwin, New York 11510 (516) 223 - 5500
www.RNELSONLAW.com

disorderly conduct toward the Petitioner. The legislature, in its wisdom, limited the granting of an order of protection only to those specific crimes or violations enumerated in section 812 of the Family Court Act. *Roofeh v. Roofeh*, 138 Misc. 2d 889, 895, 525 N.Y.S.2d 765, 769 (Sup. Ct. Nassau County 1988); *Ross v. Ross*, 152 A.D.2d 580, 543 N.Y.S.2d 162 (2d Dep't 1989) (holding that one of the enumerated crimes or violations in the Family Court Act must be shown by a preponderance of the evidence to add a stay-away provision to an order of protection barring a spouse from the marital residence). Accordingly, the petition should be dismissed pursuant to Civil Practice Law and Rules section 3211(a)(7) for failure to state a cause of action.

THE PETITION FAILS TO ALLEGE ANY ACT WITH THE REQUISITE SPECIFICITY

EIGHTH. The underlying petition fails to state a claim as a matter of law because it fails to allege any act on the part of the Respondent that would constitute a crime or violation. The New York Courts have repeatedly held that allegations made under Article 8 of the Family Court Act must be alleged with specificity to sustain an order of protection. *See, e.g.*, *Vasciannio v. Nedrick*, 305 A.D.2d 420, 758 N.Y.S.2d 534 (2d Dep't 2003); *Jones v. Roper*, 187 A.D.2d 593, 591 N.Y.S.2d 336 (2d Dep't 1992). In *Vasciannio v. Nedrick*, the Second Department held that the Family Court properly vacated an *ex parte* order of protection and dismissed the related petition without a hearing because it was devoid of specificity. As in the matter at bar, the temporary order of protection in *Vasciannio* amounted to, "in effect, a temporary order of custody to the father." *Id.* at 421. Accordingly, the temporary order of protection should be vacated and the petition dismissed without a hearing. It would be unfairly prejudicial for the Court to conduct a hearing so as to the Petitioner to attempt to cure his defective Petition

Law Offices of Robert N. Nelson • 2249 Derby Road • Baldwin, New York 11510 (516) 223 - 5500
www.RNELSONLAW.com

during the course of the hearing itself. A finding cannot be properly predicated upon facts not alleged in the petition. *See, e.g.*, *Whittemore v. Lloyd*, 266 A.D.2d 305, 698 N.Y.S.2d 275 (2d Dep't 1999) (reversing Family Court granting of order of protection based upon second-degree aggravated harassment where based upon facts outside the record and not alleged in petition).

THERE IS NO PRIMA FACIE CASE OF AGGRAVATED HARASSMENT IN THE SECOND DEGREE

NINTH. Even if it were deemed that the petition does contain the required amount of specificity, none of the allegations are sufficient to constitute any of the crimes or violations alleged, which must be proven to form the basis for an order of protection. For example, New York Penal Law states that a person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy or alarm another person:

> 1. He or she strikes, shoves, kicks or otherwise subjects such other person to physical contact, or attempts or threatens to do the same; or
>
> 2. He or she follows a person in or about a public place or places; or
>
> 3. He or she engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose.

See N.Y. Penal L. § 240.26.

TENTH. None of the allegations in the petition, even if true, constitute aggravated harassment in the second degree. In the first instance, there is no allegation that the Respondent specifically intended to harass, annoy or alarm another person. Second, the acts that are alleged do not fit within any of the subsections that must be

proven for a finding of aggravated harassment in the second degree. There are no allegations of any physical contact or attempts or threats of physical contact as enumerated in § 240.26(1); there are no allegations of the Respondent following anyone about as in § 240.26(2); and as would be required under § 240.26(3), there is no course of conduct or repeated acts which alarm or seriously annoy. There is merely one date specified of any act occurring. Furthermore, the act alleged, that the Respondent vomited and was intoxicated in her own home, cannot reasonably be construed as an act "with intent to harass, annoy or alarm another person." As such, the Petitioner cannot sustain a claim for aggravated harassment in the second degree.

THERE IS NO PRIMA FACIE CASE OF RECKLESS ENDANGERMENT

ELEVENTH. The petition fails to state which degree of reckless endangerment allegedly occurred, and no prima facie case of reckless endangerment in any degree is sufficiently alleged. New York Penal Law states that a person is guilty of reckless endangerment in the second degree when:

> he recklessly engages in conduct which creates a substantial risk of serious physical injury to another person.

See N.Y. Penal L. § 120.20.

As a matter of law, the allegation that the Respondent was ill and intoxicated in her own home, and went into the bathroom while her husband was also at home, is not the creation of a "substantial risk of serious physical injury to another person."

THERE IS NO PRIMA FACIE CASE OF MENACING

TWELFTH. There is no prima facie case of menacing alleged. Again, the petition fails to state which degree of menacing with which the Respondent is charged.

Law Offices of Robert N. Nelson • 2249 Derby Road • Baldwin, New York 11510 (516) 223 - 5500
www.RNELSONLAW.com

New York Penal Law states that a person is guilty of menacing in the second degree when:

> 1. He or she intentionally places or attempts to place another person in reasonable fear of physical injury, serious physical injury or death by displaying a deadly weapon, dangerous instrument or what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; or
>
> 2. He or she repeatedly follows a person or engages in a course of conduct or repeatedly commits acts over a period of time intentionally placing or attempting to place another person in reasonable fear of physical injury, serious physical injury or death; or
>
> 3. He or she commits the crime of menacing in the third degree in violation of that part of a duly served order of protection, or such order which the defendant has actual knowledge of because he or she was present in court when such order was issued, pursuant to article eight of the family court act, section 530.12 of the criminal procedure law, or an order of protection issued by a court of competent jurisdiction in another state, territorial or tribal jurisdiction, which directed the respondent or defendant to stay away from the person or persons on whose behalf the order was issued.

See N.Y. Penal L. § 120.14.

THIRTEENTH. As such, review of the statutory language reveals that none of the allegations within the petition, even if proven to be true, constitute menacing in the second degree under any subsection. Subsection 120.14(1) was not violated as there is no allegation that a deadly weapon, dangerous instrument or other item specified was displayed by the Respondent to the Petitioner. In fact, there is no allegation that the parties were ever in physical contact with each other. Subsection 120.14(2) was not violated as there is no substantiated or specific allegation of repeated acts or a course of conduct as required by that subsection. The petition only alleges that one incident

Law Offices of Robert N. Nelson • 2249 Derby Road • Baldwin, New York 11510 (516) 223 - 5500
www.RNELSONLAW.com

occurred on December 24, 2007. Moreover, like the harassment charge, the menacing charge must fail because the *mens rea* that the Respondent was "*intentionally* placing or attempting to place another person in reasonable fear" (emphasis added) is required. There is no allegation that the Respondent's alleged intoxication was intended to cause fear, nor would such be reasonable to infer. Finally, subsection 120.14(3) cannot apply here because there is no previous order of protection in place.

THERE IS NO PRIMA FACIE CASE OF DISORDERLY CONDUCT

FOURTEENTH. New York Penal Law states that a person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof:

> 1. He engages in fighting or in violent, tumultuous or threatening behavior; or
>
> 2. He makes unreasonable noise; or
>
> 3. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or
>
> 4. Without lawful authority, he disturbs any lawful assembly or meeting of persons; or
>
> 5. He obstructs vehicular or pedestrian traffic; or
>
> 6. He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or
>
> 7. He creates a hazardous or physically offensive condition by any act which serves no legitimate purpose.

See N.Y. Penal L. § 240.20. Under the Family Court Act, "disorderly conduct" includes disorderly conduct not in a public place. *See* Fam. Court Act § 812.

Law Offices of Robert N. Nelson • 2249 Derby Road • Baldwin, New York 11510 (516) 223 - 5500
www.RNELSONLAW.com

FIFTEENTH. The petition does not set forth the subsection of 240.20 that allegedly was violated. Nevertheless, the petition again lacks any allegation attributing the Respondent with the *mens rea* required to be found guilty of disorderly conduct. Specifically, because the petition does not allege an intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, the petition should be dismissed. It is merely alleged that the Respondent was ill and intoxicated in her own home, which cannot reasonably be interpreted to constitute a crime or violation.

SIXTEENTH. As such, the allegations that on or about December 24, 2007 at 11:30 p.m. the Respondent committed an act or acts which constitute aggravated harassment in the second degree, reckless endangerment, menacing, or disorderly conduct toward the Petitioner fail. There are no other incidents reported with any specificity. The petition is devoid of any facts that could merit relief. The petition, which underlies and forms the basis for the temporary order of protection, is thus defective on its face and should be dismissed, and the order of protection vacated.

WHEREFORE, it is respectfully requested that the petition be dismissed in its entirety; or in the alternative, that a hearing take place forthwith; along with any other, further and different relief as to the Court may seem just and proper.

Dated: March 19, 2008
Baldwin, New York

Attorney Signature Pursuant to
Sec. 130-1.1-a of the Rules of Chief
Admin. (22 NYCRR)

_____
ROBERT N. NELSON
Attorney for Respondent

Law Offices of Robert N. Nelson • 2249 Derby Road • Baldwin, New York 11510 (516) 223 - 5500
www.RNELSONLAW.com