

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D36695
G/kmb

_____AD3d_____

Submitted - November 16, 2012

WILLIAM F. MASTRO, J.P.
PLUMMER E. LOTT
SHERI S. ROMAN
JEFFREY A. COHEN, JJ.

2012-00679
2012-00680

DECISION & ORDER

In the Matter of Susan Clark, appellant,
v John Ormiston, respondent.

(Docket No. O-1025-11)

Susan Clark, Wappingers Falls, N.Y., appellant pro se.

In a family offense proceeding pursuant to Family Court Act article 8, the petitioner appeals (1), as limited by her brief, from so much of an order of the Family Court, Putnam County (Reitz, J.), dated December 9, 2011, as granted that branch of the respondent's motion which was pursuant to CPLR 3211(a)(7) to dismiss the petition for failure to state a cause of action, and (2) from an order of disposition of the same court dated December 13, 2011, which dismissed the petition without prejudice and vacated a temporary order of protection dated October 26, 2011.

ORDERED that the appeal from the order dated December 9, 2011, is dismissed, without costs or disbursements; and it is further,

ORDERED that the order of disposition dated December 13, 2011, is reversed, on the law, without costs or disbursements, that branch of the respondent's motion which was pursuant to CPLR 3211(a)(7) to dismiss the petition for failure to state a cause of action is denied, the petition is reinstated, the order dated December 9, 2011, is modified accordingly, and the matter is remitted to the Family Court, Putnam County, for further proceedings on the petition; and it is further,

ORDERED that pending further action by the Family Court, Putnam County, the provisions of the temporary order of protection dated October 26, 2011, shall remain in full force and effect.

December 12, 2012

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The appeal from the intermediate order must be dismissed because it is not appealable as of right (*see* Family Ct Act § 1112), and, in any event, the right of direct appeal therefrom terminated with the entry of the order of disposition (*see Matter of Aho*, 39 NY2d 241, 248). The issues raised on the appeal from the intermediate order are brought up for review and have been considered on the appeal from the order of disposition (*see* CPLR 5501[a][1]; Family Ct Act § 1118; *Matter of Anna Coral DeL.*, 50 AD3d 792).

The petitioner commenced this family offense proceeding alleging, inter alia, that during a court proceeding, the respondent became irate and threw his chair violently while shouting at the judge. The petition further alleged that while being escorted out of the courtroom, the respondent stopped in front of the petitioner while waving his hand and pointing at her and twice shouted “You better watch out, I’m going to get you!” During previous proceedings, the respondent had “muttered things toward [the petitioner] and made motions towards her.”

The Family Court should have denied that branch of the respondent’s motion which was pursuant to CPLR 3211(a)(7) to dismiss the petition for failure to state a cause of action. Liberally construing the petition, and giving it the benefit of every possible favorable inference, the petition adequately alleged that the respondent had committed the family offenses of harassment in the first and second degrees and disorderly conduct (*see* Family Ct Act §§ 165[a], 812[1]; Penal Law §§ 240.25, 240.26, 240.20[1]; *Matter of Walton v New York State Dept. of Correctional Servs.*, 13 NY3d 475, 484; *Matter of Pamela N. v Neil N.*, 93 AD3d 1107, 1108-1110).

The petitioner’s remaining contentions are without merit or are not properly before this Court.

MASTRO, J.P., LOTT, ROMAN and COHEN, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court