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**ORDER OF THE MASSACHUSETTS SUPREME
JUDICIAL COURT DENYING APPLICATION
FOR FURTHER APPELLATE REVIEW
(NOVEMBER 12, 2021)**

**SUPREME JUDICIAL COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS**

J.B.

v.

M.S.

Docket No. FAR-28481

Brookline District, No. 1909RO0088

A.C. No. 2020-P-0924

**NOTICE OF DENIAL OF APPLICATION FOR
FURTHER APPELLATE REVIEW**

Please take note that on November 12, 2021, the application for further appellate review was denied.

Francis V. Kenneally
Clerk

**MEMORANDUM AND ORDER OF THE
MASSACHUSETTS COURT OF APPEALS
PURSUANT TO RULE 23.0
(AUGUST 18, 2021)**

**COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT**

J.B.

v.

M.S.

No. 20-P-924

**Before: GREEN, Chief Judge,
BLAKE and LEMIRE, Judges.**

**MEMORANDUM AND ORDER
PURSUANT TO RULE 23.0**

The self-represented defendant, M.S., appeals from an order denying his motion to expunge an abuse prevention order issued pursuant to G. L. c. 209A (209A order).¹ We affirm.

Background.

After statements by the defendant caused the plaintiff, J.B., to fear for her safety and the safety of

¹ The defendant is an attorney licensed to practice in New York and Connecticut.

her unborn child, she obtained an ex parte 209A order on November 7, 2019. Approximately one month later, at a hearing on an extension of the 209A order, the defendant assented to the extension subject to certain conditions. The plaintiff did not agree to the conditions. The judge, concluding that the plaintiff failed to meet her burden of proof, declined to extend the 209A order.² On March 16, 2020, the defendant filed a motion to expunge the 209A order from his record, arguing that it was obtained by the plaintiff's commission of fraud on the court. Following a hearing, the judge denied the motion to expunge. This appeal followed.

Discussion.

On appeal, the defendant purports to raise thirty-two issues for our consideration. Many of these claims raise issues that are either moot or time barred.³ Here, we review whether the judge erred by denying the defendant's motion to expunge.⁴ There was no error.

² The judge, however, issued a no contact order.

³ Notably, while the defendant's notice of appeal encompasses the ex parte 209A order, an appeal from that order is moot. *See Allen v. Allen*, 89 Mass. App. Ct. 403, 405-406 (2016). Any appeal from that order dated November 7, 2019, also is untimely, as is any appeal from the order dated December 3, 2019. *See Mass. R. A. P. 4 (a) (1)*, as appearing 481 Mass. 1606 (2019).

⁴ The defendant also appealed from the denial of his motion to compel production of subpoenaed documents, which he claimed were relevant to his motion to expunge. Assuming without deciding that this portion of the appeal is properly before us, we discern no error.

In *Commissioner of Probation v. Adams*, 65 Mass. App. Ct. 725, 737 (2006), this court held “that a judge has the inherent authority to expunge a record of a 209A order from the Statewide domestic violence registry system in the rare and limited circumstance that the judge has found through clear and convincing evidence that the order was obtained through fraud on the court.”

“[F]raud on the court’ occurs where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system’s ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party’s claim or defense.”

Id. at 729-730, quoting *Rockdale Mgt. Co. v. Shawmut Bank, N.A.*, 418 Mass. 596, 598 (1994).

Although the defendant's brief is far from a model of clarity, he contends that the plaintiff obtained the 209A order with numerous perjurious statements. The judge, however, did not find that the plaintiff engaged in “systemic or egregious” conduct amounting to fraud on the court. *M.C.D. v. D.E.D.*, 90 Mass. App. Ct. 337, 344 (2016). Rather, the judge found that the plaintiff demonstrated a reasonable “fear of imminent harm to her and her unborn child's well-being to obtain the 209A order.”

Our role as a reviewing court is not to reassess credibility determinations made by a trial judge, nor is it to decide whether we would have issued the 209A order in the first instance. *See Ginsberg v.*

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Blacker, 67 Mass. App. Ct. 139, 140 n.3 (2006) (“We accord the credibility determinations of the judge who ‘heard the testimony of the parties . . . [and] observed their demeanor,’ . . . the utmost deference” [citations omitted]). Moreover, the defendant fails to “distinguish between a false allegation, on the one hand, and a deliberate scheme, on the other, typically involving others in the court system, combined with a larger pattern of harassment, that has been held to constitute fraud on the court.”^{5,6} *M.C.D.*, 90 Mass App. Ct. at 342.

Order dated June 8, 2020, denying motion to expunge G. L. c. 209A order affirmed.

By the Court (Green, C.J.,
Blake & Lemire, JJ.⁷),

/s/ Joseph F. Santon
Clerk

Entered: August 18, 2021.

⁵ Any additional claims that we have not addressed “have not been overlooked. We find nothing in them that requires discussion.”

⁶ The plaintiff’s request for appellate attorney’s fees and costs is denied.

⁷ The panelists are listed in order of seniority.

**ORDER OF THE MASSACHUSETTS COURT
OF APPEALS, DENYING REHEARING
(SEPTEMBER 1, 2021)**

**COMMONWEALTH OF MASSACHUSETTS
COURT OF APPEALS**

J.B.

v.

M.S.

No. 2020-P-0924

Lower Court No: 1909RO0088

**Before: GREEN, Chief Judge, BLAKE
and LEMIRE, Judges.**

NOTICE OF DOCKET ENTRY

Please take note that, with respect to the Motion for Reconsideration or modification of decision filed by M.S., (Paper #30), on September 1, 2021, the following order was entered on the docket:

RE#30: After consideration, the motion filed pursuant to Rule 27 is denied. (Green, C.J., Blake, Lemire, JJ.) *Notice

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Very truly yours,

Joseph F. Stanton
Clerk

To: Arlene Beth Marcus, Esquire, M.S.

**ORDER OF THE BROOKLINE,
MASSACHUSETTS DISTRICT COURT
GRANTING MOTION TO REQUIRE
PSEUDONYMS
(JULY 28, 2020)**

***** Redacted Order as Issued by the Court *****

**TRIAL COURT OF MASSACHUSETTS
BROOKLINE DIVISION
DISTRICT COURT DEPT.**

[REDACTED]
v.
[REDACTED]

No. 1909RO0088

Before: Mary DACEY WHITE, Presiding Justice.

7-28-2020 – MOTION is allowed to entitle the case as
J.B. v. M.S. by order of the court until further orders
from the MA Appeals Court.

/s/ Mary Dacey White
Presiding Justice

**FINDING AND RULING OF THE
BROOKLINE, MASSACHUSETTS
DISTRICT COURT
(JUNE 8, 2020)**

***** Redacted Order as Issued by the Court *****

COMMONWEALTH OF MASSACHUSETTS
BROOKLINE DISTRICT COURT

[REDACTED]
v.
[REDACTED]

No. 1909RO0088

Before: Mary DACEY WHITE, Presiding Justice.

FINDINGS AND RULING OF THE COURT

After a hearing on May 21, 2020, on the Defendant's motion to Expunge, the court makes the following findings and ruling.

Procedural History

The court held an Ex Parte Hearing on November 6, 2019 and granted Plaintiff's request for an abuse prevention order against the Defendant pursuant to G.L. c. 209A. At the hearing on December 3, 2019, for an extension of the abuse prevention order, the Defendant agreed to extend the order upon certain conditions but the Plaintiff did not agree to the conditions. Therefore, the court held an extension

hearing on that date and the court denied the extension of the abuse prevention order stating that the Plaintiff had not met her burden of proof. Although the abuse prevention order was not extended, the parties were advised to have no contact with each other unless with regards to the pregnancy. On March 10, 2020, the Defendant filed a motion to expunge the matter from his record for professional reasons and claimed that the Plaintiff committed perjury to obtain the abuse prevention order and therefore, perpetrated a fraud upon the court.

Issue

Whether there was evidence of a fraud perpetrated upon the court at the November 6, 2019 hearing?

Statement of Facts

1. Defendant found out about Plaintiff's pregnancy around September 25, 2019, and expressed his emotional and mental state by messaging Plaintiff, "I have never been this stressed in my whole life . . . I practically just want to die." [Exhibit D at 1-2].
2. The Defendant increasingly requested Plaintiff to have an abortion on multiple occasions which the Plaintiff repeatedly denies to do so. [Exhibit D].
3. The Plaintiff informed the Defendant that she will keep the pregnancy. [Exhibit D at 15-17].
4. On October 24, 2019, Defendant texted Plaintiff reiterating his wish for her to have an abortion. [Exhibit D at 33]. The Defendant contacted Plaintiff with multiple messages trying to arrange a meeting or talk. [Exhibit D at 40].

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5. At the Ex Parte 209A hearing on November 6, 2019, Plaintiff appeared visibly shaken, was in tears, and was reasonably fearful for her and the unborn child's well-being.

6. Defendant stated on the record he would agree on the extension of the 209A order despite his current fraud allegations.

Applicable Law

In *Vaccaro v. Vaccaro*, 425 Mass. 153, 157-158 (1997), the court found "there is no statute that permits an order's record to be removed or expunged from the Statewide system, even if the order has been vacated." Therefore, the court looks to the case law. Under *Commissioner of Probation v. Adams*, 65 Mass. App. Ct. 725, 729 (2006), in order to expunge there must be evidence that a fraud has been perpetrated upon the court. "Fraud upon the Court" occurs where it can be demonstrated that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the tried or unfairly hampering the presentation of the opposing party's claim of defense." *Adams*, 65 Mass. App. Ct. at 729-730, quoting *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989). In this case, the evidence is insufficient to show that the Plaintiff calculated false statements to the court in order to obtain the 209A order against the Defendant; therefore, there is no fraud perpetrated upon the court. See also, *M.C.D. v. D.E.D.*, 90 Mass. App. Ct. 337, 344 (2016), perjury in front of the court is insufficient because something considerably more systemic or egregious is required to constitute fraud on the court. Therefore,

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the Plaintiff's Affidavit was neither perjurious nor considered systemic or egregious to find fraud on the court.

Finding

In the current case, Plaintiff's affidavit showed she was reasonably in fear of imminent harm to her and her unborn child's well-being to obtain the 209A order. Further, before the Ex Parte 209A order was vacated, Defendant put forth a proposal that would have extended the order for six months with certain conditions. That action, in and of itself, shows that a fraud was not brought upon the court. Therefore, the Defendant's own actions at the December 3, 2019 hearing do not show his fraud allegation.

The case law substantiates the authority for determining a fraud upon the court because the court does not have statutory authority. While the court has inherent authority to expunge the order, it requires a showing of a fraud being perpetrated upon the court. Based upon the case law and the aforementioned findings of fact, the Defendant has not substantiated his claim of a fraud upon the court.

Ruling

Based upon the aforementioned, the Defendant has not met his burden of proof by clear and convincing evidence. Therefore, the Motion to Expunge is DENIED.

/s/ Mary Dacey White
Presiding Justice

June 8, 2020

**VACATED EX-PARTE
ABUSE PREVENTION ORDER
(ISSUED NOVEMBER 7, 2019,
VACATED DECEMBER 3, 2019)**

***** Redacted Order as Issued by the Court *****

**TRIAL COURT OF MASSACHUSETTS
BROOKLINE DISTRICT COURT
360 WASHINGTON STREET
BROOKLINE, MA 02445**

[REDACTED]
v.
[REDACTED]

No. 1909RO0088

Before: Mary DACEY WHITE, Presiding Justice.

**A. The Court Has Issued the Following Orders
to the Defendant**

- This Order was issued without advance notice because the court determined that there is substantial likelihood of immediate danger of abuse.
- 1. YOU ARE ORDERED NOT TO ABUSE THE PLAINTIFF by harming, threatening or attempting to harm the Plaintiff physically or by placing the Plaintiff in fear or imminent service physical harm, or by using force.

threat or duress to make the plaintiff engage in sexual relations.

- 2. YOU ARE ORDERED NOT TO CONTACT THE PLAINTIFF, in person by telephone, in writing electronically or otherwise, either directly or through someone else, and to stay at least 100 yards from Plaintiff even if the Plaintiff seems to allow or request contact. The only exception to this order are: a) contact as permitted in Section 8, 9, 10 and 11 below; or b) by sending the plaintiff, by mail, by sheriff or by other authorized officer, copies of papers filed with the court when that is required by statute or court rule.
- 3. If this box is checked, the Court also ORDERS you to immediately leave and remain away from the entire apartment building or other multiple family dwelling in which the Plaintiff residence is located.
- 7. YOU ARE ORDERED NOT TO CONTACT THE CHILDREN LISTED ABOVE OR ANY CHILDREN IN THE PLAINTIFF'S CUSTODY LISTED BELOW, either in person, by telephone, in writing, electronically or otherwise, either directly or through someone else and to stay at least 100 yards away from them unless you receive written permission from the Court to do otherwise.
 - You are also ordered to stay away from the following school(s), day care(s) Other: [REDACTED]
- 12. THERE IS SUBSTANTIAL LIKELIHOOD OF IMMEDIATE DANGER OF ABUSE. YOU ARE ORDERED TO IMMEDIATELY

SURRENDER to the Serving Dept., Police Department or to the Police Officer serving this order all guns, ammunition, gun licenses and FD cards. Your licenses to carry a gun, if any, and FD card, if any, are suspended immediately.

14. YOU ARE ALSO ORDERED . . [REDACTED]

B. Notice of Law Enforcement

Date of Order 11/7/109

Time of Order 4:22 p.m.

Expiration Date of Order 11/18/19 at 4 p.m.

Signature of the Judge: /s/ Mary Dacey White

Next Hearing Date: 11-18-19 at 9 a.m.

C. Modification/Extension

This order was issued after a hearing at which the Plaintiff did not appear and the Defendant did not appear. The Court has ORDERED that the prior order issued 11/7/2019 be MODIFIED as follows:

Order extended by Motion of Defendant and Agreement of Plaintiff.

Firearm surrender order continued, the items surrendered under paragraph 12 will NOT be returned since doing so would present a likelihood of abuse to the Plaintiff.

Date of Order 11/14/109

Time of Order 3:50 p.m.

Expiration Date of Order 12/3/19 at 4 p.m.

Signature of the Judge: /s/ Mary Dacey White

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Time of Modification: 3:50 p.m.

Next Hearing Date: 12-3-19 at 9 a.m.

E. Prior Court Order Terminated

The Court's prior Order is terminated. Law Enforcement agencies shall destroy all records of such Order.

After hearing. Court does not extend the order. However, the parties have been advised to have no contact with each other unless with regard to the pregnancy.

/s/ Mary Dacey White

Date of Order: 12-3-2019

Time of Order 1:37 p.m.