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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-61

Filed: 17 November 2015

Carteret County, No. 14-CVD-202

AMY BRANDMEIER BOBBER, Plaintiff,

v.

RYAN P. BOBBER, Defendant.

Appeal by defendant from judgment entered 11 July 2014 *nunc pro tunc* 2 June 2014 by Judge Paul M. Quinn in District Court, Carteret County. Heard in the Court of Appeals 13 August 2015.

No brief filed for appellee.

Ward, Smith & Norris, P.A., by Kirby H. Smith, III, for defendant-appellant

STROUD, Judge.

Defendant appeals trial court judgment granting plaintiff's claim for absolute divorce. For the following reasons, we affirm.

I. Background

On 24 January 2014, the parties entered into a separation agreement which stated that "on the 25th day of February, 2013, Plaintiff and Defendant commenced living separate and apart from one another with the intent by the Plaintiff not to resume their marital relation[.]" On 27 February 2014, plaintiff filed a verified

complaint for absolute divorce. Plaintiff requested that the separation agreement be incorporated by reference into the divorce judgment. On 30 April 2014, defendant filed a motion to dismiss contending that the trial court did not have jurisdiction because the parties had not been separated for more than a year before the filing of plaintiff's complaint. On 7 May 2014, defendant filed a verified answer; defendant claimed that he was "fraudulently coerced into signing the" separation agreement. On 11 July 2014 *nunc pro tunc* 2 June 2014, after testimony and other evidence from both of the parties, the trial court concluded it did have jurisdiction, granted the absolute divorce, and incorporated the separation agreement into its judgment. Defendant appeals.

II. Date of Separation

The defendant's only argument is that the trial court erred by determining that the parties lived "separate and apart for one year prior to the institution of this action." Defendant does not challenge the validity of the separation agreement or its incorporation into the divorce judgment. Defendant contends that the evidence does not support the trial court's finding of fact regarding the date of separation as 25 February 2013 and because the parties had not been separated for a year, the trial court did not have jurisdiction to enter the divorce. *See generally* N.C. Gen. Stat. § 50-6 (2013) ("Marriages may be dissolved . . . when the husband and wife have lived separate and apart for one year[.]")

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When the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts.

An abuse of discretion has occurred if the decision is manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision.

Kelly v. Kelly, ___ N.C. App. ___, 747 S.E.2d 268, 272–73 (2013) (citations and quotation marks omitted).

Defendant is essentially asking this Court to reconsider the evidence and to determine its weight and credibility. Defendant's brief is a reassertion of all of the reasons he believes he and his wife were not separated as of 25 February 2013 and an explanation of why plaintiff's claims regarding the date of separation are not true. But both parties testified, and plaintiff specifically stated she "[s]eparated from [her] husband, February 25th, 2013[.]" and when asked on cross-examination "[y]ou separated in February of 2013 with the intent not to ever resume the marital relationship, is that correct?" plaintiff responded "Correct." Plaintiff also testified that in the two years prior to 25 February 2013 they had been "basically" living apart as they did not have sex and stayed in separate rooms during the brief period of time that defendant was not deployed on his military assignment. Even if defendant did not intend to separate permanently from plaintiff on this date or even if his evidence may contradict plaintiff's testimony, there was competent evidence to support the

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trial court's findings of fact. Only the trial court may weigh the evidence and determine credibility. *See Leak v. Leak*, 129 N.C. App. 142, 150, 497 S.E.2d 702, 706 (“Given this conflicting testimony, and the general rule that a trial court, when sitting as trier of fact, determines the credibility of witnesses which comes before it and the weight to be given to their testimony, we must pay deference to what the trial court determined was the more credible testimony[.]”), *disc. review denied*, 348 N.C. 498, 510 S.E.2d 385 (1998).

Aside from the testimonial evidence, the parties had a signed and notarized separation agreement reciting the date of separation. Defendant's brief simply argues that “Plaintiff pressured him to sign the Agreement[.]” The signed and notarized separation agreement notes the date of separation as 25 February 2013, the date the trial court found, and this signed and notarized separation agreement itself is also evidence of the date of separation.

Defendant claims that the parties continued to live together after the date of separation found by the trial court and noted in the separation agreement. Defendant claims he was deployed much of the time period plaintiff claims as their year of separation, but when he was not he stayed with plaintiff and their family. But his testimony does not defeat the other evidence regarding the date of separation because though it is

settled law that for the purpose of obtaining a divorce under G.S. 50-6 separation may not be predicated upon

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evidence which shows that during the statutorily prescribed period of separation the parties have cohabited as husband and wife . . .

where evidence is conflicting . . . the issue of the parties' mutual intent is an essential element in determining whether the parties were reconciled and resumed cohabitation. Where the court sits as judge and juror, its findings of fact have the effect of a jury verdict and are conclusive on appeal if there is evidence to support them. Contradictions and discrepancies are to be resolved by the trier of facts.

Camp v. Camp, 75 N.C. App. 498, 502, 331 S.E.2d 163, 166 (citations omitted), *disc. review denied*, 314 N.C. 663, 335 S.E.2d 493 (1985).

In *Camp*,

Plaintiff testified: that defendant requested a place to stay until he found work; that he kept one change of clothing at the house; that he looked for work constantly; that she was out of town for three of the ten days defendant was there and on the other days was involved in a training program in a nearby town; and that they did not eat together, socialize, sleep in the same bed, or have sexual intercourse. Defendant testified: that he returned home at plaintiff's request; that they slept in the same bed; and that they had sexual intercourse three times.

Id. at 500, 331 S.E.2d at 164. This Court determined that

the [trial] court resolved discrepancies in favor of plaintiff and found that the parties did not resume the marital relationship. This finding accords with numerous cases where the court has required activity more substantial than that here to find a holding-out as husband and wife. *Ledford v. Ledford*, 49 N.C. App. 226, 232, 271 S.E.2d 393, 397-98 (1980), citing: *Adamee*, 291 N.C. 386, 230 S.E.2d 541 (wife moved back into marital domicile and lived with husband for eight months); *Dudley v. Dudley*, 225 N.C. 83,

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33 S.E.2d 489 (1945) (spouses slept in same room together for two and one-half to three years and in adjoining rooms in same house for remainder of alleged five years' separation); *Young v. Young*, 225 N.C. 340, 34 S.E.2d 154 (1945) (husband in the Navy but parties stayed together whenever he was on leave or stationed near the marital home); *Tuttle v. Tuttle*, 36 N.C. App. 635, 636-37, 244 S.E.2d 447, 448 (1978) ("interruption of the statutory period should not be found . . . from the mere fact of . . . contact between the parties").

We hold that the court's findings are supported by competent evidence and they, in turn, support the conclusion of law.

Id. at 503-04, 331 S.E.2d at 166. According to the plaintiff's evidence, she allowed defendant to stay briefly at the marital home when he returned from his military assignments as they "were trying to remain cordial for the kids" because when defendant was not deployed he "wanted to be able to see the kids[.]" As the trial court had evidence to support its finding of the date of separation, it also correctly concluded that the parties had been separated for over a year prior to the filing of the complaint and properly granted the absolute divorce. *See* N.C. Gen. Stat. § 50-6. This argument is overruled.

III. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

Judges McCULLOUGH and INMAN concur.

Report per Rule 30(e).