IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-371

Filed 16 January 2024

Forsyth County, No. 22 CVD 948

ANA LAGOS PEREZ, Plaintiff,

v.

DAVID A. PEREZ, Defendant.

Appeal by defendant from order entered 19 September 2022 by Judge Carrie F. Vickery in Forsyth County District Court. Heard in the Court of Appeals 31 October 2023.

No brief filed for plaintiff-appellee.

David A. Perez for defendant-appellant.

ZACHARY, Judge.

Defendant-Husband David A. Perez appeals from the trial court's order denying his motion to change venue. We conclude that competent evidence supported the trial court's findings of fact, which supported its conclusion that venue is proper in Forsyth County. Accordingly, we affirm.

BACKGROUND

Husband and Plaintiff-Wife Ana Lagos Perez were married in 2015 and separated for a second time in February 2021, at which time Wife moved from the marital home in Davidson County to her parents' home in Forsyth County. Husband remained in Davidson County.

In January 2020, the trial court entered an order in the parties' pending custody action—that Father filed in Forsyth County—prohibiting Wife's mother from having contact with the parties' minor child. After the parties separated again, in June 2021, Wife leased an apartment in Guilford County for use when she exercised custody over the parties' child. According to Husband, he did not "know the exact time frame" of when Wife stayed in or returned to her parents' home in Forsyth County; Husband testified only that, when he was not exercising custody and would video-call Wife to speak with the parties' minor child, they would be in Wife's Guilford County apartment or otherwise outside of Forsyth County. By contrast, Wife testified that she resided at her parents' home in Forsyth County and that she stayed there "for at least half of the time"—about "three or four nights" a week "from January 2022 through July 2022"—and that she only leased the Guilford County apartment because she could not find an apartment in Forsyth County at the time that the trial court entered the no-contact order.

During this period, on 25 February 2022, Wife filed in Forsyth County the instant verified complaint seeking postseparation support, alimony, and equitable distribution. On 9 May 2022, Husband filed an answer and moved to change venue.

Wife's Guilford County apartment lease expired in July 2022. That same month, Wife rented an apartment in Forsyth County, where she then resided. Husband continued to reside in Davidson County.

On 14 September 2022, Husband's motion to change venue came on for hearing. On 19 September 2022, the trial court entered an order denying Husband's motion. The court determined that although the "Guilford County, NC address was *a* residence of [Wife] at the time of the filing of this action[,]" the house that Wife "shared with her parents [was her] *primary* residence at the time of the filing of this action." (Emphases added). Thus, the court denied Husband's motion to change venue in that he failed to meet his burden of showing that Wife did not reside in Forsyth County at the time she filed the present action.

On 20 October 2022, Husband filed notice of appeal from the 19 September 2022 order denying his motion to change venue. Husband also filed in this Court a petition for writ of certiorari to review the trial court's order.

TIMELINESS OF APPEAL

Appellate Rule 3(c) provides the deadlines for filing notice of appeal in civil cases. N.C.R. App. P. 3(c). "Failure to file a timely notice of appeal is a jurisdictional flaw which requires dismissal." *Magazian v. Creagh*, 234 N.C. App. 511, 513, 759 S.E.2d 130, 131 (2014).

In civil actions, the notice of appeal must be filed "within thirty days *after entry of judgment* if the party has been served with a copy of the judgment within the three-

day period prescribed by Rule 58 of the Rules of Civil Procedure[.]" N.C.R. App. P. 3(c)(1) (emphasis added). However, if the appellant has not been served with a copy of the judgment within the three-day window dictated by Rule 58, then the appellant must file and serve notice of appeal "within thirty days *after service upon the party* of a copy of the judgment[.]" N.C.R. App. P. 3(c)(2) (emphasis added). Absent service of a copy of the judgment, a party is deemed to have been served on the date on which the party receives actual notice of the entry of the judgment. *See Thiagarajan v. Jaganathan*, 289 N.C. App. 105, 108, 887 S.E.2d 473, 475 (2023) (explaining that our Court has "deemed . . . service to have occurred on the date when [the party] received . . . actual notice" of entry of the order (citation omitted)).

Here, the record does not contain a certificate of service indicating when Husband was served with a copy of the order, and Husband maintains that he was never served with a copy of the trial court's order denying his motion to change venue. Although the court's order was entered on 19 September 2022, Husband asserts that he did not discover that the court had entered its order until 20 October 2022. Husband then filed his notice of appeal that same day, more than 30 days after entry of the order, but on the date of "service" of the order. N.C.R. App. P. 3(c)(2).

Regardless, "where there is no certificate in the record showing when the appellant was served with the judgment, it is not the appellant's burden to show when [he] received actual notice." *Brown v. Swarn*, 257 N.C. App. 417, 422, 810 S.E.2d 237, 240 (2018). Husband was required to file his notice of appeal within 30 days after

service of the order, *see* N.C.R. App. P. 3(c)(2), which he avers that he did, and Wife makes no assertion or offer to the contrary. Consequently, Husband's appeal was timely, and we dismiss Husband's petition for writ of certiorari as moot.

INTERLOCUTORY APPEAL

Moreover, the instant appeal is interlocutory, as it "does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). "Interlocutory orders are generally not appealable unless certified by the trial court or unless a substantial right of the appellant would be jeopardized absent immediate appellate review." *Dechkovskaia v. Dechkovskaia*, 244 N.C. App. 26, 29, 780 S.E.2d 175, 179 (2015). However, it is well settled that "[a] right to venue established by statute is a substantial right[,]" and "[i]ts grant or denial is immediately appealable." *Id.* (citation omitted).

In the case at bar, Husband sought a change of venue based on a statutory right, *see* N.C. Gen. Stat. §§ 1-83(1), 50-3 (2021), rather than as a matter of the trial court's discretion, *see id.* § 1-83(2), and the hearing proceeded accordingly. The parties and the court treated Husband's motion as arising under N.C. Gen. Stat. § 1-83(2), the denial of which is "immediately appealable." *Dechkovskaia*, 244 N.C. App. at 29, 780 S.E.2d at 179 (citation omitted). Thus, this appeal is properly before us.

ANALYSIS

On appeal, Husband raises one argument: that the trial court incorrectly concluded that venue was proper in Forsyth County because the evidence showed that neither he nor Wife resided in Forsyth County at the time that Wife filed this action. We disagree.

a. Standard of Review

The question of where a party resides is a question of law, which this Court reviews *de novo*. *See Hall v. Wake Cty. Bd. of Elections*, 280 N.C. 600, 604, 187 S.E.2d 52, 55 (1972). When the trial court sits without a jury, we must determine "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." *Barker v. Barker*, 228 N.C. App. 362, 364, 745 S.E.2d 910, 912 (2013) (citation omitted). The trial court's findings of fact "are conclusive on appeal if there is evidence to support them, but conclusions of law are reviewed *de novo*." *Id.* Moreover, unchallenged findings of fact "are presumed to be supported by competent evidence and are binding on appeal." *Id.* (citation omitted).

b. Discussion

"Venue means the place of trial." *Gardner v. Gardner*, 43 N.C. App. 678, 680, 260 S.E.2d 116, 118 (1979), *aff'd*, 300 N.C. 715, 268 S.E.2d 468 (1980). Section 1-82 provides that venue is proper "in the county in which the plaintiffs or the defendants, or any of them, reside at [the action's] commencement[.]" N.C. Gen. Stat. § 1-82. Section 1-83 addresses the appropriate handling of cases of improper venue:

> If the county designated for that purpose in the summons and complaint is not the proper one, the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court.

Id. § 1-83. If the suit is filed in a county in which venue is improper, "the trial court does not have discretion, but *must* upon a timely motion and upon appropriate findings transfer the case to the proper venue." *Cheek v. Higgins*, 76 N.C. App. 151, 153, 331 S.E.2d 712, 714 (1985) (emphasis added).

Chapter 1 of our General Statutes does not define the word "reside" for purposes of determining proper venue. Indeed, our Supreme Court has noted that "[t]he words 'resident,' 'residing,' and 'residence' are in common usage and are found frequently in statutes . . . . They have, however, no precise, technical and fixed meaning applicable to all cases." *Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 266 N.C. 430, 435, 146 S.E.2d 410, 414 (1966).

In some contexts, the word "residence" has been interpreted to mean "domicile." *See Hall*, 280 N.C. at 605, 187 S.E.2d at 55. Nevertheless, as our Supreme Court has explained, "[p]recisely speaking, *residence* and *domicile* are not convertible terms. A person may have his residence in one place and his domicile in another." *Id.* "Residence simply indicates a person's actual place of abode, whether permanent or temporary. Domicile denotes one's permanent, established home as distinguished from a temporary, although actual, place of residence." *Id.*

Here, the trial court found that Wife's "domicile [was] that of her parent[s']"; that "the Forsyth County residence that [Wife] shared with her parents [was Wife's] primary residence at the time of the filing of this action"; and that venue was therefore proper in Forsyth County. The trial court made numerous findings of fact in support of its conclusions of law.

Of these findings, Husband first challenges finding 12, that "[a]t the time of the filing of this action," Wife lived three to four nights a week in Forsyth County with her parents, and finding 20, that the Guilford County apartment "was a residence of [Wife] at the time of the filing of this action." Wife's testimony provides competent evidence to support both of these findings, despite any competing or conflicting evidence offered at the hearing. It is well established that "the trial judge, sitting without a jury, has discretion as finder of fact with respect to the weight and credibility that attaches to the evidence." *Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (citations omitted), *reh'g denied*, 337 N.C. 807, 449 S.E.2d 750 (1994).

Husband also challenges findings 19 and 21, stating that Wife's primary residence was in Forsyth County, which was her domicile, and that the apartment in Guilford County was merely "a" residence. Despite their denomination as such, these are not findings of fact that can be challenged on appeal, but rather legal conclusions. *See Neil v. Kuester Real Estate Servs.*, 237 N.C. App. 132, 142, 764 S.E.2d 498, 506 (2014) ("While denominated as [a] factual finding[,] . . . . [f]inding of fact 7 is a legal conclusion.").

Husband challenges findings 16, 17, and 18 as lacking in evidentiary support. Specifically, Husband argues that the trial court erroneously found that "[a]t *the time this action was filed*," Wife 1) "was registered to vote based upon the address of her parent[s'] residence in Forsyth County"; 2) "received mail at her parent[s'] residence in Forsyth County"; and 3) "listed her parent[s'] address as her own on her federal and state tax returns." Husband is correct—there was no evidence presented of any of those facts as of "the time this action was filed." We therefore disregard findings of fact 16, 17, and 18. However, the remaining findings fully support the trial court's conclusions.

The trial court found that, at the time of the filing of the action, Wife stayed in Forsyth County three or four nights per week, despite leasing an apartment in Guilford County for use when she exercised custody of the parties' minor child. The court also found that, at the end of the lease period, Wife rented an apartment in Forsyth County. We conclude that there was competent evidence presented at the hearing of this matter to support the court's findings, and those findings support the court's conclusions that Husband did not "me[e]t his burden [of] showing [Wife] was not a resident of Forsyth County at the time of the filing of this action" and that "venue [was] proper in Forsyth County, North Carolina."

CONCLUSION

Accordingly, we affirm the trial court's order denying Husband's motion to change venue.

AFFIRMED.

Judges STADING and THOMPSON concur.

Report per Rule 30(e).