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NO. COA03-1070

NORTH CAROLINA COURT OF APPEALS

Filed: 15 June 2004

HARRY M. LANGE,
Plaintiff

v. Dare County
No. 02-CVD-493
CHERYL JESSUP LANGE,
Defendant

Appeal by plaintiff from judgment entered 13 February 2003 by Judge C. Christopher Bean in Dare County District Court. Heard in the Court of Appeals 24 May 2004.

Windy H. Rose for plaintiff-appellant.

Sharp, Michael, Outten & Graham, L.L.P. by Jeanine C. Evans, for defendant.

MARTIN, Chief Judge.

Plaintiff brought this action seeking divorce from bed and board, equitable distribution and child custody and support. In her answer, defendant moved to dismiss plaintiff's complaint, alleging plaintiff's claims were barred by a Deed of Separation entered into between the parties. Plaintiff appeals from an order dismissing his claims and enforcing a separation agreement signed by the parties on 1 February 2002.

The record, including evidence offered at the hearing on defendant's motion to dismiss, tends to show that plaintiff and defendant were married on 14 April 1984 and that one child was born of the marriage. The parties separated on or about 2 November 2001 when defendant and the parties' daughter left the marital residence. Approximately two weeks later, defendant and the child moved back into the marital residence and plaintiff moved to a separate residence.

On 1 February 2002, the parties executed a written Deed of Separation before a notary public. The agreement, *inter alia*, provided for the parties' separation as well as settlement of the issues of child custody and support, spousal support, and division of the marital property. The following day, in accordance with a provision of the agreement in which defendant agreed to lease a portion of the marital residence to plaintiff for a term to expire 2 November 2002, plaintiff moved into a separate apartment located in the downstairs of the marital residence, contemplated in the agreement to be separate living quarters. Plaintiff moved out of the downstairs unit of the residence on 25 August 2002. On 27 August 2002, he filed this action.

The sole issue on appeal is whether the trial court erred in concluding that although the parties both resided in the marital residence, albeit in separate living quarters, they did not reconcile so as to invalidate the provisions of the separation agreement. “[W]hen 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.” *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845(1992).

A married couple can “execute a separation agreement not inconsistent with public policy which shall be legal, valid, and binding in all respects; provided, that the separation agreement must be in writing and acknowledged by both parties before a certifying officer.” N.C. Gen. Stat. § 52-10.1 (2003). “Questions relating to the construction and effect of separation agreements between a husband and wife are ordinarily determined by the same rules which govern the interpretation of contracts generally” such as ascertaining the intent of the contract. *Gilmore v. Garner*, 157 N.C. App. 664, 666, 580 S.E.2d 15, 17-18 (2003). However, the executory terms of a separation agreement are terminated upon the “resumption of the marital relation,” *In re Estate of Adamee*, 291 N.C. 386, 391, 230 S.E. 2d 541, 545 (1976), which is defined by N.C. Gen. Stat. § 52-10.2 (2003) as the “voluntary renewal of the husband and wife relationship, as shown by the totality of the circumstances.”

In *Fletcher v. Fletcher*, 123 N.C. App. 744, 474 S.E.2d 802 (1996), *disc. review denied*, 345 N.C. 640, 483 S.E.2d 706-707 (1997), this Court interpreted the phrase “totality of the circumstances” as used in the statute as “focus[ing] on all the circumstances of a particular case, rather than any one factor.” *Id.* at 750, 474 S.E.2d at 806. In *Fletcher*, the Court considered such factors as (1) whether plaintiff moved back into the marital home, (2) the duration of the alleged reconciliation, (3) whether the couple shared household chores or responsibilities, (4) whether they held themselves out as husband and wife by accompanying each other to public places, (5) if they indicated to family and friends that they had reconciled, and (6) whether they engaged in sexual intercourse. In addition, where the evidence regarding reconciliation is conflicting, “the parties' mutual intent is an essential element in deciding whether the parties were reconciled and resumed cohabitation.” *Hand v. Hand*, 46 N.C. App. 82, 87, 264 S.E.2d 597, 599, *disc. review denied*, 300 N.C. 556, 270 S.E.2d 107 (1980).

In the present case, the parties executed a Deed of Separation, which conformed to the requirements of N.C. Gen. Stat. § 52-10.2 on 1 February 2002. The agreement provided, *inter alia*, for plaintiff to move back into the marital home in separate living quarters downstairs from defendant and their child. Defendant testified that she agreed to this arrangement because plaintiff indicated he could not afford to pay rent. The separate living quarters occupied by plaintiff contained a bedroom, a living area, a kitchenette, a half bathroom and an outside shower. A door with a lock was installed between the upstairs and downstairs of the house and this door remained locked most of the time, preventing plaintiff from entering the upstairs living quarters except to shower and at other times by special arrangement.

The Deed of Separation provided for plaintiff to pay certain bills in lieu of rent for the separate apartment. In addition, he paid for bottled water for the entire house and maid service for the upstairs and downstairs of the residence. Plaintiff continued performing many of the same household chores he had taken care of during the marriage such as maintenance of the yard, the vehicles, the boat, the exterior of the home and some housecleaning. He also cared for the family pet. In 2001, the parties filed a joint tax return.

The parties attended a few events together; they attended a Super Bowl party together at a friend's house, went to dinner at a Pizza Hut with their daughter and her boyfriend, went to court together twice after their daughter received a ticket, participated in an anniversary party for her parents and went to get ice cream together a few times. Although there is no evidence in the record that they explicitly held themselves out as husband and wife, a third party, looking at the marital residence from outside, might not have realized they were living

separately.

There is no indication from the evidence that either party ever led family or friends to believe they had reconciled. Plaintiff testified he told his friends he was separated but he was trying to work things out with his wife and he never told friends he had reconciled with defendant. In fact, during May 2002, plaintiff told a woman he dated that he was separated from his wife. Both parties testified they did not engage in sexual intercourse after 2 November 2001.

Plaintiff concedes he did not sign the Deed of Separation under duress. In fact, prior to signing the document, the parties negotiated for approximately a week and each consulted with their separate counsel. Even though plaintiff contends he signed the agreement only to facilitate reconciliation, the plain language of the agreement manifests an intent by *both* parties to live separate and apart. Defendant testified she never intended to renew the marital relationship even after plaintiff moved into the downstairs unit.

The trial court made findings of fact in accord with the foregoing evidence and concluded that the date of separation was 2 November 2001 and that the parties did not reconcile following the execution of the agreement. The evidence supports the findings which, in turn, support the trial court's legal conclusion that under the totality of the circumstances, there was no renewal of the relationship of husband and wife to terminate the executory terms of the parties' separation agreement. Therefore, the trial court properly dismissed plaintiff's claims for equitable distribution.

Affirmed.

Judges TIMMONS-GOODSON and HUNTER concur.

Report per Rule 30(e).

*** *Converted from WordPerfect* ***