

COURT OF APPEALS OF NORTH CAROLINA

Stoner v. Stoner

83 N.C. App. 523 (1986) · Decided December 16, 1986

OPINION

ARNOLD, J.

ARNOLD, Judge. Defendant appellant first argues that the trial court committed reversible error in finding that the parties were separated for at least one year next preceding the institution of the divorce action. We disagree.

In addition to defendant's evidence at the hearing for relief from judgment, the trial court had before it: 1) the verified complaint of the plaintiff which stated that the parties had lived separate and apart since 20 February 1984, 2) the sworn testimony of a corroborating witness at the trial for divorce and 3) the testimony at the later hearing of plaintiff's attorney who stated *525that on the day the divorce complaint was filed, defendant told him that she had been separated for more than a year.

There was ample evidence to support the trial court's finding on this matter. Defendant next contends that the trial court erred in concluding as a matter of law that the trial court had jurisdiction over the subject matter to grant the divorce.

In support of her position defendant cites a line of cases including *Henderson v. Henderson*, 232 N.C. 1, 59 S.E. 2d 227 (1950). We hold, however, that this line of cases is not dispositive of the issue in the present case because the above line of cases involved situations where the defendant was served by publication and the fraud involved due process. See *Carpenter v. Carpenter*, 244 N.C.

286, 93 S.E. 2d 617 (1956). The Supreme Court held in *Carpenter* that if a divorce decree regular on its face is obtained by false swearing, by way of pleading and evidence which relates to the grounds for divorce, the decree is not void but merely voidable. *Id.* It is immune from attack by either party to the divorce. *Id.* The rationale behind this decision is that the defendant had ample opportunity at trial to meet this testimony.

See 1 R. Lee, *North Carolina Family Law* § 90, at 423 (4th ed. 1979); *Thrasher v. Thrasher*, 4 N.C. App. 534, 167 S.E. 2d 549 (1969). Based on this authority we find the cases supporting defendant's second contention inapposite. Defendant next contends that the trial court erred in concluding as a matter of law that the defendant failed to allege and prove fraud, misrepresentation or misconduct sufficient to entitle her to relief under Rule 60(b) and that the trial court erred in concluding that defendant by her own actions is barred from the relief sought.

We disagree. Rule 60(b) states that the court “may” relieve a party from a final judgment “upon such terms as are just.” A motion under Rule 60(b) is within the sound discretion of the trial court and appellate review is limited to a determination of whether the trial court abused its discretion. *Sink v. Easter*, 288 N.C. 183, 217 S.E. 2d 532 (1975).

In light of the facts that defendant herself told plaintiffs attorney that the parties were separated for over one year, that defendant accompanied the attorney to file the complaint and to be served, that defendant failed to contest plaintiffs testimony at the divorce proceeding and that she only filed her *526motion nine months after the judgment when she learned that absolute divorce revoked her name as beneficiary on plaintiffs life insurance policy, we find no abuse of discretion on the part of the trial court in denying defendant’s motion.

Defendant lastly contends that the trial court erred in that the findings of fact are not supported by the evidence, the conclusions are not supported by the findings, the trial court lacked subject matter jurisdiction to grant the divorce and that the trial court abused its discretion in denying defendant’s Rule 60(b) motion.

For the reasons stated above we disagree. Affirmed. Judges Johnson and Eagles concur.