An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA06-696

NORTH CAROLINA COURT OF APPEALS

Filed: 1 May 2007

BENSON BUILDING SUPPLY, INC.,
Plaintiff,

v.

Johnston County
No. 04 CVS 2771

ROBERT E. (BOBBY) CREECH, JR., d/b/a BOBBY CREECH CONSTRUCTION SERVICE, DAVID L. LANE, d/b/a DIVINE CONSTRUCTION, J. ANTHONY PENRY, and wife, KAREN MORIARTY PENRY,
Defendants.

Appeal by defendant from order entered 21 March 2006 by Judge William C. Gore in Johnston County Superior Court. Heard in the Court of Appeals 14 December 2006.

Mast, Schulz, Mast, Mills, Johnson & Wells, P.A., by David F. Mills, for defendant-appellant David L. Lane.

Levinson Law Firm, P.A., by James R. Levinson, for defendant-appellee Robert E. Creech, Jr.

GEER, Judge.

Defendant David L. Lane appeals from an order of the superior court denying Lane's motion pursuant to Rule 60(b)(1) and (b)(6) to set aside a default judgment in favor of defendant Robert E. Creech, Jr. We hold that the trial court properly concluded that Lane had not established excusable neglect and that Lane has failed to demonstrate an abuse of discretion with respect to the trial

court's refusal to set aside the judgment under Rule 60(b)(6). Accordingly, we affirm the order of the trial court.

Facts

Sometime prior to January 2004, defendants J. Anthony Penry and his wife, Karen Moriarty Penry, entered into a contract with defendant Lane, a general contractor, to remodel their home. In early January 2004, defendants Lane and Creech entered into a subcontract, under which Creech agreed to provide certain labor and materials at the Penry remodeling site.

Creech had a contract with plaintiff Benson Building Supply, Inc., pursuant to which Benson agreed to supply Creech with equipment, materials, goods, supplies, and repairs on an open account. According to Creech, he permitted Lane to use this account to obtain materials for the Penry remodeling project following representations by Lane that his poor credit precluded him from buying materials on credit.

The relationship between Creech and Lane deteriorated over the course of the remodeling job, and Creech ceased working on the project before its completion. On 23 September 2004, Benson — who is not a party to this appeal — filed suit against all defendants, alleging it had not been paid for items and services it provided for the Penry remodeling project on Creech's open account. Lane and Creech asserted cross-claims against each other. Benson subsequently voluntarily dismissed its claims against Lane without prejudice.

Following a breakdown in settlement negotiations between Creech and Lane with respect to the cross-claims, the trial court permitted Lane's trial counsel to withdraw at a hearing on 2 November 2005. Lane was present at that hearing. The order allowing the withdrawal — entered on the morning of the hearing — noted that the case was "currently scheduled for trial in January of 2006 and will be tried at that time."

Lane's and Creech's cross-claims ultimately were calendared for trial during the 3 January 2006 civil session of Johnston County Superior Court before Judge Knox V. Jenkins, Jr. Lane did not appear for trial, and on 4 January 2006, Judge Jenkins entered judgment in favor of Creech against Lane, awarding Creech $7,308.95 for labor, $28,903.77 for materials, $2,000.00 in attorney's fees, plus interest from the date of Creech's cross-claim. The trial court also denied Lane's cross-claims against Creech as unsupported by evidence.

On 22 February 2006, Lane, through a new attorney, filed a verified motion to set aside the judgment pursuant to N.C.R. Civ. P. 60(b)(1) and (b)(6). Lane contended that he was not notified of the trial date, that the trial calendar was mailed to "David L. Land" rather than "David L. Lane," and that he did not receive the calendar until 17 January 2006 although the envelope was postmarked 6 December 2005. Creech filed a responsive affidavit, asserting that Lane was aware that the case would be heard in January and any delay in the receipt of the calendar was due to Lane's failure to notify the court of his change of address.

Lane's Rule 60 motion was heard by Judge William C. Gore during the 6 March 2006 term of the Johnston County Superior Court. On 21 March 2006, Judge Gore entered an order denying Lane's motion on the grounds that he had failed to show excusable neglect and a meritorious defense. Lane timely appealed to this Court.

Discussion

Lane first argues that the trial court erred by failing to conclude he had established excusable neglect. Under N.C.R. Civ. P. 60(b)(1), a judgment may be set aside if the movant shows that the judgment rendered was due to the movant's excusable neglect and the movant has a meritorious defense. *Higgins v. Michael Powell Builders*, 132 N.C. App. 720, 726, 515 S.E.2d 17, 21 (1999). Whether neglect is "excusable" is a question of law that depends upon what may be reasonably expected, under the circumstances, of a party to litigation. *JMM Plumbing & Utils., Inc. v. Basnight Constr. Co.*, 169 N.C. App. 199, 202, 609 S.E.2d 487, 490 (2005). A trial judge's determination as to whether neglect was excusable will be upheld on appeal if competent evidence supports the judge's findings, and those findings, in turn, support the judge's conclusions. *Id.*

Here, Lane does not contest the following findings of fact: (1) that the case was properly calendared for trial on 3 January 2006; (2) that prior to that time, Lane had furnished all parties with the mailing address of P.O. Box 1672, Garner, NC 27529; (3) that the motion to withdraw filed by Lane's attorney informed Lane that his case was set for trial in January 2006; (4) that Lane was

present at the 2 November 2005 hearing on his attorney's motion to withdraw; and (5) that the order entered at that hearing specifically stated that the case would be tried at the January term. Because Lane has not assigned error to these findings of fact, they are binding on appeal. *Thelen v. Thelen*, 53 N.C. App. 684, 690, 281 S.E.2d 737, 741 (1981).

In addition, the trial court found that Lane later changed his mailing address to 4415 Parkwood Drive, Raleigh, NC, but did not inform the trial court or any of the other attorneys of the change of address. Although Lane assigned error to this finding, he presented no argument on it in his brief. Accordingly, that finding is also binding on appeal. *See* N.C.R. App. P. 28(b)(6) ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned").

These binding findings, in turn, support the trial court's conclusion that Lane failed to establish excusable neglect. Although Lane knew that he was representing himself following his attorney's withdrawal in November 2005 and that trial was scheduled for January 2006, he nevertheless neglected to indicate to the parties or the court that he had changed mailing addresses until filing his motion to set aside the judgment. Our Court has previously held that such conduct did not constitute excusable neglect under Rule 60(b)(1). *See, e.g.*, *PYA/Monarch, Inc. v. Ray Lackey Enters., Inc.*, 96 N.C. App. 225, 228, 385 S.E.2d 170, 172 (1989) ("Clearly , [the attorney's] failure to monitor the progress

of the proceedings and maintain a reasonable level of communication with the court [including informing the court of a new address] constitutes 'inexcusable neglect.'"); *Standard Equip. Co. v. Albertson*, 35 N.C. App. 144, 146, 240 S.E.2d 499, 501 (1978) (plaintiff's failure to keep himself informed and to notify court of its current address, resulting in a failure to appear, was not excusable neglect). *See also Thompson v. Thompson*, 21 N.C. App. 215, 217, 203 S.E.2d 663, 665 ("A party to a legal action . . . is bound to keep himself advised as to the time and date his cause is calendared for trial for hearing; and when a case is listed on the court calendar, he has notice of the time and date of the hearing."), *cert. denied*, 285 N.C. 596, 205 S.E.2d 727 (1974).

The trial court thus did not err in determining that Lane failed to show excusable neglect. "'[I]n the absence of sufficient showing of excusable neglect, the question of meritorious defense becomes immaterial.'" *Scoggins v. Jacobs*, 169 N.C. App. 411, 413, 610 S.E.2d 428, 431 (2005) (quoting *Howard v. Williams*, 40 N.C. App. 575, 580, 253 S.E.2d 571, 574 (1979)). We, therefore, do not address Lane's arguments regarding his defense and hold that the trial court did not err in denying Lane's motion under Rule 60(b)(1).

Alternatively, Lane contends that sufficient equitable grounds existed to set aside the judgment under Rule 60(b)(6). Setting aside a judgment pursuant to Rule 60(b)(6) should only occur when (1) extraordinary circumstances exist, and (2) there is a showing that justice demands it. *Huggins v. Hallmark Enters., Inc.*, 84

N.C. App. 15, 24-25, 351 S.E.2d 779, 785 (1987). The determination whether relief under Rule 60(b)(6) is warranted "'is equitable in nature and authorizes the trial judge to exercise his discretion in granting or withholding the relief sought.'" *Id.* at 25, 351 S.E.2d at 785 (quoting *Kennedy v. Starr*, 62 N.C. App. 182, 186, 302 S.E.2d 497, 499-500, *disc. review denied*, 309 N.C. 321, 307 S.E.2d 164 (1983)). Consequently, this Court may not substitute its own judgment for that of the trial court unless the trial court's ruling is "'manifestly unsupported by reason.'" *Id.* (quoting *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980)).

Lane's reliance on *Oxford Plastics, Div. of Plastics Eng'g Corp. v. Goodson*, 74 N.C. App. 256, 328 S.E.2d 7 (1985) — for the proposition that a party's failure to notify the court of an address change, and resulting failure to attend trial, is alone an extraordinary circumstance justifying the setting aside of the judgment — is misplaced. In *Oxford Plastics*, it was the defendants' *counsel* — not the defendants *themselves* — who failed to provide the trial court with the new mailing address and who, consequently, did not receive a copy of the trial calendar. *Id.* at 260, 328 S.E.2d at 9. This Court concluded that, although neither the defendants nor their counsel appeared for trial, "a reasonable application of the provisions of Rule 60(b)(6) require that defendants be excused from attendance . . . ." *Id.* at 261, 328 S.E.2d at 10. *See also Thacker v. Thacker*, 107 N.C. App. 479, 482, 420 S.E.2d 479, 481 ("[A] lack of counsel and/or an ignorance of the law does not amount to 'extraordinary circumstances' without

some showing that the lack of counsel or ignorance *was due to reasons beyond control of the party seeking relief*." (emphasis added)), *disc. review denied*, 332 N.C. 672, 424 S.E.2d 407 (1992).

Oxford Plastics stands in sharp contrast to this case, in which it was not the neglect of Lane's attorney that caused his failure to appear, but the neglect of Lane himself. This Court has routinely held that a failure to take legal action based upon a party's own neglect is not an extraordinary circumstance warranting relief under Rule 60(b)(6). *See, e.g.*, *Baylor v. Brown*, 46 N.C. App. 664, 671, 266 S.E.2d 9, 14 (1980) (relief under Rule 60(b)(6) not justified when defendants failed to respond to plaintiff's complaint despite knowledge that action was pending); *Standard Equip. Co.*, 35 N.C. App. at 147, 240 S.E.2d at 501-02 (relief under Rule 60(b)(6) not justified when plaintiff failed to apprise trial court of plaintiff's current address and therefore failed to appear for calendared trial date).

Accordingly, we see no reason to conclude that the trial court abused its discretion by declining to find the existence of sufficient equitable grounds to set aside the judgment under Rule 60(b)(6). The trial court's order denying Lane's motion is, therefore, affirmed.

Affirmed.

Judges CALABRIA and JACKSON concur.

Report per Rule 30(e).