

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-759

NORTH CAROLINA COURT OF APPEALS

Filed: 2 January 2007

SCOTT A. MUELLER

v.

VIVIAN C. BRANTLEY, Individually,
BOBBY D. CONWAY, ex ux, LINDA
CONWAY, Individually, THOMAS H.
CONWAY, Individually, THE ESTATE
OF JOHN ALLEN CONWAY, JR., THOMAS
H. CONWAY and DOROTHY C. WHITE,
Co-Executors, WALLACE CONWAY, et
ux, PATRICIA CONWAY, Individually,
BARBARA JEAN KESTER, Individually,
ETHELYN C. PEYTON, et vir, LEVIE
E. PEYTON, JR., Individually,
DOROTHY C. WHITE, Individually

Pitt County
No. 02-CVS-3034

Appeal by defendant Wallace Conway from an order entered 10 March 2006 by Judge Thomas D. Haigwood in Pitt County Superior Court. Heard in the Court of Appeals 15 November 2006.

Horne & Horne, PLLC, by Stephen F. Horne, III, for plaintiff-appellee.

Wallace R. Conway, defendant-appellant, pro se.

HUNTER, Judge.

Wallace Conway ("defendant"), acting *pro se*, appeals from an order of the trial court granting Scott A. Mueller's ("plaintiff") motion to dismiss defendant's appeal for failure to perfect his appeal. For the reasons stated hereafter, we affirm the order of the trial court.

Plaintiff filed a complaint against multiple defendants, including present defendant, in Pitt County Superior Court, alleging breach of a real estate purchase agreement. The complaint alleged that on 8 March 2002, plaintiff entered into an agreement to purchase certain real property owned by defendant, his siblings, and their respective spouses. The purchase agreement was signed by two of defendant's siblings, to whom defendant had granted power of attorney to sell and convey the property in question. Defendant thereafter refused to convey the property to plaintiff, however. Plaintiff's complaint sought specific performance of the real estate contract.

Plaintiff thereafter moved for summary judgment, and defendant filed a motion titled "Motion Pursuant to Rule 7 of the Rules of Civil Procedure to Strike Down Plaintiff's Purchase Agreement." The matter came before the trial court on 9 September 2005. At the hearing, defendant appeared *pro se* and admitted that he gave power of attorney to his siblings to sell the property in question, and that his siblings then entered into the purchase agreement with plaintiff. Defendant argued, however, that there had been no "meeting of the minds" on the purchase agreement. The trial court ruled that plaintiff was entitled to specific performance of the purchase agreement. Defendant filed notice of appeal to this Court on 6 October 2005. The record on appeal contains no certificate of service to show that defendant served plaintiff with a copy of the notice of appeal.

Certified delivery of the hearing transcript for defendant's appeal did not occur until 6 March 2006. The record on appeal contains no extension of time in which to prepare the transcript. Nor does the record show that defendant served plaintiff with a proposed record on appeal. Rather, the record contains a certificate of service certifying that defendant served plaintiff with the record on appeal on 18 April 2006. The record contains no statement of settlement of the record on appeal.

Plaintiff filed a motion in the trial court to dismiss defendant's appeal and to sanction defendant for his failure to perfect the appeal and for multiple appellate rules violations. Upon reviewing the matter, the trial court agreed that defendant's appeal to this Court should be dismissed for violations of Rules 3, 7, 11, and 34 of the Appellate Rules and entered an order 10 March 2006 dismissing defendant's appeal. Defendant appeals.

The issue before this Court is whether the trial court properly dismissed defendant's appeal for multiple appellate rules violations. Rule 25 of the North Carolina Rules of Appellate Procedure provides in pertinent part as follows:

If after giving notice of appeal from any court, commission, or commissioner the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed. Prior to the filing of an appeal in an appellate court motions to dismiss are made to the court, commission, or commissioner from which appeal has been taken; after an appeal has been filed in an appellate court motions to dismiss are made to that court.

N.C.R. App. P. 25(a). Plaintiff made his motion to dismiss defendant's appeal on 7 February 2006; the trial court heard the matter on 10 March 2006. Defendant's appeal was not filed with this Court until 18 April 2006. Thus, plaintiff properly filed his motion to dismiss defendant's appeal with the trial court pursuant to Rule 25.

The trial court found that defendant had committed numerous violations of the appellate rules and failed to perfect his appeal. The evidence of record supports the trial court's conclusion. There is no indication that defendant served plaintiff with a copy of the notice of appeal, in violation of Rule 3. See N.C.R. App. P. 3(a). Further, in a civil case, an appellant must contract in writing with the court reporter or other neutral party for production of the portions of the transcript which are necessary for appellate review within fourteen days after filing notice of appeal. N.C.R. App. P. 7(a)(1). "The appellant shall file the written documentation of this transcript arrangement with the clerk of the trial tribunal, and serve a copy of it upon all other parties of record, and upon the person designated to prepare the transcript." *Id.* The appellant then has sixty days to prepare and deliver the transcript. N.C.R. App. P. 7(b)(1). The record contains no evidence that defendant timely arranged for the production of a transcript, served a copy of the transcript arrangement upon plaintiff, or obtained an extension of time to produce the transcript, all in violation of Rule 7. Noncompliance with the sixty-day deadline of Rule 7, where no good cause is shown

for the appellant's failure to request an extension, provides a basis for dismissal of the appeal. *Anuforo v. Dennie*, 119 N.C. App. 359, 363, 458 S.E.2d 523, 526 (1995).

The record on appeal contains no indication that defendant served plaintiff with a proposed record on appeal or otherwise settled the record on appeal, in violation of Rule 11. See N.C.R. App. P. 11. Failure to timely settle the record of appeal prior to filing it with this Court subjects the appeal to dismissal. *Higgins v. Town of China Grove*, 102 N.C. App. 570, 571, 402 S.E.2d 885, 886 (1991).

Although defendant asserts in his brief that he served a proposed record on appeal on plaintiff, plaintiff denies ever receiving such and the record on appeal contains no indication that defendant did so. "Appellate review is based 'solely upon the record on appeal,' N.C.R. App. P. 9(a); it is the duty of the appellant[] to see that the record is complete." *Collins v. Talley*, 146 N.C. App. 600, 603, 553 S.E.2d 101, 102 (2001).

"[O]nly those who properly appeal from the judgment of the trial divisions can get relief in the appellate divisions.'" *Craver v. Craver*, 298 N.C. 231, 236, 258 S.E.2d 357, 361 (1979) (quoting *In re Lancaster*, 290 N.C. 410, 424, 226 S.E.2d 371, 380 (1976)). The appellate rules are designed "to keep the process of perfecting an appeal flowing in an orderly manner[,]" and counsel may not "'decide upon his own enterprise how long he will wait to take his next step in the appellate process.'" *Id.* (quoting *Ledwell v. County of Randolph*, 31 N.C. App. 522, 523, 229 S.E.2d

836, 837 (1976)). "Furthermore, these rules apply to everyone -- whether acting *pro se* or being represented by all of the five largest law firms in the state. Because [defendant] violated many of the appellate rules, his appeal must be dismissed, notwithstanding his *pro se* status." *Bledsoe v. County of Wilkes*, 135 N.C. App. 124, 125, 519 S.E.2d 316, 317 (1999).

Based on the evidence of record, we hold the trial court properly dismissed defendant's appeal for failure to perfect the appeal and multiple rules violations. In addition, however, we have in our discretion examined the merits of defendant's appeal of the trial court's grant of summary judgment in favor of plaintiff and find no merit to defendant's arguments. We therefore affirm the order of the trial court dismissing defendant's appeal.

Affirmed.

Judges McCULLOUGH and ELMORE concur.

Report per Rule 30(e).