

**FOURTH DIVISION
MCFADDEN, P. J.,
WATKINS and PADGETT, JJ.**

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September 3, 2026

In the Court of Appeals of Georgia

A26A1003. HAM et al. v. DUNCAN et al.

MCFADDEN, Presiding Judge.

This appeal challenges the trial court's denial of a motion to set aside a final judgment entered after the appellants failed to appear at a bench trial. Because the appellants did not receive notice of the trial, the trial court abused its discretion in denying the motion to set aside. So we reverse.

1. Facts and procedural posture

In March 2018, Titus Duncan and Earl Coleman filed a complaint against Deneitra Ham and Darvin Ham, alleging that the Hams had breached a residential lease agreement by failing to pay rent for several months. The Hams filed an answer and counterclaim, denying that they had breached the agreement and asserting that

they had been authorized to move out of the residence because it had become uninhabitable after a tree fell on it. The Hams subsequently filed a motion for summary judgment as to the plaintiffs' breach of contract claim, asserting that there were no genuine issues of material fact and that they were entitled to judgment as a matter of law.

On May 25, 2022, the trial court notified the attorneys for the parties that the case had been set for a non-jury trial calendar call on July 20, 2022. Approximately three weeks later, in June 2022, the Hams' two attorneys moved to withdraw from the case, stating in their motion that they had notified the Hams of the July 20 calendar call and that all future notices should be sent to the Hams at a specified email address. On June 24, 2022, the trial court granted the motion to withdraw, but the last known address set forth in the order was for the former rental property, where the Hams had not lived in years, and the email address listed in the order was incorrect, missing a letter from the actual email address specified in the motion to withdraw.

On July 20, 2022, counsel for Duncan and Coleman appeared for the calendar call and announced ready for trial, but the Hams did not appear. During the calendar call, the court scheduled the case for a bench trial on July 28, 2022. Counsel for

Duncan and Coleman appeared for the July 28 bench trial and presented evidence, but the Hams did not appear. Over four months later, on December 9, 2022, the trial court issued its final judgment in favor of Duncan and Coleman. In the final order, the court entered default judgment on the issue of liability against the Hams based on their failure to appear; awarded \$31,000 in unpaid rent to Duncan and Coleman based on evidence presented at the bench trial; and also awarded them \$15,595 in attorney fees based on evidence presented at the bench trial and at an attorney fees hearing held immediately after the trial.

In June 2023, the Hams filed a motion to set aside the final judgment under OCGA § 9-11-60, claiming that because of a typographical error in the email address used by the court to send notice, they had not been notified of the bench trial and they had not been notified of the final judgment, learning of it only when Duncan and Coleman filed a garnishment action against them. They supported their motion with attached affidavits and exhibits allegedly showing that they had never received notice of the bench trial because the court used an incorrect email address and it was well publicized that they had moved out of state for Darvin Ham's professional basketball coaching jobs and had not lived at the former rental property address since it was

damaged by the fallen tree. After a hearing, the trial court denied the motion to set aside, finding “that [the Hams’] failure to receive notice lies with the action of [their] former attorneys and not with the [c]ourt” because the court had “used contact information provided by [the] former attorneys to send notice to [the Hams].” Thus, the court concluded, there were “no grounds pursuant to OCGA § 9-11-60 for the [c]ourt to set aside its December 9, 2022 Judgment.” This appeal followed.

2. Appellate jurisdiction

As a preliminary matter, although not raised by either party, we address our jurisdiction over this direct appeal. See *Dias v. Boone*, 320 Ga. 785, 789 (2) (912 SE2d 547) (2025) (even when not raised by the parties, it is incumbent upon this court to inquire into its own jurisdiction). The parties have characterized the ruling appealed from as the denial of a motion to set aside a judgment based on a nonamendable defect appearing on the face of the record pursuant to OCGA § 9-11-60 (d) (3). Such a ruling is not directly appealable; instead, an application for discretionary appeal is required in order to appeal from the denial of a motion to set aside a judgment under OCGA § 9-11-60 (d). See OCGA § 5-6-35 (a) (8). “Thus, if [the Hams’] motion was truly a motion to set aside based on a nonamendable defect, [their direct] appeal from the

denial of that motion would [not] be properly before us because [they did not] follow[] the procedures of OCGA § 5-6-35 (a) (8) by filing an application to appeal from the [trial] court's order denying [their] motion to set aside[.]” *Case v. State*, 300 Ga. 208, 210 (1) (794 SE2d 93) (2016).

However, in reality, [the Hams'] motion was not based on a nonamendable defect appearing on the face of the record, but [on] an argument that additional evidence would show that [due to a typographical error in the email address used by the court, they were] never given notice of the [bench trial]. This is more akin to a motion to set aside based on a clerical error [under OCGA § 9-11-60 (g)].

Case, supra (punctuation omitted). Indeed, they supported their motion to set aside with attached affidavits and documentary evidence showing that they were not notified of the trial, and the trial court cited the Hams' affidavit evidence in its order denying the motion. See *id.* at 210 (1) n. 2 (“Because motions to set aside under OCGA § 9-11-60 (d) (3) based on nonamendable defects deal only with matters that appear ‘upon the face of the record,’ additional matters introduced to the record such as affidavits should not be considered. A motion to correct clerical errors, however, contains no such restriction. See OCGA § 9-11-60 (g).”)

Under these circumstances, we “consider the trial court's denial of [the Hams'] motion as a denial of a motion to set aside based on a clerical error pursuant

to OCGA § 9-11-60 (g) rather than a motion to set aside based on a nonamendable defect pursuant to OCGA § 9-11-60 (d) (3).” *Case*, supra at 211 (1). “Because an order denying such a motion is subject to a direct appeal, [the Hams were] not required to follow the procedures of OCGA § 5-6-35 (a) (8) in this case, and [their direct appeal] is . . . properly before us.” *Id.* See also *Voyles v. Voyles*, 301 Ga. 44, 45 n. 2 (799 SE2d 160) (2017) (“This case involves the denial of a motion to set aside that . . . would be directly appealable because it is based on [evidence showing] an alleged lack of notice of a hearing rather than on a non-amendable defect [appearing on the face of] the record.”).

3. Lack of notice of bench trial

The Hams assert that the trial court abused its discretion in denying their motion to set aside based on the fact that they did not receive notice of the July 28 bench trial. We agree.

We first note that it appears the Hams had sufficient notice of the July 20 calendar call based on the trial court’s findings that their former attorneys, prior to withdrawing, received notice of the calendar call and that the calendar was sent for publication in the official county organ. See *McNally v. Stonehenge, Inc.*, 242 Ga. 258,

258-259 (248 SE2d 653) (1978) (“When the original counsel of record for [plaintiff] received notice of the trial date, [plaintiff] was on notice as to the date . . . , despite the fact that original counsel might not actually have told [plaintiff] before withdrawing from representation. Furthermore, the proper publication of the court calendar in the official organ of the county afforded [plaintiff] sufficient notice of the trial date.”) (citations omitted). But after the former attorneys had withdrawn and the Hams were proceeding pro se, the court failed to notify them of the July 28 bench trial.

In its order denying the motion to set aside, the trial court found that its prior June 24 order, allowing the former attorneys to withdraw and directing that all future notices to the Hams should be sent to an incorrect email address, had been provided by the former attorneys; that the court clerk’s office then relied on that prior order to update the Hams’ contact information; and that on July 21, 2022, the court “e-filed notice for the July 28, 2022 trial date.” The trial court went on to find that although the Hams had not received notice of the July 28 bench trial, the lack of notice was not the court’s fault. As stated in the order, “*the Court finds that the Defendants’ failure to receive notice lies with the actions of [their] former attorneys and not with the Court.*” (Emphasis supplied).

We are not persuaded by the trial court's reasoning that it was somehow absolved of its duty to notify the Hams of the trial date because of a typographical error in a court order prepared by the former attorneys. It is well established that a trial court may adopt a proposed order from a party and "once entered, the findings in an adopted final order are those of the court[.]" *State v. Holmes*, 306 Ga. 647, 651 (2) (832 SE2d 777) (2019) (punctuation omitted). Thus, any clerical error in the adopted order as to the Hams' email address became the court's error. And the court was not excused from providing notice to the Hams by relying on an error in its own order, especially in light of the fact that the correct email address had previously been provided to the court in the former attorneys' motion to withdraw and amended motion to withdraw.

OCGA § 9-11-40 (c) requires trial courts to provide notice to parties of the placing of actions upon the trial calendar. Our Supreme Court previously has held that knowledge of the month of the trial, without specific knowledge of the trial date, does not provide a party with adequate notice of a trial date. A trial court abuses its discretion in denying a motion to set aside the judgment where a party did not have sufficient notice of the trial.

Lofts of East Point Condo. Ass'n v. Blackmon, 375 Ga. App. 168, 169 (915 SE2d 31) (2025) (citations and punctuation omitted). See also *Rampersad v. The Plantation at*

Bay Creek Homeowners Ass’n, 362 Ga. App. 329, 334-335 (3) (b) (868 SE2d 475) (2022) (vacating denial of motion to set aside where no evidence in the record rebutted party’s testimony that she never received a copy of the trial notice from the court); *Fiffie v. Jiggetts*, 353 Ga. App. 730, 736 (2) n. 9 (839 SE2d 224) (2020) (trial court’s failure to provide sufficient notice of a hearing justifies setting aside the judgment to correct a clerical mistake under OCGA § 9-11-60 (g)). Here, given the finding that the Hams did not receive notice of the specific date of the bench trial, the trial court should have granted their motion to set aside the final judgment entered after that trial. See *Beresh v. Messmore*, 261 Ga. 812 (411 SE2d 493) (1992) (“A judgment or order based on a trial or hearing entered against a party without notice to that party is subject to a motion to set aside.”) (citation omitted); *Moore v. Davidson*, 292 Ga. App. 57, 58 (663 SE2d 766) (2008) (same). Because the court thus abused its discretion, we reverse the denial of the motion to set aside.

4. Pending motion for summary judgment

The Hams also contend that the trial court erred in entering default judgment against them while their motion for summary judgment was still pending. It is true that a “trial court should not enter a default judgment while a dispositive motion for

summary judgment is pending.” *Hodges v. Auction Credit Enters.*, 352 Ga. App. 517, 520 (3) (835 SE2d 357) (2019) (citation and punctuation omitted) (physical precedent). Accord *Cato Oil & Grease Co. v. Lewis*, 250 Ga. 24, 25 (2) (295 SE2d 527) (1982) (it is error to grant a motion for a default judgment prior to ruling on a pending motion for summary judgment); *Smith v. Local Union No. 1863, Int’l Longshoremen’s Ass’n of Clerks & Checkers*, 260 Ga. App. 683, 684-685 (1) (580 SE2d 566) (2003) (same). But the Hams have not shown that this issue was raised and ruled on by the trial court in denying the motion to set aside. Moreover, pretermittting whether the issue was preserved for appellate review, given our holding above in Division 3, we need not address this or any other remaining claims of error.

Judgment reversed. Watkins and Padgett, JJ., concur.