No. COA20-305

No. _____ TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

TOWN OF APEX,

Plaintiff-Appellee,

v.

BEVERLY L. RUBIN,

Defendant-Appellant.

From Wake County
19-CVS-6295

****

RULE 9(d) DOCUMENTARY EXHIBITS

(Cited as Doc. Ex. pp-pp)

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STATE OF NORTH CAROLINA COUNTY OF WAKE TOWN OF APEX, Plaintiff, vs. BEVERLY L. RUBIN, Defendant.	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 19-CVS-6295 BRIEF IN SUPPORT OF MS. RUBIN'S MOTION TO DISMISS

This lawsuit is the Town of Apex's second attempt to take Beverly Rubin's property illegally. In the first attempt, at the urging of a private land developer, the Town filed a condemnation action against Ms. Rubin so sewer lines could be run across Ms. Rubin's property, making the developer's adjacent property more valuable. While the action was pending, the Town used its "quick take" statutory powers to install the sewer lines without waiting for a final judgment.

At the "other issues" hearing before trial, the Town lost. The superior court found as a fact that the taking was for an improper private purpose. The Town appealed, but lost again. The Town asked the Supreme Court to intervene, but it declined.

On remand, Ms. Rubin moved for an injunction ordering the Town to remove the sewer lines from her property. Instead of responding to that motion, the Town commenced this new lawsuit, arguing that Ms. Rubin has somehow forfeited her property to the Town.

The Town's maneuverings are the epitome of unfairness: heads I win, tails you lose. Even though the Town took Ms. Rubin's property illegally, the Town says that it now owns her property and does not even owe just compensation. Thankfully, the Town's theory is not the law:

- The Town's new declaratory-judgment action is based on a misunderstanding of the law governing condemnation and a misapprehension of the facts of the prior lawsuit. The first lawsuit resolved all issues between the parties, leaving nothing for this second lawsuit.
- The Town's claim to Ms. Rubin's property was rejected in the first case. The final judgment in that action precludes, through res judicata, the Town's second attack.
- Ms. Rubin's motion to enforce the judgment in the original condemnation action—which was filed before this new complaint—abates this case under the prior action pending doctrine under controlling Court of Appeals precedent.

Each of these three grounds acts as an independent bar to the Town's latest assault on Ms. Rubin's property rights. For all or any of these reasons, the Town's complaint should be dismissed with prejudice.

BACKGROUND

The Town's declaratory-judgment action is its latest ploy in a dispute that dates back to 2015. Developer Brad Zadell purchased vacant land adjacent to Ms. Rubin's homestead. *Town of Apex v. Rubin*, 821 S.E.2d 613, 614 (N.C. Ct. App. 2018), *writ denied, review denied*, 825 S.E.2d 253 (N.C. 2019). Mr. Zadell's goal was to extend the Town's sewer lines over Ms. Rubin's property, thereby substantially increasing the value of his vacant property for resale to a developer—with Mr. Zadell pocketing the difference. Ex. C (Judgment) at 2 ¶ 7. Mr. Zadell offered to buy Ms. Rubin's property, but she refused. *Town of Apex*, 821 S.E.2d at 614.

Mr. Zadell then decided to "purchase" the condemnation powers of the Town to achieve by fiat what he could not achieve through negotiation. Mr. Zadell entered into a contract with the

Town whereby the Town would condemn Ms. Rubin's property, and, in return, Mr. Zadell would pay for all the costs of the condemnation proceeding. Ex. C at 3 ¶¶ 11–12.

A few weeks later, the Town commenced a condemnation proceeding against Ms. Rubin. *Town of Apex*, 821 S.E.2d at 615; Ex. A. Ms. Rubin answered the condemnation complaint, alleging that the taking was unconstitutional because it was not for a public purpose. Ex. B. She also pleaded, in the alternative, that if the taking were for a public purpose that she would be entitled to just compensation for the taking. *Id.* Having been forewarned by Ms. Rubin's attorney and acting with full knowledge that Ms. Rubin would contest the condemnation, the Town nevertheless deployed its statutory "quick-take" powers to take immediate possession of Ms. Rubin's property and to install the sewer lines while the condemnation case proceeded. Ex. D ¶ 3; *see* N.C. Gen. Stat. § 136-104.

The case proceeded to an "other issues" hearing in August 2016 under section 136-108 of the General Statutes to determine if the taking was indeed for a public purpose. *Town of Apex*, 821 S.E.2d at 614–15. This Court concluded that the taking was for an impermissible private purpose and entered judgment for Ms. Rubin. The Court held that the Town's "claim to [Ms. Rubin's] property by Eminent Domain is null and void." Ex. C at 6 ¶ 1.

Even though the trial court had correctly seen through the ruse, the Town's attorney tried to appeal. The Town's attorney—who has also initiated this case—missed the deadline for filing his notice of appeal. *Town of Apex*, 821 S.E.2d at 616–17. On that ground, the Court of Appeals dismissed the appeal. *Id.* The Town sought discretionary review from the Supreme Court, but the Court declined.

On April 10, 2019, a day after the case was remanded by the appellate courts, Ms. Rubin filed a motion in the condemnation case to enforce the judgment, and an alternative petition for a

writ of mandamus, asking this Court to order the Town to remove the sewer lines that it illegally installed on her property. Ex. D. This was Ms. Rubin's first opportunity to have the sewer lines removed because the Town had received stays of the final judgment from the appellate courts.

A month later, on May 13, 2019, the Town reacted by filing this declaratory-judgment action. The Town seeks a declaration that it owns the sewer lines on Ms. Rubin's property, and that Ms. Rubin cannot remove them. Compl. at 4–5. Ms. Rubin now moves to dismiss this declaratory-judgment action with prejudice.

GOVERNING STANDARDS

The Town's complaint fails to state a claim upon which relief can be granted. N.C. R. Civ. P. 12(b)(6). Rule 12(b)(6) is also the proper vehicle for presenting the defenses of res judicata and prior action pending. *E.g.*, *LMSP, LLC v. Town of Boone*, 818 S.E.2d 314, 316 (N.C. Ct. App. 2018) (prior action pending); *ACC Const., Inc. v. SunTrust Mortg., Inc.*, 239 N.C. App. 252, 268, 769 S.E.2d 200, 211 (2015) (res judicata).

Where, as here, a motion to dismiss based on res judicata or prior action pending relies on records from interrelated proceedings concerning the same parties and same issues, judicial notice of those related proceedings is appropriate. *West v. G. D. Reddick, Inc.*, 302 N.C. 201, 202, 274 S.E.2d 221, 223 (1981).

ARGUMENT

I. Ms. Rubin Was Not Required to File a Duplicative Counterclaim to the Town's Original Condemnation Action.

The Town's new declaratory-judgment action misconceives the purpose and procedure for inverse condemnations. A landowner may only file an inverse-condemnation action when the government has taken property rights without first initiating a condemnation proceeding. In the prior lawsuit between the parties, the Town commenced an actual condemnation proceeding.

Therefore, it would have been improper—and nonsensical—for Ms. Rubin to file an inverse-condemnation counterclaim. The Town's ill-conceived declaratory-judgment action should, therefore, be dismissed.

A. An inverse-condemnation counterclaim could not have been brought in the original action.

A claim for "inverse condemnation" is "a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, *even though no formal exercise of the power of eminent domain has been attempted by the taking agency*." *City of Winston-Salem v. Ferrell*, 79 N.C. App. 103, 108, 338 S.E.2d 794, 798 (1986) (emphasis added) (quoting *Charlotte v. Spratt*, 263 N.C. 656, 662–63, 140 S.E.2d 341, 346 (1965)). Stated another way, "[i]nverse condemnation is a device which forces a governmental body to exercise its power of condemnation." *Id.* (quoting *Hoyle v. City of Charlotte*, 276 N.C. 292, 302, 172 S.E.2d 1, 8 (1970)); *accord City of Charlotte v. Spratt*, 263 N.C. 656, 662, 140 S.E.2d 341, 346 (1965).

This makes sense. If the government initiates a condemnation action, a property owner's constitutional rights can be protected within the confines of that suit. But if the government fails to initiate an action, the property owner needs access to the courts to vindicate those rights—the purpose of an inverse-condemnation action. Requiring a property owner to pursue an inverse-condemnation action for the same property that is already subject to a pending condemnation action would be illogical.

Our state statutes confirm as much. *See* N.C. Gen. Stat. § 136-111; *Kirby v. N.C. Dep't of Transp.*, 239 N.C. App. 345, 355–56, 769 S.E.2d 218, 227 (2015), *aff'd*, 368 N.C. 847, 786 S.E.2d 919 (2016). The inverse-condemnation statute allows a landowner to bring an inverse-

condemnation claim only where "no complaint and declaration of taking has been filed by" the government. N.C. Gen. Stat. § 136-111.

The prior lawsuit filed by the Town against Ms. Rubin was a "complaint and declaration of taking." *See* Ex. A. It would, therefore, have been inappropriate for Ms. Rubin to file an inverse-condemnation counterclaim in that proceeding just to claim that the government was trying to take the very same property.

This is not to say that a landowner would never file an inverse-condemnation counterclaim. But landowners do so only when they believe that the government has taken *additional* property beyond that identified in the condemnation complaint. This too makes sense. The counterclaim serves to bring in property that would otherwise not be part of the suit.

In *North Carolina Department of Transportation v. Cromartie*, for example, the Department of Transportation commenced a condemnation action against several landowners. 214 N.C. App. 307, 308, 716 S.E.2d 361, 363 (2011). The landowners answered and filed an inverse-condemnation counterclaim, alleging that the condemnation of the original parcel stripped the remaining parcels of any value, constituting an additional taking. *Id.* at 309, 716 S.E.2d at 363.

The Department moved to dismiss the counterclaim, but the trial court denied the motion and the Court of Appeals affirmed. The Department argued that the landowners had no right under section 136-111 to file an inverse-condemnation counterclaim because the Department had filed its own "complaint and declaration of taking." *Id.* at 311–12, 716 S.E.2d at 365. The Court of Appeals rejected this argument because the landowners were asserting an inverse-condemnation claim "for a further taking" beyond the object of the Department's own condemnation action. *Id.* at 312, 716 S.E.2d at 365. *Cromartie* was drawing on prior law that allowed a landowner to seek bring an inverse-condemnation counterclaim when the landowner claimed that the government

had taken property "not listed in [the government's] original complaint." *Dep't of Transp. v. Bragg*, 308 N.C. 367, 371 n.1, 302 S.E.2d 227, 230 n.1 (1983).

This line of cases has no application here. Ms. Rubin was *not* claiming that the Town had made a "further taking" beyond the one identified in the Town's condemnation complaint. Rather, Ms. Rubin was simply challenging the constitutional basis for a taking already claimed by the Town. Under these circumstances, an inverse-condemnation counterclaim would have been pointless and procedurally improper.

B. In any event, Ms. Rubin did seek damages in the original condemnation action—the same remedy that would have been available through an inverse-condemnation counterclaim.

As the Town's declaratory-judgment complaint acknowledges, the issue to be decided in an inverse-condemnation case is the amount of just compensation owed to the landowner. Compl. ¶ 22. The inverse-condemnation statute contemplates just compensation as the remedy for an inverse-condemnation claim. N.C. Gen. Stat. § 136-111 ("The procedure hereinbefore set out shall be followed for the purpose of determining all matters raised by the pleadings and the determination of just compensation.").

Ms. Rubin's answer sought the very remedy of just compensation. Ms. Rubin's second affirmative defense requested "just compensation" for the taking, and her prayer for relief sought a trial to determine "just compensation." Ex. B (Answer) at 2.

The single case cited by Plaintiff in support of this lawsuit is *Wilkie v. City of Boiling Springs Lakes*, 370 N.C. 540, 809 S.E.2d 853 (2018), but that case has no application here. In *Wilkie*, a landowner filed an inverse-condemnation case against the City due to flooding caused by the City. The Supreme Court held that a property owner may file an inverse-condemnation action against a governmental body regardless of whether the action by the government is for a public or private purpose. The holding *expands* the rights of property owners to seek just

compensation against a government when there has been a taking. Nothing in *Wilkie* addresses—or even suggests—that a property owner must counterclaim for inverse condemnation in an ongoing condemnation action.

In short, Ms. Rubin asked for either dismissal of the Town's condemnation case or, in the alternative, just compensation for that taking. Adding the label "inverse condemnation" to her answer or a counterclaim would have added nothing—the issue of damages for the taking was already before the court. *Cf. City of Greensboro v. Pearce*, 121 N.C. App. 582, 587–88, 468 S.E.2d 416, 420 (1996) (allowing a landowner to raise an inverse-condemnation claim by answer rather than counterclaim).

II. The Final Judgment in the Town's Condemnation Action Precludes the Town's New Action.

The Town's new declaratory-judgment action is also barred by the final judgment in the former condemnation action. The Town's new lawsuit is nothing but an attempt to relitigate the propriety of the taking deemed illegal in the prior action. The doctrine of res judicata precludes this duplicative litigation.

Under the doctrine of res judicata (or claim preclusion), "a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties." *Williams v. Peabody*, 217 N.C. App. 1, 5, 719 S.E.2d 88, 92 (2011) (quoting *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004)). Res judicata bars relitigation of "every ground of recovery or defense which was actually presented or which could have been presented in the previous action." *Id.* at 7, 719 S.E.2d at 93 (quoting *Goins v. Cone Mills Corp.*, 90 N.C. App. 90, 93, 367 S.E.2d 335, 336–37 (1988)). The estoppel effect extends to "to all relevant and material matters within the scope of the proceeding which the parties, in the exercise

of reasonable diligence, could and should have brought forward for determination." *Id.* (quoting *Rodgers Builders, Inc. v. McQueen*, 76 N.C. App. 16, 22, 331 S.E.2d 726, 730 (1985)).

These requirements are met in this case.

- The Town's condemnation action resulted in a final judgment, which became final when the last of the Town's various appeals was rebuffed on April 9, 2019.
- This Town's original condemnation and its new declaratory-judgment action are between the same parties—the Town and Ms. Rubin.

The issue in the Town's new complaint was also resolved through the final judgment. The primary question in the condemnation action was whether the Town could take Ms. Rubin's property to install sewer lines. That issue was finally and fully resolved in the judgment: "The [Town's] claim to the Defendant's property by Eminent Domain is null and void." Ex. C. (Judgment) at 6.

The Town's new action seeks a declaration that the first superior court got it wrong. The Town is seeking a declaration that it gets to keep its illegal taking because Ms. Rubin never sought just compensation for the illegal taking. Compl. at 4–5. Of course, the issue of just compensation was entirely subsumed within the prior litigation. Since the Town took Ms. Rubin's property for an illegal private purpose, the trial court never had an occasion to determine the compensation owed for the taking. *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 543 (2005) ("[I]f government action is found to be impermissible—for instance because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action."). Thus, the remedy wasn't "just compensation"—it was return of the stolen property.

Ultimately, if the Town can proceed in this new action, it will be the existing judgment—rather than the Town's taking—that is rendered null and void. The final judgment in the prior case determined that the Town has no claim to her property, and that she is the property's rightful—and exclusive—owner. The Town's attempt to relitigate this determination is barred by res judicata.

III. The Prior Pending Condemnation Action Abates the Town's New Action.

Despite the entry of the final judgment in the Town's prior condemnation action against Ms. Rubin, that action remains pending in one important respect. Ms. Rubin has filed a post-judgment motion to enforce the judgment against the Town, which will require the Town to remove its illegal sewer lines from Ms. Rubin's property. This pending motion in the original condemnation action abates the Town's newest lawsuit.

Under the prior action pending doctrine, a prior pending lawsuit between the same parties over substantially the same issues abates a subsequently filed lawsuit. *Clark v. Craven Reg'l Med. Auth.*, 326 N.C. 15, 20, 387 S.E.2d 168, 171 (1990). Courts must address a prior-action-pending defense "prior to moving to the merits of the case," because the doctrine avoids "redundant lawsuits, waste of judicial resources and inconsistent verdicts." *SCA-Blue Ridge, LLC v. WakeMed*, No. 13 CVS 2470, 2014 NCBC 31 ¶ 23 n.29 (N.C. Bus. Ct. July 18, 2014) (Jolly, J.).

The same-party requirement is plainly met. The prior condemnation action was a lawsuit by the Town against Ms. Rubin, and the new inverse condemnation action is a lawsuit by the Town against Ms. Rubin. There are no other parties in either lawsuit.

The issues of condemnation (raised in the prior action) and inverse condemnation (raised in the Town's new action) are also substantially the same. To test for issue overlap, the North Carolina courts consider not only the claims that have been advanced in the prior lawsuit, but also

the claims that *could* arise in that lawsuit.[1] *Weaver v. Early*, 325 N.C. 535, 538, 385 S.E.2d 334, 336 (1989). For that reason, the Court of Appeals has held that a prior inverse-condemnation action abates a later-filed condemnation action. *Dep't of Transp. v. Stimpson*, 813 S.E.2d 634, 640–41 (N.C. Ct. App. 2018). Two condemnation actions over the same property cannot proceed simultaneously. *Id.*

The landowner in *Stimpson* filed an inverse-condemnation action against the Department of Transportation, alleging that the Department had taken the landowner's property without compensation. *Id.* at 635–36. Instead of following the inverse-condemnation procedures required by the trial court, the Department commenced a new condemnation action against the landowner. *Id.* at 636. The trial court dismissed the condemnation action, due to the prior pending inverse-condemnation action. *Id.*

The Court of Appeals affirmed. The Department claimed a right to commence condemnation proceedings at any time to determine the nature of its interests in the landowner's property, but the court rejected that argument because that same determination was one of the issues in the prior inverse-condemnation action. *Id.* at 640. The court could not find "any utility" in allowing the later proceeding to continue or to "derail" the landowner's inverse-condemnation action. *Id.* at 640–41. The legislature did not intend to permit "condemnation actions and inverse condemnation actions concerning the same property to be litigated simultaneously." *Id.* 642.

Stimpson is dispositive here. In the Town's original condemnation action, the Town claimed a right to take Ms. Rubin's property and proceeded to install sewer lines on Ms. Rubin's

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[1] In addition, the issues in two lawsuits can overlap even if the parties' legal theories differ. For example, in *Ward v. Pitt County Memorial Hospital, Inc.*, the court held that a breach-of-contract lawsuit and a libel lawsuit overlapped, because the two lawsuits involved "the same subject matter and . . . the same circumstances." 81 N.C. App. 521, 522, 344 S.E.2d 583, 584 (1986).

property while that action was pending. When it was finally determined that the Town had taken Ms. Rubin's property illegally, Ms. Rubin filed a motion to enforce the judgment and require that the sewer lines be removed. Ex. D (motion to enforce judgment).

Rather than respond to Ms. Rubin's motion in the prior action, the Town filed a new lawsuit while the motion to enforce judgment was pending. The Town's new complaint claims that it is entitled to the taking barred by the prior action. But the issue of whether the Town must remove its trespassing sewer lines is already presented in the prior pending action. The motion to enforce judgment requests that the court "enforce its judgment and order the Town of Apex to remove the sewer lines on Ms. Rubin's property." Ex. D at 5. That motion should be granted because the proper remedy for an illegal taking is an injunction against the condemnor that commenced the action. *State Highway Comm'n v. Batts*, 265 N.C. 346, 361, 144 S.E.2d 126, 137 (1965) (holding that, where a condemnation proceeding is found to lack a public purpose, the trial court must issue "an injunction permanently restraining [the condemnor] from proceeding with the condemnation and appropriation of [the landowner's] lands"). The Town's new complaint seeks the exact opposite relief: seeking to enjoin the removal of the sewer lines. Compl., prayer for relief ¶ 2.

The prior action pending doctrine bans this duplicity of actions. The motion to enforce judgment in the Town's first lawsuit abates the Town's latest assault on Ms. Rubin's property rights. There is no fair or just reason to allow this new action to continue.

CONCLUSION

For each of these three independent reasons, Ms. Rubin respectfully requests that the Town's complaint be dismissed with prejudice.

This the 21st day of May, 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Motion to Dismiss was served by email and by United States mail, first-class postage pre-paid, and addressed as follows:

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This the 21st day of May, 2019.

Troy D. Shelton

STATE OF NORTH CAROLINA		IN THE GENERAL COURT OF JUSTICE
		SUPERIOR COURT DIVISION
WAKE COUNTY		19-CVS-6295
TOWN OF APEX,	)	
	)	
Plaintiff,	)	
	)	**PLAINTIFF'S MEMORANDUM IN**
v.	)	**SUPPORT OF MOTION FOR**
	)	**PRELIMINARY INJUNCTION**
BEVERLY L. RUBIN,	)	
	)	
Defendant.	)	

NOW COMES the Plaintiff, Town of Apex ("Town"), and submits this Memorandum In Support of its Motion for Preliminary Injunction.

NATURE OF THE CASE, FACTS AND PROCEDURAL HISTORY

The Complaint filed herein on 13 May 2019 alleges a declaratory judgment action to determine the rights of the parties regarding an easement for an underground sewer line ("Project") installed utilizing the bore and jack method on Defendant Beverly L. Rubin's property described in paragraph 15 of the Complaint ("Property").

Beverly L. Rubin ("Rubin") had actual knowledge of the Project as of 30 April 2015.

The Project crosses a narrow portion of the Property. The eight (8) inch gravity flow sewer line was installed at a depth of eighteen (18) feet and placed inside an eighteen (18) inch steel casing. Bore pits were dug on each side of the Property (but not thereon) on 20 July 2015. The casing was inserted on 27 July 2015, and the sewer pipe was installed on 29 July 2015. The Project was accepted as complete by the Town on 22 February 2016.

The Town has not abandoned the Project. The sewer line remains in place, is in use, and currently serves approximately 50 residential homes and/or lots located in a subdivision in the

Town. The Project is designed to serve numerous other yet to be developed properties beyond the subdivision.

Installation of the underground sewer line by the Town was a physical invasion of the Property and constituted an inverse condemnation of the sewer easement more particularly described in paragraph 14 of the Complaint.

Town and Rubin are parties to a condemnation action filed on 30 April 2015 in Wake County Superior Court, 15 CVS 5836 ("Condemnation"). A final judgment was entered on 18 October 2016 ("Judgment"). The Judgment dismissed the Town's claim for acquisition of a sewer easement across the Property as null and void on the grounds that the taking by the Town was not for a public use. The Judgment rendered the Complaint and Declaration of Taking a nullity.

Rubin has sought in the prior condemnation action by written motion described in paragraph 18 of the Complaint herein to remove the sewer pipe and casing owned by the Town and lying within the easement described in paragraph 14 of the Complaint.

The principal relief sought by the Town in its Complaint is that Rubin be enjoined from disturbing or removing the existing underground sewer line and casing crossing the Property.

LAW AND ARGUMENT

N.C. Gen. Stat. § 1-485 provides the following applicable grounds for granting a preliminary injunction:

> (1) to preserve the status quo by restraining the commission or continuation of an act which would produce injury to the plaintiff during the litigation;
>
> (2) to prevent a party from taking some action during the litigation regarding the subject of the action which would render the judgment ineffectual.

"Generally, a preliminary injunction will be issued only where: (1) the plaintiff is able to show a likelihood of success on the merits of the case and (2) the plaintiff is likely to sustain

irreparable harm, or, in the opinion of the court, the injunction is necessary to protect the plaintiff's rights during the course of litigation. " *A.E.P. Industries v. McClure,* 308 N.C. 393, 302 S.E.2d 754 (1983). However, where as in the present case the principal relief sought is an injunction, the North Carolina Supreme Court has consistently held that a preliminary injunction must issue. *Id. at* N.C. 408. Our Supreme Court stated the applicable rule of law as follows: "We hold that where the primary ultimate remedy sought is an injunction; where the denial of a preliminary injunction would serve effectively to foreclose adequate relief to plaintiff; where no 'legal' (as opposed to equitable) remedy will suffice; and where the decision to grant or deny a preliminary injunction in effect results in a determination on the merits, plaintiff has made a showing that the issuance of a preliminary injunction is necessary for the protection of its rights during the course of litigation." *Id. at* N.C. 410.

Injunction will lie to prevent irremediable injury or threatened injury to or destruction of property rights. *Town of Clinton v. Ross,* 226 N.C. 682, 689, 40 S.E.2d 593 (1946).

A. Town is Likely to Succeed on the Merits of its Claim

The Town's Declaratory Judgment Complaint alleges an actual controversy between parties regarding rights in and to the easement and sewer pipe inversely condemned by the Town. By the construction of the Project, the Town physically invaded the Property and inversely condemned a sewer easement more particularly described in paragraph 14 of the Complaint. Town contends that it has thereby acquired a sewer easement and is therefore entitled to maintain the underground sewer pipe in place. Rubin asserts that she is entitled to an order requiring the Town to remove the sewer pipe. Rubin has formally sought such an order by written motion filed on 10 April 2019 in the condemnation - 15-CVS-5636. Consequently, a genuine

controversy exists between the Town and Rubin as to their respective rights and duties in and to the sewer easement and existing sewer pipe.

The sufficiency of a complaint in a declaratory judgment action is determined by whether or not a plaintiff is entitled to a declaration of rights at all. Even if the plaintiff is on the wrong side of the controversy, if he states the existence of a controversy, he states a cause of action for a declaratory judgment. *Walker v. City of Charlotte,* 268 N.C. 345, 150 S.E.2d 493 (1966). Motion to dismiss for failure to state a claim is not an appropriate pleading where complaint alleges a justiciable controversy. *Id.*

The Declaratory Judgment Act is available to adjudicate the rights of the parties in the sewer easement and sewer pipe. *Hubbard v. Josey,* 267 N.C. 651, 148 S.E.2d 638 (1966) (judicial declaration of right to easement over lands of defendant authorized by Declaratory Judgment Act).

B. Town is likely to sustain irreparable harm

The Town has acquired a sewer easement more particularly described in paragraph 14 of the Complaint herein. Removal of the underground sewer pipe will violate those easement rights obtained on or about 27 July 2015 and result in irreparable harm to the Town because the sewer pipe currently serves approximately fifty (50) residential homes and/or lots that will lose sewer service. Other potential users for whom the sewer pipe was designed to serve will also be denied the ability to use the sewer service. No legal (as opposed to equitable) relief is available to the Town in that money damages is not an available remedy to the Town for inverse condemnation of the sewer easement. Compensation was solely available to Rubin had she timely sought such relief.

C. Issuance of preliminary injunction is necessary for the protection of the Town's rights during the course of the litigation

Any disruption of sewer service provided by means of the underground sewer pipe will infringe upon the Town's easement rights and result in substantial injury to Town residents who are currently served by the underground sewer pipe. Same is true for users for whom the underground sewer pipe is designed to serve. This portion of the Town's sewer system depends almost entirely on gravity flow. Due to the topography of the land area surrounding the Rubin property, no viable, practical alternative exists for the relocation of the underground sewer pipe.

If the sewer pipe is removed prior to the adjudication of the Town's easement rights, the Town will be denied the benefit of a favorable adjudication. Moreover, the residents of the Town will be denied sewer service.

D. A preliminary injunction must issue under Supreme Court precedent

A preliminary injunction is necessary to protect the Town and its residents during the course of the litigation. *AEP Industries, Supra* at N.C. 410. The relief sought by the Town is equitable in nature—i.e. an injunction. Denial of a preliminary injunction would effectively foreclose adequate relief to the Town. The decision to grant or deny the preliminary injunction in effect results in a determination on the merits. The Town has made a showing that a preliminary injunction is necessary for the protection of its easement rights during the course of the litigation. *Id.*

CONCLUSION

Issuance of a preliminary injunction during the pendency of the captioned declaratory judgment action will maintain the status quo and protect the rights of the parties. Rubin will suffer no inconvenience from the underground sewer pipe remaining in place. The Town's

easement rights will be preserved pending the litigation of the parties' rights on the merits. Therefore, the Town respectfully requests the Court grant its Motion for Preliminary Injunction.

This the 21st day of May, 2019.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served a copy of the foregoing **PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** upon the parties by electronic mail and depositing the same in the United States mail, first class postage prepaid, addressed as follows:

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This the 21st day of May, 2019.

David P. Ferrell

STATE OF NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 19-CVS-6295
TOWN OF APEX, Plaintiff, v. BEVERLY L. RUBIN, Defendant.	**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

NOW COMES the Plaintiff Town of Apex ("Apex"), and submits this Memorandum In Opposition to Defendant Beverly L. Rubin's ("Rubin") Motion to Dismiss.

NATURE OF THE CASE, FACTS AND PROCEDURAL HISTORY

The Complaint herein requests declaratory and injunctive relief as to the parties' rights in and to an easement for an underground sewer line installed on Rubin's property by the Town. The underground sewer line was constructed utilizing the bore and jack method at a depth of eighteen (18) feet ("Project"). The sewer easement is described in paragraph 14 of the Complaint ("Easement"). Rubin's property is described in paragraph 15 thereof ("Property").

Rubin had actual knowledge of the Project prior to the commencement of construction on 27 July 2015.

The sewer pipe and Easement cross a narrow portion of the Property. The eight (8) inch gravity flow sewer line was installed at a depth of eighteen (18) feet and placed inside an eighteen (18) inch steel casing. Bore pits were dug Town easements on each side of the Property on 20 July 2015. The casing was inserted on 27 July 2015, and the sewer pipe was installed on 29 July 2015.

The Project was accepted as complete by the Town on 22 February 2016.

The sewer line remains in place, continues in use, and currently serves approximately 50 residential homes and/or lots in a subdivision located in the Town. The constructed sewer line is designed to serve yet to be developed properties beyond the subdivision.

The installation of the sewer pipe constituted a physical invasion of the Property and inverse condemnation of the Easement.

Town and Rubin are parties to a condemnation action filed on 30 April 2015 in Wake County Superior Court—15-CVS-5836 ("Condemnation"). A final judgment was entered on 18 October 2016 ("Judgment"). The Judgment dismissed as null and void the Town's claim for acquisition of a sewer easement across the Property – it is as if the complaint had never been filed. The grounds for the dismissal was that the public purpose for the prior condemnation complaint was outweighed by private interest. The Judgment rendered the Complaint and Declaration of Taking a nullity. All appeals have been exhausted.

Rubin has filed a written motion in the prior Condemnation action to remove the sewer pipe and casing from the Easement.

Town requests a declaration of rights that the construction of the sewer pipe on 27 July 2015 was an inverse taking, that inverse condemnation, Rubin's sole remedy, is now time barred, and the Judgment is *res judicata* as to any claims for injunctive relief or an extraordinary writ by Rubin. Alternatively, Town seeks a declaration that the Judgment does not preclude another direct condemnation by the Town of a sewer pipe and easement across Rubin's property.

LAW AND ARGUMENT

A. Complaint alleges actual controversy between parties regarding rights in and to the Easement

By construction of the underground sewer pipe the Town physically invaded the Property and inversely condemned the Easement. Town contends that it thereby acquired the Easement

and has the right to continue the maintenance and use of the underground sewer pipe therein. Rubin asserts that she is entitled to an order requiring the Town to remove the sewer pipe. Rubin has formally sought such an order by written motion filed on 10 April 2019 in the Condemnation. Consequently, a genuine controversy exists between the Town and Rubin as to their respective rights and duties in to the Easement.

Adequacy of a complaint in a declaratory judgment action is determined by plaintiff's entitlement to a declaration of rights. Even if the plaintiff is on the wrong side of the controversy, if she states the existence of a controversy, she states a cause of action for a declaratory judgment. *Walker v. City of Charlotte,* 268 N.C. 345, 150 S.E.2d 493 (1966). Motion to dismiss for failure to state a claim is not appropriate where complaint alleges a justiciable controversy. *Id.*

B. Declaratory Judgment Act is available to adjudicate rights of parties to Easement

In *Hubbard v. Josey,* 267 N.C. 651, 148 S.E.2d 638 (1966) our Supreme Court held that judicial declaration of plaintiffs' right to an easement over the lands of the defendants is authorized by the Declaratory Judgment Act. Our Supreme Court further reversed the dismissal of a declaratory judgment action on a demurrer (motion to dismiss) on the grounds that "a declaratory judgment may be entered only after answer and on such evidence as the parties may introduce upon the trial or hearing." *Id* at N.C. 639. As such, "a judgment of nonsuit may not be entered." *Id.* citing *Board of Managers etc. v. City of Wilmington,* 237 N.C. 179, 194, 74 S.E.2d 749 (1953).

***C.* *Res judicata* does not bar Town's claim for declaratory judgment as to rights of parties to Easement**

The present declaratory judgment action is not based on the same facts as the Condemnation. Consequently, *res judicata* does not apply to the Town's declaratory judgment

action. *Flynt v. Flynt,* 237 N.C. 754, 75 S.E.2d 901 (1953). The Condemnation was an unsuccessful attempt by the Town to exercise its power of eminent domain to acquire a sewer easement for a public purpose. The Condemnation was dismissed because the Court held that the exercise of the power of eminent domain by the Town primarily benefitted a private interest.

The Town's rights in and to the underground sewer pipe contained in the easement described in this declaratory judgment action arise from an inverse condemnation on or about 27 July 2015. Public use or purpose is not an element of the inverse condemnation alleged in the Complaint herein. *Wilkie v City of Boiling Spring Lakes*, 371 N.C. 540, 809 S.E.2d 853 (2018). As a result, the critical facts affording the basis for dismissal of the Condemnation are not relevant to the existence of the Easement acquired by inverse condemnation. Further, the physical invasion which resulted in the inverse taking occurred after the Condemnation was commenced. The facts on the date of taking for the inverse condemnation differ and have changed from the facts that existed on the date the condemnation complaint was filed. These facts did not exist on the date the Condemnation was commenced. The facts surrounding the inverse condemnation are different than the facts which existed when the Condemnation was commenced. As such, *res judicata* does not bar this declaratory judgment action. *City of Charlotte v. Rousso*, 82 N.C. App. 588, 346 S.E.2d 693 (1986).

For the same reasons, and pursuant to the *City of Charlotte v. Rousso*, case, *res judicata* would not bar the Town's alternative requested relief of filing a new condemnation action for a gravity sewer easement across Rubin's property. *Id.*

D. No prior action involving the Easement is pending

A final judgment has been entered in the prior Condemnation action. All appeals from the final judgment have been exhausted. The Judgment has rendered the complaint and declaration of taking a nullity. As a result, no condemnation is currently pending.

An action is pending for the purpose of abating a subsequent action between the same parties for the same cause from the time of the issuance of the summons until its final determination by judgment. *McDowell v. Blythe Brothers Co.,* 236 N.C. 396, 72 S.E. 2d 860 (1952). Further, a prior action is pending until its determination by final judgment. *Clark v. Craven Regional Medical Authority*, 326 N.C. 15, 387 S.E. 2d 168 (1990). The *Dep't of Transportation v. Stimpson* case is inapplicable because when NCDOT filed their direct condemnation action, there was a prior inverse condemnation pending and the case had not reached the point of final judgment. 803 S.E. 2d 634 (N.C. App. 2018). The *Stimpson* Court also noted that the second direct condemnation action was dismissed without prejudice for NCDOT to file a counterclaim in the pending inverse condemnation action. No such opportunity exists here. It is undisputed that the prior Court's 18 October 2016 Judgment is a final judgment; Rubin admits this in her Motion, paragraph 5. As such, the prior action pending doctrine does not apply to this declaratory judgment action and does not abate this action.

Further, this declaratory judgment action regarding the underground sewer line installed on or about 29 July 2015 is not the same cause as the prior completed action based on a condemnation petition. Rubin's filing of the Motion to Enforce Judgment in the prior action is a recognition that there is a genuine controversy between the parties about the existence of the installed sewer pipe. Regardless, Rubin's request goes beyond the applicable pleading standard of Rule 12(b)(6) motion, and thus the Court should deny the Motion. Rubin's post-judgment

motion does not change the analysis and does not "reopen" the prior final Judgment. The post-judgment motion filed in the prior Condemnation action is actually an impermissible motion in the cause which seeks an interpretation of the Judgment. *Home Health and Hospice Care, Inc. V. Meyer,* 88 N.C. App. 287, 362 S.E.2d 870 (1987). Such a motion is not a pending action. Rubin must file a separate, independent action to obtain the relief she seeks in her motion. *Id*, or could certainly file a counterclaim in this action.

CONCLUSION

A genuine controversy exists between the Town and Rubin as to their respective rights and duties in and to the Easement. The Complaint alleges a claim for declaratory relief because there is a genuine controversy between the parties. Therefore a motion to dismiss for failure to state a claim is not appropriate and should be denied. The asserted defenses of *res judicata* and prior pending action do not arise on the facts pleaded in the Complaint. Moreover, the Declaratory Judgment Act affords jurisdiction to adjudicate the rights and duties of the parties in and to the Easement.

For all of these reasons, Rubin's motion to dismiss the Complaint should be denied.

This the 2nd day of May, 2019.

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This the 22nd day of May, 2019.

David P. Ferrell