No. COA 20-304 TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

TOWN OF APEX,

Plaintiff-Appellee,

v.

BEVERLY L. RUBIN,

Defendant-Appellant.

From Wake County
15-CVS-5836

****

DEFENDANT-APPELLANT'S REPLY BRIEF

****

INDEX

TABLE OF CASES AND AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 3

I. Ms. Rubin's Request for an Injunction Was Appropriate 3

II. No Law Supports the Town's Time-Shifting Theory of Condemnation Law 8

III. The Motion to Enforce Should Have Been Granted 9

IV. The Trial Court Had No Authority to Grant Relief from the Judgment 14

CONCLUSION AND REQUEST FOR ORAL ARGUMENT 16

CERTIFICATE OF COMPLIANCE 18

CERTIFICATE OF SERVICE 19

ADDENDUM

TABLE OF CASES AND AUTHORITIES

Cases:

Chappell v. N.C. Dep't of Transp.,
841 S.E.2d 513 (N.C. 2020)..... 5

Hill v. Resort Dev. Co.,
251 N.C. 52, 110 S.E.2d 470 (1959)..... 12

Jackson v. Jackson,
No. COA19-259, 2020 WL 5159327
(N.C. Ct. App. Sept. 1, 2020) 9

Pelham Realty Corp. v. Bd. of Transp.,
303 N.C. 424, 279 S.E.2d 826 (1981)..... 6

Piedmont Triad Reg'l Water Auth. v. Sumner Hills Inc.,
353 N.C. 343, 543 S.E.2d 844 (2001)..... 10

Rubin v. Town of Apex,
No. 5:19-CV-449-BO, 2020 WL 1491662
(E.D.N.C. Mar. 27, 2020) 8

Smith v. Johnson,
125 N.C. App. 603, 481 S.E.2d 415 (1997)..... 15

State Highway Comm'n v. Thornton,
271 N.C. 227, 156 S.E.2d 248 (1967)..... 3, 6, 7, 13

State v. Navarro,
247 N.C. App. 823, 787 S.E.2d 57 (2016)..... 15

Town of Apex v. Whitehurst,
213 N.C. App. 579, 712 S.E.2d 898 (2011)..... 5

Town of Midland v. Morris,
209 N.C. App. 208, 704 S.E.2d 329 (2011)..... 6, 8, 15

Statutes:

N.C. Gen. Stat. § 1-302 12

N.C. Gen. Stat. § 136-104 ..... 9, 11

N.C. Gen. Stat. § 136-111 9

N.C. Gen. Stat. § 136-114 ..... 5, 10, 11

Rules:

N.C. R. Civ. P. 60 15

No. COA 20-304 TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

TOWN OF APEX,

Plaintiff-Appellee,

v.

BEVERLY L. RUBIN,

Defendant-Appellant.

From Wake County
15-CVS-5836

****

DEFENDANT-APPELLANT'S REPLY BRIEF

****

INTRODUCTION

The Town's response brief attempts to rewrite settled condemnation law. The Town advocates for principles foreign to the law of this state and every other jurisdiction in this country. "The house always wins" is no way for municipalities to treat residents.

Ms. Rubin's opening brief set out the fundamental principles of takings law, and how those principles require the Town to return Ms. Rubin's land. Because the Town's position runs contrary to basic Anglo-American law, the Town has ignored the fundamental principles that resolve this case:

- When the government takes private property without a public purpose, the taking violates the state and federal constitutions. The only remedy for those violations is return of the taken property.
- The final judgment in the 2015 case determined that the Town violated the state and federal constitutions by taking Ms. Rubin's property without a proper public purpose.
- No court has ever limited a landowner's remedy to just compensation when a taking lacked a public purpose.
- When a direct condemnation case is dismissed for lack of public purpose, the dismissal has the *effect* of an injunction, regardless of the *form* of the judgment.
- When the Town filed the original condemnation action and used its quick-take power, the Town acquired an easement on Ms. Rubin's property. When the trial court entered the final judgment, the Town lost the easement.
- Landowners need not file inverse condemnation actions or counterclaims to contest a taking's public purpose when the government files a direct condemnation action.

Like the Town, the trial court ignored these points, which are enough to reverse both orders.

Besides the Town's concessions, the Town's other arguments ignore inconvenient precedents and propose radical changes to condemnation law without legal authority. No government has ever gotten away with what the Town is trying to do here. Ms. Rubin asks that this case not end in a tragedy for her and in an embarrassment to this state's jurisprudence.

ARGUMENT

I. Ms. Rubin's Request for an Injunction Was Appropriate.

The final judgment determined that the Town's taking of Ms. Rubin's land lacked a public purpose, making it unconstitutional. Judge O'Neal, therefore, dismissed the Town's case, restoring Ms. Rubin's ownership without further judicial action. Once the Town had exhausted its appeals, though, it refused to recognize Ms. Rubin's ownership rights, and refused to abide by the judgment.

That left Ms. Rubin with a choice: remove the offending pipe herself or ask for the trial court's help in doing so in a more orderly fashion. Without a doubt, she had the right to engage in self-help. After all, she held title to the land; there was no sewer easement. After the judgment was entered, she was left with "whatever rights [she] may have against those who have trespassed upon [her] land and propose to continue to do so." *State Highway Comm'n v. Thornton*, 271 N.C. 227, 236-37, 156 S.E.2d 248, 255 (1967).

But she did not do that. Instead, she chose the more peaceful path. She believed the courts of this state would require the Town to accept its defeat and the judgment upheld on appeal, and could spell out a reasonable injunction that would provide clear requirements for the Town's compliance. Ms. Rubin accepted a trade-off—injunctive relief could mean that the removal of the sewer pipe was delayed while the Town rerouted the line.[1] The Town doesn't explain why anyone would prefer that a dispute like this be resolved through self-help.

Nor does the Town explain why it thinks Ms. Rubin had to request injunctive relief prior to entry of the judgment in the 2015 case. Before the Supreme Court remanded the case and the Town refused to remove the sewer pipe, Ms. Rubin had *no reason* to seek injunctive relief. She had no reason to expect that the Town would keep its unconstitutional taking.[2]

---

[1] The undisputed evidence at trial was that the Town has other options for the sewer line. (R S (I) pp 193, 200-02.) Ms. Rubin introduced evidence of alternatives during the section 108 hearing to show that the Town lacked a public purpose. (R S (I) pp 200-03.) The Town offered *no* contrary evidence. At the reconsideration hearing, the Town admitted that it simply does not want to go with the alternative sewer line, using a pump station. (1-5-2017 T p 38.) It even argued that Ms. Rubin hadn't met her burden on proving alternatives. (1-5-2017 T p 39.) Ms. Rubin's counsel explained why she had met her burden, (1-5-2017 T pp 60-61), so reconsideration was denied, (R p 101). This is not, as the Town contends, an issue that is still alive. It was part of the final judgment upheld on appeal.

[2] The Town also unfairly insinuates that Ms. Rubin delayed in scheduling the section 108 hearing. The Town overlooks the fact that it could have noticed

In a condemnation case under Chapter 136, like this one, there is no requirement for *when* a request for injunctive relief be made. In fact, there is no mention in Chapter 136 of injunctive relief to undo a quick-take at all. *See* N.C. Gen. Stat. ch. 136. The trial court has "broad" authority to enter all orders necessary to effectuate Chapter 136. N.C. Gen. Stat. § 136-114; *Chappell v. N.C. Dep't of Transp.*, 841 S.E.2d 513, 519 (N.C. 2020). The Town cites no standard for when such an injunction should be requested, so there is no basis for it to insinuate the motion was late.

In any event, the motion should have been unnecessary. In a failed quick-take case—when the government takes property at the start of the case, constructs something on the taken property, but loses on public purpose—the trial court is supposed to enter a judgment that dismisses the government's claim to the property. No injunction is necessary because we expect the government—of all litigants—will follow the law and leave. *See Town of Apex v. Whitehurst*, 213 N.C. App. 579, 584, 712 S.E.2d 898, 902 (2011) ("If Apex attempted to condemn the defendants' property for a private use, then the use would be improper and Apex would have no authority to take the property under the power of eminent domain, *thus ending the inquiry*." (emphasis added)).

---

the hearing at any time. The Town also forgets to inform the Court that Ms. Rubin had to subpoena key documents and depose witnesses as preparation for her successful section 108 hearing.

In a quick-take case, there are many alternative procedural paths. If construction is ongoing, then the landowner may seek an injunction to halt the construction. *Thornton*, 271 N.C. at 236, 156 S.E.2d at 255 (1967).[3] Of course, if the construction is already complete when the request for injunctive relief is heard, then the construction itself cannot be enjoined; a court will not enjoin an act that is over. *See id.* Instead, once the construction is over, the government must return the property if it loses on public purpose. As this Court explained in *Town of Midland v. Morris*, even when the construction is complete, a public-purpose defense is not moot. 209 N.C. App. 208, 213-14, 704 S.E.2d 329, 334-35 (2011). Instead, the landowner's remedy takes "the form of return of title to the land." *Id.* The dismissal of the quick-take proceeding, therefore, has the same effect as an injunction, putting the parties back into the positions they occupied beforehand. *Thornton*, 271 N.C. at 236-37, 156 S.E.2d 248, 255 (1967); *Pelham Realty Corp. v. Bd. of Transp.*, 303 N.C. 424, 432, 279 S.E.2d 826, 831 (1981).

[3] The Town argues that *Thornton* never ordered the condemnor to return the taken property. Opening Br. at 40. That is because *Thornton* held that the taking was supported by a public purpose; the taking was constitutional. *Id.* at 245, 156 S.E.2d at 261 (remanding for determination of just compensation). *Thornton*'s discussion of injunctive relief and dismissal was just hypothetical.

The Town has twisted the judgment awarded to Ms. Rubin into a victory for the Town, but it wasn't. Instead, the judgment followed *Thornton* and *Pelham*. The Town finished its construction in July 2015, and the judgment was entered in October 2016. (R pp 33, 157.) The judgment, therefore, dismissed the Town's claimed easement in Ms. Rubin's land. (R p 38.) That easement is gone and has never been restored.

As *Thornton* predicted, the Town is now "embarrassed" that its taking failed. *Thornton*, 271 N.C. at 237, 156 S.E.2d at 256. A condemnor that uses quick-take powers, and begins a construction project "on its own opinion as to its authority," does so at its own peril. *Id.* at 240, 156 S.E.2d at 258.

This isn't news to the Town. The Town used to admit the clear effect of the judgment. Earlier, the Town sought reconsideration of the judgment because, in its own words, it feared the consequences "[i]f we're required the remove the pipe."[4] (1-5-2017 T p 37.) At the section 108 hearing, the Town admitted that it could "undo" the taking. (8-1-2016 T pp 78-79.) Years later,

[4] The Town also argues that, if the judgment meant that the Town had to leave, it would have sought a stay of the judgment pending appeal. Resp. Br. at 25-26. As already noted, the Town sought (and received) a stay when it appealed to the Supreme Court. Opening Br. at 28.

the Town persuaded the second trial judge to engage in revisionist history, re-writing the judgment into a meaningless scrap of paper. That was reversible error.[5]

II. No Law Supports the Town's Time-Shifting Theory of Condemnation Law.

The Town argues that the final judgment transformed the Town's unconstitutional quick-take into a normal "inverse taking." Resp. Br. at 44, 47. The Town cites *no authority* for its novel theory, and there is no case in the country that would support it.

When the government files a direct condemnation action and engages in a quick-take, there is no "inverse taking," regardless of the outcome. If the government loses its direct condemnation case because the already-consummated taking lacks a public purpose, then the government must return the property. *Midland*, 209 N.C. App. at 213-14, 704 S.E.2d at 334-35. It is not, as the Town suggests, that the government can violate the constitution and

[5] In its response, the Town discusses Ms. Rubin's federal lawsuit against the Town and the developers. The Town notes that case was dismissed but does not tell this Court why. The trial court dismissed the case on abstention grounds because the 2015 and 2019 cases are "ongoing." *Rubin v. Town of Apex*, No. 5:19-CV-449-BO, 2020 WL 1491662, at *2 (E.D.N.C. Mar. 27, 2020). The federal court is waiting to see if this Court will restore Ms. Rubin's constitutional rights, which is why the dismissal was without prejudice. *Id.* at *3.

keep the land anyway. And the landowner need not file a new inverse condemnation case to relitigate the taking.[6] Once the judgment is entered, the dispute is over: the citizen gets her land back and the government leaves.

No other procedure would make sense in a quick-take case. An inverse condemnation occurs when a person's land "has been taken . . . and no complaint and declaration of taking has been filed." N.C. Gen. Stat. § 136-111. The Town's brief acts as if this statute—defining an inverse condemnation—doesn't exist. When the Town took Ms. Rubin's property, a complaint and declaration of taking had been filed. Indeed, it was only *because* those documents had been filed that the Town could use its quick-take powers. *See id.* § 136-104 (creating right to "immediate possession" after the government files "the complaint and declaration of taking and deposit").

No matter how the Town persuaded the trial court to revise the final judgment, this case has never involved inverse condemnation.

III. The Motion to Enforce Should Have Been Granted.

Ms. Rubin laid out many procedural paths for the trial court to take in affording her the remedy to which she was constitutionally entitled. The trial

---

[6] The Town is trying to relitigate whether its taking had a public purpose. Resp. Br. at 43 (arguing that the taking was for the benefit of the public). The final judgment said the opposite. (R p 37 ¶ 6.) The Town was just using its Rule 60(b) motion to replace its failed appeal, an improper use of the rule. *See Jackson v. Jackson*, No. COA19-259, 2020 WL 5159327, at *3 (N.C. Ct. App. Sept. 1, 2020) (to be published) [Add. 2-3].

court erred by taking none of those paths, and the Town's nitpicking of each procedure does not save the court's order from reversal.

Condemnation procedure. The state and federal constitutions mandate that a landowner's property be returned when taken without a public purpose. Opening Br. at 11-21. The trial court may have had discretion in setting the terms and deadline for the return of the property, but the court had no discretion to let the sewer pipe remain.[7] The state and federal constitutions provided the substantive law, and Chapter 136 required that the trial court "make all the necessary orders and rules of procedure" to return the property. *See* N.C. Gen. Stat. § 136-114.

The Town makes three conclusory objections to this authority.

First, the Town states in conclusory fashion that injunctive relief was not a "procedural order." Resp. Br. at 33. As already explained here and in the opening brief, the request for injunctive relief was procedural; the state and federal constitutions require return of the property, and an injunction is a procedure by which that return occurs. Separately, the requested injunctive

---

[7] The Town argues that the denial of her motion to enforce is subject to review only for abuse of discretion. Resp. Br. at 18. But because the state and federal constitutions mandate return of the taken property as the remedy, the trial court's discretion was cabined, so that "appellate courts [can] maintain control of and clarify the legal principles, [] 'unify precedent,' and [] provide a defined set of rules." *Piedmont Triad Reg'l Water Auth. v. Sumner Hills Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001). The trial court had no discretion to reject the remedy altogether.

relief was also a "necessary order" because the method for requesting the return of quickly-taken property is "not expressly provided for" in Chapter 136. N.C. Gen. Stat. § 136-114.

Second, the Town argues that Ms. Rubin was supposed to ask for an injunction before the judgment was entered, but the Town nowhere explains why that must be the case, nor does it provide any authority. Resp. Br. at 33. The Town repeatedly cites Civil Rule 7(b)(1), as if that rule says anything about the timing for a request for the return of unconstitutionally taken property. It doesn't. Ms. Rubin's post-remand motion states, with particularity, the relief being sought, satisfying Rule 7. (R pp 122-26.)

Finally, the Town repeats its argument that the final judgment itself had no express injunction, apparently in violation of Civil Rule 65(d). Resp. Br. at 33. But Ms. Rubin has never argued that the final judgment contained an injunction. Rather, following *Thornton* and *Midland*, the final judgment's dismissal automatically eliminated the Town's right of "possession," N.C. Gen. Stat. § 136-104, returning all rights in the property to Ms. Rubin. Ms. Rubin only filed the motion to enforce the judgment because the Town refuses to leave.

At a minimum, the final judgment authorizes Ms. Rubin to dig the sewer pipe out herself. If the Town prefers the self-help scenario to a controlled removal of the sewer pipe overseen by a judicial officer, then Ms. Rubin will accept that.

Writ of assistance. The Town tries to wish away Ms. Rubin's request for a writ of assistance, responding to it in half a sentence. Resp. Br. at 29. The Town's only counterargument is that the final judgment did not require the return or delivery of property. *Id.* That terse response misunderstands the writ.

A writ of assistance is only issued *after* a judgment is entered. *See Hill v. Resort Dev. Co.*, 251 N.C. 52, 54, 110 S.E.2d 470, 472-73 (1959).[8] Once a judgment adjudicates title, the writ then puts the rightful owner into possession. *Id.* The writ is particularly appropriate in a quick-take case. When a government's quick-take is rejected for lack of public purpose, the dismissal of the condemnation action destroys the government's right of possession, returning title to the landowner. Because the Town refused to leave, the writ should have issued to put Ms. Rubin in possession, just like an eviction. The trial court erred when it insisted that the final judgment itself needed to have

[8] This common law writ is codified at N.C. Gen. Stat. § 1-302. *See id.*

granted the relief sought by the writ. (R p 156 ¶ 8.) That fundamental misunderstanding requires reversal.

Mandamus. Ms. Rubin's opening brief set out the elements for mandamus, Opening Br. at 35-36, and the Town only challenges whether the parties' rights and obligations were clearly established by the judgment, Resp. Br. at 31-32.

The final judgment left no doubt about the parties' respective rights: Ms. Rubin held full title to her property, and the Town had no right to possess it. The Town has never identified any legal right to have the sewer pipe on Ms. Rubin's property after the trial court determined that the installation of the pipe violated the constitution. With no legal basis to possess Ms. Rubin's land, the Town was under a duty to leave.

Inherent authority. The Town's objection to inherent authority hinges on a bizarre premise: a landowner's *sole* remedy for a taking is just compensation. Resp. Br. at 34, 40. The Town could only believe that if it forgot to read Ms. Rubin's opening brief or its own cases. Her brief cited seventeen state and federal cases saying the opposite. Opening Br. at 12-18, 20-21. *Thornton* says that just compensation is the remedy for takings with a public purpose, and dismissal is the remedy for takings without a public purpose. *See Thornton*, 271 N.C. at 240, 156 S.E.2d at 258.

Here, the remedy mandated by the constitution was return of the property. Although the exercise of inherent authority may be discretionary, the trial court had no discretion to completely deny a constitutionally mandated remedy.

IV. The Trial Court Had No Authority to Grant Relief from the Judgment.

The Town's defense of the Rule 60 order is contradictory and unavailing.[9]

First, the Town does not explain why, under its theory of the case, it needed relief from the judgment at all. According to the Town, since the judgment included no injunction, the Town was free to ignore it. If, as the Town says, the judgment imposed no duties on the Town, then Rule 60 relief was not called for. From what prospective duty was the trial court relieving the Town? The only answer is that the judgment *did* impose a clear duty on the Town: it reverted title to Ms. Rubin and required the Town to leave.

Second, the Town makes a new argument on appeal: the trial court was correct to find "that it would be just and equitable to allow the Town relief from the prospective application of the Judgment." Opening Br. at 46. That phraseology is not an accident—the Town is quoting Rule 60(b)(5). That subsection

---

[9] The Town claims that Ms. Rubin failed to object to the "findings" in the two orders on appeal. Resp. Br. at 45. But Ms. Rubin noted in her opening brief that particular "findings of fact" are nothing but conclusions of law, which are reviewed de novo. Opening Br. at 38 & n.5.

of the rule, when properly invoked, allows a trial court to grant relief when "it is no longer equitable that the judgment should have prospective application." N.C. R. Civ. P. 60(b)(5). But neither the Town's motion nor the court's order relied on subsection (5). (R pp 145-48, 162-68.) Thus, the Town cannot rely on subsection (5) on appeal. *See State v. Navarro*, 247 N.C. App. 823, 828, 787 S.E.2d 57, 62 (2016); *Smith v. Johnson*, 125 N.C. App. 603, 606, 481 S.E.2d 415, 417 (1997).

Third, the Town ignores that it had no right to file a *second* Rule 60(b) motion, raising arguments available when the judgment was entered. Opening Br. at 41-42. The Town's refusal to address this argument constitutes waiver.

Fourth, the Town also ignores all of Ms. Rubin's arguments against subsection (b)(4). *Compare* Opening Br. at 38-40, *with* Resp. Br. at 48. The Town's failure to respond is a waiver, but Ms. Rubin is also right on the merits. A judgment is not "void" for mootness because mootness does not affect a court's subject-matter jurisdiction. And mootness is not implicated anyway because a condemnor cannot moot a condemnation case by completing its construction work before the condemnation action concludes. *Midland*, 209 N.C. App. at 213-14, 704 S.E.2d at 334-35. Even after the construction work is done, the landowner is "entitled to . . . return of title to the land." *Id.* at 213-214, 704 S.E.2d at 334.

Finally, the Town repeats its argument that *Wilkie* changed the law in its favor. Resp. Br. at 48. There is no real discussion of *Wilkie* anywhere in the Town's brief. The Town's only argument is that *Wilkie* means that Ms. Rubin's remedy for an unconstitutional taking is just compensation.[10] That worn-out mantra is not true in general and is not true about *Wilkie*. *See* Opening Br. at 29-32.

CONCLUSION AND REQUEST FOR ORAL ARGUMENT

Ms. Rubin requests that the trial court's orders be reversed, and that the Court remand with instructions to the trial court to order the Town to remove the sewer pipe, or, alternatively, instruct the trial court that Ms. Rubin is allowed to remove the sewer pipe herself. Ms. Rubin also requests the opportunity to present oral argument.

---

[10] The Town also makes the strange argument that its deposit of $10,000 at the start of the 2015 case insulates it from claims of unconstitutionality. Resp. Br. at 40. This argument not only ignores that the 2015 case already determined that the Town violated the constitution but also ignores that this money is unavailable as a deposit. The final judgment allotted this money to Ms. Rubin as a partial payment of her attorney's fees. (R p 38 ¶ 2.)

This the 17th day of September, 2020.

FOX ROTHSCHILD LLP

Electronically submitted
Matthew Nis Leerberg
N.C. State Bar No. 35406
mleerberg@foxrothschild.com
434 Fayetteville Street, Suite 2800
Raleigh, NC 27601
Telephone: 919.755.8700
Facsimile: 919.755.8800

N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

Troy D. Shelton
N.C. State Bar No. 48070
tshelton@foxrothschild.com
434 Fayetteville Street, Suite 2800
Raleigh, NC 27601
Telephone: 919.755.8700
Facsimile: 919.755-8800.

HOWARD, STALLINGS, FROM,
ATKINS, ANGELL & DAVIS, P.A

Kenneth C. Haywood
N.C. State Bar No. 19066
khaywood@hsfh.com
B. Joan Davis
N.C. State Bar No. 17379
5410 Trinity Road, Suite 210
Raleigh, NC 27607
Telephone: 919.821.7700
Facsimile: 919.821.7703

Counsel for Defendant Beverly L. Rubin

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, and this Court's order of 10 June 2020, counsel for Ms. Rubin certifies that the foregoing brief contains no more than 3,750 words (excluding the cover, caption, index, table of authorities, signature block, certificate of service, and this certificate of compliance) as reported by the word-processing software.

This the 17th day of September, 2020.

/s/ Matthew Nis Leerberg
Matthew Nis Leerberg

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing motion was served on the opposing party by placing a copy, contained in a first-class post-age-paid wrapper, into a depository under the exclusive custody of the United States Postal Service, this 17th day of September, 2020, addressed as follows:

David P. Ferrell
Norman W. Shearin
Nexsen Pruet, PLLC
4141 Parklake Avenue, Suite 200
Raleigh, NC 27612

/s/ Matthew Nis Leerberg
Matthew Nis Leerberg

No. 20-304 TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

TOWN OF APEX,

Plaintiff-Appellee,

v.

BEVERLY L. RUBIN,

Defendant-Appellant.

From Wake County
15-CVS-5836

****

CONTENTS OF ADDENDUM

****

Addendum Pages

Jackson v. Jackson, No. COA19-259, 2020 WL 5159327 (N.C. Ct. App. Sept. 1, 2020) .....Add. 1-4

2020 WL 5159327
Only the Westlaw citation is currently available.
Court of Appeals of North Carolina.

Brentley Allen JACKSON, Plaintiff,

v.

Kellie Lynn JACKSON
(Now Clelland), Defendant.

No. COA19-259

Filed: September 1, 2020

Appeal by Defendant from orders entered 31 August 2018 and 10 October 2018 by Judge William B. Sutton, Jr. in Sampson County District Court. Heard in the Court of Appeals 4 September 2019. Sampson County, No. 16 CVD 97

Attorneys and Law Firms

Benjamin Lee Wright, Clinton, for plaintiff-appellee.

Gregory T. Griffin, Clinton, for defendant-appellant.

Opinion

MURPHY, Judge.

***1** Rule 60 is an improper method to remedy erroneous orders, which are properly addressed only by timely appeal. As a result, the trial court erred when it entered a Rule 60(b) order to relieve Plaintiff from the provisions of its prior custody order that, as theorized by the Rule 60(b) findings of fact, erroneously contained child support obligations. We vacate and remand.

BACKGROUND

On 29 January 2016, Plaintiff-Appellee Brentley Allen Jackson ("Plaintiff") filed his *Complaint for Divorce from Bed and Board, Child Custody, and Child Support.* Defendant-Appellant Kellie Lynn Jackson (now Clelland; "Defendant") timely answered and counterclaimed, and a hearing was held on the issue of custody on 3-4 August 2017. As a result of the hearing, a custody order ("the Custody Order") was entered by the trial court on 5 September 2017. The Custody Order decreed, in relevant part:

> Plaintiff shall reimburse Defendant for travel to and from preschool and school and shall receive a credit for any trips he has to make to Fayetteville for custody exchanges and return at the same rate of reimbursement. The reimbursement rate shall be the rate given to State Employees for travel and the mileage will be from 118 Hay Street to the preschool or school or lesser mileage if Defendant moves her residence closer to the schools.

Plaintiff pursued no appeal from the Custody Order. Nor did Plaintiff pay Defendant for her travel in accordance with the Custody Order.

Eight months later, in June 2018, Defendant filed a *Motion to Show Cause* requesting that Plaintiff be held in civil contempt for violating the payment provision of the Custody Order. Plaintiff responded with a *Motion for Relief from Order and/or Modification of Order*, which asked the trial court to void the provision of the Custody Order requiring him to pay travel expenses. In relevant part, Plaintiff's motion argued:

> 5. That at the hearing on [3-4 August 2017] neither the Plaintiff nor the Defendant offered evidence as to their respective incomes nor the cost of sending the minor child to Grace Preschool.
>
> ...
>
> WHEREFORE, the Plaintiff prays the Court as follows:
>
> 1. That the Plaintiff be relieved of the child support provisions of the [Custody Order] pursuant to Rule 60(b)(1) in that the provisions concerning reimbursement and payment of daycare amount to a child support order and were entered by mistake in that the Court did not have facts in evidence to support a child support award because neither party offered evidence on the issue.
>
> ...
>
> 3. That in the alternative, the Plaintiff be relieved of the provisions of the [Custody Order] pursuant to Rule 60(b)(6) in that there are no findings of fact regarding the incomes of the parties in said order, the cost of pre-school and health insurance and the provisions concerning reimbursement and payment of daycare are not supported by evidence and Plaintiff has a meritorious defense to the entry of such provisions and his rights have been injuriously affected by the [Custody] Order.

The following week, Defendant moved to dismiss Plaintiff's motion.

***2** On 13 August 2018, the trial court heard Plaintiff's motion and entered an order ("the Rule 60(b) Order") stating in relevant part:

> **FINDINGS OF FACT**
>
> 1. This action was tried before the Court on [3 and 4 August 2017] and [the Custody] Order was entered on [5 September 2017].
>
> 2. That the Court required the Plaintiff to pay the cost of preschool and school and reimburse the Defendant for travel to and from preschool and school, receive a credit for any trips he made to Fayetteville, North Carolina for custody exchanges and gave reimbursement to Defendant at the rate given to state employees for travel and the mileage for 118 Hay Street, Fayetteville, North Carolina to the school the child attended.
>
> 3. That the Court did made no [sic] findings as to the income of the Plaintiff or the Defendant in [the Custody] Order, nor did it make findings as to the cost of preschool and school, or health insurance for the minor child and no evidence was presented on those issues by either parties [sic].
>
> 4. That the [Custody] Order requiring the Plaintiff to reimburse the Defendant for travel cost is not supported by findings of fact.
>
> 5. That the Court therefore, is setting aside [the Custody Order] and substituting therefore the order set forth herein in lieu thereof.
>
> **CONCLUSIONS OF LAW**
>
> 1. That the [Custody] Order of [5 September 2017] should be set aside and an appropriate Order substituted therefore based upon the Court's findings, pursuant to:
>
> a. Rule 60(b)(5) in that it is no longer equitable that the [Custody] Order should have prospective application; and
>
> b. Rule 60(b)(6) in that the [Custody O]rder is irregular because it did not make findings as to the parties incomes [sic], cost of insurance and daycare and ordered the Plaintiff to make reimbursements to Defendant without determining the parties[']' ability to pay.
>
> 2. That the rights of the Movant have been injuriously affected and the movant [sic] has shown a meritorious defense.
>
> 3. That the Defendant's Motion for Contempt against the Defendant [sic] has been rendered moot and therefore her motion for contempt should be dismissed.
>
> **IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED:**
>
> 1. That the [Custody] Order entered in this cause on [5 September 2017] is set aside and the Court is substituting therefore the following Order: ...

The Rule 60(b) Order is almost identical to the Custody Order, but omits the section about travel reimbursement, and was entered without an additional evidentiary hearing.

In response to the Rule 60(b) Order, Defendant moved for a new trial, arguing the trial court lacked authority to issue a new custody order without making new findings or conducting a new evidentiary hearing. On 10 October 2018, the trial court denied Defendant's *Motion for New Trial*, and Defendant filed timely notice of appeal.

ANALYSIS

Rule 60(b) states in relevant part:

> (b) ... On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (5) ... it is no longer equitable that the judgment should have prospective application; or
>
> (6) Any other reason justifying relief from the operation of the judgment.
>
> ***3** The motion shall be made within a reasonable time .... A motion under this section does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment, order, or proceeding shall be by motion as prescribed in these rules or by an independent action.

N.C.G.S. § 1A-1, Rule 60(b)(5)-(6) (2019).

"[A] motion under [N.C.]G.S. [§] 1A-1, Rule 60(b) of the Rules of Civil Procedure cannot be used as a substitute for appellate review." *Town of Sylva v. Gibson*, 51 N.C. App. 545, 548, 277 S.E.2d 115, 117 (1981) (citing *O'Neill v. Bank*, 40 N.C. App. 227, 231, 252 S.E.2d 231, 234 (1979); *In re Snipes*, 45 N.C. App. 79, 81, 262 S.E.2d 292, 294 (1980); 2 McIntosh, N.C. Practice and Procedure § 1720 (Supp. 1970)).[1]

1 *Town of Sylva* was specifically concerned with Rule 60(b)(6), which would render its more general holding on Rule 60(b) dicta. However, we have adopted the broader rule applying to all of Rule 60(b) in later cases. *See, e.g., McKyer v. McKyer*, 182 N.C. App. 456, 642 S.E.2d 527, (2007); *Smith v. Johnson*, 125 N.C. App. 603, 481 S.E.2d 415, (1997); *Jenkins v. Middleton*, 114 N.C. App. 799, 443 S.E.2d 110 . (1994); *Lang v. Lang,* 108 N.C. App. 440, 424 S.E.2d 190, (1993); *Chicopee, Inc. v. Sims Metal Works, Inc.*, 98 N.C. App. 423, 391 S.E.2d 211, (1990); *J. D. Dawson Co. v. Robertson Mktg., Inc.*, 93 N.C. App. 62, 376 S.E.2d 254, (1989); *Long v. Fink*, 80 N.C. App. 482, 342 S.E.2d 557, (1986); *Coleman v. Coleman*, 74 N.C. App. 494, 328 S.E.2d 871, (1985). Therefore, we apply *Town of Sylva's* holding to both Rule 60(b)(5) and 60(b)(6) in this case.

"An erroneous judgment is one rendered contrary to law.... [It] must remain and have effect until by appeal to a court of [appeals] it shall be reversed or modified." *Young v. State Farm Mut. Auto. Ins. Co.*, 267 N.C. 339, 343, 148 S.E.2d 226, 229 (1966) (citing *Moore v. Humphrey*, 247 N.C. 423, 101 S.E.2d 460) (emphasis omitted). "An erroneous order is one 'rendered according to the course and practice of the court, but contrary to law, or upon a mistaken view of the law, or upon an erroneous application of legal principles.' ... An erroneous order may be remedied by appeal; it may not be attacked collaterally." *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 676, 360 S.E.2d 772, 777, (1987) (quoting *Wynne v. Conrad*, 220 N.C. 355, 360, 17 S.E.2d 514, 518 (1941)).

Here, Plaintiff's motion argued the trial court should relieve him of the child support provisions because "there are no findings of fact regarding the income of the parties in [the Custody Order], the cost of pre-school and health insurance and the provisions concerning reimbursement and payment of daycare are not supported by evidence" as "neither the Plaintiff nor the Defendant offered evidence as to their respective incomes nor the cost of sending the minor child to Grace Preschool." The trial court's Rule 60(b) Order cited Rule 60(b)(5) and Rule 60(b)(6) to relieve Plaintiff from the child support provisions based on Finding of Fact 3, which states the trial court "made no findings as to the income of the Plaintiff or the Defendant in [the Custody Order], nor did it make findings as to the cost of preschool and school, or health insurance for the minor child and no evidence was presented on those issues by either parties [sic]," and Finding of Fact 4, which states "the [Custody] Order requiring the Plaintiff to reimburse the Defendant for travel cost ... [was] not supported by findings of fact."

***4** Plaintiff's 60(b) motion and the Rule 60(b) Order describe a legal error in the Custody Order, rather than an irregularity. In Plaintiff's 60(b) motion, he argues there were no findings of fact, nor any facts in evidence, to support the child support provisions of the Custody Order, and as a result he should be relieved of the provisions related to child support. Similarly, the Rule 60(b) Order concludes the child support provisions in the Custody Order are unsupported by findings of fact in that order. The motion and order reflect that both Plaintiff and the trial court believed the Custody Order was "rendered contrary to law." *Young*, 267 N.C. at 343, 148 S.E.2d at 229. Thus, it was an erroneous order that could only be remedied by appeal, not by Rule 60(b). *Town of Sylva*, 51 N.C. App. at 548, 277 S.E.2d at 117.

Although not explicit in Plaintiff's Rule 60(b) motion or the Rule 60(b) Order, we interpret the comments about the child support provisions being unsupported by the evidence to be referring to N.C.G.S. § 50-13.4(c), which requires:

> Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

N.C.G.S. § 50-13.4(c) (2019); *see also Coble v. Coble,* 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980) ("Under [N.C.]G.S. [§] 50-13.4(c), ... an order for child support must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to 'meet the reasonable needs of the child' and (2) the relative ability of the parties to provide that amount. These conclusions must themselves be based upon factual *findings* specific enough to indicate ... that the judge below took 'due regard' of the particular 'estates, earnings, conditions, [and] accustomed standard of living' of both the child and the parents."). Based

upon the findings of fact provided in the Rule 60(b) Order, the trial court relieved Plaintiff of the child support provisions ordered nearly a year earlier due to the failure of the earlier order to address "the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties." N.C.G.S. § 50-13.4(c) (2019). Absent the required findings, the earlier order was "rendered contrary to [N.C.G.S. § 50-13.4(c)]." *Young*, 267 N.C. at 343, 148 S.E.2d at 229. Such an erroneous order could only have been addressed by appeal, not by Rule 60(b). *Town of Sylva*, 51 N.C. App. at 548, 277 S.E.2d at 117.

Additionally, we interpret the aspects of Plaintiff's motion and the Rule 60(b) Order addressing findings of fact as referring to the requirement that:

> [w]here, as here, the trial court sits without a jury, the judge is required to find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.... The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition of the case is to allow a reviewing court to determine from the record whether the judgment—and the legal conclusions which underlie it—represent a correct application of the law. The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system.

***5** *Coble*, 300 N.C. at 712, 268 S.E.2d at 188-189 (internal citations and quotation omitted). Again, the findings of fact in the Rule 60(b) Order show that the action being complained of was the entry of child support provisions that were "rendered contrary to law" as the Custody Order failed to include the required findings of fact to support its child support determination. Therefore, the trial court erred in using Rule 60(b) here to relieve Plaintiff of the child support obligations as the findings of fact in the Rule 60(b) Order described the Custody Order as an erroneous order. We vacate the Rule 60(b) Order as an impermissible remedy for an alleged erroneous order that could only be addressed by appeal. *Town of Sylva*, 51 N.C. App. at 548, 277 S.E.2d at 117.

CONCLUSION

The trial court impermissibly used Rule 60(b) to rectify what it described as an erroneous order that only could have been addressed by appeal and not by Rule 60(b). We vacate the Rule 60(b) Order. Defendant's remaining arguments on appeal are rendered moot and we do not address them. We remand this matter to the trial court for further proceedings, including a hearing on Defendant's *Motion for Contempt*.

VACATED IN PART; REMANDED IN PART.

Judge INMAN concurs.

Judge BERGER concurs in result only.

All Citations

--- S.E.2d ----, 2020 WL 5159327

End of Document