No. 410PA18-2 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

TOWN OF APEX,	)	
	)	
Plaintiff-Appellant,	)	From Wake County
v.	)	15-CVS-5836
	)	COA20-304
BEVERLY L. RUBIN,	)	2021-NCCOA-187
	)	
Defendant-Appellee.	)	

No. 206PA21 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

TOWN OF APEX,	)	
	)	
Plaintiff-Appellant,	)	From Wake County
v.	)	19-CVS-6295
	)	COA20-305
BEVERLY L. RUBIN,	)	2021-NCCOA-188
	)	
Defendant-Appellee.	)	

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NEW CONSOLIDATED RESPONSE BRIEF OF PLAINTIFF-APPELLEE TOWN OF APEX

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NEW CONSOLIDATED RESPONSE BRIEF OF PLAINTIFF-APPELLEE TOWN OF APEX

****

INTRODUCTION

In situations where a North Carolina landowner challenges a condemnor's legal right to take, an adequate remedy is available at or during the condemnation proceeding to ensure title and possession does not vest with the condemnor and the project is not constructed during the pendency of the case. Whether it is a Chapter 136 or Chapter 40A condemnation, landowners can seek injunctive relief at or during the condemnation proceeding, before the project is constructed. This right and remedy is sufficient – and based on reported cases in North Carolina, is known to landowners and easy to exercise.

Rubin chose not to raise or exercise the right and remedy afforded to her by North Carolina law. She had 4 ½ months between notice of the intended condemnation action and the construction of the sewer line to request an injunction from the court. Unlike 100% of the other landowners in North Carolina reported cases who challenged the right to take, Rubin did not request or move for injunctive relief. Therefore, she was not entitled to injunctive relief and the O'Neal Judgment did not award her injunctive relief.

Rubin spends most of her New Brief making arguments to attempt to cover for her failure to take advantage of the adequate remedy available to her under current North Carolina law – such as arguing that raising constitutional claims alleviated the need to seek injunctive relief, that injunctive relief is automatic or self-executing, and even though the O'Neal Judgment did not order the Town to remove the sewer line the Town should do it anyway. These arguments are not supported by North Carolina law and should be rejected.

The trial court properly denied Rubin's untimely request for injunctive relief to have the sewer line removed. The trial court was correct when it concluded that:

> "Regardless of the Court's authority, the Court does not read the Judgment the way Defendant suggests and the Court does not agree the Judgment expressly or implicitly requires removal of the sewer line. Defendant could have requested the Court grant her injunctive relief before the sewer pipe was installed under her property, but she did not do so. The Court will not now require the Town to remove the sewer line." (2015 R p 159).

Further, Supreme Court precedent like *Batts* and *Clark* state that no claim lies against a condemnor like the Town using Chapter 136 for

the exercise of the power of eminent domain for a dismissed condemnation if the project is already constructed.

Rubin asks this Court to give her yet another do over and chance to ask for an injunction – which the Court should not award. Further, with this request, Rubin is asking the Court in her New Brief to strip the Town of any and all the defenses available to it to Rubin's claim for equitable relief and not allow a superior court to balance the equities in their consideration of Rubin's request for equitable, injunctive relief. Rubin has no North Carolina law to support her request – but is hoping this Court will create some law to save her from her failure to raise available, adequate remedies during the condemnation case. The Town respectfully requests the Court reject these requests.

ARGUMENT

I. STANDARD OF REVIEW

Rubin asserts in her brief that the appropriate standard of review is *de novo*. The standard of review of the trial court's decision to deny Rubin's request for injunctive relief is abuse of discretion. The ultimate decision whether to grant injunctive relief remains within the discretion

of the trial judge after a party establishes a prima facie showing to support such relief. *Huskins v. Hospital,* 238 N.C. 357, 78 S.E.2d 116 (1953). In the absence of a showing of abuse of discretion, such decision is binding upon the reviewing court. *Harmon v. Harmon,* 245 N.C. 83, 95 S.E.2d 355 (1956). "A decision by the trial court to issue or deny an injunction will generally be upheld on appeal if there is ample competent evidence to support the decision, even though the evidence may be conflicting and the appellate court could substitute its own findings." *A.E.P. Industries, Inc. v. McClure*, 58 N.C.App. 155, 158, 293 S.E.2d 232, 234 (1982) (Citing *Banner v. Button Corporation*, 209 N.C. 697, 700, 184 S.E. 508, 510 (1936); *see also Studios v. Goldston*, 249 N.C. 117, 119, 105 S.E.2d 277, 279 (1958). Further, in *Mid-America Apartments, L.P. v. Block At Church Street Owners Ass'n, Inc.*, 257 N.C.App. 83, 809 S.E2d 22 (2017), the court states that as to the review of error in a trial court's fashioning of injunctive relief, the abuse of discretion standard shall apply. The right to grant injunctive relief is a matter within the sound discretion of the trial court (when it is appropriately requested) and appellate courts should not interfere unless such discretion is manifestly

abused. *See Buie v. High Point Assocs. Ltd. P'ship,* 119 N.C.App. 155, 161, 458 S.E.2d 212, 216 (1995).

II. THE O'NEAL JUDGMENT DOES NOT ORDER AN INJUNCTION

The Court of Appeals correctly found that there is no evidence in the Record or law to support a finding that the O'Neal Judgment granted injunctive relief or required the Town to remove the sewer line. As we state in more detail in the Town's New Brief, Rubin failed to set forth any injunctive relief in her pleading or any motion before Judge O'Neal, and therefore Rubin was not entitled to any injunctive relief in the Judgment. N. C. R. Civ. P. 7(b)(1) (2001); *Farm Lines, Inc. v. McBrayer,* 35 N.C.App. 34, 40, 241 S.E.2d 74, 78 (1978) (trial court erred by granting relief not sought in motion, because motion failed to comply with requirement of Rule 7(b)(1) that it "set forth the relief or order sought").

Rubin's argument that the Town is disobeying the O'Neal Judgement fails. In order for the Town to have disobeyed the order, it would have to be an injunction order that ordered the Town to remove the sewer line. The Judgment says no such thing.

For example, here's the Judgment from the *City of Statesville v. Roth* case that does what Rubin requests this Court order herein:

> 1. That the petitioner's Complaint be dismissed and the property sought to be acquired is revested in the respondents.
>
> 2. That the petitioner is enjoined and restrained from appropriating the respondents' land and from going upon and maintaining lines across respondents' property and they are ordered to remove the same from the property and to restore the same to its former condition.

Roth, 77 N.C.App. 803, 806, 336 S.E. 2d 142, 143 (1985).

We do not have the provisions of this order in the case at bar – only a dismissal of the condemnation complaint as "null and void." The O'Neal Judgment rendered the Complaint and Declaration of Taking a nullity (2015 R pp 155-161, FoF ⁋2; 2015 R pp 162-168, FoF ⁋2)[1], with the effect of which is as if it had not been filed. Rubin is essentially asking this Court insert, add and rewrite Judge O'Neal's Judgment with the following language shown in bold and italics:

> 1. That the petitioner's Complaint be dismissed ***and the property sought to be acquired is revested in the respondents.***

[1] For ease of reference and to avoid confusion since the cases have been consolidated, cites to the 2015 Record (15-CVS-5836, COA20-304, 410PA18-2) will be referenced as 2015 R p xx. Cites to the 2019 Record (19-CVS-6295, COA20-305, 206PA21) will be referenced as 2019 R p xx.

> ***2. That the petitioner is enjoined and restrained from appropriating the respondents' land and from going upon and maintaining lines across respondents' property and they are ordered to remove the same from the property and to restore the same to its former condition.***

There is no evidence in the record or law that would support such an expansion, extension or rewriting of the O'Neal Judgment. Importantly in *Roth*, the landowner pled injunctive relieve so the Court addressed and awarded it. Rubin did not.

A party asserting constitutional rights must properly plead and properly request injunctive relief from the court. The rules of civil procedure are not suspended merely because a party asserts constitutional rights – and Rubin cites no case so holding.

Prior to final judgment in the 2015 condemnation case, Rubin did not ask Judge O'Neal to address the sewer line remaining on her property, did not ask Judge O'Neal to clarify her Judgment, and otherwise did nothing to advance the arguments in Court she now, several years later, makes, that the Judgment required removal and it would be unconstitutional for the sewer line to remain. (Jan. 2017 T).

The Court of Appeals properly held the Town was under no obligation under the O'Neal Judgment to do anything related to the sewer infrastructure, and properly found that "[m]andatory injunctive relief falls outside the scope of the Judgment." (*Town of Apex v Rubin,* 2021-NCCOA-187, ¶34).

III. INJUNCTIVE RELIEF IS NOT AUTOMATIC OR SELF-EXECUTING FROM THE O'NEAL JUDGMENT.

Judge O'Neal's Judgment cannot be viewed as implying, self-executing, or automatically issuing permanent injunctive relief, as Rubin contends. It is fundamental that an injunction is an equitable remedy. *Lane Trucking Co. v. Hapaonski,* 260 N.C. 514, 133 S.E.2d 192 (1963). Rubin has the burden of establishing the necessary preliminary equities for the extension of any equitable relief. *Herff Jones Co. v. Allegood*, 35 N.C.App. 475, 241 S.E.2d 700 (1978).

Rubin cites no North Carolina case that a party automatically receives equitable injunctive relief – especially when not pled. Further, N. C. R. Civ. P. 65(d) provides that an order granting an injunction "shall be specific in terms; shall describe in reasonable detail…the act or acts enjoined or restrained." The Court of Appeals has held that these

requirements are explicit and unambiguous, and an injunction cannot be issued in a cursory manner. *Wilner v. Cedars of Chapel Hill, LLC,* 241 N.C. App. 389*,* 773 S.E.2d 333 (2015). Judge O'Neal's Judgment cannot be read under the Rules of Civil Procedure and case law as granting a permanent injunction to Rubin; such relief cannot be implied, self - executing or automatic – and still be "specific in terms" and "describe in reasonable detail the act or acts enjoined or restrained."

The fact that Rubin raised constitutional rights and claims in the 2015 condemnation case does not change the result. Injunction is an equitable remedy and does not cease being so because a party asserts constitutional rights.

The North Carolina cases Rubin cites in support of her position that an injunction is automatic or self-executing from the O'Neal Judgment all involve landowners who properly pled and requested injunctive relieve in the condemnation action. Rubin did not do so – and these cases are distinguishable on this important fact. These cases do not support a finding of self-executing, but merely show that if a landowner raises or pleads injunctive relief, the trial court will address injunctive relief.

Further, all the cases cited by Rubin for the return of her property differ from this case from a procedural standpoint. In each of those cases, the landowner is requesting the judge who is making the decision on the public use or benefit issue to grant injunctive relief. But here, Rubin did not ask the presiding trial court judge for injunctive relief, but asked a different trial court judge 3 ¾ years after the sewer line was installed and after the final judgment was entered – in the context of a motion for discretionary relief.

Rubin admits in her New Brief that she failed to request that the sewer line be removed until she filed her "Motion to Enforce Judgment and Alternative Petition for Writ of Mandamus" on 10 April 2019. This was not at the appropriate time to file such a motion – 3 ¾ years after the sewer line was constructed, was in use, and serving approximately 50 residential homes and/or lots located in a properly annexed, rezoned and approved subdivision in the Town. (2015 R pp 157-158, ¶14; 164, ¶7; 2015 Doc. Ex. 17, ¶ 12). *See Thornton*; *Town of Midland*. Further, Rubin's arguments that under the "accepted doctrine" or otherwise, the trial court should have returned her property free and clear of the Town's

sewer line is not supported by North Carolina law and ignores the procedural posture of the motion before the trial court. Rubin's phrase "government must leave" is not supported by *Thornton* or *Clark*.

Separately and distinctly, it is settled law that in a condemnation case pursuant to Chapter 136, if the landowner does not seek injunctive relief, the project is installed, and the taking ultimately fails for lack of a public purpose, the condemnation petition is dismissed and the landowner has whatever rights exist at law but not a claim for mandatory injunction. *State Highway Commission v. Thornton,* 271 N.C. 227, 240-241, 156 S.E.2d 248, 258-259 (1967). And in *Clark v. Asheville Contracting Co.*, 316 N.C. 475, 342 S.E.2d 832 (1986), the Supreme Court held that the landowners could not pursue an injunction remedy against the North Carolina Department of Transportation ("NCDOT") for an unauthorized taking:

> ['']The owner of property cannot maintain an action against the State or any agency of the State in tort for damages to property (except as provided by statute . . .). *It follows that he cannot maintain an action against it to restrain the commission of a tort.*['']

Id. at 486, 342 S.E.2d at 838 (quoting *Shingleton v. State*, 260 N.C. 451, 458, 133 S.E.2d 183, 188 (1963) (emphasis added)). (*Town of Apex v Rubin,* 2021-NCCOA-187, ¶47).

So if Rubin is not entitled to injunctive relief when she made the request 3 ¾ years after the sewer line was installed under *Thorton* and *Clark*, it certainly follows that an injunction is not automatic or self-executing from the O'Neal Judgment.

Additionally, when the Town entered beneath Rubin's property to install the conduit and sewer line, it was legally authorized to do so. N. C. Gen. Stat. § 136-104 provides that "[u]pon the filing of the complaint and the declaration of taking and deposit in court, to the use of the person entitled thereto, of the amount of the estimated compensation stated in the declaration, title to said land or such other interest therein specified in the complaint and the declaration of taking, together with the right to immediate possession hereof shall vest in the Department of Transportation…" See *State v. Johnson*, 278 N.C. 126, 179 S.E.2d 371 (1971); *State Highway Comm'n v. Myers*, 270 N.C. 258, 154 S.E.2d 87 (1967). N.C. Gen. Stat. § 136-104 further provides that "…said land shall

be deemed to be condemned and taken for the use of the Department of Transportation..." The Town condemned under Chapter 136 so this statutory language applies to the Town and its condemnation herein.

By way of further comparison, N.C. Gen. Stat. § 40A-42(a)(1) provides a landowner a right to bring an injunction action in the condemnation action to halt the vesting of title and immediate possession in a condemnor after the filing of a condemnation complaint:

> "***Unless an action for injunctive relief has been initiated***, title to the property specified in the complaint, together with the right to immediate possession thereof, shall vest in the condemnor upon the filing of the complaint and the making of the deposit in accordance with G.S. 40A-41." [Emphasis supplied]

So under a Chapter 40A condemnation the landowner must request injunctive relieve to halt the vesting of title and possession in the condemnor. Article 9 of Chapter 136 of the General Statutes does not contain a similar injunction provision – but *Thornton* recognizes a landowner's ability to file an injunction to prevent or halt the construction of the project before the project is constructed. No case under Chapter 136 or Chapter 40A allows a landowner to seek injunctive relief against the condemnor when they did not raise it in the condemnation

action before final judgment – and there is certainly nothing in Chapter 136 or Chapter 40A to support Rubin's automatic or self-executing position.

With title and possession vested in the Town, they were the owner of the easement area described in the condemnation complaint, and were free to possess, use, construct and exercise other rights provided by the easement description. This "legal" status when installed is important in the context of Judge O'Neal's Judgment, particularly because the Judgment did not order removal, and defeats Rubin's claim that an injunction is self-executing from Judge O'Neal's Judgment.

Again, injunctive relief before the project is constructed is an available, adequate remedy to protect a landowner against the installation of a project that may ultimately be determined to be for a private purpose. Rubin did not exercise this remedy and therefore is precluded from obtaining an injunction after the fact.

IV. INJUNCTION IS AN EQUITABLE REMEDY AND THE TOWN IS NOT STRIPPED OF ITS DEFENSES THERETO

Rubin asks this Court to give her yet another do over and chance to ask for an injunction (which should be denied), and in doing so asks the

Court in her New Brief to strip the Town of any and all the defenses available to it to Rubin's claim for equitable relief and not allow a superior court to balance the equities in their consideration of Rubin's request for equitable, injunctive relief. Rubin has no North Carolina law to support her request – but is hoping this Court will create some law to save her from her failure to raise available, adequate remedies during the condemnation case.

It is fundamental that an injunction is an equitable remedy. *Lane Trucking Co. v. Hapaonski,* 260 N.C. 514, 133 S.E.2d 192 (1963). Rubin has the burden of establishing the necessary preliminary equities for the extension of this equitable relief. *Herff Jones Co. v. Allegood*, 35 N.C.App. 475, 241 S.E.2d 700 (1978). The trial court does not forego a balancing of the equities and a party defending an injunction does not lose its defenses just because this is a condemnation case, or just because Rubin raised constitutional claims.

In fact, the trial court has already considered the equities in denying, in his discretion, Rubin's motion. The trial court order states "[t]he Court has the inherent authority to enforce its own orders.

However, the Court is not authorized to and refuses to expand this Judgment beyond its terms, read in additional terms, and/or order mandatory injunctive relief that Defendant did not request or plead." (2015 R p 159).

The Order also states that:

> 9. Regardless of the Court's authority, the Court does not read the Judgment the way Defendant suggests and the Court does not agree the Judgment expressly or implicitly requires removal of the sewer line. Defendant could have requested the Court grant her injunctive relief before the sewer pipe was installed under her property, but she did not do so. The Court will not now require the Town to remove the sewer line.
>
> (2015 R p 159).

The trial court properly denied Rubin's late request for an injunction under the facts and circumstances of this case. Although whether to award an after-the-fact injunction has already been considered and decided by the trial court and no remand is appropriate to consider the request yet again, the Town's defenses should be available and the trial court should still be able to balance the equities.

V. THE TRIAL COURT PROPERLY DENIED RUBIN'S MOTION TO ENFORCE JUDGMENT AND ALTERNATIVE PETITION FOR WRIT OF MANDAMUS

Rubin's New Brief only focuses on three of the grounds she raised in her Motion to support her position that the O'Neal Judgment requires removal of the sewer line. The trial court property denied the motion.

The Judgment does not require the Town to the return or delivery real property as per N.C. Gen. Stat. § 1-302 (writ of assistance). As we discuss above, Rubin did not request return or delivery of her property and the O'Neal Judgment does not award this relief. The *Roth* Judgment discussed above shows what a Judgment looks like that could lead to a request for relief under N.C. Gen. Stat. § 1-302, but the O'Neal Judgment does not. Moreover, there is no existing North Carolina case law where a party successfully used N.C. Gen. Stat. § 1-302 to force an injunction in a similar situation.

Regarding mandamus, a writ of mandamus is "an extraordinary remedy which the court will grant only in the case of necessity." *Edgerton v. Kirby*, 156 N.C. 347, 72 S.E. 365, 366 (1911). Rubin's assertions fail to meet this high standard. In support of this request, Rubin alleges "the

Town has a legal duty to comply with the judgment and remove the sewer lines." Rubin's request rings hollow. The Court of Appeals properly found that Rubin cannot show that she has a clear legal right to demand removal of the sewer line under the O'Neal Judgment and that the Town is under a plainly defined, positive legal duty to remove it. The Judgment mandated no such duty or requirement of the Town to remove the sewer lines. In fact, the Judgment imposes no obligations whatsoever upon the Town. The absence of any duty alone warrants denial of Rubin's request for the Court to issue a writ of mandamus.

"The function of the writ is to compel the performance of a ministerial duty—not to establish a legal right, but to enforce one which has been established." *Hayes v. Benton*, 193 N.C. 379, 137 S.E. 169 (1927); *Wilkinson v. Board of Education*, 199 N.C. 669, 155 S.E. 562 (1930). Further, a writ of mandamus would not be issued to "enforce an alleged right which is in doubt." *Mears v. Board of Education*, 214 N.C. 89, 91, 197 S.E. 752, 753 (1938). After all, an injunction is an equitable remedy. *Lane Trucking Co. v. Hapaonski,* 260 N.C. 514, 133 S.E.2d 192 (1963), and Rubin has the burden of establishing the necessary

preliminary equities for the extension of any equitable relief. *Herff Jones Co. v. Allegood*, 35 N.C.App. 475, 241 S.E.2d 700 (1978). The right to an injunction is certainly in doubt. Manifestly, the Judgment does not order the Town to remove the underground sewer line, nor does it state that Rubin has a right to maintain her property without a sewer line in perpetuity. Rubin had her time and moment to pursue injunctive relief through the adequate means and remedies provided under the laws of this state. However, she did not do so. It would be inappropriate and contravene well established law for Rubin to be the beneficiary of a writ of mandamus at this stage of a dispute given her failure to appropriately plead for relief without excuse. As such, the trial court and Court of Appeals properly denied Rubin's request for a writ of mandamus.

Regarding inherent authority, Rubin argues that the trial court should have ordered a permanent injunction pursuant to the court's "inherent authority." The Court of Appeals correctly held that the trial court properly exercised its discretion in not using its inherent authority in this manner. *Ashton v. City of Concord*, 160 N.C. App. 250, 584 S.E.2d 108 (2003). Rubin cites no case where a trial judge has granted a

permanent injunction by using inherent authority in a condemnation case. In condemnation cases were injunctive relief is discussed, the landowner has pled injunctive relief. Rubin raised constitutional claims and rights in her answer in the 2015 original condemnation action, and statements involving constitutional provisions and rights were included in the O'Neal Judgment. (2015 R pp. 20-24, ¶¶ 1, 6; 33-38, ¶¶ 3 of the FoF, 5 of the CoL). Even with constitutional claims being raised in the original condemnation action, Rubin had to request injunctive relief in order to receive it. Injunctive relief is not inherent to or automatically flow from the allegation of a constitutional violation. Rubin had her day in court on her constitutional claims at the Section 108 hearing, and Judge O'Neal addressed the constitutional claims in her Judgment in the 2015 condemnation case. Rubin cannot now be heard again on these same constitutional claims to request an injunction which was not plead or requested in the original condemnation action under the guise of "inherent authority."

The Court of Appeals and trial court were correct to hold that Rubin's arguments about constitutional claims do not change the

equation for the trial court's inherent authority; and the trial court properly refused to exercise its inherent authority to order an injunction in this case.

VI. THE 2019 DECLARATORY JUDGMENT PROCEEDING

If the Court agrees with the trial court and Court of Appeals that Rubin is not entitled to injunctive relief in the 2015 condemnation action, and Rubin does not wish to receive just compensation damages for the Town's physical invasion beneath her property, then there may not be a need for the 2019 action. Regardless of Rubin's mischaracterization of the declaratory judgment action, the Town's 2019 declaratory judgment action is to have the court declare that the sewer easement and line exist on Rubin's property pursuant to the Town's power of eminent domain and based on the effect of Judge O'Neal's Judgment, and Rubin has a right to just compensation for the easement taken, if she so chooses. (2019 R pp 83-90). The right to compensation is Rubin's to request/enforce or not. If she does not want that remedy, then the 2019 action may not be necessary. The Town reserves the right to further evaluate the scope and

necessity of the 2019 declaratory judgment action as this appeal proceeds and/or after the Supreme Court rules in this matter.

CONCLUSION

For the reasons cited herein and in the Town of Apex's New Brief, the Town of Apex respectfully requests the Court vacate the portions of the Court of Appeals opinions that allow Rubin to bring a trespass claim against the Town, that allow Rubin to seek injunctive relief in an attempt to have the sewer line removed, and that strike or vacate portions of the trial court orders in the 2015 or 2019 cases. The Town respectfully request the Court uphold the Court of Appeals decision that Rubin is not entitled to an injunction in the 2015 case, and hold that Rubin is not entitled to seek an injunction in a subsequent action.

Respectfully submitted, this the 8th day of March, 2024.

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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.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served a copy of the foregoing **NEW CONSOLIDATED RESPONSE BRIEF OF PLAINTIFF-APPELLEE TOWN OF APEX** upon the parties by depositing the same in the United States mail, first class postage prepaid, addressed as follows:

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This the 8th day of March, 2024.

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