No. 410PA18-2 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

TOWN OF APEX,

Petitioner/Cross-Respondent,

v.

BEVERLY RUBIN,

Respondent/Cross-Petitioner.

From Wake County

No. 206PA21 TENTH JUDICIAL DISTRICT

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TOWN OF APEX,

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REPLY BRIEF OF RESPONDENT/CROSS-PETITIONER BEVERLY RUBIN

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REPLY ARGUMENT

I. PROCEDURAL RULES DO NOT TRUMP CONSTITUTIONAL RIGHTS.

The Town's response brief rests on its belief that the protections afforded by the Constitution—including the federal Bill of Rights and our state Declaration of Rights—are only effective if they do not conflict with "the rules of civil procedure."[1] (*See* Town's Consolidated Resp. Br. at 8). That is not the law. No court has held that the government can knowingly occupy a citizen's land for a private purpose, in perpetuity, because of "the rules of civil procedure."

The Town's reasoning goes like this. First, the Town feigns ignorance of the fact that Ms. Rubin challenged the Town's right to invade her property from the outset. (*See id.* (claiming that in the direct-condemnation case Ms. Rubin "did nothing to advance the argument" that "it would be unconstitutional for the sewer line to remain"); *see also id.* at 2 (arguing that Ms. Rubin is "unlike 100% of the other landowners" from other cases in this regard)). From this erroneous premise, the Town argues that the Judgment cannot be read to grant Ms. Rubin relief that she never asked for. (*See id.* at 6, 9, 18). And finally, the Town concludes that by the time Ms. Rubin

[1] Ms. Rubin has already addressed most of the Town's arguments in her opening petitioner's brief as well her respondent's response brief. Those arguments will not be repeated here.

"challenged the right to take," such challenge was "untimely" as a procedural matter. (*Id.* at 2, 3; *see also id.* at 8 ("The rules of civil procedure are not suspended merely because a party asserts constitutional rights.")).

There are several problems with this logic. For one, if the Town pursued the direct-condemnation action all the way through the appellate division without knowing Ms. Rubin was challenging the right to occupy her property, one wonders what the Town thought the fight was about. Ms. Rubin unquestionably challenged the Town's right to take—and prevailed. As the U.S. Supreme Court has explained, she did what she was expected to do:

> When the government initiates formal condemnation procedures, a landowner may question whether the proposed taking is for public use. The landowner who raises this issue . . . seeks not to establish the government's liability for damages, *but to prevent the government from taking his property at all*. As the dissent recognizes, *the relief desired by a landowner making this contention is analogous not to damages but to an injunction* . . . .

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 713 (1999) (emphasis added); *see also id.* at 741 (Souter, J., concurring in part and dissenting in part) ("Now and then a landowner will fight back by denying the government's right to condemn, claiming that the object of the taking was not a public purpose or was otherwise unauthorized by statute.").

Next, the Town's reasoning is premised on the argument that Ms. Rubin should have separately objected to the "construction of the sewer line" itself.

(*See* Town's Consolidated Resp. Br. at 2 (arguing that Ms. Rubin "had 4 ½ months between notice of the intended condemnation action and construction of the sewer line to request an injunction")). But Ms. Rubin answered the Town's complaint shortly after service—and before the Town completed construction. (2015 R pp 20-24). In that pleading, Ms. Rubin alleged that "the Town of Apex does not have the right to take any property interest of Beverly L. Rubin," raised as a first affirmative defense that she was "contest[ing] the right of the Town of Apex to take any of her property," referenced a letter from two months earlier in which she stated that she "intends to challenge, the right to take, by the Town of Apex in this matter," and prayed for the court to "issue an order in this proceeding that the Town of Apex does not possess the right of eminent domain as applied to the areas stated within the Complaint." (2015 R pp 20-24).

Ms. Rubin's answer necessarily served as a challenge both to the Town's right to take and the taking itself (*i.e.,* the construction of the sewer line). After all, a landowner's challenge to the government's *right to install* something on her property necessarily encompasses the government's *actual installation* of it. Besides, this Court has already rejected such a "race to mootness" theory. *See State Highway Comm'n v. Thornton*, 271 N.C. 227, 238, 156 S.E.2d 248, 256 (1967) (explaining that the government cannot moot a landowner's challenge by racing to complete a project). Ms. Rubin's subsequent request to

remove the installed pipe—after successfully challenging the Town's right to invade the property at all—was nothing more than a continuation of the argument she had been making from the beginning.

Nor is the Town correct that Ms. Rubin "cites no North Carolina case [holding] that a party automatically receives equitable injunctive relief—especially when not pled." (*See* Town's Consolidated Resp. Br. at 9). To the contrary, that is exactly what happened in *Bradshaw v. Hilton Lumber Co.*, 179 N.C. 501, 103 S.E. 69 (1920), which Ms. Rubin cited in her opening brief. (*See* Rubin's Opening Br. at 17, 20). There, a landowner whose property was taken for a private use successfully brought an action for damages; upon the jury's verdict, the court granted a perpetual injunction which this Court upheld as "a proper additional remedy." *See id.* at 501, 103 S.E. at 73.

Fundamentally, the Town's central mistake is its belief that the Constitution is subservient to procedural "rules." If it were, then any government could override constitutional rights by statute or rule. The U.S. Supreme Court has already rejected such a short-sighted approach to constitutional rights. *See Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 841 (1987) ("We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination."). This Court should do the same.

The danger embedded in the Town's view of the Constitution is readily apparent when applied to other constitutional protections. Consider a jailed criminal defendant who is exonerated by a jury. The government can no longer hold him without violating the Constitution, of course. The defendant does not need to then file a lawsuit and identify the perfect procedural rule supporting the issuance of an injunction commanding his release. That happens automatically.

Or, suppose that the IRS attempts to collect allegedly unpaid taxes by imposing a lien on a taxpayer's home and levying the taxpayer's bank accounts. If the taxpayer obtains a final judgment ruling that she never owed the tax in the first place, the IRS wouldn't wait for a court order before it released the lien and refunded the money. Nor would the taxpayer be expected to separately seek an injunction.

In short, once it has been conclusively determined that the government is engaging in ongoing unconstitutional conduct, that should be the end of it. The government's unconstitutional conduct must stop, especially when it involves "the fundamental right to property." *See Kirby v. N.C. Dep't of Transp.,* 368 N.C. 847, 853, 786 S.E.2d 919, 924 (2016). There are no equities to be balanced when it comes to a knowing and willful violation of a citizen's constitutional rights. Thus, the Town's discussion of the standard for injunctive relief under Civil Procedure Rule 65 is irrelevant. Ms. Rubin is not

arguing that Judge Collins got the balance wrong or should have weighed the factors differently; she is arguing that there isn't anything to weigh against her constitutional rights in the first place. (*See* Rubin's Opening Br. at 12).

The Town's reliance on the abuse-of-discretion standard of review is likewise misplaced. Judge Collins acted under a misapprehension of the law. That is a *per se* abuse of discretion. *Vaughan v. Mashburn*, 371 N.C. 428, 433, 817 S.E.2d 370, 374 (2018) (explaining that even discretionary decisions will be vacated when they are "based on a misapprehension of law"); *Koon v. United States*, 518 U.S. 81, 100 (1996) ("[A] district court by definition abuses its discretion when it makes an error of law."); *see also id.* (reiterating that applying the abuse-of-discretion standard "does not mean a mistake of law is beyond appellate correction"). The Court of Appeals erred as a matter of law in affirming this portion of Judge Collins's orders. That error is properly before this Court as well. *See* N.C. R. App. P. 16(a) ("Review by the Supreme Court after a determination by the Court of Appeals, whether by appeal of right or by discretionary review, is to determine whether there is error of law in the decision of the Court of Appeals.").

The Town maintains that Ms. Rubin "has the burden of establishing the necessary preliminary equities for the extension of the equitable relief," and that a 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." (*See* Town's Consolidated Resp. Br. at 16). Yet, the Town has no support for its theory that the government can willfully violate a citizen's constitutional rights because something else weighs heavier on the other side of the balance. The Town points to the Court of Appeals' decision in *Herff Jones Co. v. Allegood*, 35 N.C. App. 475, 241 S.E.2d 700 (1978), but that case did not involve constitutional rights at all. The court there was balancing the interests of a private employer and former employees in a contract dispute. It is one thing for courts to balance equities among private parties, and quite another to give the government a tool to undermine the constitutional guarantees that are due to all citizens.

The Town's theories here are dangerous. This Court should firmly reject the Town's novel view of our constitutional system.

II. BECAUSE THE CONSTITUTIONAL VIOLATION HAD ALREADY BEEN ADJUDICATED, MS. RUBIN'S MOTION TO ENFORCE SHOULD HAVE BEEN GRANTED.

According to the Town, there are no remedies available to Ms. Rubin that would result in removal of the sewer pipe at this juncture. (*See* Town's Consolidated Resp. Br. at 18). But as this Court recently reaffirmed, there is always a remedy for constitutional harms. *Washington v. Cline*, No. 148PA14-2, 2024 WL 1222548, at *1 (N.C. Mar. 22, 2024) (publication forthcoming) ("Where there is a right, there is a remedy. This is a foundational principle of every common law legal system, including ours. We have long called it a time-

honored maxim. It is even enshrined in the North Carolina Constitution.") (cleaned up). Ms. Rubin explained as much in her opening brief. (*See* Rubin's Opening Br. at 21, 22); *see also Sale v. State Highway & Pub. Works Comm'n*, 242 N.C. 612, 618, 89 S.E.2d 290, 296 (1955) (reiterating that a remedy exists for every wrong and thus damage done to property in violation of the Constitution will never be without redress).

The Town simply has no response to this point. The Town doesn't cite *Sale* at all. Nor does it respond to Ms. Rubin's discussion of *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992). Under *Corum*, "in the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." *Id.* at 782, 413 S.E.2d at 289; *see also Hoke Cnty. Bd. of Educ. v. State,* 382 N.C. 386, 436, 879 S.E.2d 193, 225 (2022) ("A longstanding violation of a fundamental constitutional right demands a remedy of equivalent magnitude.").

The best the Town can do is point to a Court of Appeals decision to argue that the government need not leave unless the judgment specifically says so. (*See* Town's Consolidated Resp. Br. at 7 (citing *City of Statesville v. Roth*, 77 N.C. App. 803, 806, 336 S.E.2d 142, 143 (1985)). It is true that the trial court in *Roth* declared the taking invalid and also entered an express injunction.

Roth, 77 N.C. App. at 806, 336 S.E.2d at 143. But nothing in the *Roth* opinion indicates that such injunction language is *necessary*.

The Town's reliance on *Roth* is odd for another reason: that court considered and rejected another arugment that the Town pursues here. The Town asserts that by filing a condemnation complaint and submitting a deposit, it obtained—and continues to possess— "legal" title to Ms. Rubin's property. (*See* Town's Consolidated Resp. Br. at 13, 17). Yet, *Roth* rejected this exact argument: the "filing of the Complaint by the petitioner does not vest title in the petitioner since the taking is not for a public purpose." Instead, "the property sought to be acquired by the petitioner is revested with the respondents." *Roth*, 77 N.C. App. at 806, 336 S.E.2d at 143.

The Town does not even respond to several other arguments raised by Ms. Rubin. For example, the Town has no rebuttal to the complete prohibition on the government condemning private property for a private purpose. As this Court once explained, "[i]t is so well settled by the fundamental law that private property cannot be taken for private use, that it is always assumed as a postulate, and no argument is needed to sustain it." *Bradshaw*, 179 N.C. at 508, 103 S.E. at 72-73. Only "strict adherence to this rule" is tolerated, as it is necessary to prevent "doing indirectly what cannot be done directly." *Id*.

Nor does the Town cite any cases in which a court allowed a government to stay after an unconstitutional invasion of a citizen's property for a private purpose.

Further, Ms. Rubin's opening brief repeated her argument from below that the Town's 2019 case was barred by res judicata. (Rubin's Opening Br. at 33). Yet, "res judicata" appears precisely zero times in the Town's response brief.

Ultimately, as the Town admits, Ms. Rubin "had her day in court on her constitutional claims . . . and Judge O'Neal addressed the constitutional claims in her Judgment in the 2015 condemnation case." (*See* Town's Consolidated Resp. Br. at 21). Exactly. Ms. Rubin argued from the outset that the Town's occupation of her property was for a private purpose, and the trial court agreed the Town's occupation of her property was unconstitutional. Ms. Rubin did not just *raise* a constitutional claim, she *won*. The only question now is whether that Judgment is worth the paper it's written on.

CONCLUSION

For these additional reasons, the Court of Appeals opinions should be affirmed in part and reversed to the extent that (1) they held that Ms. Rubin was not entitled to mandatory injunctive relief; and (2) they failed to dismiss the 2019 case and vacate the preliminary injunction issued therein in favor of

the Town. Ms. Rubin asks this Court to order the Town to cease its unconstitutional occupation of her private property and remove the sewer pipe.

Respectfully submitted this the 25th 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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