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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PLAINTIFF-APPELLANT'S CONSOLIDATED NEW RESPONSE TO NORTH CAROLINA ADVOCATES FOR JUSTICE *AMICUS CURIAE* BRIEF

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PLAINTIFF-APPELLANT'S CONSOLIDATED NEW RESPONSE TO NORTH CAROLINA ADVOCATES FOR JUSTICE *AMICUS CURIAE* BRIEF

****

INTRODUCTION

North Carolina Advocates for Justice's ("NCAJ") Substituted Consolidated New Brief of *Amicus Curiae* ("Amicus Brief") universally fails to recognize and acknowledge the effect Rubin's failure to utilize her adequate remedies before the trial court has on her constitutional claims and demand for removal of the pipe. Specifically, NCAJ contends that the Court of Appeals "failed to recognize that an unconstitutional taking is void *ab initio* with self-executing remedies that do not require a separate injunctive procedure." Amicus Brief, 2. This is not the law pursuant to the condemnation statutes enacted by the General Assembly. No support or case law is provided for such "self-executing remedies" because it doesn't exist.

NCAJ's Amicus Brief employs the same tactics utilized by Rubin in citing broad condemnation case law in support of the argument that the North Carolina and federal constitutions prohibit citizens being deprived of their property at the hands of the government. All of the case law cited involves a landowner properly halting constructing of a project by asserting injunctive relief. What is missing from NCAJ's Amicus Brief is

an acknowledgement that the purported "manifest injustice" is entirely of Rubin's own making. *See* Amicus Brief, 3 ("Manifest injustice results when erroneous decisions deny relief to citizens like Rubin, who remains in the right, but still lacks a remedy"). Rubin had an adequate remedy but chose not to use it. Landowners in condemnation cases that object to the right to take and want to prevent a project from being built before the challenge can be resolved have adequate remedies available under Supreme Court case law and applicable statutes – namely injunctive relief.

Here Rubin chose not to plead or request injunctive relief. So it is no surprise that when the trial court dismissed the condemnation petition, it did not grant Rubin injunctive relief and did not order the sewer line removed. Rubin even raised constitutional claims and rights in the condemnation action, but did not request the trial court issue injunctive relief as a way to protect these alleged constitutional rights. Rubin did not appeal this final judgment and it is law of the case.

ARGUMENT

I. TRIAL COURT PROPERLY CONSIDERED AND DENIED RUBIN'S MOTION TO ENFORCE JUDGMENT.

The Town filed the condemnation action in COA20-304 (410PA18-2) on 30 April 2015 to acquire via eminent domain a public gravity sewer easement across real property owned by Rubin. The Court considered documentary evidence and heard testimony on the disputed issues of fact and ultimately found that the paramount reason for the taking of the sewer easement is for a private interest, and entered a judgment (the "O'Neal Judgment") on 18 October 2016 dismissing the Town's claim for an acquisition of a forty (40) foot wide sewer easement across Rubin's property as "null and void." (2015 R pp 33-39)[1]. The Judgment rendered the Complaint and Declaration of Taking a nullity (2015 R pp 33-39), with the effect of which is as if it had not been filed.

Approximately 3 ¾ years after the installation of the sewer line and after the entry of the O'Neal Judgment in the condemnation action,

[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.

Rubin filed her motion to enforce judgment on 10 April 2019, seeking a mandatory injunction to remove the Town's sewer line. This was Rubin's first request for injunctive relief to the trial court. (2015 R p 163, ¶4).

The trial court denied Rubin's motion to enforce judgment and granted the Town's motion for relief from judgment in the 2015 case. (2015 R pp 155-162, 162-168). The fact that the 2019 case was pending did not prevent the trial court from considering and denying Rubin's motion to enforce judgment.

At no point did Rubin request injunctive relief, either preliminary or permanent, from the original trial court to prevent or halt the sewer line's construction or to remove the sewer line, nor did Rubin ask Judge O'Neal at any point to address the issue. Judge O'Neal did not order injunctive relief or revesting of title in her Judgment. Rubin then had the opportunity to have Judge O'Neal clarify her O'Neal Judgment or otherwise ask Judge O'Neal to address the sewer line beneath her property, yet she refused to do so. The Court of Appeals correctly found that there is no evidence in the Record to support a finding that the O'Neal Judgment granted injunctive relief or required the Town to

remove the sewer line. Rubin did not appeal the O'Neal Judgment and it is law of the case.

II. O'NEAL JUDGMENT WAS NOT INCOMPLETE AS TO INJUNCTIVE RELIEF, BUT WAS A FINAL JUDGMENT.

NCAJ takes issue in its Amicus Brief with the Court of Appeals' determination that because Rubin failed to utilize the adequate remedies before the trial court (i.e. motion for injunctive relief), she was not entitled to the removal of the sewer pipe. In support of its argument that the O'Neal Judgment is somehow not a final judgment, NCAJ states: "[o]nce this case is returned to the correct jurisdictional track in the original action, established law provides familiar procedures and authority for Rubin to seek ejectment or other relief." Amicus Brief, 10. Rubin did not seek injunctive relief in the original action nor appeal the O'Neal Judgment; therefore, it is law of the case.

NCAJ argues that jurisdiction remains in the original action and Rubin is still able to seek injunctive relief or request removal. Further, NCAJ alleges the original action remains pending "while waiting to consider ancillary remedies and relief such as attorney fees and cost" because the trial court "did not ever fully reach all of the *in rem* issues."

Amicus Brief, 9. NCAJ's arguments regarding *in rem* jurisdiction are without merit because the O'Neal Judgment was a final judgment.

This is clear based upon a quick review of the O'Neal Judgment:

"JUDGMENT"

- "The Plaintiff's claim to the Defendant's property by Eminent Domain is null and void." (2015 R p 38, ¶ 1)
- "The Plaintiff's claim is dismissed, and the deposited fund shall be applied toward any costs and/or fees awarded in this action, with the balance, if any, returned to Plaintiff." (2015 R p 38, ¶ 2)
- "Defendant is the prevailing party, and is given leave to submit a petition for her costs and attorney's fees as provided in Chapter 136." (2015 R p 38, ¶ 3)
- "No rulings made herein regarding Defendant's claims for attorney's fees under N.C. Gen Stat. 6-21.7, which ruling is reserved for later judication upon Defendant's submitting a Motion in Support of such request." (2015 R p 38, ¶4)

The O'Neal Judgment does not grant injunctive relief, and there is no directive to remove the previously installed sewer line. If there was anything subsequent expected regarding the previously installed sewer line, the O'Neal Judgment could have addressed it like it did Rubin's desired request for attorney's fees. But it did not. Rubin did not request Judge O'Neal address the sewer line at this point, nor did Rubin appeal the O'Neal Judgment.

It is undisputed that the O'Neal Judgment is a final judgment, one Rubin did not appeal. A final judgment "operates as an estoppel not only as to all matters actually determined or litigated in the prior proceeding, but also as 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." *Rodgers Builders, Inc. v. McQueen*, 76 N.C. App. 16, 22, 331 S.E.2d 726, 730 (1985), disc. review denied, 315 N.C. 590, 341 S.E.2d 29 (1986) (citation omitted). "A party is required to bring forth the whole case at one time and will not be permitted to split the claim or divide the grounds for recovery; thus, a party will not be permitted, except in special circumstances, to reopen the subject of the ... litigation with respect to matters which might have been brought forward in the previous proceeding." *Id*. at 23, 331 S.E.2d at 730.

Further, the O'Neal Judgment has properly been considered a final judgment by all parties and subsequent courts. The fact that the O'Neal Judgment specifically reserved the right to seek attorney's fees does not make it "non-final" or change the nature of the decisions of the trial court.

The O'Neal Judgment dismissed the Town's claim for an acquisition of a sewer easement across Rubin's property as "null and void." (2015 R pp 33-39). The effect of the Judgment is that it is as if the original condemnation complaint was not filed. *Hopkins v. Hopkins*, 8 N.C.App. 162, 169, 174 S.E. 2d 103, 108 (1970)("…null and void, i.e., as if it never happened."). The Judgment rendered the Complaint and Declaration of Taking a nullity (2015 R pp 33-39), with the effect of which is as if it had not been filed.

As a result, there is no "res" remaining at issue. 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 O'Neal Judgment, and otherwise did nothing to advance the arguments in Court she now, several years later, makes - that the O'Neal Judgment required removal and it would be unconstitutional for the sewer line to remain. (Jan. 2017 T). The Court of Appeals swiftly rejected this argument, noting how:

> Ms. Rubin seeks more than just a procedural ruling; she seeks the additional substantive right to compel removal of the Town's sewer pipe by order of the trial court. As we have explained, mandatory injunctive relief is ancillary to—and thus exceeds—the ordinary relief afforded by a judgment resolving a dispute as to title. *See English*, 41 N.C. App. at 13, 254 S.E.2d at 234

> (noting mandatory injunctive relief is ancillary to an action seeking to resolve disputes of title and possession of land).

Town of Apex v. Rubin, 2021-NCCOA-187, ¶38. The original condemnation action involved a determination as to whether the Town's exercise of eminent domain power was for a "public purpose." The O'Neal Judgment determined that it was not for a public purpose and therefore dismissed the Town's condemnation action. That was the conclusion of the original 2015 action. At that point, Rubin was free to bring any claims for injunctive relief, but she failed to do so. A party asserting constitutional rights still 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.

NCAJ tries to misdirect the court from the true issue at hand by stating that Rubin did not need to request injunctive relief. This conflicts with not only the condemnation statutes enacted by the General Assembly, but appellate case law. Cases like the *Town of Midland v. Morris,* 209 N.C.App. 208, 704 S.E.2d 329 (2011) and *City of Statesville v. Roth*, 77 N.C.App. 803, 336 S.E.2d 142 (1985) illustrate how a landowner properly seeks injunctive relief in a condemnation case – and

the trial court's judgment in *Roth* shows what a judgment ordering injunctive relief looks like. *Roth*, at 803, 336 S.E. 2d 142, 143. Judge O'Neal issued no such order. Rubin's failure to ask Judge O'Neal to grant injunctive relief or clarify her order, and Rubin's failure to appeal Judge O'Neal's Judgment, are fatal to her recent attempts to receive permanent injunctive relief after the fact.

III. RUBIN DID NOT LACK A REMEDY AND THIS COURT DOES NOT NEED TO CREATE ONE FOR HER.

NCAJ cites *Corum v. Univ. of North Carolina,* 330 N.C. 761, 413 S.E.2d 276 (1992) in an attempt to convince this Court to ignore adequate statutory remedies and create a new remedy not provided for in the statutes – years after the O'Neal Judgment was entered. NCAJ's argument is not supported by the plain language of *Corum* and must fail. The threshold issue in *Corum* is the party alleging the absence of an adequate state law remedy. *See Corum v. Univ. of N.C.,* 330 N.C. 761, 782, 413 S.E.2d 276, 289 ("Therefore, 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."), *cert. denied,* 506 U.S. 985, 113 S.Ct. 493, 121 L.Ed.2d 431 (1992); *see also Craig ex rel.*

Craig v. New Hanover Cty. Bd. of Educ., 363 N.C. 334, 340, 678 S.E.2d 351, 355 (2009) (noting that "an adequate remedy must provide *the possibility* of relief under the circumstances." (emphasis added)). There was an adequate state law remedy available to Rubin – injunctive relief – she just failed to plead and exercise it and seek injunctive relief from the trial court. *Corum* is not applicable here.

The North Carolina General Assembly has enacted such statutes and procedures with Article 9 of Chapter 136, Chapter 40A, and the Rules of Civil Procedure, specifically Rule 65, Injunctions. These procedures provide that a landowner who objects to the right to take, in order to prevent the project from being constructed, must request in the condemnation action or in a separate timely action and receive an injunction prior to the construction of the project. Such a remedy would ensure the project is not constructed pursuant to the statutory provisions that awards condemnors immediate title and possession upon the filing of the condemnation action and deposit of just compensation. N.C. Gen. Stat. § 136-104. These remedies have been discussed in numerous North Carolina appellate cases – where the landowner has requested injunctive

relief. A timely filed injunction remedy has never been found to be insufficient to protect landowners from condemnations actions that are ultimately dismissed.

NCAJ does not contend that these procedures are inadequate or insufficient to address Rubin's claims herein, or protect her constitutional rights. Even if NCAJ tried to make such argument, it would fail since Rubin did not even attempt to avail herself of the General Assembly's chosen remedy. This should end the inquiry and end Rubin's challenge to the trial court's denial of her motion to enforce judgment. (2015 R pp 122-139).

NCAJ would have this Court leave the "judicial lane" and cross over into the "legislative lane." NCAJ attempts to bolster this position by misstating the Town's actions and intent herein. A review of the Record shows that the Town believed it had the legal right to file the condemnation action – and intended to extend Town sewer to an annexed, rezoned and approved residential subdivision within the Town.

NCAJ's arguments fall flat when viewed in light of the statutory remedies available to landowners. Future landowners will have the same

adequate remedies available to past landowners – the ability to request and receive an injunction to prevent the construction of a project during the pendency of their challenge to the right to take. All landowners except Rubin exercised these rights and were able to adequately protect themselves. The fact that Rubin chose not to avail herself of the available remedy does not mean this Court must move into the legislative lane and create a new remedy for her. These statutory remedies have been available to landowners for decades, and will continue to be available and protect landowners in the future, and continue to deter governments from intentionally attempting to condemn property that is not authorized by law.

IV. NCAJ'S POSITION DOES NOT SUPPORT OR PROMOTE FINALITY OF JUDGMENTS.

NCAJ argues that in order for this Court to "protect the finality in litigation" it should re-open the O'Neal Judgment to "finally determine all the rights of the parties." Amicus Brief, 22-23. However, it is undisputed the O'Neal Judgment is a final judgment, one Rubin did not appeal. NCAJ criticizes the Town's declaratory judgment action as

"repeat collateral attacks" in the same breath as collaterally attacking the finality of the O'Neal Judgment, which was not timely appealed.

It is clear that it is NCAJ's position – not the Town's – which does not support or promote finality of judgments. As discussed *supra*, Rubin filed a motion to enforce judgment in the 2015 action, and the trial court denied her motion to enforce judgment. The Court of Appeals then affirmed that denial. Now, NCAJ seeks a remand for Rubin from this Court in order for Rubin to get a second bite at the apple because they do not like that ruling. This should be swiftly rejected.

CONCLUSION

For the reasons cited herein, 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.

Respectfully submitted, this the 8th day of April, 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 **PLAINTIFF-APPELLANT'S CONSOLIDATED NEW RESPONSE TO NORTH CAROLINA ADVOCATES FOR JUSTICE *AMICUS CURIAE* BRIEF** upon the parties by depositing the same in the United States mail, first class postage prepaid, addressed as follows:

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