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 PACIFIC LEGAL FOUNDATION AMICUS BRIEF

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PLAINTIFF-APPELLANTS CONSOLIDATED NEW RESPONSE TO PACIFIC LEGAL FOUNDATION AMICUS BRIEF

****

INTRODUCTION

The Town of Apex ("Town") agrees with the Pacific Legal Foundation ("PLF") that Rubin should not be allowed to seek injunctive relief in a separate trespass action against the Town, although the Town disagrees with the reasons why. In North Carolina a trespass action does not lie against a municipal condemnor in their exercise of the power of eminent domain.

PLF ignores the facts of this case, the North Carolina law regarding possession and title vesting upon the filing of a condemnation complaint, and the statutory remedies available to landowners in North Carolina. It is convenient for PLF to do so – so they can attack the Town without regard to the actual facts and law. Such actions undercut the credibility of PLF's filing herein.

In condemnation cases where landowners dispute the right to take and seek to halt a project's construction pending resolution of the challenge, they have available, adequate remedies available under Supreme Court case law and relevant statutes, namely injunctive relief. These measures and procedural safeguards were put into place by the

North Carolina legislature with the intention to protect the enshrined constitutional rights with which all landowners are endowed. But these rights and protections must be timely pled and exercised by landowners. In cases cited by the parties, landowners have pleaded and requested injunctive relief during or at the time of the condemnation proceedings. However, Rubin chose not to plead or request injunctive relief; instead, she indicated to the Town that she sought monetary damages if the condemnation action was dismissed. Consequently, when the trial court dismissed the condemnation petition, it did not grant Rubin injunctive relief or order the removal of the sewer line. Despite raising constitutional claims and rights in the condemnation action, Rubin did not request injunctive relief from the trial court to safeguard these alleged constitutional rights. Rubin did not appeal this final judgment, making it the law of the case.

PLF refuses to acknowledge or address these statutory remedies in its Amicus Brief and refuses to address Rubin's failure to timely pled injunctive relief. The Court of Appeals and trial court rightfully rejected

Rubin's belated attempts to raise injunctive relief *years* after the installation of the sewer line, based on the O'Neal Judgment.

Again, the Town has acknowledged that it is less than ideal for a landowner to have a sewer line under their property that was not authorized pursuant to a condemnation complaint. Nonetheless, it's important to note that the sewer line remains in place due to Rubin's failure to timely pursue available remedies. Had she timely pled and requested injunctive relief, like every other North Carolina landowner who contested the right to take, the Court could have and most likely would have prevented the sewer line from being constructed pending the ruling on Rubin's challenge to the right to take. The Court of Appeals acknowledged this in denying Rubin's motion for relief and alternative petition for a writ.

ARGUMENT

I. THE PUBLIC USE REQUIREMENT DOES NOT MAKE INJUNCTIVE RELIEF SELF-EXECUTING

PLF argues that when a landowner challenges the right to take for lack of public use, they do not have to plead or receive injunctive relief,

in order to receive it after the project is constructed and after final judgment in the case is entered. This is not the law in North Carolina.

PLF and Rubin fail to cite any North Carolina cases where a party automatically receives equitable injunctive relief in a condemnation case, especially when such relief has not been pled. Moreover, N.C. R. Civ. P. 65(d) specifies that an order granting an injunction "shall be specific in terms" and must describe in reasonable detail "the act or acts enjoined or restrained." The Court of Appeals has emphasized that these requirements are explicit and unambiguous, and an injunction cannot be issued in a cursory manner, as established in *Wilner v. Cedars of Chapel Hill, LL.C*, 241 N.C. App. 389, 773 S.E.2d 333 (2015); *see also State Highway Comm'n v. Thornton*, 271 N.C. 227, 233, 156 S.E.2d 248, 253 (1967). Judge O'Neal's Judgment cannot be interpreted 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, while still being "specific in terms" and describing the enjoined or restrained acts in reasonable detail. The fact that constitutional rights are involved does not change these rules or pleading requirements.

PLF fails to acknowledge the procedural posture of the Rubin case. All the cases cited by PLF and/or Rubin regarding the return of Rubin's property differ from the present case procedurally. In each of those cases, the landowner requested the judge who was deciding on the issue of public use or benefit to grant injunctive relief. However, in this case, Rubin did not seek injunctive relief from the presiding trial court judge but rather from a different trial court judge 3 ¾ years after the installation of the sewer line and after the final judgment was entered—within the context of a motion for discretionary relief. (2015 R 122-139)[1]. Rubin's request for injunctive relief after the project is constructed and after final judgment is entered in the case fundamentally changes the Court's view of Rubin's request.

PLF argues for a self-executing injunction but fails to acknowledge or even cite *State Highway Commission v. Thornton*, 271 N.C. 227, 156 S.E.2d 248 (1967), and *Clark v. Asheville Contracting Co., Inc.*, 316 N.C. 475, 342 S.E.2d 832 (1986). It is clear why – because PLF's argument

[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.

fails in the face of this Supreme Court precedent. In *State Highway Commission v. Thornton* and in *Clark v. Asheville Contracting Co.*, 316 N.C. 475, 342 S.E.2d 832 (1986), the Supreme Court ruled that landowners could not pursue an injunction remedy against the North Carolina Department of Transportation ("NCDOT") for an unauthorized taking. These cases apply to the Rubin case and defeat PLF's argument for an after-the-fact injunction to be automatically issued to Rubin.

Finally, and most importantly, PLF refuses to acknowledge the available adequate remedies made available to landowners by the North Carolina legislature to protect their constitutional rights when they challenge the right to take – a timely filed injunction. PLF seems to go to great lengths to discuss cases that focus on a lack of a state remedy – but the North Carolina legislature provides landowners who challenge the right to take a remedy. *See* N.C. Gen. Stat. § 136-106; *Thornton.* PLF does not argue this remedy is inadequate to protect Rubin's interests herein – nor can they. PLF misses the mark by citing to case law for general principals of constitutional law, without applying them to the facts of this case, and specifically to the remedies available to Rubin.

As such, the Court of Appeals properly ruled that the trial court was correct in denying Rubin's untimely attempts to receive an injunction in the 2015 condemnation case. Further, Rubin cannot seek injunctive relief in a separate trespass action against the Town. For the reasons stated in the Town's Consolidated New Brief, in North Carolina a trespass action does not lie against a municipal condemnor in their exercise of the power of eminent domain. *Clark v. Asheville Contracting Co., Inc.,* 316 N.C. 475, 342 S.E.2d 832 (1986); In *Clark,* the Supreme Court held that the landowners could not pursue their remedy against the North Carolina Department of Transportation ("NCDOT") for an unauthorized taking:

> As the acts the plaintiffs complain of were not for a public purpose, they were beyond the authority of DOT to take property for public use in the exercise of its statutory power of eminent domain. Since DOT as a matter of law is incapable of exceeding its authority, the acts complained of could not be a condemnation and taking of property *by DOT* or an actionable tort *by DOT*. At most, the acts complained of could have been unauthorized trespasses by agents of DOT, for which no actionable claim exists against DOT.

Id. at 485, 342 S.E.2d at 838 (citing *Thornton*, 271 N.C at 236, 156 S.E.2d at 255; *Batts*, 265 N.C. at 361, 144 S.E.2d at 137) (additional citations

omitted). (*Town of Apex v Rubin,* 2021-NCCOA-187, ¶47). The Supreme Court held that NCDOT was immune to claims for both damages and injunctive relief:

> [']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).

II. TRIAL COURT PROPERLY REFUSED TO EXERCISE ITS INHERENT AUTHORITY REGARDING RUBIN'S INJUNCTION REQUEST

PLF argues the trial court should have exercised its inherent authority to grant Rubin's request for injunctive relief, and that constitutional claims should have served the basis for this exercise. The Court of Appeals correctly determined that the trial court appropriately exercised its discretion by refraining from utilizing its inherent authority in this manner, as established in *Ashton v. City of Concord*, 160 N.C. App. 250, 584 S.E.2d 108 (2003). PLF fails to cite any North Carolina

precedent where a trial judge has granted a permanent injunction through inherent authority in a condemnation case. In North Carolina cases where an injunction was granted to prevent the construction of a project pending a ruling on a landowner's challenge to the right to take, the basis for the injunction was a timely request and/or motion by the landowner and an order entered prior to construction.

In the 2015 original condemnation action, Rubin raised constitutional claims and rights in her answer, with statements concerning constitutional provisions and rights also included in the O'Neal Judgment. (2015 R pp. 20-24, ¶¶ 1, 6; 33-38, ¶¶ 3 of the FoF, 5 of the CoL). Despite constitutional claims being asserted in the original condemnation action, Rubin was required to specifically request injunctive relief to obtain it. Injunctive relief does not inherently or automatically stem from the allegation of a constitutional violation. In fact, the statutory structure that provides that a condemnor obtains possession and title to property described in a condemnation complaint upon the deposit of just compensation with the Clerk highlights the need to timely request injunctive relief. N.C. Gen. Stat. § 136-103 *et seq., N.C.*

State Highway Comm'n v. York Indus. Center, Inc., 263 N.C. 230, 139 S.E.2d 253 (1964). Rubin had the opportunity to present her constitutional claims in court during the Section 108 hearing, and Judge O'Neal addressed these claims in her Judgment in the 2015 condemnation case. Rubin cannot now reassert these same constitutional claims to seek an injunction that was not pleaded or requested in the original condemnation action. The *Corum* case does not supply Rubin a second bite at the apple – for there was an adequate state remedy available to Rubin, she just failed to exercise it. *Corum v. Univ. of North Carolina,* 330 N.C. 761, 413 S.E.2d 276 (1992).

The Court of Appeals and trial court rightly determined that arguments concerning constitutional claims do not alter the calculus for the trial court's inherent authority. Consequently, the trial court appropriately declined to exercise its inherent authority to mandate an injunction in this case.

III. PLF URGES THIS COURT TO MOVE INTO THE LEGISLATIVE LANE AND CREATE A NEW REMEDY FOR RUBIN.

PLF urges this Court to "do something" – but its request would have this Court leave the "judicial lane" and cross over into the "legislative lane." PLF argues that if the Court does not act, it would encourage other governments to attempt to render a court's finding of lack of a public purpose meaningless. PLF 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.

PLF'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.

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 related 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-APPELLANTS CONSOLIDATED NEW RESPONSE TO PACIFIC LEGAL FOUNDATION AMICUS BRIEF** upon the parties by depositing the same in the United States mail, first class postage prepaid, addressed as follows:

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