

# Municipal Law Notes

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**Eminent Domain;**  
**Direct Condemnation Action;**  
**Non-Public Purpose;**  
**Mandatory Injunctive Relief;**  
**Separate Trespass Claim; Mandamus**

Town of Apex v. Rubin, 2021-NCCOA-187 (No. COA20-304, Wake—5/4/21)

- ***Holding***— In litigation subsequent to issuance of Town of Apex v. Rubin in 2018, Court of Appeals holds that both State Highway Comm’n v. Thornton, 271 N.C. 227, 156 S.E.2d 248 (1967) and Town of Midland v. Morris, 209 N.C. App. 208, 704 S.E.2d 329 (2011), establish that a government body cannot take title to private property for a non-public purpose simply by filing a direct condemnation action and completing the construction project. Town did not have title to any sewer easement across landowner’s property under any condemnation theory. While landowner did not seek mandatory injunctive relief in the direct condemnation action and accordingly is not entitled to that remedy by the plain language of the judgment here, landowner cannot be compelled to accept compensation and could instead elect to pursue mandatory injunctive relief through a separate trespass claim.

- ***Key Excerpt***— This appeal arose from post-judgment orders in a direct condemnation action. (The Court initially observed that many of the facts underlying this litigation dating to 2015 were summarized in its prior decision, Town of Apex v. Rubin, 262 N.C. App. 148, 821 S.E.2d 613 (2018), *disc. review denied, temp. stay dissolved, writ of supersedeas denied*, 372 N.C. 107, 825 S.E.2d 253 (2019) (dismissing appeal wherein plaintiff-Town argued that the trial court erred in concluding that its claim to defendant’s property by eminent domain was for a private purpose; see *MLN* October 2018, p. 2).

Plaintiff-appellee Town asserted title to a sewer line installed on defendant-appellant Rubin’s land: defendant Rubin’s asserted it had been for a non-public purpose, as the Town’s taking of a 40’ easement to construct the pipe was beyond the constitutional exercise of its eminent domain powers. The trial court had denied defendant-appellant’s Rubin’s motion to enforce the judgment, denied her petition for writ of mandamus, and granted plaintiff-appellee Town’s motion for relief from judgment. (Plaintiff-Town sought relief from judgment by contending that: (1) the

installation of the sewer pipe, and dismissal of the direct condemnation action, gave it title by inverse condemnation; and (2) defendant-Rubin's sole remedy was monetary compensation for the inverse condemnation. Plaintiff-Town argued *inter alia* that inverse condemnation is the only cause of action available to defendant-Rubin, that "[t]he exclusive remedy to which [defendant-] Rubin is entitled for inverse condemnation is compensation," and that "the Town ... [is] insulate[d] from [defendant-] Rubin's claim that she is entitled to mandatory injunctive relief.")

Determining that defendant-Rubin could not be compelled to accept compensation and could instead elect to pursue mandatory injunctive relief through a separate trespass claim, the Court of Appeals held that plaintiff-Town did not have title to any sewer easement across defendant-Rubin's land under any condemnation theory and that she could not be compelled to accept monetary compensation for the violation of her constitutional rights.

The Court held that binding precedents precluded the Court from holding plaintiff-Town took title to a sewer easement by inverse condemnation across the property by virtue of its "precipitate entry and construction," State Highway Comm'n v. Thornton, 271 N.C. 227, 237, 156 S.E.2d 248, 256 (1967), during the pendency of the direct condemnation action and in light of the allegation that the taking was for a non-public purpose.

The Court held that the trial court erred in its conclusions of law, found throughout both orders, establishing that plaintiff-Town took an easement by inverse condemnation when it completed the installation of the sewer pipe across defendant-Rubin's property. "Both Thornton and [Town of] Midland [v. Morris, 209 N.C. App. 208, 211-13, 704 S.E.2d 329, 333-34 (2011)] establish that a

government body cannot take title to private property for a non-public purpose simply by filing a direct condemnation action and completing the construction project. In this case, the Town's position that it took title to a sewer easement by inverse condemnation through construction of the sewer pipe during the pendency of the direct condemnation action is irreconcilable with Thornton's prohibition against the enlargement of the government's condemnation powers 'by precipitate entry and construction.' 271 N.C. at 237, 156 S.E.2d at 256. It also conflicts with this Court's holding in Midland that title reverts to the landowner after a successful challenge to a condemnation action irrespective of whether the project was completed, as a 'city [cannot] obtain permanent title to the land by fulfilling the purpose of a condemnation before final judgment ...' 209 N.C. App. at 214, 704 S.E.2d at 335."

The Court rejected plaintiff-Town's reliance on Wilkie v. City of Boiling Spring Lakes, 370 N.C. 540, 809 S.E.2d 853 (2018), for the proposition that it could claim title to the easement by inverse condemnation irrespective of the judgment in the direct condemnation action. The Court observed *inter alia* that Wilkie was an inverse condemnation claim brought by the landowners and did not involve the issue of whether a condemnor could swap its legal theory of ownership from direct condemnation to inverse condemnation when an action under the former failed.

The Court also held that the trial court erred in concluding the judgment was moot. "The trial court reached this conclusion in part on the basis that the Town took title to the easement by inverse condemnation.... [W]e hold that no such permanent vesting of title in the Town has occurred. If the completion of the pipeline in Midland

did not preclude a return of title upon a final determination that the direct condemnation was not pursued for a public purpose, 209 N.C. App. at 213-14, 704 S.E.2d at 334, the Town's completion of the sewer line cannot moot Ms. Rubin's judgment to that effect." The Court also held "that the Judgment, contrary to the Town's claim that it 'is void as to Rubin's ability to contest the installed sewer line and corresponding easement,' was not rendered void in any respect by the installation of the sewer line. As our Supreme Court held in Thornton, Ms. Rubin is 'not estopped to assert that the land in question still belongs to [her], free of any right of way across it,' 271 N.C. at 238, 156 S.E.2d at 257, and she may seek to vindicate 'whatever rights [she] may have against those who have trespassed upon [her] land and propose to continue to do so,' *id.* at 240, 156 S.E.2d at 258, despite the sewer pipe's construction. Because the Judgment was neither moot nor void and the Town has not taken title by inverse condemnation, we reverse the trial court's order granting the Town relief from the Judgment."

As to the effect of the judgment, the Court, citing both Thornton and Midland stated, "[T]he Judgment reverted title to Ms. Rubin in fee, restoring to her exclusive rights in the tract and divesting the Town of any legal title or lawful claim to encroach on it. But because Ms. Rubin did not seek mandatory injunctive relief in the direct condemnation action, she is not entitled to that remedy by the plain language of the Judgment.... The trial court ... rendered its Judgment declaring null and void both the direct condemnation action and the Town's 'quick take' title to the easement. The Judgment, given the issues raised before the trial court, did nothing more than that." (Citations omitted.)

Observing that defendant-Rubin failed to seek a mandatory injunction while the

direct condemnation action was pending, the Court determined that mandatory injunctive relief fell outside the scope of the judgment and held that the trial court did not abuse its discretion in declining to exercise its inherent authority to enforce the judgment in the manner defendant-Rubin requested. Stating that defendant-Rubin misread Thornton, the Court observed that, "Thornton establishes that it is unnecessary to enjoin a proceeding that has been extinguished by dismissal; Thornton does not hold that dismissal of a condemnation action is equivalent to a mandatory injunction to undo the construction and restore the land." Citing Ponder v. Joslin, 262 N.C. 496, 504, 138 S.E.2d 143, 149 (1964), the Court further observed that since a writ of mandamus is available only to enforce an established right, and the judgment here did not establish the right defendant-Rubin sought to enforce, she was not entitled to a writ of mandamus.

Turning to the issue of whether mandatory injunctive relief is available by a separate trespass claim, the Court stated, "The Judgment does not provide the Town an easement by inverse condemnation as a matter of law. Ms. Rubin cannot be compelled to surrender title to the Town. The Judgment also does not afford Ms. Rubin the mandatory injunctive relief she seeks. The question remains whether the trial court correctly concluded that the Judgment precluded mandatory injunctive relief. We hold that the trial court erred in this respect. While Ms. Rubin is not entitled to post-judgment mandatory injunctive relief in the direct condemnation action, she may bring a trespass claim against the Town in pursuit of the mandatory injunctive relief she seeks. We therefore vacate the trial court's orders insofar as they preclude the availability of mandatory injunctive relief, but we ultimately

affirm the trial court's denial of Ms. Rubin's motion to enforce the Judgment.” The Court emphasized that plaintiff-Town “was not a trespasser until: (1) it installed the sewer pipe *after* Ms. Rubin had filed her answer, and; (2) the Judgment extinguishing the Town's right, title, and interest in Ms. Rubin's land went into effect.” (Emphasis in original.)

In closing its opinion, the Court stated, “Like the Thorntons—had they prevailed—Ms. Rubin is entitled to relief against the Town for its trespass following the trial court Judgment dismissing the condemnation action and the exhaustion of the Town's appeal rights. Given the nature of a continuing trespass, and Thornton's holding on the continued availability of trespass actions, Ms. Rubin may seek injunctive relief for the continuing trespass that the Town refuses to abate. *Id.* at 240, 156 S.E.2d at 258. Finally, as noted by the parties at oral argument, this case presents a unique circumstance involving the continued use of a sewer line, installed pursuant to a direct condemnation action, that was determined to be for a non-public purpose and in violation of the landowner's constitutional rights. This case therefore differs significantly from those addressed by the inverse condemnation statutes [G.S.] 136-111 and 40A-51, both of which apply when no condemnation action was filed by the government. We limit our holding to cases in which a municipality filed a direct condemnation action, constructed an improvement on the protesting landowner's property, and later lost the condemnation action on the ground that it was for a non-public purpose. We do not address instances in which a taking occurred without the filing of a direct condemnation action.”

- **Synopsis**— Appeal by defendant-Rubin from January 2020 orders. Vacated in part; affirmed in part; reversed in part. Opinion by

Judge Inman, with Judge Dillon and Judge Jackson concurring.

**Eminent Domain**  
**Declaratory Judgment Action;**  
**Preliminary Injunction; Res Judicata;**  
**Prior Pending Action Doctrine**  
**Interlocutory Appeals; Substantial Right**

Town of Apex v. Rubin, 2021-NCCOA-188 (No. COA20-305, Wake—5/4/21)

- **Holding**— In appeal arising from same underlying facts at issue in Town of Apex v. Rubin, 2021-NCCOA-187 (No. COA20-304, Wake— 5/4/21), Court of Appeals rejects landowner’s contention that plaintiff-Town’s declaratory judgment action, and by extension its request for a preliminary injunction, were barred by *res judicata* and the prior action pending doctrine.
- **Key Excerpt**— This appeal arose from the same underlying facts at issue in Town of Apex v. Rubin, 2021-NCCOA-187 (No. COA20-304, Wake— 5/4/21) (hereinafter “Apex v. Rubin I”). Whereas Apex v. Rubin I arose from post-judgment orders in a direct condemnation action, this appeal arose from interlocutory orders in the Town’s separate declaratory judgment action to settle the parties’ rights in the sewer line and to prohibit defendant-Rubin from disturbing it after the Town’s condemnation action was dismissed. The trial court heard motions in both those actions jointly and ruled for the Town in each. Specifically, in the declaratory judgment action at issue here, the trial court denied defendant-Rubin’s motion to dismiss and entered a preliminary injunction prohibiting defendant-Rubin from disturbing the sewer line after the condemnation action was dismissed.

Consistent with ordinary practice, the trial court's order denying defendant-Rubin's motion to dismiss contained no findings of fact or conclusions of law, and simply denied dismissal on the two grounds asserted. As to the preliminary injunction order, the trial court made findings of fact and conclusions of law establishing: (1) a dispute existed between the parties as to whether defendant-Rubin could disturb, destroy, or compel the Town to remove the sewer line; (2) an inverse condemnation had occurred as a result of the Town's installation of the line and the subsequent dismissal of the direct condemnation action; (3) defendant-Rubin's sole remedy was an inverse condemnation claim; (4) removal of the sewer line would cause irreparable harm to the Town and the lots and/or homes served in Riley's Pond subdivision; (5) an injunction was necessary to protect the Town's rights and preserve the status quo during the course of litigation; (6) there were no practical alternatives available to the Town to serve Riley's Pond subdivision; and (7) the Town was likely to succeed on the merits of its claims for declaratory and injunctive relief. Defendant-Rubin appealed from interlocutory orders denying her motion to dismiss the Town's declaratory judgment complaint and granting the Town's motion for a preliminary injunction. The Court of Appeals: 1) reversed in part and affirmed in part the denial of defendant-Rubin's motion to dismiss, and 2) vacated in part and affirmed in part the preliminary injunction.

Defendant-Rubin broadly argued, as in Apex v. Rubin I, that the trial court's orders derived from the erroneous conclusions that: (1) the judgment did not grant her a right to mandatory injunctive relief to remove the pipe; and (2) plaintiff-Town's installation of the pipe during the pendency of the direct condemnation action, absent any effort by defendant-Rubin to enjoin that installation,

vested the Town with title to a sewer easement by inverse condemnation. Viewing those issues as necessary to the resolution of Apex v. Rubin I, defendant-Rubin contended the Town's declaratory judgment action, and by extension its request for a preliminary injunction, were barred by *res judicata* and the prior action pending doctrine.

The Court first addressed the question of appellate jurisdiction, noting that both parties agreed that defendant-Rubin sought to appeal two interlocutory orders, and that such orders are not subject to immediate appellate review unless they affect a substantial right. Observing *inter alia* that "the declaratory judgment action presents a possibility of inconsistent verdicts on the question of the Town's ownership of a sewer easement and, by extension, the remedy available to Ms. Rubin for the taking," the Court concluded that these orders affected a substantial right and accordingly denied the Town's motion to dismiss the appeal. The Court noted even assuming *arguendo* that the orders did not affect a substantial right, defendant-Rubin's petition for writ of certiorari was appropriate in the interests of judicial economy. In a footnote, the Court also observed that plaintiff-Town did not oppose defendant-Rubin's petition for certiorari review and conceded at oral argument that this appeal overlapped with Apex v. Rubin I.

Defendant-Rubin argued that the judgment in Apex v. Rubin I and *res judicata* bared the Town "from relitigating whether the Town has a claim to an easement on Ms. Rubin's property." The Court agreed, stating, "The Judgment in Apex v. Rubin I, involving the same parties, subject matter, and issues, was ... *res judicata* as to any claim by the Town that the completion of the sewer pipe during the direct

condemnation action vested it with title to a sewer easement.” Accordingly, the Court reversed the denial of defendant-Rubin’s motion to dismiss as it pertained to this claim.

The Court cited Carolina Power & Light Co. v. Merrimack Mut. Fire Ins. Co., 238 N.C. 679, 691, 79 S.E.2d 167, 175 (1953) for the principle that, “Generally, in order that the judgment in a former action may be held to constitute an estoppel as *res judicata* in a subsequent action there must be identity of parties, of subject matter and of issues.” The Court found all three requirements met here. “The parties are the same. The subject matter, namely, a sewer easement across Ms. Rubin’s land to serve Riley’s Pond [sub-division], is the same. And the issues—whether the Town can compel Ms. Rubin to surrender title to such an easement in exchange for compensation—are the same. In fact, despite now claiming Apex v. Rubin I did not involve the same facts or issues, the Town moved for—and received—relief from the Judgment on the basis that ‘[t]he sewer easement is the subject of the captioned [direct] condemnation ... [and] [t]he inverse condemnation of the sewer easement ... transferred title to the easement to the Town.’ And though the Town now argues *res judicata* should not apply because the Judgment in Apex v. Rubin I did not specifically address a taking by inverse condemnation, a party cannot escape the doctrine’s application merely by swapping theories of recovery. *See, e.g., Rodgers Builders, Inc. v. McQueen*, 76 N.C. App. 16, 30, 331 S.E.2d 726, 735 (1985) (‘The defense of *res judicata* may not be avoided by shifting legal theories or asserting a different ground for relief.’) (citations omitted)).”

The Court determined that *res judicata* barred the Town’s claims that inverse condemnation was defendant-Rubin’s sole remedy, compensation was her sole relief, and

mandatory injunctive relief was unavailable. The Court concluded that its holding in Apex v. Rubin I and *res judicata* barred a declaratory judgment limiting defendant-Rubin’s remedy to compensation pursuant to an inverse condemnation claim. “In Apex v. Rubin I, the Town moved for relief from the Judgment on the ground, among others, that inverse condemnation is the only cause of action available to Ms. Rubin, that ‘[t]he exclusive remedy to which [Ms.] Rubin is entitled for inverse condemnation is compensation,’ and that ‘the Town ... [is] insulate[d] from [Ms.] Rubin’s claim that she is entitled to mandatory injunctive relief.’ The trial court then entered orders agreeing with those arguments. Despite requesting and receiving an order relieving it from the Judgment on those bases in the direct condemnation action, the Town nonetheless sought and obtained an identical determination in its declaratory judgment action. Because these claims for declaratory relief involve the same parties, the same subject matter, and the same issues as those raised and determined in Apex v. Rubin I, our holding therein that Ms. Rubin cannot be compelled to accept compensation and may instead elect to pursue mandatory injunctive relief through a trespass claim bars relitigation of these questions by the Town in its declaratory judgment action. Apex v. Rubin I, \_\_\_ N.C. App. defend

Determining that plaintiff-Town’s remaining claims were not barred, the Court stated, “The Town’s declaratory judgment action seeks resolution of other claims that we conclude are not barred, because they were not addressed in the Judgment. Specifically, the complaint alleges the Town’s ownership of the pipe itself, asserts ‘[a] genuine controversy exists between the Town and [Ms.] Rubin as to their rights and duties regarding the underground

sewer line,’ requests a permanent injunction ‘enjoining [Ms.] Rubin ... from removing or disturbing the sewer line,’ and seeks a declaration that ‘the doctrines of laches, economic waste, and other similar equitable doctrines bar [Ms. Rubin] from causing the removal of the sewer pipe.’ The question raised by these claims—what is to be done with the Town’s encroaching pipe following the Judgment now that fee simple title in the land reverted back to Ms. Rubin—was not raised by Ms. Rubin or addressed by the Judgment in Apex v. Rubin I.... [B]ecause the Judgment addressed only whether the Town lawfully took title to a sewer easement across Ms. Rubin’s land—and not what must now be done with the installed sewer pipe—the extent and enforcement of the ‘rights [Ms. Rubin] may have’ against the Town were not adjudicated in the Judgment. The Town’s declaratory judgment action therefore presents new issues, namely whether the trespassing Town must remove its pipe or can preclude Ms. Rubin from disturbing it despite title based on ‘laches, economic waste, and other similar equitable doctrines.’”

The Court rejected defendant-Rubin’s contention that the declaratory judgment action should have been dismissed *in toto* because the complaint allegedly failed to disclose a genuine controversy, an argument premised on her belief that the question of whether removal of the sewer pipe was required had already been fully adjudicated and determined in Apex v. Rubin I. The Court emphasized that “the Judgment simply determined title reverted to Ms. Rubin and did not address what must be done with the Town’s pipe under her land.” The Court also concluded that the prior action pending doctrine did not require dismissal of the Town’s request for a declaration as to whether the pipe must be moved or may remain under some equitable theory absent title. The Court stated, “While Ms. Rubin

raised in her post-judgment motions the issue of whether the Town must be compelled to remove the pipe, we have held that the Judgment did not award her such relief and she was not entitled to obtain it in that action. *Id.* at \_\_, 2021-NCCOA-187, ¶ 33. In other words, because the Judgment did not grant mandatory injunctive relief, despite Ms. Rubin’s post-judgment motions, no proper action regarding removal of the pipe was pending at the time the Town filed its declaratory judgment action.”

The Court closed its opinion by stating, “Though we vacate portions of the preliminary injunction order, we ultimately leave it undisturbed in light of our holding that the Town’s request for a declaration resolving whether the pipe may be removed is not subject to dismissal. We must presume the preliminary injunction was proper, and Ms. Rubin bears the burden of showing error to rebut the presumption. Analog Devices [Inc. v. Michalski], 157 N.C. App. [462] at 465, 579 S.E.2d [449] at 452 [(2003)]. Ms. Rubin has offered no argument against a likelihood of success on this claim beyond the *res judicata* and prior action pending arguments, which we have rejected, so she has not rebutted the presumption that the trial court correctly determined the Town was likely to succeed on this claim. We therefore affirm the remainder of the preliminary injunction order.” The Court remanded the action to the trial court for further proceedings not inconsistent with its opinion.

- **Synopsis**— Appeal by defendant-Rubin from January 2020 orders. Reversed in part; vacated in part; affirmed in part and remanded for further proceedings. Opinion by Judge Inman, with Judge Dillon and Judge Jackson concurring.