

MUNICIPAL LAW NOTES

The image features a wooden gavel in the foreground on the left, resting on a blue background. To the right, a pair of brass scales of justice sits on a wooden base against a green background. Below the scales is the logo for the NC League of Municipalities, which includes the text "NC LEAGUE OF MUNICIPALITIES" and the slogan "Good government. Great hometowns." in green and blue.

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Torts; Immunity; Verified Complaint;
Motion to Amend; Motion to Dismiss;
Preliminary Injunction; Notice of *Lis Pendens*

Providence Volunteer Fire Dep't v. Town of Wed-
dington, __ N.C. App. __ (No. COA16-80, Un-
ion— 4/18/17)

- ***Holding***— A municipality's motion to dismiss a tort claim based on governmental immunity is properly denied when the motion does not refute a verified complaint alleging that the tort occurred when the municipality was engaged in a proprietary function. A preliminary injunction is inappropriate where a plaintiff has filed a notice of *lis pendens*, thereby securing a full, adequate, and complete remedy at law.
- ***Key Excerpt***— From 1954 to 2012, Providence Volunteer Fire Department, Inc. provided fire protection service to defendant-Town and the surrounding areas in Union and Mecklenburg counties. In May 2012, the Town Council passed a resolution establishing a Municipal Fire District. At

the heart of the case *sub judice* is a series of agreements between Providence and defendant-Town stemming from the creation of the new fire district. Providence owned a fire station in Union County that needed substantial and cost-prohibitive repairs and improvements. It agreed to convey the fire station to defendant-Town in exchange for defendant-Town's agreement to pay for repairs and improvements. Additionally, defendant-Town agreed to lease the improved fire station back to Providence and to continue to pay for fire suppression and emergency medical services for ten years. After the conveyance and completion of repairs, defendant-Town terminated its relationship with Providence and leased the fire station to another fire department. Providence filed an action against defendant-Town for breach of contract, fraud, and unfair and deceptive trade practices and filed a notice of *lis pendens* in superior court.

The Court affirmed the trial court's order granting Providence's motion to amend the complaint and denying defendant-Town's motion to dismiss the fraud claim based on governmental immunity pursuant to Rules 12(b)(2) and (6). The

Court reversed the trial court's order granting Providence's motion for a preliminary injunction.

The Court held that the trial court did not err in denying defendant-Town's motion to dismiss. "Because the trial court did not abuse its discretion in allowing Providence's motion to amend, the Second Verified Amended Complaint controls our review. The Second Verified Amended Complaint alleges that '[t]he Town's function in entering into the purchase agreement with lease back dated August 19, 2014 . . . with the Plaintiff is proprietary in nature and as such the Town can be sued by the Plaintiff for the causes of action stated herein.' This allegation was unchallenged by the Town through any evidence submitted in support of its motion. Therefore, we are required to take this allegation as true. The allegation is sufficient to support the trial court's presumed finding that the Town was not entitled to immunity because it was performing a proprietary function...."

"In affirming the trial court's denial of the Town's motion to dismiss based upon the theory of proprietary activity, we emphasize that our holding addresses only the sufficiency of the allegations in the Second Verified Amended Complaint that were not controverted by any evidence produced by the Town."

"On remand should the trial court, at a subsequent procedural posture, base its jurisdiction over the Town on the ground that the Town was acting in a proprietary function when it entered into the agreements, the trial court must adhere to the guidance provided by this opinion and the Supreme Court's precedent."

The Court rejected Providence's argument that defendant-Town waived its immunity by entering into a valid contract. "Providence asks this Court to combine the principles delineated in Smith [v. State], 289 N.C. 303, 222 S.E.2d 412 (1976)] and Ports Authority [v. Fry Roofing Co.],

294 N.C. 73, 82, 240 S.E.2d 345 (1978), *rejected on other grounds by Trustees of Rowan Technical College v. J. Hyatt Hammond Associates, Inc.*, 313 N.C. 230, 328 S.E.2d 274 (1985)] to establish that the Town implicitly waived immunity against tort claims arising out of a breach of contract claim. Providence contends that because its claim of fraud in the inducement alleges a willful conversion of the Property, the claim arises out of the agreements and the Town implicitly waived its immunity to the fraud claim. In light of Dickens [v. Thorne], 110 N.C. App. 39, 47, 429 S.E.2d 176, 181 (1993)] and the lack of any precedent extending the holding of Ports Authority to a governmental immunity case, we decline to do so here. We therefore reject this theory of waiver asserted by Providence."

Defendant-Town argued that the trial court erred in granting Providence's motion for preliminary injunction because Providence's filing of a *lis pendens* provided for an adequate remedy at law, and Providence failed to establish a likelihood of success on the merits. The Court agreed. "Our Supreme Court has held that the filing of a *lis pendens* provides 'a full, complete and adequate remedy at law.' Whitford v. N.C. Joint Stock Land Bank of Durham, 207 N.C. 229, 232, 176 S.E. 740, 742 (1934). The Court went on to note that '[b]y complying with these plain statutory provisions [regarding *lis pendens*] the plaintiffs can preserve every right they may have under their pleadings; and it is too well settled in this jurisdiction to require citations of authority that where there is a full, complete, and adequate remedy at law, the equitable remedy of injunction will not lie.' *Id.* at 233, 176 S.E. at 742."

"Here, the record is clear that Providence filed a notice of *lis pendens* on the Property. This provided constructive notice to any subsequent purchaser and binds him to 'all proceedings taken after the cross-indexing of the notice to the same extent as if he were made a party to the action.' [G.S.]

1-118 (2015). Therefore, Providence was provided an adequate remedy at law and the issuance of the preliminary injunction was improper.”

- **Synopsis**— Appeal by defendant-Town from August 2015 orders. Affirmed in part, reversed in part and remanded. Opinion by Judge Inman, joined by Judge Bryant and Judge Tyson.

Nota Bene (N.B.)

Other Recent Decision of Note

Public Enterprises; Right-of-Way Agent; Fraud; Unfair and Deceptive Trade Practices Act County of Harnett v. Rogers, ___ N.C. App. ___ (No. COA16-757, Harnett—3/21/17) (*unpublished*) (In plaintiff-County’s action against defendant (a right-of-way agent for the public utilities department) to recover stolen, confidential department documents and damages stemming from defendant’s obstruction of projects, Court of Appeals reverses and remands in part as to fraud and unfair and deceptive trade practices (UDTPA) claims. “While Defendant’s acts were unfair and deceptive practices, Walker v. Fleetwood Homes of N. Carolina, Inc., 362 N.C. 63, 72, 653 S.E.2d 393, 399 (2007) (concluding in part that an unfair and deceptive practice is an ‘immoral, unethical . . . [and] unscrupulous’ act), not all of his conduct falls within the UDTPA’s purview. That is, Defendant’s statements, submissions, and false representations made to the *Department* did not occur in interactions *between* market participants.... In sum, we hold that some of the damages proximately caused by Defendant’s acts and omissions from market participant interactions are compensable under the UDTPA. We nevertheless reverse the partial summary judgment order on the UDTPA claim as it is unclear from the evidence before us whether the damages awarded in the order were in fact proximately caused by Defendant’s unfair and deceptive practices arising from these interactions. We affirm the trial court’s order denying Defendant’s motion to

continue. We also affirm the trial court’s partial summary judgment order in favor of Plaintiff on its injunction claim and on Defendant’s counterclaim. However, we conclude genuine issues of fact exist and preclude summary judgment on Plaintiff’s fraud and UDTPA claims, and reverse the trial court’s partial summary judgment order as to these claims and remand for further proceedings not inconsistent with this opinion.” (Emphasis in original.) (Appeal by defendant from May 2014 orders. Affirmed in part, reversed in part and remanded. Opinion by Judge Dillon, with Judge McCullough and Judge Tyson concurring.))