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NO. COA11-1569
NORTH CAROLINA COURT OF APPEALS

Filed: 19 June 2012

SOUTHEAST SHORTLINES, INC. d/b/a
THERMAL BELT RAILWAY,
Plaintiff,

v.

Rutherford County
No. 09 CVS 1499

RUTHERFORD RAILROAD DEVELOPMENT
CORPORATION and TOWN OF FOREST
CITY,
Defendants.

Appeal by Defendants from judgment entered 16 June 2011 by
Judge Laura J. Bridges in Rutherford County Superior Court.
Heard in the Court of Appeals 24 April 2012.

*Williams Mullen, by Gilbert C. Laite III and Kelly
Colquette Hanley, for Plaintiff-appellee.*

David A. Lloyd for Defendant-appellants.

HUNTER, JR., Robert N., Judge.

The Town of Forest City ("the Town") and Rutherford
Railroad Development Corporation ("RRDC") appeal¹ from the trial
court's judgment granting summary judgment in favor of Southeast

¹ RRDC joins as a nominal defendant in this appeal.

Shortlines, Inc. d/b/a Thermal Belt Railway ("Plaintiff") and denying the Town's motion for summary judgment. We affirm.

I. Factual & Procedural Background

RRDC, a non-profit corporation with its principal place of business in Morganton, was formed in 1989 to preserve local rail service in Rutherford County. In 1990, RRDC purchased two railroad rights-of-way: the "Bostic Line," which ran from Bostic to Forest City, and the "Forest City-Gilkey Line," which ran between Alexander Mills and Gilkey. RRDC acquired the Bostic Line from CSX Transportation, Inc. ("CSX") by deed executed 9 March 1990 and acquired the Forest City-Gilkey Line from Southern Railway Company ("Southern") by deed ("the Southern Deed") executed 15 October 1990. The Southern Deed conveyed to RRDC

all right and title held by [Southern] in and to . . . the Railroad right of way . . . as it lies between Alexander and Gilkey . . . with a 100 foot strip, at all points being 50.00 feet on each side of [the] . . . center line . . . [t]ogether with [certain] parcels lying outside of and adjacent to the . . . 100 foot strip[, including t]hat property as described in Deed Book: 105 Page: 359 of the County Records[.]

The main portion of the railway right-of-way, consisting of the "100 foot [wide] strip," runs through Forest City as it extends approximately 13 miles from Alexander Mills to Gilkey. The

property referenced in the Southern Deed as "lying outside of and adjacent to" the 100 foot strip is a rectangular parcel of land, approximately 460 feet long and 300 feet wide, that encompasses the right-of-way at its widest point. The parties refer to this parcel as the "Depot Lot" because it once served as the location of the Forest City railroad depot.

At or about the time RRDC acquired the aforementioned railroad properties from CSX and Southern, RRDC entered into a Lease and Operating Agreement with Plaintiff whereby RRDC agreed to lease the "Railroad" to Plaintiff for "continued railroad use . . . and for such other legal purposes for which a railroad may be utilized[.]" Article I of the Lease and Operating Agreement describes the Railroad as "the rights-of-way, roadbed, main track, sidings, industrial tracks, culverts, bridges; tunnels, structures, fixtures, and all other railroad appurtenances purchased by [RRDC] from [Southern] and CSX" Plaintiff proceeded to operate the "Thermal Belt Railway," a Class III railroad typically utilized for transportation of "plastics and forest products," over the Railroad property.

By letters dated 8 November 2006 and 5 December 2006, the Town notified RRDC and Plaintiff of its intent to condemn certain real property consisting of an "area within the former

[Southern] right of way." Without receiving any response from RRDC or Plaintiff, the Town proceeded to file a complaint, declaration of taking, and notice of deposit with Rutherford County Superior Court on 5 January 2007 (the "2007 condemnation action"). Therein, the Town declared its condemnation of a portion of "the right of way of the Southern Railway and its successors in the area of the [Depot Lot]," hereinafter referred to as the "Affected Property," for the "purpose of opening, widening, extending, or improving roads, streets, alleys, and sidewalks." At or about this time, the Town entered onto the Affected Property and commenced its intended improvements, namely, the reconfiguring of roads and paving and grading over a portion of the Depot Lot.

On 20 April 2007, Plaintiff filed an answer and motion to dismiss the 2007 condemnation action on grounds that (1) the action failed to state a claim for which relief could be granted; and (2) the action was preempted by federal law in that the Affected Property consisted of railroad property subject to regulation by the Surface Transportation Board ("STB"). Plaintiff subsequently filed an amended answer asserting counterclaims for damages and injunctive relief on or about 16 May 2007.

RRDC also filed an answer to the 2007 condemnation action on 8 May 2007, in which RRDC challenged the Town's estimated amount of just compensation owed for the property taken but not the condemnation proceeding itself. The Town filed a reply asserting affirmative defenses to Plaintiff's counterclaims on 21 May 2007. However, on 16 October 2008, the Town and Plaintiff filed a stipulation of dismissal, agreeing to voluntary dismissal without prejudice of all of the parties' claims and counterclaims pursuant to Rule 41(a) of the North Carolina Rules of Civil Procedure.

Notwithstanding the stipulation of dismissal, the parties failed to settle the matter and Plaintiff filed suit in Rutherford County Superior Court on 15 October 2009. Plaintiff's complaint asserted the following claims for relief: (1) declaratory relief pursuant to N.C. Gen. Stat. § 1-253 (2011), seeking a declaration that the Town had acquired no interest in the Affected Property by virtue of the 2007 condemnation action or otherwise; (2) damages for civil trespass and attorneys' fees and costs incurred as a result of defending itself in the present action and in the 2007 condemnation action; (3) damages, costs, and attorneys' fees pursuant to 42 U.S.C. § 1983 for the Town's unlawful exercise of state power;

and (4) permanent injunctive relief. On 22 December 2009, the Town filed an answer raising the affirmative defenses of waiver, estoppel, and laches based on Plaintiff's alleged failure to raise a timely objection to the 2007 condemnation action and requesting dismissal of all claims with prejudice. Plaintiff moved for summary judgment on all claims and filed affidavits in support thereof on 11 April 2011. On 9 May 2011, Plaintiff filed a separate motion in the cause with supporting affidavits seeking reimbursement of attorneys' fees and costs incurred in defending against the 2007 condemnation action pursuant to N.C. Gen. Stat. § 40A-8 (2011).

Plaintiff's motion for summary judgment and motion in the cause came on for hearing at the 17 May 2011 Civil Session in Rutherford County Superior Court, the Honorable Laura J. Bridges presiding. Judge Bridges heard arguments from both parties, and the Town entered its own motion for summary judgment on all claims in open court. By judgment entered 16 June 2011, the trial court denied the Town's motion for summary judgment and granted Plaintiff's motion for summary judgment on all claims. The trial court also granted Plaintiff's motion in the cause by separate order entered 16 June 2011. The Town timely filed notices of appeal from the 16 June 2011 judgment and 16 June

2011 order on 15 July 2011. The instant case concerns only the Town's appeal from the trial court's judgment on the parties' motions for summary judgment. We address the Town's appeal from the order adjudicating Plaintiff's motion in the cause in a contemporaneously filed companion opinion, NO. COA11-1567.

II. Jurisdiction

The trial court's 16 June 2011 judgment and 16 June 2011 order constituted a final disposition of all of the parties' claims. We accordingly exercise jurisdiction over the Town's appeal in the instant case pursuant to N.C. Gen. Stat. § 7A-27(b) (2011) (providing for an appeal as a matter of right to this Court "[f]rom any final judgment of a superior court").

III. Analysis

A. Summary Judgment on All Claims

The Town first contends the trial court erred in denying its motion for summary judgment and in granting Plaintiff's motion for summary judgment on all claims. We disagree.

A motion for summary judgment is appropriately granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law."

N.C. Gen. Stat. § 1A-1, Rule 56(c) (2011). "The party moving for summary judgment has the burden of establishing the lack of any triable issue." *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). On appeal, this Court must review the entire record, viewing the evidence in the light most favorable to the non-moving party. *Id.*

Here, the trial court granted summary judgment in Plaintiff's favor on Plaintiff's claims for declaratory relief, trespass, injunctive relief, and unlawful state action in violation of 42 U.S.C. § 1983. The Town does not specifically challenge any of the particular elements of these claims on appeal. Rather, the Town mounts a general, "broad brush" challenge to all of Plaintiff's claims based upon the following three arguments: (1) Plaintiff holds no property interest in the Depot Lot; (2) Plaintiff failed to prove that the Depot Lot was in actual use and necessary to Plaintiff's business operations at the time of the 2007 condemnation action; and (3) Plaintiff failed to raise a timely objection to the 2007 condemnation action and, consequently, any claims arising out of that action were barred under the doctrine of equitable estoppel. We address these contentions in turn.

1. Plaintiff's Interest in the Depot Lot

The Town contends the trial court erred in granting summary judgment on Plaintiff's claims because Plaintiff holds no property interest in the Depot Lot. We decline to reach the merits on this issue, as we conclude the Town is judicially estopped from asserting this position.

"The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding[.]" *N.H. v. Me.*, 532 U.S. 742, 749 (2001) (citation and quotation marks omitted). The purpose of this doctrine "is 'to protect the integrity of the judicial process' by 'prohibiting parties from deliberately changing positions according to the exigencies of the moment[.]'" *Id.* at 750 (citations omitted); *see also Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 16, 591 S.E.2d 870, 880 (2004) ("[J]udicial estoppel seeks to protect the integrity of the judicial process itself[.]"). "Because the rule is intended to prevent 'improper use of judicial machinery,' judicial estoppel 'is an equitable doctrine invoked by a court at its discretion[.]'" *Id.* (citations omitted). Thus, "judicial estoppel provides courts with a discretionary tool 'to protect the integrity of the courts and the judicial

process.'" *Whitacre P'ship*, 358 N.C. at 27, 591 S.E.2d at 887 (citation omitted).

In *Whitacre P'ship*, the North Carolina Supreme Court adopted the test for judicial estoppel set forth by the United States Supreme Court in *New Hampshire v. Maine*[.] While noting that "the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle," the Court identified three factors used to determine if the doctrine should apply.

The first factor, and the only factor that is an essential element which must be present for judicial estoppel to apply, is that a "party's subsequent position 'must be clearly inconsistent with its earlier position.'" Second, the court should "inquire whether the party has succeeded in persuading a court to accept that party's earlier position." Third, the court should inquire "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."

Wiley v. United Parcel Serv., Inc., 164 N.C. App. 183, 188, 594 S.E.2d 809, 812 (2004) (citations omitted).

Here, in filing the 2007 condemnation action, the Town described the Depot Lot as part of the Affected Property and specifically acknowledged Plaintiff's interest therein. The Town declared that "[t]he entire tract of real property affected by the Town's taking is described as the right of way of the

Southern Railway and its successors in the area of the former Forest City rail depot[.]” The Town also set forth a metes and bounds description of the “Condemned Property,” i.e., that portion of the right-of-way for which the Town sought to acquire fee simple title. Exhibit B to the 2007 condemnation action provided that “[Plaintiff] occupies or has previously occupied the Affected Property and the Condemned Property, pursuant to a lease agreement with [RRDC], which lease includes . . . an option to purchase the Affected Property and the Condemned Property.” The Town thus recognized Plaintiff’s interest in the property designated for condemnation, including but not limited to that portion of the Affected Property known as the Depot Lot. In the wake of the parties’ stipulation of dismissal, the Town altered its position and asserted before the trial court, as it does now on appeal, that Plaintiff never acquired any interest in the Depot Lot, by virtue of its lease with RRDC or otherwise. This position is “clearly inconsistent” with the position the Town asserted in attempting to condemn Plaintiff’s property in the 2007 condemnation action. It would be unjust to permit the Town to enter upon what it believed to be Plaintiff’s property, implement improvements, and then, upon realization that it lacked the requisite condemnation authority to make the

improvements, to argue after the fact that Plaintiff holds no interest in the property.

We recognize that the second factor of the Court's three-factor test is not present here, as the parties' stipulation of dismissal precluded any possibility of the Town succeeding on its prior position regarding Plaintiff's interest in the Affected Property. However, our Supreme Court has specifically stated that "among the three 'factors' enumerated by the United States Supreme Court, the '*clearly inconsistent*' requirement alone appears to be an essential element which 'must be' present in order for judicial estoppel to be applicable." *Whitacre P'ship*, 358 N.C. at 29 n. 7, 591 S.E.2d at 888 n. 7 (emphasis added); *see also N.H.*, 532 U.S. at 750 ("'[T]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle.'" (citation omitted)). This essential element is easily satisfied in the instant case. Accordingly, we conclude the Town has changed its position "according to the exigencies of the moment," and the doctrine of judicial estoppel bars the Town from now denying Plaintiff's interest in the Affected Property, including the Depot Lot. *See Price v. Price*, 169 N.C. App. 187, 193, 609 S.E.2d 450, 453 (2005).

2. In Actual Use and Necessary to Business Operations

The Town next argues the trial court erred in granting summary judgment on Plaintiff's claims because Plaintiff "has failed to show that the area in question is in actual public use and that it is necessary to its operations."

Our General Statutes provide that a "public condemnor," as defined under N.C. Gen. Stat. § 40A-3(b) (2011), "may condemn the property of a private condemnor[, as defined under N.C. Gen. Stat. § 40A-3(a) (2011),] *if such property is not in actual public use or not necessary to the operation of the business of the owner.*" N.C. Gen. Stat. § 40A-5(b) (2011) (emphasis added). Title to the subject property does not vest in the public condemnor, nor does "the right to immediate possession of the property [] become effective[, until the superior court has rendered final judgment (after any appeals) that the property is not in actual public use or is not necessary to the operation of the business of the owner[.]" N.C. Gen. Stat. § 40A-42(c) (2011).

Here, the parties agree that the Town is a "public condemnor" and that Plaintiff is a "private condemnor." It is undisputed that the Town entered onto and made improvements to the Affected Property after acknowledging Plaintiff's property

interest therein. It is also undisputed that the Town implemented said improvements without first obtaining a final judgment that the Affected Property was not in actual public use or was not necessary to the operation of Plaintiff's business. The Town now asserts *after the fact* that the Affected Property was not in actual public use or necessary to Plaintiff's business at the time it initiated condemnation proceedings and made these improvements, and seeks to place the burden on Plaintiff to prove otherwise. Our statutory scheme clearly undermines the Town's position. Without a judgment establishing the Affected Property was not in public use or not necessary to Plaintiff's business, the Town had no right to possess or make improvements to that property. It was the Town's burden to obtain this statutorily required judicial stamp of approval before entering upon the Affected Property, and it failed to meet that burden. The Town's contention on this issue is without merit and is therefore overruled.

3. Equitable Estoppel

The Town further contends the trial court erred in granting summary judgment in Plaintiff's favor because Plaintiff failed to raise a timely objection to the 2007 condemnation action and, consequently, Plaintiff's claims pertaining to the 2007

condemnation action were barred by the doctrine of equitable estoppel. We cannot agree.

"Equitable estoppel arises when one party, by his acts, representations, or silence when he should speak, intentionally, or through culpable negligence, induces a person to believe certain facts exist, and that person reasonably relies on and acts on those beliefs to his detriment." *Gore v. Myrtle/Mueller*, 362 N.C. 27, 33, 653 S.E.2d 400, 405 (2007). "The conduct of both parties must be weighed in the balance of equity, and the party claiming estoppel, no less than the party sought to be estopped, must have conformed to strict standards of equity with regard to the matter at issue." *Creech v. Melnik*, 347 N.C. 520, 529, 495 S.E.2d 907, 913 (1998).

Here, the Town notified Plaintiff of its intention to condemn the Affected Property by letters dated 8 November 2006 and 5 December 2006, more than one month in advance of filing its condemnation action on 5 January 2007. Plaintiff was not required to object to the Town's action at that time, however, as the Town had no rights in the Affected Property without first obtaining the requisite judgment as described in Part III(A)(2), *supra*. Plaintiff appropriately challenged the 2007 condemnation action when it timely filed its answer and motion to dismiss the

action on 20 April 2007. We cannot construe Plaintiff's "silence" in the interim—after receipt of the Town's notification letters and prior to filing its answer—as prejudicial to the Town, as any reliance thereon by the Town in commencing its improvements was not only unreasonable, but contrary to the statutory mandate prescribed in N.C. Gen. Stat. §§ 40A-5(b) & 40A-42(c) (2011). See Part III(A)(2), *supra*. It was the Town, not Plaintiff, that failed to comply with the framework prescribed by our General Statutes when it "jumped the gun" by entering and improving the Affected Property without judicial authorization. As our Supreme Court has recognized, "One who seeks equity must do equity." *Creech*, 347 N.C. at 529, 495 S.E.2d at 913. We decline the Town's request to invoke our equitable jurisdiction here, when, as previously stated, the equities weigh heavily in Plaintiff's favor. We hold the trial court did not err in granting summary judgment in Plaintiff's favor on all claims, and we accordingly affirm the trial court's denial of the Town's motion for summary judgment.

B. Damages

In granting Plaintiff's motion for summary judgment, the trial court ordered the Town to pay Plaintiff damages totaling \$115,341.25. The trial court allocated its award of damages as

follows: \$52,511.25 for the rental value of the Affected Property encroached upon; \$8,500.00 for the cost of repairing damage to railroad tracks located on the Affected Property; and \$54,330.00 for the costs of removing the Town's encroachments and restoring the Affected Property to its "pre-encroachment condition." With the exception of the \$8,500.00 awarded for damage to the railroad tracks, the Town takes issue with the trial court's award of damages on appeal. However, the Town offers no standard of review or authority, and its challenge is grounded almost entirely upon its previously discussed position that Plaintiff holds no interest in the Affected Property. We reject this argument for the same reasons we rejected the Town's argument in Part III(A), *supra*. The Town's only remaining "argument" on this issue is that "the same equitable estoppel argument presented above is equally applicable on the issue of monetary relief for removing the Town's Streets." The Town provides no authority or reason in support of this conclusory assertion. We therefore conclude that the Town has abandoned the issue, see N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."), and we affirm the trial court's award of damages.

Moreover, even if the Town had preserved the issue of damages for appeal, the evidence of record reveals no issue of material fact regarding the trial court's damages award. Plaintiff provided the trial court with sworn affidavits estimating the lost rental value and costs of repairing the property at issue, and the Town failed to offer any conflicting evidence. The trial court awarded damages based upon Plaintiff's unconverted evidence and, indeed, adhered to the low end of Plaintiff's damage estimates in rendering its damages award: Plaintiff offered evidence supporting an award of \$54,330.00 to \$100,000.00 in damages for the cost of repairing and restoring the Affected Property, and the trial court awarded Plaintiff \$54,330.00 for those costs; Plaintiff offered evidence supporting an award of \$8,500.00 to \$15,000.00 for the cost of repairing the damaged railroad tracks, and the trial court awarded Plaintiff \$8,500.00 for those costs; and Plaintiff offered evidence supporting an award of \$52,511.25 for the rental value of the Affected Property, and the trial court awarded Plaintiff \$52,511.25 for the lost value. In sum, Plaintiff produced evidence on damages and the Town failed to bring forth a forecast of evidence sufficient to raise a question of material fact and overcome Plaintiff's motion for

summary judgment on this issue. See *Creech*, 347 N.C. at 526, 495 S.E.2d at 911 ("To overcome a motion for summary judgment, the nonmoving party must then 'produce a forecast of evidence demonstrating that the [nonmoving party] will be able to make out at least a *prima facie* case at trial.'" (citation omitted) (alteration in original)). We hold the trial court did not err in granting Plaintiff's motion for summary judgment on the issue of damages.

C. Attorneys' Fees

In a single sentence, the Town assigns error to the trial court's award of attorneys' fees. The Town provides no standard of review, reason, or authority in support of its contention on this issue, other than that the trial court's award of attorneys' fees "must necessarily rise and fall with the substantive issue of whether" the trial court erred in concluding Plaintiff holds a property interest in the Depot Lot. We accordingly deem the issue abandoned. See N.C. R. App. P. 28(b)(6).

IV. Conclusion

For the foregoing reasons, the trial court's judgment is Affirmed.

Judges MCGEE and STEPHENS concur.

Report per Rule 30(e).