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IN THE
COURT OF APPEALS OF INDIANA

Lake County, Indiana,

Appellant-Plaintiff,

v.

Paul G. House, Jr., Heather A. House, Mortgage Electronic Registration Systems, Inc. for Ditech Financial, LLC, Amy L. Lejeune, and Any Other Interested Parties,

Appellees-Defendants.

April 14, 2021

Court of Appeals Case No. 20A-PL-1675

Appeal from the Lake Superior Court

The Honorable Gina L. Jones, Judge

Trial Court Cause No. 45D10-1905-PL-331

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Plaintiff, Lake County (the County), appeals the reopening of its previously-dismissed complaint and the issuing of injunctive relief in favor of Appellees-Defendants, Paul G. House, Jr., Heather A. House (the Houses), Mortgage Electronic Registration Systems, Inc. for Ditech Financial, LLC, Amy L. LeJeune, and any other interested parties. The Houses cross-appeal the court's jurisdiction to entertain the instant appeal.

[2] We reverse.

ISSUES

[3] The County presents the court with two issues, one of which we find to be dispositive and restate as: Whether the trial court abused its discretion when it reopened the County's previously-dismissed complaint for condemnation.

[4] The Houses present one issue on cross-appeal, which we restate as: Whether the court has jurisdiction over the instant appeal.

FACTS AND PROCEDURAL HISTORY

[5] This matter stems from the County's desire to improve 45th Avenue (the Project), a roadway in Lake County. The Houses live in a home located on the south side of the 3400 block of 45th Avenue in Gary. The septic field for the Houses' home is located in their front yard. A ditch runs between the Houses' septic field and 45th Avenue. On May 23, 2019, in furtherance of its initial plan for the Project, the County filed a complaint for condemnation seeking to

acquire through eminent domain a portion of the Houses' front yard (the Parcel).[1] The acquisition and use of the Parcel for the Project would require relocating the septic field to another location on the Houses' property. The County alleged in the complaint that it had caused the Parcel to be appraised, offered to purchase the Parcel from the Houses for its appraised value, and made bona fide efforts to reach an agreement to purchase the Parcel prior to filing suit. The County sought a determination that it was entitled to condemn and appropriate the Parcel, an order that appraisers be appointed to assess damages and a report made to the trial court, and that the Houses and the other defendants be required to answer as to their respective interests. The County attached to its complaint documentation showing that it had offered $39,200 to the Houses, $25,000 of which was to compensate them for moving their septic system. The County also attached correspondence dated April 24, 2019, from the Houses' attorney indicating that the Houses did not believe that the septic system could be successfully moved and that their position was that the County's desire to move their septic system would constitute a complete taking, not the partial taking proposed by the County. On July 5, 2019, the Houses filed an answer denying all the allegations of the County's complaint. In addition, the Houses filed a counterclaim, alleging that, due to the impossibility of successfully moving the septic system, the County's plan constituted a

[1] Defendants Mortgage Electronic Registration Systems, Inc., for Ditech Financial, LLC, and Amy J. LeJeune were named in the complaint as mortgagees of the Houses' property. They do not participate in this appeal.

complete, not a partial, taking. The Houses sought denial of the County's complaint, or, in the alternative, compensation for the complete taking of their property.

[6] On August 7, 2019, the Houses filed a motion for summary judgment with a designation of evidence and a memorandum in support. The Houses argued that they were entitled to judgment as a matter of law because, in 2009, the Lake County Health Department had determined that there was no viable alternative location on the Houses' property for a septic disposal system, and, based on their responses to the Houses' requests for admissions, the County could not confirm that a legal and functioning septic system could be relocated on their property. On August 12, 2019, the County filed a motion to strike the Houses' summary judgment filings as untimely and in contravention of Indiana's condemnation statute which the County contended allowed for challenges to the assessment of benefits and damages only after a report by the statutorily-mandated, court-appointed appraisers had entered their report. On September 24, 2019, the trial court held a hearing on the Houses' motion for summary judgment and the County's motion to strike. The parties argued regarding whether a summary judgment motion was proper at that stage of the condemnation proceedings. At the conclusion of the hearing, the trial court denied the County's motion to strike, granted summary judgment to the Houses, and ordered that the cause was to proceed as a petition for a taking of the Houses' entire property. The trial court also issued an order for the appointment of appraisers along with detailed instructions to the appraisers that

they were to assess the fair market value of the Houses' entire real estate and file a report with the trial court by November 22, 2019.

[7] On September 26, 2019, the County filed a motion to voluntarily dismiss its complaint for condemnation in which it alleged that it had revised its plan for the Project such that it would no longer require the acquisition of the Parcel or impact the Houses' real estate. As a result, the County would not proceed with the condemnation and sought dismissal without prejudice of its complaint. On October 7, 2019, the Houses filed a response seeking the denial of the County's voluntary motion to dismiss, a motion to compel the County to answer requests for production and interrogatories they alleged they had served on the County regarding the new plans for the Project, and a motion for attorney's fees. The trial court initially denied the County's voluntary motion to dismiss. However, on October 9, 2019, the County filed a motion to reconsider, and the trial court set aside its denial of the County's voluntary motion to dismiss the same day. On October 11, 2019, the Houses filed a motion to set conditions of dismissal seeking attorney's fees and an order to compel the County to answer their discovery requests. In particular, the Houses sought responses to discovery requests aimed at determining if the County's new plan for the Project was the same as a 2017 proposed plan which the Houses believed would have brought their septic field within twenty-five feet of the ditch that ran parallel to 45th Avenue between their home and the Avenue, which they alleged would be in violation of a state regulation requiring a separation of twenty-five feet (the 25' Rule). On October 28, 2019, the trial court held a hearing on the County's

motion to voluntarily dismiss the condemnation complaint and the Houses' motions to compel discovery and for attorney's fees. After the County assured the Houses that the new plans for the Project would be made available to them, the Houses did not pursue their motion to compel discovery. On October 29, 2019, the trial court granted the County's motion to dismiss without prejudice and awarded the Houses attorney's fees. On October 30, 2019, the trial court entered final judgment on the condemnation complaint and assessed the County $8,438.50 in attorney's fees.

[8] On May 7, 2020, the Houses filed a motion captioned "Motion to Preclude Construction and Petition to Show Cause or to [R]e-open the [C]ase in the Alternative Proceed with the Assessment for an Entire Taking of the Houses' Property." (Appellant's App. Vol. II, p. 48). In this latest motion, the Houses alleged that they had procured the new plans for the Project which showed the 45th Avenue ditch placed within twenty-five feet of their septic field in violation of the 25' Rule. Relying on the trial court's previous grant of summary judgment to them, the Houses contended that it had already been determined that "if there is any taking it is an entire taking" and that the County had obtained the voluntarily dismissal based on its assurances that any new plan for the Project would not impact the Houses' real estate. (Appellant's App. Vol. II, p. 51). The Houses further alleged as follows:

> 21. The current plans impact the Houses' property and construction is imminent.

> 22. Any action that is in violation of the County's previous representations as to not impacting the Houses' property, is not only inapposite, it would amount to a taking.
>
> 23. Further, if the County is allowed to proceed with construction without sorting out this matter it could cause irreparable harm to the Houses' property.

(Appellant's App. Vol. II, p. 51). As part of their request for relief, the Houses' sought an order "that the County not proceed with construction until the County can show cause why they are not in violation of this [c]ourt's previous grant of Summary Judgment . . ." (Appellant's App. Vol. II, p. 51). The Houses also requested that the County show cause why it had misrepresented that the new plans would not impact the Houses' property and for the trial court to determine whether the case should be reopened so that appraisers could be appointed to assess the value of the Houses' real estate. On May 23, 2020, the County moved the trial court to strike the Houses' latest motion on the basis that it was improper because the condemnation complaint had been dismissed, the County had revised its plans, and the County no longer sought to acquire any of the Houses' real estate. The County argued that, if the Houses still believed that the new plans constituted a taking, the proper procedure would be for them to initiate an inverse condemnation proceeding. The County argued that the Houses' request for injunctive relief was improper and should be stricken, as equitable relief was not available to enjoin an alleged taking as part of an eminent domain proceeding. In response to the substance of the Houses' motion, the County alleged that, since the filing of the Houses' latest motion,

the County had again revised the plans for the Project, the newest plans had been approved by the Indiana State Department of Health (ISDH), and the newest plans would have no negative impact of the Houses' property, including their septic field. The County attached to its motion a copy of a report dated May 13 and 15, 2020, submitted by Alice Quinn (Quinn) of the ISDH which it argued showed that the Houses' septic system was already and currently in violation of the 25' Rule, it was in violation of the original septic permit issued in 1965, and the septic system was leaking, which, according to the County, undercut the Houses' argument that the Project constituted a full taking of their property. According to the County, the issues presented in the Houses' latest motion were moot because, according to the ISDH's report, "there [was] no scenario under which the current plan will not benefit the Houses' property." (Appellant's App. Vol. II, p. 60). In response, on May 27, 2020, the Houses filed a motion for leave to conduct discovery and for an in-person hearing, and, on May 28, 2020, they filed a motion to strike Quinn's report.

[9] Thereafter, the parties filed multiple motions to strike and responsive pleadings. On June 29, 2020, the Houses filed their "Motion for an Emergency Hearing or an Order that the County Cannot [Enter] the Houses' Property until [F]urther [O]rder of this Court" in which they alleged that the County wanted access to their property on July 1, 2020, to conduct dye testing to investigate potential E-coli contamination in the 45th Avenue drainage ditch adjacent to the Houses' septic field. (Appellant's App. Vol. II, p. 70). The Houses requested the trial court's "immediate intervention" in the form of a hearing or an order "that the

proposed testing for July 1, 2020 be stayed until all the pending filings can be heard." (Appellant's App. Vol. II, pp. 73-74). Attached to the Houses' motion was a copy of an email from Quinn acknowledging that information regarding the original septic permit and location of the driveway culvert that had formed the basis for her May 2020 report could have been inaccurate. Quinn also noted that the Houses had their existing septic system inspected and that the results of that inspection would be beneficial prior to making further decisions about the Project. In light of these factors, Quinn expressed her desire to refrain from making further recommendations regarding the feasibility of the Project until further information had been supplied and an investigation completed. On June 30, 2020, the trial court granted the Houses' motion to exclude the County from their property until further order of the trial court.

[10] On August 6, 2020, the trial court held a hearing on all pending matters. The County reasserted its argument that reopening the condemnation proceedings was improper because the County no longer sought to acquire the Parcel and the issue of whether the newest plans for the Project would impact the Houses' real estate was a different set of facts. While acknowledging that it had been judicially established in the previously-dismissed condemnation proceeding that a septic system could not be relocated on the Houses' property, the County maintained its position that the Houses were required to initiate an inverse condemnation action if they believed that the newest plans would impact their property. The Houses argued that the core issue to be addressed was whether the Project would impact their property by creating a violation of the 25' Rule.

In addressing the County's concern that they were seeking injunctive relief, counsel for the Houses stated that

> yes, we do not want anything done in front of my clients' house during this period. If they can do whatever they need to do that doesn't affect my clients' property or affect the roadway in front of their house, we would have no objection.

(Transcript p. 104). After hearing the County's argument that injunctive relief was not proper in a condemnation proceeding, the trial court stated that it was extending for sixty days the previously-issued injunction prohibiting work on the Project that might impact the Houses' real estate. The trial court strongly urged the parties to resolve the matter through mediation. The Houses did not object to the trial court's extension of the injunction prohibiting work on the Project that might impact their property.

[11] On August 12, 2020, the trial court issued its written order in which it found that the issue of whether the County's latest plan for the Project constituted a taking had not yet been determined and the Houses' petition to reopen the case was "effectively a withdrawal of the agreement to dismiss." (Appellant's App. Vol. II, p. 16). The trial court concluded, pursuant to Indiana Trial Rule 41(F), that the Houses had shown good cause and the amount of time that had elapsed was reasonable. As a result, the trial court set aside the previous dismissal and reopened the matter. The trial court ordered that the Lake County Health Department could enter the Houses' property to investigate soil contamination but that the County was otherwise "ordered not to enter [in]to the Houses'

property or cause any disturbance that may affect their property until further order of this [c]ourt." (Appellant's App. Vol. II, p. 16). The trial court also ordered the parties to participate in mediation.

[12] The County now appeals, and the Houses cross-appeal. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Reopening of the Condemnation Complaint*

[13] The County argues that the trial court improperly reopened the condemnation proceedings that had previously been subject to a voluntary dismissal without prejudice. More specifically, the County contends that the trial court erred because the Houses were required to initiate an inverse condemnation action if they wished to pursue a claim that the Project would result in a taking. We review a trial court's reinstatement of an action following a voluntary dismissal without prejudice for an abuse of discretion. *Levin & Sons, Inc. v. Mathys*, 409 N.E.2d 1195, 1198 (Ind. Ct. App. 1980).

[14] Indiana Trial Rule 41(A) governs the voluntary dismissal of actions, which may be initiated by the plaintiff or entered by order of the trial court. Ind. Trial Rule 41(A)(1), (2). Dismissals entered pursuant to a trial court order are entered without prejudice, unless otherwise specified in the order. T.R. 41(A)(2). Rule 41(F), entitled "Reinstatement Following Dismissals," provides that a dismissal without prejudice may be set aside by the trial court "for good cause shown and within a reasonable time[.]" It has long been established that, when a case is

voluntarily dismissed pursuant to Rule 41(A) and subsequently reinstated under Rule 41(F), "it stands as if it had not been dismissed." *Waitt v. Waitt*, 429 N.E.2d 6, 7 (Ind. Ct. App. 1981) (relying on *Newkirk v. Watson*, 87 Ind. App. 473, 161 N.E.2d 704 (1928)).

[15] This court noted in 1980 that there was a dearth of Indiana case law on the standard to be applied in determining whether to grant a T.R. 41(A)(2) voluntary dismissal and a T.R. 41(F) reinstatement following a voluntary dismissal, and we looked to the federal treatment of those issues for guidance. *See Levin & Sons, Inc.*, 409 N.E.2d at 1198 (examining a federal practice treatise and citing a District Court case in concluding that the defendant had failed to show good cause under T.R. 41(F) to support reinstating a cause of action). In the intervening years, the jurisprudence in this area has not grown significantly—neither party has cited any cases with similar procedural facts, and our research has revealed none. However, we find *Suárez-Torres v. Panaderia Y Reposteria España, Inc.*, 988 F.3d 542 (1st Cir 2021), to be helpful to our analysis. Suárez-Torres sued Panaderia, the owner of a bakery, claiming that Panaderia had violated the Americans with Disabilities Act (ADA) by providing inadequate accessible parking, seating, service counters, and restrooms, and by maintaining a discriminatory policy of keeping only the ADA accessible restroom locked. *Id*. at 546. Thereafter, Suáez-Torres filed a motion for dismissal of her ADA claims because the bakery had agreed to complete changes to make the structure ADA-compliant. *Id*. at 547. The trial court granted the motion to dismiss, ruling that Suárez-Torres could motion to

reopen the case if the bakery failed to comply with deadlines established by the parties to complete the changes. *Id*. Thereafter, the bakery filed a motion alleging that it had made the necessary changes to become ADA-compliant and attached an expert's report opining the same. *Id*. Suárez-Torres moved to reopen the case, arguing that the expert's report showed that the bakery was still violating the ADA because a newly-designed accessible parking space encroached on a pedestrian walkway and the bakery was still impermissibly locking only the ADA-accessible restroom. *Id*. The District Court denied her motion to reopen the ADA complaint because it found that her "new and different allegations from those in the claim are not the subject or object of this suit." *Id*. The Circuit Court upheld the denial of the motion to reopen based on the claim regarding the encroachment on the sidewalk because that was "a concededly new, although related, argument for noncompliance." *Id*. at 555. Regarding the restroom locking policy, an issue which had been raised in the original complaint, the Circuit Court found that the agreement between the parties that led to the voluntary dismissal did not cover that issue, and, thus, that the District Court had not abused its discretion in declining the reopen the case based on that allegation. *Id*.

[16] Here, the County filed a complaint for condemnation seeking to physically acquire the Parcel pursuant to its power of eminent domain effectuated by Indiana Code section 32-24-1 *et seq*. On October 29, 2019, after the County represented that it had changed the plans for the Project so that the physical acquisition of the Parcel was no longer required, the trial court granted the

County's motion to dismiss the complaint without prejudice, entered final judgment on the condemnation complaint, and awarded the Houses attorney's fees.

[17] Thereafter, the Houses sought to reopen the condemnation suit based on their belief that new plans for the Project would still materially impact the legality/functionality of their septic system, which they alleged would constitute a complete taking by the County because it had already been established in the prior proceedings that there was no other location on their property to place a new septic system. It is undisputed that the new plans for the Project materially differed from those which formed the basis of the County's original condemnation complaint. Indeed, the revised plans did not require a physical taking of the Parcel by the County, as sought in the original condemnation action. Under these circumstances, we agree with the County that the trial court's reinstatement of the condemnation case was an abuse of its discretion because the Houses did not truly seek to reinstate the condemnation proceedings. Rather, as in *Suárez-Torres*, they sought to litigate a new claim based on an entirely different putative taking than the one alleged in the original complaint. Indeed, the trial court acknowledged in its Order that it had not been determined whether the new plans for the Project constituted a taking. As such, the trial court's action was in contravention of long-standing Indiana precedent that parties to a reinstated action are placed in the same position as when the action had been dismissed. *See Waitt*, 429 N.E.2d at 7.

[18] As pointed out by the County, if the Houses wish to pursue a claim that the County's new plans constitute a taking, they have recourse under Indiana Code section 32-24-1-16, which provides that a

> person having an interest in property that has been or may be acquired for a public use without the procedures of this article or any prior law followed is entitled to have the person's damages assessed under this article substantially in the manner provided in this article.

See also Grdinich v. Plan Comm'n for Town of Hebron, 120 N.E.3d 269, 280 (Ind. Ct. App. 2019) (noting that "an owner of property acquired for public use may bring suit for inverse condemnation to recover money damages, if the government takes property but fails to initiate eminent domain proceedings."). The County did not initiate any proceedings under the eminent domain statute relating to the newest plans for the Project which it maintained did not and would not affect the Houses' property.

[19] In its Order reopening the case, the trial court found that the Houses' petition to reopen was "effectively a withdrawal of the agreement to dismiss." (Appellant's App. Vol. II, p. 16). The Trial Rules provide that "[a] plaintiff may procure dismissal without order of the trial court "by filing a stipulation of dismissal signed by all parties who appeared in the action." T.R. 41(A)(1)(b). However, the parties did not sign and file an agreement to dismiss, and therefore there was no agreement under the Trial Rules to be withdrawn by the Houses.

[20] At the August 6, 2019, hearing on all pending matters, the trial court expressed concern about accepting the County's argument that the Houses' were required to initiate an inverse condemnation proceeding rather than pursue their claims through the reopened condemnation case because it would set a precedent that the County could simply dismiss the case where it had an unfavorable ruling, "do what they want to do," and then shift the burden to the property owner to prove a taking. (Tr. p. 84). The trial court also expressed a desire to conserve taxpayer and judicial resources. Although we appreciate the concerns of the trial court, we observe that eminent domain proceedings are statutory in nature, and where the statute fixes a definite procedure, it must be followed. *Lehnen v. State*, 693 N.E.2d 580, 582 (Ind. Ct. App. 1998), *trans. denied*. The legislature has fixed a procedure for property owners such as the Houses to pursue a claim of a taking, and we are not at liberty to dictate another result. *Id*.

[21] The Houses argue that we should not consider the County's argument on this issue in part because the County did not provide a standard of review for the claim, in contravention of Indiana Appellate Rule 46(A)(8)(b).[2] However, this assertion is inaccurate, as the County cited a standard of review for this issue on page eight of its brief. In addition, due to our disposition, we do not address the Houses' claim that they showed just cause and a timely demand for reinstatement of the condemnation complaint. It is also unnecessary for us to

[2] The Houses filed a separate motion to strike portions of the County's brief and appendix, which we deny in a separate order.

address the propriety of the trial court's issuing of injunctive relief, as we reverse the reopening of the case under which that relief was granted.

II. *Jurisdiction*

[22] Although not delineated as such in their argument, the Houses raise the cross-appeal issue of whether this court has jurisdiction over the instant appeal. On September 17, 2020, the Houses filed a motion to dismiss this appeal for lack of jurisdiction. On October 16, 2020, the motions panel of the court denied the motion. On December 7, 2020, the Houses filed their second motion to dismiss, which the motions panel again denied on December 16, 2020. It is well-established that we may reconsider a ruling by our motions panel. *Wise v. State*, 997 N.E.2d 411, 413 (Ind. Ct. App. 2013). However, we rarely overrule a decision of the motions panel. *Id*. Nevertheless, we will briefly address the merits of Houses' argument.

[23] Indiana Appellate Rule 5 provides that the court "shall have jurisdiction in all appeals from Final Judgments" and "interlocutory orders under Rule 14[.]" Rule 14 further provides that one type of interlocutory orders appealable as a matter of right are those "[g]ranting or refusing to grant, dissolving, or refusing to dissolve a preliminary injunction." Ind. Appellate Rule 14(A)(5). The Houses contend that the trial court's August 12, 2020, Order reopening the previously-dismissed condemnation case and ordering the County "not to enter [in]to the Houses' property or cause any disturbance that may affect their property until further order of this [c]ourt" was neither a final appealable order nor an appealable preliminary injunction. (Appellant's App. Vol. II, p. 16).

Therefore, the Houses argue, this court does not have jurisdiction over the instant appeal.

[24] Just as the motions panel before us, we cannot agree. A preliminary injunction is an interlocutory order issued while an action is pending. *City of Gary v. Enterprise Trucking & Waste Hauling*, 846 N.E.2d 234, 242 (Ind. Ct. App. 2006). The purpose of a preliminary injunction is to preserve the status quo pending an adjudication of a case on the merits. *Kramer v. Rager*, 441 N.E.2d 700, 703 (Ind. Ct. App. 1982). An 'injunction' is a "court order commanding or preventing an action." BLACK'S LAW DICTIONARY (11th ed. 2019). Here, in its August 12, 2020, Order, the trial court enjoined the County from entering onto or otherwise disturbing the Houses' real property until further notice. This was an order preventing an action and granted the Houses injunctive relief. Therefore, the Order was an appealable interlocutory order pursuant to Appellate Rules 5 and 14(A)(5).

[25] The Houses argue that the trial court did not issue an injunction because (1) they did not request an injunction, and (2) the work on the Project continues. However, one of the Houses' motions heard at the August 6, 2020, hearing on all pending matters was entitled, in part, "Motion to Preclude Construction" and sought, in part, an order "that the County not proceed with construction until the County can show cause why they are not in violation of this [c]ourt's previous grant of Summary Judgment . . ." (Appellant's App. Vol. II, pp. 48, 51). Counsel for the Houses stated at the hearing that "we do not want anything done in front of my clients' house during this period." (Tr. p. 104).

The trial court interpreted the relief sought as one for injunctive relief, and the Houses did not object when the trial court ruled at the hearing that it was extending its previously-entered injunction for sixty days while the parties engaged in mediation.

[26] In addition, we cannot credit the Houses' argument that the trial court did not issue an injunction because the work on the Project continues. This contention rests upon facts that are not before us in the appellate record, and the issue of whether an injunction has been issued is separate and distinct from the issue of whether a party is in compliance with injunctive relief that has been ordered. In short, we conclude that the court has jurisdiction over this appeal.

CONCLUSION

[27] Based on the foregoing, we conclude that the trial court abused its discretion when it granted the Houses' motion to reopen the condemnation complaint to allow the Houses to challenge a new and distinct taking than that which formed the basis for the County's original condemnation complaint. We further conclude that we have jurisdiction over the instant appeal.

[28] Reversed.

[29] Mathias, J. and Crone, J. concur