FILED
United States Court of Appeals
Tenth Circuit

November 10, 2021

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

LKL ASSOCIATES, INC., a Utah corporation; HEBER RENTALS, a Utah limited liability company,

Plaintiff Counter Defendants - Appellants/Cross-Appellees,

v.

UNION PACIFIC RAILROAD COMPANY, a Delaware corporation,

Defendant Counterclaimant - Appellee/Cross-Appellant.

No. 18-4123

LKL ASSOCIATES, INC., a Utah corporation; HEBER RENTALS, a Utah limited liability company,

Plaintiff Counter Defendants - Appellees,

v.

UNION PACIFIC RAILROAD COMPANY, a Delaware corporation,

Defendant Counterclaimant - Appellant.

No. 18-4130

Appeal from the United States District Court
for the District of Utah
(D.C. No. 2:15-CV-00347-BSJ)

Sean Connelly, Connelly Law LLC, Denver, Colorado (David R. Nielson, Kevin M. Bischoff, and Michael D. Lichfield, Skoubye, Nielson & Johansen, LLC, Salt Lake City, Utah, with him on the briefs) for Plaintiff Counter Defendants-Appellants/Cross-Appellees.

J. Scott Ballenger, Latham & Watkins LLP, Washington, D.C. (William M. Friedman and Eric J. Konopka, Latham & Watkins LLP, Washington, D.C., and Julianne P. Blanch and Adam E. Weinacker, Parsons Behle & Latimer, Salt Lake City, Utah, with him on the briefs), for Defendant Counterclaimant-Appellee/Cross-Appellant.

Before **HOLMES**, **BRISCOE**, and **EID**, Circuit Judges.

EID, Circuit Judge.

For almost 18 years, the Union Pacific Railroad ("Union Pacific") charged Heber Rentals, LC ("Heber") and L.K.L. Associates, Inc. ("L.K.L.") rent under a lease that allowed L.K.L. to continue operating a building materials supply business on land that is owned in fee by Heber—and leased to L.K.L.—but encumbered by Union Pacific's right of way. After the Supreme Court stated in 2014 that railroad rights of way like Union Pacific's were "nonpossessory" easements, L.K.L. and Heber stopped paying rent and filed suit against Union Pacific. In addition to requesting declaratory relief, L.K.L. and Heber sought to have their leases rescinded and to receive restitution for rent already paid. Union Pacific brought counterclaims arising out of their nonpayment.

On summary judgment, the district court held that Union Pacific's easement, while nonpossessory, gave it exclusive use and possession rights "insofar as Union Pacific elects to use the land subject to its easement for a railroad purpose." App'x Vol. XVI

at 2760. Although it found that the lease agreements served no railroad purpose, it denied the rescission claim as "untimely and redundant." *Id.* at 2758. In a follow-up order, it ruled that L.K.L. and Heber had abandoned their remaining claims. The district court also rejected all of Union Pacific's counterclaims.

Both parties appeal, contesting the scope of the easement, their respective property rights, and the claims that were rejected or deemed abandoned below. We agree with Union Pacific that its right of way includes the unqualified right to exclude L.K.L. and Heber, but we agree with L.K.L. and Heber that their leases were invalid. Even if the incidental use doctrine applies, neither the leases nor the underlying business conduct furthered a railroad purpose, as the easement requires. Exercising jurisdiction under 28 U.S.C. § 1291, we REVERSE the district court's declaratory judgment rulings to the extent they are inconsistent with this opinion. However, we AFFIRM the district court's ruling that the rescission claim was time-barred. We AFFIRM its rejection of Union Pacific's counterclaim for breach of contract but REVERSE its rejection of Union Pacific's other substantive counterclaims. Finally, we REVERSE the district court's finding of abandonment and REMAND for further proceedings consistent with this opinion.

I.

Between 1871 and 1873, the Utah Southern Railroad Company ("Utah Southern") built a railroad track between Salt Lake County and Utah County, Utah. The Department of the Interior recognized Utah Southern's right of way across the public lands of the United States, to the extent of 100 feet on each side of the central line of that track,

pursuant to the General Railroad Right-of-Way Act of 1875 (the "1875 Act"), 18 Stat. 482, 43 U.S.C. §§ 934–939.

In 1987, Union Pacific succeeded to Utah Southern's right of way by acquiring full ownership of the relevant section of track. Meanwhile, the underlying fee interest in some of the land encumbered by that right of way passed from the United States to Utah to Heber, and Heber leased the land to L.K.L. Heber's property begins at a fence located less than 50 feet west of the track's central line, and a building on its property falls partly within the easement area. This zone of overlap between Heber's fee and Union Pacific's easement launched this litigation.[1]

The parties coexisted without contact until 1997, when Union Pacific informed L.K.L. and Heber that their property fell on the railroad's right of way. Union Pacific asserted that Heber could not use or occupy the property without signing a lease agreement. The railroad sent a letter to Heber demanding that it "immediately remove from the railroad's property all personal property, including buildings, equipment and materials, and refrain from further encroachment upon the railroad's property until such time that an agreement has been executed and payment made in full." App'x Vol. XI at 1727 (emphasis omitted). The railroad also sent a sheriff to get its message across.

In January 1997, Heber agreed to lease a portion of its own property back from Union Pacific because the land was located within Union Pacific's right of way. One

[1] Before the district court, there was some dispute concerning whether Heber's property was encumbered by the easement. We assume such overlap exists, but our ruling about the scope of Union Pacific's easement is not determined or affected by Heber's ownership status.

year later, L.K.L. signed a direct lease with Union Pacific and the lease between Heber and Union Pacific was canceled. Ultimately, L.K.L. and Heber paid Union Pacific at least $8,884.00 and $120,010.69, respectively, in lease payments. L.K.L. stopped making these payments in 2015, having interpreted the Supreme Court's decision in *Marvin M. Brandt Revocable Trust v. United States* to mean that the 1875 Act did not grant Union Pacific the rights to exclusive use and possession that it purported to exercise in dealing with L.K.L. and Heber. 572 U.S. 93 (2014). This lawsuit followed.

On April 16, 2015, L.K.L. and Heber filed suit in Utah state court to rescind the leases and recover their payments on the ground that the parties had been "operating under the mistaken belief that Union Pacific possessed an exclusive right of way." App'x Vol. I at 41. In addition to state law claims for rescission due to mutual and unilateral mistake, L.K.L. and Heber brought claims for breach of contract, intentional interference with economic relations, unjust enrichment, quiet title, and declarations about whether the lease was a valid contract and the nature of the parties' property rights. Union Pacific removed the case to federal court and filed counterclaims for breach of contract, encroachment/trespass, ejectment, and a different declaration concerning the parties' property rights.

While the parties agreed that the 1875 Act granted Union Pacific an easement, they fundamentally disagreed about the nature and scope of that easement. L.K.L. and Heber argued that the 1875 Act granted only a nonpossessory easement and that their leases were invalid to the extent they purported to transfer possessory rights that Union Pacific never had. On the other hand, Union Pacific argued that railroad easements have

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.