12-17151

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KAWAIISU TRIBE OF TEJON and DAVID LAUGHING HORSE ROBINSON, an individual and Chairman, Kawaiisu Tribe of Tejon

Plaintiffs-Appellants

vs.

KEN SALAZAR, in his official capacity as Secretary of the United States Department of the Interior; TEJON RANCH CORPORATION, a Delaware corporation; TEJON MOUNTAIN VILLAGE, LLC, a Delaware company; COUNTY OF KERN, CALIFORNIA; TEJON RANCHCORP, a California corporation

Defendants-Respondents

REPLY BRIEF OF APPELLANT

Appeal from Dismissal by the U.S. District Court for the Eastern District of California, Hon. Barbara A. McAuliffe Magistrate Judge, Case No. 09-cv-01977-BAM

Jeffrey M. Schwartz, Esq., SBN 254916
SCHWARTZ LAW, P.C.
629 Camino De Los Mares, Suite 203
San Clemente, CA 92673
Tel 888-7300-LAW Fax 949-481-8836

Attorney for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

California Cases

Federal Cases

Statutes

Other Authorities

TEJON AND KERN REFUSE TO ACCEPT THIS COURT'S REINSTATEMENT OF ROBINSON'S APPEAL AND ATTEMPT TO MISLEAD THE COURT AS TO THE REQUIREMENTS FOR REINSTATEMENT

A. Tejon's and Kern's argument against reinstatement has already been rejected by this Court, not once but twice.

Robinson inadvertently failed to timely file his opening brief and his appeal was summarily dismissed. (RSER[1] 1.) He applied for reinstatement. (RSER 2-7.) Tejon opposed Robinson's application. (RSER 8-15.) And, Kern joined in Tejon's opposition. (RSER 16-17.) However, this Court rejected Tejon's and Kern's arguments, granted Robinson's application, and reinstated his appeal. (RSER 18.) Tejon then moved the Court to reconsider reinstatement. (RSER 19-29.) And, Kern joined in Tejon's motion. (RSER 30-32.) However, this Court again rejected Tejon's and Kern's arguments and denied their motion, adding that "No motions for reconsideration, rehearing, clarification, or modification of this order's provisions regarding the May 2, 2013 order [reinstating Robinson's appeal] shall be entertained." (RSER 33.)

In defiance of this Court's unambiguous directive, both Tejon's and Kern's lead argument seeks further reconsideration of the Court's reinstatement of Robinson's appeal. Tejon's and Kern's decision to make this already-rejected (twice) issue their primary argument speaks volumes about the lack of merit of their subordinate arguments.

---

[1] Robinson's Supplemental Excerpts of the Record is referred to hereinafter as "RSER."

B. Tejon and Kern attempt to mislead the Court regarding the requirements for reinstatement of an appeal due to failure to timely file an opening brief.

> Rule 60(b)(1) … permits courts to reopen judgments for reasons of "mistake, inadvertence, surprise, or excusable neglect," but only on motion made within one year of the judgment. (*Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership* 507 U.S. 380, 393 (1993).)

> The Ninth Circuit has recently reiterated that "excusable neglect 'encompasses situations in which the failure to comply with a filing deadline is attributable to negligence,' and includes 'omissions caused by carelessness.'" (*In re Hawaiian Airlines, Inc.* 2011 WL 1483923 (2011).)

In his motion requesting reinstatement of his appeal, Robinson's counsel declared that his failure to timely file his opening was "inadvertent" and a "novice mistake." (RSER 5; TAB 10.) Tejon and Kern claim that that is insufficient because "[r]einstatement of an appeal 'can be exercised only in extraordinary circumstances' involving 'grave, unforeseen contingencies.' *Calderon v. Thompson*, 523 U.S. 538 ('*Calderon*')." (TAB[2] 11; KAB[3] 4.) However, that is patently false.

As the U.S. Supreme Court explained in *Pioneer, supra,* Federal Rules of Civil Procedure, Rule 60, subdivision (b)(1) permits a court to reinstate an appeal, which had been summarily dismissed for failure to timely file a brief, based upon mistake, inadvertence, surprise, or excusable neglect, provided that the motion is brought within one year.

---

[2] Tejon's Answering Brief is referred to hereinafter as "TAB."

[3] Kern's Answering Brief is referred to hereinafter as "KAB."

(*Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership, supra,* at p. 393.) And, here in the Ninth Circuit, Robinson's counsel's negligence and carelessness qualify as "excusable neglect." (*In re Hawaiian Airlines, Inc., supra,* at p. 3.) Therefore, Robinson met all of the requirements for reinstatement of his appeal.

Tejon and Kern ask this Court to ignore settled law and, instead, apply *Calderon*. However, they fail to inform this Court that *Calderon* involved two motions: one requesting recall of the Court of Appeal's mandate denying habeas relief and a second, based upon Rule 60(b)[4], requesting relief from the district court's judgment. *Calderon* required "extraordinary circumstances" only as to the motion to recall the mandate denying habeas relief, not to the Rule 60(b) motion. (*Calderon v. Thompson, supra,* 523 U.S. 538 at p. 550.)

The above cases make clear that, despite both a judgment denying habeas relief and summary dismissal of an appeal for failure to timely file the opening brief are both designed "mandates," all that is required to reinstate an appeal that was dismissed for failure to timely file a brief is "excusable neglect."

Here, it is undisputed that Robinson applied for reinstatement within one year, so Rule 60(b)(1) applies. Although, as a backup, Robinson also sought relief under subsection 6, which requires "extraordinary circumstances," this Court did not specify the subsection under which it granted reinstatement. Kern's assumption that it was

---

[4] The Opinion does not specify which subsection.

based upon subsection 6, and therefore requires "extraordinary circumstances," is baseless speculation.

TEJON'S FACTUAL ARGUMENTS ARE IRRELEVANT TO THE MOTION TO DISMISS

> Factual challenges to a plaintiff's complaint have no bearing on the legal sufficiency of the allegations under a Rule 12(b)(6) motion. (*Gordon v. Impulse Marketing Group, Inc.* 375 F.Supp.2d 1040, 1046 (2005).)

In its brief, Tejon makes a variety of factual arguments, including:

- "Kawaiisu forfeited its claim based on an alleged Spanish land grant by failing to present it under the 1851 Act. (TAB 17.)
- "The Treaty with the Utah did not grant Kawaiisu title to Tejon Ranch." (TAB 21.)
- "Treaty D was not ratified by the Senate, and it therefore has no legal effect." (TAB 23.)
- "The Kawaiisu's claim of a de facto reservation lacks merit." (TAB 25.)
- "No reservation was ever established at Tejon Ranch." (TAB 26.)
- "Even if a reservation once existed, no reservation currently exists, de facto or otherwise. (TAB 29.)

However, a Rule 12(b)(6) motion tests only the legal sufficiency of a claim. (*Navarro v. Block* 250 F.3d 729, 732 (2001).) And, as *Gordon* made clear, factual challenges, like Tejon's, "have no bearing on the legal

sufficiency of the allegations under a Rule 12(b)(6) motion." (*Gordon v. Impulse Marketing Group, Inc., supra,* 375 F.Supp.2d 1040 at p. 1046.) Therefore, the Court should disregard Tejon's factual arguments.

CONTRARY TO KERN'S CLAIMS, ROBINSON'S OPENING BRIEF CHALLENGED THE TRIAL COURT'S DISMISSAL OF HIS EQUITABLE ENFORCEMENT OF TREATY CLAIM

Kern claims that Robinson abandoned his Equitable Enforcement of Treaty claim because he failed to employ the phrase "equitable enforcement of treaty." (KAS 20.) However, as Kern concedes, "[t]he district court's dismissal order [of Robinson's Equitable Enforcement of Treaty claim] focused on the Rooker-Feldman doctrine and did not address the lack of pendent jurisdiction over a state law CEQA claim against the County." (KAB 13.) Since Robinson devoted a considerable portion of his opening brief to the trial court's erroneous Rooker-Feldman analysis, he has not abandoned this issue.

KERN'S ROOKER-FELDMAN ANALYSIS IS SPECULATIVE, NONSENSICAL, AND UNAVAILING

Kern argues that the trial court applied the Rooker-Feldman doctrine properly because "Robinson does not have a purported 'federal' CEQA claim or indeed any other viable federal claim." (KAB 24.)

First, Kern's opinion regarding the viability of Robinson's claims are merely its own opinion and worthless on appeal. Second, if Robinson actually lacked a federal claim, then the Rooker-Feldman doctrine was

inapplicable and the trial court erred by relying upon it, just as Robinson has argued.

Furthermore, Kern attempts to distinguish *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280 (2005), because the circumstances are different. (KAS 24.) However, while the *circumstances* may be different, the *law* is the same. In *Exxon,* the U.S. Supreme Court held that, "[t]he Rooker-Feldman doctrine is confined to cases of the kind from which it acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the federal district court proceedings commenced and inviting district court review and rejection of those judgments." (*Id.* at p. 281.) It is undisputed that the instant case commenced before the state-court case (*Center for Biological Diversity v. Kern County,* 2012 WL 1417682 (2012)), ended. Therefore, the doctrine is inapplicable.

Additionally, Kern points out that some cases have not foreclosed the *possibility* that Rooker-Feldman could be applied against a party not named in an earlier state proceeding. (KAS 24-25.) But, the mere possibility that, in some unknown circumstances, the doctrine could apply outside its normal boundaries is meaningless and Kern's assumption that this is one of those unknown circumstances is baseless speculation.

Finally, Kern is reduced to arguing that Rooker-Feldman is still viable. While true, this is irrelevant because Robinson never claimed that it wasn't. But, the mere fact that the doctrine survives is not evidence that it was properly applied in this case.

KERN'S FOCUS ON THE IDENTITY OF THE CLAIMANT IS BASED UPON ITS MISGUIDED FOCUS ON INCONSEQUENTIAL TECHNICALITIES COMBINED WITH ITS LACK OF ATTENTION TO LEGAL AUTHORITY

Kern argues that because Robinson's opening brief stated that it sought to vindicate the rights of the Kawaiisu, Robinson abandoned his individual claims. (KAS 21.)

But, just like Kern's above argument that Robinson's failure to include the words "equitable enforcement of treaty" somehow magically waived that issue, Kern's conclusory arguments, devoid of any legal authority, are unavailing.

CONCLUSION

Other than attempting to re-litigate this Court's reinstatement of Robinson's appeal, the answering briefs add nothing to the discussion. The Kawaiisu reiterate their request that this Court reverse the district court and permit their claims to stand or fall on their merits.

Respectfully submitted,

s/ Jeffrey M. Schwartz
Jeffrey M. Schwartz
Attorney for Plaintiffs and Appellants

9th Circuit Case Number(s) 12-17151

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) Nov 4, 2013 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) s/Jeffrey M. Schwartz

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)

Form 6. Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

☒ this brief contains 1,448 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

☐ this brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

☒ this brief has been prepared in a proportionally spaced typeface using *(state name and version of word processing program)* Word 2013 *(state font size and name of type style)* Century, 14 pt. , *or*

☐ this brief has been prepared in a monospaced spaced typeface using *(state name and version of word processing program)* _____ with *(state number of characters per inch and name of type style)*

_____ .

Signature s/Jeffrey M. Schwartz

Attorney for KAWAIISU TRIBE OF TEJON and DAVID LAUGHIN

Date Nov 4, 2013