



circuit court entered a summary judgment in favor of Union Pacific and against RMFS.

¶ 3 RMFS appeals, arguing that Hines's filing of an amended complaint without leave of court was a nullity, that unresolved questions of material fact precluded summary judgment, and that the circuit court misinterpreted the law. We affirm.

¶ 4 **FACTS**

¶ 5 On November 6, 2001, Hines filed a complaint for injunction and money damages against Myers, requesting that the court order Myers to remove, among other things, a well and pump, which Hines alleged that Myers had improperly placed in the middle of a public road, blocking ingress and egress and causing unnatural flooding to Hines's land. On June 6, 2002, Hines, without leave of court, filed an amended complaint against RMFS seeking the same relief. RMFS filed a motion to dismiss the amended complaint but did not raise the issue of Hines's failure to acquire leave to amend. The circuit court denied the motion to dismiss, and RMFS filed an answer and affirmative defenses.

¶ 6 On May 17, 2007, with leave of court, Hines filed a second amended complaint, adding Union Pacific as a defendant. In his second amended complaint, Hines alleged that RMFS had surveyed the subject property, and the survey had indicated that the well was not located on RMFS's property but was "located west of the public road on \*\*\* Union Pacific['s] property." Hines attached the "topographic survey" of RMFS's property (part of the south one-half of the southwest quarter of section 24, Township 13 South, Range 3 West in Union County, Illinois) dated October 2002, showing that the well and pump were located on the right-of-way of Missouri Pacific Railroad (Union Pacific's predecessor). Hines requested an order requiring either RMFS or Union Pacific to remove the well and pump, repair the public road, and pay monetary damages.

¶ 7 Union Pacific's right-of-way derives from a 1909 Union County circuit court order on a petition for condemnation filed by another predecessor, St. Louis, Iron Mountain and

Southern Railway Company (the Railway Company). In the order, the court stated that upon paying a jury award, the Railway Company was thereby "authorized to immediately take possession of and use and occupy the said described land for use as right[-]of[-]way, cuttings and embankments in the construction and operation of its railway and to transact all its business as a railroad, as in said petition claimed and stated."

¶ 8 On June 28, 2007, Union Pacific filed an answer and a counterclaim for contribution against RMFS as a joint tortfeasor. See 740 ILCS 100/0.01 to 5 (West 2006). Union Pacific verified its answer and denied the allegations of Hines's complaint. Specifically, Union Pacific denied the allegation that RMFS placed a well and pump on Union Pacific's property with its consent, damaging the public right-of-way.

¶ 9 In a discovery deposition taken on March 15, 2007, Myers testified that the pump was located "on the line between [his property] and the railroad [property]." Myers testified that "it could possibly be maybe some on the railroad property." When asked whether "the pump was placed on [the] property that [he] own[ed]," Myers answered: "It is. The railroad joins me." Myers testified that the pump was "by the railroad." Myers acknowledged that the survey acquired by RMFS pursuant to the litigation revealed that the well pump was not on his property but was on what was described in the survey as the right-of-way of Missouri Pacific Railroad (now Union Pacific). Myers asserted, however, that this survey was incorrect, in that the well pump was located on the line.

¶ 10 All three parties filed motions for summary judgment. On December 9, 2009, Hines filed a motion for summary judgment, seeking an injunction requiring Union Pacific and RMFS to remove the well head, pump, and pipe and RMFS to repair the public road. In his affidavit attached to support the motion for summary judgment, Hines stated that RMFS had acquired title to 27 acres that connected to his property and that as shown by an attached plat map exhibit and attached survey, the pipes, plumbing, and well were located on Union

Pacific's property. The attached topographic survey identified the "well/pump" on Union Pacific's right-of-way.

¶ 11 On March 19, 2010, RMFS filed an objection to Hines's motion for summary judgment, arguing that Hines's affidavit was defective and amounted to hearsay, which meant that it could not serve as a basis for summary judgment. See Ill. S. Ct. R. 191 (eff. July 1, 2002).

¶ 12 In its response to Hines's motion for summary judgment, Union Pacific stated that it was uncontested that Union Pacific "did not consent to having the well and pump placed on its property." In a supplemental response, Union Pacific alleged that the presence of the well caused irreparable injury to its property rights in that a leak in the well or a break in the pump could cause flooding, causing compromise to the structure of the nearby track bed, train derailment, and/or employee injury. On October 12, 2010, Union Pacific adopted Hines's motion for summary judgment. On November 9, 2010, RMFS filed a reply to Union Pacific's adoption of Hines's motion for summary judgment. In its reply, RMFS argued that RMFS's well and equipment did not interfere with Union Pacific's operations.

¶ 13 On September 23, 2010, RMFS filed a motion for summary judgment. In its motion for summary judgment, RMFS argued that Hines "ha[d] no standing to bring suit for an alleged trespass to the property owned by" Union Pacific because he had no legally recognized interest in the property owned and possessed by Union Pacific.

¶ 14 On September 24, 2010, with leave of court, Union Pacific filed a second amended counterclaim against RMFS. In the second amended counterclaim, Union Pacific sought, *inter alia*, a court order ejecting RMFS from the property and ordering it to remove its well, pump, and pipes from Union Pacific's right-of-way.

¶ 15 In RMFS's November 9, 2010, motion to strike Hines's response to Union Pacific's motion for leave to file a second amended counterclaim, RMFS again asserted that Hines

had no standing to bring an action alleging trespass "upon property owned and possessed by" Union Pacific and had no standing to file his response to Union Pacific's motion for leave to file a second amended counterclaim.

¶ 16 On February 18, 2011, the circuit court entered summary judgment in Union Pacific's favor. The circuit court stated that at the hearing held on February 4, 2011, the parties advised the court that discovery had concluded and that all amendments necessary had been submitted. The circuit court found that RMFS had installed the well and pump at issue on property designated as Union Pacific's pursuant to the 1909 order entered on Union Pacific's predecessor's petition for condemnation. The circuit court characterized as a question of law whether RMFS was required to comply with Union Pacific's demand to remove the well and pump placed on this property. Concluding that Union Pacific's use was exclusive, the circuit court answered the question in the affirmative and ordered RMFS to remove the well, pump, and related appurtenances from the property.

¶ 17 On March 17, 2011, RMFS filed a posttrial motion to reconsider the circuit court's order, arguing that because the record did not include a description of the well head, pump, and pipe, there was no indication that Union Pacific was affected by the alleged trespass. On April 8, 2011, the circuit court denied RMFS's motion to reconsider. On April 28, 2011, RMFS filed its timely notice of appeal.

¶ 18 ANALYSIS

¶ 19 RMFS argues that Hines's amended complaint was a nullity because it was filed without leave of court. Union Pacific counters that RMFS forfeited this issue by failing to raise it in the circuit court. We agree with Union Pacific.

¶ 20 In *Ragan v. Columbia Mutual Insurance Co.*, 183 Ill. 2d 342, 354 (1998), the plaintiff filed an amended complaint without leave of court to add a prayer for prejudgment interest. The defendant did not object and filed a response, and the trial court awarded

prejudgment interest. On appeal, the defendant argued that the trial court had no jurisdiction over the amended complaint because of the plaintiff's failure to obtain leave to amend, which, it argued, was a jurisdictional defect. The supreme court rejected the defendant's argument, noting that section 2-616 of the Code of Civil Procedure "provides that technical defects in pleadings should not prevent the courts from doing justice between the parties." *Ragan*, 183 Ill. 2d at 354; 735 ILCS 5/2-616 (West 2002) (amendments to pleadings may be allowed at any time and in any matter before judgment on just and reasonable terms); see also 735 ILCS 5/2-1005(g) (West 2002) (pleadings may be amended upon just and reasonable terms before or after judgment); 735 ILCS 5/2-603(c) (West 2002) (pleadings are liberally construed to do substantial justice between the parties); 735 ILCS 5/2-617 (West 2002) (pleadings may be amended to grant relief to which the plaintiff is entitled although that party sought wrong remedy); 735 ILCS 5/2-612(c) (West 2002) (defects in pleadings, whether in form or substance, not objected to at trial are waived).

¶ 21 Likewise, this court has held:

"Generally, leave of court is required to file an amendment. However, section 2-616's requirement of obtaining leave of court is directory and not mandatory. [Citation.] Thus, the requirement of obtaining leave of court may be waived by the parties." *Savage v. Pho*, 312 Ill. App. 3d 553, 557 (2000).

See also *Ganci v. Blauvelt*, 294 Ill. App. 3d 508, 515-16 (1998) (failure to obtain leave to file a third-party complaint seeking contribution was waived and could not be raised for the first time on appeal).

¶ 22 In this case, on June 6, 2002, Hines, without leave of court, filed an amended complaint raising allegations against the defendant RMFS, as opposed to Myers, who was named as the defendant in Hines's original complaint. RMFS's motion to dismiss did not raise the issue of Hines's failure to obtain leave to amend, and RMFS filed its answer on

May 27, 2003. The parties proceeded for five years under the allegations of the amended complaint until Hines filed a motion for leave to file a second amended complaint on April 13, 2007.

¶ 23 Hines's failure to obtain leave of court to file his amended complaint was not, in and of itself, a jurisdictional defect, rendering the amendment a nullity. Rather, his failure to obtain leave of court to amend the complaint was a procedural deficiency, and RMFS's failure to timely object to the issue forfeited it for purposes of review. See *Ragan*, 183 Ill. 2d at 354; *Darnall v. City of Monticello*, 168 Ill. App. 3d 552, 553 (1988) ("an issue not presented to or considered by the trial court cannot be raised for the first time on review"). If the argument had been made to the circuit court, that court could have determined whether Hines should have been allowed additional time to seek leave of court, whether the amendment should have been rejected, or whether some lesser sanction should have been imposed. See *In re Estate of Zander*, 242 Ill. App. 3d 774, 777 (1993).

¶ 24 RMFS failed to object to the filing without leave of court and instead filed responsive pleadings. RMFS argued the merits of the pleadings, including Hines's second amended complaint, which was subsequently filed with leave of court. RMFS cannot now be heard to claim unfair prejudice or surprise by the amendment. See *id.* (an adverse party is not harmed by a failure to obtain leave if there is no element of surprise or prejudice because of that failure). Instead, RMFS forfeited any argument on appeal that the amended claim was improperly filed without leave of court. See *id.*

¶ 25 RMFS next argues that the circuit court erred in granting Union Pacific's motion for summary judgment because of unresolved questions of material fact.

¶ 26 Summary judgment is properly granted if the pleadings, depositions, admissions, and affidavits on file show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2008);

*Murray v. Chicago Youth Center*, 224 Ill. 2d 213, 245 (2007). Because a summary judgment is a drastic method of terminating litigation, the reviewing court must construe the pleadings, affidavits, depositions, and admissions on file strictly against the moving party and liberally in favor of the nonmoving party. *Murray*, 224 Ill. 2d at 245; *Washington v. City of Evanston*, 336 Ill. App. 3d 117, 121 (2002). "The nonmovant need not prove its case; however, it must set forth some facts that would arguably entitle it to prevail." *Diaz v. Home Federal Savings & Loan Ass'n of Elgin*, 337 Ill. App. 3d 722, 725 (2002). "The [mere] suggestion that an issue of material fact exists, without supporting evidence, is insufficient to create one." *Sacramento Crushing Corp. v. Correct/All Sewer, Inc.*, 318 Ill. App. 3d 571, 575 (2000). "Whether the trial court properly granted summary judgment is a question of law that we review *de novo*." *Happel v. Wal-mart Stores, Inc.*, 316 Ill. App. 3d 621, 625 (2000).

¶ 27 "An injunction may lie to protect a landowner or a person in possession of real estate." *Cameron v. Bartels*, 214 Ill. App. 3d 69, 74 (1991). "Specifically, an injunction will lie to restrain acts of trespass to real property, which are continuous or constantly recurring, where irreparable injury will result unless they are restrained." *Id.* at 74-75. A mandatory injunction is an extraordinary remedy granted upon the exercise of sound judicial discretion. *McMillin v. Economics Laboratory, Inc.*, 127 Ill. App. 3d 517, 525 (1984).

¶ 28 RMFS argues that Union Pacific failed to describe the location of its right-of-way and therefore the location remains an unresolved question of fact. We disagree.

¶ 29 In its answer to Hines's first amended complaint, RMFS admitted that it owned the Union County real estate adjacent to Hines's real estate, described as follows:

"A parcel of land being a part of the South half of the Southwest Quarter of Section 24, Township 13 South, Range 3 West of the Third Principal Meridian. \*\*\* Said parcel being more particularly described as follows: Beginning at an iron pipe found

at the Southeast corner of said South half; thence  $89^{\circ}-22'-00''$  W 1165.26 feet along the South line of said South half to an iron rod set in the East right-of-way line of the Missouri-Pacific Railroad; thence along said East right-of-way line the following three (3) calls: Thence  $N 21^{\circ}-17'-31''$  E 406.59 feet to an iron rod set; thence  $S 68^{\circ}-42'-29''$  E 30.00 feet to an iron rod set; thence  $N 21^{\circ}-17'-31''$  E 1037.94 feet, passing an iron rod set at 1007.94 feet, to an iron rod set in the North line of said South half; thence  $N 89^{\circ}-33'-20''$  E 626.04 feet along the said North line to an iron rod set at the Northeast corner of said South half; thence  $S 0^{\circ}-34'-31''$  W 1327.08 feet along the East line of said South half, passing an iron rod set at 35.81 feet, to the point of beginning. Said parcel to contain 27.091 acres, more or less. Said parcel being subject to the right-of-way of Old Cape Road along its North side and any other rights-of-way and easements, recorded or otherwise \*\*\*."

¶ 30 This description coincides with the description included in the 1909 condemnation order, which authorized and empowered Union Pacific's predecessor to take possession of and use the right-of-way described as follows:

"A strip of land thirty (30) feet wide, lying east of and adjoining the present right[-]of[-]way of said railway, extending over, through and across the South-east quarter of the North-west quarter, and the North-east quarter of the South-west quarter of Section Twenty-four (24) Township Thirteen (13) South Range Three (3) West, containing 1.20 acres more or less.

A strip of land twenty (20) foot wide, lying east of and adjoining the present right[-]of[-]way of said railway, extending southwardly from Station 5900 plus 30 (said station 5900 plus 30 being 432 feet north of the south line of Section Twenty-four (24) Township Thirteen (13) South Range Three (3) West, through the South-east quarter of the South-west quarter of Section Twenty-four (24) and the North half

of the North-west quarter of Section Twenty-five (25) Township Thirteen (13) South Range Three (3) West to Station 5917 plus 13, \*\*\*. Also a strip of land thirty (30) feet wide, lying east of and adjoining the present right[-]of[-]way of said railway, extending southwardly from the aforesaid Station 5917 plus 13 to the South line of the north half of the North-west quarter of aforesaid Section Twenty-five (25), containing 0.91 acres, more or less.

A strip of land thirty (30) feet wide, lying east of and adjoining the present right[-]of[-]way of said railway, extending over, through and across the South-west quarter of the Northwest quarter of Section Twenty-five (25) Township Thirteen South Range Three (3) West, containing 0.94 acres more or less."

RMFS did not provide an alternative description or dispute these property descriptions in the summary judgment proceedings in the circuit court, and issues which are not raised in the trial court are not to be considered for the first time on appeal, even in summary judgment cases. See *Urban v. Village of Inverness*, 176 Ill. App. 3d 1, 7 (1988).

¶ 31 Moreover, the topographic survey prepared by Shawnee Survey & Consulting, Inc., for RMFS depicts the south half of the southwest quarter of section 24, Township 13, South Range 3 West, of the Third Principal Meridian in Union County, and shows the well and pump located within the right-of-way of Missouri-Pacific Railroad (now Union Pacific). RMFS argues that because the topographic survey, showing the well and pump on Union Pacific's easement, was hearsay, it cannot be used to support the circuit court's decision granting the motion for summary judgment. RMFS thus argues that the location of the pump and well also remains a genuine issue of material fact precluding summary judgment.

¶ 32 In ruling on a motion for summary judgment, a court may only consider evidence that would be admissible at trial. *Cordeck Sales, Inc. v. Construction Systems, Inc.*, 382 Ill. App. 3d 334, 377 (2008). Thus, if a party seeks to rely on a document in summary judgment

proceedings, that party must lay the proper foundation for the introduction of the document into evidence. *Id.* at 377-78. "To lay a proper foundation for a document, a party must present evidence that shows that the document is what it purports to be." *Id.* at 384. The party can authenticate the document by providing an affidavit of a witness who has sufficient personal knowledge of the document. *Id.*

¶ 33 "Rule 191(a) sets forth the requirements for affidavits submitted in favor of, or in opposition to, motions for summary judgment." *Id.* at 383. In pertinent part, this rule requires that affidavits:

"shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all papers upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto." Ill. S. Ct. R. 191(a) (eff. July 1, 2002).

¶ 34 "Affidavits submitted with summary judgment pleadings must strictly comply with the requirements of Rule 191(a)." *Cordeck Sales, Inc.*, 382 Ill. App. 3d at 383. "Accordingly, affidavits that are conclusory and fail to state facts with particularity do not strictly comply with Rule 191(a) and may be stricken." *Id.* "However, it is the burden of the party objecting to the sufficiency of a Rule 191(a) affidavit to challenge the affidavit in the trial court and obtain a ruling thereon." *Id.* "Failure to do so results in waiver." *Id.*

¶ 35 In this case, Hines attached to his motion for summary judgment his affidavit, stating that his property adjoined RMFS's property, that the attached plat map demonstrated that RMFS's property and Union Pacific's right-of-way were joined, and that RMFS's topographic survey, also attached to the affidavit, clearly showed that the well and pump were located on Union Pacific's right-of-way.

¶ 36 In its objection to the motion for summary judgment, RMFS argued that Hines's affidavit involved legal conclusions and did not resolve questions regarding ownership and other questions of fact. RMFS also argued that the statements in the affidavit were hearsay and violated Supreme Court Rule 191. However, RMFS failed to obtain a ruling on its objections.

¶ 37 It was RMFS's burden to assert its objections regarding the sufficiency of Hines's affidavit in the circuit court and obtain a ruling thereon. Because RMFS failed to obtain a ruling thereon, it may not test the sufficiency of the affidavits on appeal. See *Cordeck Sales, Inc.*, 382 Ill. App. 3d at 376; see also *American Country Insurance Co. v. Mahoney*, 203 Ill. App. 3d 453, 463 (1990) (even though defendant objected in trial court that statement did not comply with Supreme Court Rule 191, she failed to preserve her Rule 191(a) objection by obtaining a ruling on it).

¶ 38 RMFS did not argue in the circuit court that its topographic survey, which clearly shows the well and pump located on Union Pacific's predecessor's right-of-way, amounted to inadmissible hearsay. Again, issues which are not raised in the trial court are not to be considered for the first time on appeal even in summary judgment cases. See *Urban*, 176 Ill. App. 3d at 7; *Bunch v. Williams*, 175 Ill. App. 3d 582, 585 (1988) (hearsay objections not raised in the trial court were waived on appeal from summary judgment).

¶ 39 Moreover, because RMFS failed to contradict Hines's affidavit with a counteraffidavit or other admissible evidence, Hines's statements concerning the location of the well and pump must be taken as true. Accordingly, we conclude that RMFS has failed to raise a genuine issue of material fact as to this issue. See *Cordeck Sales, Inc.*, 382 Ill. App. 3d at 376.

¶ 40 Our conclusion that RMFS failed to set forth a genuine issue of material fact as to this issue is bolstered by Myers's deposition and RMFS's position in the circuit court. Myers

acknowledged in his deposition that RMFS had acquired a survey, for litigation purposes, that had revealed that the well and pump were located on Union Pacific's right-of-way, and RMFS took the affirmative position in the circuit court that the well and pump were located on Union Pacific's right-of-way in order to argue that Hines had no standing to bring suit.

¶ 41 RMFS next argues that the record does not reveal whether the well is above or below ground and that this question is also a material one precluding summary judgment. We disagree.

¶ 42 In a discovery deposition of Hines, taken on March 15, 2007, Hines testified that RMFS's pump was "clearly in the center of the road," thereby "block[ing] the county road next to the track with [the] pump and associated pipe." Later in his testimony, Hines testified that RMFS "has [the] pump there in the right-of-way itself" and that RMFS's pump was an obstacle impeding the public right-of-way. In Union Pacific's answers to interrogatories, Union Pacific stated that its employees had "noticed the well, but assumed it was not on Union Pacific's right-of-way." Myers himself testified that the pump was "by the railroad." Again, RMFS failed to genuinely dispute the fact that a portion of the well and pump was located above ground. See *Sacramento Crushing Corp. v. Correct/All Sewer, Inc.*, 318 Ill. App. 3d 571, 575 (2000) (mere suggestion that issue of material fact exists is insufficient to create one).

¶ 43 "When determining the existence of a material fact, the court must find such an issue supported by evidentiary facts revealed in the record." *North American Old Roman Catholic Church v. Bernadette*, 253 Ill. App. 3d 278, 285 (1992). Pursuant to the pleadings, affidavits, admissions, and depositions on file, RMFS has failed to set forth a genuine issue of material fact and has failed to set forth facts that would arguably entitle it to prevail. See *Diaz*, 337 Ill. App. 3d at 725. Instead, Union Pacific supplied facts that entitled it to a judgment as a matter of law. See *Argueta v. Krivickas*, 2011 IL App (1st) 102166, ¶ 6

(party opposing summary judgment may rely solely upon the pleadings to create a question of material fact until the movant supplies facts that would clearly entitle it to a judgment as a matter of law).

¶ 44 RMFS lastly argues that the circuit court erred when it found that Union Pacific had the right to exclusive possession of its right-of-way. RMFS argues that Union Pacific failed to show that the well, pump, and pipe interfered with the operation of its railroad and therefore failed to demonstrate its right to relief.

¶ 45 Article II, section 13, of the Illinois Constitution of 1870 provides, "The fee of land taken for railroad tracks, without consent of the owners thereof, shall remain in such owners, subject to the use for which it is taken." Ill. Const. 1870, art. II, § 13. Thus, where land is condemned for railroad purposes and an easement is taken, the fee remains in the original owner, who may use the land for every purpose not incompatible with the use for which it has been appropriated by the railroad company. *Chicago & Eastern Illinois R.R. Co. v. Clapp*, 201 Ill. 418, 423-24 (1903). "The use to which an easement is devoted or for which it is granted determines its character, and to the extent for which it is necessary to carry out the purpose of the grant, the rights of the owner of the easement are paramount." *Farmers Grain & Supply Co. of Warsaw v. Toledo, Peoria v. Western R.R.*, 316 Ill. App. 116, 123 (1942).

¶ 46 "An easement for right[-]of[-]way purposes acquired by a railroad company is in some respects different from other easements in its essential purposes, uses and necessities." *Id.* "[A]n easement acquired by a railroad company in an eminent domain proceeding for right-of-way purposes gives the company the right to the exclusive possession of the land taken." *Abens v. Chicago, Burlington & Quincy R.R. Co.*, 388 Ill. 261, 266 (1944); *Drainage Commissioners of Drainage District No. 8 v. Knox*, 237 Ill. 148, 151 (1908) (the right acquired by the railway company is practically exclusive, leaving the fee owner's naked

title, for all practical purposes, of no value). The railway company must, from the very nature of their operations, to secure their passengers, workmen, and the enjoyment of the road, have the right at all times to the exclusive occupancy of the land taken and to exclude all concurrent occupancy by former owners in any mode and for any purpose. *Abens*, 388 Ill. at 266; *Illinois Central R.R. Co. v. Godfrey*, 71 Ill. 500 (1874); *Thomas v. South Side Elevated R.R. Co.*, 183 Ill. App. 286, 293 (1913); see also *Chicago, Burlington & Quincy R.R. Co. v. Aman*, 254 Ill. App. 498, 503 (1929) ("[a] railroad company is entitled to an uninterrupted possession of its tracks and all of its right[-]of[-]way necessary for conducting its business"). "Where \*\*\* a railroad company has the exclusive right to the enjoyment of an easement, forcible entry and detainer may be maintained." *Chicago, Burlington & Quincy R.R. Co.*, 254 Ill. App. at 504.

¶ 47 In *Chicago, Burlington & Quincy R.R. Co.*, 254 Ill. App. at 503-04, the appellant argued that "regardless of the limits of the [railroad's] right[-]of[-]way, she [wa]s entitled to the use of the land for any purpose she may deem proper, so long as it d[id] not interfere with the proper enjoyment of the easement by [the railroad]." *Chicago, Burlington & Quincy R.R. Co.*, 254 Ill. App. at 503. She claimed that the railroad had the same use of its right-of-way after she had built the fence at issue as it did before. *Id.* The court rejected the appellant's argument, stating as follows:

"An easement of right[-]of[-]way granted to a railroad company is essentially different from any other. The nature of railway service generally requires exclusive occupancy. A railroad company is entitled to an uninterrupted possession of its tracks and all of its right[-]of[-]way necessary for conducting its business, except where built on the public highway or over public crossings. It is immaterial that appellant is willing to allow the servants of appellee to mow grass and weeds from the strip in question or that she is willing to allow the telegraph poles, cross arms, and

wires of appellee to remain in their present location, or that the servants of appellee may enter the strip enclosed at all times to maintain and repair the line. If the free use of the strip is necessary or convenient to the proper maintenance and operation of the company tracks, telegraph lines and business, it is entitled to possession thereof and should not be excluded therefrom or retarded by fences, gates, or other obstructions."

*Id.* at 504.

Thus, the court concluded that the appellant had no right to place her fence near railroad tracks and interfere with the free and convenient use of the railroad. *Id.*

¶48 In this case, pursuant to the condemnation proceeding and article II, section 13, of the Illinois Constitution of 1870, Union Pacific's predecessor acquired permanent and exclusive control of the land taken for its railroad business, and the fee subject to the easement remained in the fee owner, now RMFS. See *Illinois Central R.R. Co. v. Houghton*, 126 Ill. 233, 240 (1888) (an easement acquired by a railroad company in an eminent domain proceeding for right-of-way purposes gives the company the right to the exclusive possession of the land taken). The record reveals that RMFS's possession pursuant to its well and pump is incompatible with Union Pacific's rights pursuant to the 1909 condemnation order, which for right-of-way purposes provided Union Pacific with the right to the exclusive possession of the land surface taken to conduct its railroad operations. See *id.* (railroad's right of possession was exclusive and wholly inconsistent with the subsequent possession by the grantor for the purposes of grazing or agriculture or as part of the farm to which it originally belonged); cf. *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Central Illinois Public Service Co.*, 380 Ill. 130, 135 (1942) (terms of deed, without reference to a condemnation order or section 13 of article II of the constitution, allowed public utility to extend transmission lines above railroad right-of-way); *Eldorado, Marion & Southwestern R.R. Co. v. Sims*, 228 Ill. 9, 12 (1907) (because railroad company acquired

no title or right to exclusive possession of the minerals *beneath* the surface, fee owner had right to connect the coal on either side of the railroad's right-of-way by tunnels under the right-of-way strip, provided there was no impairment of the support to the surface).

¶ 49 The free use of the strip is necessary and convenient to the proper maintenance and operation of the railroad operation. See *Chicago, Burlington & Quincy R.R. Co.*, 254 Ill. App. at 504. Union Pacific must, by the very nature of its operations, for its passengers' and workmen's security, and the enjoyment of the road, have the right at all times to the exclusive occupancy of the land surface taken and to exclude all concurrent occupancy by the fee owners in any mode and for any purpose. Accordingly, the circuit court properly entered summary judgment in Union Pacific's favor. See *Abens*, 388 Ill. at 266.

¶ 50 CONCLUSION

¶ 51 For the foregoing reasons, the judgment of the circuit court of Union County is affirmed.

¶ 52 Affirmed.