NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 CA 1457

BRANDON WADE HIRSTIUS

VERSUS

CLECO CORPORATION, BELLSOUTH TELECOMMUNICATIONS, LLC, CHARTER COMMUNICATIONS, LLC

DATE OF JUDGMENT: JUN 05 2015

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 2013-12105, DIVISION J, PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE WILLIAM J. KNIGHT, JUDGE

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Brandon W. Hirstius
Lacombe, Louisiana

In Proper Person
Plaintiff-Appellant/Defendant
in Reconvention

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Cleco Power, L.L.C.

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BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.

Disposition: AFFIRMED.

CHUTZ, J.

Plaintiff-appellant, Brandon W. Hirstius, appeals a summary judgment dismissing his claims and granting declaratory judgment in favor of defendant-appellee, Cleco Power L.L.C. (Cleco). We affirm.

FACTS AND PROCEDURAL BACKGROUND

In 1997, Mr. Hirstius purchased a tract of immovable property located in St. Tammany Parish. In 2001, he requested that Cleco relocate electric power lines over his driveway. Before doing so, Cleco obtained a right-of-way agreement from him.[1] This servitude agreement granted Cleco a twenty-foot wide right-of-way and easement upon which Cleco was authorized to "place, construct, operate, repair, maintain, and replace thereon an electric distribution line or system, and to cut down trees and trim shrubbery to the extent necessary to keep them clear of said electric lines or system." However, the 2001 servitude agreement contained a restriction that "Cleco will not allow any other firm or corporation to install facilities in this right-of-way without the express permission of [Mr. Hirstius]." Additionally, in 2005, Mr. Hirstius executed a second servitude agreement granting Cleco the right to construct, operate and maintain underground electric distribution facilities within a ten-foot wide right of way on his property.

Mr. Hirstius claims he discovered for the first time in 2010 that a utility pole bearing a tag identifying it as "#44141-6020-3 SCBT Co," as well as a pedestal and aerial wires, were located on his property. He filed a trespass suit against BellSouth Telecommunications, Inc. (BellSouth) complaining of the unauthorized presence of the utility pole and other items. Following a bench trial, the trial court concluded that, even though Mr. Hirstius failed to prove Bellsouth's ownership of the utility pole, BellSouth's placement of the pedestal and aerial wires on Mr.

[1] The right-of-way was actually granted in favor of Cleco Utility Group Inc., which merged with and into Cleco Power Inc.

Hirstius' property constituted a trespass. The court rendered judgment in favor of Mr. Hirstius for $3,500.00, and this court affirmed that judgment on appeal. See ***Hirstius v. BellSouth Telecommunications, Inc.***, 12-2104 (La. App. 1st Cir. 8/14/13), 123 So.3d 276, writ denied, 13-2709 (La. 2/7/14), 131 So.2d 868.

On May 6, 2013, Mr. Hirstius filed the present suit against Cleco, seeking declaratory relief quieting title and declaring that he was the owner of the utility pole and was entitled to have it demolished and removed.[2] Mr. Hirstius also sought unspecified damages against Cleco for its alleged breach of the 2001 servitude agreement, as well as the termination of that agreement as a result of the breach. He asserted that Cleco allowed not only BellSouth, but also the local cable company, to attach aerial wires to the utility pole, thereby violating the restriction included in the servitude agreement.

Cleco filed an answer denying Mr. Hirstius' claims. It also filed a reconventional demand requesting declaratory relief that it was the owner of the utility pole and was entitled to operate and maintain the pole and its attached facilities at its current location. Thereafter, Cleco filed a motion for summary judgment seeking both declaratory relief and the dismissal of Mr. Hirstius' claims.

Following a hearing, the trial court granted Cleco's motion for summary judgment and dismissed Mr. Hirstius' claims, with prejudice. Additionally, the judgment granted declaratory relief to Cleco declaring that: (1) it was the owner of the utility pole identified by number 44141-6020-3; (2) it was entitled to maintain the utility pole and attached facilities at its present location; and (3) in accordance with the 2001 and 2005 servitude agreements, it had the right to enter Mr. Hirstius' property to cut down trees and shrubbery to the extent necessary to keep them clear of Cleco's facilities and to maintain the right-of-way clear of trees.

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[2] Renaissance Media, L.L.C., which provides cable services utilizing the same utility pole, was also named as a defendant. Mr. Hirstius' claims against Renaissance were dismissed in a separate summary judgment, which is the subject of the appeal in ***Hirstius v. Cleco Corporation et al.***, 14-1456 (La. App. 1st Cir. 6/5/15) (unpublished).

Mr. Hirstius has now appealed, raising the following assignments of error in a *pro se* brief:

1. The court erred in granting Motion for Summary Judgment by Cleco.

2. The court erred in granting Cleco "the utility pole."

3. The court erred in granting permission to Cleco to maintain the utility pole and its attached facilities at its present location.

4. The court erred in upholding the servitude agreement.

DISCUSSION

Initially, we note that Mr. Hirstius' appellate brief contains little argument supporting his assignments of error.[3] In the argument section of his *pro se* brief he merely asserts generally that the trial court's judgment "failed to protect [him] from the defendant[']s unrestricted and burdensome use of his property without a legal servitude" and that "he should be granted a De Nova [sic] Review." He appears to argue elsewhere in his brief that the servitude agreement with Cleco should be terminated because the sketch attached to the agreement shows the utility pole located in the state right-of-way adjacent to the highway, rather than on Mr. Hirstius' property. Mr. Hirstius claims that he should be declared the owner of the utility pole in accordance with the notice of appropriation and notice to vacate that he sent to Cleco and BellSouth. Finally, Mr. Hirstius asserts that Cleco was not the owner of the utility pole because a Cleco employee admitted in an affidavit that Cleco did not own it and BellSouth also denied ownership of the pole.

Appellate courts review summary judgments *de novo* under the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. ***Shelton v. Standard/700 Associates***, 01-0587 (La. 10/16/01), 798 So.2d 60, 64-65. A motion for summary judgment should be granted only if there

[3] Rule 2–12.4 of the Uniform Rules of the Courts of Appeal provides that this court may consider as abandoned any assignment of error that is not briefed. Nevertheless, even if Mr. Hirstius' assignments of error are inadequately briefed, in light of his *pro se* status, this court will consider the merits of his appeal, despite the deficiencies of his appellate brief. See ***Putman v. Quality Distribution, Inc.***, 11-0306 (La. App. 1st Cir. 9/30/11), 77 So.3d 318, 320.

is no genuine issue of material fact and the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B)(2). The broad issues in reviewing the summary judgment presently before us are: (1) whether the servitude agreement executed by Mr. Hirstius legally authorized Cleco's use, operation, and maintenance of the utility pole on his property; (2) whether the trial court erred in dismissing Mr. Hirstius' ownership claim regarding the utility pole; and (3) whether there were genuine issues of material fact that precluded summary judgment declaring Cleco to be the owner of the utility pole.

SERVITUDE AGREEMENT

It is undisputed that the utility pole at issue is located within the right-of-way Mr. Hirstius granted to Cleco in the 2001 servitude agreement. It is Mr. Hirstius' position, however, that he was misled by a sketch attached to the servitude agreement to believe that the utility pole, which was already in place at that time, was not located on his property.[4] According to Mr. Hirstius, the sketch prepared by a Cleco employee shows the utility pole being located in the state's right-of-way bordering the Hirstius property. Mr. Hirstius further argues that the servitude agreement is subject to termination because of Cleco's violation of the restriction that it not allow any other companies to install facilities in the right-of-way without Mr. Hirstius' express permission.

We find no error in the trial court's dismissal of Mr. Hirstius' claim that Cleco's use, operation, and maintenance of the utility pole at its present location was unauthorized. The unambiguous language of the 2001 servitude agreement authorized Cleco "to place, construct, operate, repair, maintain, and replace ... an electric distribution line or system" on the twenty-foot right of way granted across the Hirstius property. The utility pole clearly was an essential part of the "electric

[4] In reviewing the summary judgment on appeal, our references to Mr. Hirstius' arguments pertain not only to those made in his *pro se* appellate brief, but also to the arguments raised in the trial court by his counsel.

distribution line or system." The fact that Mr. Hirstius initially may have believed that the pre-existing pole was not located on his property does not alter the fact that by granting the right of way to Cleco, he authorized Cleco to place, operate and maintain a utility pole within the twenty-foot right of way across his property. That is exactly what Cleco is currently doing. The trial court properly granted summary judgment dismissing Mr. Hirstius' claim that no legal servitude authorized Cleco's maintenance of the utility pole at its present location.

Similarly, the trial court also did not err in declaring that Cleco was entitled to enter Mr. Hirstius' property for the purpose of cutting down and/or trimming trees and shrubbery. The 2001 servitude agreement specifically grants Cleco the right "to cut down trees and trim shrubbery to the extent necessary to keep them clear of said electric lines or system."

Mr. Hirstius further claimed that Cleco violated the restriction in the 2001 servitude agreement providing that Cleco should not allow other companies to install facilities within the right of way without Mr. Hirstius' express permission. In making this contention, Mr. Hirstius relies on the mere fact that BellSouth and the local cable company had wires attached to the utility pole located on his property.

However, it is undisputed that the telephone and cable wires already were attached to the utility pole prior to the time the 2001 servitude agreement was executed. Nothing in the 2001 servitude agreement required Cleco to remove telephone or cable wires already attached to the utility pole. Further, Cleco offered the affidavit of a Cleco employee to establish that since 2001, it has no record of receiving or granting a request by BellSouth or the cable company to install facilities in the right of way on Mr. Hirstius' property. In response, Mr. Hirstius failed to present any factual support that he would be able to satisfy his burden of proof at trial that Cleco violated the restriction by allowing the telephone or cable

company to install facilities within the right of way. Therefore, the trial court properly dismissed this claim on the basis that no genuine issue of material fact existed regarding this issue. See La. C.C.P. art. 966(C)(2).

MR. HIRSTIUS' OWNERSHIP CLAIM

Mr. Hirstius' claim to ownership of the utility pole is based on La. C.C. art. 493, which provides:

> When the owner of buildings, other constructions permanently attached to the ground, or plantings **no longer has the right to keep them on the land of another**, he may remove them subject to his obligation to restore the property to its former condition. If he does not remove them within ninety days after written demand, the owner of the land may, after the ninetieth day from the date of mailing the written demand, appropriate ownership of the improvements by providing an additional written notice by certified mail, and upon receipt of the certified mail by the owner of the improvements, the owner of the land obtains ownership of the improvements and owes nothing to the owner of the improvements. Until such time as the owner of the land appropriates the improvements, the improvements shall remain the property of he who made them... [Emphasis added.]

By letter dated June 14, 2013, Mr. Hirstius sent a demand to Cleco to vacate his property within five days. Subsequently, on September 16, 2013, Mr. Hirstius sent notice to Cleco that he had appropriated ownership of the improvements previously belonging to Cleco that were located on his property due to Cleco's abandonment of that property.

Under the express language of Article 493, in order to prevail on his appropriation claim, Mr. Hirstius would be required to prove that Cleco no longer has the right to maintain the utility pole on his property. Mr. Hirstius clearly cannot meet this burden, since we have already concluded that the 2001 servitude agreement authorizes Cleco to maintain the utility pole at its present location on Mr. Hirstius' property. The trial court properly dismissed Mr. Hirstius' claim of ownership of the utility pole.

CLECO'S OWNERSHIP CLAIM

According to Mr. Hirstius, summary judgment declaring Cleco to be the owner of the utility pole was inappropriate since it previously denied owning the pole. He notes further that BellSouth, from whom Cleco now claims to derive ownership, has consistently denied ownership of the pole.

Mr. Hirstius correctly notes that although the utility pole previously bore a BellSouth location tag, BellSouth has always denied owning it. Moreover, in Mr. Hirstius' prior suit against BellSouth, this court affirmed the trial court's finding that he failed to prove BellSouth owned the utility pole. Cleco previously has also denied ownership of the utility pole on more than one occasion. Nevertheless, while there may be some question as to whether Cleco or BellSouth originally installed and owned the utility pole, this issue is not a genuine issue of material fact precluding summary judgment in favor of Cleco for the following reasons.

Clearly, either BellSouth or Cleco (or one of their ancestors) installed the utility pole, which was jointly used by them for many years prior to Mr. Hirstius' purchase of the property in 1997. It was established that the utility pole was a joint use pole that fell within the scope of an Agreement for Joint Use of Poles existing between Cleco and BellSouth.

This agreement governs ownership of joint use poles, as well as other rights and duties pertaining to their use. Under Article XI of the joint use agreement, the owner (either Cleco or BellSouth) of a joint use pole may abandon the pole by giving the other party ninety-day notice and removing all of its attachments from the joint use pole. If the other party to the agreement maintains it attachments on the pole after expiration of the ninety-day period, it becomes the owner of the pole under the joint use agreement.

In the instant case, BellSouth advised Cleco by letter dated January 29, 2013, that while its records indicated that Cleco already owned the utility pole, out of an abundance of caution, BellSouth was giving notice under Article XI that it

was abandoning any ownership interest it might have in the utility pole. BellSouth then removed all of its attachment from the pole, while Cleco maintained its attachments thereto. It was after receiving BellSouth's notice of abandonment that Cleco changed its position to claim ownership of the utility pole.

Thus, Cleco either installed the utility pole and owned it from that time onward, or BellSouth originally owned the pole and Cleco acquired ownership pursuant to Article XI of the joint use agreement when BellSouth abandoned any ownership interest it might have in the pole. Therefore, whether Cleco or BellSouth originally owned the utility pole is not a material issue of fact for purposes of this summary judgment. Under either scenario, Cleco is the current owner of the utility pole, and the trial court properly granted summary judgment declaring Cleco's ownership thereof.

CONCLUSION

For the reasons assigned, the summary judgment rendered by the trial court is affirmed. Mr. Hirstius is to pay all costs of this appeal.

AFFIRMED.