

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

2016 CA 0907

JUANITA CLARK

VERSUS

BYERS ENGINEERING COMPANY CONTRACTORS AND AT&T
CORPORATION

Judgment rendered APR 20 2017

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On Appeal from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
No. 2015-14023 Div. F

The Honorable Martin E. Coady, Judge Presiding

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BEFORE: WELCH, CRAIN, AND HOLDRIDGE, JJ.

*Welch I concurs by M.J.
Crain I concurs and assigns reasons*

HOLDRIDGE, J.

In this appeal, Juanita Clark (“Ms. Clark”) seeks review of a trial court judgment sustaining exceptions of no cause of action and no right of action in favor of appellees, Byers Engineering Co. (“Byers”) and BellSouth Telecommunications, LLC, d/b/a AT&T Louisiana (“AT&T”). After reviewing the record and applicable law, we reverse.

FACTUAL AND PROCEDURAL HISTORY

Ms. Clark filed the present suit on October 6, 2015 against Byers and AT&T.¹ Because Ms. Clark is in proper person, it is difficult to discern her claims from the petition. However, she appears to be alleging causes of action against Byers and AT&T for fraud, trespass, and property damage arising out of their installation of a U-verse utility box in a public right-of-way next to her property.

In her petition, Ms. Clark alleged that Byers and AT&T trespassed on her property from October 17 through October 25, 2013.² She also alleged Byers and AT&T did not comply with St. Tammany Parish Ordinance Series No. 10-2305 (regarding installation of utility boxes). Ms. Clark asserted that “[f]raud was committed” because Linda Meiners, a contractor for the right-of-way for AT&T and/or Byers, used false documentation and “inside connection[s] with St. Tammany Parish employees or elected officials.” Ms. Clark claimed that Ms. Meiners asked her “to sign papers and give up rights to [her] property,” and she did not.

According to Ms. Clark, she was unable to use an emergency private gate, which she needed due to her disability, because it was blocked by the AT&T U-

¹Ms. Clark incorrectly named defendant Byers Engineering Co. as Byers Engineering Company Contractors in her petition and incorrectly referred to BellSouth Telecommunications, LLC d/b/a AT&T Louisiana as AT&T Corporation.

² Ms. Clark stated in her petition that “Byers Engineering Company Contractors, et al[.] trespassed onto property at [her address].” It would appear that “et al.” is referring to the defendant AT&T.

verse utility box. She alleged that “Byers Engineering Company contractors” went into the back yard and informed their supervisor several times that a side gate was there before beginning the job. She claimed that the AT&T U-verse cabinet was placed near or next to her bedroom wall and that its placement caused her damages, including loss of market value and property damages. She alleged that “[d]uring servere [sic] rain storm [sic], vibration and explosion from AT&T U-verse cabinet shakes her walls and windows.” She sought compensation due to fraud, taking, unfair business practices, and a violation of her “Fifth Amendment, disability, and civil rights”; she also sought damages for intentional property damages, mental anguish, and physical and emotional stress.

Byers filed exceptions of no cause of action and no right of action, seeking dismissal of Ms. Clark’s claims with prejudice. Byers contended that Ms. Clark failed to timely object to the building of the telecommunications cabinet with the proper party as required by St. Tammany Ordinance Section 20-010-03, subsequently amended on February 4, 2010, by St. Tammany Ordinance Council Series Number 10-2305, and therefore had no right or cause of action. AT&T also filed exceptions of no cause of action and no right of action, incorporating by reference the arguments made by Byers in its memorandum supporting its exceptions.

The trial court held a hearing on the exceptions. Although Ms. Clark failed to file a memorandum in opposition to the exceptions, the trial court permitted her to argue at the hearing. The trial court granted Byers’ and AT&T’s exceptions and dismissed Ms. Clark’s suit with prejudice. From this judgment, Ms. Clark appeals.³ Specifically, Ms. Clark contends that the trial judge erred in granting

³ Ms. Clark is appearing in proper person and has filed a ten-page statement. While she fails to specifically identify any assignments of error, we accept her brief as an appeal of the granting of the exceptions of no right of cause and no cause of action by the trial court. See Warner v. Synthes, Inc., 2010-1834 (La. App. 1 Cir. 3/25/11), 2011 WL 1104100, 1 n.2.

Byers' and AT&T's exceptions of no cause of action and no right of action and in dismissing her suit.

DISCUSSION

As used in the context of the peremptory exception, a "cause of action" refers to the operative facts which give rise to the plaintiff's right to judicially assert the action against the defendant. Reynolds v. Bordelon, 2014-2362 (La. 6/30/15), 172 So.3d 589, 594. The purpose of the peremptory exception of no cause of action is to test the legal sufficiency of the petition by determining whether the law affords a remedy on the facts alleged in the petition. Id. No evidence may be introduced to support or controvert the exception of no cause of action. La. C.C.P. art. 931. The exception is triable on the face of the pleadings, and, for purposes of resolving the issues raised by the exception, the well-pleaded facts in the petition must be accepted as true. Reynolds, 172 So.3d at 594-95. Louisiana retains a system of fact pleading, and mere conclusions of the plaintiff unsupported by facts will not set forth a cause or right of action. Id. The burden of demonstrating that a petition fails to state a cause of action is upon the mover. Id. Because the exception of no cause of action raises a question of law and the trial court's decision is based solely on the sufficiency of the petition, review of the trial court's ruling on an exception of no cause of action is *de novo*. Id. The pertinent inquiry is whether, in the light most favorable to the plaintiff, and with every doubt resolved in the plaintiff's favor, the petition states any valid cause of action for relief. Id.

The function of an exception of no right of action is a determination of whether plaintiff belongs to the class of persons to whom the law grants the cause of action asserted in the petition. La. C.C.P. art. 927(A)(6); Turner v. Busby,

2003-3444 (La. 9/9/04), 883 So.2d 412, 415. The exception of no right of action assumes that the petition states a valid cause of action for some person and questions whether the plaintiff in the particular case is a member of the class that has a legal interest in the subject matter of the litigation. Indus. Cos., Inc. v. Durbin, 2002-0665 (La. 1/28/03), 837 So.2d 1207, 1216. Unlike the trial of an exception of no cause of action, evidence is admissible on the trial of an exception of no right of action to “support or controvert any of the objections pleaded, when the grounds therefor do not appear from the petition.” La. C.C.P. art. 931. The party raising the exception of no right of action bears the burden of proof. See Falcon v. Town of Berwick, 2003-1861 (La. App. 1 Cir. 6/25/04), 885 So.2d 1222, 1224. As with our review of the court’s judgment granting the exception of no cause of action, the review on appeal is de novo. See Jeff Mercer, L.L.C. v. State, Dept. Of Transp. and Dev., 2014-1752 (La. App. 1 Cir. 6/5/15), 174 So.3d 1180, 1184, writ denied, 2015-1624 (La. 10/30/15), 179 So.3d 618.

We have reviewed the petition and are able to derive the causes of action asserted by Ms. Clark. We find Ms. Clark’s petition, while not reflecting the same standards of skill and judgment which would be expected of an attorney, was sufficient to alert Byers and AT&T of the causes of action alleged.⁴ Ms. Clark alleged that Byers and/or AT&T trespassed on her property, that they installed the AT&T U-verse box on the adjacent right-of-way without her consent, and that this box is disturbing her with noises and blocking her gate. The tort of trespass is defined as the unlawful physical invasion of the property or possession of another. Britt Builders, Inc. v. Brister, 618 So.2d 899, 903 (La. App. 1 Cir. 1993). A

⁴ We acknowledge that Ms. Clark’s petition, as well as her brief to this court, are difficult to understand. However, the jurisprudence has consistently held pro se plaintiffs cannot be held to the same standards of skill and judgment which must be attributed to an attorney, although they assume responsibility for their own inadequacy and lack of knowledge of both procedural and substantive law. Rader v. Dep’t of Health and Hosps., Office of Pub. Health, Eng’g Servs., 94-0763 (La App. 1 Cir. 3/3/95), 652 So.2d 644, 646.

trespasser is one who goes upon the property of another without the other's consent. Id. Additionally, Ms. Clark alleged that the box vibrated and exploded during a severe rainstorm, shaking her walls and windows. No one may use his property so as to cause damage to another or to interfere substantially with the enjoyment of another's property. See La. C.C. art. 667. Landowners must necessarily be exposed to some inconveniences arising from the normal exercise of the right of ownership by a neighbor. See La. C.C. art. 668. But excessive inconveniences, such as those caused by the emission of industrial smoke or odors, need not be tolerated in the absence of a conventional servitude. Critney v. Goodyear Tire & Rubber Co., 353 So.2d 341, 343 (La. App. 1 Cir. 1977). As to Byers' and AT&T's exceptions of no cause of action, we find Ms. Clark's petition sufficiently set forth causes of action against the defendants.⁵

As for Byers' and AT&T's exceptions of no right of action, Byers and AT&T relied on St. Tammany Ordinance Section 20-010-03, subsequently amended on February 4, 2010 by St. Tammany Ordinance Council Series Number 10-2305,⁶ which covered the installation of the telecommunications cabinet on a public right-of-way. They contended that, because they complied with the ordinance, Ms. Clark was not entitled to complain about the installation of the U-verse box. The ordinance provides that an application to obtain a permit to enter the parish right-of-way to install a utility structure can be acted on without a Planning Commission hearing only when the applicants comply with specific notice requirements and permit requirements. The ordinance mandates that written

⁵ We note that if a petition states a cause of action on any ground of portion of the demand, the objection of no cause of action must be overruled. See La. Pub. Serv. Comm'n v. La. State Legislature, 2012-0353 (La. App. 1 Cir. 4/26/13), 117 So.3d 532, 537. Moreover, we note that Byers and AT&T do not challenge Ms. Clark's petition based on the sufficiency of her allegations but only on the basis that she waived her rights to object to the U-verse box under the local ordinance. The trial court's ruling was also based on a lack of compliance with the ordinance.

⁶ Because the ordinance fits the criteria of La. C.E. art. 202(B)(1)(c), this court must take judicial notice of it. City of Hammond v. Parish of Tangipahoa, 2007-0574 (La. App. 1 Cir. 3/26/08), 985 So.2d 171, 177.

notice of the proposed installation of the telecommunications cabinet be provided via U.S. Mail or commercial delivery to property owners within a 150 foot radius of the proposed location of the telecommunications cabinet. The notice shall clearly inform the owner of the proposed location of the installation of the telecommunications cabinet and that the owner shall have 30 days from the delivery date of the notice in which to notify the Department of Planning of any objection to the proposed installation. The Department of Planning may grant approval when proof of written notice and the delivery thereof is provided, and there is no record of an objection being made to the Department of Planning within the 30-day period following the delivery of the written notice.⁷

Byers attached to its memorandum supporting the exceptions the following: the ordinance, a map, photographs of the utility box, certified mail receipts dated June 20, 2013, a turnkey vendor site detail, a United States Postal Service tracking page pertaining to mail from July 17 and 18, 2013, a letter dated June 19, 2013 notifying Ms. Clark of the installation of the U-verse box, a letter from Ms. Meiners to St. Tammany Parish government, a land use review application, signed approval of that application, documents regarding the completion of the project, and Ms. Meiners' affidavit.

Byers and AT&T bore the burden of proof to show that Ms. Clark has no right of action. See Carter v. Haygood, 2004-0646 (La. 1/19/05), 892 So.2d 1261, 1267. However, they failed to introduce into evidence at the hearing the items attached to Byers' memorandum in support of the exceptions. Evidence not properly and officially offered and introduced cannot be considered, even if it is

⁷ Other applicable requirements of the ordinance must also be satisfied. We note that the ordinance also provides that the notice may be waived where representatives of the applicant discuss the proposed location of the structure with the property owners. The waiver must identify the owner and his/her property, the location of the utility device, and a statement that the owner, having been made aware of all relevant information concerning the proposed installation has no objection to the utility structure. The waiver must be signed and dated by the owner.

physically placed in the record. Denoux v. Vessel Mgmt. Servs., Inc., 2007-2143 (La. 5/21/08), 983 So.2d 84, 88; Dupre Logistics v. Bridges, 2010-1071 (La. App. 1 Cir. 12/22/10), 2010 WL 5479723. Documents attached to memoranda do not constitute evidence and cannot be considered as such on appeal.⁸ Denoux, 983 So.2d at 88; Dupre.

Because Byers and AT&T failed to meet their burden of proving that Ms. Clark waived her rights to object to the installation of the U-verse box by failing to object within the time required by the ordinance, the trial court erred in granting the exceptions of no right of action.⁹

CONCLUSION

For all of the foregoing reasons, the May 11, 2016 judgment of the trial court granting the exception of no cause of action and the exception of no right of action is reversed, and this matter is remanded for further proceedings. Costs of this appeal are to be paid equally by Byers Engineering Co. and BellSouth Telecommunications, LLC, d/b/a AT&T Louisiana.

REVERSED AND REMANDED.

⁸ Additionally, the affidavit of Ms. Meiners was attached to the memorandum to support the contention that Byers and AT&T complied with the ordinance and that Ms. Clark failed to timely complain, thus waiving her right to object to the installation of the U-verse box. As with the other attachments to the memorandum, the affidavit was not offered into evidence at the hearing on the exception. Moreover, we note that Byers' and AT&T's reliance on an affidavit is improper. On the trial of the peremptory exception of no right of action, "evidence" may be introduced to support or controvert any of the objections pleaded, when the grounds thereof do not appear from the petition. La. C.C.P. art. 931. This court has interpreted the word "evidence" to mean competent legal evidence. See Michael F. Smith, CPA v. Alford, 2004-0586 (La. App. 1 Cir. 3/24/05), 906 So.2d 674, 676. A sworn affidavit is hearsay and is not competent evidence unless its use is specifically authorized by statute. Id.; Board of Comm'rs of Port of New Orleans v. La. Comm'n on Ethics for Pub. Emps., 416 So.2d 231, 238 (La. App. 1 Cir.), writ denied, 421 So.2d 248 (La. 1982). Accordingly, the affidavit, even if it had been formally offered at the hearing, would not have constituted admissible evidence.

⁹ We note that our ruling finding that the trial court erred in denying Byers' and AT&T's exceptions of no right of action does not preclude them from refiling the exception of no right of action and producing the required evidence.

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CRAIN, J., concurring.

I agree the petition states a cause of action under Louisiana Code of Civil Procedure articles 667 and 668. Because the plaintiff belongs to the class of persons granted the cause of action, she has a right to enforce it. *See Reese v. State, Department of Public Safety and Corrections*, 03-1615 (La. 2/20/04), 866 So. 2d 244, 246. It is not necessary to either determine whether the petition states additional causes of action or address documents not in evidence. *See Louisiana Public Service Commission v. Louisiana State Legislature*, 12-0353 (La. App. 1 Cir. 4/26/13), 117 So. 3d 532, 537 (“If a petition states a cause of action on any ground or portion of the demand, the objection of no cause of action must be overruled.”).