NOT FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

JEW
PMc
MRT.

2017 CA 1548

GERARD BELL, ET AL.

VERSUS

MARATHON PIPELINE, LLC
SHELL PIPELINE

JUDGMENT RENDERED: JUN 01 2018

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Appealed from the
23rd Judicial District Court
In and for the Parish of Ascension, Louisiana
Docket No. 112424 | Div. "B"

The Honorable Thomas J. Kliebert, Jr., Judge Presiding

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Gerard Bell Tacoma, Washington	Appellant Plaintiff – *Pro Se*
Thomas J. Cortazzo Brodie G. Glenn New Orleans, Louisiana	Attorneys for Appellee Defendant – Marathon Pipe Line, LLC
Troy J. Charpentier Baton Rouge, Louisiana	Attorney for Appellee Defendant – Shell Pipeline Company, LP

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BEFORE: McCLENDON, WELCH, AND THERIOT, JJ.

WELCH, J.

Plaintiff, Gerard Bell, appeals a judgment granted in favor of the defendants Marathon Pipe Line, LLC and Shell Pipeline Company, LP, dismissing his claims.

On March 13, 2015, Mr. Bell filed suit against Marathon and Shell.[1] Therein, Mr. Bell alleged that Marathon and Shell violated the terms of similar but unrelated and immediately adjacent pipeline servitudes granted to the defendants by his predecessor-in-interest on the property in question. The petition alleged the defendants violated the pipeline servitudes by installing "trade fixtures" (*i.e.*, pipeline markers), by transferring their rights in the respective servitudes without his consent, and by failing to maintain fences and gates on the property. Mr. Bell further alleged the defendants' failures to maintain fences and gates on the property violated the Occupational Safety and Health Act ("OSHA"). Marathon filed an answer, exceptions, and affirmative defenses, which the trial court set for hearing. The trial court granted Marathon's exception of vagueness in open court, and in response, Mr. Bell filed an amended petition.

Thereafter, Marathon filed an answer and affirmative defenses to the amended petition, as well as an exception of no cause of action, or alternatively, motion for summary judgment. Shell also filed a motion for summary judgment. The defendants argued they were entitled to summary judgment as a matter of law and sought dismissal of Mr. Bell's claims against them in toto. Mr. Bell opposed the exception and motions.

Following a hearing, the trial court granted Marathon's exception and both defendants' motions for summary judgment, rendering judgment and issuing reasons for judgment on April 3, 2017. Thereafter, on its own motion, the trial

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[1] Mr. Bell captioned his petition a "motion of breach of contract." A pleading is governed by its substance rather than its caption and must be construed for what it really is, not for what it is erroneously designated. **Belser v. St. Paul Fire and Marine Ins. Co.**, 542 So.2d 163, 165-66 (La. App. 1st Cir. 1989). There is no dispute that the pleading is a petition for damages alleging breach of contract, *i.e.*, breach of the terms of the respective pipeline servitudes.

court issued a proposed amended judgment, due to a typographical error in the original judgment. Mr. Bell objected to the amended judgment; following a hearing, the trial court overruled the objection and signed the amended judgment on June 30, 2017, granting Marathon's exception of no cause of action and both defendants' motions for summary judgment, dismissing Mr. Bell's claims against the defendants, with prejudice. Mr. Bell filed the instant appeal from the amended judgment.

The peremptory exception raising the exception of no cause of action tests the legal sufficiency of a pleading by determining whether the law affords a remedy on the facts alleged. **Naquin v. Bollinger Shipyards, Inc.**, 2013-1638 (La. App. 1st Cir. 5/2/14), 147 So.3d 207, 209, writ denied, 2014-1091 (La. 9/12/14), 148 So.3d 933. No evidence may be introduced to support or controvert the objection that the petition fails to state a cause of action. La. C.C.P. art. 931. Rather, the exception is triable solely on the face of the petition and any attached documents. **Paulsell v. State, Dept. of Transp. and Development**, 2012-0396 (La. App. 1st Cir. 12/28/12), 112 So.3d 856, 864, writ denied, 2013-0274 (La. 3/15/13), 109 So.3d 386. For purposes of resolving the issues raised by the exception, the well-pleaded facts in the petition must be accepted as true. **Reynolds v. Bordelon**, 2014-2362 (La. 6/30/15), 172 So.3d 589, 594-595. Therefore, the court reviews the petition and accepts well pleaded allegations of fact as true, and the issue is whether, on the face of the petition, the plaintiff is legally entitled to the relief sought. **Everything on Wheels Subaru, Inc. v. Subaru South, Inc.**, 616 So.2d 1234, 1235 (La. 1993).

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. **Scheffler v. Adams and Reese, LLP**, 2006-1774 (La. 2/22/07), 950 So.2d 641, 646-647; **Montalvo v. Sondes**, 93-2813 (La. 5/23/94), 637 So.2d 127, 131. In

addition, conclusions of law asserted as facts are not considered well pled allegations of fact, and the correctness of those conclusions are not conceded. **Hooks v. Treasurer**, 2006-0541 (La. App. 1st Cir. 5/4/07), 961 So.2d 425, 429, writ denied, 2007-1788 (La. 11/9/07), 967 So.2d 507. Because the objection 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 the exception is *de novo*. **Scheffler**, 950 So.2d at 647.

A motion for summary judgment is a procedural device used to avoid a full scale trial when there is no genuine issue of material fact for all or part of the relief prayed for by a litigant. **Duncan v. U.S.A.A. Ins. Co.**, 2006-363 (La. 11/29/06), 950 So.2d 544, 546; **Johnson v. Evan Hall Sugar Cooperative, Inc.**, 2001-2956 (La. App. 1st Cir. 12/30/02), 836 So.2d 484, 486. Summary judgment is subject to *de novo* review on appeal, using the same standards applicable to the trial court's determination of the issues. **Perrone v. Rogers**, 2017-0509 (La. App. 1st Cir. 12/18/17), 234 So.3d 153, 157. After an opportunity for adequate discovery, a motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(A)(3). The only documents that may be filed in support of or in opposition to the motion are pleadings, memoranda, affidavits, depositions, answers to interrogatories, certified medical records, written stipulations, and admissions. La. C.C.P. art. 966(A)(4).

The burden of proof rests with the mover. Nevertheless, if the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court the absence of factual support for one or more

elements essential to the adverse party's claim, action, or defense. The burden is on the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. La. C.C.P. art. 966(D)(1). If the non-moving party fails to produce factual support sufficient to establish it will be able to satisfy the evidentiary burden of proof at trial, there is no genuine issue of material fact and the movers are entitled to judgment as a matter of law. La. C.C.P. art. 966(A)(3) and (D)(1).

Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to this case. **Succession of Hickman v. State Through Bd. of Supervisors of Louisiana State Univ. Agric. & Mech. Coll.**, 2016-1069 (La. App. 1st Cir. 4/12/17), 217 So.3d 1240, 1244. Mr. Bell claimed a breach of contract by Marathon and Shell. The essential elements of a breach of contract claim are (1) the obligor's undertaking an obligation to perform, (2) the obligor failed to perform the obligation (the breach), and (3) the failure to perform resulted in damages to the obligee. See La. C.C. art. 1994; **Denham Homes, L.L.C. v. Teche Fed. Bank**, 2014-1576 (La. App. 1st Cir. 9/18/15), 182 So.3d 108, 119. Mr. Bell also alleged OSHA violations by Marathon and Shell. OSHA is legislation designed to protect employees from workplace dangers and governs only employer-employee conduct. See 29 U.S.C. § 651 *et seq.*

Based on our *de novo* review of the record, we conclude that on the face of Mr. Bell's petition, amended petition, and the attached documents, Mr. Bell failed to state a cause of action. He asserted conclusions of law as facts, which are not well pled allegations of fact, and the correctness of his conclusions are not conceded. Furthermore, Mr. Bell failed to offer any evidence in opposition to the defendants' motions for summary judgment sufficient to establish the existence of a genuine issue of material fact or that the movers were not entitled to judgment as

a matter of law. The defendants, who will not bear the burden of proof at trial, pointed out the absence of factual support for several elements essential to Mr. Bell's claims. The defendants showed that they had the right to install pipeline markers on the property at issue. See 49 C.F.R. 195.410; see also La. C.C. art. 642. Furthermore, the defendants showed that there is nothing in the respective pipeline servitudes that prohibits transfer of the servitudes or requires notice to Mr. Bell if such transfers were made. Finally, the defendants demonstrated that they had no obligation under the respective pipelines servitudes to erect or maintain fences or gates, and furthermore, that such alleged failures violated OSHA. Mr. Bell submitted no evidence in opposition to the defendants' exception and motions; he only filed a memorandum in opposition. Arguments, whether oral or in writing in the form of briefs and memoranda, no matter how artful, are not evidence. **Alomang v. Freeport-McMoran, Inc.**, 97-1349 (La. App. 4th Cir. 3/4/98), 718 So.2d 971, 973, writ denied, 98-1352 (La. 7/2/98), 724 So.2d 734.

The trial court properly granted Marathon's exception of no cause of action and the defendants' motions for summary judgment, and therefore properly dismissed Mr. Bell's claims against the defendants, with prejudice. Accordingly, we affirm the June 30, 2017 judgment of the trial court and issue this memorandum opinion in compliance with Uniform Rules—Courts of Appeal, Rule 2—16.1(B).

AFFIRMED.