NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 CA 0425

CHARLES H. THIBODEAUX

VERSUS

CLECO CORPORATION

Judgment Rendered: SEP 1 9 2008

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Appealed from the
City Court of Slidell
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 2006 C 2196

Honorable James "Jim" Lamz, Judge

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Charles H. Thibodeaux
Pearl River, LA

In Proper Person
Plaintiff – Appellant

Lamar M. Richardson
Mandeville, LA

Attorney for
Defendant – Appellee
CLECO Corp.

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BEFORE: PARRO, McCLENDON, AND WELCH, JJ.

McClendon, J. concurs and assigns reasons.

WELCH, J.

Plaintiff, Charles H. Thibodeaux, appeals a judgment granting a peremptory exception raising the objection of *res judicata* filed by defendant, CLECO Corporation, and dismissing this lawsuit with prejudice. We affirm in part, reverse in part, and remand.

BACKGROUND

On July 13, 2006, Mr. Thibodeaux, a resident of St. Tammany Parish, filed this lawsuit in proper person in Slidell City Court against CLECO, seeking removal of utility poles he averred were not spaced the proper distance from each other and were not located within CLECO's servitude. Mr. Thibodeaux sought to recover the sum of $1.00 per day from 1997 to the present because of the location of the poles on his property. Additionally, Mr. Thibodeaux complained that CLECO's trimming contractor's crew entered his property without supervision and, with no direction, cut down four fully grown fruit trees, failed to protect branches it did cut from future rotting, and failed to remove trash left on his property as a result of its work. Mr. Thibodeaux demanded that the court order CLECO to remove the trash or pay him $5,000.00 to have the trash removed.

CLECO filed an objection of *res judicata*, urging that the validity of its servitude had been decided in its favor in prior suits brought against it by Mr. Thibodeaux. In its peremptory exception, CLECO also raised the objection of prescription as to the question of the validity of its long-established servitude. CLECO attached to its exception three lawsuits filed by Mr. Thibodeaux against CLECO and its predecessor. These documents reflect that on April 16, 1986, Mr. Thibodeaux filed a lawsuit in the 22nd Judicial District Court for the Parish of St. Tammany against CLECO, alleging that it and its contractor maliciously constructed power lines across his property. He sought to recover $500,000.00 for

the loss of use of his property, loss of income, and mental anguish, as well as rental fees for the use of his property. In that litigation, CLECO filed a peremptory exception urging the objections of prescription and no right of action. The electric company averred that the electric line in question had been in place for more than 25 years, and maintained that Mr. Thibodeaux's taking claim, his claim for rental fees and other damage claims had long prescribed. Additionally, the company asserted that Mr. Thibodeaux did not have a right of action for the taking of his property for the power lines because he was not the owner of the property at the time of the construction of the power lines, and there had been no assignment of that right from the owner of the property. On September 9, 1986, following a hearing, the district court sustained the exceptions of prescription and no right of action and dismissed the lawsuit with prejudice. The judgment identified the property subject thereto as Lots 12, 13, and 15, Phase 1 of Ponderosa Ranches Subdivision.

On July 15, 1999, Mr. Thibodeaux filed a lawsuit against CLECO in the small claims division of the Slidell City Court, charging that electrical lines set a surge protector on fire, destroying his microwave and telephone. The matter went before an arbitrator, who dismissed Mr. Thibodeaux's claim with prejudice, and a judgment in accordance with the arbitrator's decision was rendered on November 23, 1999. Again, on May 25, 2000, Mr. Thibodeaux filed a lawsuit against CLECO in the small claims division of the Slidell City Court. In that suit, he asserted that CLECO illegally placed its utility poles outside the servitude provided by St. Tammany Parish's planning commission. He also charged that while he gave CLECO permission to cut trees from his property, its contractors left trash on the property, and sought to recover $6,000.00, the amount he claimed a tree removal company quoted as an estimate to clean up the "total destruction" left by

the electric company's contractors. CLECO submitted a letter dated June 5, 2001, in which its attorney apprised the city court that CLECO had bush hogged and cleaned up Mr. Thibodeaux's property to his satisfaction, and asked that the city court dismiss the matter as settled.

In opposition to CLECO's objection of *res judicata*, Mr. Thibodeaux filed a memorandum in which he admitted that there was a ruling in a lawsuit he previously filed, but urged that he had been forced to revisit the prior suit as a result of CLECO's further destruction of his property, in order to correct the indiscriminate erection of utility poles along the street, and to seek the removal of trash left on his property. He again complained about the location of the utility poles and expressed his desire to have CLECO remove its utility poles to protect human life. He averred that he was entitled to recover $200.00 each for fruit trees cut down from his property and $1.00 per month per foot for the use of his property as of December 1, 1979, the alleged date of CLECO's intrusion onto his property.

At the hearing on the exception, CLECO introduced into evidence the exhibits that were attached to its exception. Mr. Thibodeaux complained about CLECO's placement of its utility poles. The city court questioned Mr. Thibodeaux as to whether there was anything in his current lawsuit that had not been covered in his prior lawsuits. Mr. Thibodeaux responded that in the instant lawsuit, he was "taking on the entire subdivision and all utility poles that have been erected in the wrong place," not just the poles on his property. Upon finding that Mr. Thibodeaux was not able to identify any issues that had not been raised in prior lawsuits, the city court sustained the objection of *res judiciata* and signed a judgment on December 19, 2007, dismissing Mr. Thibodeaux's suit.

This appeal, taken by Mr. Thibodeaux, followed. In connection with this

appeal, Mr. Thibodeaux filed a request to introduce into evidence in this court a survey showing the servitude and photographs which he insists the Slidell City Court refused to admit into evidence. CLECO objected to the motion to supplement, arguing that such evidence was irrelevant to the issue of whether its objection of *res judicata* was properly sustained.

MOTION TO SUPPLEMENT

Mr. Thibodeaux's motion to supplement the record seeks to introduce evidence that was not submitted to the city court in connection with the hearing on the objection of *res judicata*. This court is not a court of original jurisdiction and therefore cannot receive new evidence or exhibits, but can review only those documents introduced at the *res judicata* hearing or previously filed into the city court record. **Guilbeau v. Custom Homes by Jim Russell, Inc.**, 2006-0050, p. 5 (La. App. 1st Cir. 11/3/06), 950 So.2d 732, 735. Accordingly, the motion to supplement the record to introduce new evidence not previously introduced in the city court in connection with the instant litigation must be denied.

RES JUDICATA

Next, we must determine whether the city court erred in holding that the doctrine of *res judicata* precludes consideration of the issues raised by Mr. Thibodeaux in this litigation. When, as here, an objection of *res judicata* is raised before the case is submitted and evidence is received on the objection, the standard of review on appeal is manifest error. **Leray v. Nissan Motor Corporation in U.S.A.**, 2005-2051, p. 5 (La. App. 1st Cir. 11/3/06), 950 So.2d 707, 710.

The essential elements of *res judicata* are as follows: (1) the parties to the action must be identical; (2) the prior judgment must have been rendered by a court of competent jurisdiction; (3) there must have been issued a final judgment on the merits, and (4) the same claim or cause of action must be involved in both cases.

La. R.S. 13:4231;[1] **Bruno v. Bruno**, 2006-2302, pp. 4-5 (La. App. 1st Cir. 9/14/07), 971 So.2d 350, 353, writ denied, 2007-2040 (La. 12/14/07), 970 So.2d 533. The burden of proving the facts essential to sustaining the objection is on the party pleading the objection. **Union Planters Bank v. Commercial Capital Holding Corporation**, 2004-0871, p. 3 (La. App. 1st Cir. 3/24/05), 907 So.2d 129, 130. If any doubt exists as to its application, the exception of *res judicata* must be overruled and the second lawsuit maintained. **Denkmann Associates v. IP Timberlands Operating Co., LTD**, 96-2209, p. 9 (La. App. 1st Cir. 2/20/98), 710 So.2d 1091, 1096, writ denied, 98-1398 (La. 7/2/98), 724 So.2d 738.

In this litigation, Mr. Thibodeaux challenges the placement of utility poles on his property and seeks to be compensated for the use of his property by the utility company. However, these identical claims were asserted by Mr. Thibodeaux in the 1986 lawsuit against CLECO, and those claims were dismissed with prejudice by the court in 1986. There is no indication that Mr. Thibodeaux appealed this ruling, and in the absence of an appeal, the final judgment dismissing this claim with prejudice acquired the authority of a thing adjudged. We find no manifest error in that portion of the city court's ruling that the instant lawsuit, to the extent it challenges the validity of CLECO's servitude, the placement of its

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[1] Louisiana Revised Statutes 13:4231 provides:

> Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:
>
> (1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment.
>
> (2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action.
>
> (3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

utility poles, as well as Mr. Thibodeaux's entitlement to compensation for the use of his property, is barred by the application of *res judicata*.

However, we do not find sufficient evidence in this case to support a finding that Mr. Thibodeaux's demand for damages based on the removal of trees and clean up costs is barred by the application of *res judicata*. There is no evidence that the 1986 lawsuit addressed these issues. In fact, it appears that the conduct occurred subsequent to the filing of the lawsuit and thus the 1986 lawsuit could not serve as the basis for sustaining the exception of *res judicata*. The only evidence offered by CLECO in support of the exception as to this cause of action is a 2000 small claims action filed by Mr. Thibodeaux in which he complained about the cutting of trees by CLECO and clean up costs associated with removal of debris from his property. CLECO introduced a letter written by its attorney to the small claims court advising that the matter had been settled. We find this document legally insufficient to sustain a plea of *res judicata* as to the current lawsuit.

It is true that a compromise between interested parties has a force equal to the authority of a thing adjudged and may form the basis of a plea of *res judicata*. **Leray**, 2005-2051 at p. 4, 950 So.2d at 709-10. However, the Louisiana Civil Code requires that a compromise be made in writing or recited in open court. La. C.C. art. 3072. CLECO failed to meet its burden of proving that a valid and enforceable settlement, reduced to writing, was effected between it and Mr. Thibodeaux for the purpose of settling the 2000 litigation. Therefore, we find the city court erred in sustaining the objection of *res judicata* as to that portion of Mr. Thibodeaux's lawsuit seeking damages for the removal of his fruit trees and clean up costs on his property.

CONCLUSION

For the foregoing reasons, we affirm that portion of the judgment sustaining

the peremptory exception raising the objection of *res judicata* as to those claims challenging the placement of CLECO's utility poles and seeking compensation for property use. We reverse that portion of the judgment sustaining the exception as to that part of the lawsuit seeking damages for tree destruction and clean up costs. We remand the case to the city court for proceedings consistent with this opinion. Costs of this appeal are assessed 50% to appellant, Charles Thibodeaux, and 50% to appellee, CLECO.

MOTION TO SUPPLEMENT DENIED; AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

STATE OF LOUISIANA

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CHARLES H. THIBODEAUX

VERSUS

CLECO CORPORATION

McCLENDON, J., concurs and assigns reasons.

I respectfully concur in the result based on the insufficiency of the record in this case as to the alleged settlement of the 2000 small claims action.