

2011 IL App. (1st) 100893-U

FIRST DIVISION
September 30, 2011

No. 1-10-0893

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

PBSS, INC.)	Appeal from the
)	Circuit Court of
Plaintiff -Appellant,)	Cook County.
)	
v.)	
)	No. 09 L 03880
COMMONWEALTH EDISON COMPANY,)	
)	Honorable
Defendant-Appellee.)	Allen S. Goldberg,
)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.

Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 Held: Dismissal of complaint against public utility for lack of subject matter jurisdiction was proper where the claim sought reparations for overcharging by the utility. Circuit court did not abuse its discretion by denying the motion for leave to file an amended complaint where the amendment did not correct the jurisdictional defect in the original complaint. Denial of the motion for reconsideration was proper where the court's application of the law to the facts was correct.

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¶ 2 The plaintiff, PBSS, Inc., filed a complaint against the defendant, Commonwealth Edison Company (ComEd), alleging violations of the Public Utilities Act (220 ILCS 5/1-101 *et seq.* (West 2008) (the Act)), the Consumer Fraud Act (815 ILCS 505/1 *et seq.* (West 2008)) and negligence. The complaint alleged that ComEd over billed the plaintiff, failed to properly maintain or replace its equipment for measuring electrical usage and failed to provide the electrical service for which it billed the plaintiff. The complaint sought damages for loss of its credit rating, damage to its reputation and to its business and sought more than \$30,000 in over billing charges.

¶ 3 Pursuant to section 2-619(1) of the Code of Civil Procedure (the Code), ComEd filed a motion to dismiss based on the lack of subject matter jurisdiction. 735 ILCS 5/2-619(1) (West 2008). The circuit court granted the motion and dismissed the complaint with prejudice. Following the denial of the plaintiff's motion for reconsideration and for leave to file an amended complaint, the plaintiff filed a timely notice of appeal.

¶ 4 On appeal, the plaintiff contends as follows: (1) the circuit court had subject matter jurisdiction over the complaint because the plaintiff was not challenging the rate charged by ComEd; (2) leave to file an amended complaint should have been allowed pursuant to section 2-616 of the Code (735 ILCS 5/2-616 (West 2008)); and (3) the motion to reconsider should have been granted because the circuit court misapplied the law to the facts alleged in the complaint. We affirm.

¶ 5 The following factual allegations are taken from the complaint. The plaintiff operates a gas station on property it owns at 3202 West Cermak Avenue, in the City of Chicago. When the

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plaintiff purchased the property in 2004, ComEd measured the electrical usage at the property using an analog electric meter. Until 2006, the plaintiff experienced no problems with ComEd's service, measurement of the service or billing for the service. In November 2006, ComEd changed from the analog electric meter to a recorded electric meter for measuring usage. Since that time, the plaintiff's electric bills almost tripled. The plaintiff's complaints that the measuring device was not working and that it was being over billed for electricity were ignored by ComEd. The plaintiff's own monitoring of the electric usage at the property revealed that it was being over billed by approximately \$3,000 per month.

¶ 6 The circuit court dismissed the complaint with prejudice for lack of subject matter jurisdiction. The court held that the Illinois Commerce Commission had exclusive jurisdiction where a complaint was based on overcharging by the utility. The court denied the plaintiff's motion for reconsideration, finding that the motion raised arguments that the court had previously considered or new arguments. The court also denied leave to amend the complaint because the plaintiff did not tender an amended complaint for the court to review.¹ This appeal followed.

ANALYSIS

I. Dismissal for Lack of Jurisdiction

A. *Standard of Review*

¶ 7 The court's review of a section 2-619 dismissal is *de novo*. *Van Meter v. Darien Park*

¹However, a copy of the proposed amended complaint was attached to the plaintiff's memorandum in support of its motion for reconsideration.

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District, 207 Ill. 2d 359, 368 (2003).

B. *Discussion*

¶ 8 Under sections 9-252 and 9-252.1 of the Act, the Illinois Commerce Commission (the Commission) has exclusive jurisdiction over complaints of excessive rates or overcharges by public utilities; courts have jurisdiction over those matters only on administrative review.

Village of Evergreen Park v. Commonwealth Edison Co., 296 Ill. App. 3d 810, 813 (1998). The plaintiff maintains that since its complaint does not challenge the rate ComEd charged, the circuit court had jurisdiction of the complaint pursuant to section 5-201 of the Act. Section 5-201 provides in pertinent part as follows:

"In case any public utility shall do, cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done either by any provisions of this Act or any rule, regulation, order or decision of the Commission, issued under authority of this Act, the public utility shall be liable to the persons or corporations affected thereby for all loss, damages or injury caused thereby or resulting therefrom, and if the court shall find that the act or omission was wilful, the court may in addition to actual damages, award damages for the sake of example and by the way of punishment. An action to recover for such loss, damage or injury may be brought in the circuit court by any person or corporation." 220 ILCS 5/5-201 (West 2008).

¶ 9 In determining whether a complaint falls within the jurisdiction of the Commission, courts focus on the nature of the relief sought rather than the basis for relief. *Sheffler v. Commonwealth*

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Edison Co., 399 Ill. App. 3d 51, 68 (2010), *aff'd*, No. 110166 (June 16, 2011).² If the complaint is for reparations, the Commission has jurisdiction; where the complaint is for civil damages, the circuit court may hear the case. *Sheffler*, 399 Ill. App. 3d at 68. In *Sheffler*, the court explained the difference as follows:

"A claim is for reparations when the essence of the claim is that a utility has charged too much for a service. [Citations.] In contrast, a claim is for civil damages when the essence of the claim is not that the utility has excessively charged, but rather that the utility has done something else to wrong the plaintiff. [Citations.]" *Sheffler*, 399 Ill. App. 3d at 69.

¶ 10 We disagree with the plaintiff's contention that its complaint does not implicate rates. The Act defines the term "rate" to include "every individual or joint rate, fare, toll, charge, rental or other compensation of any public utility *** and any rule, regulation, charge, practice or contract relating thereto." 220 ILCS 5/3-116 (West 2008). Pursuant to section 9-252, the Commission has exclusive jurisdiction over a complaint "concerning any rate or other charge of any public utility." 220 ILCS 5/9-252 (West 2008); see *Sheffler*, 399 Ill. App. 3d at 69 (the Commission's jurisdiction has been interpreted broadly based on "or other charge of any public utility" language of section 9-252).

¶ 11 The essence of the plaintiff's claim against ComEd is that he is being over billed for service due to a defective meter that ComEd refused to replace. Section 9-252.1 provides that "[w]hen a customer pays a bill as submitted by a public utility and the billing is later found to be

²Pending on supreme court rehearing docket, September 2011 term.

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incorrect due to an error either in charging more than the published rate or *in measuring the quantity or volume of service provided*, the utility shall refund the overcharge with interest ***without the need for a hearing and an order of the Commission. *Any complaint relating to an incorrect billing must be filed with the Commission no more than 2 years after the customer first has knowledge of the incorrect billing.*" (Emphasis added.) 220 ILCS 5/9-252.1. (West 2008).

¶ 12 The plaintiff's reliance on *Flournoy v. Ameritech*, 351 Ill. App. 3d 583 (2004), and *Gowdey v. Commonwealth Edison Co.*, 37 Ill. App. 3d 140 (1976) is misplaced as neither case involved an excessive or discriminatory rate. In *Flournoy*, the plaintiff stated a cause of action for consumer fraud where Ameritech was alleged to have deliberately terminated his collect calls after the charges had been accepted, resulting in multiple calling fees and surcharges to the plaintiff. In *Gowdey*, the plaintiffs were billed for the optional light bulb service regardless of whether they had requested the service. As the complaint did not concern the rates charged, the circuit court had jurisdiction.

¶ 13 Finally, the plaintiff relies on *Village of Deerfield v. Commonwealth Edison Co.*, 399 Ill. App. 3d 84 (2009), wherein the Second District Appellate Court held that "even where a complaint involves an actual charge on a customer's bill, the Commission does not have exclusive jurisdiction unless the basis of the complaint is that the charge is excessive or discriminatory." *Village of Deerfield*, 399 Ill. App. 3d at 88. In that case, the Village filed a complaint against ComEd alleging that ComEd's breach of its contract with the Village and violation of its statutory duty resulted in chronic power outages. In finding that the circuit court

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had jurisdiction, the second district determined that since the complaint alleged that power outages constituted deficient performance by ComEd rather than excessive or discriminatory rates, the Village's claim did not implicate rates. *Village of Deerfield*, 399 Ill. App. 3d at 89.

¶ 14 This court reached the opposite conclusion in *Sheffler*.³ Like *Village of Deerfield*, the plaintiff in *Sheffler* alleged claims against ComEd based on weather-related interruptions of service. Unlike *Village of Deerfield*, we concluded that the Commission had exclusive jurisdiction of the claim because the plaintiff's claims of inadequate service directly related to the Commission's rate-setting functions for electrical service. This court relied on the broad interpretation of the Commission's jurisdiction based on the reference in section 9-252 to rates or "other charge of any public utility," to find that claims based on interruptions of service due to weather conditions pertained to rates and were within the Commission's jurisdiction. *Sheffler*, 399 Ill. App. 3d at 69. In affirming the decision in *Sheffler*, the supreme court found that the court in *Village of Deerfield* erred in narrowly interpreting reparations as excluding any claims concerning service and overruled that part of the *Village of Deerfield* decision holding that a challenge to the adequacy of service can never be considered reparations. *Sheffler*, slip op. at 18-19.

¶ 15 We conclude that the plaintiff's claim was directly related to an alleged overcharge by

³The second district issued its opinion in *Village of Deerfield* on December 15, 2009; the supplemental opinion upon denial of rehearing was issued on March 30, 2010. This court's opinion in *Sheffler* was issued on February 26, 2010. The supreme court affirmed our decision in *Sheffler* on June 16, 2011.

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ComEd resulting from an alleged error in measuring the quantity of the electrical usage. Like *Sheffler*, the complaint in this case is based upon the provision of services by ComEd to the plaintiff. See *Sheffler*, slip op. at 19. Therefore, the plaintiff's complaint seeks reparations and is within the exclusive jurisdiction of the Commission.

¶ 16 We conclude that the circuit court correctly determined that it did not have subject matter jurisdiction over the complaint in this case.

II. Denial of Motion for Leave to Amend

A. *Standard of Review*

¶ 17 We review the denial of a motion for leave to file an amended complaint for an abuse of discretion. *Compton v. Country Mutual Insurance Co.*, 382 Ill. App. 3d 323, 331 (2008). An abuse of discretion will be found only if "the court acted arbitrarily without the employment of conscientious judgment, exceeded the bounds of reason and ignored recognized principles of law [citation] or if no reasonable person would take the position adopted by the court [citation]." *Popko v. Continental Casualty Co.*, 355 Ill. App. 3d 257, 266 (2005).

B. *Discussion*

¶ 18 The plaintiff contends that it was entitled to amend its complaint pursuant to section 2-616(a) of the Code (735 ILCS 5/616 (West 2008)). The intent of section 2-616(a) is to allow a plaintiff to amend a complaint so that the outcome of a case is decided on its substantive merit and not on pleading technicalities. *Keefe-Shea Joint Venture v. City of Evanston*, 364 Ill. App. 3d 48, 62 (2005). Generally, a party's request to amend is granted. *Keefe-Shea Joint Venture*, 364 Ill. App. 3d at 62.

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¶ 19 ComEd responds that after final judgment has been entered in a case, amendments are allowed only to conform the pleadings to the proof. *Compton*, 382 Ill. App. 3d at 332; 735 ILCS 5/616 (c) (West 2008). ComEd maintains that as the plaintiff requested leave to file an amended complaint after the circuit court had entered a final judgment in this case, the plaintiff had no statutory right to amend its pleadings.

¶ 20 Section 2-616(c) does not apply in this case because the order dismissing the complaint for lack of subject matter jurisdiction was not a final judgment, even though the order provided that the dismissal was "with prejudice." A dismissal based on a lack of jurisdiction is an exception to the rule that an involuntary dismissal operates as an adjudication on the merits. See Supreme Court Rule 273 (eff. ____). A dismissal for lack of subject matter jurisdiction is not an adjudication on the merits and is therefore "without prejudice." *Cohen v. Salata*, 303 Ill. App. 3d 1060, 1066 (1999).

¶ 21 Despite the policy favoring the allowance of amendments, the power to amend is not absolute. *Keefe-Shea Joint Venture*, 364 Ill. App. 3d at 62. To determine if a court abused its discretion in denying a motion to file an amended complaint, the reviewing courts looks at four factors: " (1) whether the proposed amendment would cure the defective pleading; (2) whether the parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleadings could be identified." *Keefe-Shea Joint Venture*, 364 Ill. App. 3d at 62. The plaintiff must satisfy all four factors; if the first factor fails, the remaining factors need not be considered. *Sheffler*, 399 Ill. App. 3d at 74.

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¶ 22 A review of the proposed amended complaint reveals that the plaintiff's claim remains one for reparations, not civil damages. The amended complaint did not establish the circuit court's jurisdiction, and therefore, the amendment did not correct the defect in the original complaint. The circuit court's denial of leave to amend was not an abuse of discretion.

III. Denial of Motion to Reconsider

A. *Standard of Review*

¶ 23 Where the motion to reconsider is based only on the allegation that the circuit court misapplied existing law, the *de novo* standard of review applies. *Compton*, 382 Ill. App. 3d at 330.

B. *Discussion*

¶ 24 The plaintiff's failure to cite any authority in support of its argument that the circuit court misapplied the law to the facts of this case forfeits this issue for review. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). Forfeiture aside, based on the law applied to the facts in this case, we concluded that dismissal of the complaint for lack of subject matter jurisdiction was correct. Therefore, denial of the motion for reconsideration was proper.

¶ 25 The orders of the circuit court dismissing the complaint for lack of subject matter jurisdiction, and denying reconsideration and leave to amend are affirmed.

¶ 26 Affirmed.

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