2012 IL App (2d) 120011-U
No. 2-12-0011
Order filed August 21, 2012

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

SECOND DISTRICT

TRYTON MACHINING TECHNOLOGIES, d/b/a TRYTON TECHNOLOGIES COMPANY and ALLIANCE MANUFACTURING, INC.,	)	Appeal from the Circuit Court Kane County.
Plaintiffs-Appellants,	)	
v.	)	No. 11-L-0406
COMMONWEALTH EDISON COMPANY,	)	Honorable Robert J. Morrow,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Schostok concurred in the judgment.

ORDER

Held: Because plaintiffs' complaint can properly be characterized as a complaint for civil damages, the trial court erred in dismissing plaintiffs' complaint on the basis that jurisdiction lay with the Illinois Commerce Commission. We reversed and remanded for further proceedings.

¶ 1 In 2011, plaintiffs, Tryton Machining Technologies, d/b/a Tryton Technologies Company. (Tryton). and Alliance Manufacturing, Inc. (Alliance) (collectively, plaintiffs), brought the current action against defendant, Commonwealth Edison Company. Plaintiffs alleged that defendant charged Tryton an incorrect transfer-of-service charge, and as a result, shut down plaintiffs' electrical

service for four days, until Tryton paid the charge. Plaintiffs further alleged that Alliance suffered $50,000 in damages as a result of lost electrical service. The trial court granted defendant's motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2010)) after concluding that the Illinois Commerce Commission (the Commission) had exclusive jurisdiction over plaintiffs' claims. Plaintiffs now appeal, and for the reasons set forth below, we reverse and remand for further proceedings.

¶ 2 I. Background

¶ 3 The following facts are gleaned from the pleadings. Tryton is an Illinois corporation that rented facilities at 400 Airport Road, Suite A, in Elgin. Alliance is an Illinois corporation with its principal place of business at the same location. Defendant provided electrical services to Tryton at that address, assigning Tryton account number 0546832080.

¶ 4 On May 27, 2009, defendant issued Tryton a billing statement to its account, showing a transfer-of-service charge totaling $52,436.27. On June 25, 2009, defendant issued Tryton another billing statement, indicating that the transfer-of-service charge resulted from transferring electical services from 1450 Arthur Avenue, Unit A, in Elk Grove Village in the amount of $52,436.27, and Tryton's May 27, 2009 billing statement reflected that charge. Thereafter, Tryton's president and corporate attorney notified defendant that Tryton never had an office located at 1450 Arthur Avenue, Unit A, in Elk Grove Village and was improperly assessed the transfer-of-service charge. Nonetheless, defendant shut off electrical service to Tryton at its Elgin facilities. Defendant required Tryton to pay the transfer-of-service fee in full in order for electrical service to be restored. Tryton paid the charge on the day defendant shut off electrical service to Tryton's Elgin facilities, but electrical service remained shut off for four days.

¶ 5 On July 26, 2011, plaintiffs filed their two-count complaint. Count I sought $52,426.27 on behalf of Tryton for the improper transfer-of-service charge, in addition to reasonable attorney fees and punitive damages. Count II alleged that Alliance, as a result of not having electrical services for four days, suffered $50,000 in damages, and sought actual damages, reasonable attorney fees and punitive damages.

¶ 6 On September 7, 2011, defendant moved to dismiss plaintiffs' complaint pursuant to section 2-619 of the Code. Defendant argued that plaintiffs' claims of improper charges and damages arising out of failing to pay the charges were within the exclusive jurisdiction of the Commission, plaintiffs' allegations were untimely, and plaintiffs failed to exhaust their administrative remedies. On November 30, 2011, the trial court entered an order granting defendant's motion after concluding that the Commission had exclusive jurisdiction over plaintiffs' claims. Plaintiffs timely appealed.

¶ 7 II. Discussion

¶ 8 The only issue in this appeal is whether the trial court erred in dismissing plaintiffs' complaint pursuant to section 2-619 of the Code. In support of its contention, plaintiffs argue that their complaint seeks civil damages, not reparations from defendant for excessive charges. Therefore, according to plaintiff, the trial court wrongly concluded that the Commission had exclusive jurisdiction over their claims. Defendant counters that plaintiffs are challenging an "overcharge" from defendant, and as a result, the Commission has exclusive jurisdiction. Therefore, defendant maintains that the trial court properly dismissed plaintiffs' complaint.

¶ 9 A motion to dismiss pursuant to section 2-619 of the Code admits the legal sufficiency of a complaint but raises defects, defenses, or other affirmative matters appearing on the face of the complaint or established by external submissions that defeat the action. 735 ILCS 5/2-619 (West

2008); *Zahl v. Kruppa*, 365 Ill. App. 3d 653, 657-58 (2006). A motion pursuant to section 2-619 admits all well-pleaded facts and reasonable inferences therefrom, and the motion should be granted only if the plaintiff can prove no set of facts that would support a cause of action. *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 277-78 (2003). When ruling on a motion pursuant to section 2-619, a court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party. *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 352 (2008). This court reviews *de novo* a section 2-619 order of dismissal. *Id.*

¶ 10 In *Village of Apple River v. Illinois Commerce Comm'n*, 18 Ill. 2d 518 (1960), our supreme court noted that the Commission "exists for the function of maintaining balance between the rates charged by utilities and the services performed." *Id.* at 523. The Commission has broad powers and can, on its own initiative, "promulgate orders, rules or regulations fixing adequate service standards and requiring adequate facilities." *Id.* Toward that end, section 9-252 of the Public Utilities Act (the Act) provides:

> "When complaint is made to the Commission concerning any rate or other charge of any public utility and the Commission finds, after a hearing, that the public utility has charged an excessive or unjustly discriminatory amount for its product, commodity or service, the Commission may order that the public utility make due reparation to the complainant therefor *** .
>
> * * *
>
> All complaints for the recovery of damages shall be filed with the Commission within 2 years from the time the produce, commodity, or service as to which complaint is made was furnished or performed *** ." 220 ILCS 5/9-252 (West 2010).

Pursuant to this statutory provision, Illinois law is well established that, because the legislature intended to provide a method by which reparations may be recovered and requiring an application be first made to the Commission, an action at law for such a reparation is precluded. *Sheffler v. Commonwealth Edison Co.*, 2011 IL 110166, ¶ 41 (citing *Terminal R.R. Ass'n of St. Louis v. Pubic Utilities Comm'n*, 304 Ill. 312, 317 (1922)). Conversely, section 5-201 of the Act provides:

> "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 acquired to be done either by any provisions of the [Act] or any rule, regulation, order or decision of the Commission *** the public utility shall be liable *** for all loss, damage or injury caused thereby or resulting therefrom *** ." 220 ILCS 5/5-201 (West 2010).

¶ 11 Pursuant to the foregoing, the gravamen of this appeal is whether plaintiffs' complaint can be properly characterized as a complaint for reparations pursuant to section 9-252 of the Act or for civil damages pursuant to section 5-201 of the Act. In resolving this issue, our supreme court has explained that "a claim is for reparations when the essence of the claim is that a utility has charged too much for a service, while a claim is for civil damages when the essence of the complaint is that the utility has done something else to wrong the plaintiff." *Sheffler*, 2011 IL 110166, ¶ 42 (citing *Flournoy v. Ameritech*, 351 Ill. App. 3d 583, 585 (2004)).

¶ 12 Review of prior case law provides further guidance in distinguishing a claim for reparations from a claim for damages under the Act. In *Sheffler*, the plaintiffs filed a complaint on behalf of a putative class against the defendant, Commonwealth Edison, seeking damages and injunctive relief for power outages to their homes following severe storms. *Sheffler*, 2011 IL 110166, ¶ 1. Specifically, the plaintiffs alleged negligence, claiming that the defendant had a duty to act as a

reasonably careful public utility in providing continuous service, and as a result of its failure to do so, the plaintiffs sustained damages in the form of spoiled food, water damage to walls, furniture, fixtures, appliances, furnace and water heaters, medical and electrical equipment, and repair costs. *Id.* ¶ 11. The plaintiffs further sought a temporary restraining order and a declaratory judgment. *Id.* ¶¶ 12-13. The supreme court affirmed the appellate court's determination that the Commission had exclusive jurisdiction over the plaintiffs' complaint, concluding that "it is clear that the relief sought by [the] plaintiffs goes directly to [the defendant's] service and infrastructure, which is within the Commission's original jurisdiction." *Id.* ¶ 50. Our supreme court further noted that "allowing [the] plaintiffs' claims to proceed in the [trial] court would place the [trial] court in the position of assessing what constitutes adequate service, and whether [the] defendant has fulfilled its responsibility for providing adequate service." *Id.* ¶ 53.

¶ 13 In *Fournoy v. Ameritech*, 351 Ill. App. 3d 583 (2004), the Illinois Appellate Court reached an opposite conclusion. In that case, the plaintiff, an inmate incarcerated at the Joliet Correctional Center, filed a complaint against the defendant, a telephone service provider, alleging fraud and negligence. *Id.* at 584. Plaintiff based his allegations on the theory that the defendant fraudulently collected multiple initial calling fees and surcharges from people he had made a collect phone call to by prematurely terminating his collect calls. *Id.* at 585-86. The defendant moved to dismiss the plaintiff's complaint, claiming that jurisdiction lay with the Commission, not the trial court. The trial court granted the motion. See *id.* at 585.

¶ 14 On appeal, the reviewing court reversed the trial court and held that it did have jurisdiction. In doing so, the court in *Flournoy* noted:

> "In this case, the essence of [the plaintiff's] claim is that [the defendant] deliberately terminated his collect telephone calls prematurely, forcing him to call the same person again. As a consequence, his family members were charged multiple surcharges and initial calling fees for accepting his collect calls. [The plaintiff] does not contest the actual rates charged as surcharges and initial calling fees, or claim those rates are excessive. Instead, his claim is that [the defendant] collected the surcharges multiple times due to its practice of prematurely terminating his collect calls. [The plaintiff] is seeking damages due to the alleged fraud and negligence that resulted in multiple surcharges and initial calling fees. Based on these circumstances, we find that [the plaintiff's] claim is for civil damages." *Id.* at 586.

¶ 15 Finally, defendant directs our attention to *Village of Evergreen Park v. Commonwealth Edison Co.*, 296 Ill. App. 3d 810 (1998). In *Evergreen Park*, the plaintiff contracted with the defendant, whereby the defendant agreed to furnish the plaintiff with lighting for municipal street lamps owned by the defendant pursuant to a tariff rate. *Id.* at 811. The defendant issued the plaintiff a monthly bill for each month for the equipment and electrical service. *Id.* at 811-12. In its complaint, the plaintiff alleged that an audit revealed that the defendant had charged it for municipal street lights that the defendant previously removed or otherwise had taken out of service. While the defendant agreed to prospectively reduce the monthly amount charged to the plaintiff, it refused to reimburse the plaintiff for erroneous charges the plaintiff had already paid. *Id.* at 812. The plaintiff's complaint sought relief based upon theories of unjust enrichment, fraud, and negligent misrepresentation, and the defendant moved to dismiss the complaint on the basis that the

Commission had exclusive jurisdiction. *Id.* The trial court granted the defendant's motion, finding that the plaintiff's theory of relief was based on an overcharge. *Id.*

¶ 16 On appeal, the reviewing court affirmed. In doing so, the reviewing court concluded:

> "[T]he plaintiff's claim in the instant case is not one of contract formation and misrepresentation and does not require inquiry into the nature of the parties' bargain, or more specifically, whether the plaintiff had contracted with the public utility to purchase certain services. *** Here, there is no question regarding the contractual relationship of the plaintiff and the defendant nor is there any question regarding the terms of their contract. *** [I]t is undisputed that the defendant agreed to provide and the plaintiff agreed to pay for municipal street lights under Tariff Rate 23 at the rates established under that tariff. The plaintiff's claim deals with the application of those rates and the charges incurred for lights cancelled by the plaintiff or disconnected or taken out of service by the defendant. Plaintiff's claim seeks recovery based upon alleged errors by the defendant in quantifying the number of lights in service." *Id.* at 815-16.

In reaching its determination, the court in *Evergreen Park* distinguished the matter before it from *Sutherland v. Illinois Bell*, 254 Ill. App. 3d 983 (1993). In *Sutherland*, the reviewing court found that the trial court had jurisdiction over the plaintiff's allegations that the defendant unlawfully charged her for inside wire service that she never ordered and for defective telephones that were improperly installed. *Sutherland,* 254 Ill. App. 3d at 993. The reviewing court concluded that the claims did not deal with "rates or charges *** which would require [the Commission's expertise]," but instead, the allegations were "ordinary claims for damages and injunctive relief for breach of contract,"

which were issues within the conventional experience of judges and typically within the competence of the courts. *Id.*

¶ 17 In the current matter, the circumstances as alleged in plaintiffs' complaint are analogous to the circumstances present in *Flournoy* and *Sutherland*, and therefore, we conclude that jurisdiction over plaintiffs' complaint lies with the trial court. Similar to the plaintiff in *Flournoy*, plaintiffs here are not contesting the actual rates defendant charged for electrical service, or claiming those rates were excessive. See *id.* Rather, plaintiffs allege that defendant charged Tryton a transfer-of-service charge from a location in Elk Grove Village that Tryton never occupied, shut off electrical service to Tryton's facilities in Elgin until Tryton paid the transfer-of-service charge, and did not restore electrical service to the facilities for four days despite Tryton paying the charge on the same day electrical services were shut off. In addition, Alliance, which has its principal place of business at Tryton's facilities, allegedly suffered $50,000 in damages as a result of electrical services being shut off for four days. Thus, the essence of plaintiffs' claims is that defendant required Tryton to compensate it for transferring electrical services from a building Tryton never occupied, and Alliance suffered resulting damages. As a result, plaintiffs' complaint is not based on rates of utilities or defendant's infrastructure, and unlike *Sheffler*, allowing plaintiffs' claims to proceed in the trial court will not require the trial court to assess what constitutes adequate service. See *Sheffler*, 2011 IL 110166, ¶ 53. Rather, the only issues that the trial court will have to resolve are whether defendant erred by billing Tryton for transferring electrical services from the Elk Grove Village address because Tryton never occupied that location, and if so, whether Alliance suffered damages as a result.

¶ 18 Moreover, the circumstances *Evergreen Park* are distinguishable. Here, plaintiff alleged that it never received electrical services from the Elk Grove Village address. Therefore, this is not a situation in which plaintiff is seeking recovery based on errors in quantifying the services it received at the location it contracted with defendant for defendant to provide electrical services. On the contrary, unlike *Evergreen Park*, there is a question regarding the contractual relationship between plaintiff and defendant—whether plaintiff ever contracted with defendant to receive electrical services at the Elk Grove Village address, and if not, whether defendant properly charged plaintiff for transferring electrical services from that location. Thus, at this stage of the proceedings, we find the circumstances here more analogous to *Sutherland* because, as previously discussed, resolving plaintiff's allegations will not require the Commission's special expertise in rate charges or adequacy of service. See *Sutherland*, 254 Ill. App. 3d at 993.

¶ 19 In sum, we believe that plaintiffs' allegations that defendant charged it for transferring electrical services from a location it never contracted to receive electrical services at and resulting damages is a claim for civil damages. Therefore, jurisdiction properly lies with the trial court, not the Commission. Accordingly, the trial court erred in dismissing plaintiffs' complaint.

¶ 20 III. Conclusion

¶ 21 For the foregoing reasons, the judgment of the circuit court of Kane County is reversed and this matter is remanded for further proceedings.

¶ 22 Reversed and remanded.