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SIXTH DIVISION
June 28, 2013

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SRT ENTERPRISES, INC., for Itself Individually and on)	Appeal from the
Behalf of Others Similarly Situated,)	Circuit Court of
)	Cook County.
Plaintiff -Appellant,)	
)	
v.)	No. 12 CH 3000
)	
DIRECT ENERGY BUSINESS, LLC,)	The Honorable
)	Franklin Valderrama,
Defendant-Appellee.)	Judge Presiding.

PRESIDING JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Gordon concurred in the judgment.

ORDER

¶ 1 HELD: Plaintiff's complaint was properly dismissed where jurisdiction to consider the challenges raised rested exclusively with the Illinois Commerce Commission.

¶ 2 Plaintiff, SRT Enterprises, Inc., for itself individually and on behalf of others similarly situated, appeals the trial court's dismissal of its lawsuit in favor of defendant, Direct Energy Business, LLC. Plaintiff contends the trial court erred in dismissing the lawsuit where it was not

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barred by the doctrine of collateral estoppel or, alternatively, where the Illinois Commerce Commission (Commission) did not have exclusive jurisdiction over the claims. Based on the following, we affirm.

¶ 3

FACTS

¶ 4 Plaintiff owns and operates a convenience store and gas station. Defendant provides electricity services as an alternative retail electric supplier (ARES). On February 26, 2009, the parties entered into a "PowerSupply Coordination Service Agreement." Section 4 of the agreement defines pricing, such that:

"The price per kWh to be paid by Buyer for the Services provided hereunder during the Term of this Agreement (the "Price") shall be that set forth in the Pricing Attachment. ***. Any sales taxes, transactional taxes or other governmental or regulatory imposed taxes or surcharges to which Buyer may be subject and all applicable SECA or other similar FERC mandated transmission charges are not included in the Price and shall be passed through to the Buyer in addition to the Price. The Price shall not include any charges for delivery services provided by the Host Utility; however, subject to Section 5 below, charges from the Host Utility for any delivery service charges shall also be included upon the Direct Energy invoice." (Emphasis added.)

Section 5 of the agreement provided that defendant's invoices to plaintiff would include fees for defendant's service as well as for ComEd's delivery service. In addition, section 11 of the agreement detailed the "event of termination," such that the parties were liable for "the payment

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by the owing Party of any sums due and owing to the other party for service rendered prior to the termination date, any Actual Damages, any indemnification or confidentiality obligation of either Party which has arisen hereunder and any other obligation hereunder which by its nature survives the termination of this Agreement."

¶ 5 On June 15, 2009, plaintiff received its first invoice from defendant containing charges labeled "customer charge," "standard metering charge," "distribution facility charge," "environmental cost adj," and "energy efficiency programs." On July 1, 2009, plaintiff terminated its service agreement with defendant. In response, defendant sent plaintiff two invoices for electricity services, including fees for "early termination."

¶ 6 On June 13, 2011, plaintiff filed a putative class action lawsuit alleging breach of contract and a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (Fraud Act) (815 ILCS 501/1 et seq. (West 2010)). Plaintiff claimed defendant failed to disclose fees for delivery services and improperly assessed an early termination fee. On July 21, 2011, the lawsuit was transferred to federal court. Defendant filed a motion to dismiss the suit, arguing that the federal court lacked jurisdiction to consider the case because the Commission had exclusive jurisdiction over plaintiff's claims. On December 20, 2011, the federal court granted defendant's motion to dismiss, finding jurisdiction to consider plaintiff's breach of contract and fraud claims was reserved exclusively for the Commission.

¶ 7 On January 27, 2012, plaintiff filed a second lawsuit in the circuit court again asserting claims for breach of contract and a violation of the Fraud Act. On March 1, 2012, defendant filed a combined motion to dismiss the second suit pursuant to section 2-619.1 of the Code of

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Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2010)) alleging the suit was barred by the federal court ruling (735 ILCS 5/2-619(a)(4) (West 2010)), the Commission had exclusive jurisdiction to resolve the claims (735 ILCS 5/2-619(a)(9) (West 2010)), and the complaint failed to state a claim upon which relief could be granted (735 ILCS 5/2-615 (West 2010)). On June 14, 2012, following oral arguments on the motion, the circuit court dismissed the action based on collateral estoppel pursuant to section 2-619(a)(4) of the Code. However, in "the eventuality that the matter goes up," the court also ruled on whether it had jurisdiction to consider plaintiff's claims. In so doing, the circuit court stated:

"This court finds that [plaintiff's] allegations are grounded in fact that [defendant] did not disclose certain charges in the Agreement and that there were overcharges. Section 16-115B of the [Illinois Public Utilities Act] [220 ILCS 5/16-115B (West 2010)] states that the [Commission] has exclusive jurisdiction to entertain and dispose of any complaint against an ARES where the alternative retail electric supplier has violated or is in nonconformance with the delivery services, tariff law, or any of its agreements related to the delivery of services with the electric utility.

I could go on, but essentially what this court is finding is that [at] the end of [the] day, this is a case that more closely resembles a reparations claim rather than a civil claim for damages, and as such the court finds that the jurisdiction is proper with the Commission. As far as the cases that are cited by the defendants [sic], the court did, in fact, examine those cases, and the court finds that those

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cases are distinguishable from this case, specifically in that in those cases, the issues in those cases and the damages sought in those cases, were in the nature of damages and not in the nature of reparations."

The circuit court entered a written ruling on August 17, 2012, granting defendant's motion to dismiss "for reasons stated on the record." This timely appeal followed.

¶ 8

DECISION

¶ 9 Plaintiff contends the circuit court erred in dismissing its complaint on the basis of collateral estoppel and for lack of subject matter jurisdiction.

¶ 10 We review de novo a dismissal pursuant to section 2-619.1 of the Code. *Cload v. West*, 328 Ill. App. 3d 946, 949 (2002). Because the circuit court did not dismiss plaintiff's complaint for failing to state a cause of action, we treat the dismissal pursuant to section 2-619 of the Code. When reviewing a motion to dismiss, this court accepts as true all well-pled factual allegations. *Thomas v. People Gas Light & Coke Co.*, 2011 IL App (1st) 102868, ¶ 12.

¶ 11

I. Jurisdiction

¶ 12 Because it is this court's sua sponte duty to establish our jurisdiction (*In re Barion S.*, 2012 IL App (1st) 113026, ¶ 34) and where we can affirm on any basis appearing in the record before us (*Ray Dancer, Inc. v. DMC Corp.*, 230 Ill. App. 3d 40, 50 (1992)), we address plaintiff's jurisdictional contention first.

¶ 13 Plaintiff contends the circuit court's finding that the Commission had exclusive jurisdiction over the complaint was incorrect because plaintiff does not contest defendant's rates or request reparations.

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¶ 14 The Commission's objective is to maintain a balance between the rates charged by utilities and the services performed by those utilities. *Sheffler v. Commonwealth Edison Co.*, 2011 IL 110166, ¶ 40. The Commission's exclusive jurisdiction for public utility services is described in section 9-252 of the Public Utilities Act (Act) (220 ILCS 5/9-252 (West 2010)). Section 9-252 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, with interest at the legal rate from the date of payment of such excessive or unjustly discriminatory amount.

If the public utility does not comply with an order of the Commission for the payment of money within the time fixed in such order, the complainant, or any person for whose benefit such order was made, may file in a circuit court of competent jurisdiction a complaint setting forth briefly the causes for which the person claims damages and the order of the Commission in the premises. Such action shall proceed in all respects like other civil actions for damages, except that on the trial of such action the order of the Commission shall be prima facie evidence of the facts therein stated. If plaintiff shall finally prevail, he or she shall be allowed a reasonable attorney's fee to be taxed and collected as part of the costs of the action.

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All complaints for 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, and a petition for the enforcement of an order of the Commission for the payment of money shall be filed in the proper court within one year from the date of the order. ***.

The remedy provided in this section shall be cumulative, and in addition to any other remedy or remedies this Act provided in case of failure of a public utility to obey a rule, regulation, order or decision of the Commission." Id.

¶ 15 In contrast to the Commission's jurisdiction, the jurisdiction of the circuit court for violations of the Act is described in section 5-201 of the Act (220 ILCS 5/5-201 (West 2010)).

Section 5-201 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 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 the 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 circuit court by any person or corporation."

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Id.

¶ 16 Accordingly, based on the Act, the Commission retains jurisdiction over claims submitted for reparations and the circuit court retains jurisdiction over claims submitted for civil damages.

Sheffler, 2011 IL 110166, ¶ 42. Reparation claims are those maintaining that a utility has overcharged for a service, while claims for civil damages are those maintaining that the utility has engaged in other conduct to wrong the plaintiff. Id. According to the Illinois Supreme Court, "[i]t has long been recognized that the 'evident intent and purpose of the legislature in providing a method by which reparation may be recovered and in requiring that an application therefor shall be first made to the commission, precludes an action at law for such reparation until the commission has heard a claim therefor.' " Id. at ¶ 41 (quoting Terminal R.R. Ass'n of St. Louis v. Public Utilities Comm'n, 304 Ill. 312, 317 (1922)).

¶ 17 In the case before us, the circuit court determined that the Commission had jurisdiction to consider plaintiff's complaint. In so doing, the circuit court cited section 16-115B of the Act, which provides:

"The Commission shall have jurisdiction in accordance with the provision of Article X of this Act to entertain and dispose of any complaint against any alternative retail electric supplier alleging (i) that the alternative retail electric supplier has violated or is in nonconformance with any applicable provisions of Section 16-115 through Section 16-115A; (ii) that an alternative retail electric supplier serving retail customers having maximum demands of less than one megawatt has failed to provide service in accordance with the terms of its contract

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or contracts with such customer or customers; (iii) that the alternative retail electric supplier has violated or is in non-conformance with the delivery services tariff of, or any of its agreements relating to delivery services with, the electric utility, municipal system, or electric cooperative providing delivery services; or (iv) that the alternative retail electric supplier has violated or failed to comply with the requirements of Section 8-201 through 8-207, 8-301, 8-505, or 8-507 of this Act as made applicable to alternative retail electric suppliers." 220 ILCS 5/16-115B (West 2010).

¶ 18 Section 16-115A of the Act, in relevant part, provides:

"(e) An alternative retail electric supplier shall comply with the following requirements with respect to the marketing, offering and provision of products or services to residential and small commercial retail customers:

- (i) Any marketing materials which make statements concerning prices, terms and conditions of service shall contain information that adequately discloses the prices, terms and conditions of the products or services that the alternative retail electric supplier is offering or selling to the customer.
- (ii) Before any customer is switched from another supplier, the alternative retail electric supplier shall give the customer written information that adequately discloses, in plain language, the prices, terms and conditions of the products and services being offered and

sold to the customer." 220 ILCS 5/16-115A(e) (West 2010).

¶ 19 The issue before this court is whether the circuit court was the proper venue to consider plaintiff's complaint. Our analysis requires us to interpret the relevant statutes. The primary goal of statutory interpretation is to determine and give effect to the intent of the legislature.

Wernikoff v. RCN Telecom Services of Illinois, Inc., 341 Ill. App. 3d 89, 95 (2003). The best method to determine legislative intent is to apply the plain meaning of the language provided in the statute. *Id.*

¶ 20 Plaintiff characterizes its suit as one for civil damages properly brought before the circuit court pursuant to section 5-201 of the Act. Plaintiff maintains defendant engaged in deceptive practices in violation of the parties' contract and in violation of the Fraud Act where it failed to disclose the fees related to ComEd's delivery services and improperly imposed an early termination fee. In support of its position, plaintiff cites *Thomas*, 2011 IL App (1st) 102868, *Flournoy v. Ameritech*, 351 Ill. App. 3d 583 (2004), and *Sutherland v. Illinois Bell*, 254 Ill. App. 3d 983 (1993).

¶ 21 In *Thomas*, this court found that the circuit court had jurisdiction to consider the plaintiff's complaint alleging that the defendant utility wrongfully attempted to collect a debt that had been discharged in the plaintiff's bankruptcy proceeding. *Thomas*, 2011 IL App (1st) 102868, ¶ 22. The court disagreed with the defendant that the plaintiff's claim was essentially for an overcharge, instead finding that the claim was for an unlawful charge, which had nothing to do with the utility's infrastructure, adequacy of service, or rate structure and did not involve the expert consideration of complex technological or scientific data requiring the expertise of the

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Commission. *Id.*

¶ 22 In *Flournoy*, the appellate court found the circuit court had jurisdiction over the plaintiff's claim that the defendant utility fraudulently collected multiple initial calling fees by repeatedly interrupting his collect calls made from prison only minutes after they were accepted, thereby forcing him to make more collect calls and pay more fees. *Flournoy*, 351 Ill. App. 3d at 584. The court stated that the plaintiff's claim was not for reparations where he had never contested the actual rates or fees, but rather alleged the defendant fraudulently or negligently created the needless additional charges. *Id.* at 586.

¶ 23 In *Sutherland*, the appellate court found the circuit court had jurisdiction over the plaintiff's claim that she had been charged by the defendant utility for services never ordered. *Sutherland*, 254 Ill. App. 3d at 993. The court explained that the plaintiff never alleged the defendant's rates themselves were inadequate or unfair, but rather that she was charged for services that either were "unordered, inadequate, or ambiguously billed." *Id.*

¶ 24 The case before us, however, involves an ARES. Sections 16-115A and 16-115B of the Act provide specific causes of action and remedies for plaintiff's claims. As a result, the statutory claim supersedes any common law claim based on the same facts. *Sheffler*, 2011 IL 110166 at ¶ 41; *Terminal R.R. Ass'n of St. Louis*, 304 Ill. at 317; see *Wernikoff*, 341 Ill. App. 3d at 95. Moreover, unlike the plaintiffs in *Thomas*, *Flournoy*, and *Sutherland*, plaintiff in this case contests defendant's infrastructure/rate structure, the propriety of defendant's fees alleged to be undisclosed, and the fairness of imposing the contested costs and fees.

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¶ 25 Plaintiff has filed two separate complaints alleging breach of contract. Section 16-115B of the Act, therefore, expressly covers plaintiff's claim assuming its electricity demand is less than a megawatt, which is unclear from the record before us, where the statute provides "the Commission shall have jurisdiction" for any complaint against an ARES alleging "that an [ARES] serving retail customers having maximum demands of less than one megawatt has failed to provide service in accordance to the terms of its contract or contracts." (Emphasis added.) 220 ILCS 5/16-115B(a)(ii) (West 2010); see *Siegel v. Lake County Officers Electoral Board*, 385 Ill. App. 3d 452, 458 (2008) (legislative language containing the word "shall" is typically interpreted to be mandatory).

¶ 26 Moreover, sections 16-115A and 16-115B further control where plaintiff's complaint alleged that the charges and fees imposed were not disclosed prior to the parties entering the agreement. Specifically, section 16-115A provides "[b]efore any customer is switched from another supplier, the [ARES] shall give the customer written information that adequately discloses, in plain language, the prices, terms and conditions of the products and services being offered and sold to the customer." (Emphasis added.) 220 ILCS 5/16-115A(e)(ii) (West 2010). Then, section 16-115B provides "the Commission shall have jurisdiction" over complaints against an [ARES] alleging "that the [ARES] has violated or is in nonconformance with any applicable provisions of Section 16-115 through Section 16-115A." (Emphasis added.) 220 ILCS 5/16-115B(a)(i) (West 2010); see *Siegel*, 385 Ill. App. 3d at 458 (legislative language containing the word "shall" is typically interpreted to be mandatory).

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¶ 27 Because plaintiff essentially raised a reparation claim for overcharges by challenging defendant's infrastructure/rate structure of passing the delivery fees to plaintiff, the propriety of defendant's undisclosed fees, and the fairness of imposing the contested costs and fees, we conclude that the Commission had jurisdiction to consider plaintiff's complaint. See *Chiku Enterprises Inc. v. GDF SUEZ Energy Resources NA, Inc.*, 2011 WL 1474049 (Ill. C.C. 2011). The fact that plaintiff identified its causes of action in terms of seeking civil damages does not automatically impose the jurisdiction of the circuit court. *Village of Evergreen Park v. Commonwealth Edison Co.*, 296 Ill. App. 3d 810, 816-17 (1998).

¶ 28 II. Collateral Estoppel

¶ 29 Based on our finding that the circuit court did not have jurisdiction to consider plaintiff's complaint, we need not consider plaintiff's collateral estoppel contention.

¶ 30 CONCLUSION

¶ 31 We conclude plaintiff's complaint was properly dismissed.

¶ 32 Affirmed.