2012 IL App (2d) 120279-U
No. 2-12-0279
Order filed September 18, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WOODLAKE APARTMENTS, Plaintiff-Appellant, v. COMMONWEALTH EDISON COMPANY, Defendant-Appellee.	)))))))))	Appeal from the Circuit Court of Winnebago County. No. 11-L-270 Honorable J. Edward Prochaska, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Hudson concurred in the judgment.

ORDER

Held: The trial court erred in dismissing plaintiff's complaint for lack of subject-matter jurisdiction: plaintiff's complaint did not set out a claim for "reparations" (for utility service that was either inadequate or improperly priced), which claim would have been within the exclusive jurisdiction of the Illinois Commerce Commission; instead, plaintiff sought only civil damages for defendant's alleged failure to bill the responsible party.

¶ 1 Plaintiff, Woodlake Apartments, appeals the dismissal of its complaint against defendant, Commonwealth Edison. See 735 ILCS 5/2-619.1 (West 2010). We reverse and remand.

¶ 2 Plaintiff's complaint alleged as follows. Plaintiff owns an apartment complex in Loves Park. Plaintiff agreed to pay defendant to supply electricity to complex's parking lot and laundry room,

and it has always paid on time. The apartments have separate electricity connections, and plaintiff never agreed to pay for electrical service to any of the units. However, defendant had terminated service to the parking lot and the laundry room, solely because the tenant in unit 9 of the complex had been delinquent in paying "rent."[1] Plaintiff had advised defendant of its billing error and had demanded the resumption of service to the parking lot and the laundry room, but defendant continued to withhold service to those areas. Plaintiff sought $5,000 in actual damages and $95,000 in punitive damages for defendant's wrongful termination of service.

¶ 3 Plaintiff filed, as an exhibit, a copy of a letter dated August 16, 2011, from its attorney, Kenneth F. Ritz, to defendant's customer service department. Ritz's letter stated as follows. Defendant claimed that plaintiff owed it $1,711.65, and it had served plaintiff with a final notice of disconnection even though plaintiff had never received any bills for the services for which defendant had demanded payment. A statement of charges that defendant sent to another attorney for plaintiff disclosed that the charges were not plaintiff's liability but had been incurred by the tenant in unit 9.

¶ 4 Defendant moved to dismiss the complaint on three grounds. The first was that, under the Public Utilities Act (Act) (220 ILCS 5/1-101 *et seq*. (West 2010)), jurisdiction over plaintiff's claim rested exclusively with the Illinois Commerce Commission (Commission). Defendant relied on section 9-252 of the Act, which reads, as pertinent here:

> "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

[1]It appears that plaintiff meant "charges for electricity."

> therefor, with interest at the legal rate from the date of payment of such excessive or unjustly discriminatory amount.
>
> ***
>
> All complaints for the recovery of damages shall be filed with the Commission within 2 years from the time the produce [*sic*], 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 within the proper court within one year from the date of the order ***." 220 ILCS 5/9-252 (West 2010).

Defendant denied that the complaint could be heard by the trial court per section 5-201 of the Act, which reads, as pertinent here:

> "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 ***. 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 2010).

Defendant cited *Sheffler v. Commonwealth Edison Co.*, 2011 IL 110166, for the proposition that, because plaintiff's complaint sought relief involving defendant's service and infrastructure, the matter was within the Commission's exclusive jurisdiction.

¶ 5 Defendant's motion contended second that the complaint must be dismissed because plaintiff had failed to exhaust its administrative remedies. Relying on its exclusive-jurisdiction argument, defendant reasoned that, under the Act, complaining customers must follow the Commission's prescribed dispute-resolution procedure and that this remedy is exclusive.

¶ 6 Defendant's motion contended third that plaintiff's complaint did not plead facts that would support a recognized cause of action. Defendant asserted that, although plaintiff had sought relief based on negligence, it had not alleged facts that would establish the elements of such a claim: a duty, the breach of that duty, and damages proximately caused by the breach.

¶ 7 Plaintiff filed a response, but it is not included in the record on appeal.

¶ 8 The trial court granted defendant's motion to dismiss. The court's written order described the motion as one to dismiss "for lack of subject matter jurisdiction" but did not directly specify the grounds on which the court relied. Plaintiff moved to reconsider, arguing that *Sheffler* held that the Commission has exclusive jurisdiction of a claim for "reparations," which is based on the allegation that a utility has charged a customer too much. Plaintiff explained that it conceded that the charges at issue were not excessive and was contending only that defendant had charged the wrong party. The trial court denied the motion to reconsider, and plaintiff timely appealed.

¶ 9 On appeal, plaintiff contends that, under *Sheffler*, the Commission's exclusive jurisdiction is limited to claims for "reparations," which are based on the allegation that a utility has charged too much for service. Plaintiff notes its concession that defendant's charges were reasonable for the service that was provided; it asserts only that somebody else owes them. Defendant responds that the complaint alleges an overcharge and thus should be heard by the Commission, not the trial court.

¶10 We review *de novo* a dismissal under section 2-619.1 of the Code of Civil Procedure (Code). *Cload v. West*, 328 Ill. App. 3d 946, 949 (2002). Here, although the trial court did not explain its ruling in depth, both the court's judgment and plaintiff's motion to reconsider strongly implied that the court ruled on the jurisdictional issue only and did not consider whether the complaint stated a cause of action for negligence. Moreover, defendant does not urge affirming on the ground that the complaint failed to state a cause of action for negligence. Therefore, we treat the dismissal as one under section 2-619(a)(1) of the Code (735 ILCS 5/2-619(a)(1) (West 2010)) for lack of subject-matter jurisdiction. (As defendant's exhaustion-of-remedies ground for dismissal derived from its exclusive-jurisdiction ground, we see it as lacking independent significance.) We consider whether the trial court correctly held that the Commission has exclusive jurisdiction of the subject matter of plaintiff's complaint.

¶ 11 In *Sheffler*, the supreme court addressed the scope of the Commission's exclusive jurisdiction. There, the plaintiffs, who had suffered from power outages following a severe storm, filed a five-count third amended complaint against defendant. The first three counts alleged, respectively, that defendant's negligence had caused service interruptions; that defendant had violated the Act; and that defendant had breached its contracts to provide continuous service. The fourth count sought injunctive relief for certain customers who relied on defendant's electricity for life support systems; and the fifth count alleged that defendant had committed statutory consumer fraud (see 815 ILCS 505/1 *et seq*. (West 2006)). *Sheffler*, 2011 IL 110166, ¶¶ 1-15. On the defendant's motion, the trial court dismissed the complaint. The appellate court affirmed, holding that the complaint essentially alleged that defendant had not provided adequate service under the Act and that deciding what constituted adequate service and whether defendant had met its statutory

obligations was for the exclusive jurisdiction of the Commission. *Sheffler v. Commonwealth Edison Co.*, 399 Ill. App. 3d 51, 69 (2010). The court also held that the claim for damages was barred by the tariff that defendant had filed with the Commission. *Id*. at 72-73.

¶ 12 The plaintiffs appealed the dismissal of the counts that sought damages. After holding that these counts were barred by the tariff (2011 IL 110166, ¶ 34), the court then held that they were also barred by the exclusive-jurisdiction rule, because plaintiffs were seeking "reparations" as opposed to "civil damages" (*id*. ¶ 42). "[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." *Id*. (citing *Flournoy v. Ameritech*, 351 Ill. App. 3d 583, 585 (2004)). The plaintiffs' claims were in the first category, because the relief sought went "directly to [defendant's] service and infrastructure, which is within the Commission's original jurisdiction." *Id.* ¶ 50. The plaintiffs were seeking compensation for defendant's "allegedly inadequate service, which directly relates to the Commission's rate-setting functions for electrical power services." *Id*. ¶ 53.

¶ 13 We conclude that this case is dissimilar from *Sheffler* and more akin to cases in which the reviewing courts have held that complaints could be brought in the trial court because they sought civil damages and not reparations. In *Flournoy*, cited with favor in *Sheffler*, the court held that the trial court had jurisdiction over a claim that the defendant utility fraudulently collected multiple initial calling fees from plaintiff, a prisoner, by repeatedly cutting off his collect phone calls only minutes after they were accepted, thus forcing him to make more collect calls. *Flournoy*, 351 Ill. App. 3d at 584. The court explained that the plaintiff's claim was not for reparations, because he had never contested the actual rates or fees but had claimed only that the defendant had fraudulently

or negligently created those needless charges. *Id*. at 586. In *Sutherland v. Illinois Bell*, 254 Ill. App. 3d 983 (1993), the court held that the trial court had jurisdiction over the plaintiff's claim that she had been charged for services that she had never ordered. As has plaintiff here, the plaintiff never contended that the rates themselves were inadequate or unfair; she contended instead that she was charged for services that were either "unordered, inadequate, or ambiguously billed.' " *Id*. at 993.

¶ 14 To the extent that *Sutherland* held that the claim that the utility's services were inadequate was within the trial court's jurisdiction, it might be dubious now in view of *Sheffler*'s statement that the adequacy of service and the propriety of the charges for that service are essentially intertwined. However, *Sutherland* appears untouched insofar as it concerns a claim that a customer was billed for service that she never ordered. Further, in *Thomas v. Peoples Gas Light & Coke Co.*, 2011 IL App (1st) 102868, postdating *Sheffler*, the court held that the trial court had jurisdiction of a complaint alleging that the defendant utility wrongfully attempted to collect a debt that had been discharged in the plaintiff's bankruptcy proceeding. The court disagreed with the defendant that the claim was within the Commission's exclusive jurisdiction because it alleged an overcharge: the plaintiff claimed not an "overcharge" but "an unlawful charge," which had "nothing to do with the utility's infrastructure, adequacy of service, or rate structure." *Id.* ¶ 22. Resolving the issue would not require "the expert consideration of complex technological and scientific data." *Id*.

¶ 15 Here, plaintiff has never contended that the service at issue was overpriced or inadequate. Instead, plaintiff contends only that, *after* providing satisfactory service at a reasonable price to the tenant in unit 9, defendant mistakenly billed plaintiff. Deciding that claim would not implicate the expertise or policy-making prerogatives of the Commission, as the relationship between the quality of the electrical service provided and the charges for the service is nowhere involved. The trial court

will not need to decide what constitutes inadequate service or what is a proper charge. Instead, reminiscent of *Sutherland* and *Smith*, it will be resolving a claim of generic bureaucratic negligence—a billing error. Therefore, the action should be allowed to proceed in the trial court.

¶ 16 Defendant's motion to dismiss asserted in part that plaintiff's contention that defendant unlawfully terminated its service because of a billing error is "a topic specifically addressed by [Commission] regulations." See 83 Ill. Adm. Code §§ 280.20, 280.50, 280.90, 280.160. The motion did not specify the import of this fact or explain the provisions. On appeal, defendant does not invoke these provisions. We note here that, aside from the first provision, a general statement of the scope of section 280 of the Illinois Administrative Code, the provisions govern such matters as utilities' billing practices and discontinuation of service (83 Ill. Adm. Code § 280.50); treatment of past-due bills (83 Ill. Adm. Code § 280.90); and permissible responses to customers' disputes (83 Ill. Adm. Code § 280.160).

¶ 17 Of course, the content of the provisions is irrelevant to the issue of whether the trial court has exclusive jurisdiction, an issue of statutory construction that requires judicial resolution. Defendant cannot very well contend that the Commission's regulations overrule *Sheffler* or other case law. Also, under section 5-201 of the Act, the trial court has jurisdiction over a claim that a utility has caused the plaintiff "damages" by doing "any act *** forbidden *** either by any provisions of this Act or any rule, regulation, order or any rule, regulation, order or decision of the Commission." 220 ILCS 5/5-201 (West 2010). That the Commission's regulations in some way address the subject matter of the complaint thus does not imply that the Commission has exclusive jurisdiction over it.

¶ 18 For the foregoing reasons, the judgment of the circuit court of Winnebago County is reversed, and the cause is remanded.

¶ 19 Reversed and remanded.