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2016 IL App (3d) 150835-U

Order filed November 9, 2016

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2016

GRAHAM HARTUNG,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellant,	)	Will County, Illinois.
	)	
v.	)	
	)	Appeal No. 3-15-0835
COMMONWEALTH EDISON COMPANY,	)	Circuit No. 14-L-648
an Illinois Corporation; CORINA ZAMUDIO,	)	
Individually and as an Agent of Commonwealth	)	
Edison Company; KATHRYN SUGRUE,	)	
Individually and as an Agent of Commonwealth	)	
Edison Company,	)	
	)	Honorable Michael J. Powers,
Defendants-Appellees.	)	Judge, Presiding.

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JUSTICE SCHMIDT delivered the judgment of the court.  
Presiding Justice O'Brien and Justice Holdridge concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court did not err in granting defendant's motion to dismiss. The Illinois Commerce Commission has exclusive jurisdiction over plaintiff's Public Utilities Act claim.

¶ 2 Following a power outage at his home in Crete, Illinois, plaintiff, Graham Hartung, filed a complaint against defendant, Commonwealth Edison Company (ComEd), seeking

compensatory and punitive damages. Plaintiff's first amended complaint alleged that ComEd had violated the Public Utilities Act (Act) (220 ILCS 5/1-101 *et seq.* (West 2014)). The circuit court dismissed plaintiff's first amended complaint with prejudice; plaintiff appeals. On appeal, plaintiff argues that the court erred in finding it lacked subject matter jurisdiction over his claim. We affirm.

¶ 3

### FACTS

¶ 4

On June 30, 2014, a storm passed through Crete, Illinois, that resulted in the loss of electrical power to plaintiff's home. Upon notifying ComEd of the power outage, plaintiff learned that the power lines on his property were privately owned (*i.e.*, not owned by ComEd) and that ComEd had no duty to repair them.

¶ 5

After speaking with a ComEd engineer and determining that the price difference between an overhead and an underground transformer was approximately \$600 to \$800, plaintiff decided to convert his property from overhead to underground service. ComEd notified plaintiff it would perform the conversion but, for cost reasons, plaintiff chose to hire a third-party contractor to perform the conversion.

¶ 6

On August 4, 2014, plaintiff entered into a private contract with Ken Klausner of Contractors Power & Light to install underground electrical service on his property. The contract presupposed that ComEd would deliver a transformer prior to the start of work.

¶ 7

That same day, plaintiff e-mailed his Contractors Power & Light contract to ComEd agent Corina Zamudio and inquired as to what steps he needed to take to obtain a transformer. Klausner also e-mailed Zamudio to request that ComEd expedite delivery of the transformer so that plaintiff's service could be restored by August 11, 2014.

¶ 8 On August 5, 2014, Zamudio notified plaintiff that she would be sending him a customer work agreement. Plaintiff did not hear from Zamudio or any other ComEd agent for the next 11 days. On August 16, 2014, plaintiff received the work agreement from Zamudio. The work agreement included charges totaling \$5,362.41 and stated that payment was due in full before the beginning of work. Of the total amount, \$707.79 was for the cost difference between an overhead and an underground transformer. The remaining \$4,654.62 was for “requested installation.”

¶ 9 Plaintiff immediately e-mailed Zamudio stating that the customer work agreement included unnecessary charges and that ComEd had previously quoted him \$600 to \$800 for the work. Zamudio e-mailed plaintiff back stating that the work agreement was correct, and that ComEd would proceed with the work as soon as it received payment in full.

¶ 10 On August 27, 2014, plaintiff filed a complaint in the circuit court of Will County. Plaintiff’s complaint included six counts: count I (Violation of the Act); count II (Tortious Interference with a Contract); count III (Breach of Contract (Transformer)); count IV (Unjust Enrichment); count V (Breach of Contract (General Repairs)); count VI (Intentional Infliction of Emotional Distress).

¶ 11 On December 14, 2014, ComEd moved to dismiss plaintiff’s complaint pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2014)). On January 30, 2015, the circuit court granted ComEd’s motion, dismissing counts IV, V, and VI with prejudice, and dismissing counts I, II, and II without prejudice.

¶ 12 On February 27, 2015, plaintiff filed his first amended complaint, alleging a violation of the Act (hereinafter referred to as plaintiff’s PUA claim) and tortious interference with a contract. In support of his PUA claim, plaintiff alleged that under the Act, ComEd had a duty to

provide its services without discrimination and without delay (220 ILCS 5/8-101 (West 2014)). He claimed ComEd's refusal to deliver the transformer until he paid \$5,362.41 constituted a violation of its own tariff and a willful breach of its duties under the Act.

¶ 13 Plaintiff specifically alleged: (1) Zamudio unreasonably delayed providing a customer work agreement for 11 days; (2) ComEd's own duly-filed tariff required it to furnish transformers to its residential retail customers for free or, at most, the price it had quoted to him; (3) ComEd's University Park office did not even attempt to apply its own schedules and tariffs to calculate the appropriate charge for the transformer; and (4) it would be impossible that ComEd would need to expend \$4,654,62 in labor in relation to "requested installation" of the transformer, as Ken Klausner had already completed the work to prepare the transformer pad and was qualified—and contractually obligated—to participate in connecting the transformer.

¶ 14 The tariff that plaintiff refers to in his complaint states:

“Residential Service Stations

For a situation in which the electric power and energy requirements of a residential retail customer preclude the use of community facilities, standard transformation is provided via a residential service station located on such residential retail customer's premises. A residential service station includes the land, enclosures, foundations, structures, poles, vaults, transformer, and related facilities necessary to make such transformation. *The Company furnishes, installs, operates, replaces and maintains a pole-mounted, ground-type, or vault-type transformer and related electrical equipment, as applicable and consistent with good*

engineering practice, for such residential retail customer. The residential retail customer must furnish, install, own, operate, replace, and maintain (a) an acceptable location on its premises for the residential service station, and as required, (b) the poles, concrete foundations, fences, structures, fireproof enclosures, ventilation, lighting, barriers, locks, drainage facilities, sump pumps, and any other required facilities in accordance with applicable electric, safety, and local codes and Company specifications.” (Emphasis added.) ILL. C. C. No. 10 2nd Revised Sheet No. 165 (Canceling Original Sheet No. 165).

¶ 15 As a result of these alleged violations, plaintiff claimed that he and his family had suffered damages including: the loss of the use of their home, separation from their pets, marital and family friction, increased commuting costs, alternate living arrangements costs, flooding, mold, and other property damages, lost wages, embarrassment before their coworkers and associates, and mental and emotional suffering.

¶ 16 On March 30, 2015, ComEd moved to dismiss plaintiff’s first amended complaint pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2014)). Specifically, ComEd asserted that the circuit court lacked subject matter jurisdiction over plaintiff’s PUA claim (735 ILCS 5/2-619 (West 2014)), and that both claims were insufficiently pled (735 ILCS 5/2-615 (West 2014)).

¶ 17 With regard to the PUA claim, ComEd argued that the Commission had exclusive jurisdiction pursuant to section 9-252 of the Act (220 ILCS 5/9-252 (West 2014)) because the claim dealt with ComEd’s rates and services. In response, plaintiff argued that his PUA claim

was not about the adequacy of ComEd’s services; ComEd had attempted to extort him by charging over \$5,000 for a transformer it had a duty to supply for free.

¶ 18 On May 22, 2015, the circuit court granted ComEd’s motion to dismiss. The court agreed that it lacked subject matter jurisdiction over plaintiff’s PUA claim and dismissed it with prejudice. The court dismissed plaintiff’s tortious interference claim without prejudice, and granted him leave to replead. On June 26, 2015, plaintiff filed his second amended complaint, realleging his tortious interference claim. ComEd, again, moved to dismiss, and on November 6, 2015, the court dismissed plaintiff’s second amended complaint with prejudice.

¶ 19 Plaintiff appealed.

¶ 20 ANALYSIS

¶ 21 The sole issue on appeal is whether the circuit court erred in finding that the Commission has exclusive jurisdiction over plaintiff’s PUA claim. We review a circuit court’s dismissal for lack of subject matter jurisdiction *de novo*. *Sheffler v. Commonwealth Edison Co.*, 2011 IL 110166, ¶ 23.

¶ 22 The Illinois General Assembly enacted the Public Utility Act in 1986 to ensure that public utilities in Illinois provide “adequate, efficient, reliable, environmentally safe, and least-cost public utility services at prices which accurately reflect the long-term cost of such services and which are equitable to all citizens.” 220 ILCS 5/1-102 (West 2014). To achieve this goal, the legislature created the Commission and charged it with “general supervision of all public utilities.” 220 ILCS 5/4-101 (West 2014). Pursuant to the Act, the Commission is the administrative body responsible for setting the rates utilities charge their customers and ensuring that these rates are “just and reasonable.” *United Cities Gas Co. v. Illinois Commerce Comm’n*, 163 Ill. 2d 1, 23-24 (1994); 220 ILCS 5/9-201(c) (West 2014).

¶ 23 Section 9-252 of the Act grants the Commission exclusive jurisdiction to hear complaints concerning excessive rates or charges of public utilities. 220 ILCS 5/9-252 (West 2014).

Section 9-252 specifically 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.” 220 ILCS 5/9-252 (West 2014).

¶ 24 In contrast, section 5-201 of the Act provides the circuit courts with jurisdiction for violations outside the realm of “reparations.” Section 5-201 specifically 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 \*\*\* 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 2014).

¶ 25 Taken together, these sections of the Act provide that a claim for reparations lies within the Commission’s jurisdiction while a claim for civil damages lies within the circuit court’s jurisdiction. *Scheffler v. Commonwealth Edison Co.*, 2011 IL 110166, ¶ 42. In determining whether a claim is for reparations or civil damages, courts must “focus on the nature of the relief sought rather than the basis for seeking relief.” *Id.* at ¶ 50. Generally, “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.* at ¶ 42 (citing *Flournoy v. Ameritech*, 351 Ill. App. 3d 583, 585 (2004)).

¶ 26 In *Pusateri v. The Peoples Gas Light & Coke Co.*, 2014 IL 116844, our supreme court provided guidance on this issue. There, the plaintiff had filed a complaint under the False Claims Act, alleging that the defendant company had used falsified gas leak response records to justify a fraudulently inflated natural gas rate before the Commission. On appeal, the supreme court held that the circuit court lacked subject matter jurisdiction over plaintiff’s claim. It explained, “Though the remedy [the plaintiff] seeks is a mix of penalty and damages, the sole reason the alleged falsehoods might be actionable under the False Claims Act is that they would have induced the State to pay too much for [the defendant’s] natural gas.” *Id.* ¶ 19. Thus, at its heart, the plaintiff’s claim was one for reparations, putting it within the exclusive, original jurisdiction of the Commission.

¶ 27 Here, plaintiff argues that the circuit court had jurisdiction over his PUA claim because, unlike the plaintiff in *Pusateri*, he is not contesting ComEd’s rates or services. In support of his argument, plaintiff cites multiple appellate cases where the courts ultimately found the complainants were seeking civil damages rather than reparations. See *Flournoy*, 351 Ill. App. 3d 583 (plaintiff claimed defendant fraudulently charged him multiple initial calling fees by



repeatedly cutting off his collect calls); *Thomas v. Peoples Gas Light & Coke Co.*, 2011 IL App (1st) 102868 (plaintiff claimed defendant unlawfully attempted to collect a debt that had already been discharged in federal bankruptcy proceedings); *Sutherland v. Illinois Bell*, 254 Ill. App. 3d 983 (1993) (plaintiff claimed she was charged for services that were unordered, inadequate, and ambiguously billed); *Gowdey v. Commonwealth Edison Co.*, 37 Ill. App. 3d 140 (1976) (plaintiffs' complaint alleged they were charged for a service which they did not contract to purchase). However, we conclude that we need not get into a lengthy discussion of these cases, as any perceived similarities arise solely from plaintiff's attempt to recraft his first amended complaint on appeal.

¶ 28 Contrary to plaintiff's current assertions, his first amended complaint did not allege uncontracted-for charges. Rather, it alleged a delay in providing a work agreement and an overcharge for the use of ComEd's transformer. When plaintiff attempted to explain the gist of his complaint to the circuit court, he specifically stated that ComEd had tried to defraud him by charging him over \$5,000 for a transformer it had a duty to supply for free. Even now, on appeal, plaintiff claims ComEd's duly-filed tariff highlights how ComEd maliciously overreached when it "attempted to overcharge him for the transformer."

¶ 29 Thus, at its heart, plaintiff's first amended complaint alleged that ComEd charged him too much—*i.e.*, an "excessive or unjustly discriminatory amount"—for the use of its transformer. 220 ILCS 5/9-252 (West 2014); see also *Pusateri*, 2014 IL 116844 at ¶ 19. Regardless of whether ComEd violated its own tariff or the Act, in order for plaintiff to recover any of the damages he requested in his first amended complaint, the circuit court would first have to determine that ComEd overcharged him for its services. This question falls squarely within the Commission's exclusive jurisdiction under section 9-252. Accordingly, plaintiff's claim is one

for reparations, and the circuit court did not err in dismissing plaintiff's first amended complaint for lack of subject matter jurisdiction.

¶ 30

#### CONCLUSION

¶ 31

For the foregoing reasons, we affirm the judgment of the circuit court of Will County.

¶ 32

Affirmed.