

ORIGINAL
ILLINOIS COMMERCE
COMMISSION

2012 FEB 14 A 10:43
CHIEF CLERK'S OFFICE

CODA-2111 ELMWOOD, LLC)
and SCOTT KRONE, managing)
member)
)
v.)
)
NORTH SHORE GAS COMPANY,)
PEOPLES GAS, LIGHT AND COKE)
COMPANY and INTEGRYS)
BUSINESS SUPPORT, LLC)

No. 11-0704

COMPLAINANTS' RESPONSE IN OPPOSITION TO MOTION TO DISMISS

Complainants, CODA-2111 ELMWOOD, LLC ("CODA") and SCOTT KRONE, managing member ("Krone") respectfully submit their Response in Opposition to the Motion to Dismiss of Respondents, state as follows:

I. INTRODUCTION

The ALJ should deny the motion in the entirety or in the alternative strike individual paragraphs of the instant complaint by paragraph number if determining certain matters pled are outside the Illinois Commerce Commission's exclusive jurisdiction. Standards typically governing pleading sufficiency motions to dismiss (735 ILCS 5/2-615(a)) closely tracked by the language of Ill. Admin. Code tit. 83 § 200.190 in this proceeding require the ALJ's denial of the dismissal relief sought with prejudice.

II. PLEADING SUFFICIENCY MOTION STANDARDS

A cause of action will not be dismissed pursuant to 2-615 unless it clearly appears that no set of facts can be proved which will entitle the plaintiff to recover. *Vernon v. Schuster*, 179 Ill. 2d 338, 344 (1997). The court considers only the pleading allegations when ruling on a 2-615 motion to dismiss. *Chandler v. Ill. Cent. R.R. Co.*, 207 Ill. 2d 331, 349 (2003). The merits of the case are irrelevant. *Talbert v. Home Sav. of Am. F.A.*, 265

Ill. App. 3d 376, 380 (1st Dist. 1994). Finally, “[n]o pleading is bad in substance which contains such information as reasonably informs the opposite party of the nature of the claim or defense [they] are called upon to meet.” 735 ILCS 5/2-612(a).

Moreover, Respondents’ limitations argument to bar any aspect of Complainants’ claim occurring before October 31, 2009 is grounded in 735 ILCS 5/2-619(a)(5) and invokes 2-619 procedural rules. A statute of limitations defense is an affirmative defense. *Boonstra v. Chicago, 214 Ill. App. 3d 379, 389 - 390 (1st Dist. 1991)*. Respondents’ limitations argument based upon jurisdiction is found on the face of instant complaint and alleviated the need for a supporting affidavit. 735 ILCS 5/2-619(a).

III. FAULTY MOTION PREMISE

Respondents rely upon a central faulty motion premise found at 4 of the Motion, “...Complainants’ entire case upon the flawed premise that it is excused from paying for natural gas services where the invoice for services is mailed to the service address of record.” This statement upon review of the pleading at issue attempts to falsely miscast the nature of this action. This action arose from Respondents’ mistaken misdirection of mailed monthly service invoices multiple times to the wrong address despite knowing the Complainants’ correct billing address and Respondents’ stubborn refusals to reimburse imposed fees and charges from service disconnections, even after these misdirected mailings were known by Respondents to have happened.

It is axiomatic to say that a customer cannot pay a monthly service invoice if they do not receive one and do not know the amount due. Title 83 § 500.330 provides the customer’s entitlement to receive a monthly service bill with mandated information on it. Respondents repeatedly failed to provide by mail the mandated monthly service

invoice to Complainants' proper billing address of which Respondents had been provided.

The basis for Respondents' liability therefore is the violation of Title 83 § 500.330 and their improper reliance upon and use of the Title 83 sections discussed below to justify the wrongful collection from Complainants and later refusal to refund the various fees and charges from multiple service disconnections and reconnections directly resulting from Respondents' repeatedly misdirected mailing of monthly service billing to the wrong address.

III. PROPERLY PLED CLAIM BASES

Accepted as true for the purposes of the instant motion is that the fact that Krone gave NORTH SHORE GAS COMPANY ("North Shore") CODA's registered business location, 631 Lake Avenue, Wilmette, Illinois 60091 when first establishing the service account in late September 2008 for the 2111 Elmwood apartment building in Waukegan (Cmplt. ¶ 11 at 2). Also taken as true is that Krone gave North Shore the proper business phone number to directly reach CODA and Krone for any purpose.

From the fact that North Shore had the correct Wilmette business address for billing in the entire pled time frames, the acts of Respondents giving rise to the claims pled seeking reimbursement of all accumulated late fees, relighting charges, disconnection fees, reconnection fees, and the multiple deposits imposed. These fees and charges imposed all causally flow from Respondents' repeated and inexplicable failure to simply mail 2111 Elmwood building monthly service invoices to CODA's known registered business location, 631 Lake Avenue, Wilmette, Illinois 60091, but rather mistakenly mailing instead to the Waukegan service address instead initially and with each account renumbering after disconnection (Cmplt. ¶¶ 12 - 14 for 12/12/08

disconnection, ¶¶ 25 - 26, 28 for 04/05/09 disconnection, ¶¶ 34 - 35 for 07/30/09 disconnection, ¶¶ 43 - 47 (balance discrepancy) for 04/19/10 disconnection, ¶¶ 50 - 66 (balance discrepancy and no 07/08/10 billing received) for 10/07/10 disconnection even despite dispute resolution procedure ongoing).

Also taken as true is that the 2111 Elmwood building had only resident mailboxes and did not have a building mailbox (Cmplt. ¶ 8). Thus, the ALJ should conclude that Respondents, despite the pled repeated mistakes in mailing monthly service invoices to the wrong address, improperly relied upon § 280.130 to discontinue service, §§ 280.60 and 280.70 to collect deposits twice (Cmplt. ¶ 32, 43), on § 280.90 to impose late charges, § 280.150 to impose reconnection charges, and failed, despite knowing these repeated mistakes in mailing had indeed occurred, to participate in good faith in the §280.160 dispute procedure invoked and remained ongoing at the last October 2010 disconnection .

IV. NO JUSTIFICATION FOR LIMITATIONS BAR

There is no justification whatsoever for Respondents' request to bar any aspect of Complaints' claim on limitations grounds. The reason for denial is 1) the policy reason to bar only "stale" claims underlying statutes of limitations, 2) the fact that Complaints' commencement of this action in the Lake County Circuit Court had been within the two year limitations period on which Respondents rely and 3) Respondents had its counsel appear in the Lake County Circuit Court action before the two year limitations period had even run.

As a well settled matter of Illinois law, the purpose of a statute of limitations is **not to shield a wrongdoer** but rather to discourage the presentation of stale claims and to encourage diligence in the bringing of actions. *Tom Olesker's Exciting World of*

Fashion, Inc. v. Dun & Bradstreet Inc., 61 Ill. 2d 129, 137 (1975). The Complainants' Lake County Circuit Court pleading undisputedly bears the commencing stamp of filing by court clerk, Sally Coffelt on October 9, 2010. The first harm the Complainants suffered from Respondents' misdirected mailing of monthly invoices to the wrong address is the first alleged December 12, 2008 disconnection (Cmplt. ¶¶ 12 - 16). The ALJ should take notice of affirmative facts provided by court filed documents set forth here and below. *May Dep't Stores Co. v. Teamsters Union*, 64 Ill. 2d 153, 159 (1976).

Thus, Respondents' limitations argument should be denied because there is no "stale claim" appropriate to bar on limitations grounds. There is no dispute that Complainants timely commenced their action with the two year limitations period on which Respondents' rely (Motion at 12). There is also no dispute that Respondents all received process service on November 4, 2010 by the Cook County Sheriff (Service returns attached as Exhibit A) and had one counsel appear in the Lake County Circuit Court on November 12, 2010 to begin Respondents' defense (Appearance attached as Exhibit B).

Finally the state of the law existing when Complainants commenced their Lake County Circuit Court action on October 9, 2010 provided for circuit court jurisdiction over issues of damages and Illinois Commerce Commission exclusive jurisdiction over what is determined to be "reparations". *Vill. of Deerfield v. Commonwealth Edison Co.*, 399 Ill. App. 3d 84, 87 - 88 (2nd Dist. 2010) subsequently overruled in part in *Sheffler v. Commonwealth Edison Co.*, 955 N.E.2d 1110, 1126 (2011). Presiding Judge Starck ruled on February 9, 2011 that Illinois Commerce Commission had exclusive jurisdiction over Complainants' action because the "lynch pin" to Complainants' action was "the gas bill" and dismissed Complainants' entire action (02/13/11 Starck Order attached as Exhibit

C).

Judge Starck reversed himself on Complainants' motion to vacate heard March 15, 2011 on finding that only Complainants' "excessive gas billing" claims were appropriately dismissed for Illinois Commerce Commission adjudication while the remaining personal claim by Krone for damages remains stayed in the circuit court until Illinois Commerce Commission adjudication is concluded (03/15/11 Starck Order attached as Exhibit D). Complainants had already initiated their informal complaint with Illinois Commerce Commission against Respondents on March 8, 2011 by facsimile transmission of pertinent documents (03/08/11 facsimile covers and ok transmission reports attached as Exhibit E).

Accordingly, there are also no equitable grounds on which to find a time bar simply based upon which venue Complainants selected based upon the state of the law to initiate the claim that Judge Starck ultimately found over Complainants' argument otherwise to be one for "reparations" and not "damages" included within the circuit court's subject matter jurisdiction. Respondents undeniably had actual knowledge of Complainants' claim as well as chance to defend before the two years limitations period even expired.

IV. PROPER GROUNDS FOR PEOPLES GAS AND INTEGRYS PARTIES

Proper grounds exist for the joinder of both PEOPLES GAS, LIGHT AND COKE COMPANY ("Peoples Gas") as well as INTEGRYS BUSINESS SUPPORT, LLC ("Integrys") based upon the instant complaint allegations against each.

Peoples Gas and not North Shore began monthly service invoice billing to Complainants as of May 7, 2010 and wrongly directed May 7 and June 9, 2010 monthly billing invoices to the Waukegan service address so that Complainants did not receive

either bill (Cmplt. ¶ 52 - 53). A Peoples Gas supervisor acknowledged these mistakes were made and yet the next Peoples Gas July 8, 2010 monthly service bill inexplicably included an \$11.89 Late Payment Charge. (Cmplt. ¶ 56 - 57).

Integrays and not North Shore had Integrays claims personnel first and then legal counsel second directing the \$280.160 dispute procedure responses in two instances with Krone, one to resolve in late 2008 into February 2009, then in July 2009 the Mechanical Standard Inc. \$1,218.00 emergency call repair invoice to Complainants for the improper December 12, 2008 shutdown by the North Shore technician of the 2111 Elmwood building boiler (Cmplt. ¶¶ 18 - 24, 26, 38). Then in April through October 2010 in the second instance about the accumulated fees and charges imposed and taken from Complainants' monthly payments following the repeatedly misdirected monthly service invoice North Shore and Peoples Gas mailings which caused the multiple service disconnections and reconnections without any resolution whatsoever (Cmplt. ¶¶ 47 - 48, 55, 61 - 62, 65).

Moreover, the Illinois Public Utilities Act defines "Public Utility" as follows:

Sec. 3-105. Public utility. (a) "Public utility" means and includes, except where otherwise expressly provided in this Section, every corporation, company, **limited liability company**, association, joint stock company or association, firm, partnership or individual, their lessees, trustees, or receivers appointed by any court whatsoever that **owns, controls**, operates or **manages**, within this State, directly or **indirectly, for public use, any plant, equipment or property used** or to be used for or in connection with, or owns or controls any franchise, license, permit or right to engage in:

- (1) **the production, storage, transmission, sale, delivery or furnishing of heat, cold, power, electricity, water, or light, except when used solely for communications purposes;**
- (2) the disposal of sewerage; or
- (3) the conveyance of oil or gas by pipe line.

220 ILCS 5/3-105 (emphasis added).

The instant complaint alleged Integrys' management, direction and control of Peoples Gas' business activity (Cmplt. ¶ 4) and as such, certainly falls within the "Public Utility" definition above. No dispute exists that Peoples Gas is also covered by the "Public Utility" definition (Cmplt. ¶ 2). Accordingly both Peoples Gas and Integrys are properly joined as Respondents to this action.

V. 765 ILCS 735/3 ALLEGATIONS

The motion misconstrues the inclusion of the 765 ILCS 735/3 allegations in the instant complaint (Motion at 10 - 11). Review of the pertinent allegations (Cmplt. ¶ 77 - 80) to recover damages as the owner of the 2111 Elmwood building and not as a tenant caused by derogatory credit reporting of bill late payment, loss of good will and reputation in the community as an attractive place to live without disruption of heat and hot water from multiple service disconnections ultimately resulting from repeated misdirected mailing of monthly service invoice billing as set forth above.

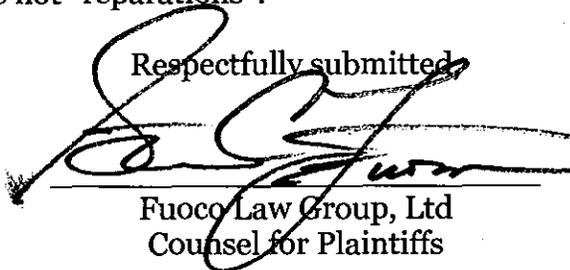
If the ALJ concludes that this claim is outside the scope of the Illinois Commerce Commissions exclusive jurisdiction for "reparations" as Judge Starck concluded this was to the contrary, the 765 ILCS 735/3 allegations can be simply stricken as inapplicable here along with the in excess of \$30,000 damages prayer and this claim taken up in the Lake County Circuit Court with Krone's now stayed personal claims. Dismissal of the entire instant complaint is certainly not warranted.

VI. CONCLUSION

For all the foregoing reasons set forth above, the Motion to Dismiss of Respondents should be denied in the entirety or those individual allegations found to be outside the Illinois Commerce Commission's exclusive jurisdiction should be stricken by paragraph number. Doing the latter will provide valuable aid in the Lake County Circuit

Court regarding what is not "reparations".

Respectfully submitted

A handwritten signature in black ink, appearing to read "S. Fuoco", is written over a horizontal line. The signature is stylized and somewhat cursive.

Fuoco Law Group, Ltd
Counsel for Plaintiffs

Steven C. Fuoco
Fuoco Law Group Ltd.
1055 Golf Avenue
Highland Park, IL 60035

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

CODA-2111 ELMWOOD, LLC)
and SCOTT KRONE, managing)
member)

v.)

No. 11-0704

NORTH SHORE GAS COMPANY,)
PEOPLES GAS, LIGHT AND COKE)
COMPANY and INTEGRYS)
BUSINESS SUPPORT, LLC)

NOTICE OF FILING BY MAIL

To: M. Gavin McCarty, Shesky & Froelich, Ltd., 111 E. Wacker, 28th Floor, Chicago, IL 60601

Please take notice that on February 9, 2012 we mailed filed with the Clerk of the Illinois Commerce Commission the following: **COMPLAINANTS' RESPONSE IN OPPOSITION TO MOTION TO DISMISS**, a copy of which are hereby served.

Name: Fuoco Law Group, Ltd.
Address: 1055 Golf Avenue
Highland Park, Illinois 60035
Telephone: (847) 432-LAWS (5297)
Counsel for: Complainants

PROOF OF SERVICE

The undersigned, an attorney, certifies that he served a copy of this Notice by mail delivery to the above named attorney(s) at their respective addresses by depositing in the U.S. Mail at the United States Post Office, 833 Central Avenue, Highland Park, Illinois before 5:00 p.m. on February 9, 2012

[X] Under penalties of perjury as provided by law, pursuant to 735 ILCS 5/1-109, I certify that the statements set forth herein are true and correct.

