

Gregory Berry
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April 1, 2010

James McNulty, Secretary
Pennsylvania Public Utility Commission
Room B-20, North Office Building
Harrisburg, PA 17105-3265

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SECRETARY'S BUREAU

RE: Gregory Berry v. PGW, Docket No. F-2010-2163390

Dear Secretary McNulty:

Pursuant to 52 Pa. Code § 5.102, Gregory Berry hereby files this Motion for Judgment on the Pleadings in the above captioned matter.

If additional information is required, please do not hesitate to contact the undersigned. Thank you for your assistance in this matter.

Sincerely,



Gregory Berry

Enclosure

cc: Ms. Laureto Farinas, Regular Mail

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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GREGORY BERRY,)	
Complainant and Appellant)	Docket No.: F-2010-2163390
)	
v.)	
)	
PHILADELPHIA GAS WORKS,)	
Defendant and Respondent)	Date: April 1, 2010
<hr style="width: 100%;"/>)	

MOTION FOR JUDGMENT ON THE PLEADINGS

To the Honorable Administrative Law Judge presiding over this matter:

Pursuant to 52 Pa. Code § 5.102, Gregory Berry, Complainant and Appellant, respectfully submits this Motion for Judgment on the Pleadings in the above captioned matter.

I. STANDARD OF REVIEW

Pursuant to 52 Pa. Code § 5.102(d), the presiding officer will grant the judgment sought “if the applicable pleadings . . . show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law.” The standard of review for the presiding officer in a formal complaint is de novo. (52 Pa. Code § 56.173.) In all matters before the PUC, the statutes will be liberally construed. (52 Pa. Code § 56.1.)

II. FACTS

For the purpose of this motion, all facts will be provisionally admitted as averred by the defendant, PGW, in its Answer to the Complaint. Specifically,

1. PGW requested a security deposit in the amount of \$365 on October 10, 2007.

2. The subsequent gas usage was billed to a placeholder account beginning August 16, 2007.

3. PGW spoke with Mr. Berry on October 10, 2007, and again on November 8, 2007, regarding the gas service at the service address.

4. Complainant did not receive monthly bills. In addition, according to the PGW averment, "the Complainant did not have an active gas account for the period beginning August 16, 2007 through April 14, 2008."

5. A 72-hour termination notice was left at the Service address.

6. PGW does not aver that it provided Mr. Berry with written notice 10 days prior to the date of the proposed termination.

III. ARGUMENT

For the following reasons Mr. Berry is entitled to a judgment as a matter of law.

A. PGW failed to respond in compliance with answer requirements

The defendant PGW has failed to file an answer to the complaint in compliance with 52 Pa. Code § 5.61. Subparagraph (c) states that “[a] respondent failing to file an answer within the applicable period may be deemed in default.” The answer filed by PGW is inadequate to comply with that requirement on two counts.

(a) The answer is required to “[a]dvice the parties and the Commission as to the nature of the defense.” (52 Pa. Code § 5.61(b)(2).) While PGW responded to the facts averred by Mr. Berry in his complaint, it failed to provide any information as to the nature of its defense.

(b) In addition, the answer is required to state concisely the “matters of law relied upon.” (52 Pa. Code § 5.61(b)(4).) PGW in its answer failed to state any matters of law relied upon, concisely or otherwise.

For these reasons the answer filed was inadequate and Mr. Berry moves this Commission to deem PGW in default.

B. PGW has waived all defenses

PGW failed to respond to any of Mr. Berry’s arguments regarding matters of law, and hence has waived all defenses. Consequently Mr. Berry is entitled to a judgment as a matter of law. Pennsylvania Rules of Civil Procedure state that “[a] party waives all defenses and objections which are not presented either by preliminary objection, answer or reply.” (52 Pa.

R.C.P. 1032(a).) The deadline for filing such responses was March 31, 2010. Even if the Rules of Civil Procedure do not specifically apply to administrative hearings, the equitable principle involved is in full force. Specifically, PGW has waived any defense to the following legal arguments presented in Mr. Berry's Formal Complaint.

1. PGW violated its duty of good faith, honesty, and fair dealing.

Both the common law and perhaps more importantly, the Pennsylvania Administrative Code itself, require PGW to act in good faith, honesty, and fair dealing. (52 Pa. Code § 56.1.) PGW has waived any defense to this claim, and hence has violated these duties as a matter of law. (See Mr. Berry's Formal Complaint, pp. 3-4.)

2. PGW violated its duty to avoid harm. The common law requires parties to mitigate damages. The Restatement (Second) of Contracts, for instance, provides that, "damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation." (Restatement (Second) of Contracts, § 350(1).) PGW has waived any defense to this claim, and hence has violated this duty as a matter of law. (See Mr. Berry's Formal Complaint, pp. 4-5.)

3. PGW violated numerous specific provisions of the Pennsylvania Administrative Code. It violated the requirement to bill Mr. Berry once every billing period. (52 Pa. Code § 56.11.) It violated the requirements for demanding a security deposit. (52 Pa. Code § 56.32.) It violated the

notice requirements before terminating service. (52 Pa. Code § 56.81.) It had no statutory authority to bill the gas usage to a placeholder account.

PGW has waived any defenses to each of these claims, and hence has violated these statutes, *inter alia*, as a matter of law. (See Mr. Berry's Formal Complaint, pp. 5-12.)

IV. CONCLUSION

For the reasons stated above, Mr. Berry requests the Commission to render a judgment as a matter of law in his favor, and reverse all charges from October 2007 to April 2008, including the security deposit, plus interest on the security deposit from April 2008, and all subsequent late fees and interest charged by PGW. Mr. Berry also requests reimbursement for reasonable legal fees, to be determined, or alternatively, civil penalties pursuant to 66 Pa. C.S. § 3301.

Respectfully submitted,



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NOTICE REGARDING RESPONSE

An answer or other responsive pleading to this motion shall be filed within 20 days of service of the motion, which was April 1, 2010.

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CERTIFICATE OF SERVICE

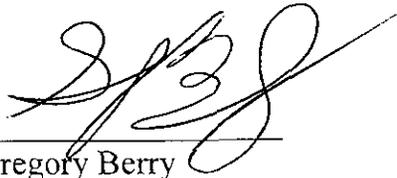
I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party).

Service List:

For Defendant:

Laureto Farinas, Esquire
Philadelphia Gas Works
800 W. Montgomery Avenue
Philadelphia, PA 19122
(215) 684-6982

Date: April 1, 2010



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