

COMMONWEALTH OF PENNSYLVANIA

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

In the Matter of:

Hyacinth Anyiam

:

v.

:

C-2009-2139134

Philadelphia Gas Works

:

PETITION FOR RECONSIDERATION AND REHEARING NUNC PRO TUNC

PURSUANT TO 1 Pa. Code § 35.241

Complainant, Hyacinth Anyiam, by and through his counsel, Forry Ullman, PC, hereby moves Reconsideration and rehearing of the June 9, 2010 Order in this matter by Administrative Law Judge Ky Van Nguyen for Dismissal for Failure to Prosecute, and in support thereof avers as follows:

1. The present motion is made pursuant to 1 Pa. Code § 35.241(a) which states that "An application for rehearing or reconsideration may be filed by a party to a proceeding within 15 days, or another period as may be expressly provided by statute applicable to the proceeding, after the issuance of an adjudication or other final order by the agency. The application shall be made by petition, stating specifically the grounds relied upon." For the reasons stated below, relief should be granted pursuant to this section of the Code nun pro tunc.

2. Until the present time Complainant represented himself pro se.

3. Complainant is an immigrant from Africa. English is not Complainant's primary language, and he has no legal training.

4. Complainant initiated this matter pro se to challenge a bill assessed by Philadelphia Gas Works ("PGW") against him believed to be improperly calculated when changes were made to his gas meter and an inaccurate "actual reading" was taken based on an alleged carbonization of his hot water heater.

5. The matter was scheduled a hearing on June 3, 2010.

6. Complainant appeared at that time and checked in with court personnel who told him to stay in a waiting area, but was not notified when his matter was called into the hearing room.

7. After a period went by, Complainant inquired and found out that his case had already been called and dismissed with prejudice while still at the PUC. At that time, Complainant wrote a statement indicating what occurred and requested a new hearing, having filed same with the PUC on June 3, 2010. A copy of this request is attached as Exhibit "A".

8. The request for a new hearing appears to have never been considered by this Court.

9. Instead on June 9, 2010, this Court entered an Order dismissing the case with prejudice due to Plaintiff's failure to appear for trial and prosecute this case.

10. Thereafter, Complainant did not pursue an appeal out of ignorance of the proper procedure to follow and believed that his request for a new hearing substantially complied with any formal exception to the Order that were required to be filed.

11. Thereafter, Complainant continued to dispute his past due account with PGW.

12. PGW then turned off Complainant's Gas service.

13. Complainant then filed a new pro se formal Complaint against PGW under docket No. C-2012-2338734 (hereinafter the "2012 Action"). The 2012 action remains pending.

14. In the 2012 Action, this Court determined that certain defenses could not be presented because of the dismissal with prejudice in the present action and that the statute of limitations bars any claims more than three years old. A copy of Administrative Judge Heep's Decisions and Order granting partial summary judgment is attached as Exhibit "B".

15. Complainant believes that he has a good faith defense to the charges that were at issue in the present matter and that such should be determined on the merits rather than be barred in the 2012 Action.

16. Complainant retained undersigned counsel to represent him in this matter on September 4, 2013.

17. Undersigned Counsel has entered his appearance this date.

18. A *nunc pro tunc* review of a decision may be allowed where extraordinary circumstances involving fraud or some breakdown in the administrative process caused the delay in filing, or where non-negligent circumstances related to the review-seeker, his or her counsel or a third party caused the delay. See Cook v. Unemployment Compensation Board of Review, 543 Pa. 381, 671 A.2d 1130 (1996). Further, where the request for review is filed within a short time after the appellant or his counsel learns of and has an opportunity to address the untimeliness, and the time period which elapses is of very short duration, and appellee is not prejudiced by the delay, the court may allow for review *nunc pro tunc*. *Id.* at 384-85, 671 A.2d at 1131.

19. Here Complainant originally appeared for a hearing with a good faith defense to the PGW bill assessed against him, and although he checked in for the hearing, he was not permitted into the hearing room and was deprived of his day in Court.

20. Complainant then sought an opportunity for a new hearing, which this Court appears to never have considered before entering a final order dismissing the case with prejudice.

21. Complainant's request for a new hearing filed on the same day as the hearing was scheduled, should have been treated as proper exceptions to the final order in light of his pro se status.

22. When Complainant filed the 2012 action pro se, this was the first time he became aware that he could be barred from contesting the claims in the present matter and has sought to remedy this situation after seeking legal counsel.

23. The hot water heater alleged to have "carbonized" and caused the high bills is still available for inspection and is in Complainant's possession. Accordingly, all necessary proofs are available for a contest on the merits.

24. The above constitutes an extraordinary circumstance and shows non-negligent conduct on the part of Complainant to have the matter reconsidered and the dismissal with prejudice vacated so that a contest on the merits can be held on Complainant's original claims.

WHEREFORE, Complainant, Hyacinth Anyiam, respectfully request that the Commission enter an Order vacating the June 9, 2010 Order dismissing the matter with prejudice and relisting this matter for trial. A hearing upon this Petition is respectfully requested.

9/9/13

Respectfully Submitted,



FORRY ULLMAN

MICHAEL F. SCHLEIGH, ESQUIRE

Attorney I.D. No. 88407

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In the Matter of:

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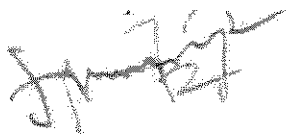
C-2009-2139134

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VERIFICATION

I, Hyacinth Anyiam, hereby declare that I am the Complainant in the present matter. I make this Verification on my own behalf. The facts set forth in the foregoing Petition are true and correct to the best of my knowledge, information and belief. I expect to be able to prove these facts at a hearing held in this matter. This verification is made subject to the penalties of 18 Pa.C.S. Sec. 4904, concerning false statements to authorities.



Date: 9.6.13

Hyacinth Anyiam

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CERTIFICATE OF SERVICE

I, Michael F. Schleigh, hereby certify that I served a copy of Complainant's

PETITION FOR RECONSIDERATION AND REHEARING NUNC PRO TUNC

PURSUANT TO 1 Pa. Code § 35.241 by e-mail and regular mail on:

Laureto A. Farinas, Esq.
Philadelphia Gas Works
800 W. Montgomery Avenue, 4th Fl
Philadelphia, PA 19122
laureto.farinas@pgworks.com



MICHAEL F. SCHLEIGH

6/3/10

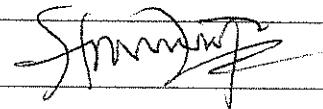
TO WHOM IT MAY CONCERN

PLEASE NOTE THAT I WAS HERE AT 1:30 PM AND SIGNED IN AT THE FRONT DESK AND BACK DESK AS INSTRUCTED BY THE SECURITY GUARD.

AFTER WAITING FOR AN HOUR WITH NO ONE COMING TO MY ATTENTION, I WENT BACK TO THE SECURITY GUARD TO FIND OUT WHAT WAS WRONG.

HE MADE A CALL TO SOME BODY AND ASKED ME TO GO SIT DOWN AND WAIT. VENITRA CAME AND ASKED ME TO WRITE A STATEMENT OF MY PRESENCE.

THANKS



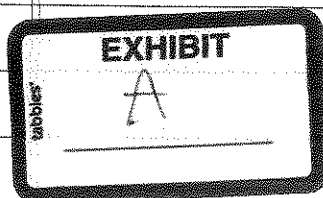
HYACINTH ANTIAM

1. ~~I~~ I HEREBY REQUEST ANOTHER HEARING AND COMPENSATION FOR TIME AND MONEY I HAVE SPENT.

RECEIVED

JUN 03 2010

Public Utility Commission
Philadelphia Office
Administrative Law Judge



BEFORE THE
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Philadelphia Gas Works

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C-2009-2139134

ORDER ON PGW MOTION TO DISMISS
(Granted in Part, Denied in Part, New Hearing Date Required)

PGW has requested that this matter be dismissed: 1) as *res judicata* because the Complainant, Hyacinth Anyiam, failed to appear for a previous hearing on the same issues and the matter was dismissed for failure to prosecute, and 2) because the statute of limitations has run on the claims.

The motion is granted in part and denied in part. The matter will be rescheduled for a new hearing date.

HISTORY OF THE PROCEEDING

On October 28, 2009, Mr. Anyiam (Complainant) filed a Complaint with the Commission disputing a PGW make-up bill for the period 9/5/07 through 2/5/08. Administrative Law Judge Ky Van Nguyen dismissed that matter for failure to prosecute when Complainant did not appear for the hearing set for June 3, 2010. (C-2009-2139134). Complainant did not file exceptions to the dismissal.

On December 6, 2012, Complainant filed a formal Complaint disputing his gas bill from 9/5/07 to 2/5/08 and from 2/5/08 to shut-off of the gas service. He seeks a payment



arrangement and that his service be restored. On January 2, 2013, PGW filed an Answer denying that there are incorrect charges on the bills.

This matter was set for hearing on March 13, 2013. Complainant appeared pro se. PGW was represented by Laureto Farinas, Esquire.

As the hearing began, Attorney Farinas asked that the matter be dismissed as *res judicata* because a previous complaint challenging the bills was dismissed when Complainant failed to appear for the hearing. He also argued that the statute of limitations had run on the claims.

In response, Complainant stated that he did appear for the hearing and waited for an hour. He then produced a note that he had written which stated that he appeared for the hearing and that contained a Public Utility Commission received stamp dated June 3, 2010, the date of the previous hearing.

The hearing was converted to a Pre-Trial Conference and the motion was taken under advisement.

Failure to Prosecute:

PGW seeks dismissal of this matter as *res judicata*. The doctrine of *res judicata* prevents a suit between the same parties on the same cause of action after a court of competent jurisdiction has rendered a final judgment on the merits. In order for the doctrine to prevail, all of the following four requirements must be met: “(1) identity of issues, (2) identity of causes of action, (3) identity of persons and parties to the action, and (4) identity of the quality or capacity of the parties suing or sued.” *Day v. Volkswagenwerk Aktiengesellschaft*, 318 Pa. Super. Ct. 225, 232, 464 A.2d 1313, 1316-17 (1983).

However, where a matter is dismissed for failure to prosecute rather than on the merits, the doctrine of *res judicata* does not apply. See, *Sebrell v. Philadelphia Police Dep’t*, 159

F. App'x 371, 2005 U.S. App. Lexis 27296 (3d Cir. 2005); *Boyertown Foundry v. Workers' Comp. Appeal Bd. (Martinez)*, 34 A.3d 322,323 (Pa. Commw. Ct. 2011).

In the instant matter, Complainant contests his bills from 2/5/08 to the shut off in 2012 and seeks a payment arrangement and that his service be restored. These claims were not a part of his 2008 Complaint (2139134) and therefore *res judicata* is inapplicable.

His remaining 2012 allegation, that the charges for the period 9/5/07 to 2/5/08 were incorrect, was also a part of the 2008 Complaint (2139134). However, that complaint was dismissed for failure to prosecute, not on the merits, and therefore dismissal based on *res judicata* is not appropriate.

Statute of Limitations

PGW also contends that the statute of limitations precludes some of Complainant's claims. Pursuant to Section 3314 of the Public Utility Code (the Code), 66 Pa. C.S.A. § 3314,

No action for the recovery of any penalties or forfeitures incurred under the provisions of this part, and no prosecutions on account of any matter or thing mentioned in this part, shall be maintained unless brought within three years from the date at which the liability therefor arose, except as otherwise provided in this part.

The statute of limitations can be tolled by the filing of an informal complaint with the Commission. The doctrine of **equitable estoppel** can serve to toll the statute of limitations and is based on the theory of estoppel. It provides that a defendant may not invoke the statute of limitations if through fraud or concealment he causes the plaintiff to relax his vigilance or deviate from his right of inquiry into the facts. The doctrine does not require fraud in the strictest sense, but rather, fraud in the broadest sense, which includes an unintentional deception. *See Lester Ely v. Pennsylvania American Water Company*, C-20055616 (Order entered July 10,

2006); see also, *Mary Esther Battle v. PECO Energy Co.*, C-00003804 (Order entered July 16, 2001).

There is no basis here upon which to toll the statute of limitations or apply the doctrine of equitable estoppel. Complainant filed an informal Complaint in the 2009 matter, not here. Also, there has been no fraud or concealment or misleading action by PGW. Furthermore, Complainant chose not to appeal the dismissal of the previous action for failure to prosecute even though he was armed with the PUC stamped document concerning his presence for that hearing and waited until 2012 to again file a complaint. Therefore, any claims pertaining to matters more than three years before the filing of this Complaint are beyond the statute of limitations and dismissed.

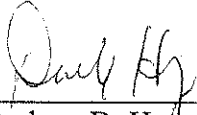
ORDER

THEREFORE,

IT IS ORDERED:

1. That all claims pertaining to matters older than three years prior to the filing of this Complaint are dismissed.
2. That all remaining claims will proceed to hearing.
3. That a new hearing date for the remaining issues will be set by the scheduling office.

Date: March 29, 2013



Darlene D. Heep
Administrative Law Judge

Hyacinth Anyiam v. Philadelphia Gas Works
Docket Number C-2012-2338734

SERVICE LIST

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