PHILADELPHIA GAS WORKS
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May 11, 2015

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: SBG Management Services, Inc. v. PGW, Docket No. C-2012-2304183
C-2012-2304324

Dear Secretary Chiavetta:

Pursuant to 52 Pa. Code §5.501, and the order dated March 27, 2015 setting the briefing scheduled in the above captioned matter, the respondent the Philadelphia Gas Works (PGW) here files its Reply Brief.

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

Sincerely,

Danielle Leva

Enclosure

cc: Donna Ross, Esq.
Mr. Philip Pulley
Ms. Kathy Treadwell
Administrative Law Judge Eranda Vero (Regular Mail)
Linda Pereira (PGW Mail)
Wendy Vacca (PGW Mail)

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

SBG Management Services, Inc. / Colonial Garden Realty Co., L.P.	:	
v.	:	**C-2012-2304183**
Philadelphia Gas Works	:	
SBG Management Services, Inc. / Simon Garden Realty Co., L.P.	:	
v.	:	**C-2012-2304324**
Philadelphia Gas Works	:	

REPLY BRIEF OF THE PHILADELPHIA GAS WORKS

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REPLY BRIEF OF THE
PHILADELPHIA GAS WORKS

Pursuant to the Order of Administrative Law Judge Eranda Vero establishing a Briefing Schedule, dated March 27, 2015 (the "Briefing Order") and 52 Pa. Code §5.502(c) (2), the Respondent the Philadelphia Gas Works (PGW) hereby files PGW's Reply Brief in response to the Complainants' Main Brief the above captioned consolidated matters.

I. History of the Proceeding/Statement of Case

The issues asserted by the Complainants in these consolidated proceedings have evolved over the many months of the pendency of the matters.[1] In the remaining months before the final set of hearings, SBG raised a new issue with respect to the assessment of late payment charges. The Complainants did not file amendments to the complaints consolidated matters. In this new issue the Complainants' allege that the manner in which PGW applies payments to accounts (First to Deposits, then to the oldest Late Payment Charges ("LPC") then to the oldest gas charges)[2] violates the Pa. Public Utility Code and other Fair Credit and Collections laws. The issue was raised by their "expert" witnesses at the hearings for the first time in January 2015. The expert witnesses did not present any written report rather, merely provided oral testimony on the new issue.[3]

A review of the Complainants' accounts shows that the Complainants on the whole make few, if any timely payments on their PGW accounts.[4] The Complainants' PGW Accounts are occasionally brought current through the satisfaction of Municipal Liens while refinancing or sale of the properties. Over the course more than a decade, Mr. Pulley and PGW (primarily with the PGW Commercial Resource Center ("CRC") engaged in dialogue concerning many of the accounts and building which receive gas service.[5] The original list of disputed claims in these matters included, among other things, several

[1] Transcript, pp. 485-487
[2] Transcript, pp. 841 -850
[3] Testimony of Colton and Gabel, February 10, 2015 (Stipulaton)
[4] Complainants' Statements of Account

make-up bills, "unexplained" charges, unaccounted for payments, and the assessment of LPC's at a rate different than the approved 1.5% per month. In the 2013 hearings, the Complainants original theory was that PGW calculated at an amount different from 1.5% differing, but not exceeding 1.5% each month.

Although it is uncontroverted that the Commission has no jurisdiction over the Municipal Liens filed on behalf of PGW by the City of Philadelphia, however, the method by which PGW assess LPC's as it relates to unpaid gas debt that is the subject of a Municipal Lien is the subject of the remains an issue raised by Complainants.

If an unpaid debt on a finalized/closed PGW account is the subject of the Municipal Lien, there is no interest assessed on the lien amount. As that PGW account is closed and finalized PGW also, does not assess LPC's on the account.[6]

If an unpaid debt on an active PGW account (i.e., an account which continues to receive gas service) is the subject of a lien, PGW will continue to assess LPC's on the unpaid debt as authorized by the Commission by Tariff, PGW Gas Service Tariff – Pa. PUC No. 2, Page No. 26 Section 4.2. Finance Charge on Late Payments. PGW will assess a late penalty for any overdue bill, in an amount which does not exceed 1.5% interest per month on the full unpaid and overdue balance of the bill.[7]

PGW is not authorized to charge interest at any other rate under any other statute. PGW does not charge "post judgment interest." If the account which has been the subject of a Municipal Lien is closed/finalized, PGW stops assessing LPC's.[8]

On March 27, Administrative Law Judge Vero issued the Briefing Orders in each of the three consolidated matters, setting forth the issues to be address in the brief. These issues involved, [1] the tolling of the Commission's Statute of Limitations, [2] whether a lien filed by the City of Philadelphia for unpaid gas service is considered a judgment within the meaning of 42 Pa. C.S. §8101, [3] whether the Commission has jurisdiction to determine whether PGW has applied the correct interest rate in Late Payment Charges to the portion of an outstanding balance that is also the subject of a lien filed by the City of

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[5] PGW Correspondence Binder
[6] Transcript, pp. 485-487
[7] Id.
[8] Id.

Philadelphia and, [4] the correct interest rate in late payment charges that should be applied on that portion of an outstanding balance which is the subject of a municipal lien (or unpaid gas service filed by the City of Philadelphia). The Complainants' new issue concerning the "order of payments" applied to accounts which was raised for the first time in January 2015 was not among the issues to be briefed according to the Briefing Order.

The Briefing Order sets forth the due date for Reply Briefs, May 11, 2015.

II. SUMMARY OF THE COUNTERARGUMENTS:

A. While the Commission Has the Authority To Toll Complainants' Claims That Fall Outside of the Limitations Period Under 66 Pa. C.S. §3314 and §1312, the Doctrines of Continuing Violations Rule, Discovery Rule and Estoppel, Do Not Apply in the Instant Matter under the Commission Case Law.

The record evidence fails to demonstrate that the statute of limitations should be tolled for Complainants' claims which fall outside the three-year general limitation period contained in 66 Pa. C.S. §3314. The doctrine of "equitable estoppel" does not apply here. PGW did not cause the Mr. Pulley to relax his vigilance or deviate from his right of inquiry into the facts by fraud or concealment. The communications between PGW and the Complainants were in the nature of inquiry concerning the general understanding of various PGW accounts. The Complainants had not articulated the specific dispute of the issues that remain in controversy in this proceeding.

B. While the Commission Does Have the Authority to Consider the Accuracy of the Underlying Accounting of Complainants' Utility Bills and to Determine the Proper Calculation of and Application of Tariff Approved Rate for Late Payment Charges ("LPC"), the Complainants Raise Questions More in the Legal Nature, Involving the Questions of the Correct Applicability of Statutes that are not Within the Commission's Jurisdiction.

In its discussion of the issue of the Commission's authority in its Main Brief, the Complainants somewhat mischaracterize the underlying issue of their complaint. While the Commission does have the authority to determine the accuracy of any bill from a utility within its jurisdiction, the question is more than mathematical or simply the definite application of a related statute. The Complainant raises issues that concern the

controverted applicability of one statute over another; neither of these is contained in the Pennsylvania Public Utility Code. From the Commission's perspective on this question, PGW simply assesses LPC's on applicable outstanding balances on active PGW accounts. Where there is no active account, PGW stops assessing LPC's on the account, irrespective of whether the balances of the account were subject to a lien.

C. Commission Lacks the Authority to Determine That A Lien Filed and Docketed In the Court of Common Pleas Judgment Indexes on Behalf PGW for Unpaid gas service is a Judgment Pursuant to 42 Pa. C.S. §8101 and is Subject to Accrual of Post-Judgment Interest Only at the Statute Rate of Six Percent per Annum Until the Judgment is Satisfied.

As stated above, the Complainant raises issues that concern the controverted applicability of one statute over another; neither of these is contained in the Pennsylvania Public Utility Code. For this reason, PGW maintains that a Municipal Lien filed by the City of Philadelphia for unpaid gas service is not considered a judgment under 42 Pa.C.S.A. §8101 with respect to the applicability of interest charges. The interest charge for a Municipal Lien is governed by the Municipal Claim and Tax Lien Law, Act 153 of 1923, P.L. 207 53 P.S. §7101, et seq. (Municipal Lien Act), particularly, 53 P.S. § 7143 – Time and place for filing; liability; interest; form; contents; appeals from assessments; indexing; revival; order fixing amount. This section of the Municipal Lien Act authorizes the charge of interest on a Municipal Lien but states that interest on a lien for particular municipal service must be individually authorized by legislation. No interest rate is authorized for Municipal Liens filed for gas service. The question of whether the authority to assess interest on Municipal Liens filed on behalf of PGW by the City of Philadelphia is governed by 42 Pa.C.S.A. §8101 or by 53 P.S. § 7143 is a question that requires the Commission to interpret the applicability of statutes that are outside of the Commission's jurisdiction.

D. The Commission Should Not Determine that the Legal Post Judgment Interest Rate to Apply to Unpaid Gas Debt Files as a Municipal Lien is the Statutory Rate of 6% per Annum until the Judgment is satisfied.

As stated above, the correct interest rate in late payment charges that should be applied on that portion of an outstanding balance which is the subject of a municipal lien

for unpaid gas service filed by the City of Philadelphia is the Commission approved Tariff PGW Gas Service Tariff – Pa. PUC No. 2, Page No. 26 Section 4.2. Finance Charge on Late Payments which authorizes 1.5% interest per month on the full unpaid and overdue balance of the bill not to exceed 18%. From the Commission's perspective the Tariff approved amount is all that is authorized to be charged on an active account.

III. ARGUMENT

Pursuant to the Public Utility Code, 66, Pa. C.S. §332(a), the party seeking affirmative relief from the Commission, the Complainant, bears the burden of proof. To establish a sufficient case and satisfy the burden of proof, complainant must show that respondent is responsible or accountable for the problem described in the Complaint. *Patterson v. Bell Telephone Company of Pennsylvania*, 72 Pa. PUC 196 (1990), *Feinstein v. Philadelphia Suburban Water Company*, 50 Pa. PUC 300 (1976). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 134 Pa.Cmwlth. 218; 221-222, 578 A.2d 600; 602 (1990), app. denied, 529 Pa. 654, 602 A.2d 863 (1992). That is, by presenting evidence more convincing, by even the smallest amount, than that presented by the other party. *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Complainant must initially produce sufficient credible evidence to establish a *prima facie* case in order that complainant not lose summarily. *Morrissey v. Dep't of Highways*, 424 Pa. 87, 225 A.2d 895 (1967). If complainant does so, the burden of going forward with evidence shifts to respondent to produce credible evidence of at least co-equal weight. This burden of going forward with evidence may shift back and forth between the parties, but the ultimate burden of persuasion remains with complainant. *Milkie v. Pa. Pub. Util. Comm'n*, 768 A.2d 1217 (Pa.Cmwlth. 2001).

Additionally, any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. *Mill v. Pa. Pub. Util. Comm'n*, 67 Pa.Cmwlth. 597, 447 A.2d 1100 (1982), *Edan Transportation Corp. v. Pa. Pub. Util. Comm'n*, 154 Pa.Cmwlth. 21, 623 A.2d 6 (1993); 2 Pa.C.S. § 704. Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Bethenergy Mines, Inc. v. Workmen's Compensation Appeal Bd. (Skirpan)*, 531

Pa. 287, 612 A.2d 434 (1992). More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk and Western Ry. v. Pa. Pub. Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Compensation Bd. of Review*, 194 Pa.Super. 278, 166 A.2d 96 (1960); *Murphy v. Dep't of Public Welfare*, 85 Pa.Cmwlth. 23, 480 A.2d 382 (1984).

Tolling of the Statute of Limitations

A. While the Commission Has the Authority To Toll Complainants' Claims That Fall Outside of the Limitations Period Under 66 Pa. C.S. §3314 and §1312, the Doctrines of Continuing Violations Rule, Discovery Rule and Estoppel, Do Not Apply in the Instant Matter under the Commission Case Law

1. The Record Evidence Fails to Demonstrate that the Statute of Limitations Should Be Tolled for Complainants' Claims which Fall Outside the Three-Year General Limitation Period Contained in 66 Pa. C.S. §3314.

The Complainants' Main Brief characterizes the interaction between PGW as one in which the Complainants sought simple information but was refused assistance. This is a mischaracterization. The record reflects that PGW attempted to ascertain what type of assistance would satisfy the inquiries of Mr. Pulley.[9] The record reflects that the multiple and lengthy string of communications with Mr. Pulley, PGW attempted to provide the assistance, organization and explanation. During the course of the discussion with John Dunn, the information sought asked by Mr. Pulley was general in nature about the condition of several of the accounts known to be associated with SBG Management Services, Inc. or Mr. Pulley.[10]

The Complainant's reliance on the Doctrine of continuing violation is misplaced. The Complainants appear to state that the continuous violation refers to the issue regarding the order of payments which was only raised for the first time in January 2015. Prior to that time the Complainants articulated issue with respect to LPC's was the accuracy of the calculation of the 1.5% per month rate of LPC's on outstanding account

[9] PGW Correspondence Binder
[10] Id.

balances. The Complainants cannot assert a continuing violation that they had not articulated until approximately three years after the commencement of the complaints. PGW sought to sort out the information requested and discern just exactly what was the nature of Mr. Pulley's problem with the bills and "what didn't make sense."[11]

The Complainants' reliance on the generic communications to support and preserve the general notion that all bills and transactions are dispute to such the large extent dispute transaction that occurred over a decade previously simply because Mr. Pulley continued make further inquiry for information stretches the doctrine governing the tolling of the statute of limitations in 66 Pa. C.S. §3314.

When the management of the CRC went to Mr. Savage, PGW continued to attempt to provide the information request. Despite the mischaracterizations contained in the Complainants Main Brief, Mr. Savage's testimony, the nature of communications between Mr. Pulley and Mr. Savage remain in the nature of inquiry.[12]

The involvement PGW's Legal Department shows PGW's willingness to respond to Mr. Pulley's concerns but could not provide the response that was to Mr. Pulley's liking. As such, PGW attempted to provide to the Complainants every opportunity to articulate the specific nature of his complaint. Mr. Pulley could not.

Conversely, even a casual review of the Complainants accounts reveal the lack of intention to pay for gas service. Even if the Complainants had a concern with the assessment of LPC's throughout the decade prior to the filing of the complaints, the Complainants could and should have paid the full amount of the undisputed bills. With little if any payments on the Complainants' accounts, the Complainants' demonstrate that their effort to understand what is going on with the accounts is simply Mr. Pulley's refusal to pay bills and shows his unwillingness to pay rather that withholding payment of only a disputed amount. The record reflects that Mr. Pulley, despite his initial claims of unfamiliarity with the Commission's dispute process, was familiar with the disputing a bill and the Commission's rules governing disputes.[13]

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[11] Transcript pp. 900 - 912
[12] Id.
[13] Official Notice taken of Formal Complaints filed by Mr. Pulley

During the course of the dialogue, PGW and Mr. Pulley agreed that while the information was sought about the accounts, the Complainants were to pay their current bills. That agreement was not honored.[14]

Upon a review of the Complainants' payment patterns, it seems disingenuous of the Complainants to maintain that they had a good faith complaint and could not articulate the nature of the complaint while the Complainants continue to receive gas service supporting their business enterprise.

2. The Issues Remaining in this Proceeding were not raised during the period outside the three year limitation period of 66 Pa. C.S. §3314.

As the issues in dispute have evolved, Complainants no longer contest many of the disputed bills and payment issues originally raised. The remaining issues involve the imposition (amount and application) of LPC's on the SBG accounts. These issues were not specifically introduced during the dialogue between Mr. Pully and PGW. The nature of the exchange was to come to an understanding and organization of the matters to be discussed. This does not constitute the articulation of a dispute. The correspondence between the Parties is an attempt to address what might be the basis of concern about the bills. The Complainants had not articulated the specific dispute of the issues that remain in controversy in this proceeding until well after the filing of the Complaints.

The communications between PGW and the Complainants were in the nature of inquires between concerning the general understanding of various PGW. Thus, therefore, the statute of limitations should not be tolled for Complainants' claims which fall outside the three-year general limitation period contained in 66 Pa. C.S. §3314.

The fact that the newest issue raised in January 2015 was not contemplated throughout the period of the alleged continuous violation should not enable the Complainants' to defeat the purpose of the 66 Pa. C.S. §3314 by disguising an extremely poor payment practices with the argument that something "just doesn't make sense," while finally crafting a legal argument more than a decade later.

[14] Transcript pp. 900 - 912

3. PGW did not cause the Mr. Pulley to relax his vigilance or deviate from his right of inquiry into the facts by fraud or concealment, therefore, the statute of limitations should not be tolled for Complainants' claims which fall outside the three-year general limitation period contained in 66 Pa. C.S. §3314.

As stated in PGW's Main Brief, the standard to be applied to this issue is governed by the Commission's decision in *Lester Ely v. Pennsylvania American Water Company, Docket No. C-20055616,* (Order adopted July 10, 2006) In that case the Commission stated that a defendant cannot assert the defense of the statute of limitations where a defendant by fraud or concealment causes a plaintiff to relax his vigilance or deviate from his right of inquiry into the facts. The doctrine of equitable estoppel prevents the defendant from asserting the bar of the statute of limitations.

In the record of the instant case, the doctrine of equitable estoppel does not apply to PGW. The doctrine of equitable estoppel serves to toll the statute of limitations only if a party by fraud or concealment causes a plaintiff to relax his vigilance or deviate from his right of inquiry into the facts.

The record shows that throughout the dialogue between PGW and Mr. Pulley, steps were taken to address his questions about the accounts in an attempt to arrive at the satisfaction of his inquiry. With each new facet of the inquiry, Mr. Pulley enjoyed the benefit of nonpayment on the Complainant's account. If the Complainants had an articulable issue with the computation of LPC's on the accounts, the Mr. Pulley could have stated to PGW that he thought that the LPC's where high and incorrectly calculated. Further, as evidence of such an articulable dispute, Mr. Pulley could have paid the PGW bill in full, save the LPC's and thus would have arrested the problem of the increasing LPC's. Instead, the Complainants continued in the pattern of non-payment.[15]

PGW's communications with Mr. Pulley were an attempt to respond to his ever increasing need for additional information from which to identify the dispute. PGW did not cause Mr. Pulley to relax his vigilance or deviate from his right of inquiry into the facts. PGW attempted to assist Mr. Pulley in his quest for information. At all times during the period of inquiry between PGW and Mr. Pulley, he could have filed a complaint with the

[15] Complainants' Statements of Account

Commission even if unsatisfied with the information provided.

Thus, the Commission must find that the Commission's Statute of Limitations has not tolled, pursuant to 66 Pa. C.S. §3314 and its decision in *Lester Ely v. Pennsylvania American Water Company, Docket No. C-20055616,* (Order adopted July 10, 2006)

Municipal Liens and Late Payment Charges

B. While the Commission Does Have the Authority to Consider the Accuracy of the Underlying Accounting of Complainants' Utility Bills and to Determine the Proper Calculation of and Application of Tariff Approved Rate for Late Payment Charges ("LPC"), the Complainants Raise Questions More in the Legal Nature, Involving the Questions of the Correct Applicability of Statutes that are not Within the Commission's Jurisdiction.

In its discussion of the issue of the Commission's authority in its Main Brief, the Complainants somewhat mischaracterize the underlying issue of their complaint. While the Commission does have the authority to determine the accuracy of any bill from a utility within its jurisdiction, the question is more than mathematical or simply the definite application of a related statute. The Complainant raises issues that concern the controverted applicability of one statute over another; neither of these is contained in the Pennsylvania Public Utility Code. From the Commission's perspective on this question, PGW simply assesses LPC's on applicable outstanding balances on active PGW accounts. Where there is no active account, PGW stops assessing LPC's on the account, irrespective of whether the balances of the account were subject to a lien.

In its Main Brief, the Complainants have ignored the applicability of Municipal Claim and Tax Lien Law, Act at 53 P.S. § 7143 which authorizes the charge of interest on a Municipal Lien.

As stated in PGW's Main Brief, a Municipal Lien filed by the City of Philadelphia for unpaid gas service is not considered a judgment under 42 Pa.C.S.A. §8101 with respect to the applicability of interest charges as the interest charge for a Municipal Lien is governed by the Municipal Claim and Tax Lien Law, Act at 53 P.S. § 7143 which authorizes the charge of interest on a Municipal Lien

The Complainants' position is that 42 Pa.C.S.A. §8101 controls the imposition of interest on the Municipal Lien. That section states,

> 42 Pa.C.S.A. §8101 – Interests on judgments
>
> Except as otherwise provided by another statute, a judgment for a specific sum of money shall bear interest at the lawful rate from the date of the verdict or award, or from the date of the judgment, if the judgment is not entered upon a verdict or award.

42 Pa.C.S.A. §8101 (Emphasis added)

In its Main Brief the Complainants mischaracterize the statute which controls the imposition of interest on a Municipal Lien, as it is governed by the Municipal Claim and Tax Lien Law, Act 153 of 1923, P.L. 207 53 P.S. §7101, et seq. (Municipal Lien Act). Under the Municipal Lien Act, the City of Philadelphia as owner of PGW has the right to collect on municipal claims owed to PGW for gas service. The Municipal Lien Act governs all aspects of liens filed for municipal claims under that act.

According to the Municipal Lien Act at 53 P.S. § 7143, the legislature has enabled the charge of interest on municipal liens to be capped at the maximum rate of interest to be charged on a lien for a municipal claim is a rate not to exceed 10%. That section continues to state that the fixed interest rate (which shall not exceed the cap) is to be authorized by separate legislation of the interest to be charged.

The Municipal Lien Act at 53 P.S. § 7143 Time and place for filing; liability; interest; form; contents; appeals from assessments; indexing; revival; order fixing amount, which is attached hereto, states in pertinent part, "...

> Interest as determined by the municipality at a rate not to exceed ten per cent per annum shall be collectible on all municipal claims from the date of the completed of the work after it is filed as a lien, and on claims for taxes, water rents or rates, lighting rates, or sewer rates from the date of the filing of the lien therefore: Provided, however, That after the effective date of this amendatory act (December 28, 1981) where municipal claims are filed arising out of a municipal project which required the municipality to issue bonds to finance the project interest shall be collectible on such claims at the rate of interest of the bond issue or at the rate of twelve per cent per annum, whichever is less. Where the provisions of any other act relating to

> claims for taxes, water rents or rates, lighting rates, power rates, sewer rents or rates or for any other type of municipal claim or lien utilizes the procedures provided in this act and where the provisions of such other act establishes a different rate of interest for such claims or liens, the maximum rate of interest of ten per cent per annum as provided for in this section shall be applicable to the claims and lien provided for under such other acts:..."

53 P.S. § 7143 (Emphasis added.)

Moreover, Pennsylvania case law bears out the applicability of legislative authority under Municipal Liens Act in determining the appropriate interest rate. In *Borough of Walnutport v. Timothy Dennis*, 13 A.3d 541, (Pa. Cmwlth 2010) which is attached, the Commonwealth Court, describes that the interest rate must be set by ordinance. (See p. 7 of the attached copy. Further, the Court in *Pentlong Corp. V. GLS Capital*, 780 A.2d 734, 746 (Pa. Cmwlth 2001) (also attached) states that the interest rate in question should be set..."under the flexible provisions of the Muncipal Claims Act." (See: *Borough of Walnutport v. Timothy Dennis*, 13 A.3d 541, (Pa. Cmwlth 2010) p. 7)

The governing statute of Municipal Liens with respect to imposition of interest "post filing" remains the Municipal Liens Act and not 42 Pa.C.S.A. §8101.

1. The disposition of the question of the applicable law 42 Pa. C.S. §8101 or 53 P.S. § 7143 is one that requires to this Commission to interpret two pieces of legislation over which the Commission lacks jurisdiction.

The question of the correct applicability of the rate of interest, whether 42 Pa. C.S. §8101 or Municipal Claim and Tax Lien Law, Act 153 of 1923, P.L. 207 53 P.S. §7101, et seq. (Municipal Lien Act) at 53 P.S. § 7143 is a question properly before the Court of Common Pleas. The Commission has repeatedly recognized its lack of subject matter jurisdiction in cases involving a dispute over a municipal lien placed upon a property. *Cornelia Strowder v. Philadelphia Gas Works*, 2002 WL 32069511 (2002), *Debra Williams Lawrence v. Philadelphia Gas Works*, Docket Number C-20066672 (Final Order entered January 22, 2007), *Tina L. Francis-Young v. Philadelphia Gas Works*, Docket Number C-2008-2029672, (Final Order entered February 23, 2009), *Dung Phat, LLC v. Philadelphia Gas Works*, Docket Number C-2009-2135667, (Final Order entered January 13, 2010), *Nathaniel Lewis Mooney v. PGW*, Docket No. C-2009-2134673, (Final

Opinion and Order entered January 13, 2010), *David Golan v. Philadelphia Gas Works*, Docket Number C-2009-2138115, (Final Order entered February 4, 2010), *2020 West Passyunk Avenue Inc. v. Philadelphia Gas Works*, Docket Number C-2009-2138727, (Final Order entered February 4, 2010), *Jean Charles v. Philadelphia Gas Works*, Docket Number C-2009-2138638, (Final Order entered February 5, 2010), Agron Vata v. Philadelphia Gas Works, Docket No. C-2009-2149960 (Final Order entered August 24, 2010), *William Petravich v. Philadelphia Gas Works*, Docket No. C-2010-2188984, (Final Opinion and Order entered February 10, 2011), *Avner and Gail Yamin v. Philadelphia Gas Works*, Docket No. C-2011-2221883, (Final Order entered June 29, 2011), *Ardelle Jackson v. Philadelphia Gas Works,* Docket No. C-2009-2119940 (Final Opinion and Order entered July 1, 2011) *Larry and Gail Newman v. Philadelphia Gas Works*, C-2011-2273565 (Final Opinion and Order issued March 29, 2012).

Pursuant to the Responsible Utility Customer Protection Act at 66 Pa. Cons. Stat. § 1414, which states: "[a] city natural gas distribution operation furnishing gas service to a property is entitled to impose or assess a municipal claim against the property and file as liens of record claims for unpaid natural gas distribution service and other related costs, including natural gas supply ...," clarifies and confirms such rights to impose a lien. The nature of a lien is such that it encumbers the real estate, regardless who caused the event, which results in the imposition of a municipal claim. PGW may collect as a municipal claim, unpaid debt for gas service rendered, even when the gas service was not rendered to the owner of the property. *Newberry Township v. Ray Stambaugh,* 848 A.2d 173; (Pa. Cmwlth. 2000)

Since the question of the applicable interest rate is governed by the Municipal Liens Act, it follows that the question of the applicable interest rate is also a question for the Court of Common Pleas.

C. Commission Lacks the Authority to Determine That A Lien Filed and Docketed In the Court of Common Pleas Judgment Indexes on Behalf PGW for Unpaid gas service is a Judgment Pursuant to 42 Pa. C.S. §8101 and is Subject to Accrual of Post-Judgment Interest Only at the Statute Rate of Six Percent per Annum Until the Judgment is Satisfied.

Since the question of the applicable interest rate is governed by the Municipal Liens Act, it follows that the question of the applicable interest rate is also a question for the Court of Common Pleas.

D. Commission Should Not Determine that the Legal Interest Rate PGW May apply to Unpaid Gas Debt On an Active PGW Account is Anything Other than PGW Gas Service Tariff , Section 4.2 Even if a Part of the Debt on that Active Account is Subject to a Municipal Lien.

1. The correct interest rate in late payment charges that should be applied on that portion of an outstanding balance which is the subject of a Municipal Lien is the Commission approved Tariff PGW Gas Service Tariff.

Despite the Complainants' erroneous characterization that the interest assessed on a Municipal Lien is subject to 42 Pa.C.S.A. §8101, the Complainants' challenge to the assessment of LPC's upon Municipal Liens filed on active accounts is somewhat misleading. PGW is not charging LPC's on all amounts that are the subject of a Municipal Lien, but rather, only to those amounts that are owed on an active PGW Account. The fact that the amount was liened for non-payment should have no effect on the assessment of LPC's.

According to the Pennsylvania Code, 66 Pa. C.S. §1303 – Adherence to tariffs, states in pertinent part,

> No public utility shall, directly or indirectly, by any device whatsoever, or in anywise, demand or receive from any person, corporation, or municipal corporation a greater or less rate for any service rendered or to be rendered by such public utility than that specified in the tariffs of such public utility until changed, as provided by this part…

Thus, PGW is charged with the task of ensuring that the amounts assessed for non-payment of an active account balance are consistent with PGW's Commission approved PGW Gas Service Tariff – Pa. PUC No. 2, Page No. 26 Section 4.2. Finance Charge on Late Payments, which states,

> PGW will assess a late penalty for any overdue bill, in an amount which does not exceed 1.5% interest per month on the full unpaid and overdue balance of the bill. These charges are to be calculated on the overdue portions of PGW Charges only. The interest rate, when annualized, may not exceed 18% simple interest per annum. Late Payment Charges will not be imposed on disputed estimated bills,

unless the estimated bill was required because utility personnel were unable to access the affected premises to obtain an Actual Meter Reading.

In this regard, the LPC rate of 1.5% per month is not being assessed on all unpaid date that is the subject of a Municipal Lien. The LPC rate of 1.5% per month continues being assessed on debt that is on an active PGW account. This is the only rate authorized by PGW Gas Service Tariff – Pa. PUC No. 2, Section 4.2.

E. The Complainants have failed to meet their burden in showing the PGW's Application of Payments is in violation of any section of the Pennsylvania Public Utility Code nor its Tariff nor any applicable statute or regulation in connection with its actions in the above referenced matter.

In the sections regarding the issues that were to be briefed, the Complainants Main contains references and some argument containing the assumption that the Complainants' a new issue alleging that the manner in which PGW applies payments to accounts (First to Deposits, then to the oldest Late Payment Charges ("LPC") then to the oldest gas charges) violates the Pa. Public Utility Code and other Fair Credit and Collections laws. The issue was raised by their "expert" witnesses at the hearings in 2015. The expert witnesses did not present any written report rather, merely provided oral testimony on the new issue. The record of this proceeding does not show that PGW's method or applying payments to accounts, violates the Public Utility Code, a Commission Order or Regulation or other statute. Thus, the Complainants have failed to meet their burden in this respect. The consolidated Complaints should be dismissed.

To the extent that the Complainants continue to argue and brief the Complainants' new issue concerning the Order of Payments and other supporting arguments, in the Complainants' Reply Brief, PGW requests that such argument be stricken from the Complainants' brief or that PGW be given the opportunity to address the issues raised in the Complainants' Reply to which PGW has not addressed.

IV. CONCLUSION

In this matter the Complainant has failed to meet its burden. For the foregoing reasons, PGW respectfully requests that the Commission dismiss the Complaint and issue a decision finding that PGW was neither in violation of any section of the Pennsylvania Public Utility Code nor its Tariff nor any applicable statute or regulation in connection with its actions in the above referenced matter.

Respectfully submitted,

May 11, 2015

Laureto A. Farinas, Esq.
Philadelphia Gas Works
800 W. Montgomery Avenue
Philadelphia, PA 19122

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS DAY SERVED A TRUE COPY OF THE FOREGOING DOCUMENT UPON THE PARTICIPANTS LISTED BELOW, IN ACCORDANCE WITH THE REQUIREMENTS OF 52 PA CODE §1.54 (RELATING TO SERVICE BY A PARTICIPANT).

Service List

For Complainants:

Donna S. Ross, Esq.
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Ms. Kathy Treadwell
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& by e-mail: dsross@sbgmanagement.com
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May 11, 2015

Laureto A. Farinas, Esq.
Philadelphia Gas Works
800 W. Montgomery Avenue
Philadelphia, PA 19122

H

Commonwealth Court of Pennsylvania.
BOROUGH OF WALNUTPORT
v.
Timothy DENNIS, Appellant.

Argued Sept. 14, 2010.
Decided Dec. 3, 2010.
Reargument Denied Jan. 21, 2011.

Background: Borough filed writ of scire facias against landowner. Landowner filed affidavit of defense, which included a demurrer, a motion to dismiss, an answer, defenses, and a counterclaims for damages. The Court of Common Pleas, Northampton County, No. 1994–ML–8215,Beltrami, J., entered judgment in favor of borough for $9,074. Landowner appealed.

Holdings: The Commonwealth Court, No. 1518 C.D. 2009,Flaherty, Senior Judge, held that:
(1) borough was entitled to collect $1184 in attorney fees from landowner;
(2) service of notice of scire facias municipal claim for curbing on landowner was proper;
(3) trial court did not abuse its discretion in determining landowner failed to prove property sustained damage from installation of curbing;
(4) landowner could not present valid counterclaim for eminent domain; and
(5) borough could not collect interest on its municipal lien.

Affirmed in part and reversed in part.

West Headnotes

[1] Scire Facias 346 ⇐14

346 Scire Facias
346k14 k. Appeal and error. Most Cited Cases
Commonwealth court's review of determination that judgment should be entered in favor of borough and against landowner for writ of scire facias was limited to whether the findings of fact were supported by substantial evidence, and whether the trial court abused its discretion or committed an error of law.

[2] Scire Facias 346 ⇐15

346 Scire Facias
346k15 k. Costs. Most Cited Cases
Borough was entitled to collect $1184 in attorney fees from landowner against whom judgment was entered in action for writ of scire facias under statute, which stated that plaintiff in municipal claim was entitled to reasonable attorney fees; attorney fees were reasonable. 53 P.S. § 7106(a.1, a.2).

[3] Appeal and Error 30 ⇐1079

30 Appeal and Error
30XVI Review
30XVI(K) Error Waived in Appellate Court
30k1079 k. Insufficient discussion of objections. Most Cited Cases
Appellant waived by failure to include in statement of matters complained of on appeal issue of whether or not borough had an ordinance in place regarding imposition of attorney fees at least 30 days before it imposed them.

[4] Appeal and Error 30 ⇐1079

30 Appeal and Error
30XVI Review
30XVI(K) Error Waived in Appellate Court
30k1079 k. Insufficient discussion of objections. Most Cited Cases
Appellant waived by failure to include in statement of matters complained of on appeal issues of lack of notice within 30 days of curb construction work informing him that he could be liable for the costs, including attorney fees, and that such notice did not comply with statute which allowed court to consider in determining reasonableness of amount of attorney fees the delinquent account collected

and benefit to the municipality from the services; appellant never petitioned the trial court to challenge the reasonableness of the attorney fees, and sections of statute upon which appellant relied were added after notice was sent.

[5] Process 313 ⚿48

313 Process
313II Service
313II(A) Personal Service in General
313k48 k. Nature and necessity in general. Most Cited Cases

Failure to properly serve an individual with original notice of an action precludes jurisdiction in said matter.

[6] Scire Facias 346 ⚿1

346 Scire Facias
346k1 k. Nature and scope of remedy. Most Cited Cases

Scire facias municipal claims are in rem proceedings as opposed to in personam; thus, it is the property that owes the debt, and not the property owner.

[7] Municipal Corporations 268 ⚿565

268 Municipal Corporations
268IX Public Improvements
268IX(F) Enforcement of Assessments and Special Taxes
268k557 Actions for Sale of Land
268k565 k. Parties. Most Cited Cases

Individuals are party defendants in a scire facias municipal claim in the sense that they are required to show cause why their land shall not be bound by the lien of the municipal claim; in this sense, a scire facias municipal claim may be brought against any person found in possession of the property as well as against any person who may have an interest in the property as owner.

[8] Municipal Corporations 268 ⚿566

268 Municipal Corporations
268IX Public Improvements
268IX(F) Enforcement of Assessments and Special Taxes
268k557 Actions for Sale of Land
268k566 k. Process. Most Cited Cases

Borough's service of notice of scire facias municipal claim for curbing on sole owner of home who signed return receipt green card was proper, although at time of service, homeowner had not recorded deed in which his ex-wife extinguished her interest in the property; ex-wife did not need to be served, since she was not an owner at the time of notice. 53 P.S. § 7141.

[9] Municipal Corporations 268 ⚿394(1)

268 Municipal Corporations
268IX Public Improvements
268IX(D) Damages
268k394 Nature of Injury and Elements of Damage
268k394(1) k. In general. Most Cited Cases

Trial court did not abuse its discretion or commit an error of law in determining that landowner had failed to prove that property sustained damage as result of borough's work in installing curbing abutting the property; landowner failed to prove that property sustained damage as a result of borough's actions, landowner was responsible for all grading, but neglected his duty to grade, and borough engineer testified that curb installation work did not damage the property, but that the current state of the property was solely due to lack of maintenance by the property owner, and landowner never made a complaint to the borough after the road improvements were completed.

[10] Scire Facias 346 ⚿4

346 Scire Facias
346k4 k. Defenses. Most Cited Cases

Once a lienholder has issued a scire facias to a taxpayer under the Municipal Claims Act, the taxpayer may file an affidavit of defense raising all defenses he may have to the municipal lien. 53 P.S. §

7106(a.1).

[11] Scire Facias 346 ⚿4

346 Scire Facias
346k4 k. Defenses. Most Cited Cases
In a scire facias proceeding to enforce a municipal claim, the defendant can set off against the claims the amount alleged to be due him or her because of damages sustained by reason of acts of the plaintiff's agents and employees. 53 P.S. § 7106(a.1).

[12] Eminent Domain 148 ⚿266

148 Eminent Domain
148IV Remedies of Owners of Property; Inverse Condemnation
148k266 k. Nature and grounds in general. Most Cited Cases
Landowner could not present a valid counterclaim for eminent domain in borough's action for writ of scire facias, where landowner was permitted to claim damages, made a claim for $34,900, had a full and fair hearing on his damages claim, and trial court held that landowner failed to prove the property sustained damages as a result of any action by the borough.

[13] Eminent Domain 148 ⚿226

148 Eminent Domain
148III Proceedings to Take Property and Assess Compensation
148k225 Assessment by Commissioners, Appraisers, or Viewers
148k226 k. Application and proceedings thereon. Most Cited Cases
Trial court's failure to appoint a board of viewers at landowner's request in borough's action for writ of scire facias was not error; claim for taking of property or for consequential damages resulting from damage to property abutting the area of a road improvement resulting from a change of grade or denial of access could only be brought before a board of viewers, and only a condemnor, condemnee, or displaced person could file a petition requesting the appointment of viewers. 26 Pa.C.S.A. § 502.

[14] Eminent Domain 148 ⚿266

148 Eminent Domain
148IV Remedies of Owners of Property; Inverse Condemnation
148k266 k. Nature and grounds in general. Most Cited Cases

Scire Facias 346 ⚿1

346 Scire Facias
346k1 k. Nature and scope of remedy. Most Cited Cases
Trial court did not err in holding that landowner's claim for eminent domain could not be litigated as part of the scire facias proceeding; any claim for taking of property or for consequential damages resulting from damage to property abutting the area of a road improvement resulting from a change of grade or denial of access was required to be brought before a board of viewers. 26 Pa.C.S.A. § 502.

[15] Municipal Corporations 268 ⚿518(1)

268 Municipal Corporations
268IX Public Improvements
268IX(E) Assessments for Benefits, and Special Taxes
268k518 Interest
268k518(1) k. In general. Most Cited Cases
Borough could not collect interest on its municipal lien for installation of curbing on landowner's property, where borough did not determine the interest rate with specificity in resolution or ordinance. 53 P.S. § 7143.

[16] Municipal Corporations 268 ⚿518(1)

268 Municipal Corporations
268IX Public Improvements
268IX(E) Assessments for Benefits, and Special Taxes

268k518 Interest
268k518(1) k. In general. Most Cited Cases

In order to collect any interest under provision of Municipal Claims Act, which stated that interest as determined by the municipality at a rate not to exceed 10% per annum shall be collectible on all municipal claims from the date of the completion of the work after it was filed as a lien, borough must adopt an interest rate at or below 10%. 53 P.S. § 7143.

[17] Municipal Corporations 268 ⚿518(1)

268 Municipal Corporations
268IX Public Improvements
268IX(E) Assessments for Benefits, and Special Taxes
268k518 Interest
268k518(1) k. In general. Most Cited Cases

Statute allows borough to set the interest rate for municipal claims from the date of the completion of the work after it is filed as a lien; but, statute does not allow borough to set interest rate in a manner that is vague and subject to change randomly, without notice and official action, otherwise, taxpayers would have to speculate on what interest rate the municipality would charge on such liens between 0.1% and 10%. 53 P.S. § 7143.

[18] Municipal Corporations 268 ⚿518(1)

268 Municipal Corporations
268IX Public Improvements
268IX(E) Assessments for Benefits, and Special Taxes
268k518 Interest
268k518(1) k. In general. Most Cited Cases

Official action by a municipality is required to adopt an ordinance or resolution establishing a specific rate of interest for municipal claims, as opposed to an ordinance that merely incorporates a statute that authorizes a flexible maximum possible rate of interest; unless municipality establishes a specific rate of interest by ordinance, there would be no assurance that a uniform rate of interest would be consistently charged to all taxpayers. 53 P.S. § 7143.

***543** Joseph P. Maher, Allentown, for appellant.

Michael F. Corriere, Bethlehem, for appellee.

BEFORE: PELLEGRINI, Judge, BUTLER, Judge, and FLAHERTY, Senior Judge.

OPINION BY Senior Judge FLAHERTY.

Timothy Dennis (Dennis) appeals from an order of the Court of Common Pleas of Northampton County (trial court) which entered an *in rem* judgment in the amount of $9,074.47 in favor of the Borough of Walnutport (Borough) and against Dennis, stating that such judgment may be enforced pursuant to Pa. R.C.P. No. 3190, against property located at 645 Lehigh Gap Street, Walnutport, Northampton County (Property). We affirm in part and reverse in part.

On April 14, 1982, Dennis and his wife, Rosemary G. Dennis (Rosemary), purchased the Property. Subsequently, Dennis and Rosemary divorced and on May 1, 1990. Rosemary conveyed her interest in the Property to Dennis and Dennis agreed to hold Rosemary harmless with regard to any expenses or liens associated with the Property. However, Dennis never recorded this deed. Due to the present litigation, Rosemary discovered the deed was not recorded and, ultimately, Dennis recorded a new deed on June 7, 2007 conveying the property. [FN1] Dennis maintained a ***544** post office box in Walnutport, Pennsylvania and has been the only person with access to that box.

FN1. At the time of trial, all claims against Rosemary were dismissed.

On March 17, 1986, the Borough enacted Ordinance No. 86–2, which authorized the Borough to reconstruct streets in the Borough. The ordinance

also authorized the Borough to install curbing on properties abutting those streets if the owner failed to do so within ninety days of receiving written notice. Ordinance No. 86–2 amended Ordinance No. 80–4, which had been enacted on September 22, 1980, and stated that if a landowner failed to install curbing after notice, the Borough could install the curbing and then collect from the owner the costs thereof "as provided in the Borough Code and/or other applicable laws, statutes, rules and regulations." Ordinance No. 80–4, Section II(g).

On November 11, 1993, the Borough passed Ordinance No. 89–4, which described and opened Lehigh Gap Street as a public street, authorized its grade and curbing alignment to be set in due course, and authorized the Borough's secretary to notify abutting landowners.

On March 4, 1994, the Borough secretary, Natalie C. Kirchner (Secretary), sent a letter to Dennis at the Property, which was returned unclaimed. The Secretary was notified that the letter should be sent to the Post Office Box (P.O. Box) 119 address. On May 10, 1994, the Secretary sent a second certified letter to Dennis at P.O. Box 119. The letter indicated that Lehigh Gap Street was scheduled for reconstruction and that curbing had to be installed by August 13, 1994. On May 28, 1994, a signed certified receipt was returned to the Borough.

On or after June 9, 1994, a third letter was sent to Dennis addressed to P.O. Box 119, which was unclaimed. At the July 7, 1994 Borough meeting, the Secretary indicated that Dennis had received his notice in May so curbing should not be installed for ninety (90) days from that date.

Dennis did not install curbing within the ninety days after receiving the notice. The Borough retained a contractor, Clark DeLong (DeLong), to install the curbing on the Property. The curbing was installed in September of 1994, and the Borough paid $3,822.25 for the curbing permit, the installation, the cutting down of two trees, the removing of stumps and legal fees. Of that amount, $500.00 was paid for the removal of two trees and stumps that were later determined to be on property not owned by Dennis.[FN2]

> FN2. The Borough withdrew its claim for reimbursement for the removal of the trees at the time of the hearing before the trial court.

On October 13, 1994, the Borough filed a municipal lien for improvements to the Property in the amount of $3,822.25. On June 21, 1995, the Secretary forwarded a letter to P.O. Box 119, indicating that a lien was placed on the Property. On December 29, 2004, the Borough filed a writ of *scire facias*. After efforts to serve the writ failed, the writ was reissued on March 9, 2007.

On April 27, 2007, Dennis filed an affidavit of defense, which included a demurrer, a motion to dismiss, an answer, defenses, and a counterclaim. On May 16, 2007, the Borough filed a demurrer to Dennis's affidavit of defense.

On August 9, 2007, pursuant to Section 3 of the Act of May 16, 1923, P.L. 207, *as amended,* 53 P.S. § 7106(a.1) (Municipal Claims Act), the Borough enacted Ordinance No. 2007–12 which authorized the Borough to collect "all charges, expenses ***545** and attorney fees incurred in the collection of any delinquent account."

On November 5, 2007, the trial court sustained, in part, Dennis's demurrer and granted the Borough twenty days to amend its lien. The trial court also sustained the Borough's demurrer, in part, dismissing several of Dennis's defenses. Dennis was granted leave to file an amended affidavit of defense.

On November 26, 2007, the Borough filed an amended lien for improvements to the Property in the amount of $3,822.25. On December 21, 2007, Dennis filed an amended affidavit of defense, which included an answer to the amended lien, new matter, four defenses (insufficient notice, Ordinance fails to provide due process, fraud and mis-

take) and two claims for damages. The first claim for damages contained Dennis's allegation that the Borough damaged the Property in widening the street and installing the curb. The second claim for damages requested that a board of viewers be appointed to assess whether the Borough condemned a portion of the Property in widening Lehigh Gap Street.

The trial court held a hearing on May 26 and 27, 2009. The Borough presented the testimony of Rosemary, as on cross, the Secretary, Borough solicitor David Backenstoe (Backenstoe), and Amy Loefflad Kunkel, an engineer for the Borough (Kunkel). Dennis presented Donald J. Ronca, a general contractor (Ronca), and then Dennis testified on his own behalf prior to calling the Secretary on rebuttal.[FN3]

FN3. Ronca estimated the cost of repairing the damages that the Borough's excavation activities had caused to Dennis's Property at $34,900.00.

The trial court determined that the Borough was authorized to widen Lehigh Gap Street pursuant to applicable Borough ordinances and resolutions, that the Borough properly notified Dennis of his obligation to install curbing in connection with the widening of Lehigh Gap Street, that Dennis did not install the curbing as required, and that the Borough was authorized to install the curbing and did so at a cost of $3222.25. The trial court further determined that Dennis was obligated to reimburse the Borough for the installation of the curbing and that Section 9 of the Municipal Claims Act, *as amended,* 53 P.S. § 7143, does not require the Borough to enact an ordinance setting the interest rate, but rather, simply allows the Borough to assess an interest rate not to exceed 10% per annum.

The trial court found that Dennis received sufficient notice of the Borough's demand for installing the curb; that the Borough properly enacted Ordinance No. 86–2; and that Dennis's assertion that the ordinance is unconstitutional is without merit. The trial court further found that Dennis failed to prove that the Property sustained any damage as a result of the Borough, its agents or employees. In addition, the trial court found that pursuant to Ordinance No. 80–4, Section II, Dennis is responsible for all grading on the Property and that Dennis's claim that the Borough condemned a portion of the Property was not properly before the trial court, as it must be brought before a board of viewers.

[1] The trial court found that the Borough was entitled to interest in the amount of $4,668.60, and attorney fees in the amount of $1,183.62. It determined that the total owed to the Borough was $9,074.47. Dennis appealed to this court.[FN4]

FN4. Our review is limited to whether the findings of fact are supported by substantial evidence, whether the trial court abused its discretion or committed an error of law. *Strand v. Chester Police Department,* 687 A.2d 872 (Pa.Cmwlth.1997).

***546** Dennis contends that the Borough failed to meet its burden of proof in that the Borough is not entitled to collect attorney fees from Dennis; that it is not entitled to collect interest at the rate of 10%, or for that matter, in any amount; and that it did not properly serve notice upon the owners of the Property prior to filing its municipal lien. Dennis further contends that the trial court abused its discretion and/or erred as a matter of law in determining that Dennis had failed to prove that the Property sustained damage as a result of the Borough installing curbing abutting the Property and in determining that Dennis could not present a valid counter claim for eminent domain, or in the alternative, in not appointing a board of viewers, as Dennis had requested in his amended affidavit of defense.

[2] First, Dennis contends that the Borough failed to meet its burden of proof that it is entitled to collect attorney fees from Dennis. Section 3 of the Municipal Claims Act, *as amended,* 53 P.S. §

7106, subsections (a.1), (a.2), and (a.3), *added by,* the Act of February 7, 1996, P.L. 1, states in pertinent part as follows:

> (a) All municipal claims, municipal liens ... which may hereafter be lawfully imposed or assessed on any property in this Commonwealth, and all such claims heretofore lawfully imposed or assessed within six months before the passage of this act and not yet liened, in the manner and to the extent hereinafter set forth, shall be and they are hereby declared to be a lien on said property, together with all charges, expenses, *and fees incurred in the collection of any delinquent account, including reasonable attorney fees under subsection (a.1), added thereto for failure to pay promptly* ....
>
> (a.1) It is not the intent of this subsection to require owners to pay, or municipalities to sanction, inappropriate or unreasonable attorney fees, charges or expenses for routine functions. Attorney fees incurred in the collection of any delinquent account, including municipal claims, municipal liens ... shall be in an amount sufficient to compensate attorneys undertaking collection and representation of a municipality or its assignee in any actions in law or equity involving claims arising under this act. A municipality by ordinance, or by resolution if the municipality is of a class which does not have the power to enact an ordinance, shall adopt the schedule of attorney fees. Where attorney fees are sought to be collected in connection with the collection of a delinquent account, including municipal claims, municipal liens ... the owner may petition the court of common pleas in the county where the property subject to the municipal claim and lien ... is located to adjudicate the reasonableness of the attorney fees imposed....
>
> (a.2) Any time attorney fees are awarded pursuant to any provision of law, the municipality shall not be entitled to duplicate recovery of attorney fees under this section.
>
> (a.1)(1) At least thirty days prior to assessing or imposing attorney fees in connection with the collection of a delinquent account, including municipal claims, municipal liens ... a municipality shall, by United States certified mail, return receipt requested, postage prepaid, mail to the owner the notice required by this subsection.
>
> * * *
>
> ***547** (c) A writ of execution may issue directly without prosecution to judgment of a writ of scire facias....
>
> (d) Attorney fees may be imposed and collected in accordance with this section upon all ... municipal claims, municipal liens, writs of scire facias, judgments or executions filed on or after December 19, 1990.

(Emphasis added.) Dennis contends that the Borough submitted no evidence during the course of the trial that it had an ordinance in place or had passed any official declaration regarding the imposition of attorney fees relating to the collection of municipal claims in the period from before 1994 through the passage of Resolution 2007–12 on August 9, 2007.

In *Monroe Township Municipal Authority v. Augsburger,* 883 A.2d 718(Pa.Cmwlth.2005), this court stated that subsection (a) of the Municipal Claims Act provides for attorney fees in the collection of a delinquent account. This court determined that, while "delinquent account" was not defined in the Municipal Claims Act, that the "failure to pay while asserting a reasonable contest ... to the validity of the lien does not render an account delinquent." *Id.* at 719. Further, this court looked at subsection (a.1) which requires that the municipality adopt by ordinance, or by resolution if the municipality is of a class which does not have the power to enact an ordinance, a schedule of attorney fees, and subsection (a.3) which requires that the municipality, at least thirty days prior to assessing attorney fees, notify the property owner by certified return

receipt mail of its intent to do so. *Id.* at 719–720. This court stated that, "[a]bsent this evidence, the Authority could not impose the attorney's fees even if [this court] had deemed the account delinquent." *Id.* at 720.

Here, Dennis argues that the Borough did not adopt an ordinance and did not provide thirty days notice that it was going to impose such fees. Further, Dennis argues that the Borough's attempt to pass such a declaration over 13 years after the initial notices were allegedly sent to Dennis and after this litigation had commenced, is an affront to the clear intent of the statutory language to advise an owner in advance of filing a municipal lien that if the owner does not take the requested action, the owner may not only have to pay for the actual cost of the installation, but may have to pay additional charges including attorney fees.

However, the Borough met its burden of proof that it is entitled to collect attorney fees from Dennis. Specifically, 53 P.S. § 7187 provides that reasonable legal fees may be collected on a municipal lien after a verdict has been entered in favor of the municipality. In this case, a verdict was entered on June 5, 2009, in favor of the Borough and, as such, the Borough is entitled to reasonable attorney fees for collection on the debt.

Pursuant to 53 P.S. § 7187, once the trial court rules on a municipal lien and a verdict is entered by the court, the municipality shall be entitled to reasonable attorney fees pursuant to 53 P.S. § 7106. Reading both statutes in conjunction with one another, as required under the rules, once the trial court rules in favor of the municipality on its municipal lien, the challenge by the property owner is deemed to be meritless, therefore, entitling a municipality to an award of reasonable legal fees. As Dennis lost his challenge, 53 P.S. § 7187 mandates an award of reasonable attorney fees. The attorney fees of $1,183.62 as found by the trial court are reasonable and therefore, the Borough is entitled to such fees.

***548** [3] Dennis waived the issue of whether or not the Borough had an ordinance in place or had passed any official declaration regarding imposition of attorney fees pursuant to 53 P.S. 7106(a)(i), as it was not contained in Dennis's statement of matters complained of on appeal.[FN5]

FN5. Dennis's statement of matters complained of on appeal provides:

> c. Whether the trial court erred in ruling that Walnutport can charge attorney fees on a municipal claim that is in litigation and not delinquent ensuing a judgment hereof the Pennsylvania Commonwealth Court has ruled to the contrary? { *Monroe Twp. Mun. Auth. v. Augsburger,* 883 A.2d 718, 2005 Pa. Commw. LEXIS 523 (Pa.Commw.Ct.2005)}....

[4] Dennis also waived the issues that he did not receive notice thirty days prior to the curb construction work informing him that he could be liable for the costs, including attorney fees, and that such notice did not comply with 53 P.S. § 7106(a)(3) and (a)(4), because they were not included in Dennis's 1925(b) statement of matters complained of on appeal. Further, Dennis never petitioned the trial court to challenge the reasonableness of the attorney fees as required by 53 P.S. § 7106(a.1) and therefore a review of this issue on appeal is waived. Finally, 53 P.S. § 7106(a)(3) and (a)(4) were added to the statute in 1996 and thus, do not apply to the notice sent in 1994.

Next, Dennis argues that the Borough failed to meet its burden of proof that it properly served notice upon the owners of the Property as a precondition to the filing of its municipal lien. Section 7 of the Municipal Claims Act, 53 P.S. § 7141, states in pertinent part as follows:

> No claim shall be filed for curbing ... unless the owner shall have neglected to do said work for such length of time as may be described by ordinance, after notice so to do, served upon him or his

known agent or occupant of the property ... and if there be no agent or occupant known by claimant, it may be posted on the most public part of the property.

Dennis contends that the Borough did not submit any evidence that Dennis had an agent or other occupant living at the Property or that the Borough served the above-stated required notice on any such person. Further, the Borough has not asserted that it posted the Property. Thus, the Borough must serve the owners of the Property which, Dennis claims, it did not.

The Secretary testified that the Borough sent out two precondition notices required by Section 7 of the Municipal Claims Act, 53 P.S. § 7141. The first letter sent March 4, 1994, was addressed to both Mr. and Mrs. Dennis at the Property address and was returned to the Borough office. Thereafter, on May 14, 1994, a second letter was allegedly sent via certified mail to Mr. and Mrs. Dennis at P.O. Box 119. A copy of the U.S. Postal return receipt card was attached as part of Exhibit B–7 and indicates what Dennis claims is an illegible signature by an alleged addressee on or about May 28, 1994. The Borough conceded that no separate letters were sent to each of the two record owners of the Property in 1994, i.e. Rosemary and Dennis.

Dennis states that even though Rosemary conveyed her interest in the Property to Dennis on May 1, 1990, and Dennis agreed to hold Rosemary harmless with regard to any expenses or liens associated with the Property, that such deed was not recorded until June 7, 2007, so the Borough's service was improper, as Rosemary did not know of the claim until being served by the Sheriff of Northampton County with the writ of *scire facias* in 2007. The Borough did, subsequently, dismiss***549** Rosemary from the action even though, Dennis alleges, she was still a record owner of the Property in 1994.

[5] Dennis further alleges that the signature on the return receipt card was illegible and was not his. He denied ever receiving the correspondence dated May 14, 1994. Dennis testified that he was not in residence at the Property in May of 1994, and that he was working in New York City at the time, living near his work, and receiving personal mail at a mail box in New York. Failure to properly serve an individual with original notice of an action precludes jurisdiction in said matter. *Township of Lycoming v. Shannon,* 780 A.2d 835, 838 (Pa.Cmwlth.2001). If there is more than one owner, the claimant is required to serve all of the owners. *Borough of Towanda v. Brannaka,* 434 A.2d 889, 892 (Pa.Cmwlth.1981).

[6][7] *Scire facias* municipal claims are *in rem* proceedings as opposed to *in personam.* It is, therefore, the property that owes the debt and not the property owner. Individuals are party defendants in the sense that they are required to show cause why their land shall not be bound by the lien of the municipal claim. In this sense, a *scire facias* municipal claim may be brought against any person found in possession of the property as well as against any person who may have an interest in the property, as owner. See Sections 18, 12 & 17 of the Municipal Claims Act, 53 P.S. § 7186, § 7181 and § 7185. The Borough properly served notice upon the owners of the Property prior to filing the municipal lien.

[8] The Borough's service was proper pursuant to 53 P.S. § 7141. Dennis was the sole occupant of the premises in 1994. The trial court determined that Dennis signed the return receipt green card and was served on or about May 28, 1994. This service complies with 53 P.S. § 7141. The factual record establishes that Rosemary did not have to be served, as she was not an owner at the time. In 1990 Rosemary and Dennis divorced. Pursuant to the divorce Rosemary tendered a deed to the Property to Dennis. The Secretary testified that she sent three notices to Dennis, two of which were sent to P.O. Box 119 and one of which she received a signed certified return receipt card back from the post office. The Secretary did verify with the post office that the P.O. Box 119 address was registered to

Dennis. Dennis testified that P.O. Box 119 was in his name only and no one else had access to the box. Dennis did deny that the signature on the return receipt was his. However, the trial court found this statement not credible.

[9] Next, Dennis contends that the trial court abused its discretion and/or committed an error of law in determining that Dennis had failed to prove that the Property sustained damage as a result of the Borough's work in installing curbing abutting the Property. Dennis sets forth the trial court's statement that:

> We find no case law limiting the special damages defense to a scire facias action. To the contrary, we find case law instructing defendant to plead all defenses to the municipal lien in the affidavit of defense 53 P.S. § 7271. *See Western Clinton v. Estate of Rosamilia,* 828 [826] A.2d 52, 55 (Pa.Cmwlth.2003).

Dennis's Brief at 17. Dennis presented his own testimony and photographs regarding the Property as it existed before and after the Borough's work on the abutting cartway and curbing, and also the expert testimony of Ronca. Ronca stated that abutting construction work created consequential problems to the adjoining property, particularly creating driveway ***550** access problems after installing the curbing.

Section 612 of the former Eminent Domain Code, Act of June 22, 1964, Special Sess., P.L. 84, *as amended, formerly* 26 P.S. § 1–612, repealed by Section 5 of the Act of May 4, 2006, P.L. 112. NOTE: Section 1 of the Act of May 4, 2006, No. 2006–34, enacted the consolidated Eminent Domain Code; the act was effective September 1, 2006, 26 Pa.C.S. § 714, recognizes the issue of consequential damages to property due to work by a municipality on its own abutting property. When access to property is interfered with, it creates a right to compensation by the land owner from the government. *See, Jackson Gear Co. v. Department of Transportation,* 657 A.2d 1370 (Pa.Cmwlth.1995). Dennis contends that he did prove his case for special damages by a preponderance of the evidence.

[10][11] The trial court did not abuse its discretion and/or commit an error of law in determining that Dennis had failed to prove that the Property sustained damage as a result of the Borough's work in installing curbing abutting the Property. Once a lienholder has issued a *scire facias* to a taxpayer under the Municipal Claims Act, the tax payer may file an affidavit of defense raising all defenses he may have to the municipal lien. In a *scire facias* proceeding to enforce a municipal claim, the defendant can set off against the claims the amount alleged to be due him or her because of damages sustained by reason of acts of the plaintiff's agents and employees. During the trial the Borough engineer and general contractor testified. The trial court ruled that Dennis failed to prove that the Property sustained damage as a result of the Borough's actions. Pursuant to the Borough Ordinance No. 80–4, Section II, Dennis was responsible for all grading on the Property. The record supports the trial court's findings. Kunkel, the Borough engineer, testified that the curb installation work did not damage Dennis' Property and that the current state of the Property was solely due to lack of maintenance by the property owner. It was further stated that Dennis never made a complaint to the Borough in 1994 after the road improvements were completed. The Borough also notes that the trial court reviewed numerous photographs of the Property from 1981 and 2009. The Borough states that it is clear that the Property has not been maintained in the last fifteen years and that Ronca's estimate regarding property damage was done eighteen days before the trial and he had not observed the Property in 1994.

[12][13] Further, Dennis argues that the trial court abused its discretion and/or committed an error of law in determining that Dennis could not present a valid counterclaim in eminent domain, or in the alternative, the trial court abused its discretion in not appointing a board of viewers as Dennis

requested in his amended affidavit of defense. Dennis contends that the trial court refused to allow him to proceed with a cognizable counterclaim he had against the Borough in eminent domain, as the trial court believed the Borough had the authority to widen Lehigh Gap Street. Dennis agrees that the Borough had the authority to widen Lehigh Gap Street, but argues that such authority does not preclude a claim for consequential/special damages for work that the Borough did that affected the Property. Section 714 of the Eminent Domain Code, 26 Pa.C.S. § 714.[FN6]

> FN6. 26 Pa.C.S. § 714 regarding consequential damages sets forth the following:
>
> > All condemnors, including the Commonwealth, shall be liable for damages to property abutting the area of an improvement resulting from change of grade of a road or highway, permanent interference with access or injury to surface support, whether or not any property is taken.

***551** Moreover, Dennis contends that the trial court has subject matter jurisdiction in a claim for eminent domain and can try such a case *de novo.* 26 Pa.C.S. § 1103. Second, it is obvious that the trial court has personal jurisdiction over the parties because they are the same parties in both the eminent domain action and the case *sub judice.* As a matter of judicial economy, trying the counterclaim at the same time as the hearing on the municipal claim, both of which involve 'damages' arising out of the Borough taking and rebuilding Lehigh Gap Street, makes logical sense.

In the alternative, Dennis argues that the trial court had an option to appoint a board of viewers as requested by Dennis in his amended affidavit of defense. The trial court took no action on this request even though the Borough filed no objections to said request.

Dennis is concerned that he is compelled to bring his action or counterclaim for the Borough's taking of his real estate as a compulsory counterclaim or be forever barred via *res judicata* or collateral estoppel. *Del Turco v. Peoples Home Savings Association,* 329 Pa.Super. 258, 478 A.2d 456 (1984). Thus, the trial court should have permitted Dennis to counterclaim in eminent domain or to have stayed the present proceeding until a board of viewers could have held a hearing and made a finding.

[14] The trial court did not abuse its discretion and/or commit an error of law in determining that Dennis could not present a valid counterclaim in eminent domain, nor did the trial court abuse its discretion in not appointing a board of viewers. Dennis contends that he had a right to seek consequential damages as a counterclaim. The record reflects that Dennis was permitted to claim damages. Ronca testified to what he believed the damages were and the cause. The trial court permitted Dennis to submit a claim for $34,900.00. The trial court held that Dennis failed to prove the Property sustained damages as a result of any action by the Borough and denied the counterclaim. Dennis had a full and fair hearing on his damages claim.

Additionally, the trial court did not err in holding that Dennis's claim for eminent domain could not be litigated as part of the *scire facias* proceeding. Any claim for taking of property or for consequential damages resulting from damage to property abutting the area of a road improvement resulting from a change of grade or denial of access, must be brought before a board of view. We note that 26 Pa.C.S. § 502, entitled "Petition for Appointment of viewers" permits only a condemnor, condemnee or displaced person to file a petition requesting the appointment of viewers. Therefore, the trial court correctly declined to appoint a board of viewers in this matter. Even if this issue were properly raised, it is without merit.

[15][16] Further, Dennis argues that the Borough failed to meet its burden of proof that it is entitled to collect interest at the rate of 10% or in any

amount. Section 9 of the Municipal Claims Act, 53 P.S. § 7143, states in pertinent part that:

> Interest *as determined by the municipality* at a *rate not to exceed ten per cent* per annum shall be collectible on all municipal claims from the date of the completion of the work after it is filed as a lien.... (Emphasis added).

***552** Section 9 states that the rate is not to exceed 10%, it does not state that the interest rate accrues at 10%. It further states that the interest rate is to be "determined" by the municipality. Therefore, in order to collect any interest, the Borough must adopt an interest rate at or below 10%.

In *Pentlong Corp. v. GLS Capital,* 780 A.2d 734, 746 (Pa.Cmwlth.2001), the interest rate was set by legislation enacted by the Commissioners authorizing the county to collect interest at a rate of 12 % which was in excess of the maximum authorized under the Municipal Claims Act. Thus, Dennis argues, the Borough, in the present controversy, has not similarly complied with the legal requirements authorizing it to collect interest on alleged delinquent accounts or municipal liens. *Pentlong* is distinguishable, however. There was no question raised therein that the county should have determined the interest rate under the flexible provisions of the Municipal Claims Act. The county was held to have properly determined a specific higher interest rate under the more generous provisions of The Second Class County Code, Act of July 28, 193, P.L. 723, *as amended,* 16 P.S. §§ 3101–6302, which controlled.

Borough argues that the record reflects the municipal lien was filed against the Property on October 13, 1994. The Borough assessed interest at a rate of 10% per annum per year. The total lien amount including the interest that the Borough was owed on the municipal lien was $9,074.74, of that amount $4,668.60 was interest. Backenstoe testified that the Borough adopted Ordinance No. 80–4 that permitted the Borough to seek costs to be imposed as provided for in "the Borough Code and/or any applicable law, statute and regulation." N.T. at 80–82. Ordinance No. 80–4 Section II(g) incorporated the Municipal Claims Act provision such that the Borough may collect fees and costs as set forth in the Municipal Claims Act. Borough contends the Municipal Claims Act permits it to assess interest at 10% per annum and the Borough adopted such provision when the Municipal Claims Act was incorporated into Ordinance No. 80–4. The interest rate used by the Borough does not exceed the statutorily determined percentage per annum but complies with the Municipal Claims Act.

[17][18] The Borough also argues that Section 9 of the Municipal Claims Act, 53 P.S. § 7143, does not require an ordinance setting the interest rate, but allows the Borough to assess an interest rate not to exceed 10% per annum. We agree in part. We agree that 53 P.S. § 7143 does allow the Borough to set the interest rate. However, it does not allow the Borough to set it in a manner that is vague and subject to change randomly, without notice and official action. In order to charge interest the Borough must provide uniformity, notice and consistency by enacting an ordinance or resolution implementing the authority given it generally by the Legislature in 53 P.S. § 7143, by establishing a specific interest rate. Otherwise, taxpayers must speculate on what interest rate the municipality will charge on such liens between 0.1% and 10%. Official action by a municipality is required to adopt an Ordinance or Resolution establishing a specific rate of interest as opposed to an Ordinance that merely incorporates a statute that authorizes a flexible maximum possible rate of interest. Unless the Borough establishes a specific rate of interest by Ordinance, there would be no assurance that a uniform rate of interest would be consistently charged to all taxpayers. While it may be naive to consider that a municipality would charge less than the maximum rate permitted by law, the Legislature did not make such an assumption ***553** when it enacted 53 P.S. § 7143, setting only the maximum rate while giving each municipality the choice of determining the interest rate to charge. Therefore, we must reverse

this part of the trial court's decision and disallow the collection of interest at the rate of 10% per annum, as the Borough did not determine the interest rate with specificity in a resolution or ordinance.

Accordingly, we must affirm the trial court on attorney fees, notice, property damage and the counterclaim. However, we must reverse the trial court regarding the charging of interest.

ORDER

AND NOW, this 3rd day of December, 2010 the order of the Court of Common Pleas of Northampton County in the above-captioned matter is affirmed in part and reversed in part in accordance with the foregoing opinion.

Pa.Cmwlth.,2010.
Borough of Walnutport v. Dennis
13 A.3d 541

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Commonwealth Court of Pennsylvania.
PENTLONG CORPORATION, a Pennsylvania Corporation and Weitzel, Inc., a Pennsylvania Corporation, individually and on behalf of themselves and all others similarly situated, Appellants,
v.
GLS CAPITAL, INC. and County of Allegheny.

Argued May 9, 2001.
Decided July 5, 2001.
Reargument Denied Sept. 10, 2001.

Corporate taxpayers delinquent on their property taxes filed class action against assignee of county's rights, title, and interest to property tax liens, alleging unjust enrichment and fraud. County intervened. Assignee moved to dismiss. The Court of Common Pleas, Allegheny County, No. GD98-5800,Horgos, J., granted motion. Taxpayers appealed. The Commonwealth Court, No. 2119 C.D. 2000,Pellegrini, J., held that: (1) taxpayers were not required to exhaust remedies under scire facias procedure before bringing equity action to challenge interest and costs; (2) assignee could only charge taxpayers maximum rate of 10% interest applicable to tax claims, not 12% rate applicable to delinquent taxes; (3) assignee could not collect its attorney fees from taxpayers; (4) assignee was only entitled to collect record costs that county actually incurred; and (5) assignee was not liable to taxpayers for expense they incurred by paying liens with certified funds.

Affirmed in part, reversed in part and remanded.

Leadbetter, J., dissented.

West Headnotes

[1] Scire Facias 346 ⚿1

346 Scire Facias
346k1 k. Nature and scope of remedy. Most Cited Cases
A "scire facias" proceeding is the procedure by which a lienholder prosecutes a lien to judgment.

[2] Scire Facias 346 ⚿4

346 Scire Facias
346k4 k. Defenses. Most Cited Cases
Once a lienholder has issued a scire facias to a taxpayer under Pennsylvania's Municipal Claims Law, the taxpayer may file an affidavit of defense raising all defenses he may have to the municipal lien. 53 P.S. §§ 7182, 7184.

[3] Equity 150 ⚿46

150 Equity
150I Jurisdiction, Principles, and Maxims
150I(B) Remedy at Law and Multiplicity of Suits
150k45 Adequacy of Legal Remedy
150k46 k. In general. Most Cited Cases

Equity 150 ⚿50

150 Equity
150I Jurisdiction, Principles, and Maxims
150I(B) Remedy at Law and Multiplicity of Suits
150k50 k. Statutory creation of remedy. Most Cited Cases
While normally, equity is divested of jurisdiction where there is a prescribed statutory remedy, that is not always the case where the remedy is deemed inadequate.

[4] Equity 150 ⚿46

150 Equity
150I Jurisdiction, Principles, and Maxims
150I(B) Remedy at Law and Multiplicity of Suits
150k45 Adequacy of Legal Remedy

150k46 k. In general. Most Cited Cases

Equity 150 ⚿50

150 Equity
150I Jurisdiction, Principles, and Maxims
150I(B) Remedy at Law and Multiplicity of Suits
150k50 k. Statutory creation of remedy. Most Cited Cases

Scire facias procedure under Municipal Claims Law was not a "full and adequate remedy" for corporate taxpayers challenging interest and costs imposed by county's assignee on property tax liens, and therefore, taxpayers could challenge interest and costs by bringing unjust enrichment claims without first exhausting scire facias procedure. 53 P.S. §§ 7182, 7184.

[5] Equity 150 ⚿46

150 Equity
150I Jurisdiction, Principles, and Maxims
150I(B) Remedy at Law and Multiplicity of Suits
150k45 Adequacy of Legal Remedy
150k46 k. In general. Most Cited Cases

Equity 150 ⚿50

150 Equity
150I Jurisdiction, Principles, and Maxims
150I(B) Remedy at Law and Multiplicity of Suits
150k50 k. Statutory creation of remedy. Most Cited Cases

Section of Local Taxation Law providing that taxpayers can seek a refund if they believe a local government has improperly received funds did not provide a "full and adequate remedy" for corporate taxpayers challenging interest and costs imposed by county's assignee on property tax liens, and therefore, taxpayers could challenge interest and costs by bringing unjust enrichment claims without first exhausting remedies under such Law; taxpayers sought refund from assignee, a private party, rather than from county. 72 P.S. § 5566b.

[6] Interest 219 ⚿31

219 Interest
219II Rate
219k31 k. Computation of rate in general. Most Cited Cases

Private party to whom county assigned right, title, and interest to property tax liens was not a "collector of delinquent taxes" under provision of Local Taxation Law limiting such collector to 12% interest per annum on such taxes. 72 P.S. §§ 5648, 5652.

[7] Interest 219 ⚿31

219 Interest
219II Rate
219k31 k. Computation of rate in general. Most Cited Cases

Private party to whom county assigned right, title, and interest to property tax liens for consideration could only charge taxpayers maximum rate of 10% interest applicable to tax claims, not 12% rate applicable to delinquent taxes; private party did not purchase a delinquent tax, but an in rem lien, and its purchase satisfied the delinquent tax owed to the county. 53 P.S. §§ 7101, 7143; 72 P.S. § 5648.

[8] Taxation 371 ⚿2809

371 Taxation
371III Property Taxes
371III(K) Collection and Enforcement Against Persons or Personal Property
371III(K)1 In General
371k2809 k. Authority to collect interest, penalties, and fees. Most Cited Cases
(Formerly 371k552)

Private party to whom county assigned right, title, and interest to property tax liens was not entitled to collect its attorney fees from taxpayers in connection with such assignment; statute allowing

for collection of attorney fees in connection with municipal claims did not apply to liens on tax claims. 53 P.S. § 7106.

[9] Assignments 38 ⚿90

38 Assignments
38V Rights and Liabilities
38k90 k. Nature and extent of rights of assignee in general. Most Cited Cases
The rights of an assignee rise no higher than those of its assignor.

[10] Taxation 371 ⚿2809

371 Taxation
371III Property Taxes
371III(K) Collection and Enforcement Against Persons or Personal Property
371III(K)1 In General
371k2809 k. Authority to collect interest, penalties, and fees. Most Cited Cases
(Formerly 371k552)
Private party to whom county assigned right, title, and interest to property tax liens was only entitled to collect record costs that county actually incurred and could legally impose if it owned the liens. 53 P.S. § 7103.

[11] Taxation 371 ⚿2761

371 Taxation
371III Property Taxes
371III(J) Payment and Refunding or Recovery of Tax Paid
371k2761 k. Mode of making and medium of payment. Most Cited Cases
(Formerly 371k527)
Private party to whom county assigned right, title, and interest to property tax liens was not liable to taxpayers for expense they incurred by paying liens with certified funds, as requested by assignee; assignee did not require certified payment, but only requested it.

***735** Bernard S. Rubb, Sewickley, for appellants.

Michael G. McCabe, Stacey F. Vernallis and Byron D. Xides, Pittsburgh, for appellees.

***736** Before DOYLE, President Judge, COLINS, Judge, SMITH, Judge, PELLEGRINI, Judge, FRIEDMAN, Judge, KELLEY, Judge, and LEADBETTER, Judge.

PELLEGRINI, Judge.

Pentlong Corporation (Pentlong) and Weitzel, Inc. (Weitzel), both Pennsylvania corporations, individually and on behalf of themselves and all others similarly situated (collectively, Delinquent Taxpayers) appeal from an order of the Court of Common Pleas of Allegheny County (trial court) dismissing with prejudice their class action complaint against GLS Capital, Inc., a Virginia corporation (GLS).

This case emanates from a Purchase and Servicing Agreement that was entered into between the County of Allegheny (the County) [FN1] and GLS on September 29, 1997, in which the County assigned all of its rights, title and interest to over 125,000 property tax liens it had filed through the 1995 tax year to GLS in consideration of approximately $35 million.[FN2] The County later assigned the 1996 matching liens for the same properties for an additional amount in excess of $2.5 million.[FN3] In collecting on the delinquent taxes, GLS required that the taxpayer pay, by certified or cashier's check, the full face amount of the tax, penalties and interest, attorney's fees, lien filing fees, lien satisfaction fees, lien assignment fees and lien revival fees. The accrued interest as determined by GLS included interest for the entire month in which payment in full was made regardless of the day within the month that the taxes were paid in full.

FN1. The County is a Pennsylvania County of the Second Class and is entitled to assess and collect property taxes on real property situated within the County. The taxes are secured by liens against the prop-

erties for which property taxes are delinquent.

FN2. Specifically, Article II, Section 2.1 of the Purchase and Servicing Agreement provided:

> **Section 2.1. Agreement to Purchase Tax Liens.** Subject to the terms and conditions of this Agreement, the Seller hereby agrees to transfer, and the Purchaser hereby agrees to purchase, without recourse, representation or warranty, except as provided herein, all right, title and interest of the Seller in and to the Tax Lien Portfolio including all rights provided by applicable Laws for collection and enforcement of such Tax Liens....
>
> In consideration for the transfer of the Tax Lien Portfolio by the Seller to the Purchaser, the Purchaser agrees to pay the Seller on the Closing Date an amount equal to 96.0058% of the aggregate Face Value of the Tax Liens listed on the Tax Lien Schedule (the "Purchase Price").

FN3. However, in this subsequent Agreement, GLS agreed to pay the County 100% of the aggregate tax lien amount plus six months of accrued interest at 1% per month. In Exhibit A, though,-the Certification of Value of Tax Lien Portfolio-it is indicated that GLS paid the County 100% of the aggregate amount of the tax liens plus 5% percent penalty and 6% interest on the aggregate tax lien amount.

Pentlong, which is the record owner of certain real property situated in the County, failed to pay full property taxes for three calendar years. To secure the amount owed, the County filed liens against the property which were later assigned to GLS under GLS's agreement with the County. On March 16, 1998, Pentlong received a GLS Capital Tax Lien Payoff Report from GLS indicating the face amount of its liens as $1,252.89, that interest had accrued on the unpaid taxes in the amount of $281.99, penalties totaled $32.76, and additional costs totaled $180, or $60 for each of the three years that taxes were owed. Pentlong was instructed that payment had to be made by certified funds to GLS's Pittsburgh office before the end of March 1998 or any amount not received by that time would accrue an additional $12.53 per month representing *737 1% of the total face amount of the liens. On March 18, 1998, Pentlong paid the full amount under protest, including interest at the rate of 12% per annum computed through the end of March 1998.

Weitzel also is the record owner of real property in the County and failed to pay its property taxes from 1988 to 1995. Its taxes were also secured by liens which were later assigned to GLS. On May 21, 1998, GLS sent Weitzel a GLS Capital Tax Lien Payoff Report indicating the face amount of its liens, interest, penalties and costs and requested payment by cashier's check or certified check of the total due or it would proceed with a Sheriff's sale of the property. The notice indicated that "costs" included $55 for tax years 1988, 1989, 1990, 1991 and 1993, and $60 for tax years 1994 and 1995, for a total of $395.[FN4] There was also an item labeled "fees and expenses" in the amount of $2,829.59 and an item labeled "execution costs" in the amount of $1,229.50. These fees and expenses and execution costs included attorneys' fees and expenses. Although the Report did not state the interest rate being charged by GLS, it reflected that total interest accrued on the Weitzel taxes was computed at the rate of 12% per annum. Before the Sheriff's sale took place, Weitzel paid under protest the amount owed.

FN4. For some reason not explained in the record, tax year 1992 was excluded.

Subsequently, Delinquent Taxpayers filed a two-count class action complaint against GLS on behalf of all owners of real estate in the County

whose real property had been encumbered by liens for delinquent County property taxes for tax years before and including 1996 and who had been assessed or billed for certain improper charges by GLS or had paid such improper charges to GLS in connection with those delinquent taxes. In Count I of its complaint, Delinquent Taxpayers alleged that GLS was unjustly enriched because:

- GLS was not entitled to collect 12% interest on the unpaid face amount of its assigned liens as that is the amount of interest that only the County can charge under Section 1 of the Local Taxation Law, Act of May 31, 1933, P.L. 1135, *as amended,* 72 P.S. § 5648 and once GLS purchased the lien, that right ceased.

- GLS was not entitled to collect a full month's interest for only a partial month of delinquency;

- GLS was not entitled to collect attorney's fees from taxpayers;

- GLS was not entitled to collect costs from taxpayers, including lien filing fees, satisfaction fees, transfer/assignment fees, and lien revival fees not recorded as of record; and

- GLS was liable to taxpayers for costs they incurred resulting from GLS's requirement that taxpayers pay for their liens by certified funds.

Regarding those contentions, Delinquent Taxpayers claimed that 1) GLS did not succeed to certain governmental privileges when it bought the liens; 2) but if GLS did, the County did not take necessary action to implement those actions; and 3) certain assessed amounts imposed were not authorized and procedures implemented were improper. In Count II, Delinquent Taxpayers alleged that GLS was guilty of a fraudulent scheme to assess, bill and collect unauthorized amounts. They sought declaratory and injunctive relief as well as damages.

GLS filed preliminary objections alleging that Delinquent Taxpayers' complaint failed to state a cause of action for unjust enrichment because the additional charges added to the tax lien were charges that the County and its Prothonotary could impose ***738** and to which they were entitled upon the purchase of the taxes, interest and costs in each case. GLS further asked the trial court to strike claims related to GLS's request for payment by certified check or certified funds. The trial court denied the preliminary objections but granted GLS's motion to strike the claim for relief arising from GLS's instruction that lien payments be made by certified check with leave to Delinquent Taxpayers to amend the complaint. Delinquent Taxpayers filed an amended complaint adding Weitzel, Inc. as a representative plaintiff that had paid GLS by certified check and added additional claims arising from GLS's assessment of improper and inflated attorney's fees. At this point in the proceedings, the County filed a petition to intervene which was granted. It argued that this action was nothing more than a continuation of the challenge of its authority to assign and transfer claims to a third party, although that issue was previously decided in the companion case of *Maierhoffer v. GLS Capital, Inc.,* 730 A.2d 547 (Pa.Cmwlth.1999), *petition for allowance of appeal denied,* 561 Pa. 680, 749 A.2d 473 (2000), and it believed it was best situated to assert its rights as a tax lienholder and defend long-standing tax collection and enforcement practices. FN5 After GLS filed an answer to the amended complaint and the pleadings were closed, GLS filed a motion for judgment on the pleadings.

FN5. We note that GLS is not seeking a remedy against the County.

The trial court dismissed the complaint with prejudice finding that Delinquent Taxpayers and individual property owners could not proceed as a class action because they had failed to exhaust statutory remedies. Specifically, the trial court referred to Section 14 of the Municipal Claims and Tax Liens Act (Municipal Claims Act), Act of May 16, 1923, P.L. 207, 53 P.S. § 7182 (petitioning the court to determine the amount due) and Section 16 of the Municipal Claims Act, 53 P.S. § 7184

(requesting the claimant to issue a scire facias) as the remedies available to anyone who wanted to challenge the validity of any tax claim and/or any fees and costs assessed as part of that tax lien. Although finding that there was an adequate remedy at law, the trial court, nevertheless, went on to address the merits of the claim finding that 1) the Municipal Claims Act permitted the assignment of all rights of the original holder; 2) tax liens included penalties, interest, costs, revival fees and reasonable attorney's fees; and 3) payment by certified or cashier's checks were part of each tax lien but GLS did not limit the method by which payment was to be remitted. This appeal by Delinquent Taxpayers followed.

I.

This appeal is the sequel to our decision in *Maierhoffer*. In that case, Maierhoffer, a property owner whose property had been liened by the County, challenged the County's sale of real property tax liens contending the County had no authority to sell or assign tax liens to a private third party such as GLS. Contrary to the contention of GLS and the County that the Municipal Claims Act allowed such sale of tax liens, Maierhoffer argued that the statute only gave local governments the authority to sell municipal claims,[FN6] not tax ***739** claims. In rejecting Maierhoffer's position and affirming the trial court, we held that because Section 1 of the Municipal Claims Act defined "tax claim" as "the claim filed to recover taxes" and Section 33 of the Municipal Claims Act, 53 P.S. § 7147, provided that any claim filed under the Municipal Claims Act could be assigned or transferred to a third party and that the assignee or transferee succeeded to the rights of the original holder, in this case, the County, a sale of tax liens was authorized. We did not specifically address, however, what rights GLS acquired. We did recognize, though, that "[c]ertain sections of the [Municipal Claims] Act relate exclusively to tax claims or to municipal claims, but not to both." *Maierhoffer,* 730 A.2d at 551.

FN6. "Municipal claim" is defined in Section 1 of the Municipal Claims Act as:

> (1) the claim arising out of, or resulting from, a tax assessed, service supplied, work done, or improvement authorized and undertaken, by a municipality, although the amount thereof be not at the time definitely ascertained by the authority authorized to determine the same, and a lien therefor be not filed, but becomes filable within the period and in the manner herein provided, (2) the claim filed to recover for the grading, guttering, macadamizing, or otherwise improving, the cartways of any public highway; for grading, curbing, recurbing, paving, repaving, constructing, or repairing the footways thereof; for laying water pipes, gas pipes, culverts, sewers, branch sewers, or sewer connections therein; for assessments for benefits in the opening, widening or vacation thereof ... and (3) the claim filed to recover for work, material, and services rendered or furnished in the construction, improvement, maintenance, and operation of a project or projects of a body politic or corporate created as a Municipal Authority pursuant to law.

53 P.S. § 7101.

In addressing the issue of what charges GLS is entitled to collect, we must initially determine what exactly GLS "bought" when it purchased the County liens. As previously mentioned, those liens were bought pursuant to Section 33 of the Municipal Claims Act, 53 P.S. § 7147, which provides in relevant part:

> Any claim filed or to be filed, under the provisions of this act, and any judgment recovered thereon, may be assigned or transferred to a third party, either absolutely or as collateral security, and **such assignee shall have all the rights of**

the original holder thereof. (Emphasis added.)

GLS claims that when it bought the liens, it not only bought the face amount of the liens and interest on those liens, but it also bought the County's right to utilize the procedures set forth in the Municipal Claims Act to collect those liens. GLS also claims with regard to interest that it is entitled to collect the amount that the County is entitled to collect on delinquent taxes, not liens. Delinquent Taxpayers argue, however, that once GLS bought the liens, not only were the liens "privatized" but so, too, were the procedures used to collect the liens as well as the amount that could be collected, and GLS was only entitled to the rights that a private party would have to collect the liens that it purchased or there would be an improper delegation of governmental power.

Complicating this analysis as to what rights GLS acquired is the fact that neither party offered any evidence describing the procedures the County formerly utilized to collect taxes or any evidence describing the interest, costs and fees the County formerly collected. While we recognize that, in the past, the County may not have been charging all that it was legally entitled to charge under the law, neither party has set forth with any consistency the law on the rights and interests of the County prior to the Agreement with GLS, thereby making the determination of what rights GLS acquired even more difficult.

II.
STATUTORY REMEDIES

The threshold question involved in all of Delinquent Taxpayers' claims is whether ***740** this action can be maintained in equity or whether there are prescribed statutory remedies that must be followed that preclude Delinquent Taxpayers from challenging the interest, fees and costs that GLS imposed. Our Supreme Court in *School District of Borough of West Homestead v. Allegheny County Board of School Directors,* 440 Pa. 113, 118, 269 A.2d 904, 907 (1970), explained the following with regard to the pursuit of statutory remedies:

> [I]f the legislature provides a specific, *exclusive,* constitutionally adequate method for the disposition of a particular kind of dispute, no action may be brought in any 'side' of the Common Pleas to adjudicate the dispute by any kind of 'common law' form of action other than the exclusive statutory method. (Emphasis in original.)

The trial court found there were statutory remedies that were specific and exclusive and available to Delinquent Taxpayers to challenge the charges being challenged here.[FN7] One prescribed statutory remedy that the trial court found was a procedure contained in the Municipal Claims Act. Under that Act, for a taxpayer to challenge any costs assessed by a lienholder in conjunction with the lien against its property, the taxpayer must request the lienholder to issue a scire facias. Section 16 of the Municipal Claims Act, 53 P.S. § 7184, provides:

> FN7. Delinquent Taxpayers also argue that the trial court erred in dismissing its complaint on the basis that a class action was not viable because its class action is proper as it is against a private, for-profit entity that overcharged thousands of taxpayers in the collection of assigned tax liens. While a class action may not be available against a governmental entity, it does not mean that the action is dismissed, only that it is dismissed as a class action. *Klemow v. Time, Inc.,* 466 Pa. 189, 352 A.2d 12 (1976), *cert. denied,* 429 U.S. 828, 97 S.Ct. 86, 50 L.Ed.2d 91 (1976) (even if appellant cannot establish his action is proper as a class action, his individual action may still go forward). Because the class has never been certified, we make no decision as to the propriety of the class action allegations.

> Any party named as defendant in the claim filed, or admitted to defend there against, may file, as of course, and serve a notice upon the claimant or upon the counsel of record to issue a scire facias thereon, within fifteen days after notice so to do.

> If no scire facias be issued within fifteen days after the affidavit of service of notice is filed of record, the claim shall be stricken off by the court, upon motion. If a scire facias be issued in accordance with such notice, the claimant shall not be permitted to discontinue the same, or suffer a nonsuit upon the trial thereof, but a compulsory nonsuit shall be entered by the court if the claimant does not appear, or withdraws, or for reasons fails to maintain his claim.

[1][2] A scire facias proceeding is the procedure by which a lienholder prosecutes a lien to judgment and has been defined as:

> a mandate to the sheriff, which recites the occasion upon which it issues, which directs the sheriff to make known to the parties named in the writ that they must appear before the court on a given day, and which requires the defendant to appear and show cause why the plaintiff should not be permitted to take some step, usually to have advantage of a public record. The object of the writ of scire facias is ordinarily to ascertain the sum due on a lien of record and to give the defendant an opportunity to show cause why the plaintiff should not have execution. The writ of scire facias serves the dual purposes of a summons ***741** and a complaint... FN8

> FN8. A "scire facias sur municipal claim" is defined as a writ authorized to be issued as a means of enforcing payment of a municipal claim out of the real estate upon which such claim is a lien. Blacks Law Dictionary 1208 (5th ed.1979).

Shapiro v. Center Township, Butler County, 159 Pa.Cmwlth. 82, 632 A.2d 994 (1993), (*citing* 18 Standard Pennsylvania Practice 2d § 102:10 (1983)), *petition for allowance of appeal denied,* 537 Pa. 635, 642 A.2d 488 (1994). Once the scire facias has been issued, pursuant to Section 14 of the Municipal Claims Law, 53 P.S. § 7182, the taxpayer may file an affidavit of defense raising all defenses he may have to the municipal lien. *Shapiro; LCN Real Estate, Inc. v. Borough of Wyoming,* 117 Pa.Cmwlth. 260, 544 A.2d 1053 (1988). Section 14 of the Municipal Claims Law, 53 P.S. § 7182, provides:

> Any defendant named in the claim, or any person allowed to intervene and defend there against, may, at any stage of the proceedings, present his petition, under oath or affirmation, setting forth that he has a defense in whole or in part thereto, and of what it consists; and praying that a rule be granted upon the claimant to file an affidavit of the amount claimed by him, and to show cause why the petitioner should not have leave to pay money into court; and, in the case of a municipal claim, to enter security in lieu of the claim; whereupon a rule shall be granted as prayed for. Upon the pleadings filed, or from the claim and the affidavit of defense, and without a petition where an affidavit of defense has been filed, the court shall determine how much of the claim is admitted or not sufficiently denied; and shall enter a decree that upon payment by such petitioner to the claimant of the amount thus found to be due, with interest and costs if anything be found to be due, or upon payment into court, if the claimant refuses to accept the same, and upon payment into court of a sum sufficient to cover the balance claimed, with interest and costs, or upon the entry of approved security in the case of a municipal claim, that such claim shall be wholly discharged as a lien against the property described therein, and shall be stricken from the judgment index. Thereafter the material, disputed facts, if any, shall be tried by a jury, without further pleadings, with the same effect as if a writ of scire facias had duly issued upon said claim, to recover the balance thereof; but the jury shall be sworn to try the issues between the claimant and the parties who paid the fund into court or entered security, and verdict, judgment and payment, or execution, shall follow as in other cases. The same course may be pursued, at the instance of any owner, where the claim has not in fact

been filed, and if, in that event, the petitioner complies with the decree made, the money paid into court or security entered shall stand in lieu of the claim and the latter shall not be filed, and if filed shall be stricken off upon motion.

Under this section, the court determines if the taxpayer owes any interest or costs associated with the lien.

[3] While normally, equity is divested of jurisdiction where there is a prescribed statutory remedy such as this one, that is not always the case where the remedy is deemed inadequate. In *Hill v. Nationwide Insurance Company,* 391 Pa.Super. 184, 570 A.2d 574, 575-576 (1990), *petition for allowance of appeal denied,* 525 Pa. 647, 581 A.2d 573 (1990), the Superior Court explained:

"Generally, where the legislature provides a statutory remedy which is mandatory***742** and exclusive, equity is without power to act, and a jurisdictional question is presented." *DeLuca v. Buckeye Coal Co.,* 463 Pa. 513, 519, 345 A.2d 637, 640 (1975). However, it has also been recognized that a "court of equity has the power to afford relief despite the existence of a legal remedy when, from the nature and complications of a given case, justice can best be reached by means of equity's flexible machinery." *Peitzman[v. Seidman*], 285 Pa.Super. [228] at 234 n. 4, 427 A.2d [196] at 199 n. 4. This proposition is equally true where the legal remedy is provided by statute. *Id; Pennsylvania State Chamber of Commerce v. Torquato,* 386 Pa. 306, 125 A.2d 755 (1956), *cert. denied sub nom. Bowman v. Pennsylvania State Chamber of Commerce,* 352 U.S. 1024, 77 S.Ct. 589, 1 L.Ed.2d 596 (1957). As the *Torquato* court noted:

"To induce equity to refuse its aid to a suitor, it is not sufficient that he may have some remedy at law. *An existing remedy at law* to induce equity to decline the exercise of its jurisdiction in favor of a suitor *must be an adequate and complete one.* And when from the nature and complications of a given case, its justice can best be reached, by means of the flexible machinery of a court of equity, in short where a full, perfect and complete remedy cannot be afforded at law, equity extends its jurisdiction in furtherance of justice." (Emphasis in original.)

Equity likewise has jurisdiction to protect by injunction or appropriate remedy (a) property rights, and (b) personal rights "where a multiplicity of suits may be prevented or where a fundamental question of legal right is involved," and where the interests of justice require equitable relief. *Id.* at 329, 125 A.2d at 766 (emphasis added) (citations omitted.)

Thus, to determine whether equity jurisdiction is proper in the face of an existing legal or statutory remedy, we must determine if the legal or statutory remedy available to the plaintiff is adequate and complete. And such a remedy is clearly not adequate and complete where, because of the continuing nature of the plaintiff's injury, the plaintiff would be required to bring a succession of legal actions. *Id.; see also Luitweiler v. Northchester Corporation,* 456 Pa. 530, 319 A.2d 899 (1974); *Northeast Women's Center, Inc. v. McMonagle,* 665 F.Supp. 1147, 1153 (E.D.Pa.1987).

In making that determination of whether the remedy is adequate, our Supreme Court in *Borough of Green Tree v. Board of Property Assessments, Appeals and Review,* 459 Pa. 268, 278, 328 A.2d 819, 824 (1974) (plurality decision) stated:

The approach customarily taken by this Court in the past, when faced with a question such as the one before us today, has been to require litigants to conform with the desires of the legislature by following the statutorily-prescribed route of appeal. We have, however, at the same time recognized that the above rule is not to be unthinkingly applied, but rather that exception will be made where the statutory remedy is pointless or inadequate. *Rochester[& Pittsburgh Coal Co. v. Bd.*

of Assessment & Revision], supra [, 438 Pa. 506, 266 A.2d 78 (1970)]; *Studio Theatres, Inc. v. City of Pittsburgh [Washington], supra,* 418 Pa. [73] at 79, 209 A.2d [802] at 805-806 [1965] ("Whether a court of equity, having such jurisdiction to act, should act in view of the presence of an adequate remedy at law or for same other valid reason is another matter altogether"); *Bliss Excavating Co. v. Luzerne County*, 418 Pa. 446, 451, 211 A.2d 532, 535 (1965) ("The statutory procedure need not be followed only if it is ***743** inadequate to the task of resolving plaintiffs' objections or its pursuit will cause them irreparable harm"); *Pennsylvania Life Ins. Co. v. Pennsylvania National Life Ins. Co.*, 417 Pa. 168, 173, 208 A.2d 780, 783 (1965) ("Equity will afford relief if the statutory remedy is inadequate or its pursuit would work irreparable harm"); *Philadelphia Life Ins. Co. v. Commonwealth*, 410 Pa. 571, 580, 581, 190 A.2d 111, 116 (1963) ("the remedy must be adequate and complete; it is not adequate Where a challenge is made not to the mechanics of tax calculations but to the power of the legislature to levy any tax ..."); *Y.M.C.A. v. Reading*, 402 Pa. 592, 595, 167 A.2d 469, 471 (1961) ("The efficacy of the rule that a statutory remedy must be pursued, if one exists, is hardly questionable"). Our approach has been, in effect, a flexible one, such as that advocated by Prof. Jaffe: "Where the administrative process has nothing to contribute to the decision of the issue and there are no special reasons for postponing its immediate decision, exhaustion should not be required." L. Jaffe, Judicial Control of Administrative Action 440 (1965). [Footnotes omitted.]

[4] While a taxpayer would have to follow the prescribed statutory remedy if it desired to challenge the calculation of costs and interest charged by a municipality prior to paying those costs, along with the taxes owed,[FN9] we believe that an exception to that rule exists here as our Supreme Court countenanced in *Green Tree.* What is involved in this case is not the calculation of interest and costs for an individual taxpayer by a municipality, but policies established by a private entity to maximize the return on its investment involving thousands of delinquent taxpayers. Because of those policies and the multitude of actions that could result, the scire facias procedure is not a full and adequate remedy and exhaustion is not required, making Delinquent Taxpayers' equity action maintainable to challenge interest and costs GLS imposed.[FN10]

FN9. We note that once the taxes have been paid, the lien of the tax is void. *See Gould v. McFall,* 118 Pa. 455, 12 A. 336 (1888) (one who voluntarily pays money with full knowledge or means of knowledge of all the facts without any fraud having been practiced upon him cannot recover it back by reason of the payment having been made in ignorance of the law). However, because the Delinquent Taxpayers are alleging fraud, the fact that they already paid the taxes and costs would not preclude them from going forward with their action.

FN10. No one contends at this stage of the proceedings that Delinquent Taxpayers are not a proper party because they already paid the liens, costs and interest.

[5] The other prescribed statutory remedy found by the trial court was the remedy set forth in Section 1 of Local Taxation Law, Act of May 21, 1943, P.L. 349, *as amended,* 72 P.S. § 5566b, providing that taxpayers can seek a refund if they believe a local government has improperly received funds, in this case, the lien amount and charges associated with it in satisfying the lien. This provision is inadequate for similar reasons, but additionally because Delinquent Taxpayers are not attempting to seek a refund from the County but from GLS, a private party, who collected the interest and costs when it purchased the liens, making this provision inapplicable.[FN11]

FN11. Not mentioned by the trial court was Section 3 of the Municipal Claims

> Act, 53 P.S § 7106, which authorizes a municipality to collect counsel fees for the collection of a municipal claim and allows an owner to challenge the reasonableness of the attorney's fees imposed by petition.

***744** Because there is no adequate remedy for Delinquent Taxpayers to challenge the costs assessed by GLS, their action in equity is maintainable.

III.
INTEREST

Delinquent Taxpayers contend that the trial court erred in dismissing its claim regarding interest because GLS had no authority to collect 12% interest on the unpaid face amount of its assigned liens.[FN12] They contend that Section 1 of the Local Taxation Law, 72 P.S. § 5648,[FN13] limits the collection of interest at 12% per annum to the "collector of delinquent taxes" and requires that collector to "pay the same into the county treasury;" GLS is not a tax collector and, therefore, may not collect.[FN14] Interestingly, Delinquent Taxpayers do not argue that GLS is precluded from charging *any* interest, but do not cite a provision that sets a different rate.

> FN12. Delinquent Taxpayers also argue that it was illegal for GLS to charge and collect a full month's interest for only a partial month of delinquency. However, because the trial court failed to address this issue, we remand to the trial court for a determination on this issue.

> FN13. 72 P.S. § 5648 provides:
>
> > In counties of the second class, all county taxes after the same become delinquent, as now provided by law, shall bear interest from the time said taxes become delinquent at a rate *determined by the county commissioners* not to exceed twelve per centum per annum until paid, and it shall be the duty of the *collector of delinquent taxes* to collect such interest in addition to the tax and *pay the same into the county treasury.* (Emphasis added.)

> FN14. Delinquent Taxpayers also rely on two Pennsylvania Supreme Court cases for the proposition that an assignee of a municipal claim does not enjoy the same rights as its assignor- *Philadelphia v. Taggart,* 379 Pa. 7, 108 A.2d 68 (1954) and *Philadelphia v. Egolf,* 314 Pa. 216, 171 A. 604 (1934). In *Taggart,* however, a third party had acquired a mortgage and municipal claim after the property had been sold for taxes. The Court held that only those whose claims were discharged by the tax sale had the right of redemption and did not give that right to those who acquired the claims after the sale. In *Egolf,* the third party attempting to collect on a lien had been assigned liens from the municipality's paving contractor, not the municipality itself. Because the contractor did not have any rights of the municipality and could not confer upon the third party the municipality's rights, the assignee had no greater rights than the contractor.

GLS counters that the Local Taxation Law does not define "collector of delinquent taxes," does not give a municipality the exclusive right to recover interest accruing as part of the unpaid tax, and it should be considered the collector of delinquent taxes because that is what it became upon the purchase of the liens. GLS also argues that because it stands in the County's shoes, it is entitled to 12% interest because the County would be entitled to that amount. GLS, however, does not even mention Section 9 of the Municipal Claims Act, *as amended,* 53 P.S. § 7143, which provides that interest on liens should not exceed 10% on a claim for taxes even though we decided that it was the Municipal Claims Act that gave the County the power to sell the liens.

[6] As to GLS's contention that "collector of delinquent taxes" is undefined, Section 2 of the Local Taxation Law, 72 P.S. § 5652, specifically provides that the county treasurer in counties of the second class is the collector of all delinquent county taxes, interest and penalties. GLS, then, could not be considered the collector of delinquent taxes because where the act places a duty on an official, it cannot be contracted or delegated away. ***745***State Street Bank & Trust Co. v. Commonwealth,* 712 A.2d 811 (Pa.Cmwlth.1998) (contract between government and private party must not bargain away essential government powers); *Weatherly v. Warner,* 148 Pa.Super. 557, 25 A.2d 831 (1942) (municipal legislature cannot delegate its powers).

There is support, however, for GLS's position that it is entitled to collect the same rate of interest as the assigning county, citing the decision of the United States Court of Appeal for the Third Circuit in *Rankin v. DeSarno,* 89 F.3d 1123 (3d Cir.1996), *cert. denied,* 519 U.S. 1108, 117 S.Ct. 943, 136 L.Ed.2d 832 (1997). In that case, bankruptcy debtors owing tax liens to Allegheny County appealed the prepetition interest rate of 12% to which the County was entitled in connection with their tax claims arguing that the County was only entitled to a maximum interest rate of 10%. The Court of Appeals explained that while Section 9 of the Municipal Claims Act, 53 P.S. § 7143, [FN15] provided that interest claims made by municipalities for unpaid taxes could not exceed 10%, that section was not controlling. Instead, Section 1 of the Local Taxation Law, 72 P.S. § 5648, which allowed for an interest rate of 12% on all county tax delinquencies, was controlling, because that section specifically applied to second class counties, of which Allegheny County was the only such county, and post-dated 53 P.S. § 7143. Citing rules of statutory construction, the Third Circuit held that even though the two statutes were conflicting, because 72 P.S. § 5648 was more specific, that statute controlled and Allegheny County was entitled to collect 12% interest.

FN15. In relevant part, 53 P.S. § 7143 provides that "[i]nterest as *determined by the municipality* at a rate *not to exceed ten per cent per annum* shall be collectible on all municipal claims from the date of the completion of the work after it is filed as a lien, and *on claims for taxes,* water rents or rates, lighting rates, or sewer rates from the date of the filing of the lien ..." (Emphasis added.)

Again, the Third Circuit in *Pollice v. National Tax Funding,* 225 F.3d 379 (3d Cir.2000), addressed the issue of the interest rate applicable, but in the context of whether the City of Pittsburgh, a Home Rule Municipality, could impose interest at a rate higher than the "not to exceed 10% interest rate" contained in 53 P.S. § 7143 or a 12% rate it imposed by ordinance. It held that even though the City of Pittsburgh as a Home Rule Municipality imposed a 12% rate of interest on delinquent taxes, under Section 1 of the Home Rule and Optional Plans Law, Act of December 19, 1996, P.L. 1158, 53 P.S. 2962(a)(10), it did not have the power to charge that rate because the interest rate was the 10% interest rate set forth in the Municipal Claims Act. It did so by first finding that, "[c]learly, the assessment of interest and penalties on delinquent tax obligations falls within the scope of 'collection of municipal tax claims.' " It went on to state that a Home Rule Municipality has the authority to set "rates of taxation" but that authority "does not include the authority to set interest and penalty rates on delinquent taxes. 'Rate of taxation' undoubtedly means the rate which is applied to the value of property in order to determine the amount owed; its plain meaning does not include the rate of interest or penalty on overdue tax rates." *Id.,* 225 F.3d at 391. This statement seems to infer that if the City had the power to set the rate for delinquent tax rates, then the rate would not be the 10% rate set in the Municipal Claims Act. If we were to follow the *Pollice* statement that "the assessment of interest and penalties on delinquent tax obligations falls within the scope of 'collection of municipal tax

claims,' " then because *746 72 P.S. § 5648 imposes a 12% rate of interest on delinquent taxes, that would be the rate that could be imposed on the collection of tax claims.

[7] Both *Pollice* and *Rankin* are problematic because they were based on the premise, as either expressly stated in *Pollice* or inferentially in *Rankin,* that a "delinquent tax" and a tax claim are the same thing, which they are not. A delinquent tax is a tax that has not been paid on time while a "delinquent tax claim" under Section 7101 of the Municipal Claims Act, 53 P.S. § 7101, "mean[s] the claim filed to recover taxes" and "filed" means docketed in the office of the Prothonotary where the property is located. *See* 53 P.S. § 7106(b). Consequently, although we agree with the Third Circuit decision in *Rankin* that 72 P.S. § 5648 is later in time and specifically applies to counties of the second class, because 53 P.S. § 7143 deals with tax claims while the former deals with delinquent taxes-two different things-the "up to 10% rate" would apply. What GLS bought was not a delinquent tax but an *in rem* lien filed and sold under the Municipal Claims Act. In fact, when GLS bought the liens and paid the County, the underlying delinquent tax was satisfied. To be in accord with our decision in *Maierhoffer,* absent a superseding provision, FN16 it would be inconsistent to say that the interest rate set forth in the Municipal Claims Act does not apply to municipal liens.

> FN16. The reason we mention that there may be a superseding provision is because, in most instances, one exists. While the Municipal Claims Act applies to all political subdivisions, the Real Estate Tax Sale Law, Act of July 7, 1947, P.L. 1368, *as amended,* provides the method as to how taxes are to be calculated on real property tax liens for all counties, except, at present, first and second class counties. Section 205 of the Real Estate Tax Sale Law, 72 P.S. § 5860.205, applies to most political subdivisions through the creation of a tax claim bureau by the county in which they are located to collect their real property taxes. It provides that interest should be calculated on the rate of the underlying tax, not the underlying lien. Unfortunately, while that Act initially applied to second class counties such as Allegheny County, in 1981, second class counties were specifically excluded by the Act of September 26, 1981, P.L. 274. We also note that prior to the exclusion of second class counties, the Real Estate Tax Sale Law was amended in 1949 to allow for counties to opt out of the Act and, in any year after 1948, to elect to collect delinquent taxes under the provision of the prior law pursuant to a resolution adopted by the county commissioners. Whether Allegheny County ever elected to adopt such a resolution in 1948 or thereafter is not in the record.

In any event, neither of the parties has proffered any procedure for the collection of delinquent taxes by second class counties other than that contained in the Municipal Claims Act. Unless there is another provision applicable, based on our reasoning in *Maierhoffer,* the maximum amount that GLS can charge is 10% as provided for in Section 9 of the Municipal Claims Act, 53 P.S. § 7143. That rate, however, had to be set by the County Commissioners and no one has pled that a resolution or ordinance has ever been enacted that authorizes 10% or another interest rate. Because Delinquent Taxpayers never suggested that this was the appropriate rate or that the County Commissioners failed to implement the maximum rate, we vacate the trial court's order insofar as it granted Delinquent Taxpayers' request on a Motion for Judgment on the Pleadings based on its finding that that the interest rate was 12% provided for in Section 2 of the Local Taxation Law, 72 P.S. § 5652.

IV.
ATTORNEY'S FEES

Delinquent Taxpayers also argue that Section 3

of the Municipal Claims Act, *747 53 P.S. § 7106(a.1),[FN17] gives GLS no authority to charge and collect its own attorney's fee from taxpayers because attorney's fees may only be collected when they are incurred in the representation of a municipality, and GLS was acting as a private entity, not as a representative of the municipality.[FN18] They also argue that under that statute, where an owner disagrees with the amount of attorney's fees, the owner may challenge those fees by filing a petition in the court of common pleas in the county where the property is located. If this provision applies and if GLS succeeds to the County's rights under Section 3 of the Municipal Claims Act, 53 P.S. § 7106(a.1), because it provides a specific remedy for challenging of attorney's fees incurred by the political subdivision in collecting the municipal claim, we would dismiss that portion of Delinquent Taxpayers' claim because that procedure provides a mandatory and exclusive method of challenging the imposition of counsel fees.

FN17. 53 P.S. § 7106(a.1) provides, in relevant part:

> It is not the intent of this subsection to require owners to pay, or municipalities to sanction, inappropriate or unreasonable attorney fees, charges or expenses for routine functions. *Attorney fees incurred in the collection of any delinquent account shall be in an amount sufficient to compensate attorneys undertaking collection and representation of a municipality in actions involving claims arising under this act.* A municipality by ordinance, or by resolution if the municipality is of a class which does not have the power to enact an ordinance, shall adopt the schedule of attorney fees. Where attorney fees are sought to be collected in connection with the collection of a delinquent account, the owner may petition the court of common pleas in the county where the property subject to the municipal claim and lien is located to adjudicate the reasonableness of the attorney fees imposed. In the event that there is a challenge to the reasonableness of the attorney fees imposed in accordance with this section, the court shall consider, but not be limited to, the following:
>
> (1) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to properly undertake collection and representation of a municipality in actions arising under subsection (a).
>
> (2) The customary charges of the members of the bar for similar services.
>
> (3) The amount of the delinquent account collected and the benefit to the municipality from the services.
>
> (4) The contingency or the certainty of the compensation.
>
> (Emphasis added.)

FN18. It also argues that attorney's fees cannot be imposed because when the County enacted an ordinance imposing counsel fees, it failed to properly advertise, did not supply copies of full text to the County law library, and it was not properly recorded in the County's ordinance. However, procedural challenges to the enactment of an ordinance must be raised within 30 days of the ordinance's effective date. *Municipality of Monroeville v. Prin*, 680 A.2d 9 (Pa.Cmwlth.1996). Because there is no evidence that Pentlong ever timely challenged the enactment of the ordinance, we will not address this issue.

Whether GLS was entitled to collect attorney's fees hinges on the rights GLS acquired once it purchased the liens. If GLS had purchased a municipal

claim, say for the abatement of a nuisance, it would arguably have the right to impose counsel fees in accordance with the County's fees schedule. Section 3 of the Municipal Claims Act, 53 P.S. § 7106, however, provides that attorney's fees can be imposed on:

> (a) All municipal claims which may hereafter be lawfully imposed or assessed on any property in this Commonwealth, and all such claims heretofore lawfully imposed or assessed within six months before the passage of this act and not yet liened, in the manner and to the extent hereinafter set forth, shall be and they are hereby declared to be a lien on said property, together with all ***748** charges, expenses, and fees incurred in the collection of any delinquent account, including reasonable attorney fees under subsection (a.1), added thereto for failure to pay promptly; and said liens shall arise when lawfully imposed and assessed and shall have priority to and be fully paid and satisfied out of the proceeds of any judicial sale of said property, before any other obligation, judgment, claim, lien, or estate with which the said property may become charged, or for which it may become liable, save and except only the costs of the sale and of the writ upon which it is made, and the taxes imposed or assessed upon said property.

[8][9] As we have already noted, under *Maierhoffer,* not all provisions of the Municipal Claims Act apply to the claims that GLS purchased, but rather only those dealing with tax claims. Because Section 3 of the Municipal Claims Act, 53 P.S. § 7106, only allows for the County to impose attorney's fees for municipal claims and not tax claims, the County would not be entitled under the Municipal Claims Act to collect those attorney's fees when it sought to collect liens filed for a delinquent tax claim.[FN19] Because the rights of an assignee rise no higher than those of its assignor, *Commonwealth v. Lubrizol Corp. Emple. Benefit Plan,* 737 A.2d 862, n. 11 (Pa.Cmwlth.1999), GLS did not acquire any right to receive attorney's fees to collect tax liens because the County did not have such a right.[FN20]

> FN19. We note, though, that the provision for attorney's fees in the collection of delinquent taxes was added in 1966 by the Act of February 1, 1966, P.L. 1656, 53 P.S. § 48401.

> FN20. We note Section 501 of the Real Estate Tax Sale Act, 72 P.S. § 5860.501, provides that the property owner is only required to pay all outstanding tax claims with interest and all other accrued unpaid taxes and record costs. It appears to envision that the 5% penalty on the tax will pay for the costs of collection, including attorney's fees. Section 207 of the Real Estate Tax Sale Act, 72 P.S. § 5860.207, also provides a schedule of fees that can be imposed in addition to record costs imposed by the County.

V.
COSTS

[10] Delinquent Taxpayers also contend that it was illegal for GLS to charge and collect "costs" from taxpayers that neither it nor the County ever paid and were essentially costs of doing business. Specifically, they contend that assignment costs and revival costs were not paid by either the County or GLS, and Section 2 of the Municipal Claims Act, 53 P.S. § 7103, only allows the collection of "charges, expenses, and fees" that were *actually* paid in collecting on the face amount of any unpaid tax claim, not for costs incurred. GLS, however, argues that it is entitled to collect a lien satisfaction fee, filing fee, transfer/assignment fee and a lien revival fee because those fees were paid by the County prior to the assignments to GLS.[FN21]

> FN21. GLS indicates in its brief that for each lien from 1988 through 1993, it charged a lien filing fee of $10; a satisfaction fee of $5; a transfer/assignment fee of $15; and a 1997 lien revival fee of $25.

For each lien from 1994 and thereafter, it charged a lien filing fee of $10; a satisfaction fee of $10; a transfer/assignment fee of $15; and a 1997 lien revival fee of $25.

It appears that there are two types of costs at issue. One type being challenged is a "record cost", i.e., a cost to docket the lien in the Prothonotary's office that Delinquent Taxpayers are saying is not chargeable to them. These costs include a) the revival-of-lien cost because liens need not be revived every year, yet Delinquent Taxpayers were charged a revival fee for each ***749** of the three years it was delinquent, and b) the transfer-of-lien cost because the transfer of liens to GLS was not a cost that the County had to incur. The second type of "costs" at issue appears to be charges that GLS says it can impose pursuant to Section 2 of the Municipal Claims Act, 53 P.S. § 7103, even though they were never paid by the County. While we are not totally clear on what costs GLS contends it is entitled to collect, what GLS seems to be saying is that non-record costs can be imposed if they represent costs that the Prothonotary was authorized to receive when the County filed the lien but, for some reason, the Prothonotary did not charge the County as well as other indirect costs that the County actually incurred in processing the claim.

The trial court never directly answered this issue but only stated that the Prothonotary was authorized to impose certain fees under Section 1 of the Second Class County Prothonotary Fee Act, Act of June 18, 1982, P.L. 547, 42 P.S. § 21061. While it is clear that GLS is entitled to recover all record costs that the County incurred and could legally impose if it owned the lien, 53 P.S. § 7103 only allows the collection of "charges, expenses, and fees" that were actually incurred and could have been taxed as costs. Consequently, GLS is not entitled to any costs that the County did not actually incur. Therefore, we vacate the matter for a factual finding on the nature of each cost charged to Delinquent Taxpayers for a determination of whether the County had incurred such a cost.

VI.
CERTIFIED PAYMENT

[11] Delinquent Taxpayers also argue that GLS is liable for the expense incurred by them resulting from GLS's instruction on its GLS Capital Tax Lien Payoff Report that they should mail or deliver certified funds to its Pittsburgh office. They rely on our Supreme Court's holding in *Douglass v. Grace Building Co., Inc.*, 477 Pa. 289, 383 A.2d 937 (1978), that Bucks County could not require a delinquent taxpayer to remit its taxes only by "cash, money order or certified check" and that payment by an uncertified personal check was permissible because the legislature had not designated in what form payment had to be made. GLS, however, argues that it did not *require* taxpayers to pay by certified or cashier's check but simply *requested* payment by that method and, in fact, accepted personal checks from taxpayers, thereby complying with *Douglass*.

While it appears that, in practice, GLS now accepts payment by personal check, that is of no moment because GLS is a private entity that has purchased liens. Based on the pleadings before us, GLS is not responsible for the costs associated with Delinquent Taxpayers' form of payment.

VII.
CONCLUSION

Accordingly, the decision of the trial court is affirmed in part and reversed in part and the case remanded to the trial court for further determinations in accordance with this decision.

Judge LEADBETTER dissents.

ORDER

AND NOW, this 5th day of July, 2001, the order of the trial court is affirmed in part and reversed in part, and the case is remanded to the trial court to make further findings in accordance with this decision.

Jurisdiction relinquished.

Pa.Cmwlth.,2001.
Pentlong Corp. v. GLS Capital, Inc.
780 A.2d 734

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