

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Ivan Yotov	:	
	:	
v.	:	C-2016-2558226
	:	
Duquesne Light Company	:	

INITIAL DECISION
GRANTING RESPONDENT’S MOTION FOR JUDGMENT ON THE PLEADINGS
AND DISMISSING COMPLAINT

Before
David A. Salapa
Administrative Law Judge

INTRODUCTION

A customer filed a complaint against his electric utility alleging that the utility is unwilling to remove a tree next to its electric line, which the customer alleges poses a hazardous condition. This decision dismisses the customer’s complaint because the customer previously filed a complaint with the Commission raising these same issues and the Commission issued an order denying his request for relief.

HISTORY OF THE PROCEEDING

On July 25, 2016, Ivan Yotov (Complainant) filed a complaint (instant complaint) with the Pennsylvania Public Utility Commission (Commission) against Duquesne Light Company (Respondent). The complaint alleges that the Respondent refuses to remove a tree located close to Respondent’s electric line, which the Complainant asserts creates a hazardous condition with risk of personal injury and property damage.

According to the instant complaint, the Complainant previously filed a complaint regarding this same issue at Docket No. C-2015-2479258, in which the Commission ruled in the Respondent's favor (prior complaint). The Complainant states that he is filing the instant complaint for two reasons. First, the Complainant claims that Administrative Law Judge (ALJ) Cheskis failed to take into account a letter and communication from Walter Jarosh, a certified arborist, because Mr. Jarosh was not present at the evidentiary hearing. The Complainant states he was not informed in advance that Mr. Jarosh was required to attend the hearing, and believes that the exclusion of Mr. Jarosh's communications, upon which a large portion of the Complainant's case was based, resulted in an incorrect disposition of the case. Second, the Complainant states that on April 14, 2016, he filed with the Commission an "update" which he alleges shows that the tree in question has significantly deteriorated, and that a large chunk of the tree fell and nearly struck his wife. The Complainant admits that this update was filed after the close of the period for filing exceptions.

The Complainant states that for this proceeding Mr. Jarosh will be available as a witness at the evidentiary hearing, and that he is including the information about the tree's current status with the instant complaint for consideration. Attached to the instant complaint is a series of emails between Mr. Jarosh, the Complainant, and representatives of the Respondent, which the Complainant alleges show that the Respondent continues to refuse to remove the tree in question. These communications also include photographs of the tree.

As relief the Complainant asks the Commission to enforce the safety regulations and require the Respondent to remove the tree.

The Respondent filed an answer with new matter on August 15, 2016, properly accompanied by a notice to plead. The answer denies all material allegations of the instant complaint. The answer further indicates that the Commission recently denied and dismissed the Complainant's prior complaint at Docket No. C-2015-2479258, holding that the Respondent is not required to remove the tree in the Complainant's yard because said tree does not pose a risk of service interruption, nor poses a risk to the public.

The answer states that the Respondent has conducted multiple investigations via its vegetation management department, including two certified arborists, and has determined that the tree does not pose a safety threat to the Respondent's facilities or to the public. The Respondent asserts that the tree in question is located on the Complainant's private property, and that absent any risk to the Respondent's facilities or safety to the public, the Respondent has no obligation to remove the tree. The Respondent states that if the Complainant wants the tree removed, he will have to assume that responsibility himself, and that the Respondent's ratepayers should not have to bear the cost of the removal. The answer also states that the Complainant had every opportunity to present Mr. Jarosh as a witness at the hearing for his prior complaint, but did not choose to do so and should not be given another opportunity for a hearing on the same facts simply to include Mr. Jarosh as a witness.

The new matter states that the instant complaint is barred by the doctrines of collateral estoppel and/or res judicata and must be dismissed with prejudice. The new matter also states that the instant complaint is barred by 66 Pa.C.S. § 316. The new matter asserts that on April 28, 2015, the Complainant filed a prior complaint claiming, similarly to the instant complaint, that the Respondent was unwilling to remove a hazardous tree next to the Respondent's electric lines, and sought as a relief an order from the Commission directing the Respondent to remove the tree. The new matter states that prior to the initial telephonic hearing relating to the prior complaint, ALJ Cheskis served the parties with a prehearing order, in which he included instructions that the hearing room's default phone system could only accommodate two telephone numbers at a time, and that if the parties required more lines, accommodations could be made. The new matter asserts that the Complainant appeared pro se at the hearing, but did not present Mr. Jarosh as a witness.

The new matter states that ALJ Cheskis rendered an initial decision on November 13, 2015, in which he dismissed the Complainant's prior complaint for failing to satisfy the burden of proof that the Respondent violated the Public Utility Code, a Commission order or regulation, or the Respondent's tariff by refusing to remove the tree from the Complainant's private property where no service interruption or danger to the Respondents facilities or the public exists. The new matter asserts that the Complainant filed exceptions to

ALJ Cheskis' initial decision, and subsequently filed with the Commission an "update" containing additional information and photographs on April 15, 2016. The new matter states that the Commission's Opinion and Order, dated May 19, 2016, adopted ALJ Cheskis' initial decision and dismissed the Complainant's prior complaint in its entirety, noting that even taking into consideration the Complainant's "update", the Complainant failed to present sufficient evidence to support his claim that the Respondent is responsible for removing the tree on the Complainant's private property.¹ The Complainant did not appeal or seek reconsideration of the Commission's ruling. The answer with new matter requests that the Commission dismiss the instant complaint.

On September 16, 2016, the Respondent filed a motion for judgment on the pleadings (MJOP), which reiterates the allegations in the new matter. The MJOP notes that the Complainant did not file a written response to the new matter. The MJOP states that the complaint is barred by the doctrine of res judicata. The MJOP claims that past Commission orders demonstrate that the Respondent is entitled to judgment as a matter of law under the circumstances, because the instant complaint is barred by the doctrine of collateral estoppel, also referred to as issue preclusion. The MJOP also cites 66 Pa.C.S. § 316, which states that wherever the Commission makes a rule, finding, determination or order, the same shall be prima facie evidence of the facts found and shall remain conclusive upon all parties affected thereby, unless set aside, annulled, or modified on judicial review. In sum, the MJOP claims that the Respondent is entitled to judgment as a matter of law on the pleadings, requests that the Commission sustain the MJOP, and dismiss the instant complaint with prejudice.

The Complainant filed no response to the new matter or to the MJOP.

By notice dated October 26, 2016, the Commission notified the parties that it had assigned the case to me as motion judge. As of the date of this decision, the Complainant has not filed an answer to the new matter or MJOP. The MJOP is ready for decision. For the reasons set forth below, I will grant the MJOP and dismiss the instant complaint.

¹ The new matter filed by the Respondent at Docket No. C-2016-2558226 stated that the Commission's Opinion and Order was dated May 19, 2015. Pursuant to Pa.R.E. 201, I am taking judicial notice of the fact that the Commission's Opinion and Order was actually issued on May 19, 2016, and have included the correct date here.

FINDINGS OF FACT

1. The Complainant in this case is Ivan Yotov, who resides at 144 Woodshire Road, Pittsburgh, PA 15215.
2. The Respondent in this case is Duquesne Light Company.
3. On July 25, 2016, the Complainant filed the instant complaint against Duquesne Light Company, the Respondent.
4. On August 15, 2016, the Respondent filed an answer with new matter.
5. The Respondent filed a motion for judgment on the pleadings on September 16, 2016.
6. The Complainant did not file an answer to the new matter or motion for judgment on the pleadings.
7. The Complainant previously filed a complaint docketed at C-2015-2479258 regarding an allegedly hazardous tree located on the Complainant's property.
8. ALJ Cheskis issued an initial decision dismissing the complaint at C-2015-2479258, for the Complainant's failure to satisfy the burden of proof that the Respondent violated the Public Utility Code, a Commission order or regulation, or the Respondent's tariff by refusing to remove the tree from the Complainant's private property where no service interruption or danger to the Respondents facilities or the public exists.
9. By Order entered May 19, 2016, at C-2015-2479258, the Commission upheld ALJ Cheskis' initial decision and denied the Complainant's request for relief.

DISCUSSION

The Commission's Rules of Practice and Procedure at 52 Pa.Code § 5.102 govern motions for judgment on the pleadings. Generally, the moving party bears a heavy burden of showing that no genuine issue of material fact exists and that it is entitled to a judgment as a matter of law. The Commission must view the record in the light most favorable to the non-moving party, giving that party the benefit of all reasonable inferences. First Mortgage Co. of Pennsylvania v. McCall, 459 A.2d 406 (Pa. Super. 1983); Mertz v. Lakatos, 381 A.2d 497 (Pa. Cmwlth. 1978). It must accept as true all well pleaded statements of fact of the non-moving party and consider only those facts that the non-moving party specifically admits. Weik v. Estate of Brown, 794 A.2d 907 (Pa. Super. 2002). All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Thomson Coal Company v. Pike Coal Company, 412 A.2d 466 (Pa. 1979).

The Commission will grant a motion for judgment on the pleadings only if the pleadings show there is no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law. Only in a case where the moving party's right to prevail is so clear that a trial would be a fruitless exercise should judgment on the pleadings be granted. Williams v. Lewis, 466 A.2d 682 (Pa. Super. 1983); Service Employees International Union, Local 69, AFL-CIO v. The Peoples Natural Gas Company, d/b/a Dominion Peoples, Docket No. C-20028539 (Opinion and Order entered December 19, 2003). Judgment on the pleadings should be entered only when the case is clear and free from doubt. Reuben v. O'Brien, 496 A.2d 913 (Pa. Super. 1985).

The Complainant has not filed a written response to Respondent's answer and new matter within 20 days since September 16, 2016, the date of service. Therefore, facts set forth in Respondent's answer and new matter are deemed admitted pursuant to 52 Pa. Code § 5.63(a).

Having reviewed the standards for granting a motion for judgment on the pleadings, I will briefly explain the doctrines of res judicata and collateral estoppel. The

doctrines of res judicata and collateral estoppel apply to cases brought before the Commission. O’Toole v. Bell Telephone Company of Pennsylvania, Inc., 77 Pa. PUC 98 (1992).

Res judicata, which is also known as claim preclusion is the concept that a final judgment on the merits by a court of competent jurisdiction will bar any future action on the same cause of action between the parties. Hopewell Estates, Inc. v. Kent, 646 A.2d 1192 (Pa. Super. 1994). For the doctrine of res judicata to apply, four conditions must be met: (1) identity of issues, (2) identity of causes of action, (3) identity of persons and parties to the action, and (4) identity of the quality and capacity of the parties suing or sued. Day v. Volkswagenwerk Aktiengesellschaft, 474 A.2d 1313 (Pa. Super. 1983).

Similar to the doctrine of res judicata is the doctrine of collateral estoppel or issue preclusion. Collateral estoppel is a doctrine of issue preclusion that seeks to prevent the relitigation of a finally litigated issue of law or fact in a subsequent proceeding between the same parties. Baker v. Pa. Human Relations Comm’n., 462 A.2d 881 (Pa. Cmwlth. 1983). For the doctrine of collateral estoppel to apply, four requirements must be met: (1) the issues decided in the prior adjudication are identical to the ones presented in the later action, (2) there was a final judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication, and (4) the party against whom collateral estoppel is asserted had had a full and fair opportunity to litigate the issue in question in the prior action. Day v. Volkswagenwerk Aktiengesellschaft, 474 A.2d 1313 (Pa. Super. 1983).

In addition, to the doctrines of res judicata and collateral estoppel, the instant complaint in this case may be barred by Code, 66 Pa.C.S. § 316 which states in part:

Whenever the [c]ommission shall make any rule, regulation, finding, determination or order, the same shall be prima facie evidence of the facts found and shall remain conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review.

Having briefly explained the doctrines of res judicata and collateral estoppel and set forth the statute at 66 Pa.C.S. § 316, I will now review the facts set forth in the prior

complaint docketed at C-2015-2479258 and the Commission's decision in that proceeding in order to determine whether the instant complaint in this case is barred. The complaint at C-2015-2479258 alleges that the Respondent is refusing to remove a tree near the Respondent's electric lines, which the Complainant alleges constitutes a hazardous condition. The complaint at C-2015-2479258 requests that the Commission order the Respondent to remove the tree.

The Commission's May 19, 2016 Order at C-2015-2479258 dismissed the Complainant's prior complaint in its entirety, noting that even taking into consideration the Complainant's "update", the Complainant failed to present sufficient evidence to support his claim that the Respondent is responsible for removing the tree on the Complainant's private property. The Commission's Order upheld ALJ Cheskis' initial decision dismissing the complaint at C-2015-2479258.

Having reviewed the facts set forth in the prior complaint at C-2015-2479258 and the Commission's decision in that proceeding, I will now discuss whether the instant complaint in this case is barred by res judicata. I conclude that the complaint in this case is barred by res judicata because there is identity of issues, identity of causes of action, identity of persons and parties to the action, and identity of the quality and capacity of the parties suing or sued between the proceeding docketed at C-2015-2479258 and the instant complaint in this proceeding.

The issues in the proceeding docketed at C-2015-2479258 and the instant complaint in this proceeding are identical. The issue in both proceedings is whether the Respondent is obligated to remove the allegedly hazardous tree from the Complainant's private property. In both proceedings, the Complainant contends that the Respondent is refusing to remove a tree near its facilities, which the Complainant alleges constitutes a hazardous condition, and that the Commission should order the Respondent to remove the tree.

It is beyond argument that the causes of action are identical since both are complaints before the Commission involving the same address, the same allegedly hazardous tree, and same utility company. Similarly, it is beyond argument that the parties are identical and

the quality and capacity of the parties suing or sued are identical. Since all four of these conditions are met, res judicata applies to bar the complaint in this proceeding.

In this case, the Complainant's prior complaint at C-2016-2558226 was dismissed, and the Complainant did not seek to appeal or request reconsideration of the Commission's decision. The Complainant's argument that ALJ Cheskis did not consider Mr. Jarosh's testimony nor the "update" filed on April 14, 2016, is irrelevant, as the Commission addressed both issues in its May 19, 2016 Opinion and Order. The Complainant's complaint in this case is therefore barred by res judicata.

Decisions of Commonwealth administrative agencies are entitled to res judicata and collateral estoppel effect where the agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which parties had an opportunity to litigate. Kentucky-West Virginia Gas v. Pa. Pub. Util. Comm'n., 721 F.Supp. 710 (M.D. Pa. 1989), aff'd 899 F.2d 1217 (3rd Cir. 1990). In its May 19, 2016 Order at C-2015-2479258, the Commission acted in a judicial capacity and resolved the issues that the Complainant had the opportunity to litigate with regard to the allegedly hazardous tree. The Commission's September 26, 2013 Order at F-2013-2345438 is therefore entitled to res judicata effect.

Since the pleadings in this case show there is no genuine issue as to a material fact a hearing is unnecessary. The Respondent is entitled to judgment as a matter of law. I will therefore grant its motion for judgment on the pleadings. The Complainant's claims raised in this proceeding are barred and the instant complaint is dismissed. I will enter the following order.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties to and subject matter of this proceeding. 66 Pa.C.S. § 701.

2. The Commission will grant a motion for judgment on the pleadings only if the pleadings show there is no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law. Williams v. Lewis, 466 A.2d 682 (Pa. Super. 1983); Service Employees International Union, Local 69, AFL-CIO v. The Peoples Natural Gas Company, d/b/a Dominion Peoples, Docket No. C-20028539 (Order entered December 19, 2003).

3. The doctrines of res judicata and collateral estoppel apply to cases before the Commission. O'Toole v. Bell Telephone Company of Pennsylvania, Inc., 77 Pa. PUC 98 (1992).

4. For the doctrine of res judicata to apply, four conditions must be met: (1) identity of issues, (2) identity of causes of action, (3) identity of persons and parties to the action, and (4) identity of the quality and capacity of the parties suing or sued. Day v. Volkswagenwerk Aktiengesellschaft, 474 A.2d 1313 (Pa. Super. 1983).

5. For the doctrine of collateral estoppel to apply, four requirements must be met: (1) the issues decided in the prior adjudication are identical to the ones presented in the later action, (2) there was a final judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication, and (4) the party against whom collateral estoppel is asserted had had a full and fair opportunity to litigate the issue in question in the prior action. Day v. Volkswagenwerk Aktiengesellschaft, 474 A.2d 1313 (Pa. Super. 1983).

6. Whenever the Commission shall make any rule, regulation, finding, determination or order, that rule, regulation, finding, determination or order is prima facie evidence of the facts found and shall remain conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review. 66 Pa.C.S. § 316.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the motion for judgment on the pleadings filed by Duquesne Light Company at Docket No. C-2016-2558226 is granted.
2. That the complaint of Ivan Yotov at Docket No. C-2016-2558226 against Duquesne Light Company is dismissed.
3. That the case at Docket No. C-2016-2558226 is marked closed.

Date: October 31, 2016

_____/s/
David A. Salapa
Administrative Law Judge