

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Tanine Bennett

v.

PECO Energy Company

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C-2016-2546542

**ORDER DENYING MOTION
FOR JUDGMENT ON THE PLEADINGS**

Procedural background

On May 18, 2016, Tanine Bennett (Ms. Bennett) filed with the Pennsylvania Public Utility Commission (Commission) a formal complaint against PECO Energy Company (PECO or the Company), at Docket Number C-2016-2546542. In her complaint, Ms. Bennett averred that PECO was threatening to shut off her gas service or has already shut off her gas service, and that she would like a payment agreement. The complaint was processed and served by the Commission on May 20, 2016.

On June 2, 2016, PECO filed an answer with new matter and a notice to plead in response to Ms. Bennett's complaint. In its answer, PECO admitted or denied the various averments Ms. Bennett made in her complaint. In particular, PECO admitted that it issued a termination notice(s) to Ms. Bennett and that Ms. Bennett seeks a payment agreement. PECO denied that Ms. Bennett is entitled to a payment arrangement because Ms. Bennett's entire past due amounts are customer assistance program (CAP) arrears.

On September 29, 2016, PECO filed a motion for judgment on the pleadings in this case. In its motion, which was accompanied by a notice to plead, PECO contends that there are no issues of fact to be decided at a hearing. Specifically, PECO contends that Ms. Bennett's failure to reply to PECO's new matter should be deemed an admission by Ms. Bennett to the

facts set forth in the new matter that the entire past due balance consists of CAP arrearages which are not subject to Commission-ordered payment agreements. PECO also contends that there is no factual dispute concerning threatened termination of service, since Ms. Bennett previously testified (in another proceeding before a different Administrative Law Judge) that she was not paying her bills and that she understood that failure to pay her bills gave PECO the right to terminate her service.

A response to the motion was due by October 24, 2016. 52 Pa.Code § 5.102(b). Ms. Bennett did not file a response to the motion.

By Motion Judge Assignment Notice dated December 9, 2016 the parties were informed that PECO's motion for judgment on the pleadings had been assigned to me for a ruling.

PECO's motion for judgment on the pleadings is procedurally ready to be ruled upon. For the reasons discussed below, PECO's motion will be denied, and Ms. Bennett's complaint will be heard during an Initial Hearing to be scheduled for a later date.

Legal discussion

The Commission's Rules of Administrative Practice and Procedure, 52 Pa. Code Chapters 1, 3 and 5, provide for the filing of motions for judgment on the pleadings. In particular, Section 5.102 of the Commission's Rules provides in relevant part:

§ 5.102 Motions for summary judgment and judgment on the pleadings.

(a) *Generally.* After the pleadings are closed, but within a time so that the hearing is not delayed, a party may move for judgment on the pleadings or summary judgment. A motion must contain a notice which states that an answer or other responsive pleading shall be filed within 20 days of service of the motion.

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(d) *Decisions on Motions.*

(1) *Standard for grant or denial on all counts.* The presiding officer will grant or deny a motion for judgment on the pleadings or a motion for summary judgment, as appropriate. The judgment sought will be rendered if the applicable pleadings, depositions, answers to interrogatories and admissions, together with affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law.

(2) *Standard for grant or denial in part.* The presiding officer may grant a partial summary judgment if the pleadings, depositions, answers to interrogatories and admissions, together with the affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law on one or more but not all outstanding issues.

52 Pa.Code § 5.102(a), (d)(1) and (d)(2). When disposing of a motion for judgment on the pleadings, the record must be examined in the light most favorable to the nonmoving party. First Mortgage Co. of Pennsylvania v. McCall, 313 Pa. Superior Ct. 54, 56, 459 A.2d 406, 408 (1983). To avoid the motion for judgment on the pleadings, the nonmoving party must set forth facts showing that there is a genuine issue for trial. Id. at 58-59.

In this case, Ms. Bennett indicated that PECO has threatened to shut off her utility service or has already shut off her utility service and that she would like a payment agreement. Ms. Bennett also averred that PECO inaccurately stated that she was on a CAP agreement when she was not on such an agreement.

In its motion, PECO requests that Ms. Bennett's case be dismissed on the following grounds: 1) Ms. Bennett's failure to reply to PECO's new matter should be deemed an admission by Ms. Bennett to the facts set forth in the new matter that the entire past due balance consists of CAP arrearages which are not subject to Commission-ordered payment agreements; and 2) there is no factual dispute concerning threatened termination of service, since Ms. Bennett previously testified (in another proceeding before a different Administrative Law Judge) that she was not paying her bills and that she understood that failure to pay her bills gave PECO the right to terminate her service.

1) Ms. Bennett's failure to reply to new matter will not be deemed an admission

In its motion, PECO requests that the facts contained in its new matter be deemed admitted, by virtue of Ms. Bennett's failure to reply to PECO's new matter to the complaint. Motion at paragraph 18. Deeming the facts admitted establishes that Ms. Bennett's entire account balance is composed of CAP arrearages, and that Ms. Bennett is not entitled to a payment arrangement as a result. Motion at paragraph 11. PECO also states that a different Administrative Law Judge followed this requested course of action, and dismissed Ms. Bennett's request for a payment agreement on those grounds¹. Motion at paragraph 13.

Section 5.62 of the Commission's regulations permits a respondent to set forth affirmative defenses under the heading of "New Matter." A party may set forth as new matter another material fact which is not merely a denial of the averments of the preceding pleading. 52 Pa.Code § 5.62(b). Failure to timely reply to new matter *may be deemed in default*, and relevant facts stated in the new matter *may be deemed to be admitted*. 52 Pa.Code § 5.63(b) (emphasis added). Given the language of the regulations, it is clear that they are permissive and not mandatory in nature; thus, failure to reply to new matter does not require a finding of an admission on the part of the defaulting party.

In considering whether Ms. Bennett's failure to reply to PECO's new matter will be deemed an admission on Ms. Bennett's part, it is crucial to note that Ms. Bennett has directly put at issue the nature of her arrearages. In that regard, Ms. Bennett stated in the complaint that "PECO inaccurately stated I was on a CAPP [sic] agreement and I was not." Complaint at paragraph 5. Therefore, since the issue of CAP arrearages versus non-CAP arrearages was already at issue, Ms. Bennett will not be required to reiterate her legal position via a reply to PECO's new matter.

Well-established Commission precedent tends to afford unrepresented complainants the opportunity to orally set forth their cases on the record, and cautions against

¹ The other case referenced by PECO is Bennett v. PECO at docket no. C-2016-2547137. That case is legally distinct from this case, however, as it was separately filed and docketed. As such, the rulings in that matter are not necessarily controlling in this particular case.

dismissing cases on a preliminary basis. In the often cited case of Richard Carlock v. The United Telephone Company of Pennsylvania, Docket No. F-00163617 (Order entered July 14, 1993) (Carlock), the Commission determined that unrepresented complainants should have an opportunity to be heard orally, and not have their case dismissed on the basis of a preliminary pleading. Id. at 7 (in many cases unrepresented complainants can explain their dispute orally much better than they can communicate their grievance in written form and to deny unrepresented complainants a meaningful opportunity to be heard in such cases can be viewed as a gross abuse of authority), *citing*, Halpern v. The Bell Telephone Company of Pennsylvania, Docket No. C-00923950 (Order entered October 1992) and William Schleisher v. The Bell Telephone Company of Pennsylvania, Docket No. F-00161252 (Order entered December 17, 1992); *see also*, John M. Gera v. PPL Electric Utilities Corporation, Docket No. C-20054657 (Opinion and Order entered November 2, 2005).

Since the issue of CAP arrearages versus non-CAP arrearages was already placed at issue by Ms. Bennett, and given the above legal authority, Ms. Bennett's failure to reply to PECO's new matter will not be deemed an admission on Ms. Bennett's part. Therefore, as there is a question of material fact warranting a hearing, PECO's motion for judgment on the pleadings will be denied with regard to CAP arrearages and whether Ms. Bennett is entitled to a payment arrangement.

2) Ms. Bennett's claim of threatened termination of service is not barred by her testimony in the other proceeding

In its Motion, PECO seeks dismissal of Ms. Bennett's claims involving threatened termination of service. PECO states that this issue was already decided in another case, which, as noted above, was the matter of Bennett v. PECO at docket no. C-2016-2547137. PECO asserts that Ms. Bennett testified in case no. C-2016-2547137 (at a hearing held August 5, 2016) that she was not paying her bills on time or in full, and that the Administrative Law Judge therefore ruled that PECO had the right to threaten termination of service since Ms. Bennett admittedly was not paying her bills on time or in full. Motion at paragraphs 14-23.

While not expressly stated in the Motion, it seems apparent that PECO seeks to invoke the legal doctrine of *res judicata*. The doctrine of *res judicata* is designed to promote certainty, finality and judicial economy. It reflects the refusal of the law to tolerate the re-litigation of a matter decided by a court or agency of competent jurisdiction. The courts have repeatedly stated that a "final valid judgment on the merits by a court of competent jurisdiction bars any future suit between the same parties on the same cause of action." McCarthy, et al. v. Township of McCandless, 7 Pa. Commonwealth Ct. 611, 300 A.2d 815 (1973); Martin v. Poole, 232 Pa. Superior Ct. 263, 177 A.2d 339 (1975). Under *res judicata*, when a court of competent jurisdiction enters a final judgment on the merits of a cause of action, the parties to that case and their privies are thereafter bound "not only as to every matter which was offered and received, but also as to any other admissible matter which might have been offered." Commission v. Sunnen, 333 U.S. 591, 68 S.Ct. 715, 719 (1948); Jones v. Costlow, 354 Pa. 245, 47 A.2d 259 (1946).

For the doctrine to prevail, 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. Safeguard Mutual Insurance Co. v. Williams, 463 Pa. 567, 345 A.2d 664 (1975) and Day v. Volkswagenwerk Aktiengesellschaft, 318 Pa. Superior Ct. 225, 464 A.2d 1313 (1983); Northwestern Lehigh School District v. Commonwealth of Pennsylvania, Agricultural Lands Condemnation Approval Board, 134 Pa. Commonwealth Ct. 291, 578 A. 2d 614 (1990). The Commonwealth Court stated that, "for the purposes of *res judicata*, there is identity of causes of action when in both the old and new proceedings, the subject matter and the ultimate issues are the same." Howard v. Department of Public Welfare, 108 Pa. Commonwealth Ct. 592, 529 A.2d 1231 (1987).

Review of the docket entries and filings in case no. C-2016-2547137, and comparing that case to this case, it is clear that there is an identity of the following:

- 1) issues, at least insofar as the transcript of testimony in case no. C-2016-2547137 indicates that Ms. Bennett was seeking relief for threatened termination of service;

- 2) causes of action, at least insofar as the transcript of testimony in case no. C-2016-2547137 indicates that Ms. Bennett was seeking relief for threatened termination of service;
- 3) parties to the action, as they are the same in case no. C-2016-2547137 and this case; and
- 4) quality and capacity of the parties suing and being sued, as they are the same in case no. C-2016-2547137 and this case

What is lacking, however, is a final judgment in case no. C-2016-2547137. In that regard, review of the dockets shows that the Administrative Law Judge has not yet issued an Initial Decision in that case. In order for there to be a final judgment in the case, the Initial Decision must first be issued, following which the parties have the right to file exceptions, following which the Initial Decision will be reviewed by the Commission and the Commission will then enter its final judgment in the case which is subject to appeal. Since none of these procedural steps has occurred, at least as of the date of this Order, the doctrine of *res judicata* cannot be applied in this instance. As a result, the motion is denied at this preliminary stage regarding the application of the doctrine of *res judicata*. However, the Company is free to raise the issue at the hearing and present its evidence in support of any such defenses at that particular time. To the extent that PECO can demonstrate, at that time, that the doctrine of *res judicata* is applicable to this case, Ms. Bennett's complaint may be narrowed or dismissed.²

Conclusion

In conclusion, when viewing the record in the light most favorable to Ms. Bennett, as is required when addressing PECO's motion for judgment on the pleadings, PECO's motion is denied for the reasons discussed above. Ms. Bennett is advised, however, that in order to carry her burden of proof on her complaint, she will need to demonstrate by a preponderance of the

² Should a final order be entered in case no. C-2016-2547137, then the rulings in that case may well bar Ms. Bennett's claims regarding threatened termination of service in this case. Moreover, although not specifically addressed in the motion, PECO noted in its answer to Ms. Bennett's complaint that same issues in this case were already litigated before an Administrative Law Judge in case no. C-2015-2488809. PECO's answer also notes that the Initial Decision in case no. C-2015-288809 dismissing Ms. Bennett's complaint was approved via a final order by the Commission on January 28, 2016. PECO is free to raise the issue of *res judicata* with respect to case no C-2015-2488809 at the hearing in this case as well.

evidence that PECO has violated the Public Utility Code, a Commission order or regulation, or a Commission-approved tariff of the company with regard to the service provided to her. This is a higher legal standard than that which was used to judge PECO's motion for judgment on the pleadings.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Motion for Judgment on the Pleadings, filed by PECO Energy Company in the above-captioned proceeding at Docket Number C-2016-2546542 on September 29, is denied.

2. That the Complaint filed by Tanine Bennett on May 18, 2016 against PECO Energy Company at Docket Number C-2016-2546542 shall proceed to a hearing on a date to be scheduled.

Date: December 27, 2016

a m. c.
Andrew M. Calvelli
Administrative Law Judge

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