



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

ISSUED: January 5, 2005

F-01552407, ET AL.

THOMAS S ANDERSON ESQUIRE
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**DOCUMENT
FOLDER**

Barry L. Bowers	:	
V.	:	
Equitable Gas Company and	:	F-01552407
Duquesne Light Company	:	F-01552486
Mary Mehaffey,	:	
Indispensable Party	:	

TO WHOM IT MAY CONCERN:

Enclosed is a copy of the Initial Decision of Administrative Law Judge Larry Gesoff. This decision is being issued and mailed to all parties on the above specified date.

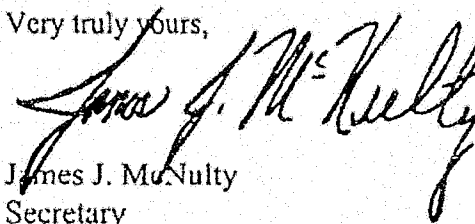
If you do not agree with any part of this decision, you may send written comments (called Exceptions) to the Commission. Specifically, an original and nine (9) copies of your signed exceptions MUST BE FILED WITH THE SECRETARY OF THE COMMISSION 2ND FLOOR, KEYSTONE BUILDING, 400 NORTH STREET, HARRISBURG, PA OR MAILED TO P.O. BOX 3265, HARRISBURG, PA 17105-3265, within twenty (20) days of the issuance date of this letter. The signed exceptions will be deemed filed on the date actually received by the Secretary of the Commission or on the date deposited in the mail as shown on U.S. Postal Service Form 3817 certificate of mailing attached to the cover of the original document (52 Pa. Code §111(a)) or on the date deposited with an overnight express package delivery service (52 Pa. Code 111(a)(2), (b)). If your exceptions are sent by mail, please use the address shown at the top of this letter. A copy of your exceptions must also be served on each party of record. 52 Pa. Code §1.56(b) cannot be used to extend the prescribed period for the filing of exceptions/reply exceptions. A certificate of service shall be attached to the filed exceptions.

If you receive exceptions from other parties, you may submit written replies to those exceptions in the manner described above within ten (10) days of the date that the exceptions are due.

Exceptions and reply exceptions shall obey 52 Pa. Code 5.533 and 5.535 particularly the 40-page limit for exceptions and the 25-page limit for replies to exceptions. Exceptions should clearly be labeled as "EXCEPTIONS OF (name of party) - (protestant, complainant, staff, etc.)".

If no exceptions are received within twenty (20) days, the decision of the Administrative Law Judge may become final without further Commission action. You will receive written notification if this occurs.

Very truly yours,


James J. McNulty
Secretary

Encls.
Certified Mail
Receipt Requested
MK
See Attached List for Additional Parties of Record

THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Barry L. Bowers

v.

Equitable Gas Company and
Duquesne Light Company

Mary Mehaffey,
Indispensable Party

F-01552407
F-01552486

INITIAL DECISION

Before
Larry Gesoff
Administrative Law Judge

DOCKETED
JAN 06 2005

**DOCUMENT
FOLDER**

HISTORY OF THE PROCEEDING

This decision grants motions for summary judgments filed by Equitable Gas Company (Equitable), Duquesne Light Company (Duquesne Light) and Mary Mehaffey and dismisses the complaints Barry L. Bowers filed against Equitable and Duquesne Light.

On July 7, 2004 Barry L. Bowers filed a formal complaint against Equitable alleging that Equitable should bill the owner of his apartment (Ms. Mehaffey) for gas service to his apartment from August 1999 through August 2003 based on foreign load. On July 26, 2004 Equitable filed an answer and new matter and a motion to join Ms. Mehaffey as an indispensable party.¹

¹ On or shortly after November 16, 2004 Equitable served Ms. Mehaffey with the motion to join her as an indispensable party.

On July 8, 2004 Mr. Bowers filed a formal complaint against Duquesne Light alleging that there was a foreign load on his electric meter due to "compromised ... ductwork" and requesting that Duquesne Light be ordered to bill the property owner for electric service to his apartment from August 1999 through August 2004. On August 12, 2004 Duquesne Light filed an answer and new matter and a motion to dismiss the complaint or in the alternative to join Ms. Mehaffey as an indispensable party. On August 20, 2004, Ms. Mehaffey submitted a letter response to the motion to join her as an indispensable party asking that she not be joined because the issues Mr. Bowers raises had been decided by the Allegheny County Court of Common Pleas, Arbitration Division.

By First Interim Order issued November 16, 2004 Mr. Bowers' complaints against Equitable and Duquesne Light were consolidated.

On November 16, 2004 Duquesne Light filed a motion for summary judgment. On the same date, I issued a Prehearing Order.

On November 24, 2004 Ms. Mehaffey filed separate answers and new matter to the complaints of Equitable and Duquesne Light.

On December 2, 2004 Ms. Mehaffey filed a motion for summary judgment regarding both complaints.

By Second Interim Order issued December 6, 2004 Mr. Bowers' request, received December 6, 2004, for a continuance of the December 9, 2004 hearing was denied.

On December 7, 2004 Equitable filed a motion for summary judgment.

I converted the December 9, 2004 hearing into a Prehearing Conference to give Mr. Bowers the opportunity to respond to the motions to dismiss orally.² Mr. Bowers appeared and represented himself. Regina M. Sestak, Esquire, represented Duquesne Light; Thomas S. Anderson, Esquire, represented Equitable; and John J. Romza, Esquire, represented Ms. Mehaffey. The record, which consists of a transcription of the Prehearing Conference, closed at the conclusion of the conference. The parties did not file briefs. This decision is written before receipt of the transcript.

FINDINGS OF FACT

1. Mary Mehaffey owns the property at 2407 Pennsylvania Avenue, West Mifflin, PA 15122 and Duquesne Light bills an electric service account to her at said premises. Duquesne Light Answer ¶4.

2. Barry Bowers resided at 2407 Pennsylvania Avenue, Second Floor Apartment, West Mifflin, PA 15122. Equitable Answer ¶1. He now resides at 519 Taft Avenue, West Mifflin, PA 15122.

3. On October 13, 1995 Mr. Bowers became the Equitable ratepayer of record for service to 2407 Pennsylvania Avenue, Second Floor Apartment. There are four gas meters at the premises: Mr. Bowers' residential meter, a rear meter for a residential account in Ms. Mehaffey's name and two commercial meters in the name of H.M. Sopp. At Mr. Bowers' request Equitable completed a foreign load investigation on April 14, 2001, finding a vacant building under Mr. Bowers' apartment and finding no foreign load. In August 2003 new tenants wanted to occupy both units on the first floor and during renovations of the first floor the first floor ceiling was ripped out and a potential foreign load was discovered. Again at Mr. Bowers' request Equitable completed a foreign load investigation on September 26, 2003. Equitable's serviceman reported a potential foreign load evidenced by a cutout in certain ductwork which

² The Commission has ruled that a complainant faced with a motion for summary judgment or motion to dismiss, and who is not represented by legal counsel, be given the opportunity to orally respond to the motion before a ruling on the motion may be issued. *Richard Carlock v. The United Telephone Company of Pennsylvania*, Docket No. F-00163617 (July 14, 1993).

could provide heat to an apartment on the first floor. The serviceman, however, indicated that as of September 26, 2003 there was no foreign load because the ductwork had been sealed. On December 3, 2003 Mr. Bowers filed an informal complaint with the Commission and on May 11, 2004 the Commission's Bureau of Consumer Services (BCS) issued a decision at BCS Case No. 1552407 determining that no foreign load existed when Equitable completed its investigation on September 26, 2003 because it was appropriately capped/sealed at that time. Equitable claims that Mr. Bowers is responsible for the \$1,549.56 balance owing to it. Equitable answer ¶3; BCS Case No. 1552407.

4. During an inspection of Mr. Bowers' electric meter by Duquesne Light's representative on September 26, 2003, no foreign wiring was found. Duquesne Light Answer ¶3. Although the first floor of the building had its own furnace and air-conditioning system, two vents to the first floor were found to be connected to the second floor's system. On December 3, 2003 Mr. Bowers filed an informal complaint and on May 11, 2004 BCS issued a decision at BCS Case No. 1552486 determining that no foreign load existed at the time Duquesne Light conducted the September 26, 2003 inspection. BCS Case. No. 1552486.

5. In May 2004 Ms. Mehaffey filed a complaint against Mr. Bowers before a district magistrate for unpaid rent and possession of Mr. Bowers' apartment. Mr. Bowers did not appear at the hearing and on June 4, 2004 a default judgment was entered against him. Mr. Bowers appealed the judgment and filed a counter claim requesting judgment against Ms. Mehaffey in the amount of \$8,592.47 plus interest for payment of utilities diverted from him. Mr. Bowers attended the resulting arbitration hearing on August 12, 2004. Duquesne Light's motion for summary judgment, Ex. 1; Statement of counsel for Ms. Mehaffey.

6. On August 12, 2004 the Arbitration Division of the Common Pleas Court awarded Ms. Mehaffey \$6,040.00 for rent and awarded her possession of the apartment. On September 10, 2004 Mr. Bowers appealed the award. By Order of the Court of Common Pleas dated November 4, 2004, the Honorable Eugene B. Strassburger III (1) ordered a judgment in the amount of \$7,210.00 in favor of Ms. Mehaffey and against Mr. Bowers, (2) awarded to Ms. Mehaffey possession of the property at 2407 Pennsylvania Avenue, Rear, West Mifflin, PA

15122 and (3) made an award in favor of Ms. Mehaffey and against Mr. Bowers on Mr. Bowers' counterclaim. Duquesne Light's motion for summary judgment, Exhs. 2, 3 and 4.

DISCUSSION

The Commission's procedural rules authorize a motion for summary judgment. 52 Pa. Code §5.102(b). If there is no factual issue pertinent to the ultimate resolution of a proceeding before the Commission, it is not necessary to hold a hearing. 66 Pa. C.S. §703(a). See also, *Lehigh Valley Power Committee v. Pa. Public Utility Commission*, 128 Pa. Cmwlth. Ct. 276, 563 A.2d 557 (1989); *Lehigh Valley Power Committee v. Pa. Public Utility Commission*, 128 Pa. Cmwlth Ct. 259, 563 A.2d 548 (1989); *M.E. Bessemer Cement, Inc. v. Pa. Public Utility Commission*, 116 Pa. Cmwlth Ct. 13, 540 A.2d 1006 (1988); *White Oak Borough Authority v. Pa. Public Utility Commission*, 175 Pa. Superior Ct. 114, 103 A.2d 502 (1954).

A motion for summary judgment shall be granted if the 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 participant is entitled to judgment as a matter of law. The moving party has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. 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 summary judgment, the nonmoving party must set forth facts showing that there is a genuine issue for trial. If the nonmoving party fails to oppose a properly supported motion for summary judgment with affidavits, depositions, or the like, it may not rely on its pleadings to controvert the facts presented by the moving party's affidavits. *Id.* at 58-59.

Collateral estoppel prevents a question of law or an issue of fact that has been litigated and adjudicated finally in a court of law of competent jurisdiction from being re-litigated in a later action. *Day v. Volkswagenwerk Aktiengesellschaft*, 318 Pa. Super Ct. 225, 464 A.2d 1313 1316-1317 (1983). The judgment in the prior action operates not as to those matters which might have been litigated and determined, but "only those matters or issues in points controverted upon which the finding of fact was rendered." *Commission v. Sunnen*, 333

U.S. 591, 68 S. Ct. 715, 719; *Thal v. Krawitz*, 555 Pa. 30, 47 A.2d 648 (1946) The four conditions required for a plea of collateral estoppel to prevail are: (1) the issue decided in the prior adjudication is identical with the one presented in the later action; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and (4) the party against whom the plea is asserted had a full and fair opportunity to litigate the issue in the prior action. *Day, Safeguard Mutual Insurance Co. v. Williams*, 463 Pa. 567, 345 A.2d 664 (1975); *Northwestern Lehigh School District v. Commonwealth of Pennsylvania, Agricultural Lands Condemnation Approval Board*, 134 Pa. Cmwlth. Ct. 291, 578 A. 2d 614 (1990). Collateral estoppel is a doctrine of issue preclusion that seeks to prevent re-litigation of a finally litigated issue in a subsequent proceeding between the same parties. *Baker v. Pa. Human Relations Comm.*, 75 Pa. Cmwlth Ct. 296, 307, 462 A.2d 881 (1983).

The doctrine of collateral estoppel applies here and bars Mr. Bowers from re-litigating before the Commission the same issues he litigated before the common pleas court, namely whether Ms. Mehaffey is responsible for his utility bills based upon diversion of service.

Duquesne Light filed its motion for summary judgment first. Ms. Mehaffey's motion is essentially identical to Duquesne Light's. Equitable adopts Duquesne Light's motion with a clarification that in his complaint against Equitable Mr. Bowers requests that Equitable bill Ms. Mehaffey for gas service resulting from the alleged foreign load.

Duquesne Light, Equitable and Ms. Mehaffey have shown that Mr. Bowers' formal complaints meet criteria (2), (3) and (4).

There was a final adjudication on the merits in the prior Common Pleas Court action, so criterion (2) is met. At the Prehearing Conference, however, Mr. Bowers stated that he was going to file a motion with Judge Strassburger for reconsideration of his November 4, 2004 Order. Mr. Bowers maintains that he was not notified of the November 4 hearing before Judge Strassburger. He stated that he found out about the hearing when he stopped at the Common Pleas Court's Prothonotary Office on November 3 while in Pittsburgh on other business. He did

so because on November 2 he received from Mr. Romza a copy of Ms. Mehaffey's Pretrial Statement in advance of the November 4 hearing. According to Mr. Bowers someone in the Prothonotary Office recognized his name and located the notice of the November 4 hearing, showing him a photocopy of the first class mailing of the notice to him. Mr. Bowers maintains that the notice should have been sent to him by certified mail. Mr. Bowers did not attend the November 4 hearing because he could not get off work. He stated that someone in the Prothonotary Office told him to submit a letter requesting reconsideration of Judge Strassburger's Order and that the Prothonotary Office later told him to file a motion for reconsideration. Mr. Romza noted that as the moving party (Mr. Bowers appealed the arbitration decision) Mr. Bowers should have made sure he was aware of the hearing date set for his appeal. Mr. Romza also noted that the deadline to file a motion for reconsideration was 30 days from the date of Judge Strassburger's Order, as was the deadline to file an appeal of Judge Strassburger's Order to Superior Court. These deadlines elapsed on December 5, 2004. I conclude that the adjudication in the Common Pleas Court is final.

The parties assert their plea of collateral estoppel against Mr. Bowers who was a party to the Common Pleas Court action, so criterion (3) is met.

Mr. Bowers had a full and fair opportunity to litigate the issue in question here before the Common Pleas Court, so criterion (4) is met. Mr. Bowers litigated all issues before the arbitration board, including his counter claim that Ms. Mehaffey should pay for his utilities based on foreign load. He took the appeal from the arbitration decision and had the responsibility to be aware of and appear at the November 4 hearing. The Common Pleas Court notified him about the hearing by first class mail. In addition, Mr. Bowers had actual notice of the hearing on November 3, 2004 when he learned of it during his visit to the Prothonotary Office. He failed to get time off work, did not request a continuance before the hearing was held and did not attend the hearing. Mr. Bowers' due process rights of notice and the opportunity to be heard at the November 4 hearing were met. Mr. Bowers' failure to appear at the November 4 hearing on his appeal from the arbitration award, and his failure to file a timely motion for reconsideration of Judge Strassburger's Order or to file a timely appeal from the Order, does not prevent the doctrine of collateral estoppel from being applied here because it does not mean that

he did not have a full and fair opportunity to litigate the issue in question before the Common Pleas Court.

As Duquesne Light, Equitable and Ms. Mehaffey argue in their motions for summary judgment, criterion (1) is met because the issue decided in the Common Pleas Court action was identical to the issue Mr. Bowers presents in his complaints before the Commission. In his counter claim at the arbitration hearing level, Mr. Bowers maintained that Ms. Mehaffey "did cause or allow the diversion of heat and air-conditioning from Plaintiff Barry L. Bowers to Units One and Two [the units below his apartment] of [the property she owns]." The counter claim states that "[o]n or about August 27, 2003, compromised ventilation ductwork was discovered and capped off at Plaintiff's request." It adds, that "[d]espite repeated requests, Defendant, Mary E. Mehaffey, has failed to respond to requests for payment for utilities diverted from Plaintiff, Barry L. Bowers." The counter claim ends with Mr. Bowers requesting judgment in the amount of \$8,592.47 against Ms. Mehaffey. In his complaints before the Commission, Mr. Bowers also alleges foreign load because of compromised ductwork and asks for a Commission order that Ms. Mehaffey be responsible for four years of gas and electric bills to his apartment. Both the counter claim filed in the Common Pleas Court and the Commission complaints Mr. Bowers filed allege diversion of utility services and request that Ms. Mehaffey pay for the services. The issues decided in the Common Pleas Court action and the issues Mr. Bowers wishes this Commission to resolve are identical. This meets the requirement of criterion (1).

For the above reasons, the doctrine of collateral estoppel applies to Mr. Bowers' attempt to litigate before this Commission what he was unable to achieve in his Court of Common Pleas action, an order finding Ms. Mehaffey responsible for his utility bills based upon diversion of service. For the above reasons, the motions for summary judgment should be granted and Mr. Bowers' complaints should be dismissed.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties to and the subject matter of this proceeding.
2. In a Common Pleas Court action to which Mr. Bowers was a party, the Court reached a final adjudication on issues which Mr. Bowers had a full and fair opportunity to litigate and which issues, whether or not Ms. Mehaffey should pay for Mr. Bowers' utility bills based upon a diversion of service, Mr. Bowers raised in his complaints before the Commission against Duquesne Light and Equitable.
3. There are no genuine issues as to a material fact before the Commission and Equitable, Duquesne Light and Ms. Mehaffey are entitled to judgment as a matter of law.
4. The doctrine of collateral estoppel applies to bar the re-litigation before the Commission of the same issues he litigated before the Common Pleas Court.
5. The motions for summary judgment filed by Duquesne Light, Equitable and Ms. Mehaffey should be granted and Mr. Bowers' complaints should be dismissed.

ORDER

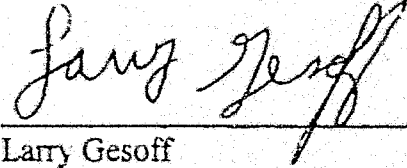
THEREFORE;

IT IS ORDERED:

1. That the motions for summary judgment which Duquesne Light Company, Equitable Gas Company and Mary Mehaffey filed are granted.
2. That the complaint of Barry L. Bowers v. Equitable Gas Company at Docket No. F-01552407 is dismissed.

3. That the complaint of Barry L. Bowers v. Duquesne Light Company at Docket No. F-01552486 is dismissed.

Dated: December 9, 2004



Larry Gesoff
Administrative Law Judge

DATE February 1, 2005

SUBJECT: F-01552407, et al

TO: Office of Administrative Law Judge
Susan Hoffner

FROM: James J. McNulty
Secretary
nvl

DOCKETED
FEB 03 2005

**DOCUMENT
FOLDER**

Barry L. Bowers	:	
V.	:	
Equitable Gas Company and	:	F-01552407
Duquesne Light Company	:	F-01552486
	:	
Mary Mehaffey,	:	
Indispensable Party	:	

The Initial Decision has been served upon all parties of interest.

Neither exceptions nor requests for review from the Commissioners have been received by the Commission. This matter is referred to your office for whatever action you deem necessary.

cc: Office of Special Assistants

P.S. Please note that exceptions or reply exceptions may come in timely with certificates of mailings. A second memo will not be released for these exceptions.