

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Tyrone Brown	:	
	:	
v.	:	F-2018-2641015
	:	
Philadelphia Gas Works	:	

**INITIAL DECISION SUSTAINING PRELIMINARY OBJECTIONS
AND DISMISSING COMPLAINT**

Before
David A. Salapa
Administrative Law Judge

INTRODUCTION

A customer filed a complaint against his natural gas utility alleging that he was not responsible for the charges on his utility bills. This decision dismisses the complaint because the charges that the customer contests were incurred more than three years prior to the date the customer filed his complaint.

HISTORY OF THE PROCEEDING

On January 4, 2018, Tyrone Brown (Complainant) filed a complaint with the Pennsylvania Public Utility Commission (Commission) against Philadelphia Gas Works (Respondent). The complaint alleges that the Complainant is not responsible for charges on his natural gas bills.

The complaint concerns a property at 1809 South 58th Street, owned by the Complainant. According to the complaint, the tenants renting the property failed to pay their natural gas bills then vacated the property. The property remained vacant for an unstated time. The complaint alleges that, after the tenants vacated the property at 1809 South 58th Street, the Respondent billed the tenants based on estimated usage.

The complaint alleges that, at some point, the Respondent determined that the Complainant was responsible for his tenants' outstanding balance for the property at 1809 South 58th Street. The complaint asserts that the Complainant has the tenants' new address and will provide that information to the Respondent so that the Respondent can bill the tenants for the outstanding balance. The complaint requests that the Commission direct the Respondent to remove the charges for 1809 South 58th Street from the Complainant's bill and bill the tenants.

The Respondent filed an answer with new matter and preliminary objections on January 25, 2018. The answer admits that the Respondent provided natural gas service to 1809 South 58th Street but that it terminated service to that address. According to the answer, the Complainant has not had service at 1809 South 58th Street since June 2009.

The new matter asserts that the Complainant's complaint is barred by the statute of limitations at 66 Pa.C.S. § 3314. The new matter argues that 66 Pa.C.S. § 3314 divests the Commission of jurisdiction to hear an action brought more than three years from the date the liability arose. The answer with new matter requests that the Commission dismiss the Complainant's complaint.

The preliminary objections reiterate the assertions in the Respondent's answer with new matter. The preliminary objections contend that the subject matter of the Complainant's complaint is outside the Commission's subject matter jurisdiction because the statute of limitations bars the claim. The preliminary objections conclude that the Complainant's complaint is barred by the statute of limitations and request that the Commission dismiss the complaint.

By notice dated March 2, 2018, 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 either the Respondent's new matter or its preliminary objections. The preliminary objections are ready for decision. For the reasons set forth below, I will sustain the preliminary objections and dismiss the complaint.

FINDINGS OF FACT

1. The Complainant in this case is Tyrone Brown.
2. The Respondent in this case is Philadelphia Gas Works.
3. On January 4, 2018, the Complainant filed a complaint with the Commission against the Respondent.
4. The Respondent filed an answer with new matter to the complaint on January 25, 2018.
5. On January 25, 2018, the Respondent filed preliminary objections.
6. The Complainant has not filed a response to either the Respondent's new matter or its preliminary objections.

DISCUSSION

The Commission's Rules of Practice and Procedure permit parties to file preliminary objections. The grounds for preliminary objections are limited to those set forth in 52 Pa.Code § 5.101(a) as follows:

1. Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.

2. Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
3. Insufficient specificity of a pleading.
4. Legal insufficiency of a pleading.
5. Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.
6. Pendency of a prior proceeding or agreement for alternative dispute resolution.
7. Standing of a party to participate in the proceeding.

Here, the Respondent's preliminary objections assert lack of Commission jurisdiction, pursuant to 52 Pa.Code § 5.101(a)(1).

Commission preliminary objection practice is analogous to Pennsylvania civil practice regarding preliminary objections. Equitable Small Transportation Intervenors v. Equitable Gas Company, 1994 Pa PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994). A preliminary objection asserting lack of Commission jurisdiction, pursuant to the Commission's Rules of Practice and Procedure, is therefore analogous to preliminary objections allowed by Rule 1028 of the Pennsylvania Rules of Civil Procedure.

Preliminary objections in civil practice requesting dismissal of a pleading will be granted only where the right to relief is clearly warranted and free from doubt. Interstate Traveller Services, Inc. v. Pa. Dept. of Environment Resources, 406 A.2d 1020 (Pa. 1979); Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc., 595 A.2d 172 (Pa.Super. 1991). The Commission follows this standard. Montague v. Philadelphia Electric Company, 66 Pa. PUC 24 (1988).

The Commission may not rely upon the factual assertions of the moving party but must accept as true for purposes of disposing of the motion all well pleaded, material facts of the nonmoving party, as well as every inference from those facts. County of Allegheny v. Commonwealth of Pennsylvania, 490 A. 2d 402 (Pa. 1985); Commonwealth of Pennsylvania v.

Bell Telephone Co. of Pa., 551 A.2d 602 (Pa.Cmwlt. 1988). The Commission must view the complaint in this case in the light most favorable to the Complainant and should dismiss the complaint only if it appears that the Complainant would not be entitled to relief under any circumstances as a matter of law. Equitable Small Transportation Intervenors v. Equitable Gas Company, 1994 Pa PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994).

The Commission regulation at 52 Pa.Code § 5.21(a) states that a person may file a formal complaint claiming violation of a statute that the Commission has jurisdiction to administer. The regulation at 52 Pa.Code § 5.21(d) authorizes the Commission to dismiss a complaint if a hearing is not necessary and authorizes preliminary objections to be filed in response to a complaint.

The regulation at 52 Pa.Code § 5.101(a)(1) permits the filing of preliminary objections to dismiss a pleading for lack of jurisdiction. The provision at 52 Pa.Code § 5.101(a)(1) serves judicial economy by avoiding a hearing where no factual dispute exists. If no factual issue pertinent to the resolution of a case exists, a hearing is unnecessary. 66 Pa.C.S. § 703(a); Lehigh Valley Power Committee v. Pa. Pub. Util. Comm'n, 563 A.2d 557 (Pa.Cmwlt. 1989); Lehigh Valley Power Committee v. Pa. Pub. Util. Comm'n, 563 A.2d 548 (Pa.Cmwlt. 1989); S.M.E. Bessemer Cement, Inc. v. Pa. Pub. Util. Comm'n, 540 A.2d 1006 (Pa.Cmwlt. 1988); White Oak Borough Authority v. Pa. Pub. Util. Comm'n, 103 A.2d 502 (Pa.Super. 1954).

The Commission, as a creation of the General Assembly, has only the powers and authority granted to it by the General Assembly contained in the Public Utility Code. Shedlosky v. Pennsylvania Electric Company, Docket No. C-20066937 (Opinion and Order entered May 28, 2008); Feingold v. Bell Tel. Co. of Pa., 383 A.2d 791 (Pa. 1977). The Commission must act within, and cannot exceed, its jurisdiction. City of Pittsburgh v. Pa. Pub. Util. Comm'n, 43 A.2d 348 (Pa.Super 1945). Jurisdiction may not be conferred by the parties where none exists. Roberts v. Martorano, 235 A.2d 602 (Pa. 1967). Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. Hughes v. Pennsylvania State Police, 619 A.2d 390 (Pa.Cmwlt. 1992), alloc. denied 637 A.2d 293 (Pa. 1993).

The Commission has previously determined that the statute of limitations at 66 Pa.C.S. § 3314 may be raised through preliminary objections, pursuant to 52 Pa.Code § 5.101(a)(1). Speeler v. Peoples Natural Gas Company, LLC, Docket No. C-2016-2526110 (Final Order entered April 18, 2016). Commission preliminary objections, pursuant to 52 Pa.Code § 5.101, are analogous to preliminary objections pursuant to Rule 1028 of the Pennsylvania Rules of Civil Procedure in civil practice. Pennsylvania appellate courts have determined that some statutes of limitations may be raised through preliminary objections, pursuant to Pa. R.C.P. 1028.

Pennsylvania appellate courts have set forth very clear standards as to when statute of limitations may be raised by preliminary objections, pursuant to Pa. R.C.P. 1028. If the statute of limitations is a non-waivable defense, it may be raised as a preliminary objection, pursuant to Pa. R.C.P. 1028. However, if the statute of limitations is waivable, it must be raised by new matter in a responsive pleading. Reuben v. O'Brien, 445 A.2d 801 (Pa.Super. 1982) (Reuben). A statute of limitations is non-waivable if the time limitation contained in it terminates not just the remedy but the actual right to bring the action. A statute of limitations is waivable if the time limitation contained in it terminates just the remedy, but not the right to bring the action. Reuben.

The statute of limitations at 66 Pa.C.S. § 3314 is non-waivable. The statute at 66 Pa.C.S. § 3314 provides that no action for recovery of penalties or forfeitures, or any prosecution may be maintained unless brought within three years from the date the liability arose. This is a non-waivable statute of limitations since it terminates the right to bring an action before the Commission as well as any remedy the Commission may order. The statute of limitations at 66 Pa.C.S. § 3314 divests the Commission of jurisdiction to hear an action brought more than three years from the date the liability arose and is properly raised through preliminary objections, pursuant to 52 Pa.Code § 5.101(a)(1).

The Respondent's preliminary objections contend that the Commission lacks jurisdiction over the Complainant's complaint because it is barred by the statute of limitations. While my review of the Respondent's preliminary objections, along with the Respondent's new

matter, show that the statute of limitations bars the Complainant's complaint, preliminary objections are not the proper vehicle for dismissal of this case.

In considering preliminary objections, the Commission cannot rely upon the assertions made by the Respondent but must rely only on the assertions made by the Complainant in the complaint. Here, the assertions in the complaint do not provide information on when the events alleged in the complaint occurred. That information is contained only in Respondent's unanswered preliminary objections and new matter.

The regulation at 52 Pa. Code §1.2(a) provides that the presiding officer or Commission may disregard an error or defect of procedure which does not affect the substantive rights of the parties. Here, the Respondent raised the issue of the statute of limitations in its new matter but filed a preliminary objection rather than a motion for summary judgment. I may disregard the Respondent's error in procedure if it does not affect the Complainant's substantive rights.

I will consider the issue of the statute of limitations to secure a just, speedy and inexpensive determination of this proceeding pursuant to 52 Pa. Code §1.2(a). This will not adversely affect the Complainant's substantive rights since the Complainant had notice of the issue. The Respondent raised the statute of limitations in its new matter as an affirmative defense as well as in its preliminary objections. I shall treat the statute of limitations as an affirmative defense in this case and treat the Respondent's preliminary objection as a motion for summary judgment, filed pursuant to 52 Pa. Code § 5.102. For consistency and clarity, I will refer to the Respondent's preliminary objections as a motion for summary judgment in the remainder of this decision.

Having addressed the issue of whether the Respondent has properly raised the statute of limitations in preliminary objections and determined that it is appropriate to treat the preliminary objections as a motion for summary judgment, I will now review the standards for granting a motion for summary judgment.

The Commission's regulation at 52 Pa. Code §5.102(a) permits any party to move for summary judgment after the pleadings are closed, but within such time as not to delay a hearing. A motion for summary judgment must be based on the pleadings, depositions, answers to interrogatories, admissions and supporting affidavits. 52 Pa. Code §5.102(c). The presiding officer will grant a motion for summary judgment if the pleadings, depositions, answers to interrogatories, admissions and affidavits show that there is no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law. 52 Pa. Code §5.102(d)(1).

The moving party bears the 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. 1976). 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). Summary judgment will be granted only where the right is clear and free from doubt.

The non-moving party in a motion for summary judgment must allege facts showing that an issue for trial exists. First Mortgage Co. of Pennsylvania v. McCall, 459 A.2d 406 (Pa. Super. 1983); Commonwealth v. Diamond Shamrock Chemical Co., 391 A.2d 1333 (Pa. Cmwlth. 1978); Stover v. The United Telephone Co. of Pennsylvania, Docket No. C-00923833 (Order entered July 21, 1992). The Commission has interpreted Section 5.102(c) of its regulations in conformity with Rule 1035 (now Rule 1035.1) of the Pennsylvania Rules of Civil Procedure. South River Power Partners, L.P. v. West Penn Power Company, Docket No. C-00935287 (Order entered November 6, 1996). In civil practice, a non-moving party may not rely solely upon denials in its pleadings but must submit some materials to establish that a genuine issue of material fact exists. Nicastro v. Cuyler, 467 A.2d 1218 (Pa.Cmwlth. 1983); Pennsylvania Gas & Water Co. v. Nenna & Frain, Inc., 467 A.2d 330 (Pa. Super. 1983); Geriot v. Council of Borough of Darby, 457 A.2d 202 (Pa.Cmwlth. 1983)

In this instance, the complaint alleges that there are incorrect charges on the Complainant's bill. While this fact must be accepted as true, facts alleged in the Respondent's new matter which are not denied by the Complainant, may also be accepted as true. The Commission's regulation at 52 Pa. Code § 5.63(b) states that a party failing to file a timely reply to new matter may be deemed in default and the facts stated in the new matter deemed admitted. The Complainant did not respond to the Respondent's answer with new matter within the time period allotted by law. Admitting the factual allegations in the complaint as true for purposes of disposing of the preliminary objection, as well as the averments in Respondent's new matter, the Complainant has not had service at 1809 South 58th Street since 2009. The statute of limitations therefore bars the claims raised in the Complainant's complaint concerning service and billing to that address.

Since the statute at 66 Pa.C.S. § 3314 divests the Commission of jurisdiction to hear an action brought more than three years from the date the liability arose, it is appropriate for me to apply the statute of limitations to this proceeding. Applying the three-year statute of limitations at 66 Pa.C.S. § 3314 to this case, the Complainant filed his complaint on January 4, 2018, alleging incorrect charges on his bills from the property at 1809 South 58th Street. The three-year statute of limitations therefore bars any claim that arose prior to January 4, 2015.

Since the three-year statute of limitations at 66 Pa.C.S. § 3314 bars the Complainant from continuing any prosecution against the Respondent for events that occurred prior to January 4, 2015, the claims in the Complainant's complaint that occurred before that date are barred. As stated above, the Complainant has not had service at 1809 South 58th Street since 2009. Any claims concerning billing to that address are barred by the statute of limitations.

Accepting as true all the facts alleged in the complaint as well as the allegations in the new matter that have been deemed admitted, the Complainant is not entitled to relief as a matter of law for any claims that arose prior to January 4, 2015. The claims in the Complainant's complaint concerning 1809 South 58th Street are therefore barred by the three-year statute of limitations at 66 Pa.C.S. § 3314. Counsel v Philadelphia Gas Works, Docket No.

C-2014-243 (Opinion and Order entered November 19, 2015); Pearson v Duquesne Light Company, Docket No.C-2015-2465168 (Final Order entered July 7, 2015).

Sustaining the Respondent's preliminary objections, which I am treating as a motion for summary judgment, is appropriate under the circumstances. I will therefore grant the Respondent's request to dismiss the complaint as barred by the statute of limitations and enter the following order.

CONCLUSIONS OF LAW

1. The Commission's Rules of Practice and Procedure govern motions for summary judgment. 52 Pa.Code § 5.102.
2. A motion for summary judgment is properly granted where the pleadings, depositions, answers to interrogatories, admissions and affidavits 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. 52 Pa.Code § 5.102(d)(1).
3. No action for recovery of penalties or forfeitures, or any prosecution may be maintained unless brought within three years from the date the liability arose. 66 Pa.C.S. § 3314.
4. A statute of limitations is non-waivable if the time limitation contained in it terminates not just the remedy but the actual right to bring the action. Reuben v. O'Brien, 445 A.2d 801 (Pa.Super. 1982).
5. The statute of limitations at 66 Pa.C.S. § 3314 is non-waivable. Reuben v. O'Brien, 445 A.2d 801 (Pa.Super. 1982).

6. The statute at 66 Pa.C.S. § 3314 divests the Commission of subject matter jurisdiction to hear an action brought more than three years from the date the liability arose. Reuben v. O'Brien, 445 A.2d 801 (Pa.Super. 1982).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the preliminary objections filed by Philadelphia Gas Works at Docket No. F-2018-2641015 are sustained.
2. That the complaint of Tyrone Brown at Docket No. F-2018-2641015 against Philadelphia Gas Works is dismissed.
3. That the docket at Docket No. F-2018-2641015 is marked closed.

Date: March 6, 2018

_____/s/
David A. Salapa
Administrative Law Judge