

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Paula Donson	:	
	:	
v.	:	C-2018-3001673
	:	
Columbia Gas of Pennsylvania, Inc.	:	

INITIAL DECISION

Before
Benjamin J. Myers
Administrative Law Judge

INTRODUCTION

A customer filed a complaint requesting that the Pennsylvania Public Utility Commission (Commission) investigate the construction methods of the contractor and subcontractor that installed the gas furnace in her residence. This decision dismisses this complaint as the Commission does not have the authority to grant the customer the relief she is requesting.

HISTORY OF THE PROCEEDING

On April 23, 2018, Paula Donson (Complainant), filed a formal complaint with the Commission which indicated that a gas leak had occurred in connection with the gas furnace in her residence and that a short time later a neighbor also experienced a gas leak in their residence. The Complainant asserted that the leaks were the fault of the contractor that had built her, and her neighbor's, residence and the subcontractor that had performed the furnace installations during the construction. The Complainant's gas utility, Columbia Gas of Pennsylvania (Columbia Gas or Respondent), was credited by the Complainant as finding the gas

leak and potentially saving her from injury or death as a result of those dangerous conditions. Complainant has asked that the Commission investigate the building and inspection practices of the contractor and subcontractor that were responsible for the installation of her gas furnace. The Complainant also stated that since hundreds of residential units were built by those same contractors, she feared that gas leaks could potentially be a wide-ranging problem in her residential area. The Complainant specifically requested that the Commission order her building contractor to pay for gas line inspections of all the residences in which the same subcontractor installed gas furnaces.

On May 23, 2018, Respondent filed an answer with new matter with attached notice to plead. In its answer, Respondent admitted that it provides service to the Complainant at the address shown on the complaint and that it has responded to a report by the Complainant of a gas leak in her residence. Respondent further indicated that a small leak was found in a connection to Complainant's water heater which was red-tagged and she was advised to have the leak repaired. After the repair was made, Respondent inspected those repairs upon request and found them to be satisfactory.

In its new matter, Respondent argued that the complaint filed in this matter relates to gas leaks in the home of the Complainant as well as her neighbors' homes. The Complainant has alleged that the gas leaks were the result of work performed by a contractor and subcontractor that constructed these residences. The Respondent further argued that the Complainant makes no complaint against the Respondent for these alleged issues and that the alleged perpetrators of the leaks, the contractor and subcontractor, are not under the Commission's jurisdiction. Respondent therefore argues that the Complainant has failed to set forth any violation by the Respondent of the Public Utility Code or any order or regulation of the Commission and because there are no genuine issues of material fact the Respondent is entitled to judgment as a matter of law. The Respondent requested that the complaint therefore be dismissed.

The Respondent also filed preliminary objections with attached notice to plead on May 23, 2018. In short, the Respondent argues that the complaint in this matter should be

dismissed for legal insufficiency as the Complainant's allegations relate to parties other than the Respondent, over which the Commission has no jurisdiction. The Respondent reiterates that the allegations in the complaint relate directly to a contractor and subcontractor, and not the Respondent, and fail to set forth any violation by the Respondent of the Public Utility Code or any order or regulation of the Commission and because there are no genuine issues of material fact the Respondent is entitled to judgment as a matter of law. Respondent therefore requests that the complaint be dismissed for legal insufficiency.

The Complainant has not filed an answer to the Respondent's new matter or preliminary objection.

On June 27, 2018, the Commission issued a motion judge assignment notice thereby assigning this matter to me to resolve any issues which may arise during the preliminary phase of this proceeding. Respondent's preliminary objection is now ready for disposition. For the reasons discussed below, the preliminary objection will be granted and the complaint dismissed.

FINDINGS OF FACT

1. The Complainant in this case is Paula Donson.
2. The Respondent in this case is Columbia Gas of Pennsylvania, Inc.
3. On February 12, 2018, the Complainant believed gas was leaking in her home.
4. The Complainant reported this belief to the Respondent.
5. The Respondent immediately conducted an investigation and discovered a small leak at the connection to the Complainant's water heater.

6. The Respondent red-tagged the water heater and advised the Complainant to have this leak repaired.

7. The Complainant contacted the contractor and subcontractor that constructed her residence and installed her gas furnace.

8. The gas leak was repaired by the contractors.

9. The Respondent inspected the repair and determined that it was adequate.

10. On April 23, 2018, Complainant filed a formal complaint with the Commission which indicated that a gas leak had occurred in connection with the gas furnace in her residence as well as in the residence of a neighbor.

11. The Complainant attributes these leaks to the contractor that built her residence and the subcontractor that installed the gas furnace in the residence.

12. By way of relief, the Complainant has requested that the Commission order her building contractor to pay for gas line inspections of all the residences in which the same subcontractor installed gas furnaces.

DISCUSSION

The Commission's Rules of Administrative Practice and Procedure permit the filing of preliminary objections. 52 Pa. Code § 5.101. Commission procedure regarding the disposition of preliminary objections is similar to that utilized in Pennsylvania civil practice. Equitable Small Transportation Interveners v. Equitable Gas Company, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994) (Equitable).

A preliminary objection seeking dismissal of a pleading will be granted only where relief is clearly warranted and free from doubt. Interstate Traveller Services, Inc. v. Pa.

Dept. of Environmental Resources, 486 Pa. 536, 406 A.2d 1020 (1979) (Interstate). The moving party may not rely on its own factual assertions but must accept for the purposes of disposition of the motion, all well-pleaded material facts of the other party, as well as every inference fairly deducible from those facts. County of Allegheny v. Commonwealth of Pa. (County of Allegheny), 507 Pa. 360, 490 A.2d 402 (1985). The Commission must view the complaint in this case in the light most favorable to Complainant and should dismiss the complaint only if it appears that Complainant would not be entitled to relief under any circumstances as a matter of law. Equitable, *supra*; *see also*, Interstate.

The Commission's rules at 52 Pa.Code § 5.101(a) provide, in relevant part:

(a) *Grounds*. Preliminary objections are available to parties and may be filed in response to a pleading except motions and prior preliminary objections. Preliminary objections must be accompanied by a notice to plead, must state specifically the legal and factual grounds relied upon and be limited to the following:

- (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 a proceeding.

Respondent has filed a preliminary objection arguing that the complaint in this matter is legally insufficient. This is also known as a demurrer. Thomas Engle v Verizon Pennsylvania, Inc., Docket No. C-2009-2254904 (Order entered May 13, 2009) (Engle). Respondent therefore contends that even if all the facts set forth in the complaint are assumed to

be true, the complaint fails to set forth a claim for which relief may be granted by the Commission.

In reviewing preliminary objections, only the averments contained in the complaint may be considered in order to rule on the objections and determine whether recovery by the Complainant is possible. Here, the Complainant has named the Respondent in her complaint but appears to be seeking relief solely from the contractor and subcontractor responsible for the construction of her residence. The averments contained in the Respondent's new matter essentially mirror the Complainant's version of the facts while providing additional clarity as to the relief which the Complainant is seeking from the Commission. However, in addressing the Respondent's preliminary objections, this new matter may not be relied upon.

In Lashanna Seaton v. Columbia Gas of Pennsylvania, Docket No. C-20078463 (Final Order entered July 8, 2008), Chief Administrative Law Judge Veronica A. Smith issued an interim order on January 22, 2008 which treated a preliminary objection as a motion for judgment on the pleadings. Likewise, the Respondent's preliminary objection relating to legal insufficiency will be treated as a motion for judgment on the pleadings here. By doing so the ambiguities contained in the complaint, and the precise relief which the Complainant is seeking, can be clarified and properly addressed. This will ensure that the Complainant's complaint, and the Respondent's preliminary objections, are addressed in a just and efficient manner.

Presiding officers may, at any stage of the case, disregard errors or defects in procedures and waive requirements, if the substantive rights of the parties are not adversely affected. 52 Pa. Code §§ 1.2 (a) and (c). While the time for responding to a motion for judgment on the pleadings is twenty (20) days, as opposed to ten (10) days for a preliminary objection, Complainant was provided twenty (20) days for filing a response to Respondent's new matter containing the allegations that the relief which the Complainant sought was against the contractor and subcontractor that constructed her residence – and not the Respondent. This new matter therefore argued that the Complainant failed to set forth any violations by the Respondent of the Public Utility Code or any order or regulation of the Commission, and because there are no genuine issues of material fact, the Respondent is entitled to judgment as a matter of law.

Complainant failed to file any response to the new matter or Respondent's preliminary objection relating to legal insufficiency. Complainant has therefore been given a full and fair opportunity to respond to Respondent's assertions and arguments.

The Commission's Rules of Practice and Procedure at 52 Pa.Code § 5.102 govern motions for judgment on the pleadings. 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. 52 Pa.Code § 5.102(d)(1). 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. Peoples Natural Gas Company, d/b/a Dominion Peoples, Docket No. C-20028539 (Opinion and Order entered December 19, 2003). In ruling on a motion for judgment on the pleadings, the tribunal must consider as true all well-pleaded averments of the party against whom the motion is directed and consider against her only those facts she specifically admits. 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).

Respondent's motion is subject to the Commission's Rules of Administrative Practice and Procedure, 52 Pa. Code Chapters 1, 3 and 5, providing 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.

(b) *Answers.* An answer to a motion for judgment on the pleadings or summary judgment, including an opposing affidavit or verification to a motion for summary judgment, may be filed within 20 days of the date of service of the motion...

(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.

(3) *Form of decision.* The presiding officer will grant, in whole or in part, the motion in the form of an initial or recommended decision which shall be subject to exceptions as set forth in § 5.533 (relating to exceptions). Denial of a motion will be in the form of a written order.

52 Pa.Code §§ 5.102(a)(b), (d)(1)(3). For a court to grant a motion for judgment on the pleadings, the record must show that no facts are at issue and that the law is so clear that a trial would be a fruitless exercise. All of the opposing party's well-pleaded allegations are viewed as true but only those facts admitted by him may be considered against him. Beardell v. Western Wayne School District, 91 Pa. Commonwealth Ct. 348, 496 A.2d 1373 (1985) (Beardell). In short, in order for Respondent's motion to be granted, no material facts may be at issue and based upon those facts Respondent must be entitled to a judgment as a matter of law.

The question of whether there are material facts at issue will be addressed first. Here, the Complainant admitted in her complaint that the relief she was seeking was for the Commission to order the contractor in question to pay for inspections of all furnace installations performed by the subcontractor responsible for the furnace installation in her residence. The

Complainant further admits that the Respondent had no responsibility for the gas leak which occurred in her residence and that it was in fact the Respondent who acted promptly to identify and stop the cause of the leak. The Complainant does not allege that the Respondent violated the Public Utility Code or any order or regulation of the Commission - but credits the Respondent with saving the Complainant from death or serious injury as a result of said leak. In addition to the facts alleged in the complaint are the facts alleged in Respondent's new matter which are deemed admitted since the Complainant did not file an answer to this new matter. Pursuant to 52 Pa.Code § 5.63(b), a failure to file a timely reply to new matter may be deemed in default, and relevant facts stated in the new matter may be deemed to be admitted.

In short, the Respondent's new matter mirrored the description of events described in the complaint. Respondent argued that the Complainant was seeking relief against the contractor and subcontractor at issue and had not accused the Respondent of violating the Public Utility Code or any order or regulation of the Commission by the Complainant. In light of the averments made in both the complaint and new matter, it is concluded that the applicable pleadings show that there is no genuine issue as to a material fact under 52 Pa.Code § 5.102(d)(1).

The last question to therefore be decided with respect to Respondent's motion for judgement on the pleadings under 52 Pa.Code § 5.102(d)(1) is whether Respondent as the moving party is entitled to a judgment as a matter of law. The undisputed facts indicate that the Complainant is solely seeking relief from the Commission in the form of an order against the contractor and subcontractor responsible for the construction of her residence. The Respondent is correct that the Commission would have no jurisdictional authority over such individuals. In addition, the Complainant has not raised any allegations that the Respondent violated the Public Utility Code or any order or regulation of the Commission - and has gone as far as calling the Respondent "a hero" in finding and stopping the gas leak in her home. The Respondent has established that there is no genuine issue as to a material fact and that Respondent as the moving party is entitled to a judgment as a matter of law.

