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Decision No. 69392

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

FELIX PENALOZA, Complainant, vs. THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, Defendant.	Case No. 8091

Felix Penaloza, in propria persona.

Arthur T. George and Pillsbury, Madison and Sutro, by Richard Odgers, for defendant.

Tibor I. Toczauer, for the Commission staff.

O P I N I O N

Complainant asks this Commission to cancel a classified directory advertising contract entered into between complainant and defendant and to relieve complainant of the charges incurred under the contract. Defendant has answered, denying the material allegations of the complaint, and has filed a motion to dismiss the complaint on the ground that this Commission is without jurisdiction to grant the relief sought.

The matter was heard and submitted before Examiner DeWolf at Los Angeles on March 30, 1965.

At the outset the Commission is confronted with defendant's motion to dismiss. As a general rule this Commission has no jurisdiction to adjudicate contract disputes merely because one party is a public utility. However, the Commission often adjudicates

contract disputes in the exercise of its regulatory jurisdiction. The adjudication of reparation claims and service disconnection disputes, for example, are clearly within Commission jurisdiction even though the interpretation of contracts may be involved.

The facts of each individual case determine the extent of Commission jurisdiction. Because the Commission is not bound by many of the rules of formal pleading (Public Utilities Code sec. 1701) or by the prayer of the complaint (cf. Zellner v. Wassman, 184 Cal. 80, 88 (1920)), it may look to the body of the complaint to determine whether the complaint states any facts giving rise to a cause of action within Commission jurisdiction. The Commission may hear the case and grant relief to the extent of its power even though the relief specifically prayed for is beyond its power to grant. (See Bank of Calif. v. Superior Court, 16 Cal.2d 516, 526 (1940).)

In the case at bar, complainant alleges, albeit imperfectly, that he was charged for services he did not request; that he inadvertently paid these charges for several months; that when he discovered the nature of these charges, he refused to continue to pay them and demanded the return of the amounts paid (by way of a credit against other valid charges); that defendant refused to grant such a credit but instead continued to charge complainant for this unauthorized service; and that complainant then refused to pay any charges, whether authorized or unauthorized. At the hearing it was brought out that defendant disconnected all telephone service from complainant because of unpaid charges.

This Commission has jurisdiction to determine reparation matters. (Public Utilities Code sec. 734.) In Palm Springs

Panorama v. Rancho Ramon Water Co., 62 CPUC 686 (1964), the Commission awarded reparation where the defendant utility failed to construct water distribution facilities contracted and paid for by complainant. The Commission had to construe the contracts involved to determine whether reparation was due and the amount thereof. However, although requested to award consequential damages for breach of contract, the Commission did not do so as that was beyond its jurisdiction. (Accord: Milgrim v. General Telephone Co., 63 CPUC 448 (1964).) In the case at bar, complainant alleges, in substance, that no valid contract for directory advertising was entered into between the parties and that defendant charged for unauthorized service. This allegation as clearly invokes Commission reparation jurisdiction as those in the Palm Springs Panorama case. Moreover, the Commission also has jurisdiction to hear complaints against service disconnections stemming from improper billing. (Cf. Dyke Water Co., 60 CPUC 491 (1963); Citizens Utilities Co. of Calif., 52 CPUC 555, 559 (1953).) If there was no contract (or only a void contract) for classified directory advertising between complainant and defendant, complainant is entitled to a Commission reparation award for the amounts paid to defendant, and is also entitled to have his telephone service reconnected on the condition that he satisfy the past due telephone charges solely for the service he ordered.

Defendant's motion to dismiss is denied.

Testimony

Complainant testified as follows: He came to the United States from Mexico in order to improve his station in life. He opened a travel bureau at 2710 N. Broadway, Los Angeles, California, obtained telephone service from defendant, and specialized in tours

to Mexico. On January 10, 1963 he was approached by a salesman of defendant and was solicited to buy advertising in both the classified telephone directory and the white-page telephone directory. The classified advertising consisted of a $2.50 charge per month for bold type lettering plus a $35 charge per month for a quarter column advertisement. The white-page advertising was for a bold type listing at a $4.75 charge per month. At the time agreements to such effect were signed, he had a poor command of English and did not understand some of the words used by the salesman; he did not know the difference between classified advertising and white-page advertising. Soon after the salesman left his business premises, complainant telephoned defendant's business office and canceled the classified advertisement. After this telephone call, defendant's salesman called almost every day for two months endeavoring to resell the advertising to him. On April 5, 1963 complainant signed a contract for classified advertising which consisted solely of a $2.50 charge for bold type printing. The amount $37.50 had been inserted on the face of this new contract, prior to signing, in the space allowed for total charges; this amount was scratched out and the amount $2.50 was inserted directly below, prior to signing. Complainant did not receive a copy of this contract until four or five days later. He signed it under the impression that it was in lieu of the $4.75 bold type white-page directory listing. After signing the April 5, 1963 contract, he again telephoned defendant's business office and requested cancellation of this contract; defendant agreed. He did not see his telephone bills until December 1963, as it was his practice to have his bookkeeper check them. He issued checks on the advice of his bookkeeper. In late 1963 he became aware that his telephone bill was unusually high,

checked the bills, and found the charges for advertising. At this time he contacted defendant and attempted to obtain an adjustment of the bill. He requested a cancellation of the $35 charge and a set-off of monies paid for the quarter column ad against monies due defendant for authorized service. Defendant refused and continued to charge him for services, including the $35 charge for the quarter column ad. He refused to pay any part of his telephone bill until the charges were adjusted as he requested, and consequently defendant, in March of 1964, disconnected all telephone service to him.

Complainant testified that defendant made up the classified ad from a 4 x 5 card which complainant distributed to potential customers, but that he gave the card to defendant's salesman, not as a prototype for an ad, but to show the salesman the kind of advertising which complainant utilized, and that complainant never received an ad proof.

Complainant's landlady testified that she was requested by defendant's salesman to help persuade complainant to purchase directory advertising; that she had seen the salesman around the premises for about six weeks and complainant had asked her to tell the salesman not to come back; and that in her opinion complainant had difficulty with the English language.

Defendant presented one witness, the salesman, who testified as follows: His first contact with complainant was on January 10, 1963 to sell complainant directory advertising. He showed complainant a layout which defendant's art department had made up, unsolicited by complainant; complainant did not want it. Complainant then gave him a 4 x 5 card which had advertising on it and said, "No, here is what I want." Complainant then signed a

contract for a white-page bold type ad at $4.75 per month and a contract for bold type classified advertising at $2.50 per month and a quarter column ad at $35 per month. The difference between the classified directory and the white-page directory was explained to complainant. Soon thereafter complainant telephoned defendant's business office and canceled the classified ad. As a result of this call the salesman returned to complainant's office, on March 1, 1963, and convinced complainant that the ad would benefit complainant's business. However, after this contact, complainant again telephoned defendant's business office and canceled the ad. In response to this second call, on April 5, 1963, the salesman again went to complainant's office, this time with a new contract for classified advertising. This new contract was almost a duplicate of the one signed January 10, 1963, except for the signatures. It showed an order for bold type at $2.50 and a quarter column ad at $35. The place for total charges showed the figure $37.50 with a line through it. 1/ This

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1/ The salesman explained this procedure as follows (R.T. 78):

"A. Yes, sir, I will attempt to explain this.

"The reason for this being, had Mr. Penaloza on my subsequent contact displayed a wish, for example, to cancel the $2.50 bold type but to retain the quarter-column display ad, the monies involved would not have been the same so I therefore take the amount on the initial contract, which was $37.50, delete that amount and show the new amount, which in this particular instance, it was decided that all items of advertising would remain as originally subscribed to.

"Q. Well, is this procedure of putting in the amount from the old contract and then crossing it through standard practice, or is it not?

"A. Yes, sir. In all instances this is done because of intercompany reasons mainly, because I have been paid commission one time on $37.50, and this merely shows that there is no change in the monthly billing, that I have already been paid commission on it and will not be repaid commission.

"Q. Now, below that figure of 37.50 there is another figure of 37.50, at what point was that placed on the contract which is Exhibit 8?

"A. Prior to my giving the contract to Mr. Penaloza for signature."

contract was signed April 5, 1963 by both complainant and the witness and a copy was left with complainant. Complainant did not attempt to cancel this contract. Complainant received an ad proof prior to April 5, 1963; defendant's copy of this ad proof was destroyed after complainant's telephone service was disconnected pursuant to usual company procedure. The sales commission on this ad was $30. The salesman solicited complainant only three or four times during the period January 10 through April 5, 1963. The reason the landlady saw him so often was that the premises were in his five-block "territory", which he covered every day.

Defendant's closing bill to complainant shows $460.86 due and owing for telephone service. Of this amount $76.21 represents unpaid charges for the quarter column classified ad. It is not disputed that complainant paid to defendant $140 in charges for the quarter column ad.

Discussion

Three grounds for granting relief may be inferred from the testimony of complainant: (1) the contract was signed under duress; (2) the contract was materially altered by defendant, after signature of complainant, without the consent of complainant; and (3) there was no contract because it had been canceled prior to its becoming effective. These grounds will be discussed separately.

Defendant's salesman indulged in high-pressure salesmanship in his dealings with complainant. On his first visit to complainant's office the salesman brought with him an unsolicited ad planned by defendant's art department. After agreeing to a classified directory advertising contract, complainant twice telephoned to cancel it. Defendant's salesman lost no time in returning to complainant's office to attempt to change complainant's

mind; on his last try the salesman enlisted the aid of complainant's landlady, and succeeded. However, whether or not high-pressure salesmanship is a defense to a contract depends to a large extent on the capacity of the person seeking to avoid responsibility. Certainly able businessmen do not need the same protection which the law accords to minors, incompetents, and illiterates. In this case complainant had established himself in a highly competitive business involving transportation tariffs; by his own admission, he was very busy; he required a bookkeeper to assist him; his telephone bills were over $100 per month; and he knew the value of advertising. Notwithstanding his lack of fluency in the English language, complainant has shown himself to be competent enough to carry on a sophisticated business in a competitive field. When the importunities of the salesman are weighed against the abilities of complainant, the Commission can find no overreaching which requires legal protection. Certainly there was no duress.

The allegation that defendant altered the April 5, 1963 contract by raising a $2.50 figure to $37.50 is most serious, and we have reviewed the evidence, both testimonial and written, with great care. We have examined both defendant's and complainant's copies of the April 5th contract and find no material alteration. Defendant's copy does have a mark over the number "7" in the figure 37.50, but it appears that that was to make the number more legible, not to alter it. An examination of the document does not persuade us that, in the figure which represents the total charges for the advertising, a "3" was placed before the "2" and the "2" changed to a "7". Complainant's own testimony supports these observations. At one point he testified that he signed the April 5th contract because it was for bold type classified advertising at a

charge of $2.50 per month and was in lieu of the prior white-page directory listing he had contracted for, and that the quarter column ad had been dropped. At another point he testified that immediately after signing this contract he telephoned defendant and canceled it. Finally, he testified that he received his copy of the April 5th contract four or five days after signing it. If complainant had signed an advertising contract at $2.50 per month and also thought that the contract was in lieu of his prior white-page directory contract at $4.75 per month, there would have been no reason to cancel the contract immediately after the signing. Further, if complainant had signed a contract with a $2.50 charge and five days later received a copy by mail showing a charge of $37.50, he would be expected to have taken additional action. It is also noteworthy that no allegation of this material alteration was made in complainant's pleading. Complainant had received an ad proof pursuant to his January 10, 1963 order, so that no further ad proof was required for the April 5th contract, which was simply a reaffirmation of the January 10th contract. We find that the April 5th contract covered both a bold type listing and a quarter column ad in defendant's classified directory; that the total charge shown on the contract at the time it was signed by both parties was $37.50; that complainant received a copy of the contract at the time he signed it; and that there was no material alteration made on the contract after it was signed.

In passing, we feel justified in observing that defendant's practice of crossing out figures on such contracts has contributed to the difficulties of this proceeding, is poor business practice, and should be discontinued.

Complainant's final contention is that he canceled the contract before it became effective. One of the contract terms is that the contract "...so far as it pertains to insertion of advertising in the forthcoming issue, may be terminated by either party prior to the closing date of such issue upon written notice

to the other party, provided such notice is received by such other party prior to said closing date." (The closing date of the issue referred to was May 2, 1963.) On its face the contract requires written notice to cancel. Complainant admits that he did not give written notice of cancellation but claims that his cancellation by telephone was sufficient. Provisions of a contract may be waived by the contracting parties, and in this case it is apparent that defendant, by the actions of its salesman, waived the written notice requirement as to the first contract. On two occasions, when complainant telephoned to defendant requesting cancellation, defendant's salesman revisited complainant to seek to persuade him to change his mind. On his last visit the salesman brought a new contract to be signed, and obtained a signature. This course of conduct constituted a waiver of the written notice provision. It is not necessary to determine whether this waiver extended to the April 5th contract, for we find no oral cancellation thereof. The only evidence that would support a finding of such a cancellation is complainant's testimony that immediately after signing the April 5th contract he telephoned defendant's business office and canceled it. There is no independent evidence to substantiate this claim, and defendant denied receiving this telephoned cancellation. Considering the character of complainant's testimony on the issue of the alleged alteration of the contract, we are not disposed to believe complainant on this issue. We find that the April 5, 1963 contract was not canceled.

Findings and Conclusion

The Commission finds that:

1. On January 10, 1963 complainant contracted to purchase bold type advertising in defendant's white-page directory; this contract was never canceled.

2. On January 10, 1963 complainant contracted to purchase bold type advertising and a quarter column ad in defendant's classified directory; this contract was canceled prior to April 5, 1963.

3. On April 5, 1963 complainant again contracted to purchase bold type advertising and a quarter column ad in defendant's classified directory for a total price of $37.50 per month; this contract was never canceled.

4. Defendant did not obtain complainant's signature on the April 5, 1963 contract by fraud or duress; nor did defendant at any time materially alter the terms of said contract.

5. Defendant's action in disconnecting complainant's telephone service for nonpayment of charges was reasonable.

The Commission concludes that the relief requested by complainant should be denied.

O R D E R

IT IS ORDERED that the relief sought by complainant is denied and the complaint is denied.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 13th day of July, 1965.

Frederick B. Holoboff
President

George G. Grover

Wm. Symons, Jr.

William M. Bennett
Commissioners

Commissioner Peter E. Mitchell, being necessarily absent, did not participate in the disposition of this proceeding.