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Decision No. 75307

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

BERT C. JOHNSON;

Complainant,

vs.

PACIFIC TELEPHONE & TELEGRAPH
CO.,

Defendant.

Case No. 3685
(Filed September 12, 1967)

Bert C. Johnson, in propria persona,
complainant.
Robert E. Michalski, for The Pacific Telephone
and Telegraph Company, defendant.
J. G. Shields, for the Commission staff.

O P I N I O N

This is a complaint by Bert C. Johnson (hereinafter referred to as Johnson) against The Pacific Telephone and Telegraph Company (hereinafter referred to as PT&T). Johnson seeks an order requiring PT&T to pay him the sum of \$477.00, or, in the alternative, an order declaring that he does not owe PT&T any money.

A duly noticed public hearing was held in this matter before Examiner Jarvis at San Francisco on June 11, 1968. The matter was submitted subject to the filing of briefs, which were received by September 6, 1968.

Because of the affirmative defenses and legal points raised by PT&T, the hearing was confined to the legal points raised herein. The matter was submitted, subject to the filing of briefs, on questions of law. For the purposes of determining the legal questions herein presented we consider all the factual allegations in the complaint to be true.

The complaint alleges that a dispute arose between Johnson and PT&T when Johnson's name was omitted from the yellow pages of a telephone directory; that Johnson believed he had a right to be compensated for damages for this omission; that it was later determined that PT&T's liability was limited by provisions in its tariff; that thereafter Johnson made claim for \$477.00, the amount of the charge for exchange service during the life of the directory in question; that he was given to understand that if he would forego a claim for a larger amount an adjustment of \$477.00 would be made; that it became apparent that the matter would not be adjusted; that he determined to offset a part of the claim against current charges; that by letter dated December 26, 1966 to PT&T he attempted to offset the amount of \$228.63; that as a result PT&T threatened to disconnect service; that while the controversy over the threatened disconnect was going on Johnson sent a check to PT&T for \$102.19 with the notation on its face "payment in full", and that PT&T cashed the check. As indicated, the complaint seeks an order directing PT&T to pay Johnson \$477.00 or a declaration that Johnson does not owe PT&T any money.

The complaint itself does not state the date of the alleged omission of Johnson's name from the yellow pages of the telephone directory. However, in addition to its answer PT&T filed a motion to dismiss prior to the hearing based on the ground that the complaint was barred by the limitation of actions provisions of Section 735 of the Public Utilities Code. The affidavit attached to the motion to dismiss indicates that Johnson first complained to PT&T about the omission of the listing from the February 1964 Vallejo Telephone Directory yellow pages on February 18, 1964. Johnson does not challenge these dates and in his argument on the

motion to dismiss and affirmative defense based on the statute of limitations indicated that the events took place as indicated in the affidavit. We therefore look to February 18, 1964 as the date when Johnson had knowledge that his listing was omitted from the yellow pages of the 1964 Vallejo Telephone Directory.

The complaint was filed on September 12, 1967. Sections 734, 735 and 736 of the Public Utilities Code provide in part that:

"734. When complaint has been made to the commission concerning any rate for any product or commodity furnished or service performed by any public utility, and the commission has found, after investigation, that the public utility has charged an unreasonable, excessive, or discriminatory amount therefor in violation of any of the provisions of this part, the commission may order that the public utility make due reparation to the complainant therefor, with interest from the date of collection if no discrimination will result from such reparation. No order for the payment of reparation upon the ground of unreasonableness shall be made by the commission in any instance wherein the rate in question has, by formal finding, been declared by the commission to be reasonable, and no assignment of a reparation claim shall be recognized by the commission except assignments by operation of law as in cases of death, insanity, bankruptcy, receivership, or order of court.

"735. ...All complaints for damages resulting from a violation of any of the provisions of this part, except Sections 494 and 532, shall either be filed with the commission, or where concurrent jurisdiction of the cause of action is vested by the Constitution and laws of this State in the courts, in any court of competent jurisdiction, within two years from the time the cause of action accrues, and not after.

"736. All complaints for damages resulting from the violation of any of the provisions of Sections 494 or 532 shall either be filed with the commission, or, where concurrent jurisdiction of the cause of action is vested in the courts of this State, in any court of competent jurisdiction within three years from the time the cause of action accrues, and not after. ..."

Sections 494 and 532 of the Public Utilities Code deal with a common carrier or public utility charging or receiving compensation different than that provided for in its tariff. It is not necessary

to determine whether the two year statute of limitations in Section 735 or the three year statute of limitations in Section 736 applies to this matter because more than three years elapsed between February 18, 1964 and the filing of this complaint.

Johnson contends that the complaint is not barred by the statute of limitations because the four year statute of limitations contained in Section 337 of the Code of Civil Procedure is applicable. Section 337 provides as follows:

"Within four years: 1. An action upon any contract, obligation or liability founded upon an instrument in writing, except as provided in Section 336a of this code; provided, that the time within which any action for a money judgment for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of the power of sale in such deed of trust or mortgage, may be brought shall not extend beyond three months after the time of sale under such deed of trust or mortgage.

2. An action to recover (1) upon a book account whether consisting of one or more entries; (2) upon an account stated based upon an account in writing, but the acknowledgement of the account stated need not be in writing; (3) a balance due upon a mutual, open and current account, the items of which are in writing; provided, however, that where an account stated is based upon an account of one item, the time shall begin to run from the date of said item, and where an account stated is based upon an account of more than one item, the time shall begin to run from the date of the last item.

3. An action based upon the rescission of a contract in writing. The time begins to run from the date upon which the facts that entitle the aggrieved party to rescind occurred. Where the ground for rescission is fraud or mistake, the time does not begin to run until the discovery by the aggrieved party of the facts constituting the fraud or mistake. Where the ground for rescission is misrepresentation under Section 359 of the Insurance Code, the time does not begin to run until the representation becomes false."

Johnson cites no authority for this contention. The simple answer to this contention is that the Commission has not been given jurisdiction over the actions to which Section 337 of the Code of

Civil Procedure applies. (Atchison, T. & S.F. Ry. Co. v. Railroad Commission, 173 Cal. 577, 582; Motor Transit Co. v. Railroad Commission, 189 Cal. 573; cf., Cal. Water & Tel. Co. v. Public Utilities Commission, 51 Cal. 2d 478; Hempy v. Public Utilities Commission, 56 Cal. 2d 214; Sale v. Railroad Commission, 15 Cal. 2d 612, 620-21.)

The Commission's jurisdiction herein is derived from Sections 734, 735 and 736 of the Public Utilities Code and the statutes of limitation in Sections 735 and 736 are controlling.

"Generally the Commission is not charged with the enforcement of private contracts. It can, however, award reparation pursuant to Pub. Util. Code Section 734 for the amount of money unreasonably collected from a ratepayer by a utility for utility services improperly furnished. (Penaloza v. P.T. & T. Co., 64 Cal. PUC 396.)" (Cortez v. P.T. & T. Co., 66 Cal. PUC 197.)

Johnson cites Section 344 of the Code of Civil Procedures to support his contention that this complaint is not barred by the statute of limitations. That section provides that:

"In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item proved in the account on either side."

Johnson argues that his alleged right of action against PT&T for failure to list him in the yellow pages created a mutual account and the statute of limitations did not start to run until he attempted to deduct the \$228.00 from his payment to PT&T in December of 1966. We doubt that PT&T's failure to list Johnson in the yellow pages and his subsequent contentions in connection therewith created a "mutual, open, and current account". However, even if it be assumed, for purposes of discussion only, that such account existed, Section 344 is of no help to Johnson. Section 344 indicates the time the cause of action accrued was "from the time of the last item proved in the account on either side." While Johnson attempted to place a dollar

amount of \$228.00 on his claim in December of 1966, the incident upon which the amount was placed occurred in February of 1964. Furthermore, Section 344 is not itself a statute of limitations but is supplementary to Section 337 of the Code of Civil Procedure. The Commission has already held that we have no jurisdiction over actions comprehended by Section 337.

Johnson next contends that the applicable statute of limitations contained in the Public Utilities Code was tolled because of the pendency of consolidated Cases Nos. 7232, 7424 and 7796 in which he appeared as a witness. Again, Johnson cites no authority for this proposition.

In public utility law the running of a statute of limitations for reparations extinguishes the right thereto. (Application of Southern Pacific Co., 57 Cal. P.U.C. 328, 331; Pac. Mercury Television Mfg. Corp. v. Cal. Water & Tel. Co., 55 Cal. P.U.C. 721-725.) Even if it be assumed, for purposes of discussion only, that a reparations statute could be tolled under some circumstances, there are no facts here present which would justify that result. Johnson is an attorney. All of his actions were based upon his own analysis of the facts and law. Consolidated Cases Nos. 7232, 7424 and 7796 involved a Commission investigation of PT&T's rules limiting liability for directory errors and two complaints against PT&T. (Pac. Tel. & Tel. Co.'s Rules 17(b), etc., 65 Cal. P.U.C. 103.) On December 3, 1963, prior to the events here in question, the Commission issued Decision No. 66406 (Ross v. PT&T Co., 61 Cal. P.U.C. 760) which held that no relief could be granted (other than that provided in PT&T's rules) for directory errors which had already occurred. The consolidated cases dealt with considering whether PT&T's rules should be changed for the future.

When Johnson's yellow page listing was omitted in February of 1964 hearings had not yet been held in the consolidated cases and no decision had been entered. Under the holding in Ross, it was clear that the decision in the consolidated cases would not be applicable.

Johnson's contention that his testimony as a witness in the consolidated cases tolled the statute of limitation's law has no merit. Even if it be assumed, for the purpose of discussion only, that this testimony achieved the status of an informal complaint, this would not meet the statutory requirements. An informal complaint does not meet the requirements of Sections 735 or 736 of the Public Utilities Code. (Application of Southern Pacific Co., supra; Pac. Mercury Television Mfg. Corp. v. Cal. Water & Tel. Co., supra.)

We turn now to the last question presented herein. Is PT&T precluded from collecting the difference between the \$228.63 which Johnson owed to it and the \$102.19 which Johnson paid by a check which was marked on its face "payment in full"?

A public utility is required by law to charge reasonable rates, which are subject to the jurisdiction of the Commission. (Cal. Const., Art. XII, Sec. 23; Pub. Util. Code §§ 451, 453, 454, 491, 495.) Public Utilities Code Section 532 provides that:

"532. Except as in this article otherwise provided, no public utility shall charge, or receive a different compensation for any product or commodity furnished or to be furnished, or for any service rendered or to be rendered, than the rates, tolls, rentals, and charges applicable thereto as specified in its schedules on file and in effect at the time, nor shall any public utility engaged in furnishing or rendering more than one product, commodity, or service, charge, demand, collect, or receive a different compensation for the collective, combined, or contemporaneous furnishing or rendition of two or more of such products, commodities, or services, than the aggregate of the rates, tolls, rentals, or charges specified in its schedules on file and in effect at the time, applicable to each

such product, commodity, or service when separately furnished or rendered, nor shall any such public utility refund or remit, directly or indirectly, in any manner or by any device, any portion of the rates, tolls, rentals, and charges so specified, nor extend to any corporation or person any form of contract or agreement or any rule or regulation or any facility or privilege except such as are regularly and uniformly extended to all corporations and persons. The commission may by rule or order establish such exceptions from the operation of this prohibition as it may consider just and reasonable as to each public utility."

While the general rule may be that the cashing of a check which states that it is in full payment of a claim releases the debtor from liability (see Petroleum Collections Inc. v. Susler, (Superior Court) 265 Adv. Cal. App. 537) this is not true in the case of a public utility in the collection of its tariff charges. In Transmix Corp. v. Southern Pacific Co., 187 Cal. App. 2d 257, the court had before it a common carrier (subject to Public Utilities Code §494) which was also a public utility (Public Utilities Code § 216) and subject to Public Utilities Code Section 532. The court held:

"The carrier [public utility] cannot by contract, conduct, estoppel, waiver, directly or indirectly increase or decrease the rate as published in the tariff of the carrier until the published tariff itself is changed.

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" '...The reason why there must be inflexibility in enforcement of the published rate against all and every suggestion for relaxation rests upon the practical impossibility otherwise of maintaining equality between all shippers without preferential privileges of any sort. The rate when published becomes established by law. It can be varied only by law, and not by act of the parties.' (Emphasis added.)

"In Pittsburgh, C.C. & St. L.R. Co. v. Fink, supra 250 U.S. 577, 582 it is stated: "...but instances of individual hardship cannot change the policy which Congress has embodied in the statute in order to secure uniformity in charges for transportation."

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"In Seaboard By-Product Coke Co. v. Director General, 62 I.C.C. 317, there was an error in the publishing of the name of a point. There the carrier intended for the tariff to show the station of Fresh Pond Junction, Long Island. Through error the tariff showed Fresh Pond Junction, New Jersey. The commission held that the tariff must be construed as it was printed regardless of any error, saying at page 329 among other things: '...[T]he intention of the tariff framers is not controlling.' The court in Magnolia Provision Co. v. Beaumont, S.L.W. Ry. Co., 20 F.2d 384, 385 said:

'I agree with the carriers that the evidence in the case, both the oral testimony and the structure of the tariff itself, shows plainly that the 23-cent rate was not originally drafted for the bracket 3405; but I agree with plaintiffs that the question of what the carriers intended abstractly is wholly immaterial, and that none of this evidence is relevant to the issue here joined, because in law it is an irrebuttable presumption that a rate filed with the Commission and published is the lawful rate, and the carrier cannot be heard to dispute the rate by such claim. (Emphasis added.)

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'So earnest has been the insistence of counsel for the railroad companies, and so able and diligent their briefing, that I have labored mightily to see the matter as they have presented it. But I have come back at the conclusion of the inquiry to the point whereat I began, that a rate filed and published is the only rate which the carrier may exact, and the only rate which the shipper may pay.' (Emphasis added.)"

(187 Cal. App. 2d at pp. 264, 265, 266.)

The Commission finds and holds that there cannot be an accord and satisfaction or release from liability of a required tariff charge by a public utility where a debtor tenders a check for less than the full amount, the check is marked as payment in full for any amount owed and the utility endorses and cashes the check.

(Transmix Corp. v. Southern Pacific Co., supra; Butler v. Bell Oil & Refining Co., 70 Cal. App. 2d 728; R. E. Tharp, Inc. v. Miller Hay Co., 261 Adv. Cal. App. 99, 104.)

Since Johnson's tender of the check for \$102.19 and the cashing thereof by PT&T did not result in an accord and satisfaction nor release Johnson from liability for the balance of the \$228.63

which he owed to PT&T, PT&T may apply its tariff provisions dealing with failure to pay bills or other lawful methods of collection with respect to this amount.

No other points require discussion. The Commission makes the following findings and conclusions.

Findings of Fact

1. PT&T omitted Johnson's name from the yellow page listing "Attorneys" in the 1964 Vallejo telephone directory which was issued in February of 1964.

2. Johnson first complained to PT&T about the aforesaid omission on February 18, 1964.

3. This complaint was filed on September 12, 1967.

4. Johnson appeared as a witness in consolidated Cases Nos. 7232, 7424 and 7796.

5. If it be assumed, for purposes of discussion only, that it is possible to toll the statutes of limitation contained in Sections 735 and 736 of the Public Utilities Code, there are no facts here present which would justify the tolling of said statutes of limitation.

6. On December 26, 1966, Johnson sent a letter to PT&T indicating that he proposed to offset from his bill the amount of \$228.63, which he claimed was an amount of money he was entitled to because of the failure to list him in the yellow pages of the 1964 Vallejo telephone directory. PT&T threatened to disconnect Johnson's telephone service if he failed to pay this amount. Thereafter, Johnson sent to PT&T a check for \$102.19 which was marked on its face "payment in full". PT&T endorsed and cashed said check.

Conclusions of Law

1. The Commission has no jurisdiction over actions encompassed by Sections 337 and 344 of the Code of Civil Procedure.

2. The portion of the complaint dealing with the omission of Johnson's name from the yellow pages of the 1964 Vallejo telephone directory is barred by Section 735 or Section 736 of the Public Utilities Code.

3. The endorsement and cashing by PT&T of Johnson's check for \$102.19 which was marked "payment in full" did not result in an accord and satisfaction or release Johnson from liability from the difference between that amount and \$228.63, the amount PT&T was required to charge by its filed and published tariff which rate had been authorized by this Commission.

4. Johnson is not entitled to any relief in this proceeding.

O R D E R

IT IS ORDERED that complainant is not entitled to any relief in this proceeding 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 11th day of FEBRUARY, 1969.

William J. ...
President

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Commissioners