

ORIGINAL

Decision No. 81958

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA
SAN FRANCISCO EYE AND EAR HOSPITAL, INC.

Complainant,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY,
Defendant.

Case No. 9384
(Filed May 26, 1972)

Crosby, Heafey, Roach & May, by John A. Reding, Attorney at Law, for complainant.
Katherine V. Tooks, Attorney at Law, for defendant.

O P I N I O N

This is a complaint by San Francisco Eye and Ear Hospital, Inc. (Hospital) against The Pacific Telephone and Telegraph Company (PT&T).

A duly noticed public hearing was held in this matter before Examiner Donald B. Jarvis in San Francisco on December 13, 1972. The proceeding was submitted on January 18, 1973.

The complaint stems from a dispute between the parties over the alleged improper handling in 1965 and 1966 of requests for telephone listing information by PT&T's information operators. Hospital and PT&T each claim that they are entitled to prevail herein on the basis of the statute of limitations. The presiding examiner correctly ruled that examination into the merits of the 1965-1966 controversy was barred by the statute of limitations. He received evidence on the transactions between the parties during that period in order to determine the legal effect thereof on the complaint at bench.

The material issues presented in this proceeding are:

(1) Which litigant had the burden of taking action with respect to the controversy between the parties in 1965-1966? (2) Did PT&T properly apply its first in first out accounting procedures under the facts of this case?

PT&T has a first in first out accounting system. It credits monies received from customers to the oldest outstanding balance on their accounts. PT&T contends that Hospital presently owes approximately \$1,500 on its telephone bill and that PT&T may apply its disconnect tariff provisions and refuse to provide new equipment to Hospital until the amount is paid. Hospital contends that PT&T is attempting to collect an old alleged debt which is barred by the statute of limitations. Hospital argues that PT&T's accounting methods cannot be used to defeat its legal rights: that because of the nature of telephone service there is a forced ongoing relationship between the parties; that Hospital has refused to pay the \$1,500 since 1966; that PT&T had the burden of collecting the amount; that the statute of limitations precludes collection at this time and that PT&T's refusal to provide Hospital new telephone equipment and threats to disconnect service are improper attempts to collect an alleged debt whose collection is barred by the statute of limitations.

Neither of the parties has referred to Section 1479 of the Civil Code, which we deem to be controlling. That section provides that:

"Where a debtor, under several obligations to another, does an act, by way of performance, in whole or in part, which is equally applicable to two or more of such obligations, such performance must be applied as follows:

"One--If, at the time of performance, the intention or desire of the debtor that such performance should be applied to the extinction of any particular obligation, be manifested to the creditor, it must be so applied.

"Two--If no such application be then made, the creditor, within a reasonable time after such performance, may apply it toward the extinction of any obligation, performance of which was due to him from the debtor at the time of such performance; except that if similar obligations were due to him both individually and as a trustee, he must, unless otherwise directed by the debtor, apply the performance to the extinction of all such obligations in equal proportion; and an application once made by the creditor cannot be rescinded without the consent of [the] debtor.

"Three--If neither party makes such application within the time prescribed herein, the performance must be applied to the extinction of obligations in the following order; and, if there be more than one obligation of a particular class, to the extinction of all in that class, ratably:

1. Of interest due at the time of the performance.
2. Of principal due at that time.
3. Of the obligation earliest in date of maturity.
4. Of an obligation not secured by a lien or collateral undertaking.
5. Of an obligation secured by a lien or collateral undertaking."

As indicated, there was a dispute between Hospital and PT&T in 1965-1966 over alleged improper handling of telephone listing information requests by PT&T's information operators. The record indicates that Hospital paid all charges assessed by PT&T during the period to which the dispute pertains. If Hospital had refused to pay the disputed charges when billed and notified PT&T that subsequent payments were to apply only to subsequent current charges, PT&T could not have applied its accounting procedures to credit the monies paid to the disputed items. (Civil Code §1479.) PT&T would have had the burden of pursuing the collection of the amount due. It could have done so by utilizing its tariff provisions for discontinuance of

service for nonpayment of bills or filing a civil action or both. However, the record indicates that on May 17, 1966, Hospital sought to withhold from PT&T an amount equal to disputed items on bills already paid from July 1965 to February 1966. This was an attempt to recapture monies already paid. Civil Code Section 1479 requires that the debtors instructions concerning the extinction of obligations must be given at the time of performance. No such instructions were given when the payments were made from July 1965 to February 1966. Under the facts presented, PT&T was under no obligation to reverse on its books the credit given for the payment of the disputed amounts and could continue to credit payments made by Hospital to the obligation with the earliest date of maturity. (Civil Code §1479; Ewing Irrigation Products v Rohnert Park Golf Course Corp. (1973) 29 CA 3d 862, 866; Oregon Cedar Products Co. v Ramos & Kohler (1957) 148 CA 2d 679, 682; Hollywood, etc. Co. v John Baskin, Inc. (1953) 121 CA 2d 415, 422-26.)

In the circumstances, the burden was on Hospital to pursue its claim over the disputed charges. On March 11, 1968 Hospital filed a complaint against PT&T in connection with the disputed charges. (Case No. 8775.) On July 9, 1968, the Commission dismissed the complaint without prejudice because of Hospital's failure to respond to communications about the status of the complaint. (Decision No. 74376.) The present complaint, which involves the same subject matter, was filed on May 26, 1972. It is clear that the statute of limitations bars the award of any reparations for incidents which may have occurred in 1965 and 1966. (Public Utilities Code §§735, 736; Johnson v PT&T Co. (1969) 69 CPUC 290, 294; Southern Pacific Co. (1959) 57 CPUC 328, 331.)

Hospital's contention that it has been deprived of due process because it never had a hearing on the 1965-1966 disputed charges has no merit. The reason Hospital has not had a hearing on the 1965-1966 disputed charges is that it slept on its rights. "A statute of limitations is one of repose, enacted as a matter of public policy

to promote justice by preventing the assertion of stale claims after the lapse of long periods of time--or at least the periods designated in the statute--to the surprise of parties or their representatives, perhaps fraudulently, after evidence has been lost, memories have faded, and witnesses have disappeared or died, making it impossible or extremely difficult to prove the actual facts or make a fair presentation of the case. It is presumed that a person who has a well-founded claim and the power to sue will enforce his claim within a reasonable time. . . ." (31 Cal Jur 2d, p. 428, and cases therein cited.) Furthermore, in public utility law the running of a statute of limitations is more than a defense, it extinguishes the underlying right of action. (Johnson v PT&T Co., supra; Southern Pacific Co., supra.) Hospital's own conduct cannot support the claim that the Commission has denied it due process. The Commission's processes were available to it during the period it could have asserted its alleged rights.

In the light of the previous discussion, the Commission holds that PT&T has properly credited Hospital's payments in accordance with Civil Code Section 1479; that there is a current balance owed by Hospital to PT&T; that PT&T may apply its tariff provisions for discontinuance of service for nonpayment of bills to Hospital and refuse to provide new equipment to Hospital until the outstanding balance is paid and that Hospital is entitled to no relief in this proceeding.

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

Findings of Fact

1. Hospital and PT&T had a dispute over PT&T's alleged improper handling of requests for telephone listing information by PT&T's information operators for the period July 1965 to February 1966.
2. Hospital paid all of PT&T's bills during the period from July 1965 to February 1966 which payments were credited by PT&T to Hospital's

account for that period of time. At the time of such payments Hospital gave no instructions to PT&T that any of the monies paid should not be applied to any or all of the items on the bills for the period of time involved.

3. On May 17, 1966 Hospital informed PT&T that it intended to deduct from the then current monthly billings the sum of \$1,548.43, the amount allegedly due Hospital in connection with the dispute for the period July 1965 to February 1966.

4. PT&T did not change the amounts credited to Hospital's account on its books for the period from July 1965 to February 1966. It continued to apply monies paid by Hospital to the oldest outstanding bills.

5. From 1966 to the hearing held herein, Hospital continued to withhold at least the approximate sum of \$1,500 from payments due to PT&T. During this period PT&T applied all monies received to Hospital's oldest outstanding bills.

6. On March 11, 1968 Hospital filed with the Commission a complaint against PT&T in connection with the dispute over PT&T's alleged improper handling of requests for telephone listing information by PT&T's information operators for the period July 1965 to February 1966. (Case No. 8775.) On July 9, 1968 the Commission entered an order dismissing the complaint without prejudice. (Decision No. 74376.) Said order has become final.

7. On April 19, 1972 Hospital owed PT&T \$3,542.26 for telephone service. PT&T threatened to disconnect service if the amount were not paid. In May 1972 Hospital paid PT&T monies sufficient to reduce the outstanding balance to approximately \$1,500. The present complaint was filed on May 26, 1972. From May 1972 to December 1972 Hospital had outstanding balances for telephone service as follows: May \$3,278; June \$3,278; July \$4,952; August \$3,278; September \$3,533; October \$3,278; November \$4,981. On the day of the hearing Hospital paid PT&T monies totaling \$3,687.

8. PT&T has informed Hospital that unless all outstanding past due charges are paid, including the disputed \$1,500, it will not furnish Hospital any new telephone equipment and it will apply its tariff procedures for discontinuance of service for nonpayment of bills to Hospital. The proposed discontinuance of service has been held in abeyance pending the disposition of this complaint.

9. Section 1479 of the Civil Code provides that:

"Where a debtor, under several obligations to another, does an act, by way of performance, in whole or in part, which is equally applicable to two or more of such obligations, such performance must be applied as follows:

"One--If, at the time of performance, the intention or desire of the debtor that such performance should be applied to the extinction of any particular obligation, be manifested to the creditor, it must be so applied.

"Two--If no such application be then made, the creditor, within a reasonable time after such performance, may apply it toward the extinction of any obligation, performance of which was due to him from the debtor at the time of such performance; except that if similar obligations were due to him both individually and as a trustee, he must, unless otherwise directed by the debtor, apply the performance to the extinction of all such obligations in equal proportion; and an application once made by the creditor cannot be rescinded without the consent of [the] debtor.

"Three--If neither party makes such application within the time prescribed herein, the performance must be applied to the extinction of obligations in the following order; and, if there be more than one obligation of a particular class, to the extinction of all in that class, ratably:

1. Of interest due at the time of the performance.
2. Of principal due at that time.
3. Of the obligation earliest in date of maturity.
4. Of an obligation not secured by a lien or collateral undertaking.
5. Of an obligation secured by a lien or collateral undertaking."

Conclusions of Law

1. Consideration of the merits of the dispute between Hospital and PT&T over the alleged improper handling in 1965 and 1966 of requests for telephone listing information by PT&T's information operator is barred by Sections 735 and 736 of the Public Utilities Code.

2. Application of the statute of limitations to Hospital does not constitute a denial of due process.

3. Application of the payments by Hospital to PT&T for outstanding charges is governed by Section 1479 of the Civil Code.

4. PT&T properly credited payments made by Hospital in connection with its account during the period here under consideration.

5. The monies owed by Hospital to PT&T represent a current past due balance due PT&T.

6. If Hospital does not pay the past due balance on its account, PT&T may apply its discontinuance of service for nonpayment of bills tariff provisions to Hospital and refuse to furnish new or additional telephone equipment to Hospital.

7. Hospital is entitled to no relief in this proceeding.

O R D E R

IT IS ORDERED that the relief requested is denied.

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

Dated at San Francisco, California, this 2nd
day of OCTOBER, 1973.

William Lyons President
[Signature]
[Signature] Commissioners

Commissioner Vernon L. Sturgeon, being necessarily absent, did not participate in the disposition of this proceeding.

Commissioner J. P. Vukasin, Jr., being necessarily absent, did not participate in the disposition of this proceeding.