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Decision No. 84787

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

READY PAC PRODUCE, INC., Complainant, vs. PACIFIC TELEPHONE COMPANY, Defendant.	Case No. 9843 (Filed December 16, 1974)

Dennis Gertmenian, for Ready Pac Produce, Inc., complainant.
Michael J. Ritter, Attorney at Law, for Pacific Telephone Company, defendant.

O P I N I O N

Ready Pac Produce, Inc., a food processor anticipating start up of continuous operations in a 1-1/2 acre new facility with a 26,000 sq. ft. building subdivided into offices, processing plant, warehouse, and loading area, in April 1974 sought bids for a complete telephone system to include loudspeaker paging. Defendant and California Pacific Communications Company competed for the business. Negotiations between complainant's office manager and defendant's communication consultant resulted in a bid by defendant on May 9, 1974 to furnish a new system called a Com Key 718 Communication System (Exhibit 1). On May 21, 1974 complainant accepted the bid with installation scheduled for June 21, 1974.

Primarily because of delays in completion of defendant's new building and a concurrent crushed conduit problem in an access street, installation was delayed until July 23, 1974. In the delay interval a semipublic coin installation was installed to service the facility.

At time of installation, complainant's president determined to reduce the number of paging loudspeakers in the plant processing area from the three recommended by defendant to one. When this equipment in the processing area was installed the single speaker immediately proved to be entirely inadequate. Complainant's office manager agreed to the ordering of four additional speakers, of which three were to be added to the processing area. Complainant's president subsequently expressed doubts that any number of Com Key 718 system speakers would be adequate. At this point it was learned that the ordered additional speakers would necessarily be delayed because of a strike at Western Electric, supplier to defendant.

In discussions August 2, 1974 complainant's president expressed additional dissatisfaction with details of the new installation, centering on the quality of the speaker paging, and on the lack of a satisfactory night bell in the processing area. He stated that if these matters could not be remedied, he would request removal of the entire Com Key system, even though there had been no problems with the rest of the system. Defendant was able to recommend solutions, including substitution of more readily available, albeit more expensive, larger speakers for the back ordered Com Key speakers. After initially refusing to pay any of the additional costs, complainant's president agreed to pay for the other additional equipment but declined to pay the added costs for the larger speakers. Then, after further consideration, he took the position that all additional work should be done at no extra cost beyond that of the

original Com Key bid. Told that defendant was bound by the charges of its filed tariff, complainant again reconsidered and ordered removal of the Com Key system with substitution by a 6-button telephone system. Defendant offered to show complainant's president a similar noisy facility where a 4-speaker Com Key system similar to defendant's original bid, had proved entirely adequate. Complainant's president declined to make the comparison visit, and on August 26, 1974 gave defendant until September 10, 1974 to obtain and install the back ordered Com Key speakers, or proceed with the order for the change out.

Meanwhile, on August 27, 1974, complainant signed an agreement with the rival communication company to install its communication system, including a 4-speaker paging arrangement, if defendant could not deliver by September 10, 1974. Because of the Western Electric strike defendant could not obtain the back ordered Com Key speakers by September 10, 1974, and thereafter removed the Com Key 718 system as ordered and replaced it with a 6-button system. The rival firm made its installation and it performs to complainant's satisfaction.

Complainant readily agrees defendant was entirely "cordial and accommodating" at all times in trying to make the system work, but complainant refuses to pay the $632 installation charge for the Com Key 718 system, asserting it negotiated in good faith for a

"complete communication system" which when installed did not function as expected. Complainant asserts the rival communication firm unconditionally guaranteed its system at a fixed cost, and defendant should do likewise. Complainant asks that defendant be required to "absorb" the $632 installation cost for the unsatisfactory Com Key 718 system, presumably as the charge allegedly violates Section 451.[1/]

A duly noticed public hearing was held in Los Angeles on July 1, 1975 and the case was submitted.

1/ California Public Utilities Code Section 451:

"All charges demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge demanded or received for such product or commodity or service is unlawful.

"Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.

"All rules made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable."

Section 532 of the California Public Utilities Code forbids a utility from refunding "directly or indirectly, in any manner or by any device" the scheduled charges for its services.[2/] In addition, a public utility "cannot by contract, conduct, estoppel, waiver, directly or indirectly increase or decrease the rate as published in the tariff...." (Transmix Corp. v Southern Pacific Co. (1960) 187 CA 2d 257, 264.) The concept being that scheduled tariffs must be strictly enforced in order to maintain equal treatment for all

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2/ California Public Utilities Code Section 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."

customers. Thus customers of a public utility should not be able to recover damages as this would in effect constitute a preferential rate reduction, the cost of which other customers would have to absorb. This principle arose from and is usually applied in cases which involve mistakes made by a utility in quoting rates, and the utility, when it discovers its mistake, may initiate an action to recover its full tariff charges for the services supplied.

However, here we are not concerned with a dispute over a rate amount. Instead, and reduced to its essence, we have a situation wherein the complainant in effect alleges that defendant misrepresented a system as adequate to do a task and induced complainant to order that system over that of a competitor, when in fact the system was inadequate and defendant had the technical expertise to anticipate this inadequacy but nonetheless urged the inadequate service upon complainant.

If the facts supported complainant's contentions, complainant would find support in Decision No. 77406 in Case No. 8593 (1970) in which the Commission, adopting its examiner's report, held, inter alia, that the ordinary rules limiting liability do not apply to situations involving willful or fraudulent misconduct.[3/] But in the case before us, where has there been willful or fraudulent misrepresentation?

3/ This exception to the ordinary rules limiting utility liability attained further viability in Empire West v So. Cal. Gas Co. ((1974) 12 C 3d 803), where the California Supreme Court stated that a utility customer who has been actually damaged by a utility's fraudulent misrepresentation regarding matters within its technical competence and not contained in the published tariff should be entitled to bring an action to recover these damages. The court noted that Section 2106 of the Public Utilities Code permits the filing of damage suits against public utilities for the commission of any act prohibited or declared unlawful under the laws of this state.

Complainant sought and received a bid from defendant. Key to successful operation of the system was a loudspeaker paging combination. Defendant recommended three Com Key 718 speakers and the system was ordered and delivered for installation with three speakers. During installation complainant's president, not a communications engineer and with no special expertise in the field, cut back the installation of speakers in the critical processing area to one. The other two speakers were then used elsewhere by defendant. The truncated speaker system proved unable to overcome the din of the processing area. Defendant has contended that the system would work if permitted the recommended speakers, and offered to show complainant's president a similar installation successfully operating with three speakers. By the time complainant agreed to permit defendant to complete the installation, Com Key speakers could be obtained only after an indeterminate delay, being on back order as a consequence of a supplier's plant strike. Defendant offered alternative larger speakers but complainant refused to pay the additional cost.

There has been no showing that the basic Com Key 718 system, including the truncated speaker portion, has been in any way misrepresented. Complainant was billed for installation of what he received. There was no charge for the removal of the Com Key 718 system. The system failed to meet the expectations of complainant's president, particularly in the speaker paging area of the installation, but that appears to be the fault of the complainant's president rather than of defendant. While fraud, like any other fact, may be inferred from circumstantial evidence, it is never presumed, and the burden of proving fraud rests on the one asserting it (King v Hawley (1952) 113 CA 2d 534). Failure of the installation to meet expectations does not establish willful or fraudulent misrepresentation. To establish a cause of action for willful or fraudulent misrepresentation

the party claiming it must prove that a material misrepresentation was made; that it was false; that defendant knew it to be untrue or lacked sufficient knowledge to warrant belief it was true; that it was made with intent to induce complainant to act in reliance thereon; that complainant reasonably believed it to be true; that it was relied upon by complainant, and that complainant suffered damages thereby (Doctor v Lakeridge Const. Co. (1967) 252 CA 2d 715). Proof must be clear and convincing and absence of any element is generally fatal (Pinney & Topliff v Chrysler Corp. D.C. (1959) 176 F Supp 801). Complainant has failed its burden of proof. It is noteworthy that it did not produce its most percipient witness - the office manager who negotiated the contract (see Evidence Code Section 412[4/]). There has been no showing beyond the mere opinion of complainant's president that the system as contracted for would not work. For reasons attributable to the complainant, not to the defendant, it was never tried in completed form. The only competent evidence on the workability of a Com Key 718 system was that of defendant relating to a similar installation, with alike noise problems, which system worked when equipped with the full complement of speakers.

As to the second problem, the night bell in the processing area; it appears that this deficiency was a relatively minor one which readily could and would have been cured by installation of a more audible bell or gong had complainant retained the Com Key 718 system.

4/ California Evidence Code Section 412:

"If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust."

Findings

1. Complainant sought from defendant and a rival a "complete internal telephone service", including speaker paging in its noisy processing area.

2. Defendant bid, was awarded the contract, and after delays not attributable to it, attempted installation of its Com Key 718 system which included three speakers in the processing area.

3. Complainant determined it would have but one speaker in the processing area and restricted installation to one speaker.

4. The truncated one speaker system immediately proved inadequate in the processing area although the balance of the system was generally satisfactory elsewhere in the plant. Complainant thereafter agreed to addition of the deleted speakers.

5. Because of supplier labor troubles defendant could not thereafter immediately furnish the deleted speakers. Although defendant offered substitute larger speakers, complainant refused to pay the added cost.

6. When defendant could not meet complainant's deadline for remedy of the deficiency, complainant ordered removal of the Com Key 718 system and replaced it by the rival vendor's system which includes three speakers in the processing area.

7. Complainant declines to pay any installation charges for the Com Key 718 system and seeks an order that defendant be ordered to waive installation charges alleging the Com Key 718 system was misrepresented.

8. Complainant agrees defendant at all times relevant hereto was "cordial and accommodating."

9. Complainant's interference in deleting two speakers in the processing area at time of installation of the Com Key 718 system was the proximate cause of unsuccessful operation of the vital paging component of the system.

10. Complainant did not thereafter allow defendant sufficient time to correct the deficiency attributable to complainant, considering the unfortunate intervening labor dispute at defendant's supplier.

Conclusions

1. There has been no willful or fraudulent misrepresentation by the defendant proved by the complainant.

2. Defendant's charges for installation of the Com Key 718 system are in accord with Tariff Schedule Cal. P.U.C. No. 22-T, Sheets No. 3-11.

3. Defendant's attempt to collect the $632 installation charge for the Com Key 718 communication system is not a violation of Section 451.

4. Complainant is entitled to no relief.

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 12th day of AUGUST, 1975.

President

Commissioners