ALJ/JCG/vdl

Mailed
FEB 21 1992

Decision 92-02-054 February 20, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

Equillen Allen,

Complainant,

vs.

General Telephone of California,

Defendant.

Case 90-11-048
(Filed November 26, 1990)

Doreen Kramer, Attorney at Law, for Equilla Allen, complainant.
Michael L. Allan, Attorney at Law, for GTE California Incorporated, defendant.

O P I N I O N

At the time of hearing, complainant Equilla Allen resided in defendant GTE California Incorporated's (GTEC) (the caption is in error) service area.[1] She seeks an order that GTEC provide her with residential telephone service. She is elderly, infirm, and needs telephone service to maintain her life in the community and for possible health emergencies.

GTEC contends that under its tariff, it is authorized to deny service to complainant until she pays unpaid amounts due under old accounts in her name or allegedly attributable to her. Table 1, supplied by defendant, describes the accounts and amounts assertedly due.

1 Since the hearing, she has been temporarily residing out of state.

Table 1

Billing Name	Service Installed	Service Address	Service Discon-nected	Final Bill Dated	Amount Owing
Equilla Herron	05/06/85	1423 Indian Hill Pomona (714) 621-7303	06/29/85	08/07/85	$ 250.10
Equilla Herron	05/18/86	1101 W. Francis, Apt. F, Ontario (714) 391-1649	10/23/86	02/19/87	$ 593.51
Equilla Herron	03/17/87	1101 W. Francis, Apt. F, Ontario (714) 983-8954	05/29/87	07/10/87	$ 390.38
Equilla Herron	11/24/87	1101 W. Francis, Apt. F, Ontario			
	05/17/88 Transferred service to	11819 Central #113, Chino (714) 590-0591	09/08/88	10/28/88	$ 308.82
				Total	$1,542.81

This table may be in error. The testimony indicates that the 590-0591 number was in the name of Equilla Allen. It also indicates that the number before transfer was (714) 988-7988. A possibly significant discrepancy concerns the discontinuance of the number 3 account ((714) 983-8954). The testimony indicates that this account was not discontinued for nonpayment but was "superseded" to another name, Kathy Herron, with the $390.38 unpaid.

At a different time, a Serena Allen had a phone at the Pomona address which was terminated with a large sum owing. Subsequently, one Theresa Allen had another phone number at the Pomona address.

GTEC contends that complainant was the customer for service rendered to Equilla Herron (Herron is complainant's maiden name); assertedly each of these accounts were established under identification traceable to complainant.

Hearings were held in Pomona on March 22 and May 2, 1991 before Administrative Law Judge (ALJ) Gilman. Briefs were filed in late June. On June 25, the ALJ ruled that the briefs did not deal adequately with the question of the statute of limitations, and required new briefs which were by agreement to be filed on July 30.

Evidence

A GTEC employee testified to explain GTEC records which describe the service rendered and the amounts unpaid at the termination of each service. She also explained the company's practices, which allow a new customer to obtain service by merely calling the utility and giving a name and an ID number, such as a California driver's license number. (However, account No. 1 on the list was apparently opened without any ID.) She noted some of the service had been paid for with checks drawn on complainant's bank accounts.

Complainant responds that each of the services in question was in fact established by her daughter, Serena Theresa

Allen, who used the mother's name and identification without authorization. While mother and daughter are now estranged, they both shared the apartments in Pomona and Ontario. Assertedly, complainant believed that the phone in each of the apartments was in her daughter's name. She contends that Serena intercepted the mail so that she never received bills from GTEC. Complainant concedes that GTEC received several checks on her account to pay for some service, but claims that Serena forged them and intercepted the bank statements. Complainant testified that she never used the phone in any of the apartments.

With regard to the most recent account, complainant contends that she never shared that apartment with Serena. However, she permitted the daughter to list complainant as a resident so that the landlord would believe that her Social Security income would be available to help defray the rent. She did not move in, because she suffered a stroke and went to the hospital for an extended stay; it is open to question whether she ever intended to live there.

She also admits to having attempted to obtain additional credit from other nonutility creditors by securing a second California identification card in a name other than Equilla Allen. When someone pointed out that this would be unlawful, she abandoned the attempt. More significantly, she admitted to having used the name Herron to obtain credit from an energy utility. She excuses this by claiming that Serena had used the name Equilla Allen to obtain service from that utility also, and destroyed her credit.

Complainant also admits that her stroke has impaired her memory. Her testimony at hearing was often unresponsive and difficult to follow.

Complainant subpoenaed Serena to testify at the second day of hearing. Serena complied with the subpoena by attending the hearing, but complainant excused her. Even though she was present

in the hearing room, GTEC did not call her as an adverse witness. (Cf. Code of Civil Procedure (CCP) §1990.)

Discussion

Who was Defendant's Customer?

With the exception of the Pomona account, it appears that GTEC opened these accounts without requiring a deposit or face-to-face identification as authorized under the "Trial 1" procedure authorized by the Commission in Resolution R-12092 (cf. Decision 91-05-018 in I.86-08-018). Under this procedure, GTEC would institute service to any residence in response to a telephone call if the requesting party gave the name of the customer and an ID number. GTEC was induced to issue credit on the second and succeeding accounts because of the use of different names; the caller used California drivers' license numbers which varied slightly from each other (complainant does not hold a driver's license) and varying Social Security numbers.

There is no dispute that GTEC has lost a substantial sum on these four accounts. There is no dispute that it could have reduced the amount of credit extended if the person who ordered the service had not identified herself (or themselves) deceptively. The central factual issue is whether it was complainant or her daughter who ordered service in a manner that induced defendant to extend credit without collecting prior bills.

Complainant does not have a strong case. It rests solely on her unsupported memory, which she admits is impaired. She also admits to have participated in at least three schemes to deceive other creditors. The most significant is her attempt to use the name Herron to induce an energy utility to extend credit. She justifies this by claiming that Serena ran up large energy bills using the name Equilla Allen.

The most serious weakness is self-inflicted--her failure to call a potentially corroborating witness, her daughter. We cannot tell whether this decision was motivated by a desire to

ameliorate an interfamily dispute or to a belief that the testimony would conflict with her own. Whatever the reason, the decision cost the Commission its best chance to verify complainant's contention that Serena rather than herself was the customer.

There are weaknesses in defendant's case. There is ample evidence that a member of this household deceived GTEC into instituting new services when there were outstanding bills which should have been paid first. The utility has however, produced no evidence to directly refute complainant's testimony that it was Serena, not herself, who committed the fraud. Even though Serena was present in the courtroom, it did not exercise its right to call her as an adverse witness.[2]

We are thus forced to choose between two weak positions. Given the lack of corroborating testimony, we find it difficult to believe that complainant was not at least a knowing participant in a scheme to deceive the utility into extending credit to a fictitious person. We have therefore declined to find that Serena was defendant's customer. Consequently, except to the extent that bills are outlawed by the passage of time or not covered by the tariff item, defendant may demand payment before providing service to defendant. (It would not matter whether the payment is actually provided by Serena or by complainant.)

In the discussion which follows, we explain why defendant could not demand payment of the two oldest bills as a condition to instituting service to complainant. The $308.82 debt for 590-0591,

---

2 For the utility, questioning the daughter would have been a zero-risk tactic. If her testimony contradicted her mother's, it would have strengthened the utility's claim that Equilla should pay overdue bills. On the other hand, if the daughter had admitted using another name or ID to obtain service, defendant could use that testimony in an effort to collect from Serena. Since Serena has a job, she is probably more able to pay backbills than complainant.

on the other hand, was still a valid claim when complainant applied for service. The debt for $390.38 for 983-8954 poses special problems; it was apparently not extinguished when GTEC's answer was filed. However, it was a bill not covered by tariff Rule 5; consequently GTEC could not insist on payment of that bill for instituting service.

The final result of our analysis is that GTEC can demand payment of only the $308.82 bill left when 590-0591 was discontinued.

Validity of Backbills

In the first round of briefs, complainant argued that all of the overdue bills would be barred by the two-year statute of limitations provided by CCP § 339, or, alternatively, the four-year period provided by CCP § 337 for a book account.

GTEC's first brief failed to discuss the statute of limitations question.

The ALJ ruled that the briefs were unsatisfactory and required a second round of simultaneous briefs.

On the second round of briefs, GTEC argued that § 737 of the Public Utilities (PU) Code,[3] rather than any CCP section, governs customer debts to utilities and carriers. That statute provides in part:

> "All complaints for the collection of the lawful tariff charges or any part thereof, of public utilities may be filed in any court of competent jurisdiction within three years from the time the cause of action accrues, and not after, but if a public utility presents its claim or demand in writing to the person from whom the tariff charges, or any part thereof, are alleged to be due within such period of three years, that period shall be extended to include six months from the date notice in

---

3 Unless otherwise noted, all subsequent citations are to the PU Code.

> writing given to the public utility, by such person, or refusal to pay the demand, or any part or parts thereof specified in the notice of refusal."

GTEC further contends that the closing bills for each account constituted a "claim or demand in writing" sufficient to extend § 737's three-year period. If § 737 is applicable and if there is no estoppel, it concedes that the two oldest bills are barred, even with the extension.

GTEC, alternatively, contends that § 737 would only be applicable if the utility had filed an independent action to collect tariff charges; the section should not bar it, the utility reasons, from demanding that overdue sums should be paid before it is compelled to render service to complainant. It claims that such demands are governed solely by its tariff Rule 5, which states:

> "An applicant for service who previously has been a customer of the utility (for the same class of service as being appled for) and during the last twelve months of that prior service has had service...disconnected for nonpayment, and whose date of application is within three years of the last date of prior service, will be required to pay any unpaid balance due the Utility...before service is established."

GTEC asserts that since its tariff provides for a three-year limitation period, there can be no conflict between the provisions of § 737 and the tariff Rule.

Finally, defendant claims that complainant should be estopped to raise the defense created by § 737, because she used fraudulent means to obtain telephone service.

In her second brief, complainant now relies on § 737, claiming that all debts are barred. She also claims that no extension was created because final bills were addressed to the wrong person. As for the tariff provision, she contends that it

was inapplicable because the utility did not provide adequate notice of the discontinuances.

Which Statute of Limitations Applies?

We have concluded that CCP §§ 337 and 339 do not apply to a regulated utility's (or carrier's) attempts to collect unpaid tariff charges. The only applicable statute of limitations for a utility's actions to collect lawful tariff charges is provided by PU Code § 737. It should be noted that § 737 provides that the normal three-year period can be extended by a properly timed written demand by the utility. Complainant seems to concede that final bills such as GTEC's would trigger that extension, if addressed to the correct person.

Does the Running of the Statute Bar the Claim or Merely the Remedy?

Both parties now agree that, if the time period provided by § 737 has run, the debt is extinguished. We have so concluded, and explain our reasoning for the benefit of litigants in other cases.

Normally, statutes of limitation merely bar a creditor from asking a court for a judgment on a outdated claim. The underlying debt, however, continues to exist and may have some economic value. For example, if the debtor whose debt is barred files suit against the dilatory creditor, the creditor may use the otherwise barred claim as an offset. (Cf. CCP § 440.)

However, it has long been the rule that § 736, a statute of limitations for customer's overcharge claims against utilities and common carriers, operates to extinguish the debt rather than merely barring enforcement.

Apparently this rule was first adopted in The Mills etc. Co. v S.P.Co. and A.T.&S.F. Ry. (1916) 9 CRC 80. This decision relied on A.J. Phillips v Grand Trunk Ry. (1915) 236 U.S. 662, which held that a comparable federal statute of limitations extinguished rather than merely barred enforcement. The Commission

decision adopted the outcome of Phillips, even though Phillips was based on a federal statute which included the words "and not after" while the 1916 version of § 736 did not. The Commission, after some soul-searching, held that the California statute should likewise extinguish, conceding, however, that the difference in wording might well have required the opposite result. The Legislature subsequently ratified the Commission's conclusion by adding "and not after" to both §§ 736 and 737 (and to § 735).

This appears to be a case of first impression under § 737. The Commission has apparently never considered whether § 737 extinguishes the obligation, as does § 736.

The fact that the phrase "and not after" now occurs in both sections would seem to be determinative. We conclude that the Legislature, by adding "and not after" to both § 736 and § 737, intended to adopt the Phillips rule as part of California law and to remove all doubt that both sections should extinguish the debt rather than merely the right to sue.

To the extent that the running of the period of limitations extinguished complainant's past due bills, they should have no more legal effect than if complainant (or Serena) had paid them.

Is § 737 Applicable When a Utility Asserts Outdated Bills as a Defense?

Under GTEC's analysis, § 737 would only be applicable to a proceeding in which a utility seeks to obtain a judgment for tariff charges against a customer. Here, it claims it is merely using the existence of the past due bills as a defense to a charge that it has violated its duty to serve a member of the public. In such a situation, it claims the only applicable limitation on its ability to demand payment is provided by the tariff itself.

The literal wording of the statute tends to support such an interpretation. The Commission is not a court, in the literal sense of the word. Nor is this a "...complaint for the collection

of lawful tariff charges" in the strict sense; GTEC is defendant rather than an complainant, and this is not the proper court to issue a judgment for such charges.

Nevertheless, we disagree with GTEC. While a tariff can place reasonable limitations on the utility's duty to serve all members of the public, it cannot revive an extinguished debt. The tariff cannot provide a means, judicial or extra-judicial, to collect a debt extinguished by § 737. If the Legislature has declared that a debt is extinguished, a tariff cannot create a means of enforcement. Therefore, GTEC's tariff is void to the extent that it purports to require payment of extinguished bills. To permit such a requirement would be to condone a form of legalized extortion.

By GTEC's calculation, the statutory period, even with the extension, had already expired on the first two accounts when it filed its answer on January 4, 1991. For the third account, the period had not quite expired, if we adopt GTEC's concession that the maximum period allowed by § 737 is three years and six months.[4] The final bill for the most recent account, would also under GTEC's theory, have postponed the extinguishment of that debt.

Fraud and Limitation of Actions

Defendant claims that complainant should be estopped to raise the defense created by § 737 because she used fraudulent means in applying for telephone service. The rule it cites is equitable in nature. If a defendant has committed a fraud which leads a plaintiff not to file a timely action, courts consider that it would be inequitable to allow a cheat to profit from his fraud by barring the action. Consequently, courts will hold that the

4 This question may need to be reexamined in the next case which turns on this statute.

fraudulent defendant may not claim the benefit of the statute of limitations for the time which elapsed while plaintiff was induced to sleep on his rights.

We need not consider whether this estoppel rule should apply to either § 735 or § 737. Even if these were conventional statutes of limitation,[5] concealment of the debtor's true name is not the kind of fraud which will bar a defendant from benefiting from a statute of limitations. The most authoritative case on this point is Jolly v. Eli Lilly & Co. (1988) 44 Cal 3d 1103. There the Court reasoned that concealment of defendant's identity does not interfere with the creditor's ability to commence an action before the statute runs. The Court noted that the creditor could easily protect its rights by filing a timely action against both the fraudulent alias and John or Jane Doe, substituting the true name whenever it is discovered.

In this instance, GTEC could easily have filed an action to collect the older claims against Equilla Herron within three years after the final billing; such a filing would have tolled the statute against any person fraudulently using that name, if the utility had followed the customary practice of naming several Does. By so doing, defendant would have preserved its right to proceed against either Serena or complainant or both, by substituting complainant and/or Serena for Does, when it discovered that the identity of its customer was in doubt.

---

5 There is authority, based on Mills, (supra) that there can be no estoppel, by fraud or otherwise, under a statute such as § 735 which limits reparations actions; because the type of fraud alleged in this case would not toll even a conventional statute of limitations, we need not consider whether the no-estoppel rule should apply to § 737.

We have therefore concluded that concealment of the true identity of the utility customer does not toll the running of § 737.

Did GTE's Final Bills Trigger § 737's Extension?

Defendant argues, and complainant seems to concede, that the final bills noted in Table 1 would be sufficient to trigger § 737's extension, if addressed to the actual customer. Complainant contends, however, that since she was not the customer, the final bills were misdirected and should not extend the period of limitations.

We disagree. We think the core issue is whether the bills gave her sufficient notice to prompt her to deny liability, not whether she has grounds to claim that someone else was the customer. In our opinion, bills addressed to any one named Equilla at the service address should have been sufficient notice. GTEC cannot be charged with the knowledge that she never lived at one of the service addresses. Nor should it be charged with notice that Serena was (at least allegedly) intercepting mail addressed to complainant. If that is indeed the fact, such conduct may give complainant rights against Serena, but not against the utility.

We have therefore concluded that final bills addressed to either Equilla Herron or Allen at the service address notified her that someone else had used her name to obtain phone service; they were thus sufficient to extend the three-year period of limitations. (A different rule might apply if the fictitious customer had borne a less distinctive first name.)

Effect of Tariff

As quoted above, Rule 5 allows the utility to demand payment of certain outstanding bills when a previous customer applies for a new service. However, the rule is applicable only when the prior service was discontinued for nonpayment. In this case, the testimony indicates that the account No. 3, rather than

being discontinued for nonpayment, was "superseded" to Kathy Herron (inferrably, an alias of Serena Allen).

Under the wording of the tariff item, only those bills due and owing on accounts discontinued for nonpayment can be enforced by withholding service.

Therefore, GTEC should not have demanded payment of that bill (though not extinguished by § 737) before it instituted service to complainant. (GTEC could however, have used any other method of attempting to collect, as long as the debt was not extinguished.)

Notice

Complainant contends that § 779.1 and/or § 10010(b) gives her the right to specified forms of notice before GTEC discontinued service for nonpayment. This would mean, arguably, that none of these past due bills would qualify under Rule 5. We have rejected this contention. Section 779.1 applies only to energy and water companies. Section 10010(b) applies only to publicly owned utilities.

Findings of Fact

1. The evidence does not demonstrate that service rendered to Equilla Allen or Herron was in fact rendered to Serena. It does not demonstrate that Serena used complainant's identity to open services, without complainant's knowledge or consent.

2. The sum of $308.82 is still owing on the last account for service to Equilla Allen at the Chino address.

3. At the time the answer was filed, there was an unpaid bill for service to Equilla Herron for the second account at the Ontario address. This bill was for $390.38. The service was not discontinued for nonpayment.

4. Defendant concedes that the Pomona bill and the first Ontario bill are extinguished, unless complainant is estopped to assert the defense.

5. The deception was not such as to prevent defendant from filing suit to collect using a fictitious name. It would not be inequitable to allow complainant to rely on § 737.

Conclusions of Law

1. Defendant should not be required to provide telephone service to complainant until the sum still due on service to the Chino address is paid in full.

2. Collection of the debts at issue in this proceeding is governed by § 737. If the utility does not file a pleading to collect the debt within the period set forth in § 737, the debt is extinguished.

3. Defendant's tariff, to the extent that it would allow a utility to refuse service unless an extinguished debt is paid, is contrary to statute and void.

4. Concealment of the true identity of the utility customer does not toll the running of § 737. Complainant should not be estopped to rely on the defense of § 737.

5. Tariff Rule 5 allows defendant to demand payment of any unpaid bills remaining from a prior service to the same customer, if the bills were left after discontinuance for nonpayment, as a condition to reinstituting service. It does not allow the utility to demand payment as a condition if the unpaid bill was left after discontinuance for any other reason.

6. Final bills addressed to either Equilla Herron or Allen at the service address were sufficient to extend the three-year period of limitations.

7. Complainant was not entitled to notice under § 779.1 and/or § 10010(b) before defendant refused to render service.

8. Defendant can require complainant to pay $308.82 before reinstituting service.

O R D E R

IT IS ORDERED that GTE California Incorporated shall institute telephone service to Equilla Allen upon the receipt of $308.82 plus any interest or late charges authorized by tariff.

This order becomes effective 30 days from today.

Dated February 20, 1992, at San Francisco, California.

DANIEL Wm. FESSLER
President
JOHN B. OHANIAN
NORMAN D. SHUMWAY
Commissioners

Commissioner Patricia M. Eckert, being necessarily absent, did not participate.

I CERTIFY THAT THIS DECISION WAS APPROVED BY THE ABOVE COMMISSIONERS TODAY

NEAL J. SHULMAN, Executive Director