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Decision 92-09-014 September 2, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Ecolab, Inc.,
Complainant,
vs.
Sterling Transit Company, Inc.,
Defendant.

Case 92-03-034
(Filed March 17, 1992)

O P I N I O N

1. Summary

Defendant Sterling Transit Company, Inc. (Sterling) moves to dismiss the complaint of Ecolab, Inc. (Ecolab) for lack of jurisdiction pursuant to Public Utilities (PU) Code § 737. The motion is granted and the complaint is dismissed.

2. Background

Sterling transported goods for Ecolab during the period October 6, 1987 through October 26, 1989. The parties agreed that published tariff STER 200 Item 3200 (also known as Tariff 20-4 STER) would apply. That tariff provides, among other things, that Ecolab was to annotate the bill of lading with the applicable tariff. Ecolab did not do so. The failure to annotate was discovered during an audit. Under terms of Tariff 20-4 STER, the tariff did not apply in the absence of annotation. Consequently, Sterling billed Ecolab for an alleged undercharge under Tariff WMT 570, Cal. PUC #85, Item 9112.

When Ecolab refused to pay, Sterling on October 24, 1990, filed suit in the Municipal Court for the Santa Clara Judicial District. The suit seeks collection of freight charges pursuant to provisions of PU Code §§ 494, 532, and 736-738. A first amended

complaint was filed on November 9, 1990, and served on November 16, 1990. Ecolab answered the first amended complaint on or about January 14, 1991.

Trial in the Municipal Court was scheduled for April 7, 1992. On March 17, 1992, Ecolab filed this complaint with the Commission, seeking an order declaring that the actions of Sterling were unreasonable and discriminatory under PU Code §§ 451 and 453 and that, therefore, additional freight charges did not accrue. Ecolab also filed a motion in the Municipal Court suit asking that trial there be continued pending action by the Commission.

The Municipal Court granted Ecolab's motion. It continued the trial to May 19, 1992, and it ordered Ecolab's counsel to inquire about Commission procedure with respect to the Ecolab complaint. Accordingly, Ecolab wrote to the Commission. The response, a letter dated April 21, 1992, by Commission Assistant General Counsel William N. Foley, was forwarded to the Municipal Court.¹ No further continuances were granted by the Municipal Court, and trial was conducted on May 19, 1992, before the Honorable Judge Rise Jones Pichon. The matter was taken under submission, and a ruling is pending.

Meanwhile, Sterling filed its answer to the complaint before the Commission, stating as an affirmative defense that the Commission lacks jurisdiction to hear the complaint because it was

¹ Responding to Ecolab's general inquiry, Foley outlined pertinent provisions of the PU Code concerning undercharge billings. The letter stated that, generally:

"Highway common carriers are required to strictly observe the rates and rules contained in their tariffs on file with the Commission. It is unlawful for a carrier to charge or collect other than its applicable tariff rates. The relevant statutes are Sections 458 and 494 of the Public Utilities Code. The courts have consistently upheld these statutes under the 'filed rate doctrine.'"

not filed within 90 days pursuant to PU Code § 737. The administrative law judge directed both parties to brief this jurisdictional issue. Final briefs were filed on June 15, 1992.

3. Sterling's Motion to Dismiss

Sterling states that the summons and complaint in the Municipal Court action were served on November 16, 1990. Ecolab did not file its complaint with the Commission until March 17, 1992. PU Code § 737 states as follows:

"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 writing is 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.

"If suit for the collection of the lawful tariff charges or any portion thereof of a public utility is filed in any court in accordance with the terms of this section, or if such collection is made by the public utility without filing suit, the person against whom such suit is filed or from whom such collection is made may, within 90 days from the date of service of summons in the suit, or the date of the collection, file with the commission, or with any court of competent jurisdiction, a complaint for damages resulting from the violation of any of the provisions of this part with respect to the transaction to which the suit of the public utility relates, or for which such collection has been made." (Emphasis added.)

Since Ecolab did not file its complaint with the Commission within 90 days from the date of service of summons in

Sterling's Municipal Court suit, Sterling argues that the plain language of § 737 makes the Commission complaint untimely, and the Commission therefore lacks jurisdiction to proceed.

4. Ecolab's Response

Ecolab responds that the use of the word "may" in § 737 indicates the permissive nature of the statute. It states that had the Legislature intended for § 737 to be a jurisdictional statute of limitations on Commission complaints, it would have used the word "shall," as it did in the companion provisions of PU Code §§ 736 and 735.² Ecolab asserts that § 735, with its two-year statute of limitations, applies here, since Ecolab's complaint

2 PU Code § 736 states in part:

"All complaints for damages resulting from the violation of any of the provisions of Section 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 the state, in any court of competent jurisdiction within three years from the time the cause of action accrues, and not after...."
(Emphasis added.)

PU Code § 735 states:

"If the public utility does not comply with the order for the payment of reparation within the time specified in the order, suit may be instituted in any court of competent jurisdiction to recover the payment within one year from the date of the order, and not after. 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."
(Emphasis added.)

attacks alleged "violation of any of the provisions of this part, except §§ 494 and 532..." Ecolab states:

"The unambiguous language of the statutes themselves indicate[s] section 735 shall be controlling. It is reasonable to conclude that section 737 is meant to give the person for whom suit is filed an extension should one of the statutes expire. Sterling has not cited any case law or legislative history in support of their argument. Surely, the legislature did not intend for the statutes to conflict. To bar an action under section 735 when someone sued under section 737 failed to exercise their rights on the ninety-first day is an absurd result." (Memorandum in Opposition to Motion to Dismiss, pp. 4-5.)

Ecolab states further that its complaint does not seek the "damages" described in PU Code § 737, but rather challenges the practices of Sterling as unreasonable and discriminatory. Such discriminatory practices, Ecolab states, are prohibited by PU Code § 451 (all charges shall be just and reasonable); by PU Code § 453 (prohibiting rates that grant preference or advantage to any corporation); and by PU Code § 455 (providing for suspension of a new rate upon complaint).

5. Discussion

As complainant in this action, Ecolab has the burden of showing that its complaint is timely. Statutes of limitations set forth in the PU Code are strictly construed.³ It is a primary rule of statutory construction that a court and the Commission "are bound to give effect to statutes according to the usual, ordinary

³ See, e.g., App. of San Francisco Eye and Ear Hospital, Inc. (1973) 75 CPUC 758 (interpreting two-year statute in PU Code § 735, no reparation for incidents seven years earlier); Request of King Alarm Systems, Inc. (1976) 80 CPUC 267 (interpreting three-year statute in PU Code § 736, running of statute of limitations extinguishes both remedy and right of action).

import of the language employed in framing them." (In re Alpine (1928) 203 Cal. 731, 737.) Similarly, "the provision must be given a reasonable and common sense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity." (DeYoung v. City of San Diego (1983) 11 C.A.3d 147).

PU Code § 737 addresses the facts that are before us. A highway carrier governed by the Commission (Sterling) has filed suit in civil court for the collection of alleged lawful tariff charges. The company against which suit is filed (Ecolab) has filed with the Commission a complaint seeking legal or equitable relief for alleged violations of provisions of the Code with respect to the transaction for which it has been sued. § 737 states plainly that the Commission complaint, if filed at all, must be filed within 90 days of the date of service of summons in the collection lawsuit. Ecolab waited nearly a year and a half before filing its complaint with the Commission.

Ecolab would have us interpret the 90-day requirement in a manner that makes it meaningless. Under this theory, a defendant in a civil case seeking tariff charges would have a "permissive" 90 days in which to complain to the Commission about the underlying transaction. If it did not file in that time, it could still file with the Commission within two years (PU Code § 735) through artful pleading. Such an interpretation of the statute of limitations in § 737 is not a reasonable one.

A more sensible interpretation is that the Legislature intended to impose a short, 90-day limit in this narrow band of cases so that issues in the underlying collection case could be joined and decided without undue delay. Just as the time for

filing a cross-complaint is limited,⁴ so a defendant must move quickly to assert a PU Code violation in the transaction for which it has been sued.⁵ Otherwise, a defendant could, after a trial date has been set, file a complaint with the Commission and claim that the civil trial should then be stayed. That is precisely what happened here. It is well within the power of the Legislature to seek to prevent occurrences of this nature.

By the same token, we find no merit in Ecolab's contention that the 90-day limit cannot apply because PU Code § 737 refers to complaints for damages, and Ecolab does not seek damages. The same reference to "complaints for damages" is stated in PU Code § 735, which Ecolab seeks to apply. The Code provisions use the term "damages" when referring to complaints in which the court and the Commission have concurrent jurisdiction, and in context clearly refer to both the legal and equitable relief available in these forums. In any event, the complaint before us is in the nature of one for damages or reparation for any charges that the complainant might be compelled to pay in the Municipal Court lawsuit.

6. Other Issues

Both parties raise numerous other issues in addition to the statute of limitations. We do not reach these issues.

7. Conclusions

We find that the complaint before us is subject to the 90-day filing requirement in PU Code § 737 applicable to defendants

4 A cross-complaint against the plaintiff may be filed as a matter of right before or at the same time as the answer. (CCP § 428.50(a).) Leave to file may be granted after that time, but generally will be denied once a trial date has been set. (S.F.Sup.Ct. L&MM § 122.)

5 Since collection suits generally require a showing of demand by the creditor and refusal to pay by the debtor, a defendant in fact has substantially more than 90 days to research and plan its defense.

in civil cases that are being sued for tariff charges by a common carrier and that seek to attack the underlying transaction for which the tariff charges are sought. Since the complaint was not timely filed, the Commission lacks jurisdiction to proceed. Sterling's motion to dismiss should be granted.

Findings of Fact

1. Sterling on October 24, 1990, filed suit against Ecolab (Case DC90-222222) in the Municipal Court for the Santa Clara Judicial District seeking collection of tariff charges.

2. Sterling filed a first amended complaint in the Municipal Court on November 9, 1990.

3. The first amended complaint and summons were served on Ecolab on November 16, 1990, and Ecolab answered the complaint on or about January 14, 1991.

4. Trial in Municipal Court was set for April 7, 1992.

5. Ecolab, on March 17, 1992, filed this complaint with the Commission challenging the reasonableness of Sterling's actions with respect to the matters alleged in the Municipal Court suit.

6. Ecolab moved to continue the Municipal Court trial date pending action on Ecolab's complaint before the Commission.

7. The Municipal Court trial was continued to May 19, 1992, at which time trial was conducted.

8. Sterling, on April 20, 1992, filed its answer to the complaint before the Commission, alleging, among other things, that the Commission lacks jurisdiction because the complaint was not filed within the statute of limitations prescribed in PU Code § 737.

Conclusions of Law

1. PU Code § 737 should be deemed to apply to the complaint filed with the Commission by Ecolab.

2. PU Code § 737 requires that a complaint in the nature of the one stated by Ecolab may be filed with the Commission or with any court of competent jurisdiction within 90 days from the date of service of summons in the underlying collection lawsuit.

3. Sterling's motion to dismiss on grounds that the Commission lacks jurisdiction because Ecolab's complaint was not timely filed under PU Code § 737 should be granted.

O R D E R

IT IS ORDERED that the complaint is dismissed and Case 92-03-034 is closed.

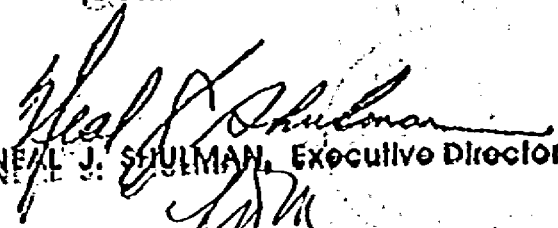
This order becomes effective 30 days from today.

Dated September 2, 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