No. 1-10-1758

FIRST DIVISION
FILED: January 31, 2011

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

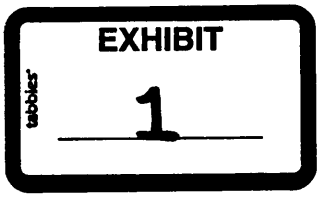
MICHAEL DIKCIS, on behalf of himself and all others similarly situated,	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY
Plaintiff-Appellant	)	
v.	)	No. 09 L 560
NICOR GAS COMPANY,	)	HONORABLE MARY K. ROCHFORD,
Defendant-Appellee.	)	JUDGE PRESIDING.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Hall and Justice Lampkin concurred in the judgment.

ORDER

Held: The plaintiff's claim that the utility improperly charged him at the higher April 2008 rate for his January, February, and March 2008, gas usage, was a rate or overcharge claim that fell within the exclusive jurisdiction of the Illinois Commerce Commission.

The plaintiff, Michael Dikcis, appeals from the circuit court's order dismissing his complaint against the defendant, Nicor Gas Company, for lack of subject matter jurisdiction. On appeal, the plaintiff argues that the circuit court erred in concluding that the Illinois Commerce Commission (ICC) has exclusive jurisdiction over this matter. For the reasons that follow, we



affirm the circuit court's judgment.

For the purposes of this appeal, the relevant facts are essentially undisputed. In November 2009, the plaintiff filed a class action complaint alleging that the defendant "devised a scheme to defraud its residential customers" by using estimated, instead of actual, gas usage readings from January through March 2009. The plaintiff alleged that the estimated readings, which were calculated based on a full year's usage, predictably underestimated customers' winter gas usage and thus caused customers to pay for an unusually large amount of gas when their accounts were reconciled with actual readings in April. The plaintiff further alleged that the defendant anticipated that gas prices would increase from January to April and that the defendant intentionally underbilled customers' winter gas usage so that it could charge the higher April rate for all unbilled gas. According to the plaintiff's complaint, the defendant's practice of using estimated billing for three consecutive months violated an ICC regulation mandating that utilities undertake actual meter readings "at least every second billing period." 83 Ill. Adm. Code § 280.80(a) (the Billing Regulation). The plaintiff sought damages for the defendant's alleged violation of the Public Utilities Act (220 ILCS 5/1-101 *et seq.* (West 2008)) as well as damages under the Illinois Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq.* (West 2008)).

The defendant moved to dismiss the complaint pursuant to

subsection 2-619(a)(1) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619) (West 2008)) on the ground that the plaintiff's allegations fell within the exclusive jurisdiction of the ICC. The circuit court agreed and dismissed the complaint for lack of subject matter jurisdiction. The plaintiff timely appealed.

On appeal, the parties dispute the propriety of the circuit court's decision to grant the defendant's section 2-619 motion to dismiss for lack of subject matter jurisdiction. A section 2-619 motion to dismiss admits, for purposes of the motion, the legal sufficiency of the complaint but raises some defense or affirmative matter to defeat the plaintiff's claim. *Cohen v. McDonald's Corp.*, 347 Ill. App. 3d 627, 632, 808 N.E.2d 1 (2004). Pursuant to subsection 2-619(a)(1), the defendant here asserted, and the circuit court agreed, that the circuit court lacked subject matter jurisdiction over the plaintiff's claim. See 735 ILCS 5/2-619(a)(1) (West 2008). The propriety of that decision is a question of law, which we review *de novo*. *Village of Evergreen Park v. Commonwealth Edison Co.*, 296 Ill. App. 3d 810, 812, 695 N.E.2d 1339 (1998).

Illinois circuit courts have original jurisdiction over all justiciable matters. Ill. Const. 1970, art. VI, § 9; *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 334-41, 770 N.E.2d 177 (2002). "While the legislature generally cannot deprive courts of this jurisdiction, an exception arises in administrative actions." *People v. NL Industries*, 152 Ill. 2d 82,

96, 604 N.E.2d 349; see also Ill. Const. 1970, art. VI, § 9 ("Circuit Courts shall have such power to review administrative action as provided by law"). "Because it establishes administrative agencies and statutorily empowers them, the legislature may vest exclusive jurisdiction in [an] administrative agency." *NL Industries*, 152 Ill. 2d at 96-97. "However, if [the legislature] does divest circuit courts of their original jurisdiction through a comprehensive statutory administrative scheme, it must do so explicitly." *Employers Mutual Companies v. Skilling*, 163 Ill. 2d 284, 287, 644 N.E.2d 1163 (1994).

For its argument that the ICC has exclusive jurisdiction over this matter, the defendant relies on section 9-252 of the Public Utilities Act, which provides as follows, in pertinent part:

> "When complaint is made to the [ICC] concerning any rate or other charge of any public utility and the [ICC] finds, after a hearing, that the public utility has charged an excessive or unjustly discriminatory amount for its product, commodity or service, the [ICC] may order that the public utility make due reparation to the complainant therefor ***.
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> * * *
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> All complaints for the recovery of damages shall be filed with the Commission within 2 years from the time the product, commodity or service as to which complaint is made was furnished or performed ***." 220 ILCS 5/9-252 (West 2008).

Alternatively, the defendant argues that this is an overcharge

case covered by section 9-252.1 of the Public Utilities Act, which provides as follows:

> "When a customer pays a bill as submitted by a public utility and the billing is later found to be incorrect due to an error either in charging more than the published rate or in measuring the quantity or volume of service provided, the utility shall refund the overcharge with interest ***. *** Any complaint relating to an incorrect billing must be filed with the [ICC] no more than 2 years after the date the customer first has knowledge of the incorrect billing." 220 ILCS 5/9-252.1 (West 2008).

Courts have interpreted both of the above passages to confer to the ICC exclusive jurisdiction over complaints of excessive rates or overcharges by public utilities, and to allow circuit court jurisdiction over such matters only on administrative review. *Village of Deerfield v. Commonwealth Edison Co.*, 399 Ill. App. 3d 84, 86, 929 N.E.2d 1 (2009), citing *City of Chicago, ex rel. Thrasher v. Commonwealth Edison Co.*, 159 Ill. App. 3d 1076, 1079-80, 513 N.E.2d 460 (1987) (interpreting Ill. Rev. Stat. 1983, ch. 111 2/3, par. 76 (now 220 ILCS 5/9-252)); *Village of Evergreen Park v. Commonwealth Edison Co.*, 296 Ill. App. 3d 810, 813, 695 N.E.2d 1339 (1998) (discussing section 9-252.1). Based on these provisions, the defendant argues that this action is no more than a rate or overcharge case, shrouded in the lexicon of civil and Consumer Fraud Act actions so as to avoid the ICC's exclusive

jurisdiction.

Under the defendant's theory of the case, the term "rate" as used in section 9-252 of the Public Utilities Act, combined with the overcharge language of section 9-252.1, encompasses all gas charges assessed against a customer and the defendant's methods of ascertaining and applying those charges, so that its decision to bill a particular quantity of the plaintiff's gas at the higher April cost fell under one of the two sections and thus within the exclusive jurisdiction of the ICC.

The plaintiff counters that the term "rate" encompasses only the per-unit charge the defendant assessed for gas service each month, and he argues that he does not dispute the propriety of those figures so much as the defendant's implementation of its rates. The plaintiff further argues that section 9-252.1's overcharge language applies only to bills that are incorrect "due to an error," and the defendant's calculations here were purposeful. The plaintiff thus argues that his complaint is not a rate or overcharge action, but rather a civil suit brought pursuant to section 5-201 of the Public Utilities Act, which provides as follows:

> "In case any public utility shall do, cause to be done or permit to be done any act, matter or thing prohibited *** either by any provisions of this Act, or any rule, regulation or order of the [ICC], issued under authority of this Act, the public utility shall be liable to the persons or corporations

affected thereby ***. An action to recover for such loss, damage or injury may be brought in the circuit court by any person or corporation." 220 ILCS 5/5-201 (West 2008).

As the plaintiff argues in his brief, his complaint asserted that the defendant's practice of estimating bills for three consecutive months violated the Billing Regulation, an ICC regulation, promulgated under the authority of the Public Utilities Act, that restricts utilities' ability to use estimated meter readings for consecutive months. See 220 ILCS 5/8-304 (West 2008) ("the [ICC] shall initiate rule-making proceedings to promulgate such rules as it believes reasonable and necessary to ensure the minimization of the frequency of estimated billing and the increased accuracy of estimation procedures"). Thus, the plaintiff argues that this case is not a section 9-252 or a section 9-252.1 rate or overcharge case but a section 5-201 civil case for the violation of an ICC regulation.

Both parties direct us to case law distinguishing between rate and overcharge cases within the ICC's exclusive jurisdiction and section 5-201 civil cases within a circuit court's jurisdiction. For its part, the defendant refers us to *Village of Evergreen Park*, 296 Ill. App. 3d 810. In that case, the plaintiff alleged that the defendant electric company wrongfully collected electric bill payments for street lights that had been retired or removed at the plaintiff's request. *Evergreen Park*, 296 Ill. App. 3d at 811-12. To determine which type of issue the plaintiff raised, the court

explained that "[t]he fact that the plaintiff labels its action a breach of contract action is not dispositive nor does it transform plaintiff's action into a civil action for damages [under section 5-201 of the Public Utilities Act]." *Evergreen Park*, 296 Ill. App. 3d at 816-17. Instead, the court in *Evergreen Park* noted, in discerning whether an action is a rate/overcharge case or a section 5-201 civil action, " 'courts have consistently focused on the nature of the relief sought rather than on the plaintiff's basis for seeking the relief. Where the essence of the claim is that a utility has charged too much for the service provided, the claim is [a rate or overcharge claim]. Where the essence of the claim is not that too much has been charged for service, but rather that the utility has done something else which has wronged the plaintiff, the claim is [a section 5-201 civil claim].' " *Evergreen Park*, 296 Ill. App. 3d at 817-18, quoting *Thrasher*, 159 Ill. App. 3d 1076, 1079-80, 513 N.E.2d 460 (1987). (The remaining decisions in this discussion employ this same legal test.)

Under this test, according to the court in *Evergreen Park*, the plaintiff's claims regarding the phantom street light charges amounted to allegations "that the utility charged too much for the service it provided" (*Evergreen Park*, 296 Ill. App. 3d at 818) and thus constituted a rate or overcharge claim within the ICC's exclusive jurisdiction.

Likewise, in *Thrasher*, a decision upon which *Evergreen Park* relied and another decision the defendant commends to us, the

plaintiff brought suit against the defendant electric company on the basis that the company allegedly charged more than their contract allowed by failing to account for nonoperational street lamps, and also on the basis that the defendant's method of measuring usage violated the Public Utilities Act. *Thrasher*, 159 Ill. App. 3d at 1078. After stating the legal principles later quoted in *Evergreen Park* , the court in *Thrasher* rejected the plaintiff's argument that the case was either a fraud action, a breach of contract action, or an action based on a violation of the Public Utilities Act. See *Thrasher*, 159 Ill. App. 3d at 1080. The court noted "the conspicuous absence of fraud allegations" in the plaintiff's complaint, and it then concluded that the plaintiff was "seeking a refund of allegedly excessive charges," and that, despite the labels the plaintiff had placed on his claims, "[i]t [was] clear that plaintiff's claim [was] nothing more than that [the defendant] ha[d] charged too much for electricity." *Thrasher*, 159 Ill. App. 3d at 1080.

Read together, *Evergreen Park* and *Thrasher* appear to stand for the proposition that any suit with any relation to the charges paid by a utility consumer will fall within the ICC's exclusive jurisdiction under the combined effect of sections 9-252 and 9-252.1. Decisions the plaintiff cites, however, seem to interpret the ICC's exclusive jurisdiction less broadly.

For example, in *Flournoy v. Ameritech*, 351 Ill. App. 3d 583, 814 N.E.2d 585 (2004), the plaintiff asserted theories of fraud and

negligence based on his allegations that the defendant telephone company deliberately cut off his collect calls so that his call recipients would be forced to incur another set of fees for finishing the conversation in a second collect call. After quoting the rules articulated in *Evergreen Park* and *Thrasher*, the *Flournoy* court concluded that the plaintiff did "not contest the actual rates charged as surcharges and initial calling fees, or claim those rates [were] excessive. Instead, his claim [was] that [the defendant] collected the charges multiple times" as a result of its fraud or negligence. *Flournoy*, 351 Ill. App. 3d at 586. Accordingly, the *Flournoy* court concluded that the plaintiff had asserted a civil claim justiciable in the circuit court, not a rate claim within the ICC's exclusive jurisdiction. *Flournoy*, 351 Ill. App. 3d at 586.

In another of the plaintiff's cases, *Sutherland v. Illinois Bell*, 254 Ill. App. 3d 983, 627 N.E.2d 145 (1993), the plaintiff asserted, among other things, that the defendant telephone companies had breached a contract by charging her for a service she never ordered or received and by charging her for defective or improperly installed telephone jacks. *Sutherland*, 254 Ill. App. 3d at 985-86. After reciting the same legal standards articulated in the above cases, the *Sutherland* court concluded that, in its case, "it [was] plain *** that plaintiff [was] not claiming that [the defendants] charged excessive or unjustly discriminatory rates" but instead that "she claim[ed] that the services and equipment in

question *** were either unordered, inadequate or ambiguously billed." *Sutherland*, 254 Ill. App. 3d at 993. The court held, then, that "these questions [did] not deal with rates or charges which are set by the [ICC] and would require [its] special expertise" but instead were "ordinary claims for damages and injunctive relief for breach of contract" within the conventional expertise of the court system. *Sutherland*, 254 Ill. App. 3d at 993.

In a third case the plaintiff cites, *Gowdey v. Commonwealth Edison Co.*, 37 Ill. App. 3d 140, 345 N.E.2d 785 (1976), the plaintiff asserted that the defendant electric company improperly charged customers for an "optional" light bulb service without informing them that they could decline the option, and perhaps while using confusing billing to conceal the charge. *Gowdey*, 37 Ill. App. 3d at 142. The *Gowdey* court recited the relevant legal boilerplate and then stated that the plaintiffs made "no challenge *** to the fairness of the *** service charge" but rather complained that the defendant "wrongfully assumed its residential customers had exercised the option to purchase the service." *Gowdey*, 37 Ill. App. 3d at 148. Based on that distinction, the distinction between electric utility service and the provision of a consumer product, and the idea that no ICC expertise was necessary to evaluate a claim that the plaintiffs "were charged for a service which they did not contract to purchase," the court held that the plaintiff had raised a civil action based on the

defendant's failure to comply with a supreme court ruling mandating that the light bulb service be optional. *Gowdey*, 37 Ill. App. 3d at 149.

Although all of the above decisions--those relied upon by the plaintiff and those the defendant cites--purport to follow the same legal standard, they follow that standard to divergent ends. If the distinction between rate or overcharge cases on one hand, and civil cases on the other, is that the former cases include any allegations with any relation to charges assessed by a utility, then the fact patterns in *Flournoy*, *Sutherland*, and *Gowney* surely would fall within that broad definition. Nor can we accept the defendant's proposal that we reconcile all of the above cases on the ground that the plaintiff's cases all involved plaintiffs who were charged for a service they did not order. If the defendant's proposal truly described the limit on section 5-201 civil cases, then the facts of *Evergreen Park*, the case in which the plaintiff was charged for electricity to street lights that it had asked be discontinued, would have given rise to a civil cause of action.

From the above discussion, we conclude that we can take little guidance from the factual distinctions among the decisions the parties cite, and we instead limit our reliance on those decisions largely to the legal principles they articulate. Those principles define rate/overcharge cases within the ICC's exclusive jurisdiction as those cases in which the essence of the plaintiff's claim, regardless of its label, is that a utility charged too much

for the service provided. See *Evergreen Park*, 296 Ill. App. 3d at 817-18, quoting *Thrasher*, 159 Ill. App. 3d at 1079-80. This conception follows closely with the relevant statutory guidance, which defines the word "rate" as including "every individual or joint rate, fare, toll, charge, rental or other compensation of any public utility or any two or more such individual or joint rates, fares, tolls, charges, rental or any other compensation of any public utility or any schedule or tariff thereof, any rule, regulation, charge, practice or contract relating thereto." 220 ILCS 5/3-116 (West 2008); see *In re Marriage of Holtorf*, 397 Ill. App. 3d 805, 809, 922 N.E.2d 1173 (2010) ("A fundamental rule of statutory construction requires that, when an act defines its own terms, those terms must be construed according to the act's definitions"). Thus, the statute and the case law agree in their expansive classification of a rate case as one involving any claim asserting that a utility has charged too much for a service.

That is precisely what the plaintiff here alleges. Although the plaintiff casts his complaint in terms of fraud and rule violations, the essence of his cause of action is that he paid too high a rate for his gas service. That complaint falls decidedly within the ambit of the ICC's exclusive jurisdiction over claims that relate to the charges a utility assesses for a service. For that reason, we affirm the judgment of the circuit court dismissing the plaintiff's claim for lack of subject matter jurisdiction.

Affirmed.