

Campbell v National Grid

2013 NY Slip Op 31142(U)

May 20, 2013

Sup Ct, Queens County

Docket Number: 11102/2009

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

TREVOR CAMPBELL d/b/a/ MERRICK
LAUNDERMAT,

Plaintiff,

- against -

Index No.: 11102/2009
Motion Date: 04/30/13
Motion No.: 214
Motion Seq.: 3

NATIONAL GRID a/k/a KEYSpan,

Defendant.

- - - - - x

The following papers numbered 1 to 13 were read on this motion by the plaintiff for an order pursuant to CPLR 6301 staying defendant National Grid a/k/a Keyspan from removing the gas meter from the subject property located at 109-30 Merrick Blvd., Jamaica, New York; and for an order restoring this matter to the calendar for a determination of the unresolved charges sought by National Grid:

Papers
Numbered

Order to Show Cause-Affidavits-Exhibits.....1 - 7
Affirmation in Opposition-Affidavits-Exhibits.....8 - 13



This is an action for breach of contract, negligence, a declaratory judgment and injunctive relief commenced by the plaintiff by filing a summons and complaint on April 29, 2009. Plaintiff operates the "Merrick Laundermat" in Jamaica, New York and receives its gas service from the defendant, National Grid a/k/a Keyspan ("National Grid"). Plaintiff alleges that in August 2008 and December 2008, National Grid unilaterally and arbitrarily cancelled charges from previous bills which the

plaintiff had payed and substituted higher estimated charges that do not reflect plaintiff's actual gas usage. Based on the alleged over billing by the defendant, plaintiff's complaint contains causes of action for breach of contract, negligence, and for a declaration that the estimated gas charges contained in the replaced bills generated by the defendant are void.

After testing the meter and determining that it was not functioning correctly, National Grid issued a re-bill of \$29,388.42 covering the period of October 10, 2006 through August 29, 2008. By decision and order dated June 29, 2009, this Court granted a preliminary injunction staying National Grid from disrupting gas service to the plaintiff pending the resolution of the action. In addition, this Court directed the plaintiff to file a complaint with the appropriate Public Service Division to resolve the amount the plaintiff owed the defendant, if any.

In March 2011, defendant moved for an order pursuant to CPLR 3212 granting summary judgment to the defendant and dismissing the plaintiff's complaint and for an order vacating the preliminary injunction previously ordered by this Court. Defendant argued that the court lacks subject matter jurisdiction over plaintiff's claims as the billing dispute is subject to the primary jurisdiction of the PSC and that by failing to file a complaint with the PSC, the plaintiff failed to exhaust his administrative remedies.

By decision and order dated May 11, 2011, this court held that "courts have uniformly held that disputes involving billing or service with a utility company are subject to the primary jurisdiction of the Public Service Commission, a state agency (see Guglielmo v. Long Island Lighting Co., 83 AD2d 481 [2d Dept. 1981] [billing dispute and discontinuance of service due to nonpayment was subject to primary jurisdiction of PSC]); Brownsville Baptist Church v. Consol. Edison Co. of New York, 272 AD2d 358 [2d Dept. 2000] [claim challenging reasonableness of rates, rules, or practices is subject to primary jurisdiction of PSC])." This court stated that primary jurisdiction does not divest this court of subject matter jurisdiction, but rather, requires this court to refer the matter to the special competence of the administrative body. Accordingly, it was ordered that the instant action be stayed pending plaintiff's filing of a complaint with the Public Service Commission, pursuant to 16 NYCRR Part 11 (see Guglielmo v Long Island Lighting Co., Brownsville Baptist Church v Consolidated Edison Co. of N.Y., Inc., 272 AD2d 358[2d Dept. 2000]; Haddad v. Salzman, 188 AD2d 515 [2d Dept. 1992]; Sternberg v New York Water Service Corp., 94 AD2d 723 [2d Dept. 1983]). This court also noted that a

preliminary injunction was available to the plaintiff from the PSC upon the filing of a complaint pursuant to 16 NYCRR Part 12.

On April 17, 2013, Brooklyn Union Gas Company, d/b/a National Grid commenced an action against the Merrick Laundromat in Kings County Civil Court under Index No. 40521/2013 seeking an order of seizure directing a Marshal to seize the gas meter in the laundromat alleging that the laundromat was in arrears to National Grid in the amount of \$20,567.89 as of April 8, 2013.

By order to show cause dated April 24, 2013, plaintiff again moves for an order staying National Grid from removing the gas meter from the subject property and restoring this case to the active calendar of the court for a determination of the unresolved charges sought by National Grid. Plaintiff contends that by letter dated July 18, 2011 counsel for National Grid, Elisa M. Pugliese, Esq. conveyed an offer to settle the previously disputed bill of \$29,502.21 for the total sum of \$14,000 on condition that payment would be made within 15 days. The letter also states that "Mr. Campbell's account presently has a balance of \$44,890.63 and therefore once the disputed bill is resolved by payment of \$14,000 and a credit of the balance of \$15,502.21, Mr. Campbell's outstanding balance with National Grid will be reduced to \$14,627.55 which will remain due and owing. On September 28, 2011, Plaintiff paid \$14,000 to settle the original claim, however, plaintiff now disputes the amount of the additional outstanding balance and claims that it consists of interest charges on the \$29,502.21 and that National Grid failed to provide an accounting showing how it arrived at that sum. Plaintiff claims that as he has made each and every current payment for the last two years, and as the parties have not been able to fully settle this matter, that the matter should be restored to the court's active calendar. Counsel submits that plaintiff has pursued his administrative remedies to no avail and therefore the defendants should be stayed from removing his gas meter pending resolution of this matter as the removal of the gas meter will result in the loss of his business.

In support of the motion, Trevor Campbell submits an affidavit dated April 15, 2013, in which he states that he agreed to settle this case for the sum of \$14,000 which he paid on September 28, 2011. Campbell asserts that he executed a stipulation of settlement although neither side produced a stipulation. Campbell states that in July 2012 he began to receive bills indicating that he still owed in excess of \$14,000. He contends that he was advised by the Public Services Commission that NATIONAL GRID had failed to respond to their inquiries and he should commence legal action against the defendant. He

contends that the outstanding amount consists of interest charges on the amount that was settled and is not for actual gas usage.

Plaintiff also submits a letter he wrote to the PSC on May 1, 2012 asking for a hearing regarding the outstanding charges. On May 9, 2012 the PSC responded to the plaintiff stating that they could not begin their investigation without additional documentation regarding the settlement and copies of the court decisions. On May 14, 2012 the PSC provided the plaintiff with a case number and stated that if Campbell could not resolve the matter with defendant he should so advise the PSC and they would initiate an investigation.

Defendant opposes the motion for an injunction on the ground that the current dispute is subject to the primary jurisdiction of the New York State Public Service Commission and plaintiff has failed to exhaust his administrative remedies by following the procedures for a hearing as set forth by the PSC.

Defendant submits an affirmation from Richard D. Mills, a supervisor in the Accounts Processing Department for defendant dated April 29, 2013. Mr. Mills states that he reviewed the plaintiff's account and found that he presently owes \$20,612.89 to National Grid for gas service to the laudromat. He states that the original amount in dispute, for which this case was commenced in 2009 was for \$29,388.42. He states that this dispute was settled when the plaintiff paid \$14,000 on September 28, 2011 and National Grid credited his account with the balance of \$15,502.21. Mills states that after these transactions took place, plaintiff still had an outstanding balance of \$15,897.61. Mills states that this amount is based upon plaintiff's failing to pay certain bills in 2009, 2010 and 2013 and having been assessed late payment charges. Mills states that if plaintiff wishes to contest the outstanding balance that he should follow the complaint and hearing procedures through the PSC. He states that while the PSC reviews a customer's complaint, the customer's service cannot be terminated for non-payment of bills in dispute.

Defendant asserts that although the plaintiff made a complaint to the PSC in May 2012 he did not follow the complaint handling procedures as set forth by the PSC in their written response to the plaintiff. Counsel states that the PSC regulations provide a multi-level complaint handling procedure leading up to an investigation, a hearing before an Administrative Law Judge, and an appeal to the PSC appeals board if necessary. Defendant also asserts that there are significant issues of fact which preclude the court from finding that the plaintiff has a likelihood of success on the merits. In addition,

defendant asserts that the plaintiff can show no danger of irreparable injury because the PSC's regulations (16 NYCRR § 12.3) provide that service to a customer will not be terminated for nonpayment of disputed amounts while the complaint is pending before the commission.

Upon review and consideration of the plaintiff's order to show cause and the defendant's affirmation in opposition, this court finds that the plaintiff's application for a preliminary injunction staying National Grid from removing the gas meter from the plaintiff's laundromat at 109-30 Merrick Boulevard, Jamaica, New York and for an order restoring this case to the courts calendar is denied.

In this court's prior decision dated May 11, 2011, for the reasons set forth therein, this court stayed the action pending plaintiff's filing a complaint with the Public Service Commission pursuant to 16 NYCRR Part 11. This Court found that plaintiff's action involves questions of fact regarding a billing dispute with National Grid which should be determined by the PSC. Similarly, the billing dispute set forth in the instant order to show cause also raises questions of fact which should be determined the PSC based upon their primary jurisdiction (see (Public Service Law, § 66; 16 NYCRR Part 11) (Guglielmo v Long Island Lighting Co., 83 AD2d 481 [2d Dept. 1981])).

Accordingly, plaintiff is directed to follow the appropriate consumer complaint procedures set forth by the Public Service Commission as contained in Title 16 Part 12 of the New York Code of Rules and Regulations in order to have his present dispute investigated and determined by the PSC, and it is further,

ORDERED that the preliminary injunction enjoining the discontinuance of gas service previously granted by this Court in the order to show cause dated April 24, 2013, shall be vacated on June 10, 2013 in order to give the plaintiff time to initiate his complaint. A temporary restraining order is available to the plaintiff from the PSC upon the filing of a complaint pursuant to 16 NYCRR Part 12 (see NYCRR § 12.3; also see Guglielmo v Long Island Lighting Co., supra).

Notify counsel.

Dated: Long Island City, N.Y.
May 20, 2013

ROBERT J. MCDONALD
J.S.C.