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Order text

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

STEVEN BARRETT,
individually, and as Class representative
of all those similarly situated,

Plaintiff,

v.

CITY OF OPA LOCKA,
a Florida municipal corporation,

Defendant.
_____/

CASE NO.: 06-04499 CA 23

2007 ... 11:28

PARTIAL FINAL JUDGMENT

This action was tried before the Court on July 26, 2007 on the limited issue of liability. After taking testimony and hearing argument of counsel, the Court makes the following **findings of fact**:

1). The Defendant, CITY OF OPA LOCKA, is a municipality located in northwest Miami-Dade County. The CITY is approximately 4.5 square miles and has a population of a little over 15,000 persons. A five (5) person elected City Commission serves as the CITY's governing body.

2). The liability issue arises from the CITY OF OPA LOCKA'S ("CITY") practice of adding and collecting a ten percent (10%) penalty interest charge on its utility account holders' utility bills, when a customer does not pay the utility bill by the payment due date.

3). The CITY owns and operates the water and sewer pipes and other infrastructure that provide potable water and sanitary sewer services to commercial and residential properties within the CITY and to some properties located outside of the geographic boundaries of the CITY.

4). The CITY's Utility Department purchases potable water and sanitary sewer treatment services from Miami-Dade County ("COUNTY"). The COUNTY then bills the CITY monthly for these services.

5). The CITY has approximately 4,800 utility account holders. Of these 4,800, approximately 85% of these accounts are residential utility customers and the remaining fifteen percent (15%) are commercial utility customers.

6). The Opa-Locka City Commission establishes the rates charged to these utility account holders for water and sewer utility services.

7). On November 13, 1986, the Opa-Locka City Commission adopted Ordinance 86-15, Section 2, which amended Section 21-83 of the City of Opa-Locka's Code of Ordinances. The ordinance remains in effect to date. Ordinance 86-15, Section 2, titled "Billing Procedure; Penalty for Late Payment; Lien" provides as follows:

> Utility charges levied at the rates established by Ordinance shall be billed each month of the calendar year and payable upon billing. Bills shall be mailed to the service address or to some other place mutually agreed upon. **In case of failure to pay any bill for charges when due, a penalty of ten percent (10%) of such charge shall be added to such bill.** In the event that service(s) is (are) discontinued for nonpayment of outstanding balances, a reestablishment fee of $25.00 per account will be added along with all outstanding balances prior to reestablishing the supply of services.

8). The liability issue stems from the manner in which the CITY'S Utility Department, pursuant to Ordinance 86-15 ("Ordinance"), has implemented and collected the "penalty/interest"[1] due from its utility account holders.

9). The CITY bills its utility account holders monthly. In turn, the utility account holders are required to pay the amount due within thirty (30) days. If the utility bill is not paid within the thirty (30) days, a penalty of ten percent (10%) is added to the unpaid balance due. At that time, the CITY's utility department notifies the account holder that the unpaid bill and penalty must be paid within five (5) days or water service will be discontinued.

10). If payment is still not made, utility services are supposed to be discontinued and the utility account closed. When the utility account is closed, the CITY applies any utility deposit to the amount owed and any excess monies are refunded to the account holder.

11). Ms. Faye Douglas, the CITY's representative, testified that of the approximate 4,800 utility account holders, roughly, 1,800 or one-third are delinquent in

[1] The term "penalty/interest" is the term as used by the CITY in its business records.

paying their utility bill each month. Of these 1,800 delinquent accounts, approximately 250 accounts monthly have utility service discontinued and the utility account closed. Most utility account customers, however, pay their delinquent bill, within five (5) days of the CITY's notification of delinquency.

12). However, a small number of utility account customers periodically fail to timely pay their monthly utility bill and their service is not discontinued. These utility account holders consist of commercial and public properties that provide essential services such as hospitals and schools, current utility account holders that are disputing the accuracy of the water usage billed, and a group of utility customers, referred to by Ms. Douglas as members of the CITY's "friends and family plan," that the CITY's Utility Department has made a practice of not discontinuing utility service when a utility bill is delinquent.

13). The "friends and family plan" are a group of utility customers consisting of CITY employees and current, or former, elected CITY officials. These utility customers next utility bill will reflect the unpaid balance, another ten percent (10%) penalty/interest on the unpaid balance (including the previous month's 10% penalty/interest, if any unpaid balance remains for more than one month), and the current month's charges. This process is repeated for each ensuing month until the late balance is paid or otherwise adjusted by the CITY.

14). Ms. Douglas testified that the CITY regularly waives the late penalty/interest for some account holders, who have failed to timely pay their utility bill and whose services have not been discontinued.

15). The Plaintiff, STEVEN BARRETT ("Mr. Barrett) and his wife, EVELYN BARRETT ("Mrs. Barrett), are longtime residents of the CITY. Mrs. Barrett has been employed by the City, as a law enforcement officer, for many years. Mr. Barrett served as an elected CITY Commissioner and Vice-Mayor from 1988 until 1996. The Barretts are longtime commercial and residential utility account customers of the CITY.

16). From March 8, 2001 to the present, there have been several occasions when Mr. Barrett has failed to pay his monthly utility bill within the thirty (30) day period and his utility services have not been discontinued. Moreover, there have been several occasions where Mr. Barrett has failed to pay past-due charges during subsequent billing cycles and, as a result, multiple compounded penalty charges have been billed in the manner described above.

17). Ms. Douglas also testified that the monthly utility bills include charges for water, sewer, returned check fees (if any), taxes, environmental resource consumption units, and DERM charges. The 10% penalty is applied to the total bill, including these other charges, instead of only to the CITY's water and sewer service charges.

18). In addition, Ms. Douglas testified that the CITY's employees have an "informal policy" of refraining from cutting off the water service to CITY employees,

CITY commissioners and others depending on who you were. This informal policy was referred to by Ms. Douglas, as the "friends and family plan." This Court finds that the selective enforcement of the cut off policy, as applied by the CITY, is arbitrary, capricious and discriminatory.

19). Moreover, Ms. Douglas testified that the CITY's Administrative Policy and Procedure[2] entitled "Cut-Off Policy for Active Delinquent Accounts" was written by the CITY's Finance Department in response to the numerous requests by the CITY's utility account holders for an explanation of the CITY's application of the cut-off and penalty/interest charge. The Finance Department's policy was never sent to the CITY Commission for approval or comment.

20). The policy states the following:

> In the event that a customer has accrued substantial penalty Charges % compounded, the City reserves the right to enter into a Payment plan agreement whereby the customer agrees to pay the current monthly charges, plus an amount monthly which would settle the delinquency within a reasonable time. During this time frame Water/Sewer liens are placed against the property.

21). The Court finds that this policy was never adopted nor approved by the CITY Commission. In the absence of any testimony or evidence of proper delegation of rule making authority by the CITY Commission to its executive or administrative branch, this Court finds that the CITY's policy is improper and unenforceable.

22). Accountant David Simon testified as to the effect of the compounding of the 10% penalty charge on Mr. Barrett's previously reviewed utility billing history. Plaintiff introduced Exhibits 8 and 9, which were summaries of Barretts' billing history. Exhibit 8 showed that Mr. Barrett was charged 101.95% per annum penalty/interest by the CITY during the March 25, 2005 period and Exhibit 9 showed a 126.05% per annum penalty/interest charge during the period of September 25, 2002 through November 25, 2002. The Court finds that the monthly 10% compounding of the penalty/interest by CITY is not specifically authorized by the Ordinance; and therefore, the application of this compounding of penalty/interest, over and above the allowable one-time charge of 10% penalty on overdue utility charges, must cease.

23). The language of the subject Ordinance only authorizes a one-time penalty on overdue utility charges and not the compounding penalty/interest charge, currently being paid by some of the CITY's utility customers.

24). No other person testified that as an account holder he or she had ever paid these compounded 10% penalty charges. Mr. Simon, however, testified that there were other local governments in Miami-Dade County that have late payment penalties substantially similar to those established by the CITY in this case. For example, Section

[2] Plaintiff's Trial Exhibit No. 2.

32-91 of the Miami-Dade County Code of Ordinances provides that a ten percent (10%) late charge may be added to a customer's water and sewer bill, and that after sixty (60) days, unpaid balances, including utility charges and late charges, shall accrue an interest charge at the rate of eight percent (8%) per annum. Similar charges for delinquent utility payments have also been established by the municipalities of North Bay Village and the City of Virginia Gardens.

25). The evidence presented at trial failed to establish that the late payment penalty as set forth in the CITY's Ordinance and defined as the "subject penalty" in paragraph nineteen (19) of the Complaint, constitutes an unjust and/or inequitable rate or charge.

26). The evidence at trial, however, has proven that the CITY's Finance Department's application of its own, unapproved policy of compounding the 10% penalty is improper.

27). The evidence at trial, further, proved that the CITY chose to selectively and arbitrarily enforce the penalty clause. This selective application of the "friends and family plan," as applied by the CITY is arbitrary, capricious and discriminatory.

CONCLUSIONS OF LAW

1). Florida Statute, §180.13, provides in pertinent part that:

> (1) The city council, or other legislative body of the municipality, by whatever name known may create a separate board or may designate certain officers of said municipality to have the supervision and control of the operation of the works constructed under the authority of this chapter, which said board or designated officers may make all necessary rules or regulation governing the use, control and operation of said works; **subject, however, to the approval of the city council, or other legislative body, by whatever name known.**
>
> (2) The city council, or other legislative body of the municipality, by whatever name known, may establish **just and equitable rates or charges** to be paid to the municipality for the use of the utility by each person, firm or corporation whose premises are served thereby...
>
> (emphasis added).

It was apparent to this Court that the requirements of § 180.13(1) were not followed by the CITY's staff, when they formulated the policy and procedures for implementation of Ord. 86-15, Section 2. The testimony of the CITY's representative, Ms. Douglas, admitted that the "Cut-Off Policy for Active Delinquent Accounts" was never presented to the CITY's commission for approval and that the policy was written in

response to several customers request on the spur of the moment. This is clearly contrary to the requirements set out in § 180.13(1).

2). A municipality's authority to set rates and charges is limited only by the statutory requirement that the rates and charges be just and equitable. Spierer v. North Miami Beach, 560 So .2d 1198, 1199 (Fla. 3d DCA 1990). In Riviera Beach v. Martinique 2 Owners Ass'n., 596 So. 2d 1164, 1165 (Fla. 4th DCA 1992), the court held that:

> The term "just and equitable" as used in Section 180.13(2) is a brake primarily on the legislative rate-making, not on later judicial review. That is to say, the ***cities are given broad authority to establish their own rates for municipal utilities charges. The amount or form those rates take in a representative democracy is something that is left to a civically vigilant electorate.*** Judicial deference to the legislative will requires a rule of review of utility rates such that ***it is only when the rate is so excessive as to be entirely unjustifiable – i.e., when the rate is arbitrary, unreasonable or invidiously discriminatory – that a court should enjoin enforcement.***
>
> (Emphasis added).

3). "Discrimination to be unlawful must draw an unfair line or strike an unfair balance between those in like circumstances having equal rights and privileges. Discrimination with respect to rates charged does not vitiate unless it is arbitrary and without a reasonable fact basis or justification." City of Gainesville v. FDOT, 778 So. 2d 519, 526 (Fla. 1st DCA 2001) (quoting 12 McQuillin, Municipal Corporations (3rd ed. 1970), § 35.37b). The CITY did not provide this Court with a reasonable fact basis or justification for the CITY's "friends and family plan." It is, therefore, evident to this Court that the CITY has drawn an unfair line or balance between its citizens in applying the late charge authorized by Ord. 86-15. As stated by the court in the City of Gainesville, 778 So. 2d at 525, "[a] city may charge different rates to different classes of utility users so long as the classifications are not arbitrary, unreasonable or discriminatory.

In Florida Cities Water Co. v. Florida Public Service Comm'n, 705 So. 2d 620, 626 (Fla. 1st DCA 1998), the court explains that an agency's action "which yields inconsistent results based upon similar facts, without reasonable explanation is improper." The CITY's representative's own testimony admitted that the imposition of the compounded interest was not applied equally to all, some utility subscribers' late fees were waived either partially or completely. Furthermore, there were no policies or procedures that were established or approved by the CITY's commission specifying the criteria that a utility customer had to meet, prior to a reduction or waiver of the late fees. Instead, the decision and the reasoning was left completely to the discretion of the CITY employee handling the utility customer's account.

4) Like other actions taken by legislative bodies, a utility rate ordinance is presumed valid. Pompano Beach v. L.M. Oltman, 389 So. 2d 283, 286 (Fla. 4th DCA 1980). The burden of proof rests upon any customer contesting the rates. Mohme v. Cocoa, 328 So. 2d 422, 424 (Fla. 1976) and Rosalind Holding Co. v. The Orlando Utils. Comm'n, 402 So. 2d 1209, 1210-11 (Fla. 5th DCA 1981). A municipality "should not be required to come forward to prove the efficacy of its rates unless and until a dissatisfied customer has made a prima facie showing based on competent evidence of invalidity." Mohme, 328 So.2d at 426. This Court finds that the Plaintiff has met his burden of showing a prima facie basis of invalidity. However, this Court does **not** find that the ten percent (10%) late charge is so excessive that it is unjust or unreasonable. Instead it is the manner in which the utility department has implemented the ordinance that the Court finds to be unjust and unreasonable. The practice of compounding the interest rate is **not** specifically authorized by the Ordinance. The continual compounding of not only the past due charges, but also of accrued late charges, leads to an excessive and unreasonable interest rate that this Court must find to be unjust and unreasonable.

5). As to the Plaintiff's argument that the late charge is usurious, this Court finds that § 687.03(2)(c), Fla. Stat. (2000), does not apply to the CITY's utility billing practices. First, the CITY does not lend money or extend any other form of credit as required by the statute. Mr. Barrett was not loaned money by the CITY. Further, the CITY has not extended him any form of credit. While credit is not defined under the statute, it is commonly defined as "[t]he ability of a business or person to borrow money, or obtain goods on time, in consequence of the favorable opinion held by the particular lender as to solvency and past history of reliability." *Black's Law Dictionary,* 367 (6th ed. 1990). In this case, the CITY simply billed Mr. Barrett on a monthly basis for services rendered. In addition, §687.03(2)(c) applies to any merchant "who is regularly engaged in the business of selling or leasing merchandise, goods, or services which are ***for other than personal, family, or household purposes***." (emphasis added).

The CITY regularly provides water through its utility for "personal, family, or household purposes." Moreover, for §687.03(2)(c) to apply, the merchant must be "the holder of a commercial installment contract." The term "commercial installment contract" is not defined in Chapter 687. Mr. Barrett's consumer relationship with the CITY cannot be construed as an installment contract, commercial or retail. Mr. Barrett did not allege that he had a contract with the CITY that allowed him to pay for goods or services in a series of installments. Instead, Mr. Barrett received a monthly bill for the utility services consumed, which were billed by the CITY each month.

6). The CITY argues that an agency's interpretation of a statute that it is charged with enforcing is entitled to great deference and must be approved if not clearly erroneous. Florida Interexchange Carriers Assoc. v. Clark, 678 So. 2d 1267, 1270 (Fla. 1996); Florida Cable Television Association v. Deason, 635 So. 2d 14, 15 (Fla. 1994). However, as stated previously, an agency's action that "yields inconsistent results based upon similar facts, without reasonable explanation, is improper." Florida Cities Water Company, 705 So. 2d at 626. The testimony of the CITY's representative clearly showed

that the department's own policy yielded inconsistent results and the CITY's representative did not provide this Court with an adequate explanation for these inconsistencies.

7). The Defendant also argues that Mr. Barrett is not entitled to recovery of the late payment because he voluntarily made payment. In Blumberg v. Pinellas County, 836 F. Supp. 839, 845 (M.D. Fla. 1993), the court explains that "water is a necessity, not a luxury. In our society, even the most humble of dwellings within a municipality is expected to have piped-in running water. ... It is hard for this Court to see how a monopoly which provides a service that residents must, as a matter of law, consume, can argue that those same residents have 'freely agreed' to partake of that service." Unlike the cable fees, which were at issue in Hassen v. Mediaone of Greater Fla., Inc., 751 So. 2d 1289 (Fla. 1st DCA 2000), the CITY's ordinance allows the CITY to place a lien on the property, if the bill is left unpaid and the deposit is insufficient to cover the amount due and owing. As stated by the Florida Supreme Court in New Smyrna Inlet District v. Esch, 137 So. 1, 4 (Fla. 1931), "[w]here the levy of an illegal tax may become a cloud upon title to real estate, payment of the tax to avoid the cloud or to avoid the imposition of substantial burdens upon property rights of the owner is not a voluntary payment. See also Ves Carpenter Contractors, Inc. v. City of Dania, 422 So. 2d 342 Therefore, this Court finds that Mr. Barrett did not make payment voluntarily, when the CITY has the right to lien the property, the payment of the amount due is not voluntarily made by the utility customer. However, this Court rejects the argument of Plaintiff that the theory of unjust enrichment applies to the CITY.

Therefore, it is hereby **ORDERED AND ADJUDGED** as follows:

1). On the Plaintiff's request for declaratory relief, the Court rules in favor of the Plaintiff and against the Defendant that Ordinance 86-15, as it being applied and enforced by the CITY, violates § 180.13(2). The compounding of customers' penalty charges results in an unjust and unreasonable rate. In addition, the administrative policies and procedures, as developed and written by the CITY's staff **without Commission approval**, are VOID. Finally, the arbitrary manner in which the penalty is being applied by the CITY's staff is unjust and unreasonable.

2). The CITY is enjoined from enforcing Ordinance 86-15, in the manner described supra, which ultimately results in the imposition of multiple 10% late penalties on the same

utility charge, even after said charge has gone unpaid for more than one month. The Ordinance, as it is being applied and enforced by the CITY, is arbitrary, capricious and discriminatory.

2). Having found that Ordinance 86-15 has been applied in an unjust and unreasonable manner, the Plaintiff is ordered to set a future hearing on the issue of supplemental relief and what monies, if any, he is entitled to recover from Defendant, as an individual and as class representative of all those similarly situated.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida on 15 day of October, 2007.

HONORABLE VICTORIA S. SIGLER
CIRCUIT COURT JUDGE

cc: Robert C. Mayland, Esquire
Mark D. Press, Esquire
A. Quinn Jones, III, Esquire
Michael T. Burke, Esquire