OIA 9-6-89

FILED
SID J. WHITE
JUL 11 1989
CLERK, SUPREME COURT
By _____ Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

JACKSONVILLE ELECTRIC AUTHORITY,

Petitioner,

vs.

CASE NO. 73,259

DRAPER'S EGG AND POULTRY CO., INC., a Florida Corporation,

Respondent.

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL
THE FIRST DISTRICT OF FLORIDA

PETITIONER'S CORRECTED REPLY BRIEF

JAMES L. HARRISON
GENERAL COUNSEL

STEVEN E. ROHAN
ASSISTANT COUNSEL

LEONARD S. MAGID
ASSISTANT COUNSEL

715 Towncentre
421 West Church Street
Jacksonville, Florida 32202
(904) 630-4900

ATTORNEYS FOR PETITIONER
JACKSONVILLE ELECTRIC AUTHORITY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

All references to the Petitioner, Jacksonville Electric Authority, will be made by referring to it as JEA.

The Respondent, Draper's Egg and Poultry Co., Inc., a Florida corporation, will be referred to as Draper's.

All references to the Record on Appeal will be as follows: (R-).

All references to the Transcript of Testimony will be as follows: (Tr-).

All references to documentary evidence will be referred to, for example, as follows: (Pl.Ex.1)(Plaintiff's Exhibit 1).

ISSUES ON APPEAL

POINT I

WHETHER FULL PAYMENT OF A BILLING CONSTITUTES AN ACCORD AND SATISFACTION PRECLUDING RECOVERY FOR SUBSEQUENTLY DISCOVERED UNDERBILLINGS?

A

"Payment" is the Performance of an Obligation

B

An Accord and Satisfaction Requires the Intent to Discharge an Existing Obligation with the Intent to Create a New Contract

POINT II

WHETHER AN ACCORD AND SATISFACTION CAN BE FOUND WITHOUT A LEGITIMATE DISPUTE OR CONSIDERATION?

A
An Accord and Satisfaction Requires a Legally Sufficient "Dispute"

B
An Accord and Satisfaction Requires Consideration

POINT III
WHETHER AN ACCORD AND SATISFACTION CAN BE REACHED WHERE ALLEGED DISPUTES ARE SEPARATED BY TIME AND DISTINGUISHED BY SUBJECT MATTER?

A
Draper's Two "Disputes" Occurred at Separate Times

B
Draper's Alleged Accord Occurred in a Different Account

POINT IV
WHETHER AS A MATTER **OF** PUBLIC POLICY, AN ACCORD AND SATISFACTION IS NOT A DEFENSE TO COLLECTION **OF** CHARGES FOR PUBLIC UTILITY SERVICES?

POINT V
WHETHER THERE WAS NO SUFFICIENT EVIDENCE IN **THE** RECORD TO SUPPORT THE TRIAL COURT'S FINDING **OF** ESTOPPEL?

The JEA's argument is not responded to by Draper. The phrase "meeting of the mind" can only be found on page 17 of Draper's brief:

> In determining whether there is a meeting of the minds, the manifestation of the intention of mutual assent controls rather than any unexpressed intention. . . .

Draper's only factual argument in support is that:

> [T]he notation on the back of Draper's check, when considered with the correspondence and other surrounding circumstances, was bound to induce an understanding by the **JEA** that if it accepted the check, it accepted it subject to the condition of accord and satisfaction; and the **JEA** accepted the **$21,967.57** payment.

Draper's brief, page 17 (emphasis added). This statement is a pure unsupported conclusion. It is remarkable in view of the fact that the check with the restrictive endorsement was not for **$21,967.57** but rather for **$21,253.15.** Additionally, not one fact is presented explaining why the surrounding circumstances were "bound to induce an understanding by the JEA" that the recovery of unforeseen charges was expected to be foreclosed by acceptance of the payment.

In summary, Draper's whole argument is that a meeting of the minds was "bound" to have occurred. Draper's does not contest that a meeting of the minds and mutuality on the terms of a new contract must occur and offers no factual predicate for how it occurred. There was no accord and satisfaction.

POINT II

AN ACCORD AND SATISFACTION CANNOT BE FOUND WITHOUT A LEGITIMATE DISPUTE OR CONSIDERATION.

A
An Accord and Satisfaction Requires a Legally Sufficient "Dispute"

Draper's fails to counter JEA's assertion and record reliance that no legally sufficient dispute existed between the parties.

JEA's basic contention is that there was no legally sufficient dispute between the parties underlying an accord and satisfaction defense. **JEA,** in its Brief on the Merits, defined the legal concept of a dispute. **A** dispute is essentially the parties assertion of conflicting positions. In contrast, Draper's December **1984** communication was merely an inquiry and the inquiry was concluded with Draper's full payment of known charges absent any manifestation to settle a conflicting position.

In its brief, Draper's fails to provide a definition for a "dispute", though it states in conclusory fashion without support that "The record is replete with evidence that a dispute occurred." See Draper's Brief at page 13.

Draper's has elevated its billing inquiry (Why is my bill so high?) into a "dispute" in order to manufacture an accord that the parties simply never contemplated. There was no settlement of an existing obligation with a superceding agreement to discharge any debt because neither party knew the underbillings existed at the time. The **JEA** merely advised Draper's that the billing was so high because it represented five months of billing. Draper's then paid. While Draper's may suggest that the **JEA** should have known of the billing errors, the record demonstrates that the **JEA** never manifested knowledge of the errors. The statement of Draper's on page 18 of its brief that the **JEA** "knew of

the underbillings at the time of accord and satisfaction'! is a misrepresentation and not supported in the record.

Draper's position that if the JEA should have known of the errors an accord may be imputed, is not supported by even a single case citation. In contrast Rock ***Springs Land Company v. West,*** **281** So.2d 555 (Fla. 4th DCA 1973), stands for the proposition that negligence in submitting billings does **not** reach the level of "inexcusable lack of care". Nowhere in Draper's brief is it demonstrated why simple negligence, even if proven, constitutes the type of "inexcusable lack of due care" (underline added) which might allow for the waiver of the dispute requirement.

Draper's claims that the record shows that the JEA, at the very least, should have ascertained the consumption of water and sewer services in the exercise of due diligence. Why? The record very clearly demonstrates that the amount of consumption was not disputed. When Draper's was told of the lack of billing in the account for five months, Draper's made no further inquiry as to the correct consumption. Draper's payment alleviated the need for careful scrutiny of **the** consumption records. There is no record justification for the argument that the JEA should have known of the undercharges at the time of accepting the **March** payment and as in Rock ***Springs Land Company,*** any such "negligence" does not rise to the level of inexcusable lack of care.

B

An Accord and Satisfaction Requires Consideration

Once again Draper's has failed to address another essential element of accord and satisfaction argued by the JEA. Draper's does not contest that the payment of a preexisting debt is **not** consideration for a new contract. Draper's does not contest that the payment of a lesser sum than that admittedly then due,

is not consideration to support an accord and satisfaction of the entire indebtedness, without some gain to the creditor or inconvenience to the debtor.

Significantly the word "consideration" cannot even be found in Draper's brief. No accord and satisfaction occurred.

POINT III

AN ACCORD AND SATISFACTION CANNOT BE REACHED WHERE ALLEGED DISPUTES ARE SEPARATED BY TIME AND DISTINGUISHED BY SUBJECT MATTER.

A

Draper's Two ' Occurred at Separate Times

Draper's entire answer argument to this salient point is limited to seven (7) lines on page 16 of Draper's brief. Draper's first suggests that the JEA overlooks the fact that the underbilling was known or should have been known to the the JEA in March of 1985. Draper's then blatantly misrepresents the record by stating that the "claims. . . were known to the JEA at the time it entered into the accord and satisfaction in March of 1985." Of course, record citation is made because the evidence is uncontradicted that the persons who responded to Draper's December 1984 inquiry had no knowledge of the underbillings.

Draper's simply cannot get around the fact that the people who dealt with Mr. Draper in February and March of 1985 had no knowledge of the existence of underbillings that were discovered in April of 1985. The purported disputes did not occur at the same time. The claim for compensation for services rendered in December 1984 resulted the simple fact that the account was not billed for five months previous. The claim for compensation for services which

developed in April was a wholly different matter. Clearly the "disputes" were separated by time.

B

Draper Alleged Accord Occurred in a Different Account

Draper's would have the Court attach no significance to the fact that it delivered two checks to JEA in order to reach the alleged accord. Draper's Brief at page 14. Draper's attempts to obfuscate the fact that the alleged accord did not even occur in the account where the "dispute" took place.

The billing inquiry by Draper's was in regard to account "7" (Pl.Ex.1). The underbillings were found in account "5" (Pl.Ex.8).

Draper's accord defense is based upon the notation on its first check to JEA. This check did not include the payments for all the accounts indicated in JEA's March 7 letter. This check specifically did not include $714.42 which was the amount due in account "5".

Account "5", where undercharges were later discovered, was paid with a second Draper's check only in response to JEA's March 22 letter requesting payment for the separate account. The second check did not contain any restrictive endorsement. Draper's argument that the letters and checks demonstrate an accord is thus further flawed.

The existence of the second check undermines Draper's after the fact proposition of an accord. JEA's March 22 letter coupled with Draper's second check do not evidence an understanding that the parties had reached a superceding agreement to discharge the remaining debt owed in account "5"; specifically, when at the time of tender of payment, neither party knew of the existence of undercharges in account "5".

The purported "disputes" clearly involved different subject matter and were in separate accounts so no accord and satisfaction can be established.

POINT IV

AS A MATTER OF PUBLIC POLICY, AN ACCORD AND SATISFACTION IS NOT A DEFENSE TO COLLECTION OF CHARGES FOR PUBLIC UTILITY SERVICES.

JEA agrees with Draper's reading of ***Corporation De Gestion Ste-Foy, Inc. v. Florida Power and Light Company,*** 385 So.2d **124** (Pla. 3rd DCA 1980), that no accord was present in that case. However, ***Corporation's*** holding went even further to enunciate the rule, held by many other jurisdictions, that even if an accord had been reached it simply would not be available as a defense to a customer of a public utility.

The primary purpose of this rule, as elaborated in JEA's initial brief on the merits, is predicated on the public policy concern of protecting the public from possible fraud, corruption or discrimination. Draper's suggestion that imposing a contrary rule requiring utilities to diligently search their records at the hint of an inquiry is better public policy ignores all of the deception and corruption that such a system would foster if in place. A convenient "mistake", a convenient "settlement" are all intolerable but all too likely probables if customer's were permitted to escape their utility responsibilities so easily.

Moreover, the fact Draper's alleges an accord with JEA in regard to its billings only underscores the need for a rule which would prevent a customer from receiving preferences not available to other customers. Draper's finds it fair that it should be able to escape its public utility responsibilities on a "technicality". The ratepayers are told to ignore the fact that Draper's used the

services. Draper's argument suggests that one who innocently is in the possession of stolen property should have no obligation to return the property. Of course, such is not the law. The arrangements with public utilities supported by Draper's should be strictly barred in order to prevent the public perception that they can be made.

Draper's references to Section 750.609, Jacksonville Ordinance Code are inapplicable. This ordinance limits the recovery period when a meter is not properly operational and the precise and correct billing cannot be ascertained. This has no application to a billing error that can be precisely unraveled. Draper's suggests that the payment of a bill that has an incorrect decimal assignment should preclude recovery four months later when the correct billing is established. While these examples may at first glance appear silly, silly is the result if the principles of ***Corporation*** are not followed.

Draper's references to the Public Service Commission rules limiting back billing to one year are not relevant and ignore one salient point. The State has established its public policy in that regard. There is no indication that the City has departed or should depart from the existing public policy cited by Judge Ervin in his dissenting opinion below and by ***Corporation.*** That public policy should be supported by this Honorable Court in this action.

POINT V

THERE WAS NO SUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT THE TRIAL COURT'S FINDING OF ESTOPPEL

The Trial Court concluded its Final Judgment by denying the JEA recovery for underbillings for March 19, 1985, through October 17, 1985, by

virtue of JEA's failure to notify Draper immediately in April of 1985, when the JEA knew of the erroneous billings.

While there is no question that the doctrine of equitable estoppel may be invoked against a municipality as if it were an individual, ***Hollywood Beach Hotel Co. v. City of Hollywood,*** 329 So.2d 10 (Pla. 1976), ***Enderby v. City of Sunrise,*** 376 So.2d 444 (Fla. 4th DCA 1979), there are also very strict requirements for the application of the doctrine of equitable estoppel.

The First District Court of Appeal in ***Tri-State Systems, Inc. v. Dept. of Transportation,*** 500 So.2d 212 (Fla. 1st DCA 1986), and in ***Taylor v. Kenco Chemical & Mfg. Corp.,*** 465 So.2d 581 (Fla. 1st DCA 1985), recited the well established principles that a pleader of estoppel must establish:

1. A representation of a material fact that is contrary to a later asserted position;
2. Reliance on that representation; and
3. A change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon. ***Tri-State*** at 215.

See also ***Kuge v. State Dept. of Administration,*** 449 So.2d 389 (Fla. 3d DCA 1984).

In the case ***sub judice,*** there was undisputed evidence that Ms. Bennett, a Customer Service Supervisor of the JEA, notified a representative of Draper's of the new billing difficulty, informed him of the $10,000 to $15,000 exposure Draper's could be expecting and that the details were yet to be worked out (Tr-52,53). Mr. Draper, the owner/operator, only testified that he knew of the full impact in November of 1985. Mr. Draper responded to the following question:

Q All right, now, when did you first become aware, Mr. Draper, that the JEA was going to bill you for $297,303.00 for a period beginning in December of '83 through October of '85?

A In November.

(Tr-103) This is not contested for there is no evidence the JEA informed Mr. Draper or his representatives of the precise amount that would be billed until November.

Mr. Draper, however, did not contest that his representatives knew of the impending dilemma. Mr. Hudson did not testify to dispute the JEA testimony though he was listed as a witness on the Pretrial Stipulation (R-66-69). Draper's misleads this Honorable Court when it states that "The JEA argued that it advised Draper of a possible $10,000 to $15,000 exposure . . ." Draper's Brief page 23. The JEA has always maintained that it notified a representative of Draper's; not Mr. Draper himself.

Furthermore, estoppel does not arise from the failure to notify a party but rather from the affirmative representation of a material fact. To warrant reliance on the principle of equitable estoppel, a party must make a change in position caused by the representation and reliance. In this case, the most Draper contended, was that if it had known, it might or would have changed its position in 1983. The extent of Draper's purported reliance is demonstrated in the transcript of the May 14, 1987, hearing.

Q If Mrs. Bennett had notified you in April of 1985 of the scope of this under billing with respect to Meter Number 5, could you have taken or would you have taken any action with respect to that knowledge at that time?

A Yes, I would.

Q What would you have done?

A We would have first determined if there was any way we could have conserved water, number one. Number two, with the increases shown here and the amount of money, it's just a matter of economics. Up until that point, with the lower billings, we didn't feel that a water cleanup system would pay for itself, but this shows an entirely new light on it. Had we had known this back in '83, I figured we could have applied some eighty-three thousand dollars to the installation of a water cleanup system.

Q Have you since learning of this under billing taken any steps?

A Yes, we have. We have a letter that went to the Public Works Department only today after some study and research, giving them a schedule on a water cleanup system.

(Tr-106, 107)

This is not the contemplated change of position that warrants application of equitable estoppel. The First District Court of Appeal below addressed this matter quite completely when it stated:

> Draper's suggested that it might have installed a water conservation system had it been accurately billed or more promptly advised as to the undercharges. But at the time of the final hearing, approximately a year and a half after Draper's received formal notice of the undercharges, it still had not installed such a system. The evidence does not show any detrimental reliance. . .

Jacksonville Electric Authority v. Draper's, 531 So.2d 373,374 (Fla. 1st DCA 1988). Shockingly, though Draper's is asking this Court to reverse on this issue, the decision or the above quotation of the First District Court of Appeal is not even addressed.

Furthermore, Mr. Draper's possible change in position in 1983 has nothing to do with the time frame the Trial Court was concerned with, that is, April of 1985 through October of 1985.

Estoppel has often been rejected as a defense in public utility cases. This has been so held in ***United Sanitation Services, Inc. v. City of Tampa,*** 302 So.2d 435 (Fla. 2d DCA 1974), and in ***Corporation De Gestion, supra.***

In ***Goddard v. Public Service Company of Colorado,*** 599 P.2d 278 (Col.App. 1979), the Court denied estoppel even though there was a **"reliance"** on the part of the utility consumer. Goddard's reliance is similar to the case *sub judice.* The Court there stated:

> The Goddards filed this action for injunctive relief, contending that the utility was barred from asserting its claim by the doctrine of equitable estoppel, because they had relied on the previous gas bills in making their determination to purchase the apartment building, had set their rentals accordingly, and could no longer collect the difference in higher heating costs from their tenants. Public Service counterclaimed for the amount of the bill. The trial court found for Public Service and we affirm.
>
> We interpret the Public Utilities law as forbidding estoppel of a public utility from collecting the established rate. Gas rates are set by the Public Utilities Commission, § 40-3-102, C.R.S. 1973, and § 40-3-105(2), C.R.S. 1973, provides that:
>
> > '[N]o public utility shall. . . receive a greater or lesser or different compensation for any product . . . than the rates . . . applicable to such product . . . as specified in its schedules on file . . . nor shall any such public utility refund. . . directly or indirectly, in any manner or by any device, any portion of the rates. . . so specified . . .'
>
> The Goddards had received the gas at half price contrary to the terms of this statute.

Id. at 279 (emphasis added).

Thus, the Trial Court's theory below of estoppel has no support either factually or equitably and the decision of the First District Court of Appeal on this point should be affirmed.

CONCLUSION

For all of the reasons stated herein and in the JEA's Initial Brief on the Merits, the First District Court of Appeal should be reversed as to its accord and satisfaction position and the dissenting opinion of Judge Ervin supported, and the First District Court of Appeal should be affirmed as to its decision on estoppel.

Respectfully submitted,

JAMES L. HARRISON
GENERAL COUNSEL

STEVEN E. ROHAN
ASSISTANT COUNSEL
Florida Bar ID **No. 138839**

LEONARD S. MAGID
ASSISTANT COUNSEL
Florida Bar ID **No. 717101**

Office of General Counsel
715 Towncentre
421 West Church Street
Jacksonville, Florida **32202**
(904) 630-4900

ATTORNEYS FOR PETITIONER,
Jacksonville Electric Authority

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief has been furnished to GARY B. TULLIS, ESQUIRE, 500 North Ocean Street, Jacksonville, FL 32201, Jacksonville, FL 32202, Attorney for the Respondent, by mail, this 6 day of July, 1989.

Attorney