IN THE SUPREME COURT OF THE STATE OF FLORIDA

FILED
SID J. WHITE
JUN 18 1992
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

JOHN FALK,

Appellant,

vs.

CASE NUMBER **79,676**

J. **TERRY DEASON** and SUSAN F. **CLARK,** as and constituting the **FLORIDA PUBLIC SERVICE** COMMISSION,

Appellees.
_____/

APPEAL PROM
THE **FLORIDA** PUBLIC SERVICE COMMISSION
DOCKET NUMBER **910056-PU**

INITIAL BRIEF OF APPELLANT

Bacon, Bacon, Johnson, Goddard & Lamont, P.A.

BY: DAVID A. LAMONT, ESQUIRE
Post Office Box 13576
2959 **First** Avenue North
St. Petersburg, FL 33733-3576
(813) 327-3935
SPN 853832/FBN 747378
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

The subject of this appeal is an order of the Florida Public Service Commission, which shall hereinafter be referred to as "the COMMISSION." The proceeding before the COMMISSION in which the subject order was rendered was brought by Consumer John Falk, who shall hereinafter be referred to as "FALK", against the H. Geller Management Company, which shall hereinafter be referred to as "GELLER."

The record has been prepared in two volumes, identified as Volume I and Volume II. Accordingly, all citations to the record shall be in either of the following forms: (Vol.I R. --) or (Vol.II R. --). The exhibits introduced at the Formal Hearing are a part of Volume II of the record, but have not been separately paginated. Accordingly, FALK has prepared an Appendix comprised of those exhibits or portions thereof believed necessary for FALK's argument. Citations to the Appendix will be in the following form: (App. --).

STATEMENT OF THE CASE AND FACTS

This is an appeal from the final order of the COMMISSION denying relief sought by FALK against GELLER regarding the resale of electricity and gas by GELLER in the Terrace Park of Five Towns condominium community, of which FALK is a resident.

The Terrace Park of Five Towns condominiurn community, located in Pinellas County, Florida, is comprised of thirty-four (34) separate buildings. (Vol.II R. 105). The thirty-four (34) separate buildings, however, are thirty-one (31) independent condominiums lawfully organized and existing under Chapter 718, Florida Statutes with the concomitant independent condominium associations. (Vol.II R. 105). Further, each condominium association is subject to an individual management contract with GELLER for the management of that association. (Vol.II R. 107). Thus, GELLER provides management services to the thirty-four (34) buildings pursuant to thirty-one (31) different management contracts. (Vol.II R. 107).

The number of individual condominium units within each of the thirty-four (34) buildings varies. However, each individual unit within each building is separately metered by Florida Power for the electricity used in that unit, and each unit owner is the customer of record with Florida Power for their unit. (Vol.II R. 120). The electricity used in the common areas of each building and the complex, on the other hand, is metered by Florida Power separate from the individual units, and GELLER is the customer of record for this electricity. (Vol.II R. 120).

FALK owns a condominium unit in Terrace Park of Five Towns No. 25, more commonly known as the "Jefferson Building." (Vol.II R. 13). There are forty-four individual condominium units within the Jefferson Building. Under the terms of the management agreement between the Jefferson Building and GELLER each resident of the Jefferson Building, including FALK, pays GELLER a monthly maintenance fee which expressly includes the cost of electricity used for the common areas of the Jefferson Building and the complex generally. According to the initial budget provided by GELLER, the Jefferson Building residents were to collectively pay $180.00 per month for electricity used in the common areas. (App. 15).

Furthermore, according to Paragraph VI of the Jefferson Building management contract GELLER has the power to increase this monthly maintenance fee in response to increases in the charges imposed upon him for common area electricity by Florida Power. (App. 6). The increase in the monthly maintenance fee is set by the contract at $15.00 for every 5% increase in Florida Power's charges. (App. 6). GELLER in fact utilized this provision in 1982 to increase the aggregate monthly maintenance fee for the Jefferson Building by $45.00 (App. 16), and again in 1983 to increase the aggregate monthly maintenance fee for the Jefferson Building by another $105.00 (App. 17).

In 1989, FALK filed a complaint with the Division of Consumer Affairs of the COMMISSION, alleging that GELLER was, by virtue of the foregoing provisions of the management contract and

his conduct thereunder, unlawfully reselling electricity to the residents of the Jefferson Building in violation of Rule 25-6.049(6)(b), Florida Administrative Code.

Pursuant to Rule 25-22.032, Florida Administrative Code, an informal conference was scheduled by the COMMISSION to be held in St. Petersburg, Pinellas County, Florida. However, before the informal conference could be held, **GELLER** obtained an injunction from the Circuit Court of the Sixth Judicial Circuit in and for Pinellas County enjoining the informal conference on the ground that the **COMMISSION** had no jurisdiction over **GELLER** because FALK's complaint was purely a matter of contract dispute. The COMMISSION then filed its petition with this Honorable Court seeking a writ of prohibition against the circuit court, arguing that it indeed did have jurisdiction over GELLER and the subject matter of FALK's complaint. In Florida Public Service Commission v. Bryson, 569 So.2d 1253 (Fla.1990), this Honorable Court agreed with the COMMISSION, and overturned the circuit court's injunction. (Vol.I R. 207).

Thereafter, the informal conference was held, and no resolution was reached by the parties. Accordingly, a full evidentiary hearing was scheduled by the COMMISSION pursuant to Chapter 25-22, Florida Administrative Code. This formal hearing was held April 19, 1991.

During the formal hearing, PALK contended that GELLER's conduct under its management contract with the **Jefferson** Building violated the provisions of Rule 25-6.049(6), Florida

Administrative Code. (Vol.I R. 9-95). Under Rule 25-6.049(6)(a), Florida Administrative Code, a customer of record of an electricity utility can, under certain circumstances, pass along the costs of that electricity to the ultimate users of that electricity. However, Rule 25-6.049(6)(b), Florida Administrative Code, provides that when a customer of record does pass along electricity costs as permitted by Subsection (6)(a), he cannot do so in such a manner as to be reimbursed for more than his actual costs. Alternatively stated, he cannot make a profit through the reimbursement scheme.

It was FALK's position that GELLER was in violation of Rule 25-6.049(6)(b) because it collected more from the residents of the Jefferson Building for common area electricity than it had paid Florida Power for the same electricity.

FALK argued that under the initial budget used when the Jefferson Building became available for occupancy in 1980, the residents of the Jefferson Building paid $180.00 per month to GELLER for common area electricity, which arithmetically resulted in an annual payment to GELLER for 1980 of $2,160.00 for Jefferson Building common area electricity use. Yet, the records of both GELLER and Florida Power clearly showed that in 1980 GELLER paid Florida Power only $1,221.87 for the Jefferson Building's common area electricity. The Jefferson Building residents also paid $2,160 for common area electricity in 1981, while GELLER paid Florida Power only $1,744.10. (Vol.I R. 66-100).

GELLER's overcharges became more pronounced in 1982 and later years, after GELLER had imposed the March, 1982 increase of $45.00 per month and the April, 1983 increase of $105.00 per month. In 1982, the Jefferson Building residents paid GELLER $2,610.00 for common area electricity, while GELLER paid Florida Power only $1,602.07. Similarly, in 1983 the Jefferson Building residents paid GELLER $3,645.00 for common area electricity, while GELLER paid Florida Power only $1,613.89. Since GELLER imposed no increases after 1983, FALK knew that the annual payment by the Jefferson Building remained at a constant $3,645.00. FALK then determined through the records of GELLER and Florida Power that GELLER paid Florida Power $1,956.08 in 1984; $1,881.31 in 1985; $1,737.03 in 1986; $2,178.53 in 1987; $2,578.27 in 1988; $2,593.15 in 1989; and $2,533.98 in 1990. (Vol.I R. 66-100).

GELLER's defense before the COMMISSION was simple. GELLER argued that it was not a public utility and was not reselling electricity because its management contract used the costs of electricity only as a cost of living index. (Vol.II R. 117). GELLER further argued through witness Charles Parmalee that Rule 25-6.049(6)(b) prohibited the resale of electricity at a profit only as to occupancy units, and since GELLER only provided common area electricity, it could not be subject to the prohibition of the rule. (Vol.II R. 229-232).

Upon the foregoing, on October 18, 1991 the COMMISSION issued its Order numbered 25234 denying FALK the relief that he sought. (Vol.I R. 207). The COMMISSION ruled that GELLER was not acting as a public utility under its management contract; with the Jefferson Building because GELLER used the costs of electricity simply as a "cost of living index" and did not really pass the Jefferson Building common area electricity costs along to the residents of the Jefferson Building. (Vol.I R. 208-209). Based upon these conclusions, the COMMISSION essentially ruled that it did not have jurisdiction over GELLER. The COMMISSION also ruled that the anti-profit provisions of Rule 25-6.049 would not apply to GELLER in any event since GELLER did not provide electricity for occupancy units and, according to the COMMISSION, Rule 25-6.049 prohibited resale of electricity at a profit only as to occupancy units. (Vol.I R. 210).

On October 30, 1991, FALK filed with the COMMISSION his Motion for Reconsideration pursuant to Rule 25-22.060, Florida Administrative Code. (Vol.I R. 212-218). On March 10, 1992, by its order numbered PSC-92-0031-FOF-PU, the COMMISSION denied FALK's Motion for Reconsideration. (Vol.I R. 224-226). On March 19, 1992, the COMMISSION entered its Amended Order Denying Reconsideration, numbered PSC-92-0031A-FOF-PU. (Vol.I R. 227). From this, FALK has appealed. (Vol.I R. 228-229).

SUMMARY OF ARGUMENT

I. Under Fletcher Properties, Inc. v. Florida Public Service Commission, 356 So.2d 289 (Fla.1978), the managing agent of a condominium complex acts as a public utility when it passes along to the condominium residents the costs of common area utilities, and as a public utility comes within the jurisdiction of the Florida Public Service Commission. GELLER, under its management contract, unquestionably passed along common area electricity costs to the residents of the complex. Accordingly, GELLER was, by the mandate of Fletcher, acting as a public utility and within the jurisdiction of the COMMISSION. The COMMISSION's decision that GELLER was not a public utility, therefore, is manifestly erroneous and must be reversed.

11. Rule 25-6.049(6)(a) permits a customer of record of condominium common area electricity to pass along those common area electricity costs to the residents of the condominiurn complex. However, Rule 25-6.049(6)(b) prohibits the customer of record from collecting more from the condominium residents for the common area electricity than it paid the utility for such electrical. service. GELLER's conduct under its management agreement clearly falls within these provisions. The COMMISSION's conclusion that Rule 25-6.049(5) prohibits resale of electricity at a profit only as to occupancy units is fundamentally contrary to logic, reason, the express language of Rule 25-6.049(5) and (61, when read in pari materia.

ARGUMENT

I. THE COMMISSION ERRED IN RULING THAT GELLER WAS NOT ACTING AS A PUBLIC UTILITY UNDER ITS MANAGEMENT CONTRACT WITH THE JEFFERSON BUILDING

The COMMISSION ruled that GELLER was not acting as a public utility under its management contract with the Jefferson Building. The COMMISSION stated that GELLER, under the management contract, simply provided services to the residents of the Jefferson Building, the provision of which services incidentally required the use of the electricity. The COMMISSION found that the management contract did not contemplate or envision the sale of electricity. Based upon this finding, the COMMISSION presumably concluded that it lacked jurisdiction over GELLER. FALK respectfully submits that this ruling is erroneous and fundamentally contrary to both the evidence and applicable law.

In Fletcher Properties, Inc. v. Florida Public ~~Service Commission~~, 356 So.2d 289 (Fla.1978), this Honorable Court specifically and expressly ruled that the managing agent of a condominium complex ~~does~~ act as a public utility, for the purposes of coming within the COMMISSION'S jurisdiction, when it passes along to the residents of the condominium complex the costs of common area utilities. Fletcher was recently reaffirmed by this Honorable Court in ~~P.W.~~ Ventures v. Nichols, 533 So.2d 281 (Fla.1988). This Honorable Court, by its decision in Fletcher, has affirmatively placed GELLER within the jurisdiction of the COMMISSION so long as GELLER passes the common area

electricity costs along to the residents of the Jefferson Building. Accordingly, the only inquiry pertinent to the issue of the COMMISSION's jurisdiction over GELLER is whether or not GELLER passed along common area electricity costs to the Jefferson Building residents. If GELLER did in fact pass along common area electricity costs to the Jefferson Building residents, the COMMISSION must assert jurisdiction over GELLER pursuant to the mandate of the Eletcher decision.

Under the evidence presented, it is absurd to suggest that GELLER is not passing common area electricity costs along to the residents of the Jefferson Building. To begin with, the initial estimated budget prepared by GELLER contained a specific line item indicating that the cost of electricity for the common areas of the Jefferson Building was to be borne by the residents of the Jefferson Building in their monthly maintenance fee, said cost being estimated to be $180.00 per month. (App. 15). Thus, from the inception of the Jefferson Building the residents were reimbursing GELLER for the costs of common area electricity.

Furthermore, Paragraph VI of the Jefferson Building management contract specifically states:

> The monthly maintenance fee for each condominium parcel owner shall be increased as provided for hereinafter to represent ~~increa~~ases for public utilities... In the event that Florida Power.. .increases its rate per KWH by an amount equal to 5%..such increase will be apportioned among the condominium units by the addition to the monthly maintenance fee...the sum of $15.00 ...There shall be no increase in the amount of the management fee ~~for~~ this increase. (emphasis added)1

(App. 6). The language, as well as the effect, of this contractual provision is clear and unambiguous; when Florida Power's rate per kilowatt hour rises by 5%, the residents of the Jefferson Building pay $15.00 more per month because of and directly arising ~~from~~ Florida Power's increase in that rate per kilowatt hour. There is no other rational interpretation of this contractual provision. Even GELLER's own witness, Carl Parker, the Pinellas County attorney who drafted the management contract, testified that there was no other way to read the contract but that it was specifically intended to reimburse GELLER for his costs of common area electricity. (Vol.II R. 210-211).

GELLER argued in the formal hearing that he never intended for this provision to pass along the costs of electricity to the residents; rather, he meant for it to serve as a "cost of living" index. This testimony is simply too fundamentally at odds with the language of the contract, the testimony of his former attorney who drafted the contract, and common sense, to be given credence.

The COMMISSION's decision that GELLER does not act as public utility is strikingly odd when considered in light of the COMMISSION's express reliance on Fletcher in its emphatic efforts to retain jurisdiction over this very case in Florida Public Service Commission v. Bryson, 569 So.2d 1253 (Fla.1990).

Under the evidence before the COMMISSION, there can be no question that the COMMISSION erred in finding that GELLER did not act as a public utility under its management contract with

the Jefferson Building residents. Accordingly, **FALK** respectfully submits that the COMMISSION's order denying **FALK** the relief he sought must be reversed.

11. THE COMMISSION ERRED IN RULING THAT THE PROVISIONS OF RULE 25-6.049 WERE INAPPLICABLE TO GELLER IN ITS CONDUCT UNDER THE MANAGEMENT AGREEMENT

In addition to denying **FALK** relief based upon the conclusion that GELLER did not act as a public utility, the COMMISSION **also** denied FALK relief upon the ground that Rule 25-6.049, which prohibits resale of electricity at a profit, did not apply to GELLER's conduct under the management agreement. The COMMISSION determined that Rule 25-6.049 prohibited the resale of electricity only as to occupancy units, and not as to common areas. Since GELLER's management contract only addressed the electricity used in common areas, the COMMISSION concluded that GELLER could not be subject to the anti-profit provisions of Rule 25-6.049. Again, FALK respectfully submits that the COMMISSION's decision is erroneous.

The analysis must begin with those portions of Rule 25-6.049 that are pertinent to this matter. First, Rule 25-6.049(5)(a) provides, in pertinent part, as **follows:**

> Individual electric metering by the utility shall be required for each separate occupancy unit of new.. .condominiums.. .for which construction is commenced after January 1, 1981.

The phrase "separate occupancy unit" is defined by Rule 25-6.049(5)(b) in such a manner as to include the condominium units.

Thus, all that is known from a review of Rule 25-6.049(5) is that individual meters are required for separate occupancy units.

Rule 25-6.049(6)(a), provides, in pertinent part, as follows:

> Where individual metering is not required under Subsection 5(a) and master metering is used in lieu thereof, reasonable apportionment methods.. .may be used by the customer of record., .soley for the purpose of allocating the cost of the electricity billed by the utility.

In turn, Rule 25-6.049(6)(b) provides, in pertinent part, as follows:

> Any fees or charges collected by a customer of record for electricity billed to the customer's account by the utility...shall be determined in a manner which reimburses the customer of record for no more than the customer's actual cost of electricity.

Read together, these provisions establish a very clear and unambiguous scheme. If separate occupancy units are involved, there must be individual electric metering. If separate occupancy units are not involved, individual electric meters are not required. Rule 25-6.049(5)(a). If in fact individual electric meters are not required under Rule 25-6.049(5)(a) because separate occupancy units are not involved, then the customer of record is absolutely entitled to pass along electricity costs for the non-occupancy unit areas to the ultimate user of that particular electricity. Rule 25-6.049(6)(a). However, the customer of record cannot pass long these non-occupancy unit electricity costs in such a manner as to reimbursed more than his actual cost. Rule 25-6.0459(6)(b).

In light of the foregoing, FALK respectfully submits that the COMMISSION's ruling that GELLER was not subject to Rule 25-6.049 was manifestly erroneous. It is clear from the language of Rule 25-6.049(5) that it does nothing more than establish a requirement that individual electric metering be used for each "separate occupancy unit", as that term is defined therein. Nowhere in Rule 25-6.049(5) is there to be found any language addressing the resale of electricity at a profit.

Yet, the COMMISSION found that Rule 25-6.049(5) prohibited resale of electricity only as to "occupancy units." This conclusion is fundamentally contrary to logic, reason, and the express language of the pertinent portions of the rule. Rule 25-6.049(6)(a) makes very clear that reimbursement to the customer of record is allowed under Rule 25-6.049(6)(a) only when individual metering is not required by Rule 25-6.049(5). This was expressly recognized by the COMMISSION in its rule-making proceedings when Rule 25-6.049(6) was being enacted:

> [Rule 25-6.0491 was revised to prohibit reselling of electricity, that is, allocation of master meter charges in such a manner as to result in earned profit by the customer of record, in those cases where individual utility meters were not required.

See, e.g., Volume 14, Number 21, Florida Administrative Weekly, page 1971. In turn, Rule 25-6.049(6)(b) prohibits reimbursement at a profit. Thus, the only pertinency of Rule 25-6.049(5), as far as FALK's complaint is concerned, is with respect to whether or not GELLER was entitled to pass along the costs of common area electricity because individual metering was not required.

Clearly, individual metering was not required because separate occupancy units were not involved.

In accordance with the foregoing, FALK respectfully submits that GELLER in fact was subject to Rule 25-6.049. As FALK argued in his first point on appeal, GELLER did, under its management contract, pass along the costs of common area electricity costs to the residents of the Jefferson Building. This clearly places GELLER's conduct within the ambit of Rule 25-6.049(6)(a). The evidence before the COMMISSION, and indeed the COMMISSION's own admission in the subject order on appeal, clearly established that GELLER was in fact reimbursed more for its common area electricity costs by the complex residents than it paid Florida Power. This clearly places GELLER's conduct in violation of Rule 25-6.049(6)(b). There is nothing in the language of Rule 25-6.049(5), implicit or explicit, which can rationally alter this analysis. Accordingly, FALK respectfully submits that the COMMISSION's order is erroneous and must be reversed.

CONCLUSION

Based upon the foregoing presentation of argument and authorities, FALK respectfully submits that the decision of the COMMISSION denying the relief requested by FALK was manifestly erroneous, and must be reversed. Therefore, FALK further respectfully requests this Honorable Court to enter its order reversing the decision of the COMMISSION, and remanding the Cause to the COMMISSION for entry of a final order granting FALK the relief requested by him in the proceeding below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to Robert Vandiver, Esquire, Florida Public Service Commission, 101 East Gaines Street, Tallahassee, Floridas 32301, and C. Everett Boyd, Esquire, 305 South Gadsden Street, Tallahassee, Florida 32301 this 17th day of June, 1992.

Bacon, Bacon, Johnson, Goddard & Lamont, P.A.

BY: DAVID A. LAMONT, ESQUIRE
Post Office Box 13576
St. Petersburg, FL 33733
(813) 327-3935
Florida Bar Number 747378
Attorneys for Appellant