

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Dade County Circuit) DOCKET NO. 951270-TI
Court Referral of Certain issues) ORDER NO. PSC-97-0554-FOF-TI
in Case No., 94-14234-CA-22) ISSUED: May 15, 1997
(S.H. Dohan & Company, P.A. vs.)
Transcall America, Inc. d/b/a)
ATC Long Distance) that are)
within the Commission's)
jurisdiction.)

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
SUSAN F. CLARK
J. TERRY DEASON
JOE GARCIA
DIANE K. KIESLING

ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT

BY THE COMMISSION:

Dohan & Company, P.A., (Dohan) filed a complaint against Transcall America, Inc., d/b/a ATC Long Distance (Transcall) for alleged improper billing in the 11th Circuit Court on March 22, 1995, upon a Stipulation Regarding Conditional Class Certification and Settlement. On August 3, 1995, the Court issued I. Order Determining Claim to Be Maintained as Class Action II. Final Order Approving Class Action Settlement III. Order Staying Action and Transferring Same to the Florida Public Service Commission. Therein, the Court stated that Dohan's claims raise issues regarding Transcall's billing system and the application of tariff provisions that are within the specialized expertise and jurisdiction of the Commission. Accordingly, this docket was opened to address the specific issues referred to us. Discovery has ensued and this matter has been set for hearing on June 19 and 20, 1997.

On February 19, 1997, Dohan filed a Motion for Partial Summary Judgment on the Issue of Liability. In its motion, Dohan requested that the Commission enter an order on the specific issue of whether Transcall is liable for overbilling nine seconds on every phone call placed through the Miami billing system from 1986 through 1991. On February 21, 1997, the prehearing officer conducted a

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status conference in order to coordinate procedural matters in this docket and to discuss clarifying and narrowing the issues. In addition, there was some discussion regarding Dohan's Motion for Partial Summary Judgment and the propriety of that motion in view of the narrowing of the issues and the mechanics of a Chapter 120, Florida Statutes, hearing. On March 14, 1997, Dohan filed a Procedural Memorandum and Request for Ruling on its Motion for Partial Summary Judgment on the Issue of Liability. On March 20, 1997, Transcall responded to the motion for partial summary judgment.

A. Transcall's March 20, 1997, Response to Dohan's Motion

Pursuant to Rule 25-22.037(2)(b), Florida Administrative Code, parties may respond to a motion within seven days after service of the motion. If served by mail, five days are added to the computation of time in accordance with Rule 25-22.028(4), Florida Administrative Code. In addition, if the response period runs on a weekend, the period is extended to the next business day pursuant to Rule 25-22.028(5), Florida Administrative Code. Dohan served its Motion for Partial Summary Judgment by mail on Transcall on February 18, 1997. Thus, Transcall's response was due March 3, 1997. Transcall filed its response on March 21, 1997. Transcall's response was, therefore, untimely. In this instance, however, Dohan's counsel indicated at the February 21, 1997, status conference, that, as a result of numerous questions, he would further research the propriety of Dohan's Motion for Partial Summary Judgment and report with his findings. After further research, Dohan filed a Procedural Memorandum and Request for Ruling on its Motion for Partial Summary Judgment on March 14, 1997. Thereafter, on March 20, 1997, Transcall filed its Response to the motion.

The discussion regarding the Motion for Partial Summary Judgment at the status conference may have led to some confusion regarding whether the motion would be withdrawn. We note that Dohan did not contest Transcall's late-filed response. In light of the discussion at the February 21, 1997, status conference, we have considered Transcall's response in making our determination on the Motion for Partial Summary Judgment.

B. Dohan's Motion for Partial Summary Judgment on the Issue of Liability

While summary judgment is not specifically provided for our rules, case law requires that in making a determination on a Motion for Partial Summary Judgment, the fact-finder must decide whether there is a material factual issue in dispute. Jones v. Stoutenburgh, 91 So. 2d 299 (Fla. 1956). The fact-finder should draw every possible inference in favor of the nonmoving party. Moore v. Morris, 475 So. 2d 666, 668 (Fla. 1985). If there is a possibility that an issue exists, summary judgment is improper. Gomes v. Stevens, 548 So. 2d 1163, 1164 (Fla. 2nd DCA 1989). See also Athans v. Soble, 553 So. 2d 1361, 1362-1363 (Fla. 2nd DCA 1989).

In order to assure ourselves of the propriety of our ruling upon this motion, we have reviewed current case law, the new Administrative Procedures Act, Commission rules, and the proposed Uniform Rules of Administrative Procedure. Commission Rule 25-22.035(3), Florida Administrative Code states:

Procedure: Generally, the Florida Rules of Civil Procedure shall govern in proceedings before the Commission under this part, except that the provisions of these rules supersede the Florida Rules of Civil Procedure where conflict arises between the two.

We have not found any conflict between our rules and Rule 1.510, Fla. Rules of Civ. Procedure, on Summary Judgment. Cf. Middlebrooks v. St. Johns River Water Management District, 529 So. 2d 1167 (Fla. 5th DCA 1988) (Florida Rules of Civil Procedure are applicable to Water Management District to extent they are not inconsistent with Chapter 120 or administrative rules). In addition, while Commission rules do not address summary judgments, we have ruled upon a motion for summary judgment in the past. See Order Denying Motion for Summary Judgment, Order No. PSC-92-0492-FOF-EQ, issued April 11, 1992, in Docket No. 911142. See also Final Order Amending Certificate No. 379-S to Include Additional Territory, Order No. PSC-96-1281-FOF-SU, issued October 15, 1996, in Docket No. 951419-SU (stating that, at the technical hearing, Alafaya's Motion for Partial Summary Disposition was denied as untimely). Based on our review, we conclude that it is appropriate for us to make a determination on Dohan's motion for partial summary judgment.

In its Motion, Dohan asserts that it has found undisputed evidence that Transcall overbilled consumers on all phone calls placed through its Miami Billing system from 1986 through 1991.

In support of its assertion, Dohan cites the Deposition of Joseph Signorelli, where Mr. Signorelli stated that he was a computer programming manager for Teltec in charge of all billing systems. Mr. Signorelli asserted that in approximately 1986 he was instructed by Teltec's executive vice-president to add nine seconds to all calls billed through Teltec's Miami switch (Miami Billing system). See Signorelli 42-44. He stated that in 1988 Teltec merged with Long Distance America to form Telus. Mr. Signorelli stated that he remained in charge of the billing system and the nine-second addition was retained.

In approximately 1989, Telus and ATC Long Distance (Transcall) merged. Dohan argues that Telus and Transcall retained separate billing systems and Telus continued to bill the additional nine seconds. Citing the deposition of Telus's former chief financial officer Sullivan, Dohan argues that neither Transcall, Teltec, nor Telus had a system in place to determine if overbilling was occurring. Dohan states that computer programmer David Resposo confirmed that nine seconds were added to all calls during his employment with the company. Dohan further asserts that Sullivan indicated that the addition of nine seconds would always force a call into the next billed-time increment if the company was billing on six-second increments, and would sometimes result in the addition of another minute if the company billed on one minute increments.

Dohan further argues that Transcall has admitted that overbilling occurred. Dohan states that William Anderson, Transcall's vice president and general counsel, left a phone message for one of Transcall's customers stating that he believed nine seconds had been added on timepoints to billing for Telus. In addition, Dohan asserts that Mr. Anderson agreed in his deposition that he had spoken with the customer regarding the addition of nine seconds.

Based on the cited deposition transcripts, Dohan argues that it has presented undisputed evidence that Transcall overbilled consumers for a minimum of a five year period by adding nine seconds to each call. Dohan argues that Transcall will be unjustly enriched if Transcall is not held liable for overbilling for the added nine seconds.

In its response, Transcall states that, pursuant to the Circuit Court's order referring this matter to the Commission, the Commission is to determine if overcharges occurred and, if so, during what period of time. Transcall asserts that Dohan's Motion for Partial Summary Judgment asks the Commission to enter an order finding Transcall liable for alleged overcharges as a matter of

law. Transcall, however, argues that such a legal finding cannot be made when all of the facts have not been presented and an issue of material fact exists.

Transcall argues that billing irregularities do not always result in overcharges. Transcall states that overcharges occur only when billing time exceeds the amount permissible in the applicable tariff on file with the Commission. Thus, Transcall argues that a customer could experience billing irregularities on their account, but not be overcharged. Transcall, therefore, argues that overcharges are what actually precipitates liability, not billing irregularities.

In support of its response, Transcall provides the following example. Transcall states that under its existing tariff, which permits call rounding, a call of 10 seconds would be properly billed as a one minute call. Similarly, a call lasting 55 seconds would be properly billed as a one minute call. Transcall argues, however, that adding nine seconds would only result in overbilling on the call lasting 55 seconds. Transcall argues that Dohan has not shown any evidence that Transcall engaged in improper timekeeping in excess of the effective tariff, or that billing irregularities or improper timekeeping resulted in charges in excess of the effective tariff.

Furthermore, Transcall asserts that the transfer of assets from Telus to Transcall took place on approximately April 1, 1990. Transcall argues that in that transaction, it acquired only Telus's assets, not Telus's liabilities.

At our May 6, 1997, Agenda Conference, counsel for Dohan and Transcall indicated that the parties had reached a partial stipulation of the issues raised in Dohan's Motion for Partial Summary Judgment. The parties were, however, unable to clearly identify the factual issues upon which an agreement had been reached. The parties appeared to remain in dispute over several factual issues raised by Dohan's motion.

Upon consideration of Dohan's motion, Transcall's response, and the discussion at our May 6, 1997, Agenda Conference, we believe that a genuine issue of material fact remains at issue regarding Transcall's liability for overbilling nine seconds on phone calls placed through its Miami Billing system between 1986 and 1991. See Papi Express, Inc. v. Dosal Tobacco Corp, 677 So. 2d 1314 (Fla. 3rd DCA 1996); Aetna Casualty & Surety Co. v. Pappagallo Restaurant, Inc., 547 So. 2d 243 (Fla. 3rd DCA 1989) (it is error to enter summary judgment when a genuine issue of material fact remains unresolved). In seeking partial summary judgment, Dohan is

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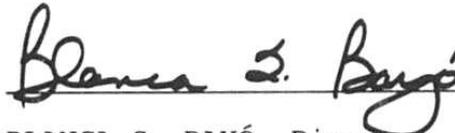
asking us to determine that Transcall is liable for overbilling for nine seconds added to calls. Dohan has not, however, presented evidence indicating that the addition of nine seconds was in violation of Transcall's tariff, or that it actually resulted in overbilling to all customers. Thus, Dohan has failed to meet its burden of establishing that there is no issue of material fact and that it is entitled to a judgment as a matter of law. Connell v. Sledge, 306 So. 2d 194, 196 (Fla. 1st DCA 1975); citing Hughes v. Jemco, Inc., 201 So. 2d 565 (Fla. 1st DCA 1967).

Based on the foregoing, Dohan's Motion for Partial Summary Judgment on the Issue of Liability is denied. This Order does not preclude the parties from presenting a stipulation or request for admissions regarding these factual issues for consideration by the prehearing officer at the prehearing conference.

Based on the foregoing, it is therefore

ORDERED by the Florida Public Service Commission that Dohan & Company, P.A.'s Motion for Partial Summary Judgment on the Issue of Liability is denied.

By ORDER of the Florida Public Service Commission, this 15th day of May, 1997.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.