

STATE OF MICHIGAN
COURT OF APPEALS

ANO-TECH, INC.,

Plaintiff-Appellee,

v

MICHIGAN CONSOLIDATED GAS
COMPANY,

Defendant-Appellant.

UNPUBLISHED

May 25, 2004

No. 245355

Wayne Circuit Court

LC No. 2000-030268-CZ

Before: Saad, P.J., and Sawyer and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as on leave granted from the trial court's order denying its motion for summary disposition.¹ We reverse.

Defendant first argues that the trial court erred when it denied its respective motions for summary disposition and reconsideration once the trial court concluded that deferral of this action to the Michigan Public Service Commission (MPSC) was not required on the basis of the primary jurisdiction doctrine. Specifically, defendant argues that this is a rate case that falls within the MPSC's regulatory scheme, and because plaintiff seeks to avoid paying the distribution charges for the gas commodity under a new voluntary experimental program ("customer choice program"), the matter should be decided by the MPSC. We agree.

On appeal, a trial court's grant or denial of summary disposition is reviewed de novo. *First Public Corp v Parfet*, 468 Mich 101, 104; 658 NW2d 477 (2003). Similarly, the applicability of the primary jurisdiction doctrine presents a question of law, which this Court also reviews de novo. *Michigan Basic Property Ins Ass'n v Detroit Edison Co*, 240 Mich App 524,

¹ Defendant filed an application for leave to appeal the trial court's order in this Court. That application was denied. Subsequently, plaintiff filed an application for leave to appeal to the Supreme Court. In response to that application, the Supreme Court remanded the case to this Court for consideration as on leave granted in lieu of granting leave to appeal. *Ano-Tech, Inc v Michigan Consolidated Gas Co*, 467 Mich 907; 654 NW2d 332 (2002).

528; 618 NW2d 32 (2000). Lastly, this Court reviews a motion for reconsideration for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

The primary jurisdiction doctrine pertains to matters “whereby a court defers its own jurisdiction to the jurisdiction of an administrative agency better suited to handle the parties’ dispute.” *Durcon Co v Detroit Edison*, 250 Mich App 553, 556; 655 NW2d 304 (2002), citing *Michigan Basic Property Ins Ass’n*, *supra*. This Court in *Durcon*, articulated the following principles pertaining to primary jurisdiction:

Primary jurisdiction “is a concept of judicial deference and discretion.” LeDuc, Michigan Administrative Law, § 10:43, p 70. The doctrine exists as a “recognition of the need for orderly and sensible coordination of the work of agencies and of courts.” *White Lake Improvement Ass’n v City of Whitehall*, 22 Mich App 262, 282; 177 NW2d 473 (1970). In *White Lake*, the Court of Appeals correctly noted that “[t]he doctrine of primary jurisdiction does not preclude civil litigation; it merely suspends court action.” *Id.* at 271. Thus, LeDuc notes, “[p]rimary jurisdiction is not a matter of whether there will be judicial involvement in resolving issues, but rather of when it will occur and where the process will start.” *Id.* at § 10:44, p 73. A court of general jurisdiction considers the doctrine of primary jurisdiction “whenever there is concurrent original subject matter jurisdiction regarding a disputed issue in both a court and an administrative agency.” *Id.*, § 10:43 at 70. [*Durcon Co*, *supra* at 557, quoting *Rinaldo’s Constr Corp v Michigan Bell Telephone Co*, 454 Mich 65, 70; 559 NW2d 647 (1997).]

The *Durcon* Court further reaffirmed the factors articulated in *Rinaldo’s* that guide a court’s decision to suspend an action in favor of agency review:

First, a court should consider “the extent to which the agency’s specialized expertise makes it a preferable forum for resolving the issue” Second, it should consider “the need for uniform resolution of the issue” Third, it should consider “the potential that judicial resolution of the issue will have an adverse impact on the agency’s performance of its regulatory responsibilities.” Where applicable, courts of general jurisdiction weigh these considerations and defer to administrative agencies where the case is more appropriately decided before the administrative body.

Accordingly, “the *Rinaldo’s* opinion directs us to consider the nature of the plaintiff’s claim (tort/contract; violation of regulatory code or tariffs) in light of the three purposes underlying the primary jurisdiction doctrine.” *Michigan Basic*, *supra* at 534. [*Durcon Co*, *supra* at 558.]

Relying on this Court’s opinion in *Dominion Reserves, Inc v Michigan Consolidated Gas Co*, 240 Mich App 216, 218-222; 610 NW2d 282 (2000), the trial court determined that the special expertise of the MPSC was not needed because (1) the parties only disputed whether defendant could collect the distribution charges, and (2) the “contract” involved was not complex. However, the trial court erroneously concluded that *Dominion Reserves* required that the MPSC should hear and decide a contract claim only if the parties’ dispute involved a *complex* contract. Rather, the *Dominion Reserves* Court specifically recognized that if a plaintiff’s claim

is governed by the MPSC's regulatory scheme, initial jurisdiction lies with the MPSC. Michigan courts have recognized that (1) contractual relationship claims or claims "pertaining to, necessary, or incident to the regulation of" a public utility should be deferred to the MPSC, and (2) claims that the defendant has somehow violated a tariff or code, or claims that plead facts "which give rise to a legal duty in tort independent of breach of contract," may be heard and decided in the trial courts (although the MPSC may also hear tort claims). See *Travelers Ins Co v Detroit Edison*, 465 Mich 185, 202, 209-211; 631 NW2d 733 (2001); *Rinaldo's, supra*; *Durcon, supra*; *Dominion Reserves, supra*; *Michigan Basic Property Ass'n, supra*.

Here, plaintiff pleaded facts regarding defendant's inaccurate billings and defective meter in its complaint. Additionally, in the course of the parties' negotiations, but after the complaint was filed, plaintiff clarified its dispute of the billings and specifically contested the distribution charge for the gas commodity. On the basis of plaintiff's complaint alone, plaintiff did not plead an identifiable tort independent of contract, nor has plaintiff alleged that defendant violated a specific tariff or code since plaintiff has not identified a specific tariff or code. Consequently, plaintiff's claims either constitute a contractual claim or a claim "pertaining to, necessary, or incident to the regulation of" a public utility. Consequently, we conclude that the matter should be deferred to the MPSC.

Where the claim asserted is essentially a matter already contemplated by the controlling tariffs, such as a claim for defective . . . equipment or service, and the only issue is the extent to which those tariffs will apply, deferral to the MPSC under the doctrine of primary jurisdiction is proper. The MPSC, charged with the authority to regulate and oversee [public utility] companies, possesses the degree of expertise with regard to the purpose and effect of the governing tariffs to decide whether the presumptively valid tariff provisions apply to particular facts that do not constitute tortious conduct or a violation of the code or tariff. Thus, the first consideration, the need for agency expertise, weighs in favor of deferral of such matters to the MPSC. [*Rinaldo's, supra* at 75-76.]

We note that plaintiff asserts that the distribution charges do not apply, which is tantamount to a request for a different rate since the distribution charge would not be included. In this respect, the instant case is analogous to *La Salle Townhouses Cooperative Ass'n v Detroit Edison Co*, 69 Mich App 7, 9-11; 244 NW2d 343 (1976), where this Court concluded that the MPSC should determine whether the approved rates applied to the plaintiffs because their position was "that the approved rates [did] not apply to them and that another rate, without a fuel adjustment clause, should apply." *Id.* In sum, we conclude that the MPSC is best equipped to determine if the distribution charges apply to plaintiff in accordance with the requirements of the new voluntary experimental consumer choice program. *Rinaldo's, supra*.

We need not address defendant's remaining arguments, including the trial court's decision to deny defendant's motion for reconsideration, in light of our conclusion that the matter should be heard and decided by the MPSC under the primary jurisdiction doctrine.

Reversed. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ David H. Sawyer

/s/ Karen M. Fort Hood