IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KHAMSING (KAM) SITTHIDETH, Appellant, v. CEDAR RIVER WATER & SEWER DISTRICT, Respondent.	)	No. 67521-4-I DIVISION ONE UNPUBLISHED OPINION FILED: November 5, 2012

Appelwick, J. — Property owner Sitthideth challenges the summary judgment dismissal of his lawsuit against the Cedar River Water and Sewer District. The essence of Sitthideth's claim is that after he fell behind on his utility payments and the District disconnected water service to his property, the District unlawfully continued to impose monthly charges for maintenance of the water and sewer system. However, because Sitthideth's property remained physically connected to the water and sewer system, water service was still available even though Sitthideth was not using water. Under these circumstances, the monthly charges imposed by the District were statutorily authorized. The trial court did not err in granting summary judgment in favor of the District.

FACTS

Cedar River Water and Sewer District (District) operates under chapter 57 RCW

and provides water and sewer service within a 37 square-mile area located in King County. The District charges its customers a monthly base rate for water and sewer service that does not depend on usage. Based on meter readings showing actual consumption, the District imposes an additional charge for water usage.

Khamsing Sitthideth has owned a home within the service area for the District for more than 10 years.[1] Beginning in July 2009, Sitthideth began missing payments for his water and sewer service. The District disconnected his water service on November 4, 2009. Following the disconnection, the District continued to charge Sitthideth the monthly base rate. The District also assessed various other charges, including a disconnection fee, a lien letter notice fee, and a lien filing fee. As of March 2010, Sitthideth owed a balance of $980.56.

In April 2010, Sitthideth, acting pro se, filed a complaint for declaratory judgment against the District. Sitthideth's complaint challenged the legality of the District's imposition of base charges during the time when his water service was disconnected. He also claimed that the District improperly compounded the penalties imposed upon unpaid charges. The trial was set for September 19, 2011.

In October 2010, after Sitthideth made a partial payment of $320.35 toward his bill, the District offered to turn Sitthideth's water back on if he agreed to pay all current charges on future bills. Sitthideth did not agree.

In May 2011 approximately four months before the scheduled trial date,

[1] Sitthideth is alternatively spelled as Sitthidet in parts of the record. We use the spelling Sitthideth in accordance with the court's ruling granting Sitthideth's motion to correct the spelling in the caption.

Sitthideth filed a motion to amend his complaint seeking to add new claims. In addition to requesting declaratory relief, Sitthideth claimed the District violated the federal Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692, and the Consumer Protection Act (CPA), chapter 19.86 RCW, and was liable for damages.[2] The trial court denied the motion to amend, determining that the motion was untimely and that the late amendment would prejudice the District, given approaching dates for discovery cutoff and trial.

The District moved for summary judgment. Following a hearing, the trial court granted the motion and dismissed Sitthideth's case, and later denied his motion for reconsideration. Sitthideth appeals.[3]

ANALYSIS

Acting pro se, Sitthideth claims the trial court improperly dismissed his lawsuit without resolving his claim for damages under the CPA.

We review summary judgment de novo. Wright v. Safeco Ins. Co. of Am., 124 Wn. App. 263, 270, 109 P.3d 1 (2004). Summary judgment is properly granted when

[2] There are two amended complaints in the record. The complaint attached to the motion to amend was signed on May 11. The similar, but not identical, complaint sent to the District was signed on May 18.

[3] In addition to Clerk's Papers, the record on appeal includes a "Transcript of Court'[s] Summary Judgment Proceeding." (Some capitalization omitted.) It appears that this document was prepared by Sitthideth, who does not appear to be a "person authorized to prepare a verbatim report of proceedings" under the rules governing the compilation of the appellate record. RAP 9.2. Although an attached letter confirms that a company who prepares transcriptions of court proceedings reviewed Sitthideth's transcript, the report of proceedings provided fails to comply with the applicable rules pertaining to the record on review. We decline to consider it. Likewise, we do not consider Sitthideth's supplemental conclusion to appellant responsive brief, as the court rules do not permit an appellant to submit additional briefing after filing a reply unless specifically authorized by the court. See RAP 10.1(b), (h).

the pleadings and affidavits show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The statutory authority of a municipal corporation, such as a water and sewer district under chapter 57 RCW, is an issue of law that we review de novo. Okeson v. City of Seattle, 159 Wn.2d 436, 444, 150 P.3d 556 (2007).

Sitthideth fails to acknowledge that his complaint did not seek damages nor include a claim under the CPA and the trial court denied his motion to amend. Sitthideth addresses the denial of his motion to amend only in his reply brief, pointing out that CR 15 allows amendment at any stage in the litigation. See CR 15(a) (once a party's right to amend expires, a party may amend by "leave of court" or written consent of the other party). This court, however, generally does not consider issues raised for the first time in a reply brief. RAP 10.3(c); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Nevertheless, we discern no abuse of discretion in the trial court's ruling. An appellate court will not disturb a trial court's decision on a motion to amend a pleading in the absence of a clear showing of abuse of discretion. CR 15(a); Wilson v. Horsley, 137 Wn.2d 500, 505, 974 P.2d 316 (1999). Prejudice is the most important factor in the court's consideration of a motion to amend. Id. To evaluate prejudice caused by amendment of the pleadings, the court may consider undue delay and unfair surprise. Caruso v. Local Union 690 of Int'l Bhd. of Teamsters, 100 Wn.2d 343, 349-50, 670 P.2d 240 (1983). Sitthideth claims the District would not have been prejudiced by the addition of his new claims because it "did not want to go to trial any way," and intended

to instead employ summary judgment procedures as a means to "block" his right to a trial. But, Sitthideth admits that the financial losses he claimed as damages occurred within the time frame that his original complaint was filed. He offers no reason for the delay. He does not dispute that he sought to raise the new claims more than a year after the complaint was filed and within three months of the discovery cutoff date and four months of the scheduled trial date. Under these circumstances, the court's finding of prejudice was not manifestly unreasonable or based on untenable grounds.

Moreover, in deciding whether to grant a motion to amend, "the court may consider the probable merit or futility" of the proposed amendments. Doyle v. Planned Parenthood of Seattle–King County, Inc., 31 Wn. App. 126, 131, 639 P.2d 240 (1982). The claims Sitthideth sought to add lacked probable merit for several reasons. As an initial matter, water and sewer districts, as municipal corporations, are not regulated by the CPA. Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1, 77 Wn.2d 94, 98, 459 P.2d 633 (1969) ("Nowhere does [the CPA's] language imply that municipal corporations or political subdivisions of the state are within the definition of persons and entities made subject to it."); see also Ottgen v. Clover Park Technical College, 84 Wn. App. 214, 221, 928 P.2d 1119 (1996).[4]

In addition, Sitthideth failed to establish that the District engaged in any unlawful practice. The primary core of Sitthideth's claim is that the District engaged in

[4] Sitthideth's claim under the Fair Debt Collection Practices Act also lacked probable merit because the District's conduct in collecting the debt owed to it is not subject to the Act. See 15 U.S.C. § 1692a(6) (FDCPA's definition of the term "debt collector" excludes creditors collecting their own debts, unless in doing so, a creditor uses a different name to indicate that a third party is collecting the debt).

fraudulent billing by applying monthly sewer charges after it was no longer providing actual water service. This position is, however, inconsistent with the statute and contrary to well-settled caselaw.

RCW 57.08.005 authorizes the District to construct and maintain a waterworks system, to regulate use of the system and to determine the rates charged for use. RCW 57.08.081(1) also provides, in relevant part:

> [T]he commissioners of any district shall provide for revenues by fixing rates and charges for furnishing sewer and drainage service and facilities to those to whom service is available or for providing water, such rates and charges to be fixed as deemed necessary by the commissioners, so that uniform charges will be made for the same class of customer or service and facility. Rates and charges may be combined for the furnishing of more than one type of sewer or drainage service and facilities.

(Emphasis added.) Service is "available" where property is physically connected to the water and sewer system. See Lake Stevens Sewer Dist. v. Vill. Homes, Inc., 18 Wn. App. 165, 173, 566 P.2d 1256 (1977). The statute also specifically contemplates that a customer may be charged for water service in the absence of consumption: "[w]here a customer connected to the district's system uses the water on an intermittent or transient basis, a district may charge for providing water service to such a customer, regardless of the amount of water, if any, used by the customer." RCW 57.08.005(3).

In 1959, the legislature amended the predecessor to RCW 57.08.081 by changing the phrase "to those receiving such service," Laws of 1941, ch. 210, § 22, to read "to those to whom such service is available." Laws of 1959, ch. 103, § 11. In Lake Stevens Sewer Dist., this court considered the effect of the amendment when a property owner challenged the validity of sewer service charges imposed on property

that contained unoccupied dwellings that were physically connected to the sewer system. 18 Wn. App. at 170. The property owners argued that sewer service charges could not be imposed until the dwellings were occupied and actual use began. Id. at 173. We rejected this argument, recognizing the amendment to the statute makes the availability of the sewer system, not actual use of it, the basis for imposing charges. Id. at 176-77. Our Supreme Court has approved of the analysis in Lake Stevens. Holmes Harbor Sewer Dist. v. Holmes Harbor Home Bldg., LLC, 155 Wn.2d 858, 863, 123 P.3d 823 (2005). In Holmes Harbor, in contrast, the District could not impose monthly sewer charges because the unimproved lots at issue were not connected to the sewer system and had no guaranteed right to a future connection. Id. at 866. Water and sewer service remained available to Sitthideth's property even after water service was discontinued. The District acted within its authority in imposing monthly service charges.

Sitthideth challenges the 10 percent penalty charges imposed after he failed to pay the monthly base charges. He cites no authority to support this position that such charges are "illegal." RCW 7.08.081(3), in fact, authorizes the District to impose a 10 percent penalty on delinquent payments. Sitthideth claims that the District imposed "scamming charges" for disconnection of service warnings after service had already been disconnected. But, as Sitthideth acknowledges, the District corrected the error and removed the redundant charges for service disconnection warning notices.

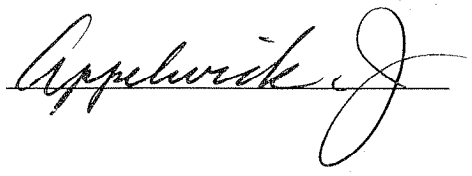
Sitthideth claims that before he purchased his property, the District was required and failed to disclose the monthly sewer service rates or inform him that monthly base

rates would apply even without the provision of actual water service. No authority supports this position. Sitthideth contends he could not have discovered that sewer service charges would apply irrespective of water use because the statute was amended in 1998, the year he purchased his property. The 1998 amendments did not alter the fact that monthly assessments are based on service availability. See Laws of 1998, ch. 106, § 9, ch. 285, § 2. As explained, the statute was amended to that effect decades before Sitthideth purchased his property. Sitthideth provides no support for his claim that the District's rates and policies were unavailable to the public.

Another theme of Sitthideth's complaint and briefing on appeal is that the rates charged by the District are excessively high. But, it is undisputed that setting rates is within the statutory authority of the District. See RCW 57.08.081(1). Where, as here, the District's actions are within its statutory authority and no express limitations apply, operation of the system is within the discretion of the District. Mun. of Metro. Seattle v. Div. 587, Amalgamated Transit Union, 118 Wn.2d 639, 646, 826 P.2d 167 (1992). Specifically, the District's ratemaking decision must be upheld unless it was arbitrary, capricious, or unreasonable. Id. While Sitthideth submitted self-prepared exhibits purporting to show that the District's rates are high compared to the rates of other districts, he failed to refute the evidence of the annual survey prepared by Seattle Public Utilities showing that the District's rates are in line with the other regional districts.

Sitthideth is obviously unhappy with the sewer service rates and practices of the District. But, because he failed to make any showing that the District acted outside of

its statutory authority or that any of its decisions were arbitrary or capricious, the District was entitled to judgment as a matter of law. We affirm the trial court's dismissal of Sitthideth's complaint.



WE CONCUR: