

ROMAN DZURINSKIY,
Complainant,
v.
MISSOURI AMERICAN WATER COMPANY
Respondent.

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Issue Date: October 20, 2010 Effective Date: October 20, 2010

a. The Motions

Missouri American Water Company (“MAWC”) filed the *Respondent’s Motion for Summary Determination* (“MAWC’s motion”) on September 10, 2010, seeking a decision in its favor without a hearing. On October 7, 2010, Roman Dzurinskiy filed the *Complainant’s Motion in Opposition to Summary Determination* (“Mr. Dzurinskiy’s motion”), responding to MAWC’s motion and seeking a decision in his favor without a hearing. On October 15, 2010, MAWC filed *MAWC’s Reply to Complainant’s Motion in Opposition to Summary Determination* responding to Mr. Dzurinskiy’s motion.

The Commission may decide the merits of a “case” without a hearing according to the Commission’s regulation.¹ But, under such regulation, a motion is not self-proving. The motion must include:

. . . specific references to the **pleadings, testimony, discovery, or affidavits** that demonstrate the lack of a genuine issue as to such facts. Each motion for summary determination shall have attached thereto a separate legal memorandum explaining why summary determination should be granted and **testimony, discovery or affidavits** not previously filed that are relied on in the motion. [²]

The regulation provides that the Commission may grant either motion:

. . . if the **pleadings, testimony, discovery, affidavits, and memoranda** on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case [³]

The Commission modeled its regulation on another agency’s regulation,⁴ which closely resembles Missouri Supreme Court Rule 74.04:

[T]he two are sufficiently similar (and in many instances, nearly identical) as to make many cases interpreting the latter helpful. [⁵]

Therefore, case law discussing the rule explains the regulation.

The allegations requiring support in pleadings, testimony, discovery, affidavits, and memoranda depend on the motion’s theory.

b. Mr. Dzurinskiy’s Motion

Mr. Dzurinskiy claims that MAWC is billing him incorrectly due to pressure fluctuations in MAWC’s facilities. As the claimant party, Mr. Dzurinskiy carries his

¹ 4 CSR 240-2.117.

² 4 CSR 240-2.117(1)(B) (emphasis added).

³ 4 CSR 240-2.117(1)(E) (emphasis added).

⁴ 1 CSR 15-3.450 (rescinded Nov. 30, 2002).

⁵ *Johnson v. Missouri Bd. of Nursing Adm’rs*, 130 S.W.3d 619, 626 (Mo. App. W.D., 2004).

motion if he establishes the facts on which he would have the burden of proof at hearing.⁶ Mr. Dzurinskiy's motion includes ample allegations that water pressure fluctuations caused faulty readings on his meter, resulting in erroneous bills. Mr. Dzurinskiy refers to "recently obtained evidence from a credible source[,]"⁷ "[m]y recordings"⁸ and statements of other persons.

But Mr. Dzurinskiy fails to support such references and other allegations with citations to the necessary documents—pleadings,⁹ testimony, discovery, affidavits, and memoranda¹⁰—in the file or attached to his motion. Therefore, Mr. Dzurinskiy has not established facts beyond genuine dispute. Having failed to do so, Mr. Dzurinskiy has not shown entitlement to a favorable decision.

Therefore, the Commission will deny Mr. Dzurinskiy's motion.

c. MAWC's Motion

As defending party, MAWC carries its motion by establishing facts that negate any one element of Mr. Dzurinskiy's claim.¹¹ MAWC cites its tariff for provisions that insulate MAWC from liability based on Mr. Dzurinskiy's new water heater ("heater"). MAWC cites no document stating that the heater caused the problem.

⁶ *ITT Comm. Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 381 (Mo. banc 1993).

⁷ Mr. Dzurinskiy's motion, paragraph 6.

⁸ *Id.*, paragraph 7.

⁹ Pleadings in this context means the pleadings of another party, which may contain admissions useful against such parties' own case.

¹⁰ Memoranda in this context means the memoranda of Staff. Staff does not have a stake in this action so it does not join in the complaint or answer. Staff files its neutral advice in the form of reports supported by an affidavit.

¹¹ *ITT Comm. Fin. Corp.*, 854 S.W.2d at 381. That opinion further provides that the defending party may prevail by showing that claimant cannot prove some element of the claim, despite sufficient time for discovery, or by establishing all the elements of an affirmative defense. But neither those arguments appears in MAWC's motion.

Instead, MAWC alleges that the billing issues started with the installation of Mr. Dzurinskiy's new water heater ("heater"), and that no fluctuation occurs when the heater's inlet valve ("intake") is shut. If such facts negate Mr. Dzurinskiy's allegation that MAWC's water pressure fluctuations caused the billing problem, those facts do so only by inference.

In support of its allegations, MAWC cites the complaint¹² for admissions of Mr. Dzurinskiy but as Mr. Dzurinskiy notes, the complaint does not state that the problems started with the heater's installation. As to shutting the intake, the complaint states only that no fluctuation coincided with that event. The complaint alleges that Mr. Dzurinskiy's plumbers installed the heater properly and that fluctuations occurred before the replacement of the meter.

Those facts support an inference that MAWC's water pressure fluctuations caused the billing errors.

[I]f the movant requires an inference to establish his right to judgment as a matter of law, and the evidence reasonably supports any inference other than (or in addition to) the movant's inference, a genuine dispute exists and the movant's prima facie showing fails.¹³

MAWC's citations support inferences favorable to MAWC and to Mr. Dzurinskiy.

Therefore, MAWC has not established facts that entitle MAWC to a favorable decision, so the Commission will deny MAWC's motion.

¹² MAWC's exhibits B and D do not constitute pleadings, testimony, discovery, affidavits, or memoranda, so they cannot support summary determination but that infirmity would not be fatal if the complaint's admissions supported the motion.

¹³ *Id.* at 382.

THE COMMISSION ORDERS THAT:

1. The *Respondent's Motion for Summary Determination* is denied.
2. The *Motion in Opposition to Summary Determination* is denied.
3. This order is effective when issued.

BY THE COMMISSION



Steven C. Reed
Secretary

(S E A L)

Daniel Jordan, Regulatory Law Judge,
by delegation of authority pursuant
to Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 20th day of October 2010.