2017 IL App (1st) 170476
No. 1-17-0476
Opinion filed September 12, 2017

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WAYNE UNDERWOOD, Petitioner-Appellant, v. ILLINOIS COMMERCE COMMISSION and ILLINOIS BELL TELEPHONE COMPANY, INC., Respondents-Appellees.	)	Petition for Review of the Order of the Illinois Commerce Commission ICC Docket No. 14-0301

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Neville and Justice Pierce concurred in the judgment.

ORDER

¶ 1 *Held*: Illinois Commerce Commission's dismissal is affirmed. Petitioner's request for a declaratory ruling for respondent to reimburse late fees assessed against all customers for its purported failure to adhere to postmark requirements in the Illinois Administrative Code, was time barred and not subject to tolling.

¶ 2 Wayne Underwood filed a petition with the Illinois Commerce Commission seeking a declaratory ruling that between July 1, 2002 and February 28, 2010, Illinois Bell Telephone Company, Inc. (now AT & T) violated section 735.160(a) of the Illinois Administrative Code

(83 Ill. Adm. Code 735.160 (West 2014)) by failing to include the proper postmarks on its bills. Underwood asserted that because AT & T failed to abide by the postmark requirements, it should be required to refund all late payments assessed against customers during that period, more than $126 million. The Commission dismissed the petition finding it: (i) was time barred under section 9-252 of the Public Utilities Act (220 ILCS 5/9-252 (West 2014)) and not subject to tolling; (ii) fell outside the scope of declaratory rulings permitted under the Commission's rules; and (iii) was a class action, which the Commission does not have authority to hear under section 200.95 of the Illinois Administrative Code (83 Ill. Admin Code § 200.95 (West 2014)). Underwood appeals arguing all three of the Commission's findings were wrong. Because we agree with the Commission that the petition was time-barred, we affirm on that basis and do not address the other issues.

¶ 3 BACKGROUND

¶ 4 Underwood's petition raises issues that have been before the courts and the Commission as far back as 1991. We briefly discuss that history to provide context for Underwood's claim.

¶ 5 Before March 1, 2010, section 735.160(a) of the Illinois Administrative Code addressing telephone companies' billing procedures stated that "[t]he due date printed on the monthly bill may not be less than twenty one days after the date of the postmark on the bill, if mailed or the date of delivery as shown on the bill of delivered by other means." 83 Ill. Admin Code § 735.160(a). After March 1, 2010, that provision was amended to state that no postmark was required. Specifically, the rule makes a postmark optional and instead requires telephone companies to "retain documentation" for two years of the due date of each bill; and the date each bill was mailed, delivered, sent or made available to a customer. 83 Ill. Admin Code § 735.160(a)(10, (a)(5) (eff. March 1, 2010). The issues Underwood's petition raises and which

have been raised by others before the courts and the Commission, relate to the pre-March 2010 postmark requirements.

¶ 6 In 1991, attorney Clinton Krislov, on behalf of a class of AT & T customers, sued AT & T for damages arising from its assessment of late payment charges on consumer bills that were mailed without a dated postmark (*Morrison* Litigation). Bills were generally payable within 21 days of mailing, and the class argued that it could not determine the due date without a postmarked envelope showing the mailing date, as required by law. Plaintiffs argued that AT & T sent bills to customers without postmarks and at times set due dates less than 21 days from the date the bill was mailed and then improperly charged late fees before the actual date the charged accrued. Plaintiffs argued that the illegal late fees should be refunded to all affected customers.

¶ 7 Concurrently, Krislov filed a complaint with the Commission essentially asserting the same misconduct and seeking the same relief. Before the Commission matter went to trial, the class action suit settled. AT & T admitted no liability but agreed to place a "dated mark" on the billing envelope for as long as required by the Administrative Code. Krislov and all class members agreed to be enjoined from bring any future claim based on the lack of a dated mark on the billing envelope. Krislov was authorized to monitor compliance with the settlement agreement.

¶ 8 Several years after the settlement, AT & T changed its marking procedures by replacing the mailing date on the envelope with a string of numbers, which were only understood by AT & T. In 2005, Krislov filed a motion in circuit court to enforce the 1994 settlement agreement and for an accounting for all late charges AT & T collected since it changed its postmark procedure. Krislov alleged AT & T unlawfully collected more than $126 million in late fees during that period. The circuit court denied the motion to enforce finding that AT & T had not violated the

settlement agreement. The appellate court reversed, holding that AT & T had breached the settlement agreement and remanding for further proceedings. *In re Illinois Bell Telephone Link-Up II & Late Charge Litigation*, No. 1-06-1675 (May 1, 2008) (unpublished order under Supreme Court Rule 23). (Krislov also filed a complaint with the Commission alleging violation of the Administrative Code's postmark requirements. The Commission dismissed the complaint finding that the settlement agreement barred the claim. The appellate court affirmed. *Krislov v. Illinois Commerce Comm'n*, No. 1-07-2860 (2008) (unpublished order under Supreme Court Rule 23)).

¶ 9 On remand, Krislov moved for summary judgment and asked for an order refunding all late charges with interest, and an order requiring AT & T to comply with the 1994 settlement agreement. AT & T argued that Krislov failed to present any evidence of causation or damages. The circuit court agreed and entered an order denying the motion to enforce the judgment and granting AT & T's motion to terminate the litigation. The appellate court affirmed, finding that Krislov failed to maintain his burden to show damages proximately caused by AT & T's breach of the settlement agreement to warrant the relief requested. *In re Illinois Bell Telephone Link Up II & Late Charge Litigation*, 2013 IL App (1st) 113349.

¶ 10 In July 2010, while the *Morrison* litigation was pending, Krislov filed a putative class action in circuit court on behalf of Samuel Cahnman (with Wayne Underwood named as a proposed intervener), alleging that AT & T violated section 735.160(a) of title 83 of the Illinois Administrative Code (83 Ill. Adm. Code 735.160(a)(d), amended at 8 Ill. Reg. 5161 (eff. Apr. 13, 1984)) in omitting the dated postmark on the exterior of its billing envelopes sent to customers and subsequently charging late fees on the bills it considered past due. The complaint asserted that AT&T should be required to forfeit all late charges, totaling over $126 million

dollars, assessed from July of 2002 to March of 2010. The circuit court granted AT & T's motion to dismiss for lack of jurisdiction finding that Cahnman was requesting reparations of utility rates under section 9-252 of the Public Utilities Act (220 ILCS 5/9-252 (West 2014), which is the exclusive jurisdiction of the Commission. The appellate court affirmed. *Cahnman v. SBC Illinois d/b/a AT&T Illinois, Illinois Bell*, 2013 IL App (1st) 113350-U (unpublished order under Supreme Court Rule 23).

¶ 11 On April 10, 2014, Krislov, on behalf of Wayne Underwood, filed a petition with the Commission, which was later amended, seeking the same relief as in Cahnman's class action case, namely, a declaration that from July 2002 to March 2010, AT & T violated the pre-March 2010 version of section 735.160(a) of Administrative Code by failing to include postmarks on its bills and that all AT & T customers who paid a late fee during that period were entitled to a refund, an amount totaling more than $126 million.

¶ 12 AT & T filed a motion to dismiss under section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2014)), arguing, in part, that (i) Underwood's petition was time-barred by the two year statute of limitations in section 9-252 of the Public Utilities Act (220 ILCS 5/9-252 (West 2014)); (ii) the petition is barred by the Filed Tariff Doctrine; (iii) the petition improperly sought to bypass prior settlement agreements and judgments resolving the postmark issue; (iv) the petition does not comply with the rules for declaratory relief; and (v) the petition violates the Commission's rules prohibiting class actions. The Commission's staff filed a response supporting AT & T's motion to dismiss.

¶ 13 On February 1, 2017, the Commission issued an order granting AT & T's motion to dismiss. The Commission found that (i) it does not have authority to issue a declaratory finding that AT & T violated the Administrative Code or to order AT & T to issue refunds to all affected

customers; (ii) Underwood's petition is a reparations claim, which fell outside the two year statute of limitations of section 9-252 of the Public Utilities Act, which was not tolled by equitable tolling, class tolling or venue tolling theories, (iii) Underwood's petition improperly attempted to circumvent the terms of the *Morrison* settlement agreement and two prior judgments; and (iv) Underwood's claims are effectively a class action, which the Commission lacks authority to adjudicate. Underwood filed an application for rehearing, which the Commission denied. Underwood appealed.

¶ 14 ANALYSIS

¶ 15 Underwood does not dispute that his claim is a reparations claim under section 9-252 of the Public Utilities Act (220 ILCS 5/9-252 (West 2014)) or that that section 9-252's two year statute of limitations applies. But, Underwood asserts the limitations period was extended by equitable tolling, class tolling, and venue tolling principles. Specifically, he contends the 2005 litigation pursued by his attorney, Krislov, on behalf of a class of AT & T customers, tolled the two year statute of limitations from July 13, 2005 to November 27, 2013, when the Illinois Supreme Court denied the plaintiffs' petition for leave to appeal.

¶ 16 AT & T contends that because section 9-252 of the Public Utilities Act (220 ILCS 5/9-252 (West 2014)) sets a two year time limit for bring reparations claims before the Commission, a state agency, it is a jurisdictional limitation, which cannot be tolled. Alternatively, AT & T asserts that even if section 9-252 could be tolled there is no basis for tolling under any of theories Underwood raises. We agree with AT & T on both counts and thus, we affirm the Commission's dismissal.

¶ 17 Illinois has consistently held that time limitations on bringing actions before administrative agencies are matters of jurisdiction that cannot be tolled. *Fredman Brothers*

Furniture Co. v. Department of Revenue, 109 Ill. 2d 202, 209-10 (1985). In *Fredman Brothers*, our supreme court recognized a distinction between ordinary statutes of limitations and statutes that both confer jurisdiction and fix a time within which such jurisdiction may be exercised. *Id.* at 209. The court stated that where the court is in the exercise of special statutory jurisdiction, "if the mode of procedure prescribed by statute is not strictly pursued, no jurisdiction is conferred on the circuit court." *Id.* at 210. A statute of limitations that is jurisdictional is not subject to tolling. See *Robinson v. Human Rights Comm'n*, 201 Ill. App. 3d 722, 729 (1990) (requirement under Human Rights Act that charge be filed within 180 days after violation was committed is jurisdictional and not subject to defense of tolling). Thus, because this is a reparations claim under section 9-252 of the Public Utilities Act, (220 ILCS 5/9-252 (West 2014), it is jurisdictional and not subject to tolling.

¶ 18 In his reply brief, Underwood contends section 9-252 and its two year statute of limitations should not apply; he challenges the legality of AT & T charging late fees absent a proper postmark rather than the applicable rate or the amount of a charge. But, even if we were to accept his contention, none of the theories he proffers—equitable, venue, or class tolling—apply to his petition.

¶ 19 Equitable Tolling

¶ 20 "Generally, the doctrine of equitable tolling permits a court to excuse a plaintiff's failure to comply with a statute of limitations where 'because of disability, irremediable lack of information, or other circumstances beyond his control,' the plaintiff cannot reasonably be expected to file suit on time." *Williams v. Board of Review*, 241 Ill. 2d 352, 360 (2011) (quoting *Miller v. Runyon*, 77 F.3d 189, 191 (7th Cir.1996)). Equitable tolling requires a showing of due diligence by the plaintiff. *Williams*, 241 Ill. 2d at 372. "Due diligence is a 'fact-specific inquiry,

guided by reference to the hypothetical reasonable person [ ]' * * *." *Williams*, 241 Ill.2d at 372 (quoting *Former Employees of Siemens Information Communication Networks, Inc. v. Herman*, 24 Ct. Int'l Trade 1201, 1208 (2000)). But, "where the evidence leaves no room for a reasonable difference of opinion, the court may properly resolve such issues as a matter of law." *Mackereth v. G.D. Searle & Co.*, 285 Ill. App. 3d 1070, 1077 (1996). While Illinois recognizes equitable tolling, rarely is it applied. *American Family Mutual Insurance. Co. v. Plunkett*, 2014 IL App (1st) 131631, ¶ 33.

¶ 21 As the Commission noted, Underwood cites *Williams* but makes no attempt to address or invoke the conditions in *Williams* to show why equitable tolling applies. He asserts in his brief that equitable tolling should be applied because his attorney had claims before the Illinois courts from 2005 through 2013. Although that may be grounds for class tolling, they are not a basis for equitable tolling, and absent facts showing why he could not reasonably be expected to file his petition on time, we reject his argument.

¶ 22 Venue Tolling

¶ 23 Underwood next contends the statute of limitations should be tolled under the principle of venue tolling. Specifically, he asserts that during earlier proceedings, namely the *Cahnman* litigation, AT & T argued that the circuit court was the improper venue for a reparations claim, an argument this court agreed with in affirming the circuit court's dismissal of Cahnman's class action complaint. *Cahnman v. SBC Illinois d/b/a AT&T Illinois, Illinois Bell*, 2013 IL App (1st) 113350-U (unpublished order under Supreme Court Rule 23). Underwood argues that because Cahnman filed a claim in the wrong venue, the statute of limitations on Underwood's petition was tolled until November 27, 2013, when the Illinois Supreme Court denied Cahnman's request for leave to appeal.

¶ 24 To support his venue tolling claim, Underwood relies on section 2-104 of the Code of Civil Procedure: "No action shall abate or be dismissed because commenced in the wrong venue if there is a proper venue to which the cause may be transferred." 735 ILCS 5/2-104 (West 2014). But, section 2-104 applies to cases timely filed in the wrong venue that need to be transferred to another venue. For instance, in *Kane County Defenders, Inc. v. Pollution Control Board*, 139 Ill. App. 3d 588, 590 (1985), this court found that "a cause of action * * * timely filed in the wrong venue and then transferred to the proper venue after the statutory filing period has expired * * * remains timely filed." In *Kane County Defenders*, the appellants filed their appeal in the Appellate Court for the First District when it should have been filed in the Appellate Court for the Second District. *Id*. at 590. Because the venue was essentially the same forum (the appellate court), the action could be transferred and the cause remained unaffected.

¶ 25 In contrast, Cahnman filed a declaratory petition for reparations in the circuit court although the Utilities Act required him to file it with the Commission. Thus, his case was not being transferred from one improper venue to a proper venue, as contemplated by section 2-104. Moreover, Cahnman's case and Underwood's case are separate proceedings, and section 2-104 does not apply to toll the statute of limitations for a different party and a different proceeding entirely. Nothing that occurred in Cahnman's case precluded Underwood from filing his petition with the Commission.

¶ 26 Class Tolling

¶ 27 Lastly, Underwood contends that prior class action cases involving the issues he raises tolls the statute of limitations. It is well established when a class action is filed, the statute of limitations normally is tolled for all putative plaintiffs. See *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974); *Steinberg v. Chicago Medical School*, 69 Ill.2d 320, 342 (1977).

In *American Pipe & Construction Co*., the United States Supreme Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. 538. Further, the supreme court specified that the rule applied to cases in which "class action status [was] denied solely because of failure to demonstrate that 'the class is so numerous that joinder of all members is impracticable,'" in accordance with the requirements of the Federal Code of Civil Procedure (Fed. R. Civ. P. 23(a)). *Id*. at 552-53. Later, this doctrine was expanded so that a class action suspends the limitations period as to asserted members of the class whether they choose to intervene or file separate, individual actions following the denial of class certification. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983).

¶ 28 Underwood argues that the 1994 class action suit (*Morrison*), which resulted in the settlement agreement and the 2005 motion to enforce the 1994 settlement agreement, was a continuous class action lawsuit that tolled the statute of limitations on Underwood's petition until November 27, 2013, when the supreme court denied leave to appeal the enforcement action. The *Morrison* litigation was dismissed in 1994. In 2005, Krislov filed a motion in circuit court to enforce the settlement agreement and this court found that it was a breach of contract action rather than a class action lawsuit. *In re Illinois Bell Telephone Link Up II & Late Charge Litigation*, 2013 IL App (1st) 113349, ¶ 19. Even if we agreed with Underwood that the *Morrison* litigation and the 2005 enforcement action were a continuous class action lawsuit, Underwood would not have been a putative member of the class in the *Morrison* litigation, because he was not an AT & T customer at that time. As the Commission found, the "only class action filed regarding this matter was dismissed with prejudice on March 4, 1994, pursuant to a Circuit Court approved settlement agreement. There is no evidence of any class action suit filed

or certified regarding the issues presented here for which Mr. Underwood was a member; therefore, no tolling would arguably apply."

¶ 29 Moreover, class tolling applies when a court declines to certify a class in a class action lawsuit. The limitations period for individual class members is deemed tolled so that each class member can have time to file an individual claim. The earlier cased involving AT & T's postmark practices did not involve a court declining class certification. The 1994 case was settled, the 2005 enforcement motion was denied for failure to produce evidence of causation or damages, and Cahnman's 2010 class action was dismissed for lack of jurisdiction. Thus, class tolling does not apply.

¶ 30 Because section 9-252's two year statute of limitations applied to Underwood's reparations claim and he failed to present facts or law supporting his tolling arguments, the Commission properly dismissed his petition. Accordingly, we need not reach the additional bases for the Commission's dismissal.

¶ 31 Affirmed.