SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

CLIENT EARTH, U.S. PIRG EDUCATION FUND, and ENVIRONMENT AMERICA RESEARCH & POLICY CENTER Plaintiffs, v. WASHINGTON GAS LIGHT COMPANY, Defendant.	Case No. 2022 CA 003323 B Judge Danya A. Dayson

ORDER

This matter comes before the Court on Defendant Washington Gas Light Company's Opposed Special Partial Motion to Dismiss, filed September 19, 2022, and it's Opposed Motion to Dismiss, filed on November 8, 2022. Plaintiff filed its oppositions on October 19, 2022, and January 12, 2023, respectively. For the reasons contained herein, the Motion to Dismiss is granted and the Special Partial Motion to Dismiss is denied as moot.

BACKGROUND

This matter was brought by Plaintiffs, ClientEarth, U.S. PIRG Education Fund, and Environment America Research & Policy, against Defendant, Washington Gas Light Company ("WGL"), under the District of Columbia Consumer Protection Procedures Act ("CPPA"). Plaintiffs brought this claim on behalf of the general public and DC consumers, alleging that Defendant is engaging in misleading and deceitful marketing, in violation of the CPPA. Plaintiffs allege that Defendant's statements and advertisements describing its product as "clean" and "sustainable," despite the production and use of natural gas being harmful to the environment, are

misleading to consumers. Plaintiffs filed the instant Complaint on July 28, 2022, seeking a declaratory injunction preventing Defendant from continuing to make such misleading claims.

On September 19, 2022, Defendant filed its Opposed Special Partial Motion to Dismiss ("Partial Motion"), arguing that Defendant's speech is protected under the Anti-SLAPP Act as it concerns Defendant's exercise of the right of advocacy, and concerns the public interest. Plaintiffs opposed the Partial Motion, arguing that the statements at issue are not protected, as they are made for commercial purposes. Defendant filed its Opposed Motion to Dismiss ("Motion") on November 8, 2022, arguing that the case should be dismissed as the Court does not have jurisdiction over Defendant, as jurisdiction for complaints against Defendant resides with the Public Service Commission, and further, that this claim does not fall under the CPPA, as the CPPA exempts suits against individuals regulated by the Public Service Commission. Plaintiffs filed an opposition, arguing that the claim is valid under the CPPA, and further, that they are not required to exhaust their remedies with the Public Service Commission before filing in Superior Court, as Plaintiffs do not have any right to bring this cause of action to the Public Service Commission.

LEGAL STANDARD

Under D.C. Super. Ct. Rule 12(b)(1), a party may move to dismiss a complaint for lack of subject matter jurisdiction. The question of subject matter jurisdiction concerns the authority of the court to hear the type of case or controversy presented. *Davis & Assocs. v. Williams*, 892 A.2d 1144, 1148 (D.C. 2006). "A challenge to a plaintiff's standing is properly raised as a challenge to the court's subject matter jurisdiction via a motion to dismiss under Super. Ct. Civ. R. 12 (b)(1). *UMC Dev., LLC v. District of Columbia*, 120 A.3d 37, 43 (D.C. 2015). In determining standing Courts "generally adhere to the case and controversy requirement of Article III as well as prudential principles of standing" and "look to federal standing jurisprudence, both constitutional

and prudential, when considering issues of standing." *Riverside Hosp. v. D.C. Dep't of Health*, 944 A.2d 1098, 1104 (D.C. 2008). "[A] plaintiff in our local courts must adequately allege that (1) [they] suffered an injury in fact, (2) the injury is fairly 'traceable to the defendant's action,' and (3) the injury will likely be 'redressed' by a favorable decision." *UMC Dev., LLC v. District of Columbia*, 120 A.3d at 42–43 (quoting *Daley v. Alpha Kappa Alpha Sorority, Inc.*, 26 A.3d 723, 728–29 (D.C. 2011)). Courts have additionally summarized the "prudential principles" as requiring "(1) that 'the plaintiff generally must assert his own legal rights and interests,' (2) that courts avoid 'abstract questions of wide public significance which amount to generalized grievances,' and (3) that '[a] plaintiff's complaint fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Riverside Hosp. v. D.C. Dep't of Health*, 944 A.2d at 1104 (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474 (1982)). The Plaintiff bears the burden to establish standing." *UMC Dev., LLC v. District of Columbia*, 120 A.3d at 43.

ANALYSIS

In its Motion to Dismiss, Defendant argues that this Court does not have jurisdiction to hear this case, and further that the claims at issue are not actionable under the CPPA. Defendant first argues that actions against WGL, as a statutorily defined gas company, must first be heard by the Public Service Commission ("the PSC"), before becoming reviewable by the Court of Appeals. Mot. at 3. Defendant argues that until all of the clearly defined statutorily required administrative remedies have been exhausted this Court does not have the authority to hear this case. *Id*. at 3-4. Defendant argues that the use of the word "shall" in WGL's enabling statute, DC Code § 34-605, stating that the Commission *shall* have supervision over gas companies and *shall* have the power to enforce provisions of the subtitle, creates a clear jurisdictional bar against this matter being

brought before this Court. *Id*. at 5-6. Defendant next argues that even if the statutory language does not create a jurisdictional bar, the DC Court of Appeals still requires that plaintiffs exhaust their administrative remedies, wherever possible, before turning to the courts, which Defendant argues Plaintiffs have not done. *Id*. at 7. Defendant then argues that even should the Court find that it has jurisdiction over this matter, Plaintiffs have failed to state a claim for relief under the CPPA, as the CPPA, by its own terms does not apply to "persons subject to regulation by the Public Service Commission of the District of Columbia," which includes gas companies like WGL. *Id*. at 8. Defendant relies on *Gomez v. Indep. Mgmt. of Delaware, Inc.*, in which the Court of Appeals determined that the DC Council's 2000 Amendments to the CPPA, which removed the express link between the Department of Consumer and Regulatory Affairs' (DCRA) jurisdiction and CPPA jurisdiction over landlord-tenant cases, was not intended to expand the scope of the CPPA. 967 A.2d 1276 (D.C. 2009). The appellants in that case argued that the Council's removal of the linking language indicated an intent to expand the scope of the CPPA to include those areas once precluded because of the limits to DCRA jurisdiction. The *Gomez* court concluded that it would not have made sense for the Council to "'preserve the language which linked the scope of the private action to the jurisdiction to the DCRA,' given that the Department could not enforce the CPPA at [the] time [of the amendment]." *Gomez*, 967 A.2d at 1287. Defendant argues that *Gomez* is not limited to landlord tenant affairs, as the Court of Appeals expressly rejected the notion that "the Council, although silent on the matter, intended to extend the reach of the CPPA not only to landlord-tenant relations but also to persons regulated by the Public Service Commission." Mot. at 10. Defendant argues that, significantly, the DC Council has since passed legislation in response to *Gomez* allowing CPPA private actions arising from landlord-tenant relations but has not similarly expanded the private right of actions for other exempted entities, such as those regulated by the

Public Service Commission. *Id*. Finally, Defendant argues that the statements at issue in the instant suit are constitutionally protected speech, as they are not commercial in nature, but rather political and related to advocacy, and therefore not actionable under the CPPA, even if such a claim could be brought against WGL under the statute. *Id*. At 11.

Plaintiffs filed an opposition, arguing that WGL's statements are actionable under the CPPA, that the Commission does not have jurisdiction over Plaintiffs' private right of action on behalf of the general public of the District of Columbia, and that the First Amendment does not protect WGL's commercial statements. Plaintiffs first argue that the CPPA is not precluded from *generally* applying to entities regulated by the PSC, but rather, the restriction refers back to the statute's original establishment of the DCRA as an agency that was vested with the power to investigate and remedy consumer complaints. Opp'n at 4-5. Plaintiffs argue that while WGL is in part regulated by the PSC, this is not a lawsuit brought by the DCRA, but rather, is brought by a public interest organization on behalf of the general public, as expressly permitted under the CPPA. *Id*. Plaintiffs further argue that *Gomez* is not applicable, as the Court's holding in *Gomez* found that the CPPA was not meant to address violations of the Sale Act, and unlike *Gomez*, the instant suit does not allege that WGL violated any statute *other than the CPPA. Id*. at 6. Plaintiff next argues that the PSC does not have jurisdiction over Plaintiffs' private right of action on behalf of the general public, and therefore Plaintiffs have not failed to exhaust their administrative remedies. Plaintiffs argue that the PSC's statutory authority over dispute resolution for public utilities and consumers "does not amount to exclusive jurisdiction over consumer-protection claims nor establish that the legislature intended jurisdictional exhaustion to apply to matters that fall within the powers it provided for the PSC in Title 34." *Id*. at 8. Plaintiffs contend that WGL has selectively chosen subsections of Title 34 to argue that this Court does not have jurisdiction,

when in fact, the subsections highlighted by WGL merely restrict this Court's jurisdiction over specific matters related to public utilities, not all general consumer protection matters. *Id*. at 10. Plaintiffs argue that because the PSC's enabling statute does not require, nor does it even permit, Plaintiffs to bring the instant claim before the PSC, Plaintiffs are not required to exhaust any administrative remedies before approaching this Court. *Id*. Finally, Plaintiffs argue that the statements at issue, described by Plaintiffs as advertisements, are in fact commercial speech, and are therefore not protected under the First Amendment. *Id*. at 11.

In construing a statute, the Court's objective "is to ascertain and give effect to legislative intent." *United States v. Facon*, 288 A.3d 317, .328 (D.C. 2023). First, the Court looks to the plain language of the statute and determines whether the language is ambiguous or if the literal meaning leads to absurd consequences. *Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 754 (D.C. 1983) ("[W]e must first look at the language of the statute by itself to see if the language is plain and admits of no more than one meaning."). The "unambiguous statutory language trumps all other considerations." *Cass v. District of Columbia*, 829 A.2d 480, 485 (D.C. 2003).

The Court recognizes, however, that "even where the words of a statute have a 'superficial clarity,' a review of the legislative history or an in-depth consideration of alternative constructions that could be ascribed to statutory language may reveal ambiguities that the court must resolve." It thus is "a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." And "we may also look to the legislative history to ensure that our interpretation is consistent with legislative intent." *Peoples Drug Stores*, 470 A.2d at 754.

Furthermore, where there are potential conflicts between the plain language either within or between statutes, courts "have a duty to make 'every effort' to reconcile allegedly conflicting

statutes and to give effect to the language and intent of both, as long as doing so does not deprive one of the statutes of its essential meaning." *District of Columbia v. Smith*, 329 A.2d 128, 130 (D.C. 1974). "The cardinal principle of statutory construction is to save and not to destroy." *Teachey v. Carver*, 736 A.2d 998, 1004 (D.C. 1999) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937)). Additionally, while not binding on this Court, courts in other jurisdictions have further found that "[a] 'cardinal rule' of statutory construction provides that, when two statutes arguably overlap, the statute which more specifically addresses the issue at hand controls." *Purdy v. Cap Gemini Am., Inc*., 248 Wis. 2d 804, 817 (2001) (citing *State v. Jones (In re Return of Prop.)*, 226 Wis. 2d 565, 576 (1999)).

The Court first finds that WGL, as a gas company, is exempt from the enforcement procedures detailed in § 28-3905 of the CPPA. Pursuant to the CPPA, the Department of Licensing and Consumer Protection, the agency charged with enforcing the CPPA, does not have enforcement jurisdiction over persons regulated by the Public Services Commission. The CPPA states that "[t]he Department may not … apply the provisions of section 28-3905 to …(B) persons subject to regulation by the Public Service Commission of the District of Columbia." D.C. Code § 28-3903(c)(2)(B)(hereinafter "the public utilities exemption"). The Public Service Commission is a statutorily created body charged with "insur[ing] every public utility doing business within the District of Columbia is required to furnish service and facilities reasonably safe and adequate and, in all respects, just and reasonable." D.C. Code § 1-204.93. All gas companies fall under the general jurisdiction of the Public Service Commission. D.C. Code §34-301. The Public Utilities Act provides an exception to the public utilities exemption, stating that "[t]his chapter shall not be construed to exempt natural gas suppliers from otherwise applicable District of Columbia or federal consumer protection laws." D.C. Code § 34-1671.13. Thus, if WGL may be understood to

be a natural gas supplier, rather than, or in addition to, a gas company, it would be subject to the CPPA. However, this exception does not apply to WGL, as it is a gas company, rather than a natural gas supplier and those two terms are substantively distinct for purposes of the statute.

As an initial matter, the Court looks to whether the CPPA applies to WGL by virtue of its plain language. In setting out the powers of the consumer protection agency, § 28-3903 states that "The Department may not…apply the provisions of section 28-3905 to…persons subject to regulation by the Public Service Commission of the District of Columbia." D.C. Code § 28-3903(c)(2)(B). This provision has been largely unchanged from the CPPA's initial implementation in 1976 when the Consumer Protection Agency was founded. The original D.C. law, as reported on by the Committee on Public Services and Consumer Affairs, stated that "[t]he following businesses are exempt from complaint cases under section 6… (B) public utilities and securities brokerage…" D.C. Council Rep. Bill No. 1-253, at 17 (1976). WGL, as a gas company, falls squarely into these exemptions for public utilities and "persons subject to regulation by the Public Service Commission of the District of Columbia." While the Court acknowledges that the Public Service Commission was conceived of to regulate matters concerning the provision of services, such as bills and rates, rather than large scale consumer protection complaints, the plain language of the CPPA here exempts all individuals "regulated by the Public Services Commission," without any regard to what that regulation might entail. Importantly, the Court of Appeals has previously rejected attempts to expand the CPPA's reach to areas it is explicitly precluded by D.C. Code §28-3903, which includes "persons subject to regulation by the Public Service Commission of the District of Columbia." D.C. Code §28-3903(c)(2)(B). As the Court in *Gomez* found, "there is no indication whatsoever that the Council intended by deleting this language [related to the jurisdiction of the agency charged with consumer protection at the time] to expand the reach of

the CPPA. Significantly, the Council did not repeal the express limitations on DCRA activities set forth in D.C. Code § 28-3903 (c) (2001)." *Gomez*, 967 A.2d at 1287.

In *Gomez,* the Court was faced with the question of whether a landlord's transfer of property through subsidiary companies to a new owner, without first offering sale to the tenants residing in the property, violated the CPPA. The tenant Appellants in *Gomez* alleged that the owner of the building violated both the Rental Housing Conversion and Sale Act, as well as the CPPA, when he transferred ownership of the building first to a subsidiary company of the original ownership company, and then transferred ownership of the subsidiary company to the buyer, rather than selling the property outright. The Court of Appeals found that the CPPA did not apply, concluding not only that the Sale Act already applies to such situations, but further that "the Council has expressly forbidden the DCRA to apply the administrative remedies of the CPPA to landlord-tenant relations." *Id.* at 1286. The Court rejected the argument that an earlier amendment to the statute, which removed the explicit link between the scope of private civil actions under the CPPA to the jurisdiction of the DCRA, was intended to extend the private right of action, especially as the Court noted that the Council had not made any changes to the explicit exemptions specific to landlord and tenant actions. *Id.* While Plaintiffs contend that *Gomez* is not applicable to the instant matter due to its specific context in the realm of landlord-relations, the Court in *Gomez* explicitly states the logic of appellant's position in that case would dictate that the Council intended to expand the reach of the CPPA over not just landlord-tenant relations, but "also to persons regulated by the Public Service Commission, to professional services of clergymen, lawyers, and Christian Science practitioners, to television or radio broadcasting stations, and to the other entities listed in [§28-3903(c)(2)]" but that "[n]othing in the plain language of the statute or its legislative history indicates that the legislature intended such a dramatic expansion of the Act." *Id.* at 1288.

Plaintiffs further contend that *Gomez*'s discussion of the Council's intention not to expand the CPPA is outdated in light of the D.C. Council's 2012 and 2018 amendments "which sought to underscore the Council's intent that the CPPA be 'applied liberally to promote its purpose,'" however, those amendments notably did not alter the explicit exemptions from the CPPA set out in §28-3903(c)(2). Moreover, while the Plaintiff argues that this Court's jurisdiction is restricted regarding specific matters related to public utilities, not all general consumer protection matters, the language of the stature restricts application of the CPPA to classes of parties as it relates to public utilities, not subject matter as it does for other exceptions. For instance, D.C. code §28-3903(c)(2)(A) and (C) both prohibit the application of the CPPA to subject matter areas – landlord and tenant relations and the professional services of identified classes of parties. In contrast, D.C. code §28-3903(c)(2)(B) prohibits the application of the CPPA to a class of parties- that is, "persons subject to regulation by the Public Service Commission of the District of Columbia," without limitations on the subject matter related to that prohibited class.

The Court next looks to whether any provision of the Public Utilities Code removed WGL from the CPPA's exemption. Plaintiffs argue that even in the face of the CPPA's explicit exemption for entities regulated by the PSC, Title 34 of the Code specifically preserves the public's access to the Courts on issues concerning natural gas suppliers. Plaintiffs point to DC Code §34-1671.13, which states that "[t]his chapter shall not be construed to exempt natural gas suppliers from otherwise applicable District of Columbia or federal consumer protection laws." In determining whether this provision exempts WGL from the protection of the PSC's regulation to allow it to fall under the CPPA, the Court looks to the plain language of the statute. *Peoples Drug Stores, Inc.*, 470 A.2d at 754.

Title 34 of the DC Code specifically defines both "gas company" and "natural gas supplier" as distinct and mutually exclusive categories. § 34-1671.02(11)-(12). Under the statute, "Gas company" is defined as "a person regulated by the Commission that owns or controls the distribution facilities required for the transmission and delivery of natural gas to customers." § 34-1671.02(11). "Natural gas supplier" is defined as "a person including an aggregator, broker, or marketer, who sells natural gas or purchases, brokers, arranges or, markets natural gas for sale to customers. The term shall not include a person that supplies natural gas exclusively for its own consumption or the consumption of one or more of its affiliates. The term shall not include the following: … (E) The gas company." §34-1671.02(12). The legislative history of this section supports a reading of these terms as distinct. Following public comment and debate, the subcommittee report for the Subcommittee on Public Interest notes that the original definition of "Natural Gas Supplier" included "natural gas local distribution company," which was deleted following concerns voiced by WGL that the definition of retail natural gas supplier should not include the local distribution company. D.C. Council Rep. Bill No. 15-679, at 7 (2004). In response to these concerns, the subcommittee deleted the term "natural gas local distribution company," replacing it with "gas company" and removing the reference to the natural gas local distribution company from the definition of "Natural Gas Supplier." *Id*. at 13. The provision relied on by Plaintiffs specifies that it only applies to natural gas suppliers but does not mention gas companies. The legislative history of the section similarly states that natural gas *suppliers* are not exempt from other applicable consumer protection laws, again with no mention of gas *companies*. *Id*. At 17. In determining the meaning of statutory terms, the Court has a duty to interpret statutory provisions in a manner that does not render other provisions obsolete. *See Teachey,* 736 A.2d at 1004. Where, as here, the Council specifically defined both natural gas suppliers and gas companies, and

explicitly excluded gas companies from the definition of natural gas suppliers, the Court cannot assume that the Council intended to include gas companies in this exception to the public utilities exemption. Therefore, the Court does not find that Title 34 of the CPPA allows application of the CPPA to a gas company regulated by the PSC, where the CPPA explicitly exempts such entities from its subject matter jurisdiction.

CONCLUSION

Accordingly it is this 31st day of August 2023, hereby

ORDERED that Defendant's Motion to Dismiss is **GRANTED**; and it is

FURTHER ORDERED that the Defendant's Special Motion to Dismiss is **DENIED AS MOOT**.

SO ORDERED.

Danya A. Dayson
Associate Judge, D.C. Superior Court

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