

307 A.D.2d 676, *; 763 N.Y.S.2d 371, **;
2003 N.Y. App. Div. LEXIS 8539, ***

LEXSEE 307 AD2D 676

Carole Bullard et al., Appellants, v. State of New York, Respondent.

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**SUPREME COURT OF NEW YORK, APPELLATE DIVISION, THIRD
DEPARTMENT**

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July 31, 2003, Decided

July 31, 2003, Entered

SUBSEQUENT HISTORY: Related proceeding at *Byrd v. Goord*, 2005 U.S. Dist. LEXIS 18544 (S.D.N.Y., Aug. 26, 2005)

DISPOSITION: [***1] Order affirmed.

COUNSEL: Levy, Phillips & Konigsberg, New York City, (Barbara J. Olshansky of counsel) and The Center for Constitutional Rights, New York City, for appellants.

Eliot Spitzer, Attorney General, Albany, (Robert M. Goldfarb of counsel), for respondent.

JUDGES: Before: Crew III, J.P., Peters, Spain, Rose and Kane, JJ. Crew III, J.P., Spain, Rose and Kane, JJ., concur.

OPINION BY: Peters

OPINION: [*676] [**372] Peters, J. Appeal from an order of the Court of Claims (Collins, J.), entered May 1, 2002, which granted defendant's motion to dismiss the claim.

Claimants are recipients of telephone calls from inmates at correctional facilities maintained by the Department of Correctional Services (hereinafter DOCS). Pursuant to a contract dated April 1, 1996 with MCI Worldcom, Inc. and its subsidiary, MCI Telecommunications Corporation (hereinafter collectively referred to as Worldcom), DOCS operates a program that permits inmates to make telephone calls to designated friends or family from coinless telephones by use of a collect call system. The contract with Worldcom was [**373] the result of a [**2] competitive bidding process. Bidders were required to meet extensive security and monitoring requirements, which included the capacity to block, store and record all phone calls; DOCS was also to receive a commission of no less than 47% of [*677] the gross monthly revenue generated by these calls. n1 Pursuant to statutory requirements,

Worldcom filed its interstate telephone rates with the Federal Communications Commission (hereinafter FCC) and its intrastate rates with the Public Service Commission (hereinafter PSC) (47 USC § 201; Public Service Law § 92). On December 16, 1998, the PSC approved the proposed rates; they have remained unchanged.

n1 The stated purpose of this commission was to fund a legislatively established family benefit program.

On September 27, 2000, claimants, on behalf of themselves and others, alleged that the Worldcom agreement infringed upon their rights to due process, freedom of speech and equal protection [***3] (*see* NY Const, art I, §§ 6, 8, 11). They further alleged that DOCS, through the agreement, imposed an unlawful tax and/or regulatory fee (*see* NY Const, arts III, XVI), violated General Business Law §§ 340 and 349, and tortiously interfered with their contractual rights to use alternative carriers offering call options at lower rates. Among other things, claimants sought an accounting and monetary damages incurred between April 1, 1996 and December 31, 1998. In 2002, defendant moved for summary judgment on numerous grounds, including a lack of both subject matter and personal jurisdiction, the existence of a federal action n2 and a preclusion of the claim by the "filed rate" doctrine. Claimants opposed the motion and sought class action status.

n2 There was a companion action filed in the United States District Court for the Southern District of New York on March 21, 2000.

The Court of Claims dismissed the action finding

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that claimants failed to timely commence it either within 90 days of its accrual [***4] pursuant to Court of Claims Act § 10 (3) or (3-b) or within six months of the accrual date relative to any claim subject to the residual time limitation in Court of Claims Act § 10 (4). It determined that the accrual date was April 1, 1996, the date that DOCS entered into the agreement with Worldcom and that damages were ascertainable at least by December 17, 1998, the day *after* the PSC approved the rate plan. Claimants appeal.

As it is settled that the Court of Claims does not obtain jurisdiction unless there is a timely filing of a claim or a notice of intention to do so (*see* Court of Claims Act § 10; *Selkirk v State of New York*, 249 A.D.2d 818, 819, 671 N.Y.S.2d 824 [1998]), we agree that the claim was properly dismissed as untimely. All allegations stem from the April 1, 1996 agreement with Worldcom and the rates thereafter approved by the PSC on December 16, 1998--the date after which damages were reasonably ascertainable (*see* [*678] *Commack Self-Serv. Kosher Meats v State of New York*, 270 A.D.2d 687, 688, 704 N.Y.S.2d 737 [2000]; [***5] *Conner v State of New York*, 268 A.D.2d 706, 707, 701 N.Y.S.2d 481 [2000]). Any contention that subsequent contractual agreements created a variant accrual date is unavailing, since the original contract detailed an option to renew for two one-year terms.

Nor do we find merit in claimant's contention that the continuing violation doctrine is applicable (*see Selkirk v State of New York, supra* at 819; *Smith v State of New York*, Ct Cl, July 8, 2002, Read, J., Claim No. 101720). While claimants characterize the damages sustained after every completed [*374] telephone call as continuing unlawful acts, we find that they are more appropriately viewed as the continuing effects of the April 1, 1996 Worldcom contract, which claimants challenged earlier as "unlawful conduct" (*Commack Self-Serv. Kosher Meats v State of New York, supra* at 688, quoting *Selkirk v State of New York, supra* at 819). Moreover, we agree with the Court of Claims that claimants did not meet the discretionary standards of Court of Claims Act § 10 (6) (*see Lichtenstein v State of New York*, 93 N.Y.2d 911, 912, 690 N.Y.S.2d 851, 712 N.E.2d 1218 [1999]) in the absence of a prior [***6] request to file a late claim (*see Selkirk v State of New*

York, supra at 819-820). Additionally, since the alleged injury asserted by claimants arose directly from their payment of the filed rate approved by the PSC, "[t]he filed rate doctrine bars [judicial proceedings] against regulated utilities grounded on the allegation that the rates charged by the utility are unreasonable" (*Matter of Concord Assoc. v Public Serv. Commn.*, 301 A.D.2d 828, 830-831, 754 N.Y.S.2d 93 [2003], quoting *Wegoland Ltd. v NYNEX Corp.*, 27 F.3d 17, 18 [1994]; *see Smith v State of New York, supra*).

Next addressing claimants' reliance upon *Brown v State of New York* (89 N.Y.2d 172, 184, 652 N.Y.S.2d 223, 674 N.E.2d 1129 [1996]) to justify a monetary award against defendant predicated upon a constitutional tort cause of action, we find that *Brown*, tempered by *Martinez v City of Schenectady* (97 N.Y.2d 78, 735 N.Y.S.2d 868, 761 N.E.2d 560 [2001]), supports the Court of Claims' determination that claimants had an alternative remedy through a CPLR article 78 proceeding [***7] (*see Matter of Cahill v Public Serv. Commn.*, 113 A.D.2d 603, 605, 498 N.Y.S.2d 499 [1986], *affd* 69 N.Y.2d 265, 513 N.Y.S.2d 656, 506 N.E.2d 187 [1986], *certs denied* 484 U.S. 829, 830, 98 L. Ed. 2d 61, 108 S. Ct. 100 [1987]). Notably, the Court of Appeals clarified that its ruling in *Brown* sought to protect two vital interests: "the private interest that citizens harmed by constitutional violations have an avenue of redress, and the public interest that future violations be deterred" (*Martinez v City of Schenectady, supra* at 83). It further explained that the claimants in *Brown* were limited to [*679] recovery by that action "or nothing" (*id.* at 83). Accordingly, *Martinez* recognized that where an adequate remedy could be provided, "a constitutional tort claim * * * is [not] necessary to effectuate the purposes of the State constitutional protections * * * [invoked] nor appropriate to ensure full realization of [claimants'] rights" (*id.* at 83).

Claimants' remaining arguments have been examined and found to be lacking in merit.

Crew III, J.P., Spain, Rose and [***8] Kane, JJ., concur.

Ordered that the order is affirmed, without costs.