STATE OF MICHIGAN

COURT OF APPEALS

RANDY SNYDER and DIANA SNYDER,

Plaintiffs-Appellants,

v

GRAND VALLEY TITLE COMPANY,

Defendant-Appellee.

UNPUBLISHED
March 5, 1999

No. 206616
Mecosta Circuit Court
LC No. 96-011310 CP

Before: Smolenski, P.J., and Saad and Gage, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a judgment permitting them to recover the $9 fee defendant wrongfully charged them to record the discharge of their mortgage. Plaintiffs challenge on appeal the circuit court's refusal to certify a class so that the action could proceed on a representative basis. We reverse and remand.

Plaintiffs contend that the trial court erred in concluding that they failed to meet the various class certification criteria prescribed by MCR 3.501(A)(1). We review for clear error a trial court's decision whether to certify a class. *Mooahesh v Dep't of Treasury*, 195 Mich App 551, 556; 492 NW2d 246 (1992). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Markillie v Bd of Co Rd Comm'rs of Co of Livingston*, 210 Mich App 16, 22; 532 NW2d 878 (1995).

MCR 3.501(A)(1) establishes five specific, fact-based criteria for determining when it is appropriate to certify a class for a representative action.

> One or more members of a class may sue or be sued as representative parties on behalf of all members in a class action only if:
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> (a) the class is so numerous that joinder of all members is impracticable;
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> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;

(c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

(d) the representative parties will fairly and adequately assert and protect the interests of the class; and

(e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice. [MCR 3.501(A)(1).]

Plaintiffs first argue that the circuit court erred in finding that they failed to satisfy the numerousness requirement because the potential class members identified by plaintiffs would likely fall into several different subgroups, each having a minimal number of members. The court rules do not require a plaintiff to show that a minimum number of individuals will comprise a class, but only that there would be so many members of the class that joinder would be impracticable. MCR 3.501(A)(1)(a). Although the circuit court expressed its concern regarding the number of potential subclasses and the number of members that would occupy each subclass, the court failed to specifically address whether the number of potential class members identified by plaintiffs would make it impracticable to join the members as plaintiffs. In their brief in support of the motion for certification, plaintiffs identified thirteen other transactions in which defendant allegedly improperly charged and kept a $9 release recording fee, and estimated that there would be thousands of members of the class identified at the close of discovery. In fact, by the time plaintiffs had filed their motion for reconsideration, they had provided the circuit court with records of defendant that identified eighty-five potential class members. In light of this large number of potential class members, and keeping in mind the fact that plaintiffs had not even reviewed several applicable years of defendant's records,[1] we conclude that it would be impracticable to join in this action even the eighty-five parties already identified by plaintiffs, and that there is a reasonable likelihood that the class size will be even larger at the completion of discovery. See *Pressley v Wayne Co Sheriff*, 30 Mich App 300, 319-320; 186 NW2d 412 (1971) (finding class action numerousness requirement met by approximately fifty to sixty potential class members when that number fluctuated). Therefore, the trial court erred in finding that plaintiffs failed to satisfy MCR 3.501(A)(1)(a).

Plaintiff next argues that the circuit court erroneously determined that common questions of fact and law would not predominate over questions affecting individual class members. MCR 3.501(A)(1)(b). Regarding plaintiffs' counts alleging fraud, misrepresentation and violations of the Michigan Consumer Protection Act, MCL 445.901 *et seq*.; MSA 19.418(1) *et seq*., the circuit court found common claims among the potential class members and common allegations of defendant's involvement in a scheme of deception. To the extent the court considered, however, that the fraud and misrepresentation claims could not be conveniently administered, we note that the manageability consideration is irrelevant to the independent issue whether common issues of fact and law apply to the class members. *Dix v American Bankers Life Assurance Co of Florida*, 429 Mich 410, 416-417; 415 NW2d 206 (1987).

Regarding plaintiffs' breach of contract count, the circuit court found that the number of different contracts involved would result in more individual questions than common issues. The court misconstrued plaintiffs' breach of contract argument as requiring that it interpret a number of different contracts. To the contrary, plaintiffs' complaint alleged that *all* potential class members had "contracted with Defendant to prepare their closing statements, calculate amounts due the parties to the transaction, and administrate the closings in a manner which was accurate and consistent with the covenants of their various contracts with their mortgagees." This language, as clarified by plaintiffs in subsequent filings and at the motion for certification, alleged that a provision obligating the class members' mortgagees to record their mortgage discharges constituted a common characteristic of the various underlying agreements.[2] Plaintiff claimed that defendant in the same manner breached its agreements with all the potential class members by imposing the discharge recording fee when the various underlying mortgage agreements all had otherwise provided that this fee would be satisfied by the class members' mortgagees.[3] Therefore, because the court misinterpreted plaintiffs' breach of contract argument, we find that the court erred in concluding that questions regarding individual class members' contracts would predominate over any questions common to the class members.

Regarding plaintiffs' negligence claim, the circuit court concluded without explaining its analysis that individual questions would predominate. A review of plaintiffs' complaint reveals that they alleged that defendant owed all potential class members a duty to refrain from imposing statutorily prohibited fees, that defendant breached this duty by charging plaintiffs and others the $9 recording fee, thus proximately causing damage to the potential class members. The court did not explain which negligence elements would involve predominately individual questions, but cited only that plaintiffs' expressed willingness to dismiss the negligence claim was an implicit admission that there would be significant differences within the class. Given that plaintiffs alleged virtually identical wrongful transactions by defendant as the basis for all their claims, we find that the circuit court erred in concluding without explanation that individual questions would predominate over common issues of fact and law. See *Grigg v Michigan National Bank*, 405 Mich 148, 184; 274 NW2d 752 (1979) (commonality does not require every class member to have mirror image complaints against a defendant, there need only be a common question of law or fact to satisfy this portion of the rule).

Plaintiffs also claim that they satisfy MCR 3.501(A)(1)(c)'s requirement that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." This rule ensures that the named plaintiffs, as average members of the class, will share and protect the interests of the class. The lower court did not separately address this factor. Within its discussion of MCR 3.501(A)(1)(d), the court stated simply that "[t]here exist different causes of action which relate to different circumstances applicable to each potential class member." However, to the extent this statement reflects the court's conclusion that plaintiffs' claims would be atypical of other class members' claims, we have not found any evidence in the record that suggests any significant differences between the claims of plaintiffs and the other potential class members. Again, given plaintiffs' allegations that defendant has engaged in the same wrongful conduct toward all the potential class members, we find that the trial court erred to the extent it concluded that plaintiffs possessed atypical claims.

Plaintiffs further argue that the circuit court erred in determining that they could not "fairly and adequately assert and protect the interests of the class." MCR 3.501(A)(1)(d). The trial court did not analyze plaintiffs' competency or motivation to properly notify or represent the class under this criterion. See *Grigg*, *supra* at 170-171. Neither the trial court nor defendant has raised any issue or argument that leads us to believe that plaintiffs could not zealously pursue the interests of the class. Compare *Smolen v Dahlmann Apartments, Ltd*, 127 Mich App 108, 121-122; 338 NW2d 892 (1983).

MCR 3.501(A)(1)(e) requires plaintiffs to show that "the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice." MCR 3.501(A)(2) lists six factors relevant to determining whether a class action is the superior form of suit.[4] Our review of the applicable factors indicates that they weigh in favor of certifying the class. The small amount of money involved in the potential class members' individual claims, the unlikelihood that potential class members would independently discover the wrongful charge, and the costs to the individual class members and the cost in judicial resources involved in separate, individual attempts to collect the charge make the collective nature of the representative action and the notice to class members administratively valuable. Furthermore, defendant has admitted from time to time imposing the $9 discharge recording fee on seller/mortgagors, and we are equally concerned that denying class certification would permit defendant to retain these allegedly wrongful charges. We note however, that our decision that the lower court erred in failing to certify the class does not endorse plaintiffs' allegations as true for every class member, and that defendant is still entitled to mount a vigorous defense.

The circuit court's opinion reveals its reservations regarding its ability to effectively manage a class action, MCR 3.501(A)(2)(c), especially the numerous documents that it believed would be involved. See *Dix*, *supra* at 418-419 (slight differences in facts and law may be manageable; and the relevant concern is whether the issues are disparate).[5] However, the lower court can minimize the burden of this case by carefully defining the class, requiring the parties to clearly flag the relevant language in documents with an appropriate technique, and relying on all of the pretrial procedures that the court rules make available for case management. We note that it is within the court's discretion to define the class and exclude those individuals who do not have this common contract language or who have any other significantly disparate characteristic. MCR 3.501(B)(3). We do not doubt that class actions may be harder to manage than cases with fewer parties, but the facts of this case do not raise any special concerns. Compare *Lee v Grand Rapids Bd of Ed*, 184 Mich App 502; 459 NW2d 1 (1989) (affirming denial of class certification in case challenging school district's sick leave policy regarding pregnancy when there were seven different collective bargaining agreements controlling the issue and widely varying facts underlying each potential class member's application for leave time).

Thus, after examining the relevant considerations prescribed by MCR 3.501(A), we are left with a definite and firm conviction that the circuit court erred in denying plaintiffs' motion to certify.

Lastly, plaintiffs challenge the circuit court's decision to deny their motion to require defendants to pay for class notification pursuant to the Michigan Consumer Protection Act. MCL 445.911(5); MSA 19.418(11)(5). The trial court did not reach this issue, finding it moot in light of its decision to deny class certification. Our disposition of the class certification issue requires that the trial court now

consider whether it would be appropriate to order defendants to pay for class notification. In making that determination the circuit court must consider the likelihood that plaintiffs will succeed on the merits of their suit. MCL 445.911(5); MSA 19.418(11)(5).[6]

Reversed and remanded for class certification and such other proceedings as deemed necessary by the trial court consistent with MCR 3.501. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Hilda R. Gage

[1] Plaintiffs' complaint contained a count based on the Michigan Consumer Protection Act, MCL 445.901 *et seq*.; MSA 19.418(1) *et seq*., which specifically addresses consumer class actions. MCL 445.911; MSA 19.418(11). Under this provision, a six-year statute of limitations applies. MCL 445.911(7); MSA (7). Plaintiffs alleged in their motion for reconsideration that they had "spot check[ed]" defendant's closing files for the period from August 1994 through November 1995 in accumulating the eighty-five potential class members. Given that several applicable years of defendant's records remained unreviewed, the possibility of a still larger number of potential class members exists.

[2] Plaintiffs in their motion to certify specifically requested that the circuit court certify a subclass comprised of those potential class members whose mortgage contracts had "covenants similar or identical to those contained within the Michigan Single Family FNMA/FMLHC Instrument form 3023."

[3] Plaintiffs contend that the class members' mortgagees are statutorily required to satisfy the mortgage discharge recording fee pursuant to the following provision:

> A mortgagee or his personal representative, successor or assign, within 90 days after a mortgage has been paid or otherwise satisfied and discharged, shall prepare and file a discharge thereof with the register of deed for the county where the mortgaged property is located and pay the fee for recording the discharge. [MCL 565.41; MSA 26.558(1).]

[4] Specifically, MCR 3.501(A)(2) provides as follows:

> In determining whether the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice, the court shall consider among other matters the following factors:
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> (a) whether the prosecution of separate actions by or against individual members of the class would create a risk of
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> (i) inconsistent or varying adjudications with respect to individual members of the class that would confront the party opposing the class with incompatible standards of conduct; or

(ii) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

(b) whether final equitable or declaratory relief might be appropriate with respect to the class;

(c) whether the action will be manageable as a class action;

(d) whether in view of the complexity of the issues or the expense of litigation the separate claims of individual class members are insufficient in amount to support separate actions;

(e) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action; and

(f) whether members of the class have a significant interest in controlling the prosecution or defense of separate actions.

[5] The circuit court concluded that it had to deny certification regarding plaintiffs' fraud and misrepresentation claims because "in a fraud action there are too many disparate issues of law and fact for there to be a manageable class action," quoting *Dix*, *supra* at 417. Defendant also cited *Dix* and *Freeman v State-Wide Carpet Distributors, Inc*, 365 Mich 313; 112 NW2d 439 (1961), for the proposition that fraud and misrepresentation class actions are precluded. However, *Dix* and *Freeman* are distinguishable from the instant case. While the plaintiffs seeking class certification in *Dix* and *Freeman* alleged various separate misrepresentations on which potential class members could have relied, *Dix*, *supra* at 412-413 n 3; *Freeman*, *supra* at 315-318, 320, the instant plaintiffs claim that defendant made the same implicit misrepresentation (that it was lawfully imposing fees) in all its written closing statements, that damages in the amount charged by defendant were the same in each case, and that each class member's reliance could be shown through their payment of the mortgage discharge recording fee.

[6] We decline to address the merits of defendant's suggestion that venue in Mecosta County was somehow improper because defendant has waived this issue. MCR 2.221. We also refuse to consider defendant's further comment regarding plaintiffs' motivation in filing their motion to certify because any motivation of plaintiffs is irrelevant to the legal issues involved in this case.