

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 0536

JENNIFER HOOKS AND BEATRICE HOOKS,
Individually and on Behalf of All Others Similarly Situated

VERSUS

BOH BROS. CONSTRUCTION CO., L.L.C.,
ROBERT H. BOH, ROBERT S. BOH, and
XYZ INSURANCE COMPANY

Judgment Rendered: October 29, 2010.

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On Appeal from the
22nd Judicial District Court,
In and for the Parish of St. Tammany,
State of Louisiana
Trial Court No. 2007-15849

Honorable William J. Knight, Judge Presiding

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BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

CARTER, C. J.

Plaintiffs challenge the trial court's decision to deny class action certification in this case. We affirm the trial court's judgment.

FACTS

Plaintiffs, Jennifer Hooks and Beatrice Hooks, filed a class action petition against defendant, Boh Brothers Construction Co., L.L.C. (BOH), claiming property damage and personal injury as a result of allegedly excessive airborne dust and other noxious materials that occurred during maintenance and repair work conducted by BOH in August 2007 on Lopez Street in Slidell, Louisiana.¹ Plaintiffs timely filed a motion to certify their class action, alleging that over 330 individual residences and business establishments within four blocks of Lopez Street suffered from the airborne substances. BOH opposed the class certification.

The trial court held a hearing on plaintiffs' motion to certify the class action, pursuant to LSA-C.C.P. art. 591. At the hearing, plaintiffs introduced a map of the neighborhood affected by the airborne substances and pictures of the dusty material on a variety of items located in the vicinity of Lopez Street. Additionally, plaintiffs presented testimony of three witnesses designated as class representatives, Jennifer Hooks, Beatrice Hooks, and Sylvia Hooks, together with the affidavits of three additional putative class members who were residents of the neighborhood allegedly affected by the airborne substances, Normand Pizza, Tonya Meyer, and Sara Giangrosso. BOH presented the testimony of the company's claims' manager, Jeffery Clement, and the Lopez Street resurfacing project foreman,

¹ Plaintiffs originally named additional defendants, Robert H. Boh and Robert S. Boh individually, but the claims against those defendants were later voluntarily dismissed.

Robert Brown. After the hearing, the trial court permitted the record to be left open for forty-five days for further specified discovery and the filing of post-hearing memoranda. Thereafter, the trial court issued written reasons for denying plaintiffs' motion for class action certification, finding that plaintiffs did not carry their burden of proving numerosity, one of the required elements for certifying a class action. The trial court signed a judgment rendered in accordance with its reasons on October 20, 2009, and plaintiffs timely appealed.

LAW AND ANALYSIS

The trial court's consideration of class action certification involves a two-step process. Therefore, appellate review of the trial court's decision must also follow a two-step analysis: (1) determine whether a factual basis exists for certifying the matter as a class action, and review those factual findings pursuant to the manifest error standard; and (2) if a factual basis exists for certification, then review the trial court's ultimate decision with respect to certification pursuant to the abuse of discretion standard, giving the trial court's decision wide latitude. See Singleton v. Northfield Ins. Co., 01-0447 (La. App. 1 Cir. 5/15/02), 826 So.2d 55, 60-61, writ denied, 02-1660 (La. 9/30/02), 825 So.2d 1200; Hampton v. Illinois Cent. R. Co., 98-0430 (La. App. 1 Cir. 4/1/99), 730 So.2d 1091, 1093-1094. Unless the trial court committed manifest error in its factual findings or abused its discretion in deciding that class certification is appropriate, we must affirm the trial court's determination. Singleton, 826 So.2d at 61.

Article 591A of the Louisiana Code of Civil Procedure sets forth the prerequisites for maintaining a class action, establishing that the use of the class action procedure is appropriate when:

- 1) The class is so numerous that joinder of all members is impracticable.
- 2) There are questions of law or fact common to the class.
- 3) The claims or defenses of the representative parties are typical of the claims or defenses of the class.
- 4) The representative parties will fairly and adequately protect the interests of the class.
- 5) The class is or may be defined objectively in terms of ascertainable criteria, such that the court may determine the constituency of the class for purposes of the conclusiveness of any judgment that may be rendered in the case.

All of the above threshold elements, numerosity, commonality, typicality, adequate representation, and objectivity (definability), must be present to maintain a class action. LSA-C.C.P. art. 591B;² **State v. Ford Motor Co.**, 06-1810 (La. App. 1 Cir. 6/27/07), 965 So.2d 438, 442, writ denied, 07-1580 (La. 10/12/07), 965 So.2d 405. The failure to establish any element precludes certification. **Galjour v. Bank One Equity Investors-Bidco, Inc.**, 05-1360 (La. App. 4 Cir. 6/21/06), 935 So.2d 716, 723.

The initial burden to establish the article 591 elements is on the party seeking to maintain the class action. Conclusory allegations of the pleadings alone are insufficient to establish the existence of a class. **Cotton v. Gaylord Container**, 96-1958 (La. App. 1 Cir. 3/27/97), 691 So.2d 760, 768, writ denied, 97-0800 (La. 4/8/97), 693 So.2d 147. In determining whether these elements have been established, the court may consider the pleadings, affidavits, depositions, briefs, exhibits, and testimony presented at a certification hearing. **Singleton**, 826 So.2d at 62. Class certification is purely procedural. Therefore, the issue at a class certification hearing is

² Paragraph B of article 591 provides additional prerequisites for a class action to be properly certified if the Paragraph A prerequisites are met; however, the additional requirements are not at issue in this appeal.

whether the class action is procedurally preferable, not whether any of the plaintiffs will be successful in urging the merits of their claims or whether the plaintiffs have a cause of action. **Id.**

The first required element, that the persons constituting the class are so numerous as to make joinder impracticable, is commonly referred to as “numerosity.” This element is determined based upon the facts and circumstances of each individual case, and there is no set number above which a class is automatically considered so numerous as to make joinder impractical as a matter of law. **Id.** The key is “impracticality, and not impossibility of joinder.” **Galjour**, 935 So.2d at 723 (quoting 1 Frank L. Maraist and Harry T. Lemmon, *Louisiana Civil Law Treatise: Civil Procedure* § 4.12 (1999)). And although it is not necessary that all potential class members be identified, the party seeking certification should be able to establish a *definable group of aggrieved persons* with plausible claims. **Singleton**, 826 So.2d at 62. See also **Boyd v. Allied Signal, Inc.**, 03-1840 (La. App. 1 Cir. 12/30/04), 898 So.2d 450, 457, writ denied, 05-0191 (La. 4/1/05), 897 So.2d 606; **Hampton**, 730 So.2d at 1094-1095. The simple conclusory allegation of the existence of a large number of potential claimants does not satisfy the necessity to establish the element of numerosity. **Singleton**, 826 So.2d at 63.

In its well-written reasons for judgment, the trial court noted that plaintiffs had the burden of establishing the numerosity element. The trial court stated, in pertinent part:

Plaintiffs contend that they have spoken with various other individuals who have encouraged them to bring this proceeding and who have expressed their interest to participate in this suit. Plaintiffs state in their Post-Hearing Memorandum in Support of Class Certification that “all of the property owners and/or

residents of this area would be members of the putative class.” While plaintiffs specifically define the area of the alleged tort, the mere conclusory statement of “all property owners and/or residents,” along with the testimony of the three live witnesses and three affidavits is simply not enough evidence to satisfy plaintiffs’ burden of proving that the numerosity requirement is met. As stated by the First Circuit in *Hampton v. Illinois Central Railroad Company*, 730 So.2d 1091 (La. App. 1st Cir. 1999), “numerosity is not shown by mere allegations of a large number of potential claimants.” *Id at 1094*. The burden is placed “on the plaintiffs to make a prima facie showing that a definable group of aggrieved persons exist.” *Id at 1095*. In the instant matter, plaintiffs have only specifically identified about ten people who have expressed an interest in pursuing a claim against [BOH]. Therefore, the Court finds that plaintiffs have not carried their burden of proving that the requirement of numerosity is met; and because of this failure with regard to one of the elements necessary for a class action, denial of certification is justified. *Id at 1095*. Since plaintiffs have failed to meet their burden of proof regarding numerosity, the Court will not address the other factors. Accordingly, the Court denies plaintiffs’ Motion to Certify Class Action.

Our review of the record supports the trial court’s factual finding that plaintiffs only identified approximately ten people who were potentially affected by the airborne substances allegedly caused by BOH’s Lopez Street resurfacing project, and who have actually expressed an interest in pursuing a claim against BOH. On the other hand, BOH presented testimony from the foreman in charge of the Lopez Street resurfacing project, as well as the claims manager for BOH. Both witnesses testified that BOH did not receive any complaints about excessive dust on the Lopez Street job until plaintiffs’ lawsuit was filed. Additionally, the foreman testified that the dust on the Lopez Street project was typical of resurfacing jobs, and he did not witness any dust from the job four-to-five blocks away from Lopez Street.

Generally, a class action is appropriate whenever the interested parties appear to be so numerous that separate suits would unduly burden the courts, and a class action would “clearly be more useful and judicially expedient

than the other available procedures.” **Singleton**, 826 So.2d at 63, quoting Cotton 691 So.2d at 769. Such is clearly not the case here. The record indicates that there are approximately ten interested/potentially aggrieved persons. The burden was on plaintiffs to make a prima facie showing that a sufficiently numerous and definable group of aggrieved persons existed, such that joinder of their claims would be impractical. See Boyd, 898 So.2d at 463; **Hampton**, 730 So.2d at 1096. Mere speculation that a large number of people living within a certain neighborhood were possibly exposed to excessive dust does not equate to the establishment of a large group of aggrieved or injured people. See Carr v. Houma Redi-Mix Concrete Co., Inc., 96-1548 (La. App. 1 Cir. 11/10/97), 705 So.2d 213, 215, writ denied, 98-0743 (La. 5/1/98), 718 So.2d 416.

We agree with the trial court’s finding that plaintiffs did not meet their burden of proving numerosity, and we conclude that the trial court did not abuse its discretion in denying class action certification in this case. There was insufficient evidence in the record to demonstrate that the proposed class representatives actually represent a sufficiently large number of persons within a definable geographic area, who were aggrieved by the allegedly excessive dust on the Lopez Street resurfacing project, and who desire to assert claims against BOH. Under these circumstances, a class action would be inefficient and unnecessary; however, if the facts presented to the trial court change, class certification can be re-urged. **Id.**

CONCLUSION

We affirm the trial court’s judgment denying plaintiffs’ motion to certify a class action. Plaintiffs are cast with all costs of this appeal.

AFFIRMED.