JUDITH SULLIVAN AND WILMONT THOMPSON	*	**NO. 2019-CA-0086**
	*	
VERSUS		**COURT OF APPEAL**
	*	
MALTA PARK, DONALD RANKEY, MARIE LETELLIER, WILLWOODS COMMUNITY MANAGEMENT, INC., AND HOMELIFE IN THE GARDENS, LLC	*	**FOURTH CIRCUIT**
	*	
		STATE OF LOUISIANA
	* * * * * * *	

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2013-01355, DIVISION "I-14"
Honorable Piper D. Griffin, Judge
* * * * * *

Judge Paula A. Brown
* * * * * *

(Court composed of Judge Sandra Cabrina Jenkins, Judge Regina Bartholomew-Woods, Judge Paula A. Brown)

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AFFIRMED

MAY 22, 2019

This appeal arises out of a denial of a motion and order to set class certification. Plaintiffs/Appellants, Judith Sullivan and Wilmont Thompson (collectively "Plaintiffs"), residents at Malta Park, an assisted living facility located in New Orleans, Louisiana, filed in the district court an Original Petition (the "Petition") asserting claims against Defendants/Appellees, Malta Park, Donald Rankey, Marie Letellier, Willwoods Community Management, Inc., and Homelife in the Gardens, LLC (collectively "Defendants"). Following, Plaintiffs filed a motion and order seeking class certification of their claims; the motion was denied by the district court. From this judgment, Plaintiffs appeal.

For the reasons set forth below, we conclude that the district court did not err in finding Plaintiffs failed to prove the numerosity requirement for class certification, and we affirm the district court's judgment.

FACTS AND PROCEDURAL HISTORY

Malta Park was an assisted living facility located at 1101 Aline Drive, New Orleans, Louisiana. Mrs. Sullivan resided at Malta Park from December 26, 2011 until November 16, 2012. Mr. Thompson resided at Malta Park from April 21, 2010 to November 19, 2012. Both Mrs. Sullivan and Mr. Thompson are now deceased.

In February 2013, Plaintiffs filed a Petition in Civil District Court for the Parish of Orleans. Plaintiffs alleged that they, or through their representatives, entered a contract to reside in Malta Park, and relied on the assurance that there would be "[p]rofessional [s]taff . . . on site 24 hours a day including L.P.N.s [and] R.C.A.[s]." Plaintiffs allege, amongst other claims, that they paid a $2,000.00 community fee which Malta Park purportedly dedicated to the preservation and maintenance of the building, but no such preservation occurred. Plaintiffs assert breach of contract along with tort claims arising out of the alleged deficient care provided to them by Malta Park while they were residents.[1] Specifically, Plaintiffs asserted the following causes of action: (1) fraud in the inducement, (2) strict liability pursuant to La. C.C.P. art. 2317.1, (3) failure to exercise reasonable and ordinary care over the premises, (4) negligent hiring, (5) a Louisiana Unfair Trade Practice Act claim, (6) breach of state law as to the administration of drugs to residents, (7) breach of fiduciary duty, (8) mental anguish, (9) invasion of Mrs. Sullivan's right to privacy, (10) unjust enrichment for refusal to reimburse for unused portion of rent and unaccounted for $2,000.00 fee, (11) fraud as to documents, (12) negligent misrepresentation, (13) conspiracy, (14) detrimental reliance, (15) conversion, (16) duty to exercise reasonable care as to the premises,

[1] In November 2012, Malta Parks was sold or transferred to Homelife in the Gardens, LLC.

and (17) respondeat superior. Additionally, Plaintiffs alleged that their action satisfied the requirements for maintaining a class action and set forth a proposed class definition, reserving their right to amend the class definition.

Plaintiffs' current proposed class definition is as follows:

> All current and former residents of Malta Park from April 21, 2010 to the present, who entered into contracts of service with the facility and did not receive the contract services provided by the entities and who were forced to pay $2,000.00 each as an unknown entry fee to reside at the facility.[2]

In November 2017, Plaintiffs filed, in the district court, a motion and order to set a class certification hearing. The hearing, scheduled for March 14, 2018, was continued. In June 2018, Defendants filed a motion requesting the certification hearing be rescheduled; the matter was set for hearing in July 2018. Following, Plaintiffs requested a continuance. The district court granted the continuance, the parties consented to submit the matter for decision on the briefs, and the district court ordered that the parties be allowed to file supplemental memoranda, including documents in support of the class certification.

The district court issued a judgment on October 24, 2018, denying Plaintiffs' motion for class certification and set forth written reasons for its judgment.[3] In

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[2] The first proposed class definition provided: "All current and former residents of MALTA PARK Assisted Living Home operating in its current name or assumed names from April 21, 2010 until present who entered into contracts of service with MALTA PARK and did not receive the contract services promised by MALTA PARK."

[3] In its written reasons, the district court succinctly set forth Plaintiffs' petition as follows:

> Plaintiffs' claims are based in tort, breach of contract, and violation of La. R.S. 40:2010.8 which provides for a private right of action. The crux of their argument in favor of class certification is that an overarching scheme on the part of the defendants to cut costs and maximize profits led to understaffing and significant lack of care at the facility. More specifically, plaintiffs allege the dire situation was exacerbated upon the transfer of the facility to Homelife in the Gardens, LLC and its owner/manager, Donald Rankey. This alleged scheme put the health and safety of the plaintiffs at grave risk and resulted in numerous

denying Plaintiffs' motion for class certification, the district court found Plaintiffs failed to prove, pursuant to La. C.C.P. art. 591, numerosity, commonality, predominance, and superiority. From this judgment, Plaintiffs appeal.[4]

DISCUSSION

In challenging the district court's judgment, Plaintiffs complain in three assigned errors:

> (1) the district court erred by finding Plaintiffs failed to prove numerosity by concluding Plaintiffs failed to "adduce sufficient evidence that an impracticably large number of individuals were aggrieved by defendants[']alleged actions;"
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> (2) the district court erred by finding Plaintiffs failed to prove commonality; and
>
> (3) the district court erred by finding Plaintiffs did not meet the requirements set forth in La. C.C.P. art. 591(B)(3) of predominance and superiority.

Before we address Plaintiffs' assigned errors, we will review Louisiana's Class Action Law.

LOUISIANA CLASS ACTION LAW

Louisiana Class Action Law was explained by the Supreme Court in *Doe v. S. Gyms, LLC*, 12-1566, 12-1572, 12-1580, p. 6 (La. 3/19/13), 112 So.3d 822, 827-28:

> In *Ford v. Murphy Oil U.S.A., Inc.*, 1996-2913, p. 4 (La.9/9/97); 703 So.2d 542, 544, we said:
>
> > [t]he class action is a nontraditional litigation procedure permitting a representative with typical claims to sue or defend on behalf of, and stand in judgment for, a class of

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injuries both to dignity, physical well-being, and—in the case of other putative class members—death.

[4] A trial court's judgment denying certification is an appealable judgment. La. C.C.P. art. 592 A(3)(c)(providing that "[a] suspensive or devolutive appeal, as provided in Article 2081 *et seq.* of the Code of Civil Procedure, may be taken as a matter of right from an order or judgment provided for herein.").

> similarly situated persons when the question is one of common or general interest to persons so numerous as to make it impracticable to bring them all before the court. *See* Herbert B. Newberg & Alba Conte, *1 Newberg on Class Actions*, § 1.10, p. 1-2, 1-3 (3d ed.1992). The purpose and intent of class action procedure is to adjudicate and obtain *res judicata* effect on all common issues applicable not only to the representatives who bring the action, but to all others who are "similarly situated," provided they are given adequate notice of the pending class action and do not timely exercise the option of exclusion from the class action.

> Introduced into Louisiana civil procedure in 1961 and modeled after original Federal Rule 23, the Louisiana class action procedure has since been extensively revised. *See Ford*, 1996-2913, p. 5; 703 So.2d at 545; *Dupree v. Lafayette Ins. Co.*, 2009-2602, p. 5 (La.11/30/10); 51 So.3d 673, 679. The code of civil procedure articles governing class actions which control the present action, found in La. C.C.P. art. 591 *et seq.*, essentially adopt current federal law regulating class actions under Fed. Rule Civ. Proc. 23 and codify this court's prior class certification jurisprudence. *Price v. Martin*, 2011-0853, p. 6 (La.12/6/11); 79 So.3d 960, 966; *Dupree*, 2009-2602, p. 5; 51 So.3d at 679. . . .

As noted in *S. Gyms, LLC*, the class certification requirements are codified in La. C.C.P. art 591. Subsection (A) provides the initial requirements:

> A. One or more members of a class may sue or be sued as representative parties on behalf of all, only if:
>
> (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. This prerequisite shall not be satisfied if it is necessary for the court to inquire into the merits of

> each potential class member's cause of action to determine whether an individual falls within the defined class.

These requirements are generally referred to as numerosity, commonality, typicality, adequacy of representative parties, and objectively definable class. *S. Gyms, LLC*, 12-1566, p. 9, 112 So.3d at 830 (citations omitted).

"The burden is on the plaintiff, as the party seeking to utilize the class action procedure, to establish each element by a preponderance of the evidence." *Galjour v. Bank One Equity Inv'rs-Bidco, Inc.*, 05-1360, p. 8 (La. App. 4 Cir. 6/21/06), 935 So.2d 716, 723 (citing *Royal Street Grocery, Inc. v. Entergy New Orleans, Inc.*, 99-3089, 99-3090, p. 6 (La. App. 4 Cir. 1/10/01), 778 So.2d 679, 684). Louisiana Code of Civil Procedure Article 591(B) provides that "[a]n action may be maintained as a class action only if all of the prerequisites of Paragraph A of [La. C.C.P. art. 591] are satisfied. . . ." In addition, a plaintiff is required to prove, pursuant to La. C.C.P. art. 591(B)(3), that "common questions of law or fact predominate over individual issues and that the class action is superior to any other method for resolving the controversy fairly and efficiently." *Price v. Martin*, 11-0853, p. 9 (La. 12/6/11), 79 So.3d 960, 968.[5] "'Class action rules do not set forth a mere pleading standard; rather, a party seeking class certification must affirmatively demonstrate his compliance with the [class action requirements]—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.'" *S. Gyms, LLC*, 12-1566, p. 8, 112 So.3d at 829 (quoting *Price*, 11-0853, p. 7, 79 So.3d at 967, citing *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___,131 S.Ct. 2541, 2551 (2011))(emphasis in

[5] La. C.C.P. art. 591(B) provides that "[a]n action may be maintained as a class action only if all of the prerequisites of Paragraph A of this Article are satisfied" and sets forth additional requirements and/or factors to obtain class certification.

original). Failure to establish any of the requirements precludes certification. *Galjour*, 05-1360, p. 8, 935 So.2d at 723.

In determining whether a plaintiff has met her burden of proof as to the requirements imposed by law for a class certification, the trial court must conduct a rigorous analysis "to determine whether a class action meets the requirements imposed by law, since this procedural device is an exception to the rule that litigation be conducted by and on behalf of the individually named parties only." *S. Gyms, LLC*, 12-1566, p. 8, 112 So.3d at 829 (citing *Brooks v. Union Pacific R. Co.*, 08-2035, p. 10 (La.5/22/09), 13 So.3d 546, 554, *Dukes*, __U.S. at __, 131 S.Ct. at 2550, and *Price*, 11-0853, p. 6, 79 So.3d at 966.) The Supreme Court set forth what was required by the trial court in conducting this analysis:

> [to] evaluate, quantify and weigh [the relevant factors] to determine to what extent the class action would in each instance promote or detract from the goals of effectuating substantive law, judicial efficiency, and individual fairness. Upon arriving at an estimate of the class action's overall effectiveness in furthering the intertwined goals, the court must compare this with its assessment of the effectiveness of other adjudicatory methods and decide whether the class action is the superior procedural device.
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> *McCastle v. Rollins Environmental Services of Louisiana, Inc.*, 456 So.2d 612, 618 (La. 1984). In doing so, "the trial court must actively inquire into every aspect of the case and should not hesitate to require showings beyond the pleadings." *Id.*

S. Gyms, LLC, 12-1566, p. 8, 112 So.3d at 829.

The standard of review of a class certification decision is bifurcated. *Galjour*, 05-1360, p. 6, 935 So.2d at 722 (citation omitted). The trial court's factual findings are subject to the manifest error standard; whereas, the trial court's ultimate decision of whether to certify the class is reviewed under an abuse of discretion standard. *S. Gyms, LLC*, 12-1566, p. 9, 112 So.3d at 830 (citations

omitted). Furthermore, whether the trial court applied the correct legal standard in determining to certify the class is reviewed *de novo. Id*. (citations omitted). This Court in *Doe v. Univ. Healthcare Sys., L.L.C.*, 13-1457, p. 17 (La. App. 4 Cir. 7/9/14), 145 So.3d 557, 568, opined that "the trial court is afforded great discretion in class certification determinations and, unless it has committed manifest error or an abuse of discretion, we must affirm its decision."

With these precepts in mind, we turn to Plaintiffs' assigned errors.

NUMEROSITY

The first factor under La. C.C.P. art. 591 that must be met is that "[t]he class is so numerous that joinder of all members is impracticable." La. C.C.P. art. 591(A)(1). This factor is referred to as the numerosity requirement. To meet the numerosity requirement, a plaintiff must show that joinder is impractical, and there is a definable group of aggrieved persons; a plaintiff, however, is not required to identify every member of the potential class prior to certification. *S. Gyms, LLC*, 12-1566, p.12, 112 So.3d at 831(citations omitted). Some factors have developed jurisprudentially "for determining the practicality of joinder of a large number of potential class members, including: (1) the geographic dispersion of the class; (2) the ease with which class members may be identified; (3) the nature of the action; (4) the size of the individual claims; (5) judicial economy in avoiding a multiplicity of lawsuits; and (6) financial resources of class members." *S. Gyms, LLC*, 12-1566, p. 12, 112 So.3d at 831-32 (citing *Galjour*, 05-1360, p. 10, 935 So.2d 724; *Davis v. Jazz Casino Co, L.L.C.*, 03-0005, p. 7 (La. App. 4 Cir. 1/4/04), 864 So.2d 880, 888). "Knowledge of names and existence of members has been called the 'most important' factor, precisely because it renders joinder practicable." *Galjour*, 05-1360, p. 11, 935 So.3d at 725 (quoting *Primavera Familienstiftung v. Askin*,

178 F.R.D. 405, 410 (S.D.N.Y.1998)). "When the group is small and the individual members are identifiable, joinder rarely will be impracticable." *Id.*, 05-1360, p. 11, 935 So.3d at 725 (citation omitted). Moreover, there is no set number that a class is considered to have satisfied an impracticability of joinder; but this requirement is not met by "simply alleging that a large number of potential claimants exist." *S. Gyms, LLC*, 12-1566, p. 11, 112 So.3d at 831(citations omitted).[6] This Court in *Galjour* emphasized that "[a]lthough identification of all potential class members is not necessary, the party seeking certification must establish a definable group of *aggrieved* claimants," and "[c]onclusory allegations do not carry the plaintiff's burden to establish numerosity." *Id*., 05-1360, p. 9, 935 So.2d at 723-24 (citations omitted)(emphasis in original). *See also*, *Albe v. City of New Orleans*, 14-1013, p. 11 (La. App. 4 Cir. 7/29/15), 174 So.3d 212, 220 (wherein this Court opined that "[P]laintiffs must produce evidence to demonstrate a definable group of aggrieved claimants . . . .").

Plaintiffs presented the following pertinent documents in support of certification: (1) Mrs. Sullivan's documentation provided to Malta Park which included her personal information, her apartment security deposit agreement, and community fee agreement; (2) Mrs. Sullivan's deposition; (3) an affidavit of Clifford Abel, a resident at Malta Park, dated August 10, 2018; (4) an excerpt of

[6] In *Vela v. Plaquemines Par. Gov't*, 94-1161, 94-1162, 94-1163, 94-1164, p. 2 (La. App. 4 Cir. 6/29/95), 658 So.2d 46, 48 (citation omitted), this Court stated that "[a] presumption arises that joinder is impractical if more than 40 class members exist." (This presumption is not argued by Plaintiffs.) In *Galjour*, 05-1360, p. 10 (La. App. 4 Cir. 6/21/06), 935 So. 2d 716, 724 fn 9, however, this Court clarified:

> Despite the dicta language in *Vela* regarding the use of a presumption, this court has recognized that "no set number has been established that automatically makes joinder impracticable; rather the determination is based on the facts and circumstances of each case." *Cooper* [*v. City of New Orleans*], 2001-0115 at p. 4, [(La. App. 4 Cir. 2/14/01),]780 So.2d [1158] at 1160 (citing *Dumas v. Angus Chemical Co.*, 25,632 (La. App. 2 Cir. 3/30/94), 635 So.2d 446, 450).

the November 1, 2012 sworn statement of Deleria J. Rancifer, a certified nursing assistant ("CNA") for Malta Park,[7] and (5) the September 27, 2017 deposition of Tammy Cardinale, a certified public accountant ("CPA") who was the director of finance at Willwoods Community Management, Inc.

Plaintiffs assert that the district court erred in finding they failed to prove numerosity by failing to "adduce sufficient evidence that an impracticably large number of individuals were aggrieved by defendants[']s alleged actions." This assigned error encompasses the second *Galjour* factor—the ease at which the class members may be identified.

In addressing this factor, the district court opined:[8]

> As to the second [*Galjour*] factor, difficulty in identifying the claimants tends to make joinder impracticable. *See Johnson* v. *Orleans Par. Sch. Bd.*, 2000-0825 (La. App. 4 Cir. 6/27/01), 790 So.2d 734, 742. Analysis of this factor also implicates the fifth *Galjour* factor of judicial economy: "Cases in which numerosity have been found lacking 'often rest on the proposition that, despite large potential numbers of class members, an insufficient number have indicated a dissatisfaction with the defendant or a desire to assert a claim.'" *Galjour* at 726 (quoting Stephen H. Kupperman, *Louisiana Class Actions*, 74 Tul. L.Rev. 2047, 2058-59 (2000) (citing *Farlough v. Smallwood*, 524 So.2d 201, 202 (La. App. 4 Cir. 1998), *writ denied*, 526 So.2d 810 (La. 1988))). Plaintiffs rely on Mr. Abel's testimony citing a potential 1,200-1,800 class members along with the *Jackson* and *Queral* litigations. Defendants counter these numbers are speculation based on an approximation that would require assuming each of 70 apartments in the facility were occupied by three residents starting in 2012. And that every year thereafter, three new residents would occupy each apartment. Further, Mr. Abel left the facility in early 2014. The Court would also note that Mr. Abel only identifies approximately ten ascertainable individuals who suffered injuries and mentions that "[t]he facility was about 65 percent rented" in 2012 when he initially took up residence.
>
> Plaintiffs contend that because the actions/inactions on the part of the defendants affected every resident, "numerosity can be

[7] The complete sworn statement of Ms. Rancifer is not contained in the appellate record.

[8] The district court addressed each *Galjour* factor.

> calculated simply by determining the census of the 'assisted living facility' on a monthly basis and then multiply by each year.". . . However, the Fifth Circuit, recently reversing certification, admonished a trial court for "focus[ing] solely on the mathematical number of potential plaintiffs and thereafter affording plaintiffs the benefit of a non-existent presumption based upon that number to find that joinder was impracticable." *Bagot* [*v. James Holdings, LLC*, 17-121 (La. App. 5 Cir. 12/20/17),] 235 So.3d [1330] at 1335[, *writ denied*, 18-0124 (La. 3/9/18), 238 So.3d 451]. These factors thus weigh against a finding for numerosity. *See Farlough* at 203; *Doe* v. *University Healthcare Systems, LLC*, 2013-1457 (La. App. 4 Cir. 7/9/14), 145 So.3d 557, 570; and *Carr* v. *Houma Redi-Mix Concrete Co.*, 1996-1548 (La.App. 1 Cir. 11/10/97), 705 So.2d 213, 215 ("mere speculation that a large number of [plaintiffs] must have been harmed and will wish to sue is not sufficient to meet the numerosity requirement"). Numerosity is not met by merely alleging that a large number of potential claims exist as it is incumbent on the party seeking certification to "show that joinder is impracticable and there is a definable group of aggrieved persons." *Doe v. S. Gyms, LLC*, 2012-1566 (La. 3/19/13), 112 So.3d 822, 831.
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> * * *
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> In light of the *Galjour* factors [,] this Court finds that plaintiffs have failed to adduce sufficient evidence that an impracticably large number of individuals were aggrieved by defendants' alleged actions. The numerosity requirement has not been met. . . .

Plaintiffs argue that they were not required to present evidence of the "exact and actual number of persons who will come forward" with a claim in this matter. Plaintiffs assert because Defendants' "actions/inactions" affected every resident, "numerosity can be calculated . . . by determining the census of the 'assisted living facility' on a monthly basis and then multiply by each year." Plaintiffs point out they proved there are 1,200 to 1,800 potential class members and reference the August 10, 2018 affidavit of Clifford Abel. Mr. Abel was a resident of Malta Park from 2012 to 2014. Mr. Abel was of the opinion there were 1,200 to 1,800 potential class members based upon the occupancy of Malta Park. He attested that "'Malta Park/Willwoods' had around 70 apartments available for lease to residents in 2012. As it is now 2018, I calculate, considering normal turn-over such as

residents leaving or death that over a period of six years, that the proposed class is easily between 1,200 and 1,800 residents over this period." Moreover, Plaintiffs alleged that two other similar lawsuits have been filed—*Jackson, et al v. Homelife in the Gardens, LLC, et al.*, CDC No. 2017-9210 and *Queral, et al. v. Homelife in the Gardens, LLC*, CDC No. 2017-3468.[9]

Lastly, Plaintiffs assert that there is "a definable group of aggrieved persons" and their "names and medical records are in possession of Defendants and protected by HIPPA at this time."[10] Plaintiffs allege in their brief that the names of the residents of Malta Park from April 2010 to present have not been disclosed by Defendants. Specifically, Plaintiffs write:

> Appellants were still fighting discovery issues as late as March 6, 2018 with Defendants opposing discovery . . . As of this date, defendant, Donald Rankey[,] has not been deposed even after many requests.
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> * * *
>
> For their actual names [of potential class members], both Defendants and Appellants would run afoul of HIPPA if they were named. How may they be contacted, easy, the Defendants have their names and current status, but the trial court would have to confect a protective order and review them *in camera* due to HIPPA. Defendants already know this as the records of both of the original plaintiffs were provided under a protective order because of HIPPA. Further current counsel discussed the HIPPA problems with undersigned counsel as a problem in potential release of residents names and information.

[9] The district court explains in a footnote in written reasons that "[t]he *Queral* case was limited to the filing of a petition and answer before plaintiffs' attorneys withdrew on Nov 29, 2017—there has been no activity since that date. Plaintiffs in *Jackson* filed for a Motion to Dismiss which was signed on July 2, 2018." The petitions from these lawsuits are not part of the appellate record.

[10] HIPPA stands for "Health Insurance Portability and Accountability Act" which is a law that provides privacy standards to protect patients' medical records and other health information provided to health plans, doctors, hospitals and other health care providers.

Because of Plaintiffs' assertion that discovery was outstanding, this Court ordered the Civil District Clerk of Court of Orleans Parish to supplement the record with the following documents that had been filed in the trial court:

> (1) Plaintiffs' "Motion to Compel Answers to Interrogatories Sullivan Putative Class Motion to Compel Discovery" filed on February 5, 2018;
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> (2) Plaintiffs' memorandum in support of motion to compel, if any;
>
> (2) Defendants' opposition memorandum to Plaintiffs' motion to compel discovery filed on February 28, 2018; and
>
> (3) District court's judgment on Plaintiffs' motion to compel discovery issued on May 14, 2018.

Upon receipt of the supplemental record, a review of the documents reflects that in January 2018, Plaintiffs filed "Plaintiffs First Set of Interrogatories for Class Action Purposes Directed to Defendants." In these interrogatories, however, Plaintiffs did not ask Defendants to produce the number and/or name of residents of Malta Park from April 2010 to present. In addition, the record before this Court does not reflect Plaintiffs requested that the district court conduct an *in camera* inspection of Malta Park's records to determine the number and/or names of the potential class members.

In February 2018, Plaintiffs filed in the district court a motion to compel discovery alleging Defendants failed to answer the referenced propounded interrogatories. In addition, Plaintiffs requested to depose Mr. Rankey. A hearing on the motion was held on March 9, 2018. The district court, on May 14, 2019, denied Plaintiffs' motion to compel Mr. Rankey's deposition but *granted* the motion to compel "as it pertains to plaintiffs' written discovery of January 29, 2018, only to the extent that such written discovery is relevant to the pending motion for class certification." The appellate record does not include the answers

to the interrogatories; information from the parties indicates the answers to interrogatories were not filed in the district court. In addition, the appellate record does not reflect that Plaintiffs filed a motion for contempt asserting Defendants failed to comply with the district court's order for Defendants to answer the interrogatories.

On April 7, 2019, Plaintiffs filed, in this Court, a motion requesting that Defendants' answers to the interrogatories, which were not filed in the trial court record, be added to the appellate record. This Court denied the request as an appellate court cannot receive new evidence. *See Melerine v. O'Connor*, 13-1073, p. 8 (La. App. 4 Cir. 2/26/14), 135 So.3d 1198, 1205, (citing La. C.C.P. art. 2164 and *Board of Directors of Industrial Development Bd. of City of New Orleans v. All Taxpayers, Property Owners, Citizens of New Orleans*, 03-0826, p. 4 (La. App. 4 Cir. 5/29/03), 848 So.2d 740, 744). Consequently, only the evidence filed in the district court and contained in the appellate record can be considered by this Court.

A trial court's determination as to numerosity is a factual one, reviewed by an appellate court under the manifest error standard. *See S. Gyms, LLC*, 12-1566, p. 13, 112 So.3d at 832. In reviewing the appellate record to determine if the district court erred in finding that Plaintiffs failed to prove joinder was not impractical, we turn to several cases by this Court and the Louisiana Supreme Court that lend guidance to this particular issue.

In *Farlough v. Smallwood*, 524 So.2d 201 (La. App. 4th Cir. 1988), this Court affirmed the trial court's denial of a class certification on behalf of residents of the Housing Authority of New Orleans ("HANO") allegedly affected by HANO's rent-adjustment policy. Plaintiffs alleged there were over 13,000 tenants

in HANO projects using the HANO standard lease. This Court found the proposed class did not satisfy the numerosity requirement:

> [T]here is no evidence in the record to indicate that all of HANO tenants, or even a substantial number of them, had been aggrieved by the policy. Further, we find that plaintiff has not sufficiently established that there exists a group of people who have requested adjustments and been denied relief. Additionally, the plaintiff has not shown that the alleged aggrieved parties are not identifiable and no obstacles have been shown which might hamper their joinder. [*O'Halleron v. L.E.C., Inc.,* 471 So.2d 752 (La.App. 1st Cir.1985)].

Farlough, 524 So.2d at 203.

In *Chiarella v. Sprint Spectrum LP*, 04-1433 (La. App. 4 Cir. 11/17/05), 921 So.2d 106, Sprint subscribers moved to certify a class action against the cellular telephone company and retail outlets that sold the cellular phones pertinently alleging Sprint and retailers made certain misrepresentations to the plaintiffs on which they relied before purchasing a phone and wireless service from Sprint.[11] At the hearing, the parties agreed that there were approximately 60,000 Sprint PCS wireless subscribers during the class period. Out of the twenty-nine named plaintiffs, five testified; the germane testimony focused on "the high volume of blocked and dropped calls experienced by those plaintiffs who testified, as well as the [sic] their inability to place and/or receive calls in geographical regions that the Sprint Defendants and Retail Defendants allegedly represented were available for use." *Id*., 04-1433, p. 4, 921 So.2d at 111(footnote omitted.) The trial court granted certification of the class, and the defendants appealed. On appeal, this Court reversed the trial court's judgment, and aptly concluded that the plaintiffs failed to satisfy the numerosity requirement because "the plaintiffs must demonstrate with

[11] This Court found this claim was the only issue properly before it. *Chiarella*, 04-1433, pp. 15-16, 921 So.2d at 118.

evidence a definable group of aggrieved claimants, which they did not do at the certification hearing." *Id*., 04-1433, p. 20, 921 So.2d at 120 (first emphasis added; second emphasis in the original). This Court noted:

> Based on the evidence in the record, however, a court cannot assume that all of the Sprint PCS wireless subscribers were unhappy with their service. . . .
>
> During the class period, the Sprint Defendants averaged 5.27% blocked and 2.06% dropped calls in the New Orleans area. Because these figures are averages, some subscribers would experience a higher percentage while others would experience a lower percentage. Thus, those subscribers with lower incidence of blocked and dropped calls would not necessarily be unhappy Sprint PCS wireless customers.

Id., 04-1433, p. 19, 921 So.2d at 120.

In *S. Gyms, LLC*, 112 So.3d 822, the plaintiff, a patron of a fitness gym, sought class certification for claims as a result of video voyeurism by the gym's assistant manager. The trial court granted class certification which was affirmed by the appellate court. The Supreme Court reversed the appellate court's judgment. The Supreme Court found that the trial court erred in finding "the threshold requirement of La. C.C.P. art. 591(A)(1)—the class is so numerous that joinder of all members is impracticable—was proved." *Id*., 12-1566, p. 19, 112 So.3d at 836. The Supreme Court noted that "the evidence adduced showed joinder would be an efficient manner to proceed with this lawsuit. Of the nine women for whom there is some evidence that they were videotaped . . . three of them, including the plaintiff, have filed their own lawsuits." *Id*., 12-1566, p. 19, 112 So.3d at 835.

Conversely to the cases discussed *supra*, in *Fransen v. City of New Orleans*, 16-0844 (La. App. 4 Cir. 3/28/18), __So.3d__ (2018 WL 1516989), *writ denied*, 18-0871 (La. 9/28/18), 252 So.3d 926, plaintiffs presented evidence to support the

numerosity requirement. In *Fransen*, the district court granted class certification as to plaintiffs' claims against one of the defendants, the City of New Orleans, and defined the class:

> Those persons and/or entities or their heirs, successors or assigns, who pursuant to New Orleans City Ordinance No. 18637 were assessed city penalties and collection/penalty fees by defendants and who paid these unconstitutional penalties and collection/penalty fees from April 17, 2000 through February 21, 2002.

Id., 16-0844, p. 5. On appeal, this Court affirmed the trial court's judgment.[12] Although numerosity was not an issue, *Fransen* is instructive; in finding plaintiffs proved the numerosity requirement, the district court considered the testimony of Ms. Li Downing, a CPA, who was admitted as an expert in the areas of data analysis and claims processing. *Id*., 16-0844, p. 6. Ms. Downing testified that the City's records identified "roughly 31,492 potential plaintiffs who paid the unconstitutional penalties between April 17, 2000, and February 21, 2002." *Id.*

Applying the manifest error standard, we conclude the district court did not err in finding Plaintiffs failed to adduce sufficient evidence that "an impracticably large number of individuals were aggrieved by defendants' alleged actions." Unlike *Fransen*, but similar to *Farlough*, *Chiarella*, and *S. Gyms, LLC*, Plaintiffs failed to submit evidence to prove by a preponderance of the evidence there was a definable group of aggrieved claimants to find joinder impractical; instead, the evidence adduced showed joinder would be an efficient manner to proceed.

Mr. Abel's assertion there were 1,200 to 1,800 potential class members was not supported by the record. The district court found that Mr. Abel only identified

[12] This Court affirmed the judgment as amended and amended the judgment to reflect the effective date of New Orleans City Ordinance No. 18637 from February 21, 2002 to March 6, 2002. *Fransen*, 16-0844, pp. 13-14.

"ten ascertainable individuals who suffered injuries." In a footnote, in its written reasons, the district court explained:

> The sworn statement of Deleria Rancifer—a CNA formerly employed at the [Malta Park]—corroborates some of the incidents involving individuals Mr. Abel recounts; however, between the two[,]the number of aggrieved individuals does not appear to be higher than ten. Additionally, Rancifer recalls there were only approximately 50-60 residents under her care during the afternoon shift which undercuts the estimated 1,200-1,800 alleged by plaintiffs.

The deposition of Tammy Cardinale, a CPA and director of finance for Willwoods Community Management, Inc., was solely focused on the financial condition of Malta Park and reflected that Malta Park was sold or transferred to HomeLife in the Gardens, LLC.[13] When Ms. Cardinale was questioned about the reason for the transfer, Ms. Cardinale responded that "[t]hey [Malta Park] did not have good occupancy." Mrs. Sullivan, in her deposition, answered "No," when asked if she had any problems with the management at Malta Park. In addition, Mrs. Sullivan's deposition is devoid of any testimony regarding how many residents lived in Malta Park.

As to the $2,000.00 community fee that Plaintiffs allege all Malta Park residents paid but was unaccounted for,[14] only Mrs. Sullivan's signed agreement to pay the community fee was contained in the appellate record.[15] Again, Plaintiffs

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[13] The district court did not mention this deposition, but it was part of the appellate record.

[14] Mr. Abel attested that he was demanding a refund of the $2,000.00 as "I have not yet to be informed as to what it was for."

[15] The document was entitled "Malta Park Assisted Living Community Fee Agreement." It set forth Mrs. Sullivan's name and her apartment number at the facility. The agreement, which was signed by Mrs. Sullivan or her representative and a representative from Malta Park, provided in pertinent part:

> The undersigned agrees to pay Malta Park Assisted Living Residence a $2,000.00 Community Fee, which is due upon move-in and is non-refundable. **Within 90 days of Resident move in, a 50% refund for this Community Fee will only be

failed to prove by a preponderance of the evidence that all of the Malta Park residents or even a substantial number of them were aggrieved by agreeing to pay the community fee.

Accordingly, we conclude the district court did not manifestly err in finding the threshold requirement of La. C.C.P. art. 591(A)(1)—the class is so numerous that joinder of all members is impracticable—was not proven. Furthermore, our *de novo* review reflects that the district court applied the correct legal standard in denying the certification of a class action.

Because we find the numerosity requirement of La. C.C.P. art. 591 was not met, there is no need to address Plaintiffs' remaining assignments of error or the remaining factors of La. C.C. P. art. 591, including those reviewed by the district court. *See Galjour,* 05-1360, pp. 14-15, 935 So.2d at 727 (quoting *Ewh v. Monarch Wine Co.*, 73 F.R.D. 131, 132 (E.D.N.Y.1977)(wherein this Court held that "consideration of numerosity alone is sufficient to establish that class action certification should be denied."). As a result, Plaintiffs' remaining assignments of error are moot, and any discussion thereof is pretermitted.

CONCLUSION

The district court's judgment is affirmed.

AFFIRMED

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considered if the Resident must leave Malta Park due to severe illness and requires a move to a skilled nursing care facility.