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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

ROBERT ANGELO, et al., *Plaintiffs/Appellants*,

v.

STEWART TITLE & TRUST OF PHOENIX, INC., *Defendant/Appellee*.

No. 1 CA-CV 15-0689
FILED 1-31-2017

Appeal from the Superior Court in Yavapai County
No. V1300CV201380021
The Honorable David L. Mackey, Judge

AFFIRMED

COUNSEL

Carpenter, Hazlewood, Delgado & Bolen, PLC, Tempe
By Mark A. Holmgren
And
Armistead W. Gilliam, Sedona
Counsel for Plaintiffs/Appellants

Burch & Cracchiolo, P.A., Phoenix
Edwin D. Fleming and Jake D. Curtis
And
Sidley Austin LLP, Chicago Illinois
By Gerard Kelly, Kevin Fee, Daniel C. Craig
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Chief Judge Michael J. Brown joined.

T H O M P S O N, Judge:

¶1 At issue on appeal is whether the trial court erred in denying the motion for class certification by plaintiffs/appellants Robert Angelo, et al. Finding no abuse of discretion on this record, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 The putative class claims concern the Club at Seven Canyons golf course and club in Sedona and the over 200 club members who paid membership deposits to the developer Sedona Development Partners, L.L.C. (Developer). The membership agreements at issue were entered into between 2001 and 2005 and cost, variously, up to $155,000. The golf course and amenities were never fully completed. Developer entered bankruptcy in August 2010.

¶3 The proposed class, via three named plaintiffs,[1] brought a complaint in January 2013 against Developer's escrow company, Stewart Title & Trust of Phoenix, Inc., (Stewart) asserting breach of fiduciary duty, negligence, gross negligence, fraud, breach of the covenant of good faith and fair dealing, as well as breach of the Escrow Agreement as to the intended third-party beneficiaries.[2] In that complaint, plaintiffs assert that the class, collectively, made membership deposits in the amount of

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[1] The three named plaintiffs are Robert Angelo, Don Davis and Lucien Riley. Two other formerly named plaintiffs, Hans Epprecht and Trent Cosse, have since been dismissed.

[2] The trial court denied Stewart's motion to dismiss, holding plaintiffs were intended third-party beneficiaries of the 2001 Escrow Agreement and that Stewart owed plaintiffs a fiduciary duty.

$26,804,350, which were put into an escrow account with Stewart and then improperly disbursed to Developer.[3]

¶4 Plaintiffs moved for class certification, which Stewart objected to on various grounds. After briefing and oral argument, the trial court denied the motion for class certification without elaboration. Plaintiffs timely appealed.

DISCUSSION

¶5 Plaintiffs seeking class certification must meet all the requirements listed under Arizona Rule of Civil Procedure (Rule) 23(a) and at least one of the requirements listed in Rule 23(b).[4] Where a plaintiff seeks

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[3] The 2001 Escrow Agreement provided two alternative conditions to disbursal of escrow money to Developer. The first was based on the completed proportion of the golf resort build-out and the second

> [u]pon receipt by the Escrow Agent of written notice from the Company that the Company has provided an irrevocable letter of credit, a performance bond and/or other reasonably comparable security *in the opinion of the Company* including, without limitation, a corporate guarantee, ensuring completion of the Club Facilities or a refund of the membership deposits in the event the Club Facilities are not completed, the Escrow Agent shall disburse to the Company, by check or wire transfer all Membership Proceeds then held in escrow and interest earned thereon or appropriate portion thereof, *as determined by the Company*, for which security has been provided, which may be *used by the Company in its sole discretion*. [Emphasis added.]

It is this latter method of distribution which is at issue.

[4] Rule 23(a) provides:

> 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, and (4) the representative

to bring a class action suit, he bears the burden of proof to show that his case is appropriate for class action certification. *Lennon v. First Nat'l Bank of Ariz.*, 21 Ariz.App. 306, 308, 518 P.2d 1230, 1232 (1974). Class certification

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> parties will fairly and adequately protect the interests of the class.

Rule 23(b) provides:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
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> (1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
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> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

is a matter within the sound discretion of the trial court. *Godbey v. Roosevelt Sch. Dist. No. 66 of Maricopa Cnty*, 131 Ariz. 13, 16, 638 P.2d 235, 238 (App. 1981). Absent an abuse of discretion, we will affirm the trial court's decision on a motion to certify a class. *Id.*

¶6 Stewart objected to class certification on the following bases:[5]

> (1) plaintiffs and their counsel did not meet the adequate representation requirements of Rule 23(a)(4) due to intra-class clashes between named and unnamed plaintiffs, conflicts between parties and counsel, the prior relationship between counsel and the named representatives, and the manner the fee agreement proposed to pay parties;
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> (2) plaintiffs failed to satisfy their burden of showing commonality under Rule 23(a)(2) because different results were expected for different plaintiffs;
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> (3) plaintiffs failed to satisfy the typicality requirement of Rule 23(a)(3) because the named plaintiffs are atypical proposed class members, especially as to statute of limitations issues for those members;
>
> (4) plaintiffs failed to show the proposed class's common questions of law predominated over the claims by individual plaintiffs as required by Rule 23(b)(3), especially as to statutes of limitations and damages;
>
> (5) plaintiffs failed to show a class action was the superior method of adjudication of the claims under Rule 23(b)(3); and
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> (6) Plaintiff Angelo's affidavit was improper.

In support of its opposition to the motion, Stewart attached nearly 400 pages of exhibits.

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[5] Stewart also attacks plaintiffs' motion for certification for failure to provide evidence to support the motion and plaintiffs' burden of proof. We note plaintiffs' motion for class certification did not include exhibits, but rather referenced the exhibits to the complaint, including the escrow agreement, the membership plan, and the summary of the funds released to Developer by Stewart. Plaintiffs' supplemental motion for certification additionally attached the affidavit of Robert Angelo.

¶7 After argument and briefing, the trial court found the proposed class did not meet their threshold burden of proof under Rule 23(a) to show the class had numerosity, commonality, typicality, and that the representative members and counsel would fairly and adequately represent the class. The trial court additionally found that the proposed class failed to meet at least one of the required elements of Rule 23(b). The trial court's ruling stated nothing more, and plaintiffs have not provided us with a transcript of the oral argument. Thus, we will presume whatever transpired at the argument supported the trial court's denial of class certification. *Johnson v. Elson*, 192 Ariz. 486, 489, ¶ 11, 967 P.2d 1022, 1025 (App. 1998).

¶8 It is clear from the record, namely the filings by Stewart and the trial court's discovery rulings[6], that the major obstacles to class certification concern whether the named representatives and counsel could fairly and adequately represent the class and the class certification issues implicated by the statutes of limitations.[7] Both arise, at least in part, from the pre-existing relationship between named representatives and class counsel. The record demonstrates that counsel and named plaintiffs had a relationship prior to Developer's bankruptcy filing in 2010. The named plaintiffs were interested parties in the bankruptcy, and, with the assistance of counsel, considered filing an alternative plan in that bankruptcy. As interested parties, they were privy to financial information, such as tax returns, filed in the bankruptcy. Those same named parties formed an LLC that Developer approached, prior to the bankruptcy, regarding purchasing the unfinished golf course and facilities. The original fee agreements

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[6] Prior to the ruling on the motion for class certification, the trial court granted Stewart's motion to compel full class certification discovery. The court's discovery order primarily required plaintiffs to be more forthcoming with various documents and answers to interrogatories regarding documents, which related to the statute of limitations defense, documents to and from counsel (including a 2013 legal team summary sent to a broad distribution list), and documents related to legal representation of the proposed class and prior representation, including completing a privilege log for communications predating this case. Plaintiffs were also ordered to provide verifications from all plaintiffs, not just Robert Angelo, of the interrogatory responses.

[7] The statutes of limitations on plaintiffs' various claims range from two to six years. *See* Ariz. Rev. Stat. (A.R.S.) §§ 12-542, -548 (2016).

between the named class representatives and counsel in this matter also provided for preferential treatment of those named parties.[8,9]

¶9 In its brief on appeal, Stewart argued that limitations issues prevent plaintiffs from demonstrating the requisite commonality and typicality under Rule 23(a)(2) and (3). With its opposition to the motion, Stewart offered proof that some of the named plaintiffs knew before 2011 of facts that, Stewart argued, put them on notice of the alleged claims. For example, in 2008, Developer contacted a named plaintiff, who has since been dismissed from the case, about a loan for construction of the clubhouse. Stewart also offered correspondence between named plaintiffs and other Club members as early as April 2010 regarding the escrow fund. Stewart asserts that at least one named plaintiff, Don Davis, in an August 2010 interview with a newspaper stated, "There's no money in escrow." Stewart also argued that similar limitations questions would exist with respect to large numbers of the other members of the putative class.

¶10 Stewart argues the trial court correctly denied the class certification motion because of the burden of having to do a plaintiff-by-plaintiff statute of limitations analysis. To this end it cites, among others, *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 320 (4th Cir. 2006) and *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 149 (3rd Cir. 1998). In *Thorn*, statute of limitation issues precluded a proposed class of African-Americans in a suit against an insurer where the proposed class was charged higher premiums than white policyholders. 445 F.3d at 320. The court in that case stated:

> Our circuit's accrual rule, which focuses on the contents of the plaintiff's mind, is not readily susceptible to class-wide determination. Examination of whether a particular plaintiff possessed sufficient information such that he knew or should have known about his cause of action will generally require individual examination of testimony from each particular plaintiff to determine what he knew and when he knew it. *See Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 342

[8] Amended fee agreements were entered into two weeks before argument on the certification; the amendments cured most, if not all, of the fee agreement issues.

[9] Stewart also points out that counsel is general counsel for the Seven Canyons resort homeowner's association and, apparently, in that capacity is adverse to some of the parties in other actions.

> (4th Cir. 1998) (noting, in holding that a state statute of limitations defense presented individual issues, that "[w]hether and when each [plaintiff] received, read, and understood [the information that could have alerted them to the existence of a cause of action] is crucial to whether their ... claim against [the defendant] is time-barred by [the] statute of limitations"). Indeed, in cases where the legal issue is similarly focused on the plaintiff's knowledge, such as the requirement that a plaintiff in a fraud claim reasonably rely on the defendant's representations, we have consistently held that individual hearings are required.…It is not enough, therefore, for Appellants to argue that Jefferson–Pilot failed to show that its statute of limitations defense presents individual issues. Instead, the record must affirmatively reveal that resolution of the statute of limitations defense on its merits may be accomplished on a class-wide basis.

Id. at 320-321. The *Barnes* court, likewise, held that individual statute of limitations issues in a tobacco litigation suit precluded class certification. 161 F.3d at 149.

¶11 Plaintiffs cite no case law in response to Stewart's argument that individualized statutes of limitations issues preclude a finding of predominance, typicality and commonality. We note, however, that plaintiff-specific limitations issues do not necessarily prevent class certification. *See, e.g., Williams v. Sinclair*, 529 F.2d 1383, 1386-88 (9th Cir. 1975) ("The existence of a statute of limitations issue does not compel a finding that individual issues predominate over common ones. Given a sufficient nucleus of common questions, the presence of the individual issue of compliance with the statute of limitations has not prevented certification of class actions in securities cases.").

¶12 There being no Arizona case law on point, we are persuaded that individualized statutes of limitations analysis could create issues sufficient to preclude class certification. Given these facts, there is reasonable evidence to support the trial court's determination that plaintiffs did not meet their burden of proof to show a class action was appropriate. Finding no abuse of discretion, we affirm.

CONCLUSION

¶13 For the above stated reasons, the trial court is affirmed.

AMY M. WOOD • Clerk of the Court
FILED: AA