

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ARTHUR BENNING, SR.,)
BARBARA LEE BENNING,) No. 116, 2001
ARTHUR E. BENNING, JR., and)
JANESSA DABLER *On Behalf of*) Court Below: Superior Court
Themselves and all others Similarly) of the State of Delaware in
Situated,) and for New Castle County
)
Appellants/Plaintiff) C.A. No. 99C-06-157
and Intervenor Below,)
)
v.)
)
WIT CAPITAL GROUP, INC.,)
and WIT CAPITAL CORPORATION)
dba WIT CAPITAL,)
)
Appellees/)
Defendants Below)

Submitted: October 10, 2001

Decided: November 1, 2001

Before **VEASEY**, Chief Justice, **BERGER** and **STEELE**, Justices.

ORDER

This 1st day of November 2001, it appears to the Court that:

1. Appellants, Plaintiffs-below, Arthur Benning, Sr., Barbara Lee Benning, Arthur Benning, Jr., and Janessa Dabler appeal from the decisions of the Superior Court denying their Motion for Class Certification and granting Appellee, Defendant-below, Wit Capital's Motion to Dismiss. Appellants argue that the trial court erred in finding that the proposed Plaintiff class failed to meet the

numerosity¹ and typicality² requirements of Superior Court Rule 23(a) and that it further erred in determining that questions affecting individual members of the proposed class would predominate over those common to the class under Superior Court Rule 23(b)(3).³

2. We review the Superior Court’s determination of the applicable law *de novo*.⁴ We review the factual determination of the lower court to determine whether its application of those legal precepts is “supported by the record and the product of an orderly and logical deductive process.”⁵

3. Appellants contend that the trial judge refused to allow discovery that would have aided in identifying instances where Wit Capital’s actions harmed other proposed class members. The record demonstrates that Appellants requested documents relating to the identification, recording, monitoring, and tracking of orders not fulfilled. When these documents were not produced, the judge failed to compel their production prior to rendering her decision on class certification. We find that the Superior Court could not have made an orderly and logical decision concerning the presence or absence of numerosity and typicality without these documents and any others that may relate to the identification of other class members and potential claims. While Rule 23 directs the trial court to make a

¹ See Super. Ct. Civ. R. 23(a)(1).

² See Super. Ct. Civ. R. 23(a)(3).

³ See Super. Ct. Civ. R. 23(b)(3).

determination on class certification as soon as practicable,⁶ this is not a mandate for the court to make that type of determination without the necessary facts before it.⁷ The trial court must allow the parties to conduct sufficient discovery before it determines whether or not a viable class exists.⁸

4. In light of this finding, the Superior Court should order a discovery schedule that will allow it to determine properly if the proposed class meets the numerosity and typicality requirements of Superior Court Rule 23. The court should tailor the discovery order to allow the parties to review all documents that it believes would bear on the viability of the class.

5. The trial judge further found that the factual issues of this case were “too individualized” under Rule 23(b)(3) for this litigation to proceed as a class action.⁹ Because the court failed to allow for sufficient discovery during the certification phase, the trial judge’s conclusions are based upon speculation that additional discovery would have yielded divergent claims requiring substantial

⁴ *Leon N. Weiner & Assoc., Inc. v. Krapf*, Del. Supr., 584 A.2d 1220, 1223 (1991).

⁵ *Id.*; *Nottingham Partners v. Dana*, Del. Supr., 564 A.2d 1089, 1102 (1989).

⁶ See Super Ct. Civ. R. 23.

⁷ See *Newton v. Merrill Lynch, Pierce, Fenner & Smith*, 3d. Cir., 259 F.3d 154, 166 (2001) (“Before deciding whether to allow a case to proceed as a class action, ... [courts] should make whatever factual and legal inquiries are necessary under Rule 23.”); see also *Kamm v. California City Dev. Co.*, 9th Cir., 509 F.2d 205 (1975) (while extent of discovery lies within the sound discretion of the trial court, it is an abuse of discretion to deny discovery where it is necessary to determine the existence of a class).

⁸ See *Shelton v. Pargo, Inc.*, 4th Cir., 582 F.2d 1298, 1313 (1978) (courts should be encouraged to conduct the discovery necessary to make the appropriate findings concerning class certification).

⁹ See Super. Ct. Civ. R. 23(b)(3).

individual attention. Specifically, the trial judge concluded that the alleged wrongful conduct would have to be examined individually in order to determine damages. While this Court recognizes that issues of damages by nature require individualized examination, they are not so insurmountable that they automatically preclude class certification.¹⁰ Moreover, the court erred in reaching its conclusion before the parties had sufficiently established the record to support its findings. The Rule 23(b) determination must be made in light of all the facts and circumstances available to the court. Thus, the trial judge should have waited to make this determination until after a clearer view of the potential claims and damages of the proposed plaintiff class emerged from discovery.

6. Once the parties complete appropriate discovery, the Superior Court should then weigh the relevant factors to determine if Plaintiffs have met the requirements of Rule 23(b)(3) for purposes of class certification.¹¹ The trial judge

¹⁰ *Glosser v. Cellcor Inc.*, Del. Ch., C.A. No. 12725, 1995 WL 106527, at *2 n.5, Allen, C. (1995) (citing *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975) (“amount of damages is invariably an individual question and does not defeat class action treatment”); *see also Newton*, 259 F.3d at 189 (obstacles to calculating damages may not preclude class certification, although the putative class must still demonstrate economic loss on a common basis).

¹¹ Rule 23 states that the following factors are to be considered by the trial court:

- (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. Super. Ct. Civ. R. 23(b)(3).

should take care to consider not only whether questions of law or fact common to the class predominate over the questions affecting individual members, but to also give equal weight to the question of whether or not a class action remains the superior method for the fair and efficient adjudication of this litigation.¹²

NOW, THEREFORE, IT IS ORDERED that the orders of the Superior Court denying Plaintiff's Motion for Class Certification and granting Defendant's Motion to Dismiss be REVERSED and REMANDED for further proceedings consistent with this order.

BY THE COURT:

/s/ Myron T. Steele
Justice

¹² Super. Ct. Civ. R. 23(b)(3).