Soto v. Commercial Recovery Systems, Inc. et al Doc. 99

United States District Court
For the Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JORGE SOTO,

Plaintiff,

v.

COMMERCIAL RECOVERY SYSTEMS, INC.,

Defendant.
_____/

No. C 09-2842 PJH

ORDER DENYING MOTION FOR CLASS CERTIFICATION

Plaintiff's motion for class certification came on for hearing before this court on November 30, 2011. Plaintiff Jorge Soto ("Soto" or "plaintiff") appeared through his counsel, William Kennedy, and Cynthia Singerman. Defendant Commercial Recovery Systems ("CRS" or "defendant") appeared through its counsel, Jennifer Hutcheson McCune. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court DENIES plaintiff's motion for class certification, for the reasons stated at the hearing, and as follows.

BACKGROUND

This action arises under federal and state Fair Debt Collection Practices acts. Plaintiff Jorge Soto ("Soto"), on his own behalf and that of a proposed class, generally alleges that defendants Chase Home Finance LLC ("Chase") and Commercial Recovery Systems, Inc. ("CRS")(collectively "defendants") unlawfully attempted to collect on outstanding purchase money mortgages after foreclosure sales had taken place – an act prohibited by state and federal law.

On April 26, 2007, Soto purchased a single family residential home at 2040 Sommer Street, in Napa, California. See Class Action Complaint for Violations of the Federal and State Fair Debt Collection Practices Acts ("Class Action Complaint"), ¶ 8. The cost of the

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home was $490,000 and Soto bought the property as his primary residence. Id. In order to purchase the residence, Soto applied for and received two home mortgage loans from Chase. The first mortgage was for $416,500 ("first mortgage"), and the second mortgage was for $73,500 ("second mortgage"). Class Action Complaint, ¶ 9. Both were purchase money loans, as reflected by the loan documents and the communications that took place during the loan application process. See id.

In 2008, Soto struggled with his mortgage payments, and on February 17, 2009, Soto lost title to his home through a nonjudicial foreclosure sale. Id., ¶ 10. Pursuant to California law – specifically, Code of Civil Procedure § 580b – the foreclosure sale terminated the mortgage holders' interest in both mortgages, and resulted in an extinguishment of Soto's liability to Chase for any remaining balance on the loans following the foreclosure sale. Id., ¶ 11.

On February 28, 2009, however – eleven days following the foreclosure sale of his property – Soto received a letter from CRS, a collection agency, seeking to collect $78,710 from Soto. See Class Action Complaint, ¶ 12. This was the amount that CRS contended remained due on Soto's second mortgage. One month later, on March 28, 2009, Soto received an automated call from CRS, again stating that Soto owed money in connection with his Chase account, and notifying Soto of CRS' intent to collect the debt. Id. at ¶ 13. Soto also received a personal call from a CRS representative, stating that Soto was liable for the outstanding amount on the second mortgage. Id. at ¶ 14. After Soto explained to the representative that he did not believe he owed any money on the second mortgage following the foreclosure, the CRS representative continued to insist that money was owed. Id.

Finally, in early May 2009, a Chase representative called Soto, leaving a message for him. When Soto returned the call, the Chase representative – who identified himself as Steven – sought payment in an amount exceeding $70,000 in connection to outstanding liability on the second mortgage. Class Action Complaint, ¶ 15. Chase called yet again on

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May 15, 2009, informing Soto once more that he had to pay on the second mortgage. Id. at ¶ 16.

As a result of the foregoing, Soto has filed the instant complaint on his behalf an on behalf of a similarly situated class of individuals.[1] Specifically, Soto brings suit on behalf of a proposed class consisting of all California residents who (a) took out one or more loans subject to California Code of Civil Procedure § 580b; (b) had the real property securing the loan(s) sold in foreclosure; and (c) were subjected to collection attempts by CRS following the foreclosure sale. See Class Action Complaint, ¶ 17.

Soto alleges that CRS improperly sought to collect on outstanding liabilities owed on foreclosed properties, despite the fact that California Code of Civil Procedure § 580b prohibits collection attempts on money purchase loans secured by foreclosed properties that were primary residences. To that end, plaintiff alleges two causes of action against defendants: (1) for violation of the Federal Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 et seq.; and (2) for violation of California's Fair Debt Collection Act, Cal. Civil Code § 1788 et seq. See generally Class Action Complaint.

DISCUSSION

A. Legal Standard

In order for a class action to be certified, plaintiffs must prove that they meet the requirements of Federal Rule of Civil Procedure 23(a) and (b). As a threshold to class certification, plaintiffs must satisfy four prerequisites under Rule 23(a). First, the class must be so numerous that joinder of all members individually is "impracticable." See Fed. R. Civ. P. 23(a)(1). Second, there must be questions of law or fact common to the class. Fed. R. Civ. P. 23(a)(2). Third, the claims or defenses of the class representative must be typical of the claims or defenses of the class. Fed. R. Civ. P. 23(a)(3). And fourth, the person representing the class must be able to protect fairly and adequately the interests of all

[1] Plaintiff's complaint actually alleges two proposed classes, one that was exposed to CRS' collection efforts, and the other exposed to Chase's collection efforts. However, since Chase was voluntarily dismissed on November 19, 2009, only one actionable class remains.

members of the class. Fed. R. Civ. P. 23(a)(4). The parties moving for class certification bear the burden of establishing that the Rule 23(a) requirements are satisfied. Gen'l Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 156 (1982); see also Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2551 (2011).

If all four prerequisites of Rule 23(a) are satisfied, the court then determines whether to certify the class under one of the three subsections of Rule 23(b), pursuant to which named plaintiffs must establish that either 1) there is a risk of substantial prejudice from separate actions; or 2) declaratory or injunctive relief benefitting the class as a whole would be appropriate; or 3) common questions of law or fact common to the class predominate and that a class action is superior to other methods available for adjudicating the controversy at issue. See Fed. R. Civ. P. 23(b)(3).

The court does not make a preliminary inquiry into the merits of plaintiffs' claims in determining whether to certify a class. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974). It will, however, scrutinize plaintiffs' legal causes of action to determine whether they are suitable for resolution on a class wide basis. See, e.g., Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 480 (9th Cir. 1983). Making such a determination will sometimes require examining issues that overlap with the merits. See Wal-Mart Stores, 131 S.Ct. at 2551-52 (acknowledging that frequently, court's "rigorous analysis" will entail some overlap with the merits of the plaintiff's underlying claim). The court will consider matters beyond the pleadings, if necessary, in order to ascertain whether the asserted claims or defenses are susceptible of resolution on a class wide basis. See McCarthy v. Kleindienst, 741 F.2d 1406, 1419 n.8 (D.C. Cir. 1984).

B. Legal Analysis

Through this motion, plaintiff seeks certification of a class pursuant to Federal Rules of Civil Procedure 23(a) and (b)(3). The class plaintiff seeks to certify is a class of California residents that includes: persons with mortgage loans secured by property in California; where the mortgage loan was subject to California Code of Civil Procedure §

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580b in that the loan was a purchase money loan for the purchase of a dwelling for not more than four families, and for property which was owner-occupied; where the real property securing the loan was sold in foreclosure; and where CRS engaged in collection attempts after foreclosure on or after June 25, 2008. See Mot. Class Cert. at 3:15-23; Complaint, ¶ 17.

Plaintiff contends that the critical issue is whether California Code of Civil Procedure ("CCP") § 580b has the effect of rendering any deficiency debts on money purchase loans resulting from foreclosure sales void. Plaintiff contends that if such deficiency debts are void, then any attempt to collect them is a clear violation of the federal and state fair debt collection practices acts. However, if § 580b is interpreted as merely prohibiting judgments as to these deficiency balances, but does not render the deficiency debt itself void, then collection attempts are not in and of themselves prohibited, but such collection attempts must comply with the law and collectors must clearly explain to individuals that the payment sought is voluntary. Either way, however, plaintiff contends that defendant here has violated the law.

It appears from the papers that both parties agree that the merits of this case revolve around this disputed issue of law – whether § 580b renders deficiency debts based on foreclosure sales void, or whether it merely prohibits deficiency judgments based on foreclosure sales. If the former, the parties appear to both agree that neither a judgment nor collection efforts on the debt may be attempted. And if the latter, collection efforts may be undertaken with respect to the outstanding debt – but the disclosures made in any attempt to collect must comply with fair debt collection practices, which plaintiff contends did not occur.

With this legal backdrop, the court turns to plaintiff's Rule 23 showing.

1. Plaintiffs' Rule 23(a) Showing

As indicated in the legal standards section above, plaintiff must first demonstrate that he has satisfied the requirements for class certification under Rule 23(a), which

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requires a showing as to the following four elements: numerosity, commonality, typicality, and adequacy. When considering class certification under Rule 23, district courts "are not only at liberty to, but must, perform a rigorous analysis to ensure that the prerequisites of Rule 23(a) have been satisfied." See Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 581 (9th Cir. 2010)(this standard has not changed with the Supreme Court's recent Wal-Mart ruling). In doing so, and as Wal-Mart clarifies, a district court must examine evidence going to the merits, to the extent examination of that evidence necessarily overlaps with the analysis required to determine whether Rule 23(a) factors have been met.

a. numerosity

Rule 23(a)(1) requires that a class be so numerous that joinder of all members is impracticable. In order to satisfy this requirement, plaintiffs need not state the "exact" number of potential class members, nor is there a specific number that is required. See In re Rubber Chems. Antitrust Litig., 232 F.R.D. 346, 350-51 (N.D. Cal. 2005). Rather, the specific facts of each case must be examined. In re Beer Distrib. Antitrust Litig., 188 F.R.D. at 561 (citing General Tel. Co. v. EEOC, 446 U.S. 318, 330 (1980)). While the ultimate issue in evaluating this factor is whether the class is too large to make joinder practicable, courts generally find that the numerosity factor is satisfied if the class comprises 40 or more members, and will find that it has not been satisfied when the class comprises 21 or fewer. See, e.g., Consolidated Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir. 1995); Ansari v. New York Univ., 179 F.R.D. 112, 114 (S.D.N.Y. 1998).

The parties here dispute what the class membership numbers are. Ultimately, however, regardless whether they are on the upper end at 92, as plaintiff contends, or on the lower end at 63, as defendant asserts, the court finds, using 40 as the general benchmark, that numerosity is satisfied.

b. commonality

Commonality requires that there must be questions of law or fact common to the class. Fed.R.Civ.P. 23(a)(2). The commonality preconditions of Rule 23(a)(2) have

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generally been construed permissively. See Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998). To share sufficient factual commonality to satisfy the minimal requirements of Rule 23(a)(2), "[t]he existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." Staton v. Boeing Co., 327 F.3d 938, 953 (9th Cir. 2003). "Where the circumstances of each particular class member vary but retain a common core of factual or legal issues with the rest of the class, commonality exists." Parra v. Bashas', Inc., 536 F.3d 975, 978-79 (9th Cir. 2008); see also Wal-Mart, 131 S.Ct. at 2551 (citations ommitted)("What matters to class certification ... is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation").

Here, although defendant attempts to make much of the fact that some members of the class were subject only to verbal collection attempts and were not subject to written collection attempts, these objections are not sufficient to show a lack of commonality. Generally, all plaintiffs share the same legal issue – i.e., whether they could have properly been the subject of collection attempts pursuant to § 580b, given the deficiency debts they owed based on purchase money loans for properties that were foreclosed – and the slightly "divergent factual predicates" they share are insufficient to preclude a finding of commonality.

c. typicality

The third requirement under Rule 23(a) is that the claims or defenses of the class representatives must be typical of the claims or defenses of the class. Fed. R. Civ. P. 23(a)(3). Typicality exists if the named plaintiffs' claims are "reasonably coextensive" with those of absent class members. Staton, 327 F.3d at 957. To be considered typical for purposes of class certification, the named plaintiff need not have suffered an identical wrong. Id. Rather, the class representative must be part of the class and possess the same interest and suffer the same injury as the class members. See Falcon, 457 U.S. at

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"The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." Hanon, 976 F.2d at 508 (citation omitted). According to the Ninth Circuit, "[t]ypicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought." Id. (quotation omitted). "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." Id. (internal quotation marks omitted); see also Armstrong v. Davis, 275 F.3d 849, 868 (9th Cir. 2001) (typicality is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability); Lightbourn v. County of El Paso, 118 F.3d 421, 426 (5th Cir. 1997)(typicality focuses on the similarity between the named plaintiffs' legal and remedial theories and the legal and remedial theories of those whom they purport to represent). In practice, the commonality and typicality requirements of Rule 23 "tend to merge." Gen'l Tel. Co. Of Southwest, 457 U.S. at 158 n. 13. The Ninth Circuit interprets the typicality requirement permissively. Hanlon, 150 F.3d at 1020.

Plaintiff has a similar injury to the putative members of the class, since all are claiming that CRS unlawfully sought to collect a deficiency judgment in violation of § 580b and in violation of the fair debt collection practices statutes (state and federal). Furthermore, the fundamental conduct of which plaintiff and the putative members complain – i.e., CRS' conduct in attempting to collection on the deficiency debts – is the same for all members, in a general sense, even if the nature of the attempts varied among class members. Thus, it is the same general course of events undertaken by defendant that has prompted all the class members' claims. And while defendant argues that Soto's claim is atypical because he is one of three putative class members sent the initial PD1 letter but not the other two letters, this argument rings hollow. The content of all letters,

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and the conduct complained of on CRS' behalf, does not depend upon the type of letter sent but rather on the mere fact that all were sent letters.

Furthermore, the court rejects as without support CRS' argument that the separate state court action that plaintiff is pursuing against Chase somehow renders plaintiff's claims atypical. Pursuit of a separate law suit against a separate defendant is not the same thing as the pursuit of claims separate from the class in the same lawsuit against the same defendant, which could perhaps suggest atypicality.

d. adequacy

The fourth requirement under Rule 23(a) is adequacy of representation. The court must find that named plaintiff's counsel is adequate, and that named plaintiff can fairly and adequately protect the interests of the class. To satisfy constitutional due process concerns, unnamed class members must be afforded adequate representation before entry of a judgment which binds them. See Hanlon, 150 F.3d at 1020. Legal adequacy is determined by resolution of two questions: (1) whether named plaintiffs and their counsel have any conflicts with class members; and (2) whether named plaintiffs and their counsel will prosecute the action vigorously on behalf of the class. Id. Generally, representation will be found to be adequate when the attorneys representing the class are qualified and competent, and the class representatives are not disqualified by interests antagonistic to the remainder of the class. Lerwill v. Inflight Motion Pictures, 582 F.2d 507, 512 (9th Cir. 1978).

Here, plaintiff asserts that his counsel has the right qualifications to prosecute this class action, and furthermore that there are no conflicts between him as the class representative and the putative class members. Defendant takes issue with this, asserting that there are conflicts present between the named plaintiff and the class members, as well as between counsel and the class. Specifically, defendant notes that (a) Soto cannot adequately represent the class since he has different incentives to vigorously pursue class claims, based on his separate pending litigation against Chase in state court; and (b) class

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counsel cannot vigorously pursue litigation on the class' behalf, since they, too, are representing Soto in the state proceedings.

As with the discussion on typicality above, there is simply no support for these conclusions in the record or in the law. At best, defendant cites only to Moore's Federal Practice Guide, for the proposition that to the extent a plaintiff has non-class claims that he pursues in addition to his class claims in the same litigation, a conflict may arise. But this is simply not the scenario presented here. The state and federal proceedings are unrelated, and plaintiff asserts only class claims in this action, and the court assumes that class counsel has and does routinely litigate more than one case at a time. Adequacy has been satisfied.

2. Plaintiff's Rule 23(b)(3) Showing

Plaintiff seeks certification pursuant to Rule 23(b)(3), which requires plaintiff to establish that common questions of law or fact common to the class predominate, and that a class action is superior to other methods available for adjudicating the controversy at issue. See Fed. R. Civ. P. 23(b)(3).

Defendant argues that common factual questions do not predominate, because individual inquiry must be made among the class members to demonstrate the type and content of collection activity that allegedly took place (i.e., whether a collection letter was received and/or whether and what verbal collection activity took place), whether putative class member's homes were owner occupied such that the owners are entitled to the protections afforded by CCP § 580b, and whether putative class members suffered individual damages apart from statutory damages. Defendant highlights in particular the necessity of individual inquiry in determining whether each loan falls under the protection of § 580b, because this provision – which covers only borrowers who occupy their home as a primary residence and not those who rent out their home or use it as a secondary residence – is at the heart of plaintiff's liability arguments.

Plaintiff, in response, asserts that proof of collection activity is simple and covered by

mere membership in the class – regardless whether the collection activity was written or verbal – and that proof of § 580b applicability, in particular, can be made based on uniform residential loan applications supplied by Chase. Plaintiff also notes that other courts – primarily in Illinois – have already found that the uniform residential loan applications are sufficient proof of the character of class members' loans.

On this question, defendant's arguments are strongest. As both parties appeared to concede at the hearing, the heart of plaintiff's case rests upon a legal determination as to whether and how CCP § 580b applies to plaintiff and the putative class members. As such, if plaintiff is to succeed in securing class certification, proof of the statutory provision's applicability to the class members must be susceptible to class wide proof. Furthermore, and § highlighted by defendant, demonstrating the provision's applicability to the class depends in part upon whether the loans purportedly secured by the class members from Chase were "in fact used to pay all or part of the purchase price" of dwellings that were "occupied, entirely or in part, by the purchaser." See Cal. Code Civ. Proc. § 580b.

Here, some of the potential class members have already been disqualified from the class because, although they indicated on the uniform residential loan application that their purchase money loan was for a primary owner-occupied residence, it wasn't. It was for an investment home, or for a second home. Thus, the uniform applications that plaintiff wishes to rely upon for class-wide proof have demonstrably been shown to provide unreliable proof of loans utilized for owner-occupied dwellings. As such, they expose a need for individualized inquiry, since plaintiff cannot rely on the applications to prove that each member of the class "in fact" used the subject loans to purchase an owner-occupied residence, but must instead rely upon factual proof unique to each individual in order to do so.

To the extent that plaintiff otherwise relies upon out of circuit case law to support reliance on the uniform residential loan applications, plaintiff's case citations are not wholly apposite, since the cases plaintiff relies on mostly considered the reliability of uniform loan

applications in the TILA context and furthermore, since none of those cases dealt with a situation like this one – where the very legal liability at stake centers precisely on the loan status of potential class members (i.e., § 580b only applies if the class members got purchase money loans for primary residences).

In view of the critical nature of the foregoing issue, and since resolution of the issue would require delving into each class member's actual facts in order for the fact finder to conclusively determine the purposes for which each plaintiff actually secured their loans, the court concludes that individual issues predominate.

Moreover, the court also notes that to the extent the content of any verbal communications with CRS among class members is critical to determining the merits of plaintiff's claim that CRS' collection efforts violated the state and federal Fair Debt Collection Practices Acts, this is also a highly individualized inquiry, since conversations may have differed among class members.

In sum, and for the foregoing reasons, the court finds that common issues do not predominate with respect to critical liability issues in the case, and plaintiff has failed to satisfy the predominance element contemplated by Rule 23(b)(3).

C. Conclusion

Accordingly, and for all the foregoing reasons, the court DENIES plaintiff's motion for class certification, due to plaintiff's failure to establish the requisite elements pursuant to Rule 23(b)(3).

The parties shall appear at a case management conference, in order to establish a pretrial schedule, on January 5, 2012, at 2:00 p.m.

IT IS SO ORDERED.

Dated: December 5, 2011

PHYLLIS J. HAMILTON
United States District Judge