

Case No. 8:09-CV-1985-T-17TBM

treats technicians as independent contractors. Plaintiffs contend Plaintiffs provided a benefit to Defendant Knight by performing the work, that Defendant had knowledge of the work, and accepted the benefit of it, and that Defendant did not pay Plaintiffs for the work, either through non-payment for repair work or by taking deductions for chargebacks, and from retainers.

C. Conversion

Under Florida law, conversion is defined as a wrongful taking of personal property with intent to exercise an ownership which is inconsistent with the real owner's right of possession. King v. Saucier, 356 So.2d 930 (Fla. 2d DCA 1978). Plaintiffs argue that the common question is whether the retention of unpaid wages, and the retainer, was wrongful, based on the misclassification of the technicians, and whether the technicians were employees under Florida law.

Defendant does not dispute that there are common questions of law or fact as to the FDUTPA claims, the unjust enrichment claim or the conversion claim.

3. Typicality

Under Rule 23(a), "the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class." Fed.R.Civ.P. 23(a)(3). "The key inquiry in determining whether a proposed class has 'typicality' is whether the class representative is part of the class and possesses the same interest and suffers the same injury as the class members." Clausnitzer, 248 F.R.D. at 656 (citation omitted). Typicality requires that the claims of the named representative bear the same essential characteristics of the claims of the class at large. Id. The named representative's claims need not be identical to class members' claims as long as they "arise out of the same conduct and are grounded on the same legal theory." Jeld-Wen, 250 F.R.D. at

694. "The test for typicality, like commonality, is not demanding." Id. (citation omitted).

Plaintiffs argue that Plaintiffs are members of the class they seek to represent, that they performed the same work, were subject to the same types of damages, and were subject to the same control over the manner in which they performed their services.

Defendant argues that there are potential conflicts among Plaintiffs in the proposed class. Defendant argues Plaintiffs who were engaged in quality assurance or quality control have adverse interests to other class members. Where Plaintiffs are seeking the return of monies that were the subject of "chargebacks" and payment for time spent repairing their own work, the existence of a chargeback is an outcome of the quality assurance function. Quality assurance or quality control technicians were engaged to inspect other technicians' work and to determine whether the work was done properly. Defendant argues that if a chargeback has been taken or if the quality control technician who sets the chargeback in motion testifies that the work was defective, the interests of the installing technicians is adverse to the interests of the quality control technicians. Defendant argues that quality control technicians are not appropriate representatives of, and/or members of, a class of installers, and vice versa.

Defendant argues that the claim of Plaintiff Michael Scantland is not typical. Defendant argues that Plaintiff Michael Scantland has filed a worker's compensation claim, alleging that he is entitled to benefits for an injury sustained while he was working as a Knight contractor. Defendant further argues that Plaintiff Scantland has invoked the Internal Revenue Service to conduct an investigation in to the relationship between Knight and its contractors. Defendant argues that Knight was requested to furnish a list of names, Social Security Numbers, addresses and telephone numbers of all workers performing the same work as Plaintiff Scantland. Defendant argues that since some individuals have not filed income tax returns, Plaintiff Scantland's request has placed

him in a position where he brought unwelcome attention to the other Plaintiffs such that Plaintiff Scantland's interests are adverse.

This issue is a disputed issue. For the purpose of resolving this Motion, the Court will assume that the typicality requirement is met.

3. Adequacy of Representation

Rule 23(a)(4) requires a showing that "the representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). The analysis "encompasses two separate inquiries: (1) whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representatives will adequately prosecute the action." Valley Drug Co. v. Geneva Pharmaceuticals, Inc., 350 F.3d 1181, 1189 (11th Cir. 2003) (citation omitted). In addition to looking at the adequacy of the named representatives, the Court also must examine the adequacy of the representatives' counsel. Dahlgren's Nursery v. E.I. du Pont de Nemours, No. 91-8709-CIV, 1994 WL 1251231, at *6-*7 (S.D. Fla. Oct.30, 1994). Counsel will be deemed adequate if they are shown to be qualified, adequately financed, and possess sufficient experience in the subject matter of the class action. Id. at *7.

Plaintiffs argue that they are typical of the class, making them adequate representatives for all claims. Plaintiffs argue that counsel is competent class counsel, with extensive experience handling wage and hour class actions. Plaintiffs argue that the requirement of adequacy of representation is met.

As noted above, Defendant has raised an issue as to potential conflicts between class representatives who have been quality control technicians, and as to conflicts between Plaintiff Scantland and other members of the class. For the purpose of resolving this Motion, the Court will assume that at least some of the named Plaintiffs

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have no conflict of interest.

C. Rule 23(b)

1. Predominance

In order to satisfy the predominance inquiry under Rule 23(b)(3), Plaintiffs need not demonstrate that every question of law or fact is common to the class. See Jones v. Jeld-Wen, Inc., 250 F.R.D. 685 (S.D. Fla. 2008) (“Under Rule 23(b)(3) it is not necessary that all questions of law or fact be common, but only that some questions are common and that they predominate over the individual questions.”) (quoting Klay v. Humana, Inc., 382 F.3d 1241, 1254 (11th Cir. 2004)). The predominance inquiry, however, is much more stringent than Rule 23(a)(2)'s requirement of commonality. See Id.; Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999, 1005 (11th Cir.1997).

Plaintiffs argue that common questions of law and fact predominate. Plaintiffs argue that the damage claims are susceptible to class adjudication because all are based on Defendant's alleged deceptive and unfair practice of labeling the technicians as independent contractors.

Defendant argues that, if prosecuted as a class action, this case will break down into an unmanageable variety of individual class issues, the only common issue of law or fact being the alleged misclassification of Plaintiffs. Defendants argue that common issues will not predominate as to the FDUTPA, unjust enrichment, and conversion claims.

A. FDUTPA

Plaintiffs argue that the core of Plaintiffs' claim for damages under FDUTPA are the issues of: 1) whether the technicians have been improperly classified as independent contractors; 2) whether the misclassification constitutes an unfair, unconscionable, or deceptive practice; and 3) whether this practice caused technicians to suffer damages related to unpaid work for repairs, "chargebacks," and the loss of retainers paid to Knight. Plaintiffs argue that these issues can be determined based on common class-wide evidence.

Plaintiffs argue that individual issues will not predominate where there is a central policy of misclassifying workers as independent contractors, that the workers signed the same agreements establishing this classification, that the workers were subject to the same management policies, and worked under similar management. In Re FedEx Ground Package Sys., 273 F.R.D. 424 (N.D. Ind. 2008).

The Court has examined the "Independent Contractor Services Agreement" at issue. The Court notes the following provisions:

2. Work Assignments. To the extent that Knight decides to utilize the services of Contractor, Knight shall (directly or through the Company, at Knight's option provide to Contractor a work order describing the location, providing other relevant contact information, and describing the type of work to be performed. Contractor may decline any work assignments and is not required to maintain a set schedule. Once Contractor has accepted one or more assignments, including a day's worth of assignments, Contractor shall timely complete said assignments pursuant to the terms and conditions of this Agreement and may not thereafter refuse to full complete the accepted assignments. The Contractor agrees to perform specific work for the specific amounts set forth in this Agreement.

3. Performance. Contractor shall perform the work in a timely and competent manner and all work shall be done in a good and workmanlike manner. Contractor shall use its best efforts to complete all work during regular business hours. Contractor shall comply with all specifications of Knight and the Company regarding the work. Contractor shall keep the area in which the work is being performed clean and shall return the area to the condition it was in prior to commencement of the work once the work is completed, including the removal of any debris and excess materials. The manner and means of performance of the work, including technique, sequence, procedures, selection and assignment of employees shall be subject to Contractor's exclusive discretion, supervision and control. Contractor may employ others to assist Contractor in performing the work, in which case Contractor shall be solely responsible for all wages, taxes, workers compensation, unemployment, fringe benefits, and any other matters associated with its employees. Knight shall be under no obligation to assign any work to Contractor. Contractor indemnifies, agrees to defend and holds Knight harmless from any damage, claim, loss, fee or liability arising out of Contractor's failure to satisfactorily complete the work.

....

8. Independent Contractor/No Agency. Contractor will perform the work as an independent contractor of Knight, and this Agreement will not be construed to create a partnership, joint venture or employment relationship between Contractor and Knight. Contractor will retain full control over the manner in which it performs the work and will not be entitled to workers' compensation, unemployment, retirement, insurance or other benefits that may upon occasion be afforded to employees of Knight. Contractor shall have no authority to enter into any agreements binding upon the Company, or to create any other obligations on the part of Knight, and further agrees that Contractor is in no way Knight's agent.

In In Re FedEx Ground Package Systems, *supra*, the Court distinguished between Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995), in which the parties'

written contract vested no right to control in the defendant, and the FedEx case, in which the Florida plaintiffs argued that the standard Operating Agreement vested the right to control in FedEx Ground as to make the drivers employees. Unlike the Keith court, which looked to evidence of actual control because a sufficient right did not exist in the contract, the FedEx court did not need to examine the parties' actual practice to find a right to control.

To determine whether a relationship is that of employer-employee or contractor-subcontractor, in Keith v. News & Sun Sentinel, 667 So.2d 167, 171 (Fla., 1995), the Florida Supreme Court held:

Hence, courts should initially look to the agreement between the parties, if there is one, and honor that agreement, unless other provisions of the agreement, or the parties' actual practice, demonstrate that it is not a valid indicator of status. In the event that there is no express agreement and the intent of the parties cannot otherwise be determined, courts must resort to a fact-specific analysis under the Restatement based on the actual practice of the parties. Further, where other provisions of an agreement, or the actual practice of the parties, belie the creation of the status agreed to by the parties, the actual practice and relationship of the parties should control. See Cantor v. Cochran, 184 So.2d 173 (Fla. 1966).

In FedEx Ground, it was not necessary for the court to make an individual analysis of other factors in the actual practice of the parties, because the plaintiffs did not contend that those factors made them employees, but rather that employment status could be determined primarily on the terms of the Operating Agreement.

This case is the opposite of the situation as In Re FedEx Ground Package System, Inc.. The independent contractor agreement, which is an integrated contract, expressly provides that the parties to the Agreement understand that the Contractor's

status is "independent contractor" and that the Contractor controls the manner and means of performance of the work. The Court does not consider the requirement of compliance with the technical specifications of Defendant and the Company to equate to active supervision and control of the work. An individual analysis of the Restatement factors in the actual practice of the parties would be required.

After consideration, the Court concludes that common questions of law or fact would not predominate as to the FDUTPA claims.

B. Unjust Enrichment

Before the Court can grant relief on an equitable claim, the Court must examine the particular circumstances and assure itself that, without a remedy, inequity would result or persist. Where an individual analysis of the facts would be required as to any express contracts entered into, and the circumstances surrounding each contract, to determine the existence of a contract, or whether a contract implied in law arose, and to consider any resulting inequity, common questions would not predominate over individual questions. Vega v. T-Mobile, Inc., 564 F.3d 1256, 1274 (11th Cir. 2009).

C. Conversion

The Court finds that an examination of individualized proof will be required as to each Plaintiff's bargaining relationship with Defendant, and the circumstances surrounding the bargain, in determining whether any conversion occurred. The Court finds that common questions would not predominate over individual questions.

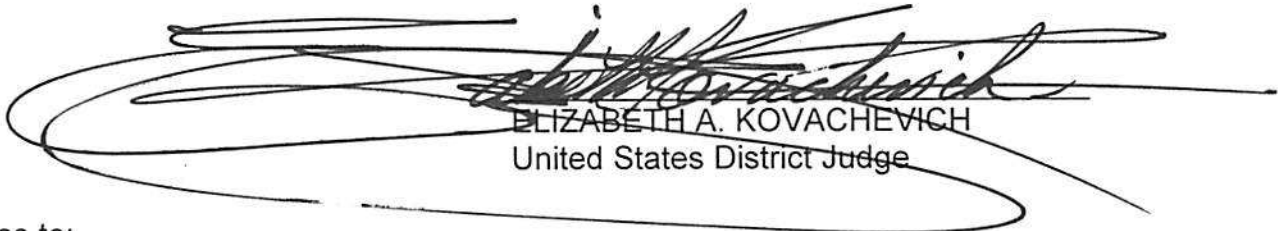
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2. Superiority

The Court has concluded that individual questions of fact or law will predominate over common issues. The Court therefore concludes that a class action is not superior to other methods to efficiently resolve the controversies involved. Accordingly, it is

ORDERED that the Motion for Class Certification (Dkt. 132) is **denied**. The Motion for Leave to File Reply (Dkt. 137) is **denied** as moot.

DONE and ORDERED in Chambers in Tampa, Florida on this 29th day of September, 2011.



ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to:
All parties and counsel of record