NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 2006

ALAIN MURGA, Individually and on behalf of all other similarly situated Plaintiffs,	**	
Appellant,	**	CASE NO. 3D05-2295
vs.	**	
UNITED PROPERTY & CASUALTY INSURANCE COMPANY,	**	LOWER TRIBUNAL NO. 04-20162
Appellee.	**	

Opinion filed November 1, 2006.

An Appeal from the Circuit Court for Miami-Dade County, Jon I. Gordon, Judge.

Mary E. Kestenbaum and David J. Pettinato, for appellant.

James C. Kelley, for appellee.

Before WELLS, CORTIÑAS, and LAGOA, JJ.

WELLS, Judge.

Alain Murga appeals from an order dismissing his class action complaint against insurer United Property & Casualty Insurance Company. Rule 1.220 of the Florida Rules of Civil Procedure governing pleadings in class action cases requires the

plaintiff to allege the existence of a class; to define the alleged class; to specify the approximate number of class members; and to "demonstrate that the four prerequisites specified in rule 1.220(a) are satisfied and that the action meets the criteria for one of the three types of class actions defined in rule 1.220(b)." Bobinger v. Deltona Corp., 563 So. 2d 739, 742 (Fla. 2d DCA 1990). Murga's complaint demonstrates that his claim cannot satisfy the criteria of any of the three types of actions defined in Rule 1.220(b). Because amendment in this case would be futile, the action was properly dismissed. See Kay's Custom Drapes, Inc. v. Garrote, 920 So. 2d 1168, 1171 (Fla. 3d DCA 2006)(quoting Kimball v. Publix Super Mkts., Inc., 901 So. 2d 293, 296 (Fla. 2d DCA 2005), observing that "[r]efusal to allow an amendment is an abuse of the trial court's discretion 'unless it clearly appears . . . amendment would be futile.' State Farm Fire & Cas. Co. v. Fleet Fin. Corp., 724 So. 2d 1218, 1219 (Fla. 5th DCA 1998)."); Carter v. Ferrell, 666 So. 2d 556, 557 (Fla. 2d DCA 1995)(observing that "refusal to allow an amendment constitutes an abuse of discretion unless it clearly appears that . . . amendment would be futile").

Accordingly, the order under review is affirmed.

LAGOA, J., concurs.

CORTIÑAS, Judge (dissenting).

I respectfully dissent. This is an appeal from an order granting a motion to dismiss the class action complaint. The trial court's order does not explain or detail the judge's grounds for dismissal.

Assuming, as the majority does, that the trial court dismissed the complaint for failure to meet the Rule 1.220 criteria applicable to class actions, the order doing so is completely defective.[1] Rule 1.220(d)(1) of the Florida Rules of Civil Procedure requires that the court conduct a hearing "as soon as practicable after service of any pleading alleging the existence of a class." Fla. R. Civ. P. 1.220(d)(1). After holding a hearing, the trial court "shall enter an order determining whether the claim or defense is maintainable" as a class action. Id. Rule 1.220(d)(1) further requires that "[i]rrespective of whether the court determines that the claim or defense is maintainable on behalf of a class, the order shall

[1] There is nothing to indicate that the trial court's dismissal of the complaint was based on Rule 1.140, which applies to dismissals for failure to state a cause of action. Cf. Slade v. Federated Nat'l Ins. Co., 904 So. 2d 623, 624 (Fla. 4th DCA 2005)(holding that an order granting a motion to dismiss class action allegations on the grounds that they are not sufficient to maintain a class action is implicitly a Rule 1.140(b)(6) motion, not a denial of class certification, and therefore is not appealable as a non-final order); see also Fla. Dep't of Agric. & Consumer Servs. v. City of Pompano Beach, 829 So. 2d 928, 930 (Fla. 4th DCA 2002)(recognizing a difference between motions to dismiss for failure to state a cause of action under Rule 1.140 and motions to deny class certification under Rule 1.220).

separately state the findings of fact and conclusions of law upon which the determination is based." Fla. R. Civ. P. 1.220(d)(1)(emphasis added); see also Fla. Dep't of Agric. & Consumer Servs. v. City of Pompano Beach, 829 So. 2d 928, 930 (Fla. 4th DCA 2002)("Rule 1.220(d) requires the court to conduct a hearing and enter an order determining whether the claim is maintainable on behalf of a class, stating its findings as to the requirements of Rule 1.220(a) and (b).").

Here, the trial court's order does not contain a single finding of fact or any conclusion of law. In fact, the trial court's order does not even cite to the rule under which dismissal is being granted. On its face, the trial court's order is completely defective and, as such, cannot be affirmed.

In my opinion, the majority puts the proverbial cart before the horse in conducting what is essentially a de novo review of the propriety of appellant's class action allegations without any indication that the allegations were properly considered and ruled upon by the trial court. Such a review is entirely inconsistent with the applicable standard of review for appeals of trial court decisions on class certification. United Auto. Ins. Co. v. Diagnostics of S. Fla., Inc., 921 So. 2d 23, 25 (Fla. 3d DCA 2006)(stating that a trial court's order certifying a class is reviewed for abuse of discretion)(citations omitted). An abuse of discretion review, which is required in this case,

does not and can not entail performing the functions of a trial court. As an appellate court, we cannot review the propriety of the trial court's order without any indication, as required by Rule 1.220(d)(1), of the grounds on which it is based. I would reverse the order of dismissal and remand this case to the trial court for consideration of appellant's class action allegations.