IN THE COURT OF APPEALS OF IOWA

No. 2-509 / 11-1779
Filed October 3, 2012

BANKRUPTCY ESTATE OF DANA D. VANGILDER, on Behalf of Herself and all Others Similarly Situated,
Plaintiff-Appellee,

vs.

MIDWESTONE BANK d/b/a IOWA STATE BANK & TRUST COMPANY,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Patrick R. Grady, Judge.

The defendant appeals the district court's order certifying a class action lawsuit involving the interest rate it applied to commercial loans made by the bank. **REVERSED AND REMANDED.**

Patrick M. Roby and Robert M. Hogg of Elderkin & Pirnie, P.L.C., Cedar Rapids, for appellant.

Eric M. Updegraff of Stoltze & Updegraff, P.C., Des Moines, for appellee.

Heard by Vogel, P.J., and Danilson and Mullins, JJ.

MULLINS, J.

MidwestOne Bank d/b/a Iowa State Bank & Trust Company (the Bank), appeals the district court ruling entered October 3, 2011, granting the Bankruptcy Estate of Dana D. VanGilder's (VanGilder) motion for class certification. The Bank contends that the district court abused its discretion by failing to properly identify the nature of VanGilder's cause of action, which ultimately led the district court to erroneously conclude that common questions predominated over individual ones. The Bank further contends that the district court abused its discretion by finding there were other claimants in the class and by failing to describe the class as required by Iowa Rule of Civil Procedure 1.264(1). For the reasons stated herein, we reverse the district court's ruling and remand for further proceedings.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY.

On August 15, 2006, Dana VanGilder, as president of Sun Plus Rooms, Inc. d/b/a Four Seasons Sun Rooms, entered into a loan agreement and promissory note with the Bank. The standard form promissory note prepared by the Bank stated that the initial interest rate would be 9.000% per annum applied to a total principal amount of $350,000. The interest rate information is located in bold near the top of the promissory note and also within the third paragraph of the text of the note. The second paragraph of the note, in a section titled "Payment," states that interest will be computed on a 365/360 basis. The note explained this method of interest calculation divides the annual interest rate by 360 days, then multiplies that resulting ratio by the outstanding principal balance

and finally multiplies that number by the number of days the principal balance is outstanding. At the end of the promissory note, in bold type, there is a clause stating that the borrower read and understood all of the provisions of the note and agreed to the terms of the note. There is no dispute that VanGilder signed the promissory note.

VanGilder contends that by using the 365/360 method of interest calculation, the Bank actually allocated to itself 0.14% more interest per year than the agreed upon 9.000% amount would generate. VanGilder alleges that the Bank failed to adequately disclose that the 365/360 method would actually result in the Bank charging more than 9.000% annual interest and this constitutes a breach of contract. On October 1, 2010, the plaintiff filed a class action petition believing there to be other individuals similarly situated who should be included as plaintiffs in the class action. On October 3, 2011, after a hearing, the district court granted VanGilder's motion for class certification, certifying the matter as a class action.

Shortly after certification of the class, the Bank filed a "Motion for Enlargement or Amendment of the Court's Certification Order of October 10, 2011." The Bank sought to have the district court enlarge or amend its findings to specify the identity of the class, who would be included in the class, and the time period included within the class certification. While this motion was still pending the Bank appealed the class certification on November 1, 2011. The Bank then sought a limited remand to the district court to permit the court to rule on the pending motion. The Supreme Court of Iowa denied the limited remand

request and ruled that the Bank waived its pending motion by filing a notice of appeal while the motion was still pending.

II. PRESERVATION OF ERROR.

VanGilder asserts the Bank has waived its claim on appeal that the district court erred in not identifying the class members because the Bank filed its appeal before receiving the district court's ruling on its motion to enlarge or amend. As we find that the district court abused its discretion by certifying this case as a class action because the individual issues predominate over common issues, we need not reach the issue of whether the Bank preserved error on its claim that the district court erred in failing to identify the class members.

III. STANDARD OF REVIEW.

This court reviews a district court's decision on class certification for abuse of discretion. *Vos v. Farm Bureau Life Ins. Co.*, 667 N.W.2d 36, 44 (Iowa 2003). The district court has broad discretion in the certification of class action lawsuits. *Stone v. Pirelli Armstrong Tire Corp.*, 497 N.W.2d 843, 845 (Iowa 1993). The reviewing court will find an abuse of discretion only where the district court's grounds were clearly unreasonable. *Varner v. Schwan's Sales Enters. Inc.*, 433 N.W.2d 304, 305 (Iowa 1988).

IV. ISSUES.

Certification of class action lawsuits in Iowa is primarily governed by Iowa Rules of Civil Procedure 1.261 through 1.264. Before the commencement of a class action, both of the following need to be true: "1.261(1) The class is so numerous or so constituted that joinder of all members, whether or not otherwise

required or permitted, is impracticable" and "1.261(2) There is a question of law or fact common to the class." Iowa R. Civ. P. 1.261. Iowa Rule Civil Procedure 1.263(1) states in part:

> [T]he court shall consider and give appropriate weight to the following and other relevant factors:
> a. Whether a joint or common interest exists among members of the class.
> . . . .
> e. Whether common questions of law or fact predominate over any questions affecting only individual members.
> f. Whether other means of adjudicating the claims and defenses are impracticable or inefficient.
> g. Whether a class action offers the most appropriate means of adjudicating the claims and defenses.

Iowa Rule Civil Procedure 1.264(1) then provides that "the order of certification shall describe the class and state the following: a. The relief sought. b. Whether the action is maintained with respect to particular claims or issues. c. Whether subclasses have been created."

The Iowa Supreme Court has held that "the burden of establishing that a purported class of plaintiffs meets the prerequisites is, of course, on the plaintiffs." *Vignaroli v. Blue Cross of Iowa*, 360 N.W.2d 741, 744 (Iowa 1985). If the plaintiff fails to meet its burden of proof on any of the prerequisites, it is fatal to class certification. *City of Dubuque v. Iowa Trust*, 519 N.W.2d 786, 791 (Iowa 1994). Thus, the burden at the trial court was on VanGilder to establish the existence of the requisite number of the class members and the predominance of a question of law or fact common to the class. The issues in this case deal primarily with predominance of a common question of law or fact. "The question as to whether common issues of fact or law predominate over those affecting

only individuals is a fairly complex one." *Vignaroli*, 360 N.W.2d at 744. "It is not necessary that the individual claims be carbon copies of each other." *Id.* at 745. In regards to predominance, the supreme court has also held that "a claim will meet the predominance requirement when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position." *Vos*, 667 N.W.2d at 45.

In determining whether or not a cause of action should be certified as a class action, the question is not whether the plaintiffs will ultimately prevail on the merits. *Vignaroli*, 360 N.W.2d at 745. The court simply looks at whether the requirements for class action certification have been met. *Id*. "The appropriate inquiry is not the strength of each class member's personal claim, but rather, whether they, as a class, have common complaints." *Martin v. Amana Refrigeration, Inc.*, 435 N.W.2d 364, 367 (Iowa 1989). The court looks at whether the prerequisites for a class action have been established by the plaintiff, not whether the plaintiff will likely prevail at trial.

Because the Iowa Rules of Civil Procedure 1.261 and 1.263 closely resemble the class action rules of the Federal Rule of Civil Procedure 23, Iowa courts may rely on federal authorities construing the federal class action rules. *Vos*, 667 N.W.2d at 44. Interpretation of class action law in Iowa is scant and for that reason federal authorities may be consulted if necessary.

A. Predominance of a Common Question of Law or Fact

Iowa Rule Civil Procedure 1.261(2) requires that there be a common question of law or fact to the class before it can be certified. Although VanGilder uses language such as "deceptively," and "surreptitiously," which are more generally found in allegations of fraud, VanGilder's claim is based on breach of contract and in its brief VanGilder explicitly states that it is not alleging fraud.

Because VanGilder has asserted that this case is based on a breach of contract claim, we look to contract law to determine whether there is a common question of law or fact that predominates. "It is a cardinal principle of contract law that the parties' intention at the time they executed the contract controls." *Hofmeyer v. Iowa Dist. Ct.*, 640 N.W.2d 225, 228 (Iowa 2001). For this cause of action to move forward as a class action, the district court would be required to inquire as to each and every class member's intent at the time they executed the contract.

VanGilder has also raised the "reasonable expectation" theory as it relates to its breach of contract claim. In *Vos*, the supreme court found that class certification was not appropriate for a breach of contract claim involving insurance company agents selling "vanishing premium" life insurance policies to consumers. 667 N.W.2d at 36. The plaintiffs in *Vos* based their claim on whether the defendants knowingly created a "reasonable expectation" that life insurance premiums would vanish and no additional costs would be incurred after a certain period of time. *Id*. As the *Vos* court stated, "even if the doctrine were to apply, the plaintiffs face an insurmountable reliance issue. The party

asserting the doctrine of reasonable expectations must show not only the expectations, but also that they were relied upon by the insurance purchaser in deciding to buy the policy." *Id*. at 50.

To the extent that VanGilder has urged us to adopt the Restatement (Second) of Contracts section 211 as it relates to boilerplate language, we decline to do so. The district court did not base its decision on this provision and we find that courts have generally only turned to it in cases involving insurance contracts. In one such case, *Stratton v. American Medical Security, Inc.*, 266 F.R.D. 340, 353 (D. Ariz. 2009), the United States District Court interpreted Arizona law as it applied to certifying a class action and concluded that the Arizona Supreme Court had adopted the "reasonable expectations" rule from section 211 when standardized insurance contracts are being interpreted. That court concluded that those contracts, as well as contracts generally, are required to be interpreted according to the intentions of the parties and all of the surrounding circumstances are to be considered. *Stratton* 266 F.R.D. at 353. The court determined that the fact-finder "would need to determine each insured's reasonable expectation of the group policy" and that "individual issues would outweigh any common ones." *Id.* Thus, even if we were to adopt the Restatement (Second) of Contracts section 211, individual issues specific to each particular plaintiff would still predominate over any common questions.

VanGilder has not alleged that the Bank has violated any state or federal regulation. The plain language of the promissory note states that the Bank will calculate interest based on the 365/360 method and gives a short explanation of

how that method works. The superintendent of banking for the state of Iowa approved the use of this interest calculation method in 2003, and VanGilder conceded in discovery that this method of interest calculation did not violate any state law or regulation. As a result, VanGilder's claim is that the Bank, while not violating any law by using the 365/360 method of interest calculation, nonetheless committed a breach of contract by not specifically informing the borrower that this method of calculation would result in the borrower paying slightly more than the stated 9.000% interest rate.

Without determining the merits of VanGilder's case, it seems that it has staked its breach of contract claim on the premise that although the 365/360 interest calculation provision was contained in the promissory note, the class members did not realize or understand that this method of calculation would cause them to pay an interest rate slightly higher than 9.000%. "Absent fraud or mistake, ignorance of a written contract's contents will not negate its effect." *Huber v. Hovey*, 501 N.W.2d 53, 55 (Iowa 1993). VanGilder has not alleged any fraud or mistake in this case, but has asserted that the terms of the contract were breached because the borrower did not understand the method of interest calculation. This is a fact individual to each borrower, and without investigating each borrower's specific situation, the court will not know whether or not each of the class members understood the 365/360 method.

"Any determination of meaning or ambiguity must be made in light of all the circumstances, including the relations of the parties, subject matter of the transaction, preliminary negotiations, usages of trade and the course of dealing."

Hofmeyer, 640 N.W.2d at 228. This rule of contract interpretation further supports the conclusion that claims against the Bank involving the 365/360 provision in the promissory notes would require case specific fact finding and investigation into each particular borrower's circumstances. Before the court could determine if a contract was ambiguous, it would have to consider all of those circumstances.

The district court's decision, after sufficiently and accurately stating the requirements for class action certification, simply states that there "is a question of law or fact common to the class in that the use and application of the 365/360 method is in question in each case, which establishes a common nucleus of operative facts." We do not believe there is a question of law or fact that would be common to the members of the plaintiff class. Because this is a breach of contract action, individual fact finding would be necessary in each case to determine the nature of the conversations that took place between each individual borrower and the bank agent, the nature of the questions asked by the borrower, the degree of care taken by the borrower in reviewing the loan document, the degree of the borrower's sophistication, and the borrower's overall understanding of the loan agreement.

VanGilder also faces an insurmountable obstacle of showing what each individual class member's reasonable expectations were. It is possible that in this case VanGilder had a reasonable expectation regarding how interest would be calculated, but even if that were so, that expectation cannot be extrapolated to

each and every borrower who signed a promissory note containing a 365/360 calculation provision.

After a careful reading of the trial court record and the briefs filed by the parties, it is clear that a common question of law or fact does not predominate in this case. Individualized fact finding would be required. As stated above, the failure of the plaintiff to carry the burden on either one of the prerequisites is fatal to the class action certification. *City of Dubuque*, 519 N.W.2d at 791. As a result, we find that the district court abused its discretion by certifying this cause of action as a class action.

B. Numerosity

Having concluded that class certification must fail on the predominance prong, we need not consider the issue of numerosity.

V. CONCLUSION.

For these reasons we find that the district court abused its discretion in certifying the class. We reverse the district court's decision on this issue and remand the case to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.