NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT
NUMBER 2013 CA 2165

MICHAEL SULLIVAN, CHARLES BALDWIN, JOHNNY KNIGHTEN, JIMMY PHILLIPS AND RON DICKERSON, INDIVIDUALLY AND AS CLASS REPRESENTATIVES

VERSUS

THE WORLEY COMPANIES, WORLEY CATASTROPHE SERVICES, L.L.C., WORLEY CATASTROPHE RESPONSE, L.L.C., AND CLAIMS LIQUIDATING, L.L.C., FORMERLY KNOWN AS WORLEY CLAIMS SERVICES OF LOUISIANA, INC.

Judgment Rendered: DEC 0 3 2014

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge,
State of Louisiana
Docket Number 599,055
Honorable R. Michael Caldwell, Judge Presiding

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BEFORE: WHIPPLE, McCLENDON, AND HIGGINBOTHAM, JJ.

McClendon, J. concurs for reasons assigned.

WHIPPLE, CJ.

In this appeal, plaintiffs challenge the trial court's judgment decertifying this matter as a class action. For the following reasons, we reverse and remand.

FACTS AND PROCEDURAL HISTORY[1]

On April 20, 2010, the Deepwater Horizon offshore drilling rig exploded, resulting in a massive oil spill in the Gulf of Mexico. Thereafter, Worley Catastrophe Services, L.L.C., and Worley Catastrophe Response, L.L.C., provided claims adjusting services on behalf of ESIS, Inc., BP Exploration & Production, Inc. ("BP"), and the Gulf Coast Claims Facility ("the GCCF") for third-party claims arising from the event. Worley, in turn, contracted with approximately 1,200 adjusters to perform adjusting services on its behalf for those claims. In connection with their performance of the adjusting services for claims from the oil spill, these 1,200 adjusters signed employment agreements with Worley, all in substantially the same form and substance.

On February 8, 2011, plaintiffs, Michael Sullivan, Charles Baldwin, Johnny Knighten, Jimmy Phillips, and Ron Dickerson, claims adjusters hired by Worley to perform adjusting services, filed a petition styled "Class Action Petition," asserting claims on their own behalf and as representatives of other similarly situated individuals and naming as defendants The Worley Companies, Worley Catastrophe Services, L.L.C., Worley Catastrophe Response, L.L.C., (hereinafter referred to collectively as "Worley"), and Claims Liquidating, L.L.C., formerly known as Worley Claims Services of Louisiana,

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[1]The factual background and procedural history of this class action lawsuit are more fully developed in this court's earlier decisions in Sullivan v. Worley Companies Worley Catastrophe Services, L.L.C., 2012-0095 (La. App. 1st Cir. 12/21/12)(unpublished opinion) and Sullivan v. Worley Companies Worley Catastrophe Services, L.L.C., 2012-1140 (La. App. 1st Cir. 12/21/12)(unpublished opinion), writ denied, 2013-0527 (La. 4/12/13), 111 So. 3d 1009.

Inc.[2] In the original and amending petitions, plaintiffs averred that pursuant to written employment agreements entered into with Worley, they were entitled to wages in excess of those paid to them by Worley. Specifically, plaintiffs averred that while the employment agreements they signed provided for a wage "equivalent to 65% of the total fee Worley invoiced its client," they had received at most $550.00 per day, plus expenses, an amount less than the agreed-upon 65% of the fee invoiced to, and paid by, Worley's clients, ESIS, the GCCF, and BP. Thus, individually, and on behalf of all class members, plaintiffs sought unpaid wages purportedly due under the employment agreements together with statutory penalties and attorney's fees pursuant to LSA-R.S. 23:631 and 23:632.[3]

Plaintiffs filed a "Motion to Certify Action as Class Action" pursuant to LSA-C.C.P. art. 592, contending that all of the elements necessary for class certification were present. Worley opposed the motion, claiming: (1) that in a similar breach-of-contract claim pending in the United States District Court for the Eastern District of Louisiana, the federal magistrate had denied the plaintiffs' motion to certify the claim as a class action[4]; (2) that class certification was inappropriate because there was no evidence of any adjusters, other than the five named plaintiffs, having ratified the forum selection clause in the employment agreements, which it averred was a prerequisite to participating in this lawsuit; and (3) that the breach-of-contract claim will

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[2]Plaintiffs' claims against Claims Liquidating, L.L.C. were subsequently dismissed without prejudice.

[3]Louisiana Revised Statute 23:631 provides for the payment of wages due upon the discharge or resignation of an employee, and LSA-R.S. 23:632 imposes liability upon the employer for the payment of penalties and attorney's fees where the employer fails or refuses to comply with the provisions of LSA-R.S. 23:631.

[4]See Altier v. Worley Catastrophe Response, LLC, 2011 WL 3205229 (E.D.La. 7/26/11).

require an adjuster-by-adjuster, claim-by-claim, file-by-file, invoice-by-invoice, day-by-day, receipt-by-receipt analysis that precludes class treatment.

Following a hearing, the trial court granted the plaintiffs' motion to certify the action as a class action. Thereafter, Worley filed a motion for summary judgment basically contending that: (1) the Agreement upon which the plaintiffs' and class members' claims were based, by its unambiguous language, did not apply to third party claims such as the BP Project, but only applied to the adjusting of first party insurance claims on projects for insurance carriers; (2) the adjusters working on the BP Project were paid pursuant to separate oral agreements with Worley; and (3) even if the Agreement were ambiguous, it should nonetheless be interpreted to apply only to insurance claims "adjusting." Following a hearing on the motion, the trial court granted Worley's motion for summary judgment and dismissed plaintiffs' claims.

Worley appealed the trial court's judgment certifying the matter as a class action and plaintiffs appealed the judgment of the trial court granting Worley's motion for summary judgment. On review, we affirmed the judgment certifying the class action, finding that plaintiffs met the threshold prerequisites to sustain a class action.[5] In doing so, we held "the record supports a finding of common questions capable of class-wide resolution as to whether the parties intended the written Agreement to govern their employment relationship for claims adjusting services relating to the oil spill or whether an oral contract governed the parties' relationship instead and the proper interpretation of the compensation portion of the Agreement, if it is found to apply to the employment relationship at issue." Sullivan v. Worley Companies Worley Catastrophe Services, L.L.C., 2012-0095 at p. 5. On review of the judgment of

[5]See Sullivan v. Worley Companies Worley Catastrophe Services, L.L.C., 2012-0095 (La. App. 1st Cir. 12/21/12)(unpublished opinion).

the trial court granting Worley's motion for summary judgment, we reversed the trial court's grant of summary judgment on the basis that material issues of fact remained as to whether the written agreement applied, and which terms, if any, governed the employment relationship of the parties with regard to plaintiffs' adjusting services related to the BP oil spill, such that summary judgment was not appropriate.[6]

The decisions in these companion cases were handed down on December 21, 2012. Shortly thereafter, in April of 2013, Worley filed a "Motion to Decertify Action as a Class Action," pursuant to LSA-C.C.P. art. 592(A)(3)(c),[7] contending therein that, in light of the findings set forth in the opinions of this court, class certification was no longer appropriate. In support, Worley relied on the dissenting opinion of Judge McClendon in this court's earlier opinion affirming the class certification, as well as the decision of this court reversing the trial court's grant of summary judgment, wherein we held that the determination of "whether the written Agreement applied, and which terms, if any, governed the employment relationship of the parties with regard to plaintiffs' adjusting services related to the BP oil spill" is a factual determination, which must "be resolved by the careful weighing of testimony and evidence to determine the underlying facts and the intention of the parties

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[6]See Sullivan v. Worley Companies Worley Catastrophe Services, L.L.C., 2012-1140 (La. App. 1st Cir. 12/21/12)(unpublished opinion), writ denied, 2013-0527 (La. 4/12/13), 111 So. 3d 1009.

[7]Louisiana Code of Civil Procedure article 592(A)(3)(c) provides:

> If the court finds that the action should be maintained as a class action, it shall certify the action accordingly. If the court finds that the action should not be maintained as a class action, the action may continue between the named parties. In either event, the court shall give in writing its findings of fact and reasons for judgment provided a request is made not later than ten days after notice of the order or judgment. A suspensive or devolutive appeal, as provided in Article 2081 et seq. of the Code of Civil Procedure, may be taken as a matter of right from an order or judgment provided for herein.

in confecting an employment relationship." See Sullivan v. Worley Companies Worley Catastrophe Services, L.L.C., 2012-1140 at p. 8.

In support of its motion, Worley maintained and reiterated its argument that a class action certification was not appropriate where the provision of the Agreement upon which plaintiffs base their breach-of-contract claim specifies a number of highly individualized factors that must be evaluated in assessing each plaintiff's alleged damages; that assessing each plaintiff's alleged damages will require an assessment of each invoice, payment, and receipt for each file; and that on the BP Project, adjusters performed work on files not assigned specifically to them, which would require further individualized assessment, which cannot be made on a class-wide basis.

Plaintiffs opposed the motion, contending that arguments urged by Worley have already been considered and rejected by this court, and that Worley ignores the earlier opinions rendered in this matter, which recognized that the issues capable of class-wide resolution are: (1) whether or not the written Agreement, which Worley required approximately 1,200 adjusters to sign in connection with their employment on the BP Oil Spill, was intended to govern the parties' employment relationship, and (2) if the written Agreement applies, how the compensation portion of that Agreement should be interpreted. Plaintiffs further relied on our finding that these class-wide common issues predominate over potential individual damage issues.

Following a hearing on the matter, the trial court granted Worley's motion to decertify the class by judgment dated July 18, 2013.[8] In its oral reasons for decertifying the class, the trial court noted in particular that this court's opinion reversing the grant of Worley's motion for summary judgment

[8]Although not assigned as error in this appeal, the July 18, 2013 judgment of the trial court further rendered a motion to approve and disseminate class notice filed by plaintiffs moot.

held that application of the Agreement turned on the individual intent of the parties, which can only be resolved by the careful weighing of testimony and evidence to determine the underlying facts and the intention of the parties in confecting an employment relationship. Considering this court's opinion on summary judgment to be the "law of the case," the trial court then interpreted that opinion as mandating that the determination as to which of the two contracts applies (oral or written) must be made by considering the intent of each party, which "becomes an individual adjuster-by-adjuster case of what was that adjuster's intent when it entered into either the oral agreement or the written agreement and what applied under the written agreement." In doing so, the trial court stated:

> I don't see any way that the intention of the parties can indicate a common issue of fact or law. Instead, it must be of each individual adjuster. And how can we, in one case, determine the intent of 1200 individual adjusters?
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> * * *
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> I don't see any way that this case can go forward as a class action given the predominance now of the individual intent of the parties and resolution of the issues of the intent of each party.

From this judgment, plaintiffs filed the instant devolutive appeal, contending the trial court erred in:

(1) not recognizing the "conclusive effects" of our rulings in Appeal No. 2012-CA-0095, which, in the absence of any change in circumstances, forecloses relitigation of that issue at the trial court on remand;

(2) decertifying a class where there had been no change of circumstances from the time the class was first certified and later when the certification was affirmed on appeal;

(3) misconstruing and misapplying this court's reasoning in reversing summary judgment in Appeal No. 2012-CA-1140 and reaching an erroneous and unsubstantiated conclusion that it would now take an "individual adjuster-

by-adjuster" examination to determine whether the written Agreement controlled the putative class members' compensation; and

(4) concluding that the question of whether the written Agreement governed the adjusters' compensation was an issue that is incapable of class-wide resolution as a common issue of fact or law.

MOTION TO DECERTIFY CLASS

When subsequent developments in the course of the proceedings eliminate or substantially impair any of the requisite elements for maintenance of a class action, decertification is appropriate. Mire v. Eatelcorp, Inc., 2004-2603 (La. App. 1st Cir. 12/22/05), 927 So. 2d 1113, 1118, writ denied, 2006-0209 (La. 4/24/06), 926 So. 2d 549. A trial court has broad discretion in deciding whether to certify a class; it also has the same discretion to amend or reverse its decision at any time. Mire v. Eatelcorp, Inc., 927 So. 2d at 1118. Accordingly, neither the trial court's initial order of certification, nor this Court's opinion affirming that order bars reconsideration of the propriety of maintaining the class action if the fundamental nature of its cause of action changes. Mire v. Eatelcorp, Inc., 927 So. 2d at 1118.

However, in the absence of materially changed or clarified circumstances, or the occurrence of a condition on which the initial class ruling was expressly contingent, courts should not condone a series of reargruments on the class issues by either the proponent or the opponent of class, in the guise of motions to reconsider the class ruling. Orrill v. Louisiana Citizens Fair Plan, 2011-1541 (La. App. 4th Cir. 6/13/12), 96 So. 3d 647, 649, writ denied, 2012-1643 (La. 12/14/12), 104 So. 3d 434. Moreover, errors to be made in deciding class action issues should be in favor of and not against the maintenance of the class action. Orrill v. Louisiana Citizens Fair Plan, 96 So. 3d at 648.

DISCUSSION

Through plaintiffs' assignments of error on appeal, plaintiffs contend the trial court erred in decertifying a class where there had been no change of circumstances from the time the class was first certified and where the certification was later affirmed on appeal, and in misconstruing and misapplying this court's reasoning in reversing summary judgment. Plaintiffs also contend the trial court erred in failing to recognize the "conclusive effects" of our appellate rulings previously affirming the class certification, which, in the absence of any change in circumstances, forecloses relitigation of that issue at the trial court by the doctrine of "law of the case."

At the outset, we note that the "law of the case" doctrine does not prohibit an appellate court that has previously reviewed a class certification, from reviewing the class certification in a subsequent appeal where the court was presented with new issues or questions as to whether the certification was proper. See Mire v. Eatelcorp, Inc., 927 So. 2d at 1117-1118. However, absent such, under the "law of the case" doctrine, an appellate court generally will not, on a subsequent appeal, reconsider its earlier ruling in the same case. Mire v. Eatelcorp, Inc., 927 So. 2d at 1117.

Mindful that a class certification may be modified or the class decertified if subsequent developments during the course of the litigation so warrant, given a material change or clarified circumstances, or the occurrence of a condition on which the initial class ruling was expressly contingent, we must determine whether the court was presented with any new issues or questions as to whether the certification was proper or whether there was a material change in the facts, law, or circumstances of this case since the initial class ruling, which could justify or warrant decertification. See Mire v. Eatelcorp, Inc., 927 So. 2d at 1118-1119 and Orrill v. Louisiana Citizens Fair Plan, 96 So. 3d at 649-650.

On appeal, plaintiffs argue that there were no "later developments" or material change in circumstances to justify a re-litigation of the class certification issues, since the initial class certification was affirmed by this court. Plaintiffs contend that where there have been no change of circumstances, facts, or additional developments of any kind since the class certification was affirmed by the court, it was error for the trial court to ignore or misinterpret our earlier ruling and our determination therein that the record clearly discloses a common nucleus of operative facts, that class commonalities predominated, and that the class action mechanism afforded all putative members the opportunity to pursue their claims without a multitude of suits, affording Worley the opportunity to defend itself in one forum. Plaintiffs further contend that to the extent that Worley argues that this court's reversal of summary judgment should itself be considered a change in circumstances warranting decertification of the class, this court's decision on summary judgment merely held that the determination of whether the written Agreement governed the employment relationship of the parties is a question of fact, not law, which was not appropriate for resolution by summary judgment. Plaintiffs contend that just because this particular issue may require a factual determination, it does not automatically trigger a decertification of the class. We agree.

The fact that we reversed summary judgment, on the basis that there is a genuine issue of material fact as to whether the written Agreement applies or the oral contract that Worley alleges it entered into with each adjuster applies, does not, in and of itself, constitute a material change in the facts, law, or circumstances of this case. See Sullivan v. Worley Companies Worley Catastrophe Services, L.L.C., 2012-1140 at p. 6. Moreover, although the trial court held that it would now be required to determine the intent of each

individual adjuster, that would only be the case *if* Worley's argument that it entered an oral agreement with the adjusters should prevail over plaintiffs' contention that the written Agreement governs the employment relationship of the parties herein. This factual determination remains to be made. As we noted in our earlier decision:

> Initially, we observe that there are two allegedly applicable contracts at issue herein, *i.e.,* the **oral contract** Worley contends it entered into with each adjuster who performed services for it related to the BP oil spill and the **written Agreement** signed by each adjuster in connection with the deployment to perform the adjusting services at issue. While plaintiffs contend that the written Agreement governs the parties' relationship, Worley contends that the oral contracts govern. Which of two contracts applies is a determination that may, under the particular facts presented, raise genuine issues of material fact as to which of the two contracts applies herein.

Sullivan v. Worley Companies Worley Catastrophe Services, L.L.C., 2012-1140 at p. 6.

The only new evidence introduced at the decertification hearing was a "Third Expense Invoice Report" dated May 26, 2010, sent by Worley to the third party claims administrator, which covers time and expenses for work performed by adjusters from May 17, 2010 to May 23, 2010.[9] Plaintiffs introduced the weekly invoice at the decertification hearing to establish that Worley billed and was paid on only **one** file, which Worley identified as "CAT B96," for **one** claim number, identified by Worley as "B76," and that it would not take a "file-by-file, invoice-by-invoice, day-by-day, receipt-by-receipt" analysis to establish Worley's liability and amount of damages. Plaintiffs contended that this weekly invoice was the only record produced by Worley thus far in response to discovery requests for its actual billing and invoices for

[9]The invoice was filed under seal, which according to plaintiffs' brief, was pursuant to a judicial confidentiality order prohibiting disclosure in any public document of the actual amount Worley was paid by ESIS/BP per adjuster, per day.

the work performed by the adjusters on the Oil Spill and that the invoice could be considered when and if there is a determination of damages.

Worley contends that the weekly invoice introduced by plaintiffs constitutes a change in circumstances as it underscores the "individualized nature of the issues." In support, Worley reiterates its previous arguments, averring that the invoice shows that at that particular time, there were only roughly 389 adjusters on the project, and that the number of adjusters fluctuated over the course of the project. Worley avers that as the project "ramped up," the number of adjusters grew, and as it "wound down," the number of adjusters depleted; thus, the trier of fact would still be required to look at each individual weekly invoice, tally up the number of adjusters on that invoice, determine how many of those are plaintiffs in this case, then figure out "who gets what portion" of that particular invoice. Worley further argues that there was not one particular storm number used for Worley's internal tracking and billing purposes assigned to this file, but that there were actually forty-two different storm numbers assigned over the course of the project, due to state tax and payroll issues, location issues, position issues and certain programs within the BP Claims Project, such as vessel of opportunity claims and government claims. However, none of this is borne out by the record as Worley failed to introduce any evidence at the hearing to support these contentions.

As to the "Third Expense Invoice Report," plaintiffs contend, and we agree, that this billing invoice essentially speaks to the issue of damages. Moreover, in our earlier opinion affirming the class certification, these same "individualized-nature-of-the-claim" arguments were urged by Worley and were previously addressed and rejected. As we noted therein, the issue of varying damages is not fatal to class certification where common liability issues predominate over individual damages issues. As we previously stated:

> [W]ith regard to the issue of calculation of damages, we note that Worley's assertion that class certification is improper because resolution of the claims involves regarding highly individualized determinations as to damages based on "an adjuster-by-adjuster, claim-by-claim, invoice-by-invoice, day-by-day, receipt-by-receipt analysis" is dependent upon its interpretation of the Agreement being accepted as the prevailing interpretation. On the other hand, the interpretation of the compensation provisions of the Agreement asserted by plaintiffs would involve a much simpler determination of the issue of damages. Additionally, the fact that individual class members may be entitled to varying damage awards is not fatal to class certification, especially where common liability issues predominate over individual damage issues. McCastle v. Rollins Environmental Services of Louisiana, Inc., 456 So. 2d 612, 620 (La. 1984); Lewis v. Texaco Exploration and Production Co., Inc., 96-1458 (La. App. 1st Cir. 7/30/97), 698 So. 2d 1001, 1013.

Sullivan v. Worley Companies Worley Catastrophe Services, L.L.C., 2012-0095 at p. 8, n.13.

We further agreed with the trial court's determination that there may ultimately be a necessity to decertify the class *if* Worley's interpretation of the Agreement should prevail, noting:

> [T]he court specifically and astutely noted that if it were later determined that Worley's suggested interpretation of the compensation portions of the Agreement should prevail and, thus, that compensation was to be determined on a file-by-file basis, rather than a percentage of the day rate Worley charged for each adjuster's services, then there may be a necessity at that time to decertify the class. This is a remedy specifically sanctioned by the Code of Civil Procedure. LSA-C.C.P. art. 592(A)(3)(c).

Sullivan v. Worley Companies Worley Catastrophe Services, L.L.C., 2012-0095 at p. 6.

To reiterate, our analysis turned on the predominate overriding issue of whether the written Agreement governs the employment relationship of the parties, an issue that remains undetermined at this point in the proceedings. Thus, this case is essentially in the same posture now as when the case was previously before us on appeal. As we noted in our prior opinion reviewing Worley's appeal of the class certification:

> [T]he record supports a finding of common questions capable of class-wide resolution as to whether the parties intended the written Agreement to govern their employment relationship for claims adjusting services relating to the oil spill or whether an oral contract governed the parties' relationship instead and the proper interpretation of the compensation portion of the Agreement, if it is found to apply to the employment relationship at issue.

Sullivan v. Worley Companies Worley Catastrophe Services, L.L.C., 2012-0095 at p. 5. Again, once a determination is made regarding the common questions capable of class-wide resolution, there may be a necessity at that time to decertify the class. Until then, barring any material changes in the facts, law, or circumstances of this case, the class certification we previously upheld remains proper.

In sum, while we recognize that a class certification may be modified where the court is presented with new issues or questions as to whether the certification was proper, in the instant case, on a second review of the class certification herein, Worley failed to set forth any issues, questions, or arguments as to whether the certification was proper that have not already been considered by this court. See Mire v. Eatelcorp, Inc., 927 So. 2d at 1117-1118. Worley also failed to establish that material changes occurred or the occurrence of a condition on which the initial class ruling was expressly contingent. See Orrill v. Louisiana Citizens Fair Plan, 96 So. 3d at 649. Thus, absent any new evidence reflecting a material change in the facts, law, or circumstances of this case since the initial class ruling, which would justify or warrant decertification, the trial court erred and abused its discretion in decertifying the class herein.

CONCLUSION

For the above and foregoing reasons, the July 18, 2013 judgment of the trial court is reversed. This matter is remanded to the trial court for further proceedings consistent with the views expressed herein. Costs of this appeal

are assessed to the defendants/appellees, The Worley Companies, Worley Catastrophe Services, L.L.C., and Worley Catastrophe Response, L.L.C.

REVERSED AND REMANDED.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 2165

MICHAEL SULLIVAN, CHARLES BALDWIN, JOHNNY KNIGHTEN, JIMMY PHILLIPS AND RON DICKERSON, INDIVIDUALLY AND AS CLASS REPRESENTATIVES

VERSUS

THE WORLEY COMPANIES, WORLEY CATASTROPHE SERVICES, L.L.C., WORLEY CATASTROPHE RESPONSE, L.L.C., AND CLAIMS LIQUIDATING, L.L.C., FORMERLY KNOWN AS WORLEY CLAIMS SERVICES OF LOUISIANA, INC.

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McCLENDON, J., concurring.

While I believe the matter was improperly certified for the reasons set forth in my dissent in **Sullivan v. Worley Companies Worley Catastrophe Services, L.L.C.**, 2012-0095 (La.App. 1 Cir. 12/21/12)(unpublished opinion), I concur with the result reached by the majority.