

STATE OF MICHIGAN
COURT OF APPEALS

SCOTT KEECH, KENNETH KREICHELDT,
GAIL KREICHELDT, SCOTT BARR,
KATHLEEN BARR, on behalf of themselves and
others similarly situated,

UNPUBLISHED
June 13, 2006

Plaintiffs-Appellees,

v

No. 258599
Wayne Circuit Court
LC No. 00-040731-NI

S.R. JACOBSON DEVELOPMENT
CORPORATION,

Defendant/Third-Party Plaintiff,

and

LOUISIANA PACIFIC CORPORATION,

Defendant/Third-Party Defendant-
Appellant,

and

WOLOHAN LUMBER COMPANY,

Third-Party Defendant.

Before: Fort Hood, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

Defendant Louisiana Pacific Corporation (LP) is a manufacturer of wood-chip/resin siding that defendant S.R. Jacobson Development Corporation (SRJ), a development company, used in the construction of nearly five-hundred residential homes, including those owned by plaintiffs. This class action lawsuit arises out of plaintiffs' claims that LP knowingly sold defective siding, that SRJ used the LP siding knowing that it was defective, and that SRJ induced plaintiffs to participate in a federal class action lawsuit against LP even though plaintiffs could have had their siding replaced under SRJ's warranty. Defendant LP appeals by leave granted from the trial court's order certifying the subclass represented by plaintiff Scott Keech. We reverse.

I. Factual Background

In 1993, SRJ discovered that eight homes it had constructed in the Adams Ridge Subdivision had moisture problems related to LP's Inner-Seal siding. LP and SRJ agreed that SRJ would pay for one-third of the cost of repair, while LP would pay the remainder. SRJ acknowledged that it had deviated from the installation specifications, which is why it agreed to assume some of the cost. SRJ provided a Standard Limited Warranty Agreement to its customers that provided, in part, that the home "will be free from defects in material and workmanship for a period of one year from the date of closing." Under the warranty, SRJ agreed to repair or replace the defective items. SRJ admitted that its warranty covered defects in the LP siding.

LP was experiencing problems nationally with its Inner-Seal siding. In 1995, a class action lawsuit was initiated in federal court in Oregon with regard to defective LP Inner-Seal siding. The plaintiffs in the federal action alleged that the LP Inner-Seal siding prematurely rotted, cracked, buckled, and otherwise deteriorated when exposed to the elements. A settlement ultimately was reached that pertained to all homes for which LP Inner-Seal siding was installed on or before January 1, 1996. The parties do not dispute that plaintiff Keech's claims are unaffected by the federal settlement because his siding was installed after January 1, 1996, and was not LP's Inner-Seal brand, but rather LP's SmartLap product.

The instant class action was filed in 2000 by plaintiff Keech, and the Barrs and the Kreichelts joined the action in 2001. As relevant to this appeal, plaintiffs' complaint alleged claims against SRJ and LP for breach of express warranty (Count I), breach of implied warranty of merchantability and of fitness (Count II), fraudulent and innocent misrepresentation (Count IV), and a violation of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.* (Count VI), for homes constructed after January 1, 1996. Plaintiffs alleged that LP sold and SRJ installed LP's SmartLap siding, a new generation of the defective LP Inner-Seal siding, after the LP national settlement and that this siding was also defective.

In May 2001, plaintiffs moved for class certification seeking the creation of two subclasses. In one subclass, plaintiffs sought to have Keech and the Kreichelts act as class representatives "for all purchasers of homes containing L-P siding that was installed on or after January 1, 1996 and are not within the class period of the L-P national class action settlement." In September 2004, the trial court granted plaintiffs' motion for class certification, although it defined the subclasses differently because of the dates plaintiffs had their siding installed. Pertinent to this appeal, the trial court certified the Keech subclass, which it defined as "all purchasers from [SRJ] of homes containing [LP] siding that was installed on or after January 1, 1996, against [SRJ and LP]," limited to claims of a breach of warranty and a violation of the MCPA.

II. Standard of Review

This Court applies the clearly erroneous standard of review to a trial court's ruling regarding a class certification. *Zine v Chrysler Corp*, 236 Mich App 261, 270; 600 NW2d 384 (1999). “[F]actual findings are clearly erroneous if there is no evidence to support them or there is evidence to support them but this Court is left with a definite and firm conviction that a mistake has been made.” *Id.*

III. Analysis

LP argues that the trial court clearly erred in finding that the requirements for class certification were met with regard to the Keech subclass. In determining whether to certify a class, the trial court considers the factors listed in MCR 3.501(A)(1), which provides:

One or more members of a class may sue or be sued as representative parties on behalf of all other members in a class action only if:

- (a) the class is so numerous that joinder of all members is impracticable;
- (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
- (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
- (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
- (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

The party seeking certification bears the burden of showing that the requirements for class certification have been met. See *A & M Supply Co v Microsoft Corp*, 252 Mich App 580, 597-598; 654 NW2d 572 (2002).

Among its arguments, LP asserts that the numerosity requirement, MCR 3.501(A)(1)(a), was not met because plaintiffs presented no evidence that other homeowners had LP SmartLap siding. We conclude that the siding distinction is immaterial because plaintiffs alleged in their complaint that *all* LP siding was inherently defective. Nevertheless, we conclude that the trial court clearly erred in finding that the numerosity requirement was met based on the 475 homes alleged to have defective LP siding. As LP points out, these 475 homes comprised “a list of properties to be excluded from the class action settlement” – a list that SRJ provided to LP when it opted out of the federal settlement. Notably, Keech’s home was not part of this list, because the settlement covered homes with LP siding installed *before* January 1, 1996, and the Keech subclass was defined as homes with LP siding installed *after* January 1, 1996. Therefore, plaintiffs offered no evidence to establish that there were any other homeowners besides Keech

in the Keech subclass. Accordingly, because plaintiffs failed to prove numerosity, the trial court clearly erred in certifying the Keech subclass. A class must meet all of the requirements of MCR 3.501(A)(1) in order to proceed as a class action. *A & M Supply Co, supra* at 597. Because the numerosity requirement was not satisfied, we need not address the remaining requirements.

Reversed.

/s/ Karen M. Fort Hood

/s/ David H. Sawyer

/s/ Patrick M. Meter