

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

PHILLIP M. WENNER on his own behalf
and on behalf of a class

Plaintiffs-Appellants

-vs-

MIDLAND TITLE SECURITY

and

NATIONAL CITY CORPORATION

Defendant-Appellee

JUDGES:
W. Scott Gwin, P.J.
Sheila G. Farmer, J.
Julie A. Edwards, J.

Case No. 03CA107

O P I N I O N

CHARACTER OF PROCEEDING:

Civil Appeal From Richland County Court
of Common Pleas Case 02-715D

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

July 26, 2004

APPEARANCES:

For Plaintiffs-Appellants

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Edwards, J.

{¶1} Plaintiff-appellant Phillip M. Wenner appeals from the October 20, 2003, Judgment Entry of the Richland County Court of Common Pleas which denied plaintiff-appellant's motion for class certification. Defendant-appellee is Midland Title Security, Inc.

STATEMENT OF THE FACTS AND CASE

{¶2} Plaintiff-appellant Phillip M. Wenner [hereinafter appellant] filed a complaint on July 22, 2002, asserting a class action seeking redress for damages allegedly suffered by him and the asserted class as a result of an illegal real estate "flipping" scheme. The flipping scheme was allegedly perpetrated by defendants National City Corporation, Midland Title Security, Inc. and Richard Balliett.

{¶3} The complaint defined flipping as the practice of purchasing real estate and then selling it within a short period of time. Appellant asserted that flipping is illegal when the sale occurs at a substantially higher price, based in part upon an inflated appraisal. According to appellant, in a typical scenario, an individual (the flipper) contracts to purchase real estate in his or a co-conspirator's name. Without obtaining title to the property, the flipper then contracts to sell the property to a third person at a substantially higher price than that specified in the first purchase agreement. The financing for both transactions is typically provided by the flipping victim as the flipper rarely advances any money to fund the process once the sale is consummated. To ensure financing can be obtained, the flipper arranges, either directly or through a loan

officer, to obtain an inflated appraisal on the property, thus justifying the inflated purchase price. Once the sale is consummated, the flipper walks away with a profit equal to the difference between the price for which he contracted to purchase the real estate and the price at which he sold it to the innocent third party. The appraiser, lender, and title/escrow company have received payment for their services and the innocent third party is stuck with real estate that is worth substantially less than the price he or she paid for it and a corresponding excessive debt obligation.

{¶4} In the complaint, appellant claimed that he had been the victim of flipping in a residential real estate transaction with defendant Balliett more than five years earlier, in 1997. In addition, appellant sued his lender, National City Bank, and the provider of his title insurance and escrow services, Midland Title Security, Inc. Appellant raised multiple claims. As to Midland Title, appellant alleged that Midland's local agent was aware that Balliett rapidly purchased and resold property to his victims who were unaware of the earlier transaction. Appellant alleged that Midland Title was liable because it took no steps to inform the victims of the simultaneous transactions.

{¶5} In this case, appellant agreed with Balliett to allow Balliett to use appellant's credit so Balliett could get home loans. Allegedly, appellant would purchase the property from Balliett simultaneously or within a short period of time of when Balliett purchased the property. In return, Balliett would give appellant \$1,000.00 for every house purchased. Appellant was entitled to take the mortgage interest deduction on appellant's income tax return. Balliett would manage the houses, including renting the houses, doing all the maintenance and collecting the rent money. Balliett would mail

appellant the rent check monthly and appellant would use it to make the mortgage payment.

{¶6} Most of appellant's claims which were raised in the complaint were dismissed as being barred by the statute of limitations by a Judgment Entry issued March 10, 2003. This appeal does not challenge that dismissal. The surviving claims center on fraud (common law fraud and constructive fraud) as well as breach of fiduciary duty and civil conspiracy.

{¶7} Relevant to this appeal is appellant's attempt to certify a class in regard to defendant Midland Title Security, Inc. [hereinafter Midland Title]. Appellant sought to certify the following class: "All person or entities who during the period 1993 to present (1) obtained title to real estate either directly from Richard Balliett or from a grantor who originally contracted to sell that real estate to Richard Balliett; and 2) closed on the purchase of that real estate pursuant to a transaction in which defendant Midland provided title/or escrow services. Excluded from the classes are defendants, their employees and defendant Balliett's immediate family members."¹

{¶8} In an Order dated October 20, 2003, the trial court denied certification of the class. Thus, it is from the October 20, 2003, Judgment Entry that appellant appeals, raising the following assignment of error:

{¶9} "THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO CERTIFY THIS ACTION AS A CLASS ACTION PURSUANT TO RULE 23 OF THE OHIO RULES OF CIVIL PROCEDURE."

¹ Appellant also requested certification in regard to defendant National City Bank. In an Order dated October 20, 2003, the trial court denied certification of that class. Subsequently, appellant and National City reached an individual settlement. Thus, any issues concerning National City Bank are not relevant to this appeal.

{¶10} This case comes to us on the accelerated calendar. App. R. 11.1, which governs accelerated calendar cases, provides, in pertinent part:

{¶11} (E) Determination and judgment on appeal. The appeal will be determined as provided by App. R. 11. 1. It shall be sufficient compliance with App. R. 12(A) for the statement of the reason for the court's decision as to each error to be in brief and conclusionary form. The decision may be by judgment entry in which case it will not be published in any form.

{¶12} This appeal shall be considered in accordance with the aforementioned rule.

{¶13} Class certification is governed by Civ. R. 23. Civil Rule 23 states as follows:

{¶14} "(A) Prerequisites to a class action

{¶15} "One or more members of a class may sue...as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

{¶16} "(B) Class actions maintainable

{¶17} "An action may be maintained as a class action if the prerequisites of subdivision (A) are satisfied, and in addition:

{¶18} "(1) the prosecution of separate actions by...individual members of the class would create a risk of

{¶19} "(a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

{¶20} "(b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

{¶21} "(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

{¶22} "(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action."

{¶23} In addition, courts have held that the following are elements not explicitly found in Civ. R. 23 but are required for certification: (1) that the class be identifiable and that the definition of the class be unambiguous; and (2) that the class representative be

a member of the class. *Shaver v. Standard Oil Co.* (1990), 68 Ohio App.3d 783, 793, 589 N.E.2d 1348.

{¶24} If a plaintiff fails to prove any one of the prerequisites of Civ. R. 23 or either of the two implicit requirements of Civ. R. 23, class certification should be denied by the trial court. *Shaver*, 68 Ohio App.3d at 793. This court's standard of review concerning a trial court's decision whether a class action may be maintained is abuse of discretion. *Planned Parenthood Association of Cincinnati, Inc. v. Project Jericho* (1990), 52 Ohio St.3d 56, 556 N.E.2d 157. In order to find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶25} Appellant sought to certify the following question:

{¶26} "All person or entities who during the period 1993 to present (1) obtained title to real estate either directly from Richard Balliett or from a grantor who originally contracted to sell that real estate to Richard Balliett; and 2) closed on the purchase of that real estate pursuant to a transaction in which defendant Midland provided title/or escrow services. Excluded from the classes are defendants, their employees and defendant Balliett's immediate family members."

{¶27} The trial court denied appellant's motion, finding, in part, that appellant's claims were atypical of the class sought to be certified and that individual issues predominated over common issues in this case. After stating the six elements of fraud,²

² In order to prove fraud, a plaintiff must demonstrate the following six elements: (1) a representation or concealment, (2) material to the transaction, (3) the falsity of the representation or of the impression created by concealment, (4) intended by the defendant to

the trial court pointed out that there would be material variations in the representations involved and the kinds or degrees of reliance by the purported class members. The trial court cited a portion of appellant's deposition as an indication of how atypical appellant's claim was. The trial court stated as follows:

{¶28} "In each of [appellant's] investments, [appellant] sold his credit to Mr. Balliett to permit the transaction to go forward. [Appellant] was paid \$1,000.00 by Balliett for his credit in each of the seven transactions. There is no evidence that this was the usual procedure for other investors. In addition, the [appellant] was apparently nonchalant about protecting his interests in the transaction:

{¶29} "Q. Did you get a Deed for the house at 15 Baldwin Avenue?

{¶30} "A. [appellant] No, I did not.

{¶31} "Q. Do you know who sold the house?

{¶32} "A. Sold the house to me?

{¶33} "Q. Yeah.

{¶34} "A. Well, at that time I just – I was taking for granted it was Richard Balliett selling the house to me.

{¶35} "Q. Did you ask him how long he'd owned the house?

{¶36} "A. No, I did not.

{¶37} "Q. Did ask you [sic] him from whom he had bought the house?

{¶38} "A. No, I did not.

{¶39} "Q. Did you ask him what he paid to whoever he bought the house from?

{¶40} "A. No, I did not.

mislead, (5) justifiable reliance by the plaintiff, and (6) an injury suffered as the proximate result of reliance. *Gaiver v. Peterm-Cleveland, Inc.*, (1987), 33 Ohio St.3d 54,55, 514 N.E.2d 709.

{¶41} "Q. Did you care?

{¶42} "A. No, I did not.

{¶43} "Q. Did you ask him how long he had owned the house?

{¶44} "A. No, I did not.

{¶45} "Q. Did that matter to you?

{¶46} "A. No, sir.

{¶47} "Q. Your interest was getting the thousand dollars?

{¶48} "A. Yes, sir.

{¶49} "Q. And the interest deductions?

{¶50} "A. Yes, sir.

"[Appellant's] nonchalant attitude could make his case of justifiable reliance atypical of other potential class members. [Appellant's] lack of demonstrated typicality is a concomitant of the fact that individual issues predominate over common issues in this case."

{¶51} Upon review, we find that the trial court did not abuse its discretion. Appellant was paid for his involvement in the transaction. He was not an innocent purchaser who wanted to buy a property for himself and, as a result of Midland Title's failure to disclose the recent or simultaneous purchase of the property by Balliett, lost money and had his credit destroyed. If appellant's credit was destroyed it was arguably not so much due to Midland Title's actions as from appellant's own involvement in Balliett's scheme. Accordingly, we find that the trial court did not abuse its discretion when it found that individual issues predominated over common issues and that appellant's claims were not typical.

{¶52} Appellant's sole assignment of error is overruled.

{¶53} The judgment of the Richland County Court of Common Pleas is affirmed.

By: Edwards, J.

Gwin, P.J. and

Farmer, J. concur

JUDGES

JAE/0525

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JUDGMENT ENTRY

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Defendant-Appellee : CASE NO. 03CA107

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Richland County Court of Common Pleas is affirmed. Costs assessed to appellant.

JUDGES