

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

LINDA HILL

Appellant

v.

MONEYTREE OF OHIO
INCORPORATED

Appellee

C. A. No. 08CA009410

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 06CV148815

DECISION AND JOURNAL ENTRY

Dated: September 8, 2009

MOORE, Presiding Judge.

{¶1} Appellant, Linda Hill, appeals from the decision of the Lorain County Court of Common Pleas. This Court reverses.

I

{¶2} In March of 2006, Appellant, Linda Hill, purchased mortgage-loan services from Appellee, Moneytree, a licensed Ohio Mortgage Broker. R.C. 1322.062(A)(1) requires that “[w]ithin three business days after taking an application for a loan from a buyer, a registrant shall deliver to the buyer a mortgage loan origination disclosure statement” containing several statutorily mandated terms. Hill contends that Moneytree never gave her the “mortgage loan origination disclosure statement”. Ohio’s Mortgage Broker Act, set forth in R.C. 1322.07, also prohibits a mortgage broker from omitting statements required by state law and further prohibits any “conduct that constitutes improper, fraudulent, or dishonest dealings[.]” R.C. 1322.07(B)

and (C). Hill asserts that Moneytree received a payment from Hill's lender without making a full advance disclosure to Hill.

{¶3} On December 12, 2006, Hill filed a complaint against Moneytree, asserting individual and class-action claims. Her class claims alleged that Moneytree violated R.C. 1322.062(A)(1) and R.C. 1322.07(B)/(C) and that Moneytree breached its fiduciary duties to make a full advance disclosure that it would receive a payment from the lender at closing. Hill timely moved for certification of the class claims. Her proposed class included all persons who obtained non-commercial mortgage loans through Moneytree from January 1998 through the present. Moneytree opposed the class certification. The trial court held a hearing on the "typicality" requirement on February 6, 2008, however, no transcript was prepared from that proceeding. Consequently, pursuant to App.R. 9(C) Hill submitted a statement of the evidence and proceedings to the trial court. The trial court approved the statement, as follows:

"The only evidence the trial court received on Plaintiff's motion for Class Certification consisted of the following:

"(1) the disclosure statements which are marked Exhibits 1-A through 1-M and 2 that were appended to Plaintiff's Motion to Alter or Amend (filed May 22, 2008);

"(2) the affidavits which were appended to the parties' motions and briefs filed in this action; and

"(3) the parties' discovery responses which were appended to the parties' motions and briefs filed in this action.

"The mortgage loan origination disclosure statements marked Exhibits 1-A through 1-M and 2 that were appended to Plaintiff's Motion to Alter or Amend are the only mortgage loan origination disclosure statements which Defendant Moneytree of Ohio Incorporated could find in its possession in response to the Court's Order (filed February 7, 2008) directing Moneytree to 'provide Plaintiff with mortgage loan origination disclosure statements back to January of 1998 for all customers of Moneytree.'"

{¶4} On May 6, 2008, the trial court denied Hill’s motion to certify the class action. Hill timely appealed the trial court’s decision. She has raised three assignments of error for our review.

II

ASSIGNMENT OF ERROR I

“THE TRIAL COURT REVERSIBLY ERRED TO THE PREJUDICE OF [HILL] WHEN THE TRIAL COURT, IN ITS MAY 6, 2008 RULING ON CLASS CERTIFICATION, CONCLUDED THAT ‘THE CLASS REPRESENTATIVE WILL NOT FAIRLY AND ADEQUATELY PROTECT THE INTERESTS OF THE CLASS,’ AND FOR THAT REASON DENIED [] HILL’S MOTION FOR CLASS CERTIFICATION.”

ASSIGNMENT OF ERROR II

“THE TRIAL COURT REVERSIBLY ERRED TO THE PREJUDICE OF [HILL] WHEN THE TRIAL COURT, IN ITS MAY 6, 2008 RULING ON CLASS CERTIFICATION, CONCLUDED THAT ‘QUESTIONS OF LAW OR FACT COMMON TO THE MEMBERS OF THE CLASS DO NOT PREDOMINATE OVER ANY QUESTIONS OF LAW OR FACT AFFECTING ONLY INDIVIDUAL MEMBERS OF THE CLASS,’ AND FOR THAT REASON DENIED [] HILL’S MOTION FOR CLASS CERTIFICATION.”

ASSIGNMENT OF ERROR III

“THE TRIAL COURT REVERSIBLY ERRED TO THE PREJUDICE OF [HILL] WHEN THE TRIAL COURT, IN ITS MAY 6, 2008 RULING ON CLASS CERTIFICATION, CONCLUDED THAT ‘A CLASS ACTION IS NOT SUPERIOR TO OTHER AVAILABLE REMEDIES FOR THE FAIR AND EFFICIENT ADJUDICATION OF THE CONTROVERSY,’ AND FOR THAT REASON DENIED [] HILL’S MOTION FOR CLASS CERTIFICATION.”

{¶5} In her assignments of error, Hill contends that the trial court erred when it concluded that (1) she would not fairly and adequately protect the interests of the class, (2) questions of law or fact common to the members of the class do not predominate over any questions of law or fact affecting only individual members, and (3) a class action is not superior to other available remedies for the fair and efficient adjudication of the controversy.

{¶6} In an appeal of a trial court’s decision on a motion to certify a class, an appellate court reviews the trial court’s judgment for an abuse of discretion. See *Baughman v. State Farm Mut. Auto. Ins. Co.* (2000), 88 Ohio St.3d 480, 482-83. An abuse of discretion is more than an error of law or judgment; rather, it is a finding that the trial court’s attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Under this standard of review, an appellate court may not merely substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd* (1993), 66 Ohio St.3d 619, 621.

{¶7} A class action is permitted under Civ.R. 23 subject to the satisfaction of the following prerequisites:

“(1) an identifiable class must exist and the definition of the class must be unambiguous, (2) the named representatives must be members of the class, (3) the class must be so numerous that joinder of all members is impracticable (numerosity), (4) there must be questions of law or fact common to the class (commonality), (5) the claims or defenses of the representative parties must be typical of the claims or defenses of the class (typicality), (6) the representative parties must fairly and adequately protect the interests of the class (adequacy), and (7) one of the three Civ.R. 23(B) requirements must be met.” *Carder Buick-Olds Co., Inc. v. Reynolds & Reynolds, Inc.*, 148 Ohio App.3d 635, 2002-Ohio-2912, at ¶19, citing *Hamilton v. Ohio Sav. Bank* (1998), 82 Ohio St.3d 67, 71.

{¶8} The last of these requirements refers to the three different grounds for maintaining a class action under Civ.R. 23(B). These grounds include predominance and superiority. Civ.R. 23(B)(3). When a trial court considers a motion to certify a class, it accepts as true the allegations in the complaint, without considering the merits of those allegations and claims. *Ojalvo v. Bd. of Trustees of Ohio State Univ.* (1984), 12 Ohio St.3d 230, 233.

{¶9} “A determination by a trial court regarding class certification that is clearly outside the boundaries established by Civ.R. 23, or that suggests that the trial court did not conduct a rigorous analysis into whether or not the prerequisites of Civ.R. 23 are satisfied, will

constitute an abuse of discretion.” (Internal citations and quotations omitted.) *Cicero v. U.S. Four, Inc.*, 10th Dist. No. 07AP-310, 2007-Ohio-6600, at ¶10.

{¶10} In the instant case, the trial court found that Hill had satisfied the identifiability, membership, numerosity, commonality and typicality criteria for class certification. However, the trial court ultimately denied Hill’s motion, finding that

“The class representative will not fairly and adequately protect the interests of the class, as set forth infra.

“Questions of law or fact common to the members of the class do not predominate over any questions of law or fact affecting only individual members of the class; and, therefore, a class action is not superior to other available remedies for the fair and efficient adjudication of the controversy for the following reasons:

“‘there does [not] exist generalized evidence which proves or disproves an element [of the cause of action] on a simultaneous class-wide basis...[which would obviate] the need to examine each class member’s individual position;’ (Alterations sic.)

“the generalized evidence adduced in preliminary discovery would, at least on its face, demonstrate compliance by Moneytree in preparing the Loan Origination Disclosure Statement for each class member, and the giving of notice by Moneytree to the class member that Moneytree would receive a payment of money from the lender in compliance with R.C. 1322.062[.] (Emphasis added.) [A]nd,

“this generalized evidence could be rebutted only by testimony from each class member that the foregoing advice and disclosure document were not furnished; and, since the court cannot impute Hill’s credibility or lack of it to other class members, Hill cannot effectively represent the class. (Citations omitted.)

“By reason of the foregoing, a class action is not superior to litigation by each class member, since a class action under the facts relevant here, would, nevertheless, require ‘individual treatment of each class member’s claims.’” (Citations omitted.)

{¶11} In light of the court’s finding that “the generalized evidence adduced in preliminary discovery would, at least on its face, demonstrate compliance by Moneytree *** with R.C. 1322.062”, it appears that the trial court “was not reviewing the propriety of class certification but was attempting, contrary to the applicable law, to reach the merits of the claim.”

Ojalvo, 12 Ohio St.3d at 233, citing *Eisen v. Carlisle & Jacquelin* (1974), 417 U.S. 156, 177; *Portman v. Akron Savings & Loan Co.* (1975), 47 Ohio App.2d 216, 220. Specifically, the merits of Hill’s claim involve whether Moneytree violated R.C. 1322.062(A)(1).

{¶12} The Supreme Court’s review of a motion to certify a class action in *Eisen* is instructive:

“We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it. He is thereby allowed to obtain a determination on the merits of the claims advanced on behalf of the class without any assurance that a class action may be maintained. This procedure is directly contrary to the command of subdivision (c)(1) that the court determine whether a suit denominated a class action may be maintained as such ‘(a)s soon as practicable after the commencement of (the) action[.]’ In short, we agree with Judge Wisdom’s conclusion in *Miller v. Mackey International*, 452 F.2d 424 (CA5 1971), where the court rejected a preliminary inquiry into the merits of a proposed class action:

“‘In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.’ *Id.*, at 427.

“Additionally, we might note that a preliminary determination of the merits may result in substantial prejudice to a defendant, since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials. The court’s tentative findings, made in the absence of established safeguards, may color the subsequent proceedings and place an unfair burden on the defendant.” *Eisen v. Carlisle & Jacquelin* (1974), 417 U.S. 156, 177-178.

The *Eisen* Court expressed its concern about the trial court’s consideration of the merits of a matter in deciding to *grant* a motion to certify. In this case, as in *Ojalvo*, *supra*, the trial court considered the merits of the underlying matter in *rejecting* the motion for class certification. The rationale applies irrespective of the ultimate result. Consideration of the merits of the dispute is inappropriate in determining class certification.

{¶13} Here, the trial court explicitly examined the merits of the class action when it found that the evidence produced in preliminary discovery, on its face, demonstrated compliance by Moneytree with R.C. 1322.062. As the trial court was confined solely to the question of the appropriateness of class certification, it was an abuse of discretion for the trial court to make any merit findings. See *Ojalvo*, 12 Ohio St.3d at 232-234. “When an appellate court finds an abuse of discretion, it should not proceed to formulate the class or issue itself but should remand the matter to the trial court for such a determination.” *Nagel v. Huntington Natl. Bank*, 179 Ohio App.3d 126, 2008-Ohio-5741, at ¶19, citing *Marks v. C.P. Chem. Co.* (1987), 31 Ohio St.3d 200, 201. We conclude that the trial court abused its discretion in denying Hill’s motion for class certification. *Baughman*, 88 Ohio St.3d at 482-83. Accordingly, we sustain Hill’s assignments of error.

III

{¶14} Hill’s assignments of error are sustained and the judgment of the Lorain County Court of Common Pleas is reversed and remanded for a determination of class certification in conformity with this opinion

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

CARLA MOORE
FOR THE COURT

CARR, J.
CONCURS

DICKINSON, J.
CONCURS, SAYING:

{¶15} I agree with the majority that this matter must be remanded for the trial court to examine class certification without considering the merits of Ms. Hill’s claim against Moneytree. Although I acknowledge that, in *Ojalvo v. Bd. of Trs. of Ohio State Univ.*, 12 Ohio St. 3d 230 (1984), the Ohio Supreme Court termed a trial court’s improper consideration of the merits in determining whether to certify a class an abuse of discretion, the true problem is that doing so is “incorrect as a matter of law.” *Id.* at 233. I join in the majority’s opinion, therefore, not because I believe the trial court abused its discretion, but because it made a mistake of law.

APPEARANCES:

THOMAS R. THEADO, Attorney at Law, for Appellant.

JACK MALICKI, Attorney at Law, for Appellant.

BRIAN G. DATTILO, Attorney at Law, for Appellee.

MARK I. WACHTER, Attorney at Law, for Appellee.