

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

Wachovia National Bank of Delaware, NA
(fka First Union National Bank Of Delaware
and First Union Home Equity Bank, NA)

Court of Appeals No. H-08-022

Trial Court No. CVE 2002-4321

Appellant

v.

John R. Ball as Administrator of the Estate
of Inez Maenle and Catholic Charities, Inc.
as Guardian of John L. Maenle

and

Huron County, et al.

and

John Wilken and Andrea Wilken

Appellees

v.

Wachovia National Bank of Delaware, NA

DECISION AND JUDGMENT

Appellant

Decided: March 19, 2010

* * * * *

James S. Wertheim and Russell J. Pope, for appellant.

John T. Murray, Leslie O. Murray and James J. Martin,
for appellees.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a judgment of the Huron County Court of Common Pleas granting a motion for class certification filed by intervening counterclaim plaintiffs-appellees, John and Andrea Wilken. From that judgment, plaintiff-counterclaim defendant-appellant, Wachovia National Bank of Delaware, NA (fka First Union National Bank of Delaware and First Union Home Equity Bank, NA) assigns the following as error:

{¶ 2} "The trial court erred to the substantial prejudice of defendant-appellant in certifying any claims for class treatment."

{¶ 3} This case first began as an action filed by appellant's predecessor in interest to foreclose a mortgage on property owned by Inez Maenle. Because Inez was then deceased and her son, John Maenle, was legally incompetent, the action was filed against John R. Ball, as administrator of the estate of Inez Maenle, and Catholic Charities, Inc., as the guardian of John Maenle. Those defendants responded by asserting counterclaims relating to the circumstances of the mortgage loan. On December 15, 2006, appellees John and Andrea Wilken filed a motion to intervene as additional counterclaim plaintiffs and a motion for class certification. The crux of both motions was the allegation that appellees, similarly to Inez Maenle, had been granted a mortgage by First Union Home

Equity Bank/First Union National Bank of Delaware, now Wachovia, and charged an appraisal fee for an appraisal that never took place. Then appellees were penalized in the form of an increased interest rate for not having had an appraisal conducted. Appellees alleged that Wachovia's conduct amounted to negligent misrepresentation, breach of contract and fraud by omission.

{¶ 4} In an opinion and order of January 24, 2007, the lower court granted appellees' motion to intervene as additional counterclaim plaintiffs and potential class representatives and set the matter for a hearing on the motion for class certification. Following the parties' briefing of the issues, the case proceeded to a class certification hearing on April 7, 2008, during which the court ordered appellees to file a revised motion for class certification with a revised class definition. In filing their motion to amend the class definition, appellees asked the court to certify a class defined as:

{¶ 5} "All Ohio citizens or residents who entered into a loan transaction with FUHEB now known as Wachovia National Bank and whose HUD-1 settlement form shows a charge for an appraisal of real estate that was used as collateral for a loan made by FUHEB, where the collateral was valued with an Estimate of Value (EOV) done by FUHEB."

{¶ 6} The case proceeded to a further class certification hearing on June 30, 2008. On July 30, 2008, the lower court issued an opinion and order granting appellees' motion for class certification for the defined class for the claims of breach of contract, negligent

misrepresentation, and fraud by omission against Wachovia, to the extent that they involved the resolution of the following fact and law issues:

{¶ 7} "(a) whether the bank misled or assured its customers to believe it would use an independent appraisal to support the proposed mortgage loans;

{¶ 8} "(b) whether the bank had a duty to notify its customers about its choice of an EOV rather than an independent appraisal;

{¶ 9} "(c) whether the bank had a duty to notify its customers that its use of an EOV rather than an independent appraisal would cause it to charge its customer an additional 0.25% for the life of the mortgage loan;

{¶ 10} "(d) whether mortgage brokers participated in these transactions with authority to receive relevant information and to accept any related agreement for loan terms on behalf of the loan customers;

{¶ 11} "(e) whether the bank satisfied any duty to inform its customers by notifying mortgage brokers involved in these transactions; and

{¶ 12} "(f) whether mortgage brokers consented to the bank's use of an EOV rather than an independent appraisal and to the increased loan interest rate, with proper legal authority to act for the bank's loan customers."

{¶ 13} Subsequently, the lower court issued instructions to the clerk of the Huron County Court of Common Pleas to separate the class action claims from the original case, to create a new case number, CVE 2002-4321, for all proceedings relating to the class action claims by John and Andrea Wilken against Wachovia and to caption that new case

John Wilken and Andrea Wilken, Class Action Plaintiffs v. Wachovia National Bank of Delaware NA, Class Action Defendant. That is the case that is before this court for review.

{¶ 14} In its sole assignment of error, Wachovia now challenges the trial court's class certification order.

{¶ 15} A decision to certify an action as a class action is not a decision on the merits of a claim. "In determining whether to certify a class, the trial court must not consider the merits of the case except as necessary to determine whether the Civ.R. 23 requirements have been met. *Ojalvo v. Bd. of Trustees of Ohio State Univ.* (1984), 12 Ohio St.3d 230, 233, 466 N.E.2d 875." *Williams v. Countrywide Home Loans, Inc.*, 6th Dist. No. L-01-1473, 2002-Ohio-5499, ¶ 24. In determining whether to certify a class action, a trial judge is given broad discretion. *Marks v. C.P. Chem. Co.* (1987), 31 Ohio St.3d 200, syllabus. Accordingly, absent a showing of abuse of discretion, a trial court's determination as to class certification will not be disturbed. *Id.* "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 16} In *In re Consol. Mtge. Satisfaction Cases*, 97 Ohio St.3d. 465, 2002-Ohio-6720, ¶ 6, the Supreme Court of Ohio identified seven requirements under Civ.R. 23 which must be met in order to certify an action as a class action: "(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 impractical; (4) there must be questions of law or fact common to the class; (5) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; (6) the representative parties must fairly and adequately protect the interests of the class; and (7) one of the three Civ.R. 23(B) requirements must be satisfied."

{¶ 17} The Civ.R. 23(B) requirements are:

{¶ 18} "(1) the prosecution of separate actions by or against 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} Appellant first asserts that the identities of the class members cannot be readily ascertained. This issue goes to the requirement of an identifiable and unambiguous class. The requirement of an identifiable class is satisfied when the description of the class "is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." *Simmons v. Am. Gen. Life & Acc. Ins. Co.* (2000), 140 Ohio App.3d 503, 508, quoting 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* (2 Ed.1986) 120-121, Section 1760. Thus, the class definition must be specific enough to allow identification through the use of reasonable efforts." *Id.* citing *Warner v. Waste Mgt., Inc.* (1988), 36 Ohio St.3d 91, 96.

{¶ 24} To reiterate, the lower court identified the class members as: "All Ohio citizens or residents who entered into a loan transaction with FUHEB now known as Wachovia National Bank and whose HUD-1 settlement form shows a charge for an

appraisal of real estate that was used as collateral for a loan made by FUHEB, where the collateral was valued with an Estimate of Value (EOV) done by FUHEB."

{¶ 25} We find that the class definition is sufficiently specific to identify with reasonable effort the members of the class. In certifying this class, the lower court stated: "From the evidence provided to support and oppose the certification motion and the oral arguments by counsel, this court finds that the proposed class definition sufficiently identifies an unambiguous class. The bank's loan records should disclose the name and last known address of every Ohio citizen or resident who obtained the bank's mortgage loan in a transaction where (a) the required HUD-1 form shows a proposed charge for an appraisal, and (b) the bank relied on its own EOV to support that loan. Indeed, the evidence and arguments seem to show that virtually all the bank's Ohio mortgage loans met that description for an identifiable interval."

{¶ 26} The evidence submitted to the court below revealed that some 17,000 loan transactions met this definition. Appellant contends that because of the way the loans were entered into and maintained on its data system, it cannot identify the members of the class without an exhaustive hands-on search of each of the 17,000 loan files. Nothing in the record before the lower court reveals, however, that this could not be accomplished within a reasonable time period. Moreover, Kim Oliver, Wachovia's senior vice president of consumer lending compliance, testified that a simple review of the HUD-1 forms utilized by FUHEB during the time period in question, would identify on line 803 when an EOV was used in association with a loan as opposed to one of the four

appraisers identified in the addendum to the good faith estimate attached to the loans. Accordingly, the trial court did not abuse its discretion in determining the existence of an identifiable and unambiguous class.

{¶ 27} Appellant next contends that the breach of contract claim could not be certified for class treatment.

{¶ 28} Appellees' breach of contract claim alleged in relevant part:

{¶ 29} "43. Plaintiff-Interveners [i.e. the Wilkens] signed a contract with First Union [n.k.a. Wachovia] in the loan transaction.

{¶ 30} "44. The terms of the contract called for First Union to conduct an appraisal of the property subject to the loan agreement.

{¶ 31} "45. Plaintiff-Interveners Wilken and all putative class members paid \$300 in consideration for the appraisal.

{¶ 32} "46. The appraisal was never conducted.

{¶ 33} "47. The plaintiff-Interveners Wilken and all putative class members were then penalized with a charge of a quarter basis point on their loan for not having completed an appraisal.

{¶ 34} "48. First Union breached the terms of the loan agreement through its acts and omissions in failing to fulfill its obligations to complete an appraisal.

{¶ 35} "49. First Union then used their own breach of contract to trigger a penalty clause and charge the putative class members an extra quarter point over the life of the loan.

{¶ 36} "50. First Union's failure to fulfill its obligations under the contract was its basis for the extra interest charge."

{¶ 37} Appellant contends that neither the HUD-1 settlement statement nor the good faith estimate of closing costs created a contract for an appraisal. Absent a uniform contract applicable to all class members, appellant asserts, appellees cannot maintain a class action for breach of contract. Appellant further contends it disclosed to the mortgage brokers involved in the transactions that if the applicants opted to utilize an EOV, the interest rate would be higher. Accordingly, appellant asserts that the mortgage brokers, not appellant, had a fiduciary duty to disclose this to the applicants. Finally, appellant contends that the EOV constituted an appraisal and, therefore, the applicants/putative class members received the benefit of their bargain.

{¶ 38} Each of appellant's arguments on this issue goes to the merits of the breach of contract claim against it. Indeed, some of these issues were recognized by the trial court as common questions of law and fact to be resolved through class action litigation. They do not attack the lower court's findings that the breach of contract claim is appropriate for class certification. As we stated above, "[i]n determining whether to certify a class, the trial court must not consider the merits of the case except as necessary to determine whether the Civ.R. 23 requirements have been met." *Williams*, supra, at ¶ 24. At most, appellant has asserted that the breach of contract claim fails the test for class certification because there is no Civ.R. 23 typicality or commonality present, in that

each class member's claim would require an inquiry into what appraisal he or she expected appellant would initiate. We disagree.

{¶ 39} The breach of contract claim was based on the allegation that appellees and the putative class members paid appellant, as part of a loan transaction, \$300 to conduct an appraisal of the property that was the subject of the loan transaction and that appellant did not conduct the appraisal. The lower court conducted a thorough analysis of the evidence before it and clearly articulated its rationale for certifying the class action. In so doing, the court made express findings on each of the seven requirements for class certification, including that the claims of John and Andrea Wilken are typical of the class members' claims, at least insofar as they involve the resolution of the fact and law issues stated above.

{¶ 40} The court further recognized that after these class issues were resolved, the court may modify or expand the class issues or terminate the class for other matters. Upon a thorough review of the record, we cannot find that the lower court abused its discretion in certifying the breach of contract claim for class action status.

{¶ 41} Finally, appellant contends that the lower court abused its discretion in certifying for class treatment the fraud and misrepresentation claims. The second count of appellees' complaint asserted a claim for negligent misrepresentation and alleged:

{¶ 42} "53. First Union made a false representation of material fact in the loan agreement when it knowingly stated it would conduct an appraisal and then systematically failed to do so to all class members.

{¶ 43} "54. First Union intended for the Plaintiff-Interveners Wilken and all putative class members to rely on the false statements in order to collect the \$300 fee for the appraisal and then charge the putative class members an extra quarter basis point of interest on the life of the loan."

{¶ 44} The third count of appellees' class action complaint set forth a claim for fraud by omission and alleged in relevant part:

{¶ 45} "58. First Union made an affirmative representation that they would under the terms of the contract perform an appraisal as part of the loan transaction.

{¶ 46} "59. First Union has a duty to negotiate in good faith and fair dealing and they concealed the true nature of the loan transaction (specifically the appraisal fee for an appraisal that was not performed and the penalty for not having an appraisal performed)."

{¶ 47} Appellant contends that because both fraud and negligent misrepresentation require as an element, the justifiable reliance of the plaintiff on a false representation made by the defendant, an individual inquiry into each and every class member's reliance precludes class certification. Accordingly, appellant asserts that the Civ.R. 23(B)(3) predominance requirement cannot be met.

{¶ 48} The lower court expressly determined that the defined class satisfied Civ.R. 23(B)(1)(a), (B)(1)(b), and (B)(3) to the extent that it involved the fact and law issues stated previously. Specifically, the court held that "[t]he prosecution of separate actions by individual class members would create a risk of (a) inconsistent or varying adjudications with respect to individual class members which would establish

incompatible standards of conduct for the bank; and (b) adjudications with respect to individual class members which would as a practical matter be dispositive of non-party class members or substantially impair or impede their ability to protect their interests." Finally, the court held that questions of law or fact common to the class members predominated over any questions affecting only individual members and that given the relatively small economic amount of each class member's claim, a class action was superior to other available methods for the fair and efficient adjudication of the controversy.

{¶ 49} In *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 6th Dist. No. F-07-024, 2008-Ohio-3845, ¶ 44-47, we discussed the predominance and superiority requirements of Civ.R. 23(B)(3) as follows:

{¶ 50} "It is now well established 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." *Lockwood Motors, Inc. v. Gen. Motors Corp.* (D.Minn.1995), 162 F.R.D. 569, 580.' *Cope v. Metro. Life Ins. Co.* (1998), 82 Ohio St.3d 426, 430, 696 N.E.2d 1001.

{¶ 51} "In *Cope v. Metro Life Ins. Co.*, the Ohio Supreme Court reversed a decision denying class action status to an action against Metropolitan Life Insurance Company and Metropolitan Life Insurance and Annuity Company to challenge methods used to procure sales of life insurance. The complaint alleged a 'wide spread scheme to

obtain higher commissions and extra charges' by classifying sales of additional life insurance to existing policyholders as new policies when such sales were to be treated as replacement policies. *Id.*, at 427, 696 N.E.2d 1001. The difference in classification was significant in view of MetLife's practice to waive or reduce different policy charges for replacement policies. *Id.*

{¶ 52} "The court identified cases * * * 'involving similar form documents or the use of standardized procedures and practices' as presenting opportunities for 'common proof' of claims on a class basis. *Id.*, at 430-431, 696 N.E.2d 1001. The court reaffirmed its reasoning in *Hamilton v. Ohio Savings Bank* that '* * * [C]lass action treatment is appropriate where claims arise from standardized forms or routinized procedures, notwithstanding the need to prove reliance. * * * ' *Id.*, at 435, 696 N.E.2d 1001, quoting *Hamilton v. Ohio Savings Bank* [(1998), 82 Ohio St.3d 67,] at 84, 694 N.E.2d 442.

{¶ 53} "The fact that individualized determinations may be necessary, even in cases involving standardized forms and procedures, does not preclude a conclusion that class issues predominate over issues pertinent solely to individual claims[.]"

{¶ 54} Appellant's standardized practices and procedures in entering into loan transactions with the putative class members, and specifically appellant's use of the estimates of value or EOVs, supports the trial court's Civ.R. 23(B)(3) finding that common questions of law and fact predominate over issues pertinent solely to individual claims. Accordingly, the record supports the trial court's certification of these claims for class action status.

{¶ 55} In conclusion, we find that the lower court did not abuse its discretion in certifying the three claims to proceed as a class action and the sole assignment of error is not well-taken.

{¶ 56} On consideration whereof, the court finds that substantial justice has been done the party complaining and the judgment of the Huron County Court of Common Pleas is affirmed. This case is remanded to the Huron County Court of Common Pleas for further proceedings. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Richard W. Knepper, J.
CONCUR.

JUDGE

Judge Richard W. Knepper, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.