Opinion issued April 23, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-01057-CV

MOSAIC BAYBROOK ONE, L.P., AND MOSAIC BAYBROOK TWO, L.P., Appellants

V.

TAMMY CESSOR, Appellee

On Appeal from the 215th District Court
Harris County, Texas
Trial Court Case No. 2017-12564

MEMORANDUM OPINION

This case is an interlocutory appeal from an order certifying a class action based on a claim under section 92.019 of the Texas Property Code. The version of the statute in effect when the class was certified prohibits landlords from charging tenants excessive late fees by limiting the permissible charge to "a reasonable

estimate of uncertain damages to the landlord that are incapable of precise calculation and result from late payment of rent." Acts 2007, 80th Leg., R.S., Ch. 917 (H.B. 3101), § 3 (eff. Jan. 1, 2008), *as amended by* Acts 2009, 81st Leg., R.S., Ch. 1268 (H.B.1109), § 1 (eff. June 19, 2009).[1] The landlord contends that the trial court abused its discretion in certifying the class in (1) failing to rigorously analyze and adjudicate potentially dispositive issues in the section 92.019 claim; (2) failing to state the elements of the landlord's defenses and consider their effect on the statutory claim's amenability to class treatment; and (3) finding its former tenant, Tammy Cessor, to be an adequate class representative. We affirm.

Background

Baybrook Village is a residential apartment complex in Webster. It consists of more than 700 apartment units. Mosaic Residential, Inc., manages the property and serves as its landlord. The appellants, Mosaic Baybrook One, L.P., and Mosaic Baybrook Two, L.P. (collectively, Mosaic) owned the property during the relevant period.

Mosaic imposed a uniform late fee policy on Baybrook Village tenants who did not pay their monthly rent by the third day of each month. Mosaic informed its

[1] The provision's current version came into effect on September 1, 2019. Acts 2019, 86th Leg., R.S., Ch. 629 (S.B. 1414), § 1 (eff. Sept. 1, 2019). All references to section 92.019 in this opinion are to the prior version.

tenants of the policy by including the following notice in its standard lease agreement:

> If you don't pay all rent on or before the 3rd day of the month, you'll pay an initial late charge of $100.00, plus a daily late charge of $10.00 per day after that date until the amount due is paid in full. Daily late charges cannot exceed 15 days for any single month's rent. We won't impose late charges until at least the third day of the month.

Cessor is a teacher who rented an apartment at Baybrook Village in July 2016 after accepting a new teaching job in the area. She was told that the monthly base rent for her unit was $950, but Mosaic gave her a concession that lowered her monthly rent to $858.

In her testimony at the class-certification hearing, she explained that she was unable to pay rent on time in August because the job started later than she had believed it would. She contacted Mosaic about her predicament and was told to pay the $510 she was able to pay on August 1st, then pay the rest within 10 days.

After paying the $510, Mosaic posted a notice on Cessor's door showing that late fees had been added to the amount due for her August rent and warning her that if she did not pay within three days, she would be evicted.

Cessor paid the balance of $348 due on her rent about a week later. Mosaic also charged her an additional $220—$130 in rent late fees and $92 for repayment of the rent concession she received in July.

In response to interrogatories, Mosaic reported that, "during the Class Period [May 1, 2015 – September 30, 2017], approximately 2,009 tenants were assessed late fees amounting to approximately $279,813.29 in assessed fees."

Property Code section 92.019 provides that "[a] landlord may not charge a tenant a late fee for failing to pay rent unless," among other things, "the fee is a reasonable estimate of uncertain damages to the landlord that are incapable of precise calculation and result from late payment of rent." TEX. PROP. CODE § 92.019(a)(2). Landlords may collect both "an initial fee" and a "daily fee for each day the rent continues to remain unpaid." *Id.* § 92.019(b). The legislature limited these rights by including a statutory remedy against landlords for violating section 92.019 and a statutory prohibition on waiving that remedy:

> (c) A landlord who violates this section is liable to the tenant for an amount equal to the sum of $100, three times the amount of the late fee charged in violation of this section, and the tenant's reasonable attorney's fees.
>
> (d) A provision of a lease that purports to waive a right or exempt a party from a liability or duty under this section is void.
>
> (e) This section relates only to a fee, charge, or other sum of money required to be paid under the lease if rent is not paid as provided by Subsection (a)(3), and does not affect the landlord's right to terminate the lease or take other action permitted by the lease or other law. Payment of the fee, charge, or other sum of money by a tenant does not waive the right or remedies provided by this section.

TEX. PROP. CODE § 92.019(c)–(e).

Proceedings in the trial court

Cessor's motion for class certification addressed and included evidence as to the following required elements:

- *Ascertainable*. The class is composed of Baybrook tenants who during the class period "were charged one or more rent late fees that Defendants' records show was paid." Class members may be ascertained using objective criteria and Baybrook's records.

- *Numerosity*. Over 2,000 tenants were charged late fees.

- *Commonality*. "Every Class member will win or lose together," because the legality or illegality of the uniform late fee is the same for all.

- *Typicality*. Cessor's "claim arises out of the same types of late fee charged to all Class members, and her claim as well as all claims of the Class are based on the same legal theories and subject to the same defenses."

- *Adequacy*. Cessor understands the nature of the class action, its advantages and disadvantages, and her role as class representative. Her interests align perfectly with the rest of the class. Cessor's counsel have significant experience handling class actions.

- *Predominance*. Every class member "was affected in the same way by Defendants' uniform late fee practices," so "the lawfulness of the charges controls Defendants' liability across the Class." The class claims "will prevail or fail in unison." Id. After liability is established, damages will be calculated using the statutory formula. Section 92.019 preempts defenses such as voluntary payment, waiver, or estoppel.

- *Superiority*. Individual claims are cost-prohibitive, no other late fee cases exist against Baybrook, and Harris County is the proper forum.

The trial defined the class as comprised of

> All current or former residential tenants of Baybrook Village Apartments under written leases where one of the Defendants was the owner, and who, during the Class Period [May 1, 2015 – September 30, 2017], were charged a rent late fee that Defendants' records show was paid.

The trial court certified a:

> [s]tatutory claim for violation of Texas Property Code § 92.019 resulting from charging and collecting late fees and charging back rent concessions. The statute states that a landlord may not charge a tenant a late fee for failing to pay rent unless the fee is a reasonable estimate of uncertain damages to the landlord that are incapable of precise calculation and result from late payment of rent. A landlord who violates this section is liable to the tenant for an amount equal to the sum of $100, three times the amount of the late fee charged in violation of this section, and the tenant's reasonable attorney's fees.

Discussion

Baybrook contends that the trial court abused its discretion in certifying the class without conducting the rigorous analysis necessary to "determine whether all prerequisites to certification have been met." *Sw. Ref. Co. v. Bernal*, 22 S.W.3d 425, 435 (Tex. 2000). Specifically, Baybrook claims that the trial court erred in certifying the class (1) despite Cessor's failure to present a procedural mechanism for the trial court to analyze Cessor's section 92.019 claim on the merits, and (2) without addressing the elements of Baybrook's defenses, including unconstitutional vagueness and as-applied unconstitutionality.

Baybrook further contends that Cessor is not an adequate class representative because she lacks personal integrity, as evidenced by her false declaration and

deposition testimony, as well as her failure to demonstrate her familiarity with the litigation.

A. Applicable Law and Standard of Review for Class-Certification Orders

All classes seeking certification must satisfy all four requirements of Rule 42(a) and at least one of the requirements of Rule 42(b). TEX. R. CIV. P. 42; *Bernal*, 22 S.W.3d at 433 (Tex. 2000). Rule 42(a) prescribes the following prerequisites for a class action:

> One or more members of a class may sue or be sued 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.

Rule 42(b)(3) provides that:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> , , ,
>
> (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.

TEX. R. CIV. P. 42(b)(3); *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 692 (Tex. 2003).

A proper analysis of the Rule 42 factors requires the court to go beyond the pleadings in order to understand "the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues." *Union Pac. Res. Grp., Inc. v. Hankins*, 111 S.W.3d 69, 72 (Tex. 2003) (quoting *Bernal*, 22 S.W.3d at 435). "Because class determinations generally involve considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action, the trial court must be able to make a reasoned determination of the certification issues." *Exxon Mobil Corp. v. Gill*, 299 S.W.3d 124, 126 (Tex. 2009) (quoting *Intratex Gas Co. v. Beeson*, 22 S.W.3d 398, 404 (Tex. 2000)).

Rule 42 does not require the trial court to adjudicate the merits of the plaintiff's claims before certifying a class. The substantive-law analysis for class-certification purposes is "far less searching than in a trial on the merits." *Hankins*, 111 S.W.3d at 72; *see also ExxonMobil Corp. v. Gill*, 299 S.W.3d 124, 126 ("deciding the merits of the suit in order to determine . . . its maintainability as a class action is not appropriate"); *Bliss & Glennon, Inc. v. Ashley*, 420 S.W.3d 379, 387 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (same). Nevertheless, because

the applicable substantive law bears some relation to the issues of commonality, typicality, superiority, and predominance, it "must be taken into consideration in determining whether the purported class can meet the certification prerequisites under Rule 42." *Hankins*, 111 S.W.3d at 72–73.

Our review of an interlocutory appeal from a class-certification order is limited to determining whether the trial court's order constitutes an abuse of discretion. *Bliss & Glennon*, 420 S.W.3d at 387; *see Schein*, 102 S.W.3d at 690–91. Under this standard of review, the appellate court typically indulges every presumption favorable to the trial court's ruling. *See Graebel/Houston Movers, Inc. v. Chastain*, 26 S.W.3d 24, 29 (Tex. App.—Houston [1st Dist.] 2000, pet dism'd w.o.j.). On certification issues, however, the appellate court is not bound by this presumption and must independently determine whether the requirements of rule 42 have been fully satisfied. *See Ford Motor Co. v. Ocanas*, 138 S.W.3d 447, 451 (Tex. App.—Corpus Christi-Edinburgh 2004, no pet.); *see also Stonebridge Life Ins. Co. v. Pitts*, 236 S.W.3d 201, 205 (Tex. 2007) ("Actual conformance with Rule 42 is indispensable, and compliance with the rule must be demonstrated, not presumed."); *Bernal*, 22 S.W.3d at 435 (same).

B. The Trial Court Conducted the Rigorous Analysis Required By Rule 42.

Mosaic complains that the trial court abused its discretion by certifying the class absent a proper, "rigorous analysis" of Cessor's section 92.019 claim. To the

extent Mosaic posits that the trial court was required to adjudicate the claim on the merits before deciding whether to certify the class, it misplaces its reliance on *Gill*. Contrary to Mosaic's position, the Supreme Court in *Gill* reiterated its longstanding warning that "deciding the merits of the suit in order to determine . . . its maintainability as a class action is not appropriate." 299 S.W.3d at 126. The Court vacated the certification order and remanded the case to the trial court not because the *Gill* plaintiffs failed to state a viable cause of action, but because the trial court had certified the class based on a breach of contract cause of action that was not alleged in the pleadings. *Id.* at 128. The Court acknowledged that this error apparently resulted from an effort to distinguish the class claim from one based on a legal theory that the Court had rejected in *Shell Oil Co. v. HRN*, 144 S.W.3d 429 (Tex. 2004). It observed that absent the distinction, the class claim likely was inviable, but the decision does not turn on that observation; the Court left that issue for the trial court to address on remand. 299 S.W.3d at 128.

The record belies Mosaic's contention that the trial court failed to analyze the section 92.019 claim to determine whether certification was appropriate. The statute's plain language makes elaborate analysis unnecessary: it provides a remedy for tenants who have been charged excessive or unreasonable late fees, i.e., fees that are not grounded in a reasonable estimate of uncertain damages. The class-

certification order parses the statutory language to identify the issues of law and fact common to the class:

a. Did Defendants comply with Section 92.019 in charging and collecting rent late fees?

b. Did Defendants conduct an estimate of their damages?

c. Was the estimate of *damages resulting from late payment of rent?*

d. Is $100/10 a reasonable estimate of damages resulting from late payment of rent?

e. Is the chargeback of a rent concession after a late payment a "sum of money required to be paid under the lease if rent is not paid" on time under Section 92.019?

f. Do "employee salaries and other fixed overhead costs" constitute "damages" under Section 92.019 and under Texas jurisprudence on contract damages?

Mosaic does not dispute that these issues are common to the class and thus may be answered on a classwide basis. As set forth in the proposed trial plan, which is endorsed in the trial court's order, they provide a roadmap for determining liability and, if the plaintiffs are successful, for arriving at the amount due to each class member based on Mosaic's records.

In arguing that the trial court failed to consider its defenses in determining the trial plan for the class action, Mosaic fails to mention that it did not amend its pleading to add those defenses until three days before the certification hearing and months after the pleading deadline had passed. Mosaic did not seek leave to amend

its pleadings or otherwise inform the trial court that its trial plan should address those defenses. Mosaic cites to *B.C. v. Steak N Shake Operations*, No. 17-008, 2020 WL 1482586 (Tex. Mar. 27, 2020), to assert that we should presume the trial court had the late-filed amended pleading before it but erroneously failed to address the proposed defenses in the class-certification order. *See id.* at *3 (trial court's recital in summary judgment that it considered "evidence and arguments of counsel," without limitation, affirmatively indicated that trial court considered late-filed response and the evidence attached to it). On the contrary, the absence of language in the order addressing the proposed defenses, the pleading's filing so close to the class-certification hearing date, and Mosaic's failure to secure leave to file its pleading or even raise its proposed defenses at the hearing all indicate that they were not before the trial court when it signed the order and that Mosaic waived the opportunity to obtain a ruling from the trial court before it filed this interlocutory appeal. As these defenses were not properly presented to the trial court for consideration before its ruling, we do not address them, and their absence from the class-certification order does not constitute an abuse of discretion. *See* TEX. R. APP. P. 33.1(a).

C. Cessor is an Adequate Class Representative.

Mosaic contends that Cessor is not an adequate class representative because she lacks personal integrity, as evidenced by her false declaration and deposition testimony, as well as her failure to demonstrate her familiarity with the litigation.

"Adequacy of representation is a question of fact based on the individual circumstances of the case." *Supportkids, Inc. v. Morris*, 167 S.W.3d 422, 426 (Tex. App.—Houston [14th Dist.] 2005, pet. dism'd w.o.j.)). "This requirement has two components: (1) an absence of antagonism between the class representatives and the class members, and (2) an assurance the representative parties will vigorously prosecute the class claims and defenses." *Id.* (citing *Slack v. Shell Oil Co.*, 969 S.W.2d 565, 568 (Tex. App.—Austin 1998, no pet.). Texas courts have considered the following factors in determining whether the class representative adequately represents the class:

- the adequacy of counsel;
- potential conflicts of interest;
- the personal integrity of the plaintiffs;
- the representative's familiarity with the litigation and their belief in the legitimacy of the grievance;
- whether the class is manageable based on geographical limitations; and
- whether the plaintiff can afford to finance the class action.

Forsyth v. Lake LBJ Inv. Corp., 903 S.W.2d 146, 150 (Tex. App.—Austin 1995, writ dism'd w.o.j.), *cited in Supportkids*, 167 S.W.3d at 426.

Mosaic points to what it characterizes as false statements made in Cessor's sworn testimony to argue that she does not qualify as an adequate representative. Specifically, it cites Cessor's averment in her July 2018 affidavit that she had "already given a deposition" when she had not. In her testimony during the class-certification hearing, Cessor explained to the trial court that she misunderstood the meaning of "deposition":

> When I read [the affidavit], I understood it as an oral deposition I have already given my claims and what I needed to give to me [sic] attorneys…. I took it as I am complying with [the] attorneys. I've given them everything that I know to give them to get this [lawsuit] started, to get this going on so I can help others and myself….

As a result, when Cessor "signed the original declaration," she understood "it to be truthful as [she] understood the word 'deposition.'"

Given that "[c]lass representatives need not be legal scholars," *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 483 (5th Cir. 2001), Cessor's misunderstanding of what a deposition entails does not disqualify her from serving as class representative. The trial court must be given the benefit of the doubt in its determination on this credibility issue. *Sw. Bell Tel. Co. v. Mktg. on Hold Inc.*, 308 S.W.3d 909, 924 (Tex. 2010) (quoting *Schein*, 102 S.W.3d at 691).

Mosaic also contends that Cessor lacks familiarity with the litigation, complaining that she relies too extensively on class counsel. The record supports a contrary conclusion. Despite having moved from the Houston area, Cessor traveled

to appear for her deposition and for the class-certification hearing. She testified regarding the facts giving rise to her claim and recounted that she sought help from an attorney about the late fees because she felt "like this was a bigger case that I could do for myself. I would have to get attorneys to help other tenants, as well." She confirmed that her attorneys have kept her apprised of major developments in the case and that she has given them information as needed. Cessor's testimony reflects an understanding and willingness to accept her role as class representative.

Mosaic's argument relies wholly on Cessor's deposition testimony: it does not account for her hearing testimony, nor does it acknowledge the deference owed to the trial court for making a credibility determination on these issues. We hold that the trial court acted within its discretion in concluding that Cessor is an adequate class representative.

Conclusion

We affirm the trial court's class-certification order.

Gordon Goodman
Justice

Panel consists of Justices Lloyd, Goodman, and Landau.