The Honorable Regina Cahan
Hearing Date: April 11, 2014
Hearing Time: 10:00 a.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

JAMES E. FRANCE, on behalf of himself and others similarly situated,

Plaintiff,

v.

TICOR TITLE OF WASHINGTON, INC., a Washington corporation,

Defendant

No. 12-2-25688-8 SEA

FINDINGS, CONCLUSIONS AND ORDER GRANTING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

~~[PROPOSED]~~

THIS MATTER having come before the Court on Plaintiff's Motion for Class Certification pursuant to CR 23(a) and (b)(3), the defendants having responded, and the Court having considered the pleadings on file and the following submissions, as well as the arguments of counsel at the hearing on the motion:

1. Plaintiffs' Motion for Class Certification;

2. Declaration of Martin S. Garfinkel in Support of Plaintiff's Motion for Class Certification with exhibits attached thereto;

3. Ticor Title's Response in Opposition to Plaintiff's Motion for Class Certification;

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4. Declaration of Robert B. Port with exhibits attached thereto;

5. Plaintiff's Reply in Support of Motion for Class Certification;

6. Second Declaration of Martin S. Garfinkel in Support of Plaintiff's Motion for Class Certification with exhibits attached thereto; and

7. Declaration of Mary Dardeau in Support of Plaintiff's Motion for Class Certification.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court hereby finds, concludes, and orders as follows:

1. Certification of class actions is governed by Civil Rule 23. At the class certification stage, doubts are resolved in favor of class certification. *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 318-19, 54 P.3d 665 (2002). As the Court of Appeals has noted, "courts generally assume that the allegations in the pleadings are true and will not attempt to resolve material factual disputes or make any inquiry into the merits of the claim." *Miller v. Farmer Bros. Co.*, 115 Wn. App. 815, 820, 64 P.3d 49 (2003) (citations omitted). "Courts may, however, go beyond the pleadings and examine the parties' evidence to the extent necessary to determine whether the requirements of CR 23 have been met." *Miller,* 115 Wn. App. at 820 (*citing Oda v. State,* 111 Wn. App. 79, 94, 44 P.3d 8 (2002)). Because class actions are a specialized proceeding available in limited circumstances, the trial court must conduct a "rigorous analysis" of the CR 23 requirements to determine whether a class action is appropriate in a particular case. *Oda,* 111 Wn. App. at 93 (quoting *General Tel. Co. v. Falcon,* 457 U.S. 147, 160-61, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)).

Further, in small-dollar cases involving a large number of consumers, our Supreme Court has recognized that our state has a "fundamental policy" favoring class certification.

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E.g., McKee v. AT&T Corp., 164 Wn.2d 372, 191 P.3d 845 (2008). In *Scott v. Cingular Wireless*, 160 Wn.2d 843, 853, 161 P.3d 1000 (2007), the Court held that "state policy favor[s] aggregation of small claims for purposes of efficiency, deterrence, and access to justice."

2. Plaintiff France refinanced his home in September, 2008, and defendant Ticor Title of Washington, Inc. ("Ticor") provided escrow services for the transaction. Plaintiff France challenges, on behalf of himself and others similarly situated, the legality of the "Reconveyance/Processing Fee" charged him by defendant Ticor. This fee was assessed by Ticor as compensation for checking county records to make sure that the prior lender and trustee on the existing Deed of Trust ("DOT") reconveyed the DOT thus clearing title to the property. Plaintiff alleges that there was no justification for Ticor to provide such services during the first 60 days after the closing to justify the fee, which in Mr. France's case, amounted to $135. Plaintiff alleges that during this 60-day period the prior lender and trustee were, by practice and by law, required to reconvey the property and therefore there was no reason for Ticor to track the reconveyance during this period. In addition, and in any event, plaintiff alleges that he did not agree to pay for any such services.

3. Plaintiff proposes the following class definition: "All persons who, beginning on July 31, 2006 through April 27, 2009,[1] paid a reconveyance fee to defendant Ticor Title of Washington, Inc. ("Ticor") in a real estate transaction in Washington State for which defendant acted as an escrow agent and in which the reconveyance of the deed of trust was recorded less than 60 days after closing."

[1] The end date of April 27, 2009 was selected to reflect the fact that Ticor's assets were acquired by its sister company Ticor Title Company in the Spring of 2009 and that defendant's business ceased at that time.

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4. Defendant opposes class certification on numerous grounds, specifically that (a) plaintiff has changed his theory of the case in his proposed definition of the class; (b) the proposed class definition is based on a flawed legal theory; (c) the class is not sufficiently numerous as required under CR 23(a)(1); (d) plaintiff France is not a typical member of the proposed class as required under CR 23(a)(3); (e) plaintiff France is not an adequate class representative as required under CR 23(a)(4); and, under CR 23(b)(3), (f) there is no predominance of common questions of law and fact[2] and (g) a class action is not superior to individual actions.

5. The Court will address each of these challenges in turn.

6. Plaintiff has changed his theory of the case. Defendant contends that plaintiff's complaint was based on the allegation that Ticor had performed no services so as to deserve payment for reconveyance tracking, and that his present motion for class certification is inconsistent with this allegation. The Court disagrees. While the First Amended Complaint (Dkt. #23) does contain the allegation that defendant "did not provide any services to support its $135 Reconveyance Processing Fee" (¶10), it also alleges that its fee was "unreasonable, unnecessary, excessive and impermissible" (*id.*). Further, the gravamen of the both the complaint and the motion for class certification is a challenge to the legality of the charge for reconveyance services, including tracking and related activities. Plaintiff proposed no new parties or legal claims. Defendant points to no prejudice suffered by the narrowing of the class as proposed in this motion. Under Washington's liberal notice

[2] Because the "commonality" requirement of CR 23(a)(2) is "subsumed" by the more stringent predominance requirement of CR 23(b)(3), it will be addressed in the section addressing CR 23(b)(3), *infra. See Schwendeman v. USAA Cas. Ins. Co.*, 116 Wn. App. 9, 20, 65 P.3d 1 (2003)(commonality element subsumed by more stringent predominance requirement).

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pleading rules, defendant has been given sufficient and adequate notice of the claims in this case.

7. Plaintiff's proposed class definition is based on a flawed legal theory. Defendant argues that plaintiff's proposed class definition is defective because there is no legal requirement that the trustee for the prior lender ~~to~~ record the reconveyance of the existing DOT within 60 days after closing. The Court disagrees. While Washington law does not specifically require recordation of the reconveyance within 60 days, it does impose a legal penalty for failing to take steps to clear title during that period. In order to clear title, the prior lender must both acknowledge the payoff of the prior loan and request the trustee to record the reconveyance in county records. *See* RCW 61.16.020 (requiring acknowledgement of satisfaction of debt); RCW 61.24.110(1) (requiring reconveyance upon satisfaction and written request for reconveyance); and RCW 65.08.070 (any conveyance that is not recorded is "void as to any subsequent purchaser…."). Plaintiff's use of the 60-day period arises from the liability faced by a prior lender for failing to acknowledge the satisfaction of payoff within 60 days of a request to do so. *See* RCW 61.16.030. The evidence shows that Ticor makes such a request to prior lenders. *See* Second Garfinkel Dec., Ex. A. Accordingly, this 60-day period is a reasonable proxy for the legal obligations imposed on a prior lender upon satisfaction of the loan secured by the DOT. Accordingly, defendant's argument is rejected.

8. CR 23(a)(1) - Numerosity: Defendant contends that plaintiff cannot identify any other Ticor customer who was charged a fee for reconveyance processing services without agreeing to pay for the fee. This argument goes to the merits of the claim, not whether there is a sufficiently numerous group of putative class members. Here, plaintiff proposes a class of Ticor customers where the DOT reconveyance was recorded in county

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files within 60 days of the closing. The evidence shows that this information can be readily obtained by examining county files online, and that the number of affected customers likely exceeds 4,500. Defendant has not overcome the "rebuttable presumption" that a class of more than 40 putative members is sufficient. *See Miller v. Farmer Bros. Co.*, 115 Wn. App. 815, 821, 645 P.3d 49 (2003). Accordingly, the proposed class satisfies CR 23(a)(1).

9. CR 23(a)(3) – Typicality. To dispute typicality, defendant must show that Mr. France's claim does not "arise from the same practice or course of conduct that gives rise to the claims of other class members...." *Smith v. Behr Process Corp.*, 113 Wn. App. at 320. Defendant argues that (a) Mr. France's claim faces unique defenses because its "filed rate" (filed with the Washington State Office of Insurance Commissioner at the time of plaintiff's transaction on September 29, 2008) was not in effect prior to June 12, 2008 when many class members closed on their transactions; and that (b) plaintiff's claim requires a "case-by-case analysis" of each class member's subjective understanding of the fee at issue. The Court is not persuaded. First, plaintiff's implied cause of action related to the filed rates (6th cause of action in original complaint) was previously dismissed by Judge Erlick and is therefore no longer in the case. Second, the Court does not agree that the legal claims in this case require a review of the subjective beliefs of the putative class members. Defendant's reliance upon Mr. France's deposition to the contrary is not persuasive because plaintiff's belief as to the elements of his legal claim is not admissible. The Court finds and concludes that Mr. France's claims, as pled, are in fact co-extensive with the claims of all members of the proposed class. Accordingly, CR 23(a)(3) is satisfied.

10. CR 23(a)(4) - Adequacy of Representation. Under this element, there must not be an adversity of interest between the the class representative and other class members, and

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the attorneys for the class representative must be qualified to conduct the proposed litigation.

Defendant does not challenge the qualifications of proposed counsel, but does contend that proposed class representative James France is not sufficiently knowledgeable or engaged in the lawsuit to act as a proper representative. The Court disagrees. A class representative is not required to fully understand the legal intricacies and ramifications of complex cases. *See, e.g., McGuire v. Dendreon Corp.*, 267 F.R.D. 690, 697 (W.D. Wash. 2010) (noting that the "threshold of knowledge required to qualify a class representative is low"). It suffices that Mr. France is generally aware of the nature of this case and of the remedies sought and is willing and able to act on behalf of the larger group. Accordingly, the proposed class satisfies CR 23(a)(4).

11. CR 23(a)(2)/(b)(3) – Commonality/Predominance of Factual and Legal Issues, and Superiority. The Court finds and concludes that plaintiff France has satisfied the elements of CR 23(b)(3). CR 23(b)(3) requires the Court to find that "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 rule requires the Court to consider the following factors in making this assessment: "(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; and (d) the difficulties likely to be encountered in the management of a class action." The purpose of the predominance and superiority

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requirements is to ensure that class treatment will promote economy of time, effort, and expense, and a uniformity of decisions to persons similarly situated.

The CR 23(b)(3) predominance requirement is "somewhat more stringent than the CR 23(a)(2) commonality requirement but involves a similar inquiry...." This requirement "is not a rigid test," but is a pragmatic inquiry that focuses on judicial economy and looks to "whether there is a common nucleus of operative facts to each class member's claims." *Sitton v. State Farm*, 116 Wn. App. 245, 255, 63 P.3d 198 (2003).

12. The crux of defendant's argument regarding "predominance" is that there must be a "file-by-file" review of each real estate transaction in order to determine liability, which will turn on what reconveyance services were in fact provided. In response, plaintiff argues that, under his theory of the case, there would be no reason for Ticor, acting as escrow agent, to perform and charge for any reconveyance services during the first 60 days after closing when the prior lender was obligated to reconvey. He points out that an analysis of a sample of files, not substantively challenged by Ticor, reveals that in 89% of the transactions, the prior lender recorded the reconveyance as required within the first 60 days after closing, evincing support for his allegation that there was no need for Ticor to track reconveyance during this period. Further, according to plaintiff, even if Ticor can show instances of a legitimate need to perform reconveyance services in its capacity as escrow agent[3], the existence of these instances does not support a denial of class certification because Ticor will have the opportunity to show that the impacted class members should be excluded from any recovery. *See Moeller v. Farmers Insurance Co. of Washington*, 155 Wn.2d 133, 229 P.3d

[3] Plaintiff argues that such "anomalies" are relatively rare, and that if Ticor performed reconveyance services because it was, by coincidence, the original trustee on the prior loan, the services it performed in that capacity cannot be passed on to the customer by Ticor acting as escrow agent.

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852 (2011) (affirming certification of class even where some class members were not entitled to damages). Finally, plaintiff points out that all escrow instructions involved are identical across the class and therefore the answer to the questions posed will be the same for all class members.

The Court concludes that plaintiff has raised an "overriding" issue of fact and law regarding the propriety of the reconveyance processing fee that can and should be decided on a classwide basis. *See Sitton,* 116 Wn. App. at 254. While defendant may ultimately prevail on the merits, the Court need not decide liability at this time; it suffices that the merits can be resolved in one action for all members of the putative class.

13. In addition, with respect to the Consumer Protection Act claim, defendant Ticor argues that plaintiff cannot satisfy the causal link requirement between the alleged deceptive or unfair practice and class member injuries without delving into the individual circumstances of each transaction. However, as discussed above, all escrow instructions contain the same operative language, and that language did not specifically address reconveyance services, except by reference to the estimated HUD-1. *Compare Kazman v. Land Title Co.,* 2014 U.S. Dist. LEXIS 4071 (W.D. Wash. Jan 13, 2014)(instructions addressed reconveyance services). Defendant has not shown with any specificity that any individual differences existed with respect to the information provided to class members which would have affected the conduct of borrowers in paying for reconveyance processing. There is a more than sufficient showing that the Court will be able to review, on a class-wide basis, the legality of Ticor's practice of charging its borrowers a fee for reconveyance-related

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services during 60 days immediately after closing.[4]

Accordingly, the Court finds that plaintiff has satisfied the predominance prong of CR 23(b)(3).

14. Finally, defendant disputes that a class action is the superior method for resolving this dispute, repeating its argument on the need for individual file review. In light of plaintiff's legal theory of the case (which remains to be tested on the merits), the Court does not see the need for "thousands of mini-trials," as defendant urges. Thus, the Court finds that plaintiff satisfies the elements of CR 23(b)(3).

ORDER

For the foregoing reasons,

IT IS ORDERED that a class be certified and defined as follows: All persons who, beginning on July 31, 2006 through April 27, 2009, paid a reconveyance fee to defendant Ticor Title of Washington, Inc. ("Ticor") in a real estate transaction in Washington State for which defendant acted as an escrow agent and in which the reconveyance of the deed of trust was recorded less than 60 days after closing;

IT IS FURTHER ORDERED that Martin Garfinkel and Adam Berger of Schroeter Goldmark & Bender, Rob Williamson of Williamson & Williams, and Guy Beckett of Berry & Beckett, PLLP shall be designated as counsel to the class, and that James France shall be designated as the class representative;

IT IS FURTHER ORDERED that the parties shall confer and attempt to agree upon a Notice to class members no later than May 16, 2014. If no agreement can be reached, each party shall submit to the Court a proposed Notice no later than May 30, 2014;

[4] The Court recognizes that this fee is sometimes referred to by other labels in Ticor's records.

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IT IS FURTHER ORDERED that once a Notice is approved, defendants' counsel shall provide to Class Counsel, within ten (10) business days of the date of such Order, a complete and corrected list of the names of putative class members with their last known addresses, telephone numbers and social security numbers (which shall only be used to identify correct addresses if necessary). The social security numbers shall be kept confidential in conformity with the Protective Order entered in this matter.

IT IS FURTHER ORDERED that Class Counsel shall cause to be mailed a copy of the notice to all class members no later than thirty (30) days after receipt of the information provided by defendant as set forth in the preceding paragraph;

IT IS FURTHER ORDERED that class members shall have forty-five (45) days from the mailing of the Class Notice within which to return their exclusion requests advising Class Counsel of their desire to opt-out of the case; and

IT IS FURTHER ORDERED that any class member who does not request exclusion may enter an appearance through counsel;

IT IS FURTHER ORDERED that in the event any notice is returned undeliverable, counsel shall use reasonable efforts to obtain corrected addresses. When corrected addresses are obtained, Class Counsel shall cause the approved Notice to be mailed promptly to the affected individuals, with the exception that the deadline for returning the exclusion forms shall be at least forty-five (45) days after the date of mailing.

IT IS SO ORDERED this 5 day of May, 2014.

JUDGE REGINA CAHAN
King County Superior Court

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