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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

RIAD ABBOUD et al., Plaintiffs and Appellants, v. CONSOLIDATED DISPOSAL SERVICE, LLC, Defendant and Respondent.	B271827 (Los Angeles County Super. Ct. No. BC464116)

APPEAL from the judgment of the Superior Court of Los Angeles County. Ann I. Jones, Judge. Affirmed.

Pistone Law Group, Thomas A. Pistone; Mousavi Law Group and Amy A. Mousavi for Plaintiffs and Appellants.

Law Offices of Scott W. Gordon, Scott W. Gordon; Law Offices of Thomas M. Bruen, Thomas M. Bruen and Erik A. Reinertson for Defendant and Respondent.

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Plaintiffs and appellants Riad Abboud, also known as Ray Abboud, doing business as Casa Olympia, Western Loan & Jewelry, LLC, Shahram Mousavi, R. Reed's Diamond Company, Inc., and Eastmont Community Center (plaintiffs) appeal from the trial court's March 8, 2016 order denying their motion for class certification. Plaintiffs contend they demonstrated the requirements for class certification and that the court erred in finding a lack of common proof and in placing too much emphasis on case management issues.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant and respondent Consolidated Disposal Service, LLC (defendant) is a garbage collection and disposal company operating in southern California. In or around June 2007, defendant entered into several contracts with the County of Los Angeles (County)[1] to undertake garbage collection services within the unincorporated areas of the County. The unincorporated areas were divided into seven garbage disposal districts (GDD's), the largest of which was the Belvedere GDD consisting of 18,988 parcels of property. Defendant and the County executed a contract for the Belvedere GDD on June 19, 2007 (the County-Belvedere contract).

As relevant here, the County-Belvedere contract (including the attached Scope of Work designated as Exhibit A and incorporated into the contract) specified that defendant would provide garbage collection and disposal services to all property owners in the Belvedere GDD according to an agreed-upon schedule as to frequency of collection and amount of garbage, green waste and recyclable material collected per parcel.

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[1] The County is not a party to this appeal.

Depending on the type and designated use of each parcel in the GDD (e.g., single family residential, multifamily residential, commercial, industrial, etc.), the County allotted a certain number of refuse units for each parcel to be collected on a weekly basis (with certain exceptions for the type of property and holidays). For our purposes, we refer to this as "minimum basic service" under the County-Belvedere contract.

In consideration of defendant providing minimum basic service to all property owners in the Belvedere GDD, the County pays defendant based on a calculation of the number of refuse units serviced multiplied by a defined refuse unit price. When the County-Belvedere contract was initiated, the refuse unit price was $17.43 and there were 34,941.5 allotted refuse units in the Belvedere GDD to be serviced based on the County's schedule of allotments. Accordingly, defendant received annual fees from the County under the County-Belvedere contract of $7,308,364.20.[2]

All property owners in the Belvedere GDD were entitled to minimum basic service from defendant without being charged for such services directly by defendant. Instead, the County would levy a garbage collection assessment on the property tax bill of each property owner to cover the money it paid to defendant under the County-Belvedere contract for delivering such services.

Under the terms of the County-Belvedere contract, defendant was also responsible for providing written notice to all property owners in the GDD of the terms of the contract and the scope of its garbage collection services, specifically that property owners were entitled to minimum basic service without

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[2] Some minor additional funds were owed to defendant under the terms of the contract but they are not germane to our discussion.

additional charge because of the levy on their property tax bills. Plaintiffs alleged that defendant did not provide the requisite notice until April 2011.

The County-Belvedere contract permitted any property owner or other potential customer (e.g., tenant of a property owner) within the GDD to separately contract with defendant or any third party garbage disposal company for services over and above the minimum basic service to be provided by defendant. For instance, if a property owner wanted more frequent collection or wanted more or larger bins (dumpsters) than it was allotted by the County under the contract, that property owner could enter into a direct service contract with defendant (or a third party company) to provide that additional service for a fee.

In June 2011, plaintiffs, individually and as representative plaintiffs on behalf of a putative class of property owners, filed this action against defendant for alleged breaches of the contracts with the County, including the County-Belvedere contract. The operative third amended complaint states claims against defendant for breach of contract, fraud, negligent misrepresentation, unfair business practices, declaratory relief, rescission and unjust enrichment.

Plaintiffs alleged defendant failed to provide the required minimum basic service to all of the 18,988 parcels in the Belvedere GDD, but nonetheless received and accepted all of the payments from the County for such services. Plaintiffs requested disgorgement of the funds paid for which services were not rendered. Plaintiffs further alleged that because defendant failed to provide the requisite notice, property owners were unaware of their entitlement to minimum basic service from defendant and unwittingly entered into contracts for service with, and paid, defendant or other third party companies for garbage collection

services. Plaintiffs asserted these "duplicate" fees or "overcharges" as damages.

In May 2015, almost four years after the case was filed, plaintiffs filed their motion for class certification, seeking the certification of two classes of property owners: one with property owners in the Belvedere GDD, and the other with property owners in all the remaining GDD's. Both proposed classes consisted of two similar subclasses.

The Belvedere GDD class consisted of all property owners within the Belvedere GDD who contracted and paid for garbage collection services because they did not know they were entitled to minimum basic service from defendant without further charge due to the fact they already indirectly paid for such services by way of their property tax payments to the County. The two subclasses were broken down into those property owners who contracted with defendant and those who contracted with a third party company for garbage collection services.

The county-wide class made up of property owners in the remaining GDD's was based on the same criteria and broken down into two similar subclasses.

After reviewing plaintiffs' moving papers, the court, on its own motion, continued the hearing to October 29, 2015 to allow plaintiffs the opportunity to submit a trial plan and supplemental argument. The court explained that plaintiffs had improperly focused on the alleged merits of plaintiffs' claims, as opposed to the requirements for class certification, including the manageability of class issues at trial.

After oral argument on October 29, the court denied plaintiffs' motion as to the request to certify a county-wide class because plaintiffs had not submitted any evidence supporting the existence of such a class.

As for the Belvedere GDD class, the court continued plaintiffs' motion to March 3, 2016. The court ordered plaintiffs to submit a revised trial plan because the original plan was deficient and did not identify plaintiffs' theories of recovery and how they were subject to common proof at the time of trial. The court noted that defendant's opposition papers appeared to indicate the existence of computerized billing records in defendant's control that might provide common proof on *some* of the issues. The court expressed its concern that this information had not yet been discovered even though the case had been pending for over four years.

In preparation for the continued hearing, plaintiffs sought and obtained various customer records from defendant, as well as the data from two large computerized databases maintained by defendant. Plaintiffs hired a forensic accountant, Mr. Joseph C. Wheat, to analyze the records and data. As part of their supplemental briefing, plaintiffs submitted a revised trial plan and a six-page declaration from Mr. Wheat.

Mr. Wheat explained he reviewed the data from defendant, the other discovery obtained in the case, and the County parcel list that identified the number of allotted refuse units for each parcel of land in the Belvedere GDD. Mr. Wheat opined he could compare the County parcel list with each of the customer invoices and service agreements produced by defendant to "easily determine" the use designation for each parcel of property and how many parcels were actually serviced by defendant each year, from which he could calculate how that number differed from the total parcels required to be serviced under the County-Belvedere contract.

Plaintiffs argued that damages would then be easily calculated on a class-wide basis through expert testimony.

Mr. Wheat proposed three different methodologies for calculating damages: (1) for disgorgement, the total number of refuse units that defendant serviced would be deducted from the total number of refuse units defendant was paid by the County to service. The difference would be multiplied by the refuse unit price per month as set forth in the County-Belvedere contract; (2) for improper surcharges, Mr. Wheat generated a report totaling various surcharges charged to customers by defendant which plaintiffs contended were not allowed at all under the contract; and (3) for duplicate charges, Mr. Wheat stated he was preparing a "detailed accounting for each customer" based on the invoices produced by defendant.

Defendant opposed class certification arguing that plaintiffs' simplistic methodology failed to take into account numerous factors, such as (1) property owners who received only minimum basic service generally did not receive invoices from defendant, and Mr. Wheat's formula falsely assumed that if a parcel owner did not receive an invoice, then defendant provided no services for that parcel; and (2) billing records generally existed only for those property owners or other customers such as tenants of property owners who requested additional services over and above minimum basic service, and Mr. Wheat's formula falsely assumed all such property owners were double-billed. Because of faulty assumptions, defendant argued that plaintiffs' methodology would undercount the number of properties to which defendant properly provided service in accordance with the County-Belvedere contract, and would overstate or misstate the properties purportedly being overcharged.

After entertaining lengthy argument, the court took the motion under submission and issued its written order denying plaintiffs' motion on March 8, 2016.

In denying class certification, the court found it was undisputed defendant and the County entered into the County-Belvedere contract, that the property owners in that GDD are third party beneficiaries of the contract, and that the property owners paid for minimum basic service when they paid their respective property tax bills. The court concluded the primary dispute between the parties was whether defendant breached the contract by collecting duplicate fees directly from the property owners, or by failing to inform the property owners they were entitled to minimum basic service at no additional charge such that those property owners were misled into believing they had to contract and pay for basic garbage collection services.

The court explained Mr. Wheat's analysis failed to address the fact that the County-Belvedere contract allowed defendant to separately charge property owners for excess garbage and disposal services over and above minimum basic service. Plaintiffs failed to demonstrate how they would show, *on a class-wide basis*, which property owners had been invoiced and paid fees to defendant because they had specifically requested those additional or different services, as compared to those property owners, if any, who had paid money to defendant for the minimum basic service only because they did not know they were entitled to those services without charge. The court described plaintiffs' proof as an "oversimplified methodology" that failed to account for the manner in which defendant invoiced property owners (e.g., invoices generally sent only to customers who requested excess services). The court concluded that the issue of whether defendant breached the County-Belvedere contract could not be determined without undertaking an individual inquiry as to each property owner.

The court also concluded plaintiffs similarly failed to demonstrate, as to the third party subclass, that a common, class-wide basis existed for determining which property owners had contracted with third party companies because of lack of notice about defendant's contractual duty to provide them basic service for free, or because they chose to contract for excess services with a different garbage collection company. "Plaintiffs provide no evidence whatsoever as to which class members contracted with third party waste haulers."

The court found that plaintiffs' proposed "surcharge" subclass, discussed for the first time at oral argument, was not only unfair to defendant because it had not been briefed earlier, but also failed for lack of the requisite class-wide proof. As for the claims based on alleged misrepresentations by defendant, the court found there was no evidence of common proof about misrepresentations made to the property owners in the Belvedere GDD.

Finally, the trial court concluded that "[b]y failing to submit evidence that any other customers were either overcharged or underserviced, Plaintiffs fail to show that the class is sufficiently numerous."

This appeal followed. Plaintiffs have only appealed from the denial issued on March 8, 2016 as to the putative class for the Belvedere GDD and have not filed an appeal or raised any argument regarding the denial issued October 29, 2015, as to that portion of the motion regarding the putative county-wide class.

DISCUSSION

We review a trial court's ruling on a class certification motion "for abuse of discretion and generally will not disturb it ' "unless (1) it is unsupported by substantial evidence, (2) it rests

on improper criteria, or (3) it rests on erroneous legal assumptions." ' [Citation.] We review the trial court's actual reasons for granting or denying certification; if they are erroneous, we must reverse, whether or not other reasons not relied upon might have supported the ruling." (*Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 529-530 (*Ayala*).) " 'Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification. . . . "*Any valid pertinent reason stated will be sufficient to uphold the order*." ' " (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326-327, italics added (*Sav-On*).)

As the party seeking class certification, plaintiffs bore the burden of proof to establish that certification was appropriate under Code of Civil Procedure section 382. "The party seeking certification has the burden to establish the existence of both an ascertainable class and a well-defined community of interest among class members. [Citations.] The 'community of interest' requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." (*Sav-On*, *supra*, 34 Cal.4th at p. 326; accord, *Ayala*, *supra*, 59 Cal.4th at pp. 529-530 [" 'The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives.' "].)

As the trial court correctly acknowledged, " '[t]he certification question is "essentially a procedural one that does not ask whether an action is legally or factually meritorious." '

[Citations.] . . . [R]esolution of disputes over the merits of a case generally must be postponed until after class certification has been decided [citation], with the court assuming for purposes of the certification motion that any claims have merit [citation]." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1023.)

Plaintiffs nonetheless, both in the trial court and before this court, base their arguments on the alleged merit of the plaintiffs' claims. As the trial court noted, it may well be that, on an *individual* basis, certain plaintiffs may have meritorious claims against defendant. However, that is *not* germane to the question of whether the claims can be established, *on a class basis, with common proof* as opposed to individualized proof unique to each property owner within the putative class.

It is well established that "the 'ultimate question' for predominance is whether 'the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.' [Citations.] 'The answer hinges on "whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment." [Citation.] . . . "As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages." ' " (*Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, 28 (*Duran*).)

The record amply supports the trial's court conclusions that plaintiffs failed to present sufficient proof of the predominance of common issues over individual issues regarding defendant's *liability* to the property owners in the Belvedere GDD. While

plaintiffs are correct to point out that individualized issues related to damages are usually not a sufficient basis to deny certification of an otherwise valid class, the problem of lack commonality here was not limited to the issue of damages. The court correctly pinpointed that "[p]laintiffs failed to show how they would use [defendant's] records to prove on a class-wide basis that Defendant[] either overcharged certain customers or failed to service certain customers."

Plaintiffs' expert did not offer opinions about how liability could reasonably be established on a class-wide basis. His declaration was focused on damages, and was largely conclusory. He tellingly stated that he was still completing *individualized* accountings for each of defendant's customers based on the records produced. He did not set forth a credible methodology for demonstrating liability on a class basis. Plaintiffs' proposed methodology appears to exclude a large number of property owners who received minimum basic service and therefore did not have any service contract and were not sent invoices by defendant. The methodology also appears to be based on faulty assumptions, including the assumption that if there are no invoices for a parcel within the Belvedere GDD, then no service was provided to that parcel and defendant received a windfall from the County. The Supreme Court has cautioned that the class action vehicle is "not appropriate 'if every member of the alleged class would be required to litigate numerous and substantial questions determining his individual right to recover[.]" (*Duran*, *supra* at 59 Cal.4th at p. 28.) Because individual issues predominate here, class treatment was correctly denied.

Plaintiffs further contend the court over-emphasized case management issues in ruling on the motion and was more

concerned with the difficulty defendant would face in presenting its defenses instead of looking at the common theory of recovery for all plaintiffs. The contention is without merit. Our Supreme Court has explained that "[a]lthough predominance of common issues is often a major factor in a certification analysis, it is not the only consideration. In certifying a class action, the court must also conclude that litigation of individual issues, including those arising from affirmative defenses, can be managed fairly and efficiently." (*Duran*, *supra*, 59 Cal.4th at pp. 28-29.) "Trial courts must pay careful attention to manageability when deciding whether to certify a class action. *In considering whether a class action is a superior device for resolving a controversy, the manageability of individual issues is just as important as the existence of common questions uniting the proposed class*. If the court makes a reasoned, informed decision about manageability at the certification stage, the litigants can plan accordingly and the court will have less need to intervene later to control the proceedings." (*Id*. at p. 29, italics added.)

The trial court correctly concluded that plaintiffs failed to articulate how the individualized issues could be effectively managed at trial. The trial court gave plaintiffs numerous opportunities to present revised trial plans and continued the hearing for several months to allow plaintiffs to marshal additional evidence. Plaintiffs mainly argued that the individualized issues could be presented by expert testimony as opposed to, for instance, each plaintiff taking the stand to testify. However, plaintiffs failed to demonstrate how their expert could adequately address these issues and avoid the presentation of extensive evidence through individual property owner witnesses.

The court also found denial was appropriate because of a lack of evidence of numerosity, pointing to the unique experiences

of each representative plaintiff as reflected in the evidence. Such evidence supports the court's conclusion that plaintiffs have failed to show there are substantial numbers of property owners who were similarly overcharged or underserviced. Plaintiffs have failed to show the error in the trial court's assessment of the numerosity requirement.

Finally, plaintiffs filed two requests for judicial notice, asking this court to take judicial notice of voluminous discovery documents and other records obtained by one of the plaintiffs in April 2017 pursuant to the Public Records Act (Gov. Code, § 6250 et seq.). Plaintiffs argue defendant withheld evidence during discovery and the new documents are further common proof supportive of class certification. Defendant opposes both requests.

" 'Judicial notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter.' [Citation.] The court may in its discretion take judicial notice of any court record in the United States. (Evid. Code, § 451.) This includes any orders, findings of facts and conclusions of law, and judgments within court records. [Citations.] However, while courts are free to take judicial notice of the *existence* of each document in a court file, including the truth of results reached, they may not take judicial notice of the truth of hearsay statements in decisions and court files." (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882.) "The underlying theory of judicial notice is that the matter being judicially noticed is a law or fact that is *not reasonably subject to dispute*." (*Ibid.*)

Plaintiffs were obliged to timely undertake discovery to obtain evidence supportive of their claims. If plaintiffs believed

defendant failed to fully and faithfully comply with its discovery obligations, it was incumbent upon plaintiffs to pursue in good faith the remedies available to them in the trial court for such conduct, specifically the filing of a motion to compel. Plaintiffs have not provided any basis in law or fact for our taking judicial notice of numerous disputed facts within the proffered documents, none of which was presented to the trial court over the months the motion for certification was pending. Plaintiffs have not asked us to take notice of facts that are "not reasonably subject to dispute." They are not a proper subject of judicial notice. Thus, we have denied both requests and did not consider the proffered records in resolving this appeal.

DISPOSITION

The court's March 8, 2016 order denying class certification is affirmed. Defendant and respondent Consolidated Disposal Service, LLC, shall recover costs of appeal.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

SORTINO, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.