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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

NICOLAI HAHUI SAVU, Plaintiff and Appellant, v. 12300 SHERMAN WAY, LLC et al., Defendants and Respondents.	B231416 (Los Angeles County Super. Ct. No. BC423010)

APPEAL from an order of the Superior Court of Los Angeles County. Zaven V. Sinanian, Judge. Reversed and remanded with directions.

BASTA, Inc., Daniel J. Bramzon and Benjamin G. Ramm for Plaintiff and Appellant.

Citron & Citron, Thomas H. Citron; Ralph M. Weiss & Associates, Ralph M. Weiss; Ferguson Case Orr Paterson, Wendy C. Lascher and John A. Hribar for Defendants and Respondents.

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Appellant Nicolai Hahui Savu appeals from one of four orders denying his class certification motion in a lawsuit against both his former landlord and apartment manager, respondents 12300 Sherman Way, LLC (Sherman Way) and Cirrus Asset Management, Inc. (Cirrus).[1] The trial court found that the class was not ascertainable, that appellant was not a typical class member, and that appellant was not an adequate class representative. We conclude these findings are not supported by substantial evidence, and direct the trial court to certify the class.

FACTUAL AND PROCEDURAL BACKGROUND

Respondent Sherman Way acquired the Marquee Apartments (the Marquee) on December 31, 2007, and respondent Cirrus became the manager at that time. The Marquee is a 236-unit apartment complex at 12300-12312 Sherman Way in North Hollywood, California. Appellant lived at the Marquee for about three years between June 1, 2007 and August 31, 2010. He vacated his apartment pursuant to the settlement of an unlawful detainer action brought against him by Sherman Way for nonpayment of rent. Over a period of about nine months from May 18, 2009 to February 6, 2010, respondents made extensive renovations to the Marquee, which included closing both swimming pools during the summer, repaving the parking area, and replacing plumbing.

This litigation began with a class action complaint filed against respondents on October 2, 2009. The named plaintiffs were Sergio Harford and Victor Brown. Shortly after the complaint was filed, Harford voluntarily dismissed his claims. The next day Harford and more than a dozen other plaintiffs filed a separate action against respondents and others, and the case settled without respondents making any payments to the plaintiffs. The remaining plaintiff Brown also settled with respondents. Kwane Jackson

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[1] An order denying a class certification motion in its entirety is an appealable order. (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470.) Such an order has the legal effect of a final judgment because it "'is tantamount to a dismissal of the action as to all members of the class other than plaintiff.'" (*Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440, 1448, quoting *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 699.)

was then substituted as a plaintiff in the first amended complaint. The parties stipulated to the filing of a second amended complaint with Kwane Jackson and appellant as the two named plaintiffs. The operative second amended complaint alleges causes of action for illegal rent increases, breach of contract, maintenance of a nuisance, negligence per se, and breach of the covenant of quiet enjoyment.

Class Certification Motion

On September 28, 2010, the plaintiffs moved for class certification. The proposed class was defined as "any person who was or is a tenant at the Property on or after the date that any defendant acquired any ownership interest in the Property." The plaintiffs sought to have Kwane Jackson and appellant appointed as class representatives. However, Jackson's lawyers withdrew him as a class representative after he twice failed to appear for depositions they had scheduled. This left appellant as the only proposed class representative.

The motion for certification asserted the renovations disrupted the lives of the Marquee tenants in three ways: (1) interrupting the supply of clean water; (2) closing the swimming pools during the summer; and (3) allowing construction activity that caused noise, dust and parking problems.

The evidence submitted in support of the motion showed that tenants described the water in their apartments as yellow, brown, orange, rusty and cloudy. They had to run the water between half a minute to 30 minutes before they would use it. Some tenants did not drink the water. Tenants were concerned enough about the water quality to collect at least 30 samples, all of which were cloudy and discolored. Some tenants complained that water was shut off both with and without notice. One tenant's Christmas holidays were disrupted by the interruption in water service.

The evidence also showed that tenants complained about being unable to use the swimming pools during the summer months. One pool was continuously under construction while another pool was removed completely to make way for a new facility.

The evidence also showed that heavy construction caused dirt and noise. One tenant witnessed construction work before 7:00 a.m., and another estimated that construction sometimes started as early as 6:00 a.m. Piles of lumber and dirt were left all over the property, sometimes blocking access to the tenant's guaranteed parking spaces or to the property altogether.

Appellant stated in his declaration that the water in his apartment was cloudy and left a residue on his bathtub when he showered, and that he could not drink it due to the bad taste and cloudiness. Because he worked nights, he "had problems" with the construction noise during the day.

In opposition to the motion, respondents submitted a request for judicial notice, which included a declaration of Cirrus's regional property manager stating that Sherman Way acquired the Marquee on December 31, 2007.

First Hearing

During the initial hearing on the motion on December 3, 2010, the trial court found that most of the elements for certifying a class were met: "[C]ommon questions predominate the class claims"; "The class is sufficiently numerous"; "The attorneys appear to be adequate . . . as class counsel"; and "[T]he class action appears to be a superior means of conducting this litigation." The court also acknowledged that the class definition was "rather straightforward" in that it applied to "tenants at a single property," that the class members "are identified from defendant's records," and that respondents "have not challenged the ascertainability of the class." The court recommended that the class definition be changed to "set forth the actual dates to which it applies instead of merely stating that it begins on the date that defendants acquired the property." While acknowledging respondents admitted having an ownership interest in the Marquee during all relevant periods, the court nevertheless expressed concern that the motion did not indicate "the date on which defendants acquired an ownership interest in the property." The court found: "Since the date [Sherman Way] acquired its ownership interest is not set forth, it cannot be assumed that [appellant] was a tenant within the class period. . . .

Plaintiff's failure to show that [appellant] was a tenant during the class period amounts to failure to establish that he is a typical class member." The court stated it would provide an opportunity for further briefing on the issues of appellant's typicality and adequacy to act as a class representative.

To clarify the trial court's concern, appellant's attorney inquired: "My understanding then is, what I need to be able to show is that his tenancy overlapped with the time that the defendants had their interest in owning and managing the property; is that correct, your Honor?" The court responded, "That's correct. . . . it has to be shown that his interests are aligned with the interests of the persons who fall within the class definition. . . . So it has to be the same timeline." Appellant's attorney then stated: "I think I can actually point this Court to the part of the record indicating that he was a tenant of these defendants, . . . 12300 Sherman Way is the landlord that filed an unlawful detainer action against him. That would indicate that these defendants were, at one point, his landlord. . . . The lease . . . predates the defendant's acquisition of their interest in the property. And so it seems that my client actually does have [a] tenancy during the entire time where the repairs were going on. Those beginning and end dates for these construction activities are, I believe, set forth in the declaration of Jeff Altman, . . . the defendant's witness." The court responded that it still wanted further clarification by way of supplemental briefing.

Second Hearing

For the second hearing on January 19, 2011, appellant's supplemental briefing proposed an amended class definition: "Any person who was a tenant at the Property between December 31, 2007 and August 31, 2010." Appellant submitted deposition testimony establishing that he was a tenant throughout the period specified in the amended class definition. Respondents submitted a supplemental declaration of property manager Jeff Altman attaching a timeline for the renovations. All of the renovation dates overlapped appellant's tenancy.

At the second hearing on January 19, 2011, the court announced its tentative ruling: "Plaintiff's motion for class certification is denied for lack of ascertainable class, lack of typicality, and lack of an adequate class representative." Ignoring the amended class definition, the court explained: "The class consists of all persons who are or were tenants at 12300 Sherman Way on or after the date that defendants acquired an ownership interest in the property. Plaintiff's supplemental declaration does not answer the very straightforward question: When did defendants acquire any ownership interest in the property? . . . . There's a lack of evidence as to when defendants acquired an ownership interest in the property. Therefore, this defeats [appellant's] bid to be named class representative. As to adequacy, again, same reasons."

Appellant's attorney pointed out that the declaration of one of respondents' attorneys attached a settlement agreement, which recited that respondents had owned and managed the Marquee since December 31, 2007. The court nevertheless adopted its tentative ruling as its final order. When appellant's attorney inquired, "so this [motion] is denied on the grounds of the timing problem?" the court responded, "the Court will adopt its previous rulings, as well as today's ruling."

Orders

After the second hearing on January 19, 2011, the trial court issued four separate orders:

1. January 19, 2011 minute order: This single-page order repeated the court's oral findings that the class certification motion was denied due to "lack of ascertainable class, lack of typicality, and lack of adequate class representation." Respondents filed and served notice of this ruling, then submitted a proposed written order. Appellant filed an objection to respondents' proposed order, and submitted his own proposed order.

2. February 7, 2011 order: The trial court signed respondents' proposed order denying the motion for class certification. The order found: The class is not ascertainable; the claims of the representative plaintiff are not typical of the class claims; the representative plaintiff will not adequately protect the interests of the class; the

questions of law or fact common to the class are not substantially similar and individual issues predominate; and a class action is not the superior means for adjudicating the claims.

3. February 18, 2011 order: The trial court apparently reviewed appellant's objection to respondents' proposed order and issued a minute order stating that it was striking the previous February 7, 2011 order. The court then signed appellant's previously submitted proposed order denying the motion for class certification. The order found: The class is sufficiently numerous; the attorneys are adequate class counsel; common questions predominate because the plaintiff's theory is based on a single set of facts with respect to all causes of action; a class action is the superior means for adjudicating the claims; appellant has not been shown to be a typical class member because there is no evidence that his interests are aligned with the interests of the persons who do fall within the class definition; and appellant has not been shown to be an adequate class representative.

Appellant filed his notice of appeal on March 4, 2011 from the January 19, 2011 minute order.

4. March 15, 2011 order: Respondents objected to the February 18, 2011 order, and submitted an amended proposed order denying the motion for class certification, which the trial court signed. The order found: The class is not ascertainable; the claims of the representative plaintiff are not typical of the claims of the class; and the representative plaintiff will not fairly and adequately protect the interests of the class.

DISCUSSION

I. Standard of Review.

Code of Civil Procedure section 382 authorizes class action suits in California "'when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . .' The party seeking certification as a class representative must establish the existence of an

ascertainable class and a well-defined community of interest among the class members. [Citation.] 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." (*Richmond v. Dart Industries, Inc., supra,* 29 Cal.3d at p. 470 quoting *Daar v. Yellow Cab Co., supra*, 67 Cal.2d at p. 704.)

"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. . . . [A] trial court ruling supported by substantial evidence generally will not be disturbed 'unless (1) improper criteria were used [citation]; or (2) erroneous legal assumptions were made [citation]' [Citation]. Under this standard, an order based upon improper criteria or incorrect assumptions calls for reversal '"even though there may be substantial evidence to support the court's order."'" (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435–436, quoting *Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 655.) "Accordingly, we must examine the trial court's reasons for denying class certification. 'Any valid pertinent reason stated will be sufficient to uphold the order.' [Citation.]" (*Linder, supra*, at p. 436.) "When reviewing an order denying class certification, appellate courts '*consider only the reasons cited by the trial court for the denial, and ignore other reasons that might support denial*.'" (*Jaimez v. Daiohs USA, Inc.* (2010) 181 Cal.App.4th 1286, 1297–1298, italics added; *Evans v. Lasco Bathware, Inc*. (2009) 178 Cal.App.4th 1417, 1422–1423.)

II. Notice of Appeal.

As an initial matter, respondents contend the appeal was taken from a superseded order and should be dismissed. They point out that at the time the notice of appeal was filed on March 4, 2011, the trial court had entered three orders on January 19, 2011, February 7, 2011 and February 18, 2011. According to respondents, appellant should have appealed from the February 18 order and not the January 19 minute order.

As appellant notes, the January 19 minute order did not direct either party to prepare a written order. It is therefore not clear why respondents then prepared and submitted a proposed order. It is also not clear why the trial court proceeded to enter four separate orders on the motion, including one after the notice of appeal was filed.

Respondents correctly argue that a trial court has the inherent power to modify or change an order any time before judgment is entered or an appeal is taken. (See *Kerns v. CSE Ins. Group* (2003) 106 Cal.App.4th 368, 388.) They also correctly point out that in entering the third order on February 18, 2011, the trial court ordered stricken the second order of February 7, 2011. But there is nothing in the record to show that the trial court ever struck the original January 19, 2011 minute order. Nor have respondents cited to any place in the record to support such a finding. It can therefore be argued that the January 19, 2011 minute order remained in effect.

In any event, all of the orders denied the motion for class certification. While the orders do contain some contradictory findings, all of the orders contain the identical findings that appellant was neither a typical class member nor an adequate class representative—the primary issues on appeal. It can therefore be said that the January 19 minute order from which the appeal was taken "ascertained and fixed absolutely and finally the rights of plaintiffs as against [respondents]" in relation to the issue of class certification, and that "[n]o issue between them [on this subject] was left for further consideration." (*George v. Bekins Van & Storage Co*. (1948) 83 Cal.App.2d 478, 482 [finding appeal from original judgment rather than amended judgment was proper].) In this situation, the operative order was the January 19, 2011 minute order.

But even if appellant should have appealed instead from the most recent February 18, 2011 order, we would still not dismiss the appeal. "The notice of appeal must be liberally construed." (Cal. Rules of Court, rule 8.100(a)(2).) "The rule of liberality has been applied by the courts to save appeals where defects in the notice are of such a nature that the judgment or order appealed from is identifiable and the respondent is not misled or prejudiced by such defects[,]" such as where "the judgment or order is

misdescribed" or "the date of the judgment is erroneously given." (*Thompson v. Keckler* (1964) 228 Cal.App.2d 199, 209, 210.)

The notice of appeal in this case describes the nature of the order being appealed, stating "[o]rder denying motion for class certification appealable under the 'death knell doctrine.'" As appellant notes, the trial court denied the motion for class certification only once no matter how many orders it entered. Respondents could not have been misled as to what ruling was being challenged on appeal. We therefore address the merits of the appeal.

III. The Trial Court Erred in Denying the Motion for Class Certification.

The trial court denied the motion for class certification on the grounds that the class was not ascertainable and that appellant was neither a typical class member nor an adequate class representative. The court based its ruling on the finding that appellant was not a tenant at the Marquee during the time it was owned by Sherman Way. This finding is not supported by the evidence.

A. Ascertainability

The proponent of class certification has the burden to show the proposed class is ascertainable. "'Whether a class is ascertainable is determined by examining (1) the class definition, (2) the size of the class, and (3) the means available for identifying class members. [Citations.]' [Citation.] Ascertainability, . . . is best implemented by 'defining the class in terms of objective characteristics and common transactional facts making the ultimate identification of class members possible when that identification becomes necessary.'" (*Evans v. Lasco Barthware, Inc., supra*, 178 Cal.App.4th at p. 1422.) "A proponent at the class certification stage is not required to identify individual class members [citation], demonstrate the merits of their claims [citation], show that each class

member has been injured [citation], or identify a form of notice [citation] to obtain class certification." (*Ibid.*)[2]

Appellant proposed an ascertainable class. Initially, appellant proposed defining the class as "any person who was or is a tenant at the Property on or after the date that the defendants acquired any ownership interest in the Property." The trial court recommended that the definition be modified to "set forth the actual dates to which it applies." Accordingly, in his supplemental briefing, appellant proposed defining the class as "[a]ny person who was a tenant at the Property between December 31, 2007 [the date Sherman Way acquired the Marquee] and August 31, 2010 [the date appellant vacated the Marquee]." Both proposed class definitions described an ascertainable class because the dates of a person's tenancy and the ownership of a particular piece of property are "objective characteristics and common transactional facts."

Indeed, the trial court itself agreed that the class was ascertainable at the first hearing: "It appears that the class may be ascertained based upon the presentation here"; "The class definition is rather straightforward and applies to tenants at a single property . . . . The class members are identified from defendant's records." The trial court also acknowledged, "Defendants have not challenged the ascertainability of the class."

Having recommended that the class definition be modified to add specific dates, the trial court inexplicably ignored the amended definition that did so. If the court had somehow become concerned between the first and second hearing about the

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[2] (Cf. *Linder v. Thrifty Oil Co., supra*, 23 Cal.4th at p. 443 ["[I]n keeping with the principle that trial courts should be afforded flexibility in dealing with class actions [citations], we do not foreclose the possibility that, in the exceptional case where the defense has no other reasonable pretrial means to challenge the merits of a claim to be asserted by a proposed class, the trial court may, after giving the parties notice and an opportunity to brief the merits question, refuse class certification because the claim lacks merit as a matter of law. Furthermore, we see nothing to prevent a court from considering the legal sufficiency of claims when ruling on certification where both sides jointly request such action"].) Here, the trial court's stated reasons for denying the class certification motion do not include any finding regarding the merits of the proposed class claims.

ascertainability of the class, "the court itself can and should redefine the class where the evidence before it shows such a redefined class would be ascertainable." (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916.) We agree with appellant that "a class defined as those people who rented apartments in a particular building during a particular period of time may be one of the most ascertainable classes imaginable."

We note that in their supplemental briefing, respondents contended that if a class is certified its scope should be restricted to tenants who resided at the Marquee during the period of renovations. Respondents argued that appellant's proposed amended class definition is "egregiously overbroad," because it would improperly encompass tenants who moved out of the Marquee before the renovations began as well as tenants who moved in after the renovations were complete. Appellant responded that the water was contaminated and unusable even before the renovations began, and that a fact finder should determine when respondents stopped disrupting the lives of their tenants. But this response is inconsistent with the position taken in the class certification motion, which expressly argued that "[t]he Defendants began renovating the Property in May of 2009" and that "[t]hese renovations disrupted the lives of the class members . . . [by] interrupting the supply of clean water." Respondents' evidence provided the dates of renovation, which appellant does not dispute. Indeed, appellant's opening brief states that "[t]he Defendants' witnesses established that the problems lasted from May 18, 2009 until February 6, 2010." The trial court "can and should redefine the class" by narrowing it to the time period of the renovations.

B. Typicality

The trial court found that appellant was not a typical class member based on its erroneous belief that "[s]ince the date [Sherman Way] acquired its ownership interest is not set forth, it cannot be assumed that plaintiff, Hahui-Savu, was a tenant within the class period." The evidence shows otherwise.

In support of his moving papers, appellant's declaration established that he had been a tenant at the Marquee for three years from the summer of 2007 until he left in August 2010. In their opposition to the motion, respondents admitted that "[a]t all times material to this litigation, Defendant 12300 Sherman Way, LLC ('12300') was the Marquee's owner." Respondents also submitted the declaration of their regional property supervisor which stated that the renovations at the Marquee took place between May 18, 2009 and February 6, 2010, a time period that overlapped appellant's tenancy. This evidence should have been sufficient to establish that appellant was a tenant at the Marquee during the time the renovations were taking place.

But respondents presented even more evidence to establish their date of ownership. They submitted a supplemental declaration from their regional property supervisor that respondent Sherman Way became the owner of the Marquee on December 31, 2007 and that respondent Cirrus became the manager of the Marquee on the same date. Additionally, respondents submitted a settlement agreement reciting the same facts. Appellant's attorney referenced this agreement at the second hearing, but despite the fact that it was uncontested that respondent Sherman Way acquired the Marquee on December 31, 2007 and respondent Cirrus began managing the Marquee the same date, the trial court ignored the settlement agreement. Moreover, as respondents argue, the precise date on which Sherman Way acquired the Marquee is not relevant to the issue of class certification. As the trial court originally noted, the real concern was whether appellant was a tenant within the class period. The evidence showed that he was.

At oral argument, respondents' attorney pointed out that the third order of February 18, 2011, which was prepared by appellant, found that appellant was not a typical class member because there was no evidence that his interests were aligned with the interests of the persons who fell within the class definition. Respondents suggest this should be interpreted as an additional finding by the trial court that appellant had unique circumstances particular only to him. Respondents note, for example, that appellant did not drink Los Angeles tap water, he did not use the swimming pools, and he worked at

night. But the trial court expressly rejected the argument that appellant's tenancy was unique at the first hearing: "It is noted that defendants also challenged plaintiff Hahui-Savu's typicality by pointing to circumstances of his tenancy that were unique to his tenancy. However, the Court is not persuaded. The typicality issue does not look at the unique factual circumstances that surround a named plaintiff's claim. These factual differences do not impact Hahui-Savu's typicality." The trial court was correct in this regard. (See *Seastrom v. Neways, Inc.* (2007) 149 Cal.App.4th 1496, 1502 [""""'Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought.'" [Citations.] The test of typicality "is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct"""]; *Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 238 [noting that """differences in situation or interest among class members . . . should not bar class suit"""; """only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status"""; "[d]ifferences in individual class members' proof of damages is not fatal to class certification"].)

Because the trial court did not rely on the argument that appellant's situation was unique as part of its stated basis for denying the class certification motion, the standard of review applicable here precludes us from considering this argument. The trial court's finding that appellant was not a typical class member because he was not a tenant during the time the Marquee was owned by Sherman Way was an abuse of discretion.

C. Adequacy

The trial court found that appellant was not an adequate class representative, stating: "Since plaintiff, Hahui-Savu, has not been shown to be a typical class member, there is no evidence that his interests are aligned with the interests of the persons who fall within the class definition. Therefore, he cannot be deemed to be an adequate class rep at this time."

We conclude that the trial court erred in finding that appellant was not a typical class member. Because the trial court relied on this erroneous finding to conclude that appellant was not an adequate class representative, the trial court again abused its discretion.

DISPOSITION

All orders by the trial court denying the motion for class certification are reversed. The case is remanded to the trial court with directions to certify the class, defined as "Any person who was a tenant at the Property between May 18, 2009 and February 6, 2010." Appellant is entitled to recover his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ