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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

JASON REYNOLDS et al., Plaintiffs and Appellants, v. SHEA PROPERTIES MANAGEMENT COMPANY, INC., Defendant and Respondent.	B268949 (Los Angeles County Super. Ct. No. BC526470)

APPEAL from an order of the Superior Court of Los Angeles County, William F. Highberger, Judge. Affirmed.

Kabateck Brown Kellner, Brian Kabateck, Christopher B. Noyes, Shant A. Karnikian; Law Offices of Alexander J. Perez and Alexander J. Perez for Plaintiffs and Appellants.

Morgan, Lewis & Bockius, J. Warren Rissier and Jordan McCrary for Defendant and Respondent.

Jason Reynolds, Brittany Lundquist, and David Pherrin (collectively plaintiffs) filed a class action lawsuit against Shea Properties Management Company, Inc. (Shea). Plaintiffs allege that Shea improperly deducts fees for cleaning and painting from tenants' security deposits after tenants vacate their apartments. Plaintiffs allege that the fees are improper because they are governed by policies requiring that the tenant be charged for (1) *all* cleaning costs and (2) some or all painting costs depending solely on the duration of the tenancy rather than on an assessment of the actual condition of the paint. Plaintiffs appeal from the denial of their motion for class certification.

Plaintiffs contend that common issues predominate with respect to their claims because Shea's policies render the deductions from tenants' security deposits unlawful. But Shea introduced evidence showing, among other things, that Shea did conduct individualized assessments of each unit with respect to both cleaning and painting, that Shea did not charge for all cleaning costs, and that Shea did not charge for painting solely on the basis of the duration of the tenancy. We conclude that plaintiffs have shown no abuse of discretion, and we therefore affirm the order denying class certification.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual Background*

Shea is a property management company that owns and operates apartment buildings. Reynolds and Lundquist leased an apartment in Dana Point from Shea. They occupied the unit from March 1, 2011, until February 28, 2012. Pherrin leased an

apartment in Aliso Viejo from Shea. He occupied the unit from March 22, 2011, until March 21, 2013.

Before June 2013, Shea's written policy regarding cleaning fees charged to departing tenants stated:

"'Cleaning costs are always to be applied to the SODA [Statement of Deposit Accounts]. Length of residency does not affect or reduce these charges. A reasonable cleaning effort by the resident is recognized as an honest effort, and charges incurred for partial or touch-up cleaning is [*sic*] not passed on to the resident.'"[1] (Italics and underscoring omitted.)

In June 2013, Shea revised its policy by adding the following language at the end of the paragraph quoted above:

"'Normal wear and tear is expected, we do not expect the resident to clean to rent ready condition.'"

In January 2015, Shea revised its cleaning fee policy to state:

"'Cleaning costs are applied to [the] SODA if necessary to make the rental unit as clean as it was when the resident moved in[.] . . . Do not charge for cleaning any conditions that existed at the time that the departing resident moved in. In addition, do not charge for the cumulative effects of normal wear and tear[.] . . .'" (Italics and underscoring omitted.)

Before June 2013, Shea's written policy regarding painting fees charged to departing tenants stated:

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[1] The trial court granted Shea's motion to seal certain documents, including the policies at issue. The policies are quoted in plaintiffs' memoranda of points and authorities, however, which Shea did not move to seal and the court did not seal. We therefore quote the policies as quoted in plaintiffs' memoranda of points and authorities.

"'Painting charges are determined by length of residency as follows: [¶] a. One year or less = 100% of painting fee is charged to resident. [¶] b. One year, but less than 18 months = 75% of paint fee is charged to resident. [¶] c. 18 months to 2 years = 50% of paint fee is charged to resident. [¶] d. Over two years of residency = No charge to resident.'" (Italics omitted.)

In June 2013, Shea revised its painting fee policy to state:

"'Paint charges are determined by length of residency as follows: [¶] a. One year or less = 100% of painting fee is charged to resident. [¶] b. One year or more, no charge for painting.'" (Italics omitted.)

B. *The Complaint*

On November 1, 2013, plaintiffs filed a class action complaint against Shea. Plaintiffs alleged that Shea has a policy and practice of improperly deducting amounts from tenants' security deposits upon the termination of the tenancy. Plaintiffs alleged that Shea improperly deducts amounts for damages that preexisted the tenancy and damages caused by ordinary wear and tear, in violation of Civil Code section 1950.5 (section 1950.5). Plaintiffs also alleged that Shea improperly deducts amounts for cleaning without regard to the actual condition of the unit at the time of termination.

Plaintiffs alleged causes of action for (1) violation of section 1950.5; (2) unfair competition (Bus. & Prof. Code, § 17200 et seq.), based on the underlying violation of section 1950.5; (3) intentional misrepresentation; and (4) declaratory relief, seeking a declaration that Shea's policies and practices of routinely deducting amounts from the security deposits of departing tenants violate section 1950.5.

C. *The Class Certification Motion*

On June 26, 2015, plaintiffs filed a motion to certify the following class: "All California residents who were tenants in properties managed by [Shea], and who from four years preceding the filing of the Complaint until January 5, 2015, were charged out of their security deposit by [Shea] for a third-party vendor cleaning or painting fee." (Fn. omitted.) Plaintiffs argued that Shea charged departing tenants a flat-rate fee for cleaning based on the number of bedrooms in the unit whenever the cleaning was performed by a third-party vendor. Plaintiffs argued that Shea imposed such a fee "regardless of the level of uncleanliness." Plaintiffs noted that Shea's written policy stated that departing tenants were "'always'" charged a cleaning fee. Plaintiffs also argued that Shea charged departing tenants a painting fee based on length of residency without considering ordinary wear and tear, pursuant to Shea's written policy.

Plaintiffs argued that their claims presented predominantly common issues of law and fact and that their claims were suitable for class treatment. More specifically, plaintiffs argued that "the cornerstone of [p]laintiffs' case as to painting charges" is that "Shea had a policy of deducting from the security deposit paint charges based on length of residency, without consideration of wear and tear or the amount of damage," which is an issue that "applies commonly to all class members." As for cleaning charges, plaintiffs argued that "Shea's policy is to 'always' charge from the security deposit any time an outside vendor is used" and that "[n]o consideration was given of the condition of the property when the tenant moved, the tenant[']s efforts to clean, how dirty it is, or how long it takes to clean."

Plaintiffs filed declarations by their counsel, Lundquist, and Pherrin and presented other evidence in support of their motion.

In opposition to the motion, Shea introduced evidence that Shea did individually assess the cleanliness of each unit when the tenant moved out, did not charge the tenant for cleaning done by Shea's in-house personnel (even if the cleaning was necessary to return the unit to the condition it was in when the tenancy began), and did not always charge the tenant for cleaning done by outside vendors. For example, if Shea determined that the tenant had made a reasonable effort to clean, then Shea did not charge for cleaning, even when Shea hired an outside vendor to clean. Similarly for painting, Shea introduced evidence that Shea did individually assess the condition of the paint in each unit when the tenant moved out, did not charge the tenant for touch-up painting done by Shea's in-house personnel (which was usually sufficient to remedy ordinary wear and tear for tenancies of two years or less), and did not always charge the tenant for painting done by outside vendors even when the written policy called for the tenant to be charged.

D. *The Order Denying Class Certification*

On October 21, 2015, the trial court heard and denied plaintiffs' class certification motion. The court found that plaintiffs had established that the class was sufficiently numerous and ascertainable and that the class representatives and class counsel were adequate. However, the court found that plaintiffs had failed to establish "(1) commonality, (2) typicality, and (3) superiority." The court stated, "the bottom line is that adjudication of a certified class action on the merits would require a highly individualized analysis of the condition of each

putative class member's apartment at move-out to determine whether or not defendant is liable to each such class member for improper collection of cleaning and/or painting charges."

The trial court noted that Reynolds and Lundquist had kept a dog in their apartment and left dog feces visible on their patio in violation of their lease, and the court stated that Shea had appropriately charged them for cleaning stains on the vinyl bathroom floor caused by dog urine and for replacing portions of carpet stained by urine. The court further observed that the evidence showed that Shea did not "blindly adhere to" the written schedule for painting charges but rather individually assessed the condition of the units and adopted a "calibrated approach" to "determining what kind of post-occupancy cleaning and repair was needed." The court stated that this "is consistent with defendant's position that a myriad of individualized mini-trials of liability would be needed." The court concluded that "use of the class action device would not be superior to individualized resort to small claims court regarding security deposit disputes."

Plaintiffs timely appealed from the order denying class certification.[2]

DISCUSSION

Plaintiffs contend that (1) common issues of fact or law predominate over individual issues with respect to the class claims; (2) their claims are typical of the class claims; and (3) a

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[2] An order denying class certification is appealable if it effectively terminates the class claims and allows only individual claims to proceed, as here. (*In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 757-759.)

class action is the superior method to resolve this dispute. We address only the first contention, which is sufficient to dispose of the appeal.

A. *Class Certification Legal Principles*

A party moving for class certification must show (1) a sufficiently numerous, ascertainable class, (2) a well-defined community of interest among class members, and (3) that certification will provide substantial benefits to litigants and the courts, meaning that a class action is superior to other methods of conducting the litigation. (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1089.) "[T]he '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.' [Citation.]" (*Ibid.*)

"The certification question is 'essentially a procedural one that does not ask whether an action is legally or factually meritorious.' [Citation.] A trial court ruling on a certification motion determines '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.]" (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.)

"The 'ultimate question' the element of predominance presents 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.] A court must examine the allegations of the complaint and supporting declarations [citation] and consider whether the legal and factual issues they present are such that their resolution in a single class proceeding would be both desirable and feasible. '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.' [Citations.]" (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021-1022, fn. omitted.) "However, [the Supreme Court has] cautioned that class treatment 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 following the "class judgment"' on common issues. [Citation.]" (*Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, 28.)

B. *Standard of Review*

"We review an order granting or denying class certification for abuse of discretion. (*Sav-On*[*v. Superior Court*], *supra*, 34 Cal.4th at pp. 326-327.) A trial court is afforded great discretion in ruling on class certification. Such a ruling generally will not be disturbed on appeal unless it is (1) not supported by substantial evidence, (2) based on improper criteria, or (3) based on erroneous legal assumptions. (*Fireside Bank*[*v. Superior Court*], *supra*, 40 Cal.4th at p. 1089.)" (*Jones v. Farmers Ins. Exchange* (2013) 221 Cal.App.4th 986, 995.)

"Predominance is a factual question; accordingly, the trial court's finding that common issues predominate generally is reviewed for substantial evidence. [Citation.] We must '[p]resum[e] in favor of the . . . order . . . the existence of every fact the trial court could reasonably deduce from the record . . . .' [Citation.]" (*Brinker Restaurant Corp. v. Superior Court*, *supra*, 53 Cal.4th at p. 1022.)

C. *The Trial Court Did Not Abuse Its Discretion in Finding That Common Issues Do Not Predominate*

Plaintiffs' claims for violation of section 1950.5, unfair competition, and declaratory relief all are based on the alleged violation of section 1950.5.[3] The statute provides that a landlord may use a tenant's security deposit to reimburse the landlord only for costs that are "reasonably necessary" (*id.*, subd. (e)) for specified purposes, including "[t]he repair of damages to the premises, exclusive of ordinary wear and tear, caused by the tenant or by a guest or licensee of the tenant," and "[t]he cleaning of the premises upon termination of the tenancy necessary to return the unit to the same level of cleanliness it was in at the inception of the tenancy" (*id.*, subds. (b)(2), (b)(3)).[4]

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[3] Plaintiffs do not discuss their third cause of action for intentional misrepresentation and therefore abandon any claim of error with respect to that cause of action. (*Garrett v. Howmedica Osteonics Corp.* (2013) 214 Cal.App.4th 173, 180, fn. 4.)

[4] Section 1950.5, subdivision (e), further states, "The landlord may not assert a claim against the tenant or the security for damages to the premises or any defective conditions that preexisted the tenancy, or for ordinary wear and tear or the

To establish liability based on a violation of section 1950.5, plaintiffs must prove that the amount deducted from the tenant's security deposit exceeded the amount reasonably necessary for the specified purposes. (See *Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 744-745.) Whether a deduction for cleaning or painting was excessive under the statute depends on the condition of the unit at the beginning of the tenancy, its condition at the end of the tenancy, the extent of ordinary wear and tear, and the amount of the cleaning or painting fee charged. The condition of the unit at the beginning and end of the tenancy may differ for each unit. The extent of ordinary wear and tear may differ depending on the length of the tenancy.

Plaintiffs argue that common questions predominate because Shea's written policies were unlawful and applied to all of Shea's tenants. As regards painting, plaintiffs argue that "Shea's policy applicable to all class members was to charge 'based on length of residency,' and to strictly impose its rate schedule based on length of residency whenever an outside vendor was used to paint. . . . No consideration whatsoever was given to wear and tear by Shea's policies when charging for painting. Shea's tenants are charged out of their security deposit for painting whenever a third party is used, 'regardless of what that damage is.'"[5]

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effects thereof, whether the wear and tear preexisted the tenancy or occurred during the tenancy, or for the cumulative effects of ordinary wear and tear occurring during any one or more tenancies."

[5] Plaintiffs' reference to a "rate schedule" is potentially misleading. Shea's written policy for painting charges was not a rate schedule in that it did not specify particular dollar amounts

Although Shea's written policies provide some support for some of plaintiffs' assertions, the record contains substantial evidence that contradicts all of them. Shea introduced evidence that it did not "strictly impose its rate schedule based on length of residency whenever an outside vendor was used to paint." Rather, Shea individually assessed the condition of the paint in each unit and, when possible, used its in-house personnel to do touch-up painting, which was usually sufficient to deal with ordinary wear and tear in any tenancy of two years or less (and the schedule itself called for no painting charge after two years); tenants were not charged for painting done by Shea's in-house personnel. When Shea did use an outside vendor, it did not always charge the tenant the full percentage specified in the written policy and sometimes waived the charge altogether. In addition, when Shea did use an outside vendor, it would sometimes contract for a "full paint" but sometimes only for a "partial paint," depending on the condition of the unit. In sum, the record contains substantial evidence that Shea did not rigidly adhere to a percentage schedule for painting charges based on length of tenancy alone.

Because the record contains substantial evidence supporting the negation of all of the factual premises on which plaintiffs' argument is based, we cannot conclude that the trial court abused its discretion by rejecting plaintiffs' position. (*Brinker Restaurant Corp. v. Superior Court*, *supra*, 53 Cal.4th at p. 1022.) Consequently, the court did not abuse its discretion by determining that Shea's written policies concerning painting

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to be charged to tenants. Rather, it identified the percentage of the actual cost that would be charged.

charges do not present a common question as to liability. Insofar as the written policies suggest an unlawful type of uniformity in charging tenants for painting ("strictly . . . based on length of residency whenever an outside vendor was used"), the evidence shows that Shea's actual practices did not conform to the policies, were based on individual assessments of each unit, and do not present a common question of liability.

Plaintiffs raise a parallel argument concerning cleaning charges: "Shea's policy is to 'always' charge from the security deposit any time an outside vendor is used. . . . The schedule charged is a flat rate based solely on size of the unit, i.e., how many bedrooms. . . . No consideration was given of the condition of the property when the tenant moved, the tenant['s] efforts to clean, how dirty it is, or how long it takes to clean." The argument is meritless for parallel reasons: Section 1950.5 allows the tenant to be charged for the reasonable cost of restoring the unit to the level of cleanliness it was in at the start of the tenancy. The record contains substantial evidence (and common sense confirms) that tenants rarely leave a unit as clean as they found it. Thus, in the overwhelming majority of cases, section 1950.5 would allow Shea to hire a vendor to restore the unit to its pre-tenancy state of cleanliness, and Shea could lawfully charge the tenant the reasonable cost of doing so. The record contains substantial evidence that in numerous respects Shea's actual practices were not as described by plaintiffs and were more favorable to tenants than section 1950.5 requires. The record contains substantial evidence that Shea individually assessed each unit, did not charge for cleaning by in-house personnel, did not always charge for cleaning by outside vendors, and in particular did not charge as long as the tenant made a reasonable

effort to clean. Again, insofar as the written policies suggest an unlawful type of uniformity in charging tenants for cleaning ("'always' charge . . . any time an outside vendor is used," and give "[n]o consideration" to "the tenant['s] efforts to clean"), the evidence shows that Shea's actual practices did not conform to the policies, were based on individual assessments of each unit, and do not present a common question of liability.

We are mindful that "[a] class certification motion is not a license for a free-floating inquiry into the validity of the complaint's allegations; rather, resolution 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*, *supra*, 53 Cal.4th at p. 1023.) At the same time, "whether common or individual questions predominate will often depend upon resolution of issues closely tied to the merits," so courts may "'peek'" at the merits to the extent necessary to resolve class certification. (*Id.* at p. 1024.) Here, plaintiffs' argument that common issues predominate is based entirely on the contention that Shea uniformly applies certain policies concerning painting and cleaning charges. The argument is unavoidably intertwined with plaintiffs' theory of liability—plaintiffs allege that Shea's conduct is unlawful because Shea uniformly applies the policies at issue without evaluating and taking into account the condition of each unit. Thus, because "the propriety of certification depends upon disputed threshold legal or factual questions," the trial court "may, and indeed must, resolve them." (*Id.* at p. 1025.)

Plaintiffs assert that *Bauman v. Islay Investments* (1975) 45 Cal.App.3d 797 "is instructive" and "[s]upports [c]ertification."

(Bold omitted.) But *Bauman* actually tends to support Shea. In *Bauman*, the plaintiff filed a putative class action for violation of section 1950.5. The trial court denied class certification, and the Court of Appeal affirmed. The defendant's "uncontroverted" evidence showed that "liability, not merely damages, would be an issue with each member of the class," and thus "each member's right to recover was dependent on facts peculiar to his case." (*Bauman*, at p. 802.) Here too, Shea's liability to each member of the putative class will depend on individual assessments of the apartments and the amounts charged.

For all of these reasons, plaintiffs have not shown that the trial court abused its discretion in determining that "adjudication of a certified class action on the merits would require a highly individualized analysis of the condition of each putative class member's apartment at move-out to determine whether or not defendant is liable to each such class member for improper collection of cleaning and/or painting charges." Because plaintiffs have not shown any abuse of discretion in the trial court's determination that common issues do not predominate, we must affirm the order denying class certification. (*Fireside Bank v. Superior Court*, *supra*, 40 Cal.4th at p. 1089.) We therefore need not address plaintiffs' remaining arguments.

DISPOSITION

The order is affirmed. Shea shall recover its costs on appeal.

MENETREZ, J.*

We concur:

PERLUSS, P. J.

ZELON, 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.