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and on Behalf of All Others Similarly Situated*

14 SUPERIOR COURT OF CALIFORNIA
15 COUNTY OF CONTRA COSTA

16 TERESA DOSKOCZ, individually and on behalf)
17 of all others similarly situated,)

18 Plaintiff,

19 vs.

20 ALS LIEN SERVICES, a California corporation)
21 dba Association Lien Services and DOE 1)
22 through DOE 20, inclusive)

23 Defendants.

Case No: C17-01486

ORDER GRANTING PLAINTIFF'S
MOTION FOR CLASS
CERTIFICATION

Hearing Date: August 9, 2018
Hearing Time: 9:00 a.m.
Department: 39

Action Filed: August 4, 2017

COMPLEX CASE; ASSIGNED FOR ALL
PURPOSES TO HON. EDWARD G. WEIL

1 The Court heard Plaintiff's Motion for Class Certification on the 9:00 a.m. calendar on
2 August 9, 2018. Gina Di Giusto and Arthur D. Levy appeared as counsel for Plaintiff and
3 moving party Teresa Duskocz. Steven S. Nimoy appeared as counsel for Defendant and opposing
4 party ALS Lien Services.

5 The Court has read and considered Plaintiff's motion, Defendant's opposition, and
6 Plaintiff's reply, including all declarations and exhibits submitted in support of and in opposition
7 to the motion, and Defendant's Objections to Evidence in support of Plaintiff's reply. The Court
8 has heard and considered the arguments of counsel in support of and in opposition to the motion.

9 On August 8, 2018, the Court issued the attached detailed Tentative Ruling, which the
10 Court now adopts as the ruling of the Court. For the reasons stated in the Tentative Ruling,
11 Plaintiff's motion is hereby GRANTED. Defendant's Objections to Evidence in support of
12 Plaintiff's reply are hereby overruled.

13 A further Case Management Conference is hereby set for 8:30 a.m. on October 15, 2018
14 in Department 39. The parties shall meet and confer regarding a notice plan and report to the
15 Court in a Joint Case Management Conference Statement to be filed no later than seven (7)
16 calendar days before the Conference.

17 DATED: August 24, 2018



Judge of the Superior Court

Edward G. Weil

19 APPROVED AS TO FORM:

20 SOLTMAN, LEVITT, FLAHERTY & WATTLES LLP

21
22 DATED: Aug. __, 2018

23 by: Steven S. Nimoy
24 Attorney for Defendant
25 ALS Lien Services, a California corporation
26
27
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CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA

DEPARTMENT: 39

HEARING DATE: 08/09/18

1. TIME: 9:00 CASE#: MSC16-00459

CASE NAME: TRADEMARK HOMES VS. ALLARD

HEARING ON DEMURRER TO TRADEMARK HOMES' AMENDED ANSWER

FILED BY MCHALE ENGINEERING, INC.

*** TENTATIVE RULING: ***

McHale Engineering's Demurrer to Trademark Homes' Amended Answer is sustained, with 15 days leave to amend, on the basis that Trademark Homes alleges only legal conclusions and fails to plead facts supporting each affirmative defense. See *FPI Development, Inc. v. Nakashima* (1991) 231 Cal. App. 3d 367, 384; see also *Westly v. Cal. Public Emp. Retirement Sys. Bd. of Admin.* (2003) 105 Cal.App.4th 1095, 1117.

2. TIME: 9:00 CASE#: MSC17-00684

CASE NAME: CRAFT VS. WILLIAM LYON HOMES

HEARING ON MOTION TO COMPEL BINDING ARBITRATION

FILED BY WILLIAM LYON HOMES, INC.

*** TENTATIVE RULING: ***

Continued by Stipulation of the parties to September 6, 2018 at 9:00 a.m.

3. TIME: 9:00 CASE#: MSC17-01486

CASE NAME: DOSKOCZ VS. ALS

HEARING ON MOTION FOR CLASS CERTIFICATION

FILED BY TERESA DOSKOCZ

*** TENTATIVE RULING: ***

Before the Court is Plaintiff Teresa Doskocz's ("Plaintiff" or "Doskocz")'s Motion for Class Certification (the "Motion"). The Motion is opposed by Defendant ALS Lien Services ("Defendant" or "ALS"). Class Plaintiff seeks to certify a class of current and former California homeowners whose HOA contracted with ALS for the collection of delinquent HOA fees and where at any time during the period from April 2, 2011 through the date of Judgment in this case ALS either: (1) collected a payment from the homeowner and applied that payment to costs of collection before delinquent assessments were paid in full; and/or (2) either rejected a partial payment from the homeowner or charged the homeowner a partial payment fee; and/or (3) threatened or initiated non-judicial foreclosure on assessment debt below \$1,800, exclusive of fees, and less than twelve months delinquent.

Defendant opposes certification primarily on two grounds. First, Defendant contends that the class is not ascertainable. Second, Defendant contends that common questions do not predominate.

CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA

DEPARTMENT: 39

HEARING DATE: 08/09/18

Evidentiary Objections

Defendant's Objections to evidence submitted in support of Plaintiff's reply are overruled.

Legal Standard

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 . . ." Code Civ. Proc. § 382.

The proper legal criterion for deciding whether to certify a class under § 382 is whether plaintiff has established by a preponderance of the evidence that a class action is superior to alternative means for a fair and efficient adjudication of the litigation. *Sav-On Drug Stores, Inc. v. Super. Ct.* (2004) 34 Cal.4th 319, 332. The certification question is essentially a procedural one that does not ask whether an action is legally or factually meritorious. *Id.* at 326; *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439-40.

The party seeking class certification under CCP § 382 has the burden of establishing (1) the existence of an ascertainable class, (2) a well-defined community of interest among the class members, and (3) that substantial benefit to litigants and the court would result from class certification. See, e.g., *City of San Jose v. Super. Ct.* (1974) 12 Cal.3d 447, 458. The Court must "carefully weigh respective benefits and burdens and to allow maintenance of the class action only where substantial benefits accrue both to litigants and the courts." *Aguilar v. Cintas Corp. No. 2* (2006) 144 Cal.App.4th 121, 133. The Court should evaluate (1) the interest of each putative class member in controlling his or her case personally; (2) the potential difficulties in managing a class action; (3) the nature and extent of already pending litigation by individual class members involving the same controversy; and (4) desirability of consolidating all claims in a single action before one court. *Id.*

Ascertainability

Whether a class is "ascertainable" within the meaning of Code of Civil Procedure § 382 is determined by examining (a) the class definition; (b) the size of the class; and (c) the means available for identifying class members. *Reyes v. San Diego County Bd. of Supervisors* (1987) 196 Cal.App.3d 1263, 1271.

The class definition: The class definition should identify a group of unnamed plaintiffs by objectively describing a set of common characteristics sufficient to allow a member of that group to identify himself or herself as having a right to recover based on that description. *Lee v. Dynamex, Inc.* (2008) 166 Cal.App.4th 1325, 1334.

In this case, Plaintiff seeks to represent a class of all current and former California homeowners whose HOA contracted with ALS for the collection of delinquent HOA fees and where at any time during the period from April 2, 2011 through the date of Judgment in this case ALS either: (1) collected a payment from the homeowner and applied that payment to costs of collection before delinquent assessments were paid in full; and/or (2) either rejected a partial payment from the homeowner or charged the homeowner a partial payment fee; and/or (3) threatened or initiated non-judicial foreclosure on assessment debt below \$1,800, exclusive of fees, and less than twelve months delinquent. This definition would appear to be precise, objective, and ascertainable.

CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA

DEPARTMENT: 39

HEARING DATE: 08/09/18

The size of the class: As an indicator of the potential size of the class, Plaintiffs have introduced evidence that there were at least 9,104 homeowner accounts active with ALS for collections during the class period. Declaration of Zachary Nye in Support of Motion for Class Certification (“Nye Decl.”) at ¶ 9. Plaintiff provided additional evidence that her proposed subclasses can be determined from this initial set: for example, there are 6,635 accounts for which a homeowner’s payment was applied to collections costs before being applied to outstanding assessments. Nye Decl. at ¶ 12(a). There are 1,538 instances where ALS charged a fee for a partial payment. *Id.* at ¶ 12(f). Finally, there are 615 accounts for which a type of preliminary default letter was sent when the outstanding assessments for the account were less than \$1800 and less than 12 months past due. *Id.* at 12(b). The class is sufficiently numerous.

The means available for identifying class members: Although the class must be ascertainable, its members need not be identified to bind them by a class action judgment. See *Lazar v. Hertz Corp.* (1983) 143 Cal.App.3d 128, 138 (all persons who rented a car from Hertz in California during a 4-year period held an ascertainable class). Plaintiff proposes using Defendants’ Assessment Recovery Management System (“ARMS”) to identify purported class members. Defendant disputes that such a method would identify putative class members. Specifically, Defendant argues that the absence of names and contact information is fatal to ascertainability.

Under *Aguirre*, “[a] class is ascertainable if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself or herself as having a right to recover based on the description.” *Aguirre v. Amscan Holdings, Inc.* (2015) 234 Cal.App.4th 1290, 1299. *Aguirre* holds that a class plaintiff need not “identify, much less locate, individual class members to establish the existence of an ascertainable class. Nor must the representative plaintiff establish a means for providing personal notice of the action to individual class members.” *Id.* at 1301.

The more recent *Noel v. Thrifty Payless* case, under review by the Supreme Court of California, did not find ascertainability where the representative plaintiff submitted no evidence that potential class members could be identified from the retailer’s records or otherwise. (2017) 17 Cal.App.5th 1315, 1328.

Critically, neither *Aguirre* nor *Noel* require that individual members of the class must be identified by name at the time of a certification motion. Here, Plaintiff has done more than put forth a class definition under which members can self-identify at a remedial stage of the proceedings. Plaintiff’s record-based method of identification meets the higher standard of *Noel*.

Furthermore, Defendant’s argument that class members cannot be identified from the Collectronics database is not credible. Testimony from Defendant’s PMK witness Sandra Gottlieb indicates that Defendant has the homeowner name, mailing address, and secondary address for each account that they manage. *Di Gusto*, Ex. 1 at 26:11-23, 30:1-8. Defendant does not dispute that an unredacted database would contain name and address fields.

With respect to Defendant’s argument regarding non-homeowner payments on homeowner’s accounts, Defendant gives no indication of the number of accounts potentially affected by this distinction. Furthermore, it is unclear that such a distinction would be relevant to Defendant’s liability under Civil Code § 5655.

Plaintiff has undertaken significant pre-certification discovery and met her burden under Code of Civil Procedure § 382 with respect to ascertainability.

CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA

DEPARTMENT: 39

HEARING DATE: 08/09/18

Well-Defined Community of Interest

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.* (1981) 29 Cal.3d 462, 470.

Predominance of common questions: Each class member must not be required to litigate individually numerous and substantial questions to determine his or her right to recover; and the issues which may be jointly tried, when compared with those requiring separate adjudication, must be sufficiently numerous and substantial to make the class action advantageous to the judicial process and the litigants. *Washington Mut. Bank, FA v. Super. Ct.* (2001) 24 Cal.4th 906, 913-14.

To determine the predominance question, the Court must consider whether "the theory of recovery advanced by the plaintiff is likely to prove amenable to class treatment." *Jaimez v. DAIHOS, USA* (2010) 181 Cal.App.4th 1286, 1298. The Court must "examine the plaintiff's theory of recovery" and "assess the nature of the legal and factual disputes likely to be presented." *Brinker Restaurant Corp. v. Super. Ct.* (2012) 53 Cal.4th 1004, 1025. "The affirmative defenses of the defendant must also be considered, because a defendant may defeat class certification by showing that an affirmative defense would raise issues specific to each potential class member and that the issues presented by that defense predominate over common issues." *Knapp v. AT&T Wireless Services, Inc.* (2011) 195 Cal.App.4th 932, 941 (quoting *Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440, 1450 ("IKON")) (internal quotation marks omitted).

Here, it appears to be Plaintiff's theory that Defendant has engaged in five uniform unlawful practices that violate the Davis-Stirling Common Interest Development Act, Civil Code §§ 5600 *et seq.*, and therefore constitute predicate acts underlying Plaintiff's claims for violation of the Fair Debt Collections Practices Act, 15 U.S.C. § 1692, *et seq.* and Bus. & Prof. Code § 17200. Specifically, Plaintiff alleges that Defendant (1) applied homeowner payments first to pay ALS's fees before satisfying assessments and other charges, in violation of Civil Code § 5655(s); (2) refused to accept homeowner partial payments and/or charging a partial payment fee, in violation of Civil Code § 5655(a); (3) charged excessive interest for which the homeowner is not liable, in violation of Civil Code § 5650(b)(3); (4) charging excessive late fees, in violation of Civil Code § 5650(b)(2); and (5) unlawfully threatening to foreclose on homeowners' homes prematurely, when the association has no right to foreclose, in violation of Civil Code § 5720(b), to intimidate homeowners into paying.

Plaintiff has alleged uniform collection practices which violate the FDCPA and Davis-Stirling Act and which form predicate statutory violations for her UCL claim. Specifically, Plaintiff has alleged, and adduced evidence of, template pre-lien and pre-NOD notices which threaten foreclosure, template payment plan notices which indicate that payments may be applied first to collection costs rather than assessments, and template Client Late Balance Due letters which threaten to return partial payments. This evidence, if believed, would appear to determine liability on a class-wide basis.

Plaintiff has adduced evidence of how she intends to demonstrate a pattern and practice on the part of Defendant.

CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA

DEPARTMENT: 39

HEARING DATE: 08/09/18

Typicality of Daskocz's Claim: Typicality does not require that the class representative have identical interests with the class members. The class representative need only be similarly situated to the other class members. *Classen v. Weller* (1983) 145 Cal.App.3d 27, 46. The class representative's interests must align with the interests of the class. It "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." *Martinez v. Joe's Crab Shack Holdings* (2014) 231 Cal.App.4th 362, 375.

As stated above, Daskocz's claim must be typical but not necessarily identical to the claims of other class members, and Daskocz must be similarly situated to other class members such that Daskocz will have the motive to litigate on behalf of all class members. *Classen, supra*, 145 Cal.App.3d at p. 45.

In many ways, Ms. Daskocz would appear to be typical of the class: she fell behind on her HOA assessments and was assigned to ALS for collections. Complaint ¶¶ 31, 36. She entered into a standard ALS payment plan in January 2014. *Id.* at ¶ 40. Her payments were applied to fees before delinquent assessments. *Id.* at ¶ 41. She was charged a fee for partial payment. *Id.* at 47. She also received a premature threat of foreclosure from ALS. *Id.* at ¶ 50.

It may be true that Daskocz does not possess precisely the same claims as any particular individual class member, but under the above cases, that is not the test. The evidence before the Court demonstrates that Daskocz's claim is substantially similar to those of the proposed class, and that the claim possessed by Daskocz typifies those claims.

Adequacy of Representation: To meet the adequacy requirement, Daskocz must be capable, through qualified counsel, of vigorously and tenaciously protecting the interests of the class members. *Simons v. Horowitz* (1984) 151 Cal.App.3d 834, 846. The Motion contends Daskocz is an adequate representative. Her declaration supports that. See Daskocz Decl. at ¶¶ 5, 6. Plaintiff has met her burden on adequacy of representation.

Substantial Benefit to Litigants and the Court

Certifying a class action requires demonstrated substantial benefits to litigants and the court. *Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 657. Because a class should not be certified unless substantial benefits accrue both to litigants and the courts, the question arises as to whether a class action would be superior to individual lawsuits *Basurco v. 21st Century Ins. Co.* (2003) 108 Cal.App.4th 110, 120.

In this case, class adjudication presents a substantial benefit to the class members whose individual claims are relatively small, so that they are unlikely to pursue individual litigation. In general, a class action is proper where it provides small claimants with a method of obtaining redress and when numerous parties suffer injury of insufficient size to warrant individual action. *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.

The Court concludes that class adjudication presents a substantial benefit to the court, promoting the efficient use of judicial resources, avoiding duplicative discovery and pretrial motions, and multiple trials on predominantly common issues.

Plaintiff's motion for class certification is granted.