

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

Michael Pevets

Court of Appeals No. OT-10-023

Appellee

Trial Court No. 09 CV 610H

v.

Crain Communications, Inc.

DECISION AND JUDGMENT

Appellant

Decided: June 3, 2011

* * * * *

Dennis E. Murray, Sr., Dennis E. Murray, Jr., Michael J. Stewart, and
John C. Klaehn, for appellee.

Fritz Byers, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} Appellant, Crain Communications, Inc., appeals from a judgment by the
Ottawa County Court of Common Pleas, certifying a class pursuant to Civ.R. 23. For the
reasons that follow, we affirm the judgment of the trial court.

{¶ 2} Appellant, Crain Communications, Inc. ("Crain") is the publisher of AutoWeek magazine, a periodical that provides information intended to be attractive to automobile enthusiasts. Crain is an Illinois corporation and has its principal place of business in Detroit, Michigan. Before mid-January 2009, AutoWeek was published on a weekly basis. In January 2009, Crain announced that it would no longer be publishing the magazine weekly; instead, the magazine would be published every other week. The new publication schedule was implemented beginning with the January 12, 2009 issue, and continues to this date.

{¶ 3} Appellee, Michael Pevets, paid for an annual subscription to AutoWeek in June 2008 and, thus, was a subscriber to AutoWeek at the time the aforementioned publication changes were announced in January 2009. Following the January 2009 announcement, Pevets continued to accept delivery of the magazine without affirmative objection and, in fact, subsequently renewed his subscription for another year. Although some of Pevets's fellow AutoWeek subscribers reacted negatively following the publication change announcement, i.e., cancelled their subscriptions, a large majority reacted just as Pevets did, continuing to accept delivery and, ultimately, renewing their subscriptions.

{¶ 4} On October 9, 2009, Pevets filed a complaint on behalf of himself and all of the other AutoWeek subscribers who were affected by the reduced publication schedule. Included in the complaint were counts alleging breach of contract and unjust enrichment

arising out of the changed schedule. In addition, the complaint included prayers that the case be maintained as a class action, with Pevets as the class representative.

{¶ 5} On March 18, 2010, Pevets moved for certification of the action as a class action on behalf of a plaintiff class defined as "all individuals and entities in the United States who paid for a subscription to AutoWeek magazine prior to January 12, 2009 and were subscribers on that date." According to the complaint, the class of AutoWeek subscribers within the United States on January 12, 2009, consists of approximately 300,000 people distributed across all fifty states. This allegation has not been disputed by Crain.

{¶ 6} On May 26, 2010, the trial court entered a judgment granting Pevets's class-certification motion. Appellant timely filed a notice of appeal from this judgment entry, raising the following single assignment of error:

{¶ 7} "The trial court committed prejudicial error in certifying a class pursuant to Civil Rule 23."

{¶ 8} In considering this appeal, we note at the outset that a trial court has the discretion to certify a cause of action as a class action; thus, this court will not disturb the trial court's judgment absent an abuse of discretion. *Miller v. Volkswagen of Am., Inc.*, 6th Dist. No. E-07-047, 2008-Ohio-4736, ¶ 25. We are likewise aware, however, that a trial court's discretion regarding the question of class certification is to some degree limited, inasmuch as it must be exercised within the framework of Civ.R. 23. *Hamilton v. Ohio Sav. Bank* (1998), 82 Ohio St.3d 67, 70.

{¶ 9} There are seven prerequisites that must be met before a court can certify a case as a class action, and they are as follows:

{¶ 10} "(1) [A]n identifiable class must exist and the definition of the class must be unambiguous; (2) the named representatives must be members of the class; (3) the class must be so numerous that joinder of all members is impracticable; (4) there must be questions of law or fact common to the class; (5) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; (6) the representative parties must fairly and adequately protect the interests of the class; and (7) one of the three Civ.R. 23(B) requirements must be met." *Hamilton*, supra, at 71; Civ.R. 23(A) and (B).

{¶ 11} In the instant case, Crain disputes the trial court's findings with respect to the "typicality" requirement, set forth at Civ.R. 23(A), and the "predominance" and "superiority" requirements, set forth at Civ.R. 23(B)(3).

{¶ 12} In order for "typicality" to exist, there must be no express conflict between the class representatives and the class. *Hamilton*, supra, at 77. The purpose of this inquiry is to protect absent class members and to promote the "economy" of the class action by ensuring that the interests of the named plaintiff and those of the class are substantially aligned. *Miller*, supra, at ¶ 37. The typicality requirement is met where: (1) a plaintiff's claims arise from the same alleged course of conduct by the defendant that gives rise to the claims of all class members; and (2) the plaintiff's claims are based on the same legal theories advanced on behalf of the class as a whole. See *Bentley v.*

Honeywell Internl., Inc. (S.D.Ohio 2004), 223 F.R.D. 471, 484. It is noted that "a unique defense will not destroy typicality * * * unless it is 'so central to the litigation that it threatens to occupy the class representative to the detriment of the other class members.'" *Hamilton*, supra, at 78 (citation omitted). Further, regarding damages, we observe that typicality is not defeated by a potential variation in the amount of damages between individual class members. See *Vinci v. Am. Can Co.* (1984), 9 Ohio St.3d 100, 101 (recognizing that the nature of a claim and the issue of damages are analytically independent inquiries).

{¶ 13} Here, Pevets argues that he satisfies the typicality requirement because his claims are identical to the claims of the other class members -- that is, all of the claims are for breach of contract or, in the alternative, for unjust enrichment – and, further, all of the claims are based upon the same alleged course of conduct by the defendant – that is, they all arose from Crain's having reduced the frequency of its publication from once a week to once every two weeks. We agree.

{¶ 14} Crain argues against this conclusion, stating that variations in contract terms, such as subscription price and duration, in addition to subscriber expectations and responses to the reduced publication frequency, prevent a finding that typicality is achieved in this case. We are simply not persuaded that any of these potential variations, either alone or together, are sufficient to render the trial court's finding of typicality an abuse of its discretion.

{¶ 15} We next examine Crain's challenge to the trial court's determination that the "predominance" requirement was satisfied; that is, whether "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Civ.R. 23(B)(3).

{¶ 16} In performing this analysis, we note that common issues need only predominate; "they do not need to be dispositive of the litigation." *Miller*, supra, at ¶ 45 (citing authority omitted). As recognized by the Supreme Court of Ohio in *Cope v. Metro. Life Ins. Co.* (1998), 82 Ohio St.3d 426, 429-430: "It is now well established that a 'claim will meet the predominance requirement when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position.'" *Id.* at 429-430, quoting *Lockwood Motors, Inc. v. Gen. Motors Corp.* (D.Minn. 1995), 162 F.R.D. 569, 580. In addition, "class action treatment is appropriate where claims arise from standardized forms or routinized procedures, notwithstanding the need to prove reliance." *Hamilton*, supra, at 84. Finally, we note that a trial court can reasonably find that common issues predominate even where significant individual issues exist. As stated by the Supreme Court of Ohio in *Hamilton*, supra:

{¶ 17} "It is conceivable that a significant amount of time may be spent in this case litigating questions affecting only individual members of the classes. * * *

[Nevertheless, a] court should not 'determine predominance by comparing the time that the common issues can be anticipated to consume in the litigation to the time that

individual issues will require. Otherwise, only the most complex common questions could predominate since such issues tend to require more time to litigate than less complex issues.' [Citation omitted.]" Id. at 85.

{¶ 18} In the instant case, the trial court found that common questions of fact and law included: "whether Defendant entered into a contract with AutoWeek subscribers; whether the contract required Defendant to deliver a weekly news service; whether Defendant breached that contract by changing the frequency of publication; and, in the alternative, whether Defendant was unjustly enriched at the expense of Plaintiff and class members."

{¶ 19} Arguing that this characterization of the issues amounts to an oversimplification of the questions raised in this case, Crain states that in order to properly determine whether Crain had a contractual obligation of weekly publication as to any given subscriber, the trial court would have to consider on an individual basis various specific factors, such as: (1) any written or oral representations that were made to the subscriber at the time of the subscription; and (2) how the subscriber responded to the announced change in publication frequency.

{¶ 20} We agree with Pevets and conclude that the trial court did not abuse its discretion when it determined that common issues predominate over individual issues, inasmuch as we find that the broader question of whether Crain breached its contract with Pevets (and the other qualified subscribers) by halving the number of issues that would be

received in the subscription order is sufficient to support the trial court's certification decision.

{¶ 21} As for questions raised by Crain, such as whether a subscriber accepted an alleged contract modification or waived any claim for breach of contract and whether Crain's provision of a bi-weekly publication constitutes an accord and satisfaction, Pevets points out that his conduct in this case was similar to that of the majority of class members in that he continued to receive, without affirmative objection, the issues remaining on the subscription for which he had paid and then renewed his subscription to the every-other-week service. Thus, if Pevets has a valid contract claim, then all class members who reacted in the same manner would also have a claim; and if he does not, then such would also be true for the large majority of the class membership.

{¶ 22} We next consider the "superiority" factor. Examination of this prerequisite requires a comparative analysis with other available procedures, "to determine whether a class action is sufficiently effective to justify the expenditure of time and energy involved therein." *Schmidt v. Avco Corp.* (1984), 15 Ohio St.3d 310, 313.

{¶ 23} As stated by the Supreme Court of Ohio in *Hamilton*, supra:

{¶ 24} "'The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's

(usually an attorney's) labor.'" Id. at 80, quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617.

{¶ 25} Pursuant to Civ.R. 23(B)(3), a court is to consider such factors as the interest of class members in prosecuting individual actions, the extent and nature of any litigation concerning the controversy already commenced by or against members of the class, the advantage of concentrating the litigation in a single forum, and the difficulties likely to be encountered in the management of a class action. Id.

{¶ 26} Here, the individual claims at stake are small – Pevets is only asking for half of the price of a magazine subscription. Thus, any interest of individual class members in prosecuting individual actions is negligible and does not militate against class certification.

{¶ 27} In addition, there is no suggestion by either party that there is any other litigation pending regarding the change in AutoWeek's publication frequency. Inasmuch as the presence of individual actions tends to weigh against class certification, while the absence of parallel lawsuits tends to weigh in favor of certification, *Hamilton*, supra, at 81, consideration of this factor weighs in favor of class certification.

{¶ 28} Further, the trial court specifically stated that it is well able to manage the complexity that this class certification entails. Appellate courts recognize that "the trial court is in the best position to consider the feasibility and gathering and analyzing class-wide evidence." See *Stammco, LLC v. United Telephone Co. of Ohio*, 6th Dist. No. F-07-024, 2008-Ohio-3845, ¶ 58 (citation omitted).

{¶ 29} Finally, we note that Crain has not presented, nor is this court able to identify, any superior alternative method of adjudication for consideration in this case. Based on all of the foregoing, we conclude that the trial court did not abuse its discretion in finding that the requirement of "superiority" was met in this case.

{¶ 30} Crain additionally argues that the class certification order was based upon an erroneous determination by the trial court that Michigan law applies to all of the claims involved in this case. This argument implicates two separate, but interrelated, areas of the law. The first involves the question of whether the decision to apply Michigan law unconstitutionally burdens the due process rights of Crain or absent class members. The second involves the question of whether the decision to apply Michigan law was correct under Ohio's rules governing choice-of-law determinations.

{¶ 31} In determining whether application of Michigan law unconstitutionally burdens the due process rights of any of the class members, we must consider whether Michigan has "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Philips Petroleum Co. v. Shutts* (1985), 472 U.S. 797, 818, citing *Allstate Ins. Co. v. Hague* (1981), 449 U.S. 302, 312-313. Here, it is undisputed that class members exist in all 50 states. Certainly all of the states have an interest in compensating their citizens. See *In re Mercedes-Benz Tele Aid Contract Litigation* (D.N.J. 2009), 257 F.R.D. 46, 67-69. Likewise undisputed is that Crain has its principal place of business in Michigan. Clearly, then, Michigan has the additional interest, not just of compensating its citizens,

but also of regulating Crain, as a resident corporation. See *id.* In our opinion, the above-mentioned contacts are sufficiently significant, and create sufficient state interests, such that the choice of Michigan law is neither arbitrary nor fundamentally unfair.

Accordingly, we find that the trial court's decision to apply Michigan law does not unconstitutionally burden the due process rights of Crain or absent class members.

{¶ 32} Next, we must determine whether the trial court's decision to apply Michigan law was correct under Ohio's choice-of-law provisions. We initially note that when addressing any conflict of law, courts apply the choice-of-law rules of the forum state, in this case, Ohio. See *Klaxon Co. v. Stentor Elec. Mfg. Co.* (1941), 313 U.S. 487, 496. Ohio has generally adopted the choice of law rules set forth in the Restatement.

{¶ 33} In contract cases, Ohio law applies Restatement of the Law 2d, Conflict of Laws (1971), Section 188 to determine the law of the state that has the most significant relationship to the transaction and the parties. *Reserve Assoc. Ltd. v. Selective Ins. Co. of South Carolina*, 6th Dist. No. L-07-1191, 2007-Ohio-6369 at ¶ 13. "When applying section 188, * * * one does not simply tally up the number of contacts existing for each state; instead, the importance of each particular contact must be assessed with reference to the choice of law principles in section 6 and the contact's 'relative importance with respect to the particular issue.'" *McDonald v. Williamson*, 8th Dist. No. 81590, 2003-Ohio-6606, ¶ 20 (citation omitted).

{¶ 34} Restatement of the Law 2d, Conflict of Laws (1971), Section 188(2) provides:

{¶ 35} "In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include: (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation, and place of business of the parties."

{¶ 36} In this case, Pevets concedes that, taken together, these factors do not strongly favor the application of any single state's substantive law.

{¶ 37} We turn, then, to the generalized choice of law factors set forth in Restatement of the Law 2d, Conflict of Laws (1971), Section 6. These factors include: "(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of law to be applied." Restatement of the Law 2d, Conflict of Laws (1971), Section 6.

{¶ 38} In the instant case, application of Michigan law to the nationwide class recognizes Michigan's unique interest in regulating the conduct of a resident corporation, which, as described above, is an interest shared by no other state in this litigation.

{¶ 39} Regarding the "justified expectations" of the parties, it cannot be reasonably argued that Crain, as a resident corporation of Michigan, will suffer any

hardship or surprise resulting from the use of Michigan law in an action in which it is a defendant. Application of Michigan law is also favored when considering the justified expectations of the class members, to the extent that, given the small amount of damages claimed by each class member, recovery would likely be possible only by way of a class action. Stated otherwise, application of the law of each individual's home state, and the resulting denial of certification based upon differences between the breach of contract claims in the various jurisdictions, would probably preclude recovery by any one person.

{¶ 40} Similarly, consideration of the basic policy underlying the class action mechanism -- i.e., providing a mechanism of recovery in cases where damages are so small as to preclude individual recovery, see *Amchem*, supra, at 617 -- weighs in favor of applying Michigan law and certifying the class, as opposed to applying the law of each class member's home state and denying class certification.

{¶ 41} Finally, the factors of certainty, predictability, uniformity of result, and ease in the determination and application of law to be applied all support the conclusion that the application of Michigan law, rather than the law of multiple states, is appropriate in this case.

{¶ 42} We note that the trial court did not conduct a separate choice of law analysis with respect to Pevets's alternative claim for unjust enrichment. Because both parties appear to agree at this point in the litigation that this case involves a contract claim, and not a claim for unjust enrichment, we conclude that the trial court's omission is harmless and does not result in error or unfair prejudice to either party.

{¶ 43} Based upon all of the foregoing, we conclude that the trial court did not err in determining that Michigan law should apply to this case. Nor did the trial court abuse its discretion in certifying the class in this case. Accordingly, appellant's assignment of error is found not well-taken, and the judgment of the Ottawa County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Thomas J. Osowik, P.J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.