[Cite as *Clark v. Park 'n Fly*, 2011-Ohio-323.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94379

DANIEL CLARK

PLAINTIFF-APPELLANT

vs.

PARK 'N FLY

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-623864

BEFORE: Boyle, J., Stewart, P.J., and Sweeney, J.

RELEASED AND JOURNALIZED: January 27, 2011

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MARY J. BOYLE, J.:

{¶ 1} Plaintiff-appellant, Daniel Clark, appeals from a judgment of the Cuyahoga County Court of Common Pleas denying his motion for class certification regarding his claims that defendant-appellee, Park 'N Fly, violated the Ohio Consumer Sales Practices Act ("CSPA"), committed fraud, and breached contracts with its customers. He raises one assignment of error for

our review:

{¶ 2} "The trial court abused its discretion and committed reversible error in denying Appellant's Motion for Class Certification."

{¶ 3} Finding no merit to the appeal, we affirm.

Procedural History and Factual Background

{¶ 4} Clark brought a class action complaint against Park 'N Fly in May 2007. He alleged that he parked at Park 'N Fly because it advertised "free car wash." He claims that when he returned to pick up his car, he discovered the car wash "was not operational and he was denied the free car wash." He later discovered that the car wash had not been operational for some time, even though Park 'N Fly still advertised that it was available. When he exited Park 'N Fly's facility, he asked the attendant if he received a discount due to the car wash being inoperable or whether he received a coupon for a car wash somewhere else, and the attendant told him no, but said that he could fill out a complaint form and send it to Park 'N Fly's corporate headquarters. Clark took the form, but threw it away. He then brought this class action against Park 'N Fly.

{¶ 5} Clark sought class certification for his claims pursuant to Civ.R. 23(A) and 23(B)(3), asserting that common questions of law or fact predominate over individual questions, and class action is a superior method of adjudication of the matter. He proposed the following class definition:

{¶ 6} "All individuals similarly situated, who (i) utilized Park 'N Fly's facilities in Cleveland, Ohio, (ii) who were denied the advertised free car wash (iii) in the two years preceding the filing of the complaint in this action."

{¶ 7} Park 'N Fly opposed the class certification, asserting, among many other things, that Clark failed to meet his burden of establishing the threshold matter that an identifiable class exists, and further that Clark's class definition was ambiguous.

{¶ 8} After much discovery and an oral hearing on the matter, the trial court agreed with Park 'N Fly, and found that Clark failed to meet the threshold issue of establishing that an identifiable class exists and failed to unambiguously define the class. It is from this judgment that Clark appeals.

Standard of Review

{¶ 9} At the outset, we are mindful that a trial judge has broad discretion when deciding whether to certify a class action. *In re Consol. Mtge. Satisfaction Cases*, 97 Ohio St.3d 465, 2002-Ohio-6720, 780 N.E.2d 556, citing *Marks v. C.P. Chem. Co., Inc.* (1987), 31 Ohio St.3d 200, 509 N.E.2d 1249, syllabus. Absent a showing of abuse of discretion, a trial court's determination as to class certification will not be disturbed. Id.

{¶ 10} The appropriateness of applying the abuse of discretion standard in reviewing class action determinations is grounded not in credibility assessment, but in the trial court's special expertise and familiarity with case-management

problems and its inherent power to manage its own docket. *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 70, 1998-Ohio-365, 694 N.E.2d 442, citing *Marks*, supra. Nevertheless, the trial court's discretion is not unlimited and must be bound by and exercised within the framework of Civ.R. 23. Thus, the trial court is required to carefully apply the class action requirements and conduct a vigorous analysis into whether the prerequisites of Civ.R. 23 have been satisfied. *Holznagel v. Charter One Bank* (Dec. 14, 2000), 8th Dist. No. 76822.

Class Action Certification

{¶ 11} "Class action certification does not go to the merits of the action." *Ojalvo v. Bd. of Trustees* (1984), 12 Ohio St.3d 230, 233, 466 N.E.2d 875. "[A]ny doubts about adequate representation, potential conflicts, or class affiliation should be resolved in favor of upholding the class, subject to the trial court's authority to amend or adjust its certification order as developing circumstances demand, including the augmentation or substitution of representative parties." *Baughman v. State Farm Mut. Auto. Ins. Co.*, 88 Ohio St.3d 480, 487, 2000-Ohio-39, 727 N.E.2d 1265.

{¶ 12} The Ohio Supreme Court has held that seven requirements must be satisfied before a court may certify a case as a class action pursuant to Civ.R. 23: (1) an 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 impractical; (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. Civ.R. 23(A) and (B); *Warner v. Waste Mgt., Inc.* (1988), 36 Ohio St.3d 91, 96-98, 521 N.E.2d 1091.

{¶ 13} Clark sought to certify a class under Civ.R. 23(B)(3), which provides that "[a]n action may be maintained as a class action if the prerequisites of subdivision (A) are satisfied, and in addition *** the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

{¶ 14} The matters pertinent to the findings under Civ.R. 23(B)(3) include: "(a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; [and] (d) the difficulties likely to be encountered in the management of a class action."

Identifiable Class

{¶ 15} As a threshold matter, the class must be identifiable and defined unambiguously. The trial court here found that Clark failed to meet this threshold requirement. Clark first argues that the trial court abused its discretion because it did not "conduct a 'rigorous analysis' into each of the seven prerequisites for class certification." Clark is mistaken, however, because "the failure to meet any one of these prerequisites will defeat a request for class certification." *Schmidt v. Avco Corp.* (1984), 15 Ohio St.3d 310, 313, 473 N.E.2d 822. Thus, if the trial court properly found that Clark failed to meet the threshold requirement establishing an identifiable and unambiguous class, then it did not have to analyze the remaining six factors. Id.

{¶ 16} Regarding an "identifiable and unambiguous" class, the Ohio Supreme Court explained in *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 71-72, 1998-Ohio-365, 694 N.E.2d 442:

{¶ 17} "'[T]he requirement that there be a class will not be deemed satisfied unless the description of it is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member.' 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure (2 Ed.1986) 120-121, Section 1760. Thus, the class definition must be precise enough 'to permit identification within a reasonable effort.' *Warner*, supra, 36 Ohio St.3d at 96, 521 N.E.2d at 1096."

{¶ 18} This requirement is not to be confused with the predominance

requirement in Civ.R. 23(B)(3), which inquires whether "separate adjudications are likely required to finally determine the action." *Hamilton* at 73. "The focus at this stage is on how the class is defined. 'The test is whether the means is specified at the time of certification to determine whether a particular individual is a member of the class.'" Id., quoting *Planned Parenthood Assn. of Cincinnati, Inc. v. Project Jericho* (1990), 52 Ohio St.3d 56, 63, 556 N.E.2d 157.

{¶ 19} The class is sufficiently definite if it is "appropriately defined by reference to defendant's conduct." *Hamilton* at 73. "'[A]ny class, the definition of which depends on the "state of mind" of the prospective members, would be difficult to sustain, [and] the class, where possible, should be defined upon the basis of the manner in which the defendant acted toward an ascertainable group of persons.'" Id., quoting *Bernard v. First Natl. Bank of Oregon* (1976), 275 Ore. 145, 156-157, 550 P.2d 1203. Indeed, if one need only look to the actions of the defendant to determine whether an individual is a member of the class, then it would be an abuse of discretion to deny class certification based on the absence of an identifiable class. Id. at 74.

{¶ 20} In *Hamilton*, plaintiffs sought to certify a class including "all Ohio Savings mortgagors on whose residential loans Ohio Savings calculated interest according to the 365/360 method." Id. at 72. The Supreme Court concluded that "the court need only look to the actions or practices of Ohio Savings to determine whether an individual is a member of any of the respective

subclasses." Id. at 73. The high court further pointed out that "Ohio Savings readily identified and notified two thousand seven hundred of its borrowers that their loans would not fully amortize within the intended term. It is difficult to accept that individual knowledge inquiries are required to determine class membership in this case, when Ohio Savings was able to ascertain, with a reasonable effort, two thousand seven hundred prospective class members without inquiring as to their knowledge or understanding of the terms of their agreements." Id. at 73-74.

{¶ 21} Clark maintains that his proposed class definition is sufficiently definite and unambiguous because "the trial court need only look to the actions or practices of the defendant to determine if an individual is a member of the proposed class." He claims that this information is "readily obtainable" through discovery, i.e., Park 'N Fly's "business records identifying the names and addresses of Park 'N Fly customers who parked at [the Cleveland Park 'N Fly] facility during the class period and paid by a means other than cash." We disagree.

{¶ 22} Clark's proposed class definition sought to certify a class of persons who parked at Park 'N Fly during a two-year period, May 9, 2005 to May 9, 2007, and were "denied" a car wash when the company advertised that a "free car wash" was available. This information could never be obtained by reviewing Park 'N Fly's business records, as Clark contends. Park 'N Fly's

"readily obtainable" business records would only show certain customers — those who were frequent flyers, registered in advance, or paid by credit card — who used Park 'N Fly's facility within the two-year period.

{¶ 23} But in order for Park 'N Fly's customers to have been "denied" a car wash, they would have had to have wanted a car wash, parked there because of the advertised "free car wash," and then been denied a car wash because the car wash was inoperable. The only way to discover this information would be to ask Park 'N Fly's customers, some 400 to 1000 per day according to Park 'N Fly's "midnight count," if they had been denied a free car wash when they believed — based upon Park 'N Fly's representations — that they would receive one. Indeed, the only other person Clark identified as being a member of the class was his assistant, Kathleen Price. Price testified that she had been parking at Park 'N Fly for nearly 20 years — whether the car wash was operating or not — because she is "a creature of habit."

{¶ 24} As the Supreme Court stated in *Hamilton*, "'[t]he test is whether the *means is specified at the time of certification* to determine whether a *particular individual* is a member of the class.'" (Emphasis added.) 82 Ohio St.3d at 73, quoting *Planned Parenthood*, 52 Ohio St.3d at 63. Here, Clark's proposed definition fails this test. Although it is true, as Clark argues, that "at this stage of the litigation," he is not required to *prove* the identity of each class member, the definition of the class must enable the trial court, with "reasonable effort," to

determine who is a member of the class. Here, the trial court concluded that it could not do so, and we cannot say the trial court abused its discretion.

{¶ 25} We further note that Clark's proposed time period, all persons who were denied an advertised free car wash within the two years preceding the filing of his complaint, appears to be arbitrary. Clark stated that he only parked at Park 'N Fly one time, in February 2007. But he sought to certify a time period of May 9, 2005 to May 9, 2007 — even though the evidence showed that the car wash did not become permanently inoperable until the end of July 2006 and was replaced with a new one in April 2007. Clark submitted records from the company responsible for repairing the car wash when it broke down, but those records show that at times, the service repair person was only there for one hour or two hours a day, not several days at a time. And although the car wash seemed to break down more frequently in the months preceding July 2006 — when it became permanently inoperable — other times, the service records indicate that it was months between service visits.

{¶ 26} Clark further argues that the trial court should have permitted him to modify his proposed class definition to conform to the evidence or modified the definition itself.

{¶ 27} In *Ritt v. Billy Blanks Ent.*, 8th Dist. No. 80983, 2003- Ohio-3645, ¶21, this court held that "the trial court should have modified the class description so that all plaintiffs were sufficiently identifiable. *** The failure of

the trial court to modify the class itself or to allow plaintiffs to modify it constitutes an abuse of its discretion and thus a reversible error." Id. at ¶22. But our decision in *Ritt* was based upon the fact "the proposed class could be made more identifiable with little effort" and "especially in light of the fact that *** plaintiffs did try to clarify the class description" before the trial court ruled on their motion. Id. at ¶21.

{¶ 28} The facts in this case, however, are distinguishable from *Ritt*. Here, Clark does not assert that he proposed an alternative class definition to the trial court, which it failed to consider. Further, Clark does not even suggest, nor do we see, how his proposed definition could be modified so that it was administratively feasible for a particular member to be identified with any "reasonable effort."

{¶ 29} Accordingly, we overrule Clark's sole assignment of error.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, JUDGE

MELODY J. STEWART, P.J., and
JAMES J. SWEENEY, J., CONCUR