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CITY OF ST. LOUIS)

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JUN 09 2021
22ND JUDICIAL CIRCUIT
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MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(City of St. Louis)

STUART RADLOFF, TRUSTEE FOR THE BANKRUPTCY ESTATE OF JEROME TALAMANTE, and GEORGE OCHOA,

Plaintiffs,

vs.

1ST FINANCIAL FEDERAL CREDIT UNION,

Defendants.

Case No. 1922-CC10792

Division 20

ORDER

The Court has before it Plaintiffs' Motion for Class Certification. After review of the arguments and submissions of the parties and the relevant authorities, the Court now rules as follows.

Plaintiffs obtained car loans from 1st Financial Credit Union ("Credit Union"). After Plaintiffs fell behind on their loan payments, Credit Union repossessed their collateral and mailed Plaintiffs notices explaining it intended to sell their collateral if they did not pay the full accelerated amount of the loan. When Plaintiffs did not do so, Credit Union disposed of the repossessed collateral and mailed Plaintiffs post-sale notices. Plaintiffs brought this class action seeking relief

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from Credit Union's alleged failure to provide notices as mandated under Article 9 of Missouri's Uniform Commercial Code ("MoUCC").

Plaintiffs seek to certify a class defined as:

> All persons who Credit Union mailed a: (1) presale notice stating "will or will not, as possible"; or post-sale notice.
>
> Excluded from the Class are persons whom Credit Union has obtained a final deficiency judgment or who filed for bankruptcy after the date on their presale notice and whose bankruptcy ended in discharge rather than dismissal unless the bankruptcy employed special litigation counsel to pursue claims against Credit Union.

Plaintiff's Reply to Motion for Class Certification and Suggestions in Support, p. 6.

"Missouri law is clear that class certification hearings are procedural matters in which the sole issue is whether the plaintiff has met the requirements for a class action." Wright v. Country Club of St. Albans, 269 S.W.3d 461, 465 (Mo. App. E.D. 2008)(citing Meyer ex rel. Coplin v. Fluor Corp., 220 S.W.3d 712, 715 (Mo. banc 2007)). "The trial court has no authority to conduct even a preliminary inquiry into whether the plaintiff has stated a cause of action or will prevail on the merits." Id. "[T]he class certification decision is independent of the ultimate merits of the lawsuit." Green v. Fred Weber, Inc., 254 S.W.3d 874, 880 (Mo. banc 2008).

"The determination of class certification under Rule 52.08 lies within the trial court's discretion." Vandyne v. Allied Mortg. Capital Corp., 242 S.W.3d 695, 697 (Mo. banc 2008); See also Union Planters Bank, N.A. v. Kendrick, 142 S.W.3d 729, 735 (Mo. banc 2004). "Appellate review of an order granting class certification is solely for abuse of discretion." Id. "Because class certification can be modified as the case progresses, courts should err in favor of, and not against, certifying a class." Doyle v. Fluor Corp., 199 S.W.3d 784, 787-88 (Mo. App. E.D. 2006).

The prerequisites for class certification under Rule 52.08(a) and (b)(3) are: (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, (4) the representative parties will fairly and adequately protect the interests of the class, (5) 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 (6) that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. "Because Missouri Rule 52.08 and Fed. R. Civ. P. 23 are identical, we may consider federal

interpretations of Rule 23 in interpreting Rule 52.08." Craft v. Philip Morris Cos., 190 S.W.3d 368, 376 (Mo. App. E.D. 2005). "The party seeking class action certification bears the burden of proof." Id. at 379.

Numerosity

"The first element of Rule 52.08(a), known as numerosity, requires that plaintiffs show that [j]oinder of all members [of a putative class] is 'impracticable' for purposes of the rule when it would be inefficient, costly, time-consuming and probably confusing." Frank v. Enviro-Tech Servs., 577 S.W.3d 163, 168 (Mo. App. E.D. 2019)(citing Dale v. DaimlerChrysler Corp., 204 S.W.3d 151, 167 (Mo. App. W.D. 2006). "A plaintiff does not have to specify an exact number of class members to satisfy the numerosity prerequisite for class certification, but must show only that joinder is impracticable through some evidence or reasonable, good faith estimate of the number of putative class members. Id.

"Trial courts may determine whether class action plaintiffs fulfill the numerosity requirement by examining the briefs submitted by the parties, affidavits, and other evidence." Id. "Additionally, "[t]o support a finding of the numerosity prerequisite of Rule 52.08(a)(1), the trial court can accept common sense assumptions." Id. "To make a determination on the

numerosity requirement, a court must be presented with evidence that would enable the court to do so without resorting to mere speculation." Id. at 168 (citing Mielo v. Steak 'n Shake Operations, Inc., 897 F.3d 467, 484 (3d Cir. 2018)).

Here, the Court finds, and Defendant voiced its stipulation at the hearing on this matter, that Plaintiffs have satisfied the numerosity requirement.

Commonality

Rule 52.08(a)(2) requires the presence of common issues of law or fact. "The relief afforded members of a class need not be uniform but the requisite commonality of fact or law must appear." Grosser v. Kandel-Iken Builders, Inc., 647 S.W.2d 911, 918 (Mo. App. E.D. 1983). Commonality is met when the legal question "linking the class members is substantially related to the resolution of the litigation." Paxton v. Union National Bank, 688 F.2d 552, 561 (8th Cir. 1982); See also DeBoer v. Mellon Mortgage Co., 64 F.3d 1171, 1174 (8th Cir. 1995); Bradford v. AGCO Corp., 187 F.R.D. 600, 603 (W.D. Mo. 1999).

Here, Plaintiffs have met their burden as to this requirement. The predominant claim is whether the presale notices and/or post-sale notices sent by Credit Union complied with the UCC requirements.

Typicality

Rule 52.08(a)(3) requires the claims and defenses of the representative to be typical of the class. In general, the typicality element requires that a class representative "must be part of the class and must possess the same interest and suffer the same injury as the class members." Harris v. Union Electric Co., 766 S.W.2d 80, 86 (Mo. banc 1989). "If the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory, factual variations in the individual claims will not normally preclude class certification." Hale v. Wal-Mart Stores, Inc., 231 S.W.3d 215, 223 (Mo. App. W.D. 2007). Typicality is meant to preclude class certification of those actions involving legal or factual positions of the class representative "which are markedly different from those of other class members." Id.

Here, Plaintiffs have met their burden as to this requirement. Plaintiffs and the putative class claim that Credit Union: repossessed their cars and mailed them deficient form presale notices; disposed of the repossessed collateral; and sent them deficient form post-sale notices. Further, Plaintiffs and the putative class seek the same relief: actual damages not less than the statutory minimum, prejudgment interest,

injunctive relief under MoUCC § 400.9-625, and $500 for every violation of § 400.9616(b).

Adequacy

"Rule 52.08(a)(4) requires that, as a prerequisite to class certification, the trial court must find that: 'the representative parties will fairly and adequately protect the interests of the class.'" Vandyne v. Allied Mortg. Capital Corp., 242 S.W.3d 695, 698 (Mo. banc 2008). "This prerequisite applies both to the named class representatives and to class counsel." Id.

Defendant voiced its stipulation at the hearing on this matter that counsel is qualified to protect the interests of the class. However, Defendant argues that the Plaintiffs' interests are not sufficiently aligned with the putative class to fairly and adequately protect the class interests. In particular, Defendant asserts that Ochoa's vehicle was not a "consumer good" as defined by the UCC, and that Radloff presents a conflict of interest because he is already suing in a representative capacity as a trustee in bankruptcy where Credit Union is listed as a creditor.

With regard to Ochoa, the parties dispute the principle purpose of his vehicle. Defendant points to deposition testimony indicating that Ochoa drove the vehicle for work. Plaintiff

points to the fact that the contract for Ochoa's vehicle refers to itself as a "consumer credit contract" and that the parties did not mark the checkbox denoting a that the purchase was made for "business, commercial or agricultural purposes." Plaintiff also points to deposition testimony that Ochoa used the vehicle for both personal purposes and work. It is inappropriate for the Court to engage in a merits-based inquiry for the purpose of a class certification determination. The Court finds that Ochoa is an adequate class representative.

With regard to Radloff, there is no "flat rule that a trustee in a bankruptcy [...] can never be a class representative." Dechert v. Cadle Co., 333 F.3d 801, 803 (7th Cir. 2003). "[O]ne of the largest concerns in Dechert [] was that the debtor was the sole class representative. In Dechert, the court found that no conflict would exist 'if one of the other class members were the named plaintiff' because the trustee would have no actual control over the class litigation." In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig., 2021 WL 214302, at *5 (E.D. Pa. Jan. 21, 2021). Radloff is an adequate class representative so long as he is not the only class representative. At present, Radloff is accompanied by Ochoa as co-class representative.

Predominance and Superiority

"A class that is certified under Rule 52.08(b)(3) must have questions of law or fact common to the members of the class [that] predominate over any questions affecting only individual members." Hale, 231 S.W.3d at 224. "If, to make a prima facie showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question." Id. "It becomes a common question when that same evidence will suffice for each member to make a prima facie showing." Id. This is a more stringent test than the commonality requirement of Rule 52.08(a)(2); See Amchem Products, Inc. v. Windsor, 521 U.S. 591, 609 (1997); See also Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011)("That common contention, moreover, must be of such a nature that it is capable of class-wide resolution -- which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.").

"In addition to requiring that common questions of law and fact predominate, Rule 52.08(b)(3) requires that the court find that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Hale, 231 S.W.2d at 229. "Among the factors that the court must

consider in addressing superiority are the difficulties likely to be encountered in the management of a class action." Id. "The primary focus of the superiority analysis is the efficiency of the class action over other available methods of adjudication." Dale, 204 S.W.3d at 183; See also In re American Medical Systems, Inc., 75 F.3d 1069, 1085 (6th Cir. 1996)(the burden of making individualized determinations for class members may be fatal to the superiority requirement).

Here, Plaintiffs have met their burden of showing predominance and superiority. The Court finds that Plaintiffs have shown that the common questions in this case are capable of class-wide resolution and predominate over any individual questions. The Court finds that Plaintiffs have shown that proceeding with this case as a class action is superior to other methods of adjudication. In making this determination the Court has considered the pertinent factors stated in Rule 52.08(b)(3).

WHEREFORE: (1) the Court finds and holds that the proposed Plaintiff Class satisfies all of the requirements of Rule 52.08(a) and 52.08(b)(3); and (2) it is also hereby ordered that this cause of action is certified and shall be maintained as a class action on behalf of the following class of plaintiffs specified immediately hereinafter:

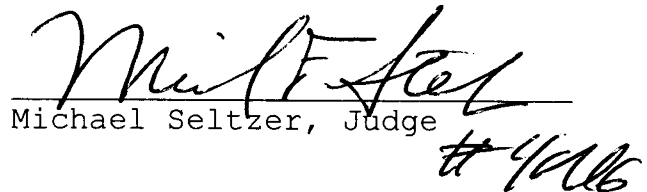
All persons who Credit Union mailed a: (1) presale notice stating "will or will not, as possible"; or post-sale notice.

Excluded from the Class are persons whom Credit Union has obtained a final deficiency judgment or who filed for bankruptcy after the date on their presale notice and whose bankruptcy ended in discharge rather than dismissal unless the bankruptcy employed special litigation counsel to pursue claims against Credit Union.

and (3)it is further ordered that the named plaintiffs herin, Stuart Radloff, trustee for the bankruptcy estate of Jerome Talamante, and George Ochoa, are appointed as Class Representatives of the Plaintiff Class; and (4) it is further ordered that Onder Law, llc (located in St. Louis, Missouri) (who have already performed extensive work in this matter) are appointed as official Class Counsel.

This Order is subject to amendment or alteration under Rule 52.08(c)(1).

SO ORDERED:



Michael Seltzer, Judge

Dated: JUNE 9, 2021