DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

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CONCERT PLANTATION, LLC, and PLANTATION GOLF AND COUNTRY CLUB, INC.,

Appellants,

v.

JOHN DORSO and SUE DORSO; JOE MERCIER; MARK SCHERER, as personal representative of the Estate of Sandra Spaugh; LOGAN CHAMBERLAIN and SUSAN CHAMBERLAIN; JOHN JANSEN; JAMES DOWDELL, JR.; JONI SHERRILL as personal representative of the Estate of Sam Tedesco; JOHN FILAK, as trustee under John Filak Revocable Trust Agreement dated May 3, 1996; JOHN WAKEFIELD and NANCY WAKEFIELD; MICHAEL McCORMICK and LAURA McCORMICK; BEVERLEY C. B. WHITE; ROBERT SMITH; CHRISTOPHER BOOTH, as executor de son tort of the Estate of Weldon S. Booth; ALBERT MEYER and FRANCINE MEYER; EDWARD CARR and MARIANNE CARR; THOMAS BECK; JAMES BRENDEL and ANNA BRENDEL; DAVID LUFT and BETTY LUFT; EDITH SHEEHAN; RICHARD VOLK; AMELIA YANATSIS; EDWARD PEEL; CHARLES AXTON and BARBARA AXTON; CAROL BARNES; JAMES DeSTEFANO and JOANNE DeSTEFANO; DONALD GROSSE and IRENE GROSSE; CAROLYN HALL; PAUL HAMMELMAN and ANNDRA HAMMELMAN; ILONA HERMLE; KARIN ISRAELSSON; JERRALD KABELIN and KAY KABELIN; ROBERT MARTIN and JEANNINE MARTIN; ROLAND SCHAPANSKI; JOSEPH TESTA and NANCY TESTA; PATRICIA MORGAN as trustee of the James I. Morgan Trust; PATRICIA THINNES; JOSEPH YOUNG and MARY YOUNG; ALAN ANDERSON; JON BERRY; MICHAEL BIGLEY and LAURIE STEIN; VIJAY DUBE and GIRJIA DUBE; DIANE CRUMLY as executor de son tort of the Estate of Paul Lang, deceased; JEFF McCARTNEY and BARBARA McCARTNEY; JOHN MOUNT; PATRICIA QUARLES; FRANK ROBINSON III and JACKLYN

ROBINSON; CHARLES WHITCHER and SHIRLEY WHITCHER; ROBERT NICKS and TERESA NICKS; RICHARD BUTLER and MARY BUTLER; PHYLLIS STONE; SHIRLEY REID and RALSTON REID; CHARLES MATTHEWSON as trustee of the Amended and Restated Shirley Anne Crandall Revocable Inter Vivos Trust No. 1; JOHN BALL and CAROL BALL; SCOTT VAN DER LINDEN; CHARLENE KNOCH as trustee of Wendell Trust UTD November 1, 1994; MARY BARCUS; THOMAS KINGSLEY and FRANCES KINGSLEY; LAURA BROWN as executor de son tort of the Estate of John W. Berryman, Jr.; WANDA MILLER as Trustee of the Geraldine F. Warstler Trust Agreement Dated August 13, 2015; JIM McCARTHY and CYNTHIA McCARTHY; ELIZABETH ROBERTSON; JEAN LARSON and THOMAS LARSON; WALTER WHITTAKER and CATHERINE WHITTAKER; WILLIAM THOMAS and CANDACE RENWALL as independent co-executors of the Estate of Robert Kloman; THOMAS BARRY and FRANCES BARRY; CHARLES HOLLOWAY; ELMER ECCHER and JANICE ECCHER; and ROBERT HLADIK, JOAN YELDING; THOMAS BROWN and ELIZABETH BROWN; DAVID VAN ALSTYNE, as Executor of the Estate of Joan Van Alstyne; WILLIAM GEPHART, as Attorney-in-Fact for Roberta Rogers; JEAN MORGAN; REGINALD MILLER and NANCY MILLER; ANN MARIE O'BRIEN; GEIR FLYCKT; ARTHUR MAYHEW and CAROL MAYHEW; DOMINICK GIAMBRONE; EDWARD MALINOWSKI; KERRY LONG and DEBRA LONG; JEFFREY BUCHS and DONNA BUCHS; BRADLEY BENFORD; ROBERT BEAVER; PATRICIA McGOWAN; ISABELLA MARKLE; THOMAS TYLER; WOODROW MILTENBERGER and PEGGY MILTENBERGER; ROSS DUNBAR and ELIZABETH DUNBAR; THOMAS SLATTERY and DEBRA SLATTERY; RAYMOND WOPPERER; PAUL EUSTACE and GEORGINA EUSTACE; DAVID GARTZKE and LOUISE GARTZKE; PAMELA HOLCOMBE, as Attorney-in-Fact for MARVIN PRUITT; JOHN BUGOSH, as Attorney-in-Fact for Nancy Bugosh; and DONALD BRISCH, as Attorney-in-Fact for Joseph Brisch; LANCE BALLARD; CAROL STADTER and RICHARD STADTER; and PATRICIA HANKINS; individually and on behalf of those similarly situated,

Appellees.

Nos. 2D21-3895, 2D22-17
CONSOLIDATED

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December 5, 2022

Appeal pursuant to Fla. R. App. P. 9.130 from the Circuit Court for Sarasota County; Andrea McHugh, Judge.

Lindsay Patrick Lopez, Amy L. Drushal, and William A. McBride, of Trenam, Kemker, Scharf, Barkin, Frye, O'Neill & Mullis, P.A., Tampa, for Appellant Concert Plantation, LLC; Terrance W. Anderson, Jr., of Nelson Mullins, Boca Raton, and Andrew P. Marcus of Law Office of Andrew P. Marcus, P.A., Fort Myers, for Appellant Plantation Golf and Country Club, Inc.

Jennifer Anne Gore Maglio and Benjamin A. Christian, of mctlaw, Sarasota, for Appellees.

ROTHSTEIN-YOUAKIM, Judge.

In this nonfinal appeal, Concert Plantation, LLC, and Plantation Golf and Country Club, Inc., challenge the trial court's certification of a class of approximately 750 former equity members of Plantation Golf and Country Club who seek a refund of a portion of their membership fees. Although it presents a close question, we conclude that the court did not abuse its discretion. *See Gundel v. AV Homes, Inc.*, 290 So. 3d 1080, 1084 (Fla. 2d DCA 2020) (" 'An appellate court reviews a trial court's order on class certification for

an abuse of discretion, examines a trial court's factual findings for competent, substantial evidence, and reviews conclusions of law de novo.' " (quoting *Waste Pro USA v. Vision Constr. ENT, Inc.*, 282 So. 3d 911, 916 (Fla. 1st DCA 2019))). "A trial court should resolve doubts with regard to certification in favor of certification . . . ." *Sosa v. Safeway Premium Fin. Co.*, 73 So. 3d 91, 105 (Fla. 2011).

Particularly because the issue of when a member's right to a refund vested remains unresolved and the defendants' position is that *no* members are entitled to the amount of refund they would have been entitled to at the time of their resignation, regardless of their place on a refund waiting list, the court reasonably determined that issues of liability are common and predominate. *See Morgan v. Coats*, 33 So. 3d 59, 66 (Fla. 2d DCA 2010) (quoting *Clausnitzer v. Fed. Exp. Corp.*, 248 F.R.D. 647, 657 (S.D. Fla. 2008), for the proposition that "to meet the predominancy requirement, a plaintiff must prove that common issues of law and fact 'ha[ve] a direct impact on every class member's effort to establish liability and on every class member's entitlement to . . . relief' " (alteration in original)). The record further supports the court's determinations of numerosity and typicality, the tests for which are "not demanding,"

*see Disc. Sleep of Ocala, LLC v. City of Ocala*, 245 So. 3d 842, 852 (Fla. 5th DCA 2018); adequacy of representation, *see id.* at 853 ("Satisfaction of the commonality and typicality requirements provides 'strong evidence that [the named plaintiffs] adequately represent the class.' " (alteration in original) (quoting *Henderson v. Thomas*, 289 F.R.D. 506, 511 (M.D. Ala. 2012))); and superiority of class representation over other available means of adjudication, *see Morgan*, 33 So. 3d at 66–67.

Although the defendants have raised a number of affirmative defenses that may ultimately preclude relief for some number of plaintiffs even if the overarching questions are resolved in their favor (and that may, as the court noted, necessitate subclasses), the existence of affirmative defenses does not undermine the predominance of the common issues. *See Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453–54 (2016) ("When 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under [the comparable federal rule governing class actions, Fed. R. Civ. P. 23(b)(3),] even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar

to some individual class members.' " (quoting 7AA C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1778, pp. 123–124 (3d ed. 2005) (footnotes omitted))). Moreover, unlike the dissent, we find no fault on this record with the trial court's decision to leave the issue of potential subclasses for later because that decision was explicitly endorsed by counsel for all parties at the time, including the defendants.

In concluding that common issues of law and fact do not predominate and that the representatives have a conflict of interest with the putative class, the dissent takes as given certain constructions of the underlying contracts and facts that are still in dispute. In addition, several of the dissent's objections to typicality and predominance appear to be grounded in concern over possible variation in the damages among class members. But that is not a basis to reject certification. *See Morgan*, 33 So. 3d at 66 (affirming class certification in part because the differences among class members went to "the determination of each class member's damages rather than to the elements of the claims").

Affirmed.

MORRIS, C.J., Concurs.
STARGEL, J., Dissents with opinion.

STARGEL, Judge, Dissenting.

Because the proposed class lacks the typicality, adequacy of representation, and predominancy requirements set forth in Florida Rule of Civil Procedure 1.220(a) and (b)(3), I must respectfully dissent.

To properly frame this dissent, some background information is necessary. John Dorso is one of approximately ninety plaintiffs below who were either equity members or represent the estate of a deceased equity member of Plantation Golf and Country Club, Inc. (PGCC), and who resigned their equity memberships on or before January 1, 2016. The resignation waiting list is a list of resigned equity members listed in order of their date of resignation. Those who resigned first were at the top of the list. Once the resigned equity member reached the top of the resignation waiting list for

their respective categories of membership, they were next in line to be refunded their respective refund amount.[1]

However, refunds were not guaranteed, and payments were contingent on the resigned equity member reaching the top of the resignation waiting list and new memberships being sold. In addition, several other factors influenced a resigned equity member's ability to receive a refund if, and when, they reached the top of the resignation waiting list, as well as how much that refund amount would be. Payments could only be made from the escrow account, and the escrow account was solely funded by the sale of new memberships. There was no contractual obligation for the club to continue to sell memberships. The purchase price of each type of membership varied significantly over the years, and the members signed membership agreements that specifically stated that the bylaws could be amended at any time. Dorso and the proposed class members joined and resigned their memberships at different times and under different bylaws that were in effect.

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[1] The relevant membership categories are (1) golf, (2) tennis, and (3) social. Each category had its own resignation waiting list, and each type of membership had a different purchase price.

The core allegation in the complaint is that PGCC unlawfully amended its bylaws in 2016, thereby impairing vested rights based on earlier bylaws predating that amendment. Concert Plantation, LLC (Concert), subsequently purchased the assets and possibly the refund obligations of PGCC. Dorso and the proposed class members sued PGCC and Concert for breach of contract, unjust enrichment, fraudulent transfer, and account stated, claiming that both entities are liable for unpaid refunds.

To maintain this action as a class action, the appellees had the burden of pleading and proving that the proposed class meets the requirements of rule 1.220. *See Miami Auto. Retail, Inc. v. Baldwin*, 97 So. 3d 846, 851 (Fla. 3d DCA 2012). Rule 1.220(a) requires a plaintiff to present evidence that the proposed class satisfies each of the following prerequisites:

> (1) The members of the class are so numerous that separate joinder of each member is impracticable, (2) the claim or defense of the representative party raises questions of law or fact common to the questions of law or fact raised by the claim or defense of each member of the class, (3) the claim or defense of the representative party is typical of the claim or defense of each member of the class, and (4) the representative party can fairly and adequately protect and represent the interests of each member of the class.

"These [four] requirements are commonly referred to as the numerosity, commonality, typicality, and adequacy of representation elements of class certification." *Marco Island Civic Ass'n v. Mazzini*, 805 So. 2d 928, 930 (Fla. 2d DCA 2001) (citing *Est. of Bobinger v. Deltona Corp.,* 563 So. 2d 739, 742 (Fla. 2d DCA 1990)). Failure to satisfy any of these requirements would make class certification improper and warrant a reversal of the trial court's certification order. *See* Rule 1.220.

Given that the proposed class consists of approximately 750 alleged class members, I agree with the trial court's finding that it is sufficiently numerous. Additionally, because "[t]he threshold for commonality is not high . . . [and f]actual differences between class members do not necessarily preclude a finding of commonality," *Morgan v. Coats*, 33 So. 3d 59, 64 (Fla. 2d DCA 2010) (alterations in original) (quoting *Leszczynski v. Allianz, Ins.*, 176 F.R.D. 659, 671 (S.D. Fla. 1997)), the trial court did not err in finding the commonality prong was satisfied.

As for the typicality requirement, the trial court was tasked with rigorously examining the relationship between the appellees' claims and those of the proposed class. *See Seminole County v.*

*Tivoli Orlando Assocs.*, 920 So. 2d 818, 823 (Fla. 5th DCA 2006). The focus of this examination is "whether the class representative has the same legal interest and has endured the same legal injury as the class members." *Easter v. City of Orlando*, 249 So. 3d 723, 730 (Fla. 5th DCA 2018) (citing *Sosa v. Safeway Premium Fin. Co.*, 73 So. 3d 91, 114-15 (Fla. 2011)). Applicability of defenses may also be considered in a typicality analysis. *Id.* If different defenses are available to the proposed class representatives and members of the proposed class, the class representatives' claims may not be typical of the class. *Id.* (citing *Wyeth, Inc. v. Gottlieb*, 930 So. 2d 635, 643 (Fla. 3d DCA 2006)). Irrespective of the variations in the potential amount of damages, the variations in the types of claims and potential defenses[2] among proposed representatives and class members preclude a finding of typicality.

As for the adequacy of representation element, the appellees fall short in demonstrating that the representatives have the same

[2] These variations include: (1) they are in different positions on the resigned equity membership lists, (2) some have previously downgraded to a different membership, (3) some have accepted payment prior to the sale of the club assets to Concert, (4) some have resigned under different versions of the bylaws, and (5) some have signed a waiver and release.

legal interest as all proposed class members. Two considerations exist to determine adequacy of representation: (1) whether plaintiffs' counsel is "qualified, experienced, and generally able to conduct the proposed litigation" and (2) whether plaintiffs have interests that are "antagonistic to those of the rest of the class." *Disc. Sleep of Ocala, LLC v. City of Ocala*, 245 So. 3d 842, 853 (Fla. 5th DCA 2018) (citing *Sosa*, 73 So. 3d at 115). In this case, the appellees have antagonistic interests to some members of the proposed class. It is uncontroverted that repayment of membership fees is done solely from the escrow account, which is funded only from the sale of new memberships and thus contains a limited amount of funds. A resigned member was only paid once he or she reached the top of the resignation waiting list. Because the denial of some proposed class members' claims increases the chances of recovery for individual appellees, the proposed class members would be competing for the same funds. Accordingly, the adequacy of representation element was not met.

In addition to satisfying rule 1.220(a), the appellees must have also established that the proposed class fits within one of the subdivisions of rule 1.220(b). The trial court found class

certification pursuant to rule 1.220(b)(3); however, because the appellees did not prove that common questions of fact or law predominated over individual issues, this was error. "Rule 1.220(b)(3) requires that common questions of law or fact predominate over any individual questions of the separate members and the class action must be superior to other available methods for a fair and efficient adjudication of the controversy." *Rollins Inc. v. Butland*, 951 So. 2d 860, 868 (Fla. 2d DCA 2006). "The rule 1.220(b)(3) requirement parallels the commonality requirement under rule 1.220(a) because both require that common questions exist, but the predominance requirement in subsection (b)(3) 'is more stringent since common questions must pervade.' " *Id.* (quoting *Wyeth, Inc.*, 930 So. 2d at 639). "[T]he trial court must determine whether the purported class representatives can prove their own individual cases and, by so doing, necessarily prove the cases for each one of the thousands of other members of the class." *Humana, Inc. v. Castillo*, 728 So. 2d 261, 266 (Fla. 2d DCA 1999). "If they cannot, a class should not be certified." *Id.*

As set forth above, there are multiple individual issues of liability and multiple potential defenses that will require resolution

for each member of the proposed class. The trial court will be required to analyze each member's place on the resignation waiting list, the funds available in the escrow account, and whether, under any theory, that individual would be entitled to payment. Because each individual member of the proposed class will need to establish his or her right to payment, a class representative proving his or her own case will not necessarily prove the cases of other class members.

When individual questions predominate, a class action is unmanageable. *Id.* It is clear the trial court resolved the predominance element in favor of the appellees because it determined that establishing subclasses pursuant to rule 1.220(d)(4) would alleviate the issue. Indeed, the trial judge stated that her finding of predominance was "predicated on the idea that there could be subclasses." However, those subclasses were not defined or certified at the time of class certification. Instead, the trial court reserved the right to certify those subclasses in the future. While it is generally appropriate to reserve the right to

establish subclasses at a later date,[3] if the court relies on subclasses to cure predominance issues as a prerequisite to certification, it must identify the required subclasses and explain why they are necessary. *See Langan v. Johnson & Johnson Consumer Cos.*, 897 F.3d 88, 98 (2d Cir. 2018); *Sacred Heart Health Sys., Inc. v. Humana Mil. Healthcare Servs., Inc.*, 601 F.3d 1159, 1183 (11th Cir. 2010). Further, the subclasses must meet the same elements set forth in rule 1.220 as a class certification. *Hummel v. Tamko Bldg. Prods., Inc.*, 303 F. Supp. 3d 1288, 1294 (M.D. Fla. 2017) ("To certify a subclass within a class action, the moving party must show (1) that the proposed subclass independently satisfies the same prerequisites for certifying a class: standing, numerosity, commonality, typicality, adequacy of representation; and (2) that the subclass falls into at least one of [rule 1.220(b)'s] three class types."). In this case, the appellees did not present sufficient evidence to specifically identify the various subclasses needed, explain why they were necessary, or demonstrate that each subclass could independently satisfy the requirements set forth in

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[3] *See e.g. Herman v. Seaworld Parks & Ent. Inc.*, 320 F.R.D. 271, 289 (M.D. Fla. 2017).

rule 1.220. In fact, the appellees did not request subclasses in their motion for class certification and instead raised the idea of subclasses for the first time during their closing argument at the evidentiary hearing. Despite the majority's assertion that the trial court did not err in reserving the issue of subclasses for a later date because all parties agreed, the discussion occurred well after the court's oral pronouncement[4] of its intention to certify a class when the appellant asked for clarification, partially for purposes of appeal. The appellant argued further there was no evidence presented to be able to identify each subclass or determine if the subclass could independently satisfy the necessary requirements of rule 1.220. Because subclasses were necessary to cure predominance issues, it was error not to define and certify the subclasses at the time of class certification.

[4] After the close of evidence, argument by the parties, and the court's oral pronouncement of its intent to certify a class, there were discussions regarding who the court was designating as class representatives and the varying classifications, including the possibility of subclasses since the court had not specifically addressed whether all ninety-one plaintiffs were being designated as class representatives in its oral pronouncement.

Lastly, because individual issues predominate and will need to be separately litigated, a class action will not be an efficient way to manage the case or costs associated with it. As such, it is not a superior method for adjudication. *See Volkswagen of Am., Inc. v. Sugarman*, 909 So. 2d 923, 924 (Fla. 3d DCA 2005) ("[T]he need to litigate substantially different factual issues indicates that a class action is not superior to individual suits." (citing *Liggett Grp. Inc. v. Engle*, 853 So. 2d 434, 446 (Fla. 3d DCA 2003))).

While I commend the trial court for its attempts at judicial efficiency, the record before us demonstrates that significant individual differences among the members of the proposed class predominate and will require individualized determinations as to PGCC's liability, whether damages exist and, if so, the amount of damages sustained. Under these circumstances, it would be more appropriate to utilize other administrative and procedural methods available to efficiently handle such mass dockets. Because I believe certification under rule 1.220(a) and (b)(3) was improper, I dissent.

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Opinion subject to revision prior to official publication.