IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

JONATHAN BAWTINHIMER and GEOFFREY FORTUNATO,

Appellants,

v. Case No. 5D13-2580

D.R. HORTON, INC., and DHI MORTGAGE CO., LTD, etc.

Appellees.

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Opinion filed October 10, 2014.

Non-Final Appeal from the Circuit Court for Orange County, Alice Blackwell, Judge.

Douglas Wilens of Robbins Geller Rudman & Dowd, LLP, Boca Raton, for Appellants.

James M. Talley of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., Orlando, for Appellee, D.R. Horton, Inc.

Karl J. Brandes, Seth M. Schimmel and Bret M. Feldman of Phelps Dunbar, LLP, Tampa, for third-party Appellee, AMEC Environment & Infrastructure, Inc.

Abigail Lewis-Fishkin of Silver & Garvett, P.A., Miami, for third-party Appellee, John A. Siegel.

WALLIS, J.

Appellants, Jonathan Bawtinhimer and Geoffrey Fortunato, appeal the trial court's order denying class certification of their eight-claim action against Appellees, D.R. Horton, Inc. and DHI Mortgage Co., Ltd. The trial court's order denied class certification on all eight claims in a single-page analysis, which explained that Appellants' demand for rescission of all contracts between Appellees and putative class members rendered the action inappropriate for class litigation. We affirm.

We write only to address the dissent's position that Florida law requires a trial court to address a request for class certification with a claim-by-claim analysis. In federal court, any order disposing of a request for class certification must address each count for relief on a claim-by-claim basis, based on federal case law. See, e.g., In re Dynegy, Inc. Sec. Litig., 226 F.R.D. 263, 270 (S.D. Tex. 2005) (citing James v. City of Dallas, 254 F.3d 551, 563 (5th Cir. 2001)); see also Rosen v. Tenn. Comm'r of Fin. and Admin., 288 F.3d 918, 928 (6th Cir. 2002); Bolin v. Sears, Roebuck & Co., 231 F.3d 970, 976 (5th Cir. 2000). The controlling federal law requires the claim-by-claim analysis regardless of whether the court grants or denies the request for certification. "Florida's Class Action rule, Florida Rule of Civil Procedure 1.220, is based on Federal Rule of Civil Procedure 23, and this court may look to federal cases as persuasive authority in the interpretation of rule 1.220." Concerned Class Members v. Sailfish Point, Inc., 704 So. 2d 200, 201 (Fla. 4th DCA 1998) (citing Broin v. Philip Morris Co., 641 So. 2d 888, 889 (Fla. 3d DCA 1994), rev. denied, 654 So. 2d 919 (Fla.1995)). Previous Florida cases have applied a claim-by-claim analysis when considering a request to certify a class, but no cases required individualized findings in orders denying

class certification. See e.g., Terry L. Braun, P.A. v. Campbell, 781 So. 2d 480, 482 (Fla. 5th DCA 2001); Barton-Malow Co. v. Bauer, 627 So. 2d 1233, 1235 (Fla. 2d DCA 1993) (noting that trial court's order certifying a class was not sufficiently clear as to whether all issues were certified or only particular issues); Alderwoods Grp., Inc. v. Garcia, 119 So. 3d 497, 502 (Fla. 3d DCA 2013) (trial court individually certified plaintiff's claims under different provisions of Florida Rule of Civil Procedure 1.220(b). But cf. InPhyNet Contracting Servs., Inc. v. Cap. Soria, 33 So. 3d 766, 769-74 (Fla. 4th DCA 2010) (reversing trial court's certification of a class, despite the existence of common issues of fact on some claims, because individual issues in other claims predominated). In this case, we find the trial court's order provided sufficient analysis to deny class certification on all eight of Appellants' claims.

AFFIRMED.

BERGER, J., concurs.
ORFINGER, J., concurring in part, dissenting in part, with opinion.

ORFINGER, J., concurring in part; dissenting in part. CASE No. 5D13-2580

I agree with the majority that the trial court's denial of class certification regarding count 4—the rescission claim—was correct. However, I would return the case to the trial court to consider class certification separately for each claim.

Appellants purchased homes constructed, marketed, and sold by Appellees in the Waterside Estates community. Waterside is allegedly located either within or "on the Northeastern boundary of" a former United States Army site known as the Pinecastle Jeep Range (the "PJR"). The Army conducted gunnery and bombing training at the PJR during and immediately after World War II. In July 2007, an unexploded bomb was found on the grounds of a school located within the former PJR. In their complaint, Appellants asserted that the proximity of their homes to the PJR diminishes the value of all the homes in Waterside. Generally, Appellants contended that Appellees should have discovered the existence of the PJR and of the unexploded ordinance, and disclosed those facts to them and other members of the putative class. Appellants asserted eight causes of action, including a demand for rescission of purchase and sale contracts between the putative class members and Appellees. Appellants also requested class certification in each claim and moved for class certification under Florida Rule of Civil Procedure 1.220(a) and (b)(3). The trial court denied Appellants' motion, concluding that the rescission count was not appropriate for class certification. The trial court's order did not address the remaining counts.

The majority and I do not disagree on the law. As the majority correctly acknowledges, Florida's class action rule is based on Federal Rule of Civil Procedure 23, and federal cases addressing class certification under the federal rule are persuasive authority. Maj. Op. at 2 (citing Concerned Class Members v. Sailfish Point, Inc., 704 So. 2d

200, 201 (Fla. 4th DCA 1998)). Likewise, the majority appropriately recognizes that federal law requires that "any order disposing of a request for class certification must address each count on a claim-by-claim basis." Id. (citing In re Dynegy, Inc. Sec. Litig., 226 F.R.D. 263, 270 (S.D. Tex. 2005)). Further, I agree with the majority that "controlling federal law requires the claim-by-claim analysis regardless of whether the court grants or denies the request for certification." Id. (emphasis added).

However, and inexplicably, the majority refuses to apply the persuasive authority that it properly recognized, instead, asserting that "[p]revious Florida cases have applied "claim-by-claim analysis when considering a request to certify a class, but no cases required individualized findings in orders denying class certification." Id. (emphasis added). That is a distinction without a difference. In support, the majority cites several cases, including our decision in Terry L. Braun, P.A. v. Campbell, 781 So. 2d 480, 482 (Fla. 5th DCA 2001) (Braun I). In that case, the trial court had granted in part and denied in part the motion to certify a class of patients, alleging that a clinic owner wrongfully hired an unlicensed dental practitioner. Braun I, 781 So. 2d at 481. The trial court certified a class as to the claims for implied contract, negligence, and battery, but denied the motion to certify the deceptive and unfair trade practices and express contract claims. Id. at 482. While the parties appealed and cross-appealed the entire order, this Court only addressed the issue of whether the trial court's factual findings and conclusions of law in the order complied with rule 1.220(d)(1). Id. at 481. We determined that the order was "devoid" of the requisite findings, and remanded for additional proceedings. Id. at 482. On remand, the trial court reached the same conclusions but included the findings of fact and conclusions of law as required by rule 1.220(d)(1).

In Terry L. Braun, P.A. v. Campbell, 827 So. 2d 261 (Fla. 5th DCA 2002) (Braun II), the parties again appealed and cross-appealed the order granting in part and denying in part the motion for class certification. Id. at 264. We determined that there was not enough evidence to satisfy each of the requirements for class certification, and thus, affirmed the denial of certification of claims while reversing the certification of the other claims. Id. at 266-69. To me, it is clear that our own precedent requires individualized findings or a claim-by-claim analysis of all the claims regardless of whether the court grants or denies the request for class certification. This determination is expressly required by rule 1.220(d)(1), which states that "[i]rrespective of whether the court determines that the claim or defense is maintainable on behalf of a class, the order shall separately state the findings of fact and conclusions of law upon which the determination is based." (Emphasis added).

Because the trial court did not consider class suitability for the remaining claims, I would reverse and direct the trial court to separately consider the appropriateness of class certification as to those claims.