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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

GRACE FONTANA,

Plaintiff and Appellant,

v.

ST. JOSEPH HOSPITAL OF ORANGE,

Defendant and Respondent.

G033694

(Super. Ct. No. 03CC02559)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William M. Monroe, Judge. Reversed and remanded with directions.

Schonbrun DeSimone Seplow Harris & Hoffman, V. James Desimone, and Michael S. Morrison; Helmer Friedman and Andrew H. Friedman for Plaintiff and Appellant.

Foley & Lardner, Tami S. Smason and Heather D. McNeill for Defendant and Respondent.

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Plaintiff Grace Fontana appeals from an order denying her motion for class certification. Because the court relied on improper criteria in denying the motion, we reverse.

FACTS

Plaintiff proposed to certify a class “of all St. Joseph Hospital employees who responded to a Pre-Employment Health Inventory” (PEHI), and alleged defendant St. Joseph Hospital of Orange required all job applicants to answer the PEHI in violation of Government Code section 12940, subdivisions (d), (e), and (f).¹ Plaintiff alleged the PEHI inquired, inter alia, whether the applicant ever had: “(1) venereal disease; (2) taken birth control pills; (3) problems with infertility; (4) children with birth defects; (5) stillborn children; (6) fetuses/unborn children with birth defects; (7) miscarriages; (8) problems with pregnancies; (9) plans to become pregnant; (10) irritable bowel syndrome; (11) spastic colitis; (12) frequent diarrhea; (13) severe hemorrhoids; (14) bloody or black stool; (15) problems with urination; (16) problems with menstrual periods; (17) irregular menstrual periods; (18) seen a counselor, psychiatrist or psychologist; (19) been very depressed; (20) been claustrophobic; (21) trouble sleeping; (22) panic attacks; (23) anxiety, nervousness or irritability; and (24) cancer of any kind.” Some questions on PEHI inquired about medical conditions of both the applicant and the applicant’s spouse, viz.: problems with infertility, miscarriages, and problems with pregnancies. Lest the

¹ Generally speaking, Government Code section 12940, subdivisions (d), (e), and (f) prohibit employers from making any pre-offer, post-offer but pre-employment, and post-employment inquires of medical and psychological histories or conditions unless the inquiry is job related and, with respect to subdivisions (e)(2) and (f)(2), consistent with business necessity. Plaintiff has acknowledged, however, that discovery she conducted revealed the PEHI was used only for post-offer, pre-employment inquiries. Accordingly, she seeks certification of that class only.

defendant had forgotten to include something in the 164 question PEHI, it inquired about “[o]ther health conditions not covered by these questions,” and also inquired whether the applicant was applying or had ever applied for workers’ compensation benefits or was now receiving or had ever received such benefits in the past.

Plaintiff filed her complaint in early February 2003,² and filed a first amended complaint adding class action allegations a few days later on February 14, 2003. At some time not shown in the record, a trial date of March 15, 2004, was set, but plaintiff’s motion to certify the class was not filed until December 5, 2003, setting the matter for hearing on January 13, 2004. For reasons again not shown in the record, the hearing on the motion was not held until February 10, 2004, just 34 days before the scheduled trial date. The court denied the class certification motion. Apparently there is no written order, for none has been provided by the parties. Our only insight into the court’s reasoning is obtained from comments made by the court at the time of the hearing.

The motion hearing actually began on February 3, 2004, but the court was scheduled to attend a meeting and did not have time to entertain argument. For that reason, the hearing was continued for one week to February 10, 2004. Before continuing the hearing, the court stated its tentative ruling on the motion as follows: “Here’s my feeling with respect to the class certification. First, I am not so sure it really ‘qualifies’ under just the straight rules of class certification, number one. [¶] Number two, we are so close to the trial date, as a practical matter, I do not think that we could have class certification without vacating this trial date, and I think that may not be appropriate under the circumstances. [¶] And, number three, based on what I read in the pleadings, I am not so sure a lot of the information that you are asking for, for purposes of the class certification, you’re entitled to. [¶] So that was my rationale for tentatively denying the

² The record on appeal does not show the exact filing date. The signature on the original complaint is dated February 5, 2003.

class certification ruling.” At the continued hearing, when the court repeated its tentative ruling, plaintiff’s counsel asked for some clarification, saying “I just didn’t understand ‘qualifies under.’” The court offered no help, saying “I do not believe it met the criteria, and even if it did, it’s too late, period.” After hearing argument, the court ruled: “The court’s tentative is the court’s final. The request for the class certification is denied.” This appeal followed.

DISCUSSION

Our Supreme Court has often set forth the standards for class certification, most recently in *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 (*Sav-on*). “Code of Civil Procedure section 382 authorizes class actions ‘when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court’ The party seeking certification has the burden to establish the existence of both an ascertainable class and a well-defined community of interest among class members. [Citations.] The ‘community of interest’ requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.”

“The certification question is ‘essentially a procedural one that does not ask whether an action is legally or factually meritorious.’ [Citation.] A trial court ruling on a certification motion determines ‘whether . . . the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.’” (*Sav-on, supra*, 34 Cal.4th at p. 326.) “[W]e consider whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment. [Citations.] ‘Reviewing courts consistently look to

the allegations of the complaint and the declarations of attorneys representing the plaintiff class to resolve this question.” (*Id.* at p. 327.)

“Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification. The denial of certification to an entire class is an appealable order [citations], but in the absence of other error, a trial court ruling supported by substantial evidence generally will not be disturbed ‘unless (1) improper criteria were used [citation]; or (2) erroneous legal assumptions were made [citation]’ [citation]. Under this standard, an order based upon improper criteria or incorrect assumptions calls for reversal “‘even though there may be substantial evidence to support the court’s order.’” [Citations.] Accordingly, we must examine the trial court’s reasons for denying class certification. ‘Any valid pertinent reason stated will be sufficient to uphold the order.’” (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435-436.) But we nevertheless “review only the reasons given by the trial court for denial of class certification, and ignore any other grounds that might support denial.” (*Bartold v. Glendale Federal Bank* (2000) 81 Cal.App.4th 816, 829.)

Under this standard, we must reverse. The first reason given by the court for denying the motion, that it was “not so sure it really ‘qualifies’ under just the straight rules of class certification,” was not a reason. It was a result. No rationale was stated. Nothing was added to the ruling beyond “motion denied.” The primary reason given by the trial court for denying the motion was proximity of the trial date. As we will discuss, under the circumstances shown by the evidence, the court abused its discretion in relying upon this ground. The third reason stated by the trial court “I am not so sure a lot of the information you are asking for, for purposes of the class certification, you’re entitled to,” does not address the merits of the class certification motion. It’s a discovery ruling, nothing more. Because we review only those reasons expressed by the trial court for denial of the motion, and because the only reasons given by the court do not support

denial of the motion, we reverse and remand to the trial court to rule on the other grounds raised by defendant in opposition to the motion.

Not Qualifying “Under Just the Straight Rules of Class Certification” Is a Conclusion, Not a Reason

The trial court gave us no guidance as to what it meant by stating the case does not qualify “under just the straight rules of class certification.” This particular “reason” amounts to no reason at all. A review of this “reason” would require a de novo review and, ultimately, an exercise of *our* discretion, not a review of the trial court’s exercise of discretion. We decline the invitation.

What “straight rules” disqualified this class action? Is the class not ascertainable? Are there not predominant common questions of fact or law? Are plaintiff’s claims not typical of the class? Can plaintiff not adequately represent the class? Can no subclass “qualify”? As noted, the trial court has a great deal of discretion to determine these questions, and, ultimately, to decide whether a class action is a superior procedural means by which to proceed. (See *Sav-on, supra*, 34 Cal.4th at p. 326.) But this is a trial court function in the first instance. We review only for abuse of discretion. And, unlike the usual rule on appeal, we do not search the record for substantial evidence to support the court’s decision. (*Linder v. Thrifty Oil Co, supra*, 23 Cal.4th at 435-436; *Bartold v. Glendale Federal Bank, supra*, 81 Cal.App.4th at 829.)

Thus, we decline to review the court’s decision to deny the motion where the reason given is that the motion does not qualify “under just the straight rules of certification.” Recognizing plaintiff’s theory is that many questions on the PEHI are not related to *any* job at the hospital, and that there is *no* business necessity to ask these questions, it is somewhat difficult to understand why a class cannot be certified, at least for the purpose of establishing whether or not there is classwide liability entitling the class to injunctive relief. But the trial court may have perceived something about the case

which we have not, or may not have perceived something which we have. We do not, however, conduct a de novo review. Under the rules applicable to appellate review of the denial of a class certification motion, we need to know the reasons for the denial of the motion. Those are the only reasons we will review.

Under the Circumstances, the Court Abused Its Discretion by Denying the Motion on the Ground the Trial Date Was Near

In denying the motion for class certification, the court gave as one of its reasons: “[W]e are so close to the trial date, as a practical matter, I do not think that we could have class certification without vacating this trial date, and I think that may not be appropriate under the circumstances.” Relevant to this determination, we note the complaint was filed on or about February 5, 2003, and the class allegations were added in a first amended complaint filed on February 14, 2003. Plaintiff’s class certification motion was filed on December 5, 2003. By that time, the trial date had been set for March 15, 2004. Defendant did not urge the trial court to deny the motion on the basis of proximity of the trial date. The court raised the issue on its own, apparently out of concern for its own case management responsibilities in our world of fast track trials.

Since defendant did not argue delay or lack of diligence as a ground for denying the motion, there is no evidence in the record supporting any finding of unreasonable delay or lack of diligence on plaintiff’s part. There are only the bare dates the complaint was filed, the motion was filed, the motion was heard, and the trial date. Without more, this evidence is insufficient to support a denial of plaintiff’s class certification motion filed 10 months after the original complaint was filed. Each case must be evaluated to determine how much time it should take to process the case through final disposition. An arbitrarily selected trial date must not be allowed to overrun an evaluation based on the individual needs of the case. Thus, if the class certification

motion were otherwise meritorious, the trial date should have given way if necessary to accommodate the additional complexity.

The California Rules of Court recognize that class certification likely will result in more time being needed to process the case than would be necessary for a simple auto accident or breach of contract case. California Rules of Court, rule 1800(c)(6)³ provides that a class action is “provisionally a complex case.” A complex case, in turn, is defined as “an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants” (Rule 1800(a).) Rule 1812(b) allows the court, on its own motion, to classify a case as complex, and rule 209(c) allows the court to exempt a case qualified as complex under rule 1800 from the case disposition time goals under rule 208(b). Thus the Rules of Court allow flexibility to tailor the trial setting to the needs of the case. The complexity of the case must drive the determination of an appropriate time goal for disposition, not vice versa. The court allowed its predetermined decision to bring this case to trial within 13 months as the basis for its decision to deny class certification. The analysis should have been in the reverse order. Should this case be certified as a class action? If yes, it would likely be appropriate to vacate the existing trial date. The bus was driven by the wrong driver.

Although defendant never argued timeliness of the motion in the trial court, here on appeal it attempts to support the trial court’s decision. None of the cases relied upon by defendant are apt, and only a brief discussion is necessary.

Danzig v. Jack Grynberg & Associates (1984) 161 Cal.App.3d 1128, 1126 held only that the class certification decision should be made *before* trial on the merits, and that it was too late to decertify the class *after* the trial had been conducted on a class-wide basis. *Danzig* provides no authority for the court’s decision here to use the pre-established trial date as the ground for denying class certification.

³ All further references to rules are to the California Rules of Court unless otherwise indicated.

Travelers Ins. Co. v. Superior Court (1977) 65 Cal.App.3d 751 was another case wherein the trial court had tried the merits of the case before deciding the class certification issue. After a decision on the merits, Travelers Insurance moved to dismiss the “class action elements of the action” on the ground, inter alia, that plaintiff had unduly delayed seeking class certification. On this ground, the Court of Appeal analogized the motion to dismiss the “class action elements” to a motion to dismiss for failure diligently to prosecute, and concluded the trial court had not abused its discretion. Nevertheless, the court held it was error to try the merits before the class certification decision had been made, and fashioned a remedy to allow the trial court to reconsider its decision concerning the order in which the matters were adjudicated. Thus *Travelers* is not authority for the proposition that proximity of a trial date by itself constitutes grounds to deny a class certification motion filed only 10 months after the case was commenced.

On remand, the court should evaluate the merits of the class certification motion first. Whether or not the class is certified will determine the timing of the trial.

The Ruling on the Discovery Motion Has No Bearing on Class Certification

Whether or not plaintiff was granted the right to conduct the class discovery it requested simply has no bearing on any of the issues relevant to class certification. While it is certainly possible plaintiff could complain that denial of the discovery request improperly denied her information she needed to prevail on the class certification motion, that is not plaintiff’s complaint. The court said, in effect, it would not certify the class because it would not allow the requested discovery. That reason is wholly irrelevant to the court’s decision on the motion presented to it, which necessarily must be based on the evidence presented to it. Although plaintiff makes a weak argument on appeal she should have been granted discovery consisting of all the names and addresses of the putative class members, she makes no reasoned argument why that information was necessary for the class certification decision, and we are thus not persuaded the court abused its

discretion in that regard. But we do conclude the court's decision to deny the class certification motion on the basis that it would not permit the requested discovery applied an improper criterion and thus constituted an abuse of discretion.

DISPOSITION

The order denying class certification on grounds of proximity of the trial date and on plaintiff's non-entitlement to discovery is reversed and the matter is remanded to the trial court for it to rule on the other grounds raised in defendant's opposition to the motion to certify the class. Plaintiff is awarded costs on appeal.

IKOLA, J.

WE CONCUR:

SILLS, P. J.

ARONSON, J.