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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

FREIDA ROSE, Cross-Complainant and Appellant, v. ASSET ACCEPTANCE, LLC, Cross-Defendant and Respondent.	A129025 (Alameda County Super. Ct. No. WG 07328408)

Debt collector Asset Acceptance, LLC, (Asset) sued appellant Freida Rose (Rose) for money she allegedly owed to "Pacific Bell Tel/[doing business as] SBC" (SBC) for telephone service. Rose countersued, claiming the telephone bills were not hers and that a statute of limitations had run on any amounts owed to SBC. She sought to certify a class of all California consumers that Asset had pursued to recover debts on telephone bills that were "so poorly documented that their authenticity [could not] be proven" and/or were "so old that they f[e]ll well beyond any pertinent statute of limitations under which they [could] be pursued . . . ." On appeal, Rose challenges the trial court's order denying her motion for class certification and contends the court: (1) improperly decided a merits issue on the class certification motion, specifically, which statute of limitations applies to telephone bill debts; and (2) erred in ruling that a four-year state statute of limitations applies to such debts. We reject the contentions and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On May 30, 2007, Asset filed a complaint against Rose, alleging she became indebted to SBC in the amount of $2,198.67 "within the last four years" and had

promised to pay that amount to SBC "for goods, wares and merchandise sold and delivered to [her] and for which [she] promised to pay . . . ." Asset alleged it had purchased Rose's account from SBC and that as current owner of the account, was entitled to collect $2,198.67 plus interest from Rose.

Rose filed a second amended class action cross-complaint against Asset alleging it was engaged in a "business practice of purchasing debts referred to as 'zombie debt' and attempting to collect them" throughout California. The debts were "so old that they f[e]ll well beyond any pertinent statute of limitations under which they [could] be pursued, or [we]re so poorly documented that their authenticity [could not] be proven." She alleged Asset attempted to collect on such debts by, among other things, "filing complaints in court, but failing to document the origination of the debt and typically tak[ing] defaults against the purported debtors on these debts." Rose alleged as to her case that she did not know how the debt originated because she had not opened or become a subject of collection upon any SBC accounts in many years. She suspected it was a debt she disputed over seven years before, or was not her debt at all. Rose brought the action on her own behalf and on behalf of all persons similarly situated—"California consumers who within the last four years were subject to attempts to collect by Cross-Defendants on accounts that have been manipulated to make them appear to be collectable when they were not and whose authenticity is otherwise insufficiently supportable by evidence."

Under her first cause of action for violation of the Rosenthal Fair Debt Collection Practices Act (the Rosenthal Act), Rose alleged Asset "manipulat[ed] accounts and account numbers . . . as an artifice to collect a debt," attempted to collect debts that were past the statute of limitations, and filed complaints after the statute of limitations had passed. Under her second cause of action for breach of contract and breach of the covenant of good faith and fair dealing, Rose alleged Asset altered account numbers or failed to properly track accounts so that the ages of the accounts or the disputes relating to those accounts were inaccurate. Under her third cause of action for unfair business practices, she alleged Asset's conduct constituted unfair competition "in that [respondent] unlawfully, and in a deceptive manner, . . . violated [the Act] . . . ."

Under her fourth cause of action for violation of the California Consumer Legal Remedies Act (CLRA), Rose alleged Asset engaged in unfair, deceptive and unconscionable practices by representing that: (1) "goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities, which they do not have"; (2) "goods or services are of a particular standard, quality, or grade, if they are of another"; and (3) "a transaction confers or involves right, remedies, or obligations which it does not have or involve, or which are prohibited by law . . . when it manipulat[ed] accounts and account numbers to make them appear to be amenable to collection efforts when they [were] not." Under her fifth cause of action, abuse of process, Rose alleged Asset commenced lawsuits "fully knowing it ha[d] no right to bring such proceedings, as the time period for filing such suits ha[d] pas[sed]."

Asset filed a motion for judgment on the pleadings, which the trial court granted in part. The court ruled that Rose "may proceed with the claims under the Rosenthal Fair Debt Collection Practices Act, the contractual duty of good faith and fair dealing, and the UCL." Asset then filed a motion for summary judgment or summary adjudication. The court granted summary adjudication as to some allegations in the first cause of action relating to violations of the Rosenthal Act. It found Rose had presented no evidence in support of her claim that Asset manipulated the account dates to make its claim appear timely when in fact it was not. It found, however, that Rose was allowed to proceed on her allegation that Asset attempted to collect debts that were past the statute of limitations and filed complaints in court after the statute of limitations had passed. The court granted the motion for summary adjudication as to the entire second cause of action for breach of contract or breach of the duty of good faith and fair dealing. It found, as it did as to the first cause of action, that Rose had not presented any evidence in support of her claim that Asset or its predecessor had "manipulated the contractual accounts and account numbers or failed to track the accounts properly." The court granted the motion for summary adjudication as to the allegations in her third cause of action for unfair business practices that were based on manipulation of data and breach of contract. It denied the

motion as to her allegations that were based on Asset's act of filing lawsuits that were barred by the statute of limitations.

Rose filed a motion for class certification on December 23, 2009. The trial court denied the motion, finding that because a four year statute of limitations applied to the debts that were at issue, and Rose had presented no evidence of the number of debtors Asset had sued beyond the expiration of the four-year statute, she had not established her burden of establishing numerosity. The court also ruled that a class was ascertainable if the court redefined the class; that common legal issues existed; that Rose was a typical class member; that Rose and her counsel were adequate; and that a class action was not a superior method of resolving Rose's claims. Both parties appealed.

DISCUSSION

Class certification is governed by Code of Civil Procedure section 382, which provides in part: "[W]hen 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, one or more may sue . . . for the benefit of all." "Class certification requires proof (1) of a sufficiently numerous, ascertainable class, (2) of a well-defined community of interest, and (3) that certification will provide substantial benefits to litigants and the courts, i.e., that proceeding as a class is superior to other methods. [Citations.] In turn, 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.' [Citation.]" (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1089.)

"The decision to certify a class rests squarely within the discretion of the trial court, and we afford that decision great deference on appeal, reversing only for a manifest abuse of discretion: '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.' [Citation.] A certification order generally will not be disturbed unless (1) it is unsupported by substantial evidence, (2) it rests on improper criteria, or (3) it rests on erroneous legal assumptions." (*Id.* at p. 1089.) " ' "Any valid pertinent

reason stated will be sufficient to uphold the order." ' [Citations.]" (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326-327.)

Rose contends the order denying class certification must be reversed because the trial court improperly decided a merits issue when it determined that a four-year statute of limitations applied to telephone bill debts. She relies on *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429 (*Linder*), for the proposition that courts are not to decide an action on its merits when determining whether to certify a class. *Linder* does not support Rose's contention. There, the Supreme Court stated that "the question of certification" is "essentially a procedural one" in which courts "do[] not ask whether an action is legally or factually meritorious." (*Id.* at pp. 439-440.) However, it also stated, "Nothing we say today is intended to preclude a court from scrutinizing a proposed class cause of action to determine whether, assuming its merit, it is suitable for resolution on a classwide basis. Indeed, issues affecting the merits of a case may be enmeshed with class action requirements, such as whether substantially similar questions are common to the class and predominate over individual questions or whether the claims or defenses of the representative plaintiffs are typical of class claims or defenses. [Citations.]" (*Id.* at p. 443.)

A number of courts have relied on the language in *Linder* in upholding a trial court's consideration of the merits at the class certification stage. In *Quacchia v. DaimlerChrysler Corp.* (2004) 122 Cal.App.4th 1442, for example, the Court of Appeal rejected the plaintiff's argument that the trial court "improperly weighed the conflicting evidence and made a finding on the merits of the case in determining that common issues would not predominate." (*Id.* at p. 1454.) The Court reasoned that where a merits issue is " 'enmeshed with' " a class action requirement, the trial court is "authorized to scrutinize a proposed class cause of action to determine whether it is suitable for resolution on a classwide basis." (*Ibid.*) In *Ali v. U.S.A. Cab. Ltd.* (2009) 176 Cal.App.4th 1333, the plaintiffs argued the trial court impermissibly weighed the merits of the lawsuit in determining that two class certification requirements—predominance of common questions and superiority of class treatment—had not been met. The Court of

Appeal rejected the argument, noting the trial court "did not deny class certification based on a finding the complaint lacks merit as a matter of law. The court did not require plaintiffs to prove their case as a prerequisite to class certification. Rather, . . . 'the court simply considered evidence bearing on the factual elements necessary to determine whether to certify the class.' [Citation.]" (*Id.* at p. 1346.)

Similarly, here, the trial court did *not* rule on the merits of Rose's case and did not require her to prove her claims against Asset as a prerequisite to class certification; rather, it expressly allowed her action to proceed, albeit on an individual basis. The court did decide an issue related to the merits of Rose's claims when it determined what statute of limitations applies to telephone bill debts. Resolving that threshold question was necessary, however, in order to determine whether the class was "sufficiently numerous [and] ascertainable." (*Fireside Bank v. Superior Court*, *supra*, 40 Cal.4th at p. 1089.)[1] Because the issue of whether Asset violated the Rosenthal Act or engaged in unfair business practices by filing time-barred lawsuits was "enmeshed with" class action requirements, the court had the authority to address the statute of limitations issue in ruling on Rose's motion for class certification.

Rose contends the order denying class certification should nevertheless be reversed because a federal two-year statute of limitations under the Federal Communications Act (FCA), 47 U.S.C. section 415(a) (Section 415(a))—not a state four-year statute of limitations under Code of Civil Procedure section 337—applies to telephone bill debts.[2] We conclude the trial court correctly determined that Asset's claims were governed by the four-year state statute of limitations.

Section 415(a) provides: "All actions at law by carriers for recovery of their lawful charges, or any part thereof, shall be begun within two years from the time the

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[1] As noted, the trial court determined that because Rose had presented no evidence regarding the number of debtors Asset had sued beyond the limitations period in violation of the Rosenthal Act or the Unfair Competition Law, she had not established her burden of establishing numerosity.

[2] Presumably, her argument is that if a two-year statute of limitations applies, she would be able to show that the class is numerous.

cause of action accrues, and not after."[3] Relying on *Castro v. Collecto, Inc.* (W.D. Tex. 2009) 668 F.Supp.2d 950, for its holding that Section 415(a) applies only to federally regulated telephone charges, the trial court ruled that because Rose had not presented any evidence that Asset's collection action sought to recover any federally regulated charges, Section 415(a) did "not apply on the facts of this case and the four year statute of limitations in [Code Civ. Proc.] § 337 applies to Asset's claims." Subsequently, the United States Court of Appeals for the Fifth Circuit affirmed the district court's decision in *Castro v. Collecto, Inc.* (5th Cir. 2011) 634 F.3d 779 (*Castro*).

In *Castro*, the plaintiff received two letters from debt collectors regarding a debt he allegedly owed to mobile phone company Sprint PCS based on unpaid phone bills. (*Castro, supra*, 634 F.3d at p. 781.) The plaintiff sued the debt collectors on the ground that they violated the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 et seq., by sending him letters threatening to sue on an approximately three-year-old debt as to which the applicable statute of limitations had elapsed. (*Castro, supra*, 634 F.3d at p. 781.) The district court granted the defendants' motion to dismiss, or alternatively, for judgment on the pleadings, reasoning that a four-year Texas statute of limitations,[4] rather than the two-year federal statute of limitations period, applies to telephone bill debts, and that the defendants therefore had not threatened to sue on time-barred debts. (*Castro, supra*, 634 F.3d at p. 781.)

The Court of Appeals focused on the issue of preemption in concluding Section 415(a) did not apply to the plaintiff's debts. First, the Court began with the assumption that Section 415(a) did not preempt the state statute of limitations " 'unless that was the clear and manifest purpose of Congress." ' [Citation.]" (*Castro, supra*, 634

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[3] Code of Civil Procedure section 337 provides in part that a four-year statute of limitations applies to actions "upon any contract, obligation or liability founded upon an instrument in writing," and "to recover (1) upon a book account . . . [and] . . . (2) upon an account stated based upon an account in writing . . . ."

[4] Texas Civil Practice & Remedies Code § 16.004(a)(3) requires anyone who wishes to "bring suit on" several enumerated actions, including debt, to do so "not later than four years after the day the cause of action accrues."

F.3d at p. 784.) There was no such showing "because Congress has not made clear that it intended for [Section 415(a)] to preempt state statutes of limitations with respect to actions to collect debts like those at issue here. (*Ibid.)* "Although the federal government formerly controlled telecommunications regulation nationwide, in 1993, Congress amended the FCA to permit the states to handle many aspects of regulating commercial mobile services, including billing practices and consumer protections. [Fn. omitted.] In addition, states have traditionally governed matters regarding contracts and consumer protections, which, on a more general level, are the issues involved in this case." (*Id.* at pp. 784-785.)

From there, the Court turned to the question whether "conflict preemption" applied. (*Id.* at p. 785.) The Court stated that this issue "depends on whether the term 'lawful charges' in [Section 415(a)] should be read to include non-tariffed charges or only tariffed charges. If 'lawful charges' does include non-tariffed as well as tariffed charges, then we would agree . . . that conflict preemption would apply, because the [state] statute of limitations would be in conflict with the balancing of interests expressed in the federal statute of limitations." (*Ibid.*) The Court observed that although many telecommunications carriers were released from the requirement of filing tariffs in the mid-1990s, thereby placing their charges outside of the definition of "lawful charges," Congress had never defined the phrase "lawful charges" and had not amended the language of Section 415(a), thus leaving it "unclear" what charges were covered by that section. (*Id.* at pp. 785-787.) The Court held the state statute of limitations therefore applied: "Because we conclude that the meaning of 'lawful charges' is ambiguous, we therefore decline to interpret the term in such a way that conflict preemption would apply. . . . [T]he Texas statute of limitations provides the limitations period in this case . . . ." (*Id.* at p. 787.)

We find the analysis in *Castro* to be persuasive and conclude that because Section 415(a) did not preempt state law in regards to the limitations period for collection of telephone bill debts, the four-year statute of limitations set forth in Code of Civil Procedure section 337, under which Asset sought to collect the debts, applied. Rose

asserts that due to various evidentiary problems, Asset "cannot now and will never be able to prove its case on the merits" under its theory that it was entitled to collect the debts under Code of Civil Procedure section 337. Whether Asset will ultimately be able to prove its claims under that section, however, is not relevant to whether the class should have been certified. As the trial court stated, "The claims that Ms. Rose seeks to prosecute on behalf of the class are that Asset is prosecuting claims that are time barred, not that Asset is pursuing claims that it cannot prove on their merits."

In light of our conclusion the trial court properly determined the statute of limitations issue, we need not, and will not, decide Rose's alternate argument that the court erred in finding that a class action was not a superior method of resolving her claims. We also decline to address the contentions Asset makes in its cross-appeal—whether the court should have denied the motion for class certification on the ground that the class was not ascertainable, common legal issues did not exist, or Rose and/or her counsel were inadequate.

Finally, we deny Rose's request that we take judicial notice of: (1) the legislative history of the Rosenthal Act, which she asserts shows that "it is the specific public policy of the [Rosenthal Act] to allow class actions for collector deceptive and unfair practices, including filing time barred complaints"; and (2) Asset's response to an interrogatory "wherein Asset acknowledge[d] that of the 14,821 lawsuit[s] it filed, it only had 316 contested cases. First, Rose did not present either of these documents to the trial court in support of her motion for class certification. (See *Cuenca v. Safeway San Francisco Employees Fed. Credit Union* (1986) 180 Cal.App.3d 985, 997 [appellate court declined to take judicial notice of court records not judicially noticed by the trial court].) Second, she has not shown that the information contained in the documents is relevant to the determination of this appeal. (See *People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 422, fn. 2 ["any matter to be judicially noticed must be relevant to a material issue"].) Even if the legislative history shows that class actions are allowed or even encouraged under the Rosenthal Act, this does not eliminate Rose's burden to show that each requirement for class certification has been met in her particular case. As to

Asset's interrogatory response, she asserts only that the response "tend[s] to indicate that it is unrealistic to believe that individuals will actually have a determination of whether violations of the [Rosenthal Act] absent class treatment and, therefore, class action treatment is superior to leaving the issues to hypothetical individual determination." Because, as noted, we are not deciding whether a class action would have been a superior method of resolving her claims, the interrogatory response's "tend[ency]" to show that "class action treatment is superior" is not relevant here.

DISPOSITION

The trial court's order denying class certification is affirmed. Respondent shall recover its costs on appeal.

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McGuiness, P.J.

We concur:

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Siggins, J.

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Jenkins, J.