

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

BEACON RESIDENTIAL COMMUNITY  
ASSOCIATION,

Plaintiff and Appellant,

v.

CATELLUS THIRD AND KING, LLC, et  
al.,

Defendants and Respondents.

A138609

(San Francisco County  
Super. Ct. No. CGC-08-478453)

Appellant Beacon Residential Community Association (the Association), a common interest homeowners' association, sought to certify a class of its homeowner members with respect to certain aspects of the underlying construction defect lawsuit. The trial court denied appellant's motion for class certification. We conclude the trial court erred in portions of its analysis, and we reverse and remand.

BACKGROUND

Appellant is the homeowners' association for a 595-unit residential condominium project in San Francisco (the Project). The Association sued a number of entities involved in the development, design, sale, and/or construction of the Project (collectively, Respondents), alleging various construction defects. The complaint asserts causes of action for violation of Civil Code section 895 et seq.,<sup>1</sup> strict liability, negligence, breach

---

<sup>1</sup> All undesignated section references are to the Civil Code.

of implied warranty, breach of contract (third party beneficiary), and fraudulent concealment.

The only alleged construction defect at issue in this appeal is what the parties refer to as the “heat gain issue.” The Association presented evidence of unit temperatures in the 80s, 90s, and even over 100 degrees, despite significantly lower outside temperatures. The Association contends the heat gain is caused by “a series of design and construction errors” including concrete construction which does not adequately cool off, large walls of glazing with no external shading, windows which transfer a high amount of solar heat, and inadequate ventilation. The amount of heat gain varies among the units and it is undisputed that some units do not experience heat gain.

The Association also contends the Respondents involved in marketing and sale of the Project units (collectively, Mission Place) knew about the heat gain issue before selling the units, yet failed to disclose the extent of the problem to prospective buyers. The written disclosure provided by Mission Place included the following: “The Units do not contain air conditioners, and the design of the Condominium Project does not permit the incorporation of air conditioning facilities in the Units. Certain Units at the Project (particularly Units with south- and west- facing windows) may become uncomfortably warm when exposed to sunny conditions and/or hot weather. Buyers may elect to open the windows in their Units to promote air circulation when appropriate. In addition, Buyers may elect to take additional temperature and air circulation management measures, such as installation of ceiling fans to promote air flow and installation of curtains or blinds to block excessive sunlight. Any such installation must be completed in accordance with applicable Association Rules. Prior to purchase, Buyers should determine that the window placement, temperature level and air flow characteristics of its Unit meet Buyer’s personal comfort standards.”

The Association sought to certify a class of all of its members with respect to certain aspects of its claims, as discussed further below.<sup>2</sup> The Association also sought certification of two subclasses. The first proposed subclass consists of approximately 34 of the Association’s members who were plaintiffs (or whose units had been owned by plaintiffs) in previous lawsuits against some of the same Respondents, which resulted in stipulated dismissals (the *Zucker* subclass). The second proposed subclass consists of the Association’s members who purchased units from a prior owner other than Mission Place (the subsequent purchaser subclass).

The trial court denied the motion, concluding there was “a predominance of individual claims . . . . The units in question have very different heating issues, and different factors affect the temperatures in each; and as [the Association’s] counsel acknowledged at the hearing, some—about 11 of them—have no heating problem at all. This is not just a problem with individualized damages, this is a problem with individualized liability and causation.” (Footnote omitted.) The trial court also noted, “[The Association] has not yet presented a clear way to determine if the amount of heat was too high or not, or higher than represented or promised, or not. [The Association’s] invocation of an industry standard- ASHRAE- is not helpful, because the standard is voluntary and has no obvious correlation with the expectations of lay folks such as the members of the public who bought the condominiums.” The trial court also found “widely different fact patterns on reliance as to each owner. Some saw the written Disclosure, some did not; some had vast experience with the unit they bought, others none; and so on.” The trial court concluded, “with respect to all the claims, the individualized damage analyses, which also go to individualized liability analyses, will swamp the common issues. Especially where [the Association] contends that it can obtain virtually all the relief to which it is entitled to repair common areas and take care of what [the Association] terms a project-wide problem, certification is not warranted.”

---

<sup>2</sup> A previous motion for class certification, brought before a different judge, was denied without prejudice.

## DISCUSSION

### I. *Standard of Review*

“The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives. [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.” ’ ” (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021 (*Brinker*)). “ ‘The certification question is “essentially a procedural one that does not ask whether an action is legally or factually meritorious.” ’ ” (*Id.* at p. 1023.)

“On review of a class certification order, an appellate court’s inquiry is narrowly circumscribed. ‘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. [Citations.]’ [Citations.] Predominance is a factual question; accordingly, the trial court’s finding that common issues predominate generally is reviewed for substantial evidence.” (*Brinker, supra*, 53 Cal.4th at p. 1022.)

### II. *The Scope of the Class Certification Motion*

As an initial matter, we must clarify the scope of the Association’s class certification motion. The Association explained in its trial court brief that it essentially seeks class certification as a precautionary measure, “due to concern about a possible argument that plaintiff lacks standing herein to obtain recovery for the overheating conditions at the Beacon Project.” The trial court has not ruled on the Association’s

standing and the issue is not before us. However, to determine the scope of the Association's class certification motion, it is necessary to set forth the Association's position on standing, which was detailed in its trial court briefs.

The Association contends it has statutory standing under section 895 et seq. (See § 895, subd. (f) [defining "[c]laimant" or "homeowner" to include common interest development homeowner associations].) However, the Association notes this standing does not extend "to any action by a claimant to enforce a contract or express contractual provision, or any action for fraud." (§ 943, subd. (a).)

With respect to its contract and fraud claims, the Association turns to section 5980. Section 5980 confers standing upon a common interest development homeowner association "in matters pertaining to the following: [¶] (a) Enforcement of the governing documents. [¶] (b) Damage to the common area. [¶] (c) Damage to a separate interest that the association is obligated to maintain or repair. [¶] (d) Damage to a separate interest that arises out of, or is integrally related to, damage to the common area or a separate interest that the association is obligated to maintain or repair." The Association contends section 5980 applies to fraud and contract causes of action. The Association believes all but one of the defects alleged in its fraud and contract claims indisputably involve matters encompassed by section 5980.

The Association is concerned, however, that Respondents may contend it lacks standing to obtain full relief with respect to the heat gain issue in connection with its fraud and contract claims. In essence, as the Association explained in its trial court brief, the Project's declaration of covenants, conditions, and restrictions "make 'windows' part of the 'Units' and assign Owners [rather than the Association] the responsibility to 'maintain' the 'interior glass,' [which] could be argued to negate the Association's standing to sue for the overheating conditions." The Association elaborated on their position at oral argument in the trial court: "There's different views of how to fix this [heat gain] problem. As I said, our experts say in 53 percent of the units, you need to put chillers [water chillers installed on the roof and piped to the units, with fan coils to cool the units]. That clearly involves common area work. [¶] In the other 47 percent . . .

there's another approach . . . involv[ing] things like putting some film inside of the windows . . . [,] putting some solar shades inside the windows and some ceiling fans in the units . . . . [¶] Now, we can get possibly into an issue that well, but what you're doing now is work to the inside of the units so is there really standing that the owners have to get that through the association's power?"

With this background, we can identify the precise scope of the Association's class certification motion. First, the Association contends on appeal that its motion is not limited to any particular cause of action but rather extends "to every claim in the complaint as to which statutory representative standing is absent." However, the only causes of action identified by the Association as to which it potentially lacks standing are the breach of implied warranty (sixth cause of action); breach of contract, third party beneficiary (seventh cause of action); and fraudulent concealment (eighth cause of action). More significantly, these are the only causes of action as to which the Association argued common issues predominate. The predominance assessment can only be made in the context of a specific claim: it involves analysis of " 'the law applicable to the causes of action alleged' " and "can turn on the precise nature of the element" at issue. (*Brinker, supra*, 53 Cal.4th at p. 1024; see *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916 (*Hicks*) ["In order to determine whether common questions of fact predominate the trial court must examine . . . the law applicable to the causes of action alleged."].) Accordingly, the Association has forfeited any argument seeking class certification on causes of action other than the sixth, seventh, and eighth by failing to make any arguments regarding common issues in connection with the elements of those claims.

Second, with respect to the sixth, seventh, and eighth causes of action, the Association expressly represented to the trial court during oral argument, consistent with its class certification arguments below and here, that it only seeks class certification with respect to the heat gain issue. It does not seek class certification with respect to any other defects alleged in those causes of action because it believes it has clear standing to litigate those defects.

Finally, the Association has not explicitly clarified whether it seeks class certification solely with respect to the window-related repairs, or whether it also seeks certification of heat gain issues requiring common area repairs. The Association’s argument that it seeks certification solely as a precautionary measure to forestall a standing challenge with respect to those units for which the repair will involve window-related work suggests it only seeks certification as to those units. However, it did not so limit its request for class certification—defining the class to include *all* Project homeowners—and it has made arguments indicating it seeks to certify a class in connection with the heat gain issue regardless of the repair to be sought. Although this position conflicts with the Association’s explanation about why it is seeking class certification in the first place, such an inconsistency does not preclude the Association from seeking to certify a broader class. Respondents have provided no authority that a homeowner’s association with statutory standing cannot also pursue claims on behalf of a class of its members, and section 5980 does not so provide. We see no legal basis to limit the Association’s class certification motion to only those units whose heat gain repair will involve windows.

Accordingly, we conclude the Association sought class certification with respect to the alleged heat gain defect as asserted in the sixth, seventh, and eighth causes of action, including both units whose repair will require common area work and units whose repair will require potentially separate area work.<sup>3</sup>

---

<sup>3</sup> After the trial court’s order denying class certification and before the Association filed its notice of appeal, the trial court granted Respondents’ motion for summary adjudication as to the Association’s seventh cause of action. The Association makes no argument as to the impact of this order on the appealability of the order denying class certification with respect to the seventh cause of action; Respondents contend the order compels us to affirm the denial of class certification as to that cause of action because the Association is now an inadequate representative. As a general rule, orders denying class certification are immediately appealable under the “ ‘death knell doctrine’ ” because of a concern that “ ‘without the incentive of a possible group recovery the individual plaintiff may find it economically imprudent to pursue his lawsuit to a final judgment and then seek appellate review of an adverse class determination’ . . . thereby foreclosing any possible appellate review of class issues.” (*In re Baycol Cases I & II* (2011) 51 Cal.4th

### III. *Predominance*

“The ‘ultimate question’ the element of predominance presents is 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.’ [Citations.] The answer hinges on ‘whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment.’ [Citation.] A court must examine the allegations of the complaint and supporting declarations [citation] and consider whether the legal and factual issues they present are such that their resolution in a single class proceeding would be both desirable and feasible.” (*Brinker, supra*, 53 Cal.4th at pp. 1021–1022, fn. omitted.) “The relevant comparison lies between the costs and benefits of adjudicating plaintiffs’ claims in a class action and the costs and benefits of proceeding by numerous separate actions—*not* between the complexity of a class suit that must accommodate some individualized inquiries and the absence of any remedial proceeding whatsoever.” (*Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 339, n. 10 (*Sav-on*).)

“To assess predominance, a court ‘must examine the issues framed by the pleadings and the law applicable to the causes of action alleged.’ [Citation.] It must determine whether the elements necessary to establish liability are susceptible of common proof or, if not, whether there are ways to manage effectively proof of any elements that may require individualized evidence. [Citation.] In turn, whether an element may be established collectively or only individually, plaintiff by plaintiff, can

---

751, 758.) Because the Association has already lost on the merits of its seventh cause of action in the trial court, the death knell doctrine does not provide a basis for interlocutory review of the denial of class certification with respect to this cause of action; its review will, and properly should, take place after final judgment. (See *id.* at p. 761 [“the death knell doctrine applies to render an order foreclosing class claims appealable when, and only when, individual claims survive”].) Accordingly, we will dismiss the portion of the appeal challenging the trial court’s order denying class certification as to the seventh cause of action. The Association may renew this appeal after final judgment.

turn on the precise nature of the element and require resolution of disputed legal or factual issues affecting the merits.” (*Brinker, supra*, 53 Cal.4th at p. 1024.)

With respect to the Association’s sixth cause of action, “there is implied in a sales contract for newly constructed real property a warranty of quality and fitness.” (*Burch v. Superior Court* (2014) 223 Cal.App.4th 1411, 1422 (*Burch*)). Elements of this cause of action include that the purchaser justifiably relied on Respondents’ skill and judgment, that the property was not fit for habitation, and that the purchaser was harmed. (See CACI No. 1232.) With respect to the Association’s cause of action for fraudulent concealment, the elements include that Respondents intentionally concealed a material fact, the homeowners were unaware of the fact and would not have acted as they did had they known of the fact, and the homeowner sustained damage as a result of the concealment. (*Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 612–613.)

As discussed below, we reject some, but not all, of the individualized issues identified by the trial court. Because “[p]redominance is a factual question” (*Brinker, supra*, 53 Cal.4th at p. 1022), we will remand the matter to the trial court for reconsideration, in light of this opinion, of whether common issues predominate.

#### A. *Variation in Quantity of Heat Gain*

One of the issues identified by the trial court was the variation in the amount of heat gain among the units. We are not persuaded that this presents an individualized issue for purposes of managing a class action.

##### 1. *Units With No Heat Gain*

As the trial court noted, the Association acknowledged a small number of units, “about 11,” “have no heating problem at all.” The Association argued these homeowners have nonetheless suffered cognizable harm because they, as members of the Association, are liable for assessments for the cost of the heat gain related repairs to the common areas. Specifically, the Association contends that it is responsible for the repair involving piping cooled water from chillers on the roof and, because the Association is responsible for this repair, it can assess all of its members to cover the costs (as a shorthand, we refer

to this as the “common area repair”). This is distinguished from the repair involving unit windows. This repair is to areas the Association arguably is *not* responsible for repairing and therefore arguably does not have standing to pursue (we refer to this as “separate area repair”).

The trial court rejected the Association’s argument in part because “the very basis on which [the Association] now wishes certification is just for those damages and repairs as to which the home owners’ association as such arguably does *not* have standing, i.e. for those claims as to which the association *cannot* levy assessments.” As discussed above, we believe this misconstrues the scope of the Association’s class certification request. Because we understand the Association’s motion to seek certification of a class regarding *all* heat gain issues in connection with the sixth, seventh, and eighth causes of action, the Association’s argument that all putative class members—including those whose units do not experience heat gain—are liable for the cost of the common area repairs, is consistent.

Respondents contend the cost of repair is not cognizable harm, citing *Aas v. Superior Court* (2000) 24 Cal.4th 627 (*Aas*). *Aas* held that homeowners may not “recover damages in negligence from the developer, contractor and subcontractors who built their dwellings for construction defects that have not caused property damage.” (*Id.* at p. 632.) Even assuming *Aas* extends to contract and fraud claims, it does not control here as the Association contends the construction defects *have* caused property damage for which, as to the common area property damage, all putative class members are liable to repair.

## 2. *How Hot Is Too Hot*

The trial court also expressed concern that the Association “has not yet presented a clear way to determine if the amount of heat was too high or not, or higher than represented or promised, or not. [The Association’s] invocation of an industry standard-ASHRAE- is not helpful, because the standard is voluntary and has no obvious correlation with the expectations of lay folks such as the members of the public who bought the condominiums.” The trial court’s comments at the hearing elaborate on this

issue: “[F]or those putative class members that do have some kind of heating problem, the evaluation of it is highly subjective. For those that have a heating problem, at least as presented by the moving papers here, that problem is defined as I understand it as a departure from an arbitrary number, that is a departure from 80 degrees, which is a stand in for this subjective, quote, comfort standard close quote. So it’s a legal problem that we’re using this arbitrary standard to try to figure out whether or not with respect to a given condominium, there is a heating problem. [¶] For some people there is a heating problem below 80, for some people there’s a heating problem above 80, so just coming up with this arbitrary standard of 80, although I understand its utility in trying to generate what looks like a common issue here, in fact covers up the truth, which is that there is no common way to determine whether we have a comfort standard for any given person. [¶] This issue is compounded by the fact that in the written disclosures, which are the subject of some of the causes of action such as, for example, the eighth cause of action, the written disclosures themselves have an equally vague standard that is being represented to the buyers who read and relied on the written disclosures. So we have a subjective individualized analysis of what is a subjective standard in the written disclosures.”

We respectfully disagree; under the Association’s theory of the case, this subjective assessment is not relevant to either issue. (*Sav-on, supra*, 34 Cal.4th at p. 327 [“in determining whether there is substantial evidence to support a trial court’s certification order, we consider whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment”].) The Association’s complaint alleges the heat gain renders the units “uninhabitable, unhealthy and unsafe during certain periods.” Based on the Association’s expert analysis, the Association appears to contend unit temperatures of 80 degrees and higher for some significant number of days per year meet these standards.<sup>4</sup>

---

<sup>4</sup> The Association’s expert divided the units into those whose temperatures did not reach 80 degrees, those whose temperatures reached or exceeded 80 degrees from 1 to 18 days per year, 19 to 36 days per year, 37 to 91 days per year, and more than 91 days per year.

With respect to the implied warranty of fitness claim, the Association’s theory is the heat gain violates objective standards of habitability and safety and thereby breaches the warranty of implied habitability; it represents that it will establish this “through industry-accepted standards . . . as well as expert testimony from appraisers and construction experts.” Respondents assert the liability determination requires assessment “of what the comfort standard is with regard to a given unit owner,” but cite no authority for this proposition. Indeed, as contractors often do not know the identity of the purchaser when they build a residence, such a standard would be difficult for them to meet. Absent authority rejecting the Association’s theory that breach of the implied warranty of fitness depends on objective standards, not the individual purchaser’s subjective assessment, the unit owners’ subjective assessments are relevant to this issue. Whether residential units with temperatures above 80 degrees for some number of days per year in fact violate objective standards of habitability and safety is a merits question (common to all putative class members) that need not be resolved at this time. (*Brinker, supra*, 53 Cal.4th at p. 1023 [“resolution of disputes over the merits of a case generally must be postponed until after class certification has been decided [citation], with the court assuming for purposes of the certification motion that any claims have merit”].)

With respect to its fraudulent concealment claim, the Association’s theory is “the overheating problem exists, objectively speaking, [and] that it was not accurately described in defendant Mission Place’s standardized disclosure.” The fact that the disclosure itself referenced the prospective purchaser’s “personal comfort standards” is not relevant to the Association’s contention that the disclosure, as a whole, failed to disclose the severity of the heat gain. Again, whether the Association’s contention has merit is not a question to be resolved now.

#### B. *Individualized Damages*

The Association’s complaint alleges harm including “physical damage,” “loss of use and loss of enjoyment,” and seeks damages for inspection, repair, “reasonable relocation and storage expenses, lost business income, . . . and all other costs or fees recoverable by contract or statute.” However, in its class certification motion, the

Association claimed it “is not seeking to recover individualized damages for Unit owners. Rather, plaintiff, on behalf of all of its members, is seeking to recover the costs of investigating and repairing the overheating problem.” At the trial court hearing, the Association further represented it would be willing to amend the complaint to clarify that it was not seeking individualized damages—damages beyond Project-wide investigation and repair—in the litigation.

At the hearing, the trial court expressed concern about individualized damages, while recognizing that the presence of individualized “damages alone is not necessarily an obstacle to class certification.” In its written order, the trial court rejected the Association’s proposed solution to amend the complaint: “I am doubtful this approach is really in the best interests of the class, but more centrally now, it is clear that in [the Association’s] efforts to strip the case down to assertedly simple common issues, [the Association] has left on the table a variety of claims which would be litigated individually. In fact, under [the Association’s] approach, an owner who alleges individual heat-related damages aside from inspection and repair must prove the entire case of liability all over again.”

As an initial matter, it appears an individualized damages analysis will be required even if the damages are limited to inspection and repair. The Association appears to represent that there are three groups of putative class members for this purpose: those whose units experience no heat gain and therefore require no repairs; those whose units require common area repairs; and those whose units require separate area repairs. If it is the case that all units will fall into one of these three groups (as the parties can clarify on remand), the damages analysis for inspection and repair does not appear to be unmanageable.

With respect to purely individualized damages—i.e., property damage and loss of use—we share the trial court’s concern with the Association’s proposal to eliminate these from the litigation altogether. “It is clear under California law a party cannot, as a general rule, split a single cause of action because the first judgment bars recovery in a second suit on the same cause. [Citation.] As a result, by seeking damages only for

[inspection and repair], plaintiff[] would effectually be waiving, on behalf of the hundreds of class members, any possible recovery of [other] damages.” (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 464, fn. omitted.)

However, that putative class members may have individualized damages is generally not a reason to deny class certification. (*Brinker, supra*, 53 Cal.4th at p. 1022 [“ ‘As a general rule if the defendant’s liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages.’ ”].) As an initial matter, it is unclear whether many—or even any—putative class members would seek such damages. Even if a significant number did so, procedural tools could be used to manage the damages determination. For example, “the trial court could limit the class issues to liability . . . and allow each class member to use that judgment as the basis for an individual action to recover damages,” or “the court could divide the class into subclasses” based on the type of damages sought. (*Hicks, supra*, 89 Cal.App.4th at pp. 925–926.) Such a resolution would address the trial court’s legitimate concern that homeowners seeking individualized damages “must prove the entire case of liability all over again”; indeed, the purpose of class actions is to avoid just such a scenario. (*Sav-on, supra*, 34 Cal.4th at p. 340 [“Absent class treatment, each individual plaintiff would present in separate, duplicative proceedings the same or essentially the same arguments and evidence, including expert testimony. The result would be a multiplicity of trials conducted at enormous expense to both the judicial system and the litigants.”].)

### C. Causation

The trial court’s written order noted that “different factors affect the temperatures” in each unit. The court’s comments at the hearing explained: “We . . . have different reasons for heat problems in the different condominiums. In other words, we’ve got compass orientation issues, we have ducting issues and the type of building, all of which interjects different considerations for each individual putative class member and all lead to a different analysis conceivably of why there is a heating problem for that particular plaintiff.”

The Association's theory is that a number of different factors contribute to the heat gain. However, we are not persuaded that this presents substantial individualized issues. The implied warranty and fraudulent concealment claims are alleged against Mission Place only.<sup>5</sup> Respondents have not claimed Mission Place is only responsible for some, but not all, of the alleged causes of heat gain, or that the defect analysis will be different as to each of the alleged causes. Even if only some of the specific causes were found to be defective, the Association contends all putative class members are harmed by any one specific cause due to their liability for the cost of common area repair. The issue of causation, therefore, will only present an individualized issue with respect to those damages that result from causes the Association is not responsible for repairing. To the extent there are such damages, the manageability of the issue is a question for remand.

#### *D. Reliance*

##### *1. Awareness of Heat Gain Prior to Purchase*

In their opposition to the Association's motion for class certification, Respondents submitted evidence that four of the putative class members had actual knowledge about the heat gain prior to their purchase: two homeowners who rented their units prior to purchasing them; one whose sister lived in the Project, and whom the homeowner visited weekly, before the homeowner's purchase; and one who lived in a different unit in the Project before purchasing his current unit. The trial court noted that, with respect to the fraudulent concealment cause of action, there were "widely different fact patterns on reliance as to each owner" and as to the implied warranty of fitness, it may be necessary for each homeowner "to testify on notice sufficient to defeat (as defendants would have it) reliance on the warranty."

---

<sup>5</sup> The Association's fraudulent concealment claim against another group of Respondents was dismissed prior to the Association's second class certification motion. Although Respondents contend the Association nonetheless moved for class certification of the fraudulent concealment cause of action against this group of Respondents, the Association's moving papers identify the claim as against only Mission Place.

The Association argues it is entitled to prove reliance through a class-wide presumption and therefore the individualized issues should not defeat class certification.<sup>6</sup> The Association relies on *Vasquez v. Superior Court* (1971) 4 Cal.3d 800 (*Vasquez*). In *Vasquez*, the Supreme Court held reliance could, in certain cases, be proven on a class-wide basis: “Williston [12 Williston on Contracts (3d ed. 1970)] speaks in terms of a presumption: ‘Where representations have been made in regard to a material matter and action has been taken, in the absence of evidence showing the contrary, it will be presumed that the representations were relied on.’ . . . Whether an inference . . . or a presumption . . . of reliance arises upon proof of a material false representation we need not determine in this case. It is sufficient for our present purposes to hold that if the trial court finds material misrepresentations were made to the class members, at least an inference of reliance would arise as to the entire class. Defendants may, of course, introduce evidence in rebuttal.” (*Id.* at p. 814, fn. omitted; accord, *Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355, 363.)

As this quote from *Vasquez* confirms, such a class-wide presumption does not preclude Respondents’ ability to rebut the presumption. If Respondents show their rebuttal of this presumption will require substantial individualized determinations, this may be sufficient to defeat class certification. (See *Weinstat v. Dentsply Internat., Inc.* (2010) 180 Cal.App.4th 1213, 1235 (*Weinstat*) [“a defendant may defeat class certification by demonstrating that ‘an affirmative defense would raise issues specific to each potential class member and that the issues presented by that defense predominate over common issues’ ”]; see also *Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 668 [issue of reliance on misrepresentation required individualized proof where evidence showed potentially substantial number of putative class members may have known alleged misrepresentations were untrue].)

---

<sup>6</sup> The cases relied on by the Association involve misrepresentation claims. It is not clear whether the Association contends their analysis applies equally to its claim for breach of the implied warranty of fitness. We express no opinion on this issue as we find, in any event, some measure of individualized analysis will be required.

We agree with the trial court that Respondents presented evidence that this issue will require individualized rebuttal evidence with respect to some putative class members. What is unclear from the current record is how pervasive this fact pattern is. Respondents submitted evidence with respect to only four putative class members. “[T]he possibility that a defendant may be able to defeat the showing of an element of a cause of action ‘as to a few individual class members[,] does not transform the common question into a multitude of individual ones.’” (*Weinstat, supra*, 180 Cal.App.4th at p. 1235.) On remand, the parties and the trial court can explore the prevalence of this individualized issue.<sup>7</sup>

## 2. *Receipt of Written Disclosure*

As relevant to the fraudulent concealment claim, the trial court also noted, “[s]ome [putative class members] saw the written Disclosure, some did not.” The Association submitted evidence that it was Mission Place’s standard practice to provide the written disclosure to all homeowners who bought from Mission Place—369 of the putative class members. As Respondents have cited no contradictory record evidence, the issue of receipt of the written disclosure is susceptible to common proof for these putative class members.

This evidence does not apply to subsequent purchasers, however. The Association proposed a subclass of subsequent purchasers, which we discuss further below. The Association has made no representation or evidentiary showing that the issue of whether the disclosure was provided to these putative subclass members is susceptible to common proof, or whether it will need to be individually proven for each member of the proposed subclass. If the latter, it will be for the trial court to determine whether the individualized issue is susceptible to management as part of a class action.

---

<sup>7</sup> The Association also suggests this issue could be resolved by redefining the class to exclude homeowners who lacked justifiable reliance, but it has not suggested a new class definition. It may wish to do so on remand.

### E. *Proposed Subclasses*

With respect to the Association's proposed subclasses, the trial court found "the creation of subclasses does not eliminate issues, it just classifies them." The Association argues the trial court erroneously held the proposed subclasses had to resolve the issues relevant to the subclasses. The language is unclear, however; the trial court appears to mean the proposed subclasses did not resolve the *other* individualized issues. On remand, the trial court can reconsider and clarify its finding with respect to subclasses.

We note that the proposed *Zucker* subclass appears to be an appropriate mechanism to address the common, discrete issue of whether the claims of these putative class members are precluded by their participation in the prior litigation. We express no opinion as to the Association's argument regarding the merits of this issue, which is not relevant to its class certification motion.

More issues are relevant to members of the proposed subsequent purchaser subclass. For example, with respect to the fraudulent concealment claim, there is the potentially individualized issue noted above of whether they received the written disclosure prior to purchase. There is also an apparently common issue of whether Mission Place had reason to expect the disclosure would be conveyed to subsequent purchasers. (See *Geernaert v. Mitchell* (1995) 31 Cal.App.4th 601, 608.) With respect to the breach of implied warranty of fitness claim, there is a common question whether subsequent purchasers can bring this claim at all. (See *Burch, supra*, 223 Cal.App.4th at p. 1423 ["The general rule is that privity of contract is required in an action for breach of either express or implied warranty and that there is no privity between the original seller and a subsequent purchaser who is in no way a party to the original sale."].) Finally, the Association suggests that those subsequent purchasers who bought their units after the instant lawsuit was filed should stand in the shoes of the original homeowner for purposes of these claims. We express no opinion on this issue, but note it may be an additional issue relevant to a subset of the proposed subsequent purchaser subclass.

#### *IV. Benefit to Proceeding as a Class Action*

In addition to its finding that individual issues predominate, the trial court found there was no substantial benefit to proceeding as a class action: “Especially where [the Association] contends that it can obtain virtually all the relief to which it is entitled to repair common areas and take care of what [the Association] terms a project-wide problem, certification is not warranted.” We disagree. The Association represented at the trial court hearing that approximately half of the units would require common area repair. The remaining half would require repair that the Association potentially lacks standing to obtain. Absent a determination of the Association’s standing, the fact that the Association believes it has standing to obtain all relief sought—something Respondents have not conceded—is not a sufficient basis to conclude class certification is not warranted. While it remains in the trial court’s discretion, the trial court may choose to resolve the question of the Association’s standing on remand before returning to class certification.

#### *V. Conclusion*

We will reverse and remand to the trial court the question of class certification. On remand, the trial court may choose to resolve the question of the Association’s standing, as we note above. If the trial court instead proceeds directly to the question of class certification (or if it has resolved the question of standing and class certification remains a live issue), the trial court should resolve the outstanding issues we have identified: the pervasiveness and manageability of any individualized damages issues (see part III.B); the manageability of any individualized issues relating to damages that result from causes the Association is not responsible for repairing (see part III.C); the pervasiveness of the individualized reliance evidence (see part III.D.1); whether the issue of the subsequent purchasers’ receipt of the written disclosure is susceptible to common proof (see part III.D.2); and whether the proposed subclasses will be a manageable tool for resolving the issues specific to the respective subclasses (see part III.E). The trial court should then determine, in light of the resolution of those issues and our analysis

above, whether common or individual issues predominate and any other issues relevant to the class certification analysis.

#### DISPOSITION

The portion of the appeal challenging the order denying class certification with respect to the Association's seventh cause of action is dismissed. The order denying class certification with respect to the sixth and eighth causes of action is reversed and remanded for proceedings consistent with this opinion.

---

SIMONS, Acting P.J.

We concur.

---

NEEDHAM, J.

---

BRUINIERS, J.