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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JOHN MAHONEY, Plaintiff and Appellant, v. EXTRA SPACE STORAGE, INC., et al. Defendants and Respondents.	G047163 (Super. Ct. No. 30-2011-00449789) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Kim Garlin Dunning, Judge. Affirmed.

Lakeshore Law Center and Jeffrey Wilens for Plaintiff and Appellant.

Sheppard, Mullin, Richter & Hampton, Robert S. Beall, Karin Dougan Vogel, and Ruben D. Escalante for Defendants and Respondents.

* * *

Plaintiff John Mahoney brought this class action suit against Extra Space Storage, Inc., and Extra Space Management, Inc., (collectively, Extra Space). Extra Space offers self-storage units. When a tenant defaults on rent, Extra Space may foreclose on and auction the property in the storage unit pursuant to the procedures set forth in the California Self-Service Storage Facility Act (Self Storage Act). (Bus. & Prof. Code, § 21700 et seq.)[1] Mahoney contends Extra Space's procedures for foreclosing on and auctioning property do not comply with the Self Storage Act.

The trial court denied Mahoney's motion for class certification. It reasoned that individual issues will predominate due to each tenants' need to prove individualized damages and the myriad factual issues associated with Extra Space's affirmative defense that the tenants abandoned their property. We affirm.

FACTS

Mahoney rented a storage unit at Extra Space, storing CDs worth, by his own estimation, about $100. Mahoney failed to make a rent payment and Extra Space initiated its auction procedures.

Extra Space's first step was to mail a preliminary lien notice to Mahoney on August 2, 2010, as required by section 21703. Mahoney contends the preliminary lien notice failed to meet the requirements of section 21703 in two ways. First, Mahoney claims it did not accurately state the amount owed. It stated he owed $69, whereas the line item amounts added up to only $60. Next, the preliminary lien notice stated Mahoney's right to use the storage space would terminate if he did not pay in full "within 14 days from [the date of the] Notice," which allegedly failed to comply with the requirement in section 21703 that the preliminary lien notice specify the exact date. The

[1] All statutory references are to the Business and Professions Code unless otherwise stated.

preliminary lien notice contains a section where the tenant may acknowledge by signature that the property in the storage unit has been abandoned. Mahoney apparently did not so acknowledge.

After Mahoney did not pay, Extra Space mailed a notice of lien and foreclosure to him on August 21, 2010. The notice of lien again was allegedly off by $9 in violation of section 21705, subdivision (b)(1)(B), which requires the notice of lien to state the current amount of the lien. In addition, the notice of lien stated that in order to avoid the lien sale, Mahoney had to pay the balance owed in cash or with a credit card or certified funds. This allegedly violated sections 21705 and 21709, which permit a tenant to stop the foreclosure process by paying "the total sum due" with no restriction on the manner of payment. The notice of lien indicates that the tenant may stop the auction process by filling out a section at the bottom of the lien notice entitled "Declaration of Opposition to Lien Sale," which would require Extra Space to file a lawsuit. Mahoney did not fill out the "Declaration of Opposition to Lien Sale."

After Mahoney still did not pay the amount due, Extra Space placed an advertisement in the Torrance Daily Breeze, which ran on September 15, 2010 and September 22, 2010. Mahoney alleges the Torrance Daily Breeze is published in Torrance, California, which is in the Los Angeles County Superior Court Southwest Judicial District. The lien sale was to be held in Long Beach, California, which is in the south judicial district. This allegedly violated section 21707, which requires the newspaper advertisement to be published in the same judicial district as the advertised location of the lien sale.

On September 29, 2010, Extra Space conducted the auction of Mahoney's property. There were no bidders for his property so Extra Space's manager took the two bags into his office and viewed the contents. The record is unclear as to the disposition of Mahoney's property, but according to Mahoney's brief, the bags of CD's were trashed.

At various points throughout the notice and foreclosure process, Extra Space left voice messages and at one point spoke with Mahoney regarding his overdue account, informing him that his property would be put up for auction if the account was not made current. At least one of those messages was left while Mahoney was free to remove his property.

Mahoney then filed a class action lawsuit against Extra Space, alleging causes of action under section 17200, conversion, and negligence. The class was defined to be "[a]ll persons who contracted with Defendants to rent storage space at a storage facility in California and whose property was sold or discarded by Defendants on or after February 11, 2007."

Defendants answered, raising affirmative defenses of, among other things, abandonment and setoff.

As part of the discovery process, Extra Space produced 292 tenant files containing foreclosures, randomly selected from 23 facilities. Mahoney's counsel was permitted a limited review of these files. According to counsel, with just a few exceptions, all of the preliminary lien notices failed to specify the exact date when the tenant must pay to stop the foreclosure process. Out of the 292 files, 283 of the notices prohibited payment by check. And in 218 of the files the preliminary lien notices overstated the amount due.

Mahoney also obtained information from the Torrance Daily Breeze and discovered that of the 2,000 advertisements for auctions placed by Extra Space, 1,200 were for auctions outside the southwest judicial district.

Mahoney moved to certify the class. During oral argument it was clear the trial court had three principal concerns. First, the court was concerned about individual issues predominating in ascertaining each individual's damages. Second, the court was concerned that the affirmative defense of setoff (i.e. rent owed) would create predominant

individual issues. And third, the court was concerned the affirmative defense of abandonment would create predominant individual issues.

The trial court denied the motion. The written order states, "The Court finds there is no ascertainable class. The proposed class definition is far too overbroad. [¶] The Court finds there is no well-defined community of interest. Resolving the issues in dispute here (e,g. Plaintiff's claims, Defendants' affirmative defenses, the existence and cause of harm, entitlement to relief, fact and extent of injury) requires highly individualized inquiries for every putative class member, Plaintiff failed to propose and the Court cannot find an acceptable manner in which to effectively manage the foregoing issues in a class action setting. [¶] The Court finds there are no substantial benefits from certification that render proceeding as a class superior to the alternatives. This is a situation where individual actions, including small claims actions, are vastly superior to a very unwieldy class action." Mahoney appealed.

DISCUSSION

Standard of Review

"Trial courts have discretion in granting or denying motions for class certification because they are well situated to evaluate the efficiencies and practicalities of permitting a class action. (*Sav–On* [*Drug Stores, Inc. v. Superior Court* (2004)] 34 Cal.4th [319,] 326 . . . .) Despite this grant of discretion, appellate review of orders denying class certification differs from ordinary appellate review. Under ordinary appellate review, we do not address the trial court's reasoning and consider only whether the result was correct. [Citation.] But when denying class certification, the trial court must state its reasons, and we must review those reasons for correctness. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435–436 . . . .) We may only consider the reasons stated by the trial court and must ignore any unexpressed reason that might support the

ruling." (*Knapp v. AT&T Wireless Services, Inc.* (2011) 195 Cal.App.4th 932, 939 (*Knapp*).)

"We will affirm an order denying class certification if any of the trial court's stated reasons was valid and sufficient to justify the order, and it is supported by substantial evidence. (*Sav–On*[*Drug Stores, Inc. v. Superior Court*], *supra*, 34 Cal.4th at pp. 326–327; see also *Kaldenbach v. Mutual of Omaha Life Ins. Co.* (2009) 178 Cal.App.4th 830, 844 ['We may not reverse, however, simply because *some* of the court's reasoning was faulty, so long as *any* of the stated reasons are sufficient to justify the order.'].) We will reverse an order denying class certification if the trial court used improper criteria or made erroneous legal assumptions, even if substantial evidence supported the order." (*Knapp, supra*, 195 Cal.App.4th at p. 939.)

General Class Certification Principles

"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. [Citation.] 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." (*Sav–On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 (*Sav–On*).)

The question of class certification is essentially procedural and does not involve the legal or factual merits of the action. (*Sav–On, supra,* 34 Cal.4th at p. 326.) The ultimate question in ruling on a class certification motion is whether the issues which may be adjudicated as a class, when compared with the issues which must be adjudicated

individually, are sufficiently numerous or substantial to make a class action advantageous to both the litigants and the judicial process. (*Ibid.*)

"In examining whether common issues of law or fact predominate, the court must [not only] consider the plaintiff's legal theory of liability," but also defendant's affirmative defenses, "because a defendant may defeat class certification by showing 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." (*Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440, 1450; see also *Gerhard v. Stephens* (1968) 68 Cal.2d 864, 913.)

The Trial Court Did Not Abuse Its Discretion in Determining the Affirmative Defense of Abandonment Created Predominant Individual Questions

As noted above, in denying the motion, the court was principally concerned with individual questions predominating over common questions with regard to proof of damages, defendants' right to setoff, and the affirmative defense of abandonment. We agree with Mahoney that the court's concerns about damages are not a sufficient basis for denial of class certification. (*Sav-on*, *supra*, 34 Cal.4th at p. 333 ["'a class action is not inappropriate simply because each member of the class may at some point be required to make an individual showing as to his or her eligibility for recovery or as to the amount of his or her damages'"].) Nonetheless, we must affirm if any of the court's stated reasons are adequate, and its reasons associated with the affirmative defense of abandonment are sufficient.

"Abandonment is defined as the 'voluntary giving up of a thing by the owner because he no longer desires to possess it or to assert any right or dominion over it and is entirely indifferent as to what may become of it or as to who may thereafter possess it.'" (*Martin v. Cassidy* (1957) 149 Cal.App.2d 106, 110.) Abandonment of property requires both nonuse and the intent to abandon. (*Gerhard v. Stephens*, *supra*, 68

Cal.2d at p. 889.) Before an abandonment may be found it is necessary to establish nonuse accompanied by "'"unequivocal and decisive acts"'" showing an intent to abandon. (*Id.* at p. 890.) "[T]he owner's nonuse[] itself may under some circumstances constitute such an act. 'Where nonuse[] is evidence of an abandonment of a right, the question is one of intention, depending on the circumstances . . . .'" (*Id.* at pp. 890-891.) Ultimately, "'[a]bandonment is a question of intention, to be determined only upon an investigation of all the facts and circumstances, and the trier of fact is ordinarily the exclusive judge of the existence of the elements thereof, including the cardinal element of intention.'" (*Martin, supra*, 149 Cal.App.2d at p. 111.) Where the defense of abandonment raises predominant individual issues, denial of class certification is proper. (*Gerhard, supra*, 68 Cal.2d at p. 913 [denying class certification due to predominant individual issues associated with the defense of abandonment].)

Mahony contends abandonment is no defense to a violation of the Self Storage Act. He argues, "Where the Legislature has deemed it appropriate to create 'exceptions' to a regimented set of procedures for forfeiture of premises or property, it has specifically created that exception in the body of the law." He then points to certain examples, such as Civil Code §§ 1951.2 and 1951.3, which prescribe procedures for deeming leased real property abandoned, and Civil Code § 798.61, which prescribes procedures for deeming a mobile home abandoned. We draw the opposite conclusion. The fact that the Legislature has seen fit to specifically regulate the defense of abandonment in other statutory schemes, but not in the Self Storage Act, suggests the Legislature intended the common law to apply. (See *California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 297 ["As a general rule, '[u]nless expressly provided, statutes should not be interpreted to alter the common law, and should be construed to avoid conflict with common law rules. [Citation.] "A statute will be construed in light of common law decisions, unless its language '"clearly and

unequivocally discloses an intention to depart from, alter, or abrogate the common-law rule concerning the particular subject matter . . . .”””””].)

Nor are we persuaded that recognizing a common law abandonment defense would “undermine the legislative intent” of the Self Storage Act. Mahoney is apparently concerned that an abandonment defense would permit storage space landlords to bypass the auction procedures of the Self Storage Act and simply claim abandonment. Relying on some vague theory of abandonment would be quite risky, however, as abandonment must be shown by ““unequivocal and decisive acts”” showing an intent to abandon. (*Gerhard, supra*, 68 Cal.2d at p. 890.) And to the extent the landlord can make that heightened showing, we perceive no policy reason to preclude the defense. If the tenant has truly abandoned the property, there is no reason to extend the tenant the protection of the auction restrictions in the Self Storage Act.

Here, there is at least prima facie evidence suggesting abandonment. Assuming Mahoney’s experience is representative of the class, the tenants received both written notices and phone calls warning them about the late rent payment and the consequences of failing to cure the default. And each tenant had an opportunity to block the auction by filling out the “Declaration of Opposition to Lien Sale.” A tenant’s inaction in the face of multiple warnings and failure to stop the auction with a simple declaration suggests abandonment. This suggestion, however, may not be conclusive, and thus the parties would have to explore the circumstances of each tenant to determine whether the tenant intended abandonment. Some tenants may admit abandoning the property. Others may deny it, but circumstantial evidence could rebut such denials. Still others may never have received the notices and phone calls or have faced other circumstances rebutting any suggestion of abandonment. In short, the approximately 13,000 auctions subject to the class action would require 13,000 individualized inquiries.

Mahoney counters by noting that the preliminary lien notice includes a section where a tenant can acknowledge by signature that the property in the storage unit

has been abandoned. Mahoney concludes that determining whether the tenant abandoned the property will be as easy as reviewing each tenant's file to see if the tenant signed the acknowledgment of abandonment. We are not persuaded. Tenants intent on abandoning their property are not likely to bother signing an acknowledgment of abandonment and sending it back to Extra Space. Naturally, therefore, Extra Space would be afforded an opportunity to demonstrate other circumstances tending to show abandonment. Given this prospect, the court did not abuse its discretion in determining that individual issues would predominate and thus denying class certification.

DISPOSITION

The court's order denying class certification is affirmed. Defendants shall recover their costs on appeal.

IKOLA, J.

WE CONCUR:

ARONSON, ACTING P. J.

FYBEL, J.