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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

FERNANDO MARTINEZ,

Plaintiff and Appellant,

v.

STEPHEN STRATTON O'HARA et al.,

Defendants and Respondents.

G050710

(Super. Ct. No. 30-2012-00614932-
CU-FR-CXC)

O P I N I O N

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

Offices of Pavone & Fonner, Kimberley Fonner and Benjamin Pavone for Plaintiff and Appellant.

Teeple Hall, Grant G. Teeple and Frederick M. Reich for Defendants and Respondents.

* * *

Plaintiff Fernando Martinez appeals from the trial court's order denying his motion for class certification against defendants Stephan Stratton O'Hara formerly known as Stephen Jones O'Hara (O'Hara), Career Solutions and Candidate Acquisitions (CSCA), and Professional Realty Council, Inc. Plaintiff contends, among other things, that the court erred in finding he had failed to establish an ascertainable class and that his claims were not typical of the putative class. We disagree and affirm the order.

FACTS AND PROCEDURAL BACKGROUND

In 2012, plaintiff, a high school graduate and college student working at a McDonald's restaurant, posted his resume on Monster.com, an Internet-based employment search service. O'Hara sent plaintiff an e-mail, stating he represented CSCA, "a Talent Acquisition firm specializing in the real estate sector of the Financial Services Industry" (boldface omitted), which had "been retained by a large company . . . seeking recent Business & Communications Majors for Interns and Full Time careers." O'Hara believed plaintiff "might be a fit for the company we represent" based on his Monster.com resume. He invited plaintiff to visit CSCA's Web site and apply if interested. Both the e-mail and the Web site provided anticipated starting salaries of \$35,000, as an intern or a licensed agent in real estate.

Plaintiff read the Web site and completed the online application. After a few days, he called the number on the CSCA Web site and spoke to O'Hara. O'Hara told plaintiff his "scores were absolutely . . . off the charts." O'Hara had plaintiff complete an assessment test and asked plaintiff to send a resume and photograph of himself to O'Hara's personal e-mail. Upon receiving the results of the assessment test, O'Hara called plaintiff to tell him how impressed he was with them and that he wanted to explain

them to him in person. They ultimately decided to meet at O'Hara's home, about 60 miles from where plaintiff was living, where they talked about plaintiff's various options.

O'Hara told plaintiff one option was to be placed with a broker, which was the position plaintiff had applied for. The downfall to that was it entailed a six-month process during which plaintiff would have to pay for and obtain a real estate license and go through a training program for which there were associated costs. The second option was for plaintiff to be part of CSCA, but that would not be up and running until 2013. The final option was for plaintiff to become O'Hara's assistant. O'Hara offered plaintiff the position because plaintiff said he needed money.

Plaintiff accepted the job as O'Hara's personal assistant for \$1,500 a month. They initially agreed plaintiff would work at O'Hara's home from 9:00 a.m. to 5:00 p.m., but the hours were flexible to allow plaintiff to work around his schedule at McDonald's. Later, O'Hara pressured plaintiff into quitting his job at McDonald's. Plaintiff agreed to their business relationship because he believed he would be enrolled in training programs that would no longer require him to go to O'Hara's home.

Around the third week of plaintiff's employment, O'Hara made sexual advances towards plaintiff and invited him to go with him on a gay cruise. Shortly thereafter, plaintiff wanted to end the personal relationship but still work for O'Hara. The employment relationship nevertheless ended as well.

Before giving plaintiff his final paycheck, O'Hara required plaintiff to sign a release agreeing: (1) it was plaintiff's personal decision to quit his job at McDonald's; (2) he had worked as an independent contractor; (3) he had resigned; (4) although he was owed \$750 at the time of resignation, cash advances reduced the amount to \$100; and (5) in exchange for a payment of \$525, plaintiff would (a) keep confidential all business and personal information related to O'Hara, a violation of which "would cause extreme exposure to various legal claims" and prosecution "to the fullest extent of the law," and

(b) “waive any past, present or future claim for damages” and fully release O’Hara and his companies from any claim or liability.

Plaintiff sued defendants in November 2012, asserting individual causes of action for rape (later dismissed), sexual harassment, fraud, Labor Code violations, and wrongful termination. After several amendments, plaintiff filed a fifth amended (operative) complaint in August 2013, alleging causes of actions for fraud, false advertising, unfair business practices, Labor Code violations, sexual harassment, and a request for alter ego findings. The cause of action for false advertising contained class action allegations that had not been pled in the prior complaints. Defendants moved to strike the class allegations from the operative complaint because plaintiff had not filed a motion for class certification and the allegations were insufficient.

Plaintiff moved for class certification in November 2013, proposing, among others, an ascertainable class comprised of California residents who were previously exposed to the approximately 20,000 generic e-mails sent out by defendants on Monster.com. Plaintiff argued he would be “an appropriate class representative” despite his sexual encounter with O’Hara because he had “traversed the length of O’Hara’s false advertising machinery,” his experience “simply emphasizes the dangers of false advertising,” his interest in stopping the false representations on the Web site aligned with those of other class members, and he had “lost money or property” as a result of those misrepresentations sufficient to merit standing.

Defendants opposed the motion in part on the grounds the proposed class was not ascertainable or numerous and plaintiff failed to show a community of interest. Additionally, plaintiff failed to describe any possible method to identify the approximately 20,000 persons comprising the proposed class, how much time and expense it would take, or whether it “may potentially involve privacy rights or other objections lodged by Monster.com, who is not a party to this lawsuit.” Further, plaintiff

had not demonstrated a sufficiently numerous class existed because he neither submitted the declarations of any “individual stating grounds for being a member of the class” nor “identif[ied] anyone else who is in the same or similar circumstances as he is.” Finally, defendants asserted there was no community of interest because the motion did not show there were other persons with similar damages, plaintiff’s claims were not “typical” as there was no evidence any other person had the same ones, and plaintiff failed to meet the adequacy of representation requirement because no evidence was presented that other potential class members would raise the same issues.

The court denied the motion for class certification, based in part on the lack of an ascertainable class or a representative with claims typical of the class. The denial of the certification motion rendered defendants’ motion to strike moot.

DISCUSSION

1. Appealability

Plaintiff contends an order denying class certification is appealable. We agree. In contrast to other interlocutory orders, “[a]n order denying class certification or decertifying a class is appealable because it “has the practical effect of disposing of the action between particular parties,” and “effectively (but not technically) end[s] the case because [it] serve[s] as a ‘death knell’ to the action, constituting a final order in practical terms.” (*Safaie v. Jacuzzi Whirlpool Bath, Inc.* (2011) 192 Cal.App.4th 1160, 1168.) “Although the individual plaintiff’s claims have not been resolved, a decertification order ‘virtually demolishe[s] the case as a class action’ and is ‘tantamount to a dismissal of the action as to all members of the class other than plaintiff.’” (*Ibid.*) Likewise, “denial of a class certification motion” also “‘end[s]’ the class case [and] dispose[s] of the class allegations.” (*Ibid.*)

2. *General Class Action Principles and Standard of Review*

Code of Civil Procedure section 382 authorizes a class action “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 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; *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 (*Sav-On*).

Trial courts “are ideally situated to evaluate the efficiencies and practicalities of permitting group action” and therefore are “afforded great discretion” in evaluating the relevant factors and in ruling on a class certification motion. (*Sav-On, supra*, 34 Cal.4th at p. 326.) “[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.”” (*Id.* at pp. 326-327.) In reviewing a ruling for substantial evidence, we do not reweigh the evidence and must draw all reasonable inferences supporting the court’s order. (*Id.* at p. 328.) Under this standard, “we must examine the trial court’s reasons for denying class certification,” keeping in mind that “[a]ny valid pertinent reason stated will be sufficient to uphold the order.” (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 436 (*Linder*).

3. *The Trial Court Properly Exercised its Discretion in Denying Class Certification*

3.1 *Ascertainable Class*

“Ascertainability is required in order to give notice to putative class members as to whom the judgment in the action will be res judicata.’ [Citation.] “Class members are ‘ascertainable’ where they may be readily identified without unreasonable expense or time by reference to official records. [Citation.]” [Citation.] In determining whether a class is ascertainable, the trial court examines the class definition, the size of the class and the means of identifying class members.” (*Lee v. Dynamex, Inc.* (2008) 166 Cal.App.4th 1325, 1334 (*Lee*)). “A class representative has the burden to define an ascertainable class” (*Sevidal v. Target Corp.* (2010) 189 Cal.App.4th 905, 918-919), but is “not required to identify individual class members” (*id.* at p. 918).

At the hearing on the certification motion, held over a year and a half after plaintiff initiated this lawsuit, plaintiff indicated his proposed class was the 20,000 people who “got an e-mail from [defendants].” The court refused to certify that class because plaintiff failed to show how the putative class members could be identified and located without unreasonable time and expense.

The court noted, “First of all, you need to get e-mail addresses,” which plaintiff could not get through defendants because the e-mails were not sent by him but rather had been transmitted through Monster’s Web site. Plaintiff acknowledged he “would have to go through Monster” and suggested “we could go into discovery and I could start sending subpoenas to Monster and start getting names and declarations. I mean, that is possible. It is not impossible, I don’t think.”

The court found this was “something that would have to have been done before [plaintiff] made a motion for class certification.” “I need something when you file your motion and your motion is heard that suggests it’s more likely than not or by preponderance of the evidence that it’s ascertainable. [¶] I don’t have anything from a

computer person. I don't have anything from anybody, from Monster, that says, yeah, we know exactly where these things go. [¶] . . . I'm assuming Monster.com doesn't have an extensive paper trail in the traditional sense because it's electronic medium. . . . [¶] So I don't know. Maybe their e-mail blast list changes every week, every 90 days. So how do you figure out who are the people who would be in your class?" Plaintiff admitted it would be "difficult to find the other 19,999 people that got this ad, some of them which may have responded, some of them which may have been bothered, some of which may have called or whatever they did."

The lack of evidence before the court supports its implied finding the class members were not ascertainable because they could not be ""readily identified without unreasonable expense or time by reference to official records."" (Lee, supra, 166 Cal.App.4th at p. 1334.) Plaintiff did not submit any declarations from Monster.com stating the company had such information or if it did, how anyone would have sorted out which of the 19,999 recipients had actually looked at the e-mail, which they would have to do in order to have likely been misled. (Davis-Miller v. Automobile Club of Southern California (2011) 201 Cal.App.4th 106, 121 [""we do not understand the UCL [Unfair Competition Law] to authorize an award for injunctive relief and/or restitution on behalf of a consumer who was never exposed in any way to an allegedly wrongful business practice""] (Davis-Miller).)

Plaintiff argues the court "used the wrong standard" in determining the proposed class was "incredibly overbroad" because it was not 'limit[ed] to people who actually acted on the e-mail'" and that plaintiff ""need[ed] to identify' the Monster.com e-mail recipients" who were triggered by the e-mail to act to their detriment. No error occurred.

Plaintiff is correct that ""[t]o state a claim under . . . the UCL . . . based on false advertising or promotional practices, "it is necessary only to show that 'members of

the public are likely to be deceived.”””” (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 312.) “A representative plaintiff need not prove that members of the public were actually deceived by the practice, relied on the practice, or suffered damages.” (*Davis-Miller, supra*, 201 Cal.App.4th at p. 121.) “Nonetheless, a class action cannot proceed for a fraudulent business practice under the UCL when it cannot be established that the defendant engaged in uniform conduct *likely to mislead the entire class.*” (*Ibid.*, italics added.) Plaintiff presented no evidence the e-mails had that capacity.

As the court observed, everyone receives annoying e-mails and “[p]robably a good chunk of those 20,000 people just hit delete.” Plaintiff admitted “[p]robably most of them didn’t look at that piece of particular spam” and some might have just been bothered by the e-mail. If most people deleted the e-mail or did not look at it, the sending of the e-mails could not constitute “conduct likely to mislead the entire class.” (*Davis-Miller, supra*, 201 Cal.App.4th at p. 121.) The court thus did not abuse its discretion in requiring plaintiff to identify a class of e-mail recipients who were likely to have been misled and in ultimately concluding the class was not ascertainable.

3.2 Plaintiff did not Have Claims Typical of the Class

The court ruled plaintiff’s claims were also not typical of the class. “[T]he purpose of the typicality requirement “is to assure that the interest of the named representative aligns with the interests of the class. [Citation.] “Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought.” [Citations.] The test of typicality ‘is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.’”” (*Johnson v. GlaxoSmithKline, Inc.* (2008) 166 Cal.App.4th 1497, 1509.)

The court found plaintiff did not meet this definition, as his “circumstances and situation appear . . . fairly unique. And I can say that with some confidence because I don’t have any declarations from anybody else to suggest that they . . . came to [O’Hara’s] condo or they went on a cruise or they were doing this, they were doing that. I have one plaintiff [in a lawsuit that is now in its second year]. [¶] . . . I can’t find that [plaintiff] is adequate, that his injuries are typical of the injuries of the class, because I have no idea . . . who else might be a class member [or] . . . what their injury might be.” The court’s findings are supported by the record.

Plaintiff contends the court erred in its analysis because “the typical claim shared by [plaintiff] and the class is that O’Hara’s Monster.com email and CSCA Web site contained false and misleading statements in violation of state law” and no individualized showing of class member reliance or injury is needed for class claims under the UCL false advertisement law. But again, a class action under the UCL requires a plaintiff to show defendant’s “uniform conduct [was] likely to mislead the entire class.” (*Davis-Miller, supra*, 201 Cal.App.4th at p. 121.) That cannot be done absent the existence of other class members who were likely to have been misled and typicality cannot be demonstrated without evidence of what their claims might be.

3.3 Conclusion

Because the lack of an ascertainable class and typicality of claims were valid reasons to deny certification of the class (*Linder, supra*, 23 Cal.4th at p. 436), we need not discuss plaintiff’s remaining arguments or challenges to defendants’ brief.

DISPOSITION

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

RYLAARSDAM, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.