Judge Robert E. Olson
October 9, 2020
Motions Calendar

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR WHATCOM COUNTY

SCOTT HILLIUS, et al.,

Plaintiffs,

v.

18 PARADISE LLP et al.,

Defendants.

No. 20-2-00701-37

MOTION FOR CLASS ACTION CERTIFICATION

I. INTRODUCTION

This action concerns a golf course and surrounding neighborhood of 600 residences that was developed as the Homestead Planned Residential Development ("PRD") in Lynden. Although the Homestead PRD was formed in 1992 and finished by 2013, the homeowners still do not have control over their own homeowners association and are being charged more than $675,000 of maintenance fees per year to maintain 8 acres of common space and 200 streetlights.

The current owner, defendant 18 Paradise LLP ("18 Paradise"), was not even the developer. It purchased the golf course in 2013 after the Homestead PRD was complete but refuses to relinquish control over the homeowners association because of the profits it reaps from the maintenance fees.

This action seeks an order compelling 18 Paradise to turn over the common areas and control of the association and to account for improper profits it has obtained. The eight named plaintiffs ask this Court to certify this case as a class action so that a single decision can conclusively resolve the issues.

DAVIS LEARY PLLC
3233 56TH PL SW
Seattle, WA 98116
206-578-5800

II. FACTS

In 1992, the City of Lynden enacted a Planned Residential Development ("PRD") ordinance that allowed the coordinated development of large areas in phases over many years. The ordinance has since been replaced, and the version in effect at the time is attached as Exhibit 1. Immediately after the ordinance was enacted, James Wynstra submitted an application through his company Homestead Northwest, Inc. ("HNW") to develop 250 acres of farmland into a golf course and surrounding residential neighborhood. Exhibit 2. Altogether, HNW planned to develop over 600 residential units in phases over 5-15 years. *Id.* at ¶ 4.

The Ordinance required each PRD to have a homeowners association ("HOA") and restrictive covenants. Exhibit 1 at 19.29.020 and 19.29.090. HNW began the development by recording the Maberry Plat of 33 parcels ("Maberry 1") on June 24, 1992. Exhibit 3. Along with the plat, HNW also recorded the Master Declaration of Covenants, Conditions, Restrictions and Reservations for Homestead / a Planned Residential Development. Exhibit 4. Because HNW did not know how the rest of the PRD would be developed, the Declaration applied only to Maberry 1, but it allowed HNW to add other plats as they were recorded. Exhibit 4 at Exhibit B and Article III.

Formation of the HOA presented a number of challenges for HNW. If the HOA were formed immediately, then the HOA might interfere with future phases of the PRD. Similarly, if the HOA were formed, then purchasers of future phases would be denied a voice in the formation of their own HOA. To avoid these problems, HNW adopted the system widely used in condominiums and retained declarant control over the HOA in the Declaration while the PRD was being completed.

The Declaration states that the declarant would retain ownership of the common areas, and that as "long as the Declarant or its successors or assigns other than Parcel Owners retains ownership of the Common Open Space, the Association shall operate in advisory capacity only to the Declarant." Exhibit 4 at ¶ 4.3. Although the Declaration does not expressly state when the Declarant would transfer the common areas and relinquish declarant control, the Declaration sets forth specific procedures for the transfer and detailed provisions for the HOA. Exhibit 4 at ¶ 3.10, Article IV. Wynstra confirmed to many

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3233 56TH PL SW
Seattle, WA 98116
206-578-5800

purchasers that the common areas and control of the HOA would be turned over to the owners upon completion of the PRD.

The Declaration provided that while HNW retained ownership of the common areas, each parcel would be assessed a monthly fee of $25 for maintenance. Exhibit 4 at ¶ 3.5. Although the Declaration permitted HNW to increase the maintenance fee by up to 5% each year, HNW left the fee at $25 for more than a dozen years.

The Homestead PRD progressed regularly until the mid-2000's, when HNW began to experience financial problems. By 2005, those problems had progressed to the point where HNW's creditor's we able to compel it to increase the maintenance fee for the first time, and the housing crisis of 2007 followed soon thereafter. At the same time, the Washington Department of Financial Institutions opened a securities investigation of HNW, and by the end of the decade, HNW was forced to close its doors.

HNW sold its interest in the Homestead PRD to Raspberry Ridge LLC in 2010 for $7.2 million in a court-ordered sale. Raspberry Ridge completed the development and/or sold off the unfinished portions of the project, and then sold the remaining property to defendant 18 Paradise in 2013 for $2.55 million.

When 18 Paradise purchased the golf course, the Homestead PRD was complete. However, 18 Paradise refused to transfer the common areas or relinquish its declarant rights. Instead, 18 Paradise treated the maintenance fee as an income stream and proceeded to increase the fee from $30 to $36 by 2019. Then in August 2019, 18 Paradise exercised its declarant rights to unilaterally amend the Declaration and impose special assessments in addition to the maintenance fee, which was immediately followed by a special assessment of $83 per parcel. In December 2019, 18 Paradise announced that it was retroactively increasing the maintenance fee by 5% for every year since 1992, and that the new monthly fee would be $93. 18 Paradise currently is charging Homestead owners over $600,000 per year in maintenance fees.

18 Paradise's resistance to turning the common areas and HOA control over to the homeowners is something of a mystery. In response to complaints from Homestead owners, 18 Paradise provided homeowners with its "Homestead Farms Golf Club Joint Maintenance Fees Profit & Loss, January through December 2019" (the "P&L"). Exhibit 5. According to the P&L, 18 Paradise incurred

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3233 56TH PL SW
Seattle, WA 98116
206-578-5800

$346,065.93 of expenses maintaining the common areas in 2019, and received only $289,547.90 in fees, for an operating loss of $56,518.04. *Id.* Although revenues should exceed $600,000 in 2020 with the increase in the fee to $93, 18 Paradise also provided homeowners with its "Homestead Farms Golf Club Joint Maintenance Fees 2020 Budget" (the "Budget"). Exhibit 6. The Budget predicts $656,027.00 of income in 2020, but it also projects expenses of $652,095.00, leaving a scant $3,932.00 of profit. *Id.*

Plaintiffs believe that the P&L and Budget are pure fantasy, but according to 18 Paradise's own representations, it receives no benefit from the maintenance fees. It bears pointing out that 18 Paradise has no other interest in the residential properties of the Homestead PRD. The golf course always has been and remains completely separate from the residential properties. Homeowners do not even receive a discount on purchases from the golf course.

Plaintiffs commenced this action in this Court on May 29, 2020, and one of the defendants promptly removed it to federal court. The federal court subsequently remanded the case to this Court. During that period, plaintiffs created a website to inform Homestead owners about the lawsuit and to seek their input. To date over 200 owners have expressly approved this action and joined in the request that it proceed as a class action. Davis Declaration at ¶ 9.

III. ISSUE PRESENTED

Should the Court certify this action as a class action?

IV. EVIDENCE RELIED ON

1. Declaration of Matthew Davis;
2. Files and records in this action.

V. ARGUMENT

Cases like this one are the reason why class actions exist. Numerous people are affected in the same way by the conduct of specific defendants pursuant to the same instrument. The decision for any individual would be ineffective if it did not apply to everyone affected, and the relief sought does not require any individualized determinations. A class action is the only way this case can be decided.

Pursuant to CR 23, class action certification is a two-step process. First, the Court must determine that the prerequisites for class action certification have been established under CR 23(a). Once that

DAVIS LEARY PLLC
3233 56TH PL SW
Seattle, WA 98116
206-578-5800

determination has been made, the Court must determine that a class action is appropriate in light of the specific allegations of this case pursuant to CR 23(b).

A. <u>This Case Meets the CR 23(a) Prerequisites for a Class Action</u>.

In general, "One or more members of a class may sue or be sued as representative parties on behalf of all" if four criteria are all satisfied.

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

CR 23(a). All of these requirements are amply satisfied here.

1. Numerosity.

Class action certification is appropriate when the action affects the rights of numerous people and separate actions by all of them would be impractical.

> A class should only be certified where a plaintiff demonstrates that the proposed class "is so numerous that joinder of all members is impracticable." CR 23(a)(1). Although plaintiffs seeking to certify a class need not show that it would be impossible to join all of the members of the proposed class, they must show that it would be "extremely difficult or inconvenient." *Hum v. Dericks*, 162 F.R.D. 628, 634 (D.Haw.1995). As a general rule, where a class contains at least 40 members, federal courts have recognized a rebuttable presumption that joinder is impracticable. *See Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir.1986), *cert. denied*, 479 U.S. 883, 107 S.Ct. 274, 93 L.Ed.2d 250 (1986); *Chandler v. Southwest Jeep-Eagle, Inc.*, 162 F.R.D. 302, 307 (N.D.Ill.1995). *Accord*, 1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions*, § 3.05 (3d ed.1992). Other sources have stated that a class having between 25 to 30 members raises a presumption of impracticability of joinder. *See, e.g., EEOC v. Printing Indus. of Metro. Washington, D.C., Inc.*, 92 F.R.D. 51, 53 (1981) (citing 1 Newberg § 1105b, at 174).

Miller v. Farmer Bros. Co., 115 Wn.App. 815, 821, 64 P.3d 49 (2003). The proposed class in this case includes the owners of 614 different legal parcels. Exhibit 7. If only half of the affected homeowners brought actions over the Declaration and maintenance fee, the Whatcom County Superior Court would be buried in the process. The numerosity requirement is met.

2. Common Questions of Law and Fact.

The commonality requirement of CR 23(a)(2) requires only that there be some core common questions of fact or law.

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3233 56TH PL SW
Seattle, WA 98116
206-578-5800

> A party seeking to certify a class must demonstrate that "there are questions of law or fact common to the class[.]" CR 23(a)(2). Certification under CR 23(a)(2) is not justified merely because class members share a legal theory of recovery. In addition, some courts have expressed reluctance to certify a class where individualized proof is required to resolve an allegedly common issue, *see Kurczi v. Eli Lilly & Co.*, 160 F.R.D. 667, 673 (N.D.Ohio, 1995), or when the resolution of a common legal issue is dependent upon highly specific factual and legal determinations that will be different for each class member. *See Liberty Lincoln*, 149 F.R.D. at 76.
>
> It is not necessary, however, that the shared questions of law or fact be identical. *Brown*, 6 Wash.App. at 255, 492 P.2d 581. Rather, commonality exists when the legal question " 'linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated.' " *Yslava v. Hughes Aircraft Co.*, 845 F.Supp. 705 (D.Ariz.1993) (quoting *Wakefield v. Monsanto*, 120 F.R.D. 112, 116 (E.D.Mo.1988)). The requirement is met if the "course of conduct" that gives rise to the cause of action affects all the class members and at least one of the elements of the cause of action is shown by all class members. *Lockwood Motors, Inc. v. Gen. Motors Corp.*, 162 F.R.D. 569, 575 (D.Minn.1995).

Miller v. Farmer Bros. Co., 115 Wn.App. 815, 824, 64 P.3d 49 (2003). Here that requirement is met because complete commonality exists between the claims of every class member.

The only distinction between the claims of the class members is when they acquired their property. However, the parcels and units within the PRD could not have existed before the PRD was formed, and this action concerns only conduct within the relevant statutes of limitations. Every class member has exactly the same claim for exactly the same conduct by the defendants. The commonality requirement is satisfied.

3. Representative Claims

For that reason, the claims of the named plaintiffs are entirely representative of the claims of the other class members. Under Washington law, "Typicality is satisfied if the class members' claims all arise from the same course of conduct and are based on the same legal theory." *Doe L v. Pierce County*, 7 Wn.App.2d 157, 203, 433 P.3d 838 (2019). The Complaint identifies a single unified course of conduct by the defendants and a single set of claims applicable to all class members. The typicality requirement is more than met.

4. Adequate Representation.

The named plaintiffs in a class action must adequately represent the class as a whole. That determination requires that the representative plaintiffs have the same claims as other class members and not have any adverse interests.

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3233 56TH PL SW
Seattle, WA 98116
206-578-5800

> In evaluating the applicability of CR 23(a)(4), the prerequisite that the interests of a purported class be fairly and adequately represented, one of the essential factors to be considered is the presence or absence of adversity within the asserted class. Conflicting or antagonistic interests among members of the alleged class in the subject matter of the litigation, necessitating a determination of priorities between class members, may render a class action an improper vehicle for seeking vindication of a given right. Anderson v. Moorer, 372 F.2d 747 (5th Cir. 1967); 7 C. Wright & A. Miller, Federal Practice and Procedure 638 (1972).

DeFunis v. Odegaard, 84 Wn.2d 617, 622, 529 P.2d 438 (1974). In this case, nine separate homeowners from different parts of the Homestead PRD have chosen to be representative plaintiffs, ensuring that the interests of all Homestead homeowners are represented. The named plaintiffs have exactly the same claim as every other class member and no adverse interests. Plaintiffs have secured the services of two established law firms to ensure adequate legal representation.

B. Class Action Certification Is Appropriate Under CR 23(b).

Once a Court determines that the prerequisites of CR 23(a) are satisfied, it must decide whether a class action is appropriate for the specific facts of the action under CR 23(b).

> An action may be maintained as a class action if the prerequisites of section (a) are satisfied, and in addition:
>
> (1) The prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest; or
>
> (2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:
>
> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
>
> (D) the difficulties likely to be encountered in the management of a class action.

CR 23(b). All three criteria are satisfied here.

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3233 56TH PL SW
Seattle, WA 98116
206-578-5800

1. CR 23(b)(1), Risk of Inconsistent, Varying or Dispositive Decisions.

"Classes certified under CR 23(b)(1) are designed to avoid prejudice to the defendant or absent class members." *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn.App. 245, 251, 63 P.3d 198 (2003). For example, an action that primarily seeks individualized awards of damages is not suitable for a class action because the individual interests of each class member are not adequately protected. *Id.* at 253. At the same time, if separate actions might result in "differing standards of conduct" for the defendants, class action certification is necessary to prevent uncertainty and prejudice to the defendants. *Smith v. Behr Process Corp.*, 113 Wn.App. 306, 321, 54 P.3d 665 (2002).

This action seeks an accounting and return of excess maintenance fees, but that claim is not individualized. Every homeowner is assessed the same maintenance fee, and every homeowner would be entitled to exactly the same refund for any given period. The primary relief sought is an order compelling 18 Paradise to convey the common areas to a homeowners association and termination of the maintenance fee. Those orders necessarily would apply to and determine the rights of every Homestead homeowner.

2. CR 23(b)(2), Conduct Affecting the Class as Whole.

A class action is appropriate when the defendant itself acted "in a way generally applicable to the class" and the action seeks injunctive or declaratory relief. *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 189, 157 P.3d 847 (2007). An action may still qualify under CR 23(b)(2) if it seeks monetary relief in addition to an injunction as long as the monetary relief does not predominate. *Nelson v. Appleway Chevrolet, Inc.*, 129 Wn.App. 927, 947-48, 121 P.3d 95 (2005). The Declaration and its amendments applied equally to every class member, and every class member was charged the same amount for the same reason. This action seeks injunctive relief to compel the transfer of the common areas to an association and declaratory relief concerning the meaning of the Declaration.

3. CR 23(b)(3), Common Question of Fact and Law Predominate.

The facts and law relevant to this case are exactly the same for every class member. Every fact discussed in the factual section above applies to the claim of every homeowner, and every legal theory pled in the Complaint is asserted on behalf of each class member. It is difficult to imagine how individual

DAVIS LEARY PLLC
3233 56TH PL SW
Seattle, WA 98116
206-578-5800

class members could even bring their own actions for the relief sought in this case. An order allowing a single homeowner to create an HOA would be meaningless. For that reason, no other homeowner has taken any legal action, and this class action would not interfere with any other pending actions. Although the class of more than 600 homeowners is numerous, every class member owns property in a confined area and can be easily identified.

This action presents one of those rare cases where the proposed class already self-identifies as a class. The class members are all residents of the Homestead Golf Course community, which forms a distinct neighborhood within Lynden. Deciding this case as anything other than a class action would defy common sense.

C. The Court Should Make Appropriate Orders Under CR 23(d).

To ensure the orderly prosecution of this case, the Court should enter orders identifying the class, providing for notice, and otherwise establishing procedures for the case.

1. Class Definition and Identity.

Although all of the relevant properties are within the Homestead PRD, the PRD itself also includes the golf course, making it unsuitable for class definition purposes. However, the Declaration as amended applies only to the properties relevant to this action. Moreover, the maintenance fee is assessed pursuant to the Declaration. Plaintiffs therefore request that the Court certify the following class:

> All owners of a fee interest in any real estate that is subject to the the Master Declaration of Covenants, Conditions, Restrictions and Reservations for Homestead / a Planned Residential Development recorded on June 24, 1992 under Whatcom County Recording Number 920624017 including any amendments thereto.

As set forth above, the identity of every potential class member can be identified from publicly recorded documents, and a complete list is set forth in Exhibit 8. The Court therefore should further order that the initial members of the Class shall be the persons identified in Exhibit 8, subject to the right of class members to opt out of the class action.

2. Class Notice and Right to Opt Out

The Court should order plaintiffs to send notice of the class action to every homeowner by first class mail to the physical address of the property. The Court should order such notice to be sent within 30 days after the order is entered and to state: (A) the court will exclude the member from the class if the

DAVIS LEARY PLLC
3233 56TH PL SW
Seattle, WA 98116
206-578-5800

member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

3. Case Information.

Plaintiffs have established an internet website for the case at homestead-hoa.org. The Court should order plaintiffs to inform class members of the existence of this website in the Notice and to maintain accessible copies of all pleadings in the action on the website. However, the Court should also order that any personal information in discovery responses need not be included.

4. Other Orders.

The Order should also include any other orders that the Court considers appropriate and reserve the Court's right to impose such additional orders as it deems necessary or proper.

VI. PROPOSED ORDER

A proposed order is attached hereto.

VI. CONCLUSION

This case can only proceed as a class action, and the Court should certify the action pursuant to CR 23.

DATED this 25th day of September, 2020.

Andersson Cross-Border Law Corporation

By_____
R. Dallan Bunce, WSBA 47213
Attorneys for plaintiffs

DAVIS LEARY PLLC

By_____
Matthew F. Davis, WSBA No. 20939
Attorneys for plaintiffs

DAVIS LEARY PLLC
3233 56TH PL SW
Seattle, WA 98116
206-578-5800