IN THE COURT OF APPEALS OF IOWA

No. 0-547 / 09-1290
Filed November 24, 2010

T.J. McGINNIS OF T.J. McGINNIS AND ASSOCIATES, SOFTWARE SOLUTIONS, INC., JOHN DONALD, STEVEN JOSEPH SMITH, DEBORAH JEAN SMITH, and SMITH PROMOTIONAL ADVERTISING, INC., As Present and Former Lessees and as Proposed Representative Plaintiffs on Behalf of All Other Lessees Similarly Situated as a Class,
Plaintiffs-Appellants,

vs.

CLEMENS GRAF DROSTE ZU VISCHERING, or His Estate Individually, VISCHERING, L.L.C., an Iowa Limited Liability Company, VISCHERING, L.L.C., an Iowa Limited Liability Company, As Assignee of Clemens Graf Droste Zu Vischering, HUBBELL REALTY COMPANY, an Iowa Corporation, and ENVIRONMENTAL DESIGN GROUP, LTD., an Iowa Corporation.
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Plaintiffs appeal a district court ruling denying class certification. **AFFIRMED.**

Michael M. Sellers of Sellers, Haraldson & Binford, Des Moines, for appellants.

F. Richard Lyford and Megan J. Erickson of Dickinson, Mackaman, Tyler & Hagen, P.C., Des Moines, for appellees.

Heard by Mansfield, P.J., and Danilson and Tabor, JJ.

MANSFIELD, P.J.

This is an appeal from a denial of class certification. The plaintiffs sought to certify a class consisting of the post-1990 tenants of a five-story commercial office building in West Des Moines. The plaintiffs allege the owner, its leasing agent, and its architect defrauded the building's tenants by overstating the square footage they were actually receiving under their leases. At the heart of the dispute is lease language stating the tenant would receive a certain number of "rentable" square feet of space, often without disclosing that the "rentable" figure included a fourteen percent load factor representing each tenant's share of the building's common areas such as elevator lobbies, shared restrooms, and shared conference rooms.

The defendants opposed class certification, arguing primarily that each tenant's claim posed separate and distinct issues. According to defendants, the individualized issues included whether the lease used the "rentable" square feet terminology, whether the lease (or in some cases separate correspondence) disclosed what the term "rentable" meant, whether the tenant understood what "rentable" square feet meant, whether the tenant's broker (if it had one) was familiar with the "rentable" term and explained it to the tenant, and whether the tenant actually relied on a representation of "rentable" square feet in the lease. The defendants also pointed out that each lease generally included a floor plan showing the tenant's space and, in any event, each tenant physically occupied its space and thus, according to the defendants, knew what it was and was not getting in return for its rent payments.

The district court accepted these arguments and denied class certification. We generally agree with the district court's analysis, and finding no abuse of discretion, we affirm its denial of class certification.

I. Facts and Procedural History.

This lawsuit is on its second go-round. Two of the four tenants who are proposed class representatives in this case tried to bring a class action before. After class certification was denied there, those tenants dismissed their claims without prejudice shortly before trial. Two additional tenants have now joined the two tenants from the prior action to bring this new class action.

The office building in question is located at 1501 42nd Street, West Des Moines, and is known as One Corporate Place. It was owned by a German citizen, Clemens Graf Droste zu Vischering, until his death in 1998 and thereafter by Vischering, L.L.C. In 1989 or 1990, Environmental Design Group (EDG) was retained to calculate a "load factor" for the building, that is, a percentage that could be used to convert a tenant's exclusive space to its "rentable" space for leasing purposes. "Rentable" space, according to the defendants, is a term used in real estate that attributes to each tenant a percentage of the common areas. Thus, a tenant's "rentable" square feet typically exceeds the square footage actually controlled by the tenant as its own, private space. EDG eventually came up with a fourteen percent load factor.

According to the allegations of the petition, from March 1990 on, each One Corporate Place lease stated in its recitals that the tenant would be receiving a certain number of "rentable square feet," without explaining the number included

the fourteen percent load factor representing the tenant's attributed portion of the common areas. The plaintiffs thus allege they were defrauded by the owners of the building (Vischering and Vischering, L.L.C.), by Hubbell Realty Co. as the owners' leasing agent, and by EDG. They also allege breach of contract by the owners.[1]

The named plaintiffs are four current or former tenants of the building. T.J. McGinnis executed his first lease in February 1991. His original lease does not use "rentable" square feet terminology, and there is no evidence McGinnis failed to receive, as his exclusive space, the amount of space set forth on the first page of that lease. Later, in December 1991, McGinnis executed a lease for a different suite. This time, the lease had the "rentable" square feet verbiage although it also stated the tenant's space was as shown on an attached floor plan. McGinnis subsequently entered into a series of written lease renewals. Each renewal did not contain a statement of square footage but simply listed a suite number and a monthly and annual rental. McGinnis moved out of One Corporate Place at the end of February 2002.

Software Solutions, Inc. executed its original lease for One Corporate Place in July 1996. The lease was for premises described in an attached floor plan, which were also represented as being "798 rentable square feet." Three years later, in 1999, Software Solutions signed a written lease renewal that described the premises simply by a suite number, providing a monthly and

[1] At oral argument, counsel for the named plaintiffs advised the court that Hubbell and EDG are no longer parties to the case.

annual rental, with no reference to "rentable" square feet. Software Solutions remains in the building today as a month-to-month tenant with no written lease.

John Donald signed leases with Vischering or Vischering, L.L.C. in 1992, 1994, 2000, and 2006 that contained representations of "rentable" square footage, together with a floor plan showing the actual demised premises.

Steven and Deborah Smith and Smith Advertising signed leases in 1995, 1997, and 2000, and a lease modification in 2003. The three leases referenced a certain amount of "rentable" square feet, with the exact space described in an attached floor plan. The Smiths, unlike the other three named plaintiffs, were represented by a broker in negotiating their original lease. The broker testified he was familiar with the concepts of "rentable" space and a "load" factor, and would have explained those concepts to a prospective tenant.

Apart from these four named plaintiffs, the record also shows that: (1) three tenants rented space during the relevant time period where the recitals in their leases actually referred to the amount of usable square feet, not rentable square feet; (2) four tenants' original leases referred to usable square feet, but subsequent versions of their leases referred to rentable square feet (and contained a higher number of square feet); (3) four tenants executed leases that defined "rentable" square feet;[2] and (4) six tenants received written explanations of what "rentable" square feet meant and how it differed from the space exclusively occupied by the tenant. A number of other tenants were represented by commercial brokers when they entered into their leases at One Corporate

[2] For example, the lease would state on the first page, "Rentable Area of the Premises shall also include the tenant's proportionate share of the common areas of the Building."

Place. Also, two tenants failed to pay rent, had judgments entered against them, and were administratively dissolved.

On August 28, 2008, McGinnis, Software Solutions, Donald, and the Smiths filed this case as a putative class action, essentially seeking recovery on behalf of all tenants of the fourteen percent load factor. The proposed class included fifty-five persons or entities that had allegedly rented space in One Corporate Place at any time since 1990. On June 5, 2009, the district court denied class certification. The court concluded primarily that common issues in the case did not predominate over individual ones. *See* Iowa R. Civ. P. 1.263(1)(*e*). As the court explained:

> Plaintiffs are alleging that the Defendants engaged in fraudulent leasing practices through affirmative misrepresentations as to the amount of square feet contained within the walls of each individual tenant's office space, and/or by failing to disclose that rents included payment for portions of the building's common areas. Critical to the justifiable reliance inquiry will be the tenants' individual understandings of the term "rentable square feet," as well as other pertinent terms contained within their leases. Also relevant to the inquiry will be each tenant's level of experience and knowledge with regard to the leasing of commercial building space, as sophisticated tenants may have had reason to know that a load factor was built in to their lease. The nature of representations made to individual tenants and conversations had prior to the signing of leases will also be important. While the Court does not rule on the merits of any of the issues presented, it finds that such an individualized inquiry into the circumstances surrounding each proposed class member would prove extremely difficult in a class action and would be contrary to class certification. Individualized issues which are essential to the determination of the fraud claim predominate over questions common to the class. Given the difficulties likely to be encountered in an examination of each class member's individual position, the Court does not find that a class action will promote a fair and efficient adjudication of the fraud claim. [Citations and footnotes omitted.]

The court reached a similar conclusion as to the breach of contract claim, noting that even where the lease used "rentable" square feet terminology, individualized issues would arise because it would be necessary to use extrinsic evidence in interpreting this term.

The plaintiffs now appeal the denial of class certification.

II. Standard of Review

A district court's denial of class certification is reviewed for abuse of discretion. *Vos v. Farm Bureau Life Ins. Co*., 667 N.W.2d 36, 44 (Iowa 2003).

III. Merits

To sue on behalf of a class, the plaintiffs in this case had to show:

> (1) The class is so numerous or so constituted that joinder of all members, whether or not otherwise required or permitted, is impracticable.
> (2) There is a question of law or fact common to the class.

See Iowa R. Civ. P. 1.261. Additionally, the court had to find that "[a] class action should be permitted for the fair and efficient adjudication of the controversy." *Id*. 1.262(2)(*b*). This in turn requires a consideration of "relevant factors," including "[w]hether common questions of law or fact predominate over any questions affecting only individual members," "[w]hether other means of adjudicating the claims and defenses are impracticable or inefficient," and "[w]hether a class action offers the most appropriate means of adjudicating the claims and defenses." *Id*. 1.263(1)(*e*)-(*g*). The court has "considerable discretion" in

weighing the relevant factors.[3] *Anderson Contracting, Inc. v. DSM Copolymers, Inc*., 776 N.W.2d 846, 848 (Iowa 2009).

We initially question whether the proposed class is so numerous that joinder of all members is impracticable, i.e., whether rule 1.261(1)'s numerosity requirement has been met. In *Martin v. Amana Refrigeration, Inc*., 435 N.W.2d 364, 368 (Iowa 1989), the supreme court observed that "[f]orty or more has been recognized as the range where numbers alone should suffice to show impracticability of joinder." Plaintiffs contend there are fifty-five class members here, but a number of them did not sign leases based on "rentable" square feet. More importantly, we are not necessarily convinced that joinder of the affected parties would be impractical. Each of these tenants has been identified and can be contacted. Moreover, this is not a situation where the size of the individual claims is so small that litigating them on a non-class basis would be uneconomical. If plaintiffs are correct, each of these tenants overpaid rent by fourteen percent. The leases show that the alleged overpayments were a substantial amount, even for a single tenant.

Regardless of how one resolves the numerosity question, however, we agree with the district court that a class action will not promote "the fair and efficient adjudication of the controversy," because individual issues predominate over common ones. *See* Iowa R. Civ. P. 1.263(1)(*e*).

[3] The court must also find that the representative parties will fairly and adequately protect the interests of the class. *See* Iowa R. Civ. P. 1.262(2)(*c*), 1.263(2). We do not need to reach that issue here, in light of our views on the plaintiffs' inability to meet the 1.262(2)(*b*) and 1.263(1) requirements.

The record here shows a variety of tenants with a variety of situations. Some never signed a lease that said they would be getting a certain amount of "rentable" square feet. Some signed multiple leases, with "rentable" terminology being used only part of the time. Some signed leases that explained, on the first page, what the term "rentable" meant and that it included a proportionate share of the common areas. Some received written explanations of the term "rentable." Others were likely sophisticated tenants (or were represented by knowledgeable brokers) who knew what "rentable" stood for. *See, e.g., Tin Mills Props., L.L.C. v. United States*, 82 Fed.Cl. 584, 586 (Fed. Cl. 2008) (analyzing a GSA proposal to lease approximately "35,075 rentable square feet of space" which "shall yield a minimum of 30,500 [usable] square feet"); *Meiselman, Denlea, Packman & Eberz, P.C. v. 11-44 Assocs., L.L.C.*, 784 N.Y.S.2d 58, 59 (N.Y. App. Div. 2004) (affirming summary judgment for the defendants and noting, "Although plaintiff lessee claims defendant lessors represented that the actual area of the demised commercial premises was 7,590 square feet, when the premises were, in fact, considerably smaller, it is plain from the lease that the representation in question was not as to the actual or usable area of the premises, but its 'rentable' square feet, and the documentary evidence establishes that there is in the commercial real estate industry a clear distinction between 'rentable' and 'usable' square footage."). To still others, the recital about "rentable" square feet may not have been material, because they relied upon the actual description of their leased premises in the floor plan and/or their own personal knowledge of the amount of space they were getting. *See Meiselman*, 784 N.Y.S.2d at 59 (noting that the

distinction between rentable and usable "should not have been lost upon plaintiff, particularly since it had every opportunity to ascertain the actual dimensions of the leased space"). Notably, one of the named plaintiffs, despite having been allegedly defrauded as to how much space it was getting, continues to rent from Vischering, L.L.C. on the existing terms. That suggests that at least as to this plaintiff, the alleged representation about square footage may not have mattered.

Common-law fraud requires the plaintiff to prove, among other elements, that the "defendant made a representation to the plaintiff" and "the plaintiff acted in reliance on the truth of the representation and was justified in relying on the representation." *Gibson v. ITT Hartford Ins. Co.*, 621 N.W.2d 388, 400 (Iowa 2001). "Because proof often varies among individuals concerning what representations were received, and the degree to which individual persons relied on the representations, fraud cases often are unsuitable for class treatment." *In re St. Jude Med., Inc.*, 522 F.3d 836, 838 (8th Cir. 2008); *see also* Fed. R. Civ. P. 23 advisory committee's note (addressing the 1966 Amendment with respect to the rule on predominance: "[A]lthough having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds of degrees of reliance by the persons to whom they were addressed."); *Vos*, 667 N.W.2d at 52-55 (denying class certification for fraud, negligent misrepresentation, and fraudulent inducement claims). The district court did not abuse its discretion in finding these fraud claims unsuited for class treatment.

We also agree with the district court that the plaintiffs' breach of contract claims pose similar difficulties. Plaintiffs do not dispute the district court's finding that the term "rentable" is ambiguous. Therefore, proving the landlord breached a given lease by not delivering exclusive office space equivalent to the lease's recital of "rentable" space will require an assessment of the extrinsic evidence. *Pillsbury Co. v. Wells Dairy, Inc*., 752 N.W.2d 430, 439 (Iowa 2008) (stating extrinsic evidence may be used to aid in the interpretation of ambiguous contract language). That evidence will be different for each tenant. Some tenants were told, in their lease, in separate correspondence, or presumably by their broker, what "rentable" meant. Others may have relied on the floor plan's designation of their space and, thus, it may be reasonable to interpret "rentable" in the way that can be reconciled with the floor plan. As noted above, some tenants entered into leases, or at least renewals or modifications thereof, that did not contain representations of "rentable" space. *See Vos*, 667 N.W.2d at 50 (holding that breach of contract claims based on "reasonable expectations" theory were unsuited for class treatment); *Adams v. Kansas City Life Ins. Co*., 192 F.R.D. 274, 282 (W.D. Mo. 2000) ("By allowing extrinsic evidence of the parties' dealings, the breach of contract claims become individualized and not reasonably susceptible to class action treatment").

In short, we share the district court's view that the individual issues in this proposed class action predominate. True enough, it appears that most leases at One Corporate Place did say something about "rentable" space. That is a common thread running through these potential claims. But it is not necessarily

a common *issue*. The fighting issues here do not center on what the leases literally said, but whether tenants got less from their landlord than they reasonably contracted for and understood they were getting. Under the circumstances of this case, that is an individualized inquiry, and accordingly, the district court did not abuse its discretion in denying class certification.

AFFIRMED.