STATE OF MICHIGAN

COURT OF APPEALS

SCOTT KEECH, KENNETH KREICHELT, GAIL KREICHELT, SCOTT BARR, KATHLEEN BARR, on behalf of themselves and others similarly situated,

Plaintiffs-Appellees,

v

S.R. JACOBSON DEVELOPMENT CORPORATION,

Defendant/Third-Party Plaintiff-Appellant,

and

LOUISIANA PACIFIC CORPORATION,

Defendant/Third-Party Defendant,

and

WOLOHAN LUMBER COMPANY,

Third-Party Defendant.

UNPUBLISHED
June 13, 2006

No. 258598
Wayne Circuit Court
LC No. 00-040731-NI

Before: Fort Hood, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

Defendant Louisiana Pacific Corporation (LP) is a manufacturer of wood-chip/resin siding that defendant S.R. Jacobson Development Corporation (SRJ), a development company, used in the construction of nearly five hundred residential homes, including those owned by plaintiffs. This class action lawsuit arises out of plaintiffs' claims that LP knowingly sold defective siding, that SRJ used the LP siding knowing that it was defective, and that SRJ induced plaintiffs to participate in a federal class action lawsuit against LP even though plaintiffs could have had their siding replaced under SRJ's warranty. Defendant SRJ appeals by leave granted from the trial court's order certifying the subclass represented by plaintiffs Scott and Kathleen Barr and Kenneth and Gail Kreichelt. We reverse.

I. Factual Background

In 1993, SRJ discovered that eight homes it had constructed in the Adams Ridge Subdivision had moisture problems related to LP's Inner-Seal siding. LP and SRJ agreed that SRJ would pay for one-third of the cost of repair, while LP would pay the remainder. SRJ acknowledged that it had deviated from the installation specifications, which is why it agreed to assume some of the cost. SRJ provided a Standard Limited Warranty Agreement to its customers that provided, in part, that the home "will be free from defects in material and workmanship for a period of one year from the date of closing." Under the warranty, SRJ agreed to repair or replace the defective items. SRJ admitted that its warranty covered defects in the LP siding.

LP was experiencing problems nationally with its Inner-Seal siding. In 1995, a class action lawsuit was initiated in federal court in Oregon with regard to defective LP Inner-Seal siding installed before January 1, 1996, as long as the siding was damaged before January 1, 2003. The plaintiffs in the federal action alleged that the LP Inner-Seal siding prematurely rotted, cracked, buckled, and otherwise deteriorated when exposed to the elements. A settlement ultimately was reached. To collect, a claimant was required to file a claim and obtain an inspection of the siding to authorize a settlement. The settlement agreement contained, in part, the following language regarding release:

> To the extent claims may be asserted against persons or entities in the chain of distribution, installation or finishing of the Exterior Inner-Seal siding, the Releasing Party shall be deemed to and does hereby release and forever discharge those persons or entities from claims based solely on distribution, handling, installation, specification, or use of the Exterior Inner-Seal Siding.

The settlement agreement in the federal case also contained an amendment whereby class members agreed to release "individuals and companies involved in the distribution, installation, construction and first-time sale of structures with [LP] siding." The paragraph also referred the reader to a letter from LP, dated March 15, 1996, in which LP clarified that class members would release "any third party involved in building, installing or distributing the product." Thus, all developers (such as SRJ) were released from claims relating to LP siding. LP pointed out that it was assuming full financial liability for the claims and that the settlement would be the sole remedy against LP and others in the "chain of distribution." LP stated, "If the results were otherwise and a claimant were able to sue parties on the claims related to LP siding, LP would not receive the benefit of the settlement since it would be at risk of being sued as a cross-defendant in those actions."

On January 15, 1996, SRJ sent a form letter to its customers providing, in pertinent part:

> We have recently been notified that there are two class action lawsuits that have been filed against [LP] related to claimed defects in its Inner-Seal Siding and trim products. These defects include swelling, rotting, buckling, and cracking. One of these class action lawsuits has now been the subject of a proposed settlement and includes you as the owner of a home incorporating the Inner-Seal product. We enclose information relating to this proposed settlement of the class action lawsuit.

> WE URGE YOU TO READ THE ENCLOSED INFORMATION CAREFULLY AND TO EXAMINE YOUR HOME TO DETERMINE WHETHER YOU ARE EXPERIENCING ANY OF THE SYMPTOMS DESCRIBED IN THE CLASS ACTION.
>
> As your builder, we are not a party to either lawsuit, and cannot undertake to interpret these papers for you. As you will note, the enclosures include an 800 number which you can call for assistance in this regard.
>
> Again, our experience indicates that most installations do not evidence the types of problems allegedly involved in the litigation. We have every hope that your home will not have these problems. However, if you should find any of these symptoms described above, as we understand the terms of the proposed settlement, [LP] appears to be accepting the full costs of replacement of damaged material.

The Barrs participated in the federal class action and received $15,485.70 from the settlement fund. They have not tendered back the money received from the federal settlement. Kenneth Kreichelt testified that his family did not receive the January 15, 1996, letter from SRJ. When the Kreichelt plaintiffs heard about the federal class action from another source, they contacted SRJ and allegedly were told that the siding on their house was not Inner-Seal, although it was later determined that their siding *was* Inner-Seal. The Kreichelts did not opt out of the federal class and the parties agree that they did not receive any money from the settlement.

The instant class action was filed in 2000 by plaintiff Keech, and the Barrs and the Kreichelts joined the action in 2001. Plaintiffs sought a declaratory judgment that the LP federal class action settlement was null and void and also sought monetary damages. They asserted that the federal court did not have subject-matter jurisdiction. In May 2001, plaintiffs moved for class certification seeking to create two subclasses. The first subclass would have the Barrs act as class representatives "for all original purchasers of homes containing L-P siding that was installed on or before January 1, 1996 and within the class period of the L-P national class action settlement." Plaintiffs sought to have Keech and the Kreichelts act as class representatives of the other subclass "for all purchasers of homes containing L-P siding that was installed on or after January 1, 1996 and are not within the class period of the L-P national class action settlement." Plaintiffs asserted that LP sold and SRJ installed a new generation of the same defective LP siding after the LP national settlement.

Before LP or SRJ responded to plaintiffs' motion, LP and the plaintiffs in the federal class action jointly moved, in the federal district court in Oregon, for an order to enforce the settlement agreement against the Barrs and the Kreichelts. The federal court orally granted the motion on August 15, 2001, but its written order was not entered until January 2003. The Barrs and the Kreichelts were ordered, in pertinent part:

> 1) to take no further steps to prosecute any released claim arising from or relating to their LP siding, and
>
> 2) to dismiss from their Complaint filed in [the instant Keech case] all released claims arising from or relating to their LP siding.

* * *

> 5) Notwithstanding anything in this Order, the Kreichelts and the Barrs specifically are NOT ENJOINED from proceeding against S.R. Jacobson in the pending Michigan state court action on their claim that S.R. Jacobson, through its letter dated January 15, 1996, fraudulently induced the Kreichelts and/or the Barrs not to timely opt out of the LP Class Action settlement. The Kreichelts and the Barrs are ENJOINED, however, from asserting claims alleging, among other things, that they were fraudulently induced by S.R. Jacobson to purchase defective LP siding. Moreover, nothing in this Order shall be construed to prohibit any party from asserting in the Michigan state court action any defense, including without limitation the defenses of release and/or waiver against any proposed class member who actually accepted a payment from LP under the Settlement Agreement entered in this matter.

The order also provided that it did not affect any claim involving LP siding installed after January 1, 1996, because that siding was not a part of the settlement. Further, the federal court held that it did have subject-matter jurisdiction.

In September 2004, the trial court granted plaintiffs' motion for class certification, although it defined the subclasses differently because of the dates plaintiffs had their siding installed. Pertinent to this appeal, the trial court certified the Barr/Kreichelt subclass, which it defined as "all persons who purchased from [SRJ] homes containing [LP] siding that was installed prior to January 1, 1996 . . . limited to claims for fraud in the inducement against [SRJ]." As a result of the federal court order enjoining the Barrs and Kreichelts from proceeding with certain claims against LP and SRJ in this action, the only remaining claims involving these plaintiffs were those pertaining to fraudulent inducement (Count III) and a violation of Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.* (Count V), both of which were against SRJ only.

In this appeal, defendant SRJ argues that the trial court clearly erred in certifying the Barr/Kreichelt subclass.

II. Standard of Review

This Court applies the clearly erroneous standard of review to a trial court's ruling regarding a class certification. *Zine v Chrysler Corp*, 236 Mich App 261, 270; 600 NW2d 384 (1999). "[F]actual findings are clearly erroneous if there is no evidence to support them or there is evidence to support them but this Court is left with a definite and firm conviction that a mistake has been made." *Id*.

III. Analysis

In determining whether to certify a class, the trial court considers the factors listed in MCR 3.501(A)(1), which provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all other members in a class action only if:

(a) the class is so numerous that joinder of all members is impracticable;

(b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;

(c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

(d) the representative parties will fairly and adequately assert and protect the interests of the class; and

(e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

A class must meet all of the requirements of MCR 3.501(A)(1) in order to proceed as a class action. *A & M Supply Co v Microsoft Corp*, 252 Mich App 580, 597; 654 NW2d 572 (2002). The party seeking certification bears the burden of showing that the requirements for class certification have been met. See *id*. at 597-598.

A. Threshold Question

Before the requirements of MCR 3.501(A)(1) may even be considered, it is necessary to determine whether the proposed class members, the Barrs and the Kreichelts, are even members of the proposed subclass. "'A plaintiff who cannot maintain the cause of action as an individual is not qualified to represent the proposed class.'" *Id.* at 598, quoting *Zine, supra* at 287. The trial court did not engage in an analysis of this question because it incorrectly stated that neither SRJ nor LP contested "the adequacy of the Kreichelt and Barr Plaintiffs." It overlooked SRJ's argument and plaintiffs' response regarding the appropriateness of the Barrs and Kreichelts as class representatives. SRJ argued below, as it does on appeal, that the Barrs and Kreichelts are not members of the subclass because they cannot sustain a fraud action against SRJ. Plaintiffs alleged in count III that SRJ fraudulently induced them into not opting out of the LP settlement, and they alleged in count V that SRJ violated the MCPA by fraudulently inducing them into not opting out of the LP settlement, thereby avoiding liability for the defective LP siding under its own warranty.

1. The Barr Plaintiffs

Relying on *Stefanac v Cranbrook Ed Community (After Remand)*, 435 Mich 155; 458 NW2d 56 (1990), SRJ contends that the Barrs are not proper representatives because, under Michigan law, they were required to tender back the consideration they received from the federal class action settlement before or at the time they joined this lawsuit in order to proceed. We agree.

Stefanac addresses several rules regarding a plaintiff's ability to seek monetary damages for claims covered by a release if the release has been signed in exchange for consideration. "[S]ettlement agreements are binding until rescinded for cause." *Id*. at 163. Tender of consideration received is a condition precedent to the right to repudiate the release based on

fraud or mistake.[1] *Id*. at 163, 165. When the action is for monetary damages, the plaintiff must tender back the consideration before or simultaneously with the filing of a suit alleging a cause of action arising out of the release agreement. *Id*. at 176. This rule applies even if the plaintiff believes that the consideration for the release was inadequate. *Id*. at 170-172. "The plaintiff is not entitled to retain the benefits of the agreement and at the same time bring suit in contravention of the agreement." *Id*. at 177.

Plaintiffs argue that the tender-back rule does not apply here because LP gave the consideration, not SRJ, and SRJ was not a party to the release. SRJ argues that the rule applies because it was a third-party beneficiary under the release. In *Collucci v Eklund*, 240 Mich App 654, 658; 613 NW2d 402 (2000), this Court held that as long as a release clearly applies to a party, then it operates to discharge that party from liability even though the party was not part of the execution of the release and did not provide any of the consideration. There is no question in this case that the release applied to third parties such as SRJ. Under the federal settlement agreement, class members agreed to release "individuals and companies involved in the distribution, installation, construction and first-time sale of structures with [LP] siding" and "any third party involved in building, installing or distributing the product." Additionally, the release was a global release; it protected these parties from all claims involving LP Inner-Seal siding installed before January 1, 1996. Therefore, individuals who received money from the federal settlement and joined this lawsuit before tendering it back are prohibited from maintaining their claims.

Plaintiffs also argue that the tender-back rule does not apply because they are not seeking to rescind the release. However, because the release covers the Barrs' claims against SRJ, they must rescind the release by tendering back the consideration in order to seek to impose liability against SRJ and maintain an action for fraud in the inducement. Without their doing so, SRJ is entitled to rely on the terms of the settlement, under which it is protected from liability. *Stefanac, supra* at 163, 177. Because the Barrs admitted that they did not tender back the consideration they received from LP as part of the settlement, they cannot maintain their claims against SRJ. *Stefanac, supra* at 166. As a result, they are not members of the class and cannot serve as representatives. *A & M Supply Co, supra* at 598.

2. The Kreichelt Plaintiffs

We also agree with SRJ that because the Kreichelts cannot prove reliance on SRJ's January 15, 1996, letter, they cannot sustain their fraud claims.[2] A claim of fraudulent

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[1] There are two exceptions to this rule, fraud in the execution of the release or a situation in which the defendant waived the plaintiff's duty under the release. *Id*. at 165. Here, plaintiffs alleged fraud in the inducement. A party claiming fraud in the inducement is still subject to the general rule requiring tender back of the consideration. *Id*. at 165-167. Also, there were no allegations that SRJ waived plaintiffs' duty under the release.

[2] SRJ advances this argument against the Barr plaintiffs as well. Because we have determined that the Barrs' failure to tender back the consideration they received from the federal settlement precludes their class membership, we need not address this argument.

inducement requires proof that (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew it was false or made it recklessly without knowledge of its truth; (4) the defendant made the representation with the intention that the plaintiff would act on it; (5) the plaintiff acted in reliance on it; and (6) the plaintiff suffered damages as a result. *Arim v Gen Motors Corp*, 206 Mich App 178, 195; 520 NW2d 695 (1994).

Kenneth Kreichelt admitted that his family did not receive SRJ's January 15, 1996, letter and testified that SRJ only made oral representations to them. Although plaintiffs based their common-law fraud claim on all representations made by SRJ, the federal court specifically enjoined all claims against SRJ regarding LP Inner-Seal siding except those that alleged that SRJ "*through its letter dated January 15, 1996*, fraudulently induced the Kreichelts and/or the Barrs not to timely opt out of the LP Class Action settlement" (emphasis added). Under this order, the MCPA claim for fraudulent inducement was similarly limited. Indeed, we note that the complaint itself does not specify how plaintiffs allegedly were induced with respect to the MCPA claim. We therefore conclude that because the Kreichelts did not receive the January 15, 1996, letter, they cannot maintain their claims against SRJ, and, thus, cannot be class representatives. *A & M Supply Co, supra* at 598.

Accordingly, because neither the Barrs nor the Kreichelts can serve as class representatives, the trial court clearly erred in certifying the Barr/Kreichelt subclass. *Zine, supra* at 287.

Reversed.

/s/ Karen M. Fort Hood
/s/ David H. Sawyer
/s/ Patrick M. Meter