JACK DUTY, ET AL NUMBER: C81283-A

VERSUS 10TH JUDICIAL DISTRICT COURT

LOUISIANA FIREFIGHTER'S RETIREMENT SYSTEM, ET AL NATCHITOCHES PARISH, LOUISIANA

2013 JUL -3 A 10:

REASONS FOR JUDGMENT

This matter is before the court for decision on a motion for partial summary judgment filed by the City of Natchitoches (City) herein, and adopted by the Louisiana Firefighters Retirement System (FRS). Written briefs were filed by the parties, and an amicus curiae brief was filed by the Louisiana Municipal Association (LMA).

The motion challenges plaintiff's putative class action on five grounds: standing, typicality, commonality, the ability of the City to be an adequate representative of the proposed defendant class, and that the defendant class, as defined, would create a prohibited "opt-in" requirement.

Background

Plaintiff Jack Duty is retired from his previous employment as a firefighter with the City. He has filed suit against the City and the FRS, alleging that the City should have, but failed to pay contributions on regularly scheduled overtime that he worked as a firefighter, to the FRS, thereby reducing the amount of the pension benefits he receives from the FRS.

In his petition, Mr. Duty seeks the certification of a putative plaintiff class consisting of ". . . all current and retired "members" of the FFRS as well as all and "beneficiaries" of the FFRS. . .", with himself as the class representative.

ATTEST A TRUE COPY
This the 3rd day of July, 2013
LOUIE BERNARD, CLERK, 10th JDC., LA
By: Deputy Clerk

He seeks the certification of a putative defendant class, consisting ". . . of all cities and/or municipalities, parishes, or fire protection districts in Louisiana that make contributions to the FFRS." During oral argument, counsel for plaintiff acknowledged that based on discovery results, the defendant class definition was too broad, and would be narrowed to cities and/or municipalities. The court's ruling is based on that new definition, and will simply refer to the putative defendant class as municipalities, for convenience.

Analysis

Louisiana Code of Civil Procedure Article 966 provides for motions for summary judgment. The article states in relevant part that:

> . . . if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements to the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden at trial, then there is no genuine issue of material fact.

In order for a class to be certified a plaintiff must satisfy five prerequisites set forth in Code of Civil Procedure Article 591. The article requires a showing of numerosity, commonality, typicality, adequate representation, and an objective class definition. See also *Duhe, et al v. Texaco, Inc., et al*, 99-2002 (La. App. 3 Cir. 2/7/01) 779 So.2d 1070. Of those five, movers here argue that plaintiff will not be able to show commonality, typicality and adequate representation. They additionally argue that plaintiff does not have standing, and that the class action, if certified, would require the class defendants to "opt-in".

Standing

Movers argue that Mr. Duty has no personal claims against the other putative defendants, because they did not employ him, and that the issues for each putative plaintiff are too individual to give Mr. Duty standing to represent the class.

Mr. Duty responds that the "juridically related exception" to standing applies. That exception allows a representative plaintiff who might not have Code of Civil Procedure Article 681 standing to proceed where the defendants are related in a manner that would expedite a single resolution of the dispute, such as where the defendants are all municipalities in the same state.

Defendants argue that the exception does not apply, because there are still too many individual issues that the plaintiff class would have, as well as separate individual defenses that the putative defendant class would have.

The court is of the opinion that the putative class of defendants with whom the plaintiff did not interact directly are juridically related to plaintiff, who does have a direct dispute with one member of the potential class, which dispute would be the same overarching one that connects all the parties, to-wit, the allegation of a practice of not paying retirement contributions on regularly scheduled overtime pay for firefighters to the FRS.

Accordingly, plaintiff's claim falls under the "juridically related" exception to the standing requirement, which encourages a single and simple resolution as opposed to a potentially voluminous number of individual litigations across the state involving essentially same core issues. To that extent, the motion is denied.

Typicality

In order for a class action to be maintained, the claims of the class representative must be typical of the claims of the absent class members. Typicality is

satisfied if the claims of the class representative arise out of the same practice or course of conduct that gives rise to the claims of other class members, and those claims are based on the same legal theory.

Movers argue that the claims are not typical, that each firefighter's claim is so individual in nature as to prohibit typicality.

The court disagrees. While there are some lesser issues to be determined on individual claims, there is a broad issue that joins all the putative parties, which is whether plaintiff and similarly situated firefighters are or will be underpaid in pension benefits because the City and other political subdivisions failed to make contributions to the FRS on regularly scheduled overtime.

The court finds that the requirement of typicality is satisfied here, and to that extent, the motion is denied.

Commonality

Here, movers argue that there are or would be two common questions to the putative defendant class: (1) Do all members of the class require firefighters to work regularly scheduled overtime? (2) Do all members of the putative defendant class fail to include regularly scheduled overtime as a component in the calculation of their contributions to the FRS? The City says answering those questions for the City will not answer for all other defendants. That is, there would be no determination as to other defendant class members as to (1) whether plaintiffs worked regularly scheduled overtime hours, (2) whether plaintiffs were entitled to payment for such hours, and (3) whether contributions were or were not made. The City is again arguing that the issues are too varied and individual, and prohibit commonality.

Code of Civil Procedure Article 591A requires that there be questions of law or fact common to the class. Article 591B (3) states:

> The court finds that the question 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. . . .

Martello v. City of Ferriday, et al, 2001-1240 (La. 3 Cir. 3/6/02) 813 So.2d 467 stated that this "common character" requirement only allows class actions to be certified ". . . where it would achieve economy of time, effort, expense, and provide for uniform outcomes for similarly situated plaintiffs", citing *McCastle v. Rollins Environmental Services,* 456 So.2d 612 (La. 1984). The *Martello* court found that under the facts of that particular case, ". . . Given the evidence provided at this time, creating a class of individuals who have similar rights will achieve more efficient outcomes than allowing separate actions to proceed." " . . . It has been established that the existence of issues particular to individual members of the class does not defeat commonality. *McCastle, supra,* at page 620."

The court finds that the nature of the potential claims here are so similar as to be almost identical. They emanate from the same common source, a requirement to pay retirement contributions to the FRS for firefighters working regularly scheduled overtime. There do not appear individualized defenses to such an extent that they would lessen the overall effectiveness of a class action. To that extent, commonality is found, and the motion is denied.

Adequacy of Representation by the City of Natchitoches

Article 591A(4) requires that "The representative parties will fairly and adequately protect the interests of the class."

Movers argue that the City's charter prevents it from providing legal representation for any party other that itself. The court is of the opinion that the role of a class representative is not prohibited by the charter.

Movers argue that the City cannot adequately assert individual defenses for all the putative class members. The court does not agree.

Movers argue that the City is neither willing nor financially able to serve as the representative for the putative class of defendants, and as such, cannot adequately do so.

The City argues that it has no interest (in effect, no desire) in being class representative. The court understands that, and it is likely that no party ever wants to be a defendant class representative, yet the role, if a class is certified, must fall upon someone.

The Louisiana Municipal Association filed an amicus curiae brief on behalf of the City, and attached as an exhibit the home rule charters of its various members, including the one for the City of Natchitoches. At the hearing on the motion for summary judgment, the City introduced that exhibit into evidence for itself, by reference. Plaintiff filed no opposition exhibits or affidavits.

The home rule charter for Natchitoches, in Article V, states that the mayor shall submit to the council a proposed operating budget, a public hearing shall be held on it, and a budget must be adopted by the council. This operating budget must contain proposed expenditures which shall not exceed the total of estimated revenues.

Additionally, payments from the city funds cannot be made or obligations incurred except in compliance with the budget or amendments approved by the council. Such amendments can only be made if there are revenues available in excess of those estimated in the operating budget, and the council agrees to spend them in the manner recommended by the mayor.

If, during the fiscal year, it appears that revenues will be insufficient to meet the amount appropriated, the mayor is to advise the council, which may reduce appropriations to keep the budget in balance.

The City argues that it is financially unable to adequately perform as class representative. The mayor says in his affidavit that the City has no funds to defend any jurisdiction other than itself. He says the City cannot afford the services of an expert economist for every defendant class member, that it does not have clerical staff members or administrative personnel to devote time to defendant class management or handling of defendant class litigation, and does not have a budget or any sums available for defense of any other member of the putative defendant class. Lacking these financial resources, the City argues, prevents it from being an adequate class representative.

While the court noted above that a simple lack of desire to serve is not determinative of adequacy of representation, it is relevant where the funding for the role of the class representative must be found, put in a proposed budget by the mayor, and approved by the council after a public hearing. From argument at the hearing on the motion for summary judgment, there is apparently no dispute that the City has not allocated funding in its current operating budget for the role of class representative. As future budgets must be approved by the mayor and city council, the assurance of sufficient funding for the role of class representative is therefore uncertain.

If a budget is approved that contains funding for the role of class representative, there is no answer to what happens if the City's revenues drop below budget estimates during the fiscal year, when the council is required to adjust expenditures.

Plaintiff argues that the City's costs of serving as class representative could be shared with other class members, but cites no jurisprudence to support that.

The court finds that movers have made a sufficient showing under Code of Civil Procedure Article 966C(2) that there is an absence of support for plaintiff's ability to satisfy the requirement of adequacy of representation by the City for the financial reasons described above, and the burden shifted to plaintiff to establish that he would be able to satisfy that evidentiary burden at the class certification trial. Plaintiff has been unable the meet that burden, and to that extent, the motion is granted.

Certification of the Defendant Class in This Matter Would Effectively Certify an "Opt-in" Class

The court finds no cases discussing "opt in" in the Louisiana state court system, and so it is appropriate to look to federal jurisprudence interpreting Rule 23 of the Federal Rules for guidance. See *Doe v. Southern Gyms. LLC, et al*, 2012-1566 (La. 3/19/13).

Ackal, et al v. Centennial, et al, 12-30084 (U.S. 5th Cir. 10/16/12) discussed the issue of opt in, and interpreted Rule 23 of the Federal Rules of Civil Procedure to the facts of that case. Citing various federal cases, treatises and scholarly works on the subject, the *Ackal* court noted that;

> . . . proceedings under Rule 23 do not require that class members affirmatively "opt in," nor is such a requirement mandated by due process considerations.
>
> . . . not only is an "opt in" provision not required, but substantial legal authority supports the view that by adding the "opt out" requirement to Rule 23, Congress prohibited "opt in" provisions by implication.

> Simply put, there is no authority for establishing "opt-in classes in which the class members must take action to be included in the class.

Some of the cases cited in *Ackal* involved a notice that required an affirmative decision to opt in to the class action. *Ackal* did not involve such a notice, but did involve Louisiana governmental entities named as putative defendants having to make a decision to seek approval of the hiring of counsel under LSA-R.S. 42: 263. That statute requires the applying governmental entity to take four special steps before it can retain special counsel other that its statutorily designated attorney.

R. S. 42:263 will not be applicable here, as plaintiff is narrowing the definition of the putative defendant class to be municipalities, which the statute does not apply to. Nevertheless, defendants and the LMA argue that municipalities will still be required to take the affirmative step of approving their participation in the class action by votes of the councils and/or approval of the mayors, and the possible hiring of special counsel, or assigning its own general counsel, or deciding to be represented by defendant class counsel, depending on the language of various home rule charters. One purpose of a class is to avoid the complexity of each class defendant having its own attorney participate in the proceedings. Rather, the simplicity of class counsel representing all class defendants is the usual goal.

This court is persuaded by the reasoning of *Ackal*, and finds it applicable here. The unique nature of the putative class of municipal defendants would require each one to decide whether to participate or not. If one does choose to participate, it would have to decide to do so by taking whatever affirmative action is required by its charter, such as a vote of its governing body, and then would have to decide whether to use class counsel, its own counsel, or hire special counsel, going through whatever steps were necessary to do so, depending on its charter.

Though not all the same steps, the court does find this sufficiently analogous to *Ackal*, that its ruling applies here:

> . . . In other words, contrary to the requirements of a Rule 23(b)(3) action, here, a potential class member's decision to take no action upon receipt of notice does not result in the entity's inclusion in the class. Rather, the default position of each class member is that it is *not* in the class until it successfully completes a series of actions required by law for it to participate in the suit. Requiring such affirmative acts from putative class members before they may actually participate . . . is contrary to the express provisions of (the Rule). . .

In conclusion, the court is of the opinion that the putative defendant class, as to be defined here, would be required to take affirmative steps to participate in the action, which would in effect be an "opt in" requirement not authorized by the Louisiana class action statute. Accordingly, to that extent, the motion is granted.

As the result of the court's ruling effectively denies plaintiff his petition for a class action, to that extent it is a final judgment. Insofar as plaintiff's individual claims against the City and the FRS, they are still in effect.

Counsel for the City is to prepare a judgment in conformity with this ruling and submit to the other counsel for written approval. Then, counsel for the City is to immediately submit the judgment to the Court for approval.

THUS DONE AND SIGNED this 3rd day of July, 2013, at Natchitoches, Louisiana.

Eric R. Harrington

ERIC R. HARRINGTON
DISTRICT JUDGE

Copies to:

All counsel of record