VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 100-5-17 Lecv

Sutton et al vs. The Vermont Regional Center et al

ENTRY REGARDING MOTION

Title: Motion to Certify a Class Action (Motion: 30)
Filer: Russell D. Barr
Filed Date: December 01, 2021

The motion is DENIED.

Plaintiffs have moved for class certification in this case. Plaintiffs have amended their complaint several times, and as a result of another ruling this day, there are now 32 named Plaintiffs. They seek certification of a proposed class of over 800 persons who invested in development projects as part of the EB-5 program. Plaintiffs initially named several individual and State defendants when they filed their complaint in 2017. As a result of the Vermont Supreme Court's decision in *Sutton v. Vermont Regional Center et al.*, 2019 VT 71A, issued in July 2020, the only Defendants remaining in the case, which is now on remand, include the Agency of Commerce and Community Development ("ACCD"), Brent Raymond, and James Candido (together "Defendants"). The Supreme Court ruled that Plaintiffs may proceed against the ACCD on their claims for negligence and against Mr. Raymond and Mr. Candido on their claims for gross negligence, and against ACCD on their claims for breach of contract and the implied covenant of good faith and fair dealing.

Class Certification under Vermont Rule of Civil Procedure 23

Rule 23 of the Vermont Rules of Civil Procedure provides that one or more members of a class may sue as representative parties only if "(1) the class is numerous enough that joinder of all of its members is impracticable; (2) questions of law or fact are common to the class; (3) the representative parties are making claims and defenses that are typical of the class; and (4) the representative parties will adequately protect the interests of the class." *Wright v. Honeywell Int'l, Inc.*, 2009 VT 123, ¶ 8, 187 Vt. 123 (citing V.R.C.P. 23(a)). If the class representative(s) are able to overcome the hurdles of Rule 23(a), they must also show that they can meet one of the conditions set forth in Rule 23(b). V.R.C.P. 23(b); *Wright*, 2009 VT 123, ¶ 9. Vermont's Rule 23 is substantially the same as the federal rule. *Alger v. Dep't of Labor and Indus.*, 2006 VT 115, ¶ 36, 181 Vt. 309. Therefore, Vermont courts consider federal precedent when

determining whether the requirements of Vermont's Rule 23 have been satisfied. *Wright*, 2009 VT 123, ¶ 10.

According to the Supreme Court, "'class actions are intended to be of limited and special application, not to be casually resorted to or authorized.'" *Salatino v. Chase,* 2007 VT 81, ¶ 11, 182 Vt. 267 (quoting *George v. Town of Calais,* 135 Vt. 244, 245 (1977)); see *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) ("The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'") (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)).

Plaintiffs have the burden of establishing each element of Rule 23. *Amgen Inc. v. Conn. Ret. Plans and Trust Funds*, 568 U.S. 455, 460 (2013); *Allen v. Dairy Farmers of Am., Inc.*, 279 F.R.D. 257, 262 (D. Vt. 2011). The court has discretion in determining whether the putative class representatives have met the requirements of Rule 23 and whether a class should be certified as long as the correct legal standards have been applied in analyzing qualification for certification. *Wright*, 2009 VT 123, ¶ 10. Accordingly, the analysis will proceed by addressing the prerequisites set forth in the Rule. Defendants contest whether Plaintiffs can meet all of the requirements of Rule 23(a), and assert that they cannot meet any of the requirements of Rule 23(b).

V.R.C.P. 23(a)(1): Sufficient Number of Class Members: "Numerosity"

Defendants do not question the numerosity component of Rule 23, but they dispute Plaintiffs' contention that they satisfy the remaining three requirements of Rule 23 (a), often referred to as commonality, typicality, and adequacy of representation.

V.R.C.P. 23(a)(2): Common Questions of Law and Fact: "Commonality"

To determine whether there are common questions of law and fact, the court must review the causes of action at issue and the elements that Plaintiffs must prove to prevail. "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Wal-Mart*, 564 U.S. 338, 348–50 (2011) (quoting *East Tex. Motor Freight System, Inc. v. Rodriguez,* 431, U.S. 395, 403 (1977). This means that "[t]heir claims must depend upon a common contention . . . [that] must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." (quoting *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 156 (1982)). *Id.* at 350.

1. *Negligence and Gross Negligence Causes of Action*

All of the negligence claims—those against the ACCD and against the individual defendants--require proof of a "special relationship" between each individual plaintiff and each defendant to overcome the economic loss rule that would otherwise bar Plaintiffs' claims. See *Sutton*, 2019 VT 71A, ¶ 31 (special relationship between plaintiff and defendant can create duty of care independent of contract obligation) (citing *Long Trail House Condo. Ass'n v. Engelberth*

Constr., Inc., 2012 VT 80, ¶ 13, 192 Vt. 322). As the *Sutton* Court wrote when addressing Plaintiffs' negligence claims against the ACCD:

> Here, plaintiffs have alleged sufficient facts to make out a special relationship between defendants and plaintiffs such that they may recover for their purely economic losses. ACCD initiated a close relationship with plaintiffs by recruiting them to invest their life savings in the Jay Peak Projects by promising exceptional oversight and management of the investment. As discussed above, ACCD demonstrated awareness of the risk that it was inducing plaintiffs to undertake—a risk it represented it would minimize—when it told plaintiffs it would provide a safeguard for their investments. ACCD did not simply endorse the Jay Peak Projects to members of the public generally; it personally solicited individual investors, and entered into individualized relationships with each plaintiff, who paid substantial fees directly to the VRC in connection with that relationship. It intended to influence a narrow class of identified people—prospective investors in the Jay Peak Projects—and those who actually invested relied on their representations and promised oversight. This is the kind of relationship that can give rise to liability for purely economic harms.

Sutton, 2019 VT 71A, ¶ 33.

When describing Plaintiffs' surviving gross negligence claims against Mr. Raymond and Mr. Candido, the *Sutton* Court wrote:

> Plaintiffs' claims of gross negligence are structurally similar to their claims of negligence: plaintiffs allege that defendants intentionally misrepresented to plaintiffs that the State provided financial oversight of the Jay Peak Projects in order to induce them to invest, and then, knowing that the investors were relying on them to conduct such oversight, failed to ensure that any was actually conducted, which contributed to plaintiffs' injuries, including losing their investments in the Projects and having their residency in the United States endangered. But beyond simply failing to ensure that any real oversight was conducted, plaintiffs also allege that Raymond and Candido actively worked to protect the Jay Peak Projects from oversight and investigation and covered up fraud within the Projects. If evidence bears out these claims, a jury could find that Raymond and Candido "heedlessly and palpably violated" the legal duty they assumed when they represented to investors that they should invest in the Jay Peak Projects because the State would protect their investments by providing financial oversight.

Id. ¶ 57.

Based on the Supreme Court's description of Plaintiffs' surviving negligence claims against the ACCD and the individual Defendants, it appears that each investor's relationship with the ACCD and the individual Defendants, and their reliance on statements by the ACCD and/or

the individual Defendants, will have to be proven and cannot be established by representative Plaintiffs. Moreover, as Defendants point out, Mr. Candido was the director of the Vermont Regional Center from 2004 until May 2012, and Mr. Raymond was the director of the VRC from June 2012 until June 2015. Investors who relied on representations by Mr. Candido could not have relied on representations by Mr. Raymond, and vice versa. Investors who did not invest in the Jay Peak projects until after June 2015 could not have relied on representations by either Mr. Raymond or Mr. Candido unless they were relying on former representations these individuals may have made. In any event, it appears that, in order to prevail on their negligence claims against the ACCD and/or the individual Defendants, proof by each investor will be required in this case and cannot be established by the putative class representatives.

Because Plaintiffs are unable to satisfy the commonality prong of Rule 23(a) with respect to their negligence and gross negligence claims, it is unnecessary to address the remaining requirements of Rule 23 with respect to those claims. Plaintiffs' motion for class certification as to the negligence and gross negligence causes of action must be denied.

2. *Breach of Contract and the Covenant of Good Faith and Fair Dealing Causes of Action*

Whether eligibility for class certification on the contract and covenant claims has been established will be analyzed separately. It is possible that a class could be certified on these causes of action even though not on the negligence and gross negligence claims.

In allowing Plaintiffs' claims for breach of contract and the covenant of good faith and fair dealing ("Contract Claims") to move forward against the ACCD, the *Sutton* Court found that Plaintiffs had made out a claim for a unilateral contract sufficient to survive a motion to dismiss. *Sutton*, 2019 VT 71A, ¶¶ 60–61. Addressing Plaintiffs' claim for breach of contract, the Court wrote:

> Plaintiffs' allegations, if true, would establish formation of a unilateral contract between the investors and ACCD, which ACCD breached. ACCD offered to plaintiffs that if they invested in the Jay Peak Projects, it would provide "oversight, administration, management, and regulatory compliance of the Jay Peak Projects for the specific benefit of Plaintiffs." Plaintiffs' allegations support an inference that, as part of the oversight ACCD pledged to undertake, ACCD promised to enforce the Jay Peak Projects' financial-reporting requirements under the MOUs. This constituted an offer: ACCD wished to receive the benefit of investments in the Jay Peak Projects, which would serve its goal of promoting economic development in the state, so it offered to plaintiffs that if they made the requisite investment, it would provide financial oversight over the Projects. Plaintiffs accepted ACCD's offer by performing: they invested in the Projects. At that point, a contract obligating ACCD to fulfill its promises formed. ACCD subsequently failed to provide any of the promised oversight, breaching its contractual obligations to plaintiffs.

Id. ¶ 61. Addressing Plaintiffs' claim for breach of the covenant of good faith and fair dealing, the Court wrote:

> Plaintiffs' allegations could likewise support a claim for breach of the covenant of good faith and fair dealing. The covenant, which is implied in every contract, serves to ensure that parties to a contract act with faithfulness to an agreed common purpose and consistency with the justified expectations of the other party. Plaintiffs allege that the parties were bound to execute their agreement for oversight, management, administration, and regulatory compliance services consistent with the covenant of good faith and fair dealing, and that defendants failed to do so. Plaintiffs' allegation that ACCD failed to provide the promised financial oversight establishes a failure by ACCD to act consistently with plaintiffs' justified expectations pursuant to their contract for oversight, and makes out a claim for breach of the covenant of good faith and fair dealing.

Id. ¶ 62 (quotations and citations omitted).

Plaintiffs do not describe with any detail the specific attributes of the claims of the members of the class of investors they seek to represent, nor of the specific harm allegedly suffered. In opposition to Plaintiffs' motion, Defendants submitted a two-page document identified as Exhibit A. Page 1 lists the eight partnerships (referred to as Phase I – Phase VIII) at issue in this lawsuit, their funding dates, the total number of investors who invested in each partnership, information regarding the status of immigration forms the investors of each partnership submitted as part of the EB-5 program, whether the immigration forms were approved, denied, and/or revoked, and whether the investors' funds were refunded, still invested, or redeployed. On page 2 of Exhibit A, Defendants provided specific investment information for each named plaintiff. Plaintiffs have not objected to the information Defendants included in Exhibit A or provided contradictory information about the investors or their particular investments. Thus, for purposes of ruling on Plaintiffs' motion to certify, the court assumes the accuracy of Exhibit A.

In support of their Contract Claims, Plaintiffs allege that the memoranda of understanding ("MOUs") for each of the Jay Peak projects contain the promises the ACCD made to the investors in exchange for the investors' investments of money in the various projects. To prevail on their Contract Claims against the ACCD, Plaintiffs will have to specify which promises the ACCD allegedly made to induce Plaintiffs to invest and then breached, and this will necessarily bring into play the various MOUs at issue for each project.[1] They also need to show that all the purported class members suffered the same injury. *Wal-Mart*, 564 U.S. at 348.

Exhibit A shows no named plaintiff who invested in Phase IV, which is identified as Golf & Mountain. Exhibit A indicates that 90 individuals invested in Phase IV, 90 I-526s were approved, 70 I-829s were approved, 14 I-829s were denied, and 6 I-829s are pending. This project is described as "complete." Plaintiffs state in their motion that "[t]he named plaintiffs

[1] Defendants suggest that there may be more than one MOU within each of the different phases.

here represent a putative class of over 800 individuals who invested in the Jay Peak Projects." However, Exhibit A reveals that a total of 846 individuals invested in the Jay Peak Projects. If 90 individuals invested in Phase IV, but no named Plaintiff invested in Phase IV, these 90 individuals could not be a part of the class Plaintiffs seek to represent, but Plaintiffs have not excluded them. On the contrary, it appears that Plaintiffs intended to include them in the proposed class. However, among the named Plaintiffs there are none who had a contract for the Phase IV project, and thus no one who can represent the interest of investors in Phase IV. Thus, the Plaintiffs do not have sufficient standing to represent Phase IV investors.

Exhibit A also shows that: Phase I has been completed, 35 individuals invested in Phase I, all 35 I-526s were approved, 34 I-829s were approved and one was withdrawn, and funds were repaid to all 35 investors. Two named Plaintiffs invested in Phase I and they both received their investments back. Based on this information, it is not clear what injury was caused that is the same as that allegedly caused to investors in each of the other projects is the same.

Exhibit A also reveals that the individuals who invested in the different projects are not necessarily in the same position vis-à-vis their immigration forms or their investments. Most investors in Phases I-VI have had their I-526s approved and more than half have had their I-829s approved. 101 of the 166 investors in Phase VII have had their funds repaid, but no investors in Phase VIII have had their funds repaid. Again, this suggests that not all of the purported class members suffered the same injury.

While proof of lack of agency oversight may be common to all investors with respect to the Contract Claims, it has not been shown that all proposed class members suffered the same injury as required for class certification. *Wal-Mart*, 564 U.S. at 348. Causation of injury is also a necessary element of the Contract Claims, and Plaintiffs have not shown that proof of causation of injury would be the same for all members of the purported class, even if subclasses were created for different projects.

In sum, Phase IV investors could not be represented by the present individual Plaintiffs, and given the number of different contracts and versions of contracts involved and the variety of outcomes and lack of information about common injury, Plaintiffs have not shown that facts related to proof of breach of a variety of different contracts or causation of injury would be the same for all members of the putative class. Plaintiffs have not sufficiently shown that they are able to satisfy the commonality requirement of Rule 23(a).

V.R.C.P. 23(a)(3): "Typicality"

The typicality requirement of Rule 23(a) "is satisfied when 'each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability.'" *Allen*, 279 F.R.D. at 272 (quoting *In re Flag Telecom Holdings, Ltd. Secs. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009) (citation and quotation marks omitted)). The Contract Claims of the investors of each Phase of the Jay Peak projects may be based on the same MOU(s), but the claims of the individual investors of one Phase will necessarily differ from those who invested in a different Phase if the Contract Claims are based on MOUs that

were issued for each Phase. The information depicted on Exhibit A shows that the statuses of the individual investors' I-526 and I-829 forms vary and also that the statuses of the investors' investments are not uniform--some investments have been refunded, whereas others have been redeployed or are still invested. Plaintiffs have failed to demonstrate, as they must to obtain class certification, that the named Plaintiffs are typical of the investor class as a whole with respect to liability. Important aspects of the putative class members are too different from one another, even within possible subclasses.

Summary

The negligence and gross negligence claims do not qualify for class certification because of the need to show a "special relationship" between each individual plaintiff and the specific defendant. With respect to the Contract Claims, not all members of the proposed class would be adequately represented because no Plaintiffs invested in Phase IV. In addition, there were different contracts for different Phases and apparently also different versions at different times within different projects. Thus, multiple subclasses would need to be created for the different Phases, and perhaps subclasses within subclasses. Plaintiffs have not shown that the commonality and typicality requirements can be met, even if subclasses were to be created.

Because Plaintiffs are unable to satisfy two of the four required elements of Rule 23(a), the motion cannot be granted and it is unnecessary to address the fourth prong of the rule, which is adequacy of representation, or the issue, under Rule 23(b), of which category, if any, the class would fall into if it were to be certified.

Furthermore, it is noted that even if all requirements were met, if subclasses for different Phases, and particularly if another layer of subclasses for different circumstances within each subclass, were created, all in addition to the fact that two of the four claims in the case would be outside of any class certification altogether, the case as a whole would be too unwieldy to manage as one action.

The court has granted this day the Plaintiffs' motion filed December 3, 2021, to include the six additional persons named in that motion. They were included in Defendants' Exhibit A. The case will proceed with those additional Plaintiffs. A status conference is scheduled for April 13, 2022.

Electronically signed pursuant to V.R.E.F. 9(d) on April 7, 2022 at 4:19 PM.

Mary Miles Teachout

Mary Miles Teachout
Superior Court Judge