IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA COMPLEX BUSINESS LITIGATION DIVISION

CASE NO. 2021-015089 CA 01
SECTION: CA43
JUDGE: Michael Hanzman

IN RE: CHAMPLAIN TOWERS SOUTH COLLAPSE LITIGATION
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JMAF'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO CERTIFY A LIABILITY CLASS PURSUANT TO FLORIDA RULES OF CIVIL PROCEDURE 1.220(b)(3), 1.220(d)(1), & 1.220(d)(4)

Defendant, JOHN MORIARTY & ASSOCIATES OF FLORIDA, INC. ("JMAF"), submits this response in opposition to Plaintiffs' Motion to Certify a Liability Class Pursuant to Florida Rules of Civil Procedure 1.220(b)(3), 1.220(d)(1), and 1.220(d)(4) (the "Motion").

INTRODUCTION

Pursuant to their Motion, Plaintiffs request the Court to certify a "liability class" for the Litigation. Noting that "Class Members' damages vary" (Motion, p. 15), Plaintiffs propose that the Court bifurcate the Litigation into liability and damages phases, conditionally certify a liability class, and proceed towards a liability trial "to first resolve the question of the Defendants' (and possible *Fabre* Defendants) liability and apportionment of fault for the cause of the CTS Collapse." Motion, p. 1. Plaintiffs define their proposed liability class as follows:

> All persons and entities located at, residing at, or owning units or personal property lost or destroyed at the Champlain Towers South condominium building, located at 8777 Collins Avenue, Surfside, Florida 33154, at the time of the Champlain Towers Collapse on June 24, 2021, together with the personal representatives and statutory survivors of all persons whose lives were lost in or as a result of the CTS Collapse.

(the "Liability Class"). *Id.* Plaintiffs maintain that "the common and predominant question for the jury to answer at this stage is whether the Defendants' tortious conduct and/or breach of duties owed to the class members caused the collapse, and how to apportion liability among those at fault." Motion, p. 2.

In seeking certification of a Liability Class, Plaintiffs conspicuously fail to articulate any plan for handling a later damages phase in the unlikely event one should ever become necessary. JMAF denies any liability in this case and thus anticipates that a damages phase involving JMAF will never occur or become necessary. But to the same extent that certification of a liability only class does not presuppose the incurrence of liability on the part of any Defendant, the improbable ultimate award of any damages in this case likewise should not forestall a consideration of how class-wide damages might be managed here.[1] Plaintiffs simply skip over this issue in their Motion, conclusorily stating that, if successful in establishing Defendants' liability at a liability trial, Plaintiffs *then* at that time "will propose to the Court a manner to conduct the second damage phase." Motion, p. 13. Nevertheless, because Plaintiffs are proposing resort to the Rule 1.220 class action device as a superior method for achieving the efficient resolution of this case, Plaintiffs should be required to offer more than a single sentence as to how they plan to apportion and adjudicate damages in the event, however remote, that such a damages plan ever would have to be implemented.

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[1] Advance consideration of how any damage recovery would be apportioned among class plaintiffs would appear to be particularly appropriate in light of reported divergences among putative class members concerning their respective losses and the propriety of any respective recoveries. *See, e.g.*, "United in grief, bitter legal battles now divide Surfside collapse survivors and families," *Miami Herald*, December 29, 2021.

In addition, the Court should postpone any certification decision until after JMAF and the other Defendants have an adequate opportunity to conduct full discovery concerning whether all of the proposed class members are commonly situated for purposes of a liability determination. Potential differences among putative class members with respect to comparative fault or other defenses might exist that would preclude certification of the currently defined Liability Class. Further, Plaintiffs' proposed Liability Class definition is overly broad because it includes proposed members – the statutory survivors of persons whose lives were lost in or as a result of the CTS collapse – who lack standing to bring claims against JMAF and the other Defendants.

The Court thus respectfully should deny Plaintiffs' request for certification of a Liability Class at this time or, at a minimum, defer the decision regarding Plaintiffs' certification request pending articulation of a class-wide damages plan, the conduct of further discovery regarding a common liability determination, and amendment of the Liability Class definition to exclude statutory survivors.

ARGUMENT

Plaintiffs seek conditional certification of a Liability Class under Florida Rules of Civil Procedure 1.220(b)(3), (d)(1), and (d)(4). Motion, p. 11. To successfully certify the requested Liability Class, Plaintiffs must carry the burden of pleading and proving satisfaction of all Rule 1.220(a) requirements, including that (i) the class is sufficiently numerous ("numerosity"); (ii) Plaintiffs and class members share common claims ("commonality"); (iii) Plaintiffs' claims are typical of the claims of all class members ("typicality"); and (iv) Plaintiffs and their counsel are adequate class representatives ("adequacy").[2] Fla.R.Civ.P. 1.220(a); *see also Sosa v. Safeway*

[2] Florida law requires that a class also be described with some degree of certainty. *Clearview Imaging L.L.C. v. Mercury Ins. Co. of Fla.*, 2010 WL 9940700, at *10 (Fla. 13th Cir. Ct. 2010);

Premium Fin. Co., 73 So. 3d 91, 106 (Fla. 2011). Additionally, Plaintiffs must establish that the proposed Liability Class satisfies at least one of the three subdivisions of Rule 1.220(b). *Sosa*, 73 So. 3d at 106. Because Plaintiffs' Motion seeks certification of the Liability Class pursuant to 1.220(b)(3), Plaintiffs must demonstrate that (i) common questions of law or fact predominate over any questions of law or fact affecting only individual members of the class ("predominance"); and (ii) class representation is superior to other available methods for the fair and efficient adjudication of the controversy ("superiority"). Fla.R.Civ.P. 1.220(b)(3); *see also Sosa*, 73 So. 3d at 111, 116.

In their Motion, Plaintiffs essentially are requesting that the Court bifurcate the Litigation into two phases – a liability phase utilizing the proposed Liability Class and a later unarticulated damages phase in the event Plaintiffs are successful in establishing that one or more of the Defendants are liable for Plaintiffs' alleged damages. To effect this bifurcation, Plaintiffs ask the Court to certify the proposed Liability Class pursuant to Florida Rule of Civil Procedure 1.220(d)(4)(A), which provides that "a claim or defense may be brought or maintained on behalf of a class concerning particular issues." *See Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, (Fla. 2006); *Las Olas Co. v. Fla. Power & Light Co.*, No. CACE19019911-18, 2020 WL 9874296 (Fla. 17th Cir. Ct. Dec. 14, 2020), *aff'd per curiam, Infratech Corp. v. Las Olas Co.*, 320 So. 3d 751 (Fla. 4th DCA 2021), *reh'g denied,* (Fla. 4th DCA July 13, 2021).

Paradise Shores Apts., Inc. v. Practical Maint. Co., Inc., 344 So. 2d 299, 302 (Fla. 2d DCA 1977). Further, a class must be "ascertainable" – the class definition must contain objective criteria for identification of class members through a manageable process that does not require much, if any, individual inquiry. *BJ's Wholesale Club, Inc. v. Bugliaro*, 273 So. 3d 1119, 1121-22 (Fla. 3d DCA 2019).

JMAF acknowledges that the Florida Supreme Court in *Engle* authorized a liability only class of the type championed by Plaintiffs here. 945 So. 2d at 1268-70. *Engle* also appeared to approve dealing with damages issues in a class action case after there has been a determination of underlying liability, citing the judiciary's authority to devise "imaginative solutions" and to invoke various "management tools" to address individualized damages issues in class action lawsuits. But at least one court has questioned whether *Engle* authorized bifurcation of a case into liability and damages phases as a means of satisfying Rule 1.220(b)(3)'s requirements. *See, e.g., Mosaic Fertilizer, LLC v. Curd,* 259 So. 3d 239, 244-45 (Fla. 2d DCA 2018) ("it is not necessarily clear that *Engle* prospectively authorized bifurcation as a means of meeting rule 1.220(b)(3)'s requirements"). In *Mosaic*, the court pointed out that, whereas *Engle* relied on several federal cases that certified liability questions and left damages questions for individual resolution later, *Engle* also recognized that federal cases are split on this issue. 259 So. 3d at 244-45; *see also Engle*, 945 So. 2d at 1268-69. Ultimately, *Engle* approved certification of certain liability issues on the facts presented in that case, but underscored the idiosyncratic nature of its decision by noting that the procedural posture of the case was unique and unlikely to be repeated.[3] *Engle*, 945 So. 2d at 1270, n.12; *see also Mosaic*, 259 So. 3d at 245.

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[3] In a similar vein, many courts have rejected attempts to use liability issue certification as means for achieving an "end run" around the "(b)(3)" predominance requirement. *See, e.g., Teggerdine v. Speedway, LLC*, Case No. 8:16-cv-03280-T-27TGW, 2018 U.S. Dist. LEXIS 91043, *16 (M.D. Fla. May 31, 2018) (because plaintiff did not satisfy the predominance requirement, Rule 23(c)(4) (the federal equivalent to Rule 1.220(d)(4)) was not available to plaintiff); *City of St. Petersburg v. Total Containment, Inc.*, 265 F.R.D. 630, 646 (S.D. Fla. 2010) (recognizing that many courts have emphatically rejected attempts to use (c)(4) as a means of avoiding the (b)(3) predominance requirement); *O'Neill v. Home Depot U.S.A., Inc.*, 243 F.R.D. 469, 481-82 (S.D. Fla. 2006) (court may not certify a single issue when the case as a whole fails to meet the requirements of Rule 23); *Richardson v. Progressive Am. Ins. Co.*, Case No. 2:18-cv-715-Ftm-99MRM, 2022 U.S. Dist. LEXIS 8783, *67 (M.D. Fla. Jan. 18, 2022); *Rink v.*

In short, *Engle* does not appear to stand for the proposition that putative class actions should automatically be bifurcated into liability and damages phases under Rule 1.220(d)(4)(A) merely upon the request of a party. Rather, courts still must undertake a "rigorous analysis" of the Rule 1.220(a) and (b) requirements before deciding whether certification of a liability only class is appropriate under the facts and circumstances of the case. For the reasons detailed below, Plaintiffs' present request for certification of a Liability Class suffers from at least three defects that augur against granting class certification in the Litigation at this time.

I. Plaintiffs' Request For Certification Of A Liability Class Should Be Postponed Until Plaintiffs Propose A Plan For Managing Damages In The Unlikely Event Of A Liability Finding.

As Plaintiffs acknowledge, any certification of a liability issue class must 'materially advance[] the disposition of the litigation as a whole." Motion at 20; *see also Rink,* 203 F.R.D. at 671-672 (explaining that prior to certification under Rule 23(c)(4)(A), a court must "conclude the proposed procedure would…materially advance the disposition of the litigation as a whole"). Courts deny requests for certification of an "issue class" if the requested certification does not render litigation of the case more efficient and manageable or if the request fails to include a workable trial plan. *See, e.g., Rahman v. Mott's LLP*, 693 F. App'x 578, 580 (9th Cir. 2017); *In*

Cheminova, Inc., 203 F.R.D. 648 (M.D. Fla. 2001). And even if *Engle* authorizes the Court to utilize Rule 1.220(d)(4)(A) to certify class-wide liability issues as requested by Plaintiffs here, Plaintiffs should be required to present a reasonable methodology for proving those issues class-wide before certification is appropriate. *Mosaic*, 259 So. 3d at 245.

re Paxil Litig., 212 F.R.D. 539, 546-48 (C.D. Cal. 2003); *In re Amla Litig.*, 282 F. Supp. 3d 751, 765-66 (S.D.N.Y. 2017); *Packard v. City of N.Y.*, 2020 WL 1479016 (S.D.N.Y. Mar. 25, 2020).[4]

Some courts have held that, to obtain certification of a liability issue or liability-only class, putative class plaintiffs must present a reasonable plan for resolving the case as a whole, including damages. For instance, in *Rahman*, the Ninth Circuit affirmed the district court's refusal to certify a liability-only class because plaintiff failed to provide sufficient supplemental briefing concerning how damages would be resolved if the liability issues were certified. 693 F. App'x at 579-80. Agreeing with the district court's conclusion that certification of an issues class must materially advance resolution of the "*entire* case," the Ninth Circuit concluded that plaintiff's failure to show why certification of a liability-only class would be more efficient or desirable justified denial of certification. Noting that the district court found little that was helpful in plaintiff's supplemental briefing regarding why certifying a liability-only class would materially advance the overall litigation, the Ninth Circuit focused on the district court's conclusion that plaintiff:

> "failed to articulate why a bifurcated proceeding would be more efficient or desirable" and was "*vague as to whether he intends to certify a damages class, allow class members to individually pursue damages, or ha[d] some other undisclosed plan for resolving the case*."

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[4] Florida Rule 1.220 is patterned after Federal Rule of Civil Procedure 23 (the federal class action rule). As Plaintiffs acknowledge in their Motion, Florida courts consider federal cases as persuasive authority regarding interpretation of Florida Rule 1.220. Motion, p. 10; *see also Chase Manhattan Morg. Corp. v. Porcher*, 898 So. 2d 153, 156-57 (Fla. 4th DCA 2005); *Seven Hills, Inc. v. Bentley*, 848 So. 2d 345, 352-53 (Fla. 1st DCA 2003); *Powell v. River Ranch Prop. Owners Ass'n, Inc.*, 522 So. 2d 69, 70 (Fla. 2d DCA), *rev. denied*, 531 So. 2d 1354 (Fla. 1988). This Court thus can look to federal decisions regarding Fed.R.Civ.P. 23 to assist in interpreting and applying Rule 1.220.

Id. (emphasis added). The court further noted that certification of a liability class is not required merely because it is permissible to do so, and should be reserved for appropriate circumstances. *Id.* at 580.

The same principles were applied in *D.C. v. County of San Diego*, Case No. 15cvi868-MMA (NLS), 2018 WL 692252 (S.D. Cal. Feb. 2, 2018), *aff'd*, 783 F. App'x 766 (9th Cir. 2019), where the plaintiff sought to reserve the question of how damages should be adjudicated in a liability-only class. Finding that plaintiff's arguments were vague regarding his proposed plan for resolving the damages phase of the case, the district court declined to certify a liability-only class, stating:

> Courts often decline to certify a liability class where plaintiffs "fail to show any model for calculating damages that (1) can be applied classwide (even if the model will be used to make individualized determinations) and (2) is tied specifically to the plaintiffs' theory of liability."

Id. at *3 (quoting *Loritz v. Exide Technologies*, No. 2:13-cv-02607-SVW-E, 2015 WL 6790247, at *23 (C.D. Cal. July 21, 2015)).

Likewise, in *Nguyen v. Nissan North Am., Inc.*, Case No. 16-CV-05591-LHK, 2018 U.S. Dist. LEXIS 93861, at *22-23 (N.D. Cal. April 9, 2018), *rev'd on other grounds,* 932 F.3d 811 (9th Cir. 2019), the court declined to certify a liability-only class because plaintiff, as in *Rahman* and *City of San Diego*, failed to articulate how a damages phase would be handled. Citing *Rahman*, the court found that plaintiff proposed "no path forward" and did "not explain how Rule 23(c)(4) certification would advance the litigation." *Id.* at 23. Plaintiff's conclusory statement "that a classwide liability finding 'will establish predominance as to the rest of Plaintiff's claims'" was insufficient without further explanation. *Id.* Further, the court concluded that plaintiff had offered no solution regarding the damages issue, merely "stating instead that

'[o]nce liability has been adjudicated as to the Class, a procedure can be crafted to resolve individual damages.'" *Id.* In short, the court ruled that speculation about disposition of damages cannot sustain certification of a liability-only class. *Id.*

Assuming *arguendo* that Plaintiffs could successfully establish that one or more of the Defendants incur liability to the proposed Liability Class (which, again, JMAF believes is highly doubtful), Plaintiffs' Motion fails to articulate even a rudimentary plan for resolving the damages phase of the Litigation. Plaintiffs merely state in their Motion, much like the plaintiffs in *City of San Diego* and *Nguyen*, that they "will propose to the Court a manner to conduct the second damage phase" if Plaintiffs are successful in "a trial as to liability." Motion, p. 13. This single-sentence damages plan is wholly insufficient to demonstrate a workable methodology for resolving the *whole* case. As a result, Plaintiffs have failed to carry their burden of demonstrating that certification of a liability-only class would materially advance resolution of the "*entire* case" as Rule 1.220(d)(4)(A) mandates. *See generally Rahman,* 693 F. App'x at 579; *see also Handloser v. HCL Techs. Ltd.,* Case No. 19-CV-01242-LHK, 2021 U.S. Dist. LEXIS 45183, *36-37 (N.D. Cal. March 9, 2021) (plaintiffs' perfunctory justification for certification requires the court to deny certification of a limited issue class).

II. Additional Discovery Is Needed Before A Fully Informed Class Certification Decision Can Be Made.

Pursuant to Rule 1.220(d)(1), the Court possesses the authority to order postponement of a certification decision pending completion of discovery concerning whether a claim or defense is maintainable on behalf of a class. The Court should exercise this authority and postpone deciding Plaintiffs' certification request to afford JMAF and the other Defendants sufficient time to complete discovery regarding Plaintiffs' Motion. Specifically, Defendants need additional

discovery to determine whether differences exist among putative class members regarding liability issues that would render certification of the proposed Liability Class improper.

For instance, if individual condominium unit owners or Association Board members (who are also unit owners) had an opportunity to approve recommended repairs to CTS that might have prevented the collapse, and some voted for approval and others against, Defendants might possess comparative fault defenses against the unit owners or Board members who declined to approve repairs. Such defenses might not be available against owners and Board members who had approved the repairs. In this scenario, Plaintiffs' requested certification should be denied because not every aspect of liability could be determined on a class-wide basis as presently claimed by Plaintiffs. Rather, a determination would need to be made regarding whether each unit owner and Board member was subject to a comparative fault defense and, if so, what percentage of fault, if any, should be attributable to each such owner and Board member.

Moreover, the foregoing scenario could trigger constitutional concerns if the Liability Class requested by Plaintiffs is certified now. For example, if the Court certified Plaintiffs' requested Liability Class and all of the liability issues were determined on a class-wide basis notwithstanding that some unit owners or Board members might have comparative fault while others do not, the comparative fault issue likely would need to be reconsidered during the damages phase of the Litigation regarding potentially at fault unit owners and Board members. Courts have concluded that such a reconsideration could raise constitutional problems if the same issue or issues (*e.g.*, comparative fault) are resolved by two different juries. *See, e.g., In re Amla*, 282 F. Supp. 3d at 765; *Engle*, 945 So. 2d at 1270-71.

III. Plaintiff's Requested Liability Class Cannot Be Certified Because The Class Definition Is Overbroad.

Plaintiffs' proposed class definition is overbroad. Pursuant to Section 768.20, *Florida Statutes*, a wrongful death action must be brought by a decedent's personal representative who is authorized to recover all damages for the benefit of the decedent's survivors and estate. *See Roughton v. R.J. Reynolds Co.*, 129 So. 3d 1145, 1150 (Fla. 1st DCA 2013) ("By statute, the personal representative is the only party with standing to bring a wrongful death actin to recover damages for the benefit of the decedent's survivors and the estate."). Survivors are not permitted to bring separate legal actions for themselves. *See, e.g., Heiston v. Schwartz & Zonas, LLP*, 221 So. 3d 1268, 1271 (Fla. 2d DCA 2017); *Wagner, Vaughan, McLaughlin & Brennan, P.A.*, 64 So. 3d 1187, 1191 (Fla. 2011).

Plaintiffs' proposed Liability Class definition includes both the personal representatives and statutory survivors of persons who died in or as a result of the CTS collapse. Motion, p. 1. Because only personal representatives have standing to pursue wrongful death claims, the decedents' statutory survivors cannot be included in any certified class. *See, e.g., Lucarelli Pizza & Deli v. Posen Constr., Inc.*, 173 So. 3d 1092, 1094 (Fla. 2d DCA 2015) (proposed class overbroad because it included members who did not have a cause of action); *Leibell v. Miami-Dade County*, 84 So. 3d 1078, 1083 (Fla. 3d DCA 2012) (proposed class fails if it is overbroad). Inclusion of statutory survivors in Plaintiffs' proposed Liability Class makes the putative liability class substantially overbroad. This threshold definitional defect must be cured before the Court considers any certification of a Liability Class in this case.

CONCLUSION

For the foregoing reasons, the Court should postpone a decision on Plaintiffs' Motion pending: 1) Plaintiffs' articulation of a plan to deal with or manage any award of damages, 2) the conduct of class discovery to ascertain whether there are differences among putative class members regarding liability issues that would render certification of the proposed Liability Class improper, and 3) Plaintiffs' correction of the existing overbroad class definition.

Dated: February 23, 2022

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 23, 2022, a true and correct copy of the foregoing *Answer and Affirmative Defenses to Plaintiffs' Consolidated Second Amended Class Action Complaint* was filed with the Court via the Florida Court's E-Filing Portal, which will provide electronic service of the filing to all counsel of record.

/s/ Seth M. Schimmel
Attorney