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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Richard Palmer and Angela Palmer, Plaintiffs and Appellees, vs. Gentek Building Products Inc., Defendant and Appellant.	)))))))))	Supreme Court No. 20180450 Williams Co. No. 53-2015-CV-00123

APPEAL FROM JUDGMENT, DATED OCTOBER 25, 2018, NOTICE OF ENTRY OF JUDGMENT, DATED OCTOBER 29, 2018, ORDER AWARDING PLAINTIFFS' ATTORNEYS' FEES DATED DECEMBER 5, 2018, AND TAXATION OF COSTS AND DISBURSEMENTS DATED DECEMBER 12, 2018.

THE DISTRICT COURT OF WILLIAMS COUNTY, NORTH DAKOTA
NORTHWEST JUDICIAL DISTRICT
THE HONORABLE PAUL W. JACOBSON, PRESIDING

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

[¶1] The Palmers did not cite a single case holding their failure to receive individual notice of class settlement renders the final order and judgment in Eliason et. al. v. Gentek Building Products, Inc. et al., Case No. 1:10cv2093 void as to them. Courts around the county have rejected the exact argument the Palmers assert in this appeal. The district court's decision is contrary to well-established law, the Palmers' claim is barred by Eliason, the district court's judgment should be vacated, and the case should be dismissed as a matter of law.

II. ARGUMENT

A. Receipt of Individual Notice is Not Required to Bind the Palmers to Eliason

[¶2] The Palmers' entire case rests on their argument that they are not bound by Eliason because they did not receive individual notice. The Palmers did not cite a single case in support of this position because it is contrary to well-established law. In fact, this argument has been rejected multiple times by multiple courts across the county. See Reppert v. Marvin Lumber & Cedar Co., 359 F.3d 53, 56-57 (1st Cir. 2004) ("Individual notice of class proceedings is not meant to guarantee that every member entitled to individual notice receives such notice...members will be bound by the court's actions, including settlement and judgment, even though those individuals never actually receive notice."); Williams v. Marvin Windows & Doors, 15 A.D.3d 393, 396, 790 N.Y.S.2d 66, 68 (2005) (holding non-receipt of individual notice is insufficient to remove plaintiff from class membership); Dolan v. Chase Home Fin., LLC, 2015 WL 4776786 at *9 (D. Mass. Aug. 11, 2015) (where the court in which a class action is decided makes a finding that notice "was the best notice practicable and fully satisfied the requirements of the Federal Rules of Civil Procedure, due process, and applicable law" the "well established principles of collateral estoppel preclude the [plaintiffs] from relitigating the issue of class membership in this court.") Benacquisito v. Am. Express Fin. Corp., 2015 WL 4661936 at * 2 (D. Minn. Aug. 5, 2015)

(holding class member was precluded from subsequent litigation and their "argument that they did not receive notice is unavailing."); Freeman v. Pacific Life Ins. Co., 577 S.E.2d 184, 187 (N.C. Ct. App. 2003) ("Plaintiffs' allegations that they did not receive actual notice are irrelevant to the effect of the [class action] judgment upon them."); Ross v. Trex Co., Inc., 2013 WL 791229 at *1 (N.D. Cal. March 4, 2013) (holding actual notice is not required to bind individual to class action settlement); Pey v. Wachovia Mortgage Corp., 2011 WL 5573894, * 7 (N.D. Cal. Nov. 15, 2011) (holding a plaintiff "cannot escape the preclusive effect of the [class action] settlement simply by arguing that he did not receive actual notice."); Silber v. Mabon, 18 F.3d 1449, 1453-54 (9th Cir. 1994) (holding absent class member's due process rights were not violated where he did not receive notice of settlement in time to opt out of class action lawsuit); In re Prudential Ins. Co of America Sales Practices Litigation, 177 F.R.D. 216, 231 (D.N.J. 1997) ("Courts have consistently recognized that due process does not require that every class member receive actual notice so long as the court reasonably selected a means likely to apprise interested parties."); Weigner v. The City of New York, 852 F.2d 646, 649 (2d Cir. 1998), ("[t]he proper inquiry is whether [class counsel] acted reasonably in selecting means likely to inform persons affected, not whether each [class member] actually received notice.") cert. denied 488 U.S. 1005 (1989).

[¶3] Instead of relying upon case law that addresses the issue squarely before the Court, the Palmers rely upon Fed.R.Civ.P. 23 and cases interpreting that rule[1]. Rule 23 "governs the

[1] Specifically, the Palmers rely on Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) and their progeny for the contention that Rule 23 requires individual notice be provided to identifiable class members. This is irrelevant to the issue on appeal because Eisen and Mullane were appeals from federal court decisions on class certifications and do not stand for the proposition that a federal court's determination of adequate notice is subject to review by a state court. Further, the myriad of cases cited above were decided long after Eisen and Mullane and make clear that failure to receive individual notice is insufficient to remove an individual from a settlement class and the issue of class membership cannot be relitigated in a subsequent court.

administration of class action lawsuits and provides for the efficient and fair administration of controversies where the class suing or to be sued is sufficiently numerous, shares common claims, and is adequately represented by named plaintiffs whose claims are typical of the rest of the class. The rule envisions a truly representative suit to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." Barham v. Ramsey, 246 F.R.D. 60, 62 (D.D.C. 2007). "It is undisputed that the purpose of Rule 23 is to prevent piecemeal litigation to avoid (i) a multiplicity of suits on common claims resulting in inconsistent adjudications and (ii) the difficulties in determining the res judicata effects of a judgment." Donovan v. University of Texas at El Paso, 643 F.2d 1201, 1206-07 (5th Cir. 1981). "Receipt of actual notice by all class members is required neither by Rule 23 nor the Constitution...What efforts are reasonable under the circumstances of the cases rests initially in the sound discretion of the judge before whom the case is pending." Carlough v. Amchem Products, Inc., 158 F.R.D. 314, 325 (E.D. Pa. 1993) (citation omitted). It is clear that Rule 23 governs the federal courts' administration of class actions. Whether a federal court followed Rule 23 is not subject to review by a state court. Farm Credit Bank of St. Paul v. Jelinek, 477 N.W.2d 243, 245 (N.D. 1991) (North Dakota courts have no power to review decisions of any federal court); see also Ross, 2013 WL 791229 at * 2 (holding plaintiff could not pursue claims against manufacturer in state court that were covered by federal class action settlement even though he did not receive actual notice because "allowing [plaintiff] to pursue his action in state court...would undermine the finality of the judgment entered in [federal court]").

[¶4] Eliason specifically held the "mailing of the Class Notice to known Class Members and the publishing of the Class Notice...fully complied with the requirements of the United States Constitution, the Federal Rules of Civil Procedure and the Rules of Court." AA 13-14. Even if Eliason's conclusion ran afoul of Rule 23's notice requirement, it is still a bar to this lawsuit

because "an 'erroneous conclusion' reached by the court in the first suit does not deprive the defendants in the second action 'of their right to rely upon the plea of *res judicata*... A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack. but can be corrected only by a direct review and not by brining another action upon the same cause [of action]". Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 399 (1981) (alteration in original).

[¶5] Further, a state court has no power to review or resolve disputes arising under a class action settlement when a federal court retains exclusive and continuing jurisdiction over class members for the implementation of a class action settlement agreement as explicitly stated in Eliason's final order and judgment. AA 17. The Second Circuit Court of Appeals explained that when "the district court expressly retains jurisdiction to enforce a settlement agreement. and to resolve disputes that may arise under it, litigation in state court would pose a significant risk of frustrating the district court's jurisdiction over the consent judgment." Flanagan v. Arnaiz, 143 F.3d 540, 545 (9th Cir. 1998) (quotation omitted). This is exactly why the final order and judgment in Eliason enjoined individuals from participation in or "receiving any benefits from any other lawsuit" that relate to the claims or causes of action in Eliason. AA 19.

[¶6] The district court ignored Eliason's definition of a "Class Member," overruled its determination that the notice provided to class members satisfied Due Process. ignored its continuing and exclusive jurisdiction, ignored an injunction, and impermissibly collaterally attacked the final and unappealed final order and judgment in Eliason. The Palmers have not cited a single case indicating the district court had authority to set aside the class action, remove the Palmers from the settlement class, and enter a judgment based on the exact dispute previously decided by a federal court.

[¶7] Eliason unambiguously found the notice provided complied with the Constitution and the Federal Rules of Civil Procedure. AA 13-14. "[A]llowing absent class members to easily escape the preclusive effect of settlement by claiming that they did not receive actual notice would undermine the ability of the class action mechanism to prevent numerous identical suits with potentially inconsistent results." Pey, 2011 WL 5573894 at * 7. The district court impermissibly attacked Eliason and erred as a matter of law by holding the Palmers were not "Class Members" because they did not receive individual notice. As explained above, the unanimous case law on this exact issue bars the district court's judgment.

[¶8] The Palmers' entire case hinges on their erroneous argument that they are not class members because they did not receive individual notice of Eliason. While their argument is clearly contrary to well-established law as explained above, they ignore the fact they were aware of Eliason prior to suit and assert their decisions under Eliason could not be discerned from an intern timekeeper's entry. Palmers' Br. at ¶ 36. This does not explain why the Palmers' attorney reviewed "status of class action" with this same intern four days after the intern called "class counsel attorneys to determine whether class action settlement is an adequate solution." AA 96. Clearly, the Palmers determined it was not, took this case to trial in an unsuccessful attempt to recover consequential damages, and were awarded $80,379 in attorneys' fees by the district court for doing so. The Palmers attempted to undermine the purpose of the class action mechanism which was created to "prevent numerous identical suits with potentially inconsistent results." Pey, 2011 WL 5573894 at * 7; see also Donovan, 643 F.2d at 1206-07. Put simply, the district court ignored the law and there are no legal grounds upon which its judgment can stand.

B. The Judgment Awarding Costs and Fees Should be Vacated.

[¶9] As explained above, the Palmer's suit is barred by Eliason. There are no valid legal grounds upon which the district court could enter a valid order on damages, costs, or fees in this action. As a result, the district court's judgment awarding costs and fees should be vacated and the Palmers' complaint should be dismissed because it is barred as a matter of law.

Dated this 17th day of May, 2019.

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CERTIFICATE OF COMPLIANCE

[¶10] The undersigned certifies the above brief is in compliance with N.D.R.App. P. 32(a)(8)(A) and the total number of words in the brief, excluding words in the table of contents, table of authorities, signature block, certificate of service, and this certificate of compliance totals 1,820 words.

Dated this 17th day of May, 2019.

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CERTIFICATE OF SERVICE

[¶11] I hereby certify that on the 17th day of May, 2019, a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** was served as follows:

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