SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1247-16T3

DARNICE GREEN, MATHEW BLUMBERG, MICHAEL PERMENTER and BETH PERMENTER, individually and as class representatives on behalf of others similarly situated,

Plaintiffs-Appellants,

v.

MORGAN PROPERTIES, MORGAN MANAGEMENT, MITCHELL L. MORGAN, INC., EAST COAST THE WILLOWS, LLC and EAST COAST COLONIAL APARTMENTS, LLC,

Defendants-Respondents,

and

ROSEMARY SPOHN, ESQ.,

Defendant.

Argued March 16, 2017 – Decided September 21, 2017

Before Judges Alvarez, Accurso and Manahan.

On appeal from Superior Court of New Jersey, Law Division, Camden County, Docket No. L-4158-10.

Lewis G. Adler argued the cause for appellants (Law Office of Lewis G. Adler and Law Office of Paul DePetris, attorneys; Mr. Adler and Mr. DePetris, on the brief).

Daniel S. Bernheim, of the Pennsylvania bar, admitted pro hac vice, argued the cause for respondents Morgan Properties, Morgan Management, Mitchell L. Morgan, Inc. and East Coast Colonial Apartments (Wilentz, Goldman & Spitzer, and Mr. Bernheim, attorneys; Rachel C. Heinrich and Mr. Bernheim, on the brief).

Jonathan I. Epstein argued the cause for respondent East Coast The Willows (Drinker, Biddle & Reath, attorneys; Mr. Epstein and John P. Mitchell, on the brief).

PER CURIAM

Plaintiffs Darnice Green, Michael and Beth Permenter and their son Mathew Blumberg appeal, on leave granted,[1] from an August 2, 2016 order denying class certification in their long-running suit against the owners and property managers of their apartment complexes, defendants East Coast The Willows, LLC, East Coast Colonial Apartments, LLC, Morgan Properties, Morgan Management, and Mitchell L. Morgan, Inc., over an attorney's fee provision in their leases. Although we agree with the trial court that the class plaintiffs proposed was too broadly

[1] See Daniels v. Hollister Co., 440 N.J. Super. 359, 361 n.1 (App. Div. 2015) (explaining our general policy of liberally granting leave to appeal from orders granting or denying class certification).

construed to meet the requirements of Rule 4:32-1(a) and (b), we think the smaller, more narrowly defined class plaintiffs offered in the alternative can be certified. We accordingly vacate the order denying class certification and remand for certification of a class in conformity with this opinion.

The essential facts were set forth in the Supreme Court's prior opinion in this matter, Green v. Morgan Props., 215 N.J. 431, 438-39 (2013).[2] We summarize them here, augmented by the undisputed facts from the record on the class certification motion. Plaintiffs are current or former tenants of The Willows, a 347-unit apartment complex in Barrington, or Colonial, a 188-unit apartment complex in Cherry Hill. Since 2007, both complexes have been operated by one of the Morgan defendants,[3] Delaware corporations that manage 131 apartment

[2] The Court affirmed in part and reversed in part our decision reversing the trial court order dismissing plaintiffs' complaint pursuant to Rule 4:6-2(e). See Green, supra, 215 N.J. at 460. Specifically, the Court affirmed the reinstatement of plaintiffs' claims under the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -206, and for negligent misrepresentation, and agreed that plaintiffs' claims under the Anti-Eviction Act, N.J.S.A. 2A:18-61.1 to -61.12 should have only been dismissed without prejudice. Id. at 437, 439, 460. The Court reversed our decision reinstating the claims against the individual defendant, Morgan's in-house counsel Rosemary Spohn, finding no basis for liability against her. Id. at 456-57.

[3] The Morgan defendants claim the two apartment complexes in which plaintiffs resided were managed by Mitchell L. Morgan (continued)

complexes in ten different states, sixty-nine in New Jersey. In September 2007, Morgan created an in-house legal department to handle lease enforcement and tenant evictions at the sixty-nine New Jersey properties it manages. Morgan maintains its New Jersey legal department handles only such matters and no other legal work.

From 2007 until 2010, each named plaintiff was a party to a lease requiring payment of an attorney's fee of $400 as additional rent in the event the landlord had to employ a lawyer to recover rent due and owing.[4] The lease provided the tenant

---

(continued)
Management, Inc., that Morgan Properties is a trade name and there is no Morgan Management. As the issue is not critical to the questions presented on appeal, we note the dispute but do not resolve it.

[4] The pertinent paragraph provided:

> (a) Landlord is entitled to remove the Tenant from the apartment for good cause under New Jersey Law. If Landlord institutes legal proceedings to remove Tenant from the apartment with good cause, including the collecting of rent, additional rent or any other charges due and owing under the lease, Tenant shall pay to Landlord court costs and costs for the preparation and filing of legal documents, reasonable attorney's fees and any additional costs of legal proceedings. Landlord is entitled to begin a legal action for non-payment of rent at any time after rent is due and owing and not paid. Rent is

(continued)

(continued)

due and owing on the first day of the month. Landlord is further entitled to late charges as set forth in Paragraph 3 of this lease and costs, when rent remains due and owing after the fifth (5) day of the month. In addition, if rent is not received by Landlord within fifteen (15) days after the due date, then, in addition to all other rights and remedies which Landlord may have, Landlord or its agents may report such delinquency or non-payment to national credit reporting agencies. (b) If Tenant fails to pay the entire amount of rent due and owing, and the services of an attorney are thereby required to resolve the matter, either by court appearance, preparation of a consent to be filed with the court or for any other purpose, then a reasonable attorney's fee of four hundred dollars ($400.00) is due and payable as additional rent by the Tenant. If the attorney's fee exceeds four hundred dollars ($400.00) then the Tenant will be required to pay the entire amount of reasonable attorney's fees [due] and owing to the attorney. In the event Tenant receives a Summons and Complaint and pays all rent due, including late charges and a legal fee of two hundred dollars ($200.00), by certified check or money order prior to the court date so that Landlord's attorney is not required to make an appearance on behalf of the Landlord, Tenant shall not be liable for the remaining two hundred dollar ($200.00) legal fee. However, the four hundred dollars ($400.00) attorney's fee is due and owing even if Tenant makes full payment on the day of the court appearance, because the attorney will be required to make an appearance on behalf of Landlord. All payments are to be by certified check, cashier's check or money order only. (c) If the Landlord is required

(continued)

was responsible for all fees exceeding $400, and could receive a $200 credit if all rent, including a $200 attorney's fee, was paid before a lawyer was required to appear in court. The lease further provided for imposition of the $400 fee for "matters that do not require the filing of an action with a court including the service of valid notices to cease, notices to vacate, and demands for possession." The leases were amended in

---

(continued)

> to institute or become involved in legal proceedings requiring the services of an attorney for any good cause, including but not limited to, an action for possession, collection of money, rent or other damages, or any other valid reason, including petitioning the court for injunctive relief, making an appearance at a hearing requested by Tenant for a stay of any portion of eviction proceedings, including the issuance and execution of the warrant of removal and/or writ of possession, or other pre- and/or post-eviction relief, or any other action whether it be of a civil or criminal nature, then this entitles the Landlord to collect a reasonable attorney's fee of four hundred dollars ($400.00), plus costs and interest due and owing. If the actual amount of the attorney's fee exceeds four hundred dollars ($400.00), then Tenant will be responsible for the entire reasonable attorney's fee. Tenant is also responsible for attorney's fees incurred for matters that do not require the filing of an action with a court including the service of valid notices to cease, notices to vacate, and demands for possession, in the amount of four hundred dollars ($400.00).

2010 to eliminate the automatic $200 reduction if no court appearance was required.[5]

Each of the named plaintiffs was subjected to eviction proceedings for non-payment of rent on multiple occasions and was charged $400 in attorneys' fees each time. They did not, however, pay that sum each time. Sometimes Morgan reduced the fee charged. Plaintiffs Green and Blumberg vacated their apartments still owing rent, including attorneys' fees, although Blumberg's co-signer eventually paid all Blumberg owed on his lease. Their individual circumstances are summarized below.

The Named Plaintiffs

Plaintiff Green was a tenant at The Willows from May 2002 until September 2010. The parties agree she was late paying her rent on twenty-six occasions, resulting in the filing of five summary dispossess actions. Each eviction action included a

[5] The 2010 lease provision provides as follows:

> (f) If the Landlord uses the services of an attorney (including in-house counsel) for any good cause in relation to the enforcement or defense of any terms of this Lease, or in any relation to this tenancy, whether or not litigation is commenced, Resident must pay Landlord's attorney fees in the amount of four hundred dollars ($400) plus costs as Additional Rent for each cause in which the attorney's services are engaged.

demand of $400 for legal fees and court costs of $31. Green paid the full $400 on two occasions. She was granted a $200 credit on one occasion and a $300 credit on another. She did not pay any amount toward the $400 legal fee charged in the fifth and final proceeding.[6] Green was thus charged total legal fees of $2000, of which she paid $1100. Green quit her apartment owing The Willows $2960.11, after application of her security deposit and interest.

The Permenters have resided at Colonial since January 2005. The parties agree the couple was late paying their rent on over thirty occasions, resulting in the filing of five summary dispossess actions. Each eviction action included a demand of $400 for legal fees and court costs of $37. The Permenters paid the full $400 on one occasion. They were granted a credit of $400 on one occasion and a credit of $200 on three others. The

[6] We have extrapolated the fees and credits for each named plaintiff for each summary dispossess action from the dates of the charges, the credits and the summary dispossess actions included in the record. The parties have calculated the total legal fees charged to the named plaintiffs, as well as the total fees they paid for all evictions, and we have included those figures here as well. Defendants have also calculated the average fee each named plaintiff paid per eviction. We have not included those averages because the actual fees charged and paid for each eviction, not the averages, would appear to be the correct way of measuring ascertainable loss and damages in this case. See D'Agostino v. Maldonado, 216 N.J. 168, 192-93 (2013).

Permenters were thus charged total legal fees of $2000, of which they paid $1000.

Plaintiff Blumberg was a tenant at Colonial from March 2006 through September 2009. He was late paying rent every month but one and was subject to five summary dispossess actions. Each eviction action included a demand of $400 for legal fees and $37 in court costs. Blumberg paid the full $400 on two occasions. He was granted a $400 credit on one occasion and a $200 credit on another. Although he was evicted from his apartment in September 2009 owing $1252.81, including the $400 legal fee charged on his last eviction, that amount was paid in full in August 2010 by his aunt, who co-signed his lease. Blumberg was thus charged total legal fees of $2000, of which "he" paid $1400.

The Supreme Court's Opinion

In its opinion reinstating the CFA claim against defendants, the Court expressed several reasons for rejecting defendants' argument that the $400 lease term represented a reasonable liquidated damages provision. Green, supra, 215 N.J. at 452-55. Chief among them was that it would impermissibly shift to plaintiffs the burden of establishing the reasonableness of defendants' attorneys' fees. Id. at 454-55. The Court held plaintiffs must be permitted the opportunity to

challenge the reasonableness of the lease clause on which the landlords relied in the summary dispossess proceedings. Id. at 454.

As the Court explained, "[t]hat these plaintiffs may have paid the attorneys' fees set forth in the leases in order to avoid eviction does not preclude them from attempting to challenge the fees as being so unreasonable as to violate the CFA in a corollary proceeding." Ibid. The Court concluded defendants might well be able to "demonstrate that the basis on which the fees were calculated and included in the leases is reasonable, but it will be their burden to do so." Id. at 456.

The Class Certification Motion

Following discovery, plaintiffs sought class certification on the single count of the complaint alleging violations of Section 2 of the CFA.[7] Plaintiffs allege defendants engaged in affirmative misconduct by including and enforcing the $400 charge in plaintiffs' leases when defendants' actual costs for each summary dispossess action were far less than $400. They sought to certify a New Jersey class consisting of all tenants of the Willows, Colonial and of any properties managed by the

[7] Following the Supreme Court's decision in this matter, plaintiffs did not move to re-plead their Anti-Eviction Act claim and elected not to seek class certification on their negligent misrepresentation claim.

Morgan defendants "who were charged a legal fee for eviction" from September 1, 2007 until the date of class certification.

Plaintiffs presented two expert reports in support of their motion. One by a practicing landlord-tenant lawyer regarding the reasonableness of the $400 fee in comparison to the rates charged by firms representing landlords in Burlington and Camden counties, and the other by a forensic accountant who analyzed Morgan's expenses for the eviction actions against the legal fees charged to the tenants in order to calculate the damages sustained by the class. Plaintiffs' attorney expert, David Capozzi, averred the $400 fee Morgan charged its tenants well exceeded the $110 to $150 per eviction two different local firms charged Morgan for preparing, filing and serving tenancy complaints and appearing on the trial date. Plaintiffs' forensic accountant, Forensic Resolutions, Inc., calculated on the basis of Morgan's records that Morgan incurred a cost of between $125 to $139 per eviction, resulting in tenants being overcharged in amounts ranging from $11 to $275 for each eviction action.

Defendants countered with their own joint forensic expert report prepared by EisnerAmper LLP, comparing the attorneys' fees charged the tenants, net of credits, against the costs of operating Morgan's in-house legal department for the years

spanning the putative class period. Based on total fees collected of $3,838,894 and operating expenses of $3,790,548 over the same period, EisnerAmper calculated that tenants were overcharged a total of $48,346, or $2.17 per eviction, leading it to conclude that the $400 charge included in the leases was supported and consistent with the operating costs of Morgan's legal department. At deposition, the expert testified that using those same figures, Morgan's actual cost per eviction was $170 and it collected, on average, $172 per eviction.

In their briefs on the motion, the parties debated whether plaintiff had established the Rule 4:32-1 prerequisites for class certification, focusing largely on typicality and whether common questions predominated over individual ones. Defendants conceded plaintiffs' proposed class would be sufficiently numerous to satisfy Rule 4:32-1(a)(1), but contended it was impermissibly overbroad in that it included tenants who were charged a $400 attorney's fee, regardless of whether they paid anything or whether the amount paid was excessive. Defendants further contended that many members of the proposed class left their apartments owing rent, leaving them exposed to recoupment, see Beneficial Fin. Co. of Atl. City v. Swaggerty, 86 N.J. 602, 609 (1981), extinguishing any sums they could recover on their consumer fraud claims, or counterclaims for the unpaid rent.

Plaintiffs argued in reply that their proposed class was not overbroad because the attorney's fee charged to tenants was "an illegal debt that is the product of fraud."[8] They further argued the court should exclude any counterclaims because "to include [them] would result in those claims predominating the litigation." Plaintiffs requested, in the alternative, that the court order partial certification to permit a class wide determination of the issue as to whether defendants had charged excessive and illegal attorneys' fees to tenants.

Although the parties disagreed on the reasonableness of the fees charged, plaintiffs accepted Morgan's figures of the number of eviction proceedings over the putative class period, the fees Morgan charged to tenants on those occasions and the credits Morgan awarded against those charges. From January 2007 through September 2014, Morgan charged over 10,000 different tenants, attorneys' fees on 22,308 different occasions. On 16,754 of

[8] Simultaneous with their class certification motion, plaintiffs filed a motion for summary judgment on liability, arguing that defendants' failure to have presented expert testimony by a lawyer as to the reasonableness of the attorneys' fees charged made it impossible for them to carry their burden of proving the fees were reasonable. The trial court rejected that argument, finding defendants had presented evidence of the reasonableness of the fees through the EisnerAmper report, thereby making the reasonableness of the fees a fact to be resolved by the jury. We denied defendants' motion for interlocutory review of that order.

those occasions, or 75% of the time, those fees amounted to $400. On the 22,308 occasions Morgan charged tenants fees, it subsequently credited the tenant's account for some or all of the fee 10,183 times, meaning on 12,125 occasions, no credits were awarded. The parties agree that of the 10,613 New Jersey tenants who were charged an attorney's fee by MLM Management through December 31, 2014, slightly over 50% (or 5319) of those tenants left owing rent and other charges, after the application of the security deposit. There are no figures in the record, of which we are aware, quantifying the number of tenants who left owing more than they were charged in legal fees.

Although plaintiffs dispute that all of the expenses Morgan's expert includes among the allocated costs of running Morgan's legal department are proper, even under Morgan's analysis there are several years in which collections of legal fees have exceeded the department's expenses, sometimes significantly. In 2008, for example, collections outstripped expenses by $425,924.[9] Morgan's expert arrived at its conclusion that the legal department generated a $48,346 profit over the

[9] EisnerAmper states that "[t]he years in which collections exceeded expenses [2008, 2009, 2010 and 2011] appear to be due to the 2008 recession and related increase in tenant collection and eviction issues."

putative class period by averaging the department's annual profits and losses from 2007 through September 30, 2014. Its conclusion that Morgan overcharged $2.17 per eviction is based on dividing that average by 22,308, the total number of times Morgan charged a tenant an attorney's fee over the period.

The Trial Court's Opinion

The trial court began its analysis by addressing the parties' dispute over plaintiffs' obligation to prove ascertainable loss in order to establish its CFA claim and the Supreme Court's holding that defendants bear the burden to "demonstrate that the basis on which the fees were calculated and included in the leases is reasonable." Green, supra, 215 N.J. at 456. The judge determined that

> the plaintiff bears the burden of challenging the fee provision of the lease agreement as an unlawful or unconscionable business practice under the CFA, while the fees actually charged to the plaintiffs — or the prospective class members — must be proven to be reasonable under the circumstances of each case by these Defendants.[10]

[10] Although this issue is not raised on the class certification motion, we note the judge's allocation of the burdens of proof is not consistent with the Court's opinion in Green. As to the $400 lease term, the Court was clear that "[i]t may well be that the corporate defendants can demonstrate that the basis on which the fees were calculated and included in the leases is reasonable, but it will be their burden to do so." Green, supra, 215 N.J. at 456 (emphasis added). So, while the court is (continued)

Analyzing the class plaintiffs initially proposed on the motion, all tenants charged attorneys' fees under the leases, the judge found it met none of the Rule 4:32-1(a)(1) through (4) prerequisites for class certification, numerosity, commonality, typicality and adequacy of representation, and that plaintiffs could not demonstrate under Rule 4:32-1(b)(3) that common questions of law or fact predominated and a class action was superior to other methods for adjudicating the controversy.

The judge rejected numerosity because "[d]efining the class by those who were merely charged a legal fee for an eviction, regardless of whether the tenant actually paid and ignoring whether the particular circumstances of the fee were actually reasonable makes for a class definition that is impermissibly broad," and would result in "a class that contained members who sustained no ascertainable loss and were not entitled to recovery under the Plaintiffs' Consumer Fraud claim."

The judge rejected commonality because "[t]he inquiry in this case principally requires a finder of fact to determine

---

(continued)
correct that plaintiffs bear the burden of demonstrating the unlawful practice they allege, because the lease term they challenge is one based on imposition of a legal fee, the burden of proving the reasonableness of the lease term, as well as the actual fees they charged any particular plaintiff, is on defendants. Ibid.

whether the fees charged to a particular plaintiff were reasonable in order to prevail on the CFA claim." He concluded that "those questions of fact or law that Plaintiffs assert are common to the class would require a much too individualized inquiry into the facts and circumstances of each class member's eviction proceedings to merit certification." Because some proposed class members "paid attorneys' fees to avoid eviction [and] others did not," the judge further concluded "there may well be no single 'typical' Plaintiff because there may well be no 'typical' class member." He thus concluded plaintiffs failed to meet the typicality requirement as well.

In analyzing predominance, the judge considered plaintiffs' argument that "common issues predominate because the central issue to the case requires a determination that the Defendants engaged in a common course of conduct that illegally charged attorney's fees to the putative class" against defendants' claim that the argument for "class certification depends less on demonstrating a common illegal scheme perpetrated by the Defendants, [and] more toward showing that the attorney's fees charged to each Plaintiff were unreasonable." The judge found "[t]he issues of liability in this case are focused on damages assessed on an individual basis," noting that plaintiffs' own expert conceded at deposition that "the reasonableness of the

fees assessed would have to be determined individually." He accordingly concluded that common questions of law or fact did not predominate over questions only affecting individual members.

In assessing the superiority of a class action against other methods of adjudication, the judge focused on the potential for counterclaims for unpaid rent against class members. Concluding "that there may be little other alternative for the Defendants but to bring claims against class members" for unpaid rent under New Jersey's entire controversy doctrine, Rule 4:30A, the judge found "[t]he addition of counterclaims would present inefficient and unwieldy litigation." In light of those management problems and the risk of counterclaims exposing some number of "class members to be subject to paying the Defendants' outstanding rent that was previously uncollected," the judge concluded "the class vehicle is not a superior method of resolution in this case, and the pursuit of individual claims and counterclaims would result in a more manageable resolution for each case."

Finally, although acknowledging defendants' concession that class counsel are certainly qualified to represent the class, the judge concluded "there is no incentive for the named Plaintiffs to defend claims against individual class members for

unpaid rent." He thus concluded the named plaintiffs would not adequately protect the interests of the class as required by Rule 4:32-1(a)(4). The judge rejected plaintiffs' suggestion to certify a "class to determine liability only, while leaving litigation of damages to individual class members," because it "fails to account for the later problem that those individual class members would face in seeking a relatively small recovery for a relatively significant expense of both time and financial resources."

Our Analysis

Our Supreme Court has described the class action as "a device that allows 'an otherwise vulnerable class' of diverse individuals with small claims access to the courthouse." Lee v. Carter-Reed Co., LLC, 203 N.J. 496, 518 (2010) (quoting Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 120 (2007)). Our courts liberally construe Rule 4:32-1, the class action rule, in accordance with the Court's instruction that "a class action 'should lie unless it is clearly infeasible.'" Iliadis, supra, 191 N.J. at 103 (quoting Riley v. New Rapids Carpet Ctr., 61 N.J. 218, 225 (1972)). The Court has noted that CFA claims are particularly well suited for class treatment. See Strawn v. Canuso, 140 N.J. 43, 68 (1995), superseded on other grounds by statute, New Residential Construction Off-Site Conditions

Disclosure Act, L. 1995, c. 253 § 10 (codified at N.J.S.A. 46:3C-10), as recognized in, Nobrega v. Edison Glen Assocs., 167 N.J. 520, 533 (2001). Although decisions on class certification are reviewed for abuse of discretion, Carter-Reed, supra, 203 N.J. at 504, our review of the trial court's analysis of the legal questions underlying a decision on certification is de novo, Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co., Inc., 192 N.J. 372, 386 (2007).

Applying that standard here, we agree with the trial court that a proposed class of all tenants who were charged attorneys' fees under the 2007 and 2010 Morgan leases is not maintainable. The very real threat of counterclaims against class members for unpaid rent exceeding any recovery makes a class including such tenants impermissibly broad. See Rodriguez v. Nat'l City Bank, 726 F.3d 372, 381 (3d Cir. 2013) (observing that certification of a class including individuals who did not experience the harm allegedly caused by the defendants diminishes the relief for class members who were harmed). We further agree the named plaintiffs would have no incentive for defending counterclaims against class members for unpaid rent and, as plaintiffs concede, including them "would result in those claims

predominating the litigation."[11] See Channell v. Citicorp Nat'l Servs., 89 F.3d 379, 385-86 (7th Cir. 1996).

In our view, however, defendants' counterclaims for unpaid rent against some former tenants are not fatal to plaintiffs' efforts to certify a class in this case. Accordingly, we review the court's class certification analysis of plaintiffs' CFA claim applied to the same putative class only excluding those tenants who were evicted or quit their apartments owing more than they were charged in legal fees.[12]

Plaintiffs pursuing a CFA claim need prove only three things: an unlawful practice, an ascertainable loss, and a causal relationship between the two. Carter-Reed, supra, 203 N.J. at 521. A party seeking class certification of a CFA claim must satisfy the general prerequisites for maintaining a class action set out in Rule 4:32-1(a), as well as one of the three

[11] Although plaintiffs have argued against permitting defendants to plead their counterclaims for unpaid rent, they offer no rational basis for excluding such claims under the entire controversy doctrine. See In re Cadillac V8-6-4 Class Action, 93 N.J. 412, 438 (1983) (noting "[c]ertification as a class action does not limit a defendant's right to pursue any defense on any of a plaintiff's claims").

[12] Plaintiffs sought certification in the trial court of this smaller class in their brief filed in response to defendants' arguments regarding assertion of their unpled counterclaims as well as at oral argument on the class motion. They have likewise continued to press for this smaller alternate in their briefs and at oral argument in this court.

criteria enumerated in Rule 4:32-1(b)(3). Rule 4:32-1(a) provides that:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

The Rule 4:32-1(a) factors are commonly referred to as numerosity, commonality, typicality and adequacy of representation. Carter-Reed, supra, 203 N.J. at 519.

Rule 4:32-1(b)(3), under which plaintiffs proceed, requires the court to find:

> that the questions 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. The factors pertinent to the findings include:
>
> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

> (C) the desirability or undesirability in concentrating the litigation of the claims in the particular forum; and
>
> (D) the difficulties likely to be encountered in the management of a class action.

The Rule 4:32-1(b)(3) factors are commonly referred to as predominance and superiority. Carroll v. Cellco P'ship, 313 N.J. Super. 488, 495 (App. Div. 1998).

A class of tenants who were charged legal fees by defendants under their leases but did not quit their apartments owing more than those charges, represented by defendants to number at least 5294 tenants, easily satisfies the numerosity requirement. See In re Cadillac, 93 N.J. at 425 (finding numerosity where number of plaintiffs is "sufficiently numerous so that joinder is not a satisfactory alternative"). Common questions of law and fact arise out of the uniform leases, the legal fees charged pursuant thereto, the reasonableness of the fee provisions in the leases and whether the $400 fee exceeded the costs of the services. With the exception of plaintiff Green, who would not be included in this smaller class because she quit her apartment owing $2960.11, a sum exceeding the $2000 in legal fees she was charged by defendants over the course of five summary dispossess actions, the claims of the named plaintiffs "'have the essential characteristics common to the

claims of the class.'"[13] See ibid. (quoting 3B James W. Moore, et al., Moore's Federal Practice ¶ 23.06-2 (2d ed. 1982)). That plaintiff Blumberg's aunt paid, on his behalf, the rent remaining due when he vacated his apartment does not distinguish his claim in our view.

The nub of the dispute over this case proceeding as a class action is whether plaintiffs have met their burden of proving that common questions of law and fact predominate over individual claims. R. 4:32-1(b)(3). In analyzing the larger, more inclusive class, the trial judge viewed the central question in the case as "whether the fees charged to a particular plaintiff were reasonable." We see the case differently.

As we see it, the central question is whether the $400 fee charged to all plaintiffs was reasonable or instead, unconscionable. Or, stated differently, whether defendants' inclusion of the $400 charge in their tenant leases, characterized by the Supreme Court as contracts of adhesion, see Green, supra, 215 N.J. at 454, was an unconscionable or unlawful practice. Framing the question as the trial court did removes the focus from the lease clause and the summary dispossess

[13] We assume plaintiffs will substitute a class representative for Green or dismiss their claim against The Willows on remand.

proceedings. See ibid. (holding "tenants must be afforded a forum to challenge the reasonableness of lease clauses on which landlords rely for purposes of summary dispossess proceedings").

The lease term is important because, as the Court has noted, "summary dispossess litigation is an effective – and at times coercive – mechanism for collecting rent and other fees." Hodges v. Sasil Corp., 189 N.J. 210, 226 (2007). "If the rent owed," here including legal fees denominated as additional rent, "is paid 'on or before entry of judgment,' the legal proceeding is terminated." Id. at 221 (quoting N.J.S.A. 2A:18-55). "The tenant and landlord understand the summons and complaint to be a demand for payment of rental arrears, a demand that prompts defaulting tenants to pay owed rent." Id. at 227-28. As the Court has acknowledged, the consequences of inflating the amount due in such circumstances "can be particularly devastating when applied to low-income tenants. The economic hardship resulting from even a few extra dollars in late charges and attorneys' fees may substantially impact a family's ability to survive." Id. at 228.

The predominance inquiry "tests whether the proposed class is 'sufficiently cohesive to warrant adjudication by representation'" by considering the significance of the common questions versus the individualized questions underlying the

members' claims. Iliadis, supra, 191 N.J. at 108 (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623, 117 S. Ct. 2231, 2249, 138 L. Ed. 2d 689, 712 (1997)). Here, resolution of the question of whether inclusion of the $400 charge in the leases was reasonable or was instead an unlawful practice is central to all of the members' claims and establishes one of the three elements of each member's case.[14]

The issue on which the trial court focused, whether the fees charged to an individual plaintiff were reasonable, no doubt depends on individual assessments. But the issue of whether the fees charged to an individual plaintiff were reasonable goes to ascertainable loss and damages and only comes into play if plaintiffs have succeeded in proving the $400 fee included in their leases was unconscionable. See D'Agostino, supra, 216 N.J. at 192-93 ("When an unconscionable commercial practice has caused the plaintiff to lose money . . . that loss

[14] Indeed, it would be the same for all tenant claims of the larger class. The common questions are the same for both putative classes. In the larger class, however, the very real possibility of thousands of individual counterclaims overwhelming the common questions make that larger class not maintainable. Cf. In re Cadillac, supra, 93 N.J. at 430 (noting "the critical question remains whether the benefit from the determination in a class action of the existence of a common defect and a common pattern of fraud outweighs the problems of individual actions involving such other issues as causation, reliance, and damages").

can satisfy both the 'ascertainable loss' element of the CFA claim and constitute 'damages sustained' for purposes of the remedy imposed under the CFA."). "[P]redominance does not require the absence of individual issues or that the common issues dispose of the entire dispute." Iliadis, supra, 191 N.J. at 108. The Court has made clear that "[i]ndividual questions of law or fact may remain following resolution of common questions." Ibid. This is especially true when remainder issues go to damages. Id. at 112-13.

The parties in this case have conducted extensive fact discovery and engaged experts who have prepared comprehensive reports directed entirely to the question of whether the $400 fee in the lease was a reasonable approximation of the fees defendants could expect to incur in a summary dispossess action or an unconscionable overreach. Any evidentiary questions regarding the reliability or admissibility of those opinions and the credibility of the experts apply uniformly to all members of the class. A jury may appropriately consider the basis on which the fees were calculated, whether the costs defendants include in the operating expenses for the legal department are fairly allocated, whether the $400 fee included in the leases is a reasonable approximation of defendants' expected costs for a summary dispossess action, whether defendants may base the $400

fee on its collections of fees charged instead of its costs for services performed and whether those costs are reasonable in comparison to the fees charged by outside lawyers for the same work. If the jury decides the $400 lease charge is unconscionable, it can decide what lease charge would be reasonable.

Although resolution of those issues may not dispose of the litigation, in the event it does not, it will at least establish a basis for determining whether individual class members suffered an ascertainable loss. Using the Permenters as an example, if the jury were to decide that the $400 fee included in the leases was reasonable, plaintiffs could not succeed in proving an unlawful practice, ending the litigation and binding all class members to that result. If, on the other hand, the jury decided the $400 lease charge was unreasonable and that a fair charge was $200, then the Permenters, having paid $400 on one occasion, $0 on one occasion and $200 on three occasions, could establish an ascertainable loss of $200, subject to defendants' ability to demonstrate that the $400 was a reasonable fee in light of the work performed on the summary

dispossess action in which the Permenters paid a $400 fee.[15] See D'Agostino, supra, 216 N.J. at 192-93.

Significantly, almost all of the proofs relating to the many individual issues defendants assert must be resolved for each class member are in defendants' possession in the form of the tenant ledgers and other computerized records. Even though defendants claim their costs varied from eviction to eviction, Morgan's actual ability to demonstrate the reasonableness of the fee charged any particular tenant is unclear in light of its lawyers' and paralegals' failure to maintain time records. "Although 'different factual situations may arise with respect to the defenses as to different plaintiffs[, such] does not derogate from the fact that the affirmative cause of action itself has the community of interests and of questions of law or fact which justify the class action concept.'" Iliadis, supra, 191 N.J. at 112 (quoting Branch v. White, 99 N.J. Super. 295, 310 (App. Div.), certif. denied, 51 N.J. 464 (1968)).

Weighing the significance of the common questions, the benefit of resolving those questions, as well as at least some individual questions of ascertainable loss, through a class

[15] Employing the same hypothetical, Blumberg could establish an ascertainable loss of $600, subject to defendants' ability to demonstrate that $400 was a reasonable fee in the three summary dispossess actions for which Blumberg paid a $400 fee.

action against alternatives, and considering the "common nucleus of operative facts," Carter-Reed, supra, 203 N.J. at 520, presented by the plaintiffs' challenge to a term in a uniform lease utilized in sixty-nine apartment complexes throughout the State, we are satisfied that the common questions predominate over any questions affecting only individual members. R. 4:32-1(b)(3). At the core of this case are tenants seeking to redress a "common legal grievance," In re Cadillac, supra, 93 N.J. at 435, involving an allegedly unconscionable lease term included in every one of their leases, making them sufficiently cohesive to warrant adjudication through class representatives, see Iliadis, supra, 191 N.J. at 108.

Finally, there can be little doubt that class litigation is "superior to other available methods for the fair and efficient adjudication of the controversy" in this case. R. 4:32-1(b)(3). Given the class members' "lack of financial wherewithal," Saldana v. City of Camden, 252 N.J. Super. 188, 200 (App. Div. 1991), and the relatively low value of the individual claims, the likelihood of any individual tenant challenging the $400 lease charge against these defendants is remote. As in New Rapids, "[i]f each victim were remitted to an individual suit, the remedy could be illusory, for the individual loss may be too small to warrant a suit or the victim too disadvantaged to seek

relief. Thus the wrongs would go without redress, and there would be no deterrence to further aggressions." New Rapids, supra, 61 N.J. at 225.

In our view, this case is well suited to class treatment. A narrowed class, drawn so as to exclude those tenants against whom defendants could assert counterclaims overwhelming the common claims of the class, is an appropriate vehicle to redress what the plaintiffs claim are systemic illegal lease charges to over 5000 tenants in this State.

Although it is likely that individual issues will remain following resolution of the common questions, posing some management challenges, the issues here are not nearly so complicated as those posed in either Iliadis or In re Cadillac. The Law Division has the ability "to craft remedies and procedures to address the peculiar problems of class litigation," by altering, amending or even decertifying a class if necessary. Iliadis, supra, 191 N.J. at 119-20; see also R. 4:32-2(a). "Class actions by their very nature are complicated creatures, but they provide an efficiency of scale and an equitable means of relief for individuals who might otherwise not have access to the courthouse or the incentive or ability to right a wrong." Carter-Reed, supra, 203 N.J. at 530.

Although we agree with the trial court that the larger class plaintiffs proposed was not maintainable in accordance with Rule 4:32-1(a) and (b), we conclude the smaller, more narrowly defined class plaintiffs offered in the alternative should be certified. Accordingly, we vacate the order denying class certification and remand for certification of a class in conformity with this opinion.

Vacated and remanded. We do not retain jurisdiction.