DAYE V. GLADINO, INC.

CLARA DAYE, on her own behalf, and on behalf of all others similarly situated,
Plaintiff-Appellant,
v.
GLADINO, INC. d/b/a TED'S PAWN AND JEWELRY,
Defendant/Third-Party Plaintiff-Appellee,
and
BURLINGTON INSURANCE COMPANY, an Illinois corporation, and ESSEX INSURANCE COMPANY, a Delaware corporation,
Third-Party Defendants.

No. A-1-CA-37310

COURT OF APPEALS OF NEW MEXICO

December 3, 2018

APPEAL FROM THE DISTRICT COURT OF MCKINLEY COUNTY, Lyndy D. Bennett, District Judge

COUNSEL

Feferman, Warren & Mattison, Nicholas H. Mattison, Albuquerque, NM, for Appellant

Butt Thornton & Baehr, P.C., Arslan S. Umarov, Monica R. Garcia, Albuquerque, NM, for Appellee

JUDGES

J. MILES HANISEE, Judge. WE CONCUR: M. MONICA ZAMORA, Judge, STEPHEN G. FRENCH, Judge

AUTHOR: J. MILES HANISEE

MEMORANDUM OPINION

HANISEE, Judge.

{1} Plaintiff Clara Daye appeals from the district court's order denying her motion for class certification, entered April 30, 2018. In this Court's notice of proposed disposition, we proposed to summarily reverse and remand. Appellee filed a memorandum in opposition (MIO) and a notice of errata, correcting a few items in its MIO, which, along with Plaintiff's response to the notice of errata, we have duly considered. Remaining unpersuaded, we reverse and remand.

{2} Appellee contends in its memorandum in opposition that this Court conflated analysis of the two proposed classes; that Plaintiff only sufficiently pled one class in her complaint; and that, because Plaintiff did not have to pay the APR for the item that she was unable to re-purchase because Appellee had sold it, she is not representative of the class. [*See* MIO 2-8] These arguments do not persuade us that our proposed disposition was erroneous. *See Hennessy v. Duryea*, 1998-NMCA-036, ¶ 24, 124 N.M. 754, 955 P.2d 683 ("Our courts have repeatedly held that, in summary calendar cases, the burden is on the party opposing the proposed disposition to clearly point out errors in fact or law."); *State v. Mondragon*, 1988-NMCA-027, ¶ 10, 107 N.M. 421, 759 P.2d 1003 (stating that a party responding to a summary calendar notice must come forward and specifically point out errors of law and fact, and the repetition of earlier arguments does not fulfill this requirement), *superseded by statute on other grounds as stated in State v. Harris*, 2013-NMCA-031, ¶ 3, 297 P.3d 374.

{3} To the degree there is any confusion regarding which class the district court should have certified for class representation, we clarify that both classes identified in Plaintiff's application should have been certified by class representation:

> The Collateral Class consists of all persons who, starting four years prior to the filing of this lawsuit, had a pawn loan with Defendant that went into default, were sent Defendant's form notice, and did not redeem their collateral.
>
> The APR Class consists of all persons who, starting four years prior to the filing of this lawsuit, took out a pawn loan with Defendant.

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{4} Additionally, we stress that our disposition does not address the merits of Plaintiff's claims, but only the certification of such claims for class representation. Moreover, the degree to which a defense would be operational against one group of individuals and not another—for example, Appellee's defense regarding an exemption to disclosure—we leave to the district court to identify and sort such individuals out of the class for which Plaintiff is representative. We note that the class definition for the APR class may need to be altered by the district court to provide for such sorting.

{5} Accordingly, for the reasons stated in our notice of proposed disposition and herein, we reverse the district court's order denying class certification and remand for further proceedings in accordance with this opinion.

{6} IT IS SO ORDERED.

J. MILES HANISEE, Judge

WE CONCUR:

M. MONICA ZAMORA, Judge

STEPHEN G. FRENCH, Judge