

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals
for the Second Circuit, held at the Thurgood Marshall United
States Courthouse, 40 Foley Square, in the City of New York,
on the 23rd day of May, two thousand sixteen.

PRESENT: AMALYA L. KEARSE,
RALPH K. WINTER,
DENNIS JACOBS,
Circuit Judges.

- - - - -X
LINDA U. GARRIDO and JOHN GARRIDO, on
behalf of themselves and all others
similarly situated,
Plaintiffs-Appellants,

RUTH ANN GUTIERREZ and LORI JO
VINCENT, on behalf of themselves and
all others similarly situated,
Plaintiffs,

-v.-

15-1891

THE MONEY STORE, TMS MORTGAGE, INC.,
HOMEQ SERVICING CORP.,
Defendants-Appellees,

1 MOSS, CODILIS, STAWIARSKI, MORRIS,
2 SCHNEIDER & PRIOR, LLP, OCWEN LOAN
3 SERVICING, LLC, WELLS FARGO BANK,
4 N.A., BARCLAYS CAPITAL REAL ESTATE,
5 INC., JOHN DOE CORPORATIONS 1-3, as
6 successors in interest to The Money
7 Store, TMS Mortgage, Inc. and HomeEq
8 Servicing Corp.,

9 Defendants.*

10 - - - - -X

11
12 **FOR APPELLANTS:** Paul S. Grobman, The Law Offices
13 of Paul Grobman, New York, New
14 York.
15

16 **FOR APPELLEES:** Daniel A. Pollack, Edward T.
17 McDermott, Anthony Zaccaria,
18 Minji Kim, McCarter & English,
19 LLP, New York, New York.
20

21 Appeal from a judgment of the United States District
22 Court for the Southern District of New York (Koeltl, J.).
23

24 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
25 **AND DECREED** that the judgment of the district court be
26 **AFFIRMED.**
27

28 Linda and John Garrido (the "Garridos") appeal the
29 February 2, 2015, denial of their motion for class
30 certification under Fed. R. Civ. P. 23(b)(3), which merged
31 into the judgment of the United States District Court for
32 the Southern District of New York (Koeltl, J.). The
33 judgment dismissed with prejudice the Garridos' claims
34 against defendants-appellees (the "Money Store
35 Defendants").¹ The Garridos allege common-law fraud in

* The Clerk of Court is directed to amend the official caption in this case to conform to the listing of the parties above.

¹ The Garridos and Money Store Defendants stipulated to dismissal of the Garridos' claims with prejudice and to entry of final judgment, and agreed that the Garridos would retain appellate rights limited solely to the denial of class certification. We treat the so-ordered stipulation of

1 connection with the Money Store Defendants' debt collection
2 practices. We assume the parties' familiarity with the
3 underlying facts, the procedural history, and the issues
4 presented for review.
5

6 The Garridos sought to certify a class of all borrowers
7 on loans owned or serviced by the Money Store Defendants who
8 were charged attorneys' fees and expenses that the Money
9 Store Defendants had not yet paid to their attorneys² (as
10 indicated by the absence of a date in the "Check Confirmed"
11 field of an invoice processing database used by the Money
12 Store Defendants), from January 2001 to the present; they
13 contend that the Money Store Defendants committed fraud by
14 representing (falsely) to borrowers that such reimbursement
15 was due, before making such remuneration to counsel. The
16 district court determined that the Garridos did not satisfy
17 the commonality requirement of Fed. R. Civ. P. 23(a)(2); the
18 adequacy of representation requirement of Fed. R. Civ. P.
19 23(a)(4); or the predominance requirement of Fed. R. Civ. P.
20 23(b)(3). We review the denial of class certification for
21 abuse of discretion. Myers v. Hertz Corp., 624 F.3d 537,
22 547 (2d Cir. 2010).³ The party seeking class certification
23 must prove by a preponderance of the evidence that each Rule
24 23 requirement is met. Id. (citing Amchem Prods., Inc. v.
25 Windsor, 521 U.S. 591, 614 (1997)).
26

27 The district court did not abuse discretion in
28 determining the Garridos failed to prove that "the questions
29 of law or fact common to class members predominate over any
30 questions affecting only individual members" Fed.
31 R. Civ. P. 23(b)(3). We therefore do not reach other
32 issues.
33

dismissal with prejudice as a final judgment. See Fed. R.
Civ. P. 54(a).

² The Garridos contend that loan documents required the Money Store Defendants to pay any attorneys' fees before requesting reimbursement from putative class members.

³ Factual findings underlying the district court's decision are reviewed for clear error; articulation of the legal standards is reviewed de novo; and application of the law to the facts is reviewed for abuse of discretion. In re IPO Sec. Litig., 471 F.3d 24, 40-41 (2d Cir. 2006).

1 "Considering whether 'questions of law or fact common
2 to class members predominate' begins, of course, with the
3 elements of the underlying cause of action." Erica P. John
4 Fund, Inc. v. Halliburton Co., 131 S. Ct. 2179, 2184 (2011).
5 A New York common law fraud claim requires proof of a
6 representation of material fact, falsity, scienter,
7 reasonable reliance, and injury. Small v. Lorillard Tobacco
8 Co., 720 N.E.2d 892, 898 (N.Y. 1999); Stuart Silver Assocs.,
9 Inc. v. Baco Dev. Corp., 665 N.Y.S.2d 415, 417 (App. Div.
10 1997).

11
12 The district court did not clearly err in ruling that
13 the Garridos failed to show that any uniform representation
14 was made to all putative class members. The Garridos relied
15 on testimony and documentary evidence regarding (i) paper
16 and electronic invoices and (ii) payoff quotes. The
17 district court found that these items were not routinely
18 sent to class members, because invoices were sent by third
19 parties to the Money Store Defendants, not to borrowers; and
20 payoff quotes were prepared and sent to borrowers only when
21 specifically requested.

22
23 Without proof of a uniform representation, the Garridos
24 cannot use class-wide evidence to prove "the central
25 disputed issues in a fraud action": a material
26 representation; its falsity; and reliance. Moore v.
27 PaineWebber, Inc., 306 F.3d 1247, 1253 (2d Cir. 2002)
28 ("[F]raud claims based on uniform misrepresentations made to
29 all members of the class . . . are appropriate subjects for
30 class certification because the standardized
31 misrepresentations may be established by generalized proof.
32 Where there are material variations in the nature of the
33 misrepresentations made to each member of the proposed
34 class, however, class certification is improper because
35 plaintiffs will need to submit proof of the statements made
36 to each plaintiff, the nature of the varying material
37 misrepresentations, and the reliance of each plaintiff upon
38 those misrepresentations in order to sustain their
39 claims."); see also Fed. R. Civ. P. 23(b)(3) advisory
40 committee's note, 1966 amendment ("[A]lthough having some
41 common core, a fraud case may be unsuited for treatment as a
42 class action if there was material variation in the
43 representations made").

44
45 The Garridos contend that (mis)representations may be
46 presumed because members of the putative class paid the
47 alleged fees, and "[t]he conclusion that borrowers might

1 have paid such legal fees and expenses without ever being
2 told they were owed would . . . 'deny human nature, run
3 counter to the traditional presumption in favor of actors
4 operating under rational economic choice, and leave the
5 Court with an absurd conclusion.'" Br. of Appellants 30
6 (quoting Chisolm v. TranSouth Fin. Corp., 194 F.R.D. 538,
7 561 (E.D. Va. 2000) (discussing doctrine of presumed
8 *reliance*); see also Reply Br. 7 ("It cannot be meaningfully
9 disputed that a party which obtains reimbursement for a
10 purported legal fee or other expense which it never incurred
11 commits fraud--'the fraud is in asking [a party] to pay a
12 debt that it does not owe because the debt was never
13 incurred by the [first party].'" (quoting United States ex
14 rel. Westmoreland v. Amgen, Inc., 812 F. Supp. 2d 39, 67 (D.
15 Mass. 2011) (False Claims Act))).
16

17 However, the claim is not that borrowers were
18 fraudulently charged for attorneys' fees that the Money
19 Store Defendants did not *incur*; the claim is that borrowers
20 were fraudulently charged for attorneys' fees that the Money
21 Store Defendants had not yet *paid*. It would be speculation
22 to conclude from the fact of payment that a representation
23 was made to all putative class members that the Money Store
24 Defendants had already paid these fees, or even that the
25 fees were currently "owed" pursuant to the borrowers' loan
26 agreements. Some borrowers may have paid fees after
27 speaking with a representative over the phone. Others may
28 have received payoff quotes. Who knows what was or was not
29 communicated?⁴
30

31 The Garridos cite no authority that representations of
32 fact (as opposed to reliance on those representations) can
33 be presumed in a common-law fraud action, and such a
34 presumption is not reasonable under the theory of this case.
35 Without class-wide proof of what representations were or
36 were not made, these claims cannot be proved on a class-wide
37 basis. Cf. In re U.S. Foodservice Inc. Pricing Litig., 729
38 F.3d 108, 120 (2d Cir. 2013) (holding that, where uniform
39 representations in the form of invoices were sent to all
40 class members, "payment may constitute circumstantial proof

⁴ The Garridos entered only one payoff quote into evidence, so there is no evidence even that payoff quotes were prepared in a uniform manner such that putative class members who did receive them received uniform representations.

1 of reliance based on the reasonable inference that customers
2 who pay the amount specified in an inflated invoice would
3 not have done so absent the invoice's implicit
4 representation that the invoiced amount was honestly owed").
5

6 The Garridos argue that they might be able to prove
7 their fraud case on a class-wide basis through evidence of
8 spoliation, and ask us to take judicial notice of a ruling
9 in a related action, in which the district court found that
10 the Money Store Defendants had failed to preserve their
11 invoice database system in its previously accessible form.
12 See Mazzei v. Money Store, 308 F.R.D. 92, 100-03 (S.D.N.Y.
13 2015). Even if this argument were not waived for failure to
14 raise it below, see Br. of Appellees 45-47, it does not bear
15 on the outcome of this appeal. The Garridos do not argue
16 that the unpreserved database contained evidence of any
17 uniform representation; to the contrary, the database at
18 issue appears to contain the invoices already discussed
19 supra, which were never sent to borrowers.⁵
20

21 For the foregoing reasons, and finding no merit in the
22 Garridos' other arguments, we hereby **AFFIRM** the judgment of
23 the district court.
24

25 FOR THE COURT:
26 CATHERINE O'HAGAN WOLFE, CLERK
27

⁵ The district court denied in Mazzei the type of trial sanctions the Garridos appear to seek here.