NO. 5-10-0028

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

LOUISE BRADLEY and EARLEEN MORRIS, Individually and on Behalf of All Others Similarly Situated,	)	Appeal from the Circuit Court of St. Clair County.
Plaintiffs-Appellees,	)	No. 06-L-95
v.	)	
SEARS, ROEBUCK AND COMPANY,	)	Honorable Andrew J. Gleason,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE SPOMER delivered the judgment of the court.
Presiding Justice Chapman and Justice Welch concurred in the judgment.

R U L E 2 3 O R D E R

Held: Although the general prerequisites to class certification pursuant to section 2-801 of the Illinois Code of Civil Procedure (735 ILCS 5/2-801 (West 2008)) are met, the order granting class certification must be reversed because the plaintiffs' amended class definition includes class members who no longer reside in the home where the saddle valve was installed and who therefore have suffered no actual injury, and therefore the definition is overbroad.

The defendant, Sears, Roebuck and Company (Sears), appeals the December 11, 2009, order of the circuit court of St. Clair County, which granted the motion of the plaintiffs, Louise Bradley and Earleen Morris, individually and on behalf of all others similarly situated (Bradley), to certify the following class:

"Each Illinois citizen who, since February 10, 1996, paid Sears a fee for the installation of a refrigerator waterline."

For the following reasons, we find that although the general prerequisites to class certification are met, the class is overbroad. Accordingly, we reverse and remand for further

proceedings not inconsistent with this order.

FACTS

On January 9, 2007, the plaintiffs filed a second amended complaint for damages, alleging that Sears arranged for the installation of refrigerator waterlines in Illinois using self-piercing valves, or "saddle" valves, and that the installations were performed by individuals who were not licensed plumbers. The plaintiffs purchased refrigerators and icemakers from Sears, and they paid an additional fee to have the icemakers installed.

The plaintiffs allege in count I that Sears' actions and omissions constitute violations of the Illinois Consumer Fraud and Deceptive Business Practices Act (the Act) (815 ILCS 505/1 *et seq.* (West 2006)), because the plaintiffs and class members relied on Sears' materially deceptive practices, including its omissions, with respect to the nature and quality of the installation services of the icemakers. The plaintiffs allege that Sears concealed the material information that the installation would not be performed by a licensed plumber and that a saddle valve would be used. The plaintiffs allege in count II that Sears entered valid and enforceable contracts with the plaintiffs and class members to install its icemakers properly, legally, safely, and durably. The plaintiffs allege that the use of saddle valves and the installation by individuals who were not licensed plumbers constituted a breach of contract and a violation of the Illinois Plumbing Code (77 Ill. Adm. Code §890.110 *et seq.*, amended at 29 Ill. Reg. 5713, eff. Apr. 8, 2005) and the Illinois Plumbing License Law (225 ILCS 320/0.01 *et seq.* (West 2006)).

On February 23, 2009, the plaintiffs filed a motion for class certification pursuant to section 2-801 of the Illinois Code of Civil Procedure (the Code) (735 ILCS 5/2-801 (West 2008)). The circuit court granted the plaintiffs leave to amend their class definition on July 15, 2009, to read as follows: "Each Illinois citizen who, since February 10, 1996, paid Sears a fee for the installation of a refrigerator waterline." On December 11, 2009, the circuit court

entered its order granting class certification. This timely appeal followed.

ANALYSIS

We begin with a statement of the applicable standard of review. "Decisions regarding class certification are within the sound discretion of the trial court and should be overturned only where the court clearly abused its discretion or applied impermissible legal criteria." *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 125-26 (2005) (citing *McCabe v. Burgess*, 75 Ill. 2d 457, 464 (1979), and *Eshaghi v. Hanley Dawson Cadillac Co.*, 214 Ill. App. 3d 995, 1001 (1991)). However, the trial court's discretion must be exercised within the bounds of section 2-801 of the Code. 735 ILCS 5/2-801 (West 2008). Section 2-801 of the Code sets forth the prerequisites needed in order to maintain a class action. 735 ILCS 5/2-801 (West 2008). As recently summarized by the Illinois Supreme Court, these are as follows:

> "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of fact or law common to the class, which common questions predominate over any questions affecting individual members; (3) the representative parties will fairly and adequately protect the interests of the class; and (4) the class action is an appropriate method for the fair and efficient adjudication of the controversy." *Barbara's Sales, Inc. v. Intel Corp.*, 227 Ill. 2d 45, 71-72 (2007).

"The proponent of the class action bears the burden to establish all four of the prerequisites set forth in section 2-801." *Cruz v. Unilock Chicago, Inc.*, 383 Ill. App. 3d 752, 761 (2008) (citing *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 125 (2005)).

Sears first contends that the plaintiffs have failed to satisfy the requirement that there are common questions of fact or law that predominate with regard to the claims for consumer fraud and breach of contract. The Illinois Plumbing License Law states, " 'Plumber' means any licensed person authorized to perform plumbing," and " 'Plumbing' includes all piping,

fixtures, appurtenances and applications for a supply of water for all purposes." 225 ILCS 320/2 (West 2006). The Illinois Plumbing Code provides, "No pipe or fitting of the water supply system shall be drilled or tapped nor shall any band or saddle be used ***." 77 Ill. Adm. Code §890.1130(e)(5), amended at 28 Ill. Reg. 4215, 4304, eff. Feb. 18, 2004. The plaintiffs claim that whether Sears breached its promise to arrange for the installation of waterlines by hiring nonlicensed plumbers who used saddle valves in the homes of class members is the common predominant issue on the breach-of-contract claim. The plaintiffs further allege that Sears' material omission of this information predominates the issue of liability under the Act.

Commonality exists where the "defendant is alleged to have acted wrongfully in the same basic manner towards an entire class." *Lee v. Allstate Life Insurance Co.*, 361 Ill. App. 3d 970, 975 (2005) (citing *P.J.'s Concrete Pumping Service, Inc. v. Nextel West Corp.*, 345 Ill. App. 3d 992, 1003 (2004)). Where the test for commonality is met, " ' "a judgement in favor of the class members should decisively settle the entire controversy, and all that should remain is for other members of the class to file proof of their claim." ' " *Smith v. Illinois Central R.R. Co.*, 223 Ill. 2d 441, 449 (2006) (quoting *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425, 434 (Tex. 2000) (quoting *Life Insurance Co. of the Southwest v. Brister*, 722 S.W.2d 764, 772 (Tex. Ct. App. 1986))).

Here, if the plaintiffs are able to provide evidence that would resolve whether Sears' practice was to hire nonlicensed plumbers who installed waterlines with saddle valves and whether this amounted to a deceptive act or practice, the determination would apply to all the class members and could establish the common liability of Sears. Sears contends that it did not install the plaintiffs' icemakers but, rather, that it hired independent contractors to perform the installation work under a contract for the installation of merchandise with Sears. Additionally, Sears contends that it did not exercise control over the means or methods by

which the independent contractors performed their work and that it lacked knowledge about whether the plaintiffs' icemakers were installed through the use of a saddle valve. The plaintiffs allege to the contrary that Sears took on the duties of a general contractor by hiring companies to install waterlines for its customers and that Sears had a contractual obligation to obey the law in performing installations. These are additional common questions that will predominate in this litigation. Accordingly, the plaintiffs have shown that there are predominant common questions of fact or law as required in order to proceed with a class certification.

Second, Sears argues that the plaintiffs cannot fairly and adequately represent the proposed class because neither plaintiff had any knowledge of Sears' alleged wrongdoing and because neither plaintiff has been an active participant in the litigation. Where "the interests of those who are parties are the same as those who are not joined" and where "the litigating parties fairly represent those not joined," the adequacy-of-representation requirement is satisfied. *Miner v. Gillette Co.*, 87 Ill. 2d 7, 14 (1981); *Wenthold v. AT&T Technologies, Inc.*, 142 Ill. App. 3d 612, 620 (1986). In this case, plaintiffs Morris and Bradley have the same interest as the other class members if Sears allowed nonlicensed plumbers to use saddle valves in their waterline installations. Both class representatives testified in deposition that they seek to have the icemakers installed properly for themselves as well as for the other members of the class. Additionally, plaintiffs Morris and Bradley testified that they have participated in the legal proceedings and understand and are willing to perform their duties as class representatives. Accordingly, the circuit court did not err in its determination that the adequacy-of-representation prerequisite to class certification is met.

Third, Sears argues that the circuit court erred in certifying the class because the plaintiffs cannot prove they suffered damages. "[E]xisting laws and statutes become implied terms of a contract as a matter of law." *Finch v. Illinois Community College Board*, 315 Ill.

App. 3d 831, 836 (2000); *Mitchell Buick & Oldsmobile Sales, Inc. v. McHenry Savings Bank*, 235 Ill. App. 3d 978, 985 (1992). We find that section 2 of the Illinois Plumbing License Law (225 ILCS 320/2 (West 2006)) and section 890.1130(e)(5) of the Illinois Plumbing Code (77 Ill. Adm. Code §890.1130(e)(5), amended at 28 Ill. Reg. 4215, 4304, eff. Feb. 18, 2004) are implied terms that become parts of the contract. We also find that a breach of these implied terms would result in damages, because a violation would require a repair before the installation would be in conformity with applicable law.

As to the plaintiffs' claim for actual damages under the Act (815 ILCS 505/1 *et seq*. (West 2006)), we recognize that a claim brought under the Act is without merit in the absence of actual damages and that actual damages are not shown by the mere fact that there would be a cost for replacing inferior parts absent a showing that the class members suffered some actual injury caused by the purportedly inferior parts. See *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 196-97 (2005). However, here, unlike in *Avery*, the parts used in the waterline installations are alleged to have been illegal, not merely inferior. We find that the cost of bringing the waterline installations up to code would constitute actual damages under the Act should a violation of the Act be proven by the plaintiffs.

Finally, having determined that the general requirements for class certification were met by the plaintiffs, we address Sears' argument that the class definition is overbroad because many of the class members have moved since purchasing their waterline installations and that those class members would not be able to make a showing that they have suffered an actual injury. Individuals who have been made whole or are no longer in a position to incur an injury as a result of the alleged breach of contract or violation of the Act are not entitled to proceed on the merits of their claims. See *Bruemmer v. Compaq Computer Corp.*, 329 Ill. App. 3d 755, 761 (2002).

In this case, when a class member who purchased a waterline installation from Sears has subsequently moved and/or no longer possesses any interest in the property, that class member has no claim of an injury, unless the class member suffered some unique or individualized injury prior to the change in residence and/or interest. These class members are not entitled to relief because they are not at risk of an injury and are no longer in a position to have the allegedly defective installations corrected. As a result, the class definition is overbroad and must be amended so that class membership is limited to individuals with valid claims for relief.

CONCLUSION

For the foregoing reasons, we find that although the general prerequisites to class certification are met, the class is overbroad. Accordingly, we reverse and remand for further proceedings not inconsistent with this order.

Reversed; cause remanded.