SUPERIOR COURT
(CLASS ACTION)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000915-187

DATE: December 20, 2018

BY THE HONOURABLE CHANTAL TREMBLAY, J.S.C.

ZULLY LILIANA SALAZAR PASAJE
Applicant
v.
BMW CANADA INC.
and
BAYERISCHE MOTOREN WERKE AG
and
BMW OF NORTH AMERICA, LLC,
and
BMW MANUFACTURING CO., LLC,
Defendants

JUDGMENT ON LEAVE TO EXAMINE THE APPLICANT AND TO SUBMIT RELEVANT EVIDENCE

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[1] Applicant filed an *Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiff* (**Authorization Application**) to represent natural and legal persons residing in Canada who purchased or leased BMW vehicles that were recalled by Transport Canada under Recall Notices # 2017-470 and #2017-588 (**Vehicles**).

[2] Applicant claims that Defendants negligently performed their duty to properly design, manufacture, market, sell or lease non-defective vehicles. She also alleges that Defendants misrepresented that the Vehicules were safe or failed to adequately disclose the defective nature of the Vehicles.

[3] As a result, the members of the class would likely not have purchased the Vehicles had they known about the safety defect nor overpaid for the Vehicles. They also lost the use of them and suffered moral damages and other troubles and inconveniences.

[4] Defendants seek leave to examine the Applicant and to adduce evidence in view of the authorization hearing. Such requests are contested in part.

[5] The parties submitted detailed written arguments in support of their respective positions regarding these preliminary issues. At the Court's suggestion, the parties agreed not to hold a hearing on such issues given their detailed written submissions.

1. CONTEXT

[6] In 2009, Applicant purchased a 2007 BMW X3 for $16 000.00.

[7] Towards the end of December 2017, she learned about the Recall Notice # 2017-470 referring to Engine PCV Blow-by Heater while she was travelling in Arkansas with her husband and two young children[1].

[8] Concerned for the safety of her family and herself, she brought her vehicle to a BMW dealership in Arkansas who could not perform the repairs because it was a Canadian vehicle. Therefore, she hired a driver to drive the BMW vehicle closer to the Canadian border and then drove it back to Canada on February 21, 2018.

[9] On March 2, 2018, Applicant brought her vehicle to a BMW dealership located in Quebec City. The repair part was not yet available.

[10] On March 23, 2018, Applicant filed the Authorization Application which proceeding was amended on September 14, 2018 (**Amended Authorization Application**).

[11] On April 16, 2018, the repairs with regard to the Recall Notice #2017-470 were performed on Applicant's vehicle.

[12] On April 20, 2018, she retrieved her vehicle and noticed smoke coming out of the hood. As such, she doubted whether the work had actually been performed or whether the replacement part suffered from the same defect as the original one.

2. ANALYSIS

2.1 Leave to adduce evidence in view of the authorization hearing

[13] The Court of Appeal in *Asselin* v. *Desjardins Cabinet de services financiers Inc.*[2] framed the Court's analysis of an Application to submit relevant evidence in view of the authorization hearing as follows:

> [37] Autre exemple de glissement : on laissera les parties produire une preuve volumineuse, qu'on examinera ensuite en profondeur comme s'il s'agissait

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1 22 months old and 8 months old at the time.

2 2017 QCCA 1673 (Application for Leave to Appeal to the Supreme Court, S.C.C, 12-28-2017, nº 37898).

d'évaluer le fond de l'affaire. **Or, ce n'est pas pour rien que, dans *Allstate du Canada, compagnie d'assurances* c. *Agostino*, réitérant un point de vue déjà exprimé dans *Pharmascience inc.* c. *Option Consommateurs*, la Cour met les juges autorisateurs (ou gestionnaires) en garde contre « la tentation d'user de l'article 1002 C.p.c. [maintenant 574 C.p.c.] de manière à faire du mécanisme de filtrage qu'est le processus d'autorisation du recours collectif une sorte de préenquête sur le fond »**, ce qui risque de contaminer l'analyse propre aux conditions d'autorisation en la faisant déborder du champ restreint qui doit être le sien. C'est en effet une tentation à laquelle il est souvent difficile de résister. Mieux vaut donc s'en prémunir.

[38] Bien sûr, aux termes mêmes de l'art. 574 *C.p.c.* (autrefois 1002 a.*C.p.c.*), « le tribunal peut permettre la présentation d'une preuve appropriée/*the court may allow relevant evidence to be submitted* », accessoirement à la contestation de la demande d'autorisation, le demandeur étant pour sa part autorisé à déposer au soutien de sa procédure, sans permission préalable, certaines pièces qu'il estime de nature à donner du poids à ses allégations. Mais cela doit être fait avec modération et être réservé à l'essentiel et l'indispensable. Or, l'essentiel et l'indispensable, côté demandeur, devraient normalement être assez sobres vu la présomption rattachée aux allégations de fait qu'énonce sa procédure. Il devrait en aller de même du côté du défendeur, dont la preuve, vu la présomption attachée aux faits allégués, devrait être limitée à ce qui permet d'en établir sans conteste l'invraisemblance ou la fausseté. C'est là le « couloir étroit » dont parle la Cour dans *Agostino*. Car, ainsi que l'écrit succinctement le juge Chamberland, au stade de l'autorisation, « le fardeau [du requérant] en est un de logique et non de preuve ». Il faut conséquemment éviter de laisser les parties passer de la logique à la preuve (prépondérante) et de faire ainsi un pré-procès, ce qui n'est pas, répétons-le, l'objet de la démarche d'autorisation.

[39] Évidemment, on peut comprendre que la partie demanderesse, désireuse de contrer par avance la contestation qu'elle prévoit, puisse être portée à déposer d'emblée une preuve abondante, le plus souvent documentaire, au soutien de ses allégations; elle peut encore chercher à produire des éléments supplémentaires au fur et à mesure qu'elle prend connaissance des moyens qu'entend lui opposer la partie défenderesse. Pour échapper à la perspective d'une action collective, cette dernière, pareillement, souhaitera présenter une preuve destinée à démontrer que l'action envisagée ne tient pas et, pour ce faire, elle pourrait bien forcer la note, sur le thème « abondance de biens ne nuit pas ». **Le juge autorisateur (ou gestionnaire) doit résister à cette propension des parties, tout comme il doit se garder d'examiner sous toutes leurs coutures les éléments produits par l'une et l'autre, au risque de transformer la nature d'un débat qui ne doit ni empiéter sur le fond, ni trancher celui-ci prématurément, ni porter sur les moyens de défense de l'intimé**.

(Our emphasis and references omitted)

[14] BMW seek leave to adduce two Sworn Declarations in view of the authorization hearing.

[15] The first Sworn Declaration is signed by Gordon Farrish, Senior Safety & Environmental Compliance Manager at BMW Canada Inc. It seeks to clarify the facts surrounding the recall of the Vehicles as well as the facts specific to Applicant's vehicle and its servicing and includes the following documents communicated in support thereof:

a) **Annex A**: Questions and Answers relating to the Engine PCV Blow-by Heater Recall Notice # 2017-470;

b) **Annex B**: Follow-up owner notification letter relating to the Engine PCV Blow-by Heater Recall Campaign # 2017-470;

c) **Annex C**: Questions and Answers relating to the Blower Motor Wiring Recall Notice # 2017-588 ;

d) **Annex D**: Service records and estimates relating to Applicant's vehicle dated March 8 and 9, 2018.

[16] The second Sworn Declaration is signed by Karen Aulbach, Customs Compliance and Planning Manager at BMW North America LLC. It seeks to correct the erroneous allegation[3] to the effect that Defendant BMW of North America, LLC either directly or through a wholly owned subsidiary agent or affiliate, manufactured and/or sold automobiles through Canada, including Quebec.

[17] Applicant contests the filing of the first Sworn Declaration and Annex D communicated in support thereof. In her view, this evidence is not relevant for the authorization stage and it constitutes a pre-inquiry on the merits of the case and includes hearsay. Subsidiarily, Applicant request permission to cross-examine both affiants.

[18] The Court is of the view that both Sworn Declarations and the exhibits, communicated in support thereof, are necessary to correct and supplement certain allegations and evidence communicated by Applicant and thus, without constituting a pre-inquiry on the merits of the case.

[19] The Court refuses Applicant's request to cross-examine the affiants[4] since the latter did not demonstrate the necessity of such examinations to present her legal syllogism at the authorization hearing and the respect of the other criteria set forth in article 575 of the *Civil Code of Procedure* (**CCP**). Furthermore, the credibility of these witnesses is not at issue at the authorization stage and the Applicant can argue what in her view constitutes hearsay in reference to the Sworn Declarations.

2.2 Leave to examine the Applicant

[20] Defendants seek leave to examine the Applicant on the following topics:

a) the circumstances surrounding the purchase by the Applicant and subsequent servicing of her vehicle, including, but not limited to, whom the Applicant

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3 Found in paragraph 8 of the Authorization Application.

4 *Sopropharm* c. *Groupe Jean-Coutu (PJC) Inc.*, 2018 QCCS 4907, paragr. 19.

purchased the vehicle from, the steps she took prior to the purchase and the Applicant's reasons for purchasing her vehicle in the first place;

b) the circumstances regarding when the Applicant learned of the Recall Notice and the allegations that her vehicle was "suffering from a serious defect";

c) the allegations that BMW misrepresented the safety of the Vehicles or failed to adequately disclose the defective nature of the Vehicles and, more specifically, that the allegedly defective Vehicles caused supposed "injury and/or damage to property";

d) Applicant's allegations that she was "concerned for the safety of the family and herself' and the interactions she had with BMW dealerships in Arkansas and in Quebec ;

e) Applicant's allegations that she has suffered ascertainable losses, as a result of the alleged omission or misrepresentation associated with the Vehicles, including expenses, a reduced resale value, increased insurance premiums, moral damages and other troubles and inconveniences; and

f) the facts regarding the Applicant's ability to properly represent the members of the proposed class, including, but not limited to , the nature of the steps taken by her leading up to and culminating in the filing of the Application.

[21] Defendants argue that such examination will help the Court in its analysis of the criteria for authorization pursuant to article 575 CCP and more particularly with regard to the requirement of the appearance of right and Applicant's ability to properly represent the members of the proposed class.

[22] Defendants submit that clarifications are required with respect to the vague factual allegations advanced in support of the alleged negligence and misrepresentations. These allegations also raise serious questions regarding the credibility and reliability of the Applicant. For example, Applicant alleges that she doubts whether the repair work was actually performed on her vehicle without relying on any evidence. Furthermore, Applicant is seeking authorization to represent the class members who received Recall Notice #2017-588 sent in January 2018 without providing any indication as to how she became aware of such recall notice and why she would be in a position to represent these members who are subject to a different and separate recall.

[23] For the following reasons, the Court is of the view that Defendants have not demonstrated the usefulness or necessity to examine the Applicant.

[24] As already mentioned by Justice Bisson in *Li* c. *Equifax*[5], if the allegations contained in the Amended Authorization Application are insufficient, incomplete, not supported by evidence or compose of arguments rather than facts, the Court does not see why

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5 *Li* c. *Equifax inc.*, 2018 QCCS 1892, paragr. 79 to 96 (Motion for Permission to Appeal rejected, 2018 QCCA 1560). See also, *Lussier* c. *Expedia Inc.*, 2018 QCCS 4019, paragr. 37 to 39; *Poitras* c. *Concession A25*, 2018 QCCS 4341, paragr. 31 and 32; *Sopropharm* c. *Groupe Jean Coutu (PJC) inc.*, 2018 QCCS 1403, paragr. 11.

Defendants would want to examine the Applicant to allow her to improve the allegations or to add new evidence. It would not be in Defendants' interest to do so.

[25] Furthermore, the filing of evidence to answer most of these topics was authorized by the Court.

[26] Lastly, the Court is of the opinion that the allegations contained in paragraphs 59 to 65 of the Amended Authorization Application, concerning the representation of the class members, are sufficient. The requested discovery on this topic is not essential or indispensable to assess the criteria set forth in article 575 (4) CCP.

[27] In essence, the Court is of the view that Defendants' request is without sufficient justification. They can contest the Amended Authorization Application without assessing the credibility of the Applicant which would not be appropriate at this stage.

[28] Therefore, the Court refuses Defendants' request to examine the Applicant.

WHEREFORE, THE COURT:

[29] **REFUSES** Defendants' request to examine the Applicant;

[30] **ALLOWS** in view of the authorization hearing, the filing of Gordon Farrish's Sworn Declaration dated September 20, 2018, and the Annexes A, B, C and D in support thereof;

[31] **ALLOWS** in view of the authorization hearing, the filing of Karen Aulbach's Sworn Declaration dated September 20, 2018;

[32] **REFUSES** Applicant's request to examine the affiants Gordon Farrish and Karen Aulbach;

[33] **THE WHOLE**, with legal costs.

Chantal Tblay JSC

CHANTAL TREMBLAY, J.S.C

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