SUPERIOR COURT

(Class Actions Chamber)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N° : 500-06-001074-208

DATE : December 9, 2020

PRESIDING: THE HONOURABLE GARY D.D. MORRISON, J.S.C.

ENRICO GIOIOSA
Petitioner

v.

NAUTILUS PLUS INC.
Respondent

JUDGMENT

1- OVERVIEW

[1] Respondent seeks the Court's authorization to submit evidence to be obtained by means of an examination out of court of Petitioner, and this in the context of the latter's Application to institute a class action.

[2] The proposed class action relates to members of Respondent's fitness studios who apparently had continued to be charged monthly fees while the studios were closed as a result of Quebec Government decrees relating to the COVID-19 pandemic (the "Temporary Closure").

[3] The specific issues that Respondent intends to cover during the proposed examination are the following:

i) The communications between Petitioner and Nautilus regarding Petitioner's Gym Contract and membership following the Temporary Closure;

ii) Petitioner's consultation of Nautilus' web site and other communications from Nautilus to its consumers regarding the COVID-19 pandemic and the Temporary Closure;

iii) Petitioner's use of Nautilus' gym facilities prior to and after the Temporary Closure;

iv) The facts regarding Petitioner's ability to properly represent the members of the proposed class, including the nature of the steps taken by him leading up to and culminating in the filing of the Authorization Application, as well as his efforts, if any, to identify other members of the Proposed Class.

2- APPLICABLE LAW

[4] Pursuant to Article 574 C.C.P., only relevant evidence ("preuve appropriée") can be allowed during the authorization phase. In this regard, it is not sufficient that such proof be relevant for the merits of the case per se, but it must, even more importantly, be relevant specifically for the authorization analysis to be conducted in accordance with Article 575 C.C.P.1.

[5] Clearly, and as is often stated, the Court is not to conclude during the authorization phase as to the merits of the claim. It is exactly in this regard that allegations of fact by applicants are taken as being true and, further, that the burden of the applicant at authorization is one of logical demonstration and not of proof.

[6] Given that only allegations of fact are to be taken as true, not inferences, conclusions, unverified hypothesis, legal arguments or opinions[2], it is only logical to conclude that the Court should be extremely reticent to authorize parties to adduce as so-called proof elements which are tantamount to such inferences, conclusions, hypothesis, arguments or opinions.

---

1 *Lambert (Gestion Peggy)* v. *Écolait Ltée*, 2016 QCCA 659, paras. 37-38.

2 *Option Consommateurs* v. *Bell Mobilité*, 2008 QCCA 2201; *Harmegnies* c. *Toyota Canada inc.*, 2008 QCCA 380, para. 44.

[7] It is also in keeping with the objective of authorization being a filtering system that relevant proof be limited to what is essential and indispensable[3], as well as proportional, to the authorization analysis.

[8] The Court understands from the case law that proof which is not simply contradictory in nature as regards the case on the merits, but which might possibly demonstrate on summary analysis that allegations of fact relating to essential and indispensable matters are improbable, manifestly inexact or simply false in the context of the authorization analysis, may be allowed by the judge exercising, with prudence and moderation, his or her discretion.

[9] In other words, and to use expression of the Court of Appeal in *Allstate du Canada, compagnie d'assurances* v. *Agostino*, the judge in deciding on relevant proof should use moderation and prudence, applying a "couloir étroit"[4], a narrow corridor, that runs between the rigidity of enforcing the filtering process and a generous permissiveness that can mistakenly lead the judge to conduct an analysis of the merits of the claim.

[10] The distinction between the authorization stage and a trial on the merits was recently described as follows by Justice Nicholas Kasirer of the Supreme Court of Canada:

> *It is true that the authorization stage is more than a mere formality, but it is also much less than an actual trial.*[5]

[11] In some cases, proof may also be considered appropriate where it provides the Court with useful and contextual clarification so that it can better understand the facts of the case or the composition of the class.[6]

[12] That said, the notion of a better understanding by the Court is not an open-door to adducing evidence that is not otherwise appropriate. In exercising its discretion in this regard the Court must still do so with prudence, within the confines of the "couloir étroit", and this solely for the purposes of the authorization process and not for the merits of an eventual class actual.

[13] As regards pre-authorization examinations of applicants, they are simply a means of obtaining factual information and to present appropriate proof. Accordingly, the rules applicable to appropriate proof generally also apply to such examinations.

---

3 *Asselin* c. *Desjardins Cabinet de services financiers inc.*, 2017 QCCA 1673, para. 38.
4 2012 QCCA 678, para. 36.
5 *Desjardins Financial Services Firm Inc.* v. *Asselin*, 2020 SCC 30, para. 74.
6 *Allstate du Canada, compagnie d'assurance* v. *Agostino*, 2012 QCCA 678, para. 64; see also *A.* v. *Frères du Sacré-Cœur*, 2017 QCCS 34, para. 29.

Hence, it is not sufficient that an examination address matters of interest for the merits of an eventual class action. The party seeking to conduct such an examination must demonstrate that the proof is necessary for the purposes of the criteria stipulated at Article 575 C.C.P.

[14] In addition, it is useful to refer to certain criteria governing applications to conduct examinations at the authorization stage, as summarized by Justice Suzanne Courchesne in *Option Consommateurs* v. *Samsung Electronics Canada Inc.*[7], which are as follows:

> (...)
>
> - *le juge dispose d'un pouvoir discrétionnaire afin d'autoriser une preuve pertinente et appropriée ainsi que la tenue d'un interrogatoire du représentant, dans le cadre du processus d'autorisation;*
>
> - *un interrogatoire n'est approprié que s'il est pertinent et utile à la vérification des critères de l'article 575 C.p.c.;*
>
> - *l'interrogatoire doit respecter les principes de la conduite raisonnable et de la proportionnalité posés aux articles 18 et 19 C.p.c.;*
>
> - *la vérification de la véracité des allégations de la demande relève du fond;*
>
> (...).

3- ANALYSIS

[15] For the reasons that follow, the Court will dismiss Respondent's application to conduct an examination of Petitioner.

3.1 Communications between the parties

[16] Respondent seeks to inquire as to whether there was any communication between the parties in addition to the emails filed by Petitioner as Exhibit R-4, which the latter's attorneys state are the only communications between them.

[17] Respondent argues that even if it already possesses all the written communication, it seeks to clarify as to whether there were any oral discussions between the parties.

---

7 2017 QCCS 1751, para. 11.

[18] There is no indication or allegation in the proceedings and exhibits that would indicate that there were any discussions between the parties as regards relevant matters. Respondent has not argued that there were, nor has it sought authorization to file any specific evidence, such as an affidavit, in that regard.

[19] Under the circumstances, the Court considers that an examination on that issue would constitute, at this stage, a proverbial fishing expedition.

[20] Moreover, Respondent has not succeeded in demonstrating that obtaining facts in that regard is relevant and useful to the authorization process.

3.2 Petitioner's consultation of the Nautilus web site and its other documentation

[21] Petitioner has filed extracts purporting to emanate from the Nautilus web site, confirming that members' contracts will be "*extended for a period equivalent to that of the Temporary Closure of our branches, as imposed by the government.*"[8]

[22] Respondent seeks to know when Petitioner consulted the web site and what other information he consulted emanating from Nautilus.

[23] However, Respondent has failed to demonstrate the relevance and utility of such information at the authorization stage.

[24] It may be that there is a credibility issue flowing from what Respondent qualifies as a possible contradiction between Petitioner's claim as structured and his prior electronic communication in which he inquired of Respondent as to whether the members' contracts will be extended and, as well, whether they will be refunded amounts paid during the Temporary Closure. In other words, was Petitioner already aware of the answers to his questions when he addressed them to Respondent?

[25] In the Court's view, and without deciding whether there is or not a credibility issue, it has not been shown that even if there was such an issue, it would be of a nature that is relevant to the authorization process.

3.3 Petitioner's use of the training facilities prior to and after the Temporary Closure

[26] This issue is not so much a matter of determining whether or not Petitioner actually used the gym facilities before and after the Temporary Closure, since it appears that Respondent may already possess that information in electronic form.

---

8 Exhibit R-5.

[27] What Respondent argues, however, is that the real question is why would Petitioner not have returned to the training facilities after the Temporary Closure had terminated.[9]

[28] In support of its request, Respondent refers to Petitioner's email dated May 29, 2020, where he expresses concern that even after the facilities reopen it will be "*with limited capacity*".[10] Respondent seeks to know whether Petitioner would not have returned for that reason. And if it was not for that reason, then why did he not return?

[29] With all due respect, Respondent has failed to demonstrate how it would be relevant for authorization purposes to know whether Petitioner may not have returned to use the training facilities after the Temporary Closure ended by reason of limited capacity or for any other reason.

3.4 Petitioner's ability to properly represent the class members

[30] Respondent argues that Petitioner's application makes no mention of any efforts he may have undertaken to identify other members of the group.

[31] Quite frankly, in a case of this nature, one can infer for authorization purposes that most of Respondent's members at the time of the Temporary Closure could conceivably be a member of the class. Whether that number is 50 or 50,000, as alleged by Petitioner in reference to a newspaper article, it matters not at this stage.

[32] One must keep in mind that as regards a person's ability to act as class representative, the criteria to be met has essentially become minimalist.[11]

[33] Respondent has not raised any issues relating to Petitioner's ability to understand the subject matter of his claim, to any potential conflict of interest involving him or to any other serious fact-driven issues that might justify his examination at the authorization stage.

FOR THESE REASONS, THE COURT:

DISMISSES Respondent's Application for Authorization to Examine the Petitioner;

---

9 Petitioner's Application was filed prior to the re-closure of Respondent's facilities by Government decree.

10 Exhibit R-4, p. 1-2.

11 *Lévesque* v. *Vidéotron s.e.n.c.*, 2015 QCCA 205, para. 27; see also *Sibiga* v. *Fido Solutions Inc.*, 2016 QCCA 1299, para. 109.

THE WHOLE with judicial costs.

Gary D.D. Morrison, J.S.C.

Mtre. Nicholas Chine
Mtre. Neil Stein
Mr. Olivier Surprenant
Stein & Stein Inc.
Attorneys for Petitioner

Mtre. Noah Boudreau
Mtre. Nicolas-Karl Perreault
Fasken Martineau DuMoulin
Attorneys for Respondent

Date of Hearing : November 27, 2020