

SUPERIOR COURT

(Class Action)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N°: 500-06-001158-217

DATE: February 22, 2022

PRESIDING: THE HONORABLE DONALD BISSON, J.S.C.

(JB4644)

JACQUES LEDUC

Plaintiff

c.

ELAD CANADA INC.

ELAD CANADA REALTY INC.

LES DÉVELOPPEMENTS CITÉ-NATURE (PHASE IV) INC.

Defendants

JUDGMENT

(on motion for leave to adduce evidence under Art. 574 CCP)

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1. INTRODUCTION

[1] The Court is seized with an amended application by defendants for leave to file relevant evidence and examine plaintiff Mr. Leduc at the authorization stage, filed under Art. 574 of the Code of Civil Procedure ("CCP").

[2] The defendants are defendant parties against a Motion for Authorization of a class action (the "Motion") filed by plaintiff, which is seeking authorization of a Class Action for the following class¹:

Original French version : Toutes les personnes qui ont versé un dépôt pour l'achat d'un condo dans le projet Harmonia Cité-Nature (phase IV).

Translation by the Court: All persons who made a deposit in order to purchase a condominium, in the Harmonia at Cité-Nature (phase IV) project.

[3] Plaintiff essentially argues that the defendants acted in bad faith and misled the proposed class members, as part of a scheme whereby they cancelled sales of the Cité-Nature Harmonia (Phase IV) project (the "Harmonia Project") units, for the sole purpose, allegedly, that it was more profitable to rent the units once they were built.

[4] Plaintiff further alleges that clause 5.10 of the contract signed by the class members², which specifically provides that the vendor's obligations are subject to it obtaining financing to its entire satisfaction, is not enforceable.

[5] Plaintiff identifies the following issues of fact and law to be dealt with collectively in the judgment to be rendered, should the class action be authorized³:

- a) Did the defendants act in bad faith?
- b) Is clause 5.10 enforceable against the class members?
- c) Are the class members entitled to compensatory and/or punitive damages and, if so, in what amount?

¹ Par. 1 of the Motion.

² Exhibit P-8 of the Motion.

³ At par. 55 of the Motion.

d) Are the class members, as consumers, entitled to punitive damages under the *Consumer Protection Act*⁴, and if so, in what amount?

e) Are the defendants jointly and severally liable for the damages claimed?

[6] Defendants seek leave to file into evidence the following four elements:

- Amended Affidavit of notary M^e Rachel Couture dated January 14, 2022 (Amended Exhibit R-1), together with Exhibits RC-1 and RC-2 (both under seal);
- Affidavit of Krysta Greenberg (Exhibit R-2);
- Affidavit of Rafael Lazer (Exhibit R-3), together with Exhibits RL-1 and RL-2; and
- Affidavit of Shai Ben Haroosh (Exhibit R-4), together with Exhibits SBA-1 to SBA-4.

[7] Defendants also want to examine plaintiff Mr. Leduc out of Court, prior to the authorization hearing, regarding the following four topics:

- Obtain details regarding Mr. Leduc's personal cause of action, more specifically regarding the decision to move to a new location and to sell furniture more than three years before what he alleges to be the anticipated move-in date (par. 17 of the Motion);
- Obtain details and the supporting documentation regarding the damages claimed by Mr. Leduc, on his own behalf as well as for the putative class members, for which no supporting evidence has been filed (par. 50 and following of the Motion);
- Seek information regarding the steps taken by Mr. Leduc to identify the members of the class; and
- Understand on which basis Mr. Leduc claims that "all members are in the same situation that he is" (par. 55 and following of the Motion);

[8] Finally, defendants ask the Court to reserve their right to submit, as evidence at the authorization hearing, the transcript of the examination of Plaintiff and the exhibits and documents produced during this examination or as undertakings, in whole or in part.

[9] As will be detailed below, Plaintiff opposes the production of some affidavits, and accepts the production of others on selected paragraphs as long as he is permitted to conduct a cross-examination on the affidavit as well as on the exhibits. Plaintiff also challenges the right of defendants to examine him. He argues that the defendants are

⁴ RLRQ, c. P-40.1

essentially seeking leave to file evidence related to the merits of the defense of the file and seeking leave to examine him on topics that need no clarification, the Motion being sufficient or not in itself.

2. ANALYSIS AND DISCUSSION

[10] The Court begins with the applicable law.

2.1 The applicable law

[11] In *Ward c. Procureur général du Canada*⁵, this Court has summarized as follows all applicable principles under Art. 574 CCP for relevant evidence and examination at the Class Action authorization stage:

[17] Les demandes de preuve appropriée à l'étape de l'autorisation sont prévues à l'article 574 Cpc. La jurisprudence de la Cour d'appel et de la Cour suprême du Canada nous enseigne quels sont les critères applicables :

- 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;
- une preuve n'est appropriée que si elle est pertinente et utile à la vérification des critères de l'article 575 Cpc. Le consentement de la partie demanderesse à une preuve suggérée par la défense ne suffit pas à en autoriser le dépôt;
- la preuve documentaire et l'interrogatoire proposés doivent respecter les principes de la conduite raisonnable et de la proportionnalité posés aux articles 18 et 19 Cpc;
- la vérification de la véracité des allégations de la demande relève du fond. Une partie défenderesse ne peut mettre en preuve des éléments qui relèvent de la nature d'un moyen de défense au mérite;
- le tribunal doit analyser la demande soumise à la lumière des enseignements récents de la Cour suprême du Canada et de la Cour d'appel sur l'autorisation des actions collectives et qui favorisent une interprétation et une application libérales des critères d'autorisation;
- à ce stade, la finalité de la demande se limite au seuil fixé par la Cour suprême du Canada, soit la démonstration d'une cause défendable. Le tribunal doit se garder d'autoriser une preuve qui inclut davantage que ce qui est strictement nécessaire pour atteindre ce seuil;
- le tribunal doit se demander si la preuve requise l'aidera à déterminer si les critères d'autorisation sont respectés ou si elle permettra plutôt de déterminer si le

⁵ 2021 QCCS 109, par. 17 to 21.

recours est fondé; dans cette dernière hypothèse, la preuve n'est pas recevable à ce stade;

- la prudence est de mise dans l'analyse d'une demande de permission de produire une preuve appropriée; il s'agit de choisir une voie mitoyenne entre la rigidité et la permissivité;
- il doit être démontré que la preuve demandée est appropriée et pertinente dans les circonstances spécifiques et les faits propres du dossier, notamment en regard des allégations et du contenu de la demande d'autorisation;
- le fardeau de convaincre le tribunal de l'utilité et du caractère approprié de la preuve repose sur la partie qui la demande;
- le tribunal ne doit pas laisser les parties produire une preuve volumineuse et ne doit en aucun cas examiner la preuve produite en profondeur comme s'il s'agissait d'évaluer le fond de l'affaire;
- le processus d'autorisation d'une action collective n'est pas, du point de vue de la preuve, une sorte de préenquête sur le fond. C'est un mécanisme de filtrage;
- l'admission de preuve appropriée doit être faite avec modération et être réservée à l'essentiel et l'indispensable. Or, l'essentiel et l'indispensable, du côté du 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 de la défense, 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 un « couloir étroit »;
- puisque le fardeau du demandeur à l'autorisation 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 préprocès, ce qui n'est pas l'objet de la démarche d'autorisation;
- pour échapper à la perspective d'une action collective, la partie défenderesse souhaitera généralement 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 doit résister à cette propension, tout comme il doit se garder d'examiner sous toutes leurs coutures les éléments produits par l'une et l'autre des parties, 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;
- à l'autorisation, le tribunal doit simplement porter un regard sommaire sur la preuve, qui devrait elle-même être d'une certaine frugalité;
- dans tous les cas, la preuve autorisée doit permettre d'évaluer les quatre critères que le juge de l'autorisation doit examiner et non le bien-fondé du dossier.

Et si, par malheur, le juge de l'autorisation se retrouve devant des faits contradictoires, il doit faire prévaloir le principe général qui est de tenir pour avérés ceux de la demande d'autorisation, sauf s'ils apparaissent invraisemblables ou manifestement inexacts;

- si l'on ne veut pas que les actions collectives accaparent une part indue des ressources judiciaires, ressources limitées, il serait donc utile, dans l'état actuel du droit, que l'on évite de faire au stade de l'autorisation ce qui, en réalité, appartient au fond.

[18] La Cour d'appel et la Cour suprême du Canada ajoutent que les seuls moyens de défense qui peuvent être tranchés par le juge d'autorisation sont ceux qui reposent sur une « pure question de droit au stade de l'autorisation si le sort de l'action collective projetée en dépend ».

[19] Dans l'arrêt *Durand c. Subway Franchise Systems of Canada*, la Cour d'appel vient d'ailleurs de rappeler ainsi ces critères :

[50] Ces principes s'harmonisent d'ailleurs parfaitement avec les règles établies quant à la recevabilité et au poids à accorder à la preuve qui peut être déposée par la partie qui s'oppose à la demande d'autorisation, telle celle produite par les intimées en l'espèce.

[51] Cette preuve doit en effet être essentielle, indispensable et limitée à ce qui permet de démontrer sans conteste que les faits allégués sont invraisemblables ou faux. Elle ne doit pas avoir pour effet de forcer la tenue d'un débat contradictoire sur une question de fond ou, dit autrement, entraîner la tenue d'un procès avant le procès.

[52] Si la preuve déposée est susceptible d'être éventuellement contredite par le requérant, le juge de l'autorisation doit faire preuve de prudence et ne pas tenir pour acquis qu'elle est vraie. Il doit se rappeler qu'il ne doit tenir pour avérés que les faits allégués par le requérant et non pas ceux allégués par l'intimé, même lorsque la preuve produite par ce dernier démontre *prima facie* l'existence de ces faits.

[53] À ce stade, le fardeau du requérant en étant un de logique (également qualifié de fardeau de démonstration) et non de preuve, il n'a d'ailleurs pas à offrir une preuve prépondérante de ce qu'il avance, mais bien, tout au plus, une « certaine preuve » et n'a pas l'obligation de contester la preuve que l'intimé dépose, ni d'y répondre. D'ailleurs, il n'est souvent pas en mesure de le faire puisqu'il n'a pas toujours toute la preuve en main, une bonne partie de celle-ci pouvant être en possession de l'intimé.

[54] Bref, la preuve déposée par un intimé au soutien de sa contestation ne change pas le rôle du juge de l'autorisation qui peut, certes, trancher une pure question de droit et interpréter la loi pour déterminer si l'action collective projetée est frivole, mais qui ne peut, pour ce faire, apprécier la preuve

comme s'il y avait eu un débat contradictoire ou encore présumer vraie celle déposée par l'intimé alors qu'elle est contestée ou simplement contestable.

[20] Enfin, il existe des décisions de la Cour supérieure qui autorisent le dépôt d'une preuve qui permet non seulement de démontrer le caractère invraisemblable ou faux de certaines allégations, mais également :

- de comprendre la nature des opérations de la partie défenderesse;
- de remplir un vide factuel laissé par la demande d'autorisation;
- de compléter, corriger ou contredire les allégations de la demande d'autorisation lorsqu'elle permet au tribunal d'avoir une meilleure compréhension du contexte factuel de la demande; ou
- d'être utile au débat d'autorisation.

[21] La Cour supérieure précise dans ces décisions que le poids de cette preuve sera décidé plus tard lors du débat sur l'autorisation.

[12] The Court must now apply these principles to the application of defendants.

2.2 Evidence

[13] As a general argument, defendants argue that the facts alleged in the Motion are not only incomplete, but also misleading, and that, as a result, clarification and additional information from the defendants is necessary.

[14] The Court will study one by one each affidavit submitted by the defendants. Arguments of the plaintiff will be detailed for each one.

2.2.1 The amended affidavit of M^e Rachel Couture, Amended Exhibit R-1, together with Exhibits RC-1 and RC-2

[15] With this affidavit, defendants want to argue that there is either no appearance of right or no class or no common questions since all steps were taken by the defendants to return the deposits to the class members and no damages were suffered in that regard.

[16] To that effect, defendants want to adduce into evidence the amended affidavit of notary M^e Rachel Couture, Amended Exhibit R-1, together its supporting documents, Exhibits RC-1 and RC-2 (proof that deposits were given back to clients), in order:

- To demonstrate that the required steps were taken to refund the deposits to the class members;
- To demonstrate that almost all class members (except for one, who is identified) have received their deposits;

- To confirm that the defendants know the identity and the contact information of all class members;
- To confirm that all cheques returning the deposit indicate "paiement final".

[17] Plaintiff does not oppose the production of M^e Couture's affidavit and Exhibits RC-1 and RC-2, as long as he is permitted to conduct a 2-hour cross-examination on the affidavit as well as on the 124 pages of both exhibits, adding that they each contain manuscript notes on them. Plaintiff adds that, as M^e Couture is not a party to the present class action at the moment, her cross-examination will shed light on her implication in the dispute.

[18] In the Court's view, the elements listed by defendants in paragraph 16 of this judgment are related to the "essentiel et indispensable". Indeed, these factual elements, if the Court gives them a probative value at the authorization, might allow defendants to argue that they establish "sans conteste l'in vraisemblance ou la fausseté" of the allegations of the plaintiff. This evidence is also neutral and is not subject to any contestation.

[19] In other words, these factual elements could assist the Court in determining at the authorization stage whether: 1) the class members have an appearance of right in light of the deposits having been refunded and of the terms of the contract; 2) a class actually exists; and 3) whether there are any common questions in light of the fact that deposits were reimbursed, in conformity with the contract signed by the proposed class members.

[20] The Court will allow into evidence the amended affidavit of M^e Rachel Couture, Amended Exhibit R-1, together with Exhibits RC-1 and RC-2. Exhibits RC-1 and RC-2 will be filed under seal, as they contain nominative, banking and financial personal information related to class members.

[21] The Court decides that no examination on affidavit will be allowed. As M^e Couture is not a party, there is no need at this stage to have light on her implication in the dispute, if any. Also, the fact that there are manuscript notes on the cheques cannot allow an examination as this will turn into a case by case analysis of each class member's position. The cheques will be taken as they are, and the Court will deal with it at the authorization stage as they are. At authorization, the parties will argue their position on the impact of these notes, if any.

[22] The Court indicates that it has not decided anything so far and it will decide within the authorization judgment the probative value, if any, to be given to this affidavit and the exhibit attached. It will also then decide if the argument of defendants based on this evidence related to the authorization stage or the merits. But, as of today, this evidence is within the narrow street referred to by the Court of Appeal and must be allowed in order to allow defendants to make their arguments at authorization.

2.2.2 The affidavit of Ms. Krysta Greenberg, Exhibit R-2

[23] The defendants want to file the affidavit of Ms. Greenberg in order to directly contradict a factual allegation of the Motion. Here is the contents of this affidavit:

1. I was Sales and Marketing Manager at Elad Canada Realty Inc. from March 2019 to August 24, 2021;
2. When I was working for Elad Canada Realty Inc., we always used the branding name "Elad Canada". To my knowledge, the entity Elad Canada Inc. was never involved in the Phase IV of the Cité-Nature / Harmonia Condominium Project (the "Harmonia Project").
3. The Harmonia Project was one of the projects I was involved with during my work with Elad Canada Realty Inc.
4. I was informed by Elad Canada Realty Inc. that the only feasible project for which the developer was able to obtain viable financing was by transforming the Harmonia Project into a residential rental project.
5. I had a conversation with Lisette Pelchat ("Ms. Pelchat") on or around July 12, 2021, as she wanted to receive more information about the cancellation of the Harmonia Project.
6. The whole conversation was in English and I do not speak French.
7. Ms. Pelchat was extremely upset about the cancellation of the Harmonia Project. Ms. Pelchat made a lot of accusations during the call. It was clear that she was angry, she cursed on numerous occasions. I did not say that the Harmonia Project was cancelled because it would be more lucrative for the defendants to lease the units, based on my recollection of our conversation. In addition, this is not language I would ever use with a purchaser.
8. I remember listening to Ms. Pelchat and said, among other things, that we are disappointed with the situation and that the only feasible project for which the developer was able to obtain viable financing was by transforming the condo project into a residential rental project, which is currently being constructed.
9. All facts herein are true and correct.

[24] Paragraphs 32 and 33 of the Motion read as follows:

32. Il est évident que lorsque Mme Faille a écrit au demandeur le 18 mai 2021 (pièce P-11), elle était déjà au courant de la situation exprimée dans sa lettre du 23 juin 2021 (pièce P-12). Les défenderesses ont occulté la vraie situation des membres et ont donc agi de mauvaise foi contrairement aux arts. 6, 7 et 1375 C.c.Q. Elles ont également manqué à leur devoir d'agir au mieux des intérêts de leur client, avec prudence et diligence (art. 2100 C.c.Q.);

33. Qui est plus, à un moment donné en juillet 2021, Mme Greenberg, une représentante d'Elad Canada, a admis à un autre membre du groupe, Lisette Pelchat, que la raison de l'annulation des contrats était qu'il était devenu plus rentable pour les défenderesses de louer les unités;

[25] Défendants argue the following two elements:

- **First**, at par. 33 of the Motion, it is alleged that Ms. Greenberg, a representative of Elad Canada, "admitted" that the contracts of class members were cancelled because it would be "more lucrative to lease the units";
- Notwithstanding the fact that is complete hearsay, the Court will benefit from the affidavit of Ms. Krysta Greenberg, who no longer works for Elad Canada Realty Inc. and indicates that she did not say those words;
- This affidavit is useful to contradict par. 32 of the Motion and Exhibit P-21 (affidavit of Lisette Pelchat), which are clearly false and ill-founded, and provides the Court with the required context for the authorization hearing;
- This is the type of evidence that clearly contradicts allegations made in the Motion and inadmissible hearsay, the whole which needs to be corrected in view of the authorization hearing;
- **Second**, the affidavit of Ms. Greenberg also explains that Elad Canada Inc. was not, to her knowledge, involved in the Harmonia Project. Notwithstanding the defendants' contestation of the authorization of the proposed class action, should it be authorized, there is no reason for Elad Canada Inc. to be a named defendant;
- The affidavit of Ms. Krysta Greenberg will assist the Court in determining whether the plaintiff has met its burden of demonstrating an arguable case (article 575(2) CCP) against the defendants.

[26] Plaintiff does not object to the production of paragraphs 1, 2 (only the first sentence, as the second sentence of par. 2 is inappropriate since this is something that a representative of Elad Canada Inc. should attest to, not the Sales and Marketing Manager at Elad Canada Realty Inc.), 3, 4 (provided he can cross-examine on this paragraph), 5 and 9 of the affidavit of Mme Greenberg. Plaintiff argues that he fails to see the pertinence of paragraph 6 of this affidavit, as the language that the conversation took place in is not in debate. Finally, plaintiff refuses paragraphs 7 and 8 of Ms. Greenberg's affidavit since he argues that they are not neutral.

[27] The Court will not allow the affidavit of Ms. Greenberg, for the following reasons:

- It is not for Ms. Greenberg to prove that Elad Canada Inc. is not involved on the litigation as she is not a representative of that company, she is Sales and

Marketing Manager of another company, Elad Canada Realty Inc. As a result, the Court cannot accept paragraph 2 of the affidavit of Ms. Greenberg;

- Paragraphs 7 and 8 of Ms. Greenberg's affidavit are not neutral, rather they open the door to a contradictory debate of "he said she said". Plaintiff's allegation contained at paragraph 33 of the Motion is supported by an affidavit signed by another class member, Ms. Pelchat (filed as Exhibit P-21 in support of par. 33) and, in the Court's view, the defendants cannot adduce evidence by way of an allegation in an affidavit to contradict this allegation – which must be taken as true – at this stage. The Court cannot accept paragraphs 7 and 8 of Ms. Greenberg's affidavit;
- As a result, the other paragraphs of Ms. Greenberg's affidavit have no purposes and do not stand alone. They are not required.

[28] Since the issue here is a "he said – she said", it is not a case where the affidavit of Ms. Greenberg might allow defendants to argue that it establishes "sans conteste l'in vraisemblance ou la fausseté" of the allegations of the plaintiff related to the declaration of Ms. Greenberg. However, the fate or weight of Exhibit P-21 and of the supporting paragraphs of the Motion will be decided at the authorization.

[29] The Court will not allow into evidence the affidavit of Ms. Greenberg.

2.2.3 The affidavit of Mr. Rafael Lazer, Exhibit R-3, together with Exhibits RL-1 and RL-2

[30] Defendants want to submit this affidavit in order to challenge the appearance of right of plaintiff. Here are the arguments of defendants:

- The Motion makes blunt allegations against all of the defendants and indicates that the reason why the Harmonia Project was transformed into a rental project is because it was more lucrative to do so;
- The affidavit of Mr. Rafael Lazer, communicated as Exhibit R-3, together with its Exhibits RL-1 and RL-2 proves these allegations are frivolous and proves inter alia that:
 - Elad Canada Inc. should not be included in this class action;
 - In the context where Les Développements Cité-Nature (Phase IV) inc. needed to resume construction on a short timeline in order to work within the permits issued by the City of Montréal and of its contract with Magil Construction Est du Canada inc., (both of which required work to commence within a very short period of time) and in which it did not have sufficient sales to receive condo construction financing in accordance with reasonable equity

requirements, Les Développements Cité-Nature (Phase IV) inc. had no choice but to transform the Harmonia Project into a rental project;

➤ The Harmonia Project was not cancelled because it would be “more profitable to lease the units”, contrary to what is alleged by the plaintiff. In fact, significant costs were incurred as a result of the cancellation of the Harmonia Project;

➤ The deeds of hypothec filed by the plaintiff as Exhibit P-20 and signed on or after April 29, 2021 are not related to the financing of the construction of the Harmonia Project, but are rather related to the purchase of the shares of Elad Canada Realty Inc. by Rester Ontario Investments Inc.

- The plaintiff will need to prove whether he has an arguable against each of the defendants. The evidence regarding Elad Canada Inc. (par. 3 and 4 and Exhibit RL-1 of the affidavit of Mr. Rafael Lazer) is clear and neutral and establishes that Elad Canada Inc. was not involved in the Harmonia Project and there is no legal justification to authorize the class action against this entity;

- Paragraphs 5 to 13 of the affidavit of Mr. Rafael Lazer establish that, contrary to the opinions raised by the Plaintiff, Les Développements Cité-Nature (Phase IV) inc. had no choice but to transform the Harmonia Project into a rental project, certainly no acting in bad faith under the present circumstances. Those paragraphs further demonstrate the timeline of the decision taken, providing the Court with the required context in view of the authorization hearing;

- Paragraphs 14 to 15 of the affidavit of Mr. Rafael Lazer evidence that losses were actually suffered as a result of the cancellation of the Harmonia Project, contrary to the unsupported allegations of the plaintiff (including at par. 12 of the Motion);

- Paragraph 16 of the affidavit of Mr. Rafael Lazer is tied to the affidavit of Me Rachel Couture and emphasize that all purchasers of units in the Harmonia Project were offered the return of their deposit;

- Paragraph 17 of the affidavit of M. Rafael Lazer finally clearly contradicts paragraph 49 of the Motion and explains the context of the deeds of hypothec filed as Exhibit P-20.

[31] Plaintiff argues the following:

- Other than paragraphs 1 and 2, Mr. Lazer’s affidavit is fraught with either means of defense or challenges to the merits of the case, certainly not the kind of neutral and indispensable evidence permitted at the authorization stage;

- This affidavit should not be permitted, but if it is, the plaintiff requests permission to cross-examine Mr. Lazer for 2-hours on paragraphs 3, 4, 5, 6, 7, 9 (not supported by any documentation when there must be documents/contracts confirming this, or not, as the case may be), 10 (defense), 11, 12, 13 (contradictory), 14, 15, 16 and 17.

[32] During the hearing, plaintiff indicated that he would be ready to accept paragraphs 14 and 15 of the affidavit of Mr. Lazer if he can examine on them and if the defendants were ready to make some admissions on the fact that it will be less profitable to rent than to sell the units. The parties then exchanged correspondence and copied the Court.

[33] The Court is of the opinion that only paragraphs 1, 2 and 4 and Exhibit RL-1 of the affidavit of Mr. Lazer are neutral and unchallenged facts.

[34] All the rest is not within the narrow street and relates directly to the defence on the merits of the case.

[35] Paragraph 3 reads as follows:

3. The entity Elad Canada Inc., a holding company, is a different legal entity, completely distinct from Elad Canada Realty Inc. and from Les Développements Cité-Nature (Phase IV) Inc. and was never involved in any aspect of the Phase IV of the Cité-Nature / Harmonia Condominium Project (the "Harmonia Project").

[36] In the Court's view, this is not sufficient to exclude Elad Canada Inc. from the class action at this stage. A simple affirmation to that effect is not sufficient, as more details and documents have to be provided, and this leads to issue on the merits.

[37] The explanation of the reasons why the Harmonia Project was transformed into a rental project and who incurred losses (par. 5 to 15) is clearly a contested matter that is to be left for the merits. It is also not something that can be decided by the Court on a simple affidavit. Oral testimony is required, including cross-examinations. At first glance, this is not an objective element. The Court does not need to address the issue of the potential admission of defendants.

[38] Paragraph 16 of the affidavit of Mr. Lazer is not required as the affidavit of M^e Couture already covers that. Paragraph 17 of the affidavit of Mr. Lazer is also within the merits of the case.

[39] As a result, without the rest of the affidavit, paragraphs 1, 2 and 4 and Exhibit RL-1 alone cannot allow defendants to argue that they establish "sans conteste l'in vraisemblance ou la fausseté" of the allegations of the plaintiff on the involvement of Elad Canada Inc. They are not allowed, as they are useless, in the Court's view.

[40] The Court will therefore not allow into evidence the affidavit of Mr. Rafael Lazer.

2.2.4 The affidavit of Mr. Shai Ben Haroosh, Exhibit R-4, together with Exhibits SBA-1 to SBA-4

[41] Defendants want to submit this affidavit in order to challenge the appearance of right of plaintiff, as well as the existence of a class or of common questions. Here are the arguments of defendants:

- The affidavit of Mr. Shai Ben Haroosh, communicated as Exhibit R-4, together with its Exhibits SBA-1 to SBA-4 prove the context in which Les Développements Cité-Nature (Phase IV) inc. needed to resume the construction work, as a result of the permits issued by the City of Montréal and of its contract with Magil Construction Est du Canada inc.;
- Those facts, read in conjunction with the facts alleged in the affidavit of M. Rafael Lazer, clearly explain the context in which financing was required by Les Développements Cité-Nature (Phase IV) inc. and that the delays associated with the construction work performed were not the result of an illicit scheme as alleged by the plaintiff.

[42] Plaintiff contests this affidavit in its entirety.

[43] Defendants have indicated that, should the Court not accept paragraph 12 of the affidavit of Mr. Lazer, then it cannot accept the affidavit of Mr. Shai Ben Haroosh as it is a complement to that paragraph.

[44] The Court will not allow the affidavit of Mr. Shai Ben Haroosh since it clearly relates to the merits of the case and deals with a contested matter that will need detailed evidence. This is not a neutral element.

2.2.5 Conclusion

[45] The Court will allow into evidence the following element:

- Amended affidavit of M^e Rachel Couture, Amended Exhibit R-1, along with Exhibits RC-1 (under seal) and RC-2 (under seal).

[46] The Court will now address the issue of the examination of plaintiff sought by defendants.

2.3 Examination of plaintiff

[47] The defendants:

- Submit that it will be essential for the Court to benefit of the examination of the plaintiff in order to assess his personal cause of action;

- Argue that, as was recently decided by this Court⁶, the examination should be allowed when it can demonstrate that some allegations are false or implausible;
- Intend to argue at the authorization hearing that plaintiff does not have a valid cause of action. In their view, no fault was committed by any of the defendant and, in addition, plaintiff's alleged damages seem to be specific to his own situation;
- Intend to raise at authorization that there are no common questions that that could significantly advance the individual claims of all class members, including with respect to the damages claimed.

[48] In order to be able to present these arguments, defendants argue that they need to examine the plaintiff in order to:

- Obtain details regarding plaintiff's personal cause of action, more specifically regarding the decision to move to a new location and to sell furniture more than three years before what he alleges to be the anticipated move-in date (par. 17 of the Motion);
- Obtain details and the supporting documentation regarding the damages claimed by plaintiff, on his own behalf as well as for the putative class members, for which no supporting evidence has been filed (par. 50 and following of the Motion);
- Seek information regarding the steps taken by plaintiff to identify the members of the class;
- Understand on which basis plaintiff claims that "all members are in the same situation that he is" (par. 55 and following of the Motion).

[49] Plaintiff contests the whole examination. He adds that, should the Court accepts that he is to be examined, his examination should take place on the same day as the authorization hearing, live in Court.

[50] The Court will not allow this examination. It is not for the defendants to complete the allegations of plaintiff. If the allegations of plaintiffs are not detailed enough or do not contain the required detail or relevant exhibits, then they will not be sufficient. If they are not clear or contain hypothesis or deductions, the plaintiff will suffer the consequences arising from that. The plaintiff must live with the proceedings he has drafted. Defendants cannot examine him in order to complete the picture.

⁶ *Décary-Gilardeau c. General Motors of Canada*, 2021 QCCS 4948, par. 35.

[51] It is also not a case where the examination could provide relevant details to the Court in order to define the class or make sub-classes or would highlight a manifest contradiction in the allegations of plaintiff.

[52] The Court will decide at the authorization the fate or weight to be given to all assumptions, deductions, presumptions and hypothesis that defendants allege that plaintiff is making.

[53] The examination of plaintiff is therefore denied. As a result, there is no need to address the reservation of rights requested by defendants. There is no need to make a time-table for the rest of the authorization process, as the next step is the fixing of a date for the hearing on the authorization. The authorization hearing will not include the examination of plaintiff.

[54] The Court will contact shortly the attorneys of the parties in order to fix the date for the authorization hearing.

2.4 Judicial costs

[55] As the issues contained in the present judgment will be decided with the authorization judgment, judicial costs will follow the fate of the authorization of a class action.

FOR THESE REASONS, THE COURT:

[56] **GRANTS** in part the Amended Application of defendants for *Leave to Adduce Relevant Evidence*;

[57] **ALLOWS** into evidence at the authorization stage the following element:

- Amended affidavit of M^e Rachel Couture, Amended Exhibit R-1, along with Exhibits RC-1 (under seal) and RC-2 (under seal);

[58] **INDICATES** that the defendants do not need to refile into the Court record this affidavit;

[59] **DENIES** the production into evidence of all other elements sought by the defendants;

[60] **INDICATES** that there will be no examinations on affidavit by plaintiff;

[61] **DENIES** to defendants leave to examine plaintiff;

[62] **THE WHOLE**, with judicial costs to follow.


DONALD BISSON, J.S.C.

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Hearing date : February 1st, 2022