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At an IAS Term, Part V of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23rd day of September, 2009.

PRESENT:

HON. ANN T. PFAU,

Justice.

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LESLIE BLAU, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Plaintiff,

- against -

Index No. 1700/09
DECISION/ORDER

GMAC FINANCIAL SERVICES CORP. AND KRYSTAL AUTO MALL CORP.,

Defendants.

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This matter, styled as a class action, arises out of a consumer auto retail transaction. Plaintiff Leslie Blau, on behalf of himself and all others similarly situated (plaintiff) brings this suit against GMAC Financial Services Corp. (defendant GMAC) and Krystal Auto Mall Corp. (defendant Krystal) for charging customers more than once for "excessive wear" or unfairly assessing "excessive wear" charges on leased vehicles. Plaintiff moved, *inter alia*, for class action certification pursuant to CPLR 901(a) and 902.[1] Oral argument on the motion was held September 18, 2009. For the following reasons, plaintiff's motion for class action certification is denied.

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[1]Plaintiff also moved for a default judgment against defendant Krystal for an untimely answer to plaintiff's verified summons and complaint. At oral argument, defendant Krystal provided the Court with a satisfactory explanation for its delay and the Court denied this portion of the motion (see CPLR 2001).

"In order to determine whether an action may proceed as a class action, the court shall consider whether the class is so numerous that joinder of all members is impracticable; whether common questions of law and fact predominate; whether the plaintiff's claim is typical of the class; whether the plaintiff will fairly and adequately protect the interests of the class; and whether a class action is the superior method for the fair and efficient adjudication of the controversy" (Canavan v Chase Manhattan Bank, 234 AD2d 493, 494 [2d Dept 1996]; *see* CPLR 901[a]). The determination of whether the matter qualifies as a class action "rests in the sound discretion of the trial court" (Globe Surgical Supply v GEICO Ins. Co., 59 AD3d 129, 136 [2d Dept 2008]; see also, e.g., Dank v Sears Mgmt. Holding Corp., 872 NYS2d 722 [2d Dept 2009]), and "the court must be convinced that the proposed class is capable of being identified" (Globe, 59 AD3d at 137).

The party seeking class certification "has the burden of establishing the prerequisites of certification" (id.; Rabouin v Metropolitan Life Ins. Co., 25 AD3d 349, 350-1 [2d Dept 2006]). General or conclusory allegations in the pleadings or affidavits are insufficient to sustain this burden; class certification "must be founded upon an evidentiary basis" (Rallis v City of New York, 3 AD3d 525, 526 [2d Dept 2004] ["general and conclusory allegations in the affirmation of the plaintiffs' counsel and the exhibits attached thereto were insufficient to sustain the plaintiffs' burden").

Here, plaintiff seeks to certify a class consisting of:

> All present and former customers of defendants who were damaged as a result of, (1) defendants' charging customers more than once for "excessive wear" damage on the customer's returned leased vehicle, and (2) charging for "excessive wear" for what was, in fact, "normal wear".

This Court holds that plaintiff's motion must be denied. Plaintiff has failed to put forth any

evidence that this matter qualifies for class treatment. Instead, plaintiff has made only the type of general and conclusory allegations that are plainly insufficient to meet his burden at the class certification stage (*see* Rallis, 3 AD3d at 526; Canavan, 234 AD2d at 494).

Moreover, the proposed class action on its face would require an individualized inquiry into each unique transaction to discern if customers were charged more than once or unjustly for "excessive wear" to their vehicles (see Komonczi v Fields, 232 AD2d 374, 375 [2d Dept 1996] [issues as to the "completeness of the procedure, the effect thereof on each patient, and the extent of the damage resulting therefrom" made class action unsuitable]; Rosenfeld v Robins Co., 63 AD2d 11, 20 [2d Dept 1978]). Additionally, plaintiff impermissibly appears to seek an inquiry going back to defendant Krystal's inception thirty years ago (see Rabouin v Metropolitan Life Ins. Co., 25 AD3d 349, 351 [1st Dept 2006] [class action precluded where, *inter alia*, insurance policies at issue were purchased prior to 1982]).

Accordingly, plaintiff's motion for class action certification is denied.

ENTERED/SO ORDERED

JSC

HON. ANN T. PFAU