CITATION: A1 Pressure Sensitive Products Inc. v. Bostik, Inc., 2009 ONCA 206
DATE: 20090306
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COURT OF APPEAL FOR ONTARIO

Borins, Cronk and LaForme JJ.A.

BETWEEN:

A1 Pressure Sensitive Products Inc.

Plaintiff (Appellant)

and

Bostik, Inc.

Defendant (Respondent)

Kevin Sherkin and Anjali Mankotia, for the appellant

J. Davis-Sydor, for the respondent

Heard: February 17, 2009

On appeal from the judgment of Justice Jane E. Kelly of the Superior Court of Justice dated August 21, 2008.

ENDORSEMENT

[1] The motion judge found that Ontario did not have jurisdiction over the appellant's claim on the ground that there was no real or substantial connection between the defendant and Ontario. She, therefore, dismissed the plaintiff's claim which was for breach of contract and breach of warranty of fitness related to an adhesive product that the appellant had purchased from the respondent, an American company. The motion judge specifically found that there was no real and substantial connection between the

subject matter of the action and Ontario notwithstanding that the appellant's business is in Ontario and that a substantial portion of the business relationship between the parties occurred in Ontario.

[2] The motion judge's reasons essentially consist of a list of 27 reasons why she dismissed the plaintiff's claim. Virtually all of the reasons reference the respondent and its connection with the United States. As for the appellant, the motion judge said: "The only connection to Ontario is that the plaintiff operates in Ontario". This was not accurate. She said that in making her decision she relied on *Muscutt v. Courelles* (2002), 60 O.R. (3d) 20 (C.A.). As a result of the decision she reached, she did not have to consider whether Ontario was the *forum conveniens* for the trial of the appellant's claim.

[3] In *Muscutt* this court listed eight factors that the court should weigh in reaching its decision. It held that the real and substantial connection test is flexible and supports a broad approach in which the forum need meet only a minimum standard of suitability under which it must be fair for the case to be heard because the forum is a reasonable place for the action to take place. From the motion judge's brief reasons, it does not appear that she weighed the *Muscutt* factors. If she had, she may well have found a case favouring the assumption of jurisdiction against the out-of-province defendant. There was considerable evidence relating to facts occurring in Ontario. It is not possible to know whether she considered these facts, and if she considered them, why she discounted them.

[4] The respondent's contract called for any dispute being resolved by the law of Wisconsin. This is a choice of law clause which, it appears, the motion judge read as a choice of jurisdiction clause. A choice of law clause is only one factor to consider. It is not determinative. If the case were to be tried in Ontario, the court could apply Wisconsin law. This is a common occurrence.

[5] In the circumstances, we feel that the best course is to allow the appeal and order that the motion be re-argued before a different judge who will have the opportunity to weigh the *Muscutt* factors. He or she will decide whether Ontario should continue jurisdiction over the appellant's claim and, if so, whether there is a more convenient forum in which to try the case. We are not in a position to make these findings.

[6] We would, therefore, allow the appeal, set aside the order of the motion judge and order that there be a re-hearing before a different judge. Costs of the appeal are reserved to the judge hearing the motion.

"S. Borins J.A."
"E.A. Cronk J.A."
"H.S. LaForme J.A."