CITATION: OZ Optics Limited v. Tektronix Inc., 2025 ONSC 2447
COURT FILE NO. CV-23-00711637-0000
DATE: 2025-07-11

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
OZ OPTICS LIMITED Plaintiff/Responding Party	*Chetan Phull*, Lawyer the Plaintiff/Responding Party
– and –	
TEKTRONIX INC. and MAXTEK COMPONENTS CORPORATION, doing business as TEKTRONIX COMPONENT SOLUTIONS Defendants/Moving Party	*Eric Leinveer and Sara Bolourchian*, Lawyers for the Defendants/Moving Party
	HEARD: April 17, 2025

REASONS FOR DECISION

G. DOW, J.

[1] The defendants dispute this action was commenced in the proper forum. The defendants' motion sought both dismissal of the action as well as being stayed but at my direction only made submissions with regard to the latter position. The defendants also complained the nature of service was invalid but did not press that issue given it had been made aware of this proceeding, retained counsel and was not prejudiced.

BACKGROUND

[2] The original defendant, Tektronix Inc is a Delaware company with a principal place of business in Beaverton, Oregon. Upon service, it notified the plaintiff it had no business dealings with the plaintiff. It was "affiliated" with the defendant Maxtek Components Corporation

("Maxtek") which did business with the plaintiff and issued a Purchase Agreement under the name Tektronix Component Solutions.

[3] OZ Optics Limited ("OZ Optics") is a Canadian Corporation operating out of a facility in or near Ottawa and makes fiber optic components. From 2004, Maxtek began ordering fiber optic components from OZ Optics through a process that followed current digital steps including:

a) OZ Optics would be asked to make a Request For Quote ("RFQ") and would generate an RFQ acknowledgment in response;

b) this would be followed by a "Quotation Form" that sets out specific prices for a specific component with reductions in unit pricing for volume thresholds. The Quotation Form contains reference to "Terms and Conditions" and directed the customer to "See our Web site". Within that web site was a "Sales and Support" option that led to a drop down menu where one of the topics was "Terms and Conditions". Clicking on that led to a "Sales" option which led to a four page document with various headings, the last of which was "General" and within that section contained the sentence "These terms and conditions shall be construed in accordance with the substantive laws of the Province of Ontario, without regard to its conflict of laws rules".

c) Maxtek would then forward a three page Purchase Agreement detailing the product, number of units, price per unit and total agreed upon amount it was prepared to buy. The third page outlined its terms and conditions of which paragraph "20 Governing Law" stated "The rights of the parties hereunder shall be governed by the laws of the State of Oregon"; and

d) OZ Optics responded by emailing its "Confirmation Letter" and "Sales Order Acknowledgment". The Confirmation Letter included that "all orders shall be governed by standard TERMS AND CONDITIONS OF SALE BY OZ OPTICS LTD.".

[4] There are 13 agreements that are the subject of this litigation. Maxtek cancelled the entire order or the balance of the any order partially filled. Maxtek paid for all product received. OZ Optics alleges the undelivered, unpaid products was a "negligent breach of contract" in excess of $7 million.

[5] As part of the business dealings between the parties, representatives of Maxtek, referring to themselves as Tektronix Component Solutions, would travel from Oregon to OZ Optics' Ottawa factory on one or two occasions per year to review the design and manufacturing process, assess quality and audit production for what it had agreed to purchase. These representatives conducted no other business activity such as marketing or made contact with any other business operation.

ANALYSIS

[6] While the factual background sets out the details of why each party claims the law of the jurisdiction it prefers should prevail and become where the action proceeds, it was agreed this motion would not nor should not determine which jurisdiction's law should apply. That should be left to the trier of fact. Further, the caselaw is clear that determining whether Ontario has a real and substantial connection to the plaintiff's claim is to be determined, this does not determine which forum is best suited to hear the matter.

[7] The defendant frames the first issue to be determined to be whether this dispute has a real and substantial connection to Ontario (See *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at paragraph 26).

[8] Both parties relied on the plaintiff demonstrating the four connecting factors being established (*Club Resorts Ltd. v. Van Bred, supra*, paragraph 90). Those four factors are:

a) the defendant being domiciled or resident in the province;

b) the defendant carrying on business in the province;

c) the tort was committed in the province; and

d) the contract connected with the dispute was made in the province.

[9] Regarding the first factor, as summarized above, on the facts, the defendant that entered into the allegedly breached contract was not resident in the province. Counsel for the plaintiff submitted the annual or semi-annual visits by the defendant employees was sufficient to fulfil this factor. I disagree. The plain legal meaning of the words "domiciled" and "resident", I find to have and require greater contact than what has occurred here.

[10] Regarding the second factor, plaintiff's counsel again relied on the regular visits to their facility by employees of the defendants to meet the test of carrying on business in this province. The defendants disagreed noting they were only reviewing and assessing quality and production of what they had committed to purchase. I agree with the defendants' position. There was no evidence of the defendant that contracted with the plaintiff attempting to sell any of its products to the plaintiff or any other business in the province nor sell what it committed to buy from the plaintiff to any other business operating in Ontario.

[11] Regarding the third factor, it describes a "tort" while the original claim pleaded in this action was, at paragraph 1(a) of the Statement of Claim only for "breach of contract". This was amended June 19, 2024 (after the parties appeared in Practice Court to schedule this motion) to add ("inclusive of negligent breach of contract (hereinafter simply referred to as "breach of contract") in paragraph 1(a) without any subsequent inclusion of the usual elements of negligence such as the duty of care earned or particulars of the breach of said duty.

[12] This raised whether such a claim exists at law with the defendants relying on the statement in *Del Giudice v. Thompson,* 2021 ONSC 5379 (at paragraph 258) where Justice Perell stated:

"The failure to perform a contract promise be it intentional, reckless, careless or because of matters beyond the control of the promisor is irrelevant to a breach of contract claim. Negligent performance of a contract is a legally meaningless concept to a cause of action for breach of contract". This was commented on by the Court of Appeal (2024 ONCA 70 at paragraph 59) where it stated: "similarly, the motion judge struck the "breach of contract" claim on the basis that it was a "doctrinal fantasy" and the appellants have not advanced any arguments as to why he was wrong to do so."

[13] However, even if the substance of this claim is breach of contract, there is precedent that can be applied to breach of contract situations as occurred in *Vale Canada Limited v. Royal & Sun Alliance Insurance Company of Canada* 2022 ONCA 862 (at paragraphs 44 to 49). This also appears to have been contemplated to some extent in the reasons in *Club Resorts Ltd. v. Van Breda, supra* (at paragraph 90) by reference to the fourth factor and whether the contract connected with the dispute was made in the province. In this regard, there is conflicting evidence and an issue to be determined.

[14] What is clear is that an Oregon based company sought to obtain from an Ottawa based company fiber optic components manufactured to the Oregon based company specifications at the Ottawa based company's production facility. The defendant regularly attended in Ottawa to monitor the quality and manufacturing process. Upon production and delivery, payment from the Oregon based company was made (or not made) to the Ottawa based company. As a result, I have concluded, mindful of the issue to be determined not requiring a determination of which forum would be preferable that whether this jurisdiction has a real or substantive connection to the subject matter of the action that same has been shown for the reasons indicated. To that end, the plaintiff has satisfied its burden of demonstrating a sufficient connecting factor that links this litigation to this forum.

Issue – *Forum non conveniens*

[15] Having concluded a real or substantial connection to Ontario, the next step is to determine whether to the court should decline to exercise jurisdiction on the basis the alternative forum, being Oregon, is clearly more appropriate. Here, the burden is on the defendants to show why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff (*Club Resorts Ltd. v. Van Breda, supra*, at paragraph 103).

[16] Again, the non-exhaustive list of factors to consider were set out in *Club Resorts Ltd. v. Van Breda, supra* (at paragraph 109) and summarized by the defendants to be (at paragraph 73) of its factum:

a) the convenience and expense for the parties and their witnesses;

b) the law to be applied to the issues in the proceeding;

c) the desirability of avoiding multiplicity of legal proceedings;

d) the desirability of avoiding conflicting decisions in different courts;

e) the enforcement of an eventual judgment; and

f) the fair and efficient working of the Canadian legal system.

[17] Regarding the convenience and expense for the parties and their witnesses, both parties maintained its witnesses were based in their preferred jurisdiction. However, the history of the relationship indicates both parties contradict themselves, the defendant, by their regular travel to the Ottawa area to monitor quality and manufacturing of their orders and the plaintiff, by choosing to issue their action in Toronto rather than in the region where their witnesses reside.

[18] I reminded counsel of the recent statement by the Court of Appeal in *Black & McDonald Limited v. Eiffage Innovative Canada Inc.*, 2023 ONCA 91 (at paragraph 22) regarding the post Covid usage of witnesses appearing virtually as a basis to render this factor neutral and the Court's direction "that this new reality will often lessen the weight to be given to this factor". I conclude this factor is not a basis to stay the action.

[19] Regarding the law to be applied to the issue in this proceeding, I was not provided with any specific or substantive differences between the law of each jurisdiction although counsel alluded to same. There is clearly a dispute between the parties as to which jurisdiction's law should be applied. As stated, I find that is part of the dispute between the parties. The law of Oregon can be tendered as evidence from appropriate experts. Thus, this jurisdiction provides the defendants with an opportunity that the law of Oregon be applied. I conclude this factor is not a basis to stay the action.

[20] Regarding the desirability of avoiding multiple legal proceedings, it appears this proceeding has been commenced first and there was no evidence of any other proceeding having been commenced in Oregon. To that end, it would appear granting a stay could result in multiple proceedings and thus is not a basis to stay this action.

[21] Regarding avoiding conflicting decision in different courts, there was no evidence of any actions in different court. Thus it is not a basis to stay the action.

[22] Regarding the enforcement of an eventual judgment, I find this to be the defendants' strongest argument. However, with the law of the jurisdiction to be applied in dispute, and the possible result of the law of Oregon being applied in determining this matter, I find that position is undermined. Further, the defendants only raised enforcement of an Ontario judgment in Oregon as requiring a "additional procedural steps" (at paragraph 80 of the defendants' factum). I find that is not sufficient to deprive the plaintiff of its choice of where to proceed with its claim.

[23] Regarding the fair and efficient working of the Canadian legal system as a whole, the parties fail to raise any specific concerns this court would not adequately address the dispute between the parties.

CONCLUSION

[24] As a result, the defendants' motion is dismissed.

[25] In its factum, the plaintiff raised additional relief it sought including leave to further amend their Amended Statement of Claim. This was not accompanied by any Notice of Motion in the responding Motion Record. It is also relief under Rule 26 which, if not consented to, should be heard by an Associate Justice. As a result, I declined to determine same.

COSTS

[26] Counsel for the defendants provided its Costs Outline at the hearing as required under Rule 57.01(6). If successful, it sought partial indemnity fees of $88,200 plus HST of $11,466 for a total of $99,666.

[27] Counsel for the plaintiff failed to comply with Rule 57.01(6) but, uploaded its Costs Outline to Case Center by the April 22, 2025 deadline I agreed to after brief submissions regarding same. That Costs Outline sets out a claim for partial indemnity fees totalling $59,577 (at 60% of actual rates) and no claim for HST. Neither Costs Outline sets out for any claim for disbursements (despite cross-examination having apparently been conducted on affidavit evidence).

[28] In the plaintiff's Costs Outline, plaintiff's counsel repeated submissions contained in its factum that the defendants' motion was a delay tactic which I find was neither substantiated on the evidence or relevant to the issue before the court. Further, the plaintiff made significant efforts to have the credibility of the defendants' affiant undermined to the extent it sought an order in its factum setting aside his evidence. Again, I find this can neither be clearly substantiated or, on areas of dispute, central to the issue to be determined.

[29] Plaintiff's counsel also detailed Rule 49 Offers to Settle and discussion about how the motion could be resolved, without any indication such disclosure was being made with the consent of counsel for the defendants. To this, in my view, is contrary to Rule 49.06(2) and (3) or, at the very least, its intended spirit.

[30] For these reasons, I decline to award the plaintiff's substantial indemnity costs as requested. Given both costs outline set out similar amounts of time expended and the hourly rates claimed by the plaintiff being significantly lower than that claimed by the defendants, and mindful of the factors set out in Rule 57.01 and the discretion provided under Section 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, I fix costs in the amount of **$59,577**, inclusive of fees, HST and disbursements payable by the defendants to the plaintiff, forthwith.

Mr. Justice G. Dow

Released: July 11, 2025

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