COURT OF APPEAL FOR ONTARIO

CITATION: GlycoBioSciences Inc. v. Herrero and Associates, 2023 ONCA 331
DATE: 20230508
DOCKET: C70814 & M54013

Roberts, Miller and Coroza JJ.A.

BETWEEN

GlycoBioSciences Inc.

Plaintiff
(Appellant)

and

Herrero and Associates

Defendant
(Respondent)

Kevin Drizen, acting in person for the appellant

Ryan T. Evans and Reagan Seidler, for the respondent

Heard and released orally: May 5, 2023

On appeal from the judgment of Justice Gisele M. Miller of the Superior Court of Justice, dated June 9, 2022, with reasons at 2022 ONSC 3494.

REASONS FOR DECISION

[1] The appellant – an Ontario corporation – approached the respondent – a law firm located in Madrid, Spain – to undertake certain work on its behalf with respect to patent applications in Panama, Costa Rica, and Ecuador. The Ecuadorian patent application is not in issue in this proceeding.

[2] The appellant brought an action in Ontario alleging that the respondent misrepresented to it the status of its patent applications in Panama and Costa Rica in a negligent and fraudulent manner, resulting in the loss of the Panamanian and Costa Rican patent applications.

[3] The respondent brought a motion to dismiss the action on the basis that the subject matter is outside of the court's jurisdiction. The appellant argued that the Superior Court has jurisdiction because the factors that would connect the tort to the province of Ontario – the representations that are the subject matter of the action – were made to the appellant in Ontario.

[4] The motion was granted and the action was dismissed.

[5] For the reasons given below, the appeal is dismissed.

[6] The appellant has not identified any error in the motion judge's reasons. The motion judge identified the correct law with respect to determining the court's jurisdiction and applied it without error. The appellant bore the burden of establishing a presumptive connecting factor that established, on a *prima facie* basis, that there is a real and substantial connection between Ontario and the subject matter of the litigation: *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, at para. 100. The appellant was required to establish a "good arguable case" for the factual allegations that underpin the legal argument that would establish jurisdiction: *Ontario (Attorney General) v. Rothmans Inc.*, 2013

ONCA 353, 115 O.R. (3d) 561, at para. 54, leave to appeal refused, [2013] S.C.C.A. No. 327.

[7] The motion judge found that the appellant had not established a good arguable case that false claims were made knowingly or negligently by the respondent.

[8] We are not persuaded that the motion judge misapprehended the evidence before her or otherwise erred.

[9] With respect to the Panamanian application, the motion judge was aware of the argument – and the appellant's evidence – that the Panamanian application was not terminated until July 6, 2021. She found that the reason for the termination was a failure in 2019 to pay a "substantive examination fee". We are not persuaded that the motion judge erred by not giving effect to the appellant's argument that the respondent could have corrected the situation. She accepted the evidence of the respondent that it had never been provided with the power of attorney that would have been a necessary precondition to taking such steps. Her conclusion that there was no good arguable case against the respondent was therefore available to her on the evidence, and we would not interfere with it.

[10] With respect to the Costa Rican application, the motion judge found on the evidence that the information provided was accurate, and that the appellant had frustrated the respondent's attempts to act on its behalf by not providing

the necessary power of attorney until it was too late. Although the argument was not pressed on appeal, we find the motion judge made no error in finding there was no good arguable case with respect to the Costa Rican application.

[11] The appellant argues further that the motion judge ought to have recused herself because of bias against the appellant exhibited first in a prior hearing on another matter, and then continued in the instant hearing. She is said to have disregarded the appellant's submissions because it was not represented by legal counsel. On review of the record, we conclude there is no basis whatsoever for this allegation. The appellant's complaint with respect to the first hearing is, essentially, that the motion judge imposed time constraints on the appellant's oral submissions, and that Mr. Drizen felt hurried and disrespected as a result. However, a motion judge managing a busy docket is in the necessary position of imposing constraints that parties may not find ideal. This is not a manifestation of bias. Nor do we accept that the motion judge failed to give respectful attention to Mr. Drizen's submissions in the hearing of the jurisdiction motion.

[12] Although not characterized as such, the appellant's motion to file fresh evidence is in effect a motion for leave to appeal the motion judge's costs order. The threshold for leave to appeal costs is high: *Carroll v. McEwen*, 2018 ONCA 902, 143 O.R. (3d) 641, at para. 58. It is not met here because the appellant has not persuaded us that the motion judge made any reversible error in her award of

costs. At root, the appellant simply complains that the award of costs is too high. We see no merit in the proposed leave motion and dismiss it accordingly.

DISPOSITION

[13] The appeal is dismissed. The respondent is awarded costs of the appeal in the amount of $26,000 all-inclusive on a substantial indemnity basis. A substantial indemnity award is warranted on this appeal for several reasons including the appellant's reckless allegations that impugned the integrity of opposing counsel and the motion judge, the imposition of an improperly voluminous record, and the respondent's offer to settle. In the circumstances of the appeal, the quantum of costs sought by the respondent is reasonable and proportionate and should have been within the contemplation of the appellant.

"L.B. Roberts J.A."
"B.W. Miller J.A."
"S. Coroza J.A."