COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

JAY SULLIVAN,	§	No. 08-20-00046-CV
Appellant,	§	Appeal from the
v.	§	345th Judicial District Court
MICROSOFT CORPORATION	§	of Travis County, Texas
Appellee.	§	(TC# D-1-GN-19-007287)

O P I N I O N

This is an appeal from an order granting Appellee Microsoft Corporation's motion to dismiss Appellant Jay Sullivan's lawsuit based on a forum-selection clause that was contained in an employment agreement signed by both parties.[1] Sullivan, a former Microsoft employee, contends that his lawsuit was not based on a breach of that employment agreement, but rather the breach of an offer letter that set forth his compensation schedule, and which did not contain a forum-selection clause. He contends that the forum-selection clause did not apply to his breach of contract case, and that the trial court erred in dismissing his lawsuit on that basis. For the reasons set forth below, we disagree, and affirm the trial court's order.

[1] This case was transferred from our sister court in Austin, and we decide it in accordance with the precedent of that Court to the extent required by TEX.R.APP.P. 41.3.

I. PROCEDURAL AND FACTUAL BACKGROUND

A. The Offer of Employment

Microsoft sent Sullivan a letter dated January 15, 2016, in which it made him an offer of employment (the "Offer Letter"), with a starting date to be mutually determined. The Offer Letter contained a heading entitled "Compensation," and stated that Microsoft was offering Sullivan a compensation package, that included an annual salary, a signing bonus, and incentive compensation plan that included a bonus schedule to be paid to Sullivan based on his performance. The Offer Letter also described two distinct bonuses that Sullivan could earn.

The Offer Letter expressly stated that as a "condition of employment," Sullivan was required to sign Microsoft's "standard form Employee Agreement" that was enclosed in the "list of Offer Documents." In two different sections in the Offer Letter, Sullivan was advised that he was an "at-will employee" and that the "offer letter is not a contract of employment for any specific or minimum term and that the employment Microsoft offers you is terminable at will."

In a section entitled "Acceptance of Offer," Sullivan was advised to "indicate [his] acceptance of this offer by electronically signing and submitting this acceptance letter and the Microsoft Corporation Employee Agreement[.]" It further stated that it was important that Microsoft "receive your letter and the signed Employee Agreement prior to your start date." And finally, the Offer Letter stated that Sullivan was "not authorized to alter the terms of the letter or the Employee Agreement in any manner."

B. The Employment Agreement

The Employment Agreement began with the admonition that as a condition of employment with Microsoft, and in consideration of compensation paid to Sullivan, he agreed to its ensuing terms. Those terms included provisions addressing trade secrets and non-disclosure agreements,

and an additional acknowledgement that Sullivan's employment was at-will and that he could be terminated at any time with or without cause. And relevant here, the Employment Agreement contained a forum-selection clause, which stated that Sullivan "agree[s] that the Agreement shall be governed for all purposes by the laws of the State of Washington . . . and that exclusive venue and exclusive personal jurisdiction for any action arising out of the Agreement shall lie in state or federal court located in King County, Washington."

Sullivan electronically signed the Offer Letter and the Employment Agreement approximately two minutes apart.

C. Sullivan's Lawsuit and Microsoft's Motion to Dismiss

Sullivan began working for Microsoft in January of 2016 and he resigned on July 31, 2018. Sullivan subsequently filed a lawsuit against Microsoft in a district court in Travis County, Texas, claiming that at the time of his resignation, he was eligible to receive a bonus, but that Microsoft refused to pay him, despite allegedly acknowledging that he met the eligibility requirements.[2] His lawsuit set forth one cause of action for "breach of contract," alleging that he and Microsoft "had valid, enforceable agreements regarding the amount of bonuses that were to be paid to [him] for the year ended June 30, 2018."

Microsoft responded to the lawsuit by filing a motion to dismiss, arguing that the parties' dispute arose under the Employment Agreement, and that the forum-selection clause contained in that agreement required Sullivan to file his lawsuit in Washington. In response, Sullivan did not deny that he signed the Employment Agreement or that the Employment Agreement contained a forum-selection clause requiring disputes arising under that agreement to be filed in Washington.

[2] The Offer Letter described a Revenue Based Incentive and a Core Priority Based Incentive bonus. Sullivan's petition sued over the Core Priority bonus, and an "Advanced Micro Devises" bonus. The latter bonus was not mentioned in either the Offer Letter or the Employment Agreement.

However, he argued that his dispute arose solely out of the Offer Letter, which he viewed as an entirely independent agreement setting forth the terms of his compensation, and which did not contain a forum-selection clause. According to Sullivan, the terms of the Employment Agreement governed entirely different aspects of his employment, and was silent on the question of his compensation. Sullivan concluded that the Employment Agreement, was therefore unrelated to his claims, and that the forum-selection clause therefore did not apply to his lawsuit.

In its reply in support of its motion to dismiss, Microsoft made two global arguments in support of its position that the forum-selection clause applied to the parties' dispute: (1) the Offer Letter incorporated by reference the Employment Agreement and all of its terms, including the forum-selection clause; and (2) the Offer Letter and the Employee Agreement were "mutually dependent" on each other and must therefore be read together to constitute "one agreement."

The trial court granted Microsoft's motion to dismiss, without making any findings of fact or conclusions of law, and dismissed Sullivan's lawsuit without prejudice to refiling his case in state or federal court in King County, Washington. This appeal followed.

II. DISCUSSION

Sullivan argues in one issue that the trial court erred by granting Microsoft's motion to dismiss. The thrust of his argument is that he is suing over breach of the Offer Letter which has no forum selection clause, and not the Employment Agreement, which does. Microsoft counters, arguing that the Offer Letter (1) incorporates by reference the Employment Agreement, given their repeated references to each other, or, in the alternative, (2) that the two documents should be read together as one unified employment contract. In response, Sullivan first contends that we cannot consider this latter argument because it was not part of the "analysis" in this case, and that consequently, the only issue before this Court is whether the Offer Letter incorporated by reference

the terms of the Employment Agreement. We turn first to address that procedural question.

A. We May Affirm on Any Basis Before the Trial Court

Sullivan asserts that Microsoft did not present its alternative legal theory regarding whether the two agreements should be read together to form one unified employment agreement to the trial court for consideration. Consequently, he argues that we may not affirm the trial court's decision based on that particular theory. We disagree.

The Austin Court of Appeals has recognized the general rule that when a trial court does not make findings of fact or conclusions of law in support of an order or judgment, a court will affirm the trial court's decision if it can be upheld on *any* legal theory that is supported by the evidence. *See, e.g., Estate of Allen ex rel. Allen v. Scott & White Clinic*, No. 03-08-00576-CV, 2011 WL 2993259, at *2 (Tex.App.--July 22, 2011, no pet.) (mem. op.) (applying rule on appeal from trial court's order granting defendant's motion to dismiss); *Transportacion Especial Autorizada, S.A. de C.V. v. Seguros Comercial Am., S.A. de C.V.*, 978 S.W.2d 716, 719 (Tex.App.--Austin 1998, no pet.) (applying rule in affirming a trial court's judgment denying a special appearance request); *Brinkley v. Tex. Lottery Comm'n*, 986 S.W.2d 764, 772 n.11 (Tex.App.--Austin 1999, no pet.) (applying rule in upholding trial court's order dismissing case for want of jurisdiction). However, as the Dallas Court of Appeals has stated, this general rule may be stated too broadly, and a "more complete statement of the rule is that [an appellate court] 'must uphold a lower court judgment on any legal theory *before it*, even if the [lower] court gives an incorrect reason for its judgment.'" *Victoria Gardens of Frisco v. Walrath*, 257 S.W.3d 284, 290 (Tex.App.--Dallas 2008, pet. denied), *quoting Guar. County Mut. Ins. Co. v. Reyna*, 709 S.W.2d 647, 648 (Tex. 1986) (recognizing that higher court "must uphold a correct lower court judgment on any legal theory before it, even if the court gives an incorrect reason for its judgment."). And

based on this more limited reading of the rule, various courts have held that an appellate court will not affirm a trial court's order or judgment based on a legal theory not presented to it, and to which the opposing party had no opportunity to respond. *See e.g.*, *Miramar Petroleum, Inc. v. Cimarron Eng'g, LLC*, 484 S.W.3d 214, 217 n.2 (Tex.App.--Corpus Christi 2016, pet. denied); *Villarreal v. Villarreal*, No. 04-15-00551-CV, 2016 WL 4124067, at *2 (Tex.App.--San Antonio Aug. 3, 2016, no pet.) (mem. op.); *Coleman v. Klöckner & Co. AG*, 180 S.W.3d 577, 586-87 (Tex.App.--Houston [14th Dist.] 2005, no pet.).

Even applying the stricter rule of appellate review, the record reflects that Microsoft raised both legal theories in the trial court in support of its motion to dismiss. In its reply in support of its motion to dismiss, Microsoft argued first that the Offer Letter incorporated by reference the terms of the Employment Agreement, and second, that the two instruments should be considered as being "mutually dependent," and "integrated into one agreement." And while Microsoft may not have expanded on either legal theory as fully as it does on appeal, its arguments were sufficiently clear enough to allow the trial court to rely on either legal theory in granting the motion, and in turn, for us to consider whether either of the two legal theories supports the trial court's ruling that the forum-selection clause applied to the parties' dispute.

B. Standard of Review and Applicable Law

Forum-selection clauses are considered presumptively valid and generally enforceable in Texas. *See Pinto Tech. Ventures, L.P. v. Sheldon*, 526 S.W.3d 428, 436-37 (Tex. 2017) ("In Texas, forum-selection clauses are generally enforceable and 'should be given full effect.'"). A motion to dismiss is the proper procedural mechanism for enforcing a forum-selection clause when the defendant believes the plaintiff has violated the clause by filing suit in a different forum than

was designated in the clause. *Young v. Valt.X Holdlings, Inc.*, 336 S.W.3d 258, 261 (Tex.App.--Austin 2010, pet. dism'd).

An appellate court reviews a trial court's ruling on a motion to dismiss based on a forum-selection clause for an abuse of discretion. *See In re Lyon Fin. Services, Inc.*, 257 S.W.3d 228, 231 (Tex. 2008) (applying abuse of discretion standard in determining whether trial court erred in refusing to enforce a forum-selection clause). However, if our review involves contractual interpretation to determine whether a forum selection clause governs a dispute--a legal matter--we apply a de novo standard of review. *Young*, 336 S.W.3d at 261. As the Austin Court has explained, this is so because a "trial court has no 'discretion' in determining what the law is or applying the law to the facts," and a court therefore "'abuses its discretion' if it misinterprets or misapplies the law." *Int'l Metal Sales, Inc. v. Glob. Steel Corp. & Glob. Steel Corp.*, No. 03-07-00172-CV, 2010 WL 1170218, at *3 (Tex.App.--Austin Mar. 24, 2010, pet. denied) (mem. op.), *quoting Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992).

The party seeking to enforce a contractual forum-selection clause carries the initial burden of establishing first that the parties entered into an agreement designating an exclusive forum, and second, that the agreement applies to the claims involved, or in other words, that the claims come within the scope of the clause. *Young*, 336 S.W.3d at 262, *citing Phoenix Network Techs. (Europe) Ltd. v. Neon Sys., Inc.*, 177 S.W.3d 605, 611-612, 612 n.6 (Tex.App.--Houston [1st Dist.] 2005, no pet.); *see also Lujan v. Alorica*, 445 S.W.3d 443, 447-50 (Tex.App.--El Paso 2014, no pet.) ("A party pursuing enforcement of a contractual forum-selection clause bears the initial burden of proving 'that the parties entered into an agreement to an exclusive forum and that the agreement applies to the claims involved.'"). And if the party seeking enforcement establishes these prerequisites, the burden then shifts to the party opposing enforcement to make a "strong

showing" overcoming the prima facie validity of the forum-selection clause. *Young*, 336 S.W.3d at 262.

In the present case, Sullivan does not dispute that he agreed to the forum-selection clause set forth in the Employment Agreement, and does not otherwise challenge its validity. Instead, his only argument is that the claims in his lawsuit do not arise under the Employment Agreement. Therefore, if we conclude that the forum-selection clause does in fact apply to the claims set forth in his lawsuit, our task is at an end.

C. Two Separate Agreements or One Employment Contract?

We first consider Microsoft's argument that the Offer Letter and the Employment Agreement must be read together to form one unified and integrated employment contract. In interpreting contracts, our primary goal is to "give effect to the parties' intent as expressed in the four corners of the document." *Pinto Tech.*, 526 S.W.3d at 439-40; *see also Rieder v. Woods*, 603 S.W.3d 86, 94 (Tex. 2020) (a court's primary objective in interpreting a contract is to "ascertain the parties' true intentions as expressed in the language they chose."). The same is true with employment agreements. *See Sanders v. Future Com, Ltd.*, No. 02-15-00077-CV, 2017 WL 2180706, at *3 (Tex.App.--Fort Worth May 18, 2017, no pet.) (mem. op.) (recognizing that court construes employment contracts as it does any other contract), *citing Frost Nat'l Bank v. L & F Distrib., Ltd.*, 165 S.W.3d 310, 311-12 (Tex. 2005).

Although a court must construe a contract in a manner that gives "effect to the parties' intent expressed in the text," the Texas Supreme Court has recognized that a court may also take into account "the facts and circumstances surrounding the contract's execution" in determining the parties' intent. *See Rieder*, 603 S.W.3d at 94-95. In accordance with that recognition, Texas courts have repeatedly held that under the appropriate factual circumstances, "a court may

determine, as a matter of law," that when parties enter into multiple separate contracts, documents, and agreements, they intended for them to be considered as "part of a single, unified instrument." *Id*. at 94, *citing Fort Worth Indep. Sch. Dist. v. City of Fort Worth*, 22 S.W.3d 831, 840 (Tex. 2000) (recognizing that a court "may determine, as a matter of law, that multiple documents comprise a written contract."); *Owen v. Hendricks*, 433 S.W.2d 164, 166-67 (Tex. 1968) (a contract may consist of "several writings when an examination of all the writings shows that the one executed by the defendant was signed with reference to the other writings," that where "the several writings, taken together, evidence with reasonable certitude the terms of the contract."). Whether several writings should be considered as a single unified instrument primarily turns on whether each written agreement and instrument was executed for the "same purpose" and whether they were a necessary part of the "same transaction." *Rieder*, 603 S.W.3d at 94-95 n.35; *see also Copano Energy, LLC v. Bujnoch*, 593 S.W.3d 721, 727 (Tex. 2020) ("multiple writings may comprise a contract even if the parties executed the instruments at different times and the instruments do not expressly refer to each other."); *Veal v. Thomason*, 159 S.W.2d 472, 475 (Tex. 1942) ("It is the settled rule in this State, as well as the rule generally, that written contracts executed in different instruments whereby a single transaction or purpose is consummated are to be taken and construed together as one contract.").

Important for our purposes, if the two agreements are construed together as one unified contract, then a forum-selection clause in one of the agreements will be applied to any disputes arising out of the unified contract. *In re Laibe Corp.*, 307 S.W.3d 314, 317 (Tex. 2010) (where two separate documents related to the sale of a drilling rig could be read together as a single contract, the court could enforce a forum-selection clause contained in only one of the documents). On the other hand, if the two instruments cannot be construed together to form one unified contract,

a forum-selection clause contained in one of the instruments will not be applied to the other. *See Rieder*, 603 S.W.3d at 96, 102 (without evidence to the contrary, two instruments cannot be considered as a single, unified contract when the two agreements are executed by different parties, deal with separate situations, impose distinct obligations, and are governed by different law). We proceed with caution when construing multiple documents together, because "tethering documents" to each other is "simply a device for ascertaining and giving effect to the intention of the parties and cannot be applied arbitrarily and without regard to the realities of the situation." *Rieder*, 603 S.W.3d at 94-95.

Sullivan argues that the two agreements function independently, and in effect have nothing to do with each other. And in turn, he contends that the forum-selection clause contained in the Employment Agreement should not apply to his dispute regarding the amount of his compensation, which he contends does not "depend" on any of the terms set forth in the Employment Agreement, and instead arises solely under the terms of the Offer Letter. In support of his argument, Sullivan relies exclusively on our sister court's holding in *In re Ruby Tequila's Amarillo W., LLC*, No. 07-11-00494-CV, 2012 WL 537812 (Tex.App.--Amarillo Feb. 17, 2012, no pet.) (per curiam).

In *Ruby Tequila's*, two of the parties (the tenants) had entered into commercial leases with two other parties (the landlords) with the intent of operating two separate restaurants in different parts of Texas. *Id.* at *1. Shortly thereafter, a business entity known as Ruby Tequila's Mexican Kitchen, LLC ("RTMK") signed an agreement guaranteeing the lease, and at some point the landlords became "investor members" of RTMK. *Id.* at *1, n.5. These parties, and several others, then entered into an unspecified business agreement governing the restaurants' operations. *Id.* at *1. After a dispute arose under that agreement, all of the parties signed a release agreement and amended operating agreement, both of which contained a forum selection clause. *Id*. at *1.

Subsequently, a dispute arose under the terms of the parties original lease agreements, and the landlords filed a lawsuit in a Randall County, Texas court against both the tenants and RTMK as guarantor of the leases, claiming they were in breach of the lease for, among other things, failing to keep the premises in good repair. *Id.* at *2. The tenants and RTMK, however, moved to dismiss the lawsuit, claiming that the forum selection clauses set forth in the amended operating agreement and the release agreements required the landlords to file their suit in Delaware. *Id*. at *2. The court of appeals, however, concluded that the landlords' claims arose solely under the lease agreements--which did not contain a forum-selection clause--and had nothing to do with the parties' rights or obligations under the amended operating agreement or the release agreements. *Id.* at *3. In particular, the court of appeals expressly rejected the tenants' argument that the various agreements were "interrelated," and instead concluded that the lease agreements functioned independently of the other agreements, and that the agreements all stood alone "without mutual dependence," with each being an integrated, independent agreement. *Id.* at *5.

Relying on the holding in *Ruby Tequila's*, Sullivan contends that we too should find that the Offer Letter and the Employment Agreement bore no "cognizable relationship" to each other, and that the claims in his lawsuit relate only to the terms of his compensation as set forth in the Offer Letter, and do "not depend on the existence of the [Employment Agreement]." As Microsoft points out, however, the court in *Ruby Tequila's* refused to construe the various agreements together, as they were signed by different parties, at different times, as part of entirely separate transactions, and for different purposes. And this is no different than the Texas Supreme Court's refusal in *Rieder* to tether two unrelated contracts together where they were executed by different parties, dealt with separate situations, imposed distinct obligations, and were governed by different laws. *See Rieder*, 603 S.W.3d at 96, 102.

In contrast to the factual scenarios in both *Ruby Tequila's* and *Rieder*, the present case is more analogous to the scenario faced by the Fort Worth Court of Appeals' in *Sanders*, 2017 WL 2180706, at *2-7. In that case, the employer offered Sanders a job by emailing him an offer letter which attached an employment agreement. The offer letter informed Sanders that he was required to sign the offer letter and the employment agreement. *Id.* at *1. Sanders complied. A dispute later arose over reimbursement of training costs. The offer letter required reimbursement by Sanders, but the employment contract was silent on the issue. And as here, the question was whether the offer letter and the employment contract were part of one unified agreement, or two separate agreements.

The court of appeals concluded that the offer letter and the employment agreement were to be read together, as a single document, given that they were executed at the same time, for the same purpose, and during the same transaction. *Id.* at *3, *citing inter alia Dallas Hotel Co. v. Lackey*, 203 S.W.2d 557, 561 (Tex.App.--Dallas 1947, writ ref'd n.r.e.) (concluding that letter offering employment and an "employment card" that were executed for the same purpose and in the course of the same transaction, were to be "construed together.").

As in *Sanders*, the Offer Letter and the Employment Agreement in the present case were executed by the same parties at the same time, and more importantly, for the same purpose, i.e., to set out the terms of Sullivan's employment, as part of a single unified transaction. *See In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135 (Tex. 2004) (orig. proceeding) ("[A]greements executed at the same time, with the same purpose, and as part of the same transaction, are construed together."). Further, unlike the situation in *Ruby Tequila's*, by their express terms, these two agreements were not intended to function independently as complete and separate contracts, and were instead clearly intended to function in tandem given their repeated references to each other.

In particular, the Offer Letter expressly stated that Sullivan's employment was conditioned upon him signing *both* agreements, and therefore, given this condition, Sullivan would not have been entitled to *any* compensation, including the bonuses at issue in his lawsuit, unless and until he agreed to the terms set forth in the Employment Agreement. And, in turn, the Employment Agreement expressly stated that Sullivan was entering into that agreement, not only as a "condition" of his employment, but also "in consideration of the compensation now and hereafter paid to me." As well, the Employment Agreement contained a section entitled "Reimbursement," in which Sullivan authorized Microsoft to withhold any monies it owed him, to include his "salary" and "bonus[es]" both during and after his employment, if he owed Microsoft any monies for any reason. Accordingly, while the Employment Agreement did not expressly set forth the terms of Sullivan's compensation, it was clearly intended to function in tandem with the compensation schedule set forth in the Offer Letter.

In short, the two agreements were not intended to function separately, but were instead intended to function in tandem with each other to accomplish the same purpose, i.e., to set forth the terms of Sullivan's employment, to include the nature of his compensation. *See generally In re Lisa Laser USA, Inc.*, 310 S.W.3d 880, 885 (Tex. 2010) (finding that a document with multiple subparts referencing each other, which would be incomplete without each other, comprised a single agreement). And, in turn, because the two agreements form one unified contract, the forum-selection clause contained in the Employment Agreement must be applied to any disputes arising from that contract, in accordance with the Texas Supreme Court's opinion in *In re Laibe Corp.*, 307 S.W.3d at 317. Having found that this legal theory supports the trial court's decision to grant Microsoft's motion to dismiss based on the application of the forum-selection clause, we need not discuss Microsoft's alternative legal theory that the Offer Letter incorporated by reference the

terms of the Employment Agreement.

Accordingly, for the reasons set forth above, we conclude the trial court did not err in granting Microsoft's motion to dismiss based on the existence of the forum-selection clause.

Sullivan's sole issue on appeal is overruled.

III. CONCLUSION

The trial court's order is affirmed.

JEFF ALLEY, Justice

February 26, 2021

Before Rodriguez, C.J., Palafox, and Alley, JJ.