Affirmed and Opinion Filed May 2, 2016

In The

Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00851-CV

MERRITT, HAWKINS & ASSOCIATES, LLC, Appellant
V.
CHRIS CAPORICCI AND MATTHEW CUMMINS, Appellees

On Appeal from the 134th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-13-13851

MEMORANDUM OPINION

Before Justices Bridges, Francis, and Myers
Opinion by Justice Francis

Merritt, Hawkins & Associates, LLC filed this permissive interlocutory appeal of the trial court's order taking judicial notice and applying California law in this case. We affirm.

MHA, a California limited liability company, is a search, placement, recruiting, and consulting firm for the healthcare industry with its principal place of business in Irving, Texas. MHA's parent company is AMN Healthcare, Inc., a Nevada corporation headquartered in San Diego. MHA hired California residents Chris Caporicci and Matthew Cummins as search consultants based in Orange County, California. Both men signed employment agreements containing noncompetition and no-solicitation clauses. The agreements also stated, in pertinent part:

> This Agreement shall be governed and construed in accordance with the substantive laws of the State of Texas. MHA is based in Irving, Texas, and this

> Agreement is to be partially performed in Irving, Texas. It is agreed that any and all disputes arising out of this Agreement will be heard and decided in the state or federal courts situated in Dallas County, Texas.

Caporicci and Cummins worked for MHA at its Irvine, California office until they resigned on September 16, 2013. Around the time they left the company, the two men founded Mission Recruiting, a physician recruiting firm located in Orange County that is a direct competitor of MHA.

About ten days after Caporicci and Cummins resigned, MHA sent each man a letter, advising them of their obligations under the noncompetition and no solicitation clauses in the employment agreements and demanding the return of any and all of MHA's property in their possession. In response, Caporicci and Cummins returned only "spreadsheets concerning certain sales commissions that they have [not] been paid or allege they are owed."

Caporicci and Cummins filed a lawsuit in Orange County against MHA alleging unfair competition, breach of contract, and quantum meruit and seeking a declaratory judgment that any contractual restraints in their employment contracts were unenforceable and violated California law. About two months later, MHA sued Caporicci and Cummins in Texas for breach of contract; theft, misappropriation, and inevitable disclosure of trade secrets and confidential and proprietary information; breach of fiduciary duty and entitlement to constructive trust; conversion; violation of the Texas Theft Liability Act; unfair competition; and unjust enrichment, asserting the defendants misappropriated MHA's trade secrets and solicited MHA's customers. Caporicci and Cummins filed counterclaims mirroring their causes of action filed in the California lawsuit. They then filed a motion asking the trial court to take judicial notice and apply California law, despite the existence of the choice-of-law clause in their employment contracts. The trial court granted the motion, then granted MHA permission to file this

interlocutory appeal. This Court likewise granted MHA's motion for a permissive interlocutory appeal.

In two issues, MHA contends the trial court erred because Caporicci and Cummins did not overcome the presumption in favor of enforcing the choice-of-law provision in the employment contracts and Texas law should apply to MHA's statutory and tort claims.

Which state's law governs a particular issue is a question of law for the court to decide. *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 848 (Tex. 2000). Determining the particular state's contacts to be considered in making this legal determination involves a factual inquiry. *Hughes Wood Prods., Inc. v. Wagner*, 18 S.W.3d 202, 204 (Tex. 2000).

The first question presented is whether California or Texas law governs the enforceability of the noncompetition clause in the MHA employment agreements signed by Caporicci and Cummins. To determine whether to enforce the parties' contractual selection of Texas law, we apply section 187(2) of the Restatement (Second) of Conflict of Laws:

> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
>
> > (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
> >
> > (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 677–78 (Tex. 1990) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (1971)).

MHA asserts, and Caporicci and Cummins do not contest, that Texas has a substantial relationship to the parties. MHA is headquartered in Texas and both men traveled on occasion to

Texas for sales training, meeting, and awards banquets. Thus, section 187(2)(a) is inapplicable to the facts of this case.

We then turn to whether application of Texas law is inconsistent with section 187(2)(b) which provides the parties' choice of Texas law is effective unless: (1) California has a more significant relationship than Texas to the transaction and the parties under the rule set out in section 188 and California law would have applied in the absence of an effective election of law by the parties, (2) California has a materially greater interest than Texas in the determination of the particular issue, and (3) application of Texas law is "contrary to a fundamental policy" of California. *See Exxon Mobil Corp. v. Drennen,* 452 S.W.3d 319, 325−28 (Tex. 2014); *Ennis, Inc. v. Dunbrooke Apparel Corp.*, 427 S.W.3d 527, 531 (Tex. App.—Dallas 2014, no pet.).

Under the first factor, we consider whether the relationship of the transaction and parties to California is clearly more significant than their relationship to the chosen state of Texas. *See DeSantis*, 793 S.W.2d. at 678. In doing so, we take into account the place of performance, and the location of the parties, the negotiations of the agreement, and the execution of the agreement. *See Drennen*, 452 S.W.3d at 326; *DeSantis*, 793 S.W.2d. at 678–79. Here, Caporicci, Cummins, and MHA's parent company, AMN, are located in California while MHA is headquartered in Texas. In California, both Caporicci and Cummins posted their resumes on the internet, looking for jobs in Orange County.

In 2004, Caporicci interviewed with MHA's divisional vice president, Kevin Perpetua, and two senior directors at MHA's Irvine office. He was asked to return to the Irvine office for personality testing and job assessment, then had a follow-up phone interview with Perpetua who offered Caporicci a job as a search consultant. Caporicci returned to the Irvine office to sign his employment agreement; Perpetua signed on behalf of MHA. Caporicci had a week-long training in Dallas and worked thereafter at MHA's offices in Irvine. All of the hospitals and medical

groups he worked with were based in the western region of the United States, specifically Arizona, California, Idaho, Montana, Nevada, Oregon, Washington, and Wyoming. He estimated that 85% were based in California and said all of his work was performed in California. None of the hospitals or medical groups he worked with was based in Texas. In 2005 or 2006, San Diego-based AMN bought MHA; according to Caporicci, he was paid by the San Diego office and interacted with AMN in San Diego regarding human resources, benefits and, following his resignation, all separation paperwork. Caporicci occasionally attended quarterly meetings and annual awards banquets in Dallas.

Cummins found out about a job opening through Caporicci and applied in 2008. He initially had a phone interview with Troy Fowler, MHA's divisional vice president of recruiting, and was told to complete an employment agreement at MHA's Irvine office. Fowler, who was based in Texas, signed Cummins's contract on behalf of MHA. All human resource contacts and benefits were handled out of the San Diego office, and Cummins was paid out of the San Diego office. Cummins had a two-week training in Dallas and afterwards he worked exclusively at the Irvine offices. Like Caporicci, Cummins worked with hospitals and medical groups in the western division; Cummins estimated 75% of the hospital and medical groups he worked with were based in California and that none was based in Texas. Cummins's work involved calling doctors and discussing the employment opportunities offered by his clients, all performed in California at MHA's Irvine offices. In addition to his two-week training, Cummins said he went to Texas "two or three times for awards shows."

James Leising, divisional vice president of southwest marketing at MHA, said the decisions to hire Caporicci and Cummins were made in Texas and their offer letters were generated in Texas. He agreed that Caporicci and Cummins were based in Irvine but said they were part of the west region which was "run from the Texas headquarters." According to

Leising, the MHA employees who supervised Caporicci and Cummins were based in Texas, and the two men relied heavily on MHA's marketing, pricing, information technology, recruiting, resource development, and research teams, all of which was available online but was based in Texas. Leising "spoke frequently with Caporicci and Cummins via telephone, from Texas" and communicated with them "on a regular basis" via email. He said Caporicci recruited at least forty-two physicians from Texas and Cummins recruited at least fifty-six.

While the transaction and parties bear relations to both states, after weighing the respective interests between California and Texas, we conclude the relationship to California is more significant than to Texas. Both men interviewed for the jobs, completed their employment agreements, and performed their jobs in California. Although MHA is headquartered and maintains support divisions in Texas, Caporicci and Cummins live in California and traveled infrequently to Texas. The gist of the agreement was the performance of services by Caporicci and Cummins where the two were located. Therefore, we conclude California has the more significant relationship with this case and its law would govern absent the choice-of-law provision. *See DeSantis*, 793 S.W.2d at 678−79; *see also Cardoni v. Prosperity Bank*, 805 F.3d 573, 583 (5th Cir. 2015).

We next consider which state has a materially greater interest in determining whether the noncompetition, no-solicitation portions of the employment agreements are enforceable. As previously noted, MHA in based in Texas while the former employees and their newly formed company are based in California. The majority of the services Caporicci and Cummins performed were in California. And MHA no longer has a California office or California-based employees, having shut down those operations shortly after Caporicci and Cummins left. While Texas shares a general interest in "protecting the justifiable expectations of entities doing

business in several states," that does not outweigh California's interests in this case. *See Drennen*, 452 S.W.3d at 326−27. This factor weighs in favor of California.

Finally, we determine whether the application of Texas law would be contrary to or violate a fundamental policy of California. Section 16600 of the California Business and Professions Code states:

> Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.

CAL. BUS. & PROF. CODE § 16600. Exceptions not applicable here include noncompetition agreements in the sale or dissolution of corporations, partnerships, and limited liability corporations. CAL. BUS. & PROF. CODE §§ 16601−07; *Edwards v. Arthur Andersen LLP*, 189 P.3d 285, 290−91 (Cal. 2008). California courts have consistently affirmed that section 16600 "evinces a settled legislative policy in favor of open competition and employee mobility," "protects Californians," "and ensures that every citizen shall retain the right to pursue any lawful employment and enterprise of their choice." *Edwards*, 189 P.3d at 291. In contrast, Texas law allows the enforcement of noncompetition clauses to the extent they are reasonable, they are ancillary to an otherwise valid transaction or agreement, their restraints are not greater than necessary to protect a legitimate interest, and "the promise's need for the protection afforded by the agreement not to compete must not be outweighed by either the hardship to the promisor or any injury likely to the public." *DeSantis*, 793 S.W.2d at 682. We conclude applying Texas law would contravene a fundamental policy of California law.

Because California has a more significant relationship than Texas to the transaction, California has a materially greater interest than Texas in the determination of the particular issue, and application of Texas law is "contrary to a fundamental policy" of California, we conclude

the trial court did not err by granting the motion to take judicial notice and apply California law with respect to the employment contracts in this case. We overrule MHA's first issue.

In its second issue, MHA argues the trial court erred by concluding California law should govern MHA's statutory and tort claims.

In Texas, all conflicts cases sounding in tort are governed by the "most significant relationship" test set out in sections 6 and 145 of the Restatement (Second) of Conflicts. *Gutierrez v. Collins*, 583 S.W.2d 312, 318 (Tex. 1979). Application of the most significant relationship analysis does not turn on the number of contacts with one state, but more importantly on the qualitative nature of those contacts. *Crisman v. Cooper Indus.*, 748 S.W.2d 273, 276 (Tex. App.—Dallas 1988, writ denied). Section 6 factors include the relevant policies of the forum and other interested states in determining the particular issue, the protection of justified expectations, the basic policies underlying the particular field of law, certainty, predictability and uniformity of result, and ease in the determination and application of the law to be applied. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971); *see Stutzman.*, 46 S.W.3d at 848. Section 145 lists factual matters to be considered when applying the section 6 principles to a given case; these include where the injury occurred, where the conduct causing the injury occurred, the domicile, residence, nationality, place of incorporation and place of business of the parties, and the place where the relationship, if any, between the parties is centered. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971); *see Stutzman*, 46 S.W.3d at 848.

MHA's tort claims are theft, misappropriation, and inevitable disclosure of trade secrets and confidential and proprietary information; breach of fiduciary duty and entitlement to constructive trust; conversion; violation of the Texas Theft Liability Act; unfair competition; and unjust enrichment, all of which stem from Caporicci and Cummins misappropriating

information, resigning from MHA's employment, starting their own company, and soliciting MHA's clients in Orange County. Under these circumstances, we conclude California has the most significant relationship to the parties and the dispute. *See Red Roof Inns, Inc. v. Murat Holdings, L.L.C.*, 223 S.W.3d 676, 685 (Tex. App.—Dallas 2007, pet. denied). The trial court did not err by granting the motion to take judicial notice and apply California law to the tort claims. We overrule MHA's second issue.

We affirm the trial court's order.

/Molly Francis/
MOLLY FRANCIS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

MERRITT, HAWKINS & ASSOCIATES, LLC, Appellant

No. 05-15-00851-CV V.

CHRIS CAPORICCI AND MATTHEW CUMMINS, Appellees

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Trial Court Cause No. DC-13-13851.
Opinion delivered by Justice Francis, Justices Bridges and Myers participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellees CHRIS CAPORICCI AND MATTHEW CUMMINS recover their costs of this appeal from appellant MERRITT, HAWKINS & ASSOCIATES, LLC.

Judgment entered May 2, 2016.