IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

ANCHORBUILT, INC., a New Mexico Corporation,

Plaintiff-Appellant,

v.

No. A-1-CA-42128

ARVISO CONSTRUCTION COMPANY, INC., a New Mexico Corporation, and LIBERTY MUTUAL INSURANCE COMPANY, a foreign insurer,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Beatrice J. Brickhouse, District Court Judge

Jackson Loman Downey & Stevens-Block, P.C.
Leah M. Stevens-Block
Dyea A. Reynolds
Albuquerque, NM

for Appellant

Moses, Farmer, Glenn, Gutierrez & Werntz, P.C.
Eraina M. Edwards
Justin R. Sawyer
Albuquerque, NM

for Appellees

DISPOSITIONAL ORDER[1]

WRAY, Judge.

A subcontractor, Anchorbuilt, Inc. (Plaintiff), filed a complaint against a general contractor, Arviso Construction Company, Inc., and a surety, Liberty Mutual Insurance Company (individually, Arviso and LMIC; and collectively, Defendants). On appeal, Plaintiff argues that the district court incorrectly enforced a forum selection clause for all of the claims. We affirm because, as we will explain, we conclude that Plaintiff has not carried its burden of establishing reversible error.

1. This dispute involves three contracts: (1) the prime contract between Arviso and the Navajo Nation Housing Authority to build a youth complex; (2) a surety contract between Arviso and LMIC to secure a performance bond for the project; and (3) a subcontract between Arviso and Plaintiff for services such as installing plumbing, HVAC, a storm drainage system, and a fire suppression system. The parties agree that the subcontract and surety contract have clauses that incorporate the terms of the prime contract, and that the prime contract selects "the Navajo Nation Tribal Court" as the forum for any disputes. Only the prime contract has a choice of law provision, which first selects the law of the Navajo Nation and

[1]This case is disposed by nonprecedential dispositional order pursuant to Rule 12-405(B) NMRA.

in the absence of Navajo law, federal law, followed by the law of the state in which the project is located.

2. After a dispute arose about Plaintiff's ongoing work, Plaintiff filed suit against both Defendants and alleged that (1) Arviso wrongfully terminated the subcontract and retained control over Plaintiff's tools and equipment at the project site; and (2) LMIC wrongfully refused to pay the performance bond. Defendants moved to dismiss Plaintiff's claims based on the prime contract's forum selection clause. The district court granted Defendants' motion to dismiss and ruled that the prime contract's forum selection clause applied to all of Plaintiff's claims. Plaintiff appeals.

3. We review de novo "[a] district court's ruling on a motion to dismiss for improper venue." *Bank of Am. v. Apache Corp.*, 2008-NMCA-054, ¶ 12, 144 N.M. 123, 184 P.3d 435. On appeal, we begin with the presumption that the district court ruled correctly, and Plaintiff bears the burden "to clearly demonstrate the district court's error." *Firstenberg v. Monribot*, 2015-NMCA-062, ¶ 57, 350 P.3d 1205 (internal quotation marks and citation omitted). In the present case, that burden included demonstrating that the district court (1) improperly construed the three contracts according to the applicable law; and (2) misconstrued Plaintiff's tort claims as arising under the contracts.

4. Under New Mexico law, in a case involving potential conflict of applicable laws, a first—and essential—step is to determine whether the laws of the various forums conflict. *See Ferrell v. Allstate Ins. Co.*, 2008-NMSC-042, ¶ 57, 144 N.M. 405, 188 P.3d 1156 (reviewing the law that governs the choice of law). The parties do not analyze whether Navajo, federal, or New Mexico law are in conflict with each other.

5. Even if we assume a conflict without any argument from the parties, we apply New Mexico law to determine the law applicable to the dispute. *See Terrazas v. Garland & Loman, Inc.*, 2006-NMCA-111, ¶ 11, 140 N.M. 293, 142 P.3d 374 ("The forum applies its own rules in characterizing an issue for conflicts analysis."). New Mexico courts have generally enforced both choice of law and forum selection clauses. *See Tavarez v. AB Staffing Sols.*, 2024-NMCA-052, ¶¶ 6-9, 551 P.3d 857 (addressing forum selection clauses). Although New Mexico courts have not adopted the Restatement (Second) Conflict of Laws (1971) with respect to forum selection clauses, "we have previously determined that 'New Mexico would likely adopt the Restatement (Second) [Conflict of Laws (1971)] approach to choice of law under circumstances in which the parties had expressly chosen the law.'" *See Tavarez*, 2024-NMCA-052 ¶ 6 (quoting *Reagan v. McGee Drilling Corp.*, 1997-NMCA-014, ¶ 7, 123 N.M. 68, 933 P.2d 867); *see also Ideal v. Burlington Res. Oil & Gas Co. LP*, 2010-NMSC-022, ¶ 21, 148 N.M. 228, 233 P.3d 362 ("Under the

Restatement (Second) Conflict of Laws there is a clear process for determining which law is applicable."). As noted, the prime contract selects Navajo, federal, and state law—in that order. Neither the surety contract nor the subcontract selects the applicable law.

6. Under the Restatement (Second) of Conflict of Laws, "[i]f the parties have not elected applicable law," we "look to the contract[s] at issue," *Ideal*, 2010-NMSC-022, ¶ 21, and if the answer is not to be found there, the "most significant relationship test" is applied, *Ferrell*, 2008-NMSC-042, ¶ 55 (internal quotation marks and citation omitted). The parties do not engage in these analyses. Plaintiff acknowledges the applicability of the law of the Navajo Nation to construe the forum selection clause in the prime contract but (1) takes the position that the surety contract is not incorporated into the prime contract and therefore New Mexico law applies; and (2) takes no position on the law applicable to the subcontract but maintains that the claim is a tort and not a contract claim, and the restrictions of the contracts therefore do not apply.

7. Plaintiff argues that the prime contract's forum selection clause does not apply based on the following provision in the surety contract: "No suit or action shall be commenced by a Claimant under this Bond other than in a court of competent jurisdiction in the state in which the project that is the subject of the Construction Contract is located or after the expiration of one year" from two events.

Plaintiff contends that this provision itself is a forum selection clause that conflicts with the prime contract's forum selection clause, in part, because the Navajo Nation could not be "a court of competent jurisdiction" when the parties to this action are not members of the Navajo Nation. Our Supreme Court has explained that state courts may not determine whether tribal courts have or must exercise civil jurisdiction—such matters are in the exclusive purview of the tribes and Congress. *See Garcia v. Gutierrez*, 2009-NMSC-044, ¶ 62, 147 N.M. 105, 217 P.3d 591 ("It is not for us as a state court to say whether [a tribe], subject to the plenary power of Congress, has jurisdiction."). Nevertheless, because this matter arose out of a contract between the Navajo Nation Housing Authority and a nontribal member (Arviso), we disagree that the Navajo Nation could not have jurisdiction or that the parties' choice of forum should be disregarded on this basis, despite uncertainty about whether the Navajo Nation has or will exercise its jurisdiction over these claims. *See Montana v. United States*, 450 U.S. 544, 565-66 (1981) (holding that tribes can regulate nonmembers that consent and can exercise civil authority when there is "some direct effect on the . . . the economic security, or . . . welfare of the tribe"); *see also* 7 N.N.C. [Navajo Nation Code Ann.] § 253a(C) (2014) ("A Court of the Navajo Nation may exercise personal and subject matter jurisdiction over any non[]member who consents to jurisdiction."); *cf. Zangara v. LSF9 Master Participation Tr.*, 2024-NMSC-021, ¶ 19, 557 P.3d 111 (noting that our Supreme

Court has a "steady focus on protecting plaintiffs' substantive rights" that "is consistent with New Mexico's policy favoring access to judicial resolutions as embodied in [NMSA 1978, § 37-1-14 (1880)] our savings statute." (internal quotation marks and citation omitted)).

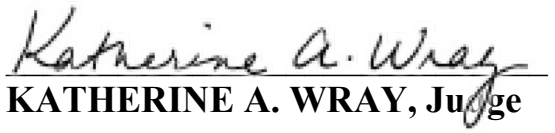
8. Plaintiff does not alternatively explain (1) how the choice of forum is impacted if the surety contract and the subcontract do incorporate the prime contract's choice of law; or (2) which forum's law applies to answer the question of whether the tort claims arise under the contract for the purposes of the parties' choice of forum selection. *See, e.g.*, *Paul Bus. Sys., Inc. v. Canon, U.S.A., Inc.*, 397 S.E.2d 804, 808 (Va. 1990); *see also Forrest v. Verizon Comms., Inc.*, 805 A.2d 1007, 1014 (D.C. 2002) (collecting cases holding that "non[]contract claims that involve the same operative facts as a parallel breach of contract claim fall within the scope of a forum selection clause"); *Lambert v. Kysar*, 983 F.2d 1110, 1121-22 (1st Cir. 1993) ("[C]ontract-related tort claims involving the same operative facts as a parallel claim for breach of contract should be heard in the forum selected by the contracting parties."); *Magi XXI, Inc. v. Stato della Citta del Vaticano*, 714 F.3d 714, 724 (2d Cir. 2013) ("A contractually-based forum selection clause also covers tort claims against non[]signatories if the tort claims ultimately depend on the existence of a contractual relationship between the signatory parties." (internal quotation marks and citation omitted)); *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 514

(9th Cir. 1988) ("Whether a forum selection clause applies to tort claims depends on whether resolution of the claims relates to interpretation of the contract.").

9. As we have endeavored to demonstrate, the choice of law analysis that is necessary to construe these contracts and the jurisdictional questions implicated are complex and require close analysis. Our Supreme Court has cautioned that "it is of no benefit either to the parties or to future litigants for this Court to promulgate case law based on our own speculation rather than the parties' carefully considered arguments." *Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 70, 309 P.3d 53. Given the way that this matter developed in the district court, the arguments have understandably become more refined on appeal. While we do not see this as a preservation problem, we are left without a full analysis by either party on issues that would be vital to reversing the district court's decision.

10. Given the uncertainties in this case on appeal and the dangers of constructing and applying the legal framework ourselves, we conclude that Plaintiff did not meet the burden on appeal to demonstrate that the district court erred in enforcing the forum selection clause. *See Premier Tr. of Nev., Inc. v. City of Albuquerque*, 2021-NMCA-004, ¶ 10, 482 P.3d 1261 ("[W]e reiterate that it is the appellant's burden to demonstrate, by providing well-supported and clear arguments, that the district court has erred."). We therefore affirm.

IT IS SO ORDERED.



KATHERINE A. WRAY, Judge

WE CONCUR:

JENNIFER L. ATTKEP, Judge

ZACHARY A. IVES, Judge