

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

FILED
2020 SEP -1 AM 10:57
BARBARA A. WIEDENBEIN
CLERK OF COMMON PLEAS
CLERMONT COUNTY, OH

SCENTS CORPORATION D/B/A :
PERFUMES OF THE WORLD :
Plaintiff : CASE NO. 2019 CVH 01394
vs. : Judge McBride
TOTAL QUALITY LOGISTICS, LLC : DECISION/ENTRY
Defendant :

Lewis Brisbois Bisgaard & Smith, LLP, John R. Christie and Y. Timothy Chai, counsel for the plaintiff, Scents Corporation d/b/a Perfumes of the World, 1375 East 9th Street, Suite 2250, Cleveland, Ohio 44114 and Katherine Compton (appearing *pro hac vice*), co-counsel for Scents Corporation d/b/a Perfumes of the World, 2100 Ross Avenue, Suite 2000, Dallas, Texas 75201.

Dickinson Wright PLLC, Matthew J. Wiles and David A. Lockshaw, Jr., counsel for the defendant Total Quality Logistics, LLC, 150 East Gay Street, Suite 2400, Columbus, Ohio 43215.

This cause is before the court for consideration of the motion filed by the plaintiff, Scents Corporation d/b/a Perfumes of the World (hereinafter referred to as "POTW") to apply Texas law to this litigation as requested in Count II of the plaintiff's complaint styled "Declaratory Judgment as to Application of Texas Law."

The plaintiff filed its motion and supporting argument on January 15, 2020. The defendant Total Quality Logistics, LLC (hereinafter referred to as "TQL") filed its

COPY

memorandum in opposition to motion to apply Texas Law on January 28, 2020. On March 19, 2020, POTW filed a pleading entitled supplemental evidence in support of plaintiff's motion to apply Texas law. On April 22, 2020, TQL filed a motion to strike plaintiff's supplemental evidence in support of plaintiff's motion to apply Texas law. On May 5, 2020, POTW filed its response in opposition to TQL's motion to strike plaintiff's supplemental evidence in support of plaintiff's motion to apply Texas law. On May 19, 2020, TQL filed a pleading entitled defendant's opposition to plaintiff's motion to extend time to file supplemental evidence in support of its motion to apply Texas law.

As the parties will note in this decision, in its analysis the court has determined that it is unnecessary to address the issue regarding the admissibility of the supplemental evidence, because the matter can be resolved without doing so.

Oral hearing on the motion was held on May 22, 2020. The court then took the issues raised by the motion under advisement.

Upon consideration of the motion, the responses, the written arguments of counsel, and the applicable law, the court now renders this written decision.

PLAINTIFF'S ALLEGATIONS PERTINENT TO CHOICE OF LAW

The following is a summary of the facts alleged in the plaintiffs' complaint which give rise to the motion to apply Texas law substantively. POTW, headquartered in Texas, contracted with TQL's North Carolina office to broker the shipment of flats of perfume from Florida to Texas. The Customer Application prepared by TQL and executed by POTW's Texas billing manager includes a set of 12 general terms and conditions

prefaced by the statement: "These General Terms and Conditions ("General Terms") apply to all transportation services provided by Total Quality Logistics, LLC ("TQL") or its subsidiaries, including TQL Global, LLC." They include a "selection of forum" clause which reads as follows:

"The state courts in Clermont County, Ohio will have exclusive and irrevocable jurisdiction over and will be the exclusive and mandatory venue for any claim, counterclaim, dispute, or lawsuit arising in connection with any transactions, loads, or other business between TQL and Customer."¹

The Customer Application did not designate any particular state's law as governing the terms of the relationship between POTW and TQL. The Customer Application did not detail any specific brokerage service job requested by POTW and provided by TQL.

POTW alleges that the Customer Application does not contain the complete contractual agreement of the parties. For example, attachments to the motion include various text message requests from POTW and responses from TQL as well as an email. These include initial advice from POTW to TQL as to the high value cargo of a requested shipment from Florida to Texas. TQL replied that it could handle this for \$1,500.00 including two pick-ups plus the high value insurance. The next day, POTW advised TQL it wanted to add another pallet to the high value shipment. TQL responded that day with a text message quote of \$1,700.00 to include the additional pallet. There were additional electronic communications between the parties regarding POTW bringing its account current with TQL prior to TQL providing this brokerage service.

Apparently the shipment details were established. Unfortunately, after being transferred to the carrier selected by TQL, the shipment of perfume was stolen in the

¹Pl's Mot., Ex. A, pg. 4, Gen. Term & Cond. 9.

State of Florida. It never reached its intended destination in the State of Texas. It is alleged in the complaint that the carrier did not carry insurance nor was additional insurance placed on the shipment by TQL.

POTW states that Texas law allows successful plaintiffs in breach of contract suits to collect their reasonable attorney fees while Ohio law does not.

This claim was originally filed in federal district court in Texas. That court, relying on the choice of forum language in the Customer Application, dismissed the action noting that the courts in Clermont County, Ohio were the contractually agreed-to forum for legal disputes of this nature.²

STANDARD OF REVIEW IN CHOICE OF LAW QUESTIONS

The Twelfth District Court of Appeals has noted “that it is proper to use Ohio law to determine the choice of law matter, and further, as the forum state, Ohio’s procedural law will be applied.”³

The Ohio Supreme Court first announced its adoption of the use of Restatement process for determining conflicts issues in the case of *Morgan v. Biro Manufacturing Company*, 15 Ohio St.3d 339 (1984). It announced, in *dicta*, the adoption of the entire Restatement (Second) of Conflict of Laws. Although the *Morgan* court announced the adoption of the Restatement in its entirety, that case related exclusively to tort law. In 2007, the court applied the Restatement to a subrogation claim arising from workers’

² Def’s Mot. to Dism. Am. Compl., Ex. A.

³ *Scanlon v. Pfaller*, 12th Dist. Butler No. CA2006-05-110, 2006-Ohio-2022, ¶ 5, fn. 2, 2006 WL 1064051.

compensation payments. Using Restatement principles, it stated that the correct choice of law was that of the state in which the compensation was paid.⁴ In doing so, the Ohio Supreme Court once again established that it follows the Restatement (Second) in determining conflict of laws issues. The court shall follow that guidance in the legal analysis of the issue raised in the plaintiff's motion.

LEGAL ANALYSIS

The Restatement (Second) of Conflict of Laws establishes a three-step procedure to follow in deciding choice-of-law questions. The first step requires the court to characterize the legal issue(s) because without proper classification of the issues, comparison is impossible.⁵ The claim in this case involves the alleged breach by TQL of a contract for services. Therefore in step one the court must determine whether there is an actual conflict between Ohio law and Texas law with respect to the breach of contract claim in this lawsuit. If the court finds that there is no conflict, the analysis stops at that point and the forum state's law is applied to the substantive claim. If there is an actual conflict, then a choice-of-law analysis moves to step two because "[r]esort to the principles of conflict of laws is necessary only if there is an actual conflict between local law and the law of another jurisdiction."⁶ According to the Restatement (Second) step two requires the forum court to identify the state that has the most significant relationship

⁴ *Am. Interstate Ins. Co. v. G & H Serv. Ctr., Inc.*, 112 Ohio St.3d 521, 2007-Ohio-608, 861 N.E.2d 524.

⁵ 1 Restatement of the Law 2d, Conflict of Laws, Section 7 (1971).

⁶ *Akro-Plastics v. Drake Indus.*, 115 Ohio App.3d 221, 224, 685 N.E.2d 246 (11th Dist.1996).

to the disputed issue(s).⁷ Finally step three, as discussed in the Restatement (Second) states that if the court finds (a) that a conflict exists between the forum state's local law and that of the foreign state and (b) that the foreign state has the most significant relationship to the issue in dispute, the court must then decide how much of that foreign state's law to apply.⁸

Step One – Characterization of the legal issues

According to the Restatement (Second) § 7, the first step in deciding choice-of-law questions requires the court to characterize the legal issues:

"Characterization is an integral part of legal thinking. In essence, it involves two things: (1) classification of a given factual situation under the appropriate legal categories and specific rules of law, and (2) definition or interpretation of the terms employed in the legal categories and rules of law."⁹

The sole cause of action in the plaintiff's first amended complaint is a breach of contract claim against TQL. Using the Restatement analysis, both Texas and Ohio would characterize the nature of the claim as contractual. For the following reasons, the court finds that the sole, substantive contractual question presented in this case – what constitutes a breach of contract – is not in conflict in a comparison of Texas law and Ohio law.

Ohio law defines "breach," as applied to contracts, as a failure without legal excuse to perform any promise that forms a whole or a part of a contract, including the refusal of

⁷ 1 Restatement of the Law 2d, Conflict of Laws, Section 6 (1971).

⁸ 1 Restatement of the Law 2d, Conflict of Laws, Section 8 (1971).

⁹ 1 Restatement of the Law 2d, Conflict of Laws, Section 7 (1971).

a party to recognize the existence of the contract or doing of something inconsistent with its existence.¹⁰ Texas law defines breach identically.¹¹ The determination of the substantive issues in the case at bar would involve the same application of law whether the case was tried in the State of Texas or the State of Ohio.

The plaintiff's argument as to a conflict lies not in a substantive conflict between the laws of Texas and Ohio, but rather a remedial conflict.

The plaintiff argues correctly that the remedy of an award of attorney fees is available in a successful breach of contract claim under Texas law, but not available under Ohio law. The Texas statute appearing in its Civil Practice & Remedies Code provides as follows:

"A person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for:

- (1) rendered services;
- (2) performed labor;
- (3) furnished material;
- (4) freight or express overcharges;
- (5) lost or damaged freight or express;
- (6) killed or injured stock;
- (7) a sworn account; or
- (8) an oral or written contract."¹²

Ohio law awards costs to the prevailing party; however, attorney fees are not included in "costs" unless they are specifically provided for by statute. Ohio follows the "American Rule" which does not permit the prevailing party to recover attorney fees, in the absence of statutory authorization. The Ohio Supreme Court has consistently held "

¹⁰ *Caley v. Glenmoore Country Club, Inc.*, 2013-Ohio-4877, 1 N.E.3d 471 (5th Dist.); *Campbell v. George J. Igel & Co., Inc.*, 2013-Ohio-3584, 3. N.E.3d 219 (4th Dist.); *Allason v. Gailey*, 189 Ohio App.3d 491, 2010-Ohio 4952, 939 N.E.2d 206 (7th Dist.).

¹¹ Texas Jurisprudence, Contracts § 6.

¹² V.T.C.A., Civil Practice & Remedies Code §38.001.

* * * that an allowance of attorney fees may be made to a party only when some statute provides for such allowance * * *.”¹³

Matters of remedy, such as an award of attorney fees, are governed by the laws of the state where the action is maintained. Significantly, the conflicts law of Texas recognizes this proposition. In construing Texas conflicts law, the Fifth Circuit Court of Appeals noted that “matters of remedy and procedure are governed by the laws of the state where the action is sought to be maintained.”¹⁴

Because remedial issues are governed by the forum state, this court need not consider the conflict-of-laws argument further. The attorney fee issue will be decided in accordance with Ohio law. Having determined that there is no conflict in the substantive law pertaining to a breach of contract, the analysis required by the Restatement (Second) of Conflict of Laws is complete at this point and the court is not required to go forward with an analysis of steps two and three.

CONCLUSION

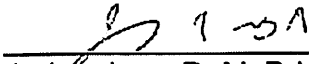
For the foregoing reasons, the plaintiff’s motion to apply Texas law is found to be not well taken and is denied.

IT IS SO ORDERED.

¹³ *Shuey v. Preston*, 172 Ohio St. 413, 414, 177 N.E.2d 789 (1961).

¹⁴ *Morris v. LTV Corp.*, 725 F.2d 1024, 1927 (5th Cir. 1984). It is also of interest to note that the Texas statutes pair remedies and procedures.

DATED: 9/30/20



Judge Jerry R. McBride

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Decision/Entry were sent on this 15th day of Sept. 2020 by e-mail to Jordan D. Rauch, at JRauch@dickinsonwright.com, and Matthew J. Wiles, at mwiles@dickinson-wright.com, Attorneys for the Defendant, and by regular U.S. Mail to John Christie, Attorney for the Plaintiff, 1375 East 9th Street, Suite 2250, Cleveland, Ohio 44114.



Judicial Assistant to Judge McBride