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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

PATRICK KELLY,

Plaintiff and Appellant,

v.

JACK EUGENE TEETERS, as Executor,
etc.,

Defendant and Respondent.

A138423

(San Francisco County
Super. Ct. No. CGC-09-494198)

Patrick Kelly appeals from a judgment in favor of Thomas F. White¹ in a suit for wrongful termination of employment and breach of contract. He contends the trial court erred in finding the case governed by Mexican law, which resulted in the conclusion that he had no enforceable claims against White. We affirm.

STATEMENT OF THE CASE AND FACTS

On March 21, 2012, appellant, in propria persona, filed a first amended complaint against Thomas White.² According to the allegations of the complaint, appellant entered

¹ White died during the pendency of this appeal, and the executor of his estate was substituted as respondent.

² This case had a lengthy procedural history before the filing of the first amended complaint. According to the register of actions, appellant filed his original complaint in this case on November 6, 2009. White filed a motion to quash service, which was denied on April 13, 2011. Neither the motion to quash nor the court’s order appear in the record on this appeal. This court denied White’s petition for writ of mandate (A131807). White then filed a motion to quash service based on lack of in personam jurisdiction, which was denied on June 10, 2011. Again, neither the motion nor the court’s order appear in the

into an employment relationship with White on or about December 23, 2003, when White was incarcerated in Bangkok, Thailand, due to an extradition request by Mexico, where White had been charged with rape. White allegedly hired appellant to provide internet research services, visit him, advise him on legal and other matters, and assist in his efforts toward release. Appellant was paid what White referred to as a “stipend” of \$2,000 per month and it was agreed that appellant would be further compensated “based upon the proven worth of what he was able to do to assist” White.

Appellant alleged that in early February 2005,³ he and White entered into an oral agreement under which White agreed to pay appellant “a substantial bonus”—specifically, a Mercedes S-500 or the cash equivalent, at the time approximately

record on appeal. The register of actions states, “Tentative Ruling adopted – Defendant’s motion to quash service based on lack of in personam jurisdiction is denied. In addition, the court relies on its own court records of legal actions involving defendant, which the court has taken judicial notice of specifically cases CGC-09-484733, CGC-06-458269, CGC-03-427552. The court also relies on lines 10-17 of page 3 of plaintiff’s opposition to motion to quash and paragraphs 6-9 on page 7.” According to San Francisco Superior Court records, the first of the listed cases is a 2009 suit against White concerning a contract to sell a house owned by White in San Francisco; the others are cases filed in 2006 and in 2003 by White as plaintiff in San Francisco Superior Court.

White filed a demurrer to the complaint on November 16, 2011, which the court sustained without leave to amend as to the cause of action for promissory estoppel and overruled as to all other causes of action. White also filed an unsuccessful motion to dismiss or stay the action on grounds of forum non conveniens; as explained in the register of actions, “Defendant has not shown that there is a suitable alternative forum or that the public and private factors weigh in favor of either dismissal or stay.”

Appellant filed a first amended complaint on December 22, 2011. White filed a motion to strike, which was granted without prejudice to appellant seeking leave to file a first amended complaint. White again moved to dismiss the action, this motion was denied, and appellant was granted leave to file the first amended complaint underlying this appeal.

³ The complaint alleged that his contract was entered on October 12, 2005. We take judicial notice of the briefs and record in another appeal involving these parties currently pending in this court (Evid. Code, § 452, subd. (d); *Kelly v. Teeters*, A141503), which indicate that in response to a request for admissions, appellant stated that this contract was entered in early February 2005 rather than on October 12.

\$350,000 in Thailand—if appellant succeeded in gaining citizenship for White in a country of White’s choosing.⁴ On or about June 9, 2006, appellant acquired legal citizenship for White, with a valid passport containing a Thai visa, but White paid appellant only \$25,000 instead of the promised bonus. White represented that he would pay the remainder upon his release from prison, saying that if paid the full amount, appellant might decide not to work for White anymore, and assured appellant he would provide financing for future business ventures the two would pursue together after his release. Appellant accepted the payment and agreed to defer the remainder of the bonus because he had no other option. He believed White could and would pay the remainder because White was “reported to have a net worth of somewhere in the area of \$65,000,000 at the time.”

In May 2007, White was convicted by a Mexican trial court of raping a teenage boy. Appellant’s complaint alleged that on or about May 31, 2007, the parties entered into an oral agreement under which White agreed to pay appellant a bonus of \$495,000 to \$660,000 for “extra work” appellant had done in San Francisco, California, and Mexico, provided appellant was able to convince a new legal team he had located to represent White and to negotiate a retainer agreement, and the team obtained a reversal of White’s rape conviction rape. The bonus was to be 15 to 20 percent of the amount of the retainer agreement appellant negotiated with the new legal team. Appellant performed his obligations under the agreement, convinced the new team to represent White and negotiated a \$3.3 million retainer agreement that was \$800,000 less than what the team initially requested. As a result of work by appellant and the new legal team, White’s

⁴ Among the exhibits appellant submitted to the trial court were the first page of a March 23, 2004 indictment charging White with conspiracy to travel with intent to engage in sexual acts with juveniles (18 U.S.C. § 2423(b)), conspiracy to sexually exploit children (18 U.S.C. § 2251(d)) and criminal forfeiture (18 U.S.C. § 2233), and a June 30, 2004, letter from the United States Embassy in Thailand to White, at an address in Thailand, informing him that his United States passport had been revoked due to his being the subject of an arrest warrant for the above offenses.

conviction was overturned by the Mexican Supreme Court on or about November 1, 2007.

Appellant alleged that White first refused to discuss payment of the bonus, then upon further requests offered to pay a bonus of \$100,000. Appellant rejected this offer, and White said he wanted to discuss the matter at a later date. After two to three months of appellant requesting payment, on or about February 12, 2008, White withdrew the offer to pay “the \$100,000 bonus [White] conceded was earned” and made no further offers or compromises to settle the debt. On February 19, 2008, White terminated appellant’s employment, and on February 27 he published an email accusing appellant of committing crimes including attempted extortion and damaging or stealing personal and or real property.

The first cause of action of appellant’s amended complaint sought damages for termination of employment in violation of public policy, alleging that his employment was terminated unlawfully in retaliation for his complaints that he was not being compensated as promised. The second cause of action alleged that White breached the 2005 oral contract by failing to pay the full bonus of \$350,000. The third cause of action alleged breach of the May 31, 2007 oral contract by refusing to compensate appellant as agreed. The fourth cause of action alleged that White breached the implied covenant of good faith and fair dealing under California law by terminating appellant’s employment without cause, preventing appellant from carrying out his duties and responsibilities under the employment contract, unfairly preventing appellant from obtaining the benefits of the employment relationship, and depriving appellant from obtaining the benefits of the parties’ agreements, including the promised bonus payments.

On March 22, 2012, White filed a demurrer to the amended complaint on grounds of insufficient facts to state a cause of action and uncertainty, as well as a motion to dismiss the action. The demurrer was overruled by order filed May 14, 2012; the motion to dismiss was denied; and this court denied White’s petition for writ of mandate (A135457).

On July 19, 2012, White filed a motion for summary adjudication of the second cause of action, breach of the 2005 contract. White offered appellant's response to an interrogatory stating that performance of the agreement was "excused" in that appellant "agreed to accept a partial bonus payment of \$25,000 and defer the remaining \$325,000 to the time White was released from prison" White stated that since he had not been released from prison, his duty of payment had not arisen and the suit for breach of contract was premature.

Appellant's opposition to the motion for summary adjudication pointed to the allegations of the second cause of action that White's termination of his employment accelerated the date the deferred bonus payment was due from the date White was released from prison to the date he terminated appellant's employment.

The motion was argued and taken under submission on October 10, 2012, and granted on October 17, 2012. The remaining causes of action were set for trial.

On January 14, 2013, White filed an in limine motion on the application of choice of law principles. White urged that the court was required to determine as a matter of law whether the contract alleged in the third cause of action was valid, and that pursuant to Civil Code section 1646,⁵ this determination had to be made according to Mexican law because the alleged contract was entered at the jail in Mexico. With respect to the first cause of action for wrongful termination in violation of California public policy, White argued that the court had to apply Thai law to determine whether a valid employment contract existed, as the contract was alleged to have been entered in Thailand, but that because the contract was performed and terminated in Mexico, the question whether the termination violated California public policy had to be resolved under Mexican law. White further argued that there could be no breach of the implied covenant of good faith and fair dealing, as alleged in the fourth cause of action, because appellant did not allege breach of the contract of employment and breach of the implied covenant could not exist independently of breach of the contract.

⁵ Further statutory references will be to the Civil Code unless otherwise specified.

On January 16, 2013, the court ruled that Mexican law would be applied because the contract was entered in Mexico and most of its provisions were to be performed in Mexico. The following day, at the court's direction, the parties drafted questions to be submitted to Mexican attorneys of the parties' choosing as follows:

"Hypothetical situation:

"Person #1 who is in jail in Mexico and has been convicted of a crime in Mexico, proposes to Person #2 that if he (1) secures Mexican legal representation for Person #1 to appeal the conviction within [the] Mexican court system, (2) negotiates a retainer agreement that is acceptable to those attorneys and Person #1 which is then signed by both, and (3) the attorneys are successful on appeal and the conviction is reversed, then Person #2 will be paid pursuant to a formula calculation. Person #2 does secure attorneys, does successfully negotiate a retainer agreement that is signed by both the attorneys and Person #1, and the attorneys are successful on appeal and the conviction is reversed:

"Questions:

"1. Is the agreement between Persons #1 and #2 required to be in writing in order to be valid under Mexican law, or is it valid if oral?

"2. Does the answer to Question No. 1 depend on the status of Person #2, *i.e.*, whether he is an employee agent, independent contractor, *etc.*?

"3. Does it matter that the compensation to Person #2 is contingent: is this a commission under Mexican law?"

Five days later, on January 22, 2013, White submitted an opinion letter from an attorney in Mexico, David W. Connell, which stated that the type of agreement at issue was required to be ratified in writing before the business it called for was concluded. The attorney appellant consulted also stated that Mexico would require the agreement to be in writing, unless the defendant appeared in court and confessed the existence of the contract.

Also on January 22, appellant filed a supplemental response to the in limine motion on choice of law,⁶ arguing that the determination of which law to apply should be governed by the governmental interests test rather than by Civil Code section 1646, and that the parties' intent to create an enforceable contract should be effectuated. Appellant stated that he was in Thailand for most of the time he worked for White, including at the point White terminated his employment, as well as in Mexico, the United States, and Cambodia. He argued that his employment was tied to California in that he sent his expense reports to, and was paid by, White's agent in San Francisco, and that White, during his incarceration, maintained "extensive" ties to California including retaining attorneys in San Francisco, owning property in the San Francisco area, having bank accounts in California, having a California driver's license, and being registered to vote in California. Appellant disputed the suggestion he said had been made that the contract was a "commission agency arrangement," and argued that the opinion on Mexican law given by White's attorney could be "tainted and unreliable" because the attorney had worked for White for more than 10 years and would be predisposed to find law to bolster White's position. Appellant noted that he did not have a relationship with a Mexican attorney who could offer an opinion "tainted in his favor."

On January 24, the court reviewed emails the parties believed relevant to the alleged agreement. The court noted that one of these, dated February 22, 2008, bolstered appellant's claim. This email, from the account of Wray Pomeroy, read as follows: "Tom White writes: [¶] Hi Pat: [¶] The retainer agreement you 'negotiated' unfortunately [*sic*] is not worth the paper it is printed on. I promised you a \$100,000 bonus if things went as what was promised. I would much rather pay you the money than have the contract broken as it has been. [¶] The \$350,000 to \$500,000 you claim upon winning the appeal is pure fiction and is obviously an attempted con job to take

⁶ The minute order for January 16 indicates that appellant filed three documents in response to White's 17 in limine motions. The only document in the record that appellant filed in response to the in limine motions on or before January 16 addresses different in limine motions, not the choice of law issue.

advantage of my incarceration. [¶] I am glad your true colors have come out before we went any farther. [¶] Regards, Tom.”

The court then concluded that the employment contract was unenforceable under Mexican law. Appellant moved to amend the complaint to “augment his status as an employee under the Mexican Law which applies to day laborers.” This motion was denied. At the court’s suggestion, appellant waived his right to jury trial and made his opening statement, after which White moved for nonsuit. Explaining that appellant’s opening statement did not present anything to refute the court’s previous rulings, the court granted the nonsuit motion.

On February 19, 2013, appellant filed a motion to vacate the judgment, which was denied on March 12, 2013.⁷ In connection with this motion, among other things, appellant submitted as an exhibit a document entitled “Declaration of Thomas White,” signed and dated May 26, 2011, in which White declared “under penalty of perjury, and under the laws of Mexico, California, and the United States” that he had never instructed appellant to perform services for him in San Francisco, never instructed appellant to assist him by meeting with people in San Francisco, and had not had a California driver’s license since the early 2000s. Another exhibit appellant submitted was a copy (not file stamped) of document entitled “Declaration of Defendant Thomas White in Support of Motion to Quash Service of Process Based on Lack of In Personam Jurisdiction,” dated March 8, 2011, in which White stated that since 2002 he had been a permanent resident

⁷ Appellant’s motion to vacate argued that the court placed unreasonable demands on appellant when it ordered him to obtain an English opinion on Mexican law from a Mexican attorney within four days, three of which fell on a holiday weekend; failed to consider enumerated statutes when it ruled that section 1646 applied to the third cause of action; erred in finding Mexican law would not permit appellant to pursue his claim; erred in its application of Mexican law on agency and exceeded its authority in ignoring appellant’s evidence that there was no agency contract; failed to consider a 1994 convention giving appellant the right to have his contract adjudicated under California law; erred in failing to consider the impact of dismissing appellant’s case; failed to recognize issues raised in appellant’s opening statement that required determination by a jury; and erred in denying appellant’s request to amend the complaint to include a claim for breach of employment contract.

of Puerto Vallarta, Mexico, and had not been a resident of San Francisco; that he became a citizen of Cambodia on May 8, 2006, and renounced his United States citizenship on February 15, 2008; and that all of his dealings with appellant occurred while he was in Puerto Vallarta.

The court's "Orders Granting Defendant's Pretrial Motions," filed on February 20, 2013, state that Mexican law applied; in the absence of written ratification or oral confession by the defendant in court, the alleged oral contract was unenforceable; that there was no basis for appellant to proceed on the first cause of action for wrongful termination because it was dependent upon the validity of the alleged oral contracts; that summary adjudication had been granted previously on the second cause of action; that the breach of contract claim in the third cause of action was not legally valid; and that the fourth cause of action could not proceed because the implied covenant of good faith and fair dealing could not exist independent of a valid breach of contract claim. Judgment in favor of White was also filed on February 20, 2013.

Appellant filed a timely notice of appeal on April 18, 2013.⁸

DISCUSSION

Appellant contends the trial court erred in applying section 1646 to conclude that Mexican law governed this case, which resulted in the determination that he had no enforceable claims against White. His appeal is focused on the third cause of action of his first amended complaint, which alleged an oral contract entered on or about May 31, 2007, under which appellant would be paid a specified bonus if he secured a new legal team to represent White and successfully negotiated a retainer agreement, and the legal

⁸ White contends this court lacks jurisdiction because although appellant's notice of appeal referenced the judgment of February 20, 2013, it indicated by a check mark that the appeal was from a judgment after an order granting a summary judgment motion. White maintains that the notice of appeal was thereby limited to the court's ruling on the second cause of action, breach of the 2005 oral contract, as to which the court granted summary adjudication, and insufficient to confer jurisdiction to review the matters appellant presses on appeal concerning the third cause of action for breach of the 2007 oral contract. We denied White's motion to dismiss on this basis on September 27, 2013, and decline his request to reconsider that ruling.

team succeeded in obtaining a reversal of White’s rape conviction by a Mexican trial court. Appellant argues that the court should not have applied section 1646 because it was clear that the parties intended their agreement to be governed by California law, both were United States citizens whose presence in Mexico when the agreement was entered was “incidental, transitory and temporary,” and application of Mexican law led to dismissal of the entire case, resulting in gross injustice to appellant and unjust enrichment of White.

Section 1646 provides: “A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made.”

As the record on appeal does not include reporter’s transcripts, the only explanation of the basis for the court’s choice of law ruling is a statement in the court’s minute order that “Mexican Law may be invoked in this matter, as the contract between plaintiff and defendant was entered into in Mexico, and most of the provisions of said contract were to be performed in Mexico.”

“The choice-of-law issue is a legal one that is decided de novo.” (*Brown v. Grimes* (2011) 192 Cal.App.4th 265, 274.) We review the trial court’s resolution of disputed factual matters under the substantial evidence standard, in the light most favorable to the prevailing party. (*Brack v. Omni Loan Co., Ltd.* (2008) 164 Cal.App.4th 1312, 1320.)⁹

Appellant urges that the trial court’s application of section 1646 was contrary to *Nedlloyd Lines B.V. v. Superior Court* (1992) 3 Cal.4th 459, 464-465, which held that

⁹ White’s assertion that we review the trial court’s ruling for abuse of discretion is incorrect. White relies upon *Condon-Johnson & Associates, Inc. v. Sacramento Municipal Utility Dist.* (2007) 149 Cal.App.4th 1384, 1392, presumably for its statement that “[g]enerally, a trial court’s ruling on an in limine motion is reviewed for abuse of discretion.” As that court went on to say, “[h]owever, when the issue is one of law, we exercise de novo review. (*Ibid.*) The in limine motion being reviewed in *Condon-Johnson* presented a question of statutory construction, a legal issue that the court reviewed de novo. (*Ibid.*)

“[i]n determining the enforceability of arm’s-length contractual choice-of-law provisions, California courts shall apply the principles set forth in Restatement section 187, which reflects a strong policy favoring enforcement of such provisions.” Section 187 of the Restatement Second Contracts provides: “(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue. [¶]

(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.”

The comments to section 187 of the Restatement Second Contracts make clear that the provisions above apply “only in situations where it is established to the satisfaction of the forum that the parties have chosen the state of the applicable law.” (Rest.2d Contracts, § 187, com. a.) The comment states that “[w]hen the parties have made such a choice, they will usually refer expressly to the state of the chosen law in their contract, and this is the best way of insuring that their desires will be given effect. But even when the contract does not refer to any state, the forum may nevertheless be able to conclude from its provisions that the parties did wish to have the law of a particular state applied. So the fact that the contract contains legal expressions, or makes reference to legal doctrines, that are peculiar to the local law of a particular state may provide persuasive evidence that the parties wished to have this law applied. [¶] On the other hand, the rule of this Section is inapplicable unless it can be established that the parties have chosen the state of the applicable law. It does not suffice to demonstrate that the parties, if they had

thought about the matter, would have wished to have the law of a particular state applied.” (*Ibid.*)

In the present case, there is no written contract specifying a choice of governing law. Nor does appellant claim that any express term of the alleged oral contract refers to choice of law. He maintains, however, that “it is not necessary for contracting parties to state the obvious about which state’s laws should govern their contract so long as their intent can be reasonably interpreted.”¹⁰ In arguing that the trial court overlooked the evidence demonstrating that the parties’ intended to have the contract governed by California law, appellant cites a portion of his supplemental response to White’s in limine motion on choice of law and a portion of his declaration filed as part of this response. Both the cited argument¹¹ and the cited statements in the declaration¹² address appellant’s own intent and expectations.

¹⁰ Appellant points to a comment to section 187 of the Restatement Second stating that “most rules of contract law are designed to fill gaps in a contract which the parties could themselves have filled with express provisions.” (Rest.2d Contracts, § 187, com. c.) Appellant takes this provision to mean that express contractual provisions, including those regarding the intended governing law, need not be written to be valid. The point made in comment c is that the rule of subsection (1)—“[i]ssues the parties could have determined by explicit agreement” are to be decided by the law of the state chosen by the parties”—“is a rule providing for incorporation by reference and is not a rule of choice of laws.” The comment explains that the rule of subsection (1) is applied to effectuate the parties’ intent because “most rules of contract law are designed to fill gaps in a contract which the parties could themselves have filled with express provisions.” Appellant’s assertion that contractual terms need not be written begs the question whether in this case the parties mutually intended any particular state’s laws to govern their contract.

¹¹ At the pages cited, appellant quoted an argument appellant made in his opposition to White’s demurrer to the complaint—in essence, that when the oral agreements were entered, neither party suggested they would be governed by the laws of foreign states, and that California had a legitimate state interest in protecting employees from wrongful dismissal, breach of contract, fraud and other claims.

Appellant’s supplemental response to White’s in limine motion on choice of law additionally urged that White’s agent paying appellant from San Francisco was the same as White himself paying appellant from San Francisco, and effectively the same as if appellant was working for an entity with head offices in San Francisco; that some of appellant’s work for White involved meetings in San Francisco; that appellant’s stays in

In essence, appellant argued below, as he does on appeal, that he expected California law to apply and that because of the parties' connection to California, it is most reasonable to conclude White shared this expectation. The circumstances reflected in the record defy this conclusion: For several years preceding May 31, 2007, when the alleged agreement was entered, appellant had been living in Thailand and White had been imprisoned in either Thailand or Mexico; White, according to his declarations, had not resided in San Francisco or had a California driver's license since the early 2000's, had been a permanent resident of Puerto Vallarta since 2002, and had become a citizen of Cambodia in 2006. But putting aside these indications that White (at least) had severed ties with California—at least some of which appellant claims are untrue—the critical point is that appellant cannot rely upon the principle that the parties' intent controls which state's law governs their contract without establishing that they actually considered the issue and addressed it in the contract. As just stated, even proof that both parties, "*if they had thought* about the matter, *would have* wished to have the law of a particular state applied" is insufficient to trigger the rule of Restatement Second Contracts section 187. (Rest.2d Contracts, § 187, com. a, italics added.)

Thailand and Mexico were temporary and tied to White's legal proceedings in those jurisdictions; that White's stays in these countries were temporary because the conviction for which he was incarcerated was under appeal; that White had no basis to claim residency in Thailand or Mexico because his United States indictment would have prevented him from obtaining legal visas for either country; and that White retained extensive ties to California as discussed above.

¹² Appellant's declaration stated that the parties understood Thailand was a temporary location for appellant's employment and they would return to the United States after White resolved his legal problems; that appellant understood the employment relationship would be governed by California law because both parties were United States citizens who resided in the United States and neither expressed anything to question his understanding that the employment was "bound by US law" because he was paid from the United States by White's agent; that he knew he would have to pay United States taxes on his earnings; that he expected White's accountants to arrange for payment of his social security taxes; and that he was paid via wire transfers originating in San Francisco by White's agent, whose office was located in or around San Francisco.

Appellant further argues that instead of section 1646, the trial court should have made its choice of law determination by application of the governmental interests analysis. Under that test, which has been called the “most prevalent modern choice-of-law rule in California” and “sometimes labeled California’s modern choice-of-law rule” (*Frontier Oil Corp. v. RLI Ins. Co.* (2007) 153 Cal.App.4th 1436, 1454 (*Frontier*)), “the court first determines whether the applicable rules of law of the potentially concerned jurisdictions are the same or different. If the applicable rules of law are identical, the court may apply California law. If the applicable rules of law differ materially, the court proceeds to the second step, which involves an examination of the interests of each jurisdiction in having its own law applied to the particular dispute. If each jurisdiction has an interest in applying its own law to the issue, there is a ‘true conflict’ and the court must proceed to the third step. In the third step, known as the comparative impairment analysis, the court determines which jurisdiction has a greater interest in the application of its own law to the issue or, conversely, which jurisdiction’s interest would be more significantly impaired if its law were not applied. The court must apply the law of the jurisdiction whose interest would be more significantly impaired if its law were not applied. (*Kearney v. Salomon Smith Barney, Inc.* (2006) 39 Cal.4th 95, 107-108 . . . ; *Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 919-920)” (*Frontier*, at pp. 1454-1455.)

Whether a conflict of laws question should be decided under section 1646 or under the governmental interests test depends on the issue presented in a given case. As explained in *Frontier*, “the governmental interest analysis as developed by the California Supreme Court . . . does not supplant the legislative command of section 1646.” (*Frontier*, at p. 1454.) “[N]otwithstanding the application of the governmental interest analysis to *other* choice-of-law issues, Civil Code section 1646 is the choice-of-law rule that determines the law governing the *interpretation* of a contract.” (*Frontier*, at pp. 1442-1443.)

Thus, for example, section 1646 would govern where the issue before the court required interpretation of contractual provisions, while the governmental interests

analysis would be applied to a case presenting an issue involving imposition of a rule of law independent of the parties' intentions. In one case discussed in *Frontier*, the question was whether an excess insurer could be required to provide indemnity for punitive damages. (*Frontier, supra*, 153 Cal.App.4th at pp. 1460-1461, discussing *Stonewall Surplus Lines Ins. Co. v. Johnson Controls, Inc.* (1993) 14 Cal.App.4th 637.) California law precluded liability on public policy grounds. The insured argued for application of a different state's law, which would permit the insured to recover. The governmental interests analysis governed the choice of law question because the issue "concerned the existence of a right of indemnity for punitive damages and did not involve an issue of contract interpretation." (*Frontier*, at pp. 1460-1461.) *Frontier* itself held that the issue of whether a contract included a duty to defend a certain type of claim was a matter of contract interpretation as to which the conflict of law question would be governed by section 1646. (*Id.* at pp. 1442-1443.)

In the present case, it is not necessary for us to decide whether the issue presented is interpretation of the contract or, as suggested by the court's ultimate conclusion, validity of the contract. Under either the statutory rule or the governmental interests analysis, the trial court was correct in concluding that Mexican law applied.¹³

¹³ Application of the rules established in the Restatement would lead to the same conclusion: "In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include: [¶] (a) the place of contracting, [¶] (b) the place of negotiation of the contract, [¶] (c) the place of performance, [¶] (d) the location of the subject matter of the contract, and [¶] (e) the domicile, residence, nationality, place of incorporation and place of business of the parties. [¶] These contacts are to be evaluated according to their relative importance with respect to the particular issue." (Rest.2d Contracts, *supra*, § 188.)

Section 6 of the Restatement Second (Conflicts of Law) provides, "(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law. [¶] (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include [¶] (a) the needs of the interstate and international systems, [¶] (b) the relevant policies of the forum, [¶] (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, [¶] (d) the protection of justified expectations, [¶] (e) the basic policies

Considering the statutory rule first, “[s]ection 1646 states that a contract is to be interpreted according to the law and usage of the place it is to be performed if the contract ‘indicate[s] a place of performance’ and according to the law and usage of the place it was made if the contract ‘does not indicate a place of performance.’ A contract ‘indicate[s] a place of performance’ within the meaning of section 1646 if the contract expressly specifies a place of performance or if the intended place of performance can be gleaned from the nature of the contract and its surrounding circumstances.” (*Frontier, supra*, 153 Cal.App.4th at p. 1443, fn. omitted.)

The trial court found that “most of the provisions” of the contract were to be performed in Mexico and that the contract was entered into in Mexico. There is no question as to the place the contract was entered. Appellant contends, however, that the court erred in concluding Mexico was the contemplated place of performance. He argues that he performed his obligations under the alleged contract while in Thailand and the United States, as well as in Mexico, as reflected in his declaration in support of his motion to vacate judgment, which stated that of the days he spent performing these services, nine were in San Francisco, 79 were in Thailand and 66 were in Mexico. His services were performed, he urges, mainly through email correspondence and internet research while he was in Thailand, and he met with White’s attorneys in San Francisco to confer with them about the retainer agreement he was negotiating with the new legal team. Further, appellant claims, his services under the contract included attempting to acquire evidence that the alleged victim in the Mexico case was being paid by conspirators who resided in California to make false claims against White, evidence that would be provided both to the Mexican attorneys and to White’s San Francisco attorneys, who were defending him in a lawsuit involving the same conspirators’ claims that White had sexually abused Mexican street children. Additionally, the contract

underlying the particular field of law, [¶] (f) certainty, predictability and uniformity of result, and [¶] (g) ease in the determination and application of the law to be applied.”

contemplated White's agent in California making payments on the retainer from White's United States bank account, and paying appellant from that account as well.

The contract alleged in appellant's amended complaint called for White to pay appellant a specified bonus if appellant located a new legal team, convinced it to represent White, successfully negotiated a retainer agreement with the new team, and the new team obtained a reversal of White's rape conviction. Since the alleged contract did not expressly specify a place of performance, it can be viewed as indicating a place of performance for purposes of section 1646 only if "the intended place of performance can be gleaned from the nature of the contract and its surrounding circumstances." (*Frontier, supra*, 153 Cal.App.4th at p. 1443.) Appellant's argument focuses not on the *intended* place of performance but on the places where he in fact physically performed services called for by the contract. But the purpose of section 1646 "is to determine the choice of law with respect to the interpretation of a contract in accordance with the parties' presumed intention *at the time they entered into the contract.*" (*Frontier*, at p. 1449, italics added.) It is undisputed that the alleged contract was entered in Mexico, where White was incarcerated. The clear purpose of the contract was to secure a team of attorneys to obtain a reversal of White's rape conviction. White had been convicted by a Mexican court of a rape committed in Mexico and the appeal would be to a Mexican court. While the allegations of the complaint do not further describe the "new" legal team to be assembled, the circumstances make it apparent that Mexican attorneys would be involved. Evidence appellant submitted to the trial court documents that appellant's meeting with White's lawyers in San Francisco, to which appellant refers in his argument that the contract was performed, in part, in the United States, was for the purpose of updating the attorneys on "things in Mexico," with specific reference to negotiations with White's "new Mexican attorneys."

Considering the purpose and terms of the alleged contract, if it can be said that a particular place of performance was contemplated at the time the agreement was entered, it was Mexico. Certainly nothing in the terms of the contract pointed to California or any other specific jurisdiction as the intended place of performance. And if it is accepted that

the contract did not specify a place of performance, section 1646 would call for the interpretation of the contract to be governed by the place it was made—Mexico.

Under the governmental interests analysis, there is clearly a material difference in the applicable rules of law, as Mexican law appears to require a contract of the type at issue here to be in writing while California law does not. Mexico has an interest in having its law applied to the dispute over a contract entered into in Mexico and concerning events taking place in Mexico. California’s interest in the controversy is far less clear. At the time the contract was entered, it had been at least several years since either party had resided in California,¹⁴ and the subject matter of the contract had nothing to do with California. The fact that there were minimum contacts with California sufficient to support jurisdiction in the courts of this state does not demonstrate an interest in the controversy substantial enough to overcome Mexico’s obvious interest.

It is true that application of Mexican law—if the trial court’s conclusion was correct—would result in invalidating a contract that California law would recognize as valid. Appellant argues that California law should have been applied to avoid this result. “Generally speaking: “The basic policy in the field of contracts is protection of the justified expectations of the parties. Parties will generally enter into a contract with the expectation that the provisions of the contract will be binding on them. These expectations ‘should not be disappointed by application of the local law rule of a state which would strike down the contract or a provision thereof unless the value of protecting the expectations of the parties is substantially outweighed in the particular case by the interest of the state with the invalidating rule in having this rule applied.’” (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 65, p. 109.)” (*Maxim Crane Works, L.P. v. Tilbury Contractors* (2012) 208 Cal.App.4th 286, 291.) But the fact that a

¹⁴ Appellant’s interrogatory responses, as well as invoices submitted to the court by White’s attorney, indicated that appellant had resided in Thailand from 2004 to the time of the proceedings. White claimed to have been a permanent resident of Mexico since 2002, and he had been incarcerated in Thailand and then Mexico since at least 2005.

jurisdiction's law would not recognize a contract, in and of itself, cannot be the basis for applying the law of a jurisdiction with far less interest in the controversy in question.

Turning to the trial court's application of Mexican law, as we have said, both parties submitted evidence—the opinions of Mexican lawyers as requested by the trial court—that Mexican law required the type of contract appellant alleged to be in writing unless ratified in court by the defendant. The trial court's conclusion that the alleged oral contract was not enforceable under Mexican law was dictated by this evidence.

Appellant complains that the trial court abused its discretion in discounting his objection that the legal opinion on Mexican law White presented to the court was likely to be biased because it came from an attorney White had employed for over 10 years. Appellant urges it was “inconceivable” White's attorney would provide an opinion unfavorable to his client, and suggests his suspicion of bias was confirmed by the attorney locating a Mexican statute that “claimed to render the parties' contract void.” He argues that the trial court denied him a reasonable opportunity to locate Mexican law relevant to the case, and complains that he was disadvantaged as a pro. per. litigant facing a seasoned attorney with a wealthy client.

Appellant was not entitled to special treatment or greater leniency due to his status as an in propria persona litigant. “Under the law, a party may choose to act as his or her own attorney. (*Paradise v. Nowlin* (1948) 86 Cal.App.2d 897, 898; *Gray v. Justice's Court* (1937) 18 Cal.App.2d 420, 423.) ‘[S]uch a party is to be treated like any other party and is entitled to the same, but no greater consideration than other litigants and attorneys. [Citation.]’ (*Barton v. New United Motor Manufacturing, Inc.* (1996) 43 Cal.App.4th 1200, 1210.)” (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246-1247.)

The court sought input from both parties as to the applicable Mexican law by having them jointly draft the questions each was to put to a Mexican attorney. We agree with appellant that the court allotted **too** little time for the parties to obtain the legal opinions that would then define the law applicable to the case. The court instructed the parties on Thursday January 17, 2013, to draft questions on the issues before the court for submission to attorneys in Mexico chosen by each party. The record does not reflect

what deadline the court set for submitting the required information, but the hearings at which the court received the parties' input were held on Wednesday and Thursday, January 23 and 24, 2013, after a Monday court holiday for Martin Luther King Day. The court thus allowed the parties less than a week to obtain responses from lawyers in Mexico to the questions intended to establish the law applicable to the case, despite its knowledge that White had access to legal counsel in Mexico and appellant did not,¹⁵ and despite appellant's request for additional time.¹⁶

But appellant provided the fruits of his further research into Mexican law in the motion to vacate judgment he filed on February 19, almost a month after the parties were first directed to obtain legal opinions on Mexican law. In addition to his argument that "the task of acquiring English language translations of Mexican laws relevant to the issues in this case placed unrealistic expectations upon the plaintiff in light of the fact the court ordered this be done in 4-days, three of which fell on a holiday weekend," appellant urged that the court should have obtained more reliable information about Mexican law, and that it "neglected to consider whether a Mexican court would limit the scope of laws it decided to use in making a determination in this case to only those laws specifically related to plaintiff's stated causes of action or whether it could decide a COA was improperly plead [*sic*] and allow any necessary modifications to correct improper pleadings."

¹⁵ In the supplemental response to the in limine motion he filed on January 22, appellant urged that because White had a longstanding relationship with his attorney in Mexico, the opinion obtained from that attorney was likely to be unreliable in that the attorney would seek out laws favoring his client's position. Appellant further urged that he did not have any similar relationship with an attorney in Mexico from whom he could obtain an opinion favoring his position.

¹⁶ On January 23, appellant asked the court for additional time to consult further with an attorney from Mexico; this request was apparently denied, as the minutes reflect a notation at 10:30 a.m. that the court "grants plaintiff additional time (1:30 p.m.) to determine what, if anything is left in his first amended complaint to go to trial in light of the fact that the court has determined that Mexican Law applies to enforcement of the contract."

Appellant quoted a number of Mexican statutes he viewed as providing him avenues of recovery. For example, to demonstrate that Mexican law provided for enforcement of oral contracts, appellant quoted Article 2234 of the Mexican Civil Code as providing, “Voluntary fulfillment through payment, novation, or in any other manner, is considered as tacit ratification and extinguishes the action of nullity.” Appellant argued that this provision would be satisfied by the email from White to appellant, in which White stated that in the “retainer agreement” he had promised appellant a “\$100,000 bonus if things went as what was promised” but not a \$350,000 to \$500,000 bonus. As we have noted, the trial court had commented that this email “bolstered” appellant’s case. Among others, appellant offered provisions he interpreted as allowing a party to overcome the absence of a writing by proving the parties’ intent to enter into a contract,¹⁷ and as authorizing the court to sign the necessary documents if the obligor refused to “give legal form” to an agreed upon contract.¹⁸ He also urged that Mexican law protected against unjust enrichment, quoting Article 1882 of what he described as “Book Fourth of Obligations, Contracts, Chapter III, Of Illegal Enrichment: “He who without consideration enriches himself to the detriment of another is obliged to indemnify the latter for the latter’s impoverishment in the measure to which he enriched himself.” (Italics omitted.)

Taken purely at face value, some of the statutes appellant offered suggest that Mexican law might temper the single governing rule the trial court applied to find the

¹⁷ “When the lack of form produces the nullity of an act, if the intention of the parties has remained constant in an indubitable manner and the act in question is not a revocable act, any of the interested parties may demand that the act be executed in the form required by law.” (Mex. Civ. Code, art. 2232.)

¹⁸ “If the obligor refuses to sign the documents necessary to give legal form to the contract agreed upon, they shall, in his default, be signed by the judge; except in the case where the thing offered has passed for a valuable consideration to the ownership of a third person in good faith; in this case, the promise remains without effect and he who made it is liable for all the damages and losses caused to the other party.” (Mex. Civ. Code, art. 2247.)

alleged oral contract unenforceable.¹⁹ But nothing in the record before us provides any means to assess the reliability of appellant’s sources of Mexican law or accuracy of their translations from the Spanish, nor any guidance regarding the interpretation of these provisions, their scope and proper application. The overview of Mexican law supplied by White’s Mexican attorney explains that while the Mexican legal system relies comparatively more on codes and less on caselaw than does that of the United States, “case law in Mexico should not be ignored” and “just because Mexican law is less voluminous and in some ways more manageable than U.S. law does not mean that the outcome of its application is always predictable.” (Italics omitted.)

The trial court denied appellant’s motion to vacate judgment in a minute order stating, “Having considered all papers and evidence submitted, and hearing argument from parties, and good cause appearing therefor, the court denied plaintiff’s motion to vacate judgment. [¶] [Respondents’ attorney] to prepare an Order and submit to Dept. 220 for signing.” No further order appears in the record. Given the absence of a reporter’s transcript of the hearing on the motion to vacate judgment, we have no way to determine whether the trial court fully considered the substance of the provisions of law appellant offered and argument from the parties about their meaning and application, or acceded to one or more of respondents’ various procedural objections to consideration of the material.²⁰ “ ‘In the absence of a transcript the reviewing court will have no way of

¹⁹ On the other hand, it is not difficult to find reason to question the literal interpretation appellant attaches to these provisions. For example, it appears from an exhibit attached to appellant’s opening brief, that Article 2247 of the Mexican Civil Code, which appears to give the judge authority to sign a contract the obligor refuses to put into written form (see fn. 18, *ante*) is part of a section of the code entitled “Of Preparatory Contracts – The Promise,” which deals with “a promise to contract” or “contract preliminary to another.” (Mex. Civ. Code, art. 2244.) Appellant does not point to a similar provision for saving an oral contract of some other type.

²⁰ Respondents argued that appellant’s memorandum in support of his motion to vacate judgment was not timely; that appellant did not object at trial to the method by which the court obtained opinions on Mexican law and presented an opinion consistent with that of White’s Mexican attorney; and that the Mexican law appellant cited should be disregarded as lacking foundation and because appellant did not provide Spanish

a request to amend has been denied, an appellate court is confronted by two conflicting policies. On the one hand, the trial court's discretion should not be disturbed unless it has been clearly abused; on the other, there is a strong policy in favor of liberal allowance of amendments. This conflict “is often resolved in favor of the privilege of amending, and reversals are common where the appellant makes a reasonable showing of prejudice from the ruling.” ’ (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 296-297.) If the original pleading has not framed the issues in an articulate and precise manner, a plaintiff should not be precluded from having a trial on the merits.” (*Honig v. Financial Corp. of America* (1992) 6 Cal.App.4th 960, 965.)

“Generally, a trial court abuses its discretion by dismissing an action after granting a demurrer or motion to strike where a reasonable possibility exists that a defect in the pleading can be cured by amendment.” (*Central Concrete Supply Co., Inc. v. Bursak* (2010) 182 Cal.App.4th 1092, 1101-1102.) But the “ ‘plaintiff bears the burden of proving there is a reasonable possibility of amendment.’ (*Rakestraw v. California Physicians’ Service* (2000) 81 Cal.App.4th 39, 43) To satisfy that burden, the plaintiff ‘ “must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.” [Citation.] The assertion of an abstract right to amend does not satisfy this burden. [Citation.] The plaintiff must clearly and specifically set forth the “applicable substantive law” [citation] and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, the plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action. [Citations.] . . . [¶] The burden of showing that a reasonable possibility exists that amendment can cure the defects remains with the plaintiff; neither the trial court nor this court will rewrite a complaint. [Citation.] Where the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend. [Citations.]’ (*Id.* at pp. 43–44.)” (*Rosen v. St. Joseph Hospital of Orange County* (2011) 193 Cal.App.4th 453, 458-459.)

Here, on January 24, after the court explained to appellant that there was no need to proceed with presentation of evidence because “the entire action [was] predicated upon an unenforceable contract,” appellant moved to amend his complaint “to augment his status as an employee under the Mexican Law which applies to day laborers.” If appellant further explained his proposed theory of recovery, the record before us does not disclose it. Nothing in the facts alleged in the existing complaint suggested appellant served as a “day laborer.” And appellant does not suggest on this appeal that he should be permitted to amend to allege such a theory.

After the trial court entered judgment, in his motion to vacate that judgment, appellant asked the court “to permit him to amend his claim so he can include a claim for Breach of Employment Contract and for Quantum Meruit which the attorney the plaintiff hired to write the complaint failed to do.” He did not discuss the elements of the proposed causes of action or how they would avoid the problems met by his previously asserted claims. Nor does he provide a further explanation on appeal. In his opening brief, appellant’s entire argument is as follows: “The trial court abused its discretion when it denied [Kelly’s] request to amend his complaint [record citation] to include a claim for breach of employment contract so it could survive a motion for non-suit in spite of [Kelly’s] request he be allowed to do so since the attorney he hired to write his complaint made an error by not including the correct contract claim which fact did not come to [Kelly’s] attention until trial.” In his reply brief, appellant contests respondents’ arguments that they would be prejudiced by an amendment at this late date and discusses the general policy of liberally allowing amendment of pleadings, but provides no further detail as to the substance of his new claims.

With respect to the proposed claim for breach of employment contract, this failure is fatal: Appellant offered the court no explanation of how he could state such a cause of action independent of the two bonus contracts that had been found not to support a cause of action for breach. The situation is different with respect to the suggestion of a claim for quantum meruit, as nothing in the court’s ruling demonstrates such a claim could not survive. But, so far as the record shows, appellant has presented nothing to demonstrate

is *could* survive, and it was his burden to do so. (*Rosen v. St. Joseph Hospital of Orange County, supra*, 193 Cal.App.4th at pp. 458-459.) The closest appellant came to explaining how his complaint could be amended to state a cause of action for quantum meruit was the quotation set forth above about “illegal enrichment,” which was presented in the motion to vacate as part of appellant’s argument that the trial court erred in concluding that the absence of a written contract precluded all means of enforcing the agreement. His request to amend included no explanation of how this provision is applied under Mexican law. Again, the absence of a reporter’s transcript is fatal. The court heard argument on appellant’s motion to vacate but, without a transcript, we have no record of what was or was not discussed concerning the request to amend. In the absence of a reporter’s transcript, “ ‘no abuse of discretion can be found except on the basis of speculation’ ” (*Snell v. Superior Court, supra*, 158 Cal.App.3d at p. 49.)

DISPOSITION

The judgment is affirmed. Parties to bear their own costs.

Kline, P.J.

We concur:

Richman, J.

Stewart, J.