FILED
United States Court of Appeals
Tenth Circuit

August 30, 2021

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SAMANTHA GERSON,

Plaintiff - Appellant,

v.

LOGAN RIVER ACADEMY, d/b/a Maple Rise Academy,

Defendant - Appellee,

and

DOES, 1 through 11,

Defendants.

No. 20-4074

Appeal from the United States District Court
for the District of Utah
(D.C. No. 1:20-CV-00010-DB)

Alan S. Mouritsen (Michael W. Young with him on the briefs), Parsons Behle & Latimer, Salt Lake City, Utah, for Appellant.

Molly M. Loy (Thomas E. Beach with her on the brief), Beach Cowdrey Jenkins, LLP, Oxnard, California, for Appellees.

Before **HARTZ**, **BRISCOE**, and **CARSON**, Circuit Judges.

HARTZ, Circuit Judge.

At the age of 15, Plaintiff Samantha Gerson was allegedly sexually abused by an employee (the Perpetrator) at Logan River Academy, a residential treatment facility in Logan, Utah. She filed suit against Logan River a decade later in the United States District Court for the Central District of California (the Central District), from which the case was transferred to the United States District Court for the District of Utah. Logan River moved to dismiss on the ground that the suit was barred by Utah's applicable statute of limitations. Ms. Gerson responded that the suit was timely under California law. The district court applied California's choice-of-law doctrine, determined that Utah's statute of limitations governed, and granted the motion to dismiss. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

I. BACKGROUND

Because this case comes to us on review of a dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim, we accept as true the well-pleaded allegations in Ms. Gerson's complaint. *See Brooks v. Mentor Worldwide LLC*, 985 F.3d 1272, 1281 (10th Cir. 2021). Although the statute of limitations is an affirmative defense, *see* Fed. R. Civ. P. 8(c)(1), a dismissal on that ground is permissible if "the complaint itself admits all the elements of the affirmative defense by alleging the factual basis for those elements." *Fernandez v. Clean House, LLC*, 883 F.3d 1296, 1299 (10th Cir. 2018).

Ms. Gerson was a California resident and high school student in Beverly Hills. On October 15, 2008, Logan River staff members came to her school and transported her to Logan River. Ms. Gerson claims she was taken from California involuntarily and against

her will.[1] While at Logan River, the Perpetrator repeatedly sexually abused Ms. Gerson until April 2009. She continues to suffer physically and emotionally from her ordeal.

In June 2019 Ms. Gerson—then 25—filed suit in the Central District[2] against Logan River and 11 unknown and unnamed individuals and entities, not including the Perpetrator. She pleaded eight causes of action based on allegations that the defendants knew or had reason to know of the Perpetrator's unlawful sexual conduct but covered it up and failed to properly supervise the Perpetrator. Logan River responded by moving to dismiss the complaint or, alternatively, transfer the case to federal court in Utah. The Central District granted the motion to transfer because Ms. Gerson could have brought

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[1] Although the complaint alleges that Logan River staffers "abducted and kidnapped" her from her high school, Aplt. App. at 11, Ms. Gerson has abandoned that characterization on appeal. Instead, both in her appellate briefing and at oral argument, Ms. Gerson repeatedly characterized her removal as involuntary and against her will. *See* Aplt. Br. at 21, 24 (involuntary); *id.* at 1, 3, 5, 21, 23 (against her will). We will have more to say about this particular language later in the opinion.

[2] The federal court had diversity jurisdiction under 28 U.S.C. § 1332. But jurisdiction was not established by the complaint. It recognized that Logan River is organized as a Utah LLC, yet it characterized Logan River as a traditional "corporation incorporated in the State of Utah" for purposes of invoking federal jurisdiction. Aplt. App. 10. This was error. "[A]n LLC, as an unincorporated association, takes the citizenship of all its members." *Siloam Springs Hotel, L.L.C. v. Century Sur. Co.*, 781 F.3d 1233, 1234 (10th Cir. 2015). And "where an LLC has, as one of its members, another LLC, the citizenship of unincorporated associations must be traced through however many layers of partners or members there may be to determine the citizenship of the LLC." *Zambelli Fireworks Mfg. Co. v. Wood*, 592 F.3d 412, 420 (3d Cir. 2010) (internal quotation marks omitted). The error apparently went unnoticed until we sua sponte issued an order directing Logan River to identify the citizenship of each of its members. Logan River's response reported three members: two natural persons of Utah citizenship and one Delaware LLC. Because this response failed to provide any information on the members of the Delaware LLC, we issued a second order seeking that information. Logan River's second response assures us that there is complete diversity among the parties.

her action in Utah and because on balance the convenience of the parties and witnesses, as well as the interest of justice, favored transfer. *See* 28 U.S.C. § 1404(a). Once in Utah, Logan River again moved to dismiss, arguing that Utah law governed and the applicable Utah statute of limitations barred the claims. In response, Ms. Gerson did not dispute that her claims would be barred under Utah law but argued that California law governed and her claims were timely under the applicable California statute of limitations. The district court agreed with Logan River. Applying California choice-of-law principles, it decided that Utah substantive law governed because it was the State whose interests would be more significantly impaired if its law were not applied to this case. It dismissed the complaint as time-barred under Utah law.

II. DISCUSSION

The sole issue on appeal is whether Utah's or California's statute of limitations applies. There is much debate about how to decide which State's substantive law should govern a dispute that has connections with more than one State, with one leading commentator having identified seven approaches in use among the 50 States. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2019: Thirty-Third Annual Survey*, 68 Am. J. Comp. L. 235, 259 (2020) (*2019 Annual Survey*). A highly influential approach is that adopted by the Restatement (Second) of Conflict of Laws, whose guiding principle for tort claims is to apply the law of the State with the "most significant relationship" to the parties and the occurrence with respect to the issue in question. Restatement (Second) of Conflict of Laws §§ 6, 145 (1971); *see* Gregory E. Smith, *Choice of Law in the United States*, 38 Hastings L.J. 1041, 1044–46 (1987). But

that approach is far from universally accepted. *See* Symeonides, *2019 Annual Survey* at 259 (cataloging each State's choice-of-law approach and identifying 25 States that follow Restatement (Second) of Conflict of Laws for tort claims). Accordingly, our first task is to determine what choice-of-law rules apply to this case.

When exercising diversity jurisdiction under 28 U.S.C. § 1332, a district court ordinarily applies the choice-of-law rules of the State in which it sits. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); *Brooks*, 985 F.3d at 1278 n.1. But when, as here, a case lands in a forum by way of transfer under 28 U.S.C. § 1404(a) on a motion by the defendant, the transferee court generally must use the choice-of-law rules that would have prevailed in the transferor court. *See Ferens v. John Deere Co.*, 494 U.S. 516, 519 (1990); *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964). *But see Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 65–66 (2013) (when transfer is ordered to effectuate a valid contractual forum-selection clause, the choice-of-law rules of the transferee court apply). Because Ms. Gerson initially filed this case in the Central District, we use California's choice-of-law rules to determine which State's law should apply. We review de novo the district court's choice-of-law determination. *See Carolina Cas. Ins. Co. v. Burlington Ins. Co.*, 951 F.3d 1199, 1207 (10th Cir. 2020).

A. California's Choice-of-Law Rules

California has long been recognized as the leading proponent of so-called governmental-interest analysis to resolve conflicts of laws arising from tort claims. *See McCann v. Foster Wheeler LLC*, 225 P.3d 516, 524 (Cal. 2010); *see also* Symeonides, *2019 Annual Survey* at 259 (cataloging California as the only State (along with the

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