

No Publication**(Cite as: 1999 WL 343427 (Tex.App.-Amarillo))**

Only the Westlaw citation is currently available.

NOTICE: NOT DESIGNATED FOR PUBLICATION. UNDER TEX.R.APP.P. 47.7 UNPUBLISHED OPINIONS MAY NOT BE CITED AS AUTHORITY.

Court of Appeals of Texas, Amarillo.

Richard Clarence LUEDTKE, Appellant
v.
BHP PETROLEUM (AMERICAS) INC., Appellee

No. 07-97-0442-CV.

April 12, 1999.

From the 334th District Court of Harris County; No. 96-25521; Honorable Russell Lloyd, Judge.

Before [BOYD](#), C.J., and [QUINN](#) and [REAVIS](#), JJ.

[BOYD](#), Chief Justice.

*1 Richard Luedtke (Luedtke) brings this appeal from a take-nothing summary judgment in favor of BHP Petroleum (Americas) Inc. (BHP Americas) with respect to Luedtke's claims for breach of contract, defamation, and invasion of privacy. In the suit, Luedtke asserted BHP Americas was liable as his direct employer, or alternatively, as an alter ego or participant in a single business enterprise. In two points of error, Luedtke asserts the trial court erred in entering the judgment 1) without first permitting him an opportunity to take two "material and necessary" depositions, and 2) because the evidence raises material questions of fact regarding the existence of an employment relationship between Luedtke and BHP Americas. For reasons we later express, we reverse the summary judgment.

In May of 1983, Luedtke, a Texas resident, accepted employment with Hamilton Brothers Oil Company. He commenced expatriate assignment in London, U.K., with a subsidiary of Hamilton Brothers Oil Company, Hamilton Brothers Oil and Gas Limited.

In March 1991, The Broken Hill Proprietary Company Limited, an Australian company, and one of its subsidiaries, BHP Holdings (USA) Inc., entered into a merger with Hamilton Oil Corporation, at the time the parent of the above Hamilton subsidiaries. BHP Holdings (USA) Inc. was the surviving corporation. After the merger, Hamilton Brothers Oil and Gas Limited became known as BHP Petroleum Limited. Following subsequent transfers of ownership, BHP Petroleum Limited and BHP Americas were subsidiaries of the common parent, BHP Holdings (International) Inc.

Luedtke continued employment in London throughout the acquisition of Hamilton by BHP Petroleum and, in early 1995, became the Vice-President of International Operations. The parties dispute whether Luedtke served in this capacity solely for BHP Petroleum or whether it was for the benefit of the group of companies. At some point during the transition, Hamilton ceased payrollling Luedtke, and BHP Americas assumed responsibility for payrollling BHP expatriates working in the UK (as well as other countries in which the BHP Group had subsidiaries). In 1994, Luedtke received a memorandum on combination BHP/Hamilton letterhead indicating he would continue to be administered under the old Hamilton Oil Expat policy until further notice, that his balance sheets would be administered by Dean Courtenay with BHP Petroleum in Melbourne, that his benefits would be provided by, and administered under, BHP Petroleum Americas in Houston, and if he had any questions regarding payroll, benefits, salary, etc., to contact Laura Guthrie in Houston.

For some time prior to, and during, the time in question, Luedtke's immediate supervisor was Howard Paver, the President and Group General Manager of BHP Petroleum Limited. In February of 1996, Luedtke was informed by Paver that an anonymous letter had been sent to John O'Connor and Mike Baugh [\[FNI\]](#) in Australia, suggesting that Luedtke had engaged in irregular contracting practices and had accepted kickbacks. As a consequence, the Arthur Andersen firm in London was hired to undertake an investigation into the matter. The parties dispute whether, and to what extent, the investigation revealed any wrongdoing on Luedtke's part. Nevertheless, the process culminated in Paver terminating Luedtke's employment on March 13, 1996.

No Publication**(Cite as: 1999 WL 343427 (Tex.App.-Amarillo))**

FN1. At the time of the filing of the suit, O'Connor was the Executive General Manager over the BHP petroleum group of companies, which is composed of BHP Petroleum Limited (UK), BHP Americas (United States), BHP Hawaii, Inc., and BHP Petroleum Pty. Ltd. (Australia). Mike Baugh was the president and Group General Manager of BHP Petroleum Pty. Ltd. in Australia.

*2 On May 21, 1996, Luedtke filed suit in Houston against BHP Americas. In the suit, he asserted claims for breach of contract, defamation, and invasion of privacy. Respectively, Luedtke claimed he was terminated without good cause, thereby breaching his 1983 letter agreement employment contract; that BHP Americas made false statements to third parties regarding the conditions of his departure from BHP, actionable as defamation; and that his privacy was invaded when BHP Petroleum Limited confiscated his lap top computer for the purpose of viewing his e-mail which was personal in nature, and his personal papers were sent to Howard Paver for review, although Luedtke had requested that the papers be returned to him. Luedtke based his claims against BHP Americas upon the allegation that BHP Americas was his employer, or alternatively, that BHP Americas and BHP Petroleum Limited were either alter egos or part of a single business enterprise.

In furtherance of his discovery efforts, Luedtke sought the trial court's assistance, as well as international judicial assistance, in obtaining the depositions of Simon Bevan (the investigator for Arthur Andersen) and Howard Paver in London. On June 20, 1997, the trial court entered an order in which it found that the witnesses "are witnesses who have knowledge of relevant facts, and their testimony is material and necessary to the trial of this cause," and authorized the pursuance of proceedings to obtain the depositions in accordance with the Hague Evidence Convention and the law of England if that convention be incompatible with the law of England. However, during the pendency of the deposition efforts, on July 10, 1997, BHP Americas filed its motion seeking summary judgment as to each of Luedtke's claims. [FN2] The judgment granting the motion gives rise to this appeal.

FN2. The motion states in its entirety:

Pursuant to Tex.R. Civ. P. 166a, BHP Petroleum (Americas), Inc. ("BHP Americas") moves the court for Summary Judgment on Plaintiff's claims of breach of contract, defamation, and invasion of privacy. As established in Defendant's Brief in Support of its Motion for Summary Judgment, filed contemporaneously herewith, the claims asserted by Plaintiff in his Original Petition fail as a matter of law. The arguments presented to the trial court only appear in the supporting brief. Although under the dictates of McConnell v. Southside Independent School Dist., 858 S.W.2d 337, 342 (Tex.1993), the motion might facially appear to be insufficient, the language used appears to be sufficient to incorporate the brief's argument in the motion. See Howell v. Murray Mortg. Co., 890 S.W.2d 78, 85 (Tex.App.--Amarillo 1994, writ denied).

In his first point of error, Luedtke asserts the trial court abused its discretion in granting summary judgment without first permitting him to take the depositions of Bevan and Paver in London. Luedtke sought a continuance or a denial of the motion for summary judgment based upon the need to engage in discovery, and claimed that without the two crucial depositions, he would be unable to obtain testimony containing facts essential to justify his opposition to BHP's motion.

Although a trial court can presume that a plaintiff has investigated his own case prior to filing, the presumption does not deny a plaintiff the right to engage in necessary discovery prior to the granting of a summary judgment. Leventhal v. Kelsey-Seybold Clinic, P.A., 902 S.W.2d 508, 511 (Tex.App.--Houston [1st Dist.] 1994, no writ). Rule 166a(g) provides that a trial court may grant a continuance to permit discovery when it appears from the affidavits of a party opposing summary judgment that he cannot present facts sufficient to justify his opposition for reasons stated. Tex.R. Civ. P. 166a(g). The granting of such a continuance is within the trial court's discretion, and we will not disturb the trial court's denial of such a motion except for a clear abuse of discretion. Villegas v. Carter, 711 S.W.2d 624, 626 (Tex.1986); Verkin v. Southwest Center One, Ltd., 784 S.W.2d 92, 94 (Tex.App.--Houston [1st Dist.] 1989, writ denied). In deciding whether the trial court abused its discretion in denying the

(Cite as: 1999 WL 343427 (Tex.App.-Amarillo))

continuance, we must consider the following nonexclusive list of factors: 1) the length of time the case had been on file; 2) the materiality of the discovery sought; and 3) whether due diligence was exercised in obtaining the discovery. [Levinthal v. Kelsey-Seybold Clinic, P.A., 902 S.W.2d at 510.](#)

*3 In his summary judgment response, Luedtke stated the testimony of Howard Paver, his immediate supervisor in London, was necessary to "fully rebut BHP Americas' argument that it bears no responsibility for the injuries incurred by Luedtke" and that it was "crucial in order to determine the extent to which the various BHP entities (including BHP Americas and Limited) coordinated their work, their functions, their employees, and their consultants." Likewise, Luedtke indicated the testimony of Simon Bevan was necessary in order to determine "what defamatory statements he and his fellow Arthur Andersen employees made about Luedtke in connection with the BHP-directed 'fraud' investigation against Luedtke."

In support of the trial court's decision, BHP Americas claims the "materiality" of the London depositions was questionable. It asserts that neither deposition would be material to the underlying basis for the summary judgment, namely, the lack of an employment relationship between BHP Americas and Luedtke. In that regard, it posits that Luedtke did not seek any material evidence as to the corporate relationship or Luedtke's employment from Bevan, and the testimony Luedtke sought to obtain from Paver regarding the corporate relationships between BHP Americas/BHP Petroleum Ltd. and Luedtke's employment was covered in the deposition of Ed Blair (Paver's counterpart with BHP Americas) and would thus only be cumulative.

However, it is impossible to know what evidence would have been disclosed by virtue of the desired depositions. BHP Americas, in making its assertions as to the lack of materiality, assumes the substance of the testimony to be elicited and the content of documents that might be produced. We are unwilling to confine Luedtke to his opponent's assumptions and are persuaded that the sought after discovery, insofar as it has been identified by Luedtke, would be material to his claims. We also note that, as evidenced by its June 20, 1997 order entered some 20 days prior to the filing of the motion for summary judgment, the trial court was also convinced of the materiality of the deposition testimony.

BHP Americas also urges that Luedtke failed to exercise due diligence in seeking these depositions because he waited over a year after filing suit before initiating the process for obtaining them. The record does not disclose an explanation as to why Luedtke chose to delay initiation of the procedure for deposing these individuals. However, it does disclose that Luedtke had, during the course of that year, undertaken other discovery and that he began the process of obtaining the depositions prior to the filing of the motion for summary judgment. In sum, under this record, we conclude the trial court abused its discretion in granting the summary judgment without allowing Luedtke the opportunity to fully pursue the depositions of Paver and Bevan, whose testimony it had earlier found to be material and necessary. Luedtke's first point is sustained.

*4 Even assuming arguendo that the trial court's action in granting the summary judgment without allowing the completion of the deposition procedure was not an abuse of its discretion, we also conclude that Luedtke's second point of error is sustainable. In that point, he contends the record reveals the existence of genuine issues of material fact regarding whether there was an employment relationship between Luedtke and BHP Americas.

It is axiomatic that a defendant is entitled to summary judgment if it is able to defeat one of the essential elements of the plaintiff's cause of action by showing as a matter of law that there is no genuine issue of fact as to one or more of those essential elements. [Gibbs v. General Motors Corp., 450 S.W.2d 827, 828 \(Tex.1970\).](#)

With respect to each of Luedtke's claims, BHP Americas asserted entitlement to summary judgment based upon the absence of a relationship between it and Luedtke. In doing so, it averred that it was neither a party nor a successor- in-interest to any employment contract between Luedtke and Hamilton, and that none of the individuals whom Luedtke cited as making defamatory statements, nor those allegedly responsible for invading his privacy, were employees, agents or officers of BHP Americas. In response, Luedtke asserted that BHP Americas was in fact his employer or, alternatively, that it could be liable as an alter ego of the BHP group of companies or as part of a single business enterprise, and that the corporate fiction should be disregarded.

A corporate form may be disregarded when it is used as a part of an unfair device to achieve an inequitable

No Publication**(Cite as: 1999 WL 343427 (Tex.App.-Amarillo))**

result, such as when a corporation is organized and operated as a mere tool or business conduit of another corporation (alter ego), or when the corporate fiction is resorted to as a means of evading an existing legal obligation. [Castleberry v. Branscum, 721 S.W.2d 270, 271-72 \(Tex.1986\)](#). Under the "single business enterprise" doctrine, when corporations are not operated as separate entities but rather integrate their resources to achieve a common business purpose, each constituent corporation may be held liable for the wrongful acts committed in pursuit of that business purpose. [Beneficial Personnel Services of Texas, Inc. v. Rey, 927 S.W.2d 157, 164 \(Tex. App.--El Paso 1996, writ granted, judgment vacated w.r.m.\)](#); [Paramount Petroleum Corp. v. Taylor Rental Ctr., 712 S.W.2d 534, 536 \(Tex.App.--Houston \[14th Dist.\] 1986, writ ref'd n.r.e.\)](#).

In determining whether corporations have been maintained as separate entities, courts have considered factors such as common employees and offices, centralized accounting, payment of wages by one corporation to another corporation's employees, common business names, services rendered by the employees of one corporation on behalf of another corporation, undocumented transfers of funds between corporations, and unclear allocation of profits and losses between corporations. *Id.* at 536. The determination of whether the corporate fiction should be disregarded is a fact question for the jury. [Harwood Tire-Arlington, Inc. v. Young, 963 S.W.2d 881, 885 \(Tex.App.--Fort Worth 1998, writ dismissed by agr.\)](#)

*5 We must now review the summary judgment evidence in the light most favorable to Luedtke, mindful to resolve all reasonable inferences in his favor. The record reveals, among other things, that after BHP acquired Hamilton, Luedtke received a memorandum on BHP/Hamilton letterhead indicating that he would continue to be administered under the old Hamilton Oil Expat policy, that his balance sheets would be administered by Dean Courtenay with BHP Petroleum in Melbourne, that his benefits would be provided by, and administered under, BHP Petroleum Americas in Houston, and if he had any questions regarding payroll, benefits, salary, etc., to contact Laura Guthrie in Houston. Luedtke also received a memorandum advising him that the tax equalization policy had been updated by the Tax Manager for BHP Americas, and that all U.S. expatriates in the UK would be administered under the policy. Luedtke received compensation from BHP Americas and Luedtke's W-2 tax forms, which were submitted to

the IRS by BHP Americas, listed BHP Americas as his employer.

In July 1994, Luedtke received a letter from Fred Hamilton regarding his incentive bonus which stated that "overall performance for Hamilton was assessed at 75% by Melbourne which resulted in a reduction of our incentive pool. The rest of the Petroleum Group met its targets" Viewed favorably to Luedtke, the letter suggests the presence of interrelationships among the BHP petroleum companies and the parent company in Melbourne. On at least two occasions, Luedtke was consulted while in London regarding projects being undertaken by other BHP companies (in the U.S. and in Australia), and directed the project work. The anonymous letter regarding Luedtke was sent to O'Connor and Baugh in Australia, and prompted an investigation of him by Paver in London. Finally, the March 22, 1996 letter from Paver to Luedtke, which in part addresses the procedure for Luedtke's appeal of his termination states, "[y]our employment has been with the Petroleum division of the BHP Division of the BHP group of companies."

Our consideration of the record leads us to conclude that genuine issues of material fact exist with respect to an employment relationship that may have existed between Luedtke and BHP Americas. We also conclude that genuine issues of material fact exist regarding whether BHP Americas is an alter ego of other BHP companies or whether the BHP group of companies functions as a single business enterprise. Point of error two is sustained.

Because we have sustained both of Luedtke's points of error, we must, and do, reverse the judgment of the trial court and remand this cause to that court for further proceedings.

END OF DOCUMENT