

No. 14-16-00933-CV

IN THE FOURTEENTH COURT OF APPEALS
HOUSTON, TEXAS

CENTRAL PETROLEUM LIMITED,
Appellant,

v.

GEOSCIENCE RESOURCE RECOVERY, LLC
Appellee.

On Appeal from the 152nd District Court, Harris County, Texas
Trial Court Cause No. 2015-42477

APPELLEE'S RESPONSE TO MOTION FOR REHEARING

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SUMMARY OF THE ARGUMENT

Appellant's Motion for Rehearing misstates the status of the Australian proceeding and overstates the scope of Appellant's Brief. Even if CTP somehow raised in the trial court a future holding in the Australian proceeding which had not yet been filed when the trial court ruled, this Court defers to the trial court's factual findings regarding compliance with traditional notions of fair play and substantial justice. Appellant's Motion for Rehearing should be denied in all respects.

ARGUMENT

I. CTP Failed to Brief the Issue

Appellant's Brief mentions in Issue 4 that any judgment must be collected in Australia, but as this Court noted, "[m]uch of Central's Briefing, however, does not track its stated issues" (Opinion at 5). There is no argument or authority in Appellant's Brief addressing CTP's claim regarding collection in Australia, nor is there argument or authority explaining the relevance of those collection proceedings to traditional notions of fair play and substantial justice.

There is certainly no argument or authority in Appellant's Brief explaining how Geoscience Resource Recovery, LLC ("GRR") is somehow required to demonstrate at the jurisdictional stage that GRR will be able to collect any eventual judgment against Central Petroleum Limited (traded on the Australian stock exchange as "CTP"), because that is not the law in Texas.

A. Failure to Include in Appellant's Brief Waives the Argument

An Appellant's Brief "must contain clear and concise argument for the contentions made, with appropriate citations to authority and to the record." Tex. R. App. P. 38.1(i). Rule 38 requires Appellant's Brief to provide discussion of the facts and citation to the authorities relied upon to maintain the point at issue. *Collins v. Walker*, 341 S.W.3d 570, 575 (Tex. App. -- Houston [14th Dist.] 2011, no pet.).

"This requirement is not satisfied by merely uttering brief, conclusory statements unsupported by legal citations." *Id.* "Failure to cite legal authority results in waiver of the complaint." *Id.*; *Nguyen v. Kosnoski*, 93 S.W.3d 186, 188 (Tex. App. -- Houston [14th Dist.] 2002, no pet.). "Similarly, appellate issues are waived when the brief fails to contain a clear argument for the contentions made." *Izen v. Comm'n for Lawyer Discipline*, 322 S.W.3d 308, 322 (Tex. App. -- Houston [1st Dist.] 2010, pet. denied).

Here, Appellant's Brief failed to present any argument – not even a conclusory statement -- connecting Australian judgment collection to traditional notions of fair play and substantial justice. Appellant's Brief likewise fails to cite any authority connecting the two issues or otherwise explaining the legal relevance of the Australian collection proceedings. CTP waived the issue.

B. CTP's Reply Brief Cannot Salvage the Argument

CTP's Motion for Rehearing also invokes its Reply Brief, but issues not raised by the original appellant's brief cannot be raised by a reply brief. "It is well-settled

that Rule 38.3 of the Texas Rules of Appellate Procedure does not allow an appellant to include in a reply brief a new issue in response to a matter pointed out in the appellee's brief but not raised by the appellant's original brief.” *In re TCW Global Project Fund II, Ltd.*, 274 S.W.3d 166, 171 (Tex. App. -- Houston [14th Dist.] 2008, orig. proceeding).

Appellant's Motion for Rehearing cites *State v. Lueck*, 290 S.W.3d 876, 885 n.2 (Tex. 2009) as a case in which the Texas Supreme Court (without discussion or analysis) cited a Reply Brief while addressing a waiver argument – but that footnote reflects on its face that it is addressing subject-matter jurisdiction, which cannot be waived. *Prairie View A&M Univ. v. Brooks*, 180 S.W.3d 694, 702 (Tex. App. -- Houston [14th Dist.] 2005, no pet.) citing *Waco ISD. v. Gibson*, 22 S.W.3d 849, 850 (Tex. 2000). Accordingly, the waiver discussion in *Lueck* is dictum at best, and has no application to this dispute over personal jurisdiction in any event.

C. CTP Cannot Shift the Burden to GRR

CTP bears the “difficult” burden of showing that proceeding in Texas will not comport with traditional notions of fair play and substantial justice. Opinion at 28. This requires CTP to show that trial in Texas would effectively deprive CTP of its day in court. *Id.* CTP has failed to make that showing.

At most, CTP has suggested a hypothetical circumstance which would, if true, weigh against only one of the eight elements to be considered in determining whether Texas jurisdiction will comport with traditional notions of fair play and substantial

justice. See *Alenia Spazio, S.P.A. v. Reid*, 130 S.W.3d 201, 220-21 (Tex. App. -- Houston [14th Dist.] 2003, pet. denied) (listing “effectiveness” as one of eight elements). This is simply not enough to overcome the remaining elements and show that a Texas trial would effectively deprive CTP of its day in court.

Appellant’s Motion for Rehearing claims (at page 9) that GRR is asking the Court to presume an implied finding of CTP assets located outside of Australia, but that misplaces CTP’s burden. When CTP attempts to defeat jurisdiction by claiming that GRR’s judgment will never be enforceable against CTP, then it is CTP’s burden to establish: (a) that CTP does not have any tangible or intangible assets outside of Australia which could be the subject of enforcement, (b) that CTP will never have assets outside of Australia during the enforceable life of GRR’s hypothetical judgment, and (c) that the Australian courts will indeed decline to enforce GRR’s judgment against CTP. See Opinion at 28 (burden on CTP).

D. The Evidence Does Not Support CTP’s Claim

In the absence of written Findings of Fact, the trial court is presumed to find all facts in favor of its jurisdictional ruling, and the appellate court will not substitute its own findings. Opinion at 6. Accordingly, all disputed facts are presumed to be found in favor of traditional notions of fair play and substantial justice. If CTP did not present the evidence, then it waived the issue; and even if CTP did present the evidence, then all disputed facts must be presumed against CTP’s claim. Opinion at 6.

Affidavits supporting CTP's claims defeating jurisdiction were due seven days before the October 21, 2016 hearing of CTP's special appearance. Tex. R. Civ. P. 120a(3). The timely-filed affidavits and other jurisdictional evidence fail to conclusively establish CTP's claim about the collectability of a Texas judgment against CTP. CTP's special appearance cannot be sustained on this record.

II. The Australian Proceeding Has Not Decided the Merits

The Australian court has found only that it has jurisdiction to decide whether a judgment by GRR against CTP would be enforceable. See Australian opinion attached as Exhibit A to CTP's November 22, 2017 letter brief. No Australian Court has reached the merits and held that GRR's judgment against CTP would be unenforceable (contrary to the Motion for Rehearing at page 1), and GRR is appealing that jurisdictional decision in any event.

It would be premature to deny GRR jurisdiction based on speculation about how the Australian courts might rule on the merits if CTP continues to pursue the Australian lawsuit. CTP did not file the Australian suit until weeks after the Texas trial court found Texas jurisdiction, and this suggests CTP would not pursue the Australian case but for a finding of Texas jurisdiction. See Appellee's Response to Appellant's Opposed Motion for Extension of Time to File Reply, filed March 21, 2017, with exhibit. If CTP's special appearance were to be sustained, so that the Texas lawsuit were dismissed, then CTP's dismissal of the Australian proceeding could leave GRR with no remedy at all.

At CTP's behest, the Australian court declined to abate that later-filed proceeding in favor of this Texas proceeding, and thus contemplates a race to judgment. See Australian opinion attached as Exhibit A to CTP's November 22, 2017 letter brief. CTP sought this race to judgment, and should not now be heard to complain of it.

III. Conclusion and Prayer

Even if CTP properly briefed the issue and conclusively established that one of the eight elements for fair play and substantial justice weighs against Texas jurisdiction (and CTP did not), that would not be enough to defeat Texas jurisdiction. GRR respectfully requests that Appellant's Motion for Rehearing be denied in all respects.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Appellee's Response to Motion for Rehearing complies with the length limit of Tex. R. App. P. 9.4(i)(2)(B) because it contains 1,357 words, and all of Appellee's briefing, including letter briefs, aggregate fewer than 27,000 words.

/s/John H. Kim

John H. Kim

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on the following counsel for Appellant in accordance with Rule 9.5(b) of the Texas Rules of Appellate Procedure this 1st day of February, 2018.

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