

IN THE SUPREME COURT OF TEXAS

No. 02-0375

IN RE HAL G. KUNTZ

ON PETITION FOR WRIT OF MANDAMUS

Argued on September 10, 2003

JUSTICE WAINWRIGHT, concurring.

In this case the Court decides whether a party may be ordered to produce documents containing trade secrets when the party does not own the documents or the trade secrets and claims not to have possession, custody or control of them.

This discovery dispute arose in post-divorce proceedings between Vesta Frommer and Hal Kuntz. As a just division of the parties' property, Vesta and Hal entered an Agreement Incident to Divorce ("AID"), which the trial court approved. Under the AID, Vesta had "the right to 25% of all overriding royalty interests, if any, from MOXY assigned to Husband [Hal Kuntz] after the date of divorce that results from projects on which CLK forwarded letters of recommendation to MOXY to drill during the marriage." Hal was an owner and general manager of CLK Company, L.L.C. ("CLK"), which provided letters of recommendation ("LORs") to McMoran Offshore Exploration Co. ("MOXY") of potential oil and gas exploration and drilling opportunities primarily in the Gulf of Mexico. Based on the AID, Vesta sought to obtain all of the approximately 1,800 LORs with positive recommendations that CLK sent to MOXY during her 15 year marriage to Hal. Hal, CLK, and MOXY objected.

The trial court in this case was asked to balance a myriad of interests. Vesta was not comfortable trusting Hal to produce only the LORs for the wells from which she was entitled to 25% of the overriding royalty, and, therefore, she sought all the LORs to monitor compliance with the AID. The dispute occurred when both MOXY and CLK instructed Hal not to produce the LORs to Vesta. The trial court found that the LORs contained trade secrets involving geological and seismic data and recommended locations where MOXY may drill oil and gas wells in the future. It is undisputed that neither Hal nor his employer CLK owned the LORs; they were MOXY's. Further, pursuant to their consulting agreement with MOXY, Hal and CLK were bound to use the documents and trade secrets only in furtherance of services performed for MOXY. Thus, the trial court had to balance protection of the trade secrets in MOXY's LORs with allowing Vesta the right to verify with information from those LORs that she had received 25% of the overriding royalty interests in producing wells assigned to Hal after recommendation by CLK. The trial court, after ordering production of redacted LORs, but being confronted with the possibility that some of the LORs may contain drilling recommendations that do not use the word "drill" (and thus may be subject to interpretation), ordered Hal to produce all the LORs containing positive recommendations, subject to a confidentiality agreement.

Further complicating this matter is Vesta's attempt to obtain the documents from Hal rather than their owner, MOXY. Vesta apparently joined MOXY as a "Nominal Respondent" in the trial court proceeding and later non-suited it. MOXY was not served with citation and asserts that it made no formal appearance in the case. The LORs were subpoenaed from MOXY, but the parties do not cite any order evidencing a ruling by the trial court concerning the subpoena. Nevertheless, MOXY, as

a non-party, participated in the proceedings over the LORS, including filing written objections to the discovery requests, making arguments to the Court, objecting to evidence in evidentiary hearings and offering closing statements at the end of the hearings, along with the parties in the lawsuit. While it is unclear why Vesta sought the documents from Hal rather than MOXY, and notwithstanding our regard for the diligent inquiry and complex decisions made by the trial court, I agree with the Court's opinion. I do not disagree with the implication in the opinion of the Court that the documents should be obtained, if at all, from MOXY.

I note, however, that if this Court's decision had been adverse to MOXY's position, then as the proceeding continued in the trial court, MOXY may have had a difficult time attempting to obtain a different ruling. MOXY had notice and fully participated in the prior proceedings at the trial court over production of the LORs. Given the circumstances, a second bite at the apple may have been hard to come by.

J. Dale Wainwright
Justice

OPINION DELIVERED: December 19, 2003