

UNITED STATES BANKRUPTCY COURT  
 NORTHERN DISTRICT OF INDIANA  
 HAMMOND DIVISION

IN RE:	)	
	)	
BUCKO CONSTRUCTION COMPANY,	)	CASE NO. 07-22406 JPK
	)	Chapter 7
Debtor.	)	
*****		
NORM MANTHE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	ADVERSARY NO. 11-2023
	)	
LEN PRYWELLER and GORDON E.	)	
GOUVEIA,	)	
	)	
Defendants.	)	

MEMORANDUM OF DECISION

This adversary proceeding was initiated on February 7, 2011 by an Application for Removal (“Application”) filed by Gordon E. Gouveia, as Trustee of the Chapter 7 bankruptcy estate of Bucko Construction Company, Inc. in case number 07-22406 (“Trustee”). The Application sought removal of a lawsuit pending in the Superior Court of Lake County, Indiana as case number 45D01 1012 M1-039, in which the plaintiff Norm Manthe (“Manthe”) had filed a Complaint for Declaratory Relief against the defendants Leonard Pryweller and the Trustee to seek to recover a \$9,000.00 earnest money deposit provided with respect to a sales transaction involving property of the bankruptcy estate of Bucko Construction Company, Inc.

Although no formal order approving the Application was entered, the parties consented to the Application and to trial by this court with respect to the action asserted in the state court complaint ; removal has been thus effected pursuant to 28 U.S.C. § 1452. The parties further consented to the court’s exercise of final judgment authority in this case pursuant to 28 U.S.C. § 157(b)(1); this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(N). The court has jurisdiction of this case pursuant to 28 U.S.C. § 1334(a) and (c)(1); 28 U.S.C. § 157(a); and

N.D.Ind.L.R. 200.1.

Before proceeding to a discussion of the merits of the case, there is a small matter to clear up as to the proper party plaintiff. The purchase contract at issue was entered into between The Bankruptcy Estate of Bucko Construction Company, Inc. (acting through Trustee Gouveia) and Northwest Equipment and Trailer, Inc., and the court's order by which the sale was approved directed sale to that corporate entity. Manthe is the principal of Northwest Equipment and Trailer, Inc. At trial, the parties agreed that the initiation of the state court proceeding nominally by Manthe had no impact upon resolution of the adversary proceeding. However, the court deems it necessary to accurately state a record as to the identity of the plaintiff: pursuant to Fed.R.Bankr.P. 7017/Fed.R.Civ.P. 17(a)(1) and Fed.R.Civ.P. 17(a)(3), Northwest Equipment and Trailer, Inc. ("Northwest") is substituted as the real party in interest in place of Norm Manthe.

The record by which this adversary proceeding will be determined was created at a trial held on January 19, 2012.

I. ISSUE PRESENTED

The issue presented in this adversary proceeding is a straight-forward one:

Is Northwest entitled to return of a \$9,000.00 earnest money deposit provided with respect to a bankruptcy court approved sale of property of the bankruptcy estate of Bucko Construction Company, Inc. due to the Trustee's inability to comply with the terms of the sale contract in relation to providing Northwest with "marketable title" with respect to the property subject to the sales transaction.

II. ANALYSIS

By Application to Employ Broker and Effect Sale of Real Estate Parcel filed as record entry #480 on March 6, 2009, the Trustee sought the court's authorization to employ Len Pryweller, of Len Pryweller Realty, as broker with respect to the sale of real estate located at 890 Chase Street, Gary, Indiana. This application was approved by the court's order entered

as record #483 on March 10, 2009, which specifically authorized the Trustee “to employ Len Pryweller, Len Pryweller Realty . . . to effect the sale of real estate located at 890 Chase Street, Gary, Indiana”. The brokerage contract attached to the record #480 application, which was approved by the record #483 order, stated that Personal Property was to be included in the sale, comprised of “All furniture, fixtures, all personal property fixtures, equipment located on property”. Pryweller, who is not a stakeholder in this action (he only holds the earnest money deposit pending determination of this adversary proceeding), performed his task as broker admirably: he located a purchaser – Northwest. By record entry #529, on October 2, 2009, the Trustee filed a Motion to Sell Property of Debtor at Private Sale Free and Clear of Liens. The Motion requested authorization only for sale of real property, and all of the recitals in the motion addressed circumstances concerning the real property, including liens which were known to encumber it. The Purchase Agreement attached as Exhibit “A” to the foregoing motion included the following provision:

The following items of personal property are INCLUDED in the sale: All furniture, fixtures, all personal property fixtures & equipment located on property including all material such as stone, aggregate & scrap metal.

All other personal property and the following items are EXCLUDED from the sale:

Again, despite that inclusion of sale of personal property, the motion filed by the Trustee did not request authorization to sell any personal property of the bankruptcy estate. The foregoing motion was approved by the court’s record entry #532 order, the pertinent provisions of which are the following:

IT IS ORDERED as follows:

1. The Trustee is authorized to sell the real property commonly described as 890 Chase Street, Gary, Indiana (sic) to Northwest Equipment and Trailer, Inc. pursuant to the terms of the Contract of Sale attached as Exhibit "A" to the Trustee's motion.

2. Said sale shall be free and clear of all liens and encumbrances, with liens and encumbrances to attach to the proceeds of sale.
3. The Trustee is authorized to sign, execute and deliver such documents as are necessary to effectuate the sale.

The sale was not effected. As record #534, on February 15, 2010, the Trustee filed his Status Report on 890 Chase Street and Request for Turnover of Earnest Money, which asserted that the Trustee had performed as required by the terms of the sale agreement approved by the court's order; that the buyer "has unreasonably refused to finalize the sale of the real estate"; and that Pryweller was holding the \$9,000.00 earnest money deposit provided by Northwest with respect to the sale. Paragraph 8 of this document requested that the court order turnover of the earnest money by Pryweller to the Trustee. In response, the court entered its record #535 order which first noted that the turnover of earnest money requested by the record #534 Status Report could not be effected by a turnover motion, and further noted that said request was denied without prejudice because the report requesting turnover was not served upon Northwest Equipment and Trailer, Inc. As was true with the sales motion, the Status Report was directed solely at a sale of real property, and no mention was made of any sale of personal property.

Manthe's state court suit was then removed by the Trustee to this court, and the horses were out of the gate in their contest to determine entitlement to the \$9,000.00 earnest money deposit.

As noted above, the brokerage agreement with Pryweller specifically included items of personal property located on the real estate as being included in the authorization to the broker to sell the real property. The issues involved in this case concern the Trustee's compliance with the contract to purchase with respect to this personal property.

Manthe testified that a significant interest in Northwest's acquiring the property was "a

batch plant, conveyors, quite a bit of washed gravel”, and a “70-foot platform scale”.

Northwest’s business involves the sale of salvaged equipment and the processing of scrap metal and other scrap materials. Manthe testified that Northwest’s annual gross sales of scrap varies from \$1 million to \$2 million, and that Northwest sells a great deal of scrap handling equipment. The testimony of Manthe and Pryweller establishes that the insertion of the above-designated provision regarding inclusion of personal property in the sales transaction (page 3, *supra.*) was specifically requested by Manthe, and it is clear from the record that the inclusion of the personal property on the real property premises was a significant element with respect to Manthe’s/Northwest’s decision to enter into the purchase agreement.

The parties at trial contested the relative value of the personal property on the subject premises. Both Trustee Gouveia and Len Pryweller have been involved over a number of years in many, many sales of property, both real and personal, including sales of real estate which collaterally involved sale of personal property located on that real estate. The court notes that both Trustee Gouveia and Mr. Pryweller would have been accepted by the court as experts with respect to assessing relative values of personal property, had their testimony as expert witnesses been tendered.<sup>1</sup> However, the record establishes that Northwest’s business centers around the acquisition of salvageable scrap equipment, scrap metal, and other marketable personal property (in this case mounds of gravel), and that Manthe’s expertise with respect to the marketability and market value of that property far exceeds that of either Trustee Gouveia or of Len Pryweller. Based on the foregoing, the court finds that the “scrap” equipment and material on the subject real estate was marketable; that it was marketable by Northwest for a not insignificant amount of money; and that the acquisition of this personal property for resale

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<sup>1</sup> The concept of tendering a witness as an expert to qualify a witness as an expert is a somewhat outmoded concept under the Federal Rules of Evidence. The court merely notes that both Trustee Gouveia and Pryweller are accepted by the court as experts in the foregoing context.

was a particular focus of Northwest in its decision to enter into the purchase agreement. In this context, the court does not accept as a legal conclusion the Trustee's assertions that the personal property located on the subject real estate was essentially junk having only minimal value, and that therefore any issues which might arise with respect to the personal property were not material to the sales transaction.

The Purchase Agreement approved by the court included the following provisions:

1. J. CONDITIONS TO CLOSING: Buyer's obligations under this Agreement are conditioned upon satisfaction of each of the following items which are for the Buyer's benefit and may be waived by Buyer at Buyer's sole discretion within 30 days from the last date between Seller and Buyer of this Agreement or any counter-offers (the "DUE Diligence Period").
  1. Title Commitment: A commitment for title insurance (the "Commitment") issued by a reputable title insurance company selected or approved by Buyer (the "Title Company") showing marketable title in Seller's name shall be ordered by  (Seller)  (Buyer) promptly upon acceptance of this Agreement and shall be delivered to Buyer within 10 days after Acceptance of Purchase Agreement. At Buyer's request, legible copies of all recorded instruments affecting the Property or recited as exceptions in the Commitment shall also be delivered.
2. N. DUTIES OF BUYER AND SELLER AT CLOSING
  1. At the closing, Seller shall deliver to Buyer, at Seller's sole cost and expense, the following:
    - (A) A duly executed and acknowledged Trustee's Deed conveying marketable title in fee simple to all of the Property, free and clear of any and all liens, encumbrances, conditions, easement, assessments, reservations and restrictions, except permitted Exceptions(s);
    - (B) An Owner's Policy of Title Insurance (the "Title Policy") issued by the Title Company in the amount of the purchase price, dated as of closing, insuring Buyer's fee simple title to the Property to be marketable subject only to the Permitted Exception(s), and deleting the standard printed exceptions contained in the usual form of the Title Policy;
    - (C) An executed Vendor's Affidavit in form acceptable to the

Title Company;

- (D) A Bill of Sale, duly executed by Seller, containing warranties of title, conveying title, free and clear of all liens, to any personal property specified in Paragraph B;
3. D. EARNEST MONEY: Buyer submits \$9,000.00 as Earnest Money to be held by LPR Escrow Account with Leonard Pryweller as Escrow Agent, upon execution of this Agreement by both parties. The Earnest Money shall be applied to the purchase price at closing unless returned to Buyer, released to Seller, or otherwise disbursed in accordance with this Agreement. The Escrow Agent is not a party to this Agreement and does not assume or have any liability for performance or non-performance of any party. Before the Escrow Agent has any obligation to disburse the Earnest Money in the event of dispute, Escrow Agent has the right to require from all parties a written release of liability of the Escrow Agent termination of the Agreement and authorization or court order to disburse the Earnest Money.
4. M. DEFAULT: If Buyer breaches this Agreement, Seller may seek any remedy provided by law or equity, or terminate this Agreement and receive the Earnest Money as liquidated damages. If Seller breaches this Agreement, Buyer may terminate this Agreement and receive a refund of the Earnest Money, or Buyer may seek specific performance or any other remedy provided by law or equity. In the event of Seller default, Seller shall immediately be obligated to pay all brokerage commissions that would have been paid had this transaction closed. In the event of Buyer default, commissions may also be due and payable pursuant to the terms of the applicable brokerage agreements.

The closing of the sale was scheduled. Several days prior to the closing, Stewart Title Guaranty Company – the title insurer chosen by the parties with respect to the transaction – provided the parties with a SELLER(S) ESTIMATED CLOSING STATEMENT (Trial Exhibit #27), which stated closing charges to be disbursed from the Seller's proceeds, including the following:

Parcel 45-104-240038-00 Personal Propert, 177,522.10 (*sic.*)

The court finds that this inclusion of a cost in the preliminary estimated closing statement clearly establishes that Stewart Title Guaranty Company had obtained information from public records that personal property taxes had been asserted by the pertinent taxing authority against Bucko Construction Company, Inc., and that at least at that point in the closing transaction, the

title company deemed that assertion of tax liability to relate both to the subject real estate and to the personal property located on that real estate.

The parties then attended the closing, and the subject of the potential personal property tax liability attaching to property subject to the sales transaction was a principal focus of closing discussions. At the closing, Manthe relied heavily upon the advice of Attorney Jack Lund, who represented him with respect to the closing transaction. Both Manthe and Attorney Lund testified that because the acquisition of the personal property on the subject real estate was a central element of the sales transaction to Northwest, issues as to whether or not that property might be subject to collection of personal property tax was a critical matter. In his case before the court, the Trustee asserted that the personal property on the premises was of minimal value, and that any question of personal property tax liability with respect to that property was not a justifiable ground for Manthe's decision to refuse to close at the closing, based upon the advice of Attorney Lund.

Discussions ensued at the closing, which ultimately resulted in Stewart Title Guaranty Company's waiver of an exception in its policy of title insurance to be provided to Northwest with respect to a tax lien on the real estate in relation to personal property tax. However, Stewart Title Guaranty Company would not "guarantee over" personal property tax liability with respect to the personal property on the subject real estate, quite understandably because its business involves guarantee of title to real estate. It is also to be noted that the terms of the sales transaction, as provided for by the contract between the parties, did not require a policy of title insurance with respect to the personal property.

There is now an interesting aspect to the evidentiary record. In response to questions by his trial counsel Steve Bom, and to questions by the Trustee's counsel Catherine Molnar-Boncela, Manthe testified that between the closing date and his subsequent final determination to refuse to close on the transaction, he made a visit to the Lake County Auditor's Office and

spoke to an employee in that office. His specific concern addressed in that visit was the potential for assertion of personal property tax liability against the personal property which Northwest might acquire as a result of completing the sales transaction. Although everything that Manthe testified to as to the information he received in that visit is hearsay, no one objected to his recitation as to what he was told as being inadmissible evidence, and therefore it is admitted.<sup>2</sup> According to Manthe's testimony, the employee of the Auditor's Office told him that Bucko Construction Company, Inc. had unpaid personal property taxes, and that the consequences of those taxes could not be avoided unless those taxes were paid.

The court finds that the bottom line is that as a result of issues concerning personal property taxes with respect to the personal property to be acquired by Northwest in the sales transaction, Manthe refused to close and sought to terminate Northwest's obligation under the purchase contract.

A large portion of the testimony at trial by the respective parties related to the materiality of the acquisition of personal property by Northwest as part of the sales transaction. As stated above, the court deems the personal property to have been at the heart of the purchase transaction with respect to the purchaser, and that this fact was reasonably known to the Trustee as seller.

That does not end the inquiry. The disposition of this case involves possible breach by the respective parties of the purchase agreement, and remedies available for that breach provided by paragraph M of the sales agreement. In this context, the court has determined that the personal property on the subject real estate was a material and critical component of the

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<sup>2</sup> Admittedly, in terms of proving the truth of statements made by an employee of the Auditor's Office, Manthe's statements are hearsay, and thus would have been inadmissible. However, because no one objected, they are considered as substantive evidence, albeit with somewhat of a caveat as to total accuracy in relation to the legal conclusion to which those statements might lead. However, in another context, they are admissible for a limited purpose, i.e., to establish a foundation with respect to Manthe's concerns as to closing the transaction.

sale with respect to the purchaser Northwest. The court also determines from the record that Northwest was ready and able to close the transaction in terms of providing the necessary purchase funds, and that the reason the purchaser “backed out” is the issue concerning the personal property being subject to collection actions by the taxing authority.

The court has searched at length for Indiana case law authority in relation to personal property tax liabilities constituting a cloud on title in relation to a sales transaction, and the ability of either party to terminate the sales transaction as a result of personal property tax liabilities. The court could find are no Indiana cases in this context. However, this case involves the concept of “marketable title” with respect to personal property, and the closest that the court can come to cases which have relevance to the critical issue in this adversary proceeding are those which involve termination of sales transactions as a result of a cloud on title with respect to real property. The seminal case in this context in Indiana is *Kenefick, v. Shumaker*, 64 Ind. App. 552, 116 N.E. 319, 323 (1917), in which the following is stated:

The specification in the contract as to the kind of title to be shown by the abstract is not very exacting. It only requires that it should show a title in appellants. The most for which appellees could contend under a liberal construction of such provision in their favor is that such abstract should show a marketable title. Assuming, then, that such is the requirement of the contract, does the finding of the court show that the abstract furnished met this requirement? The term “marketable title,” as applied to real property, has been repeatedly defined by text-writers and courts, and while such definitions have not been uniform, such term has a well-defined and well-understood meaning. The following are some of the essentials that enter into all such definitions, and serve to disclose the generally accepted meaning of such term: Such a title must be free from reasonable doubt, and such that a reasonably prudent person, with full knowledge of the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear upon such transactions, be willing to accept and ought to accept. It must be so far free from defects as to enable the holder, not only to retain the land, but possess it in peace, and, if he wishes to sell it, to be reasonably sure that no flaw or doubt will arise to disturb its market value. But a mere suspicion against the title or a speculative possibility that a defect

in it might appear in the future cannot be said to render a title unmarketable. It is not required to be free from mere shadows or possibilities, but from probabilities. Moral, not mathematical, certainty that the title is good is all that is required. Kling v. Realty Co., 166 Mo. App. 190, 148 S. W. 203; Todd Ex. v. Union, etc., Institution, 128 N. Y. 636, 28 N. E. 504; Moot v. Business Men's, etc., Ass'n, 157 N. Y. 201, 52 N. E. 1, 45 L. R. A. 666; Hubachek v. Maxbass, etc., Bank, 117 Minn. 163, 134 N. W. 640, Ann. Cas. 1913D, 187; Whittier v. Gornley, 3 Cal. App. 489, 86 Pac. 736; Hayes v. Harmony, etc., 108 Mass. 400; Justice v. Button, 89 Neb. 367, 131 N. W. 736, 38 L. R. A. (N. S.) 1; Fagan v. Hook, 134 Iowa, 381, 105 N. W. 155, 111 N. W. 981; Gibson v. Brown, 214 Ill. 330, 73 N. E. 578; Cambrelleng v. Purton, 125 N. Y. 610, 26 N. E. 907; Geithman v. Eichler, 265 Ill. 579, 107 N. E. 180. In the case last cited the court said (265 Ill. on page 586, 107 N. E. on page 183):

“There is abundant authority that a title may be deemed good although there may be a possibility of a defect; that a defect in title which will excuse the performance of a contract for the purchase of land must be sufficient to cast a cloud on the title and render it suspicious in the minds of reasonable men; that a defect which is a mere possibility, but a very remote or improbable contingency, which, according to ordinary experience has no probable basis, does not show a bad or unmarketable title, but the doubt must be considerable and rational, such as ought to induce a prudent man to pause and hesitate.”

The decisions of the courts of appeal in this state, in so far as they have given expression as to what may be considered a marketable title, are in accord with the rule stated and authorities cited. Smith v. Turner (1875) 50 Ind. 367; Tewksbury v. Howard (1893) 138 Ind. 103, 37 N. E. 355; McCleary v. Chipmen (1903) 32 Ind. App. 489, 68 N. E. 320; Jackson v. Creek (1910) 47 Ind. App. 541, 94 N. E. 416.

*Kenefick* was addressed in *Staley v. Stephens*, Ind. App., 404 N.E.2d 633, 635-36 (1980)

(rehearing denied June 30, 1980), as follows:

In turning to the facts of the present case, both parties appear to agree that *Kenefick v. Schumaker*, (1917) 64 Ind.App. 552, 116 N.E. 319, provides the basis for what little modern law there is on the subject of marketable title. In *Kenefick*, the court, after reviewing the standard espoused by commentators and applied in other jurisdictions, determined that the controlling test and more reasonable rule is that a title “which has no defects of a serious nature, and none which affect the possessory title of the owner, ought to be adjudged marketable.” 64 Ind.App. at 565, 116 N.E.

at 323. The court continued, however, to clarify what it meant by a serious defect.

In such a title there is no room for reasonable doubt; no question as to peaceable possession; no indication of superior rights; nothing to suggest adverse claims, or probable litigation. For these, one and all, would be matters of a serious nature and in such a title (marketable) it is expressly declared that defects of such a nature do not exist. 64 Ind.App. at 565, 116 N.E. at 323.

What we are faced with in this case is a violation of between one-tenth of a foot and one foot six-tenths depending upon which restrictive covenant would be found controlling. The question that must be addressed is whether a title is marketable as a matter of law, notwithstanding a clear violation of a restrictive covenant.

A court of equity will not compel a purchaser to accept a title which is so doubtful that it may expose him to litigation, though the court may believe it to be good. Smith v. Turner, (1875) 50 Ind. 367. One who contracts for the purchase of real property is not bound to accept a doubtful title, or one that would likely be involved in litigation, although it might ultimately be adjudged to be good. Morris v. Goodwin, (1891) 1 Ind.App. 481, 27 N.E. 985. This same general view of marketability is followed in our sister states, as it is generally agreed that a marketable title is one which is free from reasonable doubt and will not expose the party who holds it to the hazards of litigation. Darby v. Keeran, (1973) 211 Kan. 133, 505 P.2d 710; Edwards v. St. Paul Title Ins. Co., (1977) Colo.App., 563 P.2d 979. Based upon this view of marketability, we do not believe that purchasers of real property who bargain for marketable title can be forced to accept property with an admitted cloud on the title. See Fajen v. Powlus, (1977) 98 Idaho 246, 561 P.2d 388.

When viewed in this regard, it is evident that although the title defect is small, it is nonetheless a cloud on the title that may expose Buyers to the possibility of litigation due to the remedies available to other landowners in the subdivision. Even though a damage recovery may be nominal, Buyers would still incur the cost of defending against any litigation. Absent waivers from all landowners holding Buyers harmless, the possibility of litigation on the matter will not end until the running of the twenty year statute of limitations. Consequently, with the admitted cloud on the title, we are not prepared to say that the title was marketable as a matter of law. Therefore, because the standards of T.R. 50 were met, the trial court did not err in granting Buyers' motion for judgment on the evidence as to Sellers' complaint.

Further discussion of a cloud on marketable title in relation to termination of a sales transaction

was stated in *Russell v. Walz*, Ind. App., 458 N.E.2d 1172, 1178-79 (1984), as follows:

Russell argues that she is entitled to the return of her \$20,000 earnest money, with interest, because the Walz children did not have marketable title to Coldwater Farm as of the scheduled closing date, September 25, 1981. Russell argues that “[s]ince the title to the Coldwater Farm [depends] upon facts which are clearly in dispute, and law which is at least unclear, Mildred need not have accepted the title.” The merit of this argument depends upon two sub-issues: (1) What is required for a marketable title? and (2) What claim, if any, may Dorothy Walz assert to Coldwater Farm?

The modern rule as to what represents a marketable title was enunciated in *Kenefick v. Schumaker* (1917), 64 Ind.App. 552, 116 N.E. 319. See also *Smith v. Turner* (1875), 50 Ind. 367, 373. In *Kenefick* the court held that to be marketable “a title must be free from reasonable doubt, and such that a reasonably prudent person, with full knowledge of the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear upon such transactions, be willing to accept and ought to accept.” 64 Ind.App. at 563, 116 N.E. 319. In a later passage the court explicated what it meant by reasonable doubt:

“[A] title *which has no defects of a serious nature, and none of which affect the possessory title of the owner, ought to be adjudged marketable. In such a title there is no room for reasonable doubt; no question as to peaceable possession; no indication of superior rights; nothing to suggest adverse claims, or probable litigation. For these, one and all, would be matters of a serious nature, and in such a title it is expressly declared that defects of such a nature do not exist.*”

64 Ind.App. at 565, 116 N.E. 319 [second emphasis added].

The *Kenefick* court found that the title forming the basis of the controversy before it was so free of reasonable doubt as to be marketable. The buyers in *Kenefick* had refused to accept title as shown by an abstract prepared at the direction of the sellers. 64 Ind.App. at 556, 116 N.E. 319. The buyers initially refused the abstract because it did not include a “certification as to taxes and special assessments of the corporation of Michigan City, Indiana, or ... the judgment record of the superior court at said city.” Two days later, at a date still preceding the scheduled closing date, the sellers re-tendered the abstract, with a certification as to both issues. The buyers again refused to accept title, arguing that it contained defects rendering it unmarketable. 64 Ind.App. at 562,

116 N.E. 319. Both the trial and appellate courts disagreed, finding the trivial defects asserted by the buyers insufficient to raise a reasonable doubt as to the security of the title. 64 Ind.App. at 565-66, 116 N.E. 319.

The *Kenefick* test was applied in *Staley v. Stephens* (1980), Ind.App., 404 N.E.2d 633, 635. In *Staley* the buyers contracted for the purchase of a home located in a subdivision. The home was located on a portion of Lot # 10 of the original subdivision. Lot # 10 was subject to a restrictive covenant requiring a ten foot side line set back. Lot # 10 was later divided and its portions made subject to a city side line set back of 8.5 feet. When the property was surveyed for the purchase agreement the survey revealed that a section of the sellers' house was only 8.4 feet from the side line. Therefore, the property was in violation of the city zoning ordinance and the original restrictive covenant. The trial court granted judgment on the evidence for the buyers; an action this court affirmed. 404 N.E.2d at 636. In affirming, we held that "it is generally agreed that a marketable title is one which is free from reasonable doubt and will not expose the party who holds it to the hazards of litigation." 404 N.E.2d at 635. See also *Morris v. Goodwin* (1891), 1 Ind.App. 481, 27 N.E. 985. Based upon the facts presented, we concluded that "it is evidence that although the title defect is small, it is nonetheless a cloud on the title that may expose Buyers to the possibility of litigation due to the remedies available to other landowners in the subdivision. Even though a damage recovery may be nominal, Buyers would still incur the cost of defending against any litigation." 404 N.E.2d at 636. Because this possibility represented a cloud on the title, the title was not marketable and the buyers could not be required to accept it. *Id.* at 635-36, citing *Kenefick* and *Smith v. Turner* (1875), 50 Ind. 367.

From the foregoing, in order to be "marketable", title to property transferred in a sales transaction in which the parties have bargained for a "marketable title" is one which is free of reasonable doubt as to the purchaser's acquired ownership and possessory interest in the property subject to the transaction. The "cloud" must be more than a mere possibility with a remote or improbable contingency as to realization, i.e., the cloud cannot be merely a speculative fear. The cloud must also be such as might reasonably, potentially, expose the purchaser to litigation with respect to ownership, and a right to undisturbed possession, of the property acquired by means of the sale.

This case comes down to whether or not Northwest's – through Manthe – concerns about the personal property being acquired in the purchase transaction being subject to collection action with respect to Bucko's personal property tax liability was a reasonable basis for refusing to complete the transaction, entitling Northwest to return of the earnest money deposit.

It is interesting to note that during the course of the trial proceedings, the parties were unable to definitively state whether or not there was an actual lien on the personal property with respect to the outstanding personal property tax liability of Bucko. This is not surprising: provisions concerning Indiana personal property tax are not nearly as clear as those in relation to Indiana real property tax, the latter of which clearly provides the manner in which the taxing authority acquires a lien on subject real estate. Given this uncertainty, one could make a reasonable argument that this uncertainty alone provides a basis for Northwest's cancellation of the transaction, given that a "cloud on title" was noted in preliminary closing documents by a title insurer arising from its search of public records. But let's go a little further.

The imposition of the Indiana personal property tax is provided for by I.C. 6-1.1-2-1, which states that (with exceptions otherwise provided by law irrelevant in this case): "All tangible personal property which is within the jurisdiction of this state on the assessment date of a year is subject to assessment and taxation for that year." I.C. 6-11-1-19 defines "tangible property" to mean "real property and personal property as those terms are defined in this chapter". I.C. 6-1.1-1-11 provides the definition of "personal property"; the pertinent provisions with respect to this case are sub-paragraphs (a)(5) and (6), which state:

(5) foundations (other than foundations which support a building or structure) on which machinery or equipment is installed; and

(6) all other tangible property (other than real property) which is being:

(A) held for sale in the ordinary course of a trade or business;

(B) held, uses, or consumed in connection with the production of income; or

(C) held as an investment.

At the conclusion of the trial, in response to the court's questioning, Trustee Gouveia acknowledged that the scale on the subject premises was a "trade fixture". The testimony establishes that this scale was actually built into the ground in a certain way, and that the "batch plant" was also placed in some way on a platform. Under the definition provided by I.C. 6-1.1-1-11, the components of both the scale and the batch plant would seem to certainly be "personal property" subject to personal property tax assessment to Bucko Construction Company, Inc. The court finds that all of the personal property involved in the sales transaction, including the scale and the batch plant, were subject to personal property taxation in relation to Bucko Construction Company, Inc. under applicable Indiana law.

Under Indiana law, actual or potential liability for personal property tax does not give rise to an automatic lien on the assessment date of personal property taxes, in the manner in which real property tax does. I.C. 6-1.1-23-1 provides the mechanism by which collection of personal property taxes is initiated, which essentially constitutes the county treasurer's service of a written demand upon the delinquent taxpayer. I.C. 6-1.1-23-2 provides the next collection step, stating:

Sec. 2. (a) If a taxpayer does not pay the total amount due within thirty (30) days after the date a written demand is made under section 1 of this chapter, the county treasurer shall levy upon and sell personal property of the taxpayer which is of sufficient value to pay the delinquent taxes, penalties, and anticipated collection expenses.

(b) The county treasurer shall levy upon personal property by calling upon the delinquent taxpayer at his residence or place of business and making a list in duplicate of all of his personal property. The county treasurer shall retain one (1) copy of the list and deliver the other copy to the delinquent taxpayer. The county treasurer may require the delinquent taxpayer to give a list under oath of all the personal property owned by him, and the names of

the owners of other personal property which is in the delinquent taxpayer's possession. If the delinquent taxpayer fails to provide the list, the county treasurer shall file a petition which states that fact in the circuit court of the county, and the circuit court shall order the delinquent taxpayer to provide the list.

(c) The county treasurer shall appraise the personal property included in a levy. The personal property included in a levy is subject to sale for the payment of the delinquent taxes, penalties, and collection expenses without further notice to the delinquent taxpayer.

I.C. 6-1.1-23-3 through 6-1.1-23-7 specify proceedings with respect to the sale of personal property for satisfaction of personal property tax.

Finally, I.C. 6-1.1-23-9 states:

#### 6-1.1-23-9 Record of delinquencies

Sec. 9. (a) In the year immediately following the year in which personal property taxes become delinquent, each county treasurer shall prepare a record of the delinquencies for which written demand has been made under section 1 of this chapter and which remain unpaid for at least sixty (60) days after the demand is made.

(b) The county treasurer shall prepare the record required by this section in a form prescribed or approved by the state board of accounts. For each delinquent taxpayer, the record shall contain:

(1) the name of the taxpayer who is personally liable for the taxes as shown by the tax duplicate;

(2) the last known address of the taxpayer;

(3) the date when the last installment of taxes included in the record became delinquent; and

(4) the amount of all delinquent taxes, penalties, and collection expenses for which such a demand has been made and which remain unpaid.

(c) The county treasurer shall swear to the accuracy of the record before the clerk of the circuit court and shall file the record with the clerk. When the record is so filed, the amount of delinquent taxes, penalties, and collection expenses stated in the record constitute a debt of the named taxpayer. This debt in all respects has the same force and effect as a judgment. The judgment so

entered shall be in favor of the county for the benefit of all taxing units having an interest in it. Beginning the day the record is filed, the delinquent taxpayer shall, instead of the penalties prescribed in IC 1971, 6-1.1-37-10, pay interest on the amount of the judgment at the same rate imposed on other judgments.

(d) On the date the county treasurer files the record in the office of the clerk of the circuit court, the county treasurer shall make an entry on the tax duplicate in a column headed "Certified to Clerk of Circuit Court."

From the foregoing, a lien in favor of the taxing authority with respect to personal property subject to personal property tax does not automatically arise on the assessment date of personal property taxes. As provided by I.C. 6-1.1-23-9, some form of lien arises when a record of delinquency is recorded with the clerk of a circuit court in the manner provided by that statute, and the recordation "has the same force and effect as a judgment". In Indiana, a judgment lien attaches only to real property, and in order to pursue collection against personal property of the judgment lien debtor, the procedures for levy and execution must be followed; this is the same with collection of personal property tax; I.C. 6-1.1-23-10.

In the instant case, the court concludes that the recordation of the personal property tax liabilities of Bucko Construction Company, Inc. had been effected pursuant to I.C. 6-1.1-23-9: had that not been the case, Stewart's initial closing statement could not have stated potential personal property tax liability, because there would have been no way that its search of public records would have disclosed that liability. Given that, the taxing authority was in a position to levy execution on the personal property subject to Bucko's liability, which included the personal property subject to the purchase transaction at issue in this adversary proceeding. There is nothing that the court has discovered in Indiana law which exempts personal property which is subject to personal property tax liability pursuant to recordation under I.C. 6-1.1-23-9 from collection in the hands of a purchaser of that property. Moreover, while many legal concepts in certain contexts preclude the attachment of liens to property acquired by a *bona fide* purchaser

(one who acquires property in good faith without notice of a potential encumbrance), that would not have been the case here with respect to Northwest, in view of the initial closing statement. Had the transaction been completed, the automatic stay would no longer be in effect in any manner with respect to the taxing authority's assertion of collection activity against the purchaser, because no provision of 11 U.S.C. § 362(a) controls in that context.

Would the taxing authority have ever undertaken collection against the personal property subject to this sales transaction? First, there was no evidence at trial as to whether or not the Lake County Treasurer pursues collection actions in a circumstance such as that which arose in this case. However, the admissible testimony of Norm Manthe at the trial establishes that in the view of the Lake County Auditor's office, the potential for collection action continued to attach to the personal property which Northwest would acquire at the closing. The remedies provided by state law are relatively clear – or at least as clear as this decision can divine them – and thus it is possible – and not unreasonably so – that under certain circumstances the personal property to be acquired by Northwest at the closing could have been the subject of a collection action by the taxing authority.

As addressed above, the court's order authorizing the sale of property subject to the instant transaction directed sale "free and clear of liens" solely to as to the real estate, and no order was entered pursuant to 11 U.S.C. § 363(f) in relation to personal property. Let's hypothesize that the Trustee – after the closing – may have filed a supplemental motion to sell the personal property subject to the transaction "free and clear". This request would have first been subject to a determination of whether or not the personal property tax liabilities constituted an "interest" in the personal property, a matter in which the purchaser would have been interested, and something which a court would have had to decide. No one can say whether or not the Lake County Treasurer would have opposed a motion of this nature – and that uncertainty is a cloud on the title of the personal property – but if the taxing authority had not

consented, a sale “free and clear” of its interests could not have been effected under 11 U.S.C. § 363(f). In any event, the Trustee did not attempt this possible remediation, apparently on the grounds that the personal property was junk and Manthe’s refusal to close was unreasonable.

Given the foregoing, the court concludes that the issues concerning personal property tax on the personal property which was a material element of the sales transaction “clouded” the “marketable title” to be provided to Northwest as a result of the transaction; that this “cloud” was more than speculative or theoretical; and that this “cloud” provided a basis for Northwest to terminate the sales transaction and obtain the return of its earnest money deposit.

One other issue must be addressed. Paragraph N(1)(D) required that the seller, at closing, deliver to the buyer a “Bill of Sale . . . containing warranties of title, conveying title, free and clear of all liens, to any personal property specified in Paragraph B”. The record evidence establishes that a bill of sale conforming to this provision was never provided by the Trustee to Northwest. The Trustee’s testimony stated that a bill of sale had been prepared, but the Trustee did not have a copy of the bill of sale at the trial and thus whatever it might have been is not part of this record. Additionally, it is almost impossible to envision that the Trustee would have warranted title to the personal property free and clear of all liens and encumbrances, given the issues concerning the personal property tax addressed above.

Based upon the foregoing, the court determines that Northwest was ready at the closing to perform its obligations concerning purchase of the subject property. The court determines that issues concerning personal property tax in relation to the personal property to be acquired by Northwest as a result of the sales transaction created a reasonable issue as to the marketability of title to be provided by the Trustee to Northwest at the closing. A “cloud” thus arising could not reasonably have been eviscerated in a manner which would have guaranteed the buyer the “marketable title” provided for by the sales transaction contract. As a result, the court determines that the Trustee, as a representative of the bankruptcy estate of Bucko

Construction Company, Inc., breached the sales agreement; that Northwest's termination of the sales agreement was valid; and that Northwest is entitled to return of the earnest money deposit of \$9,000.00.

IT IS ORDERED, ADJUDGED AND DECREED that Len Pryweller/Len Pryweller Realty – as the entity in possession of the earnest money deposit of \$9,000.00 – shall pay over the earnest money deposit of \$9,000.00 to Northwest Equipment and Trailer, Inc. within 30 days of the date of entry of the judgment with respect to this memorandum of decision.

Dated at Hammond, Indiana on August 6, 2012.

/s/ J. Philip Klingeberger  
J. Philip Klingeberger, Judge  
United States Bankruptcy Court

Distribution:  
Attorneys of Record  
Len Pryweller