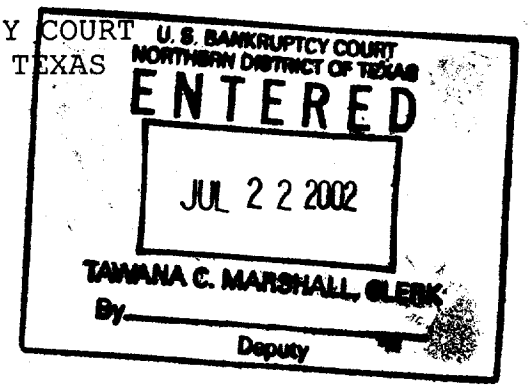
ORIGINAL

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION



IN RE:	§	
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JERRY W. BIESEL and ELIZABETH S. BIESEL,	§	CASE NO. 00-35322-SAF-11
	§	
	§	
DEBTOR(S).	§	

MEMORANDUM OPINION ON REMAND

By a judgment entered April 24, 2002, the United States District Court affirmed in part and vacated in part this court's order granting the debtor's motion to reject an executory contract. The district court remanded the matter for further proceedings. The bankruptcy court held a status conference with the parties on June 13, 2002. The court set a schedule for submitting briefs concerning the issue of the conduct of a licensed attorney in his personal business affairs. The attorneys submitted briefs on July 3 and July 8, 2002.

The district court affirmed this court's findings and conclusions that Jerry W. Biesel waived the right to assert that his contract with Karl Billings had terminated. Consequently, that holding is now the law of this case. This court had similarly found that Billings had waived the right to assert that

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the contract had terminated. Consequently, the contract remained extant and executory at the time of the petition. With the contract remaining executory at the time of the instant bankruptcy petition, the parties stipulated that Biesel as a debtor in possession had to reject the contract.[1]

As a result, Billings suggested, at the conference on remand, that this court merely withdraw its additional findings and conclusions. By doing so, the court would finalize the dispute, unless Biesel sought further review in the Fifth Circuit. With the waiver decision now the law of the case, it does appear that the contract rejection motion has been resolved without the need for further findings or conclusions.

The district court also affirmed this court's findings and conclusions that Biesel was equitably estopped from asserting that title-related matters caused the contract to terminate either when the closing did not occur by October 15, 1994, or when the parties did not expressly agree to continue the closing date. The district court held that this court's analysis, that Biesel's title misrepresentations supported the application of equitable estoppel, presented no reason for reversal.

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[1]The contract provided for a sale of real estate in Terrell County, Texas, for $660,000. By an order entered December 6, 2002, this court converted the case to a case under Chapter 7 of the Bankruptcy Code. The creditors elected Dan Lain as the Chapter 7 trustee. By an order entered June 19, 2002, the court granted the trustee's motion to sell the subject property for $2,200,000.

Presumably, then, that is now also the law of this case. Thus, with the contract termination waived by Biesel, and with Biesel estopped from claiming that title defects prevented a timely closing of the sale, the contract remained extant and executory, resulting in the rejection of the contract by the bankruptcy estate.

Billings suggested that the court again withdraw any further findings and conclusions as the law of the case results in finality for the contract rejection motion, barring Fifth Circuit review. The court does not disagree with that reading of the record.

Nevertheless, this court must comply with the district court's mandate, even if the issues being addressed are alternative holdings on matters presented at trial. At trial, this court decided all the issues it understood to have been presented in the litigation, even if unnecessary to adjudicate the dispute. Blockton Cahaba Coal Co. v. United States, 24 F.2d 180, 181 (5th Cir. 1928)(Explaining "it was the duty of the trial court to make complete findings of fact upon all the issues.") The trial court should not, after a full trial, conclude its findings when it adjudicates a dispositive issue. Instead, the court should enter findings on the remaining, contested issues. By doing so, in the event of a reversal, the other issues would have been adjudicated and could be addressed on appeal without a

remand for further proceedings. A trial court can thereby advance the resolution of litigation, reducing the costs of an already expensive process.

This court entered findings of fact and conclusions of law regarding the resolution of six title objections necessary for closing the sale. Consistent with the admonition of the Fifth Circuit to address all issues, the court entered those findings as alternatives should the court be reversed on the waiver and/or estoppel issues.

The contract provided that "Seller [Biesel] shall in good faith attempt to satisfy [title objections] prior to closing, but Seller shall not be required to incur any cost to do so." Billings contended that if Biesel had acted in good faith, then Biesel could have satisfied the six title objections. Billings further contended that, as a result, a Texas court would have ordered specific performance of the contract. This court found that Biesel could have satisfied the title objections by acting in good faith. The court further found that Billings had a basis to seek specific performance in state court prior to the bankruptcy case.

On appeal, the district court held that this court did not sufficiently address how Biesel's representations of the seller's identity and that he would deliver good and marketable title would support applying equitable estoppel with regard to the

particular title defects. This court did not intend to hold that equitable estoppel arose at the particularized level of each title objection. Rather, after deciding the equitable estoppel issue, this court attempted to address whether Biesel could have complied with the contractual requirement that he make a good faith attempt to satisfy title objections, provided that he could do so without cost. This court made its findings in the context of determining whether both parties to the contract could have been subjected to a specific performance judgment from a Texas court. A contract, executory in nature and capable of performance, would therefore be a contract appropriate for rejection under 11 U.S.C. § 365. This court reenters its findings and conclusions:

> Billings has established that Biesel did not do all [that] he reasonably could [have done] to satisfy the objections. Indeed, good faith efforts could have resolved the objections. For that reason, Billings had a basis to seek specific performance under Texas law, and as a result, a contract remained viable with the commencement of the specific performance suit. Since the suit had not been adjudicated prior to the filing of the instant bankruptcy case, the contract remained viable and executory."

Transcript of bench ruling, dated August 17, 2001, at 19-20. The court clarifies that this set of findings addresses performance and not equitable estoppel and had been entered for purposes of completeness.

Given the nature of the remand, for purposes of completeness, the court will address the sole title defect addressed by

the district court and before this court on remand, namely, a FSLIC *lis pendens*. Biesel agreed that he would make a good faith effort to cure title defects. Biesel and Billings further agreed that Biesel had no obligation to incur costs to do so. Biesel is an attorney licensed to practice law in the state of Texas. Biesel has legal and business experience in real estate transactions. By professional training and experience, Biesel understands the process and requirements of real estate closings. Based on the evidence adduced at trial and reasonable inferences drawn therefrom, Biesel: (1) knows what a *lis pendens* is; (2) knows how title companies work; (3) knows how to contact title companies; (4) knows how to contact parties to a recorded document; and (5) knows how to draft and file documents relating to title.

Billings' attorney testified at trial how he obtained the release of the *lis pendens* at *de minimis* cost. Biesel did not contest that testimony. He presented no evidence addressing what the cost to him of obtaining a release would have been. Biesel merely testified that he would have incurred the cost of retaining an attorney to do the work. He neither explained why he would have had to retain an attorney nor whether or what, if anything, an attorney would have charged him for the work. The court reenters its finding that Biesel, an attorney with real estate experience, could have obtained the release as easily as

Billings' attorney obtained it. Transcript at 21.

The contract states that Biesel shall not be required to incur any cost in attempting to cure title defects. But, this court must read "any cost" to mean costs greater than a *de minimis* amount. To read the provision literally would read the good faith requirement of the same sentence out of the sentence. "Good faith attempt" means that Biesel has to make a reasonable effort to resolve the matter. A reasonable effort has to necessarily involve some minimum cost. Making telephone calls, and writing, obtaining execution, and recording a release involves some minimal cost. The sentence of the contract must be read as a whole giving meaning to all its words.

Given Biesel's experience and considering the testimony of Billings' attorney, Biesel could have cured the *lis pendens* title objection, as he could the other title objections, by making a good faith attempt and that he could have done so at *de minimis* costs. As a result, on this alternative ground, the court again concludes that a Texas court would have considered the contract subject to an order for specific performance. On this alternative ground, the contract remained viable and executory at the time of the petition and hence subject to rejection by the debtor in possession.

The district court has also mandated that this court further consider Biesel's conduct as an attorney. The district court

recognizes Biesel's ethical obligation to this court with respect to representations made to this court. But, this court did not gratuitously or sporadically refer to Biesel's status as an attorney, as apparently argued by Biesel to the district court.

Biesel is an attorney. Moreover, he is an attorney that is experienced in real estate transactions. These two facts have bearing on the court's analysis of Biesel's representations in a contract for the sale of real estate, on his ability to perform under the contract, and on his obligation to address title objections in good faith. Similarly, these facts have bearing on the reading of the cost qualification on good faith acts, as the cost to a layman addressing a title objection may be materially different than to a person trained in the law and experienced in real estate transactions. Biesel cannot simply disregard his professional training and experience when it suits his pecuniary interest. A court may, and indeed must, consider all relevant evidence in making findings of fact and conclusions of law. Biesel's professional training and experience, and indeed the significance of his license issued by the Supreme Court of Texas, is relevant to the matters adjudicated by the court.

Beyond that, however, the court welcomes the invitation to comment on the ethical standards of an attorney when engaged in personal business matters. Before receiving a license from the

Supreme Court of Texas, a person admitted to practice law must take an oath that the person will "honestly demean himself in the practice of law." Tex. Disciplinary R. Prof'l Conduct 82.037. By doing so, the person does not suggest that the obligation for honesty does not apply to personal matters. To the contrary, admission to practice law before the highest court of a state requires that a lawyer have a "fair *private* and professional character." In the Matter of Rouss, 116 N.E. 782, 783 (N.Y. 1917)(Cardozo, J.)(emphasis added). Compliance with that condition is essential at admission and thereafter. When the condition is broken, the "privilege" to practice law may be lost. Id. To that end, Texas commands that "[a] lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Tex. Disciplinary R. Prof'l Conduct 8.04(a)(3). The Texas rules neither limit that admonition to conduct representing clients nor provide that the conduct does not include personal business affairs.

While recognizing that ethical standard, this court intended its findings to include Biesel's obligations to the court and the fact of his training and experience, as pertains to his dealings with Billings.

ORDER

Based on the court's findings of fact and conclusions of law issued from the bench on August 17, 2001, the judgment of the

United States District Court entered April 24, 2002, and the above findings of fact and conclusions of law issued pursuant to the mandate of the District Court,

IT IS ORDERED that paragraphs 2, 3, 4, and 5 of the order entered August 29, 2001, are hereby re-entered as the order of this court. The trustee of the Chapter 7 bankruptcy estate shall proceed accordingly.

SO ORDERED.

Signed this 18th day of July, 2002.

Steven A. Felsenthal
United States Bankruptcy Judge