UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In re:

MODERN PLASTICS CORPORATION,

Debtor.
_____/

Case No. 09-00651
Hon. Scott W. Dales
Chapter 7

NEW PRODUCTS CORPORATION and UNITED STATES OF AMERICA,

Plaintiffs,

v.

THOMAS R. TIBBLE, individually and in his capacity as Chapter 7 Trustee, and FEDERAL INSURANCE COMPANY,

Defendants.
_____/

Adversary Pro. No. 13-80252

MEMORANDUM OF DECISION AND ORDER

PRESENT: HONORABLE SCOTT W. DALES
Chief United States Bankruptcy Judge

I. INTRODUCTION

Bank of America ("BOA") extended credit to Modern Plastics Corporation (the "Debtor") and secured its loan, in part, with a mortgage on the Debtor's factory located at 489 North Shore Drive, Benton Harbor, Michigan (the "Property"). On January 26, 2009, the Debtor filed a voluntary petition for relief under chapter 7 and Thomas R. Tibble was appointed as trustee (the "Trustee"). BOA's assignee, New Products Corp. ("New Products"), now seeks to hold the Trustee and the estate accountable in damages for the diminution in the Property's value during the nearly five years in which it remained as property of the estate within the Trustee's custody. New Products also sued

the Trustee's surety, Federal Insurance Company (the "Surety"), which issues the blanket surety bond for panel trustees in our District, arguing that the Surety is liable because the Trustee did not faithfully perform his duties as trustee.

After a failed attempt at mediation, the parties have filed motions in the nature of summary judgment, espousing various theories affecting the scope of the Trustee's duties and the nature of his possible liability -- either in his official or personal capacity. The Trustee and the Surety jointly filed Defendants' Motion for Summary Judgment (the "Defendants' Motion," DN 56), which New Products opposes.[1] For its part, New Products filed a motion entitled "Plaintiff New Products Corporation's Motion to Determine (1) the Trustee's Legal Duties to Preserve and Insure the Modern Plastics Property and to Object to Improper Property Tax Assessments and (2) the Obligations of Federal Insurance Company as a Surety for the Trustee" (the "New Products Motion," DN 57).[2] The Defendants oppose the New Products Motion.

The court heard oral argument on December 3, 2014, in Grand Rapids, Michigan, and has carefully considered the parties' arguments. For the following reasons, the court will grant the Defendants' Motion in part, deny it in part, and address the points New Products raises in its motion.

II. JURISDICTION AND AUTHORITY

The United States District Court has jurisdiction over the Debtor's bankruptcy case pursuant to 28 U.S.C. § 1334(a), and has referred the case and this adversary

[1] The Trustee previously filed a Motion for Partial Dismissal (the "Dismissal Motion," DN 31) before the court stayed this adversary proceeding, at the parties' request, to facilitate mediation. New Products also opposed the Dismissal Motion.

[2] New Products filed its motion in response to the summary judgment deadline prescribed in the Scheduling Order dated August 11, 2014 (DN 52), and although not styled as a motion for summary judgment, the court regards the New Products Motion as akin to a motion under Fed. R. Civ. P. 56.

proceeding to the United States Bankruptcy Court pursuant to 28 U.S.C. § 157(a) and LCivR 83.2(a)(W.D. Mich.). In addition, because New Products has sued a bankruptcy trustee, 28 U.S.C. § 959 also supports the court's exercise of jurisdiction. *Robinson v. Michigan Consolidated Gas Co. Inc.*, 918 F.2d 579, 586 (6th Cir. 1990) ("The basis of the jurisdiction is that a suit against a receiver or trustee is ancillary to the court's general jurisdiction over the property he administers.").

Because New Products is attempting to recover property from the estate and is suing a bankruptcy trustee for breach of his duties under Title 11, the adversary proceeding is a "core" proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A) and (B) (administration and claims allowance). Claims arising from alleged breach of a bankruptcy trustee's statutory and fiduciary duties can only arise in a case under Title 11. The court, therefore, has authority to enter final judgment.

III. ANALYSIS

A. Summary Judgment Principles

A court may enter summary judgment "after time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party always bears the initial responsibility to inform the court of the basis for its summary judgment motion, and identify those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. *Id.*; *see also Boretti v. Wiscomb*, 930 F.2d 1150, 1156 (6th Cir. 1991). In considering whether the moving

party has met this burden, the court construes the record in favor of the non-moving party. *Gutierrez v. Lynch*, 826 F.2d 1534, 1536 (6th Cir. 1987). If the movant properly supports its motion, the burden then shifts to the non-moving party who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (quoting prior version of Fed. R. Civ. P. 56(c)).[3]

On the other hand, a court should deny a motion for summary judgment "[i]f there are . . . 'genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.'" *Hancock v. Dodson*, 958 F.2d 1367, 1374 (6th Cir. 1992). As noted above, in determining whether a genuine issue of material fact exists, a court must assume as true the evidence of the non-moving party and draw all reasonable inferences in the favor of that party. *Humenny v. Genex Corp.*, 390 F.3d 901, 904 (6th Cir. 2004) (citing *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). However, "the mere existence of some alleged factual disputes between the parties will not defeat an otherwise properly supported motion for summary judgment." *Liberty Lobby*, 477 U.S. at 247. Rather, there must be evidence on which the fact finder could reasonably find for the non-movant. *Humenny*, 390 F.3d at 904.

The purpose of the summary judgment procedure is not to resolve factual issues, but to determine if there are genuine issues of fact to be tried. *Lashlee v. Sumner*, 570 F.2d 107 (6th Cir. 1978). The court must determine only whether sufficient evidence has been presented to make the issue of fact a proper question of fact; "it does not weigh the

[3] When a court addresses cross-motions for summary judgment, the analysis applies distinctly to each motion.

evidence, judge the credibility of witnesses, or determine the truth of the matter." *Weaver v. Shadoan*, 340 F.3d 398, 405 (6th Cir. 2003).

As for the timing of such a motion, although the rules permit a party to move for summary judgment before any discovery has been conducted, Fed. R. Civ. P. 56(b), they also provide a check on premature adjudication by authorizing a non-movant to show "by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." Fed. R. Civ. P. 56(d). Counsel for New Products filed just such an affidavit, explaining that New Products seeks to examine the Trustee, especially regarding his evaluation of the Property, as well as the Trustee's realtor, and representatives from BOA and the Debtor. *See* Affidavit of Mark S. Demorest, dated November 3, 2014 (attached as Exh. 29 to Response to Defendants' Motion for Summary Judgment (DN 62-3)). Through this proposed discovery, New Products intends to test the Trustee's valuation of the Property, and hear from third parties about the steps he took (if any) to satisfy his duty to BOA, for example by keeping the bank apprised about the condition of the Property. *Id.* at ¶ 5.

The Sixth Circuit has described the predecessor to this rule as "a mechanism . . . to give effect to the well-established principle that 'the plaintiff must receive 'a full opportunity to conduct discovery' to be able to successfully defeat a motion for summary judgment.'" *Ball v. Union Carbide Corp.*, 385 F.3d 714, 719 (6th Cir. 2004). Although the courts frown on cursory or last-ditch requests for additional discovery, *Short v. Oaks Correctional Facility*, 129 Fed. App'x 278 (6th Cir. 2005) (unpublished), especially after the non-movant has had an opportunity for discovery, in this case the court (with the consent of the parties) has stayed most discovery in this proceeding to accommodate

mediation and preserve resources while giving the parties the opportunity to sort out various legal, as opposed to factual, issues. *See* Orders dated March 26, 2014 (DN 48) and August 12, 2014 (DN 53). These orders precluded New Products from conducting discovery to a considerable extent.

B. Factual Background

The Debtor filed a voluntary chapter 7 petition with this court on January 26, 2009, creating a bankruptcy estate that included, among other things, the Debtor's interest in the Property, which the Debtor reportedly used as a factory until a few months before filing for bankruptcy relief. The Property is in close proximity to the business premises of New Products, as well as an 18 hole golf course referred to as "Harbor Shores."

As of the petition date, BOA held a claim against the Debtor in the amount of $1,275,912.01, according to Proof of Claim No. 12. *See* Fed. R. Bankr. P. 3001(f). To secure its obligations to BOA, the Debtor granted a mortgage in the Property (and other real estate), as well as security interests in substantially all of the Debtor's personal property.

In a prepetition appraisal procured by BOA in 2008, the appraiser opined that the Property had a fair market value of $1,050,000.00. *See* Appraisal dated March 12, 2008 (attached to brief supporting New Products Motion). The appraisal, however, does not take into account possible environmental issues affecting the Property and resulting cleanup costs. A few months after the appraiser issued the report, the Debtor agreed to sell the Property to Ox Creek Development, LLC ("Ox Creek") for $650,000.00, less certain credits.

After the Debtor commenced its bankruptcy case, the Trustee attempted to sell the Property, retaining a realtor for this purpose, but unfortunately was unable to close any such transaction. For example, the Trustee endeavored to consummate the prepetition sale agreement between the Debtor and Ox Creek on substantially the same terms, but eventually withdrew the first sale motion. Later, the Trustee filed a second motion, on August 25, 2009, this time including a $10,000.00 option payment, and a sale price of $590,000.00. Although the Trustee received option payments from Ox Creek or its assigns, ultimately the potential purchaser did not exercise its option to purchase.

Despite the frustrated sale efforts, the Trustee did derive some value from the option payments and by leasing the Property for use as a parking lot during a PGA golf tournament at Harbor Shores, given its proximity to the course.

Tellingly, BOA consented to both proposed sale transactions, establishing (according to the Trustee) that the Property was worth approximately $600,000.00 on or about the petition date. In other words, the Trustee asks the court to infer, from BOA's consent to the sale at that price, that the Property was worth approximately $600,000.00 -- well below the $1.275 million claim of BOA encumbering the Property.

Indeed, as noted above, the court approved the option agreement and the proposed sale at the price of $590,000.00 as "fair, reasonable and equitable," and authorized the Trustee to sell the Property at that price to Ox Creek, free and clear of liens and other interests. *See* Order Approving Option Agreement and Authorizing Sale of Real Property (489 N. Shore Drive), dated September 22, 2009 (DN 45).

In its Asset Protection Report, filed with its bankruptcy petition on January 26, 2009, the Debtor clearly advised the Trustee and other interested parties that the Property was not insured, and asked that the Trustee not procure insurance.

At first, BOA maintained casualty insurance in connection with the Property but on or about November 11, 2010, after consulting with the Trustee by email, BOA and the Trustee agreed to cancel insurance coverage. *See* Defendants' Motion at Exh. C (Steve Siravo email dated November 11, 2010). In that email, BOA's Vice President observed that he was "not going to put any more of the Banks [sic] money into [the Property]." *Id.*

Although the Trustee never obtained the keys to the Property, and took no steps to secure it (for example, by changing locks or installing fencing), the Debtor's former management and a realtor had access, and the realtor periodically reported instances of vandalism affecting BOA's collateral, though perhaps not the Property,[4] specifically efforts by certain criminals to purloin the metal and other valuable items of parts BOA's collateral.

The looting of the Property became so severe that, according to New Products, the roof, which had been leaking, eventually collapsed. During the Trustee's custody of the Property, the local authorities prohibited occupancy of the structure, given its condition.

Adding insult to injury, the Property evidently suffered from environmental contamination related to a leaking transformer on site. State environmental officials were apprised of the contamination but the Trustee took no steps toward remediation, evidently hoping to sell or otherwise dispose of the Property and the environmental problem without expending other property of the estate, at least according to inferences to be

[4] The documentary evidence of the vandalism reports from the realtor seems to be referring to collateral other than the Property. *See* Amended Complaint, Exh. 4 (DN 15-7).

drawn from an email between the Environmental Protection Agency and the Michigan Department of Environmental Quality. *See* Amended Complaint, Exh. 2 (DN 15-5).

In a declaration filed in support of the Defendants' Motion, the Trustee states that he spoke with BOA's representative, Mr. Siravo, "on a regular basis throughout the bankruptcy process and kept him informed regarding my actions" with respect to the Property, the environmental concerns, the sales, and the vandalism problems. *See* Tibble Decl. at ¶¶ 7-8. The Trustee's statements, if true, evidence his efforts to fulfill his fiduciary duties to BOA (and New Products, as assignee). As noted above, however, New Products has not had the opportunity to depose Mr. Tibble or Mr. Siravo.

Notwithstanding the Trustee's position that the Property was worth well-less than the $1.275 million claim of BOA (and, by assignment, New Products), and despite the fact that most of the evidence points in favor of this conclusion, New Products notes that the Trustee himself consistently reported on the so-called "Trustee's Form 1," at several points during the case from 2009 to 2013, that the value of the Property exceeded all liens and other encumbrances. These reports, though perhaps mistaken, nevertheless constitute unexplained admissions that the Property's value exceeded encumbrances.

The photographic evidence included in the record, especially a comparison between the photographs attached to the March 2008 appraisal (DN 52-2) and those attached to other filings[5] show dramatic, indeed transformative, deterioration of the Property. Drawing inferences in favor of New Products, these photographs show that the Property deteriorated substantially under the Trustee's supposed tutelage.

[5] *See* Reply to Trustee's Response to Creditor New Products Corporation's Objection to Trustee's Final Report and Applications for Compensation (Base Case DN 154 and 155).

New Products, the Debtor's nearby neighbor and former (unpaid) supplier, eventually purchased BOA's claim and mortgage against the Property on or about March 21, 2013, well after the Property had substantially deteriorated. Since that time, New Products has complained about the Trustee's neglect or mistreatment of the Property, opposing the Trustee's final report and eventually commencing this adversary proceeding against the Trustee and the Surety to recover the diminution in value of the Property and perhaps other remediation expenses, on the theory that the Trustee breached his fiduciary duties to the estate, BOA, and derivatively to New Products as a secured and unsecured creditor.

C. The Defendants' Summary Judgment Motion

The Trustee admits that his duty ran to BOA as well as to the unsecured creditors. Simply recognizing the existence of this duty, however, does not resolve the controversy. Rather, given the different rights and responsibilities of secured and unsecured creditors, the Trustee fulfills his obligations to each in different ways.

Where a particular piece of estate property is fully encumbered, a trustee ought not to expend estate resources to protect or preserve that property, because the benefit of the expenditure inures to the secured creditors at the expense of the unsecured. *See, e.g.*, *United States ex rel. Central Savings Bank v. Lasich (In re Kinross Mfg. Corp)*, 174 B.R. 702 (Bankr. W.D. Mich. 1994). Stated differently, a trustee should not spend money that would otherwise go to unsecured creditors to prop up the collateral of a particular secured creditor. *Cf.* 11 U.S.C. § 506(c). Of course, as a practical matter, it is frequently difficult to know the value of a thing or parcel of property. As long as the property is within a trustee's legal custody, however, a trustee may be duty-bound to preserve it.

As a statutory matter, the Trustee is "accountable for all property received" as trustee. 11 U.S.C. § 704(a)(2). And, as Judge Spector observed after canvassing the case law years ago:

> A trustee who fails to exercise due diligence to conserve assets of the bankruptcy estate must account for assets dissipated through his negligence. *Carson, Pirie, Scott & Co. v. Turner*, 61 F.2d 693 (6th Cir.1932). The measure of care, diligence and skill required of a bankruptcy trustee is that of an ordinarily prudent man in the conduct of his private affairs under similar circumstances and of a similar object in view; and although a mistake of judgment is not a basis to impose liability on a trustee, a failure to meet the standard of care does subject him to liability.

Reich v. Burke (In re Reich), 54 B.R. 995, 998 (Bankr. E.D. Mich. 1985); *see also Ford Motor Credit Co. v. Weaver*, 680 F.2d 450, 461-62 (6th Cir. 1982). Similarly, courts have held that a bankruptcy trustee, as custodian of secured property, owes a fiduciary duty to creditors with claims fully secured by estate property. *Reich*, 54 B.R. at 1002. Generally speaking, bankruptcy is collective proceeding with a trustee at the center, charged with different duties to the various stakeholders depending upon the nature or extent of the interests at stake.

The Trustee does not deny the existence of the fiduciary duties, but instead argues that he fulfilled the duties, given the value of the Property and the absence of equity after taking into account the various encumbrances. The Defendant's Motion, in other words, is premised largely on the supposed fact, strongly suggested by the record evidence, that the Property was underwater at all times, *i.e.*, its value did not exceed the $1.275 million debt secured by the BOA mortgage, plus the tax liens, and other interests. Therefore, if the Property promised no benefit to the estate, the Trustee would have no need or justification to use unencumbered estate resources to preserve it. Indeed, unsecured

creditors could justifiably complain under those circumstances if the Trustee used estate property to benefit BOA at their expense: if the Property were truly underwater, it would be perfectly reasonable not to spend money to insure it indefinitely, fence it, or otherwise maintain it, or seek to reduce a tax assessment, for example. But, as New Products argues, one would then expect a faithful trustee to abandon the asset under § 554 promptly upon deciding that the property was underwater and offered no benefit to the estate.

Similarly, again premised on the Property's being underwater, if BOA instructed the Trustee not to insure, secure, improve, or otherwise protect the Property or its value, and if the Trustee took steps or refrained from taking steps consistent with that instruction, it would be easy to conclude that the Trustee fulfilled his fiduciary duties to the secured creditor.

Consequently, if BOA would be precluded from challenging the Trustee's conduct, so would New Products be estopped, under well-settled principles governing the rights of an assignee, including the familiar *nemo dat* rule of property law -- "he who hath not cannot give." *See* Black's Law Dictionary, 5th ed. (West 1979); *see also Michigan Fire Repair Contractors' Assn. v. Pacific Nat'l Fire Inc.*, 107 N.W.2d 811 (Mich. 1961) (assignor cannot convey any right that it did not possess); *Coventry Parkhomes Condominium Ass'n v. Federal Nat. Mortg. Ass'n*, 827 N.W.2d 379, 382 (Mich. App. 2012) ("It is well established that an assignee stands in the shoes of an assignor, acquiring the same rights and being subject to the same defenses as the assignor."). This principle is not controversial, as New Products's counsel conceded during an earlier colloquy with the court.

In short, the Defendants' contention that the Property was underwater -- if accepted -- could have significant implications for the case and whether the Trustee fulfilled his fiduciary duties to unsecured creditors. Similarly, if BOA, as a matter of fact, instructed the Trustee to behave with respect to the Property as he did, or knowingly acquiesced, the Defendants will not have to answer in damages to BOA's assignee, New Products.

The difficulty with the Defendants' arguments at this point in the proceeding is that their success depends upon the court's willingness to draw inferences in the Defendants' favor, inferences forbidden at the summary judgment stage. For example, the Defendants ask the court to infer, based upon the purchase price reflected in several unconsummated sales agreements, that the Property is worth approximately $600,000.00. Certainly, this evidence strongly favors the Defendants' position on this point. But other data within the record favors a different view.

New Products, for example, points to the Trustee's admissions in the various Form 1 reports, which plainly state that the Property's value exceeded liens by as much as $600,000.00 as of March 18, 2009, and $25,000.00 as of June 10, 2013. *See* Exh. 14 (attached to Response to Defendants' Motion for Summary Judgment). These admissions, if accepted as true, require no inference to support a conclusion that the Property had value beyond all encumbrances -- this is precisely what the Trustee said, at least in these court filings. The Trustee's publicly filed reports[6] suggest that for four

[6] By filing the Form 1 documents, the Trustee must have assumed that the court and others would rely on the statements included therein. Perhaps at trial, however, the Trustee will explain why the court and interested parties should not rely on these periodic reports. It certainly would be ironic if, at trial, the Trustee sought to avoid liability for negligently administering the Property by proving that he negligently prepared the official interim reports valuing the Property.

years the Property was not a lost cause and the Trustee ought to have protected the equity he reportedly identified therein.

It is also possible, based upon the record, to infer that the Trustee perceived that he might derive value from the Property through additional lease transactions or, perhaps, by negotiating a "carve out" for the estate. The court could find that these possible benefits to the estate warranted continued retention of the Property, with the concomitant responsibility to maintain and protect it against vandalism, and the elements.

Although the Defendants put considerable emphasis on the court's "findings" in its sale orders authorizing the Trustee to sell the Property to Ox Creek for approximately $600,000.00, and urge the court to conclude that New Products is bound by this earlier decision about value, the court is not inclined to do so at this stage of the case. First, the court did not conduct an evidentiary hearing, so the reference to "findings" is perhaps an overstatement. Second, the sale did not close. Third, it is not clear to the court that New Products (at the time the holder of an unsecured trade claim) had a sufficient incentive to litigate the issue of value, and it would be unfair to preclude New Products from contesting value at this time. *Cf. Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 330-31 (1979) ("If a defendant in the first action is sued for small or nominal damages, he may have little incentive to defend vigorously, particularly if future suits are not foreseeable."); *see generally* 18 Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 4423 (2d ed. 2005) ("The most general independent concern reflected in the limitation of issue preclusion by the full and fair opportunity requirement goes to the incentive to litigate vigorously in the first action."). At the time of the sale hearings, New Products had only an unsecured claim that would be satisfied by an

uncertain *pro rata* distribution with other similarly situated creditors, and it most certainly would not have foreseen that its failure to contest the sale would be used against it in this later proceeding.

Although BOA's consent to the sale strongly (though inferentially) suggests that New Products's predecessor-in-interest regarded the sale price as equivalent to the Property's value at the time, the court is not inclined to bind New Products to the supposed factual determination of value without discovery from BOA and perhaps others who might shed light on the value question. Although it seems likely that, in consenting to the sale to Ox Creek for roughly $600,000.00, BOA believed the Property was worth about that amount, it is also possible to infer that BOA may have had other reasons for consenting to the sale -- regulatory, political, environmental, commercial, or other concerns not yet discovered. As Mr. Demorest's affidavit suggests, discovery of Mr. Siravo or others from BOA may be important in understanding why the bank acted as it did, and what inferences the court should draw at trial from BOA's acts or omissions.

Moreover, the undisputed fact that the Trustee did not abandon the Property for nearly five years itself raises an inference of value because, after all, a trustee should abandon property of inconsequential value or benefit under § 554, especially where the Property, if properly tended, would impose burdens on the estate. He did not abandon the Property until late in 2013.[7] It would not be unreasonable to infer that the Trustee perceived some value in the Property beyond the BOA/New Products lien, the tax liens, and other burdens affecting its value, based upon the fact that he retained the estate's interest in the Property as long as he did, notwithstanding § 554(a).

[7] Perhaps at trial, the Trustee will explain why he retained the Property for as long as he did, despite his current view that it was underwater from the start.

Much of the Defendants' Motion depends upon the court's willingness to find that the Property promised no value beyond the BOA and other liens encumbering it. For example, with respect to the Trustee's supposed duty to object to the claims of taxing authorities (arguably premised on inflated valuations), the Defendants note that a trustee should object to claims "if a purpose would be served . . .." 11 U.S.C. § 704(a)(5). They argue, however, that no purpose would be served because the Property would still be worth less than the BOA liens -- an argument dependent upon the court's making a factual determination about the Property's value.

Similarly, the Defendants contend that it would have been a waste of resources to protect the Property against vandalism or environmental contamination, given the absence of equity in the Property above the BOA mortgage and the tax liens. Again, however, the argument that the Trustee fulfilled his fiduciary duties depends to a considerable extent on reaching a conclusion (as a matter of fact) about the Property's value. A motion for summary judgment does not license a trial court to predict the outcome of a case based upon inferences that favor the moving party, even inferences as compelling as those that support the Defendants' Motion.[8]

The Defendant's position with respect to the Trustee's cancellation of insurance, though also bearing on the question of value,[9] has broader implications because of BOA's role in the case, its role in the Trustee's decision, and its relationship to New Products as assignor. More specifically, BOA expressly agreed that the Trustee should cancel the insurance, after the Trustee consulted with Mr. Siravo. Because the Trustee followed this

[8] At trial, of course, the court (without a jury) will be authorized to draw the inferences upon which the Defendants' Motion depends.

[9] It is tempting to infer from BOA's decision to cancel insurance that the Property was worth less than the liens, but this inference is one that the court must not draw in the Defendants' favor on a summary judgment motion.

instruction, irrespective of BOA's rationale, no reasonable fact finder would conclude that the Trustee acted contrary to BOA's interests by declining to insure the property after November, 2010. Accordingly, there is no genuine issue as to the Trustee's performance of his duty to BOA in this respect. The Defendants are entitled to a ruling in their favor precluding New Products, as BOA's assignee, from any recovery premised upon the Trustee's decision to cancel insurance.

D. The New Products Motion

The New Products Motion does not read like a typical summary judgment motion, because it invites the court to make a ruling on "certain key legal issues in this case," without asking the court to find any facts as conclusively established. More specifically, New Products asks the court whether it will follow *Ford Motor Credit Co. v. Weaver*, 680 F.2d 451, 461 (6th Cir. 1982), in deciding whether the Trustee is liable in his "official capacity" (with recovery limited to estate assets and perhaps the Surety's bond), or his "personal capacity" -- so that New Products might reach the Trustee's personal assets to satisfy the claim. New Products also seeks guidance on the measure of damages.

As to the first question, the court is bound to follow the Sixth Circuit's *Weaver* decision, and will do so. Although the decision has been occasionally and thoughtfully criticized, it remains the standard in our circuit, reaffirmed recently, albeit in *dicta*. *See Grant, Konvalinka & Harrison, PC v. Banks (In re McKenzie)*, 716 F.3d 404, 413 (6th Cir. 2013) (noting that under *Weaver* a trustee is only personally liable for acts "willfully and deliberately in violation of his fiduciary duties"); *but see In re Engman*, 395 B.R. 610, 625 n.23 (Bankr. W.D. Mich. 2008) (describing as "confusing" the distinction in

Weaver between official liability and personal liability); *Reich*, 54 B.R. at 998 (criticizing *Weaver* but following it).

For the avoidance of doubt, and in the admittedly-reluctant words of Judge Spector:

> If the trustee was "merely" negligent, he is liable only in his "official" capacity, whatever that may be; however, if he willfully breached his duty, he is personally liable for any loss.

Reich, 54 B.R. at 1002.

As for the Surety's exposure, the court agrees with Judge Spector, and later Judge Howard, that if the Trustee negligently performed his duty to BOA or New Products, he did not "faithfully" perform his duty as trustee, and the Surety may be responsible under the bond. *See Kinross*, 174 B.R. at 706 (citing *Reich*, 54 B.R. at 1002).

As for the Trustee's personal exposure, if the court concludes that the Trustee was merely negligent (and that the negligence is otherwise actionable), the Trustee's personal assets will not be available to satisfy the New Products claim.

Regarding the measure of damages to New Products as holder of a secured claim, the court finds unpersuasive the argument that New Products's damages may exceed the amount of the claim it purchased from BOA, less any payments either BOA or New Products have received on account of the claim. As mortgagee, BOA's only interest in the Property is to secure payment of its claim. As assignee, the interest of New Products is similarly limited. Therefore, assuming New Products prevails at trial, its damages as holder of a secured claim will be capped accordingly.

To the extent New Products seeks recovery for damage to its interest as unsecured creditor, its efforts in this court seem quixotic, in light of the bankruptcy principle of

equitable distribution and the expense New Products is incurring in its quest for a recovery it will most likely be required to share with other unsecured creditors.

For example, if the court concludes at trial that the Trustee breached only his duty to the unsecured creditors (*i.e.*, to the estate), the court will not permit a single unsecured creditor[10] to enjoy the entire recovery for such injuries, given the derivative nature of an unsecured creditor's injury. Stated differently, any recovery from the Defendants will be shared *pro rata* among similarly-situated creditors to the extent the recovery represents proceeds of the estate's post-petition chose in action against the Trustee for breach of fiduciary duty. *See* 11 U.S.C. §§ 541(a)(7) (property of the estate includes property that the estate acquires post-petition) and 726 (distribution of estate property). Because an unsecured creditor (by definition) has no interest in any particular estate property, such a creditor who complains that a trustee has damaged the estate is similar to a shareholder who brings a derivative action to recover for injuries a corporation suffers at the hands of faithless managers. In such an action, the recovery is for the use of the injured corporation. *Cf.* Fed. R. Bankr. P. 2010(b) (proceeding on a trustee's bond is brought "for the use of the entity injured by the breach of the condition"). And, because the filing of the Debtor's petition commenced a case under chapter 7 (rather than chapter 9 or 11), it is unlikely that New Products will be entitled to recover the costs of bringing about the recovery, even assuming it qualifies as a "substantial contribution." *See* 11 U.S.C.

[10] If the value of the Property is less than the amount of BOA's claim, New Products will have an unsecured deficiency claim by virtue of 11 U.S.C. § 506(a), in addition to its original, unsecured, trade claim.

§§ 503(b)(3)(D) (authorizing administrative claim in favor of creditor who makes substantial contribution "in a case under chapter 9 or 11 of this title").[11]

E. The Trustee's Dismissal Motion

The court's prior orders staying the litigation effectively stayed the proceedings on the Dismissal Motion, and the parties have evidently moved on by filing the two motions just addressed. For the sake of completeness, however, the court will deny the Dismissal Motion based upon the court's view that New Products's Amended Complaint sufficiently states a plausible claim for relief. Indeed, the claims have largely survived scrutiny under the more exacting summary judgment standards.

IV. CONCLUSION AND ORDER

The positions of both parties are, to a considerable extent, inconsistent with the Congressional design expressed in the Bankruptcy Code. Rather than subjecting the Property to waste while it remained *in custodia legis* -- an outcome anathema to the Bankruptcy Code -- the parties might have returned it to productive use if they had simply pulled their respective statutory levers much sooner.

For example, if the Trustee succeeds in establishing that the Property was "of inconsequential value" or was "burdensome" and therefore escapes liability for fiduciary breach, he cannot escape chagrin for his failure to abandon the asset for nearly five years while the Property (and probably its neighborhood) decayed. "A trustee must make a determination early in the administration of the case which assets to administer and which to abandon." *Reich*, 52 B.R. at 1004. It is a shame that did not happen here.

---

[11] Where there are serious allegations of a trustee's breach of fiduciary duty to the estate, a trustee should consult with the United States Trustee to consider whether it makes sense to appoint an independent trustee. *See* Handbook for Chapter 7 Trustees, U.S. Dept. of Justice, July 1, 2002 (with updates through May 1, 2010), at p. 5-2 (noting that a trustee may have an actual or potential conflict when the estate has a claim against him); *see also* 11 U.S.C. § 323(a) (court may, after notice and hearing, remove trustee "for cause").

For its part, New Products now seeks damages for the diminution in the value of BOA's collateral,[12] yet BOA never formally sought adequate protection, relief from the automatic stay, or an order to compel abandonment. As the Honorable James D. Gregg observed with respect to adequate protection of an interest in collateral, "if you don't ask for it, you won't get it." *In re Kain*, 86 B.R. 506, 512 (Bankr. W.D. Mich. 1988). Because BOA did not take advantage of existing remedies designed to prevent diminution in the value of collateral, the court will not be eager to permit its successor, New Products, to "advantage itself through this back door request for an administrative expense." *In re Advisory Information and Management Systems, Inc.*, 50 B.R. 627, 631 (Bankr. M.D. Tenn. 1985). The fact that New Products purchased BOA's claims with its eyes wide open makes its present request, though perhaps permissible as a matter of law, repugnant as a matter of fact.

Adherence to remedies readily available under the Bankruptcy Code probably would have avoided this costly and embarrassing litigation, and the resulting delays in distribution to creditors. The court encourages the parties to settle.

The court notes that New Products has filed Plaintiff New Products Corporation's Motion for Leave to File Supplemental Brief (the "Post-argument Motion," DN 67). Because the Post-argument Motion was filed after the court finished preparing this Memorandum of Decision and Order, and because the trial will afford New Products the opportunity to present the evidence to which the Post-argument Motion alludes, the court will deny the motion without prejudice.

---

[12] "Adequate protection is designed to protect a secured creditor . . . against any decrease in the value of its collateral which may result from depreciation, destruction, or the [estate's] use of the collateral." *Volvo Commercial Finance LLC the Americas v. Gasel Transp. Lines, Inc. (In re Gasel Transp. Lines, Inc.)*, 326 B.R. 683, 691-92 (6th Cir. BAP 2005) (creditor was not entitled to allowance of administrative expense claim as result of Chapter 11 debtor-in-possession's postpetition use of equipment in which creditor had security interests).

NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

1. The Defendants' Motion (DN 56) is GRANTED to the extent it seeks to preclude New Products from recovering on account of the Trustee's decision to cancel insurance in November, 2010, and DENIED in all other respects;

2. The New Products Motion (DN 57) is GRANTED to the extent described in Part III (D) of this Memorandum of Decision and Order;

3. The Dismissal Motion (DN 31) is DENIED; and

4. The Post-argument Motion (DN 67) is DENIED without prejudice to offering the evidence mentioned therein at an appropriate juncture in this proceeding.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order pursuant to Fed. R. Bankr. P. 9022 and LBR 5005-4 upon Melissa L. Demorest, Esq., Mark S. Demorest, Esq., John Chester Fish, Esq., Cody H. Knight, Esq., Elizabeth M. Von Eitzen, Esq., and the United States Trustee.

IT IS SO ORDERED.

Dated December 18, 2014

Scott W. Dales
United States Bankruptcy Judge