UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17-2258

April 24, 2018

In re: MODERN PLASTICS CORPORATION,

Debtor.

NEW PRODUCTS CORPORATION,

Appellant,

v.

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

Appellees.

On Appeal from the United States District Court for the Western District

Before: GUY, SUTTON, and COOK, Circuit Judges.

RALPH B. GUY, JR., Circuit Judge. New Products Corporation (NPC) appeals the dismissal of claims it brought against former Chapter 7 Trustee Thomas Tibble and his surety Federal Insurance Company. NPC, an unhappy creditor, alleged that the

Trustee breached his fiduciary duties in handling one of the Debtor's assets—namely, real property on which sat a former manufacturing facility that was methodically stripped by scrappers and allowed to deteriorate while it was part of the bankruptcy estate. NPC argues, as it did before the district court, that the bankruptcy judge erred in narrowing its claims on motions for summary judgment, denying reconsideration, and ordering a bifurcated trial on NPC's secured creditor claims to determine the central factual question of whether there was equity in the Property. (Orders dated 12-14-14, 7-23-15, 8-26-15, and 10-15-15.) NPC contends that the bankruptcy judge erred in granting defendants' mid-trial motion for judgment on partial findings under Fed. R. Civ. P. 52(c) (Fed. Bankr. R. P. 7052), and denying NPC's motion for new trial or to alter or amend judgment under Fed. R. Civ. P. 59 (Fed. Bankr. R. P. 9023). (Orders dated 1-21-16, 3-14-16.) The district court affirmed the bankruptcy court in all respects. *See New Prods. Corp. v. Tibble, et al. (In re Modern Plastics Corp.),* 577 B.R. 270 (W.D. Mich. 2017). After careful consideration of the issues presented on appeal, the district court's order affirming the bankruptcy court's judgment on the merits is affirmed.

I.[1]

[1] The lengthy procedural history and the evidence before the bankruptcy judge will not be detailed here, and familiarity with all six of the bankruptcy court's orders relating to this appeal is assumed.

The Debtor Modern Plastics Corporation's assets included approximately 12 acres of real property commonly known as 489 North Shore Drive, Benton Harbor, Michigan (Property). The Property, located directly across the street from NPC and adjacent to a relatively new golf course development, included "a main building, initially constructed in 1936, [that] consisted of approximately 127,000 square feet [that was] at one time used for manufacturing, office, and related purposes." *New Prods. Corp. v. Tibble, et al. (In re Modern Plastics Corp.),* 543 B.R. 819, 826 (Bankr. W.D. Mich. 2016) ("Findings of Fact and Conclusions of Law After Trial"). The Property was part of the collateral that the Debtor pledged to secure its pre-petition loans from Bank of America (BOA), on which the Debtor owed $1,275,912.01 when the bankruptcy petition was filed on January 26, 2009. *Id.* at 825-26.

Financial difficulties left the Debtor unable to meet its obligations to BOA, state and local taxing authorities, and other creditors (including NPC). *Id.* at 826. The Debtor ceased operations in July 2008, and conducted a pre-petition equipment auction at the behest of BOA in October 2008. Although the condition of the building was contested, the bankruptcy judge found after the bifurcated trial that leaks in the roof resulted in "pools of standing water within the building" that were visible during the pre-petition equipment auction. *Id.* Also, the Trustee's "credible testimony established that the Property was in a deplorable and unsafe condition" when he made his one and only inspection in January 2009. *Id.*

The Property was listed for sale pre-petition and, with the consent of BOA, the Debtor entered into an agreement on December 26, 2008, to sell the Property

to Ox Creek Development, LLC (an entity associated with the golf course) for $650,000. *Id.* at 825-26. Once in bankruptcy, and again with the consent of BOA, the Trustee tried unsuccessfully to sell the Property to Ox Creek for between $650,000 and $590,000—after negotiating an agreed carve-out for the bankruptcy estate. *Id.* at 826-27. When that sale did not close, the Trustee negotiated an option agreement extending Ox Creek's right to purchase the Property for another four months. *Id.* at 827. Although the option was not exercised, the Trustee received the option payments without objection from BOA. *Id.* at 825.[2]

The Trustee obtained casualty insurance on the Property for a year and a half, but cancelled the insurance in November 2010 after BOA advised that it would not pay the premium or put any more money in the Property. (Page ID # 5509.) The Trustee later leased the parking lot for an event at the golf course and retained the income for the estate without objection from BOA. *Id.* In fact, the bankruptcy judge found that BOA had acquiesced in the Trustee's handling of the Property for more than four years—never objecting, requesting adequate protection, moving for relief from the stay, or seeking to compel the Trustee to abandon the Property. *Id.* at 821. BOA's representative testified that the bank did not want to foreclose on the Property (Page ID # 5488), which effectively "ke[pt] the bank out of the chain of

[2]Not long after the bankruptcy filing, contamination from a leaking transformer was discovered and the EPA subsequently incurred removal and cleanup costs in excess of $600,000.

title of a potentially contaminated industrial site." *Id.* at 827.[3]

NPC is a "Tier 1" automotive supplier "founded by the same man who established the Debtor and still managed by the founder's granddaughter [Cheryl Miller]." *Id.* at 820. NPC was an unsecured creditor when the Debtor filed for bankruptcy, and only later became a secured creditor when NPC "acquired BOA's rights against the Debtor and the Property under a post-petition assignment of the bank's loan documents" on March 4, 2013. *Id.* NPC acquired those rights for $225,000 as the high bidder in an auction of BOA's promissory notes, mortgages, and other loan documents (after beating out another entity associated with the golf course). *Id*. at 826. Miller testified that she saw this as an opportunity to acquire the Property, intending to use the building to expand NPC's operations, create a "buffer" between NPC and the golf course, and possibly subdivide and sell some of the lots.

Miller testified that she was shocked to discover after the assignment that the interior of the Debtor's facility had been systematically stripped by scrappers and the roof had failed in two places. Two witnesses testified to having participated in organized scrapping activities during late 2010 and into 2011; one of whom testified that he was paid to work at the site five days a week, eight hours a day, for seven months removing truckloads of material. *New Prods.,* 543 B.R. at 828. Two notices of condemnation were sent to the Debtor in 2011, allowing an opportunity to

[3]There was evidence that BOA drafted a motion to lift the stay but never filed it. (Page ID # 4556-65.)

bring the structure up to code but suggesting that the Debtor consider demolition as an alternative. *Id.* Miller testified that she had not been inside the building between the bankruptcy filing and the assignment. The bankruptcy judge found it difficult to believe Miller could have been unaware of the scrapping activities since she worked across the street during this period. *Id.* at 829. More importantly, however, the bankruptcy judge explained that he did not believe Miller—a sophisticated businessperson running a Tier 1 global automotive supplier—would have authorized the purchase of the debt without inspecting the interior "unless the condition of the building was immaterial to the decision." *Id.*

Not long after the assignment, the Trustee filed a motion for approval of his final report giving notice of the proposed distributions and the resulting abandonment of all remaining estate property pursuant to 11 U.S.C. § 554(c). *Id.* NPC opposed that motion and, in September 2013, filed this action seeking damages for diminution in value of the Property resulting from the Trustee's alleged breach of fiduciary duties owed to the estate, BOA, and NPC. *Id.* at 820-21. NPC maintained, among other things, that the Trustee failed to protect the Property against vandals and scrappers who stripped the building over time of its "copper wires, steel beams, piping, 'bus ducts,' lighting fixtures, furnaces, [and] even support beams." *Id.* at 820. NPC documented further deterioration and additional scrapping activity in the post-assignment/pre- abandonment period, but did not file any motions for relief from the stay, for adequate protection, or to compel abandonment. *Id.* Ultimately, the Trustee's final report was approved and the Property abandoned in January 2014. *Id.*

When the bankruptcy judge suggested that the appointment of an independent trustee might be warranted, Tibble resigned and a successor trustee was appointed in January 2015.

The bankruptcy judge narrowed NPC's claims in several ways that are challenged on appeal, including: (1) ruling that NPC could not pursue a claim on behalf of the unsecured creditors (*i.e.,* the estate) after appointment of the successor trustee; (2) concluding that NPC could not recover damages for the cancellation of casualty insurance where NPC's predecessor-in-interest had acquiesced in that decision; and (3) holding that NPC had "purchased only BOA's contract rights against the Debtor but not any of the tort claims BOA may have had against the Trustee (including claims that BOA may have been able to assert for pre-assignment breaches of fiduciary duty)." *Id.* at 821. Together, those rulings meant that NPC could recover only as a secured creditor and only for "diminution of the Property's value that occurred between the March 4, 2013 Assignment Date, and January 6, 2014 (the date that the Trustee technically abandoned the property)." *Id.* The bankruptcy court denied three new cross-motions for summary judgment, finding that disputed questions of valuation and equity were central to determining "whether Mr. Tibble breached his fiduciary duty or whether his actions were reasonable under the circumstances." This prompted the bankruptcy judge to order a bifurcated trial to determine the value of the Property and extent of the encumbrances against it, and clarifying that evidence regarding the value pre- and post-assignment would be considered.

At trial, the bankruptcy judge heard two days of testimony, received two important depositions, and

admitted an extensive number of exhibits into evidence. After NPC completed its proofs, defendants moved for entry of judgment in their favor under Rule 52(c). The bankruptcy judge issued written findings of fact and conclusions of law, and denied NPC's motion for new trial or to alter or amend judgment. The district court examined NPC's claims of error and affirmed in all respects. This appeal followed.

II.

In this appeal, the bankruptcy court's orders are reviewed directly rather than the intermediate decision of the district court. *Lowenbraun v. Canary (In re Lowenbraun)*, 453 F.3d 314, 319 (6th Cir. 2006). We review the bankruptcy court's legal conclusions *de novo,* and its factual findings for clear error. *Id.; Zingale v. Rabin,* 693 F.3d 704, 707 (6th Cir. 2012). Decisions regarding the admission of evidence are reviewed for abuse of discretion. *Conwood Co., LP* v. *U.S. Tobacco Co.,* 290 F.3d 768, 781 (6th Cir. 2002).

A. Breach of Fiduciary Duty

NPC argues that the bankruptcy court erred in concluding that a trustee owes no duty to protect or insure property that is retained in the bankruptcy estate if that property is fully encumbered. This characterization misstates, or at least overstates, the bankruptcy court's actual rulings recognizing the Trustee's competing duties to secured and unsecured creditors. The bankruptcy court's judgment did not rest on a finding that there was no duty, but rather determination that the Trustee had not breached his duties to BOA or NPC with respect to the Property under the circumstances. We find no error of law.

The bankruptcy court recognized that a Chapter 7 Trustee "primarily represents the unsecured

creditors, and represents the secured creditors only in his capacity as a custodian of the property upon which they have a lien." *Ford Motor Credit Co. v. Weaver,* 680 F.2d 451, 462 n.8 (6th Cir. 1982) (quoting *The Second Nat'l Bank of Nazareth v. Marcincin (In re Nadler),* 8 B.R. 330, 333 (Bankr. E.D. Pa. 1980)). The trustee's duty to "account for all property received," 11 U.S.C. § 704(a)(2), does not impose an unqualified duty to protect or manage assets for the benefit of secured creditors at the expense of the estate. *United States ex rel. The Peoples Banking Co. v. Derryberry (In re Peckinpaugh),* 50 B.R. 865, 869 (Bankr. N.D. Ohio 1985); *see also Fox v. Anderson (In re Thu Viet Dinh),* 80 B.R. 819, 823 (Bankr. S.D. Miss. 1987) ("The trustee must also exercise reasonable diligence to conserve the assets of the bankruptcy estate, but he is not relegated to the role of a 'babysitter' for the secured creditors."). Rather, "[t]he measure of care, diligence and skill required of a bankruptcy trustee is that of an ordinary prudent man in the conduct of his private affairs under similar circumstances and of a similar object in view." *Reich v. Burke (In re Reich),* 54 B.R. 995, 998 (Bankr. E.D. Mich. 1985); *see also Central Savings Bank v. Lasich (In re Kinross Mfg. Corp.),* 174 B.R. 702, 706 (Bankr. W.D. Mich. 1994) (finding that whether a trustee breached his duty, including by not procuring insurance, "is bound inextricably" with the particular facts of the case). The bankruptcy court did not err in concluding that the value of and extent of the liens against the Property would be central to determining whether Tibble breached his fiduciary duties to the secured creditors under the circumstances.

The bankruptcy judge found the evidence overwhelmingly established that the Property was

underwater. Specifically, after determining the total amount of the liens, the bankruptcy judge found that the liens exceeded the value of the Property by more than $950,000 on both the "Petition Date" and the "Assignment Date." *New Prods.,* 543 B.R. at 830. In determining the value of the Property, the bankruptcy judge found, in part, that the pre-petition offer of $650,000 was an "exceedingly persuasive indicator of the Property's value as of the Petition Date," and that BOA's willingness to grant a carve-out and accept much less than its claim "sp[oke] volumes about the lender's dim view of the Property's value." *Id.* at 827. Further, evidence that "BOA was unwilling to spend any money to insure its collateral" supported "an inference of less, rather than more, value than the $650,000 it was willing to accept pre-petition." *Id.* Even more significantly, the bankruptcy judge also found that "it was the location of the Property, rather than the structures built upon it, that accounted for most of the value." *Id.* at 828. Evidence supporting that conclusion included: a pre-petition opinion that "the highest and best use for the Property was as a redevelopment site"; credible evidence that the vacant building was in poor condition when the petition was filed; and the failure of BOA or NPC to pursue any of the protections for the building that were available to them as secured creditors. *Id.* at 828-29.

The bankruptcy court acknowledged the devastating effects of the post-petition scrapping as "shocking, if not revolting," but concluded that "BOA and the trustee agreed expressly or impliedly to neglect the building because it did not make economic sense to do otherwise." *Id.* at 832. Consequently, "[g]iven the complete absence of equity, and the relative unimportance of the building in the

evaluation of the Property," the bankruptcy judge found that "Mr. Tibble behaved as 'an ordinary prudent man in the conduct of his private affairs under similar circumstances and with a similar object in view' would have behaved." *Id* (quoting *Weaver,* 680 F.2d at 461-62; *In re Kinross,* 174 B.R. at 705). NPC argues this was error for several reasons.

B. Judgment on Partial Findings

Rule 52(c) provides, in part, that: "If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under controlling law, can be maintained or defeated only with a favorable finding on that issue." In entering judgment under Rule 52(c), the court must set forth specific findings of fact that are reviewed for clear error. *Sharp v. United States,* 401 F.3d 440, 442 (6th Cir. 2005). NPC argues that the bankruptcy court erred in granting judgment because some of the findings were not supported by the record, because testimony from NPC's expert witness was excluded, and because NPC did not have an opportunity to be "fully heard."[4]

Findings. NPC argues that there was no evidence to support the finding that the Debtor had deferred maintenance or that there were roof leaks and places with standing water at the time the petition was filed.

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[4] NPC also repeats its claim that the burden was improperly placed on NPC to disprove an affirmative defense. However, the bankruptcy court found that the evidence had so "overwhelmingly establishe[d] the absence of equity" that it was not necessary to identify which party bore the burden of proof with respect to the value proposition. 543 B.R. at 824 n.8.

As the district court observed, however, Ronald Miller testified that he was hired to evaluate Modern Plastics in 2008; that the "roof was leaking in multiple places, probably [because] there was a lot of deferred maintenance"; and that it "didn't appear as though the company had been investing in the building for quite a long time." Describing leaks in the production area, Miller said "in some of the areas it was standing water around the injection molding process." Miller added that it had rained prior to the equipment auction and potential buyers had to navigate around puddles of water. BOA's representative also testified that he saw a puddle of water inside the building in 2008. The bankruptcy judge's findings in this regard were not clearly erroneous.

NPC contends that several findings regarding the assignment were outside the scope of the trial. First, NPC argues it was error to find that Cheryl Miller was aware of the pre assignment scrapping but preclude her from explaining why she was unable to inspect the interior prior to the assignment. The bankruptcy judge expressed doubt that Miller was unaware of the condition of the building, but, whether or why she was unaware of the scrapping activities was immaterial because "it was reasonable for the bankruptcy court to infer that she acted as she did because the condition of the building was not important to her decision." *New Prods.,* 577 B.R. at 284. NPC represents that Miller would have testified that she was unable to inspect the building because she could not obtain the insurance required as a condition to access the building. NPC does not explain how this evidence could have undermined the bankruptcy judge's inference.

Second, NPC challenges the bankruptcy judge's statement in a footnote that "it must have been clear to the Trustee, after the Assignment Date, that he could no longer count on cooperation from the holder of the principal secured claim against the Property." *New Prods.,* 543 B.R. at 826 n.9. The rest of the footnote makes clear, however, that this was nothing more than a comment on the timing of the Trustee's motion for approval of his final report. *Id.* ("From the various objections to the Trustee's proposals that New Products filed while it held only an unsecured claim, it must have been clear to the Trustee . . . ."). Nor has NPC articulated how this was either inaccurate or material to the bankruptcy court's judgment.

Third, attacking the bankruptcy judge's statement that BOA and NPC had taken a "cavalier approach to the building," NPC complains that the bifurcated trial prevented Miller from testifying that NPC had taken some steps to protect the building after it became a secured party. Miller did testify, over defendants' objection, about further looting and scrapping in the post-assignment period; but, she was not asked about any self-help efforts NPC undertook to try to prevent it. Nonetheless, Miller's testimony that NPC used its own security guards and installed new locks and a surveillance camera would not have undermined the bankruptcy judge's finding that NPC did not exercise its rights as a secured creditor.

Opinion Testimony. NPC offered an unconventional method for valuing the Property based on the opinion of Michael Frederick of Frederick Construction that the scrap value of the materials removed from the Debtor's facility "would be approximately $1.5-$2.0 million dollars." Defendants moved to exclude Fredrick's opinion for a number of

reasons, including failure to comply with Fed. R. Civ. P. 26. The bankruptcy judge carefully analyzed the issues, recognized that Fredrick could be qualified as an expert, but warned that Fredrick would not be permitted to stray too far from his report. At trial, after voir dire and argument from counsel, Frederick's opinion testimony was excluded both because he relied on matters not mentioned in his report and because his opinion was not "based on sufficient facts or data" to satisfy Fed. R. Evid. 702(b). *New Prods.*, 543 B.R. at 823 n.7. The bankruptcy judge, as "gatekeeper," was required to determine whether the expert witness testimony "both rests on a reliable foundation and is relevant to the task at hand." *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 597 (1993). After review of the voir dire, we agree entirely with the district court that "Fredrick's opinion testimony was problematic in many respects" and was based on "questionable assumptions" and "a lack of concrete, reliable support for his estimate." 577 B.R. at 281.) The bankruptcy judge did not abuse his discretion by excluding Fredrick's opinion regarding the "scrap value" of the building.

Not Fully Heard. NPC argues that the bankruptcy court erred in granting judgment under Rule 52(c) because NPC did not have an opportunity to be "fully heard." NPC's argument is cast in terms of a lack of evidence regarding either the value of the land alone or under an "income approach." Reading past the argument headings, however, NPC's claim is that it was not "fully heard" on the issue of valuation because it did not have the opportunity to cross- examine two witnesses whose reports were admitted into evidence without objection but whom the defendants never called because their Rule 52(c) motion was granted. In

this appeal, NPC does not acknowledge that it could have called either witness or objected to the admission of their reports without an opportunity to cross-examine them. The bankruptcy judge did not prevent NPC from doing so, and only entertained the defendants' motion after NPC had rested. This claim is without merit. *See EBC, Inc. v. Clark Bldg. Sys., Inc.,* 618 F.3d 253, 274 n.23 (3d Cir. 2010) (rejecting similar argument).

Finally, NPC asserts in a catch-all fashion that the bankruptcy court should have considered the "Offer of Proof" that it filed shortly after its motion for new trial or to alter or amend judgment. (Page ID # 3278.) The pleading purports to summarize evidence that NPC had not presented due to the bifurcation of issues and entry of judgment under Rule 52(c). The bankruptcy judge refused to strike that pleading, but expressly declined to consider it. The pleading sets out NPC's theory of the case, including describing evidence that was admitted at trial; but, NPC has offered no explanation on appeal (here or in the district court) of how consideration of this pleading could have altered the bankruptcy court's judgment. As such, this claim of error is deemed forfeited. *See McPherson v. Kelsey,* 125 F.3d 989, 995-96 (6th Cir. 1997) ("[I]ssues averted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." (citation omitted)).

C. Assignment of BOA's Pre-Petition Claims

The bankruptcy court granted in part the defendants' second motion for summary judgment, concluding that the assignment of "all the right, title and interest of [BOA] in, to and under the Loan Documents," did not include any "non-contract claims

(including for breach of fiduciary duty) predating the Assignment." *New Prods. Corp. v. Tibble, et al. (In re Modern Plastics Corp.),* 534 B.R. 723, 729 (Bankr. W.D. Mich. 2015) (summary judgment order); *see also New Prods. Corp. v. Tibble, et al. (In re Modern Plastics Corp.),* 536 B.R. 783, 786-87 (Bankr. W.D. Mich. 2015) (denying reconsideration). NPC has not shown this was error, or that any error would be material in light of the bankruptcy judge's subsequent findings.

First, NPC argues that it succeeded to *all* of the rights of BOA because a mortgage assignee stands in the shoes of the mortgage assignor. *See Coventry Parkhomes Condo. Ass'n v. Fannie Mae,* 827 N.W.2d 379, 382 (Mich. Ct. App. 2012) (holding that lien held by assignee of mortgage had the same priority as mortgagee). It is certainly true that NPC was entitled to enforce the mortgage and notes, and stood in BOA's shoes with respect to the secured claim that had been filed in the bankruptcy proceeding. NPC does not dispute, however, that an assignment is a contract to be interpreted in accordance with rules of contract construction under Michigan law. *See Macomb Interceptor Drain Drainage Dist. v. Kilpatrick,* 896 F. Supp. 2d 650, 658-59 (E.D. Mich. 2012). As the court in *Macomb Interceptor* explained, an assignment of the rights under a contract permits an assignee to assert claims or causes of action to enforce the contractually created rights, but it does not necessarily permit the assignee to bring distinct tort or statutory claims. *Id.* at 660-61.

As noted earlier, § 2.1 of the Assignment provided that NPC purchased and BOA sold, assigned, and transferred to NPC "all the right, title and interest of [BOA] in, to and under the Loan Documents (except

with respect to the Guaranties and the Guarantors)." *New Prods.,* 534 B.R. at 726. The "Loan Documents" were specifically defined to include only the security agreement (as amended), a promissory note, a mortgage and an assignment of rents, which the bankruptcy court recognized gave NPC the right to enforce contractual claims against the Debtor and its property. *Id.* In § 2.3 of the Assignment, NPC also acknowledged that BOA was "not assigning, transferring, or otherwise providing Assignee any rights in or to anything . . . other than the Loan and the documents and items specified on Exhibit A." *Id.* Without repeating the bankruptcy court's reasoning in full, we find no error in its conclusion that "the Bank assigned to New Products only the Bank's contractual rights against the Debtor, not its tort claims, if any, against Mr. Tibble." Id.; *see also New Prods.,* 536 B.R. at 786-87.

D. Unsecured Creditor Claims

Finally, NPC asserts that it should have been allowed to pursue a breach of fiduciary duty claim on behalf of the unsecured creditors despite the appointment of a successor trustee. The bankruptcy judge ruled during a pretrial conference that NPC did not have standing to do so, and confirmed that the successor trustee had decided not to pursue a claim against Tibble on behalf of the estate. NPC argued in its post-judgment motion (and in the district court) that it could have established derivative standing. The district court found, however, that NPC had not raised the issue prior to the entry of judgment or shown that it met the requirements for derivative standing. *New Prods,* 577 B.R. at 277.

As the bankruptcy court explained, the successor trustee became "the representative of the estate and

the person with standing to sue Mr. Tibble for any breach of duty he owed to the estate during his tenure. *See* 11 U.S.C. § 323; *see also* Fed. R. Bankr. P. 2012(b) and 6009." (Page ID # 160 n.3.) NPC has abandoned the issue of derivative standing on appeal and, changing course, now argues that it should have been allowed to proceed with a claim on behalf of the estate because this action was filed when Tibble was still the Chapter 7 Trustee. This argument is deemed forfeited, however, both because NPC offers no reasoned explanation for why that should be so, and because the argument is raised for the first time on appeal. *See In re Johnston,* 209 F.3d 611, 612 & n.1 (6th Cir. 2000) (citing *White v. Anchor Motor Freight, Inc.,* 899 F.2d 555, 559 (6th Cir. 1990)); *McPherson* **v.** *Kelsey*, 125 F.3d 989, 995-96 (6th Cir. 1997).

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The district court's order affirming the bankruptcy court's judgment on the merits is **AFFIRMED.**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re: MODERN PLASTICS CORPORATION, Debtor. /	Case No: 1:16-CV-370 HON. JANET T. NEFF
NEW PRODUCTS CORPORATION, Appellant, v. THOMAS R. TIBBLE et al. Appellees. /	

OPINION

This is an appeal from a judgment in an adversary proceeding in the Bankruptcy Court of the Western District of Michigan. Modern Plastics Corporation ceased operations in 2008 and filed a petition for relief under Chapter 7 of the Bankruptcy Code in January 2009. The assets in the estate included 12 acres of real estate in Benton Harbor, Michigan, on which sat Modern Plastics' offices, warehouse, and a manufacturing facility (the "Property"). Appellee Thomas Tibble was appointed as the trustee for the bankruptcy estate. Appellant New Products is a creditor of Modern Plastics. In 2013, New Products

brought an adversary action against Tibble, claiming that he breached his fiduciary duties by, among other things, failing to protect, maintain, and insure the Property, and by failing to object to excessive tax assessments against the Property. The bankruptcy court dismissed New Products' action after determining that Tibble did not breach any fiduciary duties during the relevant time period. New Products appeals the dismissal of its action. Having considered the parties' briefs and the record, the Court finds that oral argument is unnecessary. For the reasons discussed herein, the Court affirms the judgment of the bankruptcy court.

I. Background

When Modern Plastics filed for bankruptcy, the Property was encumbered by over $1.6 million in liens. Approximately $1.3 million of that amount was owed to Bank of America ("BOA"). The remaining portion was owed to state and local taxing authorities. In addition, the building on the Property was in need of maintenance and repair. The roof of the building was leaking, resulting in pools of standing water in the facility. There were also significant environmental concerns. An internal assessment by BOA estimated that clean-up costs could exceed $500,000.[1] (Siravo Dep., PageID.5367.)

A broker informed BOA that the "highest and best" use for the Property would be a redevelopment site, due to the age and condition of the building and the

[1] Shortly after the petition for bankruptcy, a potential buyer discovered that a transformer was leaking PCBs and notified state environmental authorities. The EPA subsequently incurred over $600,000 in removal and clean-up costs. (PageID.1613.)

poor market for old industrial buildings in the area. (PageID.4158.) Similarly, an appraisal procured by BOA in March 2008 opined that redeveloping the Property would be "the only alternative to provide an adequate return on investment." (PageID.498.) The appraisal valued the Property at $1,050,000. (PageID.450.)

Shortly before the petition for bankruptcy, a developer offered to purchase the Property for $650,000. BOA agreed to this sale. After the petition for bankruptcy, Tibble sought approval of the sale from the bankruptcy court. The proposed sale included a $10,000 carve-out for the estate, but the sale was not finalized. In August 2009, Tibble attempted to sell the Property to the same party for $590,000, including a $20,000 carve-out for the estate. BOA agreed to this sale as well, but the buyer did not exercise its option to purchase the Property.

When Modern Plastics filed its bankruptcy petition, it notified BOA and Tibble that the Property was not insured. BOA initially maintained casualty insurance on the Property, but after consulting with Tibble in November 2010, BOA decided not to continue paying for insurance coverage. Steven Siravo, BOA's loan officer in charge of Modern Plastics' account, told Tibble that the bank was not willing to put any more of its money into the Property. (PageID.416.)

During Tibble's tenure as trustee, the condition of the building on the Property deteriorated substantially as a result of vandalism, theft, and a lack of maintenance. Large quantities of metal and other materials, including structural components of

the building, were taken away and sold for scrap. One scrapper worked on the site for eight hours a day, five days a week, for seven months. Eventually, the roof of the building collapsed. During this time, Tibble made no effort to secure or maintain the Property, and BOA took no action to exercise control over it.

New Products, which has offices and a manufacturing facility located across the street from the Property, initially held an unsecured claim against Modern Plastics for $19,113.82. In March 2013, it purchased the loan documents between BOA and Modern Plastics for $225,000, after much of the deterioration to the Property had already occurred. Soon thereafter, Tibble filed a report deeming the Property to be abandoned.[2] New Products subsequently brought an adversary action against the estate, Tibble, and Tibble's surety, Federal Insurance Company, seeking to recover any diminution in value of the Property during Tibble's tenure as trustee, under the theory that Tibble had breached his fiduciary duties to the estate and its creditors. Following several motions for summary judgment and a bench trial focused on the value of the Property, the bankruptcy court ruled in favor of the defendants. New Products filed a motion for relief from judgment, and the bankruptcy court denied its motion. New Products appeals the bankruptcy court's rulings to this Court.

II. Standard

The bankruptcy court's conclusions of law are reviewed *de novo*. *Rowell v. Chase Manhattan Auto.*

[2] The bankruptcy court approved the abandonment on January 6, 2014, over New Products' objection.

Fin. Corp. (In re Rowell), 359 F. Supp. 2d 645, 647 (W.D. Mich. 2004). "Under a *de novo* standard of review, the reviewing court decides an issue independently of, and without deference to, the trial court's determination." *Menninger v. Accredited Home Lenders (In re Morgeson)*, 371 B.R. 798, 800 (B.A.P. 6th Cir. 2007).

The Court applies the clearly erroneous standard when reviewing the bankruptcy court's findings of fact. *Stamper v. United States (In re Gardner)*, 360 F.3d 551, 557 (6th Cir. 2004). "A finding of fact is clearly erroneous 'when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Riverview Trenton R.R. Co. v. DSC, Ltd. (In re DSC, Ltd.)*, 486 F.3d 940, 944 (6th Cir. 2007) (quoting *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985)).

III. Analysis

A. The bankruptcy court properly limited New Products' claim to the period of time from March 4, 2013 to January 6, 2014.

The bankruptcy court held that New Products did not have standing as an unsecured creditor to assert a claim for breach of fiduciary duty, and did not have standing as a secured creditor until March 4, 2013, the date that BOA assigned the loan documents to New Products. (7/23/2015 Mem. Decision & Order, PageID.1431.) Consequently, the court limited New Products' claim against Tibble to the period of time running from the date that New Products acquired the

loan documents until the date that the court approved the abandonment of the Property.

New Products contends that it obtained BOA's rights to pursue a claim against Tibble. According to the assignment agreement between BOA and New Products, BOA assigned all "right, title and interest, and obligations in, to and under the Loan Documents."[3] (Loan Purchase & Assumption Agreement, PageID.1459.) In other words, BOA assigned its rights against Modern Plastics under loan agreements. BOA did not assign any rights against Tibble, let alone a right to recover from Tibble for breach of a fiduciary duty. An assignee of a mortgage stands in the same shoes as the original holder of the mortgage, with the same right to enforce the mortgage. But the right to enforce a mortgage is separate and distinct from the right to bring a tort claim against a third party based on a duty arising apart from the mortgage agreement. *See Macomb Interceptor Drain Drainage Dist. v. Kilpatrick*, 896 F. Supp. 2d 650, 660-61 (E.D. Mich. 2012) ("[T]he ability of an assignee to enforce contractually-created rights does not necessarily permit the assignee to also bring tort or statutory claims that are merely related somehow to the contractual relationship but that arose outside of the rights created by the contract."). Nothing in the assignment agreement purports to transfer anything other than the loan documents and

[3] The "Loan Documents" included a loan and security agreement, a note, a mortgage, and an assignment of rents. (Ex. A to Loan Purchase & Assumption Agreement, PageID.1474.)

the rights therein. Thus, BOA did not assign its right to pursue a claim against Tibble.

B. New Products did not have standing as an unsecured creditor to bring a claim against Tibble.

The bankruptcy court also held that New Products could not pursue a claim against Tibble in its capacity as an unsecured creditor because the trustee represents the estate, not the creditors. (Pre-Trial Conf. Tr. 27-28, PageID.3227-3228.) The trustee who replaced Tibble in 2014 indicated that she was not going to pursue a claim against him. (Id.)

New Products acknowledges that the trustee represents the estate, but contends that the bankruptcy court could have given New Products derivative standing to pursue a claim against Tibble for any deterioration to the Property prior to the date of assignment of the loan documents. However, New Products never raised the possibility of derivative standing until after the court entered judgment against it.

Moreover, New Products has not shown that it met the requirements for derivative standing. "[A] party moving for derivative standing must show that: (1) a demand was made on the trustee (or debtor-in-possession) to act, (2) the trustee (or debtor-in-possession) declined, (3) a colorable claim exists that would benefit the estate, and (4) the trustee's (or debtor-in-possession's) inaction was an abuse of discretion." *Hyundai Translead, Inc. v. Jackson Truck & Trailer Repair, Inc. (In re Trailer Source, Inc.)*, 555 F.3d 231, 245 (6th Cir. 2009). Derivative standing

must be "judicially approved" so that "the bankruptcy court's ability to coordinate proceedings is not impaired." Id.

New Products does not claim that it made a demand on the trustee that the trustee declined. Thus, it has not established that the bankruptcy court erred by failing to grant it derivative standing.

C. The bankruptcy court properly held that Tibble did not breach his fiduciary duties.

The bankruptcy court held that Tibble did not breach his fiduciary duties as trustee after holding a bench trial focused on the value of the Property. At the conclusion of New Products' case, the bankruptcy court held that the liens against the Property far exceeded its value. The court observed that a trustee must exercise due diligence to conserve the assets of the bankruptcy estate, using the "'measure of care, diligence and skill required of . . . an ordinarily prudent man in the conduct of his affairs under similar circumstances and of a similar object in view[.]'" (12/18/2014 Mem. of Decision & Order, PageID.896 (quoting *Reich v. Burke (In re Reich)*, 54 B.R. 995, 998 (Bankr. E.D. Mich. 1985).) "[I]f the Property promised no benefit to the estate [because its value did not exceed the debt secured by the mortgage and the tax liens], 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[.]" (Id.)

In other words, Tibble's duties ran to multiple parties with competing interests in estate property. "The Chapter 7 trustee is an officer of the court and owes a fiduciary duty both to the debtor and to the creditors as a group." *Germain v. Conn. Nat'l Bank*, 988 F.2d 1323, 1330 n.8 (2d Cir. 1993). The trustee "'primarily represents the unsecured creditors, and represents the secured creditors only in his capacity as a custodian of the property upon which they have a lien.'" *Ford Motor Credit Co. v. Weaver*, 680 F.2d 451, 462 n.8 (6th Cir. 1982) (quoting *The Second Nat'l Bank of Nazareth v. Marcincin (In re Nadler)*, 8 B.R. 330, 333 (Bankr. E.D. Pa. 1980)). Tibble was not obligated to use estate property or resources available to the unsecured creditors in order to prop up the value of property fully encumbered by the interests of secured creditors. "[A]t no time does [the trustee] have a duty to manage assets, which have no value to the estate, for the benefit of secured creditors." *United States ex rel. The People's Banking Co. v. Derryberry (In re Peckinpaugh)*, 50 B.R. 865, 869 (Bankr. N.D. Ohio 1985); *see also In re Nadler*, 8 B.R. at 334 ("[T]he trustee could not have been expected to expend time which would not eventually or potentially have benefitted general creditors of the estate."). "The secured creditor must exercise reasonable diligence to protect the property serving as security. The trustee must also exercise diligence to conserve the assets of the bankruptcy estate, but he is not relegated to the role of a 'babysitter' for the secured creditors." *Fox v. Anderson (In re Thu Viet Dinh)*, 80 B.R. 819, 823 (Bankr. S.D. Miss. 1987). If Tibble had taken the actions that New Products claims he should have taken, he would have used time and resources available to the general creditors of the estate, solely for the benefit of a secured creditor. Doing so would

have conflicted with his duty to conserve the assets of the estate for the benefit of all the creditors of the estate.

Evidence that BOA declined to insure the Property and that the building contributed relatively little to the Property's value provides further support for the reasonableness of Tibble's actions. It would make little sense for a trustee to expend resources protecting fully-encumbered property that has minimal value for the secured creditor, let alone the estate.

Moreover, as secured creditors, BOA and New Products had means to protect their property that was not available to unsecured creditors of the estate. A secured creditor is entitled to "adequate protection" of the value of its collateral, and may obtain relief from the automatic stay in bankruptcy in order to obtain this protection. 11 U.S.C. § 362(d)(1). A secured creditor also has the right to request a condition on the use, sale, or lease of its collateral by the trustee. 11 U.S.C. § 363(e). This 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 debtor's use of the collateral." *Volvo Commercial Fin. LLC the Am. v. Gasel Transp. Lines, Inc. (In re Gasel Transp. Lines, Inc.)*, 326 B.R. 683, 691-92 (B.A.P. 6th Cir. 2005) (Gregg, J., concurring). Neither BOA nor New Products ever sought the protections available to them.

New Products suggests that Tibble should have abandoned the Property as soon as he determined that it had no value for the estate, but the Bankruptcy

Code did not require him to do so. See 11 U.S.C. § 554(a) (providing that the trustee "may" abandon property that is of inconsequential value and benefit to the estate); *see also Rambo v. Chase Manhattan Mortg. Corp. (In re Rambo)*, 297 B.R. 418, 433 n.23 (Bankr. E.D. Pa. 2003) (noting that instead of filing motions to abandon property that has inconsequential value for the estate, "most trustees do not administer (i.e., seek to sell) such property, leaving the abandonment to occur at the closing of the case[.]"). Tibble had an opportunity to sell the Property with BOA's approval shortly after the petition for bankruptcy. It was not unreasonable for him to keep the Property within the estate for a period of time rather than abandon it, particularly where the sale transactions offered some benefit for the estate in the form of carve-outs from the proceeds of the sale.

New Products argues that it was presumptively improper for Tibble to attempt to sell the Property with a carve-out for the estate, though New Products does not explain why that would be the case. The estate would have benefitted from a carve-out, and the party with the greatest interest in the terms of the sale, BOA, approved it. Thus, Tibble did not breach any fiduciary duty by pursuing sale transactions with a carve-out for the estate.

New Products also contends that Tibble is liable for "waste" under Mich. Comp. Laws § 600.2919. This issue is not properly before the Court. New Products did not assert this claim in its complaint, and did not raise the issue before the bankruptcy court. "The well-established rule in the Sixth Circuit is that an appellate court will not consider arguments or issues raised for the first time on appeal unless these are

exceptional circumstances. Such exceptional circumstances [exist] where either the proper decision is beyond doubt or a miscarriage of justice might otherwise result." *Lawrence v. Jahn (In re Lawrence)*, 219 B.R. 786, 802 (E.D. Tenn. 1998); *see Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."). New Products has not established that exceptional circumstances exist here; thus, this Court will not consider New Products' claim regarding waste.

D. The liens on the Property far exceeded its value.

The parties stipulated that the liens on the Property totaled $1,608,610.35 on the petition date. (Stipulation of Facts, ECF No. 11-10, PageID.2815.) The issue at trial was the value of the Property, which the bankruptcy court found was not more than $650,000 on the petition date, and was approximately $590,000 on the date of BOA's assignment of the loan documents to New Products. (Findings of Fact & Concl. of L., PageID.3190.) The bankruptcy court based its determination of value primarily on the proposed sale transactions. Although the sales never completed, they were the best evidence of the Property's fair market value. The court discounted the $1,050,000 appraisal from 2008 due to a declining real estate market, which was mentioned in the appraisal report. The court also discounted a revised appraisal which valued the Property retrospectively at $930,000.00 as of the petition date, because the appraiser did not inspect the building and the environmental contamination at the Property was not considered. (Id., PageID.3192.)

New Products contends that these findings are flawed, for several reasons.

1. Burden of Proof

New Products contends that the bankruptcy court improperly placed the burden on New Products to prove that the Property had equity. It provides no support for this argument. Indeed, the bankruptcy court determined that, "regardless of the locus of the burden of proof," the evidence was clear: the liens on the Property "greatly exceeded [its] value." (3/14/2016 Mem. Decision & Ord., PageID.93.) This Court agrees. The proposed sales and the appraisals were the best evidence of the Property's value, but the liens far exceeded all of them. New Products offered no reliable evidence to demonstrate that the value of the Property exceeded the liens against it.

2. Carve-Outs as Equity

New Products argues that even if the liens exceeded the Property's value, there was equity in the Property because Tibble proposed to sell the Property with carve-outs for the estate. However, the bankruptcy court noted that "[a] carve-out is not equity, it is the product of a secured creditor's self-interested consent to share its collateral position with the estate, generally in exchange for disposing of collateral through the bankruptcy process, rather than through foreclosure with its attendant risks and delay." (PageID.3197.)

New Products disagrees, citing *Reeves v. Callaway*, 546 F. App'x 235, 241 (4th Cir. 2013) (holding that a "carve-out takes this case out of the 'now almost universally recognized [rule] that where the

[bankruptcy] estate has no equity in the property, abandonment is virtually always appropriate because no unsecured creditor could benefit from the administration.'") (quoting *In re Feinstein Family P'ship*, 247 B.R. 502, 507 (Bankr. M.D. Fla. 2000)).

Reeves supports Tibble's actions. According to Reeves, a trustee can justifiably attempt to sell fully-encumbered property that has no value for the estate, rather than abandon the property, where the terms of the sale include a benefit for the estate. Reeves does not discuss whether the possibility of obtaining a carve-out imposes a duty on the trustee to administer and protect fully encumbered property. In other words, the possibility of obtaining a carve-out for the estate may have justified Tibble's decision not to abandon the Property, but that possibility did not necessarily require Tibble to protect the building on the Property from looting, vandalism, and deterioration.

3. Testimony of Michael Frederick

New Products argues that the bankruptcy court improperly excluded the testimony of its expert, Michael Frederick, on the value of the scrap hauled away from the Property. This decision is reviewed for abuse of discretion. *Conwood Co., L.P. v. U.S. Tobacco Co.*, 760 F.3d 768, 781 (6th Cir. 2002).

The bankruptcy court excluded Frederick's testimony because it was not based on "sufficient facts or data." (Trial Tr. 67, 102.)[4] *See* Fed. R. Evid. 702(b). In addition, much of Frederick's testimony was based

[4] The trial transcript is available from the bankruptcy court. It was not filed in this Court.

on information not disclosed in his expert report, and this unfairly surprised the defendants. (Id. at 67.) Frederick's expert report merely stated that he visited the Property on two occasions and that he estimated that the scrap value of the materials removed from the manufacturing facility would be "approximately $1.5 - $2.0 million dollars." (Frederick Rep., PageID.1723.) The report included some pictures of the Property and a square-foot cost guide for building new construction, without explaining how the guide was used. Before trial, the bankruptcy court held that Frederick would not be permitted to stray from his report when testifying. (Order Regarding Mot. in Limine, PageID.2752.)

At trial, Frederick explained that he used an unidentified website to determine historical prices of scrap metal. (Trial Tr. 79.) To estimate the quantity of recoverable materials in the building, he relied on a drawing of the building that was not in evidence, which apparently showed where the machines in the building had been located. He also spoke with two subcontractors to try to reverse-engineer the construction of the building and the location of wiring, pipes, ducts, and other materials that would have value for sale as scrap. (Id. at 78-79.) He then made assumptions based on "best practices" for construction and "any uniqueness in the building and pathways." (Id. at 82.) He acknowledged that any estimate would not be fully accurate without a schematic showing what had actually been in the building. (Id.) His estimate did not include the labor cost for removing the scrap. (Id. at 86.)

The court's decision was not an abuse of discretion. Frederick's opinion testimony was problematic in

many respects. His expert report merely asserted a value without explaining how he arrived at that number. It became clear at trial that much of his opinion was dependent upon the method and cost of building a new facility; however, the cost of materials that might be used in building a new facility may be quite different from the value of the scrap that can be recovered from a much older one. Frederick apparently spoke with several subcontractors to arrive at his estimate, but he provided little detail about the nature of these conversations and how they were used in his calculations. In addition, he used an unidentified website to calculate the value of scrap material. Considering Frederick's questionable assumptions and the lack of concrete, reliable support for his estimate, the bankruptcy court properly excluded his testimony.

4. Estoppel

New Products asserts that Tibble should be judicially and/or equitably estopped from claiming that the Property had no value for the estate because he filed several reports with the bankruptcy court indicating otherwise. In March 2009, he reported the net value of the Property as $600,000. In September 2010, he reported the net value as $150,000, and in June 2013, he reported it as $25,000. Finally, in July 2014, he reported the net value as $0. At trial, Tibble testified that the $600,000 value was based solely on his awareness of a proposed sale for $600,000; he had not examined the liens. (Trial Tr. 125.) It was not his position that the Property was worth more than the liens. (Id. at 167.) He did not realize that his reports would be filed with the court; he thought they were for internal use. (Id. at 174.)

(a) Judicial Estoppel

"In the bankruptcy context, . . . 'judicial estoppel bars a party from (1) asserting a position that is contrary to one that the party has asserted under oath in a prior proceeding, where (2) the prior court adopted the contrary position either as a preliminary matter or as part of a final disposition.'" *White v. Wyndham Vacation Ownership, Inc.*, 617 F.3d 472, 476 (6th Cir. 2010) (quoting *Browning v. Levy*, 283 F.3d 761, 775-76 (6th Cir. 2002)) (internal quotation marks omitted). "[J]judicial estoppel is inappropriate in cases of conduct amounting to nothing more than mistake or inadvertence." *Browning*, 283 F.3d at 776.

Tibble's statements do not satisfy the conditions for judicial estoppel. First, Tibble's reports were not asserted under oath in a prior proceeding. They were not even signed.

Second, the bankruptcy court expressly determined that it did not adopt the statements in Tibble's reports as a preliminary matter or as part of a final disposition. (10/15/2015 Order Denying Parties' Summ. J. Mots., ECF No. 11-8, PageID.2230.) The bankruptcy court relied on Tibble's reports to find that a question of fact existed as to whether there was equity in the Property. (12/18/2014 Mem. of Decision & Order, PageID.898.) It did not adopt them as the position of the court. If it had, then there would have been no need for a trial to determine whether the value of the Property exceeded the liens against it.

Third, the bankruptcy court found that Tibble's reports of net value in the Property were the result of "carelessness or inattention." (Findings of Fact &

Concl. of L., PageID.3190.) Thus, judicial estoppel does not apply. See Browning, 283 F.3d at 776 (noting that judicial estoppel is inappropriate for cases of mistake or inadvertence).

(*b) Equitable Estoppel*

As to equitable estoppel, the Court cannot find any evidence that New Products raised this issue before the bankruptcy court. See *Hormelv. Helvering*, 312 U.S. 552, 556 (1941) ("Ordinarily an appellate court does not give consideration to issues not raised below."). In any event, the argument is without merit. "A party may invoke equitable estoppel to prevent the opposing party from changing positions if (1) the party was an adverse party in the prior proceeding; (2) the party detrimentally relied on the opponent's prior position; and (3) the party would now be prejudiced if the opponent changed positions." *Teledyne Indus., Inc. v. N.L.R.B.*, 911 F.2d 1214, 1220 (6th Cir. 1990). "Equitable estoppel may apply regardless of judicial acceptance of the party's original position, because equitable estoppel protects litigants instead of the integrity of the courts." Id.

There is no evidence that New Products detrimentally relied on any position or statement of Tibble. New Products claims that it relied on Tibble's "stewardship" of the Property when it purchased the mortgage from BOA. However, nothing in the record indicates that Tibble ever stated or took the position that he would maintain or protect the Property.

5. Permitting New Products to be Fully Heard on Appraisal Value

New Products claims that the bankruptcy court did not permit it to be fully heard on the three approaches to appraisal value: the sales comparison approach, the income approach, and the cost approach. For instance, it contends that it was not permitted to cross-examine Robert Essa, who conducted appraisals of the Property in 2008 and 2015 using the sales comparison and income approaches. These appraisals were offered into evidence by New Products (Trial Tr. 48, 253), but New Products complains that they were flawed. New Products asserts that it could have cross-examined Essa about these flaws and Essa's failure to use a cost approach, but it was not able to do so because the bankruptcy court ruled in Appellees' favor as a matter of law under Rule 52(c) after New Products rested its case. Appellees had identified Essa as one of their witnesses, but they did not call him to the stand because they obtained a judgment in their favor at the conclusion of New Products' case.

Similarly, New Products contends that it was not permitted to cross-examine realtor James Ringler, who listed the Property before the bankruptcy proceedings and determined that the best use of the Property would be for it to be marketed as a redevelopment site. Appellees offered his report into evidence and New Products did not object (Trial Tr. 313). Appellees had listed Ringler as one of their witnesses, but they did not call him to testify because the court ruled in their favor on the Rule 52 motion.

Rule 52(c) of the Federal Rules of Civil Procedure permits a court to rule against a party on a particular

issue if that party has been "fully heard" on that issue. Fed. R. Civ. P. 52(c). New Products cannot complain that it was not fully heard on the issue of valuation because the court allowed it to present all of its evidence on this issue. If New Products wanted the court to hear testimony from Essa or Ringler about their reports, New Products should have called them as witnesses in support of its own case. Otherwise, it should have objected to the admission of their reports without their testimony. Or, New Products could have presented competent evidence of the value of the Property from its own expert, rather than rely on the testimony of Frederick. The bankruptcy court did not prevent New Products from doing any of these things and, thus, did not prevent it from being fully heard. *See EBC, Inc. v. Clark Bldg. Sys., Inc.*, 618 F.3d 253, 274 n.23 (3d Cir. 2010) (rejecting a similar claim).

6. Findings by the Court Not Supported by the Evidence

New Products contends that the bankruptcy court made findings that were not supported by the evidence or were beyond the scope of the trial, such as the following: (1) in 2008, "deferred maintenance compromised the integrity of the roof, resulting in pools of standing water within the building" (Findings of Fact & Concl. of L., PageID.3188); (2) "it must have been clear to the Trustee, after the [assignment of the loan documents to Products], that he could no longer count on cooperation from the holder of the principal secured claim against the Property" (Id., PageID.3187); (3) the 2008 appraisal expressed "reservations about a declining real estate market" (Id., PageID.3189); (4) "it was the location of the Property, rather than the structures built upon it, that

accounted for most of the value" (Id., PageID.3191); (5) New Products' CEO, Cheryl Miller, was aware that materials were being stolen from the Property to be sold for scrap (Id., PageID.3192); (5) Miller would not have authorized New Products to purchase the loan documents from BOA without entering the Property "unless the condition of the building was immaterial to her decision" (Id., PageID.3192); and (6) New Products "took a cavalier approach to the building" after receiving assignment of the loan documents (Id., PageID.3193).

(a) Roof leaks and deferred maintenance

The roof leaks and deferred maintenance are supported by the deposition testimony of Ronald Miller, who worked as an advisor for Modern Plastics in 2008. He testified that the "roof was leaking in multiple places, probably [because] there was a lot of deferred maintenance. [It] didn't appear as though the company had been investing in the building for quite a long time." (Miller Dep., PageID.5230-5231, 5300.) In addition, Siravo testified that he saw a puddle of water inside the building when he visited it in 2008. (Siravo Dep., PageID.5340.) The parties agreed to the admission of this deposition testimony. (Trial Tr. 244.)

(b) Cooperation from New Products

The court's statement that Tibble must have assumed that he could not count on New Products' cooperation after it obtained rights to the loan documents from BOA was speculation by the court regarding the reason for the timing of Tibble's abandonment of the Property; it was not a finding

material to the court's decision regarding the value of the Property or Tibble's duties in relation to it.

(c) Reservations about a declining real estate market

The court's reference to reservations expressed in the appraisal report about a declining real estate market can be found in the report. (PageID.477, 497, 515.)

(d) Location of the Property

The court's conclusion that the location of the Property, rather than the structures on it, likely accounted for most of its value is supported by the evidence cited by the court in its opinion, including a broker opinion that the highest and best use for the site was as a redevelopment site, and New Products' decision to purchase the Property without examining the building.

(e) Miller's awareness of scrapping activity

The court found it "difficult to believe" that New Products' CEO Cheryl Miller was unaware of the scrapping activity at the Property because the scrappers regularly hauled truckloads of material away from the Property, which was across the street from her office. (Findings of Fact & Concl. of L., PageID.3192.) This is a reasonable inference from the record. New Products contends that it could have offered additional evidence to explain her lack of awareness, but ultimately, the reason for her awareness or lack thereof is immaterial. When or not she was aware of scrappers removing materials from the building, she agreed to purchase the Property

without examining the condition of the building. She may have thought that the building was in good condition, but it was reasonable for the bankruptcy court to infer that she acted as she did because the condition of the building was not important to her decision.

(f) Miller's decision to purchase the property without examining it

As indicated, it was reasonable for the court to infer that Miller likely would not have authorized New Products to purchase the loan documents from BOA without first examining the condition of the building on the Property, unless that condition was not material to her decision. New Products asserts that the bankruptcy court prevented it from offering evidence that Miller could not access the interior of the Property because she could not obtain the requisite insurance that would allow her to do so. As the court stated at trial, however, it does not matter why Miller did not examine the interior of the Property; the fact remains that she was willing to purchase the Property without doing so. This willingness tends to support the court's conclusion that the condition of the building was less important than its location. Indeed, Miller herself testified that she had several reasons for purchasing the Property: she wanted a building to use for possible future expansion, she wanted a "buffer" against incompatible uses of New Products' property, and she wanted to subdivide a portion of the land into lots and sell them off. (Trial Tr. 292-93, 296.) Two of those reasons (buffer and subdivision) have no necessary connection to the condition of the building.

(g) New Products' "cavalier" approach to the building on the Property

The court also found that New Products took a "cavalier" approach toward the building on the Property after it purchased the loan documents from BOA, because it did not seek any form of relief from the bankruptcy court in order to obtain protection for the Property. This finding is supported by the docket in the bankruptcy case. New Products asserts that it was not able to present evidence of actions that it did take, including the fact that it employed security guards and installed a security camera and new locks to protect the building, but this Court cannot find any instance in which the bankruptcy court prevented it from presenting this evidence.

7. Permitting New Products to be Heard on Other Issues

New Products asserts that it was not given an opportunity to question Tibble about his communications with BOA to determine whether BOA was aware of the theft and vandalism occurring at the Property. New Products contends that there is a difference between allowing Tibble to maintain custody of the Property while trying to sell it and knowingly allowing the Property to be looted or vandalized. However, New Products fails to explain the significance of this distinction. Siravo told Tibble that BOA did not want to insure the Property or put any more of its money into it. BOA clearly believed that the Property was not worth additional expenditure.

8. Failure to Consider the Whole Estate

New Products also contends that the court should have considered the value of the entire estate, and should have "spread out" the liens on the Property to all the assets of the estate. However, New Products provides no justification for this approach. The issue in the adversary proceeding was whether Tibble was justified in treating the Property as he did. The liens attached to the Property, not the whole estate. The Court cannot pretend otherwise.

In short, New Products has not shown that the bankruptcy court's factual findings are clearly erroneous or that its legal conclusions are incorrect.

IV. Motions to Supplement

A. New Products' Motion

New Products has filed a motion to supplement the record with evidence of the results of proceedings before the Michigan Tax Tribunal (ECF No. 29). New Products apparently challenged the tax assessments on the Property for the years 2014 and 2015 and has obtained a consent judgment reducing those assessments and obtaining a tax refund. New Products seeks to supplement the record in this case with documents from those proceedings.

Rule 8009 of the Federal Rules of Bankruptcy Procedure permits the record to be supplemented in the following ways: on stipulation of the parties; by the bankruptcy court before the record is forwarded to the appellate court; or by the court where the appeal is pending. Fed. R. Bankr. P. 8009(e)(2). Generally, Rule 8009, which was formerly Rule 8006, "'does not

permit items to be added to the record on appeal to the district court if they were not part of the record before the bankruptcy court.'" *Amedisys, Inc. v. JP Morgan Chase Manhattan Bank (In re Nat'l Century Fin. Enters., Inc.)*, 334 B.R. 907, 917 (Bankr. S.D. Ohio 2005) (quoting *Zer-Ilan v. Frankford (In re CPDC, Inc.)*, 337 F.3d 436, 443 (5th Cir. 2003)); *see In re McKenzie,* No. 08-16378, 2013 WL 5309008, at *4 (Bankr. E.D. Tenn. Sept. 19, 2013) ("The general rule for designation of the record is that only items considered by the bankruptcy court in reaching a decision should be included.").

The materials that New Products offers were not presented to the bankruptcy court. New Products offers no justification for avoiding the general rule that this Court should consider only items presented to the bankruptcy court. Moreover, it is not clear how the consent judgment and related materials are relevant to the bankruptcy court's decision. The bankruptcy court granted Tibble's request to abandon the Property on January 9, 2014. Tibble had no duty with respect to the Property after that time. It is not clear what Appellant claims that Tibble could or should have done for the tax years 2014 and 2015. Accordingly, New Products' motion is denied.

B. Appellees' Motion

Appellees have filed a motion to "supplement" their briefing with supplemental authority. (ECF No. 35.) The motion merely provides notice of a recent decision that, according to Appellees, bears on the issue of whether a carve-out is equity. New Products has not opposed the motion. Accordingly, the motion is granted.

V. Conclusion

The bankruptcy court did not err in concluding that Tibble did not breach his fiduciary duties. When Modern Plastics filed its petition for bankruptcy, the Property had no value for the estate because the liens against it greatly exceeded its value. Consequently, any resources expended by the trustee to protect or maintain the building, or to challenge tax assessments on the Property, would deplete resources available to the estate solely for the benefit of a secured creditor, to the detriment of the other creditors of the estate. Tibble had a duty to conserve the assets of the estate for all creditors, not just BOA and New Products. Further, any decision not to protect or insure the building was reasonable considering the conduct of the secured creditor with the greatest interest in the Property and the value of the building in relation to the value of the Property as a whole.

An order will enter consistent with this Opinion.

Dated: September 22, 2017

/s/ Janet T. Neff
JANET T. NEFF
United States
District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re: MODERN PLASTICS CORPORATION, Debtor. /	Case No: 1:16-CV-370 HON. JANET T. NEFF
NEW PRODUCTS CORPORATION, Appellant, v. THOMAS R. TIBBLE et al. Appellees. /	

ORDER

In accordance with the opinion entered this date,

IT IS HEREBY ORDERED that Appellant's motion to supplement the record (ECF No. 29) is **DENIED.**

IT IS FURTHER ORDERED that Appellees' motion for supplement and notice of supplemental authority (ECF No. 35) is **GRANTED.**

IT IS FURTHER ORDERED that the judgment of the Bankruptcy Court in *New Products Corp. v.*

Tibbie (In re Modern Plastics), No. 13-80252 (Bankr. W.D. Mich. 2016) is **AFFIRMED.**

Dated: September 22, 2017

/s/ Janet T. Neff
JANET T. NEFF
United States
District Judge

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In re: MODERN PLASTICS CORPORATION, Debtor . _____/	
	Case No. DK 09-00651
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 . _____/	Hon. Scott W. Dales Chapter 7 Adversary Pro. No. 13-80252

FINDINGS OF FACT AND
CONCLUSIONS OF LAW AFTER TRIAL

I. BACKGROUND

At the center of this dispute between an unhappy creditor and a bankruptcy trustee lies a now-defunct manufacturing facility in Benton Harbor, Michigan

(the "Property"). The Property, commonly known as 489 North Shore Drive, Benton Harbor, Michigan, served as the factory, warehouse, and offices of Modern Plastics Corporation (the "Debtor"), as well as the collateral for a prepetition commercial loan that Bank of America ("BOA") made to finance the Debtor's manufacturing business.

The plaintiff in this case, New Products Corporation ("New Products" or the "Plaintiff"), is a "Tier 1" automotive supplier with its headquarters and manufacturing facility across the street from the Property. New Products, founded by the same man who established the Debtor and still managed by the founder's granddaughter, originally held a general unsecured claim against the Debtor in the amount of $19,113.82, but later acquired BOA's rights against the Debtor and the Property under a post-petition assignment of the bank's loan documents.

The principal defendant in this case is the former chapter 7 trustee, Thomas R. Tibble (the "Trustee" or "Mr. Tibble"). Mr. Tibble served as the trustee of the Debtor's bankruptcy estate from his appointment on January 26, 2009 until the charges of negligence (or worse) that New Products leveled against him prompted his resignation on January 9, 2015.[1] The Trustee's surety, Federal Insurance Company ("FIC"), is also a defendant. For convenience, the court will refer to the Trustee, the estate, and FIC collectively as the "Defendants."

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[1] Because New Products sued Mr. Tibble in his personal and official capacities, the successor trustee, Laura Genovich, appeared and participated in the case, through counsel, to protect the bankruptcy estate's interests following Mr. Tibble's resignation.

Evidently frustrated with the Trustee's handling of the case, and seeing an opportunity to acquire the Property as a buffer against future development and possibly for future expansion of its own business, New Products succeeded to BOA's claims against the Debtor and its mortgage against the Property through a post-petition assignment, effective March 4, 2013 (the "Assignment Date").

New Products came to believe that, while the Property was within the bankruptcy estate and under the Trustee's aegis, scrappers freely entered the premises, removing copper wires, steel beams, piping, "bus ducts," lighting fixtures, plumbing fixtures, furnaces, even support beams -- "everything that wasn't nailed down" and much of what was. The Plaintiff blames the Trustee for not taking steps to preserve the Property it eventually acquired an interest in, against the scrapping or looting.

A. This Adversary Proceeding

A few months after the Assignment Date, after successfully opposing the Trustee's request to approve his final report of distribution, New Products sued the Trustee and FIC to recover from them the post-petition diminution in value of the Property that they attributed to the Trustee's alleged breaches of fiduciary duty to the estate, BOA and to New Products.

More specifically, and as set forth in its First Amended Complaint (the "Complaint," AP ECF No.

15),[2] New Products alleges that the Trustee breached his fiduciary duty:

(1) by failing to protect the Property against vandalism or looting (Complaint at ¶¶ 23, 42, 46, 47);

(2) by failing to insure the Property after BOA said it would no longer do so (id. ¶¶ 23, 62, 65);

(3) by failing to object to property tax assessments (id. ¶¶ 23 and 68);

(4) by failing to determine environmental contamination on the premises (id. ¶¶ 23, 51);

(5) by failing to maximize the value of the Property through sale (id. ¶ 20) or jumping to the conclusion that only the developers of the nearby "Harbor Shores" golf course would be interested in buying it (id. ¶ 28); and

(6) by leasing the Property as a parking lot to Harbor Shores for too little income (id. ¶¶ 37-40).

The Defendants, in contrast, contend that the Property was "underwater," not necessarily because of the leaking roof and standing water within the building (which largely predated the bankruptcy filing) but because the unavoidable liens against the Property greatly exceeded its value. Without any equity for the estate, and because BOA had no interest in going out-of-pocket to protect or insure its own collateral, the Defendants contend that the Trustee

[2] In this opinion, the court will refer to entries in the docket of the Adversary Proceeding as "AP ECF No. __" and to entries in the main bankruptcy base case docket as "BC ECF No. __."

acted appropriately by, in effect, holding onto the Property and generating income from it, such as a carve-out, option payments, and parking lot license fees, without expending any resources or effort to preserve it. They contend, without contradiction, that BOA acquiesced in this approach for more than four years, never objecting, nor requesting adequate protection, nor moving for relief from stay, nor to compel abandonment.

After six motions for summary judgment,[3] the court narrowed the issues by (1) precluding New Products from recovering damages caused by the Trustee's decision to cancel the casualty insurance (see Memorandum of Decision and Order, AP ECF No. 88); (2) limiting the Trustee's personal liability to any willful breach of duty (*id.*); and (3) holding that New Products purchased only BOA's contract rights against the Debtor but not any of the tort claims BOA may have had against the Trustee (including claims that BOA may have been able to assert for pre-assignment breaches of fiduciary duty). *See* Memorandum of Decision and Order, AP ECF No. 139 p. 5. This last point means that New Products could assert only the direct claims it might hold against the Trustee for the diminution of the Property's value that occurred between the March 4, 2013 Assignment Date, and January 6, 2014 (the date the Trustee technically abandoned the property). *Id.* at p. 8.

In a prior ruling, the court also concluded that the Trustee's duty to use estate resources to preserve or improve the Property would depend almost entirely upon whether there was equity in the Property that would inure to the bankruptcy estate. *See* Order

[3] See AP ECF Nos. 56, 57, 118, 182, 183, 184.

Denying Parties' Summary Judgment Motions and Bifurcating Issues for Trial, AP ECF No. 188. In other words, bankruptcy trustees must not use estate resources if doing so will benefit only secured creditors. *Id.; cf.* 11 U.S.C. § 506(c) (authorizing trustee to surcharge collateral).[4]

Given this view of a trustee's duty and the allegations seemingly premised on the notion that the Trustee ought to have used estate resources to protect and enhance the value of the Property, the court bifurcated the issues for trial, focusing first on the Property's value and whether there was any equity in it. Given the central role that the Property's value played in the pre-trial motion practice, the court hoped that an early decision on this issue would assist it in determining whether the Trustee violated his duty to preserve the Property before reaching other issues regarding the Trustee's breach of fiduciary duty, whether the breach caused any damages, and if so, the amount of those damages. *See* Order Denying Parties' Summary Judgment Motions and Bifurcating Issues for Trial, AP ECF No. 188, at p. 4. Thus, the first phase of trial, which began on January 14, 2016, was limited to establishing the value of the Property as of March 4, 2013, as well as the extent of the encumbrances against it.

In response to a motion *in limine*, which the Defendants filed mainly to exclude the testimony of New Products's expert witness, New Products conceded that it was taking an unconventional approach to valuation in that, instead of appraisers and real estate professionals, it would depend upon

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[4] All statutory references in this opinion refer to the Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*, unless otherwise indicated.

the vice president of a commercial construction firm to testify about the scrap value of the components of the building. New Products argued that the value of these parts exceeded the "market value" of the Property, as would be determined by the more traditional valuation methodologies, used by appraisers, such as the sales comparison approach. In other words, New Products's theory rested on proving that the value of the damaged and purloined parts of the building exceeded the amount of the encumbrances, which would result in the equity necessary to trigger the Trustee's fiduciary duty to protect and insure the Property (against damage)[5] for the benefit of the estate and thus, the unsecured creditors.

B. The First Phase of Trial

The first phase of the trial commenced with New Products's calling Michael Frederick to the stand. Mr. Frederick is the vice president of Frederick Construction, and is the expert witness that New Products retained under Rule 26(a)(2)(B). New Products also presented the live testimony of two men associated with Randy's Metal Recycling (Nicholas Schlipp and his grandfather, Delbert Schlipp), before concluding its presentation of live testimony with Cheryl Miller, the chief executive officer of New Products.

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[5] Nothing in this (or any prior) opinion of the court should be read to suggest that a trustee need not obtain *liability* or other types of insurance designed to manage other types of risk that a bankruptcy trustee or estate may face. For example, the judgment in this case might be different if, instead of facing a secured party at trial, the Trustee faced the parents of a child who wandered onto the Property. Today's dispute involves the failure to protect the Property, not third parties.

With the agreement of the parties, the court also admitted the transcripts of deposition testimony from Steven Siravo and Ronald Miller pursuant to Rule 32(a)(4). The court has reviewed the deposition transcripts, paying particular attention to the Plaintiff's bench-filed designations of "key portions" to which the Plaintiff has called the court's attention. See Plaintiff's Designations of Key Portions of Deposition Transcripts (AP ECF Nos. 270 and 271).

During New Products's presentation of its case, the court admitted numerous documents into evidence, including the Stipulation of Facts (Exh. BBBB). Many of the documents were culled from filings in the base case and adversary proceeding, others (such as email strings, appraisal documents, correspondence and invoices) were duly produced during discovery. The court received the specifically-identified documents into evidence, largely without controversy, based on the parties' pre-trial stipulation.[6]

The court's decision to exclude the opinion of the Plaintiff's only expert, Mr. Frederick, eviscerated the Plaintiff's case,[7] leaving Plaintiff's counsel to grasp at

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[6] The court admitted only a subset of the documents the parties agreed *could be admitted*, as set forth in their pretrial Stipulation Regarding the Admissibility of Exhibits (AP ECF No. 245). The rules assign to the court the task of admitting evidence, and the court does not feel bound to admit documents *en masse* simply because the parties so stipulate. Instead of adopting the parties' "wholesale" approach, the court adopted a "retail" method, requiring document-specific offer and admission of exhibits. The court proceeded in this fashion to produce a more focused and manageable record for trial and perhaps appeal.

[7] In denying the *in limine* motion as it pertained to Mr. Frederick's opinion testimony, the court warned New Products that it would not permit the witness to stray too far away from his supposed report -- the September 2015 letter identified as

various straws from within the record to establish value. This setback, coupled with their view of the record generally, probably precipitated the Defendants' oral motion under Rule 52(c) (the "Rule 52 Motion"), which they made at the conclusion of New Products's presentation.

C. Rule 52 Motion for Judgment on Partial Findings

In their Rule 52 Motion, the Defendants argue that the Plaintiff presented no evidence even tending to undermine the absence of equity as embodied in the Stipulation of Facts. (Exh. BBBB, ¶ 5). Because of the signal role of equity following the court's prior decisions in the case, the Defendants further asked the court to find that Mr. Tibble did not breach his duty to New Products, and therefore to enter judgment dismissing the case entirely.

Exh. 28 (not admitted but included as part of Defendants' Motion *in Limine*, (AP ECF No. 213-7)). At trial, in response to Defendants' objections to the basis for the opinion testimony, including the fact that Mr. Frederick purported to rely on matters not mentioned in the report, the court refused to admit his opinion on two grounds. First, allowing him to bolster his opinion with matters not mentioned in the "report" unfairly surprised the Defendants, and second, the apparently casual conversations with vendors (whose names he could not initially recall) and his reference to a website on the cost of various metals (not disclosed in the report and only hazily recalled during his testimony) did not qualify as "sufficient facts or data" on which to base his testimony under Fed. R. Evid. 702(b). As a result, the court refused to admit Mr. Frederick's opinion that the scrap value of the Property exceeded the encumbrances.

Rule 52(c), which applies in this adversary proceeding by virtue of Fed. R. Bankr. P. 7052, provides as follows:

> If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

Fed. R. Civ. P. 52(c). This rule permits, but does not require, a court to enter judgment after the conclusion of a plaintiff's proofs in non-jury trials. *Ingham County v. Strojny (In re Strojny)*, 337 B.R. 150, 154 (Bankr. W.D. Mich. 2006).

Rule 52 is useful when the plaintiff has not demonstrated the elements of its claim either in fact or law, or where the plaintiff's own evidence may have established one of the defendant's defenses as a matter of fact or law. *Eberhardt v. Comerica Bank*, 171 B.R. 239, 243 (Bankr. E.D. Mich. 1994) (*citing CMS Software Design Systems v. Info Designs, Inc.*, 785 F.2d 1246, 1248 (5th Cir. 1986)).[8] The rule

[8]Here, the Plaintiff contends that the absence of equity in the Property is in the nature of an affirmative defense that the Defendants must establish to avoid liability. The Defendants contend, however, that to prove a case for breach of fiduciary duty the Plaintiff must establish a breach of duty and cannot do so if (as Defendants argue) the Property is wholly encumbered. Because, as explained below, the evidence overwhelmingly establishes the absence of equity, the court need not identify which party bears the burden of proof on the value proposition. The proof on these questions is clear.

"authorizes the court to enter judgment at any time that it can appropriately make a dispositive finding of fact on the evidence." Fed. R. Civ. P. 52(c), Advisory Committee Note to 1991 Amendment.

In response to the Rule 52 Motion, Plaintiff's counsel initially argued that the standard governing the court's task under Rule 52 is essentially the same as the standard under Rule 50. He urged the court to draw inferences in his client's favor, much as the court did under Rule 56 and as a court in a jury trial would, before taking the case from the jury. After the court recessed, counsel candidly conceded his error, confirming the court's view that findings under Rule 52(c) are the same as in any bench trial, with the caveat that the party against whom the motion is directed has been fully heard on the issue.

Indeed, despite the initial confusion, there are important distinctions between the court's role in considering a motion for directed verdict under Rule 50 and one for judgment on partial findings under Rule 52(c). *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554 (1990) (explaining difference between former standards under Rule 41 and Rule 50). As under its pre-1991 predecessor, the court's evaluation differs from that under Rules 50 or 56, which are designed to remove questions from the fact finder. *Id.* Instead, "[a] judgment on partial findings is made after the court has heard all the evidence bearing on the crucial issue of fact, and the finding is reversible only if the appellate court finds it to be "clearly erroneous." *See* Fed. R. Civ. P. 52(c), Advisory Committee Note to 1991 Amendment. A court that enters judgment on partial findings, like one that enters judgment at the conclusion of all evidence, must nevertheless state its

findings of fact and conclusions of law separately, in accordance with Rule 52(a). See Fed. R. Civ. P. 52(c).

From early in the case, certainly predating the Defendants' first motion for summary judgment, the value of the Property, and the implications of that value on any evaluation of Mr. Tibble's duties as trustee, took center stage. Indeed, because of the importance of the issue, and the factual dispute surrounding it, the court denied the Defendants' Third Motion for Summary Judgment (AP ECF No. 184), a week after they filed it, without putting the Plaintiff to the expense of responding to it.

Because the dispute about the value of the Property stubbornly interfered with the court's assessment of Mr. Tibble's administration of the asset, the court concurred in the Defendants' suggestion (made during a pretrial conference on October 14, 2015) to hold a separate hearing to consider value and its impact on the analysis. See Fed. R. Civ. P. 42(b) ("to expedite and economize, the court may order separate trial on one or more separate issues").

At a pretrial hearing on the Defendants' motion in limine, the court discussed with the parties their expectations of what would occur during the first phase of the bifurcated trial. *See, generally*, Transcript of Hearing on Motion *in Limine* held December 17, 2015 (AP ECF No. 243) at 22:14 to 29:2. New Products's counsel stated that, at the first phase of the trial, the court would consider "the issue of value and essentially was there some equity for unsecured creditors that would trigger a duty on the part of Mr. Tibble to preserve the property; and then, you know, what occurred during various points of his tenure or with the property that would affect the value?" *Id.* at 22:17-21. This understanding was consistent with the

court's view of the case, and its decision to hear testimony regarding the "central issue" of value, given its close relationship to a trustee's performance of his duty:

> As the court has observed in this Order and throughout the proceeding, whether Mr. Tibble owed a duty to use estate resources to preserve the property depends almost entirely on whether there was equity in the property, above the encumbrances against it, including but not limited to the mortgage the Plaintiff now holds. See, e.g., Memorandum of Decision and Order dated December 18, 2014 (DN 69) at p. 10 ("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 Order Denying Parties' Summary Judgment Motions and Bifurcating Issues for Trial (AP ECF No. 188) at p. 4.

This opinion, including the following passages, constitutes the court's findings of fact and conclusions of law, as required by Rule 52(a) and (c).

II. FINDINGS OF FACT

A. Generally

The Debtor filed its chapter 7 bankruptcy petition on January 26, 2009 (the "Petition Date"), thereby creating a bankruptcy estate that included the Property. BOA filed a proof of claim in the Debtor's

bankruptcy for $1,275,912.01 that was secured in part by the Property.

With the consent of BOA, the Trustee unsuccessfully attempted to sell the Property to Ox Creek Development, LLC ("Ox Creek") for between $590,000.00 and $650,000.00 -- considerably less than the Property's pre-petition appraised value of $1,050,000.00 -- after negotiating a modest carve-out in exchange for the estate's role in the sale process. Again with BOA's consent or acquiescence, the Trustee also negotiated a pre-sale option agreement, and licensed or "leased" the parking lot for a golf event, generating additional funds. Though BOA might have argued that the option and lease payments represented proceeds of its collateral, it did not advance the argument and simply permitted the estate to keep these modest fruits of the Trustee's various negotiations despite their relationship to the collateral.

When, roughly four years after the commencement of the Debtor's case, it became clear that the Trustee's sale efforts would fail, BOA conducted an auction to sell its promissory notes, mortgages and other loan documents (the "Loan Documents"), eventually assigning them to New Products on March 4, 2013, for $225,000.00.

On April 4, 2013, Berrien County filed a motion for relief from the automatic stay to permit it to pursue tax foreclosure proceedings (BC ECF No. 121). Shortly after the taxing authority filed its motion, and soon after the assignment of the loan documents from BOA

to New Products,[9] the Trustee filed his final report, giving notice of his proposed distributions and deemed abandonment of property -- including the Property at issue in this opinion -- pursuant to § 554(c). *See* Trustee's Final Report (TFR) filed June 10, 2014 (the "TFR," Exh. 25).

New Products objected to the TFR and shortly thereafter, on September 27, 2013, commenced this adversary proceeding against the Trustee and his surety, complaining of the Trustee's neglect and mistreatment of the Property. Given the allegations of the Trustee's neglect, the court was unwilling to approve the TFR without an evidentiary hearing, and so the Trustee withdrew his report.

The Trustee eventually abandoned the estate's interest in the Property, effective as of January 6, 2014, following the expiration of an additional notice period for environmental regulators, over New Products's objection. *See* Objection by Creditor New Products Corporation to Trustee's Notice of Proposed Abandonment and Request for Hearing (BC ECF No. 166).

B. The Property and its Value

The Property is a manufacturing facility situated on approximately 12 acres in Benton Harbor, Michigan. The main building, initially constructed in 1936, consisted of approximately 127,000 square feet at one time used for manufacturing, office, and related purposes. More specifically, the Debtor used the

[9] From the various objections to the Trustee's proposals that New Products filed while it held only an unsecured claim, it must have been clear to the Trustee, after the Assignment Date, that he could no longer count on cooperation from the holder of the principal secured claim against the Property.

Property in the production of molded plastics since its inception. The Property served as collateral for loans the Debtor obtained from BOA. As of the Petition Date, the Debtor owed BOA $1,275,912.01 (Exh. BBBB). Prior to the filing of the Debtor's bankruptcy petition on January 26, 2009, the Debtor had experienced financial difficulties rendering it unable to meet its obligations to BOA, state and local taxing authorities, among other creditors including New Products. Deferred maintenance compromised the integrity of the roof, resulting in pools of standing water within the building which were visible during a prepetition auction of equipment conducted at the behest of BOA (Exh. 30). During the Trustee's only visit to the building interior at the Property in January 2009, his credible testimony established the Property was in a deplorable and unsafe condition.

On December 29, 2008, in the course of winding down its operations, the Debtor agreed to sell the Property, with BOA's approval, to Ox Creek for $650,000.00 (the "First Proposed Sale"). *See* Purchase Agreement dated December 29, 2008 (Exh. VV). Ox Creek was reportedly involved in the development of the Harbor Shores golf course.

Several months after the Petition Date, the Trustee agreed to complete the sale to Ox Creek, but through a sale addendum, he allowed a $60,000.00 credit to the buyer at closing, reducing the net sale amount to $590,000.00 (the "Second Proposed Sale") (*id.*). The First and Second Proposed Sales both depended on BOA's willingness to accept far less than its debt at closing in order to convey clear title. Moreover, as part of the Second Proposed Sale BOA agreed to remit $10,000.00 to the estate as a carve-out of the Bank's collateral, representing the only

meaningful benefit for unsecured creditors from the Property at that time. Unfortunately, this sale fell through.

Regardless, Ox Creek remained interested in the Property, offering to purchase it for $590,000.00, and agreeing to make option payments for four months to preserve its right to purchase (the "Third Proposed Sale," Exh. YY). Though Ox Creek and the Trustee structured the Third Proposed Sale in a slightly different manner, the purchase price remained effectively the same as with the Second Proposed Sale. On September 22, 2009, after notice and an opportunity for hearing, the court approved the Third Proposed Sale (Exh. ZZ), finding no reason to question at that time the arms-length nature of the negotiation that arrived at the $590,000.00 purchase price. But, as with the previous sale, this transaction also fell through.

Nevertheless, because there was a buyer in hand on the Petition Date who was willing to pay a $650,000.00 purchase price, the court finds this to be an exceedingly persuasive indicator of the Property's value as of the Petition Date. This is so, notwithstanding the appraisal report of Professional Appraisal Services, Inc., which suggested a value in 2008 of $1,050,000.00. Even this report expressed reservations about a declining real estate market, which turned out to be true. (Exh. A).

Significantly, BOA -- the lienholder with the greatest stake in the Property -- blessed the proposed sales at the $650,000.00 and then $590,000.00 amounts, giving rise to a strong inference that the purchase prices fairly represented the value of the Property at the time, even acknowledging that large financial institutions like BOA may have many

reasons for their action, or inaction, with respect to collateral. BOA's willingness to pay the estate a carve-out for the privilege of having the Trustee sell the Property (and keeping the bank out of the chain of title of a potentially contaminated industrial site) may reflect, in part, an aversion to risk or reliance on other collateral, but its willingness to discharge its mortgage for far less than its claim speaks volumes about the lender's dim view of the Property's value. Indeed, Mr. Siravo's deposition testimony establishes that BOA was unwilling to spend any money to insure its collateral, supporting an inference of less, rather than more, value than the $650,000.00 it was willing to accept prepetition. Similarly, taking judicial notice of the docket entries in the base case, it is clear that BOA never sought relief from stay to liquidate its collateral, similarly supporting an inference that the bank did not ascribe much value to the Property. This is not surprising, given the tax liens, the deferred maintenance and generally poor condition of the Property, and the considerable risk of environmental clean-up costs. In view of the foregoing, and especially given the proximity of the December 29, 2008 Purchase Agreement to the Petition Date, the court finds (based on the preponderance of the evidence) that the Property was worth not more than $650,000.00 on the Petition Date.

In reaching this decision, the court credits Mr. Tibble's testimony that, notwithstanding the language at the top of the third column on Form 1, he wrote "$600,000.00" to memorialize his preliminary assessment of the value of the Property, rather than the equity in the Property. His testimony establishes his carelessness or inattention while completing the several reporting forms, but his explanation was

believable. Given the explanation, which the court was not privy to when drawing inferences in New Products's favor at the summary judgment stage, the admissions included within the Trustee's reports do not establish equity.

As for the value of the Property three and a half years later -- on the Assignment Date -- likewise, the court finds, based on the preponderance of the evidence, that the $590,000.00 purchase price implicit in the Second Proposed Sale (and expressed in the third) represents the best evidence of value on that later date.

In reaching this conclusion, the court is mindful of the credible testimony from Nicholas Schlipp and his grandfather, Delbert Schlipp, to the effect that, prior to the assignment, the elder Mr. Schlipp and unnamed associates actively harvested metal and other scrap from the Property, five days a week, eight hours a day, for seven months, post-petition. Although Delbert Schlipp testified that he did not participate in removing structural components from the building, he was not the only scrapper on site, and the photographs introduced as part of Exhibit 40 show structural deterioration resulting from the removal of cinder blocks, support beams, and other substantial supporting pieces of the building. This further exposed the premises to the elements and quite likely compromised the integrity of the building.

Although the invoices included as part of Exhibit 44 show that scrappers (and perhaps Mr. Robert Orlaske) benefitted from what can only be described as post-petition looting, the court is unwilling to simply deduct the proceeds of the scrap sales from the $590,000.00 purchase price established in the Third

Proposed Sale, without some expert testimony corroborating this method of valuation.

This reluctance also stems from the evidence that shows it was the location of the Property, rather than the structures built upon it, that accounted for most of the value. For instance, James Ringler from Grubb & Ellis opined in 2008 that the highest and best use for the Property was as a redevelopment site. (Exh. H). Referring to enlarged aerial photographs, Ms. Miller showed the proximity of the Harbor Shores golf and residential developments to the Property. The Trustee testified that in 2009, after he visited the site, he came away with the feeling that the building was dangerous, but was nonetheless able to wring out some income from the real property by leasing it during a golf event at the neighboring golf course. In addition, the record includes two letters sent from the City of Benton Harbor to the Debtor in December 2011, in essence, condemning the building. Although the city gives the Debtor the opportunity to bring the structure "up to code," the building inspector suggests that the Debtor consider demolishing it as an alternative. (Exh. FF). It is more than simply conceivable that the building itself contributed very little to the value of the Property, especially given its consistently worsening state, as compared to the constancy of the $590,000.00 purchase price. The court has also considered the appraisal of Professional Appraisal Services (Exh. C), which updated its earlier appraisal (Exh. A), and suggested a retrospective estimate of value of $930,000.00 as of the Petition Date. Again, however, considering the condition of the building (which the author of the appraisal did not inspect) and the impact of environmental concerns which almost certainly would have justified a

discount, the court finds the prices consistently reflected in the aborted sales transactions to be more persuasive evidence of value in the admittedly unusual circumstances of this case, even though the sales did not close. There is nothing in the record to suggest that they failed to close because the Trustee or BOA thought the price was too low.

The court has also considered the testimony of Cheryl Miller regarding her view of the Property, her decision to cause New Products to purchase BOA's Loan Documents, and her post-assignment visits to the Property. Although her testimony implied that she was unaware of the post-petition scrapping activity on the premises, she also testified she was regularly at work in the New Products offices. This regular attendance at the office, the proximity of her office to the Property (across the street), and the testimony from Delbert Schlipp regarding the fact that for seven months he and his confederates threw the scrap in dumpsters and hauled it in truckloads from the Property, make it difficult for the court to believe she was unaware of the activity of which she now complains. Indeed, she testified that one of the photographs showing the Property's environs captured the image of her Buick automobile in the New Products parking lot. The court also finds incredible her testimony that, as a sophisticated business person in charge of a self-described global, Tier 1 automotive supplier, she authorized her company to spend $225,000.00 on the Loan Documents with the ultimate purpose of acquiring the Property, without setting foot on the interior of the Property -- unless the condition of the building was immaterial to the decision. She acted, in other words,

as if the value of the Property was not dependent on the condition of the structure.

She also testified that, after the Assignment Date, she made regular visits to the Property during which she photographed the interior, evidently in an effort to document the Trustee's failure to adequately protect her newly-acquired collateral, which she said was deteriorating due to the elements and continued scrapping. Yet, as far as the docket shows, her company did not file any motions for relief from the automatic stay, for adequate protection, or to compel abandonment. In other words, aside from building a case against the Trustee in the months following the assignment by chronicling the deterioration, New Products behaved just as its predecessor (BOA) had -- unwilling itself to spend money to preserve the Property or even to take action to compel the Trustee to do so. This similarly cavalier approach to the building -- by the first lienholders pre and post-assignment -- bears on the court's conclusion that the value of the Property was largely driven by its location rather than the improvements. If BOA and New Products behaved in this manner with respect to the Property, it probably explains why the Trustee did, too.

C. Encumbrances and Equity

As for the amount of the encumbrances, the court relies largely on the parties' Stipulation of Facts (Exh. BBBB) and finds that the liens of the State of Michigan Unemployment Insurance Agency ("MUIA"), BOA and the Berrien County Treasurer totaled $1,608,610.35 as of the Petition Date (*see* Exh. BBBB at ¶ 2). Based on that same exhibit, the court finds that BOA received payment of $239,639.87, from the sale of other collateral on August 13, 2010 (*id.* at

¶ 3), which reduced its claim, and therefore its lien, by that amount. Moreover, by March 4, 2013, Berrien County had asserted a tax lien against the Property in the amount of $307,182.36 (*id.* at ¶ 4). Because the record includes no evidence that in any way challenges the Berrien County tax lien, the court finds that the tax lien in the amount of $307,182.36 also encumbered the Property to that extent on the Assignment Date.

To summarize, the liens on the Petition Date, in the aggregate of $1,608,610.35 exceeded the value of the Property on that date ($650,000.00) by approximately $958,610.00. As of the Assignment Date, due largely to the $180,306.00 increase in the Berrien County tax lien, but also reflecting the $239,639.00 reduction in BOA's claim on account of the sale of collateral in Coloma, Michigan, liens against the Property at that time ($1,549,277.00) exceeded the value of the Property ($590,000.00) by approximately $959,277.00.

III. CONCLUSIONS OF LAW

The point of bifurcating the value issue from other issues, such as damages, was to permit the court to determine whether the condition or value of the Property was such that "an ordinarily prudent man in the conduct of his private affairs under similar circumstances and with a similar object in view" would have behaved as Mr. Tibble allegedly did. *See Ford Motor Credit Co. v. Weaver*, 680 F.2d 451, 461-62 (6th Cir. 1982); *United States ex rel Central Savings Bank v. Lasich (In re Kinross Mfg. Corp.)*, 174 B.R. 702, 705 (Bankr. W.D. Mich. 1994).

Although bankruptcy professionals and courts generally acknowledge that a bankruptcy trustee has

a duty to preserve property of the estate, the relevant statute frames the fiduciary's obligation differently: "The trustee shall . . . be accountable for all property received." 11 U.S.C. § 704(a)(2). This concept of accountability recognizes the extremely difficult job of a bankruptcy trustee who, after all, is a fiduciary of an estate in which numerous beneficiaries or stakeholders hold competing and often conflicting interests. To hold that a trustee, in order to "account" to secured creditors has an *unqualified* duty to spend money to preserve fully-encumbered estate property would make it impossible for the same trustee to "account" to the unsecured creditors. By framing the trustee's duty more flexibly in terms of accountability rather than preservation, the drafters recognized the collective nature of the proceeding, and the frequently divergent interests in the case and the property of the estate. As in most bankruptcy controversies, a trustee must be guided by the need to maximize value for the estate, not just secured creditors (for whom the Bankruptcy Code affords ample protection).

As the court observed in response to the Defendants' summary judgment motion over a year ago:

> 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.

See Memorandum of Decision and Order dated December 18, 2014 (AP ECF No. 69) at p. 10. Indeed, in ruling on the Defendants' prior summary judgment motions, if there had been "no genuine issue" that the Property was substantially underwater, the court would have dismissed the law suit over a year ago -- and practically said as much at that time. *Id.* At that time, the court also stated:

> . . . 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.

Id. at p. 11-12. The court regards these statements as the law of the case, which constitute "controlling law" within the meaning of Rule 52(c). *Entertainment Productions, Inc. v. Shelby County*, 721 F.3d 729 (6th

Cir. 2013) ("[u]nder the law-of-the-case doctrine, findings made at one point in the litigation become the law of the case for subsequent stages of that same litigation").

In the course of the hearing to determine value, the court carefully considered the manner in which BOA treated the Property, or more accurately, refrained from treating the Property, relying on the deposition testimony of BOA's Mr. Siravo as well as the credible testimony of Mr. Tibble. Similarly, the court considered the manner in which Ms. Miller responded. Significantly, the three most interested stakeholders -- BOA, New Products, and the Trustee -- took no steps to preserve the building, suggesting that its contribution to the value of the Property would not warrant the effort.

Having concluded that the utter absence of equity -- where liens exceeded the value of the Property by over $950,000.00 -- the court finds that the value-related evidence amply establishes the Defendants' defense. *Eberhardt*, 171 B.R. at 243. The court, and the Code, support his theory -- that the substantial negative equity justified the Trustee's conduct. This defense, in the language of Rule 52(c), is one that "can . . . be defeated only with a favorable finding" on the question of equity. After the Plaintiff has been fully heard on the question of equity, the court has found in favor of the Defendants on that issue.

The court is unimpressed with New Products's novel suggestion that the Trustee should have done more in order to maximize the carve-out, option payments, or rental income. Each of these benefits to the estate depended not simply on the Trustee's efforts and negotiation skills, but on the cooperation of the first secured lender. A carve-out is not equity, it is the

product of a secured creditor's self-interested consent to share its collateral position with the estate, generally in exchange for the benefit of disposing of collateral through the bankruptcy process, rather than through foreclosure with its attendant risks and delay. Permitting the estate to earn rental income and option payments -- through the use of BOA's collateral -- depends on the agreement of the secured creditor. That the Trustee was able to derive some benefit from the Property without paying to fix or even fence the building shows that he maximized value for the estate and did so with the agreement of BOA. As the court observed earlier, New Products cannot now second-guess its assignor's decision to cooperate. And, with respect to the suggestion that the Trustee should have abandoned the property sooner given the absence of equity, the court is similarly unpersuaded. The statute provides that the Trustee "*may* abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." 11 U.S.C. § 554(a) (emphasis added). The modest success that the Trustee had in getting BOA to agree that the estate could keep the carve-outs, option payments, and parking lot revenue, and do so without spending estate resources on the Property, justifies the Trustee's decision to postpone abandonment for as long as he had the cooperation of the entity holding the first lien.[10]

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[10] In his TFR, filed roughly three months after the Assignment Date, and shortly after Berrien County filed its stay relief motion, the Trustee proposed to abandon the Property. New Products opposed the abandonment by objecting to the TFR, and later in response to the Trustee's separate motion to abandon the Property.

Given the complete absence of equity, and the relative unimportance of the building in the evaluation of the Property, the court finds that Mr. Tibble behaved as "an ordinarily prudent man in the conduct of his private affairs under similar circumstances and with a similar object in view" would have behaved, and in fact as BOA and New Products behaved before, and immediately after, the assignment, respectively. *Weaver*, 680 F.2d at 461-62; *In re Kinross Mfg. Corp.*, 174 B.R. at 705.

Accordingly, the court will direct the Clerk to enter judgment dismissing the case.

IV. CONCLUSION AND ORDER

The court's impression of this case is certainly mixed. On the one hand, the photographs showing the devastating effects of the scrappers' post-petition harvest of copper, steel, and other materials is shocking, if not revolting. However, trustees, secured creditors, and even bankruptcy judges must approach assets unsentimentally in a system designed to "collect and reduce to money the property of the estate for which the trustee serves . . ." 11 U.S.C. § 704(a) (the first duty of a chapter 7 trustee). Understanding, as the court does, that BOA and the trustee agreed expressly or impliedly to neglect the building because it did not make economic sense to do otherwise makes it easier to accept what happened to it in this case. The court would understand, however, if Ms. Miller does not see the situation in the same way, given her family's history with the Debtor and the Property. Nevertheless, the Trustee's conduct did not give rise to a claim for damages, despite the damage it may have inflicted on his reputation, given the litigation and other risks he assumed by administering the Property as he did. *See, especially, supra* n.5.

Finally, although the Bankruptcy Code stacks the deck in favor of secured creditors, especially in a chapter 7 case, secured creditors must play the hand they are dealt. *See, e.g.*, 11 U.S.C. §§ 362(d), 363(e), 554(b). The observation of the Honorable James D. Gregg, with respect to adequate protection, bears repeating: "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). Here, nobody asked. Precluding recovery under the circumstances of this case is consistent with this principle, and protects the estate and its unsecured creditors from an end-run around the statutory scheme.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Rule 52 Motion is GRANTED and the Clerk shall enter judgment dismissing the Complaint.

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., Matthew Cooper, Esq., Elizabeth M. Von Eitzen, Esq., Mathew Cheney, Esq., and the United States Trustee.

END OF ORDER

IT IS SO ORDERED.

Dated January 21, 2016

/s/ Scott W. Dales
Scott W. Dales
United States
Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In re: MODERN PLASTICS CORPORATION, Debtor . _____/	
	Case No. DK 09-00651
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 . _____/	Hon. Scott W. Dales Chapter 7 Adversary Pro. No. 13-80252

JUDGMENT IN AN ADVERSARY PROCEEDING

For the reasons set forth in the Findings of Fact and Conclusions of Law After Trial entered this date, the court reached the following decision.

IT IS ORDERED, ADJUDGED AND DECREED that the Plaintiff, New Products Corporation, recover nothing, the action be dismissed on the merits, and the parties shall bear their own costs.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Judgment in an Adversary Proceeding 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., Matthew Cooper, Esq., Elizabeth M. Von Eitzen, Esq., Mathew Cheney, Esq., and the United States Trustee.

IT IS SO ORDERED.

Dated January 21, 2016

/s/ Scott W. Dales
Scott W. Dales
United States
Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF MICHIGAN

In re: MODERN PLASTICS CORPORATION,

Debtor.
_____/

NEW PRODUCTS CORPORATION and UNITED STATES OF AMERICA,

Plaintiffs,

v.

Hon. Scott W. Dales
Chapter 7 Adversary Pro. No. 13-80252

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

Defendants.
_____/

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

[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.

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 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

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[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.

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 evidence, judge the credibility of

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

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 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

[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).

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

[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).

Property deteriorated substantially under the Trustee's supposed tutelage.

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 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

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[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.

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).

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

[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.

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

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[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)

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[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.

(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. §§ 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]

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[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").

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.

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." I*n 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

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[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).

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.

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

/s/ Scott W. Dales
Scott W. Dales
United States
Bankruptcy Judge