IT IS SO ORDERED.

Dated: March 7, 2014
05:22:29 PM

Kay Woods
Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
DENMAN TIRE, LLC,	*	**CASE NUMBER 10-40855**
Debtor.	*	
* * * * * * * * * * * * * * * *	*	
RICHARD G. ZELLERS, TRUSTEE,	*	
Plaintiff,	*	**ADVERSARY NUMBER 11-4242**
and	*	
CINCINNATI SPECIALTY UNDERWRITERS INSURANCE CO.,	*	
Intervening Plaintiff,	*	**HONORABLE KAY WOODS**
v.	*	
TITAN TIRE CORP., *et al.*,	*	
Defendants.	*	

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OPINION REGARDING MOTIONS FOR PARTIAL SUMMARY JUDGMENT FILED BY (i) TITAN TIRE CORPORATION; AND (ii) KELLER RIGGING & CONSTRUCTION

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Before the Court are two motions for partial summary judgment, as follows: (i) Titan Tire's Motion for Partial Summary Judgment ("Titan's Motion") (Doc. 44) filed by Defendant Titan Tire Corporation ("Titan") on January 27, 2014; and (ii) Defendant Keller Rigging & Construction's Motion for Partial Summary Judgment ("Keller's Motion") (Doc. 46) filed by Defendant Keller Rigging & Construction ("Keller") on January 27, 2014.[1] Neither Titan nor Keller filed a joint stipulation of facts. (*See* Doc. 4, Adv. Case Mgmt. Order, § 6.) On February 7, 2014, Plaintiff Richard G. Zellers, Chapter 7 Trustee ("Trustee"), filed Richard G. Zellers, Trustee's Memorandum in Opposition to Defendants' Motions for Partial Summary Judgment ("Trustee's Response") (Doc. 48). Keller and Titan each filed a reply brief (("Keller's Reply") (Doc. 49) and ("Titan's Reply") (Doc. 50)). Intervening Plaintiff The Cincinnati Specialty Underwriters Insurance Company ("CSU") did not oppose the Motions.

For the reasons set forth herein, the Court will deny Titan's Motion and Keller's Motion.

[1]On January 27, 2014, Titan and Keller each filed a brief in support of its Motion (("Titan's Brief") (Doc. 45) and ("Keller's Brief") (Doc. 47)).

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general orders of reference (Gen. Order Nos. 84 and 2012-7) entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

I. FACTUAL AND PROCEDURAL BACKGROUND[2]

Denman Tire, LLC ("Denman") filed a voluntary petition pursuant to chapter 7 of Title 11 on March 17, 2010, which case was denominated Case No. 10-40855 ("Main Case"). Richard G. Zellers was appointed Chapter 7 Trustee in the Main Case. In liquidating Denman's assets, the Trustee entered into a purchase agreement ("Purchase Agreement")[3] with Titan for the sale of certain equipment and personal property ("Personal Property"), which was located at a Denman facility in Trumbull County, Ohio

[2]As set forth above, neither Titan nor Keller filed a joint stipulation of facts. Other than the deposition transcript of the Trustee (Doc. 43) filed by Keller, the Court was not presented with anything to show that there are no genuine issues of material fact herein. The factual statements in Section I of this Opinion are taken from the record of the Main Case and this Adversary Proceeding as a whole and are viewed in the light most favorable to the Trustee. *Banks v. Wolfe Cnty. Bd. of Educ.*, 330 F.3d 888, 892 (6th Cir. 2003) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)) ("In deciding a motion for summary judgment, the court must view the factual evidence and draw all reasonable inferences in favor of the nonmoving party.").

[3]The Purchase Agreement is attached as Exhibit A (Doc. 3) to the Trustee's Complaint (Doc. 1).

("Real Estate"). On June 3, 2010, the Court approved the sale of the Personal Property to Titan (Main Case, Doc. 93). The sale of the Personal Property closed on June 21, 2010.

The Purchase Agreement granted Titan a license to enter upon the Real Estate to remove the Personal Property. The Trustee was required to insure the Personal Property until closing, and Titan was required to insure the Personal Property for as long it remained at the Real Estate. The Purchase Agreement did not require the Trustee to insure the Real Estate.

Titan hired Keller to dismantle the Personal Property and remove it from the Real Estate. During Keller's removal process, a fire occurred at the Real Estate[4] on June 2, 2011 ("Fire").

The Trustee made a claim for damages caused by the Fire under his first-party insurance policy with CSU. A disagreement arose between the Trustee and CSU over the proper value of the damages. As a result, in August 2011, CSU made a written demand for an appraisal pursuant to the process outlined in the insurance policy ("Umpire Process").[5] The Umpire Process provided for the Trustee and CSU to each select an appraiser to separately value the Real Estate and the amount of loss. If the

[4]On July 28, 2011, the Court approved the sale of the Real Estate to Mark Gibbs for the sum of $350,000.00 (Main Case, Doc. 408). The sale of the Real Estate was unrelated to the Trustee's sale of the Personal Property.

[5]The parties refer to the Umpire Process in various documents as the "appraisal process," the "umpiring process" and the "umpire process."

appraisers failed to agree, they were required to submit their differences to an umpire. Any agreement between two of the three (the two appraisers and the umpire) would be binding upon the parties.

In August 2011, despite the dispute between the Trustee and CSU, CSU tendered a check to the Trustee in the amount of $100,797.24 ("Damages Check"), which represented CSU's determination of the amount of damages resulting from the Fire. The Trustee terminated the Umpire Process in September 2011.

On November 7, 2011, the Trustee initiated this Adversary Proceeding against Titan and Keller, which seeks damages in the amount of $1.5 million based on Titan and Keller's alleged negligence in causing the Fire. On September 21, 2012, CSU filed Motion to Intervene by the Cincinnati Specialty Underwriters Insurance Company ("Motion to Intervene") (Doc. 20), in which CSU requested permission to intervene as a plaintiff based on subrogation rights arising out of the Damages Check.[6] A hearing on the Motion to Intervene was scheduled for November 21, 2012 ("Hearing"). CSU filed a brief in support of the Motion to Intervene (Doc. 27) on October 22, 2012. In its brief, CSU stated that it had again invoked the Umpire Process to resolve the dispute between the Trustee and CSU.

[6]In April 2012, the Trustee deposited the Damages Check with a reservation of rights regarding the total amount of damages.

On November 12, 2012, Titan filed Titan Tire's Response to CSU's Motion to Intervene and Motion to Stay the Adversary Proceedings [sic] ("Motion to Stay") (Doc. 28), in which Titan (i) did not oppose the Motion to Intervene; and (ii) sought a stay of the Adversary Proceeding pending resolution of the Umpire Process. Titan argued that the Trustee might be fully compensated for his damages at the conclusion of the Umpire Process and, thus, have no need to pursue claims against Titan and Keller. If, however, after conclusion of the Umpire Process the Trustee continued this Adversary Proceeding against Titan and Keller, Titan asserted that evidence from the Umpire Process would be relevant and discoverable. Indeed, Titan stated, "The estimations of market value that would result from a formal appraisal between CSU and [the Trustee] would be relevant to the potential RECOVERABLE damages in this adversary proceeding." (Mot. to Stay ¶ 9.) Titan further argued that no party would be prejudiced by a stay, which would serve the interests of justice.

On November 12, 2012, the Trustee also filed a response (Doc. 29) to the Motion to Intervene, in which he conceded that the insurance policy required him to participate in the Umpire Process to resolve his dispute with CSU, rather than assert a

cross-claim.[7] Contrary to Titan's position, the Trustee opposed a stay of the Adversary Proceeding on the basis that the Umpire Process and the Adversary Proceeding could proceed simultaneously. (Doc. 29 ¶ 4.)

Based on the briefs and the arguments at the Hearing,[8] on November 21, 2012, the Court entered Order (i) Granting CSU's Motion to Intervene; (ii) Denying Trustee's Motion for Leave to Assert a Cross-Claim Against CSU; and (iii) Granting Titan's Motion to Stay Adversary Proceeding ("Intervention Order") (Doc. 30).

At the conclusion of the Umpire Process, on December 4, 2013, the Trustee filed Motion to Compromise Controversy ("Motion to Compromise") (Main Case, Doc. 786), which sought Court approval of a compromise between the Trustee and CSU. According to the Motion to Compromise, the appraisers and the umpire agreed: (i) the Trustee's "actual cash value loss" was $837,398.00; (ii) after application of a co-insurance penalty of 69.02%, the subtotal was $577,972.10; (iii) the subtotal should be reduced by (a) the payment previously made by CSU to the Trustee of $100,797.24 and (b) the policy deductible of

[7]At an October 15, 2012 telephonic status conference on the Motion to Intervene, the Trustee orally moved for leave to file a cross-claim against CSU. However, in his response to the Motion to Intervene, the Trustee stated that he would "not proceed with a . . . cross-claim against CSU." (Doc. 29 ¶ 3.)

[8]Although Keller did not file its own motion to stay the Adversary Proceeding, at the Hearing, Keller joined in Titan's Motion to Stay.

$25,000.00; and (iv) the net amount owed by CSU to the Trustee was $452,174.86. (Mot. to Compromise ¶ 9.) The Trustee expressly stated that approval of the compromise would not "affect or eliminate" the Adversary Proceeding and that the Trustee believed Titan and Keller were "responsible to reimburse the estate for the deductible of $25,000.00 and the expense of the appraisal and umpire process which would include, but not be limited to, the fees of the experts and attorney fees." (*Id.* ¶ 12.) On January 9, 2014, the Court entered Order (Main Case, Doc. 801), which approved the compromise as set forth in the Motion to Compromise.

In addition to filing the Motion to Compromise on December 4, 2013, the Trustee filed Motion to Set Final Pretrial or Status Conference (Doc. 38), in which he requested that the Adversary Proceeding be set for a final pretrial or status conference because the Umpire Process had been completed. As a consequence, the Court set and held a status conference on January 13, 2014. At that time, Titan and Keller requested leave to file motions for partial summary judgment. Titan and Keller asserted that the Court's consideration of the kinds or categories (as opposed to amounts) of recoverable damages in this Adversary Proceeding involved purely legal issues. The Court granted leave to Titan and Keller and set a briefing

schedule. As a result, Titan's Motion and Keller's Motion are currently before the Court.

II. STANDARD FOR REVIEW

Federal Rule of Civil Procedure 56, made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7056, states, in pertinent part,

> (a) . . . The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. . . .
>
> * * *
>
> (c) Procedures.
>
> (1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
>
> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials[.]

FED. R. CIV. P. 56 (West 2014). Material facts are those "that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of material fact exists "if a reasonable person could return a verdict for the non-moving party." *Jacob v. Twp. of W. Bloomfield.*, 531 F.3d 385, 389 (6th Cir. 2008) (citing *Anderson*, 477 U.S. at 248).

"The moving party bears the burden of proving the absence of genuine issues of material fact and its entitlement to judgment as a matter of law." *Longaberger Co. v. Kolt*, 586 F.3d 459, 465 (6th Cir. 2009) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). In evaluating a motion for summary judgment, "the court must view the factual evidence and draw all reasonable inferences in favor of the nonmoving party." *Banks v. Wolfe Cnty. Bd. of Educ.*, 330 F.3d 888, 892 (6th Cir. 2003) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

Although the Motions before the Court seek only partial judgment, rather than judgment on the entirety of the claims, the standard set forth above remains applicable.

III. PLEADINGS

A. Titan's Motion and Reply

In its Brief, Titan asserts that (i) the Trustee's fees and costs incurred in the Umpire Process are not recoverable under the American Rule; and (ii) the damages available to the Trustee do not include costs incurred under a contract with a third party – *i.e.*, the Trustee's insurance contract with CSU. (Titan's Br. at 3-4.) Titan argues that the Trustee's fees for the umpire, attorney fees and expert witness fees, all of which were incurred as part of the Umpire Process, are not recoverable as damages under the American Rule, pursuant to which a

prevailing litigant in a federal civil action is not entitled to attorney fees absent a specific statutory grant of authority for the award of such fees. (*Id.* at 3.) Because the Trustee cannot point to any statutory basis for the recovery of fees, Titan argues that the Trustee's claim for fees relating to the Umpire Process fails as a matter of law. (*Id.*) Moreover, Titan asserts that the Trustee cannot recover fees and costs incurred in the Umpire Process because that process was mandated by the Trustee's insurance contract with CSU. (*Id.* at 4.) As a consequence, Titan requests partial summary judgment in its favor regarding the Trustee's demand for fees and costs incurred during the Umpire Process. (*Id.*)

In its Reply, Titan states that, because the Trustee has "recovered over $900,000.00 for an asset with a reported value of only $500,000[.00]"[9] (Titan's Reply at 3), it would be unjust to allow the Trustee to recover the additional $346,925.39 he now seeks.[10] (*Id.* at 3-4.)

B. Keller's Motion and Reply

Keller's Motion seeks partial summary judgment, arguing that the measure of the Trustee's damages is limited to the difference in the fair market value of the Real Estate

[9]There is nothing in the record before the Court that supports the allegation that the Real Estate had a value of $500,000.00.

[10]This is an equitable argument, rather than a legal argument, that is wholly dependent upon facts not before the Court.

immediately before and after the Fire. (Keller's Mot. at 1-2; Keller's Br. at 5-6.) Keller states,

> [The Trustee's] recoverable damages must be limited to "the difference in the market value of the property as a whole, including the improvements thereon, before and after the injury." To allow [the Trustee] to recover damages for costs to repair something that he does not own and can never repair would be a windfall to [the Trustee].[11]

(Keller's Br. at 6 (quoting ***Ohio Collieries Co. v. Cocke***, 140 N.E. 356, 359 (Ohio 1923)).) Keller also joins in Titan's Motion and incorporates the argument that the Trustee's costs incurred in the Umpire Process are not recoverable. (***Id.***)

Keller's Reply primarily restates the arguments contained in its Motion and corresponding Brief.

C. The Trustee's Response

In opposing both Motions, the Trustee states that he is "entitled to be made whole for the damages sustained as a result of the defendants' negligence." (Trustee's Resp. at 1.) He argues that he is thus entitled to the actual cash value loss of the Real Estate, as well as reimbursement for fees and costs associated with the Umpire Process. (***Id.***) The Trustee asserts that three experts agreed the bankruptcy estate suffered actual cash value loss in the amount of $837,398.00, of which CSU paid the Trustee $577,972.10. (***Id.*** at 2.) Accordingly, the Trustee

[11]Like Titan's argument, Keller's second statement is based on equitable principles, rather than legal principles.

contends that he is entitled to recover from Titan and Keller the sum of (i) the $25,000.00 deductible; (ii) the $259,425.90 co-insurance penalty; and (iii) costs associated with the Umpire Process totaling $62,499.89, for a total of $346,925.79.[12] (*Id.*) The Trustee argues that, under Ohio law, the appropriate measure of damages in both contract and tort actions is that which will make the injured party whole. (*Id.*) The Trustee further argues that he would not have incurred costs associated with the Umpire Process but for the negligence of Titan and Keller and that he cannot be made whole if he is forced to incur costs caused by the negligence of another. (*Id.* at 3.)

IV. LEGAL ANALYSIS

A. The Trustee's Fees and Costs Relating to the Umpire Process

The Court will first address the argument made by Titan, which was joined by Keller, that the Trustee has no entitlement to recover the fees and costs associated with the Umpire Process. Titan principally relies on the American Rule for the proposition that such fees and costs are not recoverable.

"Pursuant to the American Rule, which is followed in Ohio, each party in a lawsuit must generally bear its own attorney fees." *B&B Contractors & Developers, Inc. v. Olsavsky Jaminet Architects, Inc.*, 984 N.E.2d 419, 424 (Ohio Ct. App. 2012) (citing *Krasny-Kaplan Corp. v. Flo-Tork, Inc.*, 609 N.E.2d 152,

[12]In its Reply, Titan states that the Trustee is seeking $346,925.39. *See*, *supra*, at 11.

154-54 (Ohio 1993)). There are, however, exceptions to the American Rule. "Ohio follows the rule that attorney fees are not recoverable in the absence of a statute, an enforceable contract, or bad faith." ***Bd. Of Trs. of Sinclair Cmty. Coll. Dist. v. Farra***, 929 N.E.2d 1105, 1106 (Ohio Ct. App. 2010).

Titan postulates that, because there is no statutory or contractual basis to award the Trustee his attorney fees, the fees associated with the Umpire Process must be excluded from recoverable damages as a matter of law. (Titan's Br. at 3-4.) Furthermore, Titan argues that the Trustee's expert fees associated with the Umpire Process are excluded from recoverable damages. (***Id.*** at 3 (citing ***L&W Supply Corp. v. Acuity***, 475 F.3d 737, 741 (6th Cir. 2007)).)

Titan has accurately articulated the American Rule, but has misapplied it to the Trustee's claim for fees and costs relating to the Umpire Process in this case. The American Rule is inapplicable here because the Trustee, as the prevailing party in the Umpire Process, is not seeking to recover his attorney fees from CSU. Nor is the Trustee seeking from Titan and Keller his attorney fees in prosecuting this Adversary Proceeding. Rather, the Trustee claims that the fees and costs associated with the Umpire Process are part of his recoverable damages because he would not have incurred such fees and costs on behalf

of the bankruptcy estate but for the alleged negligence of Titan and Keller in causing the Fire. (Trustee's Resp. at 3.)

In this regard, the Trustee's request for fees and costs associated with the Umpire Process is akin to the damages asserted by the plaintiff in *B&B Contractors*, cited above, wherein an element of the plaintiff's damages was its payment of a third party's attorney fees as part of an arbitration award between the plaintiff and such third party. In *B&B Contractors*, a portion of the money the plaintiff paid as part of the arbitration award "may have been for [the other party to the arbitration's] attorney fees at one point, but between [the plaintiff] and [the defendant], it [was] merely another element of the damages suffered by [the plaintiff] as a proximate result of [the defendant]'s professional negligence." *B&B Contractors*, 984 N.E.2d at 425.

Like the attorney fees, the Trustee contends that the expert fees incurred in the Umpire Process are part of his damages. Titan and Keller rely on *L&W Supply*, cited above, for the proposition that the Trustee may not recover the costs of his appraisers in the Umpire Process; however, such reliance is misplaced. The issue in *L&W Supply* is distinguishable from the issue for which the Defendants seek partial summary judgment. In *L&W Supply*, the Sixth Circuit considered the question of "whether expert witness fees may be taxed as costs." *L&W*

Supply, 475 F.3d at 738. The court held that "expert witness fees may not be taxed as costs at a court's discretion under Rule 54(d) because [28 U.S.C.] § 1920 does not provide for them. . . . It is, however, entitled as a matter of course to recover the witness costs provided for in [28 U.S.C.] § 1821, which are largely compensatory in nature." *Id*. at 741. In the instant proceeding, the Trustee has not requested that the costs of his appraisers be taxed as costs of this Adversary Proceeding; rather, the Trustee asserts that the costs of his required experts in the Umpire Process constitute elements of his recoverable damages from the alleged tortfeasors.

Titan and Keller expressly requested this Court to stay the Adversary Proceeding for the purpose of permitting the Umpire Process to play out to conclusion. *See*, *supra*, at 6-7. One of the stated purposes for the stay was the Defendants' anticipation that the Trustee would be made whole in the Umpire Process and would dismiss the Adversary Proceeding. In other words, Titan and Keller saw the Umpire Process, to which they were not parties and for which they bore no expense, as possibly to their benefit. Because the Umpire Process involved employment of appraisers and representation by counsel, of necessity, Titan and Keller understood that the Trustee would incur costs and expenses as part of the Umpire Process.

In the Motion to Stay, Titan argued, "The results of the mandatory appraisal process will have a significant impact on the adversary proceeding for a number of reasons set forth below." (Mot. to Stay ¶ 2.) "The estimations of market value that would result from a formal appraisal between CSU and [the Trustee] would be relevant to the potential RECOVERABLE damages in this adversary proceeding." (*Id.* ¶ 9.) "[I]f [the Trustee] decides to proceed in this adversary action against Titan Tire and Keller after resolution of his claim against CSU, evidence from the appraisal process would be relevant and discoverable in this adversary proceeding." (*Id.* ¶ 12.) Indeed, as represented by counsel for Titan and Keller at a telephonic status conference on January 13, 2014, apparently in reliance upon the relevance and discoverability of the reports by the appraisers for the Trustee and CSU, neither Titan nor Keller identified or hired its own expert or appraiser in this Adversary Proceeding.

The argument by Titan and Keller might have facial appeal if the Trustee had been required to complete the Umpire Process before seeking damages from them. This is not the case. Indeed, the Trustee was not required to make a damages claim against his primary insurance at all. The Trustee initially made a claim against CSU, but decided to forego the insurance claim process to pursue his claims against Titan and Keller as the alleged tortfeasors. If CSU had not moved to intervene in

this Adversary Proceeding, the Umpire Process would not have become an issue at all. As set forth above, both Titan and Keller wanted (i) CSU to be permitted to intervene; and (ii) the Adversary Proceeding to be stayed pending resolution of the Umpire Process. Titan and Keller welcomed CSU's intervention because they saw conclusion of the Umpire Process as a potential benefit to themselves. However, staying the Adversary Proceeding was not required by CSU's intervention as a party plaintiff. Indeed, the Trustee opposed a stay of the Adversary Proceeding and asserted that the Umpire Process[13] and the Adversary Proceeding could go forward simultaneously.

The Court could have denied CSU's Motion to Intervene, leaving resolution of CSU's subrogation rights for later. If intervention had been denied, (i) the Trustee could have engaged in the Umpire Process after conclusion of this Adversary Proceeding for any damages not recovered from Titan and Keller; and (ii) Titan and Keller would likely have incurred their own costs and expenses for expert witnesses relating to their defense of this Adversary Proceeding.

The Court finds, as a matter of law, that (i) the American Rule does not apply to the Trustee's request for attorney fees associated with the Umpire Process; and (ii) the rule prohibiting the taxation of expert fees as costs of litigation

[13]The Umpire Process did not provide for judicial oversight and would take place independent of the Adversary Proceeding. (Intervention Order at 8-9.)

does not apply to the Trustee's appraiser fees and costs associated with the Umpire Process. Accordingly, the Trustee's fees and costs associated with the Umpire Process are not, as a matter of law, excluded as potential recoverable damages. In making this ruling, the Court does not reach the issue of whether the Trustee will recover any fees and costs associated with the Umpire Process or the amount of any damages that may be recoverable. The Court's ruling is simply that Titan and Keller have failed to demonstrate that, as a matter of law, the Trustee is not entitled to seek recovery of his fees and costs relating to the Umpire Process.

B. Repair Costs v. Diminution in Value

Titan and Keller rely on *Ohio Collieries Co. v. Cocke*, 140 N.E. 356 (Ohio 1923), to support their contention that the Trustee's damages relating to the Fire are limited to the diminution in value of the Real Estate rather than the costs of repair. In *Ohio Collieries*, the Supreme Court of Ohio held:

> The rule as to the measure of damages in subsidence cases may be stated as follows:
>
> If the injury is of a permanent or irreparable nature, the measure of damages is the difference in the market value of the property as a whole, including the improvements thereon, before and after the injury. If the injury is susceptible of repair, the measure of damages is the reasonable cost of restoration, plus reasonable compensation for the loss of the use of the property between the time of the injury and the restoration, unless such cost of restoration exceeds the difference in the market value of the property

> before and after the injury, in which case the difference in market value becomes the measure.

Id. at 359. ***Ohio Collieries*** involved an action by a landowner against a coal mining company based on the improper removal of coal from under her land. As a result of the coal company's actions, the landowner claimed that her barn had become twisted and unsafe; trees in her backyard leaned; her residence had tilted, making doors and windows impossible to open and close and causing cracks in the plaster of walls; the cellar had given way; chimneys were unsafe for fires; and the slate roof leaked. There was no dispute that the landowner and her son continued to use the property. Accordingly, the Supreme Court of Ohio concluded: (i) the property was not totally destroyed nor the entire value taken; and (ii) the trial court did not error in its instructions to the jury concerning the measure of damages for the temporary damage to the property. *Id.* at 359-60.

The Trustee counters that ***Ohio Collieries*** has been modified by later case law to ensure the reasonableness of damages awards. (Trustee's Resp. 4.) He cites ***B&B Contractors & Developers, Inc. v. Olsavsky Jaminet Architects, Inc.***, 984 N.E.2d 419 (Ohio Ct. App. 2012), for the proposition that "Ohio courts have shifted from the diminution in market value approach to a reasonable cost of repair approach for the temporary damage to real property." *Id.* at 424.

In ***B&B Contractors***, the court stated, "***Ohio Collieries*** is no longer good law . . . ." ***Id.*** at 433. The court explained:

> "The rule expressed in ***Ohio Collieries***, that damages for temporary injury to property cannot exceed the difference between market value immediately before and after the injury, is limited. In an action based on temporary injury to noncommercial real estate, a plaintiff need not prove diminution in the market value of the property in order to recover the reasonable costs of restoration, but either party may offer evidence of diminution of the market value of the property as a factor bearing on the reasonableness of the cost of restoration.
>
> While evidence of loss in market value of the property may be relevant, the <u>essential inquiry is whether the damages sought are reasonable</u>. Either party may introduce evidence to support or refute claims of reasonableness, including evidence of the change in market value attributable to the temporary injury. But <u>proof of diminution in value is not a required element of the injured party's case</u>."

Id. at 434 (quoting ***Martin v. Design Constr. Servs., Inc.***, 902 N.E.2d 10, 15 (Ohio 2009)) (emphasis added). The court further stated:

> After ***Martin***, courts addressing the issue have concluded that there is no reason to ***distinguish*** between commercial and non-commercial property for purposes of proving that repair costs are reasonable and have thus refused to require diminution in value evidence as a mandatory element of damages for temporary damage to commercial realty.

Id. (citations omitted) (italics in original).

Based on the above, the Supreme Court of Ohio has limited the reach of ***Ohio Collieries***; a plaintiff seeking to recover damages from a tortfeasor no longer must demonstrate proof of

diminution in value of the property. Keller argues, "To allow [the Trustee] to recover damages for costs to repair something that he does not own and can never repair would be a windfall to [the Trustee]." (Keller's Reply at 5.) Titan makes a similar argument in its Reply. (Titan's Reply at 3-4.) These are equitable arguments that Titan and Keller can offer against the reasonableness and allowance of the Trustee's repair costs, but they do not establish that, as a matter of law, the Trustee's costs to repair are or should be excluded from this Adversary Proceeding. As a consequence, it cannot be said that, as a matter of law, the Trustee cannot recover the costs to repair the Real Estate.

The position of Titan and Keller regarding the exclusion of repair costs as a measure of the Trustee's damages appears to be based on the assumption that the costs to repair the Real Estate exceed the diminution in its value. The Court, however, has no damages amounts or figures before it. The only amounts currently known to the Court are the actual cash value determination from the Umpire Process, the amount that the Trustee has received from CSU and the amount that the Trustee received from the sale of the Real Estate. In light of ***B&B Contractors***, the Court cannot say that the Trustee is prohibited from introducing evidence of the costs to repair the Real Estate

or that the Trustee's damages are limited to the diminution in the Real Estate's value.

Regarding the actual cash value loss, which is a known amount as a result of the Umpire Process, Titan asserts that the "actual cash value loss method cannot be accepted as a measure of damages . . . ." (Titan's Reply at 3.) This statement directly contradicts the position that Titan took in moving for a stay of the Adversary Proceeding. Titan expressly represented that the appraisals used in the Umpire Process would be "relevant and discoverable" in this Adversary Proceeding. (Mot. to Stay ¶ 9.) Whether or not the actual cash value determined by the Umpire Process represents the Trustee's damages is not a question of law that can be dealt with on summary judgment.

V. CONCLUSION

As set forth above, Titan and Keller have failed to establish that there are no genuine issues of material fact and that they are entitled, as a matter of law, to obtain an order that excludes from the Trustee's asserted damages (i) the fees and costs relating to the Umpire Process; and (ii) the costs of repair to the Real Estate. As a consequence, the Court will deny Titan's Motion and Keller's Motion.

An appropriate order will follow.

# # #

IT IS SO ORDERED.

Dated: March 7, 2014
05:22:30 PM

Kay Woods
Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
DENMAN TIRE, LLC,	*	**CASE NUMBER 10-40855**
Debtor.	*	
* * * * * * * * * * * * * * * *	*	
RICHARD G. ZELLERS, TRUSTEE,	*	
Plaintiff,	*	**ADVERSARY NUMBER 11-4242**
and	*	
CINCINNATI SPECIALTY UNDERWRITERS INSURANCE CO.,	*	
Intervening Plaintiff,	*	**HONORABLE KAY WOODS**
v.	*	
TITAN TIRE CORP., *et al.*,	*	
Defendants.	*	

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ORDER DENYING MOTIONS FOR PARTIAL SUMMARY JUDGMENT FILED BY (i) TITAN TIRE CORPORATION; AND (ii) KELLER RIGGING & CONSTRUCTION

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Before the Court are two motions for partial summary judgment, as follows: (i) Titan Tire's Motion for Partial Summary Judgment ("Titan's Motion") (Doc. 44) filed by Defendant Titan Tire Corporation ("Titan") on January 27, 2014; and (ii) Defendant Keller Rigging & Construction's Motion for Partial Summary Judgment ("Keller's Motion") (Doc. 46) filed by Defendant Keller Rigging & Construction ("Keller") on January 27, 2014.[1] On February 7, 2014, Plaintiff Richard G. Zellers, Chapter 7 Trustee ("Trustee"), filed Richard G. Zellers, Trustee's Memorandum in Opposition to Defendants' Motions for Partial Summary Judgment (Doc. 48). Keller and Titan each filed a reply brief (Docs. 49 and 50). Intervening Plaintiff The Cincinnati Specialty Underwriters Insurance Company did not oppose the Motions.

For the reasons set forth in the Court's Opinion Regarding Motions for Partial Summary Judgment Filed by (i) Titan Tire Corporation; and (ii) Keller Rigging & Construction entered on this date, the Court hereby:

[1]On January 27, 2014, Titan and Keller each filed a brief in support of its Motion (Docs. 45 and 47).

1. Finds that Titan and Keller have failed to establish that there are no genuine issues of material fact in this proceeding;
2. Finds that Titan and Keller have failed to establish that, as a matter of law, the Trustee's damages exclude the fees and costs relating to the Umpire Process;
3. Find that Titan and Keller have failed to establish that, as a matter of law, the Trustee's damages exclude the costs of repair to the Real Estate;
4. Denies Titan's Motion; and
5. Denies Keller's Motion.

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