

IT IS SO ORDERED.

Dated: June 17, 2014  
09:29:49 AM

  
*Kay Woods*  
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Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

DENMAN TIRE, LLC,

Debtor.

\* \* \* \* \*

RICHARD G. ZELLERS, TRUSTEE,  
*et al.*

Plaintiffs,

v.

TITAN TIRE CORPORATION and  
KELLER RIGGING & CONSTRUCTION,

Defendants.

CASE NUMBER 10-40855

ADVERSARY NUMBER 11-4242

HONORABLE KAY WOODS

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OPINION CONCERNING MOTION IN LIMINE REGARDING  
OSHA 29 C.F.R. § 1910(H) AND (Q)

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Before the Court is Richard G. Zellers, Trustee's Motion in Limine ("Motion in Limine") (Doc. 60) filed by Plaintiff Richard G. Zellers, Trustee ("Trustee"), on May 14, 2014. The Motion in Limine seeks an order from this Court prohibiting Defendant Keller Rigging & Construction ("Keller") from introducing any evidence concerning Occupational Safety and Health Administration ("OSHA") Standards 29 C.F.R. § 1910(H) and (Q) as such evidence may relate to the Trustee on the grounds that "[a]ny testimony or evidence relating to OSHA regulations are [sic] not relevant to Denman Tire." (Mot. in Limine at 1.)

On May 30, 2014, Keller filed its Brief in Opposition to the Trustee's Motion in Limine ("Keller's Brief") (Doc. 63), arguing that such evidence is relevant because the "Trustee as well as Titan Tire could be considered 'management' and on 'whose property cutting and welding was to be performed,' and, therefore, either could be responsible for certain obligations" under the OSHA regulations. (Keller's Br. at 1-2.)

On June 6, 2014, the Trustee filed a Reply Brief ("Trustee's Reply") (Doc. 64), in which he asserts that "there is no dispute that Denman Tire was not in control of the property or the specific work being done on the property" and, as a consequence, "the OSHA regulations are not relevant" and "would unfairly prejudice" the Trustee. (Trustee's Reply at 1.) Titan Tire Corporation ("Titan") also filed a Reply Brief ("Titan's Reply") (Doc. 65) on June 6,

2014, in which it states that the OSHA regulations do "not apply to Titan Tire because Titan Tire did not control or supervise Keller's work or Denman's property."<sup>1</sup> (Titan's Reply at 2.)

For the reasons set forth herein, the Court will grant the Motion in Limine.

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 either a core proceeding pursuant to 28 U.S.C. § 157(b)(2) or a non-core proceeding over which the Court has jurisdiction. The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

### **I. FACTUAL BACKGROUND**

Denman Tire, LLC ("Denman Tire" or "Debtor") filed a voluntary petition pursuant to chapter 7 of Title 11 on March 17, 2010. Mr. Zellers was appointed the Chapter 7 Trustee. Pursuant to this Court's Order (Main Case, Doc. 124) entered on July 15, 2010, the Trustee was authorized to sell certain of the Debtor's equipment ("Purchased Equipment") located at the closed Denman Tire facility in Leavittsburg, Ohio ("Leavittsburg Facility") to Titan for the

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<sup>1</sup> Titan's Reply is non-responsive to the relief sought in the Motion in Limine - *i.e.*, that Keller be prohibited from introducing any evidence concerning the OSHA regulations as such evidence may relate to the Trustee.

sum of \$3 million. Terms of the sale were subject to the Asset Purchase Agreement by and between the Trustee and Titan, which, among other things, granted Titan the right of ingress and egress to access and remove the Purchased Equipment.

Titan hired Keller to aid it in removing the Purchased Equipment.<sup>2</sup> At the final pre-trial before the Court on April 23, 2014, Titan and Keller represented that there was no written agreement covering this arrangement.

On June 2, 2011, a fire occurred at the Leavittsburg Facility while Keller was in the process of removing some of the Purchased Equipment. Subsequent to the fire, on July 28, 2011, this Court entered Order (Main Case, Doc. 408) that authorized the Trustee to sell the Leavittsburg Facility, subject to Titan's continued right to remove the Purchased Equipment.

## **II. PROCEDURAL BACKGROUND**

The Trustee commenced this adversary proceeding on November 7, 2011 by filing a single-count Complaint (Doc. 1) against the two Defendants, alleging that Titan, through its employees or Keller, as Titan's agent, caused and allowed to continue a fire at the Leavittsburg Facility. The Trustee alleges that, as a direct and proximate result of the fire, the

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<sup>2</sup> Keller admits that it was Titan's "agent and/or employee." (Keller's Ans. ¶ 9.)

Leavittsburg Facility was damaged and its reasonable fair market value was reduced by an amount of at least \$1.5 million.

Keller filed its Answer (Doc. 8) on December 7, 2011, which generally denies all of the allegations in the Complaint and includes affirmative defenses of comparative negligence, estoppel, assumption of the risk, failure to mitigate damages, the damages were caused by persons other than Keller, failure to join necessary parties, the Trustee is not the real party in interest for all or a portion of the claims and the claims are subject to apportionment of fault among parties and non-parties.

Titan filed its Answer (Doc. 9) on December 13, 2011, in which it generally denies all of the allegations in the Complaint and asserts the affirmative defenses of comparative negligence, estoppel, assumption of the risk, failure to mitigate damages, the damages were caused by persons other than Titan and failure to join necessary parties.

Neither Keller nor Titan asserts any cross-claims against each other or a counterclaim against the Trustee.<sup>3</sup>

Keller's Answer does not raise any defense regarding OSHA standards. In its Pre-Trial Statement (Doc. 55), Keller asserts six defenses, of which the following three are asserted for the

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<sup>3</sup> On September 21, 2012, the Trustee's insurer, the Cincinnati Specialty Underwriters Insurance Company ("CSU"), moved to intervene as a plaintiff (Doc. 20) on the grounds that it is subrogated to a portion of the damages the Trustee may be awarded. Pursuant to Order (Doc. 30) entered on November 21, 2012, the Court permitted CSU to intervene.

first time: (i) Keller did not breach a duty or violate a standard of care that proximately resulted in the fire, citing to OSHA standards in 29 C.F.R. § 1910(H) and (Q); (ii) pursuant to OSHA requirements, either the Trustee or Titan was responsible for safe usage of cutting and welding and advising Keller of flammable materials and hazardous conditions; and (iii) the Trustee's sale of the Leavittsburg Facility and subsequent demolition without notice to Keller constitutes spoliation of evidence.

In response to the alleged defenses based on OSHA, the Trustee requested, and was granted, permission to file this Motion in Limine.

### **III. ARUMENTS OF THE PARTIES & ANALYSIS**

Although the Trustee is the moving party, it makes sense to first review Keller's argument for permitting evidence regarding OSHA standards in 29 C.F.R. § 1910(H) and (Q). As set forth above, Keller argues that either the Trustee or Titan "could be responsible for certain obligations" under cited OSHA regulations because either or both were "management" for purposes of OSHA. (Keller's Br. at 1-2.) Keller postulates that the Trustee and Titan should stipulate that one or both of them were management of the Leavittsburg Facility. (*Id.* at 2.) Keller baldly asserts that the Trustee "could be considered 'management' for purposes of OSHA because the Trustee managed the 'property [where the] cutting and welding was to be performed.'" (*Id.*) Alternately, Keller

argues that there is a genuine issue of material fact whether the Trustee and/or Titan were considered to be management of the property for purposes of OSHA. (*Id.*) Keller contends that whether Denman Tire was out of business at the time Keller was conducting its welding operations is "irrelevant" because the Trustee "was in possession and control of the real property." (*Id.* at 4.)

By their express terms, the OSHA regulations on which Keller relies for its new defense are applicable only if an entity satisfies two elements. First, there must be cutting and welding on property; second, an entity must be "management" of such property. See 29 C.F.R. § 1910.252, Subpart Q - Welding, Cutting and Brazing (delineating the responsibilities of "those in management on whose property cutting and welding is to be performed"). There is no question that, pursuant to 11 U.S.C. § 541, the Leavittsburg Facility constitutes property of the Debtor's bankruptcy estate over which the Trustee exercised control for purposes of administering the estate.

Keller equates being in possession and control of real property with management of welding and cutting operations at such real property. Keller, however, cites to no facts or law to support the proposition that a chapter 7 trustee's possession and control of property for purposes of distribution to creditors for the benefit of the bankruptcy estate is the same as "management" of a facility. As the Trustee points out:

Keller Rigging neither explains nor raises a question of fact as to how Denman Tire, a company no longer in operation and having sold all of its equipment and machinery to Titan Tire, could possibly be construed as management on whose property cutting and welding was to be performed pursuant to an agreement between Titan and Keller Rigging.

(Trustee's Reply at 2.)

Not only did Keller not cite to any bankruptcy case in which a chapter 7 trustee was found to be "management" of estate property for purposes of imposition of OSHA standards, this Court conducted its own research and could find no such case. A chapter 11 debtor, operating as a debtor-in-possession, may be considered management for purposes of OSHA regulations, but the same rationale does not apply to a chapter 7 trustee.<sup>4</sup> Indeed, compliance with other types of federal regulations has been held to be inconsistent with a chapter 7 trustee's statutory obligations.

A chapter 7 trustee does not function like a debtor-in-possession or a trustee in a chapter 11 case. The chapter 7 trustee's duties as set forth in section 704 of the [B]ankruptcy Code are inconsistent with arranging and supervising environmental remediation. While in some cases it might be appropriate to require the bankruptcy estate to pay for some or all of the costs of investigation and remediation, that is not the same thing as requiring the trustee to undertake such actions.

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<sup>4</sup> For example, in *In re Wysong and Miles, Co.*, Case No. 04-10005, 2005 WL 3723200 (Bankr. M.D.N.C. Dec. 29, 2005), the bankruptcy court did not accept the chapter 11 debtor's argument that, because it complied with applicable OSHA standards, the claimant's state law product liability claim was preempted and barred as a matter of law.

*In re Doyle Lumber, Inc.*, 137 B.R. 197, 203 (Bankr. W.D. Va. 1992).  
See also *In re The Robert Plan Corp.*, 439 B.R. 29, 38 (Bankr. E.D.N.Y. 2010) (“A chapter 7 trustee’s primary obligation is to ‘collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest[.]’” (quoting 11 U.S.C. § 704)).

The Trustee convincingly argues that (i) Titan was granted a license to enter the Leavittsburg Facility for the purpose of removing the Purchased Equipment; (ii) Titan was responsible for all aspects of removal of the Purchased Equipment; (iii) all utilities for the Leavittsburg Facility were transferred from the Trustee’s name to Titan; and (iv) although the Trustee occasionally went to the Leavittsburg Facility, he was not on site during Keller’s operations, and he had not been there for six to eight months prior to the fire. (Mot. in Limine at 2.) Moreover, Keller has not asserted that it is not responsible for the fire because the Trustee directed its actions or managed its operations. As the Trustee states, “Denman Tire and Trustee Zellers had no presence at the facility. Neither were [sic] managing the work being performed by Keller pursuant to an agreement with Titan.” (Trustee’s Reply at 3.)

For the reasons set forth above, the Court finds that the Trustee was not management as that term is used in the OSHA

regulations and standards. Accordingly, the Court will grant the Motion in Limine and prohibit Keller from introducing any evidence regarding the OSHA regulations and standards as they relate to the Trustee.

An appropriate order will follow.

# # #

IT IS SO ORDERED.

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*Kay Woods*  
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United States Bankruptcy Judge

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On May 30, 2014, Keller filed its Brief in Opposition to the Trustee's Motion in Limine (Doc. 63). On June 6, 2014, the Trustee filed a Reply Brief (Doc. 64).

For the reasons set forth in the Opinion Concerning Motion in Limine Regarding OSHA 29 C.F.R. § 1910(H) and (Q) entered on this date, the Court hereby:

1. Finds that the Trustee was not management, as that term is used in the OSHA regulations and standards;
2. Grants the Motion in Limine; and
3. Prohibits Keller from introducing any evidence regarding the OSHA regulations and standards as they relate to the Trustee.

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