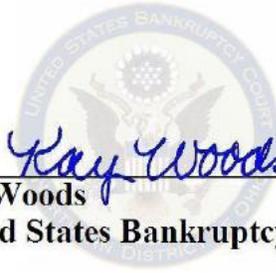


IT IS SO ORDERED.

Dated: June 19, 2014
01:16:04 PM


Kay Woods

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

ORDER REGARDING JURY DEMAND

Debtor Denman Tire, LLC filed a voluntary petition pursuant to chapter 7 of Title 11 on March 17, 2010. Richard G. Zellers was appointed 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 Denman Tire facility in Leavittsburg, Ohio ("Leavittsburg Facility") to Defendant Titan Tire Corporation ("Titan"). Titan hired Defendant Keller Rigging & Construction ("Keller") to aid in removing the Purchased Equipment. On June 2, 2011, a fire occurred at the Leavittsburg Facility while Keller was in the process of removing some of the Purchased Equipment.

The Trustee commenced this adversary proceeding on November 7, 2011 by filing a single-count Complaint (Doc. 1) alleging that Titan 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 Leavittsburg Facility was damaged and its reasonable fair market value was reduced by an amount of at least \$1.5 million. The Complaint does not include a jury demand.¹

On December 7, 2011, Keller filed its Answer (Doc. 8), which includes a jury demand. On December 13, 2011, Titan filed its Answer (Doc. 9), which also includes a jury demand. Neither Titan

¹ Because the Trustee has not made a jury demand, he has waived his right to a jury trial. See FED. R. CIV. P. 38 (2014); FED. R. BANKR. P. 9015 (2014).

nor Keller has filed a proof of claim in this case. There is also no indication that the parties had any pre-petition dealings or that the Trustee and Keller have any direct relationship.

The Court held a final pre-trial on April 23, 2014, at which appeared (i) Thomas J. Wilson, Esq. on behalf of the Trustee; (ii) John C. Hansberry, Esq. on behalf of Titan; and (iii) Beverly A. Adams, Esq. on behalf of Keller. Neither Titan nor Keller referenced its jury demand at the final pre-trial. Moreover, when asked how long it would take to present its case, neither Titan nor Keller made any reference to the need to empanel a jury. This proceeding is scheduled for trial on August 25, 2014.

Pursuant to the Court's Adversary Case Management Initial Order (Doc. 4), when a jury demand is made:

[T]he Court will make an initial determination as to whether the case constitutes a core proceeding and whether there is a basis for the Court to conclude that the right to a jury trial does or may exist. If the Court concludes that a jury right does or may exist, the parties will be polled as to whether they consent to proceed in this Court. If all parties do not consent to trial by jury in this Court, the Court will promptly refer the adversary case file to the Clerk of the United States District Court for this District for appropriate assignment.

(Adv. Case Mgmt. Initial Order ¶ 8 (citations omitted).)

I. THIS IS A NON-CORE PROCEEDING

A non-exclusive list of core proceedings is set forth in 28 U.S.C. § 157(b)(2). The Trustee asserts that this is a core proceeding pursuant to subsections (b)(2)(A) and (O), which state:

(2) Core proceedings include, but are not limited to—

(a) matters concerning the administration of the estate;

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor . . . relationship, except personal injury tort or wrongful death claims[.]

28 U.S.C. § 157(b) (2) (a), (o) (2014).

The only count in the Complaint asserts a negligence claim against the Defendants. A non-core proceeding is identified by the following characteristics:

[A] proceeding filed in the bankruptcy court alleging a cause of action which:

- 1) is not specifically identified as a core proceeding under § 157(b) (2) (B) through (N),
- 2) existed prior to the filing of the bankruptcy case,
- 3) would continue to exist independent of the provisions of title 11, and
- 4) the parties' rights, obligations, or both are not significantly affected as a result of the filing of the bankruptcy case.

Hughes-Bechtol, Inc. v. Constr. Mgmt., Inc. (In re Hughes-Bechtol, Inc.), 132 B.R. 339, 344 (Bankr. S.D. Ohio 1991) (citations omitted).

Based on these criteria, the Court finds that this adversary proceeding is non-core. Tort claims are not identified as core proceedings in 28 U.S.C. § 157(b) (2) (B) through (N). Furthermore,

the Trustee's claim would continue to exist independent of the provisions of Title 11, and the parties' rights and obligations are not affected by the bankruptcy case. Although the cause of action arose after the petition date, the other three factors support the finding that this proceeding is non-core. See *Nat'l Century Fin. Enters., Inc. v. Gulf Ins. Co. (In re Nat'l Century Fin. Enters., Inc.)*, 312 B.R. 344, 351 (Bankr. S.D. Ohio 2004) (citation omitted) (finding that all causes of action arising during a bankruptcy case do not of necessity become core).

This proceeding does not concern the administration of the estate pursuant to subsection (A). Rather, it is a post-petition claim of the estate against two non-creditor parties. Furthermore, this proceeding is not within the purview of subsection (O) because the assets of the Debtor have already been liquidated and the Defendants are not creditors of the estate. Even if the Trustee's claim could arguably fit within subsection (A) or (O), "state law . . . claims that do not specifically fall within the categories of core proceedings enumerated in 28 U.S.C. § 157(b)(2)(B)-(N) are related proceedings under § 157(c) even if they arguably fit within the literal wording of the two catch-all provisions, sections 157(b)(2)(A) and (O)." *Hughes-Bechtol*, 132 B.R. at 345 (quotation marks and citations omitted).

Although this proceeding is non-core, the Court retains "related to jurisdiction" over the Trustee's negligence claim.

28 U.S.C. § 157(c)(1) ("A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11."). The Sixth Circuit has adopted an expansive interpretation of related to jurisdiction: "whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers (In re Dow Corning Corp.)*, 86 F.3d 482, 489 (6th Cir. 1996) (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3rd Cir. 1984)). The outcome of this proceeding could conceivably affect the estate if the Trustee is able to recover additional money for distribution to creditors. As a consequence, the Court finds that this is a non-core proceeding that is otherwise related to a case under Title 11, over which the Court has jurisdiction pursuant to 28 U.S.C. § 157(c)(1).

II. THE DEFENDANTS HAVE THE RIGHT TO A JURY TRIAL

There are three criteria to consider when determining if a party to a bankruptcy proceeding is entitled to a jury trial: (i) whether the action could have been brought in the courts of England in the 18th century prior to the merger of courts of law and equity; (ii) whether the remedy sought is legal or equitable; and (iii) whether the action involves a public right that Congress has assigned to a non-Article III adjudicative body that does not use a jury as a factfinder. *Granfinanciera v. Nordberg*, 492 U.S. 33, 42, 52-53 (1989). The Trustee's tort claim is the kind of

claim that would have been brought in the courts of law in 18th-century England. Moreover, the Trustee seeks a wholly legal remedy in the form of monetary damages. Finally, this is a proceeding between private litigants, no governmental entity is involved and the parties are not asserting any public rights. "The conclusion that in an ordinary tort action . . . the right of trial by jury is guaranteed by the Constitution is so obvious that it hardly needs belaboring." *Light Mfg. Co. v. The Ins. Co. of Penn. (In re Ben Cooper, Inc.)*, 896 F.2d 1394, 1402 (2d Cir. 1990) (internal citation and quotation marks omitted). For the reasons set forth above, the Defendants have the right to a jury trial.

"If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties." 28 U.S.C. § 157(e). Pursuant to Local Bankruptcy Rule 9015-1(a), "The Bankruptcy Judges of the Northern District of Ohio are specifically designated to conduct jury trials pursuant to 28 U.S.C. § 157(e)." LBR 9015-1(a) (2014).

At the April 23, 2014 final pre-trial, neither Titan nor Keller referenced its jury demand or empanelling a jury. This conduct is consistent with the Defendants' waiver of their jury demands. However, neither of the Defendants expressly waived its timely-asserted jury demand. Accordingly, each of the Defendants

is hereby directed to file a statement no later than fourteen days after entry of this Order - *i.e.*, on or before July 3, 2014 - indicating whether (i) it waives its right to a jury trial; and (ii) if the jury demand is not waived, it consents to a jury trial before this Bankruptcy Court. The Trustee shall file a statement no later than fourteen days after entry of this Order indicating whether he consents to a jury trial before this Bankruptcy Court.

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