UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

ALL-FLOW, INC. Case No. 89-10692 K

Debtor

ORDER AND MEMORANDUM

This matter came before the Court originally as an objection by Freuhauf Trailer Corp. ("Freuhauf") to All-Flow's (the Debtor's) proposed distribution of settlement funds which were the primary financing of the Debtor's already-confirmed Plan. Freuhauf's objection was that it had a $30,000 claim against the Debtor for which it was not receiving a distributive share of the settlement proceeds. The Debtor denies that Freuhauf has such a claim.

The Court allowed the Debtor to distribute the settlement proceeds in accordance with its proposal but ordered that the pro rata share that Freuhauf was claiming be escrowed until this matter was resolved. The Debtor has done so and the Court is left with what it characterized as the Debtor's objection to Freuhauf's claim.

Freuhauf never filed a Proof of Claim nor was it "scheduled" in a fashion that would permit it not to file a claim. Freuhauf's assertions stem from an Adversary Proceeding instituted by the Debtor against Freuhauf and a co-Defendant, K-H Corp. There were many days of trial. Counterclaims were prosecuted in that litigation and ultimately Judge McGuire awarded Freuhauf $30,000 on a counterclaim asserted on its behalf. However, the Court had been led to believe that one defendant was merely a

"division" of the other, and set off Freuhauf's $30,000 award against an award of about $1.4 million to the Debtor. A net final judgment of the Court was entered in favor of the Debtor in the amount of $1,416,136, for which Freuhauf and its co-Defendant, K-H Corp. were jointly and severally liable. After judgment was entered, Freuhauf unsuccessfully asked the Bankruptcy Court to vacate the judgment, claiming that it was not a proper party-defendant and that the co-defendants were not divisions or parts of the same company.

On appeal, the judgment was settled by K-H for $1,000,000. Freuhauf now asserts that the $30,000 award on its counterclaim was not extinguished by K-H's settlement and on that basis it is asserting a $30,000 claim (on which it would receive only a fraction as its pro rata share) against the Debtor.

All-Flow disputes Freuhauf's claim of entitlement on two grounds: (1) All-Flow asserts that Freuhauf never filed a timely proof of claim, and; (2) All-Flow asserts that any valid claim by Freuhauf was extinguished in the settlement of the Adversary Proceeding that had been won by All-Flow against Freuhauf and its co-Defendant, K-H Corp. Letter briefs have been submitted by the respective counsel. After considering same, the Court finds in favor of All-Flow.

Assuming for the sake of argument only that the counterclaim raised in the Adversary Proceeding constituted an appropriate "informal" proof of claim, the state of the record with regard to the Adversary Proceeding is such as to preclude Freuhauf's current arguments.

If, before Judge McGuire rendered his decision in the Adversary Proceeding, Freuhauf had proved the "separateness" of its $30,000 claim against All-Flow from All-Flow's claims against either K-H or Freuhauf, then it probably would have been error for the Court to have ruled that that $30,000 claim owned by Freuhauf should be "netted" against the joint and several liability of Freuhauf and K-H to the

Debtor.[1] To the best of this writer's knowledge, no one ever informed Judge McGuire or any higher court of any such claim of "separateness" before the judgment was rendered or during the appellate process.[2] When Freuhauf failed to challenge, on appeal, that aspect of the Court's ruling, Freuhauf permitted that ruling to become part of the record on appeal. It is now law of the case, in that it was part of the findings of fact and conclusions of law that were before the District Court at the time the District Court rendered its decision.

It was indicated at argument that there was some stipulation by which Freuhauf elected not to press the argument on appeal that it was not a proper party-defendant. Apparently, it was intended that that election be "without prejudice" but no stipulation has been produced. If the nature of the stipulation was such as to estop All-Flow from the present argument or to constitute a waiver of same by All-Flow, that argument has not been presented to this Court. Instead, Freuhauf presents a paradox. It claims that it was not a proper party-defendant in the Adversary Proceeding (though it did not pursue that on appeal) and asserts that whoever purported to act on its behalf in the Adversary Proceeding did not have authority to do so. Yet it argues that the $30,000 claim asserted in a counterclaim by some such person nonetheless suffices as an "informal" proof of claim by Freuhauf, and that K-H's payment of $1,000,000 in satisfaction

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[1]For example, it has been said: "Where a judgment is obtained against a single defendant, it generally cannot be set off with a judgment obtained jointly by that defendant and another party, since this would be inequitable to the second party. A party must be the absolute and beneficial owner of a judgment before he can have it off-set a judgment against him." 47 Am. Jur. 2d Judgments § 1036 (1995) (citations omitted). Although that proposition is not directly on point, it would seem to bear a strong analogy to the present situation.

[2]The argument was made unsuccessfully to this writer in a Motion to Vacate the Judgment; Judge McGuire had retired just a few days after rendering his judgment.

of the judgment that this Court offset against that $30,000 claim, somehow leaves that $30,000 claim extant and unsatisfied, and leaves it as a timely and valid assertion of a claim by Freuhauf against All-Flow for purposes of distribution.

The Court finds that once Freuhauf elected not to seek review of the propriety of the off-setting of judgments, and eventually consented to dismissal of the appeal, it permitted Judge McGuire's ruling to become law of the case, and it cannot complain when the net judgment is satisfied or settled by its co-obligor. (If the co-obligor was unjustly enriched under circumstances supporting restitution or other relief, then let Freuhauf sue K-H.) Even though Freuhauf did not stipulate to a release of its claim, it had to have consented to the dismissal of the Appeal (see Fed. R. App. P. 42), and therefore to setting the record to rest. The Adversary Proceeding has ended and the claims (and counterclaims) raised therein are resolved, are final, and are law of this case.[3]

IT IS SO ORDERED.

Dated: Buffalo, New York
April 11, 1997

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U.S.B.J.

[3]Although not necessary to this decision, the Court also notes that Freuhauf chose to ignore the hearing on approval of the settlement (which hearing occurred here on November 20, 1996) despite the clear recitation that All-Flow had settled with both defendants. While that, of course, does not turn the settlement into something it was not and does not constitute the "consent" of Freuhauf to the settlement, the failure to come forward to set the record straight is troubling. It smacks of laying-back, just as it seems Freuhauf might have done when Judge McGuire tried the case for many days. "Ambush" is not favored here, and that fact might have decided this matter even if "the law of the case" had not decided it.