UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

GROSS PLUMBING & HEATING CO., INC.

Case No. 91-12445 K

Debtor

GROSS PLUMBING & HEATING CO., INC.

Plaintiff

-vs-

AP 94-1047 K

ENERGY FIBER INTERNATIONAL CORP.

Defendant

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Presented on Motion and Cross-motion for Summary Judgment is the effect of the following document on the Chapter 7 Trustee's efforts to collect approximately $400,000 allegedly owed by the Defendant to this Chapter 7 Debtor corporation for goods, services, and rents. The Trustee argues that the

document, executed by the person in control of the Debtor corporation in 1991, was a "forbearance agreement," at most, and that it is not now enforceable against the Trustee for a number of reasons. The Defendant, on the other hand, argues that it is what its title states - a "Waiver and Consent" - and that it constitutes a complete defense in this action by the Trustee to collect these debts, unless and until the conditions set forth therein come to pass. The document reads:

WAIVER AND CONSENT
RE: JOHN J. GROSS INVESTMENT
IN ENERGY FIBER INTERNATIONAL CORP.

I, John J. Gross, individually and as principal of Gross Plumbing & Heating Co., Inc., and on behalf of said corporation do hereby acknowledge that a personal investment has been made in and to Energy Fiber International Corp. (hereinafter "EFIC"). I have received equity shares for some of my investment, however, I have allowed EFIC's research and development facilities, including its equipment, to be stored and operated in and on my property situate [sic] at 13th Street in the City of Niagara Falls, New York. In addition I have funded the research and development operation by the payment of expenses, utilities and salaries of certain individuals working on and for EFIC matters. This has been ongoing for several months and may continue for several more months.

The entire investment, including rent, renovation expenses, payments to consultants whether employees or otherwise, payments of utilities, taxes, and any other such expenses related to the research and development operations of EFIC in the City of Niagara Falls, has amounted to in excess of $400,000 which amounts are considered to be advances and not specific loans on demand. It is recognized and acknowledged by the undersigned that such advances, in the form of such payments and for rent not charged, cannot be recovered from the assets of EFIC as they are presently

> constituted and cannot be recovered from the other shareholders at this time. Repayment of all such advances shall be deferred until the assets of EFIC are sold or the corporation is otherwise able to generate income or assets through its operations or the sale of its shares to repay such advances. I do not intend to make any claim and this document evidences my forbearance with respect to collecting or recovering any such advances until the corporation is able, as above stated, to repay them. In addition, repayment shall be subject solely to the discretion and direction of the Board of Directors of EFIC, and I recognize that this investment in the form of such advances may be a total loss at some future time. I also recognize and make no claim for additional shares of stock in and to EFIC as a result of these advances.
>
> /s/John J. Gross
> John J. Gross

The Court concludes that the document appears to be at most a "covenant not to sue," in the nature of "forbearance," rather than a waiver or release. "A covenant not to sue is nothing but a contract, and should be so construed."[1]

The Court so rules because this rambling, equivocal, vague document does not clearly promise anything more than forbearance of payment. The document describes past events and current understandings but has little "operative" language directing future action by any party:

"I ... hereby acknowledge that ... a[n] investment has

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[1]66 Am. Jur. 2d, Release § 2(1973).

been made...."

"I have received equity shares"

"I have allowed ... facilities ... to be stored"

"I have funded"

"This has been ongoing"

"The entire investment ... has amounted to in excess of $400,000...."

That investment is "considered to be advances and not specific loans on demand."

"It is recognized and acknowledged ... that such advances ... cannot be recovered ... at this time."

"I recognize that this investment ... may be a total loss at some future time."

The "operative" language is this:

"Repayment of all such advances shall be deferred"

"[T]his document evidences my forbearance with respect to collecting or recovering any such advances...."

"[R]epayment] shall be subject solely to the discretion and direction of the Board of Directors of EFIC [and] may be a total loss...."

The document is entirely consistent with a forbearance that recognizes that EFIC might be as worthless in the future as it was in 1991, and that there consequently might be nothing from which the debt could ever be collected. Recognizing an inability to collect is not a waiver. Nothing in the document, save the

word "waiver" in its title, connotes a forgiveness, discharge, renunciation or release, and the substance of the document is incompatible with "waiver".

The deference to the EFIC Board of Directors needs fuller exposition by means of evidence at trial, but is consistent (as is the entire document) with a classic covenant not to sue.

Like the defense of "waiver," the defense of a "covenant not to sue" is an affirmative defense as to which the burden of proof rests on the defendant.

Totally apart from the ability of John Gross to bind the corporation to this covenant[2] is the question of whether the covenant is enforceable at all. Although the Defendant speaks of the document as a "waiver agreement" there is no "agreement." This is a unilateral document -- a mere statement. It recites no consideration. Remarkably conspicuous in the present record is the absence of any evidence of the circumstances surrounding the execution of this document. Did John Gross execute it in order

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[2]The Trustee's suggestion that John Gross cannot bind the corporation when there is no reference to the corporation in the signature block is incorrect. "[the] principal and not the agent will be bound, despite the fact that the agent signs in his name alone, if the instrument clearly shows that that was the intent of the parties to the instrument, and the fact of the agency and identity of the principal are clearly disclosed. In other words, the fact that ... the agent acts and signs as agent, may appear in the body ... of a simple instrument." 2 N.Y. Jur. 2d, Agency § 182.

to break up an internal log jam in the governance of EFIC? Did he execute it in order to improve the appearance of Energy Fiber's balance sheet to potential buyers or lenders? Did he execute it to insure the continued development of Energy Fiber in hopes of bettering prospects of Gross Plumbing's collecting upon what it was owed, and to enhance the prospect of Gross Plumbing having the benefit of a future good customer in Energy Fiber? Did he execute it to thwart his own creditors or potential creditors? Did he (despite his Affidavit submitted here) execute it specifically to thwart the creditors of Gross Plumbing?

There is no hint of an answer to this question of "why?" in the affidavits of James F. Williams or Paul A. Burke, and even the affidavit of John Gross provides no suggestion of what led to his signing of the document.

Only when we know the "why" may we determine whether there was consideration for this "covenant not to sue" and may we determine the meaning of the statements that might suggest an inability to collect. If the document is unenforceable for want of consideration, then this Court need not decide the question of whether John Gross could bind Gross Plumbing thereto. Conversely, if some consideration flowed to Gross Plumbing, this might have bearing on some of the Trustee's arguments pertaining to fraudulent transfers or transactions that violated the New York Business Corporation's Law.

Furthermore, as suggested by counsel for the Defendant

at oral argument on September 27, 1995, there is no evidence other than the billing invoices themselves to demonstrate that all of the $400,000 referred to by John Gross in this document came from Gross Plumbing, and that none of it came from John Gross himself. He is not a plaintiff in this action and the Court may not award damages to the Debtor for debts owed to John Gross.

In sum, then, neither side is entitled to summary judgment. Both sides are in error in their belief that this Court could rule upon the matter as a matter of law, on the paucity of evidence provided.

The Court does declare, however, that the Defendant is not entitled to a ruling that the document is, as a matter of law, a "waiver" or a "release" of any obligations owed by Energy Fiber to the Debtor corporation. If it is enforceable against the corporation at all, it is only enforceable as a "covenant not to sue," and the Defendant will be so bound. Viewed as such, other questions remaining to be examined at trial in light of the circumstances surrounding the execution of the document are: Is the duration of the covenant discernible from the surrounding circumstances and imputable to the parties in their respective intentions?[3] If not, and if the covenant survived as an

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[3]The Trustee's authority for the proposition that a forbearance agreement is void, past a "reasonable time," if it fails to state a duration, might be inapposite. The authorities

"executory contract" under 11 U.S.C. § 365 (now clearly rejected by lapse of time in Chapter 7), are there any damages resulting to Energy Fiber from that rejection that Energy Fiber might raise as an offset against the Trustee's claims? Did the covenant become unenforceable by reason of bad faith of the officers of Energy Fiber in failing or refusing to sell the assets of the corporation? What did Messrs. Williams, Burke and Southard in fact know about the financial circumstances of Gross Plumbing and about its capital structure, including the role of Mrs. Gross? What did they know about Gross Plumbing's creditors, and could they have foreseen the Chapter 11 filing that followed mere weeks after the execution of this document? Should John Gross have been party to this action? Only after a full exposition of these matters at trial will the Court be in a position to address these questions and the arguments raised by the parties in their respective motions for summary judgment.

In conclusion, the Court grants partial summary judgment to the Trustee in the form of a declaration that this document does not constitute a "waiver" or "release" of Energy Fiber's allegations to the Debtor corporation, but the Trustee's motion is in all other respects denied. The Defendant's motion for summary judgment is denied in all respects. This matter is

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he cites address the issue of forbearance as consideration for another promise. The Court does not yet know what might have been promised in exchange for this document.

restored to the Calendar Call of October 18, 1995 at 11:30 a.m. to fix firm discovery deadlines and to select a tentative date for trial.

SO ORDERED.

Dated: Buffalo, New York
October 3, 1995

U.S.B.J.