

UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION



IN RE:)
)
BUILDNET, INC., et al.,)
)
Debtors.)
_____)
)
Holmes P. Harden, Examiner of the)
Estate of BuildNet, Inc., et al.,)
)
Plaintiff)
v.)
)
Nathan P. Morton,)
)
Defendant.)
_____)

Case Nos. 01-82293 through 01-82299
(Procedurally Consolidated)

Adversary No. 03-9022

**ORDER DENYING OBJECTION TO
SETTLEMENT AGREEMENT AND RELEASE**

This matter came on before the Court for hearing on November 16, 2004 upon an Objection to Settlement Agreement and Release filed by TUG Liquidation, LLC ("TUG"). Michael L. Robinson and Jeffrey D. Horst appeared on behalf of TUG, Holmes P. Harden appeared on behalf of the Examiner, and J. Robert Elster appeared on behalf of Nathan Morton ("Defendant"). This court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334, and this matter is a core proceeding under 28 U.S.C. § 157(b)(2). After reviewing the documents and arguments presented, the Court makes the following findings of fact and conclusions of law:

The present action arises as an adversary proceeding in the bankruptcy proceeding of BuildNet, Inc. (the "Debtor") to set aside two transactions as preferential or fraudulent transfers. The Defendant is a former employee of the Debtor. In May 1999, the Defendant entered into an

employment agreement ("Employment Agreement") with the Debtor which provided for the employment of the Defendant by the Debtor for a period of four years with a minimum base salary of \$400,000 per year and an incentive stock option to purchase up to 250,000 shares of common stock of the Debtor. On September 20, 1999, the Defendant elected to exercise his stock option. The Defendant purchased 250,000 shares of common stock, in exchange for which he executed a promissory note payable to the Debtor in the amount of \$275,000 (the "Note"), with the stock pledged as security for the Note.¹

In the third quarter of the year 2000 and after sustaining significant losses, the Debtor began to reduce its work force. The Debtor's financial condition continued to decline, and on February 12, 2001, the Debtor and the Defendant executed an amendment to the Note which limited his personal exposure on the Note to 10%. On July 18, 2001, in conjunction with the termination of the Defendant's employment, the Defendant entered into a stock repurchase agreement ("Stock Repurchase Agreement") pursuant to which the Debtor repurchased the Defendant's 250,000 shares of stock in exchange for cancellation of the Note. BuildNet filed a petition under Chapter 11 of the Bankruptcy Code on August 8, 2001. The Defendant filed a prepetition claim for wages and severance pursuant to his Employment Agreement.

On December 6, 2001, the court appointed Holmes P. Harden as an examiner (the "Examiner") to investigate and file a statement of investigation concerning any facts pertaining to incompetence, misconduct, mismanagement or irregularity in the management of the Debtor, or pertaining to a cause of action available to the estates with respect to any present or former officer or director of the Debtor. The Examiner filed his Preliminary Report on April 9, 2002

¹ The shares of stock received by the Defendant were restricted shares, not marketable.

which identified the existence of several claims BuildNet might have against certain officers and directors. TUG, the Debtor's largest unsecured creditor, disagreed with some of the findings in the Preliminary Report as well as with the Examiner's conclusions as to which claims should be pursued. The parties eventually reached an agreement whereby BuildNet assigned to TUG those claims which neither BuildNet nor the Examiner wished to pursue (the "Remaining Claims") in consideration for \$15,000. TUG then filed a complaint asserting numerous claims against former officers and directors of the Debtor, including the Defendant, as assignee of the Debtor.

This adversary proceeding by the Examiner asserts claims for fraudulent conveyances and preferential transfers which were not assigned to TUG. In the Complaint, the Examiner alleged that the amendment to the Note, on February 12, 2001, which limited the personal recourse exposure on the Note to 10%, and the Stock Repurchase Agreement executed on July 18, 2001 both constitute avoidable fraudulent conveyances, or in the alternative, preferential transfers. The Examiner sought a judgment against the Defendant in the amount of \$275,000 plus interest.

The Plaintiff and Defendant (the "Parties") first filed a Motion to Approve Settlement on December 18, 2003. TUG objected to this Motion. A hearing was held January 22, 2004 and on February 6, 2004 the Plaintiff filed a copy of the proposed Settlement Agreement and Release. The Motion to Approve Settlement was ultimately denied February 19, 2004 and the court requested that certain information be submitted regarding the Defendant's financial position. TUG filed a Supplemental Objection to the motion on February 23, 2004.

On March 2, 2004, the Parties filed a Renewed Motion to Approve Settlement. TUG objected to the Renewed Motion to Approve Settlement on March 19, 2004. A hearing on the

Renewed Motion to Approve Settlement and TUG's objection was held April 20, 2004. Subsequently, the Examiner filed a Revised Settlement Agreement and Release on May 19, 2004. Counsel for TUG and counsel for the Defendant were both served with copies of this Revised Settlement Agreement and Release. On August 16, 2004, TUG filed a Supplemental Objection to the Renewed Motion to Settle. On September 22, 2004, the Court entered an order approving the Parties' Renewed Motion to Settle ("Order Approving Settlement") finding that the proposed settlement was in the best interest of the estate. The court further directed the parties to file an executed copy of the Revised Settlement Agreement and Release within 20 days of the entry of that order. On October 12, 2004, the Parties filed an executed copy of the Revised Settlement Agreement and Release which was identical to the proposed Revised Settlement Agreement and Release previously filed on May 19, 2004. On October 22, 2004, TUG filed the present Objection to the Proposed Settlement and Release, a month after the entry of the Order Approving Settlement.

In total, TUG has filed five objections to the Parties' settlement agreements. In its most recent objection, TUG objects to certain language in the Revised Settlement Agreement and Release which provides for a general release of all claims, liabilities and causes of action that the Debtor has against the Defendant. TUG asserts that this language is an attempt to protect the Defendant against those Remaining Claims which TUG attempted to bring against the Defendant as assignee of the Debtor but were dismissed by this court.² These same claims were the subject

² The court ruled that the assignment of tort claims was void pursuant to North Carolina public policy.

of motions to compel the Debtor to pursue the Remaining Claims on behalf of the estate.³ TUG has requested that the court reject the Revised Settlement Agreement and Release and require that a new agreement be submitted.

As a preliminary matter, the court finds that objection filed by TUG is untimely. TUG had ample opportunity to object to the Revised Settlement Agreement and Release prior to the entry of the Order Approving Settlement and did, in fact, object on several occasions. An order dismissing the Remaining Claims assigned from the Debtor to TUG was entered on June 16, 2004, giving TUG several months to consider the implications of the dismissal prior to the approval of the Revised Settlement Agreement and Release and to address any resulting concerns in its Supplemental Objection filed August 11, 2004. The Court carefully considered all of TUG's objections, weighed the costs and benefits of the settlement, and found that the terms of the settlement were in the best interest of the estate.

Nevertheless, even considering TUG's objection, the court can find no basis to grant the relief requested by TUG. The language contained in the Revised Settlement Agreement and Release does not prejudice any claims that TUG may assert on behalf of itself against the Defendant. The release only pertains to claims by the Debtor, and includes language protecting any of the Remaining Claims validly assigned to TUG.⁴ The court finds that this release language is reasonable and appropriate under the circumstances in this case.

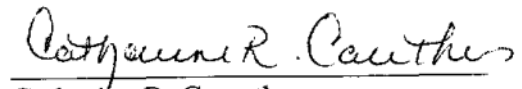
³ The Court ruled in open court on October 16, 2004, that the motion to compel Debtor to pursue the Remaining Claims was denied, therefore TUG's concern that the release language would preclude the Debtor from asserting further claims against the Defendant appears to be moot.

⁴ One of the Remaining Claims brought by TUG as assignee of the Debtor is a claim for unlawful stock redemption. The court found that this claim was validly assigned to TUG.

It is therefore ORDERED, ADJUDGED, and DECREED that the October 22, 2004

Objection filed by TUG is overruled.

This 13 day of December, 2004.

A handwritten signature in cursive script, reading "Catharine R. Carruthers". The signature is written in dark ink and is positioned above a horizontal line.

Catharine R. Carruthers
United States Bankruptcy Judge