

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
NATIONAL GYPSUM COMPANY,	§	CASE NO. 390-37213-SAF-11
AANCOR HOLDINGS, INC.,	§	CASE NO. 390-37214-SAF-11
DEBTOR.	§	(Jointly Administered Under
_____	§	Case No. 390-37213-SAF-11)
	§	
THE CENTER FOR CLAIMS	§	
RESOLUTION,	§	
PLAINTIFF,	§	
	§	
VS.	§	ADVERSARY NO. 00-3437
	§	
NGC SETTLEMENT TRUST and THE	§	
ASBESTOS CLAIMS MANAGEMENT	§	
CORPORATION,	§	
DEFENDANTS.	§	

MEMORANDUM OPINION AND ORDER

The plaintiff, the Center for Claims Resolution, moves the court for summary judgment on count II of the defendants' counterclaim. The defendants, the NGC Settlement Trust and the Asbestos Claims Management Corporation, cross-move for summary judgment on count II. The court conducted a hearing on the motions on April 10, 2001.

In count II of their counterclaim, the defendants request a declaration that the Center waived its right under the parties' producer agreement to arbitrate its dispute concerning ACMC's

unpaid shares, if any, of settlements and Center defense and operating costs. Both sides agree that count II should be resolved on summary judgment. Indeed, the parties clarified their positions at the hearing on the motions, effectively eliminating substantial portions of the dispute.

The producer agreement provides that disputes concerning issues within the scope of the agreement shall be resolved through alternative dispute resolution mechanisms. The parties have a dispute over amounts that ACMC may owe the Center. The court has held that the amount due to the Center by ACMC under the producer agreement for committed settlements or otherwise will not be determined in this adversary proceeding. See order entered November 21, 2000.

Nevertheless, ACMC and the trust contend that by filing its second emergency motion for relief in this adversary proceeding, the Center has waived its right to arbitrate its dispute concerning amounts owed by ACMC to the Center. In the motion, the Center requested that the court direct ACMC to pay approximately \$39 million to the Center. That amount would be derived from the difference between the amount allegedly owed by ACMC to the Center and the amount allegedly owed by the Center to ACMC. The court denied that motion. See order entered November 13, 2000. Arguing that the court would have had to adjudicate amounts due between the parties to grant the motion, the

defendants contend that the Center has waived the arbitration provision of the producer agreement. By denying the motion, the court did not preclude or enjoin ACMC from setting off amounts the Center owes ACMC from the Center invoices to ACMC.

"Waiver will be found when the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party. There is a strong presumption against waiver of arbitration. Accordingly, a party alleging waiver of arbitration must carry a heavy burden." Subway Equipment Leasing Corp. v. Forte, 169 F.3d 324, 326 (5th Cir. 1999) (citations omitted).

The Center titled the complaint in this adversary proceeding as a complaint for a declaratory judgment that the trust and ACMC have no setoff rights under the April 12, 1999, agreement. The court refers to that agreement as the April 1999 reimbursement agreement. The prayer for relief requests that the court enter a declaratory judgment that the April 1999 reimbursement and related agreement had not been triggered and that, as a result, ACMC's share of amounts that may be due to the Center would not be subject to setoff. The Center then filed an emergency motion for a declaration that ACMC had no setoff rights and then a second emergency motion for an order directing undisputed payments. In the latter motion, the Center maintained that ACMC owed the Center approximately \$197 million, whereas under the

April 1999 reimbursement agreement, if the defendants prevailed in this adversary proceeding, the Center would owe ACMC approximately \$158 million. The Center requested that the court order ACMC and the trust to pay the difference to the Center. Even though the motion raised the question of the amounts owed between the parties, the court did not engage that dispute. Rather, the court held that it could not grant the equitable relief requested by the Center prior to the entry of a money judgment. The court further held that an order directing payment to the Center would be premature because ACMC had not setoff amounts it contends are owing. See transcript of bench ruling, September 27, 2000, pp. 81-92. The court denied the emergency motion. Then, by order entered February 1, 2001, the court granted summary judgment for the defendants holding that the April 1999 reimbursement agreement's payment obligations had been triggered by a decision of the Fifth Circuit.

At the hearing on the motions for summary judgment, ACMC and the trust conceded that the court will not adjudicate amounts ACMC may owe the Center. In turn, the Center conceded that, in arbitration, the Center will not seek a determination of amounts the Center owes ACMC under the April 1999 reimbursement and related agreement, nor will the Center contend that ACMC may not setoff amounts the Center owes ACMC from amounts due the Center. The Center further acknowledged that enforcement of an

arbitration award would require litigation before this court. In that litigation, APMC and the trust could assert their setoff rights.

Consequently, by filing the emergency motion, the Center did not substantially invoke the judicial process concerning the amounts due the Center under the producer agreement. The defendants have not suffered prejudice. The court denied the motion and thereby did not preclude setoff. While the complaint's style connotes the need for a determination of amounts owed the Center, the prayer for relief does not require that determination. The court did not engage in any evidentiary hearing concerning amounts owed to the Center under the producer agreement, and subsequently held that this adversary proceeding did not involve determination of those amounts. The defendants' attorneys fees opposing the motion do not amount to prejudice to overcome the presumption against waiver of arbitration.

On the summary judgement record before the court, the Center has not waived its right under the producer agreement to arbitrate its dispute concerning APMC's unpaid shares, if any, of settlements and Center defense and operating costs. However, the parties agree on the record, and therefore the court adopts as part of this adjudication, that enforcement of any arbitration award, as well as a determination of amounts due under the April 1999 reimbursement and related agreement and the parties'

respective rights to setoff must be presented to this court.

Based on the foregoing,

IT IS ORDERED that the Center's motion for summary judgment on count II of the defendants' counterclaim is **GRANTED** and the defendants' motion is **DENIED**.

If the parties agree that this order resolves the remaining issues in this adversary proceeding, they shall submit a proposed final judgment. If the parties dispute whether issues remain, they shall obtain a setting for a scheduling and status conference.

Signed this _____ day of April, 2001.

Steven A. Felsenthal
United States Bankruptcy Judge