

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)

CENTRAL TRANSFER &)
DISTRIBUTION COMPANY,)

DEBTOR)

CASE NO. BK82-1704

CH. 11

MEMORANDUM OPINION

Evidentiary hearing was held on objection to claim filed by the trustee. Josephine Walsh Wandel of Breeling, Welling & Place, Omaha, Nebraska, appeared on behalf of the claimant Schenck/Otis (Schenck). Jerrold L. Strasheim of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, Omaha, Nebraska, appeared on behalf of Clay M. Rogers, Trustee. Daniel Evans of Steier & Kreikemeier, P.C., Omaha, Nebraska, appeared on behalf of the trustee.

Facts

Trial on this matter was held on two separate days and on February 1, 1988, this Court entered a Journal Entry sustaining the objection to the claim. The claimant timely filed a motion requesting a more thorough statement of findings of fact and conclusions of law. This order shall be the findings of fact and conclusions of law required by Rule 7052 and FRCP 52.

The debtor filed a Chapter 11 petition in 1982. Sometime thereafter the debtor was removed by the Bankruptcy Court as debtor-in-possession and Clay Rogers was appointed as trustee in the operating Chapter 11 case. The debtor was one of several entities owned and operated by the same shareholders and operating out of the same business facilities in Omaha, Nebraska. Both this debtor and a related entity filed for protection under Chapter 11 of the Bankruptcy Code and separate trustees were eventually appointed for those two entities. The other related entities did not file for bankruptcy and the management of the nonpetitioning debtors remained in place.

Mr. Jay Smiley had been the president and chief operating officer of all of the entities prior to bankruptcy. After the bankruptcy petition in this case, Mr. Smiley retained his position as managing officer and operated until the debtor was removed as debtor-in-possession and the trustee was appointed.

Since all of the companies operated out of the same business facilities, Mr. Smiley, although no longer having operating authority for this debtor, continued to operate his other businesses and was present on the business premises on a regular basis.

Prior to the bankruptcy filing, the claimant in this case Schenck/Otis provided various types of business insurance for the operating entities. The claimant continued to provide such insurance after the petition was filed pursuant to contract entered into by the debtor-in-possession when it was operating the business. After the trustee was appointed in late 1982 or early 1983, the claimant was notified that Clay Rogers was the trustee and that his name as trustee should be substituted as a named insured on policies concerning this debtor. The appropriate change was made and insurance coverage was provided through the policy expiration date in late September 1983.

For the policy year beginning October of 1984 and running through September of 1984 the trustee received insurance coverage and such coverage was paid for through a formula agreed upon by the trustee and the related entities and the claimant. During the 1983-1984 policy year the claimant was notified to remove the name of Clay Rogers as trustee from coverage.

From that point on there are no insurance contracts presented in evidence which indicate that the debtor, Central Transfer & Distribution Company, nor Clay Rogers as trustee were named insured, nor were either billed for premiums.

For the coverage year beginning October of 1984 and carrying through September of 1985, there is no evidence that Mr. Rogers as trustee requested insurance coverage nor that any policy was actually issued in his name or in the name of Central Transfer & Distribution Company.

The claimant alleges that it relied upon Mr. Jay Smiley, the president of the debtor, and his representations that he represented the trustee when negotiating insurance coverage. The claimant, therefore, alleges that Mr. Smiley was the agent of the trustee and had full power to bind the trustee to insurance coverage.

Mr. Smiley testified that he did have such authority, but the trustee testified that not only did Mr. Smiley have no such authority, but that the trustee had no need for insurance from the middle of 1984 on because it was not an operating entity. The trustee alleges and presented evidence that he had entered into an agreement with Mr. Smiley whereby Mr. Smiley had leased all of the equipment and was responsible for providing all of the insurance with no obligation by the trustee to provide such insurance.

This Court has reviewed all of the exhibits and listened to approximately a day and a half of testimony concerning this case. The Court concludes that Mr. Smiley was not the agent of the trustee and further concludes that the trustee had no need for insurance at the time which is pertinent to this case. The Court further concludes that Mr. Schenck of Schenck/Otis was fully aware that Mr. Rogers was the trustee and had authority to contract on behalf of the debtor. Mr. Schenck had the ability to contact the trustee to determine whether or not Mr. Smiley was actually an agent of the trustee and failed to do so. Mr. Schenck also did not provide an insurance contract naming either the trustee or debtor during the pertinent time frame.

The Court, therefore, finds that there was no insurance contract between the trustee and the claimant for the 1984-85 premium.

Conclusions of Law

In order to have a valid claim, the claimant must have contracted for insurance coverage with either the principal, Clay Rogers as trustee, or an authorized agent. In Nebraska the nature and extent of agency becomes a question of fact to be determined by what the principal said or did rather than by what the agent said or did. Principal's statements or conduct must, with reasonable certainty, give authority to the agent. Agency cannot be established by the acts or conduct of the agent. No party can become an agent of another except by will of the principal which can be found by implication from words, conduct, including acquiescence; an agent cannot create in himself authority to do a particular act merely by his performance. In Nebraska Tractor and Equipment Co., v. Great Lakes Pipeline Co., 56 N.W.2d 288, 156 Neb. 366 (1953), the Supreme Court of the State of Nebraska said "An apparent ... agent is one who the principal, intentionally or by want of ordinary care, induces third persons to believe to be his agent although the principal has not, expressly or impliedly, conferred authority upon him."

In this case the evidence is insufficient to convince this Court that the trustee authorized Mr. Smiley to act on his behalf with regard to the 1984-1985 insurance contract. There is no evidence that the claimant was misled by acts of the trustee concerning the agency relationship. There is no evidence express or implied by the trustee that Mr. Smiley had the authority to bind the trustee or the estate.

Claim is overruled. Objection to claim is sustained.

DATED: March 9, 1988.

BY THE COURT:

Timothy A. ...
Chief Judge