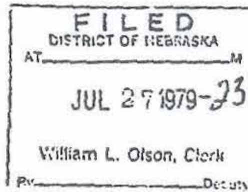
IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF NEBRASKA

ROTH BROTHERS SMELTING CORPORATION, Appellee,	CIV. 78-0-211
v.	BK. 74-0-482
AARON FERER & SONS CO., Debtor and Debtor in Possession, Appellant,	MEMORANDUM OPINION
and	
PHELPS DODGE REFINING CORPORATION, Appellant,	
and	
THE UNITED STATES NATIONAL BANK OF OMAHA, Appellant,	
and	
CHASE MANHATTAN BANK, Appellant.	



The sole question presented in this appeal from the bankruptcy court is whether the evidence supports the judge's finding that the defendant-appellant, Aaron Ferer & Sons Company (herein Ferer) acted as the undisclosed agent of Phelps Dodge Refining Corporation (herein Phelps) when it purchased certain copper scrap from the plaintiff-appellee, Roth Brothers Smelting Corporation (herein Roth). For the reasons stated herein, the Court will enter a separate order affirming the judgment of the bankruptcy court.

On April 24, 1974, Ferer, a Nebraska corporation, filed in this Court its petition for an arrangement under the provisions of Chapter XI of the Bankruptcy Act. Prior thereto, on July 18, 1973, Phelps and Ferer entered into a written agreement whereby Ferer agreed to "ship and deliver" and Phelps agreed to "receive, treat and account for" certain quantities of copper scrap on a monthly basis from July, 1973, through December, 1974.

By the terms of Paragraph 2 of their agreement, Ferer was to deliver to Phelps between five hundred and six hundred tons of copper scrap per month, one-half of which would be for the account of Ferer, and the other half for the account of Phelps. Should Ferer fail to deliver at least five hundred tons during any given month, Paragraph 2 provides that two hundred fifty tons would, at Phelps' option, be deemed to have been delivered for the account of Phelps. The paragraph also provides that Phelps "at any time and from time to time, and in its sole discretion, may advise [Ferer] to discontinue buying scrap for the account of [Phelps]."

Paragraph 9 of the agreement provides that Ferer would be paid $10 per ton "as compensation for [Ferer's] services hereunder when purchasing scrap for the account of [Phelps]."

Paragraph 10 of the agreement states in its entirety:

> All contact with various shippers of scrap, including purchase arrangements, shipping instructions and settlements, is to be by [Ferer], [Ferer] advising [Phelps] promptly of each transaction. Purchase funds for material being purchased for the account of [Phelps], will be advanced by [Phelps] to [Ferer] upon receipt of invoice and after receipt and acceptance of the material.

The other half of the scrap, that being delivered to Phelps for the account of Ferer, was to be refined by Phelps into copper wirebars and returned to Ferer, who would be billed for refining charges in accordance with a schedule contained in Paragraph 7 of the agreement.

On March 28, 1974, Ferer entered into a contract with the plaintiff-appellee Roth for the purchase of copper scrap and directed those goods to be delivered to Phelps. The scrap, with a net weight of forty thousand five hundred twenty pounds arrived at Phelps refinery on April 16. Ferer billed Phelps on April 18 for fifty per cent of this quantity at Ferer's contract price with Roth, plus $101.34 as a "commission at $10 [per net ton]," and requested that Phelps advance Ferer seventy-five per cent of the purchase price so that Ferer could pay Roth for the copper. On April 24, before any money had changed hands, Ferer filed its petition in bankruptcy.

Following an unsuccessful attempt to reclaim the copper from Phelps, and upon learning of the Phelps-Ferer agreement, Roth commenced this suit against Phelps to recover the value of one-half of the copper on the theory that, with respect to that amount, Phelps was the undisclosed principal of Ferer for the Roth-Ferer agreement.

Following trial, judgment was entered for Roth. On appeal there is no question as to any of the quantities or values involved, or as to whether Ferer was acting pursuant to its agreement with Phelps when it bought the copper from Roth. The only question presented is whether the relationship created by the Phelps-Ferer agreement was that of principal and agent.

The bankruptcy judge concluded that an agency relationship in fact existed between Phelps and Ferer. Bankruptcy Rule 810 provides that, on appeal:

> [t]he court shall accept the referee's findings of fact unless they are clearly erroneous, and shall give due regard to the opportunity of the referee to judge of the credibility of the witnesses.

Under this rule, the referee's findings of fact will be rejected only if totally unsupported by the evidence. *In Re Fabric Tree*, 558 F.2d 1069, 1072 (2d Cir. 1977); *In Re Perdue Housing Industries, Inc.*, 437 F.Supp. 36, 38 (W.D.Okla. 1977); *In Re Friedman*, 436 F.Supp. 234, 236 (D.My. 1977). The

question of the existence and scope of an agency relationship is typically one for the trier of fact. *See Minnesota Farm Bureau Marketing Corp. v. North Dakota Agricultural Marketing Association*, Inc., 563 F.2d 906, 909 n. 2 (8th Cir. 1977). Therefore, the referee's finding in this case is conclusive of the issue unless shown to be clearly erroneous.

The bulk of appellants' argument is directed toward two propositions. First, it is claimed that a finding of agency requires consideration of all the facts and circumstances proved to exist between the parties and that, therefore, the express terms of a written agreement are never, by themselves, legally sufficient to prove an agency. Appellants next claim that the referee rested his finding of a Phelps-Ferer agency solely upon the terms of the written agreement between the two parties which, according to the first proposition, is insufficient evidence as a matter of law.

At the outset, the Court notes that the existence of an actual agency depends upon the intention of the parties. That proposition is not in dispute. It is equally clear that the intent of the parties may be proved in either of two ways. It may be proved by the express language of the parties. Or, intent may be implied from conduct. However, this does not mean, as appellants assert, that there are two different types of actual agency, one express and the other implied. It means only that there are two appropriate methods of ascertaining the same thing, namely, the intent of the parties. Viewed in this context, there is no merit to the contention that the express language of a written contract cannot be relied upon to establish the existence of an actual agency. To the contrary, the same is rather persuasive evidence of the parties' intent. The most that can be claimed by appellants is that the terms of a contract are *not necessarily* conclusive of the issue, but not that such terms cannot be given conclusive weight by the trier of fact. Accordingly, the Court rejects appellants' first proposition.

Appellants' second proposition -- that the referee refused to consider any evidence other than the Phelps-Ferer agreement in making his finding of agency -- is patently untenable. It should be noted that

appellants do not contend that the bankruptcy judge failed to admit evidence other than the agreement, but only that, in weighing the evidence received, he placed too much emphasis on the terms of the agreement. Support for this assertion is allegedly derived from a sentence in the bankruptcy judge's opinion wherein he states that "the terms of the agreement between Ferer and Phelps Dodge *alone* lead me to the conclusion that Ferer was acting as an agent." However, in the same paragraph, after detailing the terms of the agreement, the bankruptcy judge concludes his analysis by saying:

> Similarly, Phelps' response to Roth's telegram that "not less than 1/2 of the material contained in this delivery belongs to us" would appear to confirm the nature of the transaction as one of agency with Phelps as the true buyer. Internal accounting records of Ferer which may suggest otherwise are not persuasive.

Clearly, then, the bankruptcy judge considered evidence of the parties' conduct under the agreement and found it to be consistent with an intent to create an agency. This Court has examined the record and concludes that substantial evidence supports the bankruptcy judge's conclusion.

The balance of the appellants' argument is devoted to the assertion that the terms of the Phelps-Ferer agreement tend to show an intention to create a buyer-seller relationship rather than one of principal and agent. This line of argument amounts in essence to a request that this Court weigh the evidence anew and reach a different conclusion than did the bankruptcy judge. In the appellate posture of this case, and with particular reference to Bankruptcy Rule 810, that is an inappropriate request. At most, appellants' argument shows that a debatable question perhaps exists as to whether the parties intended to create an agency or some other type of relationship. That question should be, and has been, resolved by the trier of fact.

Accordingly, for all of the reasons above stated, a separate order will be entered herein affirming the judgment of the bankruptcy court.

BY THE COURT:

JUDGE, UNITED STATES DISTRICT COURT