

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF )  
 )  
AARON FERER & SONS CO., ) CASE NO. BK74-0-482  
 )  
DEBTOR )  
 )  
WILLIAMS & GLYN'S BANK )  
LIMITED and AARON FERER & )  
SONS LIMITED, in Liquidation, )  
 )  
Plaintiffs )  
 )  
vs. )  
 )  
AARON FERER & SONS CO., )  
Debtor and Debtor in )  
Possession, )  
 )  
Defendant )

MEMORANDUM OPINION

Plaintiffs, Arron Ferer & Sons Co., Ltd., (herein "AFL"), and Williams & Glyn's Bank, Ltd., (herein "W & G") brought this action to recover certain funds allegedly paid sometime after May, 1975, to Aaron Ferer & Sons Co., (herein "AFO"), by Comite de Monoplio de la Corporation del Cobre (herein "CODELCO"). Plaintiffs allege that the funds in question were refunds of overpayments made by plaintiffs against provisional invoices in the course of purchasing copper from CODELCO and that AFO wrongfully induced CODELCO to pay the money to it instead of to plaintiffs. AFO answered, raising numerous affirmative defenses and counterclaiming for an accounting of funds advanced by AFO to AFL to finance transactions on behalf of AFO "including but not limited to" the transactions referred to in plaintiffs' complaint. In July, 1979, plaintiffs answered the counterclaim. In August, 1979, plaintiffs filed motions to strike, to dismiss and for summary judgment. The reason specified for all the motions is that AFO's action is barred by the applicable statutes of limitation. No affidavits or documentary evidence have been filed, and, therefore, only facts appearing of record may be considered. Local Rule 20E.

Motions to strike are governed by Rule 12(f) of the Federal Rules of Civil Procedure (herein "F.R.C.P.") as adopted by Bankruptcy Rule 712. Rule 12(f) requires such motions to be made before responding to a pleading unless no responsive pleading is permitted. Similarly, Rule 12(b), F.R.C.P., adopted by Bankruptcy Rule 712, requires motions raising defenses to be made before pleading where further pleading is permitted. As plaintiffs responded to the counterclaim before making their motions, the motions to strike and to dismiss are untimely and will be denied.

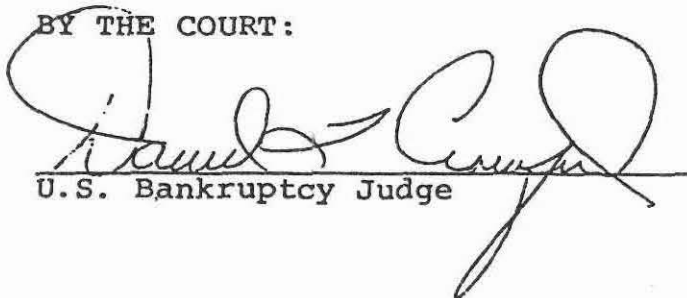
The motion for summary judgment is timely. Rule 56(b), F.R.C.P., as adopted by Bankruptcy Rule 756. However, this motion must be denied because, on the facts before me at this time, plaintiffs have not shown "with such clarity as to leave no room for controversy" that AFO is not entitled to recover on its counterclaim. Traylor v. Black, Sivalls & Bryson, 189 F.2d 213, 216 (8th Cir. 1951).

The parties assume that AFO's cause of action arose, if at all, when AFO paid funds to AFL. As the funds apparently were advanced to carry out a continuing agreement between AFO and AFL, no cause of action for an accounting could arise under Nebraska law until the agreement was terminated. Uptegrove v. Elsasser, 161 Neb. 527, 534, 74 N.W.2d 61 (1955). It is not possible to ascertain from the pleadings when AFO's cause of action arose, and, therefore, the motion for summary judgment must be denied.

A separate order is entered in accordance with the foregoing.

DATED: December 18, 1979.

BY THE COURT:

  
U.S. Bankruptcy Judge

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