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COURTS OF EQUITY AS WELL AS OF LAW
STRICTLY CONSTRUED RE EXEAT BONDS.

Vice-Chancellor Backes in *Penny v. Penny*, 88 N. J. E., 166, 162 A., 237 at page 238 describes the re-exeat bond as follows:

"The surety's undertaking was that if the petitioner sustained her charges of extreme cruelty, as laid in the original petition and thereon a divorce was granted with permanent alimony as an incident, he would respond if the defendant failed to submit himself to proceedings to enforce the decree and there his engagement ended."

Conclusion.

For the reasons herein stated the petition and rule to show cause should have been dismissed and the bond should have been held to be a mere appearance bond with the right of the surety to surrender the principal before breach.

Wherefore it is urged that the order appealed from should be reversed, and set aside.

ANTHONY P. LAPORTA,
Solicitor for and of Counsel with
Frank J. Laporta, Surety
Appellant.

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JUDGMENT RECORD.

New Jersey Supreme Court

BARNET BURSTEIN,	} <i>Plaintiff,</i>	} <i>Action</i>	10
<i>vs</i>			
NICHOLAS PALERMO, MAURICE B.	} <i>Defendants.</i>	} <i>at Law.</i>	
SUSSMAN and DOMINICK			
NIGRE,			
		} <i>On Postea,</i>	
		} <i>Judgment of</i>	
		} <i>Non-suit.</i>	

Aaron Heller, attorney for defendant, Maurice B. Sussman.

Donald Lefferts, attorney for defendants, Nicholas Palermo and Dominick Nigre. 20

Nicholas Palermo, Maurice B. Sussman and Dominick Nigre, the defendants in this cause, were summoned to answer unto Barnet Burstein, the plaintiff therein, in an action at law upon the following complaint:

(Summons issued November 24, 1925.)

Plaintiff, residing in the City of Newark, County of Essex and State of New Jersey, says that: 30

1. On the dates hereinafter mentioned plaintiff was and now still is a manufacturer of jitney bus bodies having his principal office in the City of Newark, County of Essex and State of New Jersey.

2. On May 22, 1925, defendants entered into an agreement with plaintiff for the manufacture 40

Judgment Record.

by plaintiff for defendants of five jitney bus bodies and defendants agreed to pay to plaintiff therefor the sum of Twenty-one hundred dollars (\$2,100) per body, or a total of Ten thousand five hundred dollars (\$10,500).

10 3. Plaintiff manufactured said five jitney bus bodies in accordance with the aforesaid agreement and has frequently requested of defendants that they accept delivery of said five jitney bus bodies and pay for the same in accordance with the aforesaid agreement.

20 4. Defendants have refused to accept delivery of said five jitney bus bodies or any of them and have refused to pay said sum of Ten thousand five hundred dollars (\$10,500) or any part thereof.

Judgment will be claimed for Ten thousand five hundred dollars (\$10,500) besides interest.

CORN & SILVERMAN,
Attorneys for Plaintiff.

(Filed December 16, 1925.)

30 The defendant, Maurice B. Sussman, answering the complaint herein, says:

That he admits paragraph one.

That he denies paragraphs two, three and four.

AARON HELLER,
Attorney for the Defendant.
Maurice B. Sussman.

(Filed March 23, 1926.)

Judgment Record.

The defendant, Nicholas Palermo, answering the complaint herein, says:

That he admits paragraphs one and two.

That he denies paragraphs three and four.

DONALD LEFFERTS, 10
Attorney for the Defendant,
Nicholas Palermo.

(Filed March 23, 1926.)

The defendant, Dominick Nigre, answering the complaint herein, says:

That he admits paragraph one.

That he denies paragraphs two, three and four. 20

DONALD LEFFERTS,
Attorney for the Defendant,
Dominick Nigre.

(Filed March 23, 1926.)

Plaintiff, replying to the separate answers of defendants, Nicholas Palermo, Maurice B. Sussman and Dominick Nigre, says that:

1. He joins issue on defendants' answers. 30

CORN & SILVERMAN,
Attorneys for Plaintiff.

(Filed March 24, 1926.)

Judgment Record.

This case was tried before Judge William A. Smith with the jury at the Essex Circuit on January 12, 1927, to whom the same was referred for trial.

10 The Judge rendered a judgment of non-suit in favor of the defendants, as against the plaintiff.

Whereupon it is adjudged that the complaint of the plaintiff be dismissed and that the defendant, Maurice B. Sussman, do recover of

the said plaintiff, Barnet Burstein, his costs, which

Costs of Maurice B. Sussman...\$39.10 have been taxed at the sum of Thirty-nine dollars and ten cents, and that the de-

20 fendants, Nicholas Palermo and Dominick Nigre do recover of the said plaintiff, Barnet Burstein, their costs which have been taxed

at the sum of

Judgment entered January 21, 1927.

WM. S. GUMMERE,
C. J.

30 I, EDWARD J. KELLEHER, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office.

In testimony whereof I have set (SEAL) my hand and the seal of said Court at Trenton, this twenty-first day of June, A. D. nineteen hundred and twenty-seven.

40 EDWARD J. KELLEHER,
Clerk.

Plaintiff's Opening.

NEW JERSEY SUPREME COURT.
ESSEX CIRCUIT.

Wednesday, January 12, 1927.

BARNET BURSTEIN, } 10
vs } *Action*
NICHOLAS PALERMO, *et al.* } *at Law.*

Before Hon. William A. Smith, *J.*, and a jury.

For the plaintiff appear Corn & Silverman (by Emil R. Silverman).

For the defendant, Maurice B. Sussman, ap- 20
pears Aaron Heller.

For defendants, Palermo and Nigre, appears Donald Lefferts (by Benedict Krieger).

(A jury is called and sworn.)

Mr. Silverman opens for the plaintiff as follows:

If the Court please, and gentlemen of the jury: This is a case by Barnet Burstein against Pa- 30
lermo, Nigre and Sussman. These three men who lived in Passaic or Paterson, were about to engage, or had engaged in the bus business as the North Bergen Transit Company, Inc. Five bus bodies were ordered. The order was signed by the North Bergen Transit Company, Inc. After some dickering, they entered into an agree-
ment in which Burstein was to build five bodies for the price of \$2,100 each, a total of \$10,500. The bodies were to be delivered in six weeks if the chasses on which they were to be mounted 40

Plaintiff's Opening.

were delivered. Burstein completed five of the bodies, that is, not entirely, but ready to mount on the chasses, and advised Palermo, Nigre and Sussman. They brought one chassis and the body was placed on it and completed. Burstein advised these people that they must send the chasses, otherwise the bodies could not be used by them. Finally, the owner of the chassis which had been sold these defendants on a conditional bill of sale, came to Burstein. Burstein was legally obliged to return the chassis to him because the people who delivered it to him had no title in the chassis and he was, therefore, compelled to dismount the body and return the chassis to the owner. The other four bodies were still in his place. Burstein ascertained that the North Bergen Transit Company had not completed its incorporation. They filed a certificate in the office of the Bergen County Clerk, signed by Palermo, Nigre and Sussman. They failed to proceed with the incorporation and there was none in law or fact. Subsequently, Burstein called upon the three men to pay for these bodies. If we prove to you that this corporation was never in fact or in law, completed, and the Court charges you as a matter of law that they are liable individually, we shall ask for a verdict at your hands.

Mr. Heller: Do I understand that Mr. Silverman says this is a written contract signed by the North Bergen Transit Co., Inc.?

Mr. Silverman: Yes.

Counsel for defendant, Sussman, moves that plaintiff be non-suited on his opening as far as the defendant Sussman is concerned, because nowhere on the contract does his name appear.

(Argument.)

Barnet Burstein, direct.

The Court: You don't intend to prove activity on the part of Sussman?

Mr. Silverman: I think Sussman was present at the time the contract was made. I submit, if your Honor please, that even if Sussman was not present, if he entered into this proposed joint venture he was liable.

The Court: I will deny the motion at this time.

Defendants' counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Heller opens for the defendant.

BARNET BURSTEIN, plaintiff, sworn in his own behalf.

Direct examination by Mr. Silverman.

Q Mr. Burstein, what business are you in?

A Jitney bus bodies.

Q How long have you been in that business?

A Fourteen years.

Q On or about May 22, 1925, were you given an order by Palermo, Nigre and Sussman? A Yes, sir.

Mr. Heller: Just a moment. I think the witness should not be led.

Q On May 22, 1925, were you given an order for five bus bodies? A Yes, sir.

Q Who gave you the order? A Mr. Sussman, Mr. Palermo and Mr. Nigre.

Q Were they all present? A Yes, sir.

Q What did they tell you as to who was purchasing them? A All three of them.

Barnet Burstein, direct.

Mr. Silverman: I offer the contract in evidence.

Objected to as not properly proved.

Q Did you see that contract signed? A Yes, sir.

10 Q Was it signed in your presence? A Yes, sir.

Q Who signed it? A Palermo and—

The Court: Did this witness see it signed?

Q Did you see that signed? A Yes, sir.

Q Where is Mr. Dilly? A In New York. He ought to be here any minute. He called up yesterday and the day before yesterday.

20 The Court: I don't see how you are going to get away from the cases which say that where you deal with a corporation, a *de facto* corporation, you deal with it as a corporation.

Mr. Silverman: If it is a *de facto* corporation.

30 The Court: I should say it would be a *de facto* corporation if they signed articles of incorporation, regardless of whether they filed them or not.

Objection withdrawn.

The Court: I will allow the contract in evidence.

(The same is received in evidence and marked Exhibit P. 1.)

40 Q At the time the contract was signed, what, if anything, did they tell you as to who the members of the corporation were?

Barnet Burstein, direct.

The Court: Ask him what was said.

Q What was said by Mr. Sussman at the time the contract was signed, if anything? A The people didn't go through the corporation yet; they two are the officers and after they will sign.

10

Q What did Palermo tell you? A The same thing.

Q What did Nigre tell you? A The same thing.

Q After you took this order did you build the bodies? A Yes, sir.

Q How many bodies did you build? A Five.

Q How much of the bodies did you complete? A \$2,100.

20 Q How much of the bodies did you complete? Were the bodies entirely completed? A All ready to mount on the chasses, one was already mounted on the chassis, and we had to take it off.

20

Q Why? A The chassis dealers told me not to go further; one of the partners beat it with the money, or spent the money he held, and not to deliver to them.

30 Q As a result of what they told you what did you do with the chassis you had mounted the body on? A I had to take the body off, and two weeks later they came and took the chassis away.

30

Q What happened to the other four bodies? A I still got them.

Q After the body was mounted on the chassis did anyone come to see you? A Yes, sir, two.

Q Which ones? A Mr. Sussman and Nigre.

40 Q What did they say, if anything? A They said, "You can go ahead for awhile and we will see you get paid after the work is done."

40

Barnet Burstein, direct.

Q You say you still have the bodies? A Yes, sir.

Q How much will it cost, if anything, to complete those five bodies for delivery?

Mr. Heller: I understand the contract says the price is \$2,100.

Mr. Silverman: We are trying to give them credit.

Q Why weren't they completed? A I didn't have the chasses.

Q Tell us what was not done on each body. A One was mounted, ready, except the paint.

Q How much would it cost to paint that bus? A \$75.

Q Tell us about the other four. A The other four, except mounting the body and dismounting the body would be \$100 less, for taking the body off and putting it on. The one I had to pay labor to mount it and take it off, it cost—it cost \$50.

By the Court.

Q It cost how much to mount? A \$100.

Q And the extra cost was \$50 to dismount?

A Yes, sir.

By Mr. Silverman.

Q How much would it cost to paint? A \$75.

Q The four were not mounted? A No, sir.

Q How much does it cost to mount them? A \$50.

Q And that is all that was necessary to do to those bodies? A No, there is some more work. The upholstering is not done; that is \$175 apiece.

Barnet Burstein, direct.

By the Court.

Q For each of the five? The one already mounted was not done? A No.

Q Then it is for the upholstery of five? A Yes, sir.

Q How much? A \$175 each. 10

By Mr. Silverman.

Q Was there anything else to be done? A Rear bumper.

Q How much? A \$30.

Q On each? A Yes, sir.

Q For five of them? A Yes, sir.

Q What else? A Outside guard rails.

Q How much? A \$40.

Q Anything else? A Only the gas tank has to be changed and the storage battery and some of the lights has got to be changed. That is \$30 each. 20

Q When these busses were completed and ready for delivery—

Objected to.

Objection sustained.

Q When these busses were ready to mount did anyone come to see you? A Yes, sir. 30

Q Who came? A Mr. Sussman and Mr. Nigre.

Q What did they say? A To go ahead. I said, "I haven't got the chasses."

Q What did they say? A That they would see the chassis people.

Q Did they ever deliver them? A No, sir.

Q Did they ever pay for the busses? A No, sir. 40

Barnet Burstein, cross.

Mr. Silverman: I offer in evidence a certified copy of the certificate of incorporation of the North Bergen Transit Company, Inc., filed in the Bergen County Clerk's office on May 21, 1925.

10 Mr. Heller: No objection.

(The same is received in evidence and marked Exhibit P. 2.)

Mr. Silverman: I also offer in evidence a certificate from the Secretary of State showing that the North Bergen Transit Co., Inc., was never incorporated in this State, and was not a foreign corporation licensed to do business in this State.

20 (Same is received in evidence and marked Exhibit P. 3.)

Cross examination by Mr. Heller:

Q Did I understand you to say that you had been in the bus building business fourteen years?
A Yes, sir.

Q You have had quite a good deal of experience in making contracts with bus owners for busses? A Yes, sir.

30 Q At the time this contract, or alleged contract was entered into between yourself and the North Bergen Transit Co., Inc., you say people representing them came to you? A Yes, sir.

Q Name the persons who were there? A Mr. Palermo, Nigre and Mr. Sussman.

Q Do you see any of them in court? A I don't see Mr. Palermo here, the red-headed fellow.

40 Q Do you see Mr. Nigre here? A No, I don't.

Barnet Burstein, cross.

Q Do you see Mr. Sussman here? A I can't remember him well.

Q You don't know whether he is in court or not? A I am not sure; I saw him twice only.

Q When these people came to you they had a conversation with you, didn't they? A Yes. 10

Q The conversation was with respect to what? A To go ahead with the bodies and they would have them up in six weeks.

Q The first time they came they talked about what? A About jitney bodies.

Q Did Mr. Palermo ever talk to you before that about jitney bodies? A I did some work for him before that.

Q Did you do some work for Mr. Nigre before that? A Yes, sir. 20

Q Did you do some work for Mr. Sussman before that? A No, sir.

Q That is the first time you ever have done any business with him? A Yes.

Q Did you know what business they were in? A Bus business.

Q Did you know what business Mr. Sussman was in? A No, sir, I didn't ask him.

Q What time did this conversation take place? A About eleven o'clock. 30

Q At night? A No, sir, in the morning.

Q Who drew this contract? A My bookkeeper, Mr. Dilly.

Q Mr. Dilly was your bookkeeper? A Yes, sir, at that time.

Q You discussed the terms of the contract at the time? A With the whole three of them.

Q You mean to say you discussed the contract with a man who knew nothing about the bus business? A All three of them. 40

Barnet Burstein, cross.

Q You mean to say the three of them talked at one time?

Objected to.

Objection overruled.

10 Q Do you say that the three of them talked at one time? A No, one stopped talking and the other one put some other things up, how the bodies would be built and I would suggest this and that.

Q Did Mr. Sussman do any suggesting? A He did.

Q Who did most of the suggesting? A Palermo.

Q He was the man who was in the bus business? A Yes, sir.

20 Q You say Mr. Sussman suggested something about the bus? A Yes.

Q What did he suggest? A About the seating arrangement.

Q Then you thought that he was quite well connected in this company? A Yes, sir.

Q You thought he had a good strong hold in the company because of his suggestion? A Yes, sir.

30 Q You thought he had as much to do with the company as Palermo and Nigre? A They introduced him to me as a partner.

Q You were there when the contract was signed? A Positively.

Q And the contract was signed by whom? A By Palermo and Nigre.

40 Q Can you tell us why it is you didn't have Mr. Sussman sign? A You asked me before and I said the paper didn't go through the corporation and the officers of the corporation are signing it now.

Barnet Burstein, cross.

Q Why did you permit Palermo to sign and not Mr. Sussman, who was just as much interested as Mr. Palermo?

Objected to.

Objection sustained.

Q You didn't ask Mr. Sussman to sign, did you? A I did. 10

Q Did he refuse? A No, he said it is not necessary for him to sign. After the papers go through they might change the officers.

Q When these two gentlemen signed the contract you accepted their signatures as officers of a corporation about to be formed?

Objected to.

Objection overruled. 20

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

The Witness: That's all that is necessary they told me.

Q You didn't intend to hold them personally liable, did you?

Objected to.

The Court: I will allow it as to whether he was holding them as a corporation or as individuals. 30

The Witness: I thought the corporation was sufficient.

By the Court.

Q The question is whether you considered them as a corporation or individually. A Individually, all three. 40

Barnet Burstein, cross.

Q And you took a contract signed by them as a corporation? A The whole three of them was supposed to be liable for the corporation.

Q Then you considered you were contracting with the corporation, didn't you? A Yes.

10 *By Mr. Heller.*

Q Then you did not intend to hold them personally, did you?

Objected to.

Objection overruled.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

20 Q Did you? A Who shall I hold, then?

Q Did you intend to hold the corporation liable or the three gentlemen? A The three gentlemen.

Q Then why didn't you have Mr. Sussman sign the contract? A He told me, "it is not necessary for me to sign it"; only these two is sufficient.

30 Q You intended to hold him personally liable and yet did not have him sign the contract? A Yes.

Q What did you mean by the remark, "The corporation is sufficient"? A That is what Sussman told me.

Q You had a number of contracts signed previous to this contract? A Yes, sir.

Q And some signed by corporations and some by individuals, didn't you?

Objected to.

40 Objection sustained.

Barnet Burstein, cross.

Q You took this contract to build five busses at \$2,100 each or a total of \$10,500? A Yes, sir.

Q How much cash was given to you as deposit? A I don't think they gave me any deposit.

10 Q You took a contract to do \$10,500 worth of business and took no cash deposit for it? A No, sir.

Q You never got any money at all for it, did you? A No, sir.

Q How many times did you see Mr. Sussman in your life? A Twice.

Q When was the second time? A When he came to ask how the body is coming along on the chassis.

20 Q Are you sure it was Mr. Sussman who came there? A Positive.

Q How do you know? A I seen him the second time when he came up.

Q But you don't know him today? A No.

Q If you saw Mr. Palermo you would know him? A Yes.

Q And Mr. Nigre? A Yes.

Q If you saw him walk into this court room you would recognize him in a minute? A Yes.

30 Q Isn't it a fact that you wouldn't recognize Sussman because you never saw him? A Absolutely I did saw him.

Q They must have been there for some time discussing the terms of the contract? A The first time; not the second.

Q They were there how long? A About an hour.

Q You had this deal with them and it took only about an hour? A Yes.

40 Q How long did it take the second time? A About five minutes.

Barnet Burstein, cross.

Q The second time was how long after the first time? A About three weeks.

Q He asked you what? A How I was getting on.

Q What did you tell him? A I was waiting for the other chasses; I had the first mounted.

10 Q Who gave you the chassis? A The chassis dealer.

Q Was that at the request of Palermo? A That is how it works. The chassis dealer and the body builder work together. He sends it to the body builder with the dealer's plates. He adjusts it again at his service station.

Q According to this contract the busses were to be completed when? A Six weeks after the chasses were ready.

20 Q Were they? A Yes, they were ready to mount on the chasses, I couldn't finish without the chasses.

Q Don't you put the upholstery on before mounting? A No.

Q It doesn't show anything in this contract about completing on the chassis.

30 Objected to on the ground that the contract speaks for itself.

Mr. Silverman: How is he going to complete the bus without the chassis?

(Question withdrawn.)

Q When was this part put into the contract? A At the same time when they ordered the bodies.

40 Q I notice a correction on this contract. Who made that correction? A Not as I know of; there is no corrections.

Barnet Burstein, cross.

Q Isn't that "19 feet 6 inches" in pencil? A Yes, sir.

Q And the rest of the contract is in pen? A Yes, sir.

Q Did the same person write out this part of the contract as wrote out this part? A Yes, 10 sir.

Q And at the same time? A Yes, sir.

Q You say that this pencil mark was changed the same time the contract was drawn? A Yes, 10 sir.

Q You are sure about that? A Positive.

Q And you are just as sure about that as you are about the rest of the testimony you have given us this morning? A Yes, sir—

Objected to.

Objection sustained. 20

Q The contract here says, "Changed June 10, 1925"; who wrote that? A Mr. Dilly.

Q Then it was not changed the same day? A The same time.

Q The contract was drawn May 22, 1925? A Yes, sir.

Q The insertion is changed, June 10, 1925. That's so, too, isn't it? A We couldn't get a short wheelbase chassis. 30

Q Then you want to change your statement of a moment ago that it was changed at the same time? A Change what?

Q You testified a moment ago that this contract was changed the same day it was drawn. A I didn't write the contract; the bookkeeper writes it out.

40 Q You told us it was changed the very same day. A No, I thought you asked me if it was written the same day that the ink was written. 40

Barnet Burstein, cross.

Q Who wrote this on the top of the contract, "Change bodies all 19 feet 6 inches"? A By Mr. Dilly.

Q When did he write that? A I couldn't tell you that.

10 Q Was that the same day? A I couldn't tell you that.

Q When was this written into the contract: "Complete job to be delivered six weeks from date provided chasses are delivered before June 11, 1925"? A The same day as the order.

Q Are you positive? A Positively.

Q Did you give a copy of this contract to anyone? A We got a copy.

Q Who has it? A My lawyer.

20 Mr. Heller: I ask that it be produced.

Mr. Silverman: That is the only one.

Q I have it in my hand and he has the copy? A I suppose.

Q Don't you know? A I know I got a copy after the contract was written out.

Mr. Heller: I ask that it be produced.

30 Mr. Silverman: I haven't any. I have already told you that.

Q The copy of this contract is the same as the original, isn't it? A I suppose.

Q It should be, anyway. A It should be.

Q And the copy has on it everything that the contract has on it? A It should be.

Q You have all these busses in your place of business yet? A Yes, sir.

40 Q You haven't disposed of them? A No, sir.

Barnet Burstein, cross.

Q How many bus bodies did you build since May, 1925, do you know? A I couldn't tell you.

Q Have you built more than a hundred? A I don't know, I would have to look it up.

10 Q Have you built more than a hundred since May, 1925? A I build between eight and ten bodies a week.

Q Then you must have built considerably more than a hundred? A I wouldn't be surprised.

Q You have quite a big demand for bus bodies? A Yes, sir.

Q Did you ever try to dispose of these five bus bodies?

20 Mr. Silverman: I object. He is not obliged to dispose of them.

The Court: He is entitled to ask the question.

Mr. Silverman: My contention is we are not supposed to do anything under the Sales Act.

The Court: I think it is material to find out what he elected to do.

30 Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(The stenographer reads the last preceding question.)

The Witness: I did.

Q Did you succeed? A I couldn't; I couldn't get the same chassis.

40 Q Was there anything different about these bus bodies from the average bus bodies you build? A Yes, sir.

Barnet Burstein, cross.

Q What difference? A Every chassis has a different wheel base and the body has to be according to the wheel base of the chassis, and so with the rear end and the springs.

Q You built these bodies by order, didn't you? A Yes.

10 Q There was nothing peculiar about that order. It was an ordinary bus body? A The body can be the same type, but we have to know what chassis is to be mounted.

Q What kind of a body did you build? A For a Goodwin-Guilder.

Q Isn't that a chassis used very often? A Yes.

Q Then the body can be used by anyone? A For that chassis.

20 Q How many bodies did you build for that kind of chassis since May, 1925? A Not for that chassis.

Q How many did you build before that? A Six or eight.

Q You have not built one since? A No, sir.

Q Don't they build those chasses any more?

Objected to.

Objection sustained.

30 Q Do you remember having a conversation with Nicholas Palermo after you had instituted suit against him?

Objected to.

The Court: Answer yes or no.

The Witness: Yes, sir.

40 Q That was how soon after the filing of papers against him, if you know? A I couldn't

Barnet Burstein, cross.

tell you exactly the time. I met him in Mr. Eppstone's office in Passaic.

Q Did you, after the end of your conversation, whatever it was, say to Mr. Palermo that if he will give you the sum of \$100 towards your expenses in this matter you would mark the case settled? A No, sir, not that way. 10

Q What way? A He told me he would place an order for \$5,250 each body on three de luxe bodies and he will give me \$100 for the expenses, provided he gave me the order.

Q You said, "Mr. Palermo, if you will give me an order for three other bodies and give me \$100 toward expenses, I will mark the case closed." A He told me that.

Q You consented to do that? A I was willing to do it. 20

Q And he never came around to buy the bodies and that is why you didn't settle it? A He never came around, no.

Q You didn't speak to Mr. Sussman about the \$100? A I did.

Q When? A After he received the letter from the lawyer he came up again.

Q What did he say? A He said his partner beat it with the money and we are out of luck.

Q You didn't offer him that proposition, did you? 30

Mr. Silverman: I object to this line of testimony. He is trying to prove an attempt to settle this case.

Q Did you give the North Bergen Transit Co., Inc., or any defendant in this suit, any word that the busses were complete? A Yes, sir. 40

Barnet Burstein, cross.

Q How was the notice given? A We notified them that we are ready for the chasses.

Q To whom did you send that notification?

A All three of them.

Q How? A When they came up the second time to find out if we are ready for the chasses or not.

Q You didn't send them a notice? A No, sir.

Q They came to you— A Yes, and I told them we are ready for the chasses.

Q When was that? A Three weeks after the order was placed.

Q You are sure it was not two weeks after that? A I am not sure; but it is about that.

Q It can't be more than three weeks? A No, I couldn't say, around three weeks.

Q Would you say it was between two and three or between three and four weeks? A I couldn't say that.

Q Will you say it was not more than three weeks? A Probably, maybe a couple of days more or less.

Q It could not have been five weeks? A It could be five weeks, too.

Q Could it have been eight weeks after the signing of the contract that you told them that the job was through? A It could be that, too.

Q What do you mean? A That I got three weeks more; three weeks more to finish after I got the chasses.

Q I said to you, did you notify these defendants or any one of them that the busses were complete?

The Court: I am ready to rule on the motion now. If you have anything more to offer you may do so at this time.

Maurice B. Sussman, direct.

MAURICE B. SUSSMAN, one of the defendants, sworn in behalf of plaintiff.

Direct examination by Mr. Silverman.

Q Mr. Sussman, is that your signature? A Yes, sir. 10

Mr. Silverman: I offer this affidavit in evidence.

Mr. Heller: I object to the affidavit. You may ask him to testify.

Objection sustained.

Q Mr. Sussman, did you, on February 25, 1926, make an affidavit in this cause? A I did.

Q In that affidavit did you say— 20

Mr. Heller: I object to this line of questioning as immaterial to the issue.

The Court: I don't know whether it is or not.

Mr. Heller: Let me apprise your Honor as to what happened.

Mr. Silverman: I object to any statements by counsel.

The Court: Let me see the affidavit. I will allow it in evidence. 30

Mr. Silverman: I offer the affidavit—

The Court: As an admission of the defendants.

Mr. Silverman: Yes, sir.

(The same is received in evidence and marked Exhibit P. 4.)

PLAINTIFF RESTS.

Motion for a Non-suit.

Counsel for defendant Sussman renews motion for a non-suit on the following grounds:

- 1. That the uncontradicted facts are that a contract was entered into between the plaintiff and the North Bergen Transit Co., Inc., a corporation about to be formed, or a corporation *de facto*.
- 2. That the defendant did not sign the contract as an officer of the corporation, indicating that he was not active in the contracting of these busses.
- 3. That the testimony is that the plaintiff intended to hold the corporation.
- 4. That the plaintiff has failed to prove any damage at all.

(Argument.)

The Court: Under the case of *Vannemann v. Young*, 52 N. J. L. 403; and *Stout v. Zulick*, 48 N. J. L. 599; and *Frawley v. Tenafly Transportation Co.*, 113 Atl. Rep. 242, I hold that the plaintiff, having dealt with the defendants as a *de facto* corporation, or made a written contract with these defendants as a company, which was a *de facto* corporation, he is stopped from suing them individually, and I, therefore, grant the motion for a non-suit.

Counsel for the other defendants moves for a non-suit on behalf of the other defendants.

Motion granted.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Exhibit P. 1.

EXHIBIT P. 1.

Change 5 Bodies all 19' 6"—June 16-1925—N. P.

Newark, N. J. May 22 1925

BURSTEIN BODY WORKS, 10
660-682 S. 15th STREET
NEWARK, N. J.

Gentlemen:

Build and make for North Bergen Transit Co, Inc of No. 19 Arnot Pl., Lodi N.J Passaic 1762-F. 5. Five Bus Bodies according to the following specifications:

Length	Width	Height	
2 Bodies..19'6" Bevel Front		19'6" (2)	
3 Bodies—19'6" Bevel Front.		18' (3)	20

Changed 6/10/25.

Brass Sash.

Hale-Kilbum De Luxe seat (Brown) (Plain Heating system.

Complete jobs to be delivered 6 weeks from Date hereof provided that chassis are delivered to this plant not later than June 11-1925

.....
.....

And after completion, mount same on 5 White Chassis' chassis which I shall deliver to you within.....days from date. 30

I agree to pay for same Twenty one hundred Dollars (\$2100.00) per body as follows: Deposit Dollars (\$.....)

On completion of job Six thousand five hundred Dollars (\$6500) Balance of Four thousand Dollars (\$4000) By 17 notes for \$222.22 each and one note for \$222.26 to be bayable at my bank; the first note to be due one month from completion and the others monthly thereafter, each 40

Exhibit P. 1.

note to bear interest at 6%; said notes to be secured by a chattel mortgage on the chassis and body.

EXTRAS:.....% War tax; included in above price Notes to be indorsed by Salvatore Palermo; and Michael Negri, Storage at the rate of \$1.00 per day will be added 3 days after notification that job is ready for delivery.

It is understood that your completion of the foregoing is to be contingent upon strikes, fires, accidents, shortages of material railroad delays, or other acts or causes beyond your control. Signed

NORTH BERGEN TRANSIT CO., INC

NICHOLAS PALERMO, Pres.

20 Witness J. W. DILLY Dominick Nigre

Received above deposit (\$.....)

BURSTEIN BODY WORKS

By

30

40

Exhibit P. 2.

EXHIBIT P. 2.

27265

Certificate of Incorporation

of

North Bergen Transit Co. Inc.,

10

This is to certify that the undersigned do hereby associate themselves into a corporation under and by virtue of the provisions of an Act of the Legislature of the State of New Jersey entitled "An Act concerning corporations (revision of 1896) and the several supplements thereto and acts amendatory thereof and do severally agree to take the number of shares of capital stock set opposite their respective names

20

1. The name of the corporation is "North Bergen Transit Co. Inc.

2. The location of the principal office in this State is at No. 48 East Place Lodi, N. J. in the Borough of Lodi County of Bergen and State of New Jersey The name of the statutory agent therein and in charge thereof upon whom process against this corporation may be served is Nicholas Palermo

30

3. The objects for which this corporation is formed are to acquire maintain store operate run lease let out and otherwise own and employ motor vehicles propelled by gasoline or otherwise designed for the carriage of persons or for any other use To borrow money to make and issue promissory notes bills of exchange bonds debentures and evidences of indebtedness of all kinds whether secured by mortgage pledge or otherwise without limit as to amount and to secure the same by mortgage pledge or other-

40

Exhibit P. 2.

wise Generally to purchase take on lease or in exchange hire or otherwise acquire any real and personal property and any rights or privileges which the company may think necessary or convenient for the purpose of its business To do any or all of the things in this Certificate set forth as objects purposes powers or otherwise to the same extent and as fully as natural persons might or could do and in any part of the world as principals agents contractors trustees or otherwise The Corporation shall also have power to conduct its business in all its branches have one or more offices and unlimitedly to hold purchase mortgage and convey real and personal property in any State Territory or Colony of the United States and in any foreign country or place

4. No resolution shall have any legal efficacy unless it shall have the unanimous consent of all the stockholders and all checks notes and instruments of any character shall and must be signed by the President Secretary and Treasurer to have any effect against within corporation and no sale or transfer of stock shall be made unless in accordance with the By-Laws.

5. The total authorized capital stock of this corporation is one hundred and twenty five thousand dollars (\$125,000) divided into twelve hundred and fifty shares (1250) of the par value of one hundred (\$100.00) dollars

6. The names and post office addresses of the incorporators and the number of shares subscribed by each the aggregate of such subscriptions being the amount of capital stock with which the company will commence business are as follows

40

Exhibit P. 2.

Name	Post Office Address	No of shares
Nicholas Palermo	19 Arnot Place Lodi N J	25
Maurice B. Sussman	23 Passaic Ave Passaic N J	25
Dominick Negri	290 Garibaldi Ave Lodi N J	25

10

7. The period of existence of this company is unlimited

In witness whereof we have hereunto set our hands and seals this 14th day of May 1925

Nicholas Palermo (L s)
Maurice B Sussman (L s)
Dominick Negri (L s)

Signed sealed and delivered
in the presence of

20

Alexander M MacLeod

State of New Jersey

County of Passaic SS Be it remembered that on this fourteenth day of May A D nineteen hundred and twenty five before me the subscriber personally appeared Nicholas Palermo Maurice B Sussman and Dominick Negri who I am satisfied are the persons named in and who executed the foregoing certificate of incorporation and I having first made known to them the contents thereof they did acknowledge that they signed sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed

30

Alexander M MacLeod
A Master in Chancery of New Jersey

"Maurice" twice written over erasures

40

Exhibit P. 2.

Received in the office and recorded May 21st,
1925 at 9:09 AM

William P Eager, Clerk

STATE OF NEW JERSEY, }
10 COUNTY OF BERGEN. } ss.

I, JAMES W. MERCER, Clerk of the County of Bergen, in the State of New Jersey, and also Clerk of the Circuit and Common Pleas Courts, in and for said County (Courts of Record), do hereby certify that I have compared the copy of the original Certificate of Incorporation hereto annexed, with the original record thereof in Liber 16 of Incorporations at pages 46 &c. &c., in my office at Hackensack in said County, and
20 that the same is a true copy thereof, and of the whole of such original record.

IN TESTIMONY WHEREOF, I have here-
(SEAL) unto set my hand and affixed the seal
of the said Courts and County, at
Hackensack, aforesaid, this eleventh day of January, A. D. one thousand nine hundred and seven

JAMES W. MERCER,
Clerk.

30 By WM. S. DOREMUS, D.

Exhibit P. 3.

BERGEN COUNTY CLERK'S
OFFICE
(Court Division)

CERTIFIED COPY

OF A
Certificate of Incorporation 10
of
North Bergen Transit Co Inc

Dated May 14th, 1925.
Recorded May 21st, 1925
Book 16 Page 46

EXHIBIT P. 3.

20

STATE OF NEW JERSEY
(Cut of State Seal)
DEPARTMENT OF STATE

I, JOSEPH F. S. FITZPATRICK, Secretary of State of the State of New Jersey, Do HEREBY CERTIFY, that so far as the records of this office show, the "North Bergen Transit Co., Inc." has never been incorporated under the laws of this State, nor is it a foreign corporation licensed to trans-
30 act business in this State.

IN TESTIMONY WHEREOF, I have here-
(SEAL) unto set my hand and affixed my Official Seal, at Trenton, this Seventh day of January, A. D. 1927.

JOSEPH F S FITZPATRICK
Secretary of State.

Exhibit P. 4.

EXHIBIT P. 4.

A true copy

Donald Lefferts
Atty for Defts.

10

NEW JERSEY SUPREME COURT
ESSEX COUNTY

BARNET BURSTEIN,
Plaintiff,

vs

NICHOLAS PALERMO, MAURICE B.
SUSSMAN and DOMINICK
NIGRE,
Defendants.

*Action
at Law.*

*Order to
Show Cause.*

20

It appearing to the Court, upon the affidavits of Nicholas Palermo, Maurice B. Sussman and Dominick Nigre, the defendants herein, that judgment by default was entered in the above cause against the said defendants on the sixteenth day of January, 1926, by reason of the defendants failure to file an answer or other pleading within the time limit by law and it further appearing that by said affidavits that the defendants have a judt and legal defense upon the merits of the cause and that wrong and injury may result to the defendants by reason of the entry of said judgment.

30

Therefore, it is upon motion of Donald Lefferts, attorney for the defendants, ordered that the plaintiff show cause before me at the Court House in the City of Newark, County of Essex,

40

Exhibit P. 4.

State of New Jersey, at ten o'clock in the forenoon on the tenth day of March, next, why said judgment should not be opened and the defendants granted leave to file their answer or other pleading at such date as the Court may appoint.

And it is further ordered that a copy of this order, together with said affidavits, certified to by counsel of the defendants, be served upon the plaintiff or his attorneys within three days from the date hereof.

10

Let this rule be entered in the minutes.

WM. S. GUMMERE,
C. J.

Dated February 27th 1926

20

NEW JERSEY SUPREME COURT.
Essex County.

BARNET BURSTEIN,
Plaintiff,

vs

NICHOLAS PALERMO, MAURICE B.
SUSSMAN and DOMINICK
NIGRE,
Defendants.

*Action
at Law.*

Affidavit.

30

I, NICHOLAS PALERMO, being duly sworn according to law, upon my oath say:

That I am one of the defendants in the above-entitled cause and that I am a resident of the Borough of Lodi, County of Bergen and State of New Jersey.

40

Exhibit P. 4.

That I am acquainted with Dominick Nigre and Maurice B. Sussman, the other defendants in said cause.

That prior to the 22nd day of May, 1925, I was engaged in the business of promoting a jitney bus line to operate through certain municipalities situated in Bergen County.

I received from the defendant, Maurice B. Sussman a subscription to stock in a company to be organized under the name of "North Bergen Transit Co." and that the said Maurice B. Sussman had no interest in said business of whatsoever nature, excepting as a subscriber to stock in the company to be formed by me.

That said company was never formed and that the said Maurice B. Sussman never became, directly or indirectly, interested in said business and that I returned to him the money he paid me as subscription to the stock aforesaid.

That it is not true, as alleged in the complaint in this cause, that on the 22nd day of May, 1925, the defendants entered into an agreement with the plaintiff for the manufacture, by the plaintiff for the defendants, of five (5) jitney bus bodies and that the defendants agreed to pay to the plaintiff therefor the sum of twenty-one hundred (\$2100.00) dollars per body or the total of ten thousand five hundred (\$10,500.00) dollars.

But that it is true that I and the defendant, Dominick Nigre, ordered said jitney bus bodies as alleged in said complaint, with the understanding that said bodies would be immediately manufactured and delivered to us.

That from week to week, during the months of May, June and July, the defendant, Dominick Nigre, and I called upon the plaintiff, Barnet Burstein at his place of business, in the City of

Exhibit P. 4.

Newark, to find out what progress was being made by him in the manufacture of said bus bodies and was informed, from time to time, that he had done nothing and would do nothing until he received a cash deposit.

That the defendant, Dominick Nigre, and I did not make such cash deposit and that the plaintiff never advised us that he had began the manufacture of said bodies and that he completed the same.

And that we have never had any information respecting said work having been done by him until the institution of suit in this cause.

And that the plaintiff, Barnet Burstein, has never notified me that said bodies were manufactured by him and ready for delivery to us and that I have not, at any time, refused delivery of said bodies.

I am informed and believe that the plaintiff did not manufacture said bodies for *is* in accordance with his said contract.

That I am not indebted to the plaintiff in the sum of ten thousand five hundred (\$10,500.00) dollars or any sum whatsoever.

That after the summons of complaint was served upon me in this cause, I called upon the plaintiff in his place of business in the City of Newark and informed him of the facts hereinbefore set forth and he stated to me that unless I paid his attorney one hundred (\$100.00) dollars the case could not be settled and that he would be satisfied to dispose of the entire matter if I made said payment of one hundred (\$100.00) dollars to his attorney and I promised him to do this.

And that I thereupon advised the other defendants in this cause that the case was settled

Exhibit P. 4.

and that they need not take any action in respect thereto.

10 And the said plaintiff informed me that he would tell his attorney not to take any further action in the case until I was in a position, in a reasonably short time, to pay the said one hundred (\$100.00) dollars.

That judgment by default was entered in this cause against me and the other defendants herein on the 16th day of January, 1926, for the sum of ten thousand five hundred (\$10,500.00) dollars together with interest and cost of court, default being made by us not filing an affidavit of merits and answer herein, and

20 That I am not indebted to the said plaintiff, Barnet Burstein, in any sum of money whatsoever and that I verily believe that he never manufactured said bodies for us as alleged in the complaint herein.

NICHOLAS PALERMO.

Sworn and subscribed to before me this 25th day of February, 1926.

30 DOROTHY KUEMMEL,
A Notary Public of N. J.

Exhibit P. 4.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

BARNET BURSTEIN,	}	<i>Plaintiff,</i>	Action	10
<i>vs</i>				
NICHOLAS PALERMO, MAURICE B. SUSSMAN and DOMINICK NIGRE,		<i>Defendants.</i>	<i>at Law.</i>	
			<i>Affidavit.</i>	

I, MAURICE B. SUSSMAN, being duly sworn according to law, upon my oath say:

20 That I am one of the defendants in the above-entitled cause and that I am a resident of the City of Passaic, County of Passaic and State of New Jersey.

That I did not, on the 22nd day of May, 1925, or any other time, enter into a contract, directly or indirectly, with the plaintiff herein for the purchase of jitney bus bodies, as alleged in the complaint.

30 That I have never, at any time, directly or indirectly, purchased jitney bus bodies from any person or corporation whatsoever.

That I have never been in the jitney bus business.

That about the first of June, 1925, the defendant herein, Nicholas Palermo, requested me to subscribe to stock in a jitney bus company that he was about to form to be known as the "North Bergen Transit Co."

40 And that I agreed to subscribe to stock in said company and pay to said Nicholas Palermo

Exhibit P. 4.

certain sums of money for said stock subscrip-
tion.

That said company was never formed and that
the said Nicholas Palermo returned to me the
money paid by me to him upon account of said
stock.

10 That I have never had any business with the
said defendants herein except as last stated and
I never have been associated with them in busi-
ness in any manner whatsoever.

That I do not owe the plaintiff, Barnet Bur-
stein, any money whatsoever and have no knowl-
edge of said facts set forth in the complaint of
this cause until I was served with the summons
of complaint herein and I then conferred with
Mr. Palermo, who informed me that he would
20 see Mr. Burstein about the matter and advise
me in respect thereto.

I then called upon Donald Lefferts, my at-
torney, and after having been advised by Nicho-
las Palermo, the other defendant herein, that
said case had been settled for the sum of One
hundred (\$100.00) Dollars, I instructed my at-
torney not to take any further action in the
matter.

30 I am now informed that judgment has been
entered against me and the other defendants
herein for the sum of Ten thousand five hundred
(\$10,500) Dollars, together with interest and
cost of suit and that a writ of execution has
been issued upon said judgment, directed to the
Sheriff of the County of Passaic and that said
execution is now in said Sheriff's hands for ac-
tion thereon.

40 And that I did not file an affidavit of merit
and answer in this cause because I was informed

Exhibit P. 4.

that the case had been disposed of by settle-
ment.

MAURICE B. SUSSMAN.

Sworn and subscribed to be-
fore me this 25th day of
February, 1926. 10

DOROTHY KUEMMEL,
A Notary Public of N. J.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

BARNET BURSTEIN, <div style="text-align: right;"><i>Plaintiff,</i></div>	} <i>Action</i>	20
<i>vs</i>		
NICHOLAS PALERMO, MAURICE B. SUSSMAN and DOMINICK NIGRE, <div style="text-align: right;"><i>Defendants.</i></div>	} <i>at Law.</i>	
	} <i>Affidavit.</i>	

I, DOMINICK NEGRI, being duly sworn according
to law, upon my oath say: 30

That I am one of the defendants in the above-
entitled cause and that I am a resident of the
Borough of Lodi, County of Bergen and State
of New Jersey.

That I am acquainted with Nicholas Palermo
and Maurice B. Sussman, the other defendants
in said cause.

That prior to the 22nd day of May, 1925, I
was assisting the defendant herein, Nicholas 40

Exhibit P. 4.

Palermo, in promoting a jitney bus line to operate through certain municipalities in Bergen County, this State.

And that I advanced certain funds to the said Nicholas Palermo in connection with said bus undertaking.

10 That I was present at the time Nicholas Palermo ordered from the plaintiff herein certain jitney bus bodies referred to in the complaint, with the understanding that said bodies would be manufactured and delivered as soon as possible.

20 That many times during the months of May, June and July, I accompanied the defendant, Nicholas Palermo, to the place of business of the plaintiff herein, situated in the City of Newark, to ascertain what progress was being made in the manufacture of said bus bodies and was informed that nothing had been done and ultimately was informed that nothing would be done until a certain cash deposit was paid to the plaintiff herein on account of the purchase price of said bodies.

Such deposit was not made and that I was never informed by the plaintiff or anyone else that said jitney bus bodies had been manufactured until the institution of this suit against me.

30 That I have never refused delivery of said jitney bus bodies and was never notified that they were ready for delivery and neither have I at any time, had a demand made upon me for payment until this suit was started.

And I verily believe that the plaintiff in this cause did not manufacture said bodies for us, as alleged in the complaint by him.

40 That I am not indebted to the plaintiff in the sum of ten thousand five hundred (\$10,500.00) dollars or any other sum whatsoever.

Exhibit P. 4.

That when I was served with the complaint herein, I conferred with the defendant, Nicholas Palermo, who informed me that he would see the plaintiff and advise me in respect thereto.

Afterwards the defendant, Nicholas Palermo, advised me that he had arranged with the plaintiff to settle the entire matter upon the payment of one hundred (\$100.00) dollars. And that it was not necessary for me to give the matter any further consideration. 10

I am now informed that judgment has been entered against me and the other defendants herein for the sum of ten thousand five hundred (\$10,500.00) dollars, together with interest and cost of suit and that a writ of execution has been issued upon said judgment, directed to the Sheriff of the County of Bergen and that said execution is now in said Sheriff's hands for action thereon. 20

And that I did not file an affidavit of merit and answer in this cause because I was informed that the case had been disposed of by settlement.

DOMINICK NIGRE.

Sworn and subscribed to before me this 27th day of February, 1926. 30

VINCENT VOCARINO,
Notary Public of N. J.

Notice and Grounds of Appeal.

NOTICE AND GROUNDS OF APPEAL.

Filed June 15, 1927.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

10

BARNET BURSTEIN,

Plaintiff,

vs

NICHOLAS PALERMO, MAURICE B. SUSSMAN and DOMINICK NIGRE,

Defendants.

Action at Law.

Notice and Grounds of Appeal.

20

To the defendants or Aaron Heller, attorney of defendant Maurice B. Sussman, and Donald Lefferts, attorney of defendants Nicholas Palermo and Dominick Nigre:

TAKE NOTICE that the plaintiff appeals to the New Jersey Court of Errors and Appeals in the last resort in all causes, from the whole of the judgment entered in this cause against the plaintiff, and in favor of the defendants, on the following grounds:

30

1. The Court non-suited the plaintiff, although plaintiff had established a *prima facie* case.

2. The Court found that the plaintiff dealt with the defendants as a *de facto* corporation, although there was no evidence to support this finding.

40

3. The Court decided that plaintiff was estopped from suing the defendants individually, although plaintiff had established their individual liability.

Notice and Grounds of Appeal.

4. Objection to the following question to witness Barnet Burstein was overruled: "When these two gentlemen signed the contract, you accepted their signatures as officers of a corporation about to be formed?"

10

5. Objection to the following question to witness Barnet Burstein was overruled: "Then you did not intend to hold them personally, did you?"

6. Objection to the following question to witness, Barnet Burstein, was overruled: "Did you ever try to dispose of these five bus bodies?"

CORN & SILVERMAN,
Attorneys of Plaintiff.

20

30

40

5 87 OCT. 1. 1927

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

BARNET BURSTEIN, <i>Plaintiff-Appellant,</i> <i>vs.</i> NICHOLAS PALERMO, MAURICE B. SUSSMAN and DOMINICK NIGRE, <i>Defendants-Respondents.</i>	}	<i>On Appeal from Supreme Court, Essex County.</i>
--	---	--

APPELLANT'S BRIEF.

Facts.

This action is brought for damages for breach by defendants of an agreement to pay for five jitney bus bodies at \$2,100 each, manufactured by plaintiff at their request. The answer of Palermo admits the agreement; the answers of Sussman and Nigre deny it. Plaintiff testified the three defendants, in person, gave the order for the manufacture, he built the bodies, notified defendants they were ready for delivery, and was not paid.

A written contract was on May 22, 1925, signed by North Bergen Transit Co., Inc., Nicholas Palermo, Pres., and Dominick Nigre, for the bodies. On May 21, 1925, a certificate of incorporation was filed in the Bergen County Clerk's office for North Bergen Transit Co., Inc., the incorporators being the three defendants. This company filed no papers in the office of the Secretary of State. Defendants' affidavits are in evidence; that of Palermo states he received a subscription of stock from Sussman to the company, that the company was never formed, that he returned to Sussman the money paid as subscription and that he and Nigre ordered the

bodies; that of Sussman confirms Palermo's statement as to the subscription and its return and that the company was never formed; that of Nigre admits his accompanying Palermo to plaintiff's factory.

The Court non-suited plaintiff on the ground that he was dealing with a de facto corporation and could not hold defendants individually.

ARGUMENT.

The grounds of appeal are: (1) Plaintiff established a prima facie case; (2) There was no evidence to support the finding that the company was a de facto corporation; (3) Plaintiff established defendants' individual liability. Appellant abandons the three items of evidence set out in his grounds of appeal (State of Case, p. 45) as the answers were not materially injurious, so that the propositions would be merely academic in scope.

POINT 1. The Court non-suited the plaintiff, although plaintiff had established a prima facie case.

If any evidence was produced at the trial in support of plaintiff's case, it was error to non-suit.

If there is any evidence, no matter how meager, to support a plaintiff's cause of action, the plaintiff has a right to have the case submitted to the jury.

Overend v. Kiernan (Sup. Ct., 1927), 137 Atl. Rep. 881 (not yet officially reported);

Barry v. Borden Farm Products Co. (E. & A. Ct., 1924), 100 N. J. L. 106;

Dellabello v. Central R. Co. (Sup. Ct., 1924), 99 N. J. L. 348;

Weston Co. v. Benecke (E. & A. Ct., 1912), 82 N. J. L. 445.

The complaint (State of Case, pp. 1-2) sets out an agreement of plaintiff with defendants for manufacture by the former of five jitney bus bodies for \$10,500, and their manufacture.

Plaintiff testified the bodies were ordered and purchased by the three defendants (State of Case, p. 7, ll. 28-40). The price was \$2,100 each, or a total of \$10,500 (same, p. 17, l. 2). He manufactured the five bodies (same, p. 9, l. 16) and notified the defendants they were complete (same, p. 23, l. 37, to p. 24, l. 40). Payment was not made (same, p. 11, l. 38). Here we have direct evidence on every item of the complaint.

The basis of the suit is an individual oral undertaking of the three defendants. Defendants seem to seek to show that plaintiff contracted in writing for the same goods with North Bergen Transit Co., Inc., a corporation. Even if their contention is true, plaintiff may still prevail; there is nothing unusual about holding the officers of an embryo corporation liable jointly with the corporation itself on the same debt, especially of the not-insignificant sum of \$10,500. Defendants order the busses orally, then sign an order for the busses as officers of a corporation; there is no evidence of any intention that only the latter order shall be enforceable, but, on the contrary, plaintiff says he intended to hold defendants individually liable (State of Case, p. 14, l. 39; same, p. 16, l. 22).

Here we have assumed the company is entitled to the status of a corporation. But it is not entitled to such status, for the reasons discussed under Point 2.

Coming now to consideration of the individual defendants: Palermo admits he ordered the bodies as alleged in the complaint (State of Case,

p. 36, l. 34); by his answer he admits the allegation of paragraph 2 of the complaint, to the effect that defendants entered into an agreement with plaintiff for the manufacture of the five bodies at \$2,100 each. Sussman is associated with the other two defendants in (what appellant will show to be) the firm, not corporation, of North Bergen Transit Co., Inc. (State of Case, p. 31, l. 16; same, p. 39, l. 39); the admission by Palermo of paragraph 2 of the complaint draws the three defendants into the picture as party to the agreement therein set forth. Nigre signed the order for the bodies with no qualification after his name (State of Case, p. 28, l. 19), so it must be assumed he acted as an individual; Palermo in his affidavit joins Nigre in the ordering of the bodies as alleged in the complaint (same, p. 36, l. 34), and likewise, by admitting the second paragraph of the complaint, puts the three men in one boat. All this is, of course, aside from plaintiff's testimony that defendants held themselves out as partners (State of Case, p. 14, l. 32), that they personally purchased the bodies and they were intended to be held individually liable (same, p. 14, l. 39; same, p. 16, l. 22).

Here the evidence went much further than in meager support of the plaintiff's cause of action. Had defendants declined to put in any testimony, the Court could properly have directed a verdict for plaintiff on the evidence introduced.

Furthermore, the testimony discloses that Sussman and Nigre said to plaintiff, "You can go ahead for a while and we will see you get paid after the work is done" (State of Case, p. 9, l. 38). This presents a jury question as to

whether the undertaking by them was original or collateral.

Whether the form of expression, "I will see that you are paid," is or is not a collateral promise, necessarily depends upon circumstances surrounding the making of such promise. The real test is to whom was credit given. The form of expression is not controlling, if it appears that the promisee acted upon the promise and gave credit to the promisor. * * * The Court very properly put it to the jury to say whether, from what was said and its surrounding circumstances, credit was given to the defendant.

Mulholland v. Jones (E. & A. Ct., 1912), 83 N. J. L. 604.

POINT 2. The Court found the plaintiff dealt with the defendants as a de facto corporation, although there was no evidence to support this finding.

"North Bergen Transit Co., Inc.," was not a de facto corporation. It was merely the trade name of the defendants.

Three things are necessary to establish a de facto corporation: First, a valid law under which such corporation might be incorporated; second, a bona fide attempt to organize under such a law, and third, an actual exercise of corporate powers (*Paragon Distributing Corp. v. Paragon Laboratories*, Chanc. Ct. 1925, 99 N. J. Eq. 224). The first may be conceded, but the second and third are missing.

Where it is shown that there is a charter or a law under which a corporation, with the powers assumed, might be lawfully incorporated, and there is a colorable compliance with the requirements of the charter or law, and a user of the rights claimed under

the charter or law, the existence of a corporation de facto is established.

Stout v. Zulick (E. & A. Ct., 1886), 48 N. J. L. 599.

Where the law authorizes a corporation and there is an effort, in good faith, to organize a corporation under the law, and thereupon, as a result of such effort, corporate functions are assumed and exercised, the organization becomes a corporation de facto.

Vanneman v. Young (E. & A. Ct., 1890), 52 N. J. L. 403.

Defendants executed a certificate of incorporation which was filed in the Bergen County Clerk's office (State of Case, pp. 29-33), but not in the Secretary of State's office (same, p. 33).

There was no bona fide attempt or organize under the law, for although each of the three defendants subscribed for 25 shares of a par value of \$100 each, the subscription of Sussman was returned (State of Case, p. 36, l. 23; same, p. 40, l. 7). The company was "never formed," to quote the words of Palermo and Sussman (same, p. 36, l. 18; same, p. 40, l. 5), so that there never was such a corporation. Absence of bona fides is clearly expressed in those words: "never formed." The Corporation Act requires a corporation to have stock and provides a definite method of decrease of stock—certainly not by return of subscription. Without stretching the imagination their acts could be construed as a fraud, an attempt to escape personal liability by means of the corporation, and at the same time robbing creditors of the proposed corporation of the corporate fund openly declared to have been contributed before it will commence business.

These individuals have carried on business here under their assumed name. They have

made contracts and have contracted debts as "the Belleville Manufacturing Company." They are not a domestic corporation and cannot be sued as such. They are not a foreign corporation, for it is perfectly manifest, upon the face of their proceedings, that their attempted organization under the general law of New York respecting corporations was a fraud upon the law of that state. These individuals, then, must be treated and dealt with by the law as partners trading under the name they have assumed. Although their object, in taking the name they did, was to avoid personal responsibility, the law will not allow them so to escape. A court of equity, as well as a court of law, will treat them as partners.

Hill v. Beach (Chanc. Ct., 1858), 12 N. J. Eq. 31.

There was no actual exercise of corporate powers. Indeed, the corporation could not lawfully commence business, for by the certificate of incorporation it was provided that \$7,500 was to be the capital stock with which the company will commence business and the capital stock had been returned to the subscribers. As the company was "never formed," there was no corporation to function as such.

The mere signing of the certificate of incorporation by the associates did not constitute them a de facto corporation, but that, for the company to have that character, the corporation must go further and do some corporate act, or acts, in attempted execution of the power conferred by the certificate of incorporation.

Frawley v. Tenafly Transp. Co. (E. & A. Ct., 1921), 95 N. J. L. 405.

As to the burden of proof, it would seem that all that plaintiff has to show is that the company filed no certificate of incorporation in the

office of the Secretary of State, for the Corporation Act (Sections 6, 9 and 10) provides that on so filing such certificate the corporation shall come into existence and our laws provide no other way for a corporation to be brought into being. The burden is then on defendants to prove that, although the company did not comply with the formal requirements of the statutes, it is entitled to the status of a de facto corporation, by proof of all the elements necessary to establish such facts.

It is difficult to imagine how the procedure could be otherwise. Plaintiff finds himself with an agreement made by "North Bergen Transit Co., Inc.," presumably a New Jersey corporation, for the busses, the busses made and not paid for; he wishes to sue, has the files of the Secretary of State examined and finds no record of such corporation, no registered agent, no certificate of payment of capital stock. There is no course open to him except to sue the individuals who negotiated for the company. How then can he ascertain if the company is not a de facto corporation when the facts are peculiarly within defendants' knowledge? He may be able to stumble on facts that it is a de facto corporation, but he cannot obtain proof of the negative—lack of bona fide attempt to organize, and failure to exercise corporate powers. In the present case such proof was accidentally furnished by defendants while seeking to reopen a summary judgment, but not in every case is a plaintiff thus fortunate.

Proof of existence of a corporation is by production of the original or certified copy of its filed certificate.

Stone v. The State (Sup. Ct., 1845), 20 N. J. L. 401;

Pirics v. First Russian, etc. Society (Chanc. Ct., 1914), 83 N. J. Eq. 29;
Maaget v. A. Brawer Silk Co. (Sup. Ct., 1920), 95 N. J. L. 72.

POINT 3. The Court decided that plaintiff was estopped from suing the defendants individually, although plaintiff had established their individual liability.

The evidence is, that, in Sussman's presence, Palermo and Nigre introduced him to plaintiff as a partner (State of Case, p. 14, l. 32). Plaintiff considered defendants individually and not as a corporation (same, l. 39). He intended to hold the three defendants, and not the corporation, liable (same, p. 16, l. 22). All this was brought out in cross examination.

The attempted incorporation of the three defendants and their execution of the certificate of incorporation (State of Case, pp. 29-33) discloses their partnership. Not constituting a corporation, de facto or de jure, defendants were partners.

Palermo convicts himself and Nigre as having ordered the bodies as alleged in the complaint (State of Case, p. 36, l. 34), and by his answer admits that the three defendants ordered the bodies (same, p. 3, l. 5). Nigre signed the order in his individual name, without addition, which makes him personally liable thereunder.

Prima facie, a contract on its face appearing to be that of the principal but signed only with the name of the agent without denoting thereon that he signed in the character of agent, is the contract of the agent and not of the principal.

Leadbitter v. Farrow, 5 Maule & Sel. 345;

Bradlee v. Boston Glass Manufactory, 16 Pick. (Mass.) 347;

Barlow v. Congregational Society, 8 Allen (Mass.) 460;

Pomeroy v. Slade, 16 Vt. 220;

Kendall v. Morton, 21 Ind. 205;

Caphart v. Dodd, 66 Ky. 584, 96 Am. Dec. 258;

Hypes v. Griffin, 89 Ill. 134, 31 Am. Rep. 71;

Sherman v. N. Y. Central R. Co., 22 Barb. (N. Y.) 239.

That in a case as the instant one plaintiff is not estopped from suing the defendants individually, because of the signed order, has been definitely settled in this State.

A person who enters into a written agreement which purports to be made with a corporation is not thereby estopped in a case where there is no colorable organization of a de facto corporation, from showing that the corporate name was a name under which the individuals with whom he dealt were trading.

Cottentin v. Meyer (Sup. Ct., 1910), 80 N. J. L. 52.

As "North Bergen Transit Co., Inc.," was not a de facto corporation, the defendants are liable as partners.

The company had some semblance of a corporation, in name, form of organization and assumption of a seal, yet not enough to give it a de facto corporate existence. * * * The organization is entirely outside of the act, and has no existence as a corporation, real or de facto * * * If an agent contracts, although as agent, without a legally responsible principal to whom resort may be had, the law presumes that he contracts on his personal responsibility, and intends to bind himself, and so holds him, for in no other way could the contract have

any validity. * * * The liability is that of partners.

Booth v. Wonderly (Sup. Ct., 1873), 36 N. J. L. 250.

The business conducted by the members of the organization was so entirely aside from the power conferred upon the grange by the statute under which the incorporation was effected that the business must be regarded as a partnership and not corporate. * * *

Henry v. Simanton (Chanc. Ct., 1903), 64 N. J. Eq. 592, reversed on other grounds (E. & A. Ct., 1905), 67 N. J. Eq. 606.

It must not be inferred that a grange incorporated under the act of 1876 is authorized to carry on a manufacturing or mercantile business. If not so authorized, then the borrowing of money for such a business would be ultra vires; and in such case those persons who assume to act for the grange would be personally liable for any engagement effected by them, and not enforceable against it.

Vliet v. Simonton (Sup. Ct., 1899), 63 N. J. L. 457.

At any rate, whether the liability in this case was as a corporation or as partners is a jury question (*Cottentin v. Meyer, supra*), and it was error for the Trial Court to decide such matter.

For the foregoing reasons appellant respectfully contends that the judgment under review should be reversed.

CORN & SILVERMAN,
Attorneys and Counsel of Appellant.

57 OCT. 1927

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

BARNET BURSTEIN, <i>Plaintiff-Appellant,</i>	} <i>On Appeal from Supreme Court, Essex County.</i>
<i>vs.</i>	
NICHOLAS PALERMO, MAURICE B. SUSSMAN and DOMINICK NIGRE, <i>Defendants-Respondents.</i>	

BRIEF OF DEFENDANT-RESPONDENT, MAURICE B. SUSSMAN.

This action is brought for damages for an alleged breach of contract, which contract was signed by an alleged corporation and was signed by the defendant Nicholas Palermo as president, and Dominick Nigre, no official designation was provided for the name of Nigre. The complainant alleges that the defendants herein entered into a contract with the plaintiff-appellant; wherein and whereby the defendants agreed to pay to the plaintiff the sum of \$10,500 for the manufacture by the plaintiff of five jitney buses. However, at the trial the plaintiff relied upon a certain contract which we marked "Exhibit P. 1," and which contract purported to be signed by the North Bergen Transit Co., Inc. Nowhere on the contract does the name of the defendant Sussman appear. The plaintiff intends to rely upon the fact that the alleged corporation that signed this contract was not in fact a corporation, and therefore seeks to hold the defendant Sussman upon the ground that he was one of the incorporators of the alleged corporation.

Counsel for the defendant, Maurice B. Sussman, moved for non-suit upon the ground that

the corporation as proven by the evidence was a *de facto* corporation, and that the plaintiff relied upon the corporation and dealt with the defendants as a corporation and he therefore estopped from suing them individually.

ARGUMENT.

POINT 1. The plaintiff had failed to prove a prima facie case and was therefore properly nonsuited.

Plaintiff testified that the bodies in question were ordered by Palermo, Nigre and Sussman, who represented the North Bergen Transit Co., Inc. (State of Case, p. 12, ll. 29-34).

Plaintiff further stated that he did not ask Mr. Sussman to sign the contract because he, the plaintiff, thought that it was not necessary (State of Case, p. 15, ll. 10-14).

He further states that he did not intend to hold the members of the company individually, and as a matter of fact, the corporation was sufficient for him (State of Case, p. 15, ll. 28-35).

Corroborating the statement by asserting that he was contracting with the corporation, plaintiff in his brief argues that the suit is based on the undertaking of three defendants, although in the opening of the case counsel asserted that the suit was predicated upon a contract which was signed by the North Bergen Transit Co., Inc. (State of Case, pp. 5-6).

Under the plaintiff's own testimony as hereinbefore outlined, the plaintiff did not establish a case sufficient to raise a jury question.

POINT 2. The Court properly found that the plaintiff dealt with the defendants as a *de facto* corporation. In order to be a *de facto* corporation, three things must appear;

1st. A valid law under which such corporation might be incorporated;

2nd. Bona fide attempt to organize under such a law, and

3rd. An exercise of corporate powers.

Plaintiff concedes that there was a valid law under which the North Bergen Transit Co., Inc. was organized, so that the only question remaining is as to whether the second and third requisites appear from the testimony.

Where three individuals signed a certificate of incorporation two days before the happening of an accident for which the company was sued for damages, which certificate was recorded in the County Clerk's office the day after the accident and filed in the Secretary of State's office four days after the accident, and they did certain acts in attempted execution of the powers conferred by the certificate of the incorporation, a jury was justified in finding that the company was at the time of the accident, a corporation *de facto* and therefore liable.

Tauley v. Tenafty Transportation Co., 113 Atlantic 242.

Defendants executed a certificate of incorporation which was filed in the Bergen County Clerk's office (State of Case, pp. 29-31), by reason of which said defendants expressed a bona fide attempt to organize under a valid law. The defendants actually exercised corporate powers by signing the contract in the corporation name, which contract is in evidence as "Exhibit P. 1."

The defendants, having filed a certificate of incorporation with the County Clerk, having entered into a contract and it being admitted that there being a valid law under which they were incorporated, is a *de facto* corporation and therefore the corporation and not the members individually are liable.

Vannemann v. Young, 52 New Jersey Law 403;

Stout v. Zulick, 48 Law 599.

POINT 3. The Court properly decided that the plaintiff was estopped from suing the defendant, **Maurice B. Sussman**, individually, since there was no evidence establishing any individual liability on the part of the defendant, **Maurice B. Sussman**.

Plaintiff arguing point three of his brief, argues upon the theory that the corporation was a *de facto* one, and therefore the Court erred in estopping the plaintiff from suing the defendant, **Maurice B. Sussman**.

As argued under Point 1 and Point 2 of our brief, the defendants organized a *de facto* corporation, and if this is so, the Court was unquestionably correct in ruling that only the corporation would be responsible and not its individual incorporators.

For the foregoing reasons, the defendant-respondent, **Maurice B. Sussman**, contends that the judgment under review should be affirmed.

AARON HELLER,
Attorney of Defendant-Respondent,
Maurice B. Sussman.

JOSEPH A. FEDER,
Of Counsel.

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