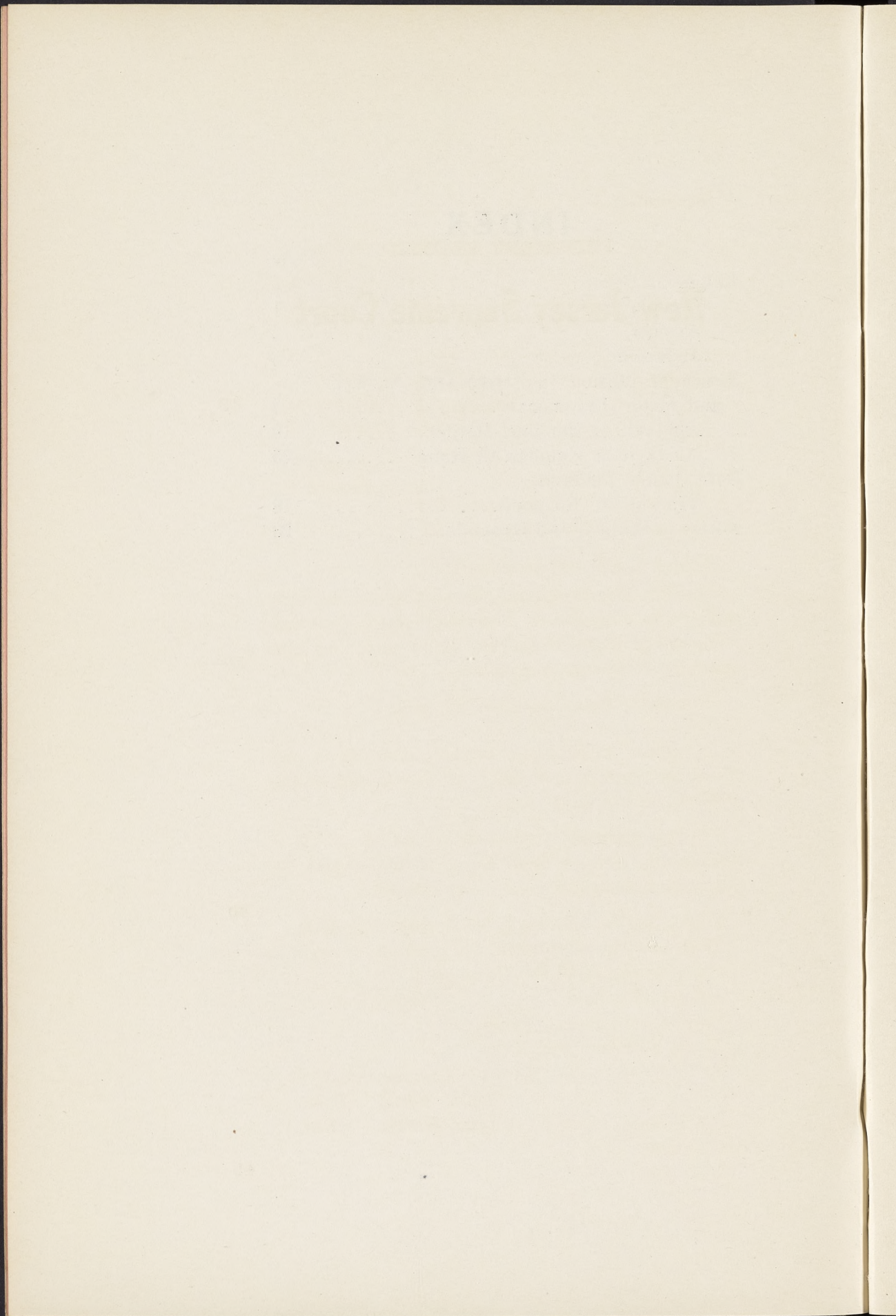


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Complaint.

JUDGMENT RECORD.

New Jersey Supreme Court

EMANUEL BERGER,	}	<i>Plaintiff,</i>	<i>Judgment</i>	10
<i>vs.</i>		<i>Defendant.</i>	<i>Record.</i>	
VINCENT W. ROSPOND,			<i>Summary</i>	
			<i>Judgment.</i>	

Kanter & Kanter, attorneys.

Vincent W. Rospond, the defendant in this cause was summoned to answer unto Emanuel Berger, the plaintiff therein in an action at law upon the following complaint: 20

(Summons issued October 22, 1930.)

The plaintiff, Emanuel Berger, residing in the Town of Irvington, County of Essex and State of New Jersey, says that:

1. The plaintiff is the holder and owner of a promissory note, a true copy of which and of the endorsements thereon, is as follows: 30

\$1500. X/100 Newark, N. J. Aug. 9th, 1928
Two months after date we promise to pay
to the order of V. W. Rospond & Co.
Fifteen Hundred X/100 Dollars
Payable at Liberty Trust Co.
Value received with Int.

Mapes Construction Co.
Louis Kroll Pres.
Louis Kotler Sec.

No. Due

Answer.

Endorsements

Louis Kross

Louis Kotler

V. W. Rospond & Co.

Vincent W. Rospond Pres.

Vincent W. Rospond

10

2. At the time and place when said note was payable, said note was presented for payment but payment thereof was refused.

3. Due notice of dishonor was mailed to the endorsers of said note.

4. No part of said note has been paid.

20

Judgment will be claimed for the sum of fifteen hundred dollars (\$1500.00) together with interest thereon from August 9, 1928, with costs of suit to be taxed.

KANTER & KANTER,

Attorneys of Plaintiff.

(Filed Oct. 30, 1930.)

30

The defendant, Vincent W. Rospond, residing in the City of Newark, County of Essex and State of New Jersey, answering the complaint herein, says that:

1. Defendant has no knowledge or information sufficient to form a belief as to paragraphs 1, 2, 3 and 4 of the complaint.

FIRST SEPARATE DEFENSE.

40

1. On or about August 10, 1928, there was due to V. W. Rospond & Co., from Mapes Construction Co. a sum in excess of \$4,500 on account of the installation of a heating system in a building

Answer.

on the northwest corner of Mapes and Elizabeth avenue, in the City of Newark, New Jersey, according to the terms of a contract existing between said V. W. Rospond & Co. and Mapes Construction Co., V. W. Rospond & Co., refused to complete said heating system unless it received a cash payment of \$1,500.00, and unless the balance were secured. Plaintiff, and one William D. Decker, were interested in said building and advanced money and materials from time to time toward the completion of the same. Said William D. Decker offered to pay V. W. Rospond & Co. \$1,500 in cash to resume work on said building and defendant accompanied William D. Decker to the latter's bank to obtain the money. Said William D. Decker handed to defendant what he, said Decker, pretended was his check payable to defendant, and required defendant to place his endorsement thereon so that said Decker might cash it. The said instrument was, in fact, the note sued on herein. Said Decker, by his fraudulent misrepresentation as aforesaid, induced defendant to endorse said note. Thereupon, said Decker paid \$1,500 to defendant.

2. In return for said payment in cash by William D. Decker defendant executed and delivered to said William D. Decker a memorandum of agreement of which the following is a true copy:

"In consideration of receiving Fifteen Hundred Dollars we do hereby agree to immediately start to complete all the work specified in contract between Mapes Construction Co. and ourselves and agree to have all work completed on or before September 1, 1928—except the pump which is to be completed by September 15, 1928.

V. W. Rospond & Co.
Vincent W. Rospond Pres.

Answer.

I do hereby guarantee the performance of this agreement.

Vincent W. Rospond.

August 10, 1928.”

10 3. Neither V. W. Rospond & Co. nor defendant accepted or received said note from Mapes Construction Co. nor did V. W. Rospond & Co. or defendant negotiate said note to plaintiff or to any person whatsoever.

4. Plaintiff did not pay any value or consideration to or on behalf of either V. W. Rospond & Co. or the defendant.

SECOND SEPARATE DEFENSE.

20 1. Defendant repeats paragraphs 1, 2 and 3 of the First Separate Defense.

2. Plaintiff did not become the holder of said note through negotiation either by V. W. Rospond & Co. or defendant; plaintiff did not become the holder of said note in good faith. Plaintiff became the holder of said note with notice of the fact that defendant had refused to continue work on his contract with Mapes Construction Co., and that said Decker had agreed to pay defendant \$1,500 to proceed; notwithstanding such notice, plaintiff took said note without making inquiry of the alleged endorsers, V. W. Rospond & Co. and defendant.

30

THIRD SEPARATE DEFENSE.

1. Plaintiff alleges title to said note derived immediately from V. W. Rospond & Co. and the defendant.

2. Plaintiff paid no value or consideration to or on behalf of either V. W. Rospond & Co. or defendant.

40

Judgment.

FOURTH SEPARATE DEFENSE.

1. Defendant did not endorse said note and the signature thereon is not the genuine signature of the defendant.

ROSPOND & ROSPOND,
Attorneys for Defendant.

10

(Filed November 19, 1930.)

This matter having been, on December 13, 1930, opened to the Court by Messrs. Kanter & Kanter, attorneys of the above named plaintiff, on due notice to, and in the presence of, Messrs. Rospond & Rospond, attorneys of the above named defendant on motion of said plaintiff's attorneys for an order to strike out the answer of the aforesaid defendant and for the entry of summary judgment in favor of the plaintiff and against the defendant; and the Court having read and considered the affidavits in support of said motion and the affidavit in opposition thereto, and the Court having also heard and considered the arguments of respective counsel, and now being of opinion that said answer should be stricken out and summary judgment entered in favor of the plaintiff and against the defendant,

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30

It is thereupon, on this Fifteenth day of December, A. D. 1930, ORDERED that the answer of the defendant, Vincent W. Rospond, heretofore filed in this cause, be, and the same hereby is, stricken out.

It is further ordered that judgment final be, and the same hereby is, entered in favor of the plaintiff, Emanuel Berger, against the defendant, Vincent W. Rospond, for the sum of seventeen

40

Judgment.

hundred eleven dollars and fifty cents (\$1711.50) damages, besides costs of suit to be taxed.

Let this rule be entered in the minutes of the Court.

WM. S. GUMMERE,
C. J. S. C.

10

Rule actually entered December 16, 1930.

On motion of

KANTER & KANTER,
Attorneys of Plaintiff.

Afterwards upon proceedings duly had according to the statute, the Court ordered the said answer stricken out.

20

Whereupon it is adjudged that the plaintiff Emanuel Berger do recover of the said defendant Vincent W. Rospond the sum of \$1,711.50 one thousand seven hundred eleven 53.78 dollars and fifty cents damages together with his costs which have been \$1,765.28 taxed at the sum of fifty-three dollars and seventy-eight cents making in the whole the sum of one thousand seven hundred 30 sixty-five dollars and twenty-eight cents.

Judgment signed and entered December 16, 1930.

WM. S. GUMMERE,
C. J.

40

Certificate of Clerk.

I, FRED L. BLOODGOOD, 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 my hand and the seal of said Court at Trenton, this eighth day of January, A. D. nineteen hundred and thirty-one. 10

(SEAL) FRED L. BLOODGOOD, Clerk.

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30

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**NOTICE OF MOTION TO STRIKE OUT
ANSWER AND ENTER JUDGMENT.**

Filed December 16, 1930.

NEW JERSEY SUPREME COURT.

10

ESSEX CIRCUIT.

EMANUEL BERGER,

Plaintiff,

*Action
at Law.*

vs.

VINCENT W. ROSPOND,

Defendant.

*Notice
of Motion.*

20

To the defendant in the above-entitled action,
or to whom it may concern:

30

PLEASE TAKE NOTICE that on Saturday, December 6, 1930, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the Essex County Court House, Newark, N. J., before the New Jersey Supreme Court, the Hon. William S. Gummere, Chief Justice thereof, presiding thereat, or before such other Justice of said court as shall then and there preside, we shall move to strike out the answer of the defendant, first on the ground that the same is frivolous, and second, on the ground that the same is sham, using in support of said last mentioned ground the affidavits hereunto annexed; at the same time and place, if the said motion be granted, we shall move for summary judgment in favor of the plaintiff and against the defendant; and at the same time and place, if any or either

40

Notice of Motion to Strike Out Answer, etc.

such order as may be just and appropriate upon the denial of such motion.

PLEASE TAKE FURTHER NOTICE that at said time and place, in the alternative, we shall also make the following motions:

1. For an order striking out paragraph 1 of defendant's answer on the ground that the same is frivolous. 10
2. For an order striking out the "first separate defense" of defendant's answer on the ground that the same is frivolous.
3. For an order striking out the "second separate defense" of defendant's answer on the ground that the same is frivolous.
4. For an order striking out the "third separate defense" of defendant's answer on the ground that the same is frivolous. 20
5. For an order striking out the "fourth separate defense" of defendant's answer on the ground that the same is sham, using in support of said motion the affidavits hereunto annexed.
6. For such further order as may be just and proper upon the disposition of the aforesaid motions. 30

Yours, etc.,

KANTER & KANTER,
Attorneys of Plaintiff.

Newark, N. J., November 29, 1930.

Affidavit of Emanuel Berger.

**AFFIDAVITS ATTACHED TO NOTICE OF
MOTION TO STRIKE OUT AND ENTER
JUDGMENT.**

NEW JERSEY SUPREME COURT.

ESSEX CIRCUIT.

10

EMANUEL BERGER,

Plaintiff,

vs.

*Action
at Law.*

VINCENT W. ROSPOND,

Defendant.

Affidavit.

STATE OF NEW JERSEY, }
20 COUNTY OF ESSEX. } ss.

EMANUEL BERGER, of full age, being duly sworn,
according to law, on his oath deposes and says:

1. I am the plaintiff in the above-entitled
cause. In paragraph 1 of the complaint, it is al-
leged (although the defendant, in paragraph 1 of
his answer, states that he has no knowledge or in-
formation sufficient to form a belief as to such al-
legation), and I now repeat that it is a fact that
30 I am the holder and owner of a promissory note,
a true copy of which and of the endorsements
thereon, is as follows:

Affidavit of Emanuel Berger.

\$1500. X/100 Newark, N. J. Aug. 9th, 1928

Two months after date we promise to pay to the order of V. W. Rospond & Co.

Fifteen HundredX/100 Dollars

Payable at Liberty Trust Co.

Value received with Int.

Mapes Construction Co. 10

Louis Kroll Pres.

Louis Kotler Sec.

No. Due

Endorsements

Louis Kroll

Louis Kotler

V. W. Rospond & Co.

Vincent W. Rospond Pres.

Vincent W. Rospond

20

2. In verification of the statements made in paragraph 2 of the complaint, I submit herewith the affidavit of Kenneth C. Hand.

3. In verification of the statements made in paragraph 3 of the complaint, I submit herewith the affidavit of Kenneth C. Hand. In Mr. Hand's affidavit, he states that, after the aforesaid note was presented, he mailed notices of the presentment, refusal to pay and protest. I received such notices, at Irvington, N. J., on Wednesday, October 10, 1928, at about three o'clock in the afternoon. Such notices were in the following form:

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Affidavit of Emanuel Berger.

KENNETH C. HAND
 NOTARY PUBLIC
 Counsellor at Law
 701 Prudential Building

Newark, N. J., October 9, 1928

10

You will please take notice that a NOTE made by Mapes Construction Co. for \$1500.00 Int. \$15.00 dated Newark, N. J., August 9, 1928 payable 2 months after date made or endorsed by you, was, after due presentment, demand of payment, and refusal to pay the same, PROTESTED this evening for non-payment, and that the holder looks to you for the payment thereof.

Your obedient servant,

20

KENNETH C. HAND,
 Notary Public.

For The National Newark and Essex Banking Company of Newark.

30

4. I mailed one of the notices (quoted in paragraph 3 above) to V. W. Rospond, in an envelope with postage fully prepaid thereon, addressed to him, 259 New York avenue, Newark, N. J., because that was the defendant's, Vincent W. Rospond's, place of business at that time. Said notice was mailed by depositing same in a post office box, that is, a letter-box, belonging to, and under the control of, the post office department of the United States, in Irvington, N. J., on Thursday, October 11, 1928, at about nine o'clock in the morning.

40

5. No part of said note has been paid. The amount now due me thereon is the sum of \$1,500.00 with interest from August 9, 1928, which interest, calculated to December 6, 1930, amounts to the sum of \$209.25; the daily interest there-

Affidavit of Emanuel Berger.

after is 25c per day. I believe that the defendant has no defense to this action.

6. I am informed, and truly believe, that the defendant, in his answer in this cause, in various ways sets up two defenses, one thereof being that I am not the holder in due course and paid no value for the note, and the other, that his, defendant's, signature is not the genuine signature of the defendant. Because of these statements in the defendant's answer, I am giving below a brief synopsis of how the note in suit arose and the consideration for the same.

10

7. V. W. Rospond & Co. was the steam-heating contractor engaged in the completion of that kind of work in the building of Mapes Construction Co., a corporation, at Elizabeth avenue and Mapes avenue, Newark, N. J. In the early part of August, 1928, the owner wanted to give V. W. Rospond & Co. \$1,500.00, and asked me to advance that sum. I refused to do so unless I could get the note, not only of the Mapes Construction Co. and its officers, but also of the aforesaid V. W. Rospond & Co. and the endorsement of Vincent W. Rospond, its president. Thereupon the note was made out in form as appearing, on the face thereof, as given in paragraph 1 hereof. Subsequently, it was brought to me in the same form, but with the addition of all the endorsements appearing thereon, as given in paragraph 1 hereof. I thereupon advanced the \$1,500.00, and on August 10, 1928, Vincent W. Rospond obtained the money, that is, \$1,500.00, at the National Newark & Essex Banking Company and that same day or shortly thereafter turned over the money to V. W. Rospond & Co.

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30

40

Affidavit of Emanuel Berger.

8. I held the note until shortly before its due date, and then deposited it in the National Newark & Essex Banking Co. for collection.

10 9. The signature of Vincent W. Rospond appearing on the note in suit in this cause is his personal signature, is genuine, and is exactly like another signature of Vincent W. Rospond appearing upon the check resulting in his getting the \$1,500.00 above mentioned.

EMANUEL BERGER.

Sworn and subscribed to before me,
this 29th day of November, A. D.
1930.

20 BERTHA WOOD,
A Notary Public of New Jersey.

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40

Affidavit of Kenneth C. Hand.

NEW JERSEY SUPREME COURT.

ESSEX CIRCUIT.

EMANUEL BERGER, <div style="text-align: center;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> VINCENT W. ROSPOND, <div style="text-align: center;"><i>Defendant.</i></div>	}	<i>Action at Law.</i> <i>Affidavit.</i>	10
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STATE OF NEW JERSEY, }
COUNTY OF UNION. } ss.

KENNETH C. HAND, of full age, being duly sworn, according to law, on his oath deposes and says:

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1. On October 9, 1928, I was a notary public of the State of New Jersey, acting principally for the National Newark & Essex Banking Company of Newark, N. J. On October 9, 1928, said Natinal Newark & Essex Banking Company of Newark, N. J., held a note of which the following is a true copy:

\$1500. X/100 Newark, N. J. Aug. 9th, 1928

Two months after date we promise to pay to the order of V. W. Rospond & Co.

30

Fifteen HundredX/100 DOLLARS

Payable at Liberty Trust Co.

Value received with Int.

Mapes Construction Co.

Louis Kroll Pres.

Louis Kotler Sec.

No. Due

40

Affidavit of Kenneth C. Hand.

Endorsements

Louis Kroll

Louis Kotler

V. W. Rospond & Co.

Vincent W. Rospond Pres.

Vincent W. Rospond

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2. On August 9, 1928, at some time during the afternoon, but during banking hours and before the bank had closed, in behalf of, and at the request of, said National Newark & Essex Banking Company of Newark, N. J., I did present the note (mentioned in paragraph 1 hereof) at the Liberty Trust Company, Newark, N. J., to a teller thereof, and of him demanded payment thereof. Said teller refused to pay the same, saying that the maker was not present and had not there left funds for that purpose.

20

3. Thereupon I protested said note for non-payment.

4. On the same day, that is, on October 9, 1928, I mailed the notice of dishonor and at least four additional copies thereof to the last endorser thereof, Emanuel Berger, he having been the person who had deposited said note in the National Newark & Essex Banking Company of Newark, N. J., for collection. Each of said notices of dishonor was in the following form:

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Affidavit of Kenneth C. Hand.

KENNETH C. HAND
NOTARY PUBLIC
Counsellor At Law
701 Prudential Building

Newark, N. J., October 9, 1928

You will please take notice that a NOTE made by Mapes Construction Co. for \$1500.00 Int. \$15.00 dated Newark, N. J., August 9, 1928 payable 2 months after date made or endorsed by you, was, after due presentment, demand of payment, and refusal to pay the same, PROTESTED this evening for non-payment, and that the holder looks to you for the payment thereof. 10

Your obedient servant,

KENNETH C. HAND,
Notary Public. 20

For The National Newark and Essex Banking Company of Newark.

KENNETH C. HAND.

Sworn and subscribed to before me,
this 28th day of November, A. D.
1930.

PETER L. HUGHES, JR., 30
An Attorney at Law of N. J.

Affidavit of Vincent W. Rospond.

Emanuel Berger. I never had occasion to borrow money from him, nor to lend my signature as security for Mapes Construction Co. on his behalf. Nor did I negotiate, or cause to be negotiated or delivered to the plaintiff any note whatsoever bearing my signature as maker or endorser in any form whatsoever.

10

3. Mapes Construction Co. had contracted with V. W. Rospond & Co. for the installation of a steam heating system in a building on the northwest corner of Mapes and Elizabeth avenues, Newark, New Jersey. Mapes Construction Co. was in arrears over \$4,500, and V. W. Rospond & Co. refused to complete said work unless it was paid \$1,500 on account, and unless the balance were secured. One William D. Decker, president of Decker Building Material Co., a creditor of Mapes Construction Co. in the sum of over \$38,000, agreed to pay this sum, and to *guaranty* the balance. I accepted his offer, and signed and delivered to said William D. Decker the following memorandum:

20

“In consideration of receiving Fifteen Hundred Dollars we do hereby agree to immediately start to complete all the work specified in contract between Mapes Construction Co. and ourselves and agree to have all work completed on or before September 1, 1928—except the pump which is to be completed by September 15, 1928.

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V. W. Rospond & Co.
Vincent W. Rospond, Pres.

I do hereby guarantee the performance of this agreement.

Vincent W. Rospond
August 10, 1928.”

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Affidavit of Vincent W. Rospond.

In return said William D. Decker executed the following memorandum:

10 "I the undersigned do hereby guarantee the collection of a payment of \$4000. specified in the contract made between Mapes Construction Co. of Newark, N. J. and V. W. Rospond & Co. of Newark, N. J. relating to the heating work for the building on the north west corner of Elizabeth Ave. and Mapes Ave. Newark, N. J.

Wm. D. Decker"

Aug. 9, 1928

witnessed by

V. W. Rospond

20 and paid on behalf of Mapes Construction Co. the sum of \$1,500 under the following circumstances: I asked Mr. Decker for his check to be cashed at his bank. He insisted upon accompanying me to his bank, the National Newark and Essex Banking Co., to identify me so that the check could be cashed. I never had this check in my possession, said William D. Decker holding it until we reached the bank. There he handed to me what he represented was his check to the order of V. W. Rospond & Co. and asked me to
30 endorse it so that it could be cashed. The instrument was thrust before me face down, and I signed it, believing it to be a check, as he represented. Said William D. Decker immediately took it up and turned over to the teller what I believed to be the instrument which I had endorsed. I received the sum of \$1,500, and thought no more of the transaction. This was the only occasion on which I could have placed my signature on any note involving the sum of \$1,500.00.

Affidavit of Vincent W. Rospond.

4. I never transacted any business with the plaintiff, Emanuel Berger, nor did I negotiate, or cause to be negotiated to the plaintiff said note, as is alleged in the complaint and the bill of particulars thereto, in which the plaintiff alleges that said note was negotiated to the plaintiff by me. This allegation is false.

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5. The statements sworn to by the plaintiff in paragraph 7 of his affidavit herein are false. I deny that I asked the plaintiff to advance me the sum of \$1,500. I deny that the sum of \$1,500 was advanced to me by the plaintiff, or by any one on the plaintiff's behalf. I deny that I negotiated or delivered said note to the plaintiff, or that I caused it to be negotiated or delivered to any person on the plaintiff's behalf.

6. My signature was obtained to said note through the fraudulent representations and manipulations of William D. Decker. I aver that the plaintiff came by this note through said William D. Decker, with full knowledge of the manner in which it was obtained. I aver that the plaintiff did not become the holder of this note in good faith, but with knowledge of the fact that Mapes Construction Co. was indebted to me; that I refused to accept its notes in payment; that I refused to complete the work unless said payments were secured; and that I refused to lend my signature for the accommodation of Mapes Construction Co. I aver that the plaintiff never made inquiry before he become the holder of the said note.

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7. Plaintiff, Emanuel Berger, was at that time, and still is, in the employ of the Decker Building Material Co., of which said William D. Decker is president. I honestly believe that he

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Affidavit of Vincent W. Rospond.

was and still is a "dummy" for said William D. Decker, and I believe that my counsel can establish that fact by examination of the plaintiff at trial, and by extrinsic circumstances which will justify the finding by the jury that the plaintiff is a "dummy" for said William D. Decker.

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VINCENT W. ROSPOND.

Subscribed and sworn to before me,
this 4th day of December, 1930.

JOHN J. CLANCY,
Master in Chancery of New Jersey.

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NOTICE OF APPEAL AND GROUNDS.

Filed December 19, 1930.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

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<p>EMANUEL BERGER, vs. VINCENT W. ROSPOND,</p>	<p style="text-align: center;"><i>Plaintiff,</i></p> <p style="text-align: center;"><i>Defendant.</i></p>	}	<p><i>Action at Law.</i></p> <p><i>Notice of Appeal and Grounds.</i></p>
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To Kanter & Kanter, attorneys for the plaintiff.

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SIRS:

TAKE NOTICE that the defendant appeals to the Court of Errors and Appeals in the last resort in all cases in New Jersey from the order striking out answer and entering summary judgment entered in this cause on the following grounds:

1. Because the Supreme Court erred in granting the motion to plaintiff to strike out defendant's answer and separate defenses and entering summary judgment against defendant.

30

(a) The Court should have denied the motion of plaintiff to strike out defendant's answer and separate defenses, because said answer and separate defenses set forth a legal defense to the plaintiff's cause of action.

(b) The counter affidavit filed in this cause by the defendant presented questions of fact as to

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Notice of Appeal and Grounds.

his defense, which should have been submitted to a jury.

ROSPOND & ROSPOND,
Attorneys for Defendant.

Dated December 17, 1930.

10

Service of a copy of the within Notice and Grounds acknowledged this 17th day of December, 1930.

KANTER & KANTER,
Attorneys for Plaintiff.

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30

40

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

New Jersey Court of Errors and Appeals

EMANUEL BERGER,
Plaintiff-Respondent,

and

VINCENT W. ROSPOND,
Defendant-Appellant.

*Action at
Law.*

*On Appeal
from
Supreme
Court, Essex
County.*

GUMMERE,
C. J.

*Defendant's
Appeal.*

APPELLANT'S BRIEF.

This action was instituted by Emanuel Berger, holder of a note purported to have been endorsed by Vincent W. Rospond directly to the plaintiff, as alleged in the bill of particulars furnished to defendant by plaintiff.

Statement of the Case.

V. W. Rospond & Co., of which the defendant was president, contracted to install a heating system in a certain apartment house owned by Mapes Construction Co. One William D. Decker had furnished building material for the erection of said building in the sum of over \$38,000.00. Mapes Construction Co. was in arrears in payments due under said heating contract, and V. W. Rospond & Co. suspended work on the same. On August 10, 1928, William D. Decker induced defendant to resume work under said contract by guaranteeing \$4,000 of payments due under the contract, and by making a payment of \$1,500

in cash to V. W. Rospond & Co. This sum of \$1,500 was paid by William D. Decker at the National Newark & Essex Banking Co., in Newark, N. J. In October, 1930, two years after this payment of \$1,500, plaintiff commenced suit on the note herein. This was the first time defendant had notice that he had executed such note. The defendant in his first defense (pp. 2-3-4) alleges that his endorsement to the note was obtained on the occasion of the aforesaid payment by the fraudulent misrepresentation of William D. Decker that an instrument which he thrust before the defendant was his check which required defendant's endorsement to be cashed, whereas it was in fact the note sued on herein. The defendant denied that he or V. W. Rospond & Co., the payee of said note, had negotiated it to the plaintiff. In paragraph 4 of the first defense (p. 4) the defendant denied that the plaintiff paid any value to or on the behalf of either V. W. Rospond & Co. or the defendant for said note.

The second defense (p. 4) repeats the first three paragraphs of the first defense, and then charges bad faith on the part of the plaintiff, the holder of note, because of his knowledge of the fact that Mapes Construction Co.'s notes were not acceptable because of its impending insolvency. The third defense (p. 4) was pleaded in order to set out in the record a direct negotiation from V. W. Rospond & Co. and defendant to plaintiff, which is to be inferred in the complaint only from the form of endorsements on the note. The plaintiff in responses to a demand for a bill of particulars claims to hold the note through direct negotiation from defendant. The fourth defense (p. 4) was pleaded by defendant because he never had occasion to endorse any of Mapes

Construction Co.'s notes to the plaintiff. It was abandoned at the argument of motion to strike out the answer.

The defenses were held to be sufficient in law, but were stricken out because the counter-affidavit contained hearsay matter and was insufficient to entitle the defendant to defend. Defendant relies upon the following specifications of points to support his contention that he is entitled to a trial by jury:

POINT I. The affidavits of the plaintiff in support of the motion are insufficient to authorize the striking out of defendant's answer and the entry of summary judgment.

POINT II. The counter affidavit of defendant raised issues of the fact which entitle defendant to a trial by jury.

POINT I.

The affidavits of the plaintiff in support of the motion are insufficient to authorize the striking out of defendant's answer and the entry of summary judgment.

The affidavit of the plaintiff does not contain explicit and positive allegations of the negotiation of the note to the plaintiff. The sworn statements of the plaintiff are evasive and indirect; they are couched in the passive mood and leave a gap between plaintiff and defendant which renders the plaintiff's cause of action incomplete.

In paragraph 7 of his affidavit (p. 13) plaintiff alleges, "subsequently it (note) was brought to me in the same form." Plaintiff astutely avoids designating the person who brought said note to the plaintiff. In the same paragraph plaintiff continues: "I thereupon advanced the

\$1,500 and on August 10, 1928, Vincent W. Rospond obtained the money at the National Newark and Essex Banking Co." It will be observed that the plaintiff does not make a direct statement that he paid the money to Vincent W. Rospond. The money was obtained, the plaintiff alleges, but he does not state from whom the money actually was obtained.

These affidavits, it is submitted, do not wholly set up a cause of action that would deny the defendant the right to require plaintiff to prove his case before a jury. There is a gap between defendant and plaintiff, which is covered by an intermediary, who perpetrated the fraud which is the basis of the defense.

Plaintiff, in his bill of particulars admits that the V. W. Rospond & Co. and defendant directly **negotiated the note to him**. Defendant in his answer alleges that the only party to the transaction was one William D. Decker. It follows then, that since plaintiff claims title by immediate endorsement from V. W. Rospond & Co. and defendant, the intermediary must have been plaintiff's agent. In that posture of the case any fraud perpetrated by the intermediary is imputed to the plaintiff and can be asserted against him.

Kennedy v. McKay, 43 N. J. L. 288;

Reitman v. Fiorillo, 76 N. J. L. 815.

There is no denial in the supporting affidavit relating to this salient feature of the transaction. The plaintiff, in his affidavit, should either specifically rebut the fraud alleged in the answer, or state that he is a holder in due course. The

burden is on the plaintiff, and he has not sustained it in his affidavits.

Sec. 59, Negotiable Instruments Act,
Pamph. L. 1902, p. 594;

*Louis DeJonge & Co. v. Woodport Hotel &
Land Co.*, 77 N. J. L. 233.

POINT II.

The counter affidavit of defendant raised issues of fact which entitle defendant to a trial by jury.

The defendant's counter affidavit contains a categorical denial of the sworn statements in plaintiff's affidavit in support of the motion, raising material issues of fact which entitle defendant to a trial by jury. Contrast paragraph 7 of plaintiff's affidavit (p. 13) with paragraph 2 of defendant's counter affidavit (p. 18). Defendant denies that he transacted any business with the plaintiff, or a representative of plaintiff in any capacity whatsoever. He denies that he or V. W. Rospond & Co. borrowed money from the plaintiff. He denies that he lent his signature as security for Mapes Construction Co. to or on behalf of the defendant. He denies that he negotiated or caused to be negotiated to plaintiff any note bearing his signature either as maker or endorser. These statements are not hearsay, but are predicated on defendant's personal knowledge and experience.

In paragraph 3 of defendant's affidavit, (p. 19) defendant sets out in detail the manner in which the fraud was perpetrated by the intermediary, William D. Decker. The plaintiff has failed to rebut these statements. As in the previous paragraph, defendant is making statements from his own knowledge and experience.

In paragraph 6 of defendant's affidavit (p. 21) defendant alleges that plaintiff is a "dummy" for William D. Decker. He states from his own knowledge, that plaintiff is and has been since August 10, 1928, the date of said note, an employee of Decker Building Material Co., of which said William D. Decker is president. A relationship of "dummy" cannot be proved by declarations of plaintiff; it must of necessity be inferred from extrinsic circumstances, and defendant's affidavit sets out sufficient circumstances which entitle the defendant to have a jury infer that fact or not.

Pertoff v. Island Development Co., 133 Atl. Rep. 178 (not officially reported);

Maurer v. Hahn, 104 N. J. L. 254;

Birkenfeld v. Ginsburg, 7 N. J. L. Adv. R. 745.

It is respectfully submitted that the order below striking out the answer be vacated and the summary judgment reversed, and the cause remitted to the court below to be proceeded with according to law.

ROSPOND & ROSPOND,
Attorneys for Defendant-Appellant.

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

New Jersey Court of Errors and Appeals

EMANUEL BERGER, <i>Plaintiff-Respondent,</i> <i>and</i> VINCENT W. ROSPOND, <i>Defendant-Appellant.</i>	}	<i>On Appeal,</i> <i>Etc.</i>
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BRIEF OF PLAINTIFF-RESPONDENT.

Introductory Statement of the Issue.

Suit was brought by the plaintiff, Emanuel Berger, the holder of a promissory note transferred to him before maturity, against the defendant, Vincent W. Rospond, the last endorser. An answer was filed, which was stricken, on due notice, and judgment entered. The appellant challenges the correctness of this ruling and judgment, but we contend that it was fully justified and should not be disturbed.

ARGUMENT.

The Complaint, Answer, Moving Affidavits and Counter-Affidavit did not leave open any question of fact.

In paragraph 1 of the complaint, it was averred that the plaintiff was the holder of a note (which is set up at the bottom of page 1 and the top of page 2 of the State of the Case). In his answer (State of the Case, page 2, lines 30-35), the defendant said that he had "no knowledge or information sufficient to form a belief" as to the averments of paragraph 1 of the complaint. However, the plaintiff's affidavit (State of Case,

pages 10-11) verified the fact that he was the holder and owner of that note, *and that statement was not denied by the counter-affidavit of Vincent W. Rospond.* In paragraph 8 of his affidavit, the plaintiff also testified that he "held the note until shortly before its due date, and then deposited it in the National Newark & Essex Banking Co. for collection" (State of Case, top of page 14); *that statement was not denied by the counter-affidavit of Vincent W. Rospond.* It was, therefore, established as a matter of law, that the plaintiff was the holder of the note acquired before maturity by endorsement of, and negotiation from, the payee.

In paragraph 2 of the complaint, it was averred that the note was presented at the time and place where same was made payable, but payment thereof was refused. In his answer (State of Case, page 2, lines 30-35), the defendant said that he had "no knowledge or information sufficient to form a belief" as to the averments of paragraph 2 of the complaint. However, the affidavit of Kenneth C. Hand, the notary public of the National Newark & Essex Banking Company, established the fact that the note was duly presented, on the due date, at the place where the same was payable, that payment was refused, that note was protested, and that on the same date, he mailed notices of dishonor (State of Case, pages 15-17). *Those statements were not denied by the counter-affidavit of Vincent W. Rospond.*

In paragraph 3 of the complaint, it was averred that "due notice of dishonor was mailed to the endorsers of said note." In his answer (State of Case, page 2, lines 30-35), the defendant said that he had "no knowledge or information sufficient to form a belief" as to the averments of

paragraph 3 of the complaint. However, the plaintiff's affidavit (State of Case, pages 11-12) verified the fact that on October 10, 1928, the plaintiff mailed one of the notices (sent to him by the bank) to the defendant endorser at his place of business. *These statements were not denied by the counter-affidavit of Vincent W. Rospond.*

In paragraph 4 of the complaint, it was averred that no part of the note had been paid. In his answer (State of Case, page 2, lines 30-35), the defendant said that he had "no knowledge or information sufficient to form a belief" as to the averments of paragraph 4 of the complaint. However, the plaintiff's affidavit (State of Case, bottom of page 12) verified the fact of non-payment and the amount due on the note, *and those statements were not denied by the counter-affidavit of Vincent W. Rospond.*

By way of "fourth separate defense," the defendant stated, in his answer, that he did not endorse the note and that "the signature thereon is not the genuine signature of the defendant" (State of Case, top of page 5). However, the affidavit of the plaintiff (State of Case, page 14, lines 5-15) established that the signature is genuine, *and the defendant did not, in his counter-affidavit, deny his signature.*

From the foregoing analysis of the pleadings and proofs, it is clear, we respectfully submit, that the plaintiff had established a *prima facie* case as being the holder of a note before maturity, with all the presumptions and inferences in his favor that accompany that status. In legal contemplation, the plaintiff's status in the case at bar is the same as was presented before this Court in the case of *Fidelity Union Trust*

Co. v. Decker Building Material Co., 8 A. R. 138, 148 Atl. 717, not yet officially reported, decided by this Court, February 3, 1930, with the opinion by the late Justice Kalisch.

The defendant, in his answer, in effect, also pleaded as follows:

- First:* The defendant placed his signature on the note, because of a fraudulent misrepresentation made by a stranger to the transaction, to the effect that the instrument was a check and not a note.
- Second:* The plaintiff took the note "with notice of the fact that the defendant had refused to continue work on his contract."
- Third:* The plaintiff did not pay value to the maker or the endorser of the note.

Assuming that these were "defenses," which were moved to be stricken because the same were frivolous (State of Case, page 9), the further difficulty was present in the appellant's case, as was present in the Fidelity Union case, cited supra, where Justice Kalisch, speaking for this Court said:

"There is no fact set out in the appellants' answering affidavits that tends to establish that the plaintiff-respondent had any knowledge of any infirmity in the note at the time it was discounted, and, as to the second contention, that the proceeds derived from said note had only been credited to Gendel's account, and not checked out by him. There is nothing in the answering affidavits of the appellants which tends to establish the claim made to be a fact; and, as the legal presumption is that the holder of a negotiable instrument, transferred to him before maturity, is

a bona fide holder for value, the burden rests upon the defendant to establish otherwise."

Fidelity Union Trust Co. v. Decker Building Material Co., 8 A. R. 138, 148 Atl. 717, not yet officially reported.

Of course, all these averments, bad faith, etc., are negatived in the affidavit of the plaintiff, which shows that he advanced the \$1,500.00 and that the maker received that sum on August 10, 1928, the day after the execution of the note (see State of Case, page 13, lines 15-40), and those facts were not denied by the counter-affidavit. In addition to all this, there is not a word in the counter-affidavit even intimating that the plaintiff had knowledge of the fraud or the other alleged "defenses"; innuendo is not proof.

At page 4 of appellant's brief, it is suggested that "the intermediary must have been plaintiff's agent." Counsel for appellant overlooks the fact that the note was negotiated within a day after its execution, by the endorsement of the payee.

We respectfully submit that the action of the Supreme Court in striking out the answer and entering judgment was correct, for the following summary of reasons:

1. Paragraph 1 of the answer which alleged that the defendant had no knowledge or information as to the allegations of the complaint was sham; the affidavit of the plaintiff and Kenneth C. Hand, the notary, established the truth of the allegations of the complaint, and they were not denied by any answering affidavit.

2. The first, second and third separate defenses were untrue, and as to the plaintiff, the holder of a note, before maturity, were at least frivolous. The fact that answers are stricken

as being sham where it appeared that they are frivolous is no ground for reversal, as stated in *Fidelity Union Trust Co. v. Decker Building Material Co.*, *supra*.

3. The fourth separate defense denying the genuineness of his endorsement was sham; the affidavit of the plaintiff established that the endorsement was genuine, and that fact was not contradicted by the defendant.

CONCLUSION.

We submit that judgment should be affirmed with costs.

Respectfully submitted,

KANTER & KANTER,
Attorneys for and of Counsel
with Plaintiff-Respondent.

ELIAS A. KANTER,
Of Counsel.

