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Essex County Circuit Court

Notice of Appeal.

EASTERN SASH & DOOR COM-  
PANY,

*Plaintiff,*

*vs.*

RANIERO SEBASTIANI, et als,  
*Defendants.*

*Action at Law*

NOTICE  
OF APPEAL.

10

To Messrs. Stein, McGlynn & Hannoeh,  
Attorneys of the Defendants.

Sirs:—

Please TAKE NOTICE that the plaintiff Eastern Sash & Door Company, in the above-entitled cause appears to the New Jersey Court of Errors and Appeals in the last resort in all cases from the whole of the judgment entered in this cause against it in the Essex County Circuit Court, and from each and every part thereof.

20

Dated: October 24, 1930.

MAURICE S. MAURER,  
*Attorney for Plaintiff-Appellant,*  
Eastern Sash & Door Company

PHILIP J. SCHOTLAND,  
*Of Counsel.*

30

Filed November 3, 1930  
3:14 P. M.

JOHN H. SCOTT, *Clerk.*

Service of copy of the within Notice of Appeal is hereby acknowledged this 29th day of October, 1930.

STEIN, MCGLYNN, & HANNOCH,  
*Attorney for Defendants.*

40

*Notice of Appeal.*

State of New Jersey, }  
ESSEX COUNTY } ss.

10 Charles J. Young, Special Deputy Sheriff of the County aforesaid, being duly sworn, on his oath deposes and says that on the 24th day of Dec. A. D., 1928, he delivered personally to the said defendant Unity Building and Loan Association (Louis Boehme, Sec) a true copy of the within summons and complaint, with a ten days' notice endorsed thereon.

Subscribed and sworn to,  
this 26th day of December A. D., 1928.

CHARLES J. YOUNG

20 HARVY W. KEOUGH,  
Notary Public of N. J., My Commission expires June 1, 1932.

30

40

## ESSEX COUNTY CIRCUIT COURT.

## Grounds of Appeal.

EASTERN SASH & DOOR COM- PANY,	}	<i>Action at Law</i>	
<i>Plaintiff,</i>		Appeal from Essex County Circuit Court	10
<i>vs.</i>			
RANIERO SEBASTIANI, et als,	}	GROUND OF APPEAL.	
<i>Defendants.</i>			

Appellant specifies the following grounds why the judgment rendered in the above entitled cause should be reversed:

1. That the learned trial Judge erred in directing a verdict in favor of the defendants and against the plaintiff. 20

2. That the court refused to admit the report of the referee in evidence and suppressed same.

3. That the order made by the Honorable Newton H. Porter, Circuit Court Judge, suppressing the referee's report is erroneous and contrary to law.

Dated:—October 24, 1930.

MAURICE S. MAURER, 30  
*Attorney for Plaintiff-Appellant,*  
Eastern Sash & Door Company

PHILIP J. SCHOTLAND,  
*Of Counsel.*

Service of a copy of the within Grounds of Appeal is hereby acknowledged this 29th day of October, 1930.

STEIN, McGLYNN & HANNOCH, 40  
*Attorney for Defendants.*

## Summons.

THE STATE OF NEW JERSEY TO

10 (L. S.) RANIERO SEBASTIANI, Builder,  
CHARLES GIAMPARTONE and  
JOSEPHINE GIAMPARTONE, his  
wife, SADIE DOMINO, FLORENCE  
DOMINO and JANET DOMINO,  
Owners, and UNITY BUILDING AND  
LOAN ASS'N. mortgagee,

20 YOU ARE SUMMONED, to answer  
the annexed complaint of the Eastern Sash & Door  
Company, a corporation of the State of New Jer-  
sey, in the Essex County Circuit Court, wherein  
the Eastern Sash & Door Company claims a build-  
ing lien on certain lands and building of the said  
Charles Giampartone and Josephine Giampartone,  
his wife, Sadie Domino, Florence Domina and  
Janet Domino, described in the said complaint.  
AND TAKE NOTICE that unless you file your  
answer to said complaint with the Clerk of the  
said Essex County Circuit Court, at Newark, New  
Jersey, within twenty days from the date of the  
service upon you of this writ and the annexed  
complaint, the plaintiff may proceed in the suit and  
judgment may be entered against you.

30 WITNESS Hon. Worrall F. Mountain, Judge of  
the Essex County Circuit Court, at Newark, New  
Jersey, this 21st day of December, nineteen hun-  
dred and twenty-eight.

M. S. MAURER,  
*Attorney.*

JOHN H. SCOTT,  
*Clerk.*

## Complaint.

## ESSEX COUNTY CIRCUIT COURT.

EASTERN SASH & DOOR COM-  
PANY, a corporation of  
PANY, a corporation of  
New Jersey,

10

*Plaintiff,**vs.**Action at Law**On Mechanic's Lien*

RANIERO SEBASTIANI, Builder,  
CHARLES GIAMPARTONE, and  
JOSEPHINE GIAMPARTONE, his  
wife, SADIE DOMINO,  
FLORENCE DOMINO and JANET  
DOMINO Owners, UNITY  
BUILDING AND LOAN ASSO-  
CIATION, Mortgagee,

20

COMPLAINT.

*Defendants.*

The plaintiff, Eastern Sash & Door Company, a corporation of the State of New Jersey, located in the City of Newark, County of Essex and State of New Jersey, says:

## FIRST COUNT.

30

1. During the times hereinafter stated, the defendants, Charles Giampartone and Josephine Giampartone, his wife, Sadie Domino, Florence Domina and Janet Domino, were and still are the owners of all that certain lot and tract of land in the City of Newark, County of Essex and State of New Jersey, and more particularly described as follows:

BEGINNING at the intersection of the Easterly line of St. Paul Avenue (formerly Madison Ave-

40

*Complaint.*

10 nue) and the Southerly line of Cliff Street (formerly Rose Street) as shown on map entitled "Map of 352 lots belonging to the Real Estate Association of Hazelwood Park of the Borough of Vailsburg, Essex County, New Jersey, surveyed by Eugene A. McMurray, C. E. July 1985"; thence running (1) Easterly along Cliff Street (formerly Rose Street) one hundred (100') feet; thence (2) Southerly at right angles to Cliff Street sixty (60') feet; thence (3) Westerly and parallel with Cliff Street one hundred (100') feet to St. Paul Avenue; thence (4) Northerly along the said side of St. Paul Avenue sixty (60') feet to the point or place of BEGINNING.

20 2. The defendants herein commenced the erection of the building and entered into an agreement with Raniero Sebastiani for the construction therefor which agreement was not filed.

3. Said Raniero Sebastiani entered into a written agreement with the Eastern Sash & Door Company for the furnishing of certain lumber materials for the construction of said building, a true copy of said agreement being hereto annexed as Schedule A.

30 4. The Eastern Sash & Door Company delivered said materials as set forth in the account hereto annexed as Schedule B, in the sum of Three Thousand Eleven Dollars and Thirty six (\$3011.36) Cents, on which there is due a credit of Seven Hundred twenty-seven Dollars and Eight (\$727.08) cents, leaving a balance of two thousand two hundred eighty-four dollars and twenty-eight (\$2,284.28) cents, between the twenty-fifth day of June, 1928 and the thirty-first day of October, 1928, both dates inclusive, and is entitled to a

40

*Complaint.*

lien upon the said described premises, by virtue of "An act to secure to mechanics and others, payment for their labor and materials in erecting any building etc."

5. On September 11, 1928, the defendant, Charles Giampartone and Josephine, his wife, Sadie Domino, Florence Domino, and Janet Domino, executed to the Unity Building and Loan Association, a mortgage in the sum of Fourteen Thousand (\$14,000.00) Dollars, covering the premises hereinabove described, which mortgage was recorded in Book M65 of Mortgages for said County, page 310.

Said mortgagee is made a party defendant because the plaintiff claims that its lien claim is prior and superior to said mortgage.

## SECOND COUNT.

1. Paragraphs 3 and 4 and all the allegations therein contained are herein repeated and made part hereof.

2. The Eastern Sash & Door Company furnished and delivered said lumber and trim materials in the sum of three thousand eleven dollars and thirty-six (\$3011.36) cents and there are credits due in the sum of Seven Hundred Twenty-seven dollars and Eight (\$727.08) Cents on which there remains due and owing the sum of Two Thousand Two Hundred Eighty-Four Dollars and Twenty-eight (\$2,284.28) Cents, which amount plaintiff has demanded of the defendant but the defendant has failed and refused to pay.

WHEREFORE judgment general will be claimed in favor of the plaintiff, Eastern Sash & Door Company and against Raniero Sebastiani in the sum of \$2,284.28 with legal interest and costs of

*Complaint.*

10 suit under the Second Count and judgment special  
against Charles Giampartone and Josephine Giampartone, his wife, Sadie Domino, Florence Domino and Janet Domino, specially to be made against the lands and building hereabove more particularly described with priority over the Unity Building and Loan Association in the sum of \$2284.28 with legal interest and costs of suit.

M. S. MAURER,  
*Attorney of Plaintiff.*

20

30

40

*Complaint.*

## Schedule A.

June 25, 1928.

This agreement is made between the Eastern Sash & Door Co. of 309 Frelinghuysen Avenue, Newark, N. J. and Raniero Sebastiani of 49 Boylan Street, Newark, N. J. that the said Eastern Sash & Door Co., will furnish and deliver the following for the house to be erected at St. Paul Avenue and Cliff Street, Newark, New Jersey for the sum of Twenty-One Hundred Seventy Dollars (\$2170.00):

1000 len ft 2x2 bdg	
2—4x6—14	
17—4x6—22	
2—4x6—26	
3—4x6—18	20
2—6x8—26	
2—6x8—20	
2—6x8—16	
2—6x8—14	
4—4x4—24	
2—2x4—20	
10—4x4—18	
12—4x4—16	
700—2x4—20	
260—2x10—26	30
8—2x10—20	
12—2x10—18	
90—2x6—26	
6—5/4x12—16 cypress	
9—1x8—16 cypress	
9—5/4x10—16 nc nosed	
34—1x12—16 wp	
30—1x6—16 wp	
2000 lin ft 1x2 spruce	
9000 sq ft 1x10 NC Shiplap	
5000 sq ft 3/4x10 rc siding	40

*Complaint—Schedule A.*

6000 sq ft 1x6 NC Roofers  
 700 len ft. 1x4 wp  
 6 squares hexagon shingles  
 1000 sq ft 1x3 NC B&B Flrg

For the sum of Twenty-one hundred seventy dollars (\$2,170.00).

10

Payments will be made as follows: A cash payment of One Thousand dollars (\$1000.00) will be made when the roof is on: Balance and extras, if any will be made when ready for trim.

If a payment is due and not paid or a suit is started or lien claim filed or operation of building is stopped, the Eastern Sash & Door Co. has the right to discontinue further shipments and the entire amount of materials delivered up to that time is due at once.

20

Accepted: Raniero Sebastiani

Eastern Sash & Door Co.  
 Harry Reisen, Pres.

30

40

Complaint.

Schedule B.

Mr. Raniero Sebastiani  
48 Boylan Street  
Newark, N. J.

Job: St. Paul Ave. and Cliff Streets  
Newark, N. J.

## STATEMENT OF ACCOUNT

Contract						\$2170.00	
Extras							10
July							
20—	4—4x6—24	192					
	4	20	160				
	10	18	360				
	12	16	384				
	4	22	176	1272	5c	63.60	
August							
6—	3000 sq ft 1x10 NC Shiplap	4c				120.00	
8—	18—2x6	18	324				
	30	14	420				20
	2— 2x8—26	70	814	5c		40.70	
	400 1ft 4" crown mldg	1600	11¼c			20.00	
						60.70	
9—	2000 sq ft 1x10 NC Shiplap	4c				80.00	
14—	160 sq ft 1x6 NC Roofers	4c				6.40	
22—	100 2x4—10	667	5c			33.35	
27—	200 1ft 4" crown mldg	800	11¼c			10.00	
						43.35	
29—	10—1x8—16 wp	107	9½c			10.17	
September Aug. 27—	50—2x4—	20	667	5c		33.35	30
5—	8—1x12—14 wp	112					
	11—1x6—16 wp	88	200	9½c		19.00	
	200 1ft 4" crown mldg	800	11¼c			10.00	
	500 1ft 1x2 spruce	1c				5.00	
						34.00	
6—	20—2x6—22	440					
	6—3x6—18—162—602	5c				30.10	
	200 1ft 5/4x6 wp	125	10½c			13.13	
	1500 sq ft 1x10 NC Shiplap	4c				60.00	
						103.23	
8—	1300 sk ft 1x10 NC Shiplap	4c				52.00	40
8—	2—2x8—18	48					
	12—2x4—20	160	208	5c		10.40	



**Notice of Affidavit of Merits.**

**NOTICE TO THE WITHIN NAMED  
DEFENDANTS:**

In case the within summons and complaint are served upon you personally, then take notice that if you intend to make a defense to this action, you must file an Affidavit of Merits within ten day from the date of service hereof upon you, and must file your answer within twenty days from the date of such service, and in default of the filing of such affidavit and answer, judgment will be entered against you. Lawful Service upon a corporation is deemed personal service for the purpose of this Notice (P. L. 1912, p. 394. Rule 56.)

10

M. S. MAURER,  
*Plaintiff's Attorney.*

20

Send the within summons and complaint upon the following within named defendants.

Raniero Sebastiani, Dec. 22, 1928 by delivering a true copy thereof to his wife at his usual place of abode, 48 Boylan St., Newark, N. J.

Charles Giampartone and Josephine Giampartone his wife Dec. 22, 1928 by delivering a true copy thereof for each to a member of the household over the age of fourteen years of age at their usual place of abode, 52 St. Paul Ave., Newark, N. J.

30

Sadie Domino, Florence Domino and Janet Domino Dec. 22, 1928 by delivering a true copy thereof for each to their Mother at their usual place of abode, 52 St. Paul Ave., Newark, N. J.

And with ten day notice endorsed thereon Dec. 24, 1928 upon Unity Building and Loan Association by delivering a true copy thereof personally

40

*Notice of Affidavit of Merits.*

to Louis Boehme, a secretary at his usual place of business, 79 Warren St., Newark, N. J.

Conrad Deuchler  
Sheriff,

By Spec. Dep.

Charles J. Young.

10

I hereby appoint and depute Charles J. Young to serve the within writ.

Witness my hand and seal this 22nd day of Dec. 1928.

CONRAD DEUHLER  
Conrad Deuchler,  
Sheriff LS.

20

By Alfred C. Walker,  
Under Sheriff.

Sheriff Fees. 11.78

12/21/28.

30

40

## Affidavit of Merits.

## ESSEX COUNTY CIRCUIT COURT.

EASTERN SASH & DOOR COMPANY, a corporation of New Jersey,

*Plaintiff,*

10

*vs.*

RANIERO SEBASTIANI, Builder, CHARLES GIAMPARTONE, and JOSEPHINE GIAMPARTONE, his wife, SADIE DOMINO, FLORENCE DOMINO and JANET DOMINO Owners, UNITY BUILDING AND LOAN ASSOCIATION, Mortgagee,

*Defendants.*

*Action at Law,  
On Mechanic's Lien*

Affidavit of Merits.

20

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

William F. Yeoman, of full age, being duly sworn on his oath according to law, deposes and says:

That he is the Vice President of the Unity Building and Loan Association, one of the defendants in the above entitled action, and that he believes that the defendant, Unity Building and Loan Association has a good and legal defense to the above action on the merits of the case.

30

William F. Yeomans

Subscribed and sworn to  
before me this 2nd day of  
January, 1929.

MATTHEW J. REILLY,

*A Master in Chancery of New Jersey*

Filed Jan. 3, 1929.

1:37 P. M.

John H. Scott, *Clerk.*

40

## Answer.

## ESSEX COUNTY CIRCUIT COURT.

10	EASTERN SASH & DOOR COMPANY, a corporation of New Jersey,	<i>Plaintiff,</i>	<i>Action at Law, On Mechanic's Lien</i>
	<i>vs.</i>		
20	RANIERO SEBASTIANI, Builder, CHARLES GIAMPARTONE, and JOSEPHINE GIAMPARTONE, his wife, SADIE DOMINO, FLORENCE DOMINO and JANE DOMINO Owners, UNITY BUILDING AND LOAN ASSOCIATION, Mortgagee,	<i>Defendants.</i>	Answer of the Defendant, Charles Giampartone and Josephine Giampartone, his wife, Sadie Domino, Florence Domino and Janet Domino.

The defendants, Charles Giampartone and Josephine Giampartone, his wife, Sadie Domino, Florence Domino and Janet Domina, reside in the City of Newark, County of Essex and State of New Jersey, answering the Complaint of the Plaintiff, say:

30

## ANSWER TO FIRST COUNT.

1. They admit Paragraph One of the First Count.
2. They deny Paragraph Two of the First Count.
3. As to Paragraph Three of the First Count of the Complaint, these Defendants are without sufficient information as to form a belief and leave Plaintiff to its proof.
- 40 4. As to Paragraph Four of the First Count of

*Answer.*

the Complaint, these Defendants are without sufficient information as to form a belief and leave the Plaintiff to its proof.

5. These defendants admit the execution of the mortgage as alleged in Paragraph Five of the First Court, but deny that the lien of the mortgage is subject to the lien or claim of the Plaintiff, and that said mortgage will be cut off by a sale under Plaintiff's Lien. 10

## ANSWER TO SECOND COUNT.

1. As to Paragraph One of the Second Count of the complaint, these defendants are without sufficient information as to form a belief and leave Plaintiff to its proof.

2. As to Paragraph Two of the Second Count of the Complaint, these Defendants are without sufficient information as to form a belief and leave Plaintiff to its proof. 20

FIRST AFFIRMATIVE DEFENSE TO  
FIRST COUNT.

1. On June 5, 1928, Antoinetta Domino and Charles Giamportone, the then owners of the premises described in the Plaintiff's complaint, entered into a written contract with Rocco Marinaccio, whereby the said Rocco Marinaccio agreed to erect completely, according to plans and specifications, the new buildings to be erected on premises described in the plaintiff's complaint, and known as No. 50 St. Paul Avenue, Newark, New Jersey, which building contract, together with specifications thereto attached, was filed in the Clerks Office of Essex County on June 6, 1928 as Building Contract No. 1048. 30

*Answer.*

SECOND AFFIRMATIVE DEFENSE TO  
FIRST COUNT.

- 10 1. Prior to June 22, 1928, the premises described in the Plaintiff's complaint were owned one-half by Charles Giamportone and Josephine Giamportone, his wife, and the other half by Antoinetta Domino.
2. On or about June 5, 1928 there were no buildings erected on said premises and the then owners of the premises entered into a building contract with one, Rocco Marinaccio for the erection and construction of a four-family dwelling and a two-car garage, as alleged in the First Affirmative Defense to First Count.
- 20 3. On or about June 22, 1928, the said Antoinetta Domino sold her interest in the premises to her three daughters, namely the Defendants, Sadie Domino, Florence Domino and Janet Domino, and the necessary deeds of conveyance were prepared so as the entire premises would be owned by these five answering defendants, so that a deed was prepared and executed from Charles Giamportone and Josephine his wife, to the said Antoinetta Domino, which deed is dated June 22, 1928 and recorded in the Essex County Register's Office on July 12, 1928 in Book D-78 of Deeds, on page 490, and by
- 30 which deed the entire ownership of said premises was vested in the said Antoinetta Domino, and that simultaneously therewith, a deed was executed by the said Antoinetta Domino, widow, to these five answering defendants, which deed is dated June 22, 1928 and recorded in the Essex County Register's Office on July 12, 1928 in Book D-78 of Deeds, on page 491.
- 40 4. These answering defendants took title to said premises subject to the building contract of Rocco Marinaccio and continued said contract.

*Answer.*

THIRD AFFIRMATIVE DEFENSE TO  
FIRST COUNT.

1. On September 17th, 1928, the said Rocco Marinaccio executed to the Defendant, Unity Building and Loan Association, a postponement, whereby the said Rocco Marinaccio postponed to said Defendant, Unity Building and Loan Association, any right of lien which he had or which he may thereafter have upon the said premises to the mortgage of the Defendant, Unity Building and Loan Association, which mortgage was in the sum of Fourteen Thousand Dollars. 10

FOURTH AFFIRMATIVE DEFENSE TO  
FIRST COUNT.

1. The lien claim of the Plaintiff, if any, is subject to the lien of the mortgage of the Defendant, Unity Building and Loan Association. 20

FIFTH AFFIRMATIVE DEFENSE TO  
FIRST COUNT.

1. The lands of these defendants are not liable to lien for the alleged debt of the Plaintiff.

SIXTH AFFIRMATIVE DEFENSE TO  
FIRST COUNT. 30

1. Said buildings and lands are not, nor are either of them, liable for the said debt of the Plaintiff.

SEVENTH AFFIRMATIVE DEFENSE TO  
FIRST COUNT.

1. The said indebtedness from the Defendant, Raniero Sebastiani, to the Plaintiff is for labor or material or both furnished by the Plaintiff to the 40

*Answer.*

10 said Raniero Sebastiani, who, so far as these Defendants are informed, and verily believe, the same to be true, was the manager of the contractor, Rocco Marinaccio, was at all times during which Plaintiff alleges to have furnished materials, erecting and constructing said building under a contract in writing, which was duly filed in the Clerk's Office of Essex County, before said labor and materials or any part thereof were so performed or finished.

20 2. The mortgage of the Defendant, Unity Building and Loan Association, was recorded prior to the filing of the lien claim of the Plaintiff. The proceeds of this mortgage were actually advanced and paid by the said Defendant, Unity Building and Loan Association, and used in the erection of the new building on said premises.

3. By reason of the aforesaid, the lien of the Defendant Unity Building and Loan Association, is prior to the lien claim of the Plaintiff.

THESE DEFENDANTS REPEAT THE AFFIRMATIVE DEFENSE TO THE FIRST COUNT FOR THE AFFIRMATIVE DEFENSE TO THE SECOND COUNT.

30 FIRST OBJECTION IN POINT OF LAW

These Defendants, at the time of the trial, will move to strike out the complaint on the grounds that there was a valid building contract duly filed in the Essex County Clerk's Office prior to the time that the Plaintiff supplied materials and labor in his complaint.

PETER A CAVICCHIA,  
*Attorney of the Defendants,*

*Answer.*

Charles Giamportone and Josephine  
Giamportone, his wife, Sadie Domino,  
Florence Domino, and Janet Domino.

I hereby consent to the filing of the within  
answer as of time.

M. S. MAURER,  
*Attorney of Plaintiff*

10

Jan. 22, 1929.

Filed Jan. 23, 1929

2:27 P. M.

JOHN H. SCOTT, *Clerk.*

20

30

40

*Answer.*

ESSEX COUNTY CIRCUIT COURT.

10	EASTERN SASH & DOOR COMPANY, a corporation of New Jersey,	<i>Plaintiff,</i>	
	<i>vs.</i>		<i>Action at Law</i>
	RANIERO SEBASTIANI, Builder, CHARLES GIAMPARTONE, and JOSEPHINE GIAMPARTONE, his wife, SADIE DOMINO, FLORENCE DOMINO and JANET DOMINO Owners, UNITY BUILDING AND LOAN ASSOCIATION, Mortgagee,	<i>Defendants.</i>	<i>On Mechanic's Lien</i>
20			Answer of the Defendant Unity Building & Loan Association.

The defendant, Unity Building and Loan Association, a corporation of the State of New Jersey, with its principal office in the City of Newark, County of Essex and State of New Jersey, answering the complaint of the Plaintiff, says:

30

ANSWER TO FIRST COUNT.

1. As to Paragraph One of the Complaint, this Defendant is without sufficient information as to form a belief and leaves plaintiff to its proof.

2. As to Paragraph Two of the Complaint, this Defendant is without sufficient information as to form a belief and leaves plaintiff to its proof.

3. As to Paragraph Three of the Complaint, this Defendant is without sufficient information as to form a belief and leaves plaintiff to its proof.

40

*Answer.*

4. As to Paragraph Four of the Complaint, this Defendant is without sufficient information as to form a belief and leaves plaintiff to its proof.

5. This Defendant admits the execution of the mortgage as alleged in Paragraph Five of the Complaint, but denies that its lien is subsequent to the lien or claim of the Plaintiff and that its mortgage will be cut off by a sale under plaintiff's lien.

10

#### ANSWER TO SECOND COUNT.

1. As to Paragraph One of the Second Count of the complaint, this Defendant is without sufficient information as to form a belief and leaves Plaintiff to its Proof.

2. As Paragraph Two of the Second Count of the complaint, this Defendant is without sufficient information as to form a belief and leaves Plaintiff to its proof.

20

#### FIRST AFFIRMATIVE DEFENSE TO FIRST COUNT.

1. On June 5, 1928, Antoinetta Domino and Charles Giamportone, the then owners of the premises described in the plaintiff's complaint, entered into a written contract with Rocco Marinaccio, whereby the said Rocco Marinaccio agreed to erect completely, according to plans and specifications, the new buildings, to be erected on premises described in the Plaintiff's complaint, and known as No. 50 St. Paul Avenue, Newark, New Jersey, which building contract, together with specifications thereto attached, was filed in the Clerk's Office of Essex County on June 6, 1928 as Building Contract No. 1048.

30

40

*Answer.*

2. Premises 50 St. Paul Avenue, Newark, New Jersey are the same premises as are described in the complaint in this cause.

10 3. According to the terms of said contract, the said Rocco Marinaccio agreed to provide all the materials and perform all the labor necessary for the complete erection of a four-family house and two car garage on said premises.

SECOND AFFIRMATIVE DEFENSE TO  
FIRST COUNT.

20 1. On September 17th, 1928, the said Rocco Marinaccio executed to this Defendant a postponement, whereby the said Rocco Marinaccio postponed to this defendant any right of lien which he had or which he may thereafter have upon the said premises to the mortgage of this defendant, which mortgage was in the sum of Fourteen Thousand (\$14,000.00) Dollars.

THIRD AFFIRMATIVE DEFENSE TO  
FIRST COUNT.

The lien claim of the Plaintiff, if any, is subject to the lien of the Defendant's mortgage.

30 FOURTH AFFIRMATIVE DEFENSE TO  
FIRST COUNT.

1. The lands of the owners are not liable to lien for the alleged debt of the Plaintiff.

FIFTH AFFIRMATIVE DEFENSE TO  
FIRST COUNT.

40 1. Said Building and lands is not, nor is either of them, liable for said debt.

*Answer.*

SIXTH AFFIRMATIVE DEFENSE TO  
FIRST COUNT.

1. The said indebtedness from the Defendant, Raniero Sebastiani, to the Plaintiff, is for labor or materials or both furnished by the Plaintiff to the said Raniero Sebastiani, who, so far as this Defendant is informed, and verily believes the same to be true, was the manager of the contractor, Rocco Marinaccio, was at all times during which Plaintiff alleges to have furnished materials, erecting and constructing said building under a contract in writing, which was duly filed in the Clerk's Office of Essex County, before said labor and materials or any part thereof were so performed or furnished. 10

2. The mortgage of this Defendant was recorded prior to the filing of the lien claim of the Plaintiff. The Proceeds of this mortgage were actually advanced and paid by this Defendant and used in the erection of the new buildings on said premises. 20

3. By reason of the aforesaid, the lien of this Defendant's Mortgage is prior to the lien claim of the Plaintiff.

This Defendant repeats the affirmative defense to the First Count for the affirmative defenses to the Second Count. 30

Wherefore judgment will be claimed for the defendant, Unity Building and Loan Association.

PETER A CAVICCHIA,  
*Attorney of the Defendants,*  
Unity Building and Loan Association.

I hereby consent to the filing of the within Answer as of time.

M. S. MAURER,  
w *Attorney of Plaintiff.* 40

Jan. 22, 1929.

Filed Jan. 23, 1929.

2:27 P. M.

JOHN H. SCOTT, *Clerk.*

## Reply.

## ESSEX COUNTY CIRCUIT COURT.

10 EASTERN SASH & DOOR COM-  
PANY, a corporation of  
New Jersey,  
*Plaintiff,*

*vs.*

20 RANIERO SEBASTIANI, Builder,  
CHARLES GIAMPARTONE, and  
JOSEPHINE GIAMPARTONE, his  
wife, SADIE DOMINO,  
FLORENCE DOMINO and JANET  
DOMINO Owners, UNITY  
BUILDING AND LOAN ASSO-  
CIATION, Mortgagee,  
*Defendants.*

*Action at Law  
On Mechanic's Lien*

REPLY.

30 The Eastern Sash & Door Company, plaintiff  
herein, joins issue with the defendants, Charles  
Giampartone and Josephine Giampartone, his wife,  
Sadie Domino, Florence Domino and Janet Domino,  
owners, and Unity Building & Loan Association,  
mortgagee, on the answer filed by them in the  
above matter.

M. S. MAURER,  
*Attorney of Plaintiff,*

Eastern Sash & Door Company.

Filed Jan. 25, 1929  
2:06 P. M.

JOHN H. SCOTT, *Clerk.*

## Assessment.

## ESSEX COUNTY CIRCUIT COURT.

EASTERN SASH & DOOR COM-  
PANY, a corporation of  
New Jersey,

*Plaintiff,*

10

*vs.*

RANIERO SEBASTIANI, Builder,  
CHARLES GIAMPARTONE, and  
JOSEPHINE GIAMPARTONE, his  
wife, SADIE DOMINO,  
FLORENCE DOMINO and JANET  
DOMINO Owners, UNITY  
BUILDING AND LOAN ASSO-  
CIATION, Mortgagee,

*Defendants.*

*Action at Law  
On Mechanic's Lien*

Assessment.

20

I, JOHN H. SCOTT, Clerk of the Essex County  
Circuit Court, State of New Jersey, upon the fore-  
going statement and affidavit do hereby assess the  
damages of the plaintiff Eastern Sash & Door  
Company, against the defendant, Raniero Sebas-  
tiani, at Two Thousand, Three Hundred Fifteen  
Dollars and Forty-Nine (\$2,315.49) Cents, besides  
costs of suit to be taxed.

30

JOHN H. SCOTT,  
*Clerk.*

Dated: Jan. 28, 1929.

40

## Assessment of Damages.

## ESSEX COUNTY CIRCUIT COURT.

10 EASTERN SASH & DOOR COM-  
PANY, a corporation of  
New Jersey,

*Plaintiff,*

*vs.*

20 RANIERO SEBASTIANI, Builder,  
CHARLES GIAMPARTONE, and  
JOSEPHINE GIAMPARTONE, his  
wife, SADIE DOMINO,  
FLORENCE DOMINO and JANET  
BUILDING AND LOAN ASSO-  
DOMINO Owners, UNITY  
CIATION, Mortgagee,

*Defendants.*

*Action at Law*

*On Mechanic's Lien*

Assessment of  
Damages.

30 This action is based upon the furnishing of  
lumber and trim materials by the plaintiff cor-  
poration for the erection and construction of the  
building owned by Charles Giampartone and  
Josephine Giampartone, Sadie Domino, Florence  
Domino and Janet Domino, defendants herein, un-  
der the statement hereto annexed and more par-  
ticularly set forth in the complaint filed herein  
by the order of Raniero Sabastiani, builder.

*Assessment of Damages.*

ESSEX COUNTY CIRCUIT COURT.

EASTERN SASH & DOOR COMPANY, a corporation of New Jersey,

*Plaintiff,*

*vs.*

RANIERO SEBASTIANI, Builder, CHARLES GIAMPARTONE, and JOSEPHINE GIAMPARTONE, his wife, SADIE DOMINO, FLORENCE DOMINO and JANET DOMINO Owners, UNITY BUILDING AND LOAN ASSOCIATION, Mortgagee,

*Defendants.*

*Action at Law* 10  
*On Mechanic's Lien*  
*Affidavit.*

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

MAURICE S. MAURER, of full age, being duly sworn according to law, on his oath deposes and says that:

"I am the attorney of the plaintiff corporation in the above-entitled matter; attached here to a statement showing the amounts due for the furnishing of materials ordered by Raniero Sebastiani, builder, set forth herein; at no time has anything been paid on account of this claim. There is now due the sum of Two Thousand, Two Hundred Eighty-Four Dollars and Twenty-Eight (\$2,284.28) Cents together with legal interest from October 31, 1928 which amounts to Thirty-One Dollars and Twenty-one (\$31.21) Cents, totaling Two Thousand Three Hundred Fifteen Dollars and Forty-nine (\$2,315.49) Cents."

Sworn and subscribed to before me this 26th day of January, 1929.

MAURICE S. MAURER  
An Attorney at Law of New Jersey.

## Account

Mr. Raniero Sebastiani  
48 Boylan Street  
Newark, N. J.

Job: St. Paul Ave. and Cliff Streets  
Newark, N. J.

## STATEMENT OF ACCOUNT

	Contract						\$2170.00
10	Extras						
	July						
	20— 4—4x6—24	192					
	4	20	160				
	10	18	360				
	12	16	384				
	4	22	176	1272	5c		63.60
	August						
	6— 3000 sq ft 1x10 NC Shiplap	4c					120.00
	8— 18—2x6	18	324				
20	30	14	420				
	2— 2x8—26	70	814	5c			40.70
	400 1ft 4" crown mldg	1600	11¼c				20.00
							<u>60.70</u>
	9— 2000 sq ft 1x10 NC Shiplap	4c					80.00
	14— 160 sq ft 1x6 NC Roofers	4c					6.40
	22— 100 2x4—10	667	5c				33.35
	27— 200 1ft 4" crown mldg	800	11¼c				10.00
							<u>43.35</u>
	29— 10—1x8—16 wp	107	9½c				10.17
30	September Aug. 27— 50—2x4— 20	667	5c				33.35
	5— 8—1x12—14 wp	112					
	11—1x6—16 wp	88	200	9½c			19.00
	200 1ft 4" crown mldg	800	11½c				10.00
	500 1ft 1x2 spruce	1c					5.00
							<u>34.00</u>
	6— 20—2x6—22	440					
	6—3x6—18—162—602	5c					30.10
	200 1ft 5/4x6 wp	125	10c				13.13
	1500 sq ft 1x10 NC Shiplap	4c					60.00
							<u>103.23</u>
40	8— 1300 sk ft 1x10 NC Shiplap	4c					52.00
	9— 2—2x8—18	48					
	12—2x4—20	160	208	5c			10.40

Account.

11—	300	1ft 2" bed mldg	600	1.25	7.50	
	10—	2x4—20	134			
	2—	4x6—20	80	214 5c	10.70	
					<u>18.20</u>	
18—	10—	2x6—18	180			
	2—	4x6—20	80	260 5c	13.00	
	4—	1x8—10 wp		9¼c	2.63	10
					<u>15.63</u>	
October						
12—	30—	2x4—20	400	5c	20.00	
		500 sq ft 1x10 Shiplap		NC 4c	20.00	
		500 1ft 1x2 spruce			5.00	
					<u>45.00</u>	
16—	20—	2x4—20	267	5c	13.35	
		152 sq ft 1x6 Fir Clg		9c	13.68	
		500 sq ft 1x10 NC Shiplap		4c	20.00	
		50 sq ft 1x3 NC B&B Flrg	90.50		45.25	20
					<u>92.28</u>	
31—	8—	1x12—16 wp	128	9½c	12.16	
	16—	5/4x5—14	117	10½c	12.29	
	15—	2x4—20	200	5c	10.00	
		160 1ft 4" crown mldg.	640	1¼c	8.00	
		200 sq ft 1x 10 NC Shiplap		4c	8.00	
					<u>50.45</u>	838.76
		Balance due on Protested Check		(fees)		2.60
		Aug 28—Prot. Ck & Fees	294.01			
		" 29—Check	291.41			
					<u>3011.36</u>	30

CREDITS

July 23—	Returned					
	4—	4x4—24	128			
	2—		20	53		
	12		16	256		
	10		18	240 677 4c	27.08	
August 21	check				700.00	727.08
					<u>2284.28</u>	40
		Balance due				
		Filed Jan. 28, 1929.				
		9:58 A. M.				
		JOHN H. SCOTT, Clerk.				

## Rule for Judgment by Default.

## ESSEX COUNTY CIRCUIT COURT.

10	EASTERN SASH & DOOR COMPANY, a corporation of New Jersey, <p style="text-align: right;"><i>Plaintiff,</i></p>	
	<i>vs.</i>	
	RANIERO SEBASTIANI, Builder, CHARLES GIAMPARTONE, and JOSEPHINE GIAMPARTONE, his wife, SADIE DOMINO, FLORENCE DOMINO and JANET DOMINO Owners, UNITY BUILDING AND LOAN ASSOCIATION, Mortgagee, <p style="text-align: right;"><i>Defendants.</i></p>	<p style="text-align: center;"><i>Action at Law</i> <i>On Mechanic's Lien</i></p> <p style="text-align: center;">Rule for Judgment by Default.</p>
20		

The writ in this cause having been duly served upon the defendant, Raniero Sebastiani, on December 22, 1928, and said defendant having failed to file any answer or take any steps in response to the complaint, within the time limited by the rule of court, it is

30 ORDERED that judgment by default be entered against Raniero Sebastiani, in favor of the plaintiff, Eastern Sash & Door Company, a corporation of New Jersey; the damages of the plaintiff having been assessed by the Clerk of this Court at the sum—Two Thousand, Three Hundred Fifteen Dollars and Forty-Nine (\$2,315.49) Cents, it is

40 ORDERED that judgment final be entered against the defendant, Raniero Sebastiani, in favor of the plaintiff, Eastern Sash & Door Company,

*Rule of Judgment of Default.*

in the sum of Two Thousand, Three Hundred Fifteen Dollars and Forty-nine (\$2,315.49) Cents, besides costs of suit to be taxed.

Rule entered this 28th day of January, nineteen hundred and twenty-nine, on motion of Maurice S. Maurer, attorney of plaintiff.

Filed Jan. 28, 1939

9:58 A. M.

JOHN H. SCOTT, *Clerk.*

10

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30

40

## Reference.

## ESSEX COUNTY CIRCUIT COURT.

10 EASTERN SASH & DOOR COM-  
PANY, a corporation of  
New Jersey,  
*Plaintiff,*

*vs.*

20 RANIERO SEBASTIANI, Builder,  
CHARLES GIAMPARTONE, and  
JOSEPHINE GIAMPARTONE, his  
wife, SADIE DOMINO,  
FLORENCE DOMINO and JANET  
DOMINO Owners, UNITY  
BUILDING AND LOAN ASSO-  
CIATION, Mortgagee,  
*Defendants.*

Order of  
Reference.

30 This matter being brought up by Maurice S.  
Maurer, attorney of Plaintiff and same being con-  
sented to by Peter A. Cavicchia, attorney of de-  
fendants, Charles Giampartone, Josephine Giam-  
partone, Sadie Domino, Florence Domino, Janet  
Domino, and Unity Building & Loan Association,  
it is on this 26th day of January, nineteen hundred  
and twenty-nine,

40 ORDERED, that the above matter be referred  
to Andrew Van Blarcom, Esquire, to take and re-  
port an account between the plaintiff and the de-  
fendants herein and to report whether the plaintiff  
is entitled to judgment specially against the build-  
ing and lands set forth in the complaint, and the  
question of priority of the liens of the plaintiff  
and the defendants, reserving to the parties hereto  
their respective rights of trial by jury.

*Reference.*

And the master shall file his report in the above matter within 30 days from date of this order.

WM. A. SMITH,  
*Judge.*

I hereby consent to the form and entry of this order. 10

PETER A CAVICCHIA,  
Atty. for Charles Giamportone,  
Josephine Giamportone, Florence,  
Sadie & Janet Domino & Unity  
B. & L. Assn.

Filed Feb. 2, 1929.  
9:52 A. M.

JOHN H. SCOTT, *Clerk.* 20

30

40



*Referee's Oath.*

to the best of my skill and understanding: So  
help me God.

Sworn and subscribed before me  
this 1st day of February, A. D.  
1929.

ANDREW VAN BLARCOM 10

Grace V. Shawell SEAL  
*Notary Public of New Jersey.*

20

30

40

## Referee's Report.

## ESSEX COUNTY CIRCUIT COURT.

10	EASTERN SASH & DOOR COMPANY, a corporation of New Jersey, <p style="text-align: right;"><i>Plaintiff,</i></p>	
	<i>vs.</i>	
20	RANIERO SEBASTIANI, Builder, CHARLES GIAMPARTONE, and JOSEPHINE GIAMPARTONE, his wife, SADIE DOMINO, FLORENCE DOMINO and JANET Owners, UNITY BUILDING AND LOAN ASSOCIATION, Mortgagee, <p style="text-align: right;"><i>Defendants.</i></p>	<p style="text-align: center;"><i>Action at Law</i> <i>On Mechanic's Lien</i></p> <p style="text-align: center;">Report of Referee.</p>

30 In pursuance of an order of reference, dated January 26th, 1929, signed by his Honor, William A. Smith, a Judge of the Essex County Circuit Court, (having first taken the oath prescribed by law) was attended by Maurice S. Maurer, Esquire, for the plaintiff; and Peter A. Cavicchia and Matthew J. Reilly, Esquires, for the defendants, Charles Giampartone and Josephine Giampartone, his wife, Sadie Domino, Janet Domino and Unity Building & Loan Association.

The action was brought to recover the sum of \$2,284.28, with interest thereon from November 1st, 1928, for materials furnished for the erection and construction of a house at the corner of St. Paul and Cliff Streets, Newark, New Jersey.

The materials were furnished between the dates  
 40 October

*Referee's Report.*

of July 20th, 1928 and July 31st, 1928, both inclusive.

The plaintiff's contract for the materials was with one Raniero Sebastiani.

The owners' contract was with one Rocco Marinaccio. This contract was filed with the County Clerk on June 6th, 1928. 10

The contention between the parties is whether the contract entered into between the owners and Rocco Marinaccia was fraudulent or fictitious.

William Marron, a witness produced by the plaintiff, testified that the contract (Exhibit P-1) was made between the plaintiff and Raniero Sebastiani, whereby the plaintiff furnished materials to the value of \$2,284.28 between the dates of July 20th, 1928 and October 31st, 1928; that said materials were delivered at the premises, corner St. Paul and Cliff Streets, Newark, New Jersey, on the property in question; and that this is the same property described in the lien claim and complaint. This balance is due, after crediting the sum of \$700.00 paid by Sebastiani. 20

Raniero Sebastiani, a witness produced by the plaintiff, testified that he entered into the written agreement (Exhibit P-1) with the plaintiff, and that he constructed the house upon the property and was employed by the owners to do so. There was a written agreement, but Sebastiani did not sign the same but did the work, and that the plaintiff furnished the lumber. The delivery slips for the lumber were offered in evidence without objection and marked "Exhibit P-3". The building was commenced in June—1928, and started before June 25, 1928. 30

On cross-examination (page 10) Sebastiani said that Marinaccio signed the contract for him, but he (Sebastiani) was the contractor; at page 11. 40

*Referee's Report.*

10 that he (Sebastiani) figured on the job, and further that he built the house and there was no superintendent, and that Marinaccio (the person who signed the contract) worked for him. He further testified that it was built according to the plans and specified and in accordance with the written contract and supervised by Mr. Bottelli, the architect; at page 12, that Sebastiani did not sign the contract because he had a little trouble; at page 13, that when payments were made the witness and Rocco Marinaccio signed the receipts; and at page 14, that Rocco Marinaccio was working under the witness, receiving \$12.00 a day, Union Wages.

The lien claim was offered in evidence and marked "Exhibit P-4".

20 There was no dispute concerning the premises being properly described in the lien claim and in the complaint (page 14).

The agreement between the defendants and Rocco Marinaccio was admitted in evidence and marked "Exhibit D-1".

Plaintiff rests.

30 Romolo Bottelli, a witness produced by the defendants, testified that he drew the agreement between Rocco Marinaccio and the owners; that the same was signed in his presence and that he was the supervising architect of the building and the garages.

The architect's certificates were produced and marked "Exhibit D-2" and were issued in the name of Marinaccio.

The witness testified (page 19) that Sebastiani had charged of the entire work, and (at page 19) that when the parties were in his office they told him that Marinaccio was the contractor and that

*Referee's Report.*

Sebastiani was to have charge of the work for him to run the job.

It appears on cross-examination (page 22) that both Sebastiani and Marinaccio signed the receipts of the certificates for payment.

The witness further testified (page 22) that he saw Marinaccio on the job working as a carpenter with the other men, and (at page 23) that he was not acting as the boss but was working as an ordinary carpenter. At page 23, that Sebastiani supervised the job. 10

Charles Giampartone, a witness for the defendants and one of the owners of the property, testified that he had no other contract for the erection of the building, excepting "Exhibit D-1" with Marinaccio; that Sebastiani at one time lived next door to him; that both Sebastiani and Marinaccio stopped work on the contract and did not finish; that one of the payments was \$1,600.00 (page 27) and was made out to both Sebastiani and Marinaccio; and (at page 28) that Marinaccio told the witness to make the check to Sebastiani only, but that he made it out in both names for his own safety and upon advice of his counsel. The second certificate was not only signed by Marinaccio, but by Sebastiani (page 34). The witness (at page 37) testified that he knew nothing about Marinaccio, but knew Sebastiani as a neighbor and that he was a builder. 20 30

Antoinette Domino, one of the owners of the property, testified that she signed the contract (Exhibit D-1) with Marinaccio that she had no other contract in writing with anybody else or by word of mouth; and that Marinaccio did not finish the house.

Defendant rests. 40

*Referee's Report.*

In rebuttal Philip Sklar, a witness produced by the plaintiff, testified that he and Sebastiani went to the owners, Giampartone, to get the owner to sign a paper and that the owner would not sign.

- 10 Rocco Marinaccio, produced by the plaintiff, testified that he never did any contracting but was just an ordinary carpenter laborer and worked under Sebastiani. The witness testified (at page 46) that he was taken by Sebastiani to the architect's office and there met the architect and the owners; that Sebastiani told them that the witness had to sign the contract because he (Sebastiani) had "a little trouble"; at page 47 the witness testified "Then they agreed it was all right for me to sign, but I was not the boss. I never was the contractor." At page 47,
- 20 "They were talking that Sebastiani had a little trouble with some house; I don't know what it was; so they agreed that I was to accommodate them like, just with the signature; and that is what I done. That is all I know about it." And further, that he did not know what he was signing; that he did not know that he was contracting to build a house; at page 48, that he never read the agreement and that no one read it to him; at page 49, that he made no estimates for the job;
- 30 that no one ever asked him to make an estimate; that the witness was not the real contractor; at page 50, that he worked on the job as a carpenter laborer receiving \$12.00 a day from Sebastiani; that Mr. Giampartone knew about the arrangement; on page 51 the witness never received any money; on page 52 (cross-examination) that the witness signed the building contract for accommodation and at that time there were present the owners, Sebastiani and the architect; at page 53,
- 40 the witness was doing a favor not only for Sebas-

*Referee's Report.*

tiani but for the owners and the architect; and further (at page 54) that the witness was accommodating the parties. The witness is aged 24 years and had been a carpenter at th time of the hearing for about three years and had never met the owners only at the office on the occasion when he signed the contract. 10

In sur-rebuttal the defendants called Charles Giampartone, who denied the testimony of Philip Sklar to the effect that he owed Sebastiani money.

Antoinette Domino was recalled and testified (pages 55-59) that Marinaccio was the contractor and brought a figure to the architect's office; that she had previously asked Sebastiani to make an estimate and this was two days before they went to the architect's office; that Sebastiani's estimate was satisfactory and that they would meet at the architect's office and Marinaccio would be there; and at page 61 Sebastiani told the witness in the architect's office that he (Sebastiani) was going to take the agreement in Marinaccio's name. 20

Raniero Sebastiani was recalled by the plaintiff and testified (pages 62-65) that the owners asked him to give them a figure on the job and they brought the plans and specifications to him; at that time he lived next door; that he made a figure; that Marinaccio first appeared in the case the same day the contract was made; at the architect's office Sebastiani said to Mr. Bottelli (the architect) that he could not sign because he had some trouble and that he (Sebastiani) received the \$15,000.00 which was paid on the job. 30

From the foregoing testimony the conclusion must be reached whether the contract is fictitious or fraudulent, and whether it is between the parties who are actually contracting with each other. 40

*Referee's Report.*

Young v. Wilson, 15 Vr., 161

Earle v. Willets, 27 Vr. 334

Improved B. & L. Assn. v. Carkin, 88  
N. J. Eq. 52.

10 After a careful consideration of the testimony and the exhibits, the Referee has concluded that the contract is fictitious and fraudulent and is not between the parties who are actually contracting with each other.

Both Sebastiani and Marinaccio testified that the real contractor was Sebastiani. The appearance and manner of testifying of Marinaccio would indicate that he was incapable of being a contractor for the erection of a house, and to this extent corroborated his testimony that he was not the

20 The three certificates (Exhibits D-2, D-3 and D-4) were signed by both Sebastiani and Marinaccio.

There is testimony from different sources that the reason Sebastiani did not sign the contract was that he was in trouble of some kind. There is testimony from several sources that Marinaccio was working as a carpenter laborer at \$12.00 a day.

30 Apparently the idea of the parties was that Sebastiani would not sign the contract because he was in trouble of some kind and that the contract should be made nominally in the name of Marinaccio, leaving Sebastiani as the real contractor.

Under these circumstance sthe plaintiff is entitled to a lien.

The lien claim has been proved, and it appears that the same was filed within the time allowed by law and that the summons was issued within the time allowed by law.

40 The Unity Building & Loan Association, mortgagee, is made a party defendantt in the summons

*Referee's Report.*

and complaint and filed an answer admitting its mortgage, which was dated on September 11th, 1928, (considerably after the plaintiff began to deliver material for the building) and setting up further defenses, but no testimony was offered at the hearing on its behalf; and while counsel for the defendants appeared for the Building & Loan Association no testimony was offered further than appears in the stenographic notes, and no defense is advanced which makes the mortgage of the Building & Loan Association superior to that of the lien. 10

In view of the foregoing, the Referee recommends that judgment be entered in favor of the plaintiff and against the defendants, Charles Giampartone and Josephine Giampartone, his wife, Sadie Domino, Florence Domino and Janet Domino, owners (said ownership being admitted in the answer) for the sum of \$2,284.28, with interest thereon from November 1st, 1928, but only to be made specially of the lands and premises described in the lien claim and complaint; and that said judgment have priority over the lien of the mortgage of the defendant, Unity Building & Loan Association, mortgagee, mentioned in the summons and complaint (judgment by default has heretofore been entered against Raniero Sebastiani, builder). 20 30

All of which, with the exhibits and testimony, is hereby respectfully submitted this Fourth day of May, Nineteen Hundred and Twenty-nine.

ANDREW VAN BLARCOM,  
*Referee.*

Filed May 7, 1929.

9:57 A. M.

JOHN H. SCOTT, *Clerk.*

*Referee's Report.*

May 8, 1929.

Case No. 48415.

Eastern Sash &amp; Door Co., a corporation of New Jersey vs. Raniero Sebastiani, builder, et als.

10 My dear Mr. Scott:—

In my Report, on page 1 in line 14, there is a mistake in a date. The date "July 31st" should be October 31st".

Will you please make the change accordingly and pin this letter to the report for your authority in making it?

Yours very truly,

A. VAN BLARCOM

20 AVB.S.

Mr. John H. Scott,  
Clerk of Essex County,  
Court House, Newark, N. J.

30

40

## ESSEX COUNTY CIRCUIT COURT.

## Motion.

EASTERN SASH & DOOR COMPANY, a corporation of New Jersey,

*Plaintiff,*

*vs.*

RANIERO SEBASTIANI, Builder, CHARLES GIAMPARTONE, and JOSEPHINE GIAMPARTONE, his wife, SADIE DOMINO, FLORENCE DOMINO and JANET DOMINO Owners, UNITY BUILDING AND LOAN ASSOCIATION, Mortgagee,

*Defendants.*

10

*Action at Law  
On Mechanic's Lien*

Notice of Motion.

20

To:

Peter A. Cavicchia, Esquire,  
Attorney of defendants,  
31 Clinton Street,  
Newark, N. J.

TAKE NOTICE that on Saturday, June 15, 1929, at 10:00 a. m. (D. S. T.) or as soon thereafter as counsel can be heard, I shall apply to the Judge of the above court for an order confirming the Referee's Report filed in the above matter and for judgment in accordance with said report.

30

M. S. MAURER,  
*Attorney of Plaintiff.*

40

*Motion.*

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

LEOPOLD REITMAN of full age being duly sworn according to law on his oath deposes and says that:

10

"I am a clerk in the office of Maurice S. Maurer; on Tuesday, May 28, 1929, about 1:30 P. M., I served upon Peter A. Cavicchia, attorney of defendants in the within matter, a true copy of the within Notice by leaving said copy at his office at No. 31 Clinton Street, Newark, New Jersey, with Margaret Rona, his secretary."

Sworn and subscribed to before me  
 this 28th day of May, 1929.

20

LEOPOLD REITMAN

TERRY KALITSKY  
*A Notary Public of New Jersey.*

Service of a true copy of the within Notice of Motion is hereby acknowledged this — day of May, 1929.

Filed June 1, 1929.

9:39 A. M.

30

JOHN H. SCOTT, *Clerk.*

40

## ESSEX COUNTY CIRCUIT COURT.

## Exception to Referee's Report.

EASTERN SASH & DOOR COMPANY, a corporation of New Jersey,

*Plaintiff,*

10

*vs.*

*Action at Law*

*On Mechanic's Lien*

RANIERO SEBASTIANI, Builder, CHARLES GIAMPARTONE, and JOSEPHINE GIAMPARTONE, his wife, SADIE DOMINO, FLORENCE DOMINO and JANET DOMINO Owners, UNITY BUILDING AND LOAN ASSOCIATION, Mortgagee,

Exception to Referee's Report.

*Defendants.*

20

The defendant, Unity Building and Loan Association, by ePter A. Cavicchia, except to the Report of Andrew Van Blarcum, Esq. Referee to whom the matters of account, which are in controversy in the above stated cause, were referred, fo rthe following reasons:

1. That the report of the Referee is unsupported by the evidence adduced before him.

2. That the Referee erred in finding and determining that the plaintiff herein is entitled to a judgment against the defendants, Charles Giampartone and Josephine Giampartone, his wife, Sadie Domino, Florence Domino and Janet Domino, for the sum of Twenty-two Hundred Eight-four Dollars and twenty-eight cents (\$2284.28) made specially on the lands and premises described in the lien claim and complaint. 30

3. That the Referee erred in finding and determining that the said judgment of lien is prior 40

*Exception to Referee's Report.*

to the lien of the mortgage of the defendant, Unity Building and Loan Association, mortgagee.

10 4. That the Referee erred in finding that the plaintiff herein is entitled to a lien and erred in finding that the lien claim had been proved and that the same had been filed according to law.

5. That the Referee erred in concluding that the contract which was offered and accepted in evidence, made by and between Rocco Marinaccio and the defendant, Charles Giamportone and Antoinetta Domino, the then owners, was fraudulent and fictitious.

6. That the Referee erred in failing to find that the said contract was a good, valid and subsisting contract between the parties thereto.

20 7. That the Referee erred in failing to find that inasmuch as the contract made between the parties thereto was a good, valid and subsisting contract, duly recorded according to law, that the plaintiff herein was not entitled to any lien claim or right of lien claim against the premises described in the complaint.

30 8. That the Referee erred in reaching his conclusion, in that he contravened and did not follow the statute entitled, "An Act to secure to mechanics and others payment for their labor and materials in erecting any building and in making any improvements to land (Revision 1898) and the several acts amendatory thereof and supplementary thereto."

Wherefore the defendant, Unity Building and Loan Association, having heretofore reserved its right to trial by jury, does hereby demand trial by jury.

40

PETER A CAVICCHIA,  
Attorney of Defendant, Unity  
Building and oLan Association.

*Exception to Referee's Report.*

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

Matthew J. Reilly, of full age, being duly sworn on his oath, according to law deposes and says:

That on June 14th, 1929, he served a true copy of the within Exceptions, upon Maurice S. Maurer, Attorney of the plaintiff in the within action, by leaving the same at his office on the 9th floor of the Orway Building locate at 207 Market Street, Newark, N. J. and leaving the same with the stenographer of said Maurice S. Maurer aforesaid, who was in charge of the office. 10

Subscribed and sworn to before me this 14th day of June, 1929.

Matthew J. Reilly 20

Joseph E. Worthington, Jr.

At Master in Chancery of New Jersey.

Service of a true copy of the within Exception is hereby acknowledged this — day of June, 1929.  
 Filed June 15, 1929

9:08 A. M.

JOHN H. SCOTT, *Clerk.*

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Exceptions to Referee's Report.

ESSEX COUNTY CIRCUIT COURT.

10 EASTERN SASH & DOOR COM-  
PANY, a corporation of  
New Jersey,

*Plaintiff,*

*vs.*

20 RANIERO SEBASTIANI, Builder,  
CHARLES GIAMPARTONE, and  
JOSEPHINE GIAMPARTONE, his  
wife, SADIE DOMINO,  
FLORENCE DOMINO and JANET  
DOMINO Owners, UNITY  
BUILDING AND LOAN ASSO-  
CIATION, Mortgagee,

*Defendants.*

*Action at Law*

*On Mechanic's Lien*

Exceptions to  
Referee's Report.

30 The defendants, Charles Giampartone and  
Josephine Giampartone, his wife, Sadie Domino,  
Florence Domino and Janet Domino, by Peter A.  
Cavicchia, except to the Report of Andrew Van  
Blarcum, Esq. Referee to whom the matters of  
account, which are controversy in the above stated  
cause, were referred, for the following reasons:

1. That the report of the Referee is unsupported  
by the evidence adduced before him.

40 2. That the Referee erred in finding and deter-  
mining that the plaintiff herein is entitled to a judg-  
ment against the defendants, Charles Giampartone  
and Josephine Giampartone, his wife, Sadie Domino,  
Florence Domino and Janet Domino, for the sum  
of Twenty-two Hundred Eighty-four Dollars and  
twenty-eight cents (\$2284.28) made specially on  
the lands and premises described in the lien claim  
and complaint.

*Exceptions to Referee's Report.*

3. That the Referee erred in finding and determining that the said judgment of lien is prior to the lien of the mortgage of the defendant, Unity Building and Loan Association, mortgagee.

4. That the Referee erred in finding that the plaintiff herein is entitled to a lien and erred in finding that the lien claim had been proven and that the same had been filed according to law. 10

5. That the Referee erred in concluding that the contract which was offered and accepted in evidence, made by and between Rocco Marinaccio and the defendant, Charles Giamportone and Antoinetta Domino, the then owners, was fraudulent and fictitious.

6. That the Referee erred in failing to find that the said contract was a good, valid and subsisting contract between the parties thereto. 20

7. That the Referee erred in failing to find that inasmuch as the contract made between the parties thereto was a good, valid and subsisting contract, duly recorded according to law, that the plaintiff herein was not entitled to any lien claim or right of lien claim against the premises described in the complaint.

8. That the Referee erred in reaching his conclusion, in that he contravened and did not follow the statute entitled "An Act to Secure to Mechanics and Others payment for their labor and Materials in Erecting any Building and in Making any Improvements to Land (Revision 1898) and the Several Acts Amendatory thereof and Supplementary Thereto." 30

Wherefore the defendants, Charles Giamportone, and Josephine Giamportone, his wife, Sadie 40

*Exceptions to Referee's Report.*

Domino, Florence Domino and Janet Domino, having heretofore reserved their right to trial by jury, do hereby demand trial by jury.

PETER A CAVICCHIA,  
*Attorney of the Defendants,*

10

Charles Giamportone and Josephine Giamportone, his wife, Sadie Domino, Florence Domino and Janet Domino.

DATED: June 14, 1929.

Service of a true copy of the within Exception is hereby acknowledged this — day of June, 1929.  
*Attorney of Plaintiff.*

Filed June 15, 1929

20

9:08 A. M.

JOHN H. SCOTT, *Clerk.*

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## Affidavit of Service.

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

Matthew J. Reilly, of full age, being duly sworn on his oath, according to law, deposes and says:

That on June 14th, 1929, he served a true copy 10  
 of the within Exceptions upon Maurice S. Maurer  
 the Attorney of the Plaintiff in the within action,  
 by leaving the same at his office on the 9th floor  
 of the Orway Building which is located at 207  
 Market Street, Newark, N. J. and leaving the same  
 with the stenographer of the said Maurice S.  
 Maurer aforesaid, who was in charge of the office.

Subscribed and Sworn to before  
 me this 14th day of June, 1929.

Matthew J. Reilly 20

Joseph E. Worthington, Jr.  
*A Master in Chancery of New Jersey.*

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## Notice of Motion.

## ESSEX COUNTY CIRCUIT COURT.

10 EASTERN SASH & DOOR COM-  
PANY, a corporation of  
New Jersey,  
*Plaintiff,*

*vs.*

20 RANIERO SEBASTIANI, Builder,  
CHARLES GIAMPARTONE, and  
JOSEPHINE GIAMPARTONE, his  
wife, SADIE DOMINO,  
FLORENCE DOMINO and JANET  
DOMINO Owners, UNITY  
BUILDING AND LOAN ASSO-  
CIATION, Mortgagee,  
*Defendants.*

*Action at Law*

Notice of Motion.

To MAURICE S. MAURER, Attorney for Plaintiff.  
SIR:

30 TAKE NOTICE, that at the trial of the above  
entitled cause we shall move before Honorable  
Newton H. Porter, or such other Judge as may sit  
to try said case, at the Hall of Records, High  
Street, Newark, N. J., for an order striking out  
the complaint on file herein on the ground that  
said complaint is sham and frivolous by virtue of  
the judgment entered for the plaintiffs on May  
6, 1930 in the Essex County Circuit Court in the  
case wherein Antoinetta Domino and Charles  
Giampartone were plaintiffs and Rocco Marinaccio  
was defendant.

*Notice of Motion.*

AND TAKE FURTHER NOTICE, that at the same time and place we shall apply for an order suppressing the Report of Andrew Van Blarcom, Esq., Referee herein, dated May 4, 1929 on the ground that said report was not confirmed and on the further ground that the portions of said report which state "that the contract is fictitious and fraudulent and is not between the parties who are actually contracting with each other" and "under these circumstances the plaintiff is entitled to a lien" are not supported by and are inconsistent with the facts stated in and the recitals made in the balance of said Referee's report and is not in accordance with the law. 10

AND TAKE FURTHER NOTICE that at the same time and place we shall apply for an order prohibiting the use of said Referee's Report as prima facie evidence that the said contract was "fictitious and fraudulent and is not between the parties who are actually contracting with each other" and that "the plaintiff is entitled to a lien" on the ground that said findings in the said Referee's Report are inconsistent with the facts and other recitals contained in said Report. 20

AND TAKE FURTHER NOTICE, that at the same time and place we shall apply for an order setting up the judgment obtained for the plaintiffs in the sum of \$534.45 on May 6, 1930 in the case of Antoinetta Domino and Charles Giamportone vs Rocco Marinaccio as res adjudicata on the question of the legality and validity of the contract entered between Antoinetta Domino and Charles Giamportone and Rocco Marinaccio on June 5, 30

*Notice of Motion.*

1928, and filed in the Clerk's Office of the County of Essex on June 6, 1928.

Yours truly,

10 STEIN, McGLYNN & HANNOCH  
Attys, for Charles Giamportone,  
Josephine Giamportone, Sadie  
Domino, Florence Domino, Janet  
Domino and Unity Building &  
Loan Association.

Service of a copy of the within Notice of Motion is hereby acknowledged Saturday May 17, 1930 at 11:30 A. M.

M. S. Maurer,  
*Attorney of Plaintiff*

20 Filed May 24, 1930.  
9:51 A. M.

JOHN H. SCOTT, *Clerk.*

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## Order Suppressing Referee's Report.

ESSEX COUNTY CIRCUIT COURT.

EASTERN SASH & DOOR COMPANY, a corporation of New Jersey,

*Plaintiff,*

*vs.*

RANIERO SEBASTIANI, Builder, CHARLES GIAMPARTONE, and JOSEPHINE GIAMPARTONE, his wife, SADIE DOMINO, FLORENCE DOMINO and JANE DOMINO Owners, UNITY BUILDING AND LOAN ASSOCIATION, Mortgagee,

*Defendants*

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*Action at Law*

Order Suppressing Referee's Report.

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It appearing that the above matter was heretofore referred to Andrew Van Blarcom, as Referee, who filed his report herein on May 24, 1930, and an application having been made to suppress said report and prevent its use as prima facie evidence in the trial of this case, and said motion having been argued by Maurice Maurer, Esq., attorney for the plaintiff herein, and Aaron Lasser, Esq. of the law firm of Stein, McGlynn & Hannoch, Attorneys of the defendants, and it appearing that said report is improper and contains matters beyond the scope of the reference to the Referee, and is contrary to law, it is on this 27th day of June, 1930, on motion of Stein, McGlynn & Hannoch, Attorneys of the defendants,

30

ORDERED, that the Referee's Report filed herein on May 24, 1930, by Andrew Van Blarcom,

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*Order Suppressing Referee's Report.*

Referee, be and the same is hereby suppressed  
and that the plaintiff be not permitted to use said  
Referee's Rport in th trial of the said case.

NEWTON H. PORTER,  
*Circuit Court Judge.*

10 Filed June 27, 1930.  
12:25 P. M.

JOHN H. SCOTT, *Clerk.*  
48415

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## Judgment on Mechani's Lien.

## ESSEX COUNTY CIRCUIT COURT.

EASTERN SASH & DOOR COMPANY, a corporation of New Jersey,

*Plaintiff,*

*vs.*

RANIERO SEBASTIANI, Builder, CHARLES GIAMPARTONE, and JOSEPHINE GIAMPARTONE, his wife, SADIE DOMINO, FLORENCE DOMINO and JANET DOMINO Owners, UNITY BUILDING AND LOAN ASSOCIATION, Mortgagee,

*Defendants.*

*Action at Law* 10

*On Mechanic's Lien*

By Default

January 28, 1929

Damage.. \$2,315.49

Costs .....\$ 89.13

Total .....\$2,404.62

20

Maurice S. Maurer, Atty. of Plaintiff.

Judgment on Mechanics Lien in the above entitled Action was rendered on the Twenty-eighth day of January A. D. Nineteen Hundred and Twenty-nine in favor of the plaintiff Eastern Sash & Door Co. and against the defendant Raniero Sebastiani for the sum of Two Thousand Three Hundred Fifteen Dollars and Forty-nine Cents (\$2,315.49) damage and Eighty-nine Dollars and Thirteen Cents Costs of Suit. 30

Judgment Entered and Signed January 28, 1929.

WILLIAM S. GUMMERE,

*C. J.*

Book 106 Page 417 C C Judgments.

## Certificate of Clerk.

## ESSEX COUNTY CLERK'S OFFICE

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

10 I, JOHN H. SCOTT, clerk of the Circuit Court, in and for the County of Essex in the State of New Jersey.

DOES HEREBY CERTIFY That the foregoing is a true and correct copy of all the pleadings in the case of Eastern Sash and Door Company, a corp. of N. J. laintiff vs Raniero Sebastiani, et als, Defendants, together with a copy of the judgment record entered in Book 106 Page 417 of Circuit Court Judgments on January 28, 1929 and the same is  
 20 taken from and compared with the original copies of all records and as the same now remains on the files of said Court.

(SEAL) IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of said Court & County at Newark, N. J., this First day of December A. D., 1930.

JOHN H. SCOTT, *Clerk.*

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## ESSEX COUNTY CIRCUIT COURT.

## Action at Law.

Thursday, September 25, 1930.  
EASTERN SASH & DOOR COM-  
PANY, a corporation of New  
Jersey,

*Plaintiff,*

*vs.*

RANIERO SEBASTIANI, Builder;  
CHARLES GIMPORTONE and  
JOSEPHINE GIAMPARTONE, his  
wife; SADIE DOMINO,  
FLORENCE DOMINO and JANET  
DOMINO, Owners; and UNITY  
BUILDING & LOAN ASSOCIA-  
TION, Mortgagee,

*Defendants.*

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*Action at Law.*

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Before Hon. Nelson Y. Dungan, J., and a  
jury.

For plaintiff appears Maurice S. Maurer  
(by Philip J. Schotland).

For owner and mortgagee defendants ap-  
pears Peter A. Cavicchia (by Edward  
R. McGlynn).

[A jury is called and sworn.]

MR SCHOTLAND. I want to offer the  
report of the Referee.

MR. McGLYNN. I object to it.

THE COURT. I find the order of Judge  
Porter striking out the Referee's report,  
for the reasons therein stated, and, feeling  
bound by that order of Judge Porter, I will  
sustain the objection, and an exception to  
that ruling may be noted.

MR. SCHOTLAND. May I have the

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*Action at Law.*

privilege of stating the reasons why it should be admitted on the record?

THE COURT. Do you think that is necessary? You may do so, if you think so.

10 MR. SCHOTLAND. Every once in a while we get a decision which says, "You did not state your reasons."

THE COURT. If you want to get upon the record your reasons, they may be stated, shortly.

MR. McGLYNN. I am wondering about the effect before the jury.

20 THE COURT. If there is any doubt about that, the stenographer and Mr. Schotland and you and I may go into my chambers.

MR. McGLYNN. I would appreciate it if it were done that day.

[The Court, counsel and the stenographer thereupon retired to Judge Dungan's chambers, and the following ensued]:

30 MR. SCHOTLAND. I contend that the report of the Referee should be admitted into evidence, because, under the decisions, when there is an order of reference and a reservation by both parties of a right of trial by jury, upon the coming in of the Referee's report, if either party objects and insists upon a trial by jury, the case is put back on the list, to be tried before a jury, but the report of the Referee is admissible in evidence as prima facie proof of the case of the side in whose favor the report is rendered.

40 THE COURT. I do not believe you have stated the statute accurately, but if

*Action at Law.*

you would like me to get the statute, I shall do so [reading]: “\* \* \* shall be prima facie evidence of all the facts therein found and reported”— that is all it says, from which I infer that it may be offered by either party to establish those facts.

MR. SCHOTLAND. In *Booty v. Pratt*, Court of Errors and Appeals decision, 53 Atlantic, it is held that on a reference, the Referee reports a sum due to defendants. After exceptions filed, a trial was had and the report was put in evidence and the defendant recovered a judgment. The judgment was reversed and a new trial had. The reversal of the former judgment did not impair the effect which the statute gives to a Referee’s report, because of a subsequent trial, and such report is prima facie evidence of the whole facts therein found and reported. The matters of trial are the issues raised by the pleadings, respecting which the report is to be offered and received in evidence, and the exceptions to the report, when produced, limit the range within which the exceptant can contradict the prima facie force of the

(L. S.)

report. That is the whole effect of his exceptions.

That is why I contend the Referee’s report is competent evidence to prove the facts on which he reports, and ask that it be admitted.

THE COURT. My statement upon that is, that the matter having been argued before and decided by Judge Porter, and he having decided that the report of the

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*Action at Law.*

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Referee is improper, and contains matters beyond the scope of the reference to the Referee, and is contrary to law, and ordered that the Referee's report be suppressed and that the plaintiff be not permitted to use said Referee's report in the trial of the case, the objection to the admission in evidence of the Referee's report at this time, because of the foregoing order, is sustained.

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

Exception noted as ground of appeal.

20

MR. SCHOTLAND. I offer in evidence the lien claim from the files of the County Clerk, which shows that the Eastern Sash & Door Company, as claimant, against Raniero Sebastiani, as builder, Charles Giamportone and Josephine Giamportone, his wife, Sadie Domino, Florence Domino and Janet Domino, as owners, filed the lien claim, claiming a lien.

THE COURT. When was this filed?

30

MR. SCHOTLAND. It was filed on the 9th of December, 1928, and it bears the endorsement, "The issuing of a summons on this lien claim on the 21st of December, 1928." It claims a lien for a balance due of \$2284.28, with interest from October 31, 1928.

[Document referred to received in evidence and considered marked Exhibit P-1.]

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*Raniero Sebastiani, for plaintiff, Direct.*

RANIERO SEBASTIANI, sworn in behalf of plaintiff.

*DIRECT EXAMINATION* by Mr. Schotland.

Q Mr. Sebastiani, in 1928 what was your business? 10

A Carpenter-contractor.

Q Contractor in what line?

A Building.

Q How long have you been a building contractor?

A Sixteen years.

Q And do you know the Giamportones and Dominos?

A Yes, sir.

Q Where did they live at that time? 20

A In my house.

Q In your house?

A Yes.

Q Did you enter into any arrangement with them to erect a building for them?

MR. McGLYNN. I object to that, if your Honor please. I think the facts should be stated rather than a conclusion of the witness, especially in view of the peculiar nature of this case.

MR. SCHOTLAND. Just a preliminary question, if your Honor please. 30

THE COURT. I will sustain the objection.

Q Did you have anything to do with erecting any building for the Giamportones and the Dominos?

A Yes. Mrs. Domino—

Q You have answered the question. Who came to see you about erecting a building? 40

A Mrs. Domino.

*Raniero Sebastiani, for plaintiff, Direct.*

THE COURT. We have here Sadie, Florence and Janet.

THE WITNESS. The second name, yes.

THE COURT. Florence Domino?

10 THE WITNESS. No, it is the old lady; I don't know the name.

MR. McGLYNN. That is the best description; that is the mother.

MR. SCHOTLAND. Mrs. Anna Domino, stand up.

[Spectator rises in rear of court room.]

Q Is that the lady?

A Yes.

Q That is Mrs. Anna Domino.

A Yes.

20 MR. SCHOTLAND. If your Honor please, it is admitted—I think Mr. McGlynn explained in his opening—that after the beginning of the erection of the building, Mrs. Anna Domino conveyed to her daughters, the other Dominos, at the time when the lien claim was filed, and the suit started was against the owners of record then.

THE COURT. Is that correct?

30 MR. McGLYNN. That is correct. The only people who figure here in this particular case are the mother and the son-in-law; the other three daughters have nothing to do with the situation, except they were grantees.

THE COURT. Mrs. Giamportone is a sister of the other—

MR. McGLYNN. Yes, Mr. Giamportone was Mrs. Domino's son-in-law; each had a half-interest; she conveys her half-interest to her three daughters.

40 THE COURT. That would make four?

*Raniero Sebastiani, for plaintiff, Direct.*

MR. McGLYNN. The fourth daughter is the wife of the other owner.

THE COURT. The Giamportone did not get it by conveyance from Mrs. Domino?

MR. McGLYNN. Giamportone had a half-interest with his mother-in-law at the time the building commenced. 10

THE COURT. Can that be stipulated on the record?

MR. SCHOTLAND. Yes.

MR. McGLYNN. That has always been understood between us.

Q Now, go on, Mr. Sebastiani—go on and tell us what Mrs. Domino talked to you about.

A He sent me the plan home to figure it up. I figured it up and sent him my estimate. 20

Q And what estimate did you give him?

A For \$23,000, but after he took off some and make contract for \$21,950.

Q \$21,950?

A \$21,950.

Q He took off some—you said, "After he took off some"—who is "he"?

A I don't understand that.

Q Whom did you talk to?

A Mrs. Domino.

Q Anyone else? 30

A No.

Q Do you know Mr. Giamportone?

A Oh, yes.

Q Did he have anything to do with this in any way?

A No.

Q Only Mrs. Domino did you talk to?

A Yes.

Q When was it that you agreed for \$21,950?

A At that architect's office. 40

*Raniero Sebastiani, for plaintiff, Direct.*

Q In the architect's office?

A Yes, Mr. Botelli.

Q Did you enter into a contract for the \$21,-  
950?

A No. I—

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MR. McGLYNN. I ask that that be a sufficient explanation.

MR. SCHOTLAND. If your Honor please, I think the examining counsel is the one who may object to the form of the answer.

THE COURT. Yes. If the answer is improper, a motion may be made to strike it out, but if it is relevant to the issue, he may continue.

20

Q Tell us what you were going to say.

A I go into Bottelli office for the contract, but he have some trouble. I don't sign the contract; I let him sign, Mr. Marinaccio, for me.

Q Did you tell—

MR. McGLYNN. It seems to me, the question being, "Did you sign a contract," I think the question was, that the only answer that the witness gave was "No," I move to strike out the rest of it.

30

THE COURT. I did not understand what he said.

[Last answer of the witness read.]

THE COURT. The answer may remain.

Q Who is Marinaccio?

A My workman.

Q What kind of work did he do for you?

A Carpenter.

Q Who, if anyone, did you tell that you wanted Marinaccio to sign the contract?

A Both, to the owners.

40

Q Well, who are the owners that you told it to?

*Raniero Sebastiani, for plaintiff, Direct.*

A Mr. Giamportone and Mrs. Domino.

Q What did you tell them?

A I tell them I can't sign the contract, because he had trouble, and he know he had trouble.

MR. McGLYNN. Who is "he"? I did not get that "he."

Q Mr. Sebastiani. just tell us over again, real slow, what you told Mr. Giamportone and Mrs. Domino, as to why you did not sign the contract yourself?

A I tell them because I had some trouble in the house, in 80 Poe avenue, and I can't sign the contract, let him sign, Mr. Marinaccio. He says yes, and Marinaccio sign for me.

Q And Marinaccio signed the contract?

A Yes, sir.

Q Now. was there any talk as to who was going to build the house, who would do the work?

A Myself.

Q Well, was there any talk about it?

A I started the building.

Q At that time, when you were in the architect's office, and Marinaccio signed the contract, I want to know if there was any talk between you and the owners about who was going to build the house, who was going to do the work?

A I say I build it.

Q Was there any talk—that is what I want to know, first—did anyone talk about it? Did you say something or did Mrs. Domino say something, or did Mr. Giamportone say something?

A What I say? I can't talk good English.

Q That is very apparent. Just try to think as to what I am asking you, and answer it the best way you can. When Marinaccio signed the contract, did anyone say who was going to be the man who would build the house?

*Raniero Sebastiani, for plaintiff, Direct.*

A Yes. Marinaccio sign the contract, but I am responsible for the building of the house.

Q Who said that?

A Myself.

Q To whom did you say it?

10 A To Mr. Botelli, and Mr. Giamportone, and Mrs. Domino.

Q What did they say?

A They say, "All right."

Q Now, after that, did you go ahead to build the house?

A Yes, sir.

Q What did you do?

A I started digging the cellar; I lay the foundation and I started to build up the house.

20 Q Well, did you do it yourself or did you hire people, or how?

A I hired people.

Q You hired people?

A Yes.

Q Who hired all the people that did any work on that?

A The mason, carpenter and painter; all the men.

Q Who hired them? Who got them to do work?

A Myself.

30 Q You, yourself?

A Yes.

Q Did Marinaccio do any of it?

A No, sir.

Q What did Marinaccio do on this job?

A Only the carpenter work.

Q As what?

A Day work, day time.

Q Just working for you as a carpenter?

A Yes.

40

*Raniero Sebastiani, for plaintiff, Direct.*

Q Who paid all of the other contractors and all of the other workingmen?

A Myself.

Q Who paid Marinaccio?

A Myself.

Q What did you pay Marinaccio?

MR. McGLYNN. I object. I do not see that it is material.

10

THE COURT. I will sustain the objection.

Q Did you make a contract with the Eastern Sash & Door Company for some material for this building?

A Yes, sir.

Q Where is this building located?

A St. Paul avenue and Cliff street.

Q I show you a paper purporting to be signed by the Eastern Sash & Door Company, by its president, and by you. Is that the contract you made for material for this building of the Dominos and Giamportone (handing witness document)?

20

A (Examining) Yes.

MR. SCHOTLAND. I offer it in evidence.

MR. McGLYNN. I object to the introduction of this contract between the witness and the Eastern Sash & Door Company, because I do not think we should be bound by its provisions, and I do not see what materiality it has against us.

30

THE COURT. It will be taken subject to a motion to strike out later.

(Contract referred to received in evidence and marked Exhibit P-2.)

MR. SCHOTLAND. This contract is dated June 25, 1928, and is an agreement between the Eastern Sash & Door Company, of Frelinghuysen avenue, of Newark, New

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*Raniero Sebastiani, for plaintiff, Direct.*

- 10 Jersey, and this witness Sebastiani, of Boylan street, Newark, and provides for the list of material to be supplied by the Eastern Sash & Door Company, for the building at St. Paul avenue and Clifff street, Newark, N. J. for the sum of \$2170, and it is signed by all of the parties.
- Q Did you get all of the material in this contract, P-2?
- A Yes.
- Q What did you do with it?
- A I built the house, to build the house.
- Q You used it in building this house for the Dominos and Giamportone?
- A Yes.
- 20 Q I show you a delivery slip of the Eastern Sash & Door Company, dated October 31, 1928, for some material, with a receipt signed by somebody. Will you look at it and tell me if you recognize who signed that receipt (handing witness document)?
- A (Examining) Tom Sebastiani, my son.
- Q Was your son on this job, on this particular building?
- A Yes, sir.
- 30 Q Now, did you receive the material represented by this slip on this job?
- A Sure; I sign—my son.
- THE COURT. Is that for material in addition to the contract?
- MR. SCHOTLAND. It fixes the last date of delivery.
- Q Is this the last material received on that job?
- A Yes.
- Q That is the very last?
- 40 A Yes, sir.

*Raniero Sebastiani, for plaintiff, Direct.*

MR. SCHOTLAND. I offer it, only for purpose of fixing the last date of delivery. (Delivery slip referred to received in evidence and marked Exhibit P-3.)

Q I show you a statement from the Eastern Sash & Door Company, to you, purporting to show all of the material and the credits. Will you look it over and tell me if that is a correct statement of what material you received, and what you paid, and whether it shows what you owe (handing witness document). 10

MR. McGLYNN. May I ask Mr. Schotland to confine his question solely to materials on this particular job?

MR. SCHOTLAND. Oh, yes.

A (Examining document) That is correct. 20

Q Any of the material that is charged on this statement— did that go to any other building except this building of the Dominos and Giampor-tone?

A No, sir.

Q All went into this building?

A Yes, sir.

Q And you owe the balance shown on this statement?

A Yes, sir.

MR. SCHOTLAND. I offer it in evidence. 30

THE COURT. How much is the balance?

MR. SCHOTLAND. \$2284.28; that is with interest from October 31, 1928, the date of the last delivery.

(Statement referred to received in evidence marked Exhibit P-4.)

Q Exhibit P-4 shows that on August 21, 1928, you made a payment of \$700. Whom did you get that \$700 from?

A From the owner. 40

*Raniero Sebastiani, for plaintiff, Cross.*

MR. McGLYNN. I do not see that that makes any difference, if your Honor please.

THE COURT. The answer may remain.

Q When you say "the owner," whom do you mean?

10 A Both, Mr. Giamportone and Mrs. Domino.

MR. SCHOTLAND. Mr. McGlynn, do you question the description of the property?

MR. McGLYNN. No, sir. I will stipulate that the description in the lien claim is the proper description of the defendants' property.

*CROSS EXAMINATION by Mr. McGlynn.*

20 Q With whom did you deal at the Eastern Sash & Door Company before this contract was signed?

A What?

Q Sir?

A I don't understand.

Q With whom did you deal at the Eastern Sash & Door Company before you signed this contract, which has been marked P-2? What was the man's name?

A This is my name.

30 Q Yes, but what is the man's name up at the Eastern Sash & Door Company that you did business with?

A The president.

Q What is his name?

A I don't know the name.

Q Did you tell him that there was a written contract on this job?

A I say, "I am the contractor."

Q Did you tell him there was a written contract?

40 A No, I say, "I am the contractor."

*Raniero Sebastiani, for plaintiff, Cross.*

Q Did you tell him that there was a contract between the owners and Marinaccio?

A No.

Q You finally told him, didn't you, some other time?

A No.

10

Q You never told him?

A No.

Q Sure?

A Sure.

Q This contract that was signed in Mr. Botelli's office, the amount of the contract was correct, \$21,950, was it not?

A Yes.

Q The specifications were correct?

A Yes.

20

Q And the house, so far as you went with it, was built according to the specifications?

A Yes, sir.

Q And the owners complied with the contract, so far as the payments were concerned,—whatever payments were made before you stopped?

A For the first three payments.

Q You did not finish the job, did you?

A No.

Q How far had the work progressed when you stopped?

30

A I never finished.

Q I know you never finished, but how far did you get when you stopped?

A It is only the painting and some plumbing.

Q The painting and plumbing still to be done?

A And some electrician.

Q And how much money had the owners paid on account of the contract price up to the time when you did your last work?

40

*Raniero Sebastiani, for plaintiff, Cross.*

MR. SCHOTLAND. I object to that as immaterial, sir.

THE COURT. The question may be answered.

A He pay to me.

10 Q I did not say that. I asked you how much the owner had paid up to the time the work stopped.

MR. SCHOTLAND. If it is limited as to what was paid to the witness, I think it is incompetent and immaterial.

THE COURT. The question may be answered.

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

20

Exception noted as ground of appeal.

A I don't know; I don't know the money that is paid after I stop.

Q I asked you about "before."

A Before, \$15,000.

Q Now, I show you a paper, dated September 17, 1928, and ask you if that is Mr. Marinaccio's signature. Is that his name (handing witness document)?

30

A (Examining) That is his name; yes.

Q It is his name?

A He is Rocco Marinaccio.

Q Did you see him sign this paper?

A I don't think so.

Q You do not think so?

MR. McGLYNN. I just ask that this be marked for identification at present.

(Document referred to marked Exhibit D-1 for identification.)

40 Q I show you an architect's certificate, dated August 10, 1928, and ask you if that is Mr.

*Raniero Sebastiani, for plaintiff, Cross.*

Marinaccio's name at the bottom, lefthand side  
(handing witness document).

A (Examining) Yes.

Q And your name on the righthand side?

A Yes.

MR. McGLYNN. I ask that that be  
marked for identification. 10

(Document referred to marked Exhibit  
D-2 for identification.)

Q I show you another architect's certificate,  
dated September 18, 1928, and ask you if that is  
Mr. Rocco Marinaccio's name at the bottom (hand-  
ing witness document).

A (Examining) Yes.

Q And yours below it?

A Yes.

MR. McGLYNN. I ask that that be  
marked for identification. 20

(Document referred to marked Exhibit  
D-3 for identification.)

Q I show you another certificate, dated Novem-  
ber 2, 1928, and ask you if that is Mr. Rocco  
Marinaccio's name at the bottom, and yours just  
above it (handing witness document).

A (Examining) Yes.

MR. McGLYNN. I ask that that be  
marked for identification. 30

(Document referred to marked Exhibit  
D-4 for identification.)

Q So that in the making of payments under  
the contract for the erection of this house, it was  
necessary for this man Marinaccio to sign the  
architect's certificate each time?

MR. SCHOTLAND. I object to that.

THE COURT. I will sustain the objec-  
tion.

Q You knew that the owner was requiring Mr. 40

*Raniero Sebastiani, for plaintiff, Cross.*

Marinaccio to sign papers in connection with the contract after the work started, didn't you?

A I don't understand.

10 Q Oh, yes, you do. You knew, after the work started on this house, that the owners required Mr. Marinaccio to sign certain papers from time to time, didn't you?

A They required to sign a certificate.

Q Yes, and you were with him when he signed?

A Yes.

Q And those signatures were put on those papers at the time that you were getting material from the Eastern Sash & Door Company, weren't they?

20 A No; I go myself to the Eastern Sash & Door Company.

Q Wasn't Mr. Marinaccio signing these papers at the time you were getting materials from the Eastern Sash & Door Company?

A He don't sign nothing.

Q Well, you just showed me three of his signatures.

A Yes, the certificates, sure, he sign.

Q Did you tell the Eastern Sash & Door Company that?

A No.

30 Q Why not?

A Because I am the contractor. What is the use talking?

Q Why didn't you tell them that it was a written contract with Marinaccio, and he was signing architect's certificates and other things?

A Because the real contractor was myself.

Q But did you tell the Eastern Sash & Door Company that?

A No.

40 Q Why not?

*Raniero Sebastiani, for plaintiff, Cross.*

A Because I didn't have to tell them.

Q Because you didn't have to tell them?

A No.

Q Now, you say that the reason you asked the owners to have this contract signed by this man was because you were in trouble?

10

A Because I am in trouble.

Q Did you tell the owners what the trouble was?

A Yes.

Q What?

A The house in 80 Poe avenue.

Q What about it?

A I buy the house for my brother-in-law, because the house wasn't mine, but my brother-in-law's, and my brother-in-law bought in my name, but he put seven thousand second mortgage on, and when he don't pay the second mortgage they chase him out of the house.

20

Q You told all that to these owners?

A Yes.

Q And to Mr. Botelli, too?

A No, Mr. Botelli—I don't say nothing to Mr. Botelli.

Q Nothing?

A I say only the trouble he had, but I don't explain to him what trouble he had.

30

Q When did you explain to the owners all this trouble about some house in Poe avenue, and brother-in-laws, and mortgages, and all that?

A They know before.

Q When did you tell them?

A When he had the trouble, because he lived in my house, and he know what the trouble I had.

Q So that at the time you made the estimate and the time you went down to the architect's office, the time you produced Mr. Marinaccio to sign

40

*Raniero Sebastiani, for plaintiff, Cross.*

the contract, you didn't say anything to anybody about the trouble?

A Yes, sir.

Q Well, now, did you or didn't you?

A I say to the owner.

10

Q When?

A Mr. Giamportone.

Q When?

A Before they started the contract.

Q Well, how long before?

A About two, three months, I don't know, because he is living in my house and he knows my trouble.

Q Is that the only time you spoke to him about your trouble?

20

A The owner.

Q Sure, Giamportone—is that the only time you told him, two or three months before the contract?

A I told a lot of times.

Q Did you tell Mrs. Domino of your trouble?

A No.

Q Did you tell Mr. Botelli of your trouble?

A I said the trouble we had, but I don't explain what trouble we had.

30

Q Well, did you explain to Mr. Botelli?

A Mr. Botelli, he don't care.

Q Never mind what he cares—did you tell him?

A I don't tell him.

Q Was there any conversation in Botelli's office about why this contract was being signed by Mr. Marinaccio?

A Botelli, he don't care who sign it.

40

Q Never mind that, sir. Answer the question. Was there anything said in Mr. Botelli's office, when this contract was signed, by you or any-

*Raniero Sebastiani, for plaintiff, Cross.*

body else, as to why this contract was being signed by a man by the name of Marinaccio?

A I don't understand.

Q Was there anything said at that time?

A He don't say nothing.

Q Of course not. Nobody said anything, did they, there in Botelli's office? 10

A In Botelli's office, I can't sign, because I explain the trouble I had.

Q Don't give me any of the reasons of your argument. I want to know—

A (Interposing) I don't understand.

Q Yes, you do understand.

A I don't understand the question.

Q There was nothing said in Mr. Botelli's office, when this contract was signed, about any reason why it was in Marinaccio's name, isn't that true? 20

A I don't understand, that is all.

Q Well, now, we will go back again. I am sorry, but I want to get this straight. Nothing was ever said by you to Mrs. Domino about your trouble?

A Yes, I told Mr. Giamportone.

Q I didn't say "Giamportone." Was anything said by you to Mrs. Domino, the old lady, about your trouble? 30

A I told them in the architect's office.

Q What did you say in the architect's office?

A I can't sign it, because I had the trouble.

Q Is that what you said?

A Yes; his son-in-law explained what trouble we had.

Q Explained it there?

A Yes.

*Raniero Sebastiani, for plaintiff, Cross.*

BY THE COURT.

Q Was Mrs. Domino there in the architect's office?

A Mr. Giamportone.

Q Was Mrs. Domino there, is my question?

10 A They told me that Mr. Giamportone was in the architect's office.

Q My question was, was Mrs. Domino in the architect's office?

A Yes.

BY MR. McGLYNN.

Q How long before the contract was signed did you figure on these plans?

A About one month before.

20 Q When was the time, before the contract was signed, that the owners said they were going to give the contract to you or to anybody that you picked out?

A That same day of the contract.

Q The same day the contract was signed. Did the owners make the appointment to meet at the architect's office and tell you to be there?

A With me, yes.

Q You did not call the architect up?

A No.

30 Q The owners did?

A Yes, sir.

Q And when you got there the contract was ready, was it?

A No.

Q It was drawn after you got there?

A Yes.

Q Did you have Marinaccio with you?

A Yes, sir.

Q Where did you meet him?

40 A In Broad street.

Q By appointment?

*Raniero Sebastiani, for plaintiff, Cross.*

A By appointment, yes.

Q When did you make the appointment with him?

A I called him in the morning.

Q That same day?

A The same day.

Q You told him you wanted to see him for what? 10

A I wanted to see him for the contract work.

Q Did you tell him you were going to have him sign a contract for you?

A After the appointment, sure.

Q After you met him?

A Yes, in Broad street.

Q You explained it to him?

A Yes.

Q Did you tell him where the building was and all about it? 20

A No, he didn't know nothing.

Q What did you tell him?

A Ain't no use to tell him.

Q What did you tell him?

A I got a building, I got a building.

Q When you meet this man on Broad street, what did you say to him?

A I said, "You want to sign the contract for me?" and he said, "All right," because he work for me, and he said, "All right." 30

Q So he went up to the architect's office with you?

A Yes.

Q And was he there while all this conversation was going on?

A Yes.

Q In the same room?

A Yes.

Q You were all together? 40

*Raniero Sebastiani, for plaintiff, Cross.*

A Yes.

Q Who was there?

A It was me, Marinaccio, Mrs. Domino, Mr. Giamportone and the architect.

Q Five people?

10

A Five people.

Q How long were you there?

A I don't know; about three-quarters of an hour or one hour; I don't remember now.

Q Was there any discussions there at the architect's about the specifications, or the contract price or payments, or anything like that?

A Yes.

Q What did you talk about there?

A Talk about the house, for the payment.

20

Q Had you arranged about the payments before you got there, when you were to get payments?

A No, sir.

Q Was that arranged there?

A Arranged there.

Q Anything else arranged there besides that?

A We change something in the house.

Q Specifications?

A In the specifications.

30

Q I show you a check dated November—It looks like November 2, 1928—on the Broad and Market National Bank, and ask you if that is Mr. Marinaccio's endorsement on the back of the check, the first endorsement on the back (handing witness document).

A (Examining) Yes.

Q That is Marinaccio's (indicating) and yours comes next?

A Yes.

40

MR. McGLYNN. I ask that the be marked for identification.

*Raniero Sebastiani, for plaintiff, Cross.*

(Check referred to marked Exhibit D-5 for identification.)

Q Now, as I recall it, I asked you before whether the owners made the payments in accordance with the contract, and you said yes, the first three payments were made whenever they were supposed to be made, is that right? 10

A They made three payments.

Q Now did the owners require Marinaccio's signature in connection with those payments?

A Yes.

Q The owners of this property did not ask you to put this contract in Marinaccio's name, did they?

A I don't know.

Q The owners did not ask you to put the contract in Marinaccio's name? You were the one that wanted it in his name, isn't that right? 20

A Yes.

Q What arrangement, if any, was made between you and Marinaccio about this contract which he was signing for you, as you say?

A We didn't make no arrangement.

Q Well, didn't you agree with him that you would be responsible to him for any trouble or loss, or anything?

A No, no. I am the contractor; I am responsible for the job. 30

Q But you knew the contract was in his name?

A He sign it for me, sure.

Q And you knew later, Mr. Sebastiani, that Mr. Marinaccio was sued on this contract, didn't you?

A I don't know that.

Q Well, you did know, didn't you?

A Yes, they sued, sure.

Q Did you come in in that case and say that 40

*Raniero Sebastiani, for plaintiff, Redirect.*

you were the contractor and he only signed it for you?

A Yes.

Q When, when did you ever come in and say that?

10 A I came with the lawyer, but the lawyer didn't call me to the stand. I come to the case.

Q You mean you were in the court room?

A Yes, in the court room.

Q And who hired the lawyer in that case, you or Marinaccio?

A Mine.

Q Your lawyer?

A Sure.

Q Did he ever represent you before?

20 A Not before, because I don't know no lawyers before.

Q Did you talk to the Eastern Sash & Door Company before that suit was tried and you hired this lawyer about this case?

A No, sir.

Q Did they recommend a lawyer?

A No.

Q You knew that the same lawyer you had in that case was the same lawyer that represents the Eastern Sash & Door Company, didn't you?

30 A No, I go myself to the lawyer.

& To which lawyer?

A Mr.—I don't know his name.

Q You do not know his name?

A I don't remember the name.

*REDIRECT EXAMINATION* by Mr. Schotland.

Q Who do you mean was the lawyer you went to? Point him out.

40 A This gentleman here (indicating Mr. Maurer).

Q Mr. Maurer?

A Mr. Maurer.

*Rocco Marinaccio, for plaintiff, Direct.*

ROCCO MARINACCIO, sworn in behalf of plaintiff.

*DIRECT EXAMINATION* by Mr. Schotland.

Q Mr. Marinaccio, how old are you?

A I will be twenty-six.

10

BY THE COURT.

Q When were you twenty-five?

A August 16th.

Q Last August you were twenty-five?

A Twenty-five.

BY MR. SCHOTLAND.

Q What is your business?

A Laborer-carpenter.

Q Are you a contractor?

A No, sir.

20

Q Were you ever a contractor?

A No, sir.

Q Do you know Mr. Sebastiani?

A Yes, sir.

Q How long have you know him?

A About five or six years.

Q Did you ever work for him?

A Yes, sir.

Q How long did you work for him?

A It will be about four years.

30

Q Up to when?

A Well, let us see—the last job was about a year ago.

Q Do you know the Giamportones and Dominos?

A I know them now, but I didn't before.

Q Did you have anything to do with erecting their house at St. Paul avenue and Cliff street?

A No, sir.

Q Did you work on it?

40

*Rocco Marinaccio, for plaintiff, Direct.*

A Yes, sir.

Q Whom did you work for?

A Sebastiani.

Q What kind of work did you do on it?

A Carpenter-labor.

10 Q How were you paid?

A By the week.

Q Did you sign a contract for that job?

A Yes, sir.

Q At whose request?

A Sebastiani, Domino, Giamportone and Botelli.

Q They all told you to sign?

A Well, there was an understanding there between them; I guess—I don't know what it was.

20 MR. McGLYNN. Then I ask, if your Honor please, that that last answer be stricken from the record.

THE COURT. It will be.

Q I asked you at whose request you signed the contract. What is your answer?

A Giamportone, Domino, Botelli and Sebastiani.

Q They all asked you to sign?

A Yes.

Q Did you build the house?

A No, sir.

30 Q Under that contract?

A No, sir.

Q Did you build it at all?

A No, sir.

Q Did you buy any material for that building?

A No, sir.

Q Did you hire any help for that building?

A No, sir.

Q Who did?

A Sebastiani.

40

*Rocco Marinaccio, for plaintiff, Direct.*

Q While the building was being erected, did either the owners or the architect ever talk to you about the work as it was going on?

A No, sir.

Q Did you sign certificates or checks or any papers?

10

A I did.

Q At whose request?

A Sebastiani, and Domino and Giamportone .

Q Did you get any of the money that was represented by any checks on this job?

A No, sir.

Q Who did get it?

A Sebastiani.

Q Why did you sign?

A Because they told me that I had to sign, because I signed the contract.

20

Q Who told you that?

A Giamportone and Domino.

*CROSS EXAMINATION by Mr. McGlynn.*

Q A minute ago, Mr. Marinaccio, you said that the reason that the four of them asked you to sign this contract was because they had an understanding. Now, just why did you sign this contract on June 5, 1928?

MR. SCHOTLAND. If your Honor please, if this question is to stand, then the motion to strike out the answer upon which this question is based should be withdrawn, and that answer permitted to remain, and then it will become cross examination of it.

30

THE COURT. I do not understand your objection to this question.

MR. SCHOTLAND. I object to it unless that answer is permitted to stand.

THE COURT. It may be answered.

40

*Raniero Marinaccio, for plaintiff, Cross.*

A Sebastiani was telling me he had a little trouble, so Botelli hesitated a little while and looked around, and they says to Sebastiani, "All right, we know you as the contractor," so they says, Marinaccio—they give me the pen and I signed it.

10 Q Who is "they" give you the pen?

A Mr. Botelli gave me the pen.

Q Now, did you know why you were going there to that office?

A I didn't until I got there.

Q Where did you meet Sebastiani?

A On Broad street.

Q Had he made an appointment to meet you there?

A I don't remember.

20 Q What did he say when he met you?

A He told me that he was going to get a job.

Q What else did he tell you?

A That is all, and he took me up along with him.

Q Didn't he say why he was taking you up?

A No, sir.

Q He didn't say anything?

A Not until he got to the office.

Q Now, when you got to the office, who was there?

30 A Domino, Giamportone, Sebastiani and I.

Q And was there any conversation there at the office?

A I just heard Sebastiani.

Q Was there any conversation there?

A Amongst them.

Q Were they talking in Italian?

A Yes.

Q And was Mr. Botelli there when they started to talk?

40 A No, sir; not at that time.

*Raniero Marinaccio, for plaintiff, Cross.*

- Q What did they talk about?  
 A All as I heard, Sebastiani had a little trouble.  
 Q Who was doing the talking?  
 A Sebastiani, Domino and Giamportone.  
 Q Well, who said Sebastiani had a little trouble, which one of them? 10  
 A Sebastiani was telling Giamportone and Domino.  
 Q That he had a little trouble?  
 A Yes.  
 Q What else?  
 A That is all I know.  
 Q He just said he had a little trouble, is that all he said?  
 A Yes.  
 Q What did they say? 20  
 A Well, they says, "All right for Marinaccio to sign."  
 Q Well, who first suggested that you should sign the contract?  
 A It was an understanding between Sebastiani and the owners.  
 Q How do you know that?  
 A That is what they were talking about there.  
 Q Well, who told you there was an understanding between them?  
 A I was there. 30  
 Q Well, did they reach the understanding and agreement while you were there?  
 A Yes.  
 Q And you were satisfied to go ahead?  
 A They told me to go ahead.  
 Q Were you satisfied to sign the contract to accommodate him?  
 A Yes.  
 Q Did you sign it?  
 A Sure, I did. 40

*Raniero Marinaccio, for plaintiff, Cross.*

Q I show you what purports to be a copy of this contract, dated June 5, 1928, and ask you if that is your signature on the top line in the back of the contract (handing witness document).

A (Examining) Yes, sir.

10

MR. McGLYNN. I ask that that be marked for identification.

(Copy of contract referred to marked Exhibit D-6 for identification.)

Q So you knew that you were signing a contract for the erection of a house on this property belonging to these two owners?

A Yes.

Q And you knew that thereafter, after the building was started, that you were signing certain papers as the contractor, didn't you?

20

A Just the certificates.

Q Well, some papers?

A Yes.

Q I show you Exhibit D-1 for identification, "Postponement of Mechanic's Lien," is the title at the top, and ask you if that is your signature (handing witness document)?

A (Examining) It looks like it.

Q Well, is it or isn't it?

30 A Well, I don't remember whether I signed it or not. It looks like my signature.

Q I show you Exhibit D-2 for identification, architect's certificate, and ask you if that is your signature down at the bottom, over to the lefthand side (handing witness document).

A (Examining) Yes.

Q I show you Exhibit D-3 for identification, another architect's certificate, and ask you if that is your signature (handing witness document).

A (Examining) Yes.

40

Q I show you a check, marked Exhibit D-5 for

*Raniero Marinaccio, for plaintiff, Cross.*

identification, and ask you to look at the top endorsement on the back of the check. It that your signature (handing witness document)?

A (Examining) Sure, but I didn't receive the money.

Q So you did sign more papers than the architect's certificates, didn't you? 10

A Sure.

Q I asked you that. And you knew you were signing those as the contractor who had executed this contract for the erection of this building on this property, didn't you?

A Yes, sir.

Q Who actually asked you to sign this contract?

A Sebastiani. 20

Q Do you recall being sued in connection with this contract that you signed?

A Yes, sir.

Q Did you hire a lawyer to defend that case?

A Sebastiani did.

Q You had nothing to do with it?

A No, sir.

Q And you knew that a judgment was entered against you in that case?

A Yes, sir.

Q Did you have any agreement with Sebastiani as to who was to be responsible or to protect you in connection with these matters? 30

A No agreements at all.

Q When you knew you were being sued on this contract, did you appear and defend the case?

A Yes, sir.

Q You are sure of that?

A Yes, sir.

Q I understood you to say you had nothing to do with it, that Sebastiani did it. 40

*Raniero Marinaccio, for plaintiff, Cross.*

A Well, I was there to see that some of the lumber yards got their money, because they are entitled to it, if I could help them.

Q I am talking about the time you were sued.

A Yes.

10

Q Were you in court?

A Sure, I was in court.

Q Did you take the stand?

A No, sir.

Q Who was your lawyer?

A I didn't have no lawyer.

Q You are not so sure of that, are you?

A Yes, I am sure.

Q Would you be surprise if you were told that there was an answer filed in that suit against you by a lawyer?

20

A Not by me.

Q You are sure of that?

A Yes.

Q You left the entire matter to Sebastiani, didn't you?

A He is the contractor.

Q Well, you left it to him to defend that suit, didn't you?

A Sure.

30

Q You gave him the papers, didn't you?

A I didn't get any papers.

Q Weren't you served with the papers in that suit?

A I dont' remember.

Q You remember being in court, don't you?

A Yes, sure.

Q With Mr. Sebastiani?

A Yes.

Q And who was the lawyer that was there with you?

40 A I didn't have no lawyer.

*Raniero Marinaccio, for plaintiff, Cross.*

Q Well, who was the lawyer who was there that day you were in court?

A Moyer.

Q Who?

A Moyer.

Q Mr. Maurer here (indicating)? 10

MR. SCHOTLAND. Mr. Maurer.

A Yes.

Q And that was a suit by Domino and Giamportone against you, wasn't it?

A Yes.

Q You lived, in December, 1929, at 164 North 11th street, Newark?

A No, sir.

Q Where did you live?

A North 10th street. 20

Q North 10th street is right. 164 North 10th is right?

A Right.

Q Do you recall a copy of that paper (indicating) being served on you there?

A I don't remember.

Q Well, if it was, what did you do with it?

A I don't know.

MR. SCHOTLAND. That is our case, your Honor. 30

CHARLES GIAMPORTONE, one of the the defendants, sworn in behalf of defendant-owners and defendant-mortgagee.

*DIRECT EXAMINATION* by Mr. McGlynn.

Q You are one of the owners of this property which is the subject matter of this suit?

A Yes, sir.

Q And you are the son-in-law of Mrs. Domino?

A Yes, sir. 40

*Charles Giamportone, defendant, Direct.*

Q As I understand it, you and she owned the property together before the building was started, is that right?

A Yes, sir.

10 Q And you knew Mr. Sebastiani before the building was commenced, didn't you?

A Yes, sir.

Q You lived in some house that he was the landlord of, or next door?

A Yes, sir.

Q And do you know how he got a copy of the plans and specifications of this proposed building?

A Yes, sir.

Q How?

20 A Well, I lived there, I guess, about a year and a half before.

Q Never mind all that. How did he get the plans and specifications?

A Well, when we were getting the plans and specification, I met him in front of the house, and I told him, "We are getting the plans and specifications to build a house on St. Paul avenue and Gliff street," and he say, "When you do get the plans and specifications, will you please let me have them? I got a good friend contractor that will figure on it, and I will see that he gives you good figures."

30 Q And you later gave him a copy of the plans and specifications?

A My mother-in-law did.

Q Your mother-in-law did?

A Yes.

Q Who made these plans and specifications?

A Architect Botelli.

Q And are those the same plans and specifications that the house was erected and built on?

40 A Yes, sir.

*Charles Giamportone, defendant, Direct.*

Q Now, did Mr. Sebastiani come back, after he had the plans, to see you?

A No, sir.

Q When did you hear from him next?

A Good while after. I had asked if his friend is through with the figuring, and he always says, "Not yet, not yet. I am going over in a couple of days and see," and he held it up for about five or six weeks. 10

Q Did he eventually give you a figure?

A Yes, sir.

Q What was the first figure he gave you?

A I don't exactly remember, but there was little changes made by my mother-in-law, which would bring it down.

Q Common floors?

A For good floors. 20

Q What conversation did you have with Mr. Sebastiani before you went down to Botelli's office, when this contract, which has been marked for identification, was signed—before you went down?

A The conversation that Mr. Marinaccio's figures were accepted by us, and he wanted to know when to meet at the architect's office and for Mr. Marinaccio to take the contract.

Q And did you make the appointment? 30

A That is with him, yes.

Q You saw Botelli and you made it?

A Yes.

Q Who was down at the architect's office?

A When I went down, I believe there was Botelli and my mother-in-law, only.

Q Later, did somebody else come in?

A Yes, sir.

Q Who came in there?

A Marinaccio and Sebastiani. 40

*Charles Giamportone, defendant, Direct.*

Q Did they come in together?

A Yes, sir.

10 Q I show you a copy and set of specifications, produced from the files of the County Clerk's office, dated June 5, 1928, marked "Filed June 6, 1928," and ask you if this is the contract and specifications that were signed in Mr. Botelli's office on that occasion (handing witness documents).

A (Examining) Yes, that is my name there (indicating).

Q Your name is the last one of the three?

A Yes.

Q Your mother-in-law's is just ahead of yours?

A Yes.

20 Q And the top line is Mr. Marinaccio's?

A Yes, sir.

MR. McGLYNN. This, if your Honor please, takes the place of the one I was using until the original came, which I had marked Exhibit D-6 for identification.

30 MR. SCHOTLAND. Why don't you continue to use the other one, and I will stipulate that it shall have the same force and effect as it if was the one from the files of the County Clerk's office?

MR. McGLYNN. Fine. Then I will offer the contract, D-6 for identification, in evidence.

(Contract referred to, previously marked Exhibit P-6 for identification, now received in evidence and marked Exhibit D-6.)

40 THE COURT. To which, it is admitted, the specifications were attached.

*Charles Giamportone, defendant, Direct.*

MR. McGLYNN. And it was regularly filed on the date that I specified.

Q Now, was anything said in Mr. Botelli's office, on the day this contract was signed, by you to this man Marinaccio, about signing this contract?

10

A No, sir.

Q Was anything said by your mother-in-law in your presence, upon this occasion, to this man about signing the contract?

A No, sir.

Q Was anything said by Mr. Botelli in your presence, to this man Marinaccio or Sebastiani, about having Marinaccio sign the contract?

A No, sir.

Q What had Sebastiani said to you before you went to Botelli's office about the person who was to sign the contract?

20

A He had told me that a friend of his, Mr. Marinaccio, was figuring on the plans and specifications.

Q He had told you his name?

A Marinaccio—yes.

Q Did he tell you anything else about him?

A He told me he had built several houses for this Marinaccio, supervising for him, on North 8th street, and that Marinaccio was a reliable contractor, and was selling the houses before he was completing the houses, and that he was a reliable contractor.

30

Q Did he say anything to you about who was to supervise the work for Marinaccio on this contract?

A Marinaccio told me, down at his office, that he would have Sebastiani supervise the job for him.

Q Now, when the work actually started, after the contract was actually signed, were both Marinaccio and Sebastiani on the job?

40

*Charles Giamportone, defendant, Direct.*

A First was Sebastiani, and shortly after Marinaccio showed up on the job.

Q Now, did you make any of the payments, provided for in this contract, to the contractor?

A Did I make any of the payments what?

10 Q Did you make any of the payments which are described in this contract?

A Yes.

Q How many of the payments did you make?

A Three payments.

Q And, according to the contract, the first payment was to be made when the building was raised, sheathed and the roof boards on—\$5000. Was that paid to him?

A Yes, sir.

20 Q Whom did you pay that to?

A Marinaccio.

Q And do you recall how you made that payment?

A Yes, sir; it was in my house.

Q I mean whether it was by check or cash?

A Some savings bank checks and cash.

Q And how much of that five thousand did you yourself advance?

A Half of it.

Q And your mother-in-law?

30 A The other half.

Q Was that payment made before your mortgage was obtained or before you were entitled to the money on it?

A Well, I don't know. We had intention of making the first payment ourselves.

Q Well, later you got a mortgage, didn't you?

A Yes, sir.

Q And then, after that, were the payments made by the building loan?

40 A Yes, building loan.

*Charles Giamportone, defendant, Direct.*

Q Do you recall just how that first payment of \$5000 was made up? Do you recall how much was checks and how much was cash, or don't you?

A There was a check for eleven-something; one for three-something; one for four-something and five hundred and something in cash.

Q What was the occasion for so many checks?

A Well, my wife has got her own bank account, and I got mine separate.

Q I mean, there were checks from different—

A (Interposing) From the Howard and the Guardian Trust Company.

Q Now, did you receive from the architect a certificate showing that the contractor was entitled to the first payment under this contract?

A Yes, sir.

Q I show you Exhibit D-2 for identification, and ask you if that is the certificate which was issued to you, as one of the owners, for the first payment (handing witness document).

A (Examining) Yes, sir.

Q That is dated August—it looks like August 10, 1928.

A Yes, that is right.

Q Did you see Marinaccio and Sebastiani both sign that receipt at the bottom (indicating)?

A Yes, sir.

Q Where was that done, do you recall?

A At my house.

Q And they were both there at the same time?

A Yes, sir.

MR. McGLYNN. I offer D-2 for identification in evidence.

(Document heretofore marked D-2 for identification now received in evidence and marked Exhibit D-2.)

10

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30

40

*Charles Giamportone, defendant, Direct.*

Q I show you Exhibit D-3 for identification, and ask you—

MR. SCHOTLAND. Offer them all.

MR. McGLYNN. I offer these others in evidence.

10 Document heretofore marked D-3 for identification now received in evidence and marked Exhibit D-3.)

(Document heretofore marked D-4 for identification now received in evidence and marked Exhibit D-4.)

(Document heretofore marked D-5 for identification now received in evidence and marked Exhibit D-5.)

20 (Document heretofore marked D-1 for identification now received in evidence and marked Exhibit D-1.)

Q Why, Mr. Giamportone, was the first architect's certificate signed by both Marinaccio and Sebastiani?

A Well, when the job was started, I used to go up now and then, when I got a chance, but there was mornings sometimes or evenings, and I looked at the job and walked around, and first I didn't see Marinaccio but I seen Sebastiani for about a week or two; then I seen Marinaccio on the job, and I  
30 asked him a question, and he referred me to Sebastiani. I asked him another question and then he would do the same thing, so it looked as so I went down and seen my lawyer, Mr. Cavicchia.

Q You cannot tell us what he said, but was it as the result of that you had these two names on the certificate?

A Yes, sir.

Q And you did that with each certificate?

A Yes, sir.

40 Q I show you Exhibit D-5, and ask you did

*Charles Giamportone, defendant, Direct.*

you make that check out yourself or have it made out for you?

A I made it our myself.

Q I notice you have it made out, on the fact of the check, with both names, haven't you?

A Yes, sir. 10

Q And you got both endorsements?

A Yes, sir.

Q What was the reason for that?

A I done the same thing as I done with the certificates.

Q Did you ever request Marinaccio to sign this contract?

A No, sir.

Q Did you ever ask him to?

A No, sir.

Q Did you ever ask Mr. Sebastiani to have Mr. Marinaccio sign the contract? 20

A No, sir.

Q Did Marinaccio complete the contract?

A No, sir.

Q How did you have it completed?

MR. SCHOTLAND. I object to that as being entirely immaterial to the issues here.

THE COURT. I will sustain the objection. 30

Q Did you subsequently institute a suit, on behalf of yourself and the other owners, against Marinaccio on this very contract, for the excess money that it cost you to complete the contract after its being stopped by the contractor?

MR. SCHOTLAND. I object to that as immaterial. I did not object to it by way of cross examination of Marinaccio or of Sebastiani, because I thought it possibly would be competent to show animus, or 40

*Charles Giamportone, defendant, Direct.*

their connection, or their interest in this case, or how they are affected, but as a separate issue to be tried by affirmative evidence, I do not see how it is competent.

10 THE COURT. The mere fact that he instituted a suit, if that were the only thing—unless there was something that arose in that suit, which would bind the plaintiff in this suit—

MR. McGLYNN. Nothing happened in that suit that could bind the plaintiff on the situation, the suit culminating in a judgment in favor of the owners. I say that is a material fact and a fact to be taken into consideration here. In my opinion, this was a valid existing contract between this man and Marinaccio, and he admitted he was sued, on cross examination, and I intend to offer, after this question is answered, if he answers yes, the record in that case.

20 MR. SCHOTLAND. Which is just what I object to. It has absolutely nothing to do with the issues here. Cross examination of Marinaccio is an entirely different thing.

30 THE COURT. I suppose that brings us to one of the defenses raised in the answer.

40 MR. McGLYNN. It brings us to that, and it also brings into play what I think is a fact here, and an argument, and a theory that is material and, I think, probably dispositive of this case. The mere fact that the plaintiff takes the stand and says he was not the contractor is mere idle words. Here is a suit against that same man, on that very contract.

*Charles Giamportone, defendant, Direct.*

THE COURT. Was Marinaccio a party to that suit?

MR. McGLYNN. He was a defendant.

MR. SCHOTLAND. He is not a party to this action here.

MR. McGLYNN. The suit I am talking about. 10

THE COURT. And Sebastiani?

MR. McGLYNN. No, of course not.

MR. SCHOTLAND. And the Eastern Sash & Door was on party.

THE COURT. I will admit it, and an exception may be noted to that ruling.

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

Exception noted as ground of appeal.

Q (Last question read.) 20

A Yes.

MR. SCHOTLAND. Of course, that question contains a lot of fact, but my objection does not go to the technical form of the question; my objection goes right to the meat of the situation. The plaintiff in this case cannot in any way be bound by any action between them; for instance, this contract, made, upon its face, between Marinaccio and Giamportone and Domino, is fully binding as between those parties; and Marinaccio and Giamportone and Domino, is would be estopped from putting up the parole agreement. It is the converse of a situation where A transfers property to B for the purpose of evading the payment of his just debts, and then, if he sues B, he cannot get the property back, but the creditors can; and to put into evidence— on a creditor's bill, to make that property 30 40

*Charles Giamportone, defendant, Direct.*

10 subject to execution, on the ground that the conveyance was in fraud, to put into evidence an action by A against B, attempting to recover the property and saying that it is absolutely B's, in that case would have no bearing, because it is covered by entirely different laws and entirely different rules, and an entirely different legal situation.

20 In our case, if we show that while they made a contract nominally with Marinaccio, the real contractor, to their knowledge, was Sebastiani, we have a right to recover. In an action between them and Marinaccio, under the laws of evidence, *Nuumberg v. Young*, they could not raise the question that the contract was not what it purports on its face to be. The parties to that contract are estopped.

THE COURT. I find that I am in doubt about the correctness of that rule. Do you prefer to speak further on it?

30 MR. McGLYNN. Yes, sir. I was wondering whether that question could be answered, and the next question will be the offer of this record, which, I think, is the real situation.

THE COURT. I assumed that that would follow, and if your second question is asked first—

MR. McGLYNN. I offer in evidence, then, the record of this suit we have been discussing, and described in the last question.

40 MR. SCHOTLAND. There is no use of my repeating my argument; the same argument applies to both.

*Charles Giamportone, defendant, Direct.*

MR. McGLYNN. The plaintiff comes in her and relies on two witnesses, this man Marinaccio and Sebastiani, and from their testimony there isn't a question but that Sebastiani admits that Marinaccio was his agent, and that is shown by everything he did, and Marinaccio, in turn, admits he executed the contract at the request of this man Sebastiani, and that he, in turn, was to be bound. 10

Now, all they come in here and say, in order to get an issue on this being an unreal or fictitious contract, is their idle words, "Mr. Marinaccio was not the contractor"—he merely says that. I say he cannot say that, and I have a right on my defense to prove that his statement has been established by solemn judgment of this Court against him, on the very contract. Why didn't he come in and defend? If he did, the record speaks for itself. 20

THE COURT. But a suit in which the plaintiff in this case is not a party—

MR. McGLYNN. I am not offering it on the doctrine of *res judicata*, or that the judgment in this case is binding against this plaintiff. 30

THE COURT. You are raising it on the subject of estoppel.

MR. McGLYNN. On the witness' testimony. The man comes in and says, "I am not the contractor." Here I say that he is the contractor. Can this Court say in one suit against him that he was the real contractor, and then allow him to come in here 40

*Charles Giamportone, defendant, Direct.*

and say that he was not the real contractor? I think the jury should know that—not *res judicata* against the plaintiff, perhaps, but as against him.

10

MR. SCHOTLAND. If your Honor please, he is not a party here; he is only a witness; and, as I pointed out before, that judgment could have no bearing, because he would not be permitted to testify in that case if he came in and attempted to testify; and we are not trying him, we are trying our case. If he were a party-plaintiff to this case, and attempted to assert something contrary to the legal effect of that judgment, the judgment could be introduced by way of estoppel, to estop him from asserting such a claim for himself; but the judgment has absolutely no bearing upon the plaintiff's claim here.

20

THE COURT. It may have a bearing upon the testimony.

30

MR. SCHOTLAND. I beg your Honor's pardon; in no way. If this witness for the plaintiff had testified in one way here, and in another way at a trial where he was a party, regarding the same subject matter, he could be confronted with that testimony on cross examination, and have the truth ascertained,—which testimony is true,—and evidence could be introduced if he denied that he so testified. That record could be introduced as his testimony; but that is not the situation. The situation is that there was some kind of an action against him, based upon this contract. Well, it is in evidence, without any objection, that the contract was actually signed by him. He

40

*Charles Giamportone, defendant, Direct.*

did not, on the witness stand here, deny he signed the contract; so that it is not a case of attempting to contradict him as to his factual testimony. He admitted he signed the contract.

Now, your Honor knows what the legal effect of him signing the contract, as between the parties, is. Why, even in the case of a president of a corporation signing a note, forgetting to put down the name of the corporation, but signing his name as president,—that is, in the Keene case,—he has been held, bound personally, by the signature, and not permitted to introduce parole evidence to show that what he intended was to sign as the president or as the treasurer—I have forgotten which, whether it was “president” or “treasurer”—of the corporation. 10 20

THE COURT. The situation was all understood between the defendants that the real contractor was Sebastiani; that to evade some complications, because of trouble with another house he had, this man was signing it, but that the real contractor was Sebastiani.

MR. SCHOTLAND. Yes, your Honor. 30

THE COURT. So that, if they understood that, do you say that no defense could have been interposed by Marinaccio in a suit which the owners of the property would bring against him, if they were parties to a fraudulent transaction, relating to this contract, in order to relieve Sebastiani from responsibility to the property in which he had trouble? 40

*Charles Giamportone, defendant, Direct.*

MR. SCHOTLAND. Yes, I say that for this reason: The owners were not participating in any fraud. It was Marinaccio who was the active participant.

10

THE COURT. According to the plaintiff's testimony, they were lending themselves to all that; they knew about it.

20

MR. SCHOTLAND. Yes, they knew about it, and they were agreeable to let Sebastiani build that house for them, and have the contract in the name of Marinaccio; and in an action at law between them and Marinaccio, Marinaccio having signed the contract personally, would not be permitted to say, "Although I signed this contract personally, you know that I did not sign agreeing to bind myself. I simply did that as a matter of form and that the real contractor is Sebastiani." He could not do that. He would not be permitted, under the rules of evidence, as between the owners and himself. They having that written contract, he was estopped from denying, as between them, that he is bound by his signature, and simply because then, when they sued him, he evidently being worthless, permitted a judgment to go against him by default, they took a judgment against him by default, is absolutely no evidence in this case, throwing no light on the situation at all, because he did not testify in the action and he did not interpose any defense. He did not testify any differently than here. A man may let a judgment go against him by default, because—well, for any number of reasons.

30

40

*Charles Giamportone, defendant, Direct.*

He may not want to spend the money for the cost of defending—you cannot tell—but a default judgment between other parties in an action where, on its face, he would be estopped from setting up the statements that he testified to in this case—I cannot see how that can possibly be competent evidence in the case. 10

THE COURT. I do not mean “estop.” My only thought is, if it is admissible at all, it is admissible as bearing upon his present testimony.

MR. SCHOTLAND. That would not be necessary, because he admitted it on cross examination; and simply because something is competent on cross examination, especially if admitted, does not make it competent to go and load up the evidence by adding affirmative evidence. 20

THE COURT. The record will be admitted.

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

Exception noted as ground of appeal.

MR. SCHOTLAND. You are offering the whole record? 30

MR. McGLYNN. Yes, sir.

(Record referred to is received in evidence and marked Exhibit D-7.)

MR. SCHOTLAND. I withdraw all objections to the record, because the record shows that he made the same claim as he did on the witness stand, and it shows my argument on the legal effect of it.

MR. McGLYNN. We are both satisfied then. 40

*Charles Giamportone, defendant, Cross.*

MR. SCHOTLAND. It shows that the Judge struck out the answer and agreed with me on the law, instead of ruling the law your Honor did.

CROSS EXAMINATION by Mr. Schotland.

- 10 Q Mr. Giamportone, you knew Mr. Sebastiani, didn't you?  
 A Yes, sir.  
 Q For how long before this house was built?  
 A About a year and a half, I guess.  
 Q You knew that he was a building contractor?  
 A I knew that he was working.  
 Q You saw him build some houses?  
 A He had built a house alongside of where we was living.
- 20 Q You saw him do that?  
 A For himself, but I was working every day. I seen the houses go up every night.  
 Q And you did not know Marinaccio at all, did you?  
 Q You never saw him before the time that you saw him sign the contract in the architect's office?  
 A No, sir.  
 Q That is true, is it not?  
 A Yes, sir.
- 30 Q You did know, didn't you, that Sebastiani was having trouble about that house on Poe avenue?  
 A I didn't know anything about Poe avenue.  
 Q You did not know that there were some foreclosure proceedings going on?  
 A No, sir.  
 Q And they were going to hold him on the second mortgage?  
 A I am only hearing it now.
- 40 Q You did not know or hear that he was in any trouble at all?

*Charles Giamportone, defendant, Cross.*

A No, sir.

Q Didn't you ask him to bid on the house you wanted built?

A As I said before—

Q Answer my question now. Never mind what you said before.

10

A No, sir; I didn't ask him.

Q Even if you change it, I don't object.

A I didn't ask him to bid on my house.

Q Well, did he ask you to let him bid?

A No, not for himself.

Q What did he ask you?

A He asked me if I would please let him have the plans and specifications, to let a friend of his bid on it.

Q Well, why didn't you ask him why he didn't bid himself?

20

A Because I knew he was working for this friend of his, who was a reliable man.

Q He was working for this friend of his?

A Yes.

Q You saw Mr. Marinaccio in Mr. Botelli's office for the first time, didn't you?

A Yes, sir.

Q You saw them that he was just a youngster, twenty-three years of age, didn't you?

A How can I tell people's age?

30

Q Well, you saw he was just a young fellow?

A I seen him just as I see you here.

Q You saw that he did not participate in the discussion about the terms of the contract, didn't you?

A There was no terms; the architect was giving the payments, how they should go.

Q But Marinaccio did not discuss that, did he?

A Discuss what, the payments?

Q Yes.

40

*Charles Giamportone, defendant, Cross.*

- A Nobody did; the architect was alone.
- Q Didn't Sebastiani discuss them?
- A No, sir.
- Q Who agreed upon the reduction in price when the character of the floors was changed?
- 10 A That was done before.
- Q Well, with whom?
- A My mother-in-law and Sebastiani.
- Q And what was said at the time when the contract was signed as to who was actually going to erect that house?
- A There was no occasion—the man that took the contract.
- Q What was said?
- A Well, I know before I went down there that Marinaccio was to be the contractor.
- 20 Q What was said as to who was to go in to really supervise the erection of the building?
- A Mr. Marinaccio told me that Mr. Sebastiani would supervise the house for him.
- Q When did he tell you that?
- A Down at the architect's office.
- Q When, at the same time the contract was signed?
- A While Mr. Botelli was working on the contract.
- 30 Q How did he come to tell you that?
- A He told me—how should I know?
- Q You did not ask him?
- A No, sir.
- Q You were not interested?
- A Interested in what?
- Q In having Sebastiani have anything to do with this contract?
- A No, sir.
- 40 Q You did not ask Marinaccio anything about it?

*Charles Giamportone, defendant, Cross.*

A No, sir.

Q But Marinaccio said that he was going to have Sebastiani supervise the contract?

A Yes, sir.

Q Now, he said it just out of a clear sky, without any talk leading up to it at all? 10

A Yes, sir.

Q That is right?

A Yes, sir.

Q What else did Marinaccio say there?

A I don't remember anything.

Q Now, who began work on this house after the contract was signed?

A Sebastiani did.

Q Was Marinaccio there?

A Not the first week.

Q Was Marinaccio there when the excavating was going on? 20

A As I say, not the first week.

Q Answer the question, please.

A No, no, no.

Q Was Marinaccio there when the foundation was being put in?

A Yes, I seen him.

Q When, when the carpenter work began?

A Before that.

Q What did you see him do before that? 30

A Just look around; no work; look around.

Q Looking around?

A Yes.

Q When?

A When the foundation was going up.

Q What did you see Marinaccio do on this job after the work was started?

A I seen him looking around and seen him work as carpenter.

Q Did you see him doing anything else ex- 40

*Charles Giamportone, defendant, Cross.*

cept work as a carpenter on this job after he once started work?

A No; no other line of work but carpenter.

Q You knew who hired the men to do the work for all parts of it, didn't you?

10 A No, sir.

Q You did not?

A No, sir.

Q You knew who bought material for this job, didn't you?

A No, sir.

Q You did not?

A No, sir.

Q You knew that there were a lot of men working on this job, didn't you?

20 A Reliable men?

Q A lot of men—there were masons and plumbers and carpenters?

A At times, yes; sure.

Q Well, you did not have anybody else sign any paper with Marinaccio besides Sebastiani, did you?

A Sign any paper?

Q Yes.

A What kind of paper?

30 Q You got papers signed, didn't you, by Marinaccio and Sebastiani?

A The certificates?

Q Oh, papers.

A Papers?

Q Yes.

A What kind of papers?

Q Any kind.

A No.

Q You did not?

A I don't remember.

40 Q I show you Exhibit D-1. You got Sebastiani

*Charles Giamportone, defendant, Cross.*

to sign that, didn't you—"Postponement of Lien"  
(handing witness document)?

A (Examining) Oh, yer, I remember now.

Q You got him to sign that?

A Yes.

Q Why didn't you get the plumber or the  
mason, or any of the other people on the job, to  
sign this Exhibit D-1? 10

A The lawyer told me to get him to sign.

Q Only Sebastiani?

A Both.

Q Sebastiani and Marinaccio?

A Yes, sir.

Q No one else?

A No, sir. A witness, I believe, is on that.  
I believe there is a witness on that.

Q All right. And you got him to sign here  
as one of the people who had agreed, by the con-  
tract in writing, duly filed or to be filed, to furnish  
labor and materials for the erection of this build-  
ing, didn't you? 20

A I got handed that paper from the lawyer,  
and he says, "Have the contractor and his super-  
visor sign this paper."

Q How did the lawyer know that the con-  
tractor had a supervisor?

A I had kicked about it, and he had told me  
about the certificate, so he done the same thing  
with it. 30

Q You kicked about what?

A As I said before, that Marinaccio did not  
seem to take enough interest to suit me.

Q Now, on the very first certificate that you  
got from the architect, on August 10th, for \$5000,  
you got Sebastiani's signature as well as Mari-  
naccio's, didn't you—I am referring now to Ex-  
hibit D-2? 40

*Charles Giamportone, defendant, Cross.*

A Yes, sir.

Q To whom did you give the money on this?

A Marinaccio.

Q Did you?

A Yes, sir.

10 Q Are you sure?

A Yes, sir.

Q You are sure you gave the money to Marinaccio, are you?

A Yes, sir.

Q Yes. You are positive

A I did say "yes."

20 Q I show you a check, dated August 13, 1928, drawn by the Fidelity Trust Company, a treasurer's check, to the order of Janet Domino, endorsed by Janet Domino and Sebastiani. Will you look at this check and tell me whether that is one of the checks that made up that five-thousand-dollar payment (handing witness document)?

A (Examining) I didn't hand this check in. How should I know? I only know about my own checks. This (indicating) was by the other half-owners. We both paid fifty-fifty, because we was both half-owners.

Q So you don't know anything about that checks. Who does know about this check?

30 A Mrs. Domino does.

Q Isn't this one of the checks you testified that you handed—

A (Interposing) I handed to whom?

Q To Marinaccio, to make up the \$5000?

A I handled my own.

Q Oh, you handled your own?

A Yes, sir.

MR. SCHOTLAND. I ask to have this marked for identification.

40

*Charles Giamportone, defendant, Cross.*

(Document marked Exhibit P-5 for identification.)

Q Now, I show you a check drawn by the Howard Savings Institution, on its own account, to the order of Charles Giamportone, for \$1043, dated August 13, 1928, and endorsed "Charles Giamportone" and "Raniero Sebastiani." Is that one of the checks that you turned over to make up the five-thousand-dollar payment (handing witness document)? 10

A (Examining) Yes, sir.

Q Will you show me where Marinaccio's endorsement comes in on that?

A I only got this the other day from the bank. How could I know who endorsed that?

Q You handed it to Marinaccio?

A I certainly did. 20

Q You are sure of that?

A Yes, sir.

MR. SCHOTLAND. I offer that in evidence.

MR. McGLYNN. I have no objection.

(Check referred to received in evidence and marked Exhibit P-6.)

Q Now, I show you another check, drawn by the Howard Savings Institution, to the order of Josephine Giamportone, endorsed by Josephine Giamportone and by Sebastiani, also dated August 13, 1928. Is that one of the checks turned over for the five-thousand-dollar payment (handing witness document)? 30

A (Examining) Yes, sir.

Q Can you account for the fact that Marinaccio did not endorse the check or receive the money on it?

A My God—

Q Can you? Yes or no. 40

*Charles Giamportone, defendant, Cross.*

A I only got the check the other day. How should I know who cashed it?

Q Did you get this check?

A I went to the bank to get it. You wanted it, or something like that, to show.

10 Q Didn't you know that these checks were subpoenaed by the plaintiff from the bank?

A Yes, but I have never seen them before.

Q But do you know why that check was cashed without Marinaccio's signature appearing at all?

A No, sir; I don't know.

MR. SCHOTLAND. I offer that in evidence.

(Check referred to received in evidence and marked Exhibit P-7.)

20 MR. SCHOTLAND. There seems to be no objection to my offering the Fidelity Union Trust Company check in evidence for the \$2500; so I offer it.

(Check previously marked Exhibit P-5 for identification now received in evidence and marked Exhibit P-5.)

30 Q I show you check made by you to Marinaccio and Sebastiani, dated November 2, 1928, endorsed by Marinaccio and Sebastiani, and then endorsed by you (handing witness document).

A (Examining) Yes, sir.

Q Who got the money on this check?

A I was requested to go down with Sebastiani and get it cashed.

Q And who did you give the cash to?

A Marinaccio asked me to go down.

Q Will you answer my question, please?

A The man that had the check.

Q Will you answer my question, please?

40 A What is the question?

*Charles Giamportone, defendant, Cross.*

Q Whom did you give the cash to on that check that I just showed you?

A I didn't take—

THE COURT. To whom did you give the cash?

THE WITNESS. It was laying on the counter and he took it. I didn't handle the cash. How can I say to whom I took it if my fingers didn't touch the money? 10

Q Are you afraid to tell the jury?

A No. My fingers didn't touch the money, I says. I know what I am talking about.

Q You made out this check to both Marinaccio and Sebastiani?

A Yes, sir.

Q Marinaccio endorsed it and then Sebastiani, and you went to the bank together, didn't you? 20

A I told you why, didn't I?

Q Now, will you please stop that and just answer my question? I think we will save a lot of time if your Honor will kindly instruct the witness. You and Sebastiani went to the bank together, did you not?

A Yes, sir.

Q Sebastiani endorsed the check?

A Yes, sir. 30

Q You endorsed it and got the cash from the paying teller?

A Yes, sir.

Q And gave it to Sebastiani?

A I didn't handle the money.

Q Oh, you let him take it himself?

A Yes, sir, from the cage. I asked the clerk to cash that.

Q But you personally went with Sebastiani?

A I did. 40

*Charles Giamportone, defendant, Redirect.*

Q To the bank?

A I did.

Q To see that he, personally, should get the cash, is that right?

A That is right; yes.

10 Q Now, have you any checks that you paid without Sebastiani's signature?

A Any check that I paid without Sebastiani's signature?

Q Yes, without Sebastiani endorsing them.

A I only made one check, and you are just after getting through with it. The others were all bank checks; I never had them in my possession.

Q The others were these bank checks that I have offered in evidence?

A Yes, sir.

20 Q On which Marinaccio's name does not appear?

A I see it now.

*REDIRECT EXAMINATION* by Mr. McGlynn.

Q What is your business?

A Jeweler by trade.

30 Q Now, I understand that these checks which have just been show to you, coming from various banks, Fidelity Union Trust Company, and Howard Saving— whatever they were—whom were these checks handed to by you after they were endorsed by the persons to whose orders they were made payable?

A To the contractor, Marinaccio.

ROMOLO BOTELLI sworn in behalf of defendants.

*DIRECT EXAMINATION* by Mr. McGlynn.

Q Mr. Botelli, you are an architect?

A Yes, sir.

40 Q And have been for how long?

*Romolo Botelli, for defendants, Direct.*

A Thirty-two years.

Q And did you draw the plans and specifications for this house which was erected by Mrs. Domina and her son-in-law?

A I did.

Q And did you draw the contract, a copy of which has been marked in evidence D-6? 10

A Yes, sir.

Q That is a copy. Is that your signature to the execution of it (handing witness document)?

A (Examining) Yes, sir.

Q And did you supervise the erection of this house for the owners?

A I did.

Q And did you issue those certificates which we have marked in evidence—three certificates—August, September and November? 20

A Yes, sir.

Q And did you supervise the completion of the house when it was completed by the owners thereof?

A Yes, sir.

Q Now, was anything said in your presence, upon the occasion of the execution of this contract, by any of the owners, either Mrs. Domino or her son-in-law, with regard to who the contractor was to be in the contract? 30

MR. SCHOTLAND. I object; that would be purely hearsay.

THE COURT. He said in his presence.

MR. SCHOTLAND. As to us, was anything said?

MR. McGLYNN. They were all there.

MR. SCHOTLAND. Will you read the question?

(Question read.) 40

*Romolo Botelli, for defendants, Direct.*

MR. SCHOTLAND. I withdraw the objection. I had not heard the first part of the question.

Q Do you understand my question?

A They did not say anything to me.

10

THE COURT. That does not quite answer the question. The question was whether anything was said in your presence, not whether anything was said to you. That was your question, was it not (addressing Mr. McGlynn)?

MR. McGLYNN. I did not really intend that. First, I wanted to ask if they said anything, and then I was going to follow it up and ask him if anything was said by anybody else upon that occasion.

20

THE WITNESS. They did not say anything, no.

THE COURT. When you speak of "they"—

THE WITNESS. I mean the owners.

Q Was anything said by this man Sebastiani, or Marinaccio, in regard to who was to execute the contract?

30

A I asked the contractor's name, and I don't exactly remember which one. Mr. Marinaccio was the man that told me his name. When I asked who the contractor was, he gave me his name, and I put it on the papers.

Q Is your recollection clear with regard to whether or not the owners said anything to you on that occasion as to the name of the contractor?

A No, they did not.

40

Q Was anything said by anyone upon this occasion, when they were in your office—and when I say "they" I mean the five of them—you were here in court this morning?

*Romolo Botelli, for defendants, Direct.*

A Yes, sir.

Q The five of those who were mentioned—was anything said in your presence at all by any of those five, with regard to some trouble that this man Sebastiani was having, for which reason he desired to have the contract put in somebody else's name? 10

A No, not to me.

Q Well, not only wasn't anything said to you, but did you hear anything said upon that occasion?

A No.

Q Was the erection of the house, which was eventually completed, substantially in conformity with the original plans and specifications that you prepared? 20

A Yes, sir.

Q No material changes, I mean?

A No.

Q In other words, the house that is standing there is the house for which you drew the plans?

A Yes.

Q Did you record the contract?

A I did.

Q With the copy of the specifications attached?

A Yes, sir. 30

*CROSS EXAMINATION* by Mr. Schotland.

Q Mr. Botelli, was there any discussion in your office, at the time the contract was being drawn?

A Plenty.

Q Between whom?

A Between the owners and the contractor, Sebastiani and I.

MR. SCHOTLAND. Mr. Sebastiani—stand up. (Mr. Sebastiani rises.) Mr. 40

*Romolo Botelli, for defendants, Cross.*

Marinaccio, stand up. (Mr. Marinaccio rises.)

Q Which of these two men took part in the discussion on the contract?

A Both of them.

10 Q Both of them?

A Yes.

Q What did Mr. Marinaccio say about it?

A I haven't any—I can't recollect the words All he said was that he was the contractor, and that is all I remember.

Q That is all he said?

A Yes.

20 Q Now, my questions were as to the discussion regarding the contract, regarding the terms and all that. You said there was plenty of discussion.

A Yes.

Q Did Marinaccio take part in that discussion?

A I don't remember exactly what he said.

Q Well, did he take part in that discussion? Did he have anything to say in it, or did Sebastiani do all the talking?

30 A Well, as far as the preparing of the contract, it was all left to me. There was no discussion on that point.

Q What was the discussion about?

A Well, there was a discussion between the owners and Mr. Sebastiani about some changes that were to be made.

At one o'clock p. m., the court takes a recess until two o'clock p. m.

*Romolo Botelli, for defendants, Cross.*

AFTER RECESS.

ROMOLO BOTELLI resumes the stand.

CROSS EXAMINATION (continued) by Mr. Schotland.

Q Mr. Botelli, just before recess I believe you told us that there was considerable discussion between the owners and Mr. Sebastiani. 10

A Yes.

Q Did Marinaccio take any part in that discussion with the owners?

A To my recollection, the only thing that Mr. Marinaccio stated was that Mr. Sebastiani was to have charge of the work.

Q That is the only thing Marinaccio did in the entire discussion? 20

A To the best of my memory, yes.

Q And the entire discussion was with Sebastiani?

A Most of it.

Q And with whom were the arrangements made as to the periodical payments, as the work progressed, which were inserted in the contract?

A That was left to me.

Q You inserted the payments?

A That was left to me, to make the payments. 30

Q Did Sebastiani say anything about those payments?

A Nobody?

Q No discussion?

A No, sir.

Q What was the point of discussion?

A Some changes in the specifications.

Q And Sebastiani conducted that discussion?

A Yes, sir.

Q Not Marinaccio? 40

*Romolo Botelli, for defendants, Cross.*

A No.

Q You, as architect, supervised the erection of this building didn't you?

A Yes, sir.

10 Q And in your supervision, with whom did you talk about the work?

A With Sebastiani.

Q Sebastiani?

A Yes.

Q And with him alone?

A Well, I haven't any recollection of talking to the other man.

Q So that, to the best of your recollection, Sebastiani is the only man you talked to about the work while the erection of the building was progressing?

20

A He had full charge of the work.

Q Did you know who hired and fired the employees on the job?

A No, sir.

Q Did you know who bought the material?

A No, sir.

Q But you knew that he was in full charge of the work?

A Yes, sir.

Q And you discussed everything with him?

30

A Yes, sir.

BY THE COURT.

Q Did you know that Marinaccio, while Sebastiani was apparently in full charge of the work, was working on the building as a journeyman carpenter?

A No, sir; I did not.

Q You did not know that?

A No, sir.

40

*Romolo Botelli, for defendants, Cross.*

BY MR. SCHOTLAND.

Q Did you see Marinaccio work as a carpenter on the job?

A I didn't pay any attention, no.

Q So that, so far as your recollection goes—

A (Interrupting) I saw him around the building. I saw him in overalls, and I saw him doing odd things around the building, just the same as Mr. Sebastiani was doing—both of them. 10

Q Now, let me attempt to refresh your recollection, Mr. Botelli. Do you remember testifying before Mr. Van Blarcom, as Master in this case sometime ago?

A Yes.

Q I want to call your attention to this question, asked you by the Master, on page 23 (reading):

"The Master (referring to Marinaccio): 20

Was he the boss there or was he working there as an ordinary carpenter?" Your answer is, "As an ordinary carpenter." Then the Master asked the question, "He was not acting as supervisor or foreman?" Your answer is, "No, sir." Does that refresh your recollection as to the fact?

A Well, it does refresh my recollection as to asking me that question, yes, and I was under the impression that he was employed as a carpenter. I couldn't tell you that. 30

Q Pardon me. You have told us today, to the best of your recollection, that you did not see Marinaccio working on the job. I am calling your attention to the fact that in February, 1929, you testified that Marinaccio was working on the job as an ordinary carpenter. Now, which is correct?

A I seen him on the job there working. I don't know whether he was working as an ordinary carpenter or what his position was.

Q That is not my question. My question is, which is correct, your testimony given in February, 40

*Romolo Botelli, for defendants, Redirect.*

1929, following the summer and fall of 1928, when the work was being done, or your testimony here today—on this particular point, of course.

A Mr. Marinaccio was working on the building, and also Mr. Sebastiani was working on the building. Both of them were working.

10

Q You are not answering my question. In February, 1929, your testimony, so far as Sebastiani is concerned being the man who did the whole thing, is the same, but your testimony as to Marinaccio was that he was working there as an ordinary carpenter.

A You say that was my testimony.

Q I am reading your testimony to you.

A All right; that is my testimony.

20

THE COURT. Suppose you read it to him.

Q The Master, referring to Marinaccio, asked you this question (reading): "Was he the boss there or was he working there as an ordinary carpenter?" Your answer is, "As an ordinary carpenter." The Master then asked you, "He was not acting as supervisor or foreman?" Your answer is, "No, sir." Now, what I want to know is, is that correct?

30

A It was correct.

*REDIRECT EXAMINATION* by Mr. McGlynn.

Q That is the same thing you say today, Mr. Botelli?

A I say the same thing today.

Q And in the same examination before Mr. Van Blarcom, on the same occasion, I read you another question and answer, and ask you if you so testified—the same page, following what you were just asked (reading): He was working as a laborer under Sebastiani when you were there

40

*Peter A. Cavicchia, for defendants, Direct.*

and saw him working there? Answer: I didn't recognize him there at all on the job. I didn't know whether he was working for Sebastiani or himself." Do you recall saying that?

A Yes.

PETER A. CAVICCHIA sworn in behalf of 10  
defendants.

*DIRECT EXAMINATION* by Mr. McGlynn.

Q Mr. Cavicchia, you are a member of the bar of the State of New Jersey?

A Yes, sir.

Q And have been for how long?

A Twenty-two years.

Q Did you represent the Unity Building Loan Association, that had a mortgage on this property? 20

A I do.

Q And did you have drawn, in your office, under your supervision, Exhibit D-1, "Postponement of Mechanic's Lien" (handing witness document)?

A (Examining) Yes, sir.

Q And do you recall to whom you gave that for the purpose of having it executed?

A I think Mr. Sebastiani took it away with him from the office, or Mr. Giamportone; either one of them; I don't remember.

Q Previous to this, had you given any advice to the owners of this building with regard to whom you had desired to have execute this postponement? 30

A Yes, sir.

Q And had you also given them some advice with regard to whom you desired to have execute the receipt which is found at the bottom of the architect's certificates, three of them being in evidence here? 40

*Antonette Domino, for defendants, Direct.*

A Yes, sir. They were signed according to the directions that I gave.

MR. SCHOTLAND. I object to that and ask that it be stricken out.

10 THE COURT. The latter part of it will be stricken out.

THE WITNESS. The answer is yes, sir.  
Q And did you find that the papers, which I have just referred to, the architect's certificates and the postponement, were executed in accordance with the advices which you gave?

MR. SCHOTLAND. I object to that as not only leading, but incompetent; it is hearsay and not binding on us at all.

20 THE COURT. I will sustain the objection.

CROSS EXAMINATION WAIVED.

ANTONETTE DOMINO sworn in behalf of defendants.

BY THE COURT.

Q Are you the one they call "Annie" Domino?

A Yes.

30 Q But your right name is Antonette?

A Antonette; yes.

*DIRECT EXAMINATION* by Mr. McGlynn.

Q You are the mother-in-law of Mr. Giampor-  
tone, who was on the stand here?

A Yes.

Q And you and your son-in-law owned this property before the building was built?

A Yes.

40 Q And you and your son-in-law had this building built?

*Antonette Domino, for defendants, Direct.*

A Yes.

Q A four-family building and two garages?

A Yes.

Q Now, did you have any conversation with Mr. Sebastiani, before you went down to Mr. Botelli's office, as to who was to take the contract for the building of the house? 10

A Marinaccio take it—no, I bring the plans and specifications—Sebastiani. Sebastiani told me, "All right."

Q I will go back a little. You remember the day you went down to Mr. Botelli's office to sign the contract?

A Yes.

Q You remember that day?

A Yes.

Q Is this your name down here, "Antonette Domino" (indicating)? 20

A (Examining) Yes.

Q Do you remember signing this paper down at Mr. Botelli's office?

A Yes.

MR. SCHOTLAND. Fill in the record:  
Showing the witness Exhibit D-6.

Q Before that day, Mrs. Domino, did you know Mr. Sebastiani?

A Yes, I know him three days before, or two days, I don't remember. I see Sebastiani and Marinaccio, and they come in my daughter's house and bring the plans and specifications and the estimate. 30

Q You saw him at your daughter's house two or three days before you went down to Mr. Botelli's office?

A Yes.

Q And was anybody with him?

A No. 40

*Antonette Domino, for defendants, Direct.*

Q Just Mr. Sebastiani?

A Mr. Sebastiani and Marinaccio, all together; they come together, yes.

Q Was he with him?

A Yes.

10 Q You are sure of that?

A Yes.

Q And did you talk, at your daughter's house, with Mr. Sebastiani about this?

A Yes.

Q And did you talk to him, down at Mr. Botelli's office, to Mr. Sebastiani?

A No, Marinaccio told Mr. Giamportone, "If you like the estimate, Monday go to Mr. Botelli's office."

20 Q This was what was said at your daughter's house?

A Yes.

Q "If you like the estimate, Monday go to Mr. Botelli's office"?

A Yes.

Q Now, did Mr. Sebastiani at any time, either before you went down to Botelli's office, or at Botelli's office, tell you anything about being in trouble?

A No.

30 Q Did he tell you anything about a house on Poe avenue?

A No.

Q Did he tell you anything about a mortgage being foreclosed, anything of that kind?

A I never know.

Q Did he tell you why Mr. Marinaccio was to be the contractor?

A Yes.

Q What did he tell you?

40 A He told me before they bring the plans and

*Antonette Domino, for defendants, Direct.*

specifications; he say, "I no make that house; I give to my friend."

Q This Sebastiani said this?

A Mr. Sebastiani, yes.

Q He said he would not make the house, he would give the contract to his friend?

10

A To his friend, yes.

Q And then somebody made an appointment to go to Mr. Botelli's office?

A Yes.

Q And you were there?

A Yes.

Q Was anything said at Botelli's office about Mr. Sebastiani being in trouble?

A No.

Q You gave Mr. Marinaccio some payments, did you not? You paid some of your money out on this job, did you not?

20

A Yes, I paid Marinaccio.

Q How much did you pay. do you remember?

A Yes, the first payment, \$2500.

Q Your half, \$2500?

A Yes.

Q And your son-in-law paid him the other half?

A Yes.

Q Do you remember where your money came from, your \$2500?

30

A Yes, I gave a check in my daughter's name.

Q That is P-5. Do you remember that check, or don't you (handing witness document)?

A (Examining) Janet Domino.

Q That is your daughter?

A Yes.

Q She drew this money from the Fidelity Union Trust Company?

A Yes.

40

*Antonette Domino, for defendants, Direct.*

Q And do you remember where the payment was made?

A The first payment.

Q Was it your house that you made the payment, or where were you?

10 A My daughter.

Q Which daughter?

A Mrs. Giamportone.

Q And was Marinaccio there?

A Sure.

Q Whom did you hand this check to?

A I gave it to Marinaccio.

Q Did you go to this house while the work was being done at any time? Did you go down to the house while they were building it?

20 A Yes, I got a lot of times to see the work.

Q And did you see Mr. Marinaccio on the job?

A Sure.

Q And Mr. Sebastiani, too?

A Sure.

Q Did Mr. Sebastiani say anything in Mr. Botelli's office?

A No.

Q Or did Mr. Marinaccio say anything about who was going to be supervisor?

30 A Yes. Sebastiani was going to be supervisor. Marinaccio say, "I take the contract, and Sebastiani would supervise."

*CROSS EXAMINATION* by Mr. Schotland.

Q Mrs. Domino, you gave the plans and specifications to Sebastiani?

A Yes.

Q And you asked him he should tell you how much he would charge to build the house?

A Yes.

40 Q And he told you how much?

*Antonette Domino, for defendants, Cross.*

A He no tell me.

Q Didn't he tell you?

A No, he tell me when he bring the estimate.

Q Well, he brought you the estimate?

A Yes, they come to me all together; Marinaccio and Sebastiani came to my house.

10

Q Marinaccio came to your house when he brought you the estimate?

A Yes.

Q And where was that?

A In my daughter's house, Mrs. Giamportone.

Q Who was there?

A Nobody.

Q Only you?

A Only me, yes.

Q And Mr. Marinaccio?

20

A And Mr. Marinaccio and Mr. Sebastiani.

Q And you say Mr. Sebastiani brought you the estimate and Mr. Marinaccio was with him?

A Yes.

Q And what did he say about who was going to build the house?

A Marinaccio.

Q He said Marinaccio?

A Sure.

Q You remember you testified before Mr. Van Blarcom, the Master in this case, in February, 1929?

30

A Yes, I remember.

Q Do you remember—on page 60—you were asked the question, "Who gave you the estimate, Marinaccio or Sebastiani?" You answered, "Both of them together." Is that right?

A Yes.

Q And then you were asked, "And did they tell you which one of the two was going to build the contract?"—that is the question, I am not refram-

40

*Antonette Domino, for defendants, Cross.*

ing it; I am reading what is here—and you answered, “Yes, Marinaccio.” Is that right?

A Yes.

10 Q Then you were asked, “Marinaccio was going to take the contract, but Sebastiani was to give you the figures?” and you answered, “Marinaccio, they both worked together.” Is that right?

A Yes, they work together, because Sebastiani told me.

Q They both worked together?

A Yes.

Q Then you were asked again, “They both worked together?” and you answered, “Yes, sir.” Is that right?

A Yes, Sebastiani told me.

20 Q Then you were asked, “They were to take it together?” and you answered, “Take it together; Sebastiani say to me, ‘I no take care of these things. I no figurer. I bring my companion Marinaccio.’” Is that right?

A That is a friend; yes, he is a friend.

Q That is right?

A Yes.

30 Q Now, on page 61, you were asked the question, “Did Sebastiani tell you, in Botelli’s office, that he was going to take the agreement in Marinaccio’s name?” and you answered, “Sure.” Is that right?

A Well, the contract was with Marinaccio.

Q He told you he is going to take the contract in Marinaccio’s name?

A Marinaccio’s name; he figured, too.

Q And then you were also asked the question, “Did you ask him why he wanted it in someone else’s name?” and you answered, “No, he told me before.” Is that right?

40 A No. He no told me anything, Sebastiani to me.

*Antonette Domino, for defendants, Cross.*

Q Now, you knew that Sebastiani was going to build this house under the contract, didn't you?

A What?

Q You knew that Sebastiani was going to build the house, didn't you?

A No. 10

Q You did not?

A No. I bring all the—

Q All right. When you saw Marinaccio, did you think he was the contractor?

A Sure. Sebastiani told me, "This is the contractor."

Q All right. You have answered my question. Now, I show you this check P-5, for \$2500 (handing witness document).

A (Examining) Yes. 20

Q Did you give this check to anybody?

A I give it to Marinaccio.

Q Did you give it to Marinaccio?

A That is my daughter's check.

Q Did you give it to Marinaccio?

A Yes.

Q Or to Sebastiani?

A I give it to Marinaccio.

Q Where?

A In my son-in-law's house. 30

Q Who was there?

A Marinaccio, Sebastiani, my son-in-law, my daughter and myself.

Q You were all there?

A Yes.

Q And you gave this check to Marinaccio?

A Yes.

Q You do not know why Marinaccio did not endorse the check, do you?

A No.

MR. McGLYNN. That is all. We rest. 40

*Raniero Sebastiani, for plaintiff in rebuttal Direct.*

THE COURT. Any rebuttal?

MR. SCHOTLAND. Mr. Sebastiani.

RANIERO SEBASTIANI recalled in behalf of plaintiff, in rebuttal.

10 *DIRECT EXAMINATION* by Mr. Schotland.

Q Mr. Sebastiani, I show you Exhibit P-5, a check drawn by the Fidelity Union Trust Company to Janet Domina, for \$2500, endorsed by her and by you. Did you get the cash on that check? They say it is part of the first payment (handing witness document).

A (Examining) Yes.

Q Did Marinaccio get any part of this money?

20

A No, sir.

Q Where did you get this check from?

A From Giamportone.

Q Giamportone handed it—to whom did he hand it?

A I don't know.

Q How did you get the check?

A The check for payment.

Q How did you get it Who gave it to you?

A Mr. Giamportone.

30

Q Mr. Giamportone and Mrs. Domino say that they gave chick check and several other checks at the same time to Mr. Marinaccio. Did they give him the checks or give them to you?

A They gave them to me. The cashier of the bank gave me all the cash.

Q What is that?

A They give it to me, and the cashier gave me the cash money.

Q The cashier in the bank gave you the cash?

A Yes.

40

Q I show you also Exhibits P-6 and P-7, checks

*Raniero Sebastiani, for plaintiff in rebuttal Direct.*

made to Charles Giamportone and Josephine Giamportone, and endorsed by them and by you (handing witness documents).

A (Examining) Yes.

Q Did you get the cash on those checks?

A I don't remember.

Q Well, look at them. Did you get the money for those checks? That is part of the first five-thousand-dollar payment.

A (Examining) That check (indicating) I don't remember whether I got the cash or not.

Q Well, did you get the money out of those checks?

A They gave me the money, sure, he gave me the money. Q You got the money?

A Yes, sure.

Q Did Marinaccio get any of this money?

A No.

Q I show you Exhibit D-5, check for \$1600, to the order of both Marinaccio and yourself, and endorsed by Marinaccio and yourself, and by Giamportone (handing witness document).

(A (Examining) Yes.

Q Do you remember how you got the cash on that?

A No, I don't remember.

Q You do not remember how you got it?

A No.

Q But did you get the money?

A Sure, I get the money.

Q Did Marinaccio get any of that money?

A No, sir.

Q I show you Exhibit D-1. Did you sign this "Postponement of lien"? Is that your signature (handing witness document)?

A (Examining) Yes.

Q Who asked you to sign it?

*Raniero Sebastiani, for plaintiff in rebuttal Direct.*

A I don't remember now who asked me.

Q You signed it?

A Yes, I signed it; that is my signature (indicating).

10 Q Now, I show you the architect's certificates that are made to Marinaccio, and all of them have Marinaccio's name and your name, too. Did you sign these three architect's certificates?

A Sure.

Q Who asked you to sign them?

A Mr. Giamportone.

Q Mr. Giamportone?

A The owner, together.

Q Now, when you signed the certificates each time, who got the money?

20 A Myself.

Q Did Marinaccio get any of the money?

A No, sir.

Q Did Giamportone give Marinaccio any money or any checks?

A No, sir.

Q Whom did he give them to?

A Both of them; he give it to me.

Q What do you mean by "both of them"?

A Both of the owners.

Q Both owners?

30 A Yes.

Q But who received the checks and the money?

A Myself.

Q Did Marinaccio get any of the checks or any of the money?

A No, sir.

Q Did you ever tell Mrs. Domino or Mr. Giamportone that you were going to get a friend of yours, who was a contractor, to estimate for this job?

40 A No.

*Raniero Sebastiani, for plaintiff in rebuttal, Cross.*

Q Did you tell them that Marinaccio was a contractor and he was going to estimate the job?

A I never did.

Q Were you in the house of Mrs. Giamportone with Marinaccio together, three days before the contract was signed?

A Mr. Giamportone come to my house and bring the plans. 10

Q But were you in Mrs. Giamportone's house when only Mrs. Domino was there, nobody else, and you and Marinaccio?

A No, sir.

Q That never happened?

A I never go in the house.

*CROSS EXAMINATION* by Mr. McGlynn.

Q You had had some business transactions with Mr. Marinaccio's father, hadn't you? 20

A What?

Q You had had some business transactions with Mr. Marinaccio's father, hadn't you?

MR. SCHOTLAND. I object to that as entirely immaterial and not cross examination.

THE COURT. If it is merely introductory—

MR. McGLYNN. It certainly is introductory. I cannot ask it all at once. 30

MR. SCHOTLAND. This witness is called on rebuttal. He is rebutting the thing that were brought out, and of course it is discretionary with your Honor to permit the opening up and going back—

THE COURT. The question may be answered as an introductory question.

Q Did you understand my question? 40

*Raniero Sebastiani, for plaintiff in rebuttal, Cross.*

A Take a sub-contract from Marinaccio father.

Q And had you told that to Mr. Giamportone or Mrs. Domino?

A No, sir.

10 Q You are sure you did not mention that to him?

A I don't mention it at all.

Q You are sure?

A Sure.

Q Where was this job that you had with his father, what street?

A Oh, I took a lot of job.

Q You had a lot of job?

A Yes, for his father.

Q Did you do any on 8th street for him?

20 A On 8th street—about five, sir.

Q Do you remember being asked these questions, Mr. Sebastiani, on the occasion of of June 9, 1930, in the former trial of this action—page 53—you understand, these questions you were asked before, on another trial?

A All right.

Q (Reading) "You told Giamportone that Marinaccio was a good builder, didn't you? Answer: No."

A No.

30 Q (Reading) "Didn't you tell him he had a house built in Atlantic Highlands? Answer: I told him I bought a house with Marinaccio's father."

A Together.

Q You told that to Mr. Giamportone?

A I don't tell that I buy the house of Mr. Marinaccio's father.

Q Didn't you tell that to Mr. Giamportone?

A No, sir; I told that in the court.

40

*Rocco Marinaccio, for plaintiff in rebuttal, Direct.*

ROCCO MARINACCIO recalled in behalf of plaintiff, in rebuttal.

*DIRECT EXAMINATION* by Mr. Schotland.

Q Mr. Marinaccio, I show you Exhibit D-5, check for \$1600, which bears your endorsement, and, underneath, Sebastiani's endorsement. Did you get the money on that check (handing witness document)? 10

A (Examining) No, sir.

Q Was that check handed to you at all by anyone?

A No, sir.

Q How did your name come to be put on the check?

MR. McGLYNN. I object to that, your Honor; this is not rebuttal. 20

THE COURT. Yes, I think it is. The question may be answered.

Q Well, now, tell it.

A They go together and they laid the check on the table, and they told me to sign it, and I signed it, and they went off.

Q Who went off?

A Sebastiani and Giamportone.

Q Giamportone says that you told him to cash this check and give the cash to Sebastiani. Did you tell him any such thing? 30

A No, sir.

Q Did they ask you anything about this check?

A No, sir.

Q Did you get any part of the money that was realized on this check?

A No, sir.

Q I show you Exhibit P-5, a check for \$2500. Will you look at it, on both sides, please? Did you ever see that check before (handing witness document)? 40

*Rocco Marinaccio, for plaintiff in rebuttal, Direct.*

A (Examining) No, sir.

Q Did you ever get any money on it?

A No, sir.

10 Q Giamportone and Mrs. Domino say they handed you that check. Did they either give you that check—either of them?

A This is the first time I see the check.

Q I show you Exhibit P-6. Look at this check carefully, on both sides, please. Did you ever see that check before (handing witness document)?

A (Examining) No, sir.

Q Giamportone says he handed you this check, P.16.

A He did not.

Q Did you ever get any money on this check?

20 A No, sir.

Q Were you present when this check was given to anyone?

A No, sir.

Q I show you Exhibit P-7. Look at that, on both sides, please. Did you ever see this check before (handing witness document)?

A (Examining) No, sir.

Q Giamportone says he handed it to you. Is that true?

A No, sir.

30 Q Did you get any money on this check?

A No, sir.

Q Were you present when this check was given to Sebastiani?

A No, sir.

Q Did you ever make up an estimate for this job?

A No, sir.

Q Or any other job?

A No, sir.

40 Q Did you ever estimate as a contractor?

*Defendants Motion for Verdict.*

A No, sir.

Q Or take a contract in your life?

A Never did.

MR. SCHOTLAND. That is all. We rest.

MR. McGLYNN. I move for the direction of a verdict on behalf of all the defendants I represent. 10

THE COURT. Suppose you deal with the mortgagee first. Is there any proof which would entitle you to a preference over the mortgage?

MR. SCHOTLAND. The burden of proving that any money advanced by the mortgagee went into the building is upon the mortgagee. There isn't an iota of evidence to that effect; and therefore, under the decision, if we are entitled to a verdict, we are entitled to a direction that the amount of our lien is prior to the mortgage. 20

MR. McGLYNN. The ground of my motion, if it please the Court—Section 2—of course, before I quote the section, I do not have to remind your Honor that there was no such lien under this common law, and therefore the act must be construed rather liberally. 30

Section 2 provides that the filing, in the office of the County Clerk, of a building contract, together with specifications accompanying the same, before work or materials furnished, protects a building and land whereon it is erected from all claims, except those of the contractor, and the only basis, as I understand it, upon which the plaintiff in this case could succeed, in view of the fact that there is a contract recorded, 40

*Defendants Motion for Verdict.*

10 in accordance with the terms of the act, is that there be sufficient facts in the record at this time from which, either by virtue of the proof of those facts or inferences to be drawn therefrom, it would appear that such contract was either wholly fictitious or fraudulent.

(Argument.)

20 THE COURT. As has been suggested in the argument, under the common law there was no right of lien against the property of the owner for materials furnished and labor performed in the erection of a building upon those premises. The right of a materialman or laborer to such a lien depends upon the statute. The right of lien is created solely by statute, and, as I have said, no such right existed at common law. There is no question in this case about the right of the plaintiff to his general judgment against the person to whom the materials were furnished, and, according to the proofs, those materials were furnished by the plaintiff to the defendant Sebastiani, and the plaintiff has already obtained its general judgment against Sebastiani for the full amount of its claim.

30 The question, then, is whether or not the plaintiff, under the statute, is entitled to its lien against the owners upon their lands and the building erected upon those lands. If it is, it must be entitled to it because of the Mechanic's Lien Law.

40 The first section of the Mechanic's Lien Law provides that "every building hereafter erected or built within this State shall be liable for the payment of any debt con-

*Defendants Motion for Verdict.*

tracted and owing to any person for labor performed or materials furnished for the erection and construction thereof, which debt shall be a lien on such building, and on the land whereon it stands, including the lot or curtilage whereon the same is erected." So that under the first section of the Mechanic's Lien Law, standing alone, there would be no question but that the plaintiff in this case would be entitled to its lien against this land; but the second section has this qualification: "Whenever any building shall be erected in whole or in part by contract in writing, such building and the land whereon it stands shall be liable to the contractor alone for work done or materials furnished in pursuance of such contract; provided said contract, or a duplicate thereof, together with the specifications accompanying the same, or a copy or copies thereof, be filed in the office of the clerk of the county in which such building is situate before such work done or materials furnished."

This contract was in writing, signed by the parties: signed by the owners and signed by a person designated therein as the contractor, and filed. Furthermore, the specifications for the erection of the building were filed with it, thereby fully complying with the second section of the Mechanic's Lien Law in depriving the plaintiff in this case of its right of lien, the plaintiff in this case being a sub-contractor who furnished certain materials for the construction of the building, and therefore was a sub-contractor, and, in consequence of that

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*Defendants Motion for Verdict.*

10 fact, is prevented from maintaining a lien against the owners of the property unless the contract was fictitious or fraudulent. It is contended, on behalf of the plaintiff, that that is the true situation: that it was a fictitious and fraudulent contract.

20 Taking the plaintiff's proof at best, the proofs appears to be that Sebastiani, who had negotiated this contract with the owners, was in some kind of difficulty with another house, whether a property of his own or a building which he had erected for some one else does not appear by the proofs in this case, but that for a reason satisfactory to himself, and consented to by the owners—I am putting this in the most favorable situation to the plaintiff in this case—satisfactory to the owners and known by them, took this contract in the name of a person who was a carpenter-workman for him.

30 That the contract was not fictitious is manifest; no question but that the contract was a real contract. It correctly expressed, with the specifications, the building which was to be constructed under it. It correctly stated the contract price, the time and amount of payments, and there is no suggestion in this case that there was any intention on the part of anybody that this building was to be constructed other than in strict conformity with the terms of the contract. Now, was it fraudulent? It is very true, taking the plaintiff's testimony at its best, that Marinaccio, named as the contractor in that contract, was not the real

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*Defendants Motion for Verdict.*

party in interest— no question but that the real party who was constructing this building was Sebastiani; nor is there any question, taking the plaintiff's proof at its best—of course, it is all denied by the defendants—that they had any knowledge of the fact that Sebastiani was the real contractor, and that Marinaccio was not—but for the purposes of this motion I must assume that they did know it, because the proofs on behalf of the plaintiff would amply warrant that finding on the part of the jury, if it be a jury question. 10

So the question is whether or not the proofs show that this substitution of Marinaccio for Sebastiani was intended to serve any false or fraudulent purpose. Was it to serve any false or fraudulent purpose? It may be, from anything that appears in this case, that that fact was in the interest of everybody; it may be that Sebastiani's involvement with this house on Poe avenue was such that it would have been embarrassing to the defendants, to himself and to those furnishing labor and material for this building, for it to have been taken in his name. Upon whom did it work a fraud—upon this plaintiff? The plaintiff insists yes, that it did work a fraud upon this plaintiff, because inquiry by it would fail to show that this contract was on file, as required by the second section of the statute; but this contract not only called for the erection of a building, but it stated also the location of that building, and was made by the owners of the property upon which the building was to be erected at 20 30 40

*Defendants Motion for Verdict.*

10 that time. Inquiry on the part of the plaintiff in this case would have shown who the owners of the property were; and a search in the clerk's office would have shown that the contract, while was on file, was for the construction of this very building and upon this particular land.

20 A fraud, it seems to me, has not been committed upon the plaintiff in this case. At the time application was made by Sebastiani to the plaintiff to furnish these materials, it would have been a perfectly easy thing for the plaintiff to have ascertained who the real contractor was, and that the contract under which the building was being constructed was on file. Therefore, the proofs do not show, in my view of the testimony, that the contract was either fictitious for fraudulent; they do show that the contract was on file, as required by the statute, in which event the plaintiff is precluded from obtaining a lien against the building and the lands upon which it is constructed.

30 The result of these views is to grant the motion and direct a verdict in favor of the defendants and against the plaintiff; and an exception to that ruling as ground of appeal may be noted on the minutes.

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

Exception noted as ground of appeal.

40

## Exhibit P-1.

Eastern Sash and Door Com-  
pany, a corp. of N. J.

*Claimant,*

*vs.*

Raniero Sebastiani

*Builder,*

*and*

Charles Giampartone and  
Josephine Giampartone, his  
wife, and Sadie Domino,  
Florence Domino and Janet  
Domino,

*Owner,*

Lien Claim. 10

COUNTY OF ESSEX, ss.

BE IT KNOWN, that Eastern Sash & Door Co.,  
a corp., of the City of Newark, in said County,  
claims a lien upon the building and lands herein-  
after described, pursuant to the provisions of  
"An Act to secure to mechanics and others, pay-  
ment for their labor and materials in erecting any  
building," and the several supplements thereto, for  
a debt contracted and owing to it for labor per-  
formed and materials furnished for the erection  
and construction of said building as hereinafter  
set forth, to wit:

23

30

First.—The said building is two (2) family  
brick residence on a lot of land or curtilage,  
situated in the City of Newark, in the County of  
Essex and State of New Jersey, and more par-  
ticularly described as follows:

BEGINNING at the intersection of the easterly  
line of St. Paul Avenue (formerly Madison Ave-  
nue) and the southerly line of Cliff Street (for-  
merly Rose Street) as shown on map entitled  
"Map of 353 lots belonging to the Real Estate

10

*Exhibit P-1.*

Association of Hazelwood Park of the borough of Vailsburg, Essex County, New Jersey, surveyed by Eugene A. McMurray, C. E., July 1935;" thence running (1) easterly along Cliff Street (formerly Rose Street) 100 feet; thence (2) Southerly at right angles to Cliff Street 60 feet; thence (3) westerly and parallel with Cliff Street 100 feet to St. Paul Avenue; thence (4) northerly along the said side of St. Paul Avenue 60 feet to the point or place of BEGINNING.

Being the same lands and premises conveyed by Antoinette Domino to the present owners, Charles Giampartone and Josephine Giampartone, his wife, Sadie Domino, Florence Domino and Janet Domino, by Deed dated June 22, 1928 and recorded in Book 78 of Deeds for Essex County page 491.

Second.—The names of the Owners of the said land and the estate therein, on which said lien is claimed, are Charles Giampartone and Josephine Giampartone, his wife, Sadie Domino, Florence Domino and Janet Domino, who has an estate in fee simple therein.

Third.—The name of the person who contracted the said debt, and for whom and at whose request the said labor was performed, and materials furnished, for which the aforesaid lien is claimed, is the said Raniero Sebastiani.

Fourth.—The following is a bill of particulars of the aforesaid labor performed and materials furnished by the said Eastern Sash & Door Company, the amount and kind of labor performed, and of materials furnished, and the prices at which and times when the same were performed and furnished, and giving credit for all the payments thereupon, and deductions that ought to be made therefrom, and exhibiting the balance justly due to him from the said Raniero Sebastiani, viz:

*Exhibit P-1.*

Mr. Raniero Sebastiani  
48 Boylan Street  
Newark, N. J.

Job: St. Paul Ave. and Cliff Streets  
Newark, N. J.

## STATEMENT OF ACCOUNT

Contract					\$2170.00	
Extras						10
July						
20—	4—4x6—24	192				
	4	20	160			
	10	18	360			
	12	16	384			
	4	22	176	1272	5c	63.60
August						
6—	3000 sq ft 1x10 NC Shiplap	4c			120.00	
8—	18—2x6	18	324			
	30	14	420			20
	2— 2x8—26	70	814	5c	40.70	
	400 lft 4" crown mldg	1600	1 1/4c		20.00	
					<u>60.70</u>	
9—	2000 sq ft 1x10 NC Shiplap	4c			80.00	
14—	160 sq ft 1x6 NC Roofers	4c			6.40	
22—	100 2x4—10 667	5c			33.35	
27—	200 1ft 4" crown mldg	800	1 1/4c		10.00	
					<u>43.35</u>	
29—	10—1x8—16 wp	107	9 1/2c		10.17	
September Aug. 27—	50—2x4—	20	667	5c	33.35	30
5—	8—1x12—14 wp	112				
	11—1x6—16 wp	88	200	9 1/2c	19.00	
	200 1ft 4" crown mldg	800	1 1/4c		10.00	
	500 1ft 1x2 spruce	1c			5.00	
					<u>34.00</u>	
6—	20—2x6—22	440				
	6—3x6—18—162—602			5c	30.10	
	200 1ft 5/4x6 wp	125	10 1/2c		13.13	
	1500 sq ft 1x10 NC Shiplap	4c			60.00	
					<u>103.23</u>	
8—	1300 sk ft 1x10 NC Shiplap	4c			52.00	40
8—	2—2x8—18	48				



*Exhibit P-1.*

All the above labor was performed and materials furnished between the 25th day of January 1928, and the 31st day of October 1928 both dates inclusive.

EASTERN SASH & DOOR CO.,  
By Joseph H. Mayzel, 10  
*Treasurer.*

20

30

40

*Exhibit P-1*

STATE OF NEW JERSEY, )  
 ESSEX COUNTY, ) ss.

10 Josephine H. Mayzel of Newark, N. J., of full age, being duly sworn, on his oath saith, that he is the treasurer of the claimant corporation named in the foregoing claim; that the within bill of particulars and statements therein set forth are true; that the same is for labor performed and materials furnished by the claimant corporation in the erection of the building in the said claim described, at the times therein specified, and that the amount, as claimed therein, is justly due and owing from the said Raniero Sebastiani to the claimant corporation.

20 Sworn and subscribed before me,  
 this 13th day of December, 1928.

JOSEPH H. MAYZEL

Maurice S. Maurer,  
*Master in Chancery of New Jersey.*

Filed Dec. 14, 1928  
 9:22 A. M.

Summons issued on within lien claim 21st day of  
 December.

30 JOHN H. SCOTT, *Clerk.*

## Exhibit P-2.

June 25, 1928

This agreement is made between the Eastern Sash & Door Co. of 309 Frelinghuysen Avenue, Newark, N. J. and Raniero Sebastian of 48 Boylan St., Newark, N. J. that the said Eastern Sash & Door Co. will furnish and deliver the following for the house to be erected at St. Paul Avenue and Cliff St., Newark, N. J. for the sum of Twenty-One Hundred Seventy Dollars (\$2170.00):

1000 lin ft 2x2 bdg	
2—4x6—14	
17—4x6—22	
2—4x6—26	
3—4x6—18	
2—6x8—26	20
2—6x8—20	
2—6x8—16	
2—6x8—14	
4—4x4—24	
4—4x4—20	
10—4x4—18	
12—4x4—16	
700—2x4—20	
260—2x10—26	
8—2x10—20	30
12—2x10—18	
90—2x6—26	
6—5/4x12—16 cypress	
9—1x8—16 cypress	
9—5/4x10—16 nc nosed	
34—1x12—16 wp	
30—1x6—16 wp	
2000 lin ft 1x2 spruce	
9000 sq ft 1x10 NC Shiplap	
5000 sq ft 3/4x10 rc siding	40
6000 sq ft 1x6 NC Roofers	

*Exhibit P-2.*

700 lin ft 1x4 wp  
6 squares hexagon shingles  
1000 sq ft 1x3 NC B&B Flrg

For the sum of Twenty-One Hundred Seventy Dollars (\$2170.00).

10

Payment will be made as follows: A cash payment of One Thousand Dollars (\$1000.00) will be made when the roof is on; Balance and extras, if any will be made when ready for trim.

If a payment is due and not paid or a suit is started or lien claim filed or operation of building is stopped, the Eastern Sash & Door Co. has the right to discontinue further shipments and the entire amount of materials delivered up to that time is due at once.

20

Accepted: Raniero Sebastiani.

Eastern Sash & Door Co.  
Harry Reisen, Pres.

30

40

**Exhibit P-3.**

**EASTERN SASH & DOOR CO., Inc.**  
 Wholesale Dealers and Jobbers in  
*Lumber, Sash, Door, Trim and Glass*  
 Birch, Klimax and Fir Doors in Stock  
 Main Office and Warehouse  
 307-309 Frelinghuysen Ave., Newark, N. J. **10**  
 Union-Yard: Morris Ave. at Lehigh Valley R. R.  
 Townley Station, Union, N. J.

Date, Oct. 31—1928.

Name.....R. Sabastiano  
 Address.....St. Paul Ave. & Cliff St.  
 Loaded by...K.....Auto...Street...Team...B629  
 Newark, N. J.

Extra  
 8—1x22—16 W. Pine.  
 16—5/4x5—14 W. Pine. **20**  
 15—2x4—20 W. Pine.  
 160 lft. 4" crown  
 200 sq. ft. 1x10 N. C. Ship.  
 (15/16)

Received by: Tom Sebastian

**DUPLICATE**

Sign and Return this ticket

**30**

**40**

## Exhibit P-4.

Mr. Raniero Sebastiani  
48 Boylan Street  
Newark, N. J.

Job: St. Paul Ave. and Cliff Streets  
Newark, N. J.

## STATEMENT OF ACCOUNT

	Contract								\$2170.00
10	Extras								
	July								
	20—	4—4x6—24	192						
		4	20	160					
		10	18	360					
		12	16	384					
		4	22	176	1272	5c			63.60
	August								
	6—	3000 sq ft 1x10 NC Shiplap	4c						120.00
	8—	18—2x6	18	324					
20		30	14	420					
	2—	2x8—26	70	814	5c				40.70
		400 lft 4" crown mldg	1600	11¼c					20.00
									<u>60.70</u>
	9—	2000 sq ft 1x10 NC Shiplap	4c						80.00
	14—	160 sq ft 1x6 NC Roofers	4c						6.40
	22—	100 2x4—10 667	5c						33.35
	27—	200 lft 4" crown mldg	800	11¼c					10.00
									<u>43.35</u>
	29—	10—1x8—16 wp	107	9½c					10.17
30	September	Aug. 27—	50—2x4—	20	667	5c			33.35
	5—	8—1x12—14 wp	112						
		11—1x6—16 wp	88	200	9½c				19.00
		200 lft 4" crown mldg	800	1¼c					10.00
		500 lft 1x2 spruce	1c						5.00
									<u>34.00</u>
	6—	20—2x6—22	440						
		6—3x6—18—162—602	5c						30.10
		200 lft 5/4x6 wp	125	10½c					13.13
		1500 sq ft 1x10 NC Shiplap	4c						60.00
									<u>103.23</u>
40	8—	1300 sk ft 1x10 NC Shiplap	4c						52.00
	8—	2—2x8—18	48						

Exhibit P-4.

12—2x4—20	160	208	5c		10.40	
11— 300 1ft 2" bed mldg	600	1.25		7.50		
10—2x4—20	135					
2 —4x6—20	80	214	5c	10.70		
				<u>        </u>	18.20	
18— 10—2x6—18	180					10
2— 4x6—20	80	260	5c	13.00		
4— 1x6—10 wp		27	9¾c	2.64		
				<u>        </u>	15.63	
October						
12— 30—2x4—20	400	5c		20.00		
500 sq ft 1x10 Shiplap	NC	4c		20.00		
500 1ft 1x2 spruce	1c			5.00		
				<u>        </u>	45.00	
16— 20—2x4—20	267	5c		13.35		
152 sq ft 1x6 Fir	Clg	9c		13.68		
500 sq ft 1x10 NC	Shiplap	4c		20.00		20
500 sq ft 1x8 NC	B&B Flrg	90.50		45.25		
				<u>        </u>	92.28	
31— 8—1x12—16 wp	128	9½c		12.16		
16—5/4x5—14	117	10½c		12.29		
15—2x4—20	200	5c		10.00		
160 1ft 4" crown mldg.	640	1¼c		8.00		
200 sq ft 1x 10 NC	Shiplap	4c		8.00		
				<u>        </u>	50.45	838.76
Balance due on Protested Check				(fees)		2.60
Aug 28—Prot. Ck & Fees	294.01					30
" 29—Check	291.41					
				<u>        </u>		<u>        </u>
					3011.36	

CREDITS

July 23— Returned						
4—4x4—24	128					
2—	20	53				
12	16	256				
10	18	240	677	4c	27.08	
August 21	check				700.00	727.08
					<u>        </u>	<u>        </u>
						2284.28
	Balance due					

Exhibit P-5.

FIDELITY UNION TRUST COMPANY  
SAVINGS DEPARTMENT  
IRONBOUND TRUST BRANCH, 2 FERRY STREET

No. 2406 NEWARK, NEW JERSEY August 13th, 1928

10 Pay to the  
Order of.....JANET DOMINO.....\$2500.00  
Fidelity  
Union Trust \$2500 and 00 cts. Dollars  
(Signed) A. M. Garrabrants (Signed) E. F. Reilly  
Teller Asst. Treasurer

TREASURER'S CHECK

Endorsement { Janet Domino  
Raniero Sebastian  
Received Payment

20 Through The Newark Clearing House  
Prior Indorsements Guaranteed  
Aug. 14, 1928  
North Ward National Bank No, 4

30

40

## Exhibit P-6.

## HOWARD SAVINGS INSTITUTION

Newark, N. J., Aug 13 1928—No. 99472

Pay to the

Order of.....CHARLES GIAMPORSTONE.....\$1043. #

Exactly One Thousand Forty-Three Dollars no Cents....Dollars

10

To the

NATIONAL  
NEWARK & ESSEX BANKING CO.

NEWARK, N. J.

(Signed) George J. Schneider	(Signed) Benjamin F. Hedden
Paying Teller	Ass't Secretary
Teller's Account	
55-1	

Endorsement	{ Charles Giamportone
	{ Raniero Sebastiani

20

Received Payment  
Through The Newark Clearing House  
Prior Indorsements Guaranteed  
Aug. 14, 1928  
North Ward National Bank No. 4

30

40

Exhibit P-7.

HOWARD SAVINGS INSTITUTION

Newark, N. J., Aug. 13, 1928—No. 99471

Pay to the  
Order of .....JOSEPHINE GIAMPORSTONE.....\$343.55

10 Exactly Three Hundred Forty-Three Dollars Fifty Five Cents

To the

NATIONAL  
NEWARK & ESSEX BANKING CO.  
NEWARK, N. J.

55-1

(Signed) O. R. Grenda (Signed) A. R. Styncus  
Paying Teller. Ass't Treasurer.  
Teller's Account

20 Endorsement { Josephine iGamportone  
Raniero Sebastiani

Received Payment  
Through The Newark Clearing House  
Prior Indorsements Guaranteed  
Aug. 14, 1928  
North Ward National Bank No. 4

30

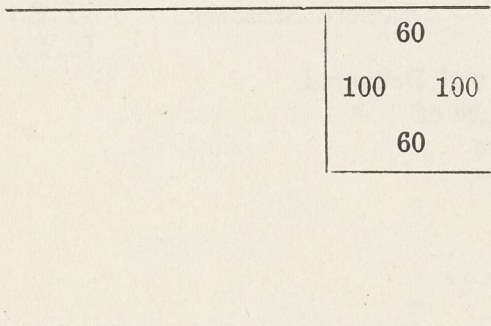
40

Exhibit D-1

STIPULATION THAT MORTGAGE SHALL  
BE PRIOR TO MECHANICS' LIEN.

We, the Undersigned, being persons who have  
agreed by contract in writing, duly filed, or to be  
filed, to furnish labor and materials for the erec-  
tion of a certain building for Charles iGamportone and Josephine Gamportone, we, Sadie Domino,  
Florence Domino, and Janet Domino, owner  
described and located as follows to wit known as  
50-52 St. Paul Ave., Newark, N. J.,

St. Paul Ave.



Cliff St.

10

20

In Consideration ,that Unity Building & Loan  
Association for the purpose of aiding said owners  
to erect said building have agreed to loan to said  
owner the sum of Fourteen Thousand (\$1400.00)  
dollars, to be secured by a mortgage or mortgages  
upon said building and lands, and for the further  
consideration of one dollar to us paid by the said  
Unity Building & Loan Association the receipt  
whereof is hereby acknowledged,

Do hereby Stipulate and Agree, that the mortgage  
or mortgages, given or to be given, to secure said  
loan shall be and remain a lien upon said building  
and lands prior and paramount to any claim or  
lien we may have upon or against said building

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*Exhibit D-1.*

10 and lands by virtue of the provisions of "An act to secure to mechanics and others payment for their labor and materials in erecting any building," and the supplements thereto, or otherwise, howsoever, but the foregoing stipulation shall not be construed as a waiver of our lien, except as to the lien of said mortgage.

Witness our hands and seals the 17th day of September in the year of our Lord One Thousand Nine Hundred and Twenty-eight.

Rocco Marinaccio (L. S.)

Raniero Sebastiani (L. S.)

(L. S.)

20 Signed, sealed and Delivered  
in the Presence of  
Joseph Arace

30

40



## Exhibit D-3

ROMOLO BOTTELI, Architect  
207 Market Street, Newark, N. J.

## CERTIFICATE

10 \$5000 Date, Sept, 18th, 28.  
To A. Domino & C. Giamportone owner.

THIS IS TO CERTIFY that under the terms of the contract dated June 5/28 for work upon house # 50 St. Paul Ave. Mt. Rocco Marinaccio, contractor for General Work is entitled to the 2nd payment amounting to Five Thousand 00/100 dollars.

	Additions,	\$
	Amount of contract,	\$21950
		<hr/>
20	Total,	\$
	Deductions,	\$
		<hr/>
	Total,	\$
	Am't of this cert.,	\$5000
	Previously paid,	\$5000
		<hr/>
	Total Paid to date,	\$10000
		<hr/>
30	Balance,	\$11950

ROCCO MARINACCIO.  
ROMOLO BOTTELLI,  
Architect.

Receiver from Rocco Marinaccio as per above certificate.

Raniero Sebistiani.

## Exhibit D-4

ROMOLO BOTTELI, Architect  
207 Market Street, Newark, N. J.

## CERTIFICATE

\$5000. 00/100

Date, Nov. 2nd, 28.

To A. Domino &amp; C. Giamportone owner

10

THIS IS TO CERTIFY that under the terms of the contract dated June 5/28 for work upon houses 50 & 52 St. Paul Ave. Mr. Rocco Marinaccio contractor for General work is entitled to the 3rd payment amounting to Five Thousand 00/100 dollars.

Amount of contract, \$21950.

Additions, \$

20

Total, \$

Deductions, \$

Total, \$

Am't of this cert., \$ 5000

Previously paid, \$10000

Total paid to date, \$15000

Balance, \$ 6950.

30

ROMOLO BOTTELI,  
Architect.

Received from Raniero Sebastiani as per above certificate.

Rocco Marinaccio.

40

Exhibit D-5.

Newark, N. J., Nov. 2, 1928 No. 16

THE BROAD & MARKET NATIONAL BANK  
of Newark

Pay to the  
Order of.....R. Marinaccio & R. Sabastiani.....\$1,600 00/100  
Sixteen Hundred .....Dollars  
(Signed) Charles Giamportone

10

(PAID 11-3-28)  
Teller 1, Nov. 3, 1929  
Guardian Trust Co., Newark.

O. K. S. M.

Endorsement { R. Marinaccio  
R. Sabastiani  
Charles Giamportone

20

30

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## Exhibit D-6

# 1048

## AGREEMENT FOR BUILDING

Filed June 6, 1928

1.22 P. M.

Specifications attached.

ROMOLO BOTTELLI, Architect  
45 Brandford Pl., Newark, N. J.

10

ARTICLES OF AGREEMENT, made the Fifth day of June in the year one thousand nine hundred and twenty-eight by and between ROCCO MARINACCIO, of Newark, N. J. as party of the first part (hereinafter designated the Contractor), and MRS. ANTOINETTA DOMINO & CHARLES GIAMPORTONE, of Newark, N. J., as party of the second part (hereinafter designated the Owner), Witnesseth that the Contractor, in consideration of the agreements herein made by the Owner, agree with the said Owner as follows:

20

I. The Contractor shall and will provide all the materials and perform all the work for the General work on house and two Garages to be erected at 50 St. Paul Avenue, Newark, N. J. as shown on the drawings and described in the specifications prepared by ROMOLO BOTTELLI, Architect, which drawings and specifications are identified by the signatures of the parties hereto, and become hereby a part of this contract.

30

II. It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direction of ROMOLO BOTTELLI, Architect, and that his decision as to the true construction and meaning of the drawings and specifications shall be final. It is also understood and agreed by and between the parties hereto that such additional drawings and explanations as may be necessary to detail and

40

*Exhibit D-6.*

illustrate the work to be done are to be furnished by said ROMOLO BOTTELLI, Architect, and they agree to conform to and abide by the same so far as they may be consistent with the purpose and intent of the original drawings and specifications referred to in Article I.

10 It is further understood and agreed by the parties hereto that any and all drawings and specifications prepared for the purposes of this contract by the said ROMOLO BOTTELLI, Architect are and remain his property, and that all charges for the use of the same, and for the services of said ROMOLO BOTTELLI, Architect, are to be paid by the said Owner.

20 III. No alterations shall be made in work, except upon written order of ROMOLO BOTTELLI, Architect; the amount to be paid by the Owner or allowed by the Contractor by virtue of such alterations to be stated in said order. Should the Owner and Contractor not agree as to amount to be paid or allowed, the work shall go on under the order required above, and in case of failure to agree, the determination of said amount shall be referred to arbitration, as provided for in Article XII of this contract.

30 IV. The Contractor shall provide sufficient, safe and proper facilities at all times for the inspection of the work by the Architect or his authorized representatives; shall, within twenty-four hours after receiving written notice from the said ROMOLO BOTTELLI, Architect to that effect, proceed to remove from the grounds or buildings all materials condemned by him, whether worked or unworked, and to take down all portions of the work which said ROMOLO BOTTELLI, Architect shall by like written notice condemn as unsound

40 or improper, or in any way failing to conform to

*Exhibit D-6.*

the drawings and specifications, and shall make good all work damaged or destroyed thereby.

V. Should the Contractor at any time refuse or neglect to supply a sufficiency of property skilled workmen, or of materials of the proper quality, or fail in any respect to prosecution the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by ROMOLO BOTTELLI, Architect, the Owner shall be at liberty, after three days written notice to the Contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the Contractor under this contract; and if the said ROMOLO BOTTELLI, Architect shall certify that such refusal, neglect or failure is sufficient ground for such action, the Owner shall also be at liberty to terminate the employment of the Contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the Contractor shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the Owner in finishing the work, such excess shall be paid by the Owner to the Contractor; but if such expense shall exceed such unpaid balance, the Contractor shall pay the difference to the Owner. The expense incurred by the Owner as herein provided, either for furnishing materials or for

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*Exhibit D-6.*

finishing the work, and any damage incurred through such default, shall be audited and certified by the said ROMOLO BOTTELLI, Architect, whose certificate thereof shall be conclusive upon the parties.

10 VI. The Contractor shall complete the several portions, and the whole of the work comprehended in this Agreement by and at the time or times hereinafter stated, to wit:

1st Day of October 1928.

20 VII. Should the Contractor be delayed in the prosecution or completion of the work by the act, neglect or default of the Owner, of ROMOLO BOTTELLI, Architect, or any other contractor employed by the Owner upon the work, or by any damage caused by fire or other casualty for which the Contractor not responsible, or by combined action of workmen in no wise caused by or resulting from default or collusion on the part of the Contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all the causes aforesaid, which extended period shall be determined and fixed by ROMOLO BOTTELLI, Architect; but no such allowance shall be made unless a claim therefor is presented in writing to the said ROMOLO BOTTELLI, Architect within forty-eight hours of the occurrence of such delay.

30 VIII. The Owner agree to provide all labor materials essential to the conduct of this work not included in this contract in such manner as not to delay its progress, and in the event of failure so to do, thereby causing loss to the Contractor, agrees that will reimburse the Contractor for such loss; and the Contractor agree that if shall delay  
40 the progress of the work so as to cause loss for

*Exhibit D-6.*

which the Owner shall become liable, then shall reimburse the Owner for such loss. Should the Owner and Contractor fail to agree as to the amount of loss comprehended in this Article, the determination of the amount shall be referred to arbitration as provided in Article VII of this contract. 10

IX. It is hereby mutually agreed between the parties hereto that the sum to be paid by the Owner to the Contractor for said work and materials shall be \$21950.00 Twenty-one Thousand Nine Hundred Fifty 00/100 Dollars, subject to additions and deductions as hereinbefore provided, and that such sum shall be paid by the Owner to the Contractor, in current funds, and only upon certificates of said ROMOLO BOTTELLI, Architect, as follows: 20

PAYMENTS

1st. when building is raised, sheathed, and roof boards on .....	\$ 5000.00	
2nd. when interior is ready for lathing, sashes are in, exterior is primed, and garage roofs are complete.....	5000.00	
3rd. when trimmed and stairs are up, tile work done, cellar bottom is in, and all plumbing and steam heating fixtures are delivered on the premises .....	5000.00	30
4th. when all is complete and accepted.....	5000.0	
5th. payment to be made 30 days after completion .....	1950.00	
	<hr/>	
Total .....	\$21950.00	

*Exhibit D-6.*

### CHANGES

It is further agreed that the contractor will furnish and set four extra doors not shown on plans, the contractor shall also make the side terrace 12" lower at rear of house.

10 Kitchen and pantry floors to be of N. C. Pine in place of Oak floors.

The final payment shall be made within 30 days after the completion of the work included in this contract, and all payments shall be due when certificates for the same are issued.

20 If at any time there shall be evidence of any lien or claim for which, if established, the Owner of the said premises might become liable, and which is chargeable to the Contractor, the Owner shall have the right to retain out of any payment then due or thereafter to become due on amount sufficient to completely indemnify against such lien or claim. Should there prove to be any such claim after all payments are made, the Contractor shall refund to the Owner all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the Contractor default.

30 X. It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials.

40 XI. The Owner shall, during the progress of the work, maintain insurance on the same against loss or damage by fire, the policies to cover all work incorporated in the building, and all materials

*Exhibit D-6.*

for the same in or about the premises, and to be made payable to the parties hereto, as their interest may appear.

XII. In case the Owner and Contractor fail to agree in relation to matters of payment, allowance or loss referred to in Article III or VIII of this contract, or should either of them dissent from the decision of the Architect referred to in Article VII of this contract, which dissent shall have been filed in writing with said ROMOLO BOTTELLI, Architect within ten days of the announcement of such decision, then the matter shall be referred to a Board of Arbitration, to consist of one person selected by the Owner, and one person selected by the Contractor, these two to select a third. The decision of any two of this Board shall be final and binding on both parties hereto. Each party hereto shall pay one-half of the expense of such reference.

Words erased before signing

IN WITNESS WHEREOF, the said parties to these presents have set their hands and seals the day and year above written.

Signed, Sealed and Delivered  
in the presence of

(L. S.) Rocco Marinaccio  
(L. S.) Antonietta Domino  
(L. S.) Charles Giamportone  
(L. S.)

Romolo Bottelli.

10

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## Exhibit D-7.

## SUMMONS

THE STATE OF NEW JERSEY TO  
(L. S.) ROCCO MARINACCIO

10 YOU ARE SUMMONED to answer the annexed complaint of

ANTOINETTA DOMINO and  
CHARLES GIAMPORTONE

20 in an action at law in the Essex County Circuit Court. And take notice that unless you file your answer to said complain with the Clerk of the said Essex County Circuit Court, at Newark within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, WORRALL F. MOUNTAIN, ESQ.,  
Judge of the Circuit Court, at Newark this  
Twelfth day of December nineteen hundred and  
twenty-nine.

Peter A. Cavicchia,  
*Attorney.*

John H. Scott,  
*Clerk.*

30

40



*Exhibit D-7.*

5. The Plaintiffs were compelled to finish said building at a great cost and expense.

10 6. The work and materials which the said defendant Rocco Marinaccio furnished under said contract did not comply with the terms of the contract, plans and specifications and said work and materials were inferior and unworkmanlike to the great damage of the plaintiffs.

20 7. The cost of completion of the building is accordance with the contract plus the cost of supplying labor and materials which the said defendant failed and neglected to furnish and for correcting defective work and materials in the premises covered by the contract is in excess of the balance unpaid on th contract price to the extent of \$860.00.

8. Th plaintiffs have demanded payment of said sum of \$860.00 from the defendant, but the defendant has failed, refused and neglected and still fails, refuses and neglects to pay the same.

WHEREFORE, judgment will be demanded in favor of the plaintiffs and against the defendant in the sum of \$860.00, together with costs of this suit to be taxed.

30

PETER A. CAVICCHIA,

*Attorney for Plaintiffs.*

Annexed to complaint is copy of agreement dated June 5, 1928 between Rocco Marinaccio, and Mrs. Antoinetta Domino and Charles Giamportone, which is the same as exhibit heretofore sent to you.



*Exhibit D-7.*

5. This defendant has no knowledge or information sufficient to form a belief as to the allegations set forth in paragraph 5 but states that he is not liable for same if plaintiffs had been put to any expense because of the fictitious contract.

10 6. Paragraph 6 is denied because this defendant never furnished any work or materials, never proceeded under the contract and never performed any work under the contract that said contract was fictitious and that any work and materials furnished was furnished by another person and not by this defendant.

7. Paragraph 7 is denied and this defendant claims that he is not liable under this fictitious contract.

20 8. Paragraph 8 is denied.

## FIRST SEPARATE DEFENSE.

1. Contract referred to in the above complaint was entered into between the Plaintiffs and one, Raniero Sebastiano for the erection and construction of such building.

30 2. Said Raniero Sebastiani advised the Plaintiffs that he could not enter into a written agreement because of certain trouble which the said Raniero Sebastiano was involved in pertaining to judgments and creditors and said Raniero Sebastiani arranged with the Plaintiffs that his contract shall be signed by a dummy.

3. This defendant was an employee of said Raniero Sebastiano, working for the said builder and at a daily wage and this defendant did not know the Plaintiffs.

40 4. At the order and request of Raniero Sebas-

*Exhibit D-7.*

tiano his employer, this defendant placed his signature on the agreement set forth in the summons and complaint in order to help the said Sebastiano and the said contract is a mere fiction and pretence.

5. This defendant never proceeded to do any work under the said contract. 10

6. The said Raniero Sebastiano proceeded to and did do all the work and purchased all the materials under the said contract.

7. This defendant was compelled to sign receipts for monies together with the said Raniero Sebastiano but the money was given to and used by the said Raniero Sebastiano, to the knowledge of the said Plaintiffs. 20

MAURICE S. MAURER,  
*Attorney of Defendant.*

30

40

*Exhibit D-7.*

ESSEX COUNTY CIRCUIT COURT.

10	ANTONINETTA DOMINO and CHARLES GIAMPORSTONE, <i>Plaintiffs,</i> <i>vs.</i> ROCCO MARINACCIO, <i>Defendant.</i>	} <i>Action at Law</i> } } <b>AFFIDAVIT.</b>
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STATE OF NEW JERSEY, }  
 COUNTY OF ESSEX } ss.

20 Matthew J. Reilly, being duly sworn according to law, on his oath, deposes and says, that on Saturday, January 25th, 1930, he served a true copy of the attached Notice of Motion upon Maurice S. Maurer, Attorney of the Defendant, Rocco Marinaccio, said service was made by leaving said copy at the office of Maurice S. Maurer, Room #960 Orway Building, 207 Market Street, Newark, New Jersey and by handing said copy to the stenographer in charge of said office at the time.

30 Deponent further says that at the time of making said service, said Maurice S. Maurer was not in his office.

Subscribed and sworn to  
 before me this 28th day  
 of January, 1930 MATTHEW J. REILLY

Carl Hinricksen,  
*A Master in Chancery of New Jersey.*



*Exhibit D-7.*

## ESSEX COUNTY CIRCUIT COURT.

10	ANTONINETTA DOMINO and CHARLES GIAMPORTONE, <i>Plaintiffs,</i>	<i>Action at Law</i>  <b>ORDER.</b>
20	<i>vs.</i> ROCCO MARINACCIO, <i>Defendant.</i>	

20 This matter coming on to be heard on motion of attorney for the plaintiffs, for an order striking out the answer filed by the defendant in the presence of Aaron Lasser, appearing for Peter A. Cavicchia, attorney for the plaintiffs and Maurice S. Maurer, attorney for defendant, and the court having heard the argument of counsel and it appearing that the answer filed herein by the defendant Rocco Marinaccio is frivolous and does not set up a legal defense to the cause of action set forth in the complaint, it is on this 6th day of March, 1930, on motion of Peter A. Cavicchia, attorney for plaintiffs,

30 ORDERED, that the answer filed herein by the defendant, Rocco Marinaccio, be and the same is hereby struck out and that judgment interlocutory be and the same is hereby entered in favor of the plaintiffs, Antoninetta Domino and Charles Giamportone and against the defendant, Rocco Marinaccio, and it is further

ORDERED, that the damages which the plaintiffs have sustained be assessed by a jury drawn from the general panel on the 7th day of April 1930.

WORRALL F. MOUNTAIN,  
*Judge.*

40

*Exhibit D-7.*

## ESSEX COUNTY CIRCUIT COURT.

ANTONINETTA DOMINO and  
CHARLES GIAMPORTONE,  
*Plaintiffs,*

*vs.*

ROCCO MARINACCIO,  
*Defendant.*

*Action at Law*

NOTICE.

10

To Rocco Marinaccio and  
Maurice S. Maurer, attorney, 164 Market St.,  
Newark, N. J.

PLEASE TAKE NOTICE that judgment inter-  
locutory has been entered against you in the within  
action and that the damages which the plaintiffs  
have sustained will be assessed by a jury drawn  
from the general panel on April 7th, 1930 at ten  
o'clock before Judge Worrall F. Mountain, at the  
Hall of Records, High Street, Newark, N. J.

20

Respectfully,

PETER A. CAVICCHIA,  
*Attorney for Plaintiffs.*

30

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*Exhibit D-7.*

## ESSEX COUNTY CIRCUIT COURT.

10	ANTONINETTA DOMINO and CHARLES GIAMPORTONE, <div style="text-align: center;"><i>Plaintiffs,</i></div> <div style="text-align: center;"><i>vs.</i></div> ROCCO MARINACCIO, <div style="text-align: center;"><i>Defendant.</i></div>	}	<i>Action at Law</i>  AFFIDAVIT OF MAILING.
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STATE OF NEW JERSEY, }  
 COUNTY OF ESSEX } ss.

ALFRED R. KEMPER, being duly sworn on his oath, according to law, deposes and says:

- 20     1. I am a clerk in the office of Stein, McGlynn & Hannoeh.
2. On March 12, 1930 I mailed by registered mail, return receipt requested, to Rocco Marinaccio, 164 No. 10th Street, Newark, New Jersey, a true copy of the attached notice, marked Schedule "A".
3. Annexed hereto and made a part hereof, marked Schedule "B" are the original receipts which were received from the United States Post
- 30     Office.

Subscribed and sworn to  
 before me this 27th day  
 of March, 1930                   ALFRED R. KEMPER

Sidney Svirsky,  
*An attorney-at-law of N. J.*

*Exhibit D-7.*

**SCHEDULE "A".**

**ESSEX COUNTY CIRCUIT COURT.**

ANTONINETTA DOMINO and CHARLES GIAMPORTONE, <i>Plaintiffs,</i> vs. ROCCO MARINACCIO, <i>Defendant.</i>	}	Action at Law  NOTICE.	10
---	---	------------------------------	----

To ROCCO MARINACCIO and  
 MAURICE S. MAURER, attorney, 164 Market  
 St., Newark, N. J.

PLEASE TAKE NOTICE that judgment inter- 20  
 locutory has been entered against you in the  
 within action and that the damages which the  
 plaintiffs have sustained will be assessed by a jury  
 drawn from the general panel on April 7th, 1930  
 at ten o'clock before Judge Worrall F. Mountain,  
 at the Hall of Records, High Street, Newark, N. J.

Resectfully,

PETER A. CAVICCHIA, 30  
*Attorney for Plaintiffs.*

*Exhibit D-7.***COPY OF DOCKET**

DOCKET # 51814

	Summons issued and complaint filed	12/12/29
	Answer	1/ 7/30
10	Notice of motion and affidavit	2/ 3/30
	Stipulation	2/ 8/30
	Order for judgment interlocutory	3/10/30
	Notice of judgment and assessment of damages	3/13/30
	Affidavit of mailing of notice of assess- ment	5/20/30
	Judgment entered	5/ 6/30
		\$534.45
	Costs	100.32
20	Total	<u>\$634.77</u>

30

40

Cozzolino Printing Co., 265 Halsey St., Newark, N. J.

## New Jersey Court of Errors and Appeals

EASTERN SASH & DOOR COM-  
PANY, a corporation of New  
Jersey,

*Plaintiff-Appellant,*

—vs—

RANIERO SEBASTIANI, et als.,  
*Defendant-Respondents,*

*Action at Law*

*On Appeal*

*From Essex County*

*Circuit Court.*

### BRIEF OF PLAINTIFF-APPELLANT.

#### Facts.

This is an appeal by the plaintiff from a judgment entered upon a verdict directed by the learned trial judge, in favor of the defendant-respondents, at the Essex Circuit. The suit was for the price of building materials furnished by the plaintiff upon the order of Raniero Sebastiani, one of the defendants, which materials were used in the construction of a building located at 50-52 St. Paul Avenue, Newark, New Jersey, and for a lien upon the premises. Said building was owned by Charles Giampartone, and Mrs. Anna Domino. Mrs. Domino conveyed her one-half interest to Sadie, Florence, and Janet Domino, her daughters, between the time the building was started and the lien claim suit instituted, and they are therefore parties defendant to this suit. The Unity Building and Loan Association holds a mortgage on the premises and is, therefore, also a party defendant.

Sebastiani, who ordered the materials, allowed judgment to be taken against him by default. But the other defendants contested the suit, denying the plaintiff's right to any lien. The case, as made out by the plaintiff's proofs, was:— Mrs.

Domino asked Sebastiani to submit figures on a house to be built on her lot. He gave her an estimate of \$23,000.00. (State of Case, Page 69, Lines 18, 23). Mrs. Domino and Mr. Giampartone, the owners of the lot, met Sebastiani on June 5th, 1928, in the office of Romolo Botelli, who, as architect, had drawn the plans and specifications on which Sebastiani had figured. There was also present Rocco Marinaccio, a young man, twenty-five years of age, who says he is a common carpenter and is not a contractor. (State of Case Page 89, Lines 17-23). Both he and Sebastiani say that he worked for Sebastiani as a carpenter. (State of Case, Page 70, Lines 33-37, and Page 89, Line 26; Page 90, Line 11) and he was brought to the meeting by Sebastiani. The defendants did not know him, and had never seen him prior to this meeting.

“Q And you did not know Marinaccio at all, did you?

Q You never saw him before the time that you saw him sign the contract in the architect's office?

A No, sir.

Q That is true, is it not?

A Yes, sir.”—(State of Case, Page 114, Lines 23-30).

At this meeting, the specifications were changed and the contract price reduced to \$21,950.00. Sebastiani says he did the required negotiating. Bottelli, the architect, as witness for the defendants, testified:—

“Well, there was a discussion between the owners and Mr. Sebastiani about some changes that were to be made.”—(State of Case, Page 128, Lines 32-34), and further:

“Q What did Mr. Marinaccio say about it?

A I haven't any—I can't recollect the words. All he said was that he was the contractor, and that is all I remember.

Q That is all he said?

A Yes."—(State of Case, page 128, Lines 12-16).

"Q Did Marinaccio take any part in that discussion with the owners?

A To my recollection, the only thing that Mr. Marinaccio stated was that Mr. Sebastiani was to have charge of the work."

—(State of Case, Page 129, Lines 14-18).

Sebastiani states that he told the owners and the architect that he wanted Marinaccio to sign the contract because he was in financial difficulties with another house;

"Q Mr. Sebastiani, tell us over again, real slow, what you told Mr. Giamportone and Mrs. Domino as to why you did not sign the contract yourself?

A I tell them because I had some trouble in the house, in 80 Poe Avenue, and I can't sign the contract, let him sign, Mr. Marinaccio. He says yes, and Marinaccio sign for me.

Q And Marinaccio signed the contract?

A Yes, sir."—(State of Case, Page 71, Lines 10-20).

that he could not take the contract in his own name for that reason, but that he was to be the builder and be responsible for the job.

"Q At that time, when you were in the architect's office, and Marinaccio signed the contract, I want to know if there was any talk between you and the owners about who was going to build the house, who was going to do the work?

A I say I build it.”—(State of Case, Page 71, Lines 25-30).

“Q . . . . When Marinaccio signed the contract, did anyone say who was going to be the man who would build the house?

A Yes. Marinaccio sign the contract, but I am responsible for the building of the house.

Q Who said that?

A Myself.

Q To whom did you say it?

A To Mr. Bottelli, and Mr. Giampartone, and Mrs. Domino.

Q What did they say?

A They say, ‘All right’.”—(State of Case, Page 71, Line 38—Page 72, Line 14).

The outcome of the negotiations was that a contract was drawn by Bottelli, for the erection of a house on the lot owned by Giampartone, and Mrs. Domino, for \$21,950. Marinaccio signed the contract as contractor, and Sebastiani's name did not appear thereon. On June 6, 1928, this contract was filed in the Essex County Clerk's Office as Number 1048 (Exhibit D-6, State of Case, Pages 175-181).

The building was then erected by Sebastiani. He bossed the work; he hired and fired the employees; he purchased the materials, held himself out as the contractor, and employed Marinaccio as a carpenter, paying him by the day. (State of Case, Page 72, Line 15—Page 73, Line 9). The only thing that the defendant himself ever saw Marinaccio do on the job was carpenter work. (State of Case, Page 117, Line 40—Page 118, Line 3). Sebastiani ordered the materials from the plaintiff and told the president of the plaintiff corporation that he was the contractor. (State of Case, Page 76, Lines 36-40).

The plaintiff further proved by Exhibits P-5, 6 and 7, and D-1, 2, 3, 4, and 5 (State of Case, Pages 166-174), that every check given by the owners in payment for the building contains Sebastiani's indorsement, while only one of them contains Marinaccio's name; also that of the three architect's certificates, one is signed by Marinaccio, one by Sebastiani, and one by both; and lastly, that the postponement of lien to the building and loan mortgage is signed by both. Sebastiani and Marinaccio both testified that Sebastiani got every penny of the money paid. Giampartone, who claimed he paid the money to Marinaccio, reluctantly admitted that he went to the bank with Sebastiani and asked the paying teller to cash the \$1600.00 check, (Exhibit D-5, State of Case, Page 174), and that Sebastiani took the money that the teller handed out. (State of Case, Page 122, Line 27—Page 123, Line 40). The reason he gave for having Sebastiani sign the postponement of lien was that his lawyer told him to do so after he told the lawyer that the contractor (Marinaccio) did not seem to take sufficient interest in the job, so he thought he better have Sebastiani, the supervisor, sign too. These were the facts established by the plaintiff, in order to prove that the contract on file (Exhibit D-6, State of Case, Pages 175-181) wherein Marinaccio is designated the contractor, was a mere cloak to hide the true situation, namely: that Sebastiani was the contractor.

The defendants denied that the contract was fraudulent. Their story was that Sebastiani told them Marinaccio was a good friend of his, an experienced and successful builder and he, Sebastiani, worked for him. Further, that they did not know of Sebastiani's financial difficulties, and thought at all times that he was merely the supervisor of the job for Marinaccio, that the contract with Mari-

naccio having been filed, they had protected themselves from any possibility of a lien, and that the plaintiff who supplied materials on the order of Sebastiani had no lien, and must be contented with his judgment against Sebastiani.

The Unity Building and Loan Association produced no evidence as to whether its money went into the building or not.

It was further proven that the building was left unfinished by Marinaccio and Sebastiani, or either or both, and that the owners had completed the building at a cost in excess of the balance due on the contract, and brought suit against Marinaccio for this excess. That in said suit Marinaccio had pleaded that the contract sued upon was a mere pretense upon which he was not supposed to be held. Upon motion, this answer was stricken as frivolous, by Judge Mountain, and judgment entered against the defendant. (Exhibit D-7, State of Case, Pages 182-194).

Upon the facts as above set forth the learned trial judge before whom this case was tried directed a verdict for the defendants. His reason for so doing, he stated, was that the contract between Marinaccio and the owners of the lot contained all the terms upon which the house was built, the price, the specifications, the location properly designated, and that under the Second Section of the Mechanics Lien Law (Compiled Statutes, 1910, Vol. 3, Page 3293) it protected the building from liens; further, that it was neither fraudulent nor fictitious in fact, and there was no jury question raised by the proofs. From the judgment entered on this directed verdict this appeal is taken.

There is one additional circumstance involved in this case. On January 26th, 1929, Judge Smith referred this case to Andrew Van Blarcom, Esquire,

“To take and report an account between the plaintiff and the defendants herein, and to report whether the plaintiff is entitled to judgment, specially against the building and lands set forth in the complaint, and the question of priority of the liens of the plaintiff and the defendants.”—(State of Case, Pages 34-35).

This order reserved to the parties the right to trial by jury, and was entered by consent. On May 4, 1929, Referee Van Blarcom reported that under the proofs the plaintiff was entitled to a lien on the premises, prior to all the defendants, including the building and loan, because he found the contract on file to be fictitious and fraudulent. (State of Case, Pages 38-45). On June 15, 1929, the defendants all filed exceptions to said report, and demanded trial by jury. (State of Case, Pages 19-54). On June 27, 1930—one year later—on motion of the defendants' attorneys, Judge Porter entered an order suppressing the Referee's report, and forbidding the plaintiff from using it at the trial, on the ground that said report was improper and contained matters beyond the scope of the reference, and was contrary to law. (State of Case, Pages 59-60). At the trial before Judge Dungan the Referee's report was excluded expressly on the strength of Judge Porter's order.

“The Court: I find the order of Judge Porter striking out the Referee's report, for the reasons therein stated, and feeling bound by that order of Judge Porter, I will sustain the objection, and an exception to that ruling may be noted.”—(State of Case, Page 63, Lines 33-39).

On this appeal a reversal of that order of June 27, 1930, suppressing the referee's report and excluding it as evidence at the trial is also sought.

**ARGUMENT.****I.****The Report of the Referee Was Admissible in Evidence.**

The practise of referring matters to referees, and allowing the parties to preserve their right to trial by jury by appropriate reservation, is one of long standing and frequent use. The authority for it is found in the Practise Act of 1903, Section 155 (Compiled Statutes, 1910, Vol. 3, Page 4101).

"All actions in which matters of account are in controversy may by rule be referred to some competent person or persons, to state and report an account between the parties and the amount that may be due from either party to the other, which report signed by the referee or a majority of the referees, when confirmed by the court, shall be final and conclusive between the parties and judgment may be entered thereon and execution issued in the manner provided by law; but either party may at the time of ordering such reference enter in the minutes his reservation of a right to trial by jury, and at the same term in which the report is filed may demand a trial by jury, in which case the action shall be tried by jury, the costs of the reference to abide the result; on such trial the report of the referee or referees shall be prima facie evidence of all the facts therein found and reported; the party demanding a trial by jury shall file his exceptions to the report in twenty days after notice that the same is filed, and no other exceptions shall be considered on the trial; if no such re-

servation has been entered, or if the party fails so to demand a trial by jury or to file exceptions, the report may be confirmed on motion of either party on ten days' notice. (P. L. 1903, p. 579)."

In the case of *Gopsill v. Hervey*, 34 N. J. L. 435, the Supreme Court, speaking through Mr. Justice Van Syckel, construed this Statute to authorize a reference if the plaintiff's claim involved an account, no matter what the contested issue in the case might be.

"The language of the act under which the reference was ordered is comprehensive, giving power to refer 'all actions in which matters of account are in controversy'.

"It is the character of the plaintiff's claim, and not the issue made upon it, that constitutes the test. If the finding of such issue in favor of the plaintiff will involve the necessity of settling matters of account, the case is within the terms of the act . . . . .

"The statute does not make the right to refer depend upon the nature of the defence which may be set up, but upon the fact that matters of account are controverted."

Whatever doubt may have existed as to whether a mechanic's lien suit could be referred (see *New York Co. v. Kernan*, 73 N. J. L. 763; 65 Atl. 444) was definitely eliminated by the enactment in 1905 of the following supplement to the mechanic's lien law:

"Any action brought by virtue of the provisions of the act to which this is a supplement and in which matters of account are in controversy may, by rule, be referred to some competent person or per-

sons to state and report an account between the parties and the amount that may be due from either party to the other; and in case a lien is claimed in said action, then, whether the plaintiff is entitled to judgment specially against the building and land in the declaration described, and in case of defendant mortgagees, to report the priority of liens of the plaintiff, and said mortgagee defendants as put in issue by the pleadings in such action. (P. L. 1905, p. 374)."

(Compiled Statutes, 1910, Vol. 3, p. 3312, Sec. 30A). In the case of Taylor v. Thornton, 81 N. J. Law. 7; 79 Atl. 330, Mr. Chief Justice Gummere, speaking for the Supreme Court, states that a mechanic's lien suit is properly subject to reference.

It is submitted then that the action of Judge Smith in referring this matter was justified; and further, that the question of whether the claim is a lien or not, and if a lien whether prior to the mortgage or not, was properly referable under Section 30A of the lien law. It follows then that there could be no error in the referee reporting on what was referred to him, and that his report to the effect that the plaintiff's claim was a lien and prior to the building and loan mortgage was not improper, nor did it contain anything beyond the scope of the reference. Since this is so, the order striking out the report was erroneous and there should be a reversal because of it, for it was highly prejudicial.

By the 155th Section of the Practise Act, "on such trial, the report of the referee or referees shall be prima facie evidence of all the facts therein found and reported." (Compiled Statutes, 1910, Vol. 3, p. 4101).

By Section 30B of the lien law (Compiled Statutes, 1910, Vol. 3, p. 3312) the referee's report in a lien suit is given the same effect. In the instant case the report was for the plaintiff and established a prima facie case if admitted into evidence. Excluding it deprives plaintiff of the corroborative aid that the report gives to his evidence from the fact that the referee believed it. The importance of the report as evidence is established by the case of *B Cody v. Pratt*, 68 N. J. L. 295; 53 Atl. 470, wherein the Court of Errors and Appeals lays down the rule that a referee's report is still prima facie evidence of the plaintiff's case, even though a trial already was had in which it was put in evidence, and there had been a reversal of the judgment on that trial.

There is in this case an added reason why the order appealed from should be reversed as error. The order of reference was consented to by the defendants' attorney. The defendants tried their case without objection before the referee. On the coming in of his report, they filed exceptions thereto and demanded a jury trial. A whole year later, after thus recognizing the legal validity of the report they moved to suppress it. Plaintiff-appellant contends that even if it was error to refer the case, or the report was outside the scope of the reference, defendants' objection was untimely, and should have been overruled. In the case of *Taylor v. Thornton*, 81 N. J. L. 7; 79 Atl. 330, it was held that after judgment had been entered on a referee's report it was too late to object on the ground that the referee did not take the proper oath, and so was without jurisdiction; and so in this case, after consenting to the reference, appearing before the referee, and excepting to his report, it was too late to then strike at the whole proceeding.

It is respectfully submitted that the order suppressing the referee's report was erroneous, and that it was error to suppress it, and to exclude that report from the trial when offered by the plaintiff, and that for this error the judgment under review should be reversed.

## II.

### **The Learned Trial Judge Erred in Directing a Verdict in Favor of the Defendant.**

The facts of this case have been stated at great length previously in this brief, and will only be summarized in the argument on this point. The plaintiff-appellant furnished material used in the building erected for the owners.

Under the first section of the Mechanic's Lien Law, standing alone, plaintiff was clearly entitled to a lien.

"1. Every building hereafter erected or built within this state shall be liable for the payment of any debt contracted and owing to any person for labor performed or materials furnished for the erection and construction thereof, which debt shall be a lien on such building, and on the land whereon it stands, including the lot or curtilage whereon the same is erected. (P. L. 1898, p. 538)."—(Compiled Statutes, 1910, Vol. 3, p. 3291).

But the defendants contend the second section of the act deprives plaintiff of its lien.

"2. Whenever any building shall be erected in whole or in part by contract in writing, such building and the land whereon it stands shall be liable to the contractor alone, for work done or materials furnished

in pursuance of such contract; provided, said contract, or a duplicate thereof, together with the specifications accompanying the same, or a copy or copies thereof, be filed in the office of the clerk of the county in which such building is situate before such work done or materials furnished; provided further, that it shall not be necessary to file the plans for such building in said clerk's office, whether such plans are referred to in said contract or not. (P. L. 1898, p. 538, as amended P. L. 1910, p. 472."—(Compiled Statutes, 1910, Vol. 3, p. 3293).

and the issue in the case becomes this: was the building erected by a contract in writing which was filed, or was it not? It is undisputed that a contract was on file as Number 1048 in the Essex County Clerk's Office, (Exhibit D-6, State of Case, Pages 175-181) wherein it was stated that Rocco Marinaccio agreed to build a house at 50-52 Poe Avenue, Newark, New Jersey, for Giampartone and Domino, for the sum of \$21,950.00. Nor is it disputed that a house was built on that lot according to the specifications set forth in that filed contract. But it is disputed that the house was erected under that contract. The plaintiff contends it was not. To prove this contention it produced as a witness Marinaccio, the contractor named therein, and Sebastiani. Both testified that Sebastiani was in fact the contractor, that he was the person with whom the owners entered into the agreement, that he was the person who actually did the contractor's work that he was the person who received every cent paid on the contract, because he was the person entitled to it in fact. They further testified that Marinaccio was but a common carpenter, he never had been a contractor, and he was not the contractor on this job; that

he had been employed by Sebastiani previously, and was employed by him as a carpenter on this job; that he never received one cent of the contract price. They further testified that Sebastiani was in trouble financially when this job was started, and was afraid to take this contract in his own name because he feared his creditors might get the benefits; that all this was clearly explained to Giampartone and Domino, and that they all agreed that Marinaccio should sign the contract, but Sebastiani should be the builder in fact. It was further proven by the documentary evidence that all checks used in payment bore Sebastiani's indorsement, (Exhibits P-5, 6, 7 and D-5, State of Case, pages 166, 167, 168, and 174) and that the proceeds of the only one on which Marinaccio's name ever appeared (Exhibit D-5) which was for \$1600.00 went to Sebastiani, because Giampartone admitted he went with Sebastiani to the bank and allowed Sebastiani to take the money handed out by the paying teller.

“Q Who got the money on this check?

A I was requested to go down with Sebastiani and get it cashed.

Q And who did you give the cash to?

A Marinaccio asked me to go down.

Q Will you answer my question, please?

A The man that had the check.

Q Will you answer my question, please?

A What is the question?

Q Whom did you give the cash to on that check that I just showed you?

A I didn't take—

THE COURT. To who did you give the cash?

THE WITNESS. It was laying on the counter and he took it. I didn't handle the cash. How can I say to

whom I took it if my fingers didn't touch the money?

Q Are you afraid to tell the jury?

A No. My fingers didn't touch the money, I says. I know what I am talking about.

Q You made out this check to both Marinaccio and Sebastiani?

A Yes, sir.

Q Marinaccio endorsed it and then Sebastiani, and you went to the bank together, didn't you?

A I told you why, didn't I?

Q Now, will you please stop that and just answer my question? I think we will save a lot of time if your Honor will kindly instruct the witness. You and Sebastiani went to the bank together, did you not?

A Yes, sir.

Q Sebastiani endorsed the check?

A Yes, sir.

Q You endorsed it and got the cash from the paying teller?

A Yes, sir.

Q And gave it to Sebastiani?

A I didn't handle the money.

Q Oh, you let him take it himself?

A Yes, sir, from the cage. I asked the clerk to cash that.

Q But you personally went with Sebastiani?

A I did.

Q To the bank?

A I did.

Q To see that he, personally, should get the cash, is that right?

A That is right; yes." (State of Case, Page 122, Line 31—Page 124, Line 9).

The reluctance with which Giampartone admitted this indicates how chary he was of the whole truth in this case. And, lastly, it was proven that Giampartone, in accordance with the instructions of his lawyer, had Sebastiani as well as Marinaccio sign the postponement of lien in favor of the building and loan association, which placed a mortgage on the property. (Exhibit D-1, State of Case, Pages 169-170). Upon this state of facts, plaintiff contended that a case had been made sufficient to go to the jury.

The sine qua non of a contract is the contracting parties. If A contracts with X, Y, and Z for each of them to do for him the same thing at the same time for the same consideration, there are three contracts and not one, because the contracting parties are different. The fact that Giampartone and Domino put in writing a contract with Marinaccio to build a house for \$21,950.00, and also orally agreed with Sebastiani to build the same house on the same lot for the same price means that there were two contracts. If the question had been left to the jury, under proper instructions, they could have found that the house was built under the oral contract with Sebastiani, and not the written one with Marinaccio which was filed. If they so found, then the owners had not protected their property from a lien in accordance with the second section of the lien law. This involves no question of intent to defraud, but merely a question of the law of contracts and the construction of the statute.

A test cause for the conclusion stated above is this: Suppose Giampartone and Domino had made this contract with Marinaccio in the best of good faith on June 5, 1928, and filed it on June 6, 1928, as was done in this case, without Sebastiani being in the picture at all. Suppose then that on June 6, 1928, as was done in this case, without Sebastiani being in the picture at all. Suppose then that

on June 7, 1928, Marinaccio had refused to carry out the contract and so informed the owners; and that then for the first time the owners went to Sebastiani and showed him the contract and asked him to build the house as therein specified for the price therein stated, and the parties had orally agreed to such an arrangement, and the house was built under this oral agreement, could it then be contended that the contract under which the house was built was the one on file; or that the building was protected from liens? No, appears to be the obvious answer. Nor would it make any difference that a search would reveal the contract with Marinaccio, for the house was not built by him.

This precise question does not appear to have been decided in this state. But the other factor in this suit, that the contract on file was a fraudulent and fictitious one, raises a question which is well settled by our decisions.

In the case of *Young v. Wilson*, 44 N. J. L. 157, the facts were that the defendant, Wilson, was the contractor to build a building on a lot owned by one Stewart, according to the records and that their contract was on file. In fact, however, Stewart was a mere dummy in whom Wilson had put the title. Wilson's own money was used to purchase the property—and the contract was prepared and filed, for the express purpose of circumventing the lien law. The plaintiff Young, who sold some materials to Wilson, sought a lien, and the Supreme Court held he was entitled to it.

“The contract to be filed as a protection against liens is a real, not a fictitious, bargain on the part of an owner who, with a purpose himself to erect a building, employs for a price the agency of another to do it for him, and the contract in form for build-

ing which, in effect is merely a license to another to build for himself, whether he have any interest or estate in the lands or not, is not the contract contemplated in the second section of the act, the filing of which is a protection against liens. (Per Knapp, J., at Page 160.)

The principle therein established has been law in this State ever since. In *Improved Building & Loan Association v. Larkin*, 88 N. J. Eq. 52; 101 Atl. 1043, the contractor for the building was in fact one of the owners of the premises, for he was a member of the partnership which held the title. Vice-Chancellor Stevens held that such a contract did not protect the premises from liens, for it was in form and not in truth a contract. He relies on the case of *Young v. Wilson* 44 N. J. L. 157, as his authority, stating:

“This case holds that the agreement, the filing of which protects against the lien of other creditors, must be between parties who in verity, and not in form merely, hold toward each other the relationship of contracting parties.”

Paraphrasing Vice-Chancellor Stevens' statement of the effect of the holding in *Young v. Wilson*, we find that: The agreement, the filing of which protects against the lien of the other creditors, must be between the parties who in verity, (*Giampartone and Domino, and Sebastiani*) and not in form merely, (*Giampartone and Domino, and Marinaccio*) hold toward each other the relationship of contracting parties.

In the instant case, the jury could readily find, if they believed the testimony introduced on the part of the plaintiff, *that the real contracting party who was to erect the house was Sebastiani, and not Marinaccio.*

In *Guerrero v. Di Trolio*, 105 N. J. L. 5; 143 Atl. 803, the owner's name was Philip Di Trolio, and so appeared on the contract. However, the County Clerk indexed the contract *Filippe Di Troilio*, and the materialman claimed a lien because the contract was so indexed. The Supreme Court denied him any lien, holding that since there was no fraud in fact, and the true contract was filed, the fact that the owner's name was incorrectly indexed, and for that reason the contract might not be found by a search was immaterial. This clearly indicates that the test is not whether it would or would not be found upon a search, but the test is, whether it is the true contract between the parties as named therein.

In *Earle v. Willets*, 56 N. J. L. 334; 29 Alt. 198, the Court of Errors and Appeals decided that the owner's name does not have to appear on the contract at all. The best clue to the searcher is unnecessary under this decision, for it is not that contract that the searcher might find, but that contract under which the building was erected that protects from liens under the statute. Mr. Justice Reed, who delivered the Court's opinion, expressly recognizes the doctrine of *Young v. Wilson*, 44 N. J. L. 157, but holds it inapplicable to the case.

"It did not appear that there existed any fraudulent intention to cheat workmen or materialmen by this manner of executing the contract. Nothing appeared in the case to bring it within the influence of the doctrine announced by the Supreme Court in the case of *Young v. Wilson*, 44 N. J. L. 157."

Mr. Justice Reed, in his reasoning, says:

"In most instances the name of the contractor is as readily discovered as is that

of the owner. The laborer or materialman knows upon whose orders he is called upon to work, or furnish materials. The laborer knows, and the material man should know, the premises to be improved."

In the instant case the plaintiff was informed by Sebastiani, who ordered the material, that *he* was the contractor. An inspection of the building would show that he was the contractor, and on the job as such. A search of the records would disclose no contract on file with him. The plaintiff, therefore, had a right to rely on the fact that in extending credit for materials used in the erection of the building (and it is not disputed that plaintiff's materials went into this building) to Sebastiani, it had the security of its right of lien against the land and premises. Even if a search disclosed the contract with Marinaccio, that would mean nothing, for many contracts are filed and the contractor does not proceed, and a new contract is then made with another person which may or may not be filed; this is not only common knowledge, but a very common experience. Furthermore, Marinaccio testified that he was not the contractor, did not erect the building, but worked as a carpenter laborer for Sebastiani. (State of Case, Page 90, Lines 27-40). If inquiry were made of him, that is what it would disclose, for that is what he says under oath.

In *Murphy-Hardy Lumber Co. v. Nicholas*, 66 N. J. L. 414; 49 Alt. 447, the contract on file showed the contract price as \$5,100.00, Whereas the contracting parties secretly agreed it should be but \$4,100.00. The Supreme Court decided that a materialman had a lien because the building was not protected by such a contract for,

"The real contract between the parties must be in writing, and that or a duplicate

must be filed. The filing of a supposititious contract will not suffice. The argument is without merit, that the only purpose of the requirement is to advise those interested that a contract exists. If this were all that was intended by the legislature, a simple statement to that effect would have been prescribed . . . . .

“The present form of the statute evinces a legislative intent that the document filed shall show the complete contract.”

It surely does not show the complete contract in the instant case when the name of the real contractor does not appear therein. The Court goes on to say:

“Because the owner would be estopped from denying the truth of the filed contract is no reason that the lien claimant should not be allowed to prove its falsity.”

And similarly in the instant case, because Marinaccio was not allowed to deny the truth of the filed contract, and in a suit by the owners his answer, attempting to do so, was stricken as frivolous, (Exhibit D-7, State of Case, Pages 182-194) does not prevent the plaintiff, a lien claimant, from proving the falsity of the filed contract and establishing his lien.

In the instant case, there was abundant proof of the fact that this was a fraudulent and fictitious contract which was filed, and was not considered by any of the parties to be the true contract. Sebastiani testified to his financial difficulties, to his desire to hide from his creditors his connection with the contract, to having so informed the owners, to their agreement to sign a contract with Marinaccio in order to help Sebastiani defraud his creditors, to the fact that he did

all the work and got all the money; and the documents—checks and receipts—prove that fact conclusively; and that he and the owners filed the Marinaccio contract to hide the truth. The fact that the owners denied all this, even though they could not explain just why the documentary evidence was in the shape it was, raised the jury question in the case. For, if the plaintiff's evidence be admitted as true, as was done by the learned trial court for the purpose of directing the verdict, the plaintiff has established that the contract on file was both fraudulent and fictitious—not the true contract between the parties—and instead of directing a verdict for the defendant, one should have been directed for the plaintiff, under the decisions. It is submitted that the plaintiff was entitled to have the jury pass upon the two questions: whether the contract on file was the one under which the building was erected, and also whether the contract on file was in truth a contract, or as plaintiff alleged a fraud and fiction.

It is respectfully submitted therefore, that it was error for the trial court to exclude the referee's report from evidence, when offered by the plaintiff, and that it was error to refuse to submit to the jury the questions as to whether or not the filed contract was fraudulent and fictitious, and whether the building was erected under it, and that for these reasons the judgment appealed from should be reversed.

Respectfully submitted,

MAURICE S. MAURER,  
Attorney of Plaintiff-Appellant

PHILIP J. SCHOTLAND,  
Of Counsel.

## New Jersey Court of Errors and Appeals

EASTERN SASH & DOOR COM-  
PANY, a corporation of New  
Jersey,

*Plaintiff-Appellant,*

*vs.*

RANIERO SEBASTIANI, *et als.*,  
*Defendants-Respondents.*

*Action  
at Law.*

*On Appeal  
from Essex  
County*

*Circuit Court.*

### BRIEF OF DEFENDANTS-RESPONDENTS.

#### Facts.

On June 5, 1928 Charles Giamportone and Antoinetta Domino were the owners of a plot of ground at 50-52 St. Paul avenue, Newark, New Jersey, and on that date made a contract in writing with Rocco Marinaccio as builder for the construction of a four-family building for the sum of \$21,950.00, on said premises. This contract, together with the specifications, was filed in the office of the Clerk of the County of Essex on June 6, 1928 as Contract #1048 for the year 1928. Thereafter, on June 22, 1928 Antoinetta Domino conveyed her one-half interest in said property to her daughters, Sadie Domino, Florence Domino and Janet Domino, so that at the present time the defendants Charles Giamportone, and Josephine Giamportone, his wife, and Sadie Domino, Florence Domino and Janet Domino are the record owners of the said premises.

In accordance with the terms of the above contract, work was commenced on the construction of the building set forth in the contract,

plans and specifications. Payments required by the terms of said contract were made as the building progressed, and when the contractor had received \$15,000.00 of the contract price, said contractor, Rocco Marinaccio, abandoned work, and thereafter the owners were compelled to complete the building themselves.

The plaintiff, Eastern Sash & Door Co. filed a mechanic's lien and instituted suit thereon to recover \$2,284.28 for materials alleged to have been furnished for the erection and construction of the above building. The complaint set forth that the defendant owners entered into an agreement with one Raniero Sebastiani, for the construction of said building, and that this agreement was not filed. The defendants filed an answer which placed at issue the material allegations of the plaintiff's complaint and which set forth affirmatively that the plaintiff was not entitled to a lien on the said premises for the reason that on June 5, 1928 Charles Giamportone and Antoinetta Domino, the then owners of the premises described in the plaintiff's complaint, entered into a written contract with Rocco Marinaccio to build the said building, which contract, together with the specifications thereto attached, was duly filed on June 6, 1928 in the office of the Clerk of Essex County, and that the building was erected in accordance with the terms of said contract. The answer further sets forth that all of the materials furnished by the plaintiff were subject to the terms of said contract, and that the plaintiff had its remedy against the owners by stop notice and had no right of lien.

Thereafter, judgment by default was entered against Raniero Sebastiani, the party defendant who is named in the complaint as builder.

On January 26, 1929 an order was entered in the Essex County Circuit Court referring the matter to Andrew Van Blarcom, Esq., to take and report and account between the plaintiff and the defendants herein, and said order of reference expressly reserved to the parties there-to their respective rights of trial by jury.

Testimony was taken before the said Referee and on May 4, 1929 the Referee submitted his report and found that the contract entered into between Charles Giamportone and Antoinetta Domino and Rocco Marinaccio was fraudulent and fictitious, and that the plaintiff was entitled to a lien against the said premises for the sum of \$2,284.28, with interest from November 1, 1928, and that said judgment had priority over the lien of the mortgage of the defendant, Unity Building & Loan Association, the mortgagee mentioned in the summons and complaint. The report sets forth at length the testimony of certain witnesses and comments on the testimony of others.

Exceptions were duly filed to said Referee's report and a jury trial was demanded. The motion of the attorney for the plaintiff for an order to confirm the Referee's report was denied and the report was not confirmed.

Application was then made on behalf of the defendants to suppress the report of the Referee, which application was granted and an order was made suppressing the said report.

At the trial the plaintiff sought to prove that the contract which was made between Rocco Marinaccio and the owners was a fraudulent and fictitious one. The learned trial judge, after considering the pleadings and hearing the tes-

timony of the witnesses and considering the evidence, directed a verdict for the defendants, and his reasons for so doing are set forth at length on pages 150-154 of the State of the Case.

### I.

**The Order suppressing the Report of the Referee was properly made and the Court was correct in excluding the said report at the trial.**

The report of the Referee should not have been admitted at the trial for the following reasons:

(1) The report was improper as to its form and contents.

(2) The Referee had no power or right to find that the building contract was fraudulent and fictitious, and he erred in so finding because the facts upon which he based his findings do not support such findings.

With regard to point (1), the power of the Referee is derived from Section 155 of the "Practice Act" and from the "Act of 1905," supplementing the "Mechanics' Lien Act." Section 155 of the "Practice Act" provides as follows:

"All actions in which matters of account are in controversy may by rule be referred to some competent person or persons to state and report an account between the parties and the amount that may be due from either party to the other \* \* \*."

The Referee in the present case not only reported the amount due from the defendants to the plaintiff, but also in his report went far beyond this. He reported at length the testimony of certain witnesses and commented on the testimony of others.

An examination of the Referee's report in the present case discloses such sentences as these taken at random from said report:

"In <sup>rebuttal</sup> ~~rebuttal~~, Philip Sklar, a witness produced by the plaintiff, testified that he and Sebastiani went to the owner, Giamportone, to get the owner to sign a paper and that the owner would not sign. \* \* \*

In sur-rebuttal the defendants called Charles Giamportone, who denied the testimony of Philip Sklar to the effect that he owed Sebastiani money. \* \* \*

There is testimony from different sources that the reason Sebastiani did not sign the contract was that he was in trouble of some kind. There is testimony from several sources that Marinaccio was working as a carpenter laborer at \$12.00 per day."

It is not conceivable that the section of the "Practice Act" making the Referee's report *prima facie* at the trial was meant to place sentences such as the above before the jury as *prima facie* evidence of the facts therein contained. The purpose of the section is merely to make the report of the Referee's findings a *prima facie* case for the winner. It is the final finding of the Referee which is *prima facie*, and not his statements contained therein.

To permit the report to be submitted to the jury in the form as it was rendered by the Referee would give the jury part of the facts, and not all of the facts, and would not give to the jury the finding of the Referee as to the account alone between the parties, and the amount which was due from the defendants to the plaintiff.

With regard to point (2) above, the only power which the Referee had under the order of reference made to him, and under the statute was "to

state and report an account between the parties and the amount that was due from either party to the other.”

The Referee was without power to determine whether or not the contract was fraudulent and fictitious. This is the function of the jury and the parties are entitled to have such an issue disposed of at the trial.

In the case of *American Saw Co. v. First National Bank*, 58 N. J. Law 438, the Supreme Court held that the Referee had no power to make findings on the question of forgery. The Court said:

“From these considerations it results that the order of reference in this case was erroneous, for the reason that the cause of action was not susceptible of such disposition. The gravamen of the issue, as we have seen, consisted of a single fact, which was, whether or not the agent of the plaintiff had committed forgery. If such an issue can be referred to and reported on by a referee, it is difficult to see why any imaginable tort may not be.

My conclusion is that the course thus pursued was not authorized by the statute. In point of fact, this question was settled, so far as this Court is concerned, in *Tunison v. Snover*, 56 N. J. Law, page 41.”

In the case of *Tunison v. Snover*, 56 N. J. Law, page 41, the Court said:

“By the provisions of sections 176-180 of the Practice Act (Rev. p. 875) courts are empowered, *ex mero motu* to refer causes in which ‘matters of account are in controversy.’ Parties to such a cause may, by timely dissent, secure the trial by jury to which they are entitled. But the authority to refer is limited to the class of causes specifically described. \* \* \* But the

cause now before us was obviously not of the class specified in these sections of the Practice Act. It was an action for breach of warranty, and sought to recover unliquidated damages. It is argued that plaintiff, to establish his damages, would be obliged to prove the amount and value of the crops from the trees he got and compare the same with such crops as would have been produced by trees answerable to the warranty. *Wolcott v. Mount*, 7 Vroom 262, S. C. 9 *Id.* 496. If this be admitted, such evidence would not be of matters of account, nor would its admission bring the action within the class specified. The reference therefore, was not within the authority of the Practice Act."

The fact that the defendants consented to the making of the order of reference and reserved their right to demand a trial by jury did not waive their right to object to the report of the Referee where said report was erroneous, improperly made and contrary to law.

We submit, therefore, that the Referee in this case had no power to find that the contract was fraudulent and fictitious and hence his report making that finding was properly suppressed, and excluded at the trial.

## II.

**The Learned Trial Judge was correct in directing a verdict in favor of the defendants.**

A careful consideration of the testimony will disclose no facts which support the plaintiff's contention that the contract on file was either fraudulent or fictitious, or that the plaintiff is entitled to a lien. And even if the Referee's report had been admitted at the trial the findings of fact therein would not have supported the contention that the contract was fraudulent or ficti-

tious, or that the plaintiff was in anywise entitled to a lien.

The plaintiff admits that there was a written contract entered into between the owners and Rocco Marinaccio on June 5, 1928, and that this contract was properly filed in the office of the Clerk of Essex County on June 6, 1928; that Marinaccio was present at the office of the architect and signed the contract; that Marinaccio commenced work thereunder, and that the owners paid \$15,000.00 pursuant to the said contract.

There is no testimony whatsoever to indicate that the plaintiff sold the materials to Raniero Sebastiani, relying upon any statements or representation made by the defendants. It is to be noted further that there is no testimony at all by any officer, salesman, or other representative of the plaintiff. The plaintiff made no inquiry whatsoever as to who owned the building or as to who was the contractor. It could easily have ascertained the name of the contractor and the name of the owners of the building. The contract had been filed, and by an examination of the records in the office of the County Clerk of Essex County, the County in which the property was located, the plaintiff could easily have ascertained the names of the owners, the contractor, and the terms of the contract.

The plaintiff made no effort at all and did not rely upon the lands and building or upon representations, if any, made by the defendants, but apparently preferred to rely upon the financial standing of Sebastiani. We submit that the record is entirely barren of those elements which Courts require a party to prove in order to establish fraud.

**THE LAW.**

Under the common law the plaintiff had no right at all to a lien claim. The only right to such lien which it may have is given by Section 2 of the "Mechanics' Lien Act" (3 Comp. Stat. 3293), which provides as follows:

"Whenever any building shall be erected in whole or in part by contract in writing, such building and the land whereon it stands, shall be liable to the contractor alone for work done or materials furnished in pursuance of such contract; provided said contract, or a duplicate thereof, together with the specifications accompanying the same, or a copy or copies thereof, be filed in the office of the Clerk of the County, in which the building is situate before such work is done or materials furnished; provided further that it shall not be necessary to file the plans for such building in said Clerk's office whether such plans are referred to in said contract or not. (P. L. 1898, p. 538, as amended P. L. 1910, p. 472)."

It is admitted that the contract between the owners and Rocco Marinaccio was duly filed on June 6, 1928 together with specifications accompanying the same, in compliance with the above act. The plaintiff therefore has no right of lien against the aforementioned land and building. The plaintiff alleges, however, that it is entitled to a lien upon the theory that the contract which was filed was fraudulent and fictitious. The burden of proving this is upon the plaintiff. Interpreting the testimony most favorably to the plaintiff, it is clear that there was on file a real contract, made between real persons for a real consideration, binding themselves to do definite legal acts. The parties really acted pursuant to the contract, under the supervision of the architect named therein, and the owners paid

\$15,000.00 thereunder. The defendant, Unity Building and Loan Association advanced moneys relying upon the genuineness of this contract. In fact a suit was instituted by the owners against the contractor, Rocco Marinaccio, upon the contract. In that suit Marinaccio filed an answer setting up the defense that he was not the real party to the contract. Upon application the answer was struck out, damages were assessed before a jury and judgment was entered in favor of the owners and against Rocco Marinaccio in the sum of \$534.45 (State of Case, p. 190).

The following authorities support our contention that there is no point to the plaintiff's argument that the contract in the instant case was fraudulent or fictitious.

In the case of *Earle v. Willets & Co.*, 56 N. J. L. 334, Court of Errors and Appeals, 1893, an action was brought upon a mechanics' lien by Willets & Co. which had furnished material toward the erection of a building upon property of the defendant, Mrs. Earle. The building was erected under a contract between Harry Earle, Mrs. Earle's husband, and the contractor, which contract was filed with specifications. Mrs. Earle set up the defense of Section 2 of the "Mechanics' Lien Law," which prevented a materialman from asserting a lien against the owner's premises when a contract with specifications had been filed. The plaintiff urged that the filing of the contract was not effective because it had been taken in the name of a person not the owner.

The Supreme Court (53 N. J. L. 270) held that the taking of the contract in the name of Mr. Earle deprived the owner of having her

property protected from the lien claimed. But the Supreme Court was reversed by the Court of Errors and Appeals on the above point, the Court of Errors stating that the filing of the above contract was sufficient to protect the premises from the lien claimed because the plaintiff had means of ascertaining that the above contract was on file. The views of the Court were expressed as follows (pp. 336-337):

“In requiring the filing of the contract, there was undoubtedly an intention that such filing should operate as notice; but that there was in the minds of the legislature any particular fact which should exist to supply a clue to the filed instrument is not probable. So long as there exist clues other than the name of the owner, it cannot be said the filing of any contract does not subserve the purpose of the act \* \* \*. In most instances the name of the contractor is as readily discoverable as is that of the owner. The laborer or materialman knows upon whose orders he is called upon to work or furnish materials. The laborer knows and the materialman should know the premises to be improved \* \* \*. *Unless such inquiries as can be made are answered by such a series of falsehoods as would brand the whole transaction as fraudulent and void, I see no difficulty in ascertaining the existence of a contract, whether it is signed in the name of the owner or in the name of a third person.*”

In the case of *Young v. Wilson*, 44 N. J. Law 157, N. J. Supreme Court, 1882, which will hereafter be distinguished from this case, Wilson purchased certain premises and took title in the name of Stewart. Wilson then entered into a contract with Stewart whereby Wilson agreed to build a house for the latter at a certain price. The contract with specifications was filed and an action was brought on a mechanics' lien

by one who furnished material to Wilson. The Court held the contract was not a real contract because not intended to be binding between the parties, and hence the filing of it would not prevent the materialman from claiming a lien against the premises. The views of the Court were expressed as follows (p. 160):

“The contract to be filed as a protection against liens is a real, not a fictitious bargain on the part of an owner who, with a purpose himself to erect a building employs for a price, the agency of another to do it for him; and a contract in form for building, which, in effect, is merely a license to another to build for himself, whether he have any interest or estate in the lands or not, is not the contract contemplated in the second section of the act, the filing of which is a protection against liens \* \* \*.

No one can for a moment believe that the so-called contract was intended by the parties to have any binding force upon them as a contract.”

In the case of *Improved Building & Loan Association v. Larkin*, 88 N. J. Eq. 52, Chan. 1917, which will also be distinguished hereafter, Kelly entered into a contract to purchase certain property. Subsequently he acquired title giving a mortgage for the whole purchase price. He entered into a building contract with the Latin America Construction Co. In fact he was a dummy throughout for that company. The building contract with specifications was filed.

The Court held, under the principle laid down in *Young v. Wilson*, 44 N. J. Law 157, that the contract was not a real contract and would not protect the land against mechanics' liens.

The above two cases are clearly distinguishable from the present case, in that in the

above two cases the owner attempted to contract with himself as builder. Such a contract is obviously a fiction, of no force in law, and the Court so held. In this case, however, as hereinabove pointed out, the contract was real, between real parties, and for a real consideration, capable of being enforced in a court of law.

The plaintiff, in order to prove that this contract was fraudulent must establish the elements of fraud as stated by Mr. Justice Woodhull in *Byard v. Holmes*, 34 New Jersey Law 296:

“The plaintiff must allege with reasonable certainty and be prepared to prove at least these three things: (1) that the defendant made some representation to the plaintiff meaning that he should act upon it; (2) that such representation was false; (3) that the plaintiff believing such representation to be true acted upon it and was thereby injured.”

There is nothing in the record to indicate that the defendants made any false representation to the plaintiff meaning that the plaintiff should rely upon it. For, even if the testimony of Sebastiani that he represented himself to the plaintiff to be the contractor be taken to be true (State of Case, p. 76) this cannot be construed to be a representation of the defendants. Nor can the mere fact that Sebastiani was permitted to manage the job warrant the inference that he was the person legally bound as contractor for it.

Furthermore, the plaintiff did not rely upon any representation that may have been made by the defendants, and had no reason to rely upon any made by Sebastiani. The authorities in New Jersey are clear on the question of the extent of reliance which must be established by a party in order to make out a case of fraud.

In the case of *Crescent Ring Co. v. Travelers Indemnity Co.*, 102 N. J. L. 85 (Court of Errors and Appeals, 1925, the plaintiff took out a robbery insurance policy with the defendant company. The defendant's agent had represented that the policy was as broad as a Lloyd jeweler's block policy. In fact it was not as broad. The plaintiff received the policy December, 1919, and did not take the trouble to read it until May, 1921, after a loss had occurred. As the policy read, it did not cover the loss but if the policy had been as represented it would have covered the loss. The insured therefore sued the insurance company in tort for deceit. The lower court allowed the case to go to the jury and there was a verdict for the insured. *The Court of Errors held, however, reversing the court below, that no jury question was presented and that a non-suit should have been granted, or failing that, the trial court should have directed a verdict for the company.*

Two grounds were stated by the upper court, one of them being that the insured should have read the policy, otherwise he had no ground for complaint.

With regard to that point, the Court said (p. 93):

“Now even if it were to be held that the declarations of Talamy were ‘deceit and overbearing inducement,’ that would not have excused the officers of the Ring Company (insured) from reading the contract of insurance because as was proved in this case, the fraud, such as it was, was not perpetrated by the Indemnity Company, the other party; nor was it authorized by it, nor did it afterwards with knowledge ratify it. *In this case the Ring Company, before accepting the policy was perfectly at liberty*

*to examine it and to call in a lawyer or an insurance expert to advise them as to the meaning of its terms and the extent of the Indemnity Company's liability. This they did not do."*

In the case of *Steiner Mfg. Co. v. Kochaniewicz*, 3 Misc. 437, N. J. Supreme Court, 1925, the plaintiff sued the defendant under a written contract to purchase a meat chopper. The defendant sought to avoid liability upon the contract on the ground that the plaintiff's agent had falsely represented to him that the contract contained a provision that the chopper would be delivered on March 1st. The lower court *directed a verdict* for the plaintiff and judgment of the lower court was affirmed.

The Court said (pp. 438-439):

"The defendant knew he was signing a contract, and it was his duty to read it before signing it. Not having done so he was bound by all its terms unless he made out by clear and convincing proof that the material fraud was practiced on him. Had he read the paper he would have found that the salesman could make no representation binding on the plaintiff. The power to sell did not carry a power to make representations binding the plaintiff in the absence of proof of authority. A special agent to sell has only limited powers in this direction. Here the authority to bind the principal was forbidden by the contract which the defendant signed and which it was his duty to read. We think the proof therefore falls short of the legal standard required to establish fraud. *It is a representation amounting to the statements that the machine could be delivered by March 1st, and further that the contract contained that provision when the first line of the instrument informed the defendant that this was not so."*

In the case of *Guerrero v. Di Trolio*, 105 N. J. Law 5 (N. J. Supreme Court, 1928), an action was brought on a mechanics' lien claim by a materialman against the builder and owner, Philip Di Trilio. The contract to build a garage between the builder and owner had been filed with specifications, before any of the work was done or materials furnished. The contract was indexed by the County Clerk under the Italian name of "Filippe" instead of "Philip." On that ground the plaintiff claimed that the filing of the contract was not effective against him. In the lower court there was a verdict and judgment for the plaintiff, but on appeal judgment was reversed so far as it went against the owner of the premises.

With regard to the duty of the plaintiff to make inquiry the Court said (p. 804):

"In the present case there is no evidence of fraud, nor suggestion of fraud, not even the slightest. It is not contended that in fact the plaintiff was misled. So far as appears, the plaintiff may have been fully aware of the precise situation before he began his work \* \* \*. *Inquiry of the owner would have disclosed the fact whether the work was being done by him or not, and if by contract, who was the contractor. There is no suggestion that any inquiries whatsoever were made. Unless such inquiries, if they had been made, were answered by such a series of falsehoods as would brand the whole transaction as fraudulent and void, there would have been no difficulty in ascertaining the existence of a contract.*"

In conclusion we submit that the judgment of the lower court in favor of the defendants should stand. We have offered argument and authorities in support of our contention that the report

of the Referee was properly suppressed. Furthermore, going into the merits of the case, the trial court properly directed a verdict in favor of the defendants. There was a valid contract on file, which under Section 2 of the "Mechanics' Lien Act" precluded the plaintiff from acquiring a lien against the premises of the defendants; for, taking the testimony introduced at the trial most strongly in the plaintiff's favor, and even assuming that the Referee's report had been admitted at the trial, there were no facts which could go to establish that the contract which had been filed was fraudulent or fictitious. It was not fictitious because it was entered into between real parties, for a real consideration, and as was later demonstrated was capable of being enforced in a court of law. It was not fraudulent because not a single element of fraud can be attributed to the defendants herein. They made no representations whatsoever to the plaintiff that Sebastiani was in fact the contractor, and any representations which Sebastiani himself might have made could not bind them. And, furthermore, the element of reliance, one of the necessary ingredients of fraud, is entirely absent from the case. There is no testimony at all that the plaintiff relied upon any representations which might have been made. In fact the plaintiff did not produce even a single representative as a witness at the trial to testify to anything. Surely the plaintiff was the only one to know whether or not it relied upon any representations, and the plaintiff chose to remain silent. It made no inquiry or investigation of the County Clerk's records, which would readily have revealed that a contract between the owners and Rocco Marinaccio, contractor, was in

force, duly filed with specifications, and affected the very premises in question.

For these reason we submit that the Referee's report was properly excluded, and there being proof that the contract with specifications was duly filed pursuant to statute and there being no proof that the contract was fraudulent or fictitious the learned trial judge was correct in directing a verdict in favor of the defendants.

Respectfully submitted,

STEIN, McGLYNN & HANNOCH,  
Attorneys for Defendants-Respondents.

AARON LASSER,  
Of Counsel.

