18 N.Y.2d 414

John WALKOVSZKY, Respondent,

v.

William CARLTON, Appellant, et al., Defendants.

Court of Appeals of New York.

Nov. 29, 1966.

Action against corporation in name of which a taxicab was registered, driver of the taxicab, nine other corporations in whose names other taxicabs were registered, two additional corporations, and three individuals for injuries sustained by plaintiff when struck by the taxicab. The Supreme Court, Edward G. Baker, J., granted motion of an individual defendant who was claimed to be a stockholder of ten corporations, including corporation in name of which taxicab was registered, to dismiss the complaint as to him for failure to state a cause of action, and plaintiff appealed. The Supreme Court, Appellate Division, 24 A.D.2d 582, 262 N.Y.S.2d 334, reversed and denied the motion and individual defendant appealed by leave of the Appellate Division on a certified question. The Court of Appeals, Fuld, J., held that complaint containing allegations that individual defendant organized, managed, dominated and controlled a fragmented corporate entity and that fleet ownership of taxicabs had been deliberately split among many corporations was insufficient to state a cause of action against individual defendant as a stockholder in such corporations, where there was no allegation that individual defendant was conducting such business in his individual capacity.

Order of Appellate Division reversed, certified question answered in the negative, order of the Supreme Court, Richmond County, reinstated with leave to serve an amended complaint.

Keating and Bergan, JJ., dissented.

1. Corporations ⟹14(1)

Incorporation of a business is permitted for the purpose of enabling its proprietors to escape personal liability, although the privilege is not without limits.

2. Corporations ⟹1.4(2, 3)

Courts will disregard the corporate form or pierce the corporate veil whenever necessary to prevent fraud or to achieve equity.

3. Corporations ⟹1.4(4)

In determining whether liability should be extended to reach assets beyond those belonging to the corporation, courts will be guided by general rules of agency.

4. Corporations ⟹1.4(4)

Whenever anyone uses control of a corporation to further his own rather than the corporation's business, he will be responsible for the corporation's acts upon principle of respondeat superior applicable even where the agent is a natural person, and such liabilty extends not only to the corporation's commercial dealings, but to its negligent acts.

5. Corporations ⟹1.4(4), 1.5(3)

Although either the circumstance that a corporation is a fragment of a larger corporate combine which actually conducts a business, or that a corporation is a dummy for its individual stockholders who in reality are carrying on a business in their personal capacities for purely personal rather than corporate ends would justify treating the corporation as an agent and piercing the corporate veil to reach the principal, in the first circumstance only a larger corporate entity could be held financially responsible, while in the other circumstance the stockholders would be personally liable.

6. Pleading ⟹34(1, 3)

In ascertaining whether a complaint states a cause of action, the entire pleading must be considered, educing therefrom whatever can be imputed from its statements by fair and reasonable intendment.

7. Corporations ⚡1.7(1)

Complaint containing allegations that an individual defendant organized, managed, dominated and controlled a fragmented corporate entity and that fleet ownership of taxicabs had been deliberately split among many corporations was insufficient to state a cause of action in tort against individual defendant as a stockholder in such corporations, where there was no allegation that individual defendant was conducting business in his individual capacity.

8. Corporations ⚡1.6(3)

The corporation form could not be disregarded merely because the assets of corporate owner of a taxicab together with mandatory insurance coverage on the taxicab which struck plaintiff were insufficient to assure plaintiff recovery sought. Business Corporation Law, §§ 510, 719, 720.

Norbert Ruttenberg, and Stephen A. Cohen, New York City, for appellant.

Lawrence Lauer and John Winston, New York City, for respondent.

FULD, Judge.

This case involves what appears to be a rather common practice in the taxicab industry of vesting the ownership of a taxi fleet in many corporations, each owning only one or two cabs.

The complaint alleges that the plaintiff was severely injured four years ago in New York City when he was run down by a taxicab owned by the defendant Seon Cab Corporation and negligently operated at the time by the defendant Marchese. The individual defendant, Carlton, is claimed to be a stockholder of 10 corporations, including Seon, each of which has but two cabs registered in its name, and it is implied that only the minimum automobile liability insurance required by law (in the amount of $10,000) is carried on any one cab. Although seemingly independent of one another, these corporations are alleged to be "operated * * * as a single entity, unit and enterprise" with regard to financing, supplies, repairs, employees and garaging, and all are named as defendants.[1] The plaintiff asserts that he is also entitled to hold their stockholders personally liable for the damages sought because the multiple corporate structure constitutes an unlawful attempt "to defraud members of the general public" who might be injured by the cabs.

The defendant Carlton has moved, pursuant to CPLR 3211(a)7, to dismiss the complaint on the ground that as to him it "fails to state a cause of action". The court at Special Term granted the motion but the Appellate Division, by a divided vote, reversed, holding that a valid cause of action was sufficiently stated. The defendant Carlton appeals to us, from the nonfinal order, by leave of the Appellate Division on a certified question.

[1-4] The law permits the incorporation of a business for the very purpose of enabling its proprietors to escape personal liability (see e. g., Bartle v. Home Owners Co-op., 309 N.Y. 103, 106, 127 N.E.2d 832, 833) but, manifestly, the privilege is not without its limits. Broadly speaking, the courts will disregard the corporate form, or, to use accepted terminology, "pierce the corporate veil", whenever necessary "to prevent fraud or to achieve equity". (International Aircraft Trading Co. v. Manufacturers Trust Co., 297 N.Y. 285, 292, 79 N.E.2d 249, 252.) In determining whether liability should be extended to reach assets beyond those belonging to the corporation,

1. The corporate owner of a garage is also included as a defendant.

we are guided, as Judge Cardozo noted, by "general rules of agency". (Berkey v. Third Ave. Ry. Co., 244 N.Y. 84, 95, 155 N.E. 58, 61, 50 A.L.R. 599.) In other words, whenever anyone uses control of the corporation to further his own rather than the corporation's business, he will be liable for the corporation's acts "upon the principle of *respondeat superior* applicable even where the agent is a natural person". (Rapid Tr. Subway Constr. Co. v. City of New York, 259 N.Y. 472, 488, 182 N.E. 145, 150.) Such liability, moreover, extends not only to the corporation's commercial dealings (see, e. g., Natelson v. A. B. L. Holding Co., 260 N.Y. 233, 183 N.E. 373; Quaid v. Ratkowsky, 224 N.Y. 624, 121 N.E. 887; Luckenbach S. S. Co. v. W. R. Grace & Co., 4 Cir., 267 F. 676, 681, cert. den. 254 U.S. 644, 41 S.Ct. 14, 65 L.Ed. 454; Weisser v. Mursam Shoe Corp., 2 Cir., 127 F.2d 344, 145 A.L.R. 467) but to its negligent acts as well. (See Berkey v. Third Ave. Ry. Co., 244 N.Y. 84, 155 N.E. 58, supra; Gerard v. Simpson, 252 App.Div. 340, 299 N.Y.S. 348, mot. for lv. to app. den. 276 N.Y. 687; Mangan v. Terminal Transp. System, 247 App.Div. 853, 286 N.Y.S. 666, mot. for lv. to app. den. 272 N.Y. 676, 286 N.Y.S. 666.)

In the Mangan case (247 App.Div. 853, 286 N.Y.S. 666, mot. for lv. to app. den. 272 N.Y. 676, 286 N.Y.S. 666, supra), the plaintiff was injured as a result of the negligent operation of a cab owned and operated by one of four corporations affiliated with the defendant Terminal. Although the defendant was not a stockholder of any of the operating companies, both the defendant and the operating companies were owned, for the most part, by the same parties. The defendant's name (Terminal) was conspicuously displayed on the sides of all of the taxis used in the enterprise and, in point of fact, the defendant actually serviced, inspected, repaired and dispatched them. These facts were deemed to provide sufficient cause for piercing the corporate veil of the operating company—the nominal owner of the cab which injured the plaintiff—and holding the defendant liable. The operating companies were simply instrumentalities for carrying on the business of the defendant without imposing upon it financial and other liabilities incident to the actual ownership and operation of the cabs. (See, also, Callas v. Independent Taxi Owners Assn., 62 App.D.C. 212, 66 F.2d 192, cert. den. 290 U.S. 669, 54 S.Ct. 89, 78 L.Ed. 578; Association of Independent Taxi Operators v. Kern, 178 Md. 252, 13 A.2d 374, 131 A.L.R. 792; P. & S. Taxi & Baggage Co. v. Cameron, 183 Okl. 226, 80 P.2d 618; cf. Black & White v. Love, 236 Ark. 529, 367 S.W.2d 427, 8 A.L.R.3d 809; Economy Cabs v. Kirkland, 127 Fla. 867, 174 So. 222, adhered to on rearg. 129 Fla. 309, 176 So. 151.)

[5] In the case before us, the plaintiff has explicitly alleged that none of the corporations "had a separate existence of their own" and, as indicated above, all are named as defendants. However, it is one thing to assert that a corporation is a fragment of a larger corporate combine which actually conducts the business. (See Berle, The Theory of Enterprise Entity, 47 Col.L.Rev. 343, 348–350.) It is quite another to claim that the corporation is a "dummy" for its individual stockholders who are in reality carrying on the business in their personal capacities for purely personal rather than corporate ends. (See African Metals Corp. v. Bullowa, 288 N.Y. 78, 85, 41 N.E.2d 466, 469.) Either circumstance would justify treating the corporation as an agent and piercing the corporate veil to reach the principal but a different result would follow in each case. In the first, only a larger *corporate* entity would be held financially responsible (see, e. g., Mangan v. Terminal Transp. System, 247 App.Div. 853, 286 N.Y.S. 666, mot. for lv. to app. den. 272 N.Y. 676, 286 N.Y.S. 666, supra; Luckenbach S. S. Co. v. Grace & Co., 4 Cir., 267 F.2d 676, 881, cert. den. 254 U.S. 644, 41 S.Ct. 14, 65 L.Ed. 454, supra; cf. Gerard v. Simpson, 252 App.Div. 340, 299 N.Y.S. 348, mot. for lv. to app. den. 276 N.Y. 687, supra) while, in the

other the stockholder would be personally liable. (See, e. g., Natelson v. A. B. L. Holding Co., 260 N.Y. 233, 183 N.E. 373, supra; Quaid v. Ratkowsky, 224 N.Y. 624, 121 N.E. 887, supra; Weisser v. Mursam Shoe Corp., 2 Cir., 127 F.2d 344, 145 A.L.R. 467, supra.) Either the stockholder is conducting the business in his individual capacity or he is not. If he is, he will be liable; if he is not, then, it does not matter —insofar as his personal liability is concerned—that the enterprise is actually being carried on by a larger "enterprise entity". (See Berle, The Theory of Enterprise Entity, 47 Col.L.Rev. 343.)

[6] At this stage in the present litigation, we are concerned only with the pleadings and, since CPLR 3014 permits causes of action to be stated "alternatively or hypothetically", it is possible for the plaintiff to allege both theories as the basis for his demand for judgment. In ascertaining whether he has done so, we must consider the entire pleading, educing therefrom "'whatever can be imputed from its statements by fair and reasonable intendment.'" (Condon v. Associated Hosp. Serv., 287 N.Y. 411, 414, 40 N.E.2d 230, 231; see, also, Kober v. Kober, 16 N.Y.2d 191, 193–194, 264 N.Y.S.2d 364, 365–367, 211 N.E.2d 817, 818–819; Dulberg v. Mock, 1 N.Y.2d 54, 56, 150 N.Y.S.2d 180, 181, 133 N.E.2d 695.) Reading the complaint in this case most favorably and liberally, we do not believe that there can be gathered from its averments the allegations required to spell out a valid cause of action against the defendant Carlton.

[7, 8] The individual defendant is charged with having "organized, managed, dominated and controlled" a fragmented corporate entity but there are no allegations that he was conducting business in his individual capacity. Had the taxicab fleet been owned by a single corporation, it would be readily apparent that the plaintiff would face formidable barriers in attempting to establish personal liability on the part of the corporation's stockholders. The fact that the fleet ownership has been deliberately split up among many corporations does not ease the plaintiff's burden in that respect. The corporate form may not be disregarded merely because the assets of the corporation, together with the mandatory insurance coverage of the vehicle which struck the plaintiff, are insufficient to assure him the recovery sought. If Carlton were to be held individually liable on those facts alone, the decision would apply equally to the thousands of cabs which are owned by their individual drivers who conduct their businesses through corporations organized pursuant to section 401 of the Business Corporation Law, Consol.Laws, c. 4 and carry the minimum insurance required by subdivision 1 (par. [a]) of section 370 of the Vehicle and Traffic Law, Consol.Laws, c. 71. These taxi owner-operators are entitled to form such corporations (cf. Elenkrieg v. Siebrecht, 238 N.Y. 254, 144 N.E. 519, 34 A.L.R. 592), and we agree with the court at Special Term that, if the insurance coverage required by statute "is inadequate for the protection of the public, the remedy lies not with the courts but with the Legislature." It may very well be sound policy to require that certain corporations must take out liability insurance which will afford adequate compensation to their potential tort victims. However, the responsibility for imposing conditions on the privilege of incorporation has been committed by the Constitution to the Legislature (N.Y.Const. art. X, § 1) and it may not be fairly implied, from any statute, that the Legislature intended, without the slightest discussion or debate, to require of taxi corporations that they carry automobile liability insurance over and above that mandated by the Vehicle and Traffic Law.[2]

2. There is no merit to the contention that the ownership and operation of the taxi fleet "constituted a breach of hack owners regulations as promulgated by [the] Police Department of the City of New York". Those regulations are clearly

This is not to say that it is impossible for the plaintiff to state a valid cause of action against the defendant Carlton. However, the simple fact is that the plaintiff has just not done so here. While the complaint alleges that the separate corporations were undercapitalized and that their assets have been intermingled, it is barren of any "sufficiently particular[ized] statements" (CPLR 3013; see 3 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 3013.01 et seq., pp. 30–142 et seq.) that the defendant Carlton and his associates are actually doing business in their individual capacities, shuttling their personal funds in and out of the corporations "without regard to formality and to suit their immediate convenience." (Weisser v. Mursam Shoe Corp., 2 Cir., 127 F.2d 344, 345, 145 A.L.R. 467, supra.) Such a "perversion of the privilege to do business in a corporate form" (Berkey v. Third Ave. Ry. Co., 244 N.Y. 84, 95, 155 N.E. 58, 61, 50 A.L.R. 599, supra) would justify imposing personal liability on the individual stockholders. (See African Metals Corp. v. Bullowa, 288 N.Y. 78, 41 N.E.2d 466, supra.) Nothing of the sort has in fact been charged, and it cannot reasonably or logically be infered from the happenstance that the business of Seon Cab Corporation may actually be carried on by a larger corporate entity composed of many corporations which, under general principles of agency, would be liable to each other's creditors in contract and in tort.[3]

In point of fact, the principle relied upon in the complaint to sustain the imposition of personal liability is not agency but fraud. Such a cause of action cannot withstand analysis. If it is not fraudulent for the owner-operator of a single cab corporation to take out only the minimum required liability insurance, the enterprise does not become either illicit or fraudulent merely because it consists of many such corporations. The plaintiff's injuries are the same regardless of whether the cab which strikes him is owned by a single corporation or part of a fleet with ownership fragmented among many corporations. Whatever rights he may be able to assert against parties other than the registered owner of the vehicle come into being not because he has been defrauded but because, under the principle of *respondeat superior,* he is entitled to hold the whole enterprise responsible for the acts of its agents.

In sum, then, the complaint falls short of adequately stating a cause of action against the defendant Carlton in his individual capacity.

The order of the Appellate Division should be reversed, with costs in this court and in the Appellate Division, the certified question answered in the negative and the order of the Supreme Court, Richmond County, reinstated, with leave to serve an amended complaint.

KEATING, Judge (dissenting).

The defendant Carlton, the shareholder here sought to be held for the negligence of the driver of a taxicab, was a principal shareholder and organizer of the defendant corporation which owned the taxicab. The corporation was one of 10 organized by the defendant, each containing two cabs and each cab having the "minimum liability" insurance coverage mandated by section

applicable to individual owner-operators and fleet owners alike. They were not intended to prevent either incorporation of a single-vehicle taxi business or multiple incorporation of a taxi fleet.

3. In his affidavit in opposition to the motion to dismiss, the plaintiff's counsel claimed that corporate assets had been "milked out" of, and "siphoned off" from the enterprise. Quite apart from the fact that these allegations are far too vague and conclusory, the charge is premature. If the plaintiff succeeds in his action and becomes a judgment creditor of the corporation, he may then sue and attempt to hold the individual defendants accountable for any dividends and property that were wrongfully distributed (Business Corporation Law, §§ 510, 719, 720).

370 of the Vehicle and Traffic Law. The sole assets of these operating corporations are the vehicles themselves and they are apparently subject to mortgages.*

From their inception these corporations were intentionally undercapitalized for the purpose of avoiding responsibility for acts which were bound to arise as a result of the operation of a large taxi fleet having cars out on the street 24 hours a day and engaged in public transportation. And during the course of the corporations' existence all income was continually drained out of the corporations for the same purpose.

The issue presented by this action is whether the policy of this State, which affords those desiring to engage in a business enterprise the privilege of limited liability through the use of the corporate device, is so strong that it will permit that privilege to continue no matter how much it is abused, no matter how irresponsibly the corporation is operated, no matter what the cost to the public. I do not believe that it is.

Under the circumstances of this case the shareholders should all be held individually liable to this plaintiff for the injuries he suffered. (See Mull v. Colt Co., D.C., 31 F.R.D. 154, 156; Teller v. Clear Serv. Co., 9 Misc.2d 495, 173 N.Y.S.2d 183.) At least the matter should not be disposed of on the pleadings by a dismissal of the complaint. "If a corporation is organized and carries on business without substantial capital in such a way that the corporation is likely to have no sufficient assets available to meet its debts, it is inequitable that shareholders should set up such a flimsy organization to escape personal liability. The attempt to do corporate business without providing any sufficient basis of financial responsibility to creditors is an abuse of the separate entity and will be ineffectual to exempt the shareholders from corporate debts. It is coming to be recognized as the policy of law that shareholders should in good faith put at the risk of the business unincumbered capital reasonably adequate for its prospective liabilities. If capital is illusory or trifling compared with the business to be done and the risks of loss, this is a ground for denying the separate entity privilege." (Ballantine, Corporations [rev. ed., 1946], § 129, pp. 302–303.)

In Minton v. Cavaney, 56 Cal.2d 576, 15 Cal.Rptr. 641, 364 P.2d 473, the Supreme Court of California had occasion to discuss this problem in a negligence case. The corporation of which the defendant was an organizer, director and officer operated a public swimming pool. One afternoon the plaintiffs' daughter drowned in the pool as a result of the alleged negligence of the corporation.

Justice Roger Traynor, speaking for the court, outlined the applicable law in this area. "The figurative terminology 'alter ego' and 'disregard of the corporate entity'", he wrote, "is generally used to refer to the various situations that are an abuse of the corporate privilege. * * * The equitable owners of a corporation, for example, are personally liable when they treat the assets of the corporation as their own and add or withdraw capital from the corporation at will * * *; when they hold themselves out as being personally liable for the debts of the corporation * * *; *or when they provide inadequate capitalization and actively participate in the conduct of corporate affairs*". (56 Cal.2d, p. 579, 15 Cal.Rptr., p. 643, 364 P.2d, p. 475; italics supplied.)

Examining the facts of the case in light of the legal principles just enumerated, he found that "[it was] undisputed that there was no attempt to provide adequate capitalization. [The corporation] never had any substantial assets. It leased the pool that it operated, and the lease was forfeited for failure to pay the rent. Its

* It appears that the medallions, which are of considerable value, are judgment proof. (Administrative Code of City of New York, § 436–2.0.)

capital was 'trifling compared with the business to be done and the risks of loss'". (56 Cal.2d, p. 580, 15 Cal.Rptr., p. 643, 364 P.2d, p. 475.)

It seems obvious that one of "the risks of loss" referred to was the possibility of drownings due to the negligence of the corporation. And the defendant's failure to provide such assets or any fund for recovery resulted in his being held personally liable.

In Anderson v. Abbott, 321 U.S. 349, 64 S.Ct. 531, 88 L.Ed. 793, the defendant shareholders had organized a holding company and transferred to that company shares which they held in various national banks in return for shares in the holding company. The holding company did not have sufficient assets to meet the double liability requirements of the governing Federal statutes which provided that the owners of shares in national banks were personally liable for corporate obligations "to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares" (U.S.Code, tit. 12, former § 63).

The court had found that these transfers were made in good faith, that other defendant shareholders who had purchased shares in the holding company had done so in good faith and that the organization of such a holding company was entirely legal. Despite this finding, the Supreme Court, speaking through Mr. Justice DOUGLAS, pierced the corporate veil of the holding company and held all the shareholders, even those who had no part in the organization of the corporation, individually responsible for the corporate obligations as mandated by the statute.

"Limited liability", he wrote, "is the rule, not the exception; and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted. But there are occasions when the limited liability sought to be obtained through the corporation will be qualified or denied. Mr. Chief Judge CARDOZO stated that a surrender of that principle of limited liability would be made 'when the sacrifice is so essential to the end that some accepted public policy may be defended or upheld.' * * * The cases of fraud make up part of that exception * * * But they do not exhaust it. *An obvious inadequacy of capital, measured by the nature and magnitude of the corporate undertaking, has frequently been an important factor in cases denying stockholders their defense of limited liability. * * * That rule has been invoked even in absence of a legislative policy which undercapitalization would defeat.* It becomes more important in a situation such as the present one where the statutory policy of double liability will be defeated if impecunious bank-stock holding companies are allowed to be interposed as non-conductors of liability. *It has often been held that the interposition of a corporation will not be allowed to defeat a legislative policy, whether that was the aim or only the result of the arrangement.* * * 'the courts will not permit themselves to be blinded or deceived by mere forms of law' but will deal 'with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require.'" (321 U.S., pp. 362–363, 64 S.Ct., p. 537; emphasis added.)

The policy of this State has always been to provide and facilitate recovery for those injured through the negligence of others. The automobile, by its very nature, is capable of causing severe and costly injuries when not operated in a proper manner. The great increase in the number of automobile accidents combined with the frequent financial irresponsibility of the individual driving the car led to the adoption of section 388 of the Vehicle and Traffic Law which had the effect of imposing upon the owner of the vehicle the responsibility for its negligent operation. It is upon this very statute that the cause of action against both the corporation and the individual defendant is predicated.

In addition the Legislature, still concerned with the financial irresponsibility of those who owned and operated motor vehicles, enacted a statute requiring minimum liability coverage for all owners of automobiles. The important public policy represented by both these statutes is outlined in section 310 of the Vehicle and Traffic Law. That section provides that: "The legislature is concerned over the rising toll of motor vehicle accidents and the suffering and loss thereby inflicted. The legislature determines that it is a matter of grave concern that motorists shall be financially able to respond in damages for their negligent acts, so that innocent victims of motor vehicle accidents may be recompensed for the injury and financial loss inflicted upon them."

The defendant Carlton claims that, because the minimum amount of insurance required by the statute was obtained, the corporate veil cannot and should not be pierced despite the fact that the assets of the corporation which owned the cab were "trifling compared with the business to be done and the risks of loss" which were certain to be encountered. I do not agree.

The Legislature in requiring minimum liability insurance of $10,000, no doubt, intended to provide at least some small fund for recovery against those individuals and corporations who just did not have and were not able to raise or accumulate assets sufficient to satisfy the claims of those who were injured as a result of their negligence. It certainly could not have intended to shield those individuals who organized corporations, with the specific intent of avoiding responsibility to the public, where the operation of the corporate enterprise yielded profits sufficient to purchase additional insurance. Moreover, it is reasonable to assume that the Legislature believed that those individuals and corporations having substantial assets would take out insurance far in excess of the minimum in order to protect those assets from depletion. Given the costs of hospital care and treatment and the nature of injuries sustained in auto collisions, it would be unreasonable to assume that the Legislature believed that the minimum provided in the statute would in and of itself be sufficient to recompense "innocent victims of motor vehicle accidents * * * for the injury and financial loss inflicted upon them".

The defendant, however, argues that the failure of the Legislature to increase the minimum insurance requirements indicates legislative acquiescence in this scheme to avoid liability and responsibility to the public. In the absence of a clear legislative statement, approval of a scheme having such serious consequences is not to be so lightly inferred.

The defendant contends that the court will be encroaching upon the legislative domain by ignoring the corporate veil and holding the individual shareholder. This argument was answered by Mr. Justice DOUGLAS in Anderson v. Abbott, supra, pp. 366–367, 64 S.Ct. p. 540, where he wrote that: "In the field in which we are presently concerned, judicial power hardly oversteps the bounds when it refuses to lend its aid to a promotional project which would circumvent or undermine a legislative policy. To deny it that function would be to make it impotent in situations where historically it has made some of its most notable contributions. If the judicial power is helpless to protect a legislative program from schemes for easy avoidance, then indeed it has become a handy implement of high finance. *Judicial interference to cripple or defeat a legislative policy is one thing; judicial interference with the plans of those whose corporate or other devices would circumvent that policy is quite another.* Once the purpose or effect of the scheme is clear, once the legislative policy is plain, we would indeed forsake a great tradition to say we were helpless to fashion the instruments for appropriate relief." (Emphasis added.)

The defendant contends that a decision holding him personally liable would discourage people from engaging in corporate enterprise.

What I would merely hold is that a participating shareholder of a corporation vested with a public interest, organized with capital insufficient to meet liabilities which are certain to arise in the ordinary course of the corporation's business, may be held personally responsible for such liabilities. Where corporate income is not sufficient to cover the cost of insurance premiums above the statutory minimum or where initially adequate finances dwindle under the pressure of competition, bad times or extraordinary and unexpected liability, obviously the shareholder will not be held liable (Henn, Corporations, p. 208, n. 7).

The only types of corporate enterprises that will be discouraged as a result of a decision allowing the individual shareholder to be sued will be those such as the one in question, designed solely to abuse the corporate privilege at the expense of the public interest.

For these reasons I would vote to affirm the order of the Appellate Division.

DESMOND, C. J., and VAN VOORHIS, BURKE and SCILEPPI, JJ., concur with FULD, J.

KEATING, J., dissents and votes to affirm in an opinion in which BERGAN, J., concurs.

Order reversed, etc.

18 N.Y.2d 427

The PEOPLE of the State of New York, Respondent,

v.

Bernard GITTELSON, Appellant.

Court of Appeals of New York.

Dec. 1, 1966.

Defendant was convicted in the Supreme Court, New York County, Arthur Markewich, J., upon his plea of guilty to 10 counts of an indictment charging first-degree perjury in giving false testimony before grand jury which was investigating an alleged conspiracy to bribe a public official, which conviction was affirmed by the Supreme Court, Appellate Division, 25 A.D.2d 265, 268 N.Y.S.2d 779, and appeal was taken. The Court of Appeals, Keating, J., held that in fixing sentence of defendant the Supreme Court properly took into consideration defendant's evasiveness and lack of cooperation in testimony given to grand jury subsequent to his guilty plea but prior to sentencing.

Affirmed.

1. Criminal Law ⟹1147

Since sentence imposed upon defendant convicted of perjury was well within statutory limits, and since Court of Appeals had no power to review the appropriateness of a discretionary sentence, latter court was limited on appeal to question of whether punishment imposed upon defendant was violative of due process or equal protection.

2. Criminal Law ⟹1214

Defendant who pleaded guilty to 10 counts of perjury in first degree and who was fined $5,000 on each count could not claim that his liabilities exceeded his assets and, as a result of his indigence, he