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Agency—Non Enforceability of Joint Venture

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engaged in a compromise between total immunity and the doctrine of respondeat superior,[18] resulting in the distinction between medical and administrative acts.[19] *Becker v. City of New York* added more confusion by holding in substance that the state and its subdivisions' liability was greater than a private hospitals'. However, full cycle was finally reached, the Court in *Bing v. Thunig* discarding the notion that the determination of whether a doctor or a nurse is an employee depended on the nature of the acts performed rather than on the relationship between the hospital and the nurse or doctor. As a result, there is no longer a privilege for any type of hospital, whether state, charitable, or profit-making, nor any necessity for making nice distinctions as to the nature of the act. The Court upset precedent of many years to, ". . . bring the common law of this state, on this question, into accord with justice . . . ."[20]

Non Enforceability Of Joint Venture

"When individuals determine to conduct business through a corporation, . . . they are not at one and same time joint venturers and stockholders, fiduciaries and nonfiduciaries, personally liable and not personally liable." This is the declaration of the Court in *Weisman v. Awnair Corporation of America*,[21] affirming the Appellate Division's reversal[22] of an order of Supreme Court denying defendant's motion to dismiss the complaint.

Plaintiff brought an action for an injunction and an accounting against a manufacturing corporation, its wholly-owned subsidiary distributing corporation, and two individual defendants who were officers, directors and stockholders in the manufacturing corporation, and with whom plaintiff had made an agreement that he would organize a corporation which would be given the exclusive right to distribute the manufacturer's product in a certain territory, the stock in the new corporation to be issued sixty per cent to him and forty per cent to the individual defendants or their nominees. He had organized the corporation and it had operated for some time when the manufacturing corporation, on about seven weeks notice, ceased to supply the new corporation with its products and proceeded to market them in the area through an newly-organized wholly-owned subsidiary

The Court said that the facts pleaded in the complaint indicated only the existence of a joint venture among three individuals, no corporation being a party to it, and that this joint venture could not be carried on by individuals through

18. Bobbe, *Tort Liability of Hospitals in New York*, 37 CORNELL L. Q. 419, 438 (1952).
19. See note 2 *supra*.
20. Woods v. Lancet, 303 N.Y. 349, 351, 102 N.E.2d 691, 692 (1951).
21. 3 N.Y.2d 444, 165 N.Y.S.2d 745 (1957).
22. 2 A.D.2d 685, 152 N.Y.S.2d 649 (2d Dep't 1956).

a corporate form. Thus plaintiff's grounds for equitable relief, the violation of a fiduciary duty, fail.

Judge Desmond dissented, arguing that the complaint alleged that the individual defendants, parties to the joint venture, had refused to go on with the project, and had caused the local distributorship to be given to a different corporation, and that such defection constituted a cause of action.

On the facts as they appear in the complaint, it would seem that equity here is electing to escape a traditional duty by seizing upon a rule of corporation law of dubious applicability. As Judge Desmond points out in his dissent, the cases cited by the majority opinion[23] merely "state the familiar rule that when one puts his interests into a corporation he cannot thereafter enforce the corporation's claims or deal with its property as if he were a sole owner or a partner."[24] It is submitted that in this case the individual plaintiff might be viewed for purposes of equity as seeking to enforce not the corporation's claims, but his own individual claim as a joint venturer. Judge Desmond points up the implications of the majority view: "We are asked to hold here that individuals agreeing to go into business together and to carry out that business through a corporation cannot enforce such an agreement. Not only is there nothing illegal about such a plan but I venture to say it is one of the commonest of modern day business arrangements"[25]

23. See, *e.g.*, Brock v. Poor, 216 N.Y. 387, 111 N.E. 229 (1915); Crespi v. Crespi, 238 App. Div. 794, 262 N.Y. Supp. 910 (*mem.*, 2d Dep't 1933); Seigel v. Liebowitz, 230 App. Div. 736, 243 N.Y. Supp. 842 (*mem.*, 2d Dep't 1930).

24. 3 N.Y.2d at 451, 165 N.Y.S.2d at 751.

25. *Id.* at 452, 165 N.Y.S.2d at 752.