

IN CHANCERY OF NEW JERSEY.

BILL FOR SPECIFIC PERFORMANCE.

(Filed July 8, 1926.)

To His Honor, Edwin Robert Walker, Chancellor of
the State of New Jersey:

Complainants, Harry Garber and Lena, his wife, 10
Harry Latt and Jennie, his wife, all of Atlantic City,
Atlantic County, New Jersey, respectfully show that:

1. On April 14th, 1926, complainants agreed to sell
and defendant Jacob Stern, agreed to buy a certain tract
of land described in said agreement, under seal, a copy
of which is hereto made a part hereof and marked
Exhibit "A" and the original of which is in complain-
ants' possession ready to be produced.

2. At the time of the signing and delivery of said
agreement defendant paid to complainants the sum of 20
\$1,500 and took possession of the land described in said
agreement and has ever since had possession thereof.

3. On the fourteenth day of June, 1926, at 3 o'clock
in the afternoon, the time stated in said agreement for
final settlement, complainants were ready, able and will-
ing to perform said agreement on their part but defend-
ant refused to perform pretending that complainants
were not able to give such title as the agreement pro-
vided for.

4. Pursuant to a verbal understanding had before said
date complainants and defendant met at the office of the 30
Chelsea Title & Guaranty Company in Atlantic City,
New Jersey, and defendant had agreed to accept title
insurance from said company. Said company was will-
ing then, and has ever since been willing, to insure com-
plainants' title, but defendant has ever since refused to
accept the same and perform the agreement on his part.

5. Complainants still tender themselves ready, able
and willing to perform said agreement on their part.

Complainants are without adequate remedy in the courts of law and therefore pray:

(1) That Jacob Stern, who is the defendant to this suit, may answer this bill of complaint, without oath, and each statement herein made.

(2) That said defendant be decreed to specifically perform the agreement on his part upon complainants performing said agreement upon their part; and complainants have such further relief as may be agreeable to equity.

(3) That a writ of subpoena may issue commanding said defendant to answer this bill of complaint and to abide such decree as this Honorable Court shall make in the premises.

COLE & COLE,
Solicitors for and of Counsel
with Complainants.

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IN CHANCERY OF NEW JERSEY.

Between
HARRY GARBER *et al.*,
Complainants,
and
JACOB STERN,
Defendant. } On Bill &c.

ANSWER AND COUNTERCLAIM.

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(Filed July 30, 1926.)

The defendant, Jacob Stern, answering the complainants' complaint says that:

- 1. He admits paragraph 1.
- 2. He admits the payment of the said sum of \$1,500 referred to in paragraph 2, but denies all the rest of said paragraph.
- 3. He denies paragraph 3.

4. He admits that he agreed to accept title insurance from the Chelsea Title and Guaranty Company, pursuant to the verbal understanding referred to in complainants' complaint, but denies that the company was willing then, or since, to insure complainants' title, in accordance with the terms of said agreement of sale.

5. He denies paragraph 5.

AFFIRMATIVE DEFENSES.

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Defendant further answering says that:

1. Under the terms of said agreement said premises were to be conveyed free and clear of all encumbrances, except such as are set forth in the agreement of sale, and further says that said title was to be good and marketable and such as would be insured by the title company referred to in said agreement.

2. Defendant further says that he paid the sum of \$1,500 on the signing of the agreement and on May 14th, 1926, paid the further sum of \$3,500 as per the terms of said agreement, making in all a total payment of \$5,000.

3. At the time fixed for the settlement, defendant was ready, willing and able to perform said agreement on his part, and so tendered himself, but complainants were not ready, able and willing to perform said agreement in accordance with the terms thereof, and, in fact, said title was not good and marketable nor was the Chelsea Title and Guaranty Company willing to insure said title. At that time said land was subject to the interest of one Abraham Browning, as trustee, or his successors in trust for Stephen Caldwell, which interest became vested in said Abraham Browning through a declaration of trust dated April 27th, 1866, and recorded in the Atlantic County Clerk's office in Deed Book 28, page 481, which said interest of the said Abraham Browning, trustee as aforesaid, or his successors in trust, was an outstanding interest or encumbrance upon the land in question not referred to in the agreement. Said premises

were also subject to the rights of the Delaware and Atlantic Telephone & Telegraph Company to construct and operate lines, erect poles, etc., as granted by Annie M. Coughlin to said company September 15, 1916, Deed Book 577, page 42.

It was also subject to the rights of the public in all streets, avenues or roads running through or abutting premises in question.

It was also subject to a right of way of Camden & Atlantic Railroad, now the West Jersey & Seashore Railroad.

It was also subject to a certain mortgage made by Harry Garber to James Ruberton, Jr., and Rose Ruberton, his wife, dated April 28, 1926, recorded May 3, 1926, to secure the sum of \$30,000 payable in two years.

It was also subject to a judgment of the New Jersey Quarry Company against W. J. Coughlin, entered in the New Jersey Supreme Court on March 11, 1915, in the amount of \$2,294.36.

It was also subject to a judgment of Alfred W. Booth & Bro., against William Coughlin et al., entered in the New Jersey Supreme Court, docketed from Hudson County Circuit Court, in the amount of \$887.14, and

Also subject to a recognizance entered into by the said William Coughlin, as surety, to the United States dated July 10th, 1923, in the amount of \$1,000 and another recognizance entered into by the said William Coughlin as surety, to the United States on July 12th, 1923, in the amount of \$1,000.

None of which liens, encumbrances or defects of title were referred to in the agreement of sale, and as a result of all or any of which said title was not good and marketable, nor would said Chelsea Title and Guaranty Company insure said premises, and by reason of the same complainants were not able to deliver unto the defendant, such title as was called for by said agreement.

4. Defendant was at all times able, willing and ready to carry out and perform his part of said contract, and so tendered himself at the time and place of settlement,

but by reason of the defect in said title aforesaid, complainants were not able to carry out and perform their part of said contract.

5. Defendant prays that said bill be dismissed with his costs most wrongfully sustained.

THOMPSON & HANSTEIN,
Solicitor of Defendant.

IN CHANCERY OF NEW JERSEY. 10

Between

HARRY GARBER *et al.*,
Complainants,
and
JACOB STERN,
Defendant.

On Bill, &c.

REPLICATION, &c.

(Filed August 24, 1926.)

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Complainants join issue on the answer of the defendant.

Denying the right of the defendant to file an affirmative defense, complainants however, say:

1. They admit paragraph 1.
2. They admit paragraph 2.
3. They deny paragraph 3.
4. They deny paragraph 4.

5. They say that if any such defects or encumbrances as are set forth in the affirmative defense appear of record, they could have been and would have been removed at the time of settlement upon defendant's being able and willing to perform upon his part.

Denying defendant's right to counterclaim, complainants notwithstanding, say:

1. They admit paragraph 1.
2. Paragraph 2 is denied.
3. Paragraph 3 is admitted.

COLE & COLE,
Solicitors of Complainants.

IN CHANCERY OF NEW JERSEY.

Between	}	On Bill for Specific Performance on Final Hearing.
HARRY GARBER <i>et al.</i> ,		
<i>Complainants,</i>		
<i>and</i>		
JACOB STERN,		
		<i>Defendant.</i>

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CONCLUSIONS.

(Filed January 13, 1927.)

MESSRS. COLE & COLE, for the Complainants.
 MESSRS. THOMPSON & HANSTEIN, for the Defendants.
 INGERSOLL, V. C.:

On the fourteenth day of April, 1926, the complainants and defendant entered into an agreement wherein the complainants agreed to sell and the defendant to buy certain premises therein described, for the sum of \$83,000 to be paid in the manner therein prescribed.

The contract provided that the conveyance should be by deed of warranty, free from all encumbrance excepting certain then existing mortgages, on or before June 14th, 1926. The title was to be good and marketable and such as would be insured by a reputable title company. It was later agreed that settlement should be made at the office of the Chelsea Title and Guaranty Company, and the title should be insured by that company.

On the day fixed for settlement, the parties appeared; the complainants presented and tendered a deed; the defendant declared himself prepared to make settlement, but insisted that the title was not such as the contract called for. Objections are made by the defendant as follows:

1. That the deed tendered was a special warranty, and not one of general warranty.

2. That the Chelsea Title and Guaranty Company was not at that time prepared to insure title.

3. That the Pennsylvania Railroad Company had a right of way over a portion of the premises.

4. That the public had right of way over certain streets or roads upon said premises.

5. That the Delaware and Atlantic Telephone and Telegraph Company had certain rights to maintain poles, wires, &c., over parts of said premises.

6. An item upon the settlement sheet concerning and interest as trustee of Stephen Colwell, which became vested in one Abraham Browning, by a declaration of trust dated April 27th, 1866.

The first objection, had it been made at the time of the proposed settlement, could have been readily corrected. This objection does not appear to be discussed by either brief, and is apparently not relied upon.

The second objection, that the title company was not at that date prepared to make settlement, may be considered later.

The third and fourth objections were disposed of at the time of the hearing. The Court announced that an examination of the agreement and the map accompanying it, evidenced clearly that the purchase was to be made subject to these rights.

The agreement in terms describes the beginning point as, "at the point of intersection of the center line of Camden and Atlantic Railroad, now the West Jersey and Seashore Railroad (usually known as the Pennsylvania Railroad), with the center line of Center Street," and the map delineates certain other streets and highways.

It is true that had there been no physical indications on the ground, of any such streets, the fact that the purchaser before making his contract for a title that would be good and marketable, free from all encumbrance (excepting certain mortgages) saw a map thereof showing a paper street, does not constitute a waiver of objections to the title because of the public servitude created

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by the dedication of the street. *Simpson and Klipstein*, 89 N. J. Eq., 543.

The fifth objection is the right of way of the Delaware and Atlantic Telephone Company.

The existence of an easement upon premises conveyed is a breach of a covenant against encumbrances. *Prop- per v. Colson*, 86 N. J. Eq., 399.

Under a contract to convey real estate "by a good and marketable title free and clear of all encumbrances," the vendor is bound to have and tender a title free from encumbrances. *Simpson v. Klipstein, supra*, 89 N. J. Eq., 543.

The word "marketable" means saleable; "encumbrance" means a right to, or an interest in, an estate to the diminution of its value. *Bier v. Walbaum*, 4 Adv. Rep. 151.

I am not inclined to view with great seriousness the exception on the title sheet of the interest, if any, of Abraham Browning in the tract. It is admitted that no such interest exists, and the title company thereafter promptly removed it as an exception.

The complainants contend that the rescission by Taylor on the day set for final settlement was not in good faith. They insist that by the placing of "For Sale" signs upon the premises by Taylor & Soloss, the admitted agents of the defendant; and that manifestly defendant never intended to urge the existence of the poles as a barrier to his performing the contract. Further, that he, the defendant, was under a high obligation to give timely notice to the complainants of any serious exception appearing upon the certificate in order to give complainant a fair opportunity to have it removed.

The title, on the day set for settlement, was such as would be insured by the title company, excepting the rights of way, and the rights of the telephone company to maintain poles and wires.

Counsel for the complainants says: "At most they (the poles) are only an incumbrance, and there should

be a decree to compel performance, subject to an abatement."

This could not be done. It is not similar to a condition where a mortgage is past due and payable and the money therefore could be retained or paid into court.

It follows, therefore, that the bill must be dismissed. The complainants were unable upon the day fixed for final settlement to give a good and marketable title, free from all encumbrances, except the mortgages.

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 IN CHANCERY OF NEW JERSEY.

Between	}	On Bill, &c.
HARRY GARBER <i>et al.</i> ,		
Complainants,		
and		
JACOB STERN,	}	20
Defendant.		

FINAL DECREE.

(Filed January 22, 1927.)

This cause coming on to be heard in the presence of Cole & Cole, Esquires, solicitors of complainants, and Thompson & Hanstein, Esquires, solicitors of defendant, Jacob Stern.

And the Court having examined the pleadings and taken proof orally in open court, and having heard and considered the arguments of counsel; and

The Court being satisfied that on the fourteenth day of April, 1926, complainants and the defendant entered into an agreement wherein the complainants agreed to sell and the defendant agreed to buy certain premises described, which contract provided that the conveyance should be by deed of warranty, free from all encumbrances, except certain then existing mortgages, on or before June 14th, 1926, title was to be good and market-

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able and such as would be insured by a reputable title company. Time was of the essence of the agreement; and

The Court having found that the parties to said agreement agreed that settlement should be made at the office of the Chelsea Title and Guaranty Company, and that the title should be insured by that company, and on the day fixed for settlement the parties appeared and the complainants presented and tendered a deed, and the
10 defendant declared himself prepared to make settlement, but understood that the title was not such as the contract called for; and

The Court being of the opinion that, upon the day fixed for final settlement, the complainants were unable to give a good and marketable title free from all encumbrances, except the mortgages;

It is, thereupon, on this twenty-second day of January, 1927, ordered, adjudged and decreed that the complainant's bill be dismissed;

20 It is further ordered that the complainants pay to the defendant the cost of this suit to be taxed, which is hereby allowed to said defendant, and that in default of the payment of said taxed costs within thirty days after service upon said complainants, or their solicitors, of a true, but uncertified, copy of this decree and of said taxed costs, execution issued against the goods and chattels, lands, tenements, hereditaments and real estate of the complainants to make said costs, according to the practice of this Court.

E. R. WALKER,
C.

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Respectfully advised.

R. H. INGERSOLL,
V. C.