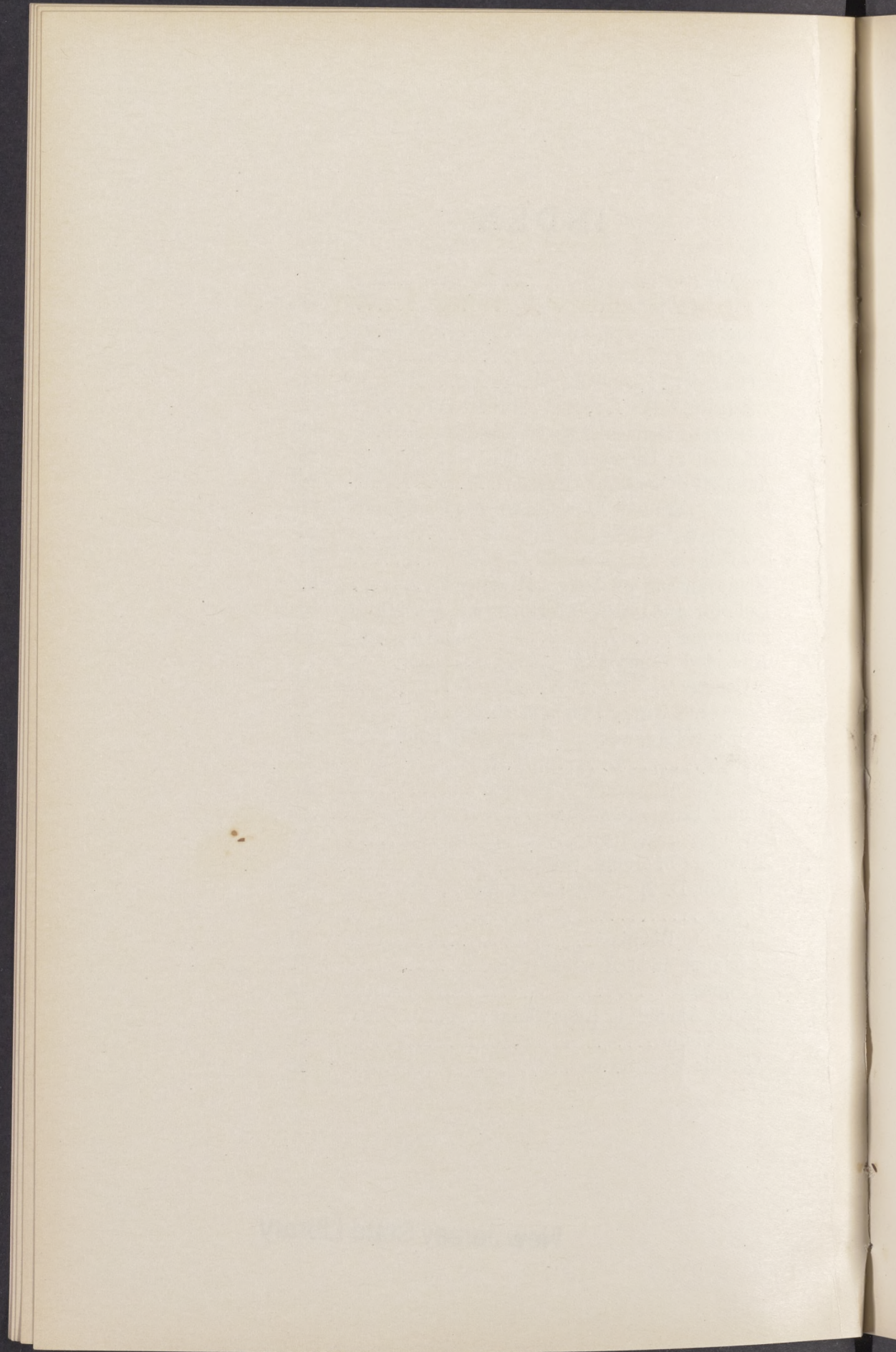


INDEX

	PAGE
Judgment	1
Notice of Appeal	4
Summons	6
Complaint	7
Contract	11
Schedule B.	12
Answer of Federal Trust Company	14
Affidavit of Harry Frieland	16
Affidavit of Rudolph Boesch	18
Notice to Amend Lien Claim and Complaint	21
Affidavit of William F. Nies	22
Affidavit of Nathaniel Kessler	23
Memorandum of Judge Mountain	25
Rule for Judgment Interlocutory by Default	27
Summons	29
Amended Complaint	31
Contract	35
Answer of Harry Frieland	38
Reply to Answer of Harry Frieland	44
Notice	45
Affidavit of Samuel I. Kessler	47
Order Extending Time	49
Rule for Judgment	50
Findings of Judge Smith	52
Exhibit D. 2. Contract of Sale	56
Order	67
Notice to Dismiss	70
Assignment of Reasons	72
Judgment	75
Order Amending Lien Claim	77
Lien Claim	79
Clerk's Certificate	85



JUDGMENT.

Essex County Circuit Court

40129

NEWARK WOODWORKING Co.,
INC., a corporation of New
Jersey,

Plaintiff,

vs.

R. BOESCH, INC., owner, RU-
DOLPH BOESCH, owner and
builder, HARRY FRIELAND,
present owner, FEDERAL
TRUST COMPANY, a corp.,
HARRY HIRSCH and GEORGE
OLLENDORF, mortgagees,

Defendants.

10

*Action
at Law.*

*On
Mechanics'
Lien by
Default.*

20

Damage\$707.00

Costs

Total

Judgment entered July 30, 1929.

Judgment on mechanic's lien by default in the
above-entitled action was rendered thirtieth day
of July, A. D. nineteen hundred and twenty-nine
in favor of the plaintiff George D. Hendrickson,
receiver for the Newark Woodworking Co., Inc.,
and against the defendant Harry Frieland for the
sum of seven hundred seven dollars damage and
costs of suit: specially to be made of the lands
and building in the complaint described as fol-
lows:

40

Judgment.

“The said building is a one-family frame dwelling and is located on a lot of land or curtilage situated in the City of Newark, County of Essex and State of New Jersey more particularly described as follows:

10 BEGINNING at a point on the northeasterly side of Chancellor avenue distant southeasterly along said side of Chancellor avenue 300.65' from southeasterly side of Bergen street: thence north 46° 27' east 103.79 ft. thence south 41° 49' east 50.02 ft. thence south 46° 27' west 105.34 ft. to Chancellor avenue thence along same north 40° 3' west 50.09 ft. to point and place of BEGINNING.

Judgment entered and signed July 30, 1929.

WILLIAM S. GUMMERE,
Judge.

20

JOHN H. SCOTT,
Clerk.

Book 108 Circuit Court Judgments, page 219.

ESSEX COUNTY CLERK'S OFFICE.

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

I, JOHN H. SCOTT, Clerk of the County of Essex in the State of New Jersey.

40 Do HEREBY CERTIFY that the foregoing is a true and correct copy of the judgment record in the case of the Newark Woodworking Co., Inc., a corporation of New Jersey, plaintiff *vs.* R. Bosch, Inc., owner, Rudolph Boesch, owner and builder, Harry Frieland, present owner, Federal Trust Company, a corp., Harry Hirsch and George Ollendorf mortgagees, defendants, en-

Judgment.

tered July 30, 1928, and recorded in Book 108 Circuit Court Judgments page 219, and the same is taken from and compared with Essex County Circuit Court Judgment record Book 108, page 219 and as the same now remains on the files of said office.

IN TESTIMONY WHEREOF, I have
(SEAL) hereunto set my hand and affixed the
official seal of said County at Newark,
N. J., this 7th day of August, A. D. 1929.

JOHN H. SCOTT,
Clerk.

10

20

30

40

NOTICE OF APPEAL

Filed September 4, 1929.

ESSEX COUNTY CIRCUIT COURT.

10 NEWARK WOODWORKING Co.,
INC., a corporation, and
GEORGE D. HENDRICKSON, re-
ceiver,

Plaintiffs-Appellee,

vs.

20 R. BOESCH, INC., owner, RU-
DOLPH BOESCH, owner and
builder, HARRY FRIELAND,
present owner, FEDERAL
TRUST COMPANY, a corpora-
tion, HARRY HIRSCH and
GEORGE OLLENDORF, mortga-
gees,

Defendants,

and

HARRY FRIELAND,

Defendant-Appellant.

30

*Action
at Law.*

*On
Mechanics'
Lien.*

*Notice
of Appeal.*

To Kessler & Kessler, Esquires, attorneys for
plaintiffs-appellee.

SIRS:

PLEASE TAKE NOTICE, that Harry Frieland, one
of the defendants in the above-entitled cause ap-
peals to the Court of Errors and Appeals in the
last resort in all causes in New Jersey from the

Notice of Appeal.

judgment of the Essex County Circuit Court entered in this cause.

WM. GREENFIELD,
Attorney of Harry Frieland,
Defendant-Appellant.

Service of a true copy of the within notice is hereby acknowledged this 4th day of September, 1929.

KESSLER & KESSLER,
Attorneys of Plaintiffs-Appellee.

10

20

30

40

SUMMONS.

ESSEX COUNTY, ss.

10 The State of New Jersey to Rudolph Boesch, Inc., owner; Rudolph
 (SEAL) Boesch, owner and builder; Federal
 Trust Company, a corporation of New
 Jersey; Harry Hirsch and George
 Ollendorf, mortgagees, YOU ARE SUMMONED to
 answer the annexed complaint of Newark Wood-
 working Co., Inc., a corporation of New Jersey,
 in an action at law in the Essex County Circuit
 Court in and for the County of Essex, in which
 the said Newark Woodworking Co., Inc., claims
 a building lien on a certain building and lands of
 Rudolph Boesch, Inc., described in said com-
 plaint.

20 AND TAKE NOTICE, that unless you file your
 answer to said complaint with the Clerk of said
 Court at Newark, N. J., 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.

30 WITNESS, WORRALL F. MOUNTAIN, Judge of the
 Essex County Circuit Court at Newark, N. J., this
 1st day of April, nineteen hundred and twenty-
 six.

JOHN H. SCOTT.

KESSLER & KESSLER,
 Attorneys for Plaintiff.

Complaint.

41 degrees 49 minutes east 50.02 ft., thence south 46 degrees 27 minutes west 105.34 ft. to Chancellor avenue, thence along same north 40 degrees 3 minutes west 50.09 ft. to point and place of BEGINNING.”

10 Being known and designated as 37 Chancellor avenue, Newark, N. J.

2. Between April 17, 1925, and December 2, 1925, the plaintiff corporation furnished and supplied materials pursuant to a contract entered into with the defendant, Rudolph Boesch, Inc., all as more particularly set forth in the contract and schedule hereto annexed and made a part hereof and specifically referred to.

20 3. Said materials were furnished and supplied at the express instance and request of Rudolph Boesch and Rudolph Boesch, Inc., who agreed to pay the plaintiff in accordance with the contract set forth and annexed hereto and the said amount called for on said schedules, including Schedule B.

30 The said materials as set forth in the annexed Schedule B were furnished at the express instance and request of said Rudolph Boesch and Rudolph Boesch, Inc., and were furnished by claimant during said period of time and said Rudolph Boesch and Rudolph Boesch, Inc., agreed to pay for said extra materials at the price mentioned in said Schedule B.

4. All of the said materials that were furnished and supplied were delivered to and for said Rudolph Boesch and Rudolph Boesch, Inc., and were all used in the construction of the building as hereinbefore described.

40 5. Plaintiff corporation alleges that on January 21, 1926, the defendant R. Boesch, Inc., exe-

Complaint.

cuted to the Federal Trust Company, a corporation of New Jersey, a mortgage in the sum of ten thousand (\$10,000) dollars, which mortgage was thereafter recorded in the Register's Office of Essex County in Book H 56 of Mortgages for said County on page 354.

Plaintiff corporation alleges that defendant Rudolph Boesch, Inc., executed a mortgage to Harry Hirsch in the sum of eight thousand (\$8,000) dollars, which mortgage was thereafter recorded in the Register's Office of Essex County in Book Q 56 page 417.

10

That the said mortgage recorded in Book Q 56 page 417 was subsequently assigned from the said Harry Hirsch to George Ollendorf on January 22, 1926, which assignment was recorded in the office of the Register of Essex County as Instrument No. 11.

20

6. Plaintiff corporation alleges that the mortgages above referred to, which mortgages purport to be an encumbrance on the said lands and building hereinbefore mentioned and described and by which the said Federal Trust Company, a corporation and Harry Hirsch and George Ollendorf claim to hold a lien thereon is subordinate and inferior to the lien of the debt rightfully due to the plaintiff corporation and avers that the lien upon which this suit is predicated is paramount to the lien of the mortgages above referred to.

30

There is due and owing to the plaintiff corporation from the said defendant on the contract annexed hereto the full sum of five hundred (\$500) dollars, which sum is more specifically as follows:

40

Complaint.

Amount of Contract.....	\$1,250.00
Payment Oct. 27, 1925.....	750.00
	<hr/>
Balance Due	\$ 500.00

SECOND COUNT.

10 1. Between April 17, 1925 and December 2, 1925, at the express instance and request of the defendants Rudolph Boesch and Rudolph Boesch, Inc., the plaintiff corporation furnished to said defendants extra material for the use and construction of the building upon which this suit is predicated, a true copy of which extra work is hereto annexed and marked Schedule B.

20 That the extra materials have been delivered and used in the construction of the building as hereinbefore described, and that no part of said sum for said extra materials has been paid.

There is due from the said defendants to the plaintiff corporation on Schedule B as annexed hereto, the full sum of two hundred seven (\$207.00) dollars, on this second count.

30 Such said indebtedness as more specifically set out above, is a lien upon building and lands by virtue of the provisions of an act entitled "An Act to secure to mechanics and others payment for their labor and materials in erecting any building (Revision of 1898)." Supplements thereto and amendments thereof.

Plaintiff demands as damages the sum of seven hundred seven (\$707.00) dollars with interest and cost of suit.

KESSLER & KESSLER,
Attorneys of Plaintiff.

Complaint.

CONTRACT.

NEWARK WOODWORKING CO. INC.
265 HILLSIDE AVENUE
NEWARK, N. J.

April 17, 1925.

R. Boesch, Inc. 10
To Rudolph Boesch
196 Market St.
Newark, N. J.

We agree to furnish you with the material necessary for interior trim frames, sash, and doors as per plans submitted for a One Family Dwelling to be erected at #37 Chancellor Avenue, Newark, N. J.

Material Whitewood Trim One Panel Miracle or Wedgewood Doors 20
1- $\frac{3}{4}$ " (Birch)
1 Linen Closet 2 Bookcases and Columns (L. G. Doors)
1 Breakfast Nook
1 Pair French Doors & Sidelights (B.P.G.)
1 Front Door and Sidelights (B.P.G.)
All Frames, Sash & Trim
All Interior Doors & Trim
All Base, Base Mldg., Floor Mldg. Picture Mldg. and all interior trim for completion of House. First Floor Chestnut Balance W. W. 30

Terms One Third on Delivery of Frames & Sash
One Third on Delivery of Standing Trim
Balance on Completion of contract.

For the sum of Twelve Hundred Fifty Dollars (\$1250)

NEWARK WOODWORKING CO. INC.

R. Boesch, Inc.

(signed) By R. Boesch, Pres. 40

Accepted by

Complaint.

SCHEDULE B.

NEWARK WOODWORKING CO. INC.
265 HILLSIDE AVENUE,
NEWARK, N. J.

10 TO R. BOESCH
37 CHANCELLOR AVE.
Newark, N. J.

March 26, 1926.

3/26/26

	2 Miracle Doors & Trim....	18.00	36.00
	2 Pair Garage Doors.....	16.00	32.00
	1 Door & Frame Garage....	14.00	14.00
	1 Door & Frame Celler....	14.00	14.00
	1 Leaded Glass 7 x 2.....	16.00	16.00
20	2 Frames & Sash.....	8.00	16.00
	9 Brackets	4.00	36.00
	4 Brackets, Large.....	6.00	24.00
	1000' Wall Moulding.....	15.00	15.00
	I Louvre	4.00	4.00

Total\$207.00

Served the within summons and complaint personally on the within named defendants as follows:

30 Rudolph Boesch, Inc. by delivering a true copy to Rudolph Boesch, president on April 9, 1926, at his office No. 196 Market street, Newark, N. J.

Rudolph Boesch by personally delivering to him a true copy thereof at his office 196 Market street, Newark, N. J. on Apr. 9, 1926.

Federal Trust Co. by personally delivering a true copy thereof to E. J. Moffett, Asst. Treasurer at its office 738 Broad street, Newark, N. J. on April 7, 1926.

Complaint.

Harry Hirsch by personally delivering a true copy to him at his office 59 Lafayette street, Newark, N. J. on April 7, 1926.

George Ollendorff by personally delivering a true copy thereof to him at his office 59 Lafayette street, Newark, N. J. on Apr. 16, 1926.

HARRY B. O'CONNELL,
Sheriff.

10

By MICHAEL J. A. DOYLE,
Special Deputy.

I hereby appoint and depute Michael J. A. Doyle to serve the within writ.

Witness my hand and seal this 1st day of April, 1926.

HARRY B. O'CONNELL,
Sheriff.

20

By CONRAD DEUHLER,
Under Sheriff.

Sheriff fees \$9.78.

30

40

ANSWER OF FEDERAL TRUST COMPANY.

Filed May 10, 1926.

ESSEX COUNTY CIRCUIT COURT.

10	NEWARK WOODWORKING Co., INC., <i>Plaintiff,</i>	}	<i>On Mechanic's Lien.</i>
	<i>vs.</i>		
	RUDOLPH BOESCH, INC., <i>et als.,</i> <i>Defendants.</i>	}	<i>Action at Law. Answer.</i>

20 The Federal Trust Company, a corporation of New Jersey, having its principal office in the City of Newark, answering the complaint filed in this cause says:

1. It admits that one, Rudolph Boesch, Inc., executed to this defendant a certain mortgage dated January 21, 1926, given to secure the sum of fifteen thousand (\$15,000) dollars, covering the premises described in the first count of the complaint:

30 2. It denies all the other allegations in the complaint.

FIRST SEPARATE DEFENSE.

Said building and land are not nor is either of them liable to said alleged debt.

SECOND SEPARATE DEFENSE.

The alleged lien of plaintiff is subject to that of this defendant's said mortgage.

Answer of Federal Trust Company.

THIRD SEPARATE DEFENSE.

Said building described in the complaint was being erected under a contract in writing duly filed in the office of the Clerk of Essex County before said materials or any of them were furnished.

10

FOURTH SEPARATE DEFENSE.

After the alleged sum became due to plaintiff he executed and delivered to defendant a release thereof.

REED & REYNOLDS,
Attorneys for Federal
Trust Company, Defendant.

20

Service of the within answer is hereto acknowledged as within time 10th day of May, 1926.

KESSLER & KESSLER,
Atty of Claimant.

Filed May 10, 1926.

JOHN H. SCOTT,
Clerk.

30

40

Affidavit of Harry Frieland.

AFFIDAVITS.

Filed June 11, 1926.

ESSEX COUNTY CIRCUIT COURT.

10	NEWARK WOODWORKING Co., INC., a corporation of New Jersey, <i>Claimant,</i>	}	<i>On Lien</i>
	<i>vs.</i>		<i>Claim.</i>
	RUDOLPH BOESCH, INC., <i>et als.</i> , <i>Defendants.</i>		<i>Affidavit.</i>

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

20 Harry Frieland of full age being duly sworn according to law on his oath deposes and says, that he resides at No. 37-39 Chancellor avenue in the City of Newark, County of Essex, State of New Jersey, which said property this deponent did enter into an agreement for the purchase thereof on the 8th day of February, 1926, Purchase price \$27,250. That deponent did on

30 the 30th day of March, 1926, in accordance with the terms of said agreement take title to the said land and premises and paid the full consideration purchase money therefor.

40 That on the said 30th day of March, 1926, the deponent received a deed for said land and premises and which deed was recorded in the Register's office of the County of Essex on the 31 day of March, 1926, at 10:22 o'clock in the forenoon, in book X 73 of deeds of said county on pages 425-426. That on the 30th day of March, 1926, about a quarter to 5 P. M. of that afternoon the deponent received the said

Affidavit of Harry Frieland.

deed, paid the consideration money therefore and received some releases of said property with an affidavit made by the said Rudolph Boesch, of which affidavit a true copy is hereto annexed. Wherein it avers in said affidavit sworn to before William Greenfield, Master in Chancery of N. J., duly authorized to take affidavits, that the said land and premises were not subject to any lien claims for any work, labor or material furnished, supplied, or performed in the erection and construction of the Building on said lands. That the said affidavit was made by the said Rudolph Boesch as president of the corporation from his own absolute knowledge, and not on information of belief that there were no debts or obligations of any kind of the corporation for the erection and construction of said building, whereby the said land and premises may become subject to Mechanic's Lien Claim. 10

That deponent on the strength of said affidavit paid the consideration money therefor. That he bought the property in good faith and for the full value. That the deponent was informed by William Greenfield, Esquire, that the title to said land and premises was searched and examined both in the Register's Office of the County of Essex and County Clerk's office of Essex County, that no liens were on file on the 30th day of March, 1926, up to 4 P. M. of that date and no lien of any kind was on file at the time and at the hour the deed was placed on record. 20 30

HARRY FRIELAND.

Affidavit of Rudolph Boesch.

Sworn and subscribed to before
me on this 3rd day of June,
A. D. 1926, at Newark, N. J.

ANNA ROTHMAN,
A Notary Public of N. J.

10

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

20

RUDOLPH BOESCH of full age being duly sworn according to law on his oath deposes and says, that he is president of R. Boesch, Inc., a corporation of the State of New Jersey; the R. Boesch, Inc., is now in possession of and the owner in fee simple of the land and premises known and designated as No. 37-39 Chancellor avenue, in the City of Newark, County of Essex and State of New Jersey, and more particularly described in a certain deed of conveyance to Harry Friedland, bearing even date herewith, the purchaser of said land and premises.

30

Deponent further says, that the said premises have been held by R. Boesch, Inc., since July 3, 1925, and that its possession thereof has been peaceable and undisturbed, and that the title thereto has never been disputed or questioned to his knowledge, nor does deponent know of any facts by reason of which said premises or title might be disturbed or questioned, or by reason of which any claim to said premises, or any part thereof, might arise or be set up adverse to R. Boesch, Inc., and that deponent is informed and believes that its grantors, and those previous held the said premises for more than twenty years prior to the transfer to R. Boesch, Inc.; and that the same are now free and clear of all taxes incumbrances or liens by

40

Affidavit of Rudolph Boesch.

mortgage decree, judgment or by statute, or by virtue, of any proceedings in any court, or filed in the office of the clerk of any County or Court in this State, and all other liens and claims of every nature or description, except a mortgage of fifteen thousand dollars, held by the Federal Trust Co. of Newark, N. J., for a period of three years from January 21, 1926, bearing interest at the rate of 6 per cent. per annum, payable semi-annually, and a second mortgage of eight thousand dollars held by Harry Hirsch, for a period of one year from January, 1926, bearing interest at the rate of 6 per cent. per annum payable semi-annually. 10

Deponent further deposes and says, that he makes this affidavit from his own personal knowledge and not as an officer of R. Boesch, Inc., that all the persons who signed the Release of Mechanic's Lien, are the only persons who have done any work and performed labor, and supplied material, in the erection and construction of the said buildings; that no other person or persons, company or corporation have performed any work or supplied material in the construction of the said buildings on the foregoing land and premises, that the buildings upon the foregoing land and premises have been fully completed in every detail; that all mechanics, laborers and materialmen, have been fully paid and satisfied, and that all fixtures that went into the construction of the building have been paid for; that the said property is not subject to any Mechanic's Lien Claim, of any kind, nature or description. 20 30

Deponent further deposes and says, that he is married to Estelle S. Boesch, and who is the same person who executed with deponent, the deed of conveyance, bearing date July 3, 40

Affidavit of Rudolph Boesch.

1925, to R. Boesch, Inc., recorded in the Register's Office of Essex County in Book X 72 of deeds, page 61, that Estelle S. Boesch is the lawful wedded wife of this deponent.

10 Deponent further deposes and says, that there are no judgment or decrees or attachments, orders of any court or officer for the payment
 20 of money against deponent or R. Boesch, Inc. or any suit or proceeding pending anywhere affecting said premises; and that no proceedings in bankruptcy have ever been instituted by or against deponent, or R. Boesch, Inc.

Deponent makes this affidavit to induce Harry Frieland to accept a Warranty Deed to said premises and pay the consideration money therefor, well knowing that the said Harry
 20 Frieland relies upon the truth of the statements herein contained.

RUDOLPH BOESCH.

Sworn and Subscribed to before
 me on this 30th day of March,
 A. D. 1926, at Newark, N. J.

WM. GREENFIELD,
 Master in Chancery of N. J.

30

40

NOTICE.

Filed June 15, 1926.

ESSEX COUNTY CIRCUIT COURT.

NEWARK WOODWORKING Co., INC.,
a corporation of New Jersey,
Claimant,

10

vs.

RUDOLPH BOESCH, INC., owner;
RUDOLPH BOESCH, owner and
builder; FEDERAL TRUST COM-
PANY, a corporation of New
Jersey, HARRY HIRSCH, and
GEORGE OLLENDORF, mortgagee
Defendants.

*Lien Claim.**Notice.*

20

To Rudolph Boesch, Inc., Rudolph Boesch; Fed-
eral Trust Company a corporation of New
Jersey; Harry Hirsch and George Ollen-
dorf:

TAKE NOTICE that on Saturday, the fifth day of
June, 1926, at ten o'clock in the forenoon at the
Essex County Circuit Court, Court House, New-
ark, N. J., we shall apply to William A. Smith,
Esq., or any other Circuit Court Judge sitting
at that time for an order permitting the plaintiff
herein to amend the lien claim and complaint
filed in the above-entitled cause, as follows:

30

1. That the lien claim and complaint shall in-
clude and be amended to include the name of
Harry Friedland.

2. To change and amend the name of Rudolph
Boesch, Inc., to "R. Boesch, Inc."

40

Notice to Amend Complaint.

and on said application we shall use affidavits, of which copies are attached hereto and made a part hereof.

3. That the mortgage held by the Federal Trust Co. shall be amended to read in the sum of \$15,000 instead of \$10,000.

KESSLER & KESSLER,
Attorneys for Plaintiff.

Dated:

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

WILLIAM F. NIES, of full age being duly sworn according to law on his oath deposes and says that:

I am an attorney-at-law of the State of New Jersey; that at the express instance and request of Messrs. Kessler & Kessler, attorneys for the plaintiff, Newark Woodworking Co., Inc., I made a search of the property which this lien claim question affects; that on March 30th, 1926, I completed the search and turned the said search over to Messrs. Kessler & Kessler; that I verily believe that on March 31st, 1926, a lien claim and complaint were filed with the Essex County Clerk at about 3:45 P. M., that on or about the 7th day of April I was again requested by Kessler & Kessler to continue the aforesaid search down to date, and that upon completing the continued search, it then disclosed that the property in question had been sold by R. Boesch, Inc. to Harry Friedland, by deed dated March 30th, 1926, and received at the Essex County Register's Office on March 31st, at 10.22 A. M.

WILLIAM F. NIES.

Notice to Amend Complaint.

Subscribed and sworn to before
me this 26th day of April A.
D. 1926.

Meyer Linnick,
Attorney-at-Law of N. J.

10

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

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

That he is a member of the firm of Kessler &
Kessler attorneys for the plaintiff, Newark Wood-
working Co., Inc., that at the express instance
and request of the said firm, William F. Nies,
made a search of the premises covered by the
lien claim, upon which this suit is predicated;
that said search was completed on March 30th,
1926, that on March 31st, 1926, the lien claim
and complaint was filed with the Essex County
Clerk at 3:45 P. M.; that on or about the 7th
day of April, William F. Nies was again re-
quested to make such search down to date, which
was accordingly done: That such continued search
disclosed that the premises in question were
sold since the completion of the original search
by R. Boesch, Inc. to Harry Friedland by deed
dated March 30th, 1926 and recorded in Essex
County Register's Office March 31st, 1926, at
10.22 A. M.

20

30

NAT KESSLER.

40

Notice to Amend Complaint.

Sworn and subscribed to before
me this 26th day of April,
A. D. 1926.

Meyer Linnick,
Attorney at Law of N. J.

10

Service of the within notice is acknowledged
herewith this day of 1926..

EDWARD FENIAS,
Attorney for R. Boesch, Inc.
Rudolph Boesch.

REED & REYNOLDS,
Attorneys for Federal Trust
Company.

20

HARRY A. FRIEDMAN,
Attorney for Harry Hirsch,
and George Ollendorf.

Attorney for Harry Friedland.

30

40

MEMORANDUM OF JUDGE MOUNTAIN.

Filed July 2, 1926.

ESSEX COUNTY CIRCUIT COURT.

NEWARK WOODWORKING Co., INC.,
a corporation of New Jersey,
Complainant,

vs.

RUDOLPH BOESCH, INC., *et als.,*
Defendants.

10

Memorandum.

This case comes before the Court on a motion by the plaintiff to amend the lien claim and complaint by adding the name of Harry Friedland and to change and amend the name of Rudolph Boesch, Inc., to "R. Boesch, Inc."

20

At the time the motion was made it appears that a deed dated March 30, 1926, covering the premises described in the lien claim had been given by "R. Boesch, Inc." to Harry Friedland and had been recorded by him on March 31, 1926, at 10:22 A. M. On the same day, but at 3:45 in the afternoon, the plaintiff in this case filed a lien claim in the office of the County Clerk and nominated the owner of the property as Rudolph Boesch, Inc. It is admitted that the lien claim was filed in time, but against the wrong owner.

30

The power to amend the lien claim in matters of substance, as well as in matters of form, is set forth in P. L. of 1911—page 47. Reference to the record would tend to indicate that Harry Friedland obtained his deed before the claim was filed, but that is not conclusive. Section 10 of

40

Memorandum of Judge Mountain.

the Mechanic's Lien Law provides that the lien given by the act shall not be valid against the bona fide purchaser or mortgagee before the lien was filed in the office of the County Clerk. Whether Harry Friedland was a bona fide purchaser or not is a jury question. The plaintiff is
10. entitled to the amendment and the status of Harry Friedland will be one of the subjects of inquiry at the time of the trial.

Counsel for the plaintiff will submit an order suggesting the amendment, for my signature, which thereafter shall be filed in the office of the County Clerk in accordance with P. L. of 1911, page 47.

WORRALL F. MOUNTAIN,
Circuit Court Judge.

20

30

40

**RULE FOR JUDGMENT INTERLOCUTORY
BY DEFAULT.**

Filed July 16, 1926.

ESSEX COUNTY CIRCUIT COURT.

NEWARK WOODWORKING Co., INC.,
a corporation of New Jersey,
Plaintiff,

vs.

R. BOESCH, INC., owner; RU-
DOLPH BOESCH, owner and
builder; HARRY FRIEDLAND,
present owner; FEDERAL
TRUST COMPANY, a corpora-
tion, HARRY HIRSCH and
GEORGE OLLENDORF, mort-
gagees,

Defendants.

10

*Action at
Law.*

*On Mechan-
ics' Lien.*

*Rule for
Judgment
Interlocutory
by Default.*

20

The summons and complaint in this cause hav-
ing been duly served upon the defendant, R.
Boesch, Inc., Rudolph Boesch, Harry Hirsch and
George Ollendorf on the 12th day of April, 1926,
and all of the aforesaid defendants having failed
to file any answer or take any other steps in
response to the complaint within the time limited
by the rules of this court,

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IT IS THEREFORE ORDERED, that judgment inter-
locutory by default be entered in favor of the
plaintiff, Newark Woodworking Co. Inc., against
the said defendants R. Boesch, Inc., Rudolph
Boesch, Harry Hirsch and George Ollendorf.

IT IS FURTHER ORDERED that judgment final be
entered against the aforesaid defendants, R.

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Rule for Judgment Interlocutory by Default.

Boesch, Inc. and Rudolph Boesch as owners and builders and Harry Hirsch and George Ollendorf as mortgagees,

10 AND IT IS FURTHER ORDERED, that the mortgages held by the aforesaid defendants, Harry Hirsch and George Ollendorf as set forth in the complaint herein, shall be subject to this plaintiff's lien claim.

Clerk.

Rule entered this 15th day of July, 1926, on motion of Kessler & Kessler, Attorneys of Newark Woodworking Co., Inc.

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SUMMONS.

ESSEX COUNTY, ss.

The State of New Jersey to: R. Boesch, Inc., past owner, Rudolph Boesch, past owner and builder, Harry Friedland, present owner; Federal Trust Company, a corporation of New Jersey; Harry Hirsch and George Ollendorf, mortgagees, YOU ARE SUMMONED to answer the annexed complaint of Newark Woodworking Co., Inc., a corporation of New Jersey, in an action at law in the Essex County Circuit Court in and for the County of Essex, in which the said Newark Woodworking Co. Inc., claims a building lien on a certain building and lands of R. Boesch, Inc., described in said complaint.

AND TAKE NOTICE, that unless you file your answer to said complaint with the Clerk of said Court at Newark, N. J., 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, Judge of the Essex County Circuit Court at Newark, N. J., this 8th day of July, nineteen hundred and twenty-six.

JOHN H. SCOTT,
Clerk.

KESSLER & KESSLER,
Attorneys for Plaintiff.

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Summons.

NOTICE TO THE ABOVE-NAMED
DEFENDANTS:

10 In case the above writ of summons and complaint is served upon you personally and, take notice, that if you intend to make a defense to this action, you must file an affidavit of merits within ten days of the date of service hereon upon you and must file your answer within twenty days from the date of such service and in behalf thereof judgment will be entered against you.

KESSLER & KESSLER,
Attorneys for Plaintiff.

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AMENDED COMPLAINT.

ESSEX COUNTY CIRCUIT COURT.

NEWARK WOODWORKING Co., INC.,
a corporation of New Jersey,
Plaintiff,

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vs.

R. BOESCH, INC., owner; RUDOLPH BOESCH, owner and builder; HARRY FRIEDLAND, present owner; FEDERAL TRUST COMPANY, a corporation, HARRY HIRSCH and GEORGE OLLENDORF, mortgagees,
Defendants.

*Action at
Law.*

*On Mechanics'
Lien.*

*Amended
Complaint.*

20

FIRST COUNT.

The plaintiff, Newark Woodworking Co. Inc., a corporation, duly organized and existing under and by virtue of the laws of the State of New Jersey, says that:

1. At the times hereinafter stated and up to March 30, 1926, the defendant R. Boesch, Inc. was the owner of a lot of land upon which there was to be erected a one-family frame dwelling, which lands are described as follows:

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“BEGINNING at a point on northeasterly side of Chancellor avenue distant Southeasterly along said side of Chancellor avenue 300.65 ft. from southeasterly side of Bergen street; thence north 46 degrees, 27 minutes east 103.79 ft., thence south 41 degrees 49 minutes east 50.02

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Amended Complaint.

ft., thence south 46 degrees 27 minutes west 105.34 ft. to Chancellor avenue, thence along same north 40 degrees 3 minutes west 50.09 ft. to point and place of BEGINNING.”

Being known and designated as 37 Chancellor avenue, Newark, N. J.

10 2. Between April 17th, 1925 and December 2nd, 1925, the plaintiff corporation furnished and supplied materials pursuant to a contract entered into with the defendant, R. Boesch, Inc., all as more particularly set forth in the contract and schedule hereto annexed and made a part hereof and specifically referred to.

20 3. Said materials were furnished and supplied at the express instance and request of R. Boesch, Inc. and Rudolph Boesch, who agreed to pay the plaintiff in accordance with the contract set forth and annexed hereto for the amount called for on said schedules, including Schedule B.

30 The said materials as set forth in the annexed Schedule B were furnished at the express instance and request of said R. Boesch, Inc. and Rudolph Boesch and were furnished by claimant during said period of time and said R. Boesch, Inc. and Rudolph Boesch agreed to pay for said extra materials at the prices mentioned in said Schedule B.

4. All of the materials set forth that were furnished and supplied were delivered to and for R. Boesch, Inc. and Rudolph Boesch and were all used in the construction of the building as hereinbefore described.

40 5. Plaintiff corporation alleges that on January 21st, 1926, the defendant R. Boesch, Inc. executed to the Federal Trust Company, a cor-

Amended Complaint.

poration, a mortgage in the sum of Fifteen Thousand (\$15,000.00) Dollars, which mortgage was thereafter recorded in the Register's Office of Essex County in Book H 56 of Mortgages for said County on page 354.

Plaintiff corporation alleges that defendant R. Boesch, Inc. executed a mortgage to Harry Hirsch in the sum of Eight Thousand (\$8,000.00) Dollars, which mortgage was thereafter recorded in the Register's Office of Essex County in Book Q 56, page 417.

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That the said mortgage recorded in Book Q 56, page 417 was subsequently assigned from the said Harry Hirsch to George Ollendorf on January 22nd, 1926, which assignment was recorded in the office of the Register of Essex County as instrument #11.

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6. Plaintiff corporation alleges that the mortgages above referred to, which mortgages purport to be an encumbrance on the said lands and building hereinbefore mentioned and described and by which the said Federal Trust Company, a corporation and Harry Hirsch and George Ollendorf claim to hold a lien thereon is subordinate and inferior to the lien of the debt rightfully due to the plaintiff corporation and avers that the lien upon which this suit is predicated is paramount to the lien of the mortgages above referred to.

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7. Plaintiff corporation alleges that on March 30, 1926, the premises upon which this lien is claimed, were conveyed by warranty deed bearing instrument number 20, which deed was recorded in the office of the Essex County Clerk on March 31, 1926 from R. Boesch, Inc. to Harry Friedland.

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Amended Complaint.

Plaintiff corporation further alleges that whatever interest the said Harry Friedland may have it is subordinate to the complainant's lien, and that this complainant's lien is paramount to any interest that the said Harry Friedland may have in the aforesaid premises.

- 10 There is due and owing to the plaintiff corporation from the said defendant on the contract annexed hereto the full sum of Five Hundred (\$500.00) Dollars, which sum is more specifically as follows:

Amount of Contract.....	\$1,250.00
Payment Oct. 27, 1925	750.00
	<hr/>
Balance Due	\$ 500.00

20

SECOND COUNT.

1. Between April 17, 1925 and December 2, 1925, at the express instance and request of the defendants Rudolph Boesch and R. Boesch, Inc., the plaintiff corporation furnished to said defendants extra material for the use and construction of the building upon which this suit is predicated, a true copy of which extra work is hereto annexed and marked Schedule B.

- 30 That the extra materials have been delivered and used in the construction of the building as hereinbefore described, and that no part of said sum for said extra materials has been paid.

There is due from the said defendants to the plaintiff corporation on Schedule B as annexed hereto, the full sum of Two Hundred Seven (\$207.00) Dollars, on this second count.

- 40 Such said indebtedness as more specifically set out above, is a lien upon building and lands by virtue of the provisions of an Act entitled "An

Amended Complaint.

Act to secure to mechanics and others payment for their labor and materials in erecting any building (Revision of 1898." Supplements thereto and Amendments thereof.)

Plaintiff demands as damages the sum of Seven Hundred Seven (\$707.00) Dollars with interest and costs of suit. 10

KESSLER & KESSLER,
Attorneys of Plaintiff.

CONTRACT.

NEWARK WOODWORKING CO. INC.

265 Hillside Avenue,
Newark, N. J.

April 17, 1925. 20

R. Boesch, Inc.
to Rudolph Boesch
196 Market St.
Newark, N. J.

We agree to furnish you with the material necessary for interior trim, frames, sash, and doors as per plans submitted for a One Family Dwelling to be erected at #37 Chancellor Avenue, Newark, N. J. 30

Material Whitewood Trim One Panel Miracle or Wedgewood Doors 1- $\frac{3}{4}$ " (Birch)
1 Linen Closet 2 Bookcases and Columns (L. G. Doors)
1 Breakfast Nook
1 Pair French Doors & Sidelights (B.P.G.)
1 Front Door and Sidelights (B.P.G.)
All Frames, Sash & Trim
All Interior Doors & Trim

Amended Complaint.

All Base, Base Mldg., Floor Mldg. Picture Mldg., and all interior trim for completion of House, First Floor Chestnut Balance W. W.

10 Terms One Third on Delivery of Frames & Sash
 One Third on Delivery of Standing Trim
 Balance on Completion of contract.
 For the sum of Twelve Hundred Fifty Dollars (\$1250.)

Accepted by

NEWARK WOODWORKING CO. INC.

R. Boesch, Inc.
 (signed) By R. Boesch, Pres.

20 NEWARK WOODWORKING CO., INC.
 265 HILLSIDE AVENUE,
 NEWARK, N. J.

TO R. BOESCH
 37 Chancellor Ave.
 Newark, N. J.

March 26, 1926.

3/26/26

	2 Miracle Doors & Trim....	18.00	36.00
	2 Pair Garage Doors.....	16.00	32.00
30	1 Door & Frame Garage....	14.00	14.00
	1 Door & Frame Cellar....	14.00	14.00
	1 Leaded Glass 7 x 2.....	16.00	16.00
	2 Frames & Sash.....	8.00	16.00
	9 Brackets	4.00	36.00
	4 Brackets Large	6.00	24.00
	1000' Wall Moulding.....	15.00	15.00
	1 Louvre	4.00	4.00
			<hr/>
	Total		207.00

Amended Complaint.

Served the within summons and amended complaint July 10, 1926, upon Harry Frieland the within named defendant as per acknowledgment by Harry B. O'Connell, Sheriff, Wm. Greenfield, attorney. By Fred E. Ober, Special Deputy.

Service of the within amended summons and complaint is hereby acknowledged on this 10th day of July, 1926, for Harry Frieland. 10

WM. GREENFIELD,
Attorney for Harry Frieland.

I hereby appoint and depute Fred E. Ober to serve the within writ.

Witness my hand and seal this 9th day of July, 1926.

HARRY B. O'CONNELL, 20
Sheriff.

By ALFRED C. WALKER,
Under Sheriff.

Sheriff's fees \$3.78.

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ANSWER OF HARRY FRIELAND.

Filed July 24, 1926.

ESSEX COUNTY CIRCUIT COURT.

10 NEWARK WOODWORKING CO., INC.,
a corporation,

Plaintiff,

vs.

R. BOESCH, INC., owner, RU-
DOLPH BOESCH, owner and
builder; HARRY FRIELAND,
present owner; FEDERAL
TRUST COMPANY, a corpora-
20 tion, HARRY HIRSCH and
GEORGE OLLENDORF, mortga-
gees,

Defendants.

*Action
at Law.*

*On
Mechanics'
Lien.*

*Answer of
Harry
Frieland.*

Harry Frieland, one of the defendants herein,
answering the plaintiff's complaint, says:

30 1. Answering the allegations in paragraphs
1, 2, 3, 4, 5 and 6 of the first count of the plain-
tiff's complaint, this defendant has no knowledge
nor information sufficient to form any belief, but
leaves the plaintiff to prove the allegations
alleged in said paragraphs.

40 2. And this defendant, Harry Frieland,
answering paragraph 7, of the first count of the
plaintiff's complaint denies that the said land
and premises mentioned and described in the
lien claim and in paragraph 1 of the first count
of the plaintiff's complaint, was conveyed to one,
Harry Frieland, in the manner as set forth in

Answer of Harry Frieland.

said complaint, but avers and says, that the said land and premises was conveyed by deed of warranty to Harry Frieland, on the 30th day of March, 1926, which said deed was duly recorded in the Register's Office of the County of Essex on March 31, 1926.

And this defendant, Harry Frieland, further answering so much of paragraph 7 of the plaintiff's complaint, wherein it alleges, "That whatever interest the said Harry Frieland may have it is subordinate to the complainant's lien, and that this complainant's lien is paramount to any interest that the said Harry Frieland may have in the aforesaid premises," this defendant denies each and every allegation therein set forth, and avers and in truth says, that he purchased the said land and premises free and clear and discharge of any alleged lien claim, that he, the said plaintiff, may have had prior to the purchase of the said land and premises by Harry Frieland and described in the plaintiff's complaint, for any alleged work done or material supplied by the plaintiff in the erection and construction of the building constructed on the said land and premises.

And this defendant further answering paragraph 7, of the first count of the plaintiff's complaint, avers, that he purchased the said land and premises in good faith, as a bona fide purchaser and for a valuable consideration, from R. Boesch, Inc., without any knowledge or notice of any alleged lien claim by the plaintiff against the said land and premises, and that there was no lien of record or proceedings of any lien pending, at the time of the purchase of the foregoing land and premises by Harry Frieland from R. Boesch, Inc.

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Answer of Harry Frieland.

And this defendant further avers, that if the said plaintiff had any lien claim prior to the purchase of the said land and premises by the defendant, Harry Frieland, the said lien claim became void and unenforceable as against this defendant, Harry Frieland, by reason of the fact, that the plaintiff's right to the lien claim had expired, prior to the institution of suit against this defendant, and therefore, became null and void and of no effect, in accordance with the Statute of the Mechanics' Lien Laws, Revision of 1898, and the supplements thereto and amendments thereof.

ANSWER TO SECOND COUNT.

1. Answering paragraph 1 of the second count of the plaintiff's complaint, wherein it avers, that the said plaintiff between April 17, 1925 and December 2, 1925, at the request of the defendants, Rudolph Boesch and R. Boesch, Inc., furnished labor and material in the erection and construction of the building on the said tract of land mentioned and described in paragraph 1 of the first count of the plaintiff's complaint, this defendant, Harry Frieland, has no knowledge nor information sufficient to form any belief, but leaves the said plaintiff to prove same by due and legal proof.

Further answering paragraph 1 of the second count of the plaintiff's complaint, wherein it avers, that the said plaintiff delivered extra materials and that the said materials were used in the erection and construction of said building, amounting to the sum of \$207, this defendant has no knowledge nor information sufficient to form any belief, but leaves the said plaintiff to its legal proof.

Answer of Harry Frieland.

And further answering so much of said paragraph 1 of the second count of the plaintiff's complaint, wherein it avers, that such indebtedness is a lien upon building and lands by virtue of the provisions of an act entitled "An Act to secure to mechanics and others payment for their labor and material in erecting any building" (Revision of 1898, supplements thereto and amendment thereof), this defendant, Harry Frieland denies that said plaintiff is entitled to any Mechanics' Lien on the said building and lands as described in the plaintiff's complaint in accordance with the provisions of said act, by reason of the fact, that the said plaintiff did not institute its proceedings, and that no summons and complaint were issued against the defendant, Harry Frieland, within a period of four months from the date of the last alleged work done and alleged material supplied as required by the statute made and provided in such case, in accordance with the Mechanics' Lien Law, Revision of 1898, supplements thereto and amendments thereof. He, the said defendant, Harry Frieland, being a bona fide purchaser for value of said land and premises, without knowledge nor information of the alleged lien claim prior to his purchase.

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FIRST AFFIRMATIVE DEFENSE.

1. That the said defendant, Harry Frieland, will on the day and date of trial at the aforesaid court, move to dismiss said proceedings against this defendant, Harry Frieland, by reason, that this defendant, for a valuable consideration, purchased the said land and premises in good faith and without any notice of any lien claim at the time of said purchase and paid the consideration

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Answer of Harry Frieland.

money therefor. And that this defendant, is a bona fide purchaser of the said land and premises and paid the consideration money therefor, without any notice or knowledge of any alleged claim or lien or pretended claim on the part of the plaintiff against the said lands and premises.

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SECOND AFFIRMATIVE DEFENSE.

1. And this defendant, Harry Frieland, will further offer to prove, that the said land and premises are not subject to the lien claim in accordance with the said act and provisions of the Mechanics' Lien Law, approved 1898, and the supplements thereto and amendments thereof, as against this defendant, by reason that this defendant, Harry Frieland, was and is a bona fide purchaser, and had no knowledge at the time of the purchase of said lien claim, and that this defendant was not made a party defendant, at the time the alleged lien claim was filed, and furthermore, that no summons and complaint were issued against this defendant, within a period of four months from the date of the last alleged work done and alleged material supplied in the erection and construction of the said building on said lands, as required under the Mechanics' Lien Act "An Act to secure to mechanics and other payment for their labor and materials in erecting any building (Revision of 1898) supplements thereto and amendments thereof," particularly, in accordance with sections 16, 17, 18, 19 and 20 of said act.

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THIRD AFFIRMATIVE DEFENSE.

And this defendant, Harry Frieland, will further object to the proceedings against him in the above-entitled cause, by reason of the fact,

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Answer of Harry Frieland.

that at the time of the filing of the Mechanics' Lien Claim, this defendant was the owner of said land and premises, and that this defendant, Harry Frieland, was not made a party defendant in said lien claim, and that no summons and complaint against this defendant, were issued within a period of four months, after the last alleged work was done and alleged material supplied, in the erection and construction of the building upon said lands described in the plaintiff's complaint in the above-entitled cause, and by reason whereof, this defendant avers, that the said land and premises are free and clear and discharged of said lien claim, if the said plaintiff had any, or if the said building and lands were subject to any lien claim of the plaintiff, in accordance with the provisions of the Mechanics' Lien Act, "An Act to secure to mechanics and others payment for their labor and materials in erecting any building (Revision of 1898), supplements thereto and amendments thereof."

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WM. GREENFIELD,
Attorney for Defendant,
Harry Frieland.

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REPLY TO ANSWER OF HARRY FRIELAND.

Filed July 29, 1926.

ESSEX COUNTY CIRCUIT COURT.

10	NEWARK WOODWORKING Co., INC., a corporation, <div style="text-align: right;"><i>Plaintiff,</i></div>	}	<i>Action at Law.</i>
	<i>vs.</i>		<i>On Mechanics' Lien.</i>
20	R. BOESCH, INC., owners, RU- DOLPH BOESCH, owner and builder, HARRY FRIEDLAND, present owner, FEDERAL TRUST COMPANY, a corporation, HARRY HIRSCH and GEORGE OLLENDORF, mortgagees, <div style="text-align: right;"><i>Defendants.</i></div>	}	<i>Reply to Answer of Harry Friedland.</i>

Newark Woodworking Co., Inc., a corporation, as and for a reply filed to the answer of the defendant, Harry Friedland, says that:

1. It reasserts and reaffirms all the allegations which are answered by paragraph one of the answer filed.

30 2. It admits that the deed by which the said premises are alleged to have been conveyed to the defendant, was recorded in the Register's Office of the County of Essex, on March 31, 1926.

3. It reasserts and reaffirms all the other allegations contained in the amended complaint filed in this cause.

1. It joins issue on the first, second and third affirmative defenses contained in the answer of this defendant.

40 KESSLER & KESSLER,
 Attorneys for the Plaintiff,
 Newark Woodworking Co., Inc.

NOTICE.

Filed February 2, 1929.

ESSEX COUNTY CIRCUIT COURT.

NEWARK WOODWORKING Co., INC., a corporation of New Jersey, <i>Plaintiff,</i> <i>vs.</i> R. BOESCH, INC., owner, RU- DOLPH BOESCH, owner and builder, HARRY FRIEDLAND, present owner, FEDERAL TRUST COMPANY, a corporation, HARRY KIRSCH and GEORGE OLLENDORF, mortgagees, <i>Defendants.</i>	}	Action at Law. On Mechanics' Lien. Notice.	10 20
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To William Greenfield, Esq., attorney for de-
 fendant, Harry Friedland:

TAKE NOTICE that on Saturday, February 9,
 1929, at 10 o'clock in the forenoon, or as soon
 thereafter as counsel can be heard, we shall
 apply to the Honorable William A. Smith, one
 of the Judges of the Essex County Circuit Court,
 at the Court House, Newark, N. J., for an order
 to extend the time to prosecute and restore the
 above entitled case to the list.

Respectfully yours,

KESSLER & KESSLER.

Dated January 31, 1929.

Notice.

Due and legal service of true copy of the within notice is hereby acknowledged this 31st day of January, 1929.

WM. GREENFIELD,
Attorney of Defendant,
Harry Friedland.

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Acknowledged January 31, 1929.

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Affidavit of Samuel I. Kessler.

Some months thereafter after numerous telephone calls and conversations, said William Greenfield prepared a State of Facts which were submitted to this Deponent and this Deponent informed Mr. Greenfield that he could not agree upon that State of Facts. After
10 considerable conversation and conferences Mr. Greenfield agreed to prepare a new State of Facts, which had been mutually agreed upon over the telephone. Since then your Deponent has been unable to procure from the defendant's attorney the State of Facts in accordance with the agreement in open Court."

SAMUEL I. KESSLER.

Sworn to and subscribed before
20 me this 5th day of February,
1929.

LOUISE B. DENNIS,
Notary Public of N. J.
My commission expires April 7, 1932.

Due and legal service of the within affidavit
is hereby acknowledged this 6th day of Feb.,
1929.

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WM. GREENFIELD.

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ORDER.

Filed February 13, 1929.

ESSEX COUNTY CIRCUIT COURT.

NEWARK WOODWORKING Co., INC., a corporation of New Jersey, <i>Plaintiff,</i> <i>vs.</i> R. BOESCH, INC., owner, <i>et als.</i> , <i>Defendants.</i>	}	<i>Action at Law.</i> <i>On Mechanics' Lien. Order.</i>	10
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Application having been made, upon notice, for an order extending the time within which to prosecute the above suit and restore same to the list; and, after hearing the argument of William Greenfield, attorney for the defendant, Harry Friedland, and Samuel I. Kessler, attorney for the plaintiff; and it appearing that the matter came on regularly for trial and by agreement between the attorneys it was agreed that the case be tried before this Court without a jury, upon an agreed State of Facts. And

It further appearing that the attorneys cannot agree upon the facts; and plaintiff having given notice of this motion, and it appearing that there was no undue delay on the part of the plaintiff in prosecuting this action, it is thereupon on this 13th day of February, 1929,

ORDERED that the time for prosecution of the above suit be extended, upon the condition that the plaintiff give notice of trial for the April term, 1929.

WM. A. SMITH,
 Judge. 40

RULE FOR JUDGMENT.

Filed July 30, 1929.

ESSEX COUNTY CIRCUIT COURT.

10	NEWARK WOODWORKING Co., INC., a corporation of New Jersey, <div style="text-align: right;"><i>Plaintiff,</i></div>	}	<i>Action</i>
	<i>vs.</i>		<i>at Law.</i>
20	R. BOESCH, INC., owner; RU- DOLPH BOESCH, owner and builder; HARRY FRIELAND, present owner; FEDERAL TRUST COMPANY, a corporation; HARRY HIRSCH and GEORGE OLLENDORF, mortgagees, <div style="text-align: right;"><i>Defendants.</i></div>		<i>On</i>
30		<i>Mechanics'</i>	
		<i>Lien.</i>	
40		<i>Rule for</i>	
		<i>Judgment.</i>	

The summons and complaint in this cause having been duly served upon the defendants and the issues joined having been tried before William A. Smith, Judge of the said Court, on the 14th day of June, 1929, counsel for both sides having agreed to submit the case to the Court on an agreed state of facts insofar as the issue between the plaintiff and Harry Frieland is concerned; and the Court having found upon the facts and proofs submitted and the finding as filed that the plaintiff is entitled to a judgment under the lien claim herein filed;

And the Court having further found that George D. Hendrickson, Esq., has been appointed receiver for the plaintiff, Newark Woodworking Co., Inc., and the attorneys for the plaintiff having suggested such appointment upon the record

Rule for Judgment.

and having consented that said receiver be substituted as plaintiff in this action,

It is on this 27th day of July, 1929, ORDERED that judgment final be entered in favor of the substituted plaintiff, George D. Hendrickson, receiver for the Newark Woodworking Co., Inc., for the sum of \$707 with costs to be taxed, generally against the said defendant, Harry Frieland, and specially to be made of the lands and building in the complaint described as follows: 10

“The said building is a one-family frame dwelling and is located on a lot of land or curtilage situate in the City of Newark, County of Essex and State of New Jersey, more particularly described as follows:

“BEGINNING at a point on northeasterly side of Chancellor avenue distant southeasterly along said side of Chancellor avenue 300.65' from southeasterly side of Bergen street; thence north 46° 27' east 103.79 ft., thence south 41° 49' east 50.02 ft., thence south 46° 27' west 105.34 ft. to Chancellor avenue thence along same north 40° 3' west 50.09 ft. to point and place of BEGINNING.” 20

Let the above rule be entered on the minutes.

WM. A. SMITH,
Judge. 30

FINDINGS OF JUDGE SMITH.

Filed July 29, 1929.

ESSEX COUNTY CIRCUIT COURT.

10	NEWARK WOODWORKING CO., INC., a corporation, <div style="text-align: right;"><i>Plaintiff,</i></div>	}	
	<i>vs.</i>		<i>Action at Law.</i>
	R. BOESCH, INC., owner, RUDOLPH BOESCH, owner and builder; HARRY FRIELAND, present owner; FEDERAL TRUST COMPANY, a corporation; HARRY HIRSCH and GEORGE OLLENDORF, mortgagees, <div style="text-align: right;"><i>Defendants.</i></div>	}	<i>On Mechanics' Lien Findings.</i>
20			

Kessler & Kessler (by Samuel I. Kessler), attorneys for plaintiff.

William Greenfield, attorney for defendant Harry Frieland.

SMITH, J.

30 This case came on for trial on June 14, 1929, and counsel agreed to submit the case to the Court on an agreed state of facts in so far as the issue between the plaintiff and Harry Frieland is concerned, the minutes of the trial being as follows:

The following are the facts admitted by Kessler & Kessler, counsel for plaintiff, and William Greenfield, counsel for Harry Frieland, one of the defendants:

40 1. R. Boesch, Inc., was the owner of a tract of land described in the Mechanics' Lien upon

Findings of Judge Smith.

which the new building was erected by R. Boesch, Inc.

2. That the plaintiff company supplied material used in the erection and construction of said building, between April 17, 1925, and December 2, 1925.

10

3. That no contract between R. Boesch, Inc., and the plaintiff company for the supply of material was ever filed in the County Clerk's office.

4. That the plaintiff claims a balance of \$707,- being \$500 balance on the contract as annexed to the complaint dated April 17, 1925, and the further sum of \$207 on a later dated contract, a total of \$707.

5. That Harry Frieland entered into a contract for the purchase of that property with R. Boesch, Inc., dated the 8th day of February, 1926, in which contract the consideration for the purchase of that property was \$27,250.

20

6. That on March 30, 1926, Harry Frieland, performed his contract by taking title to the property and paying the consideration money mentioned in said contract in accordance with the terms therein, and on that date the deed for said property was delivered and the possession of the property was turned over to Harry Frieland, who continues in possession ever since.

30

7. On March 31, 1926 at 10:22 in the forenoon the deed was put on record in the Register's Office of the County of Essex, and at that time no Mechanics' Lien was on file nor did Harry Frieland have any knowledge or notice either directly or indirectly of any alleged claim of the plaintiff.

40

Findings of Judge Smith.

8. On March 31, 1926, at 3:45 P. M., a Mechanics' Lien was filed, summons and complaint issued, on said lien claim, which was after Harry Frieland had purchased the property, taken title thereto and was in possession of same. Neither
10 complaint issued on the 31st day of March, 1926, was Harry Frieland mentioned or made a party defendant in said suit.

9. It is admitted that the defendant Harry Frieland purchased for value without actual notice of the claim of the plaintiff at the time of taking title and that he obtained knowledge of its claim more than four months after the last material was furnished.

20 It is also stipulated that the building for which the material was furnished was a new building.

Counsel for the defendant Harry Frieland offered in evidence the agreement of sale dated February 8, 1926, and the lien claim and amended lien claim, and also an affidavit sworn to March 30, 1926, and made by Rudolph Boesch with reference to the title, which states that the property is free from all other liens and claims of every nature and description except as therein
30 stated, and also refers to the fact that all persons who signed a release of Mechanics' Lien are the only persons who have done any work or performed any labor or supplied any material.

I find the facts as agreed upon, and do further find that the defendant Harry Frieland was a bona fide purchaser for value before the lien claim was filed in the office of the County Clerk, but this does not save him from having his property subject to the lien, as the lien attached as of the date of the commencement of
40 the building, which was prior to his purchase.

Findings of Judge Smith.

I find that a receiver in bankruptcy has been appointed for the plaintiff, the Newark Woodworking Company, Inc., and that the attorneys for the plaintiff will suggest that such appointment and the order made may recite the changed status of the plaintiff.

I therefore find a judgment for the substituted plaintiff under the lien claim. 10

Findings of fact and law may be submitted if the plaintiff desires it, or I will sign a rule for judgment based on these findings.

The preliminary motions referred to by defendant's attorney in his brief have already been passed upon by this court and will therefore not be reviewed here.

July 20, 1929.

20

WM. A. SMITH,
Judge.

30

40

Exhibit D. 2.

EXHIBIT D. 2.

ARTICLES OF AGREEMENT, *Made the Eighth day of February, in the year of our Lord One Thousand Nine Hundred and Twenty-six.*

10 BETWEEN R. BOESCH, INC., a corporation organized and existing under the laws of the State of New Jersey, with its principal office in the City of Newark in the County of Essex and State of New Jersey party of the first part;

AND HARRY FRIELAND of the City of Newark in the County of Essex and State of New Jersey party of the second part;

20 WITNESSETH, That the said party of the first part, for and in consideration of the sum of TWENTY-SEVEN THOUSAND TWO HUNDRED AND FIFTY DOLLARS to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that it the said party of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns, by Deed of Warranty, free and clear of all encumbrances, except the

30 mortgages and restrictions hereinafter mentioned, on or before the First day of April, 1926 next ensuing the date hereof, ALL that certain lot, tract, or parcel, of land and premises, hereinafter particularly described situate, lying and being in the City of Newark in the County of Essex State of New Jersey.

40 BEGINNING at a point on the northeasterly side of Chancellor Avenue distant southeasterly along said side of Chancellor Avenue three hundred feet and sixty-five one-hundredths of a foot

Exhibit D. 2.

from the southeasterly side of Bergen Street; thence north forty-six degrees twenty-seven minutes east one hundred and three feet and seventy-nine one-hundredths of a foot; thence south forty-one degrees forty-nine minutes east fifty feet and two one-hundredths of a foot; thence south forty-six degrees twenty-seven minutes west one hundred and five feet and thirty-four one-hundredths of a foot to Chancellor Avenue; thence along same north forty degrees three minutes west fifty feet and nine one-hundredths of a foot to the point and place of Beginning. 10

Being known and designated as Nos. 37-39 Chancellor Avenue, consisting of a one-family brick and frame building now in the course of construction and about completed.

AND the said party of the second part, for himself, his heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, its successors and assigns, that he, the said party of the second part, will pay and satisfy or cause to be paid and satisfied, unto the said party of the first part, the said sum of Twenty-seven Thousand Two Hundred and Fifty Dollars as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say: The sum of Two Thousand Dollars (\$2000.) upon the execution of this agreement, the receipt whereof is hereby acknowledged; And the further sum of Fifteen Thousand Dollars (\$15000.) by the said party of the second part assuming the payment of a first mortgage for the sum of Fifteen Thousand Dollars held by the Federal Trust Company, dated the 15th day of January, 1926, the principal sum being due and payable within three years from the day and date of 20 30 40

Exhibit D. 2.

said mortgage with interest thereon at the rate
 of six per cent per annum, payable semi-annu-
 ally; And the further sum of Eight Thousand
 Dollars, by the said party of the second part
 assuming the payment of a second mortgage for
 the sum of Eight Thousand Dollars, dated the
 10 15th day of January, 1926, the principal sum
 being payable quarterly at the rate of Three
 Hundred Dollars every three months, with in-
 terest thereon at the rate of six per cent per
 annum, payable quarterly, in the same manner
 and under the same terms as provided for the
 payments on account of the principal sum; And
 the balance purchase price is to be paid in cash
 after the apportionment of taxes, insurance,
 water and interest on mortgages. The said pay-
 20 ments on the second mortgage to continue for
 nine months and the balance principal sum to
 be paid at the end of one year.

It is further covenanted and agreed by and
 between the parties hereto, for and in considera-
 tion of the said party of the second part pur-
 chasing the said land and premises and paying
 the consideration money therefore as herein
 mentioned, that it, the said party of the first
 part, for itself, its successors and assigns, cove-
 30 nants and agrees to install the following work
 in addition thereto without any extra charge or
 compensation therefore as that being a condition
 precedent to accepting the title and paying the
 purchase price therefore:

To install six-needle one-head shower bath,
 Plate P 2766 of the Standard catalogue, the
 shower to be embedded in tile of the same kind
 and quality of the tile now in said bath room
 up to the height of the ceiling, the said work to

Exhibit D. 2.

be done water-tight and to be in complete working order.

To install a Fortune gas range, Form BE, made by Abram Cox Stove Company, the same to be installed and connected complete in working order.

To install one dish closet in kitchen and shelvings in pantry. 10

To construct a recepticle closet or preserve room in cellar, the same to be six feet by six feet and up to the ceiling of the cellar and to be built of the same construction material as that of the partitions in the cellar.

To build bannister on cellar stairs. Also to provide ice-box drainage connected with sink and cellar. All panes of glass to be installed throughout the entire house. To install copper screens the full length of window, in all windows and all doors, throughout the entire house. 20

Also to finish and complete all detail work and complete the house in every detail.

All of the aforesaid work is to be completed and finished on the day and date herein fixed and appointed for the passing of title and paying the consideration money therefore.

This agreement is further made upon the express condition that the restrictions herein mentioned and specified applies to all of the property on the northerly side of Chancellor Avenue from Elizabeth Avenue to Bergen Street and also on the southerly side of Chancellor Avenue from Elizabeth Avenue to Bergen Street, all of which is made a condition precedent to the accepting of title and paying the consideration money therefore. 30

Exhibit D. 2.

Restrictions:

(1) That party of the second part, his heirs and assigns, shall *nor* nor will use, cause, suffer or permit the premises hereby granted, or any part thereof, to be at any time used for other than private residence purposes; and shall not
 10 nor will erect, cause, suffer or permit to be erected on said premises, or any part thereof, any building except one, one-family dwelling house and the appropriate outbuildings thereof; and shall not nor will use, cause, suffer or permit any building, or any part thereof, that may be erected thereon, to be used except for such purposes.

(2) That party of the second part, his heirs and assigns shall not nor will erect on said
 20 premises, or any part thereof any dwelling house the cost whereof shall, exclusive of the cost of outbuildings connected therewith, be less than \$5000. and shall not nor will erect, cause, suffer or permit to be erected on said premises, or any part thereof, any building whatsoever of more than two and one-half stories in height nor any building with a roof of the style designated in the building trade as a "flat roof."

(3) That the party of the second part, his
 30 heirs and assigns shall not nor will erect, cause, suffer or permit to be erected upon said premises, any outbuildings, that shall at any point be within 70 feet of the northerly side line of Chancellor Avenue and shall not nor will erect, cause, suffer or permit to be erected on said premises any dwelling house the outside line or lines of the foundation wall or walls of which shall at any point be within 23 feet of said northerly line of said Chancellor Avenue; nor any
 40 dwelling house, fence or other structure or erec-

Exhibit D. 2.

tion whatsoever, any part of which shall be within 10 feet of said Chancellor line of Avenue.

(4) That said party of the second part, his heirs and assigns shall not nor will erect, cause, or suffer or permit to be erected or maintained upon said premises any barn or stable for the use of horses, cows, sheep or other animals.

10

(5) That said party of the second part, his heirs or assigns, shall not nor will erect, cause, suffer or permit to be erected on said premises or any part thereof any fence or structure intended for the purpose of a fence, that shall exceed 4 feet in height, nor shall such fence or structure intended for the purpose of a fence be constructed of wood.

(6) These covenants shall be taken to be real covenants, running with the premises hereby conveyed and every part thereof and binding upon party of the second part, his heirs executors, administrators and assigns, and any person or persons in possession under him or his title, and shall continue in full force and effect until Jan. 1, 1935.

20

The said party of the first part hereby reserves to itself, its successors or assigns, the right to erect, keep and maintain upon the rear of the premises hereinabove described immediately adjoining the rear line thereof, a pole with one or more cross arms attached thereto, to be used by said party of the first part, its successors or assigns, for the purpose of sustaining thereon telephone and electric light wires, together with the right to string said wires across said lot at the rear thereof, from said pole to other poles in the neighborhood, in both directions, the said poles to be not less than 35 feet in height, and said cross arms not to extend over said lot more

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Exhibit D. 2.

than 4 feet from rear line thereof, also reserving unto said party of the first part, its successors and assigns, the right to enter upon the said lot of land at all reasonable time for the purpose of stringing said wires and for the purposes of maintaining and keep the said pole and wires in repair. Oil in the oil tank, now used for the oil burner to be apportioned between the parties hereof.

This Contract is entered into upon the knowledge of the parties as to the value of the land and whatever buildings are upon the same, and not on any representations made as to character or quality.

AND IT IS FURTHER AGREED by the parties to these presents, that the said party of the second part, his heirs and assigns, may enter into and upon the said land and premises on the date and day of settlement next ensuing the date hereof, and from thence take the rents, issues and profits to his and their use.

AND IT IS FURTHER AGREED by the parties hereto, that the said deed of Warranty shall be delivered and received at office of William Greenfield, 130 Market Street, Newark, N. J. between the hours of ten in the forenoon and five o'clock in the afternoon on the said date and day of settlement next ensuing the date hereof.

The rents of said premises, insurance premiums, water rents, taxes, and interest on Mortgage, if any, shall be adjusted, apportioned and allowed as of the day of delivery of said deed.

Gas and electric fixtures, gas stoves, hot water heaters and chandeliers, carpets, linoleum, mats and matting in halls, screens, shades, awnings, ash cans, heating apparatus, and all other personal property appurtenant to or used in the

Exhibit D. 2.

operation of said premises is represented to be owned by seller and is included in this sale.

The risk of loss or damage to said premises by fire or otherwise until the delivery of said deed is assumed by the party of the first part.

In case the premises shall suffer injury beyond the ordinary wear and tear, the party of the first part, shall repair the damage before the date set for delivery of said deed or make an appropriate deduction from the purchase price herein stated. 10

It is understood and agreed that the buildings upon said premises are all within the boundary lines of the property as described in the deed therefor, and that there are no encroachments thereon and that the buildings comply with municipal ordinances and regulations and the provisions of the New Jersey State Tenement House Act as enforced by the State Board of Tenement House Supervision, to be shown by the report of the department or board enforcing the same where such ordinances, regulations and said act apply. 20

It is expressly understood and agreed that the title to the land and premises hereby agreed to be conveyed is not derived from any proceedings or any Act for the Sale of Land for non-payment of the municipal taxes or assessments, or by adverse possession. 30

The premises above described are sold subject to restrictions appearing of record, if any.

If at any time before the delivery of the deed the premises or any part thereof shall be or shall have been affected by any assessment or assessments which are or may become payable in annual installments of which the first installment is then due or has been paid, then for the pur- 40

Exhibit D. 2.

poses of this contract all the unpaid installments of any such assessment, including those which are to become due and payable after the delivery of the deed, shall be deemed to be due and payable and to be liens upon the premises affected thereby and shall be paid and discharged by the
 10 seller thereof, upon the delivery of the deed.

AND for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators.

IN WITNESS WHEREOF, the said party of the first part has caused these presents to be signed by its President, and attested by its Secretary and its corporate seal hereto affixed the day and year first above written, and the said party of the
 20 second part has hereunto set his hand and seal the day and year first above written.

R. BOESCH, INC.
 By RUDOLPH BOESCH,
 President.

SIGNED, SEALED AND DELIVERED
 IN THE PRESENCE OF

HARRY FRIELAND

30 Attest: EDGAR HEDDEN,
 Asst. Secretary. (SEAL)

In consideration of mutual promises and agreements herein stated, we hereby agree to extend the date for the delivery of deed and execution of this contract to at the same hour and place

WITNESS our hands and seals this day of
 A. D. 19

Exhibit D. 2.

STATE OF NEW JERSEY }
 COUNTY OF ESSEX } ss.

BE IT REMEMBERED, That on this Eighth day of February, in the year of our Lord One Thousand Nine Hundred and Twenty-six, before me the subscriber, a Master in Chancery of the State of New Jersey, personally appeared

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, who being by me duly sworn on his oath, says that he is the Secretary of R. Boesch, Inc., the grantor named in the within Instrument; that Rudolph Boesch is the President of said corporation; that deponent well knows the corporate seal of said corporation; and the seal affixed to said Instrument is such corporate seal and was thereto affixed, and said Instrument signed and delivered by said

President, as and for his voluntary act and deed and as and for the voluntary act and deed of said corporation, in presence of deponent, who thereupon subscribed his name thereto as wit-

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EDGAR HEDDEN.

Sworn and subscribed before
 me, at Newark, N. J.
 the date aforesaid.

WM. GREENFIELD,
 Master in Chancery of N. J.

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Exhibit D. 2.

CONTRACT

FOR THE SALE OF PROPERTY

R. BOESCH, INC.,
a corporation,

10

to

HARRY FRIELAND

Dated, February 8, 1926

WILLIAM GREENFIELD

Counsellor at Law

128 Market Street

Newark, N. J.

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ORDER.

Filed August 31, 1929.

ESSEX COUNTY CIRCUIT COURT.

NEWARK WOODWORKING Co., INC., a corporation, <div style="text-align: right;"><i>Plaintiff,</i></div>	}	10
<i>vs.</i>		
R. BOESCH, INC., owner; RU- DOLPH BOESCH, owner and builder; HARRY FRIELAND, present owner; FEDERAL TRUST COMPANY, a corporation; HARRY HIRSCH and GEORGE OL- LENDORF, mortgagees, <div style="text-align: right;"><i>Defendants.</i></div>	}	20

*Action at
Law.**On Me-
chanics' Lien.**Order.*

Application having been made by William Greenfield, Esquire, attorney for Harry Frieland, one of the defendants in the above cause for an order to embody in the findings of facts and law in the above cause the motion made by counsel on the opening of the trial of the above cause, of which motion a true and correct record is herein embodied and made part of this order, and also a motion made by counsel at the closing of the case alleging the same grounds and reasons as on the motion of counsel at the opening of the trial of the above cause for a judgment in favor of the defendant, Harry Frieland and against the plaintiff and the cancellation of the mechanics' lien in the above cause, both of which motions after the argument of respective counsel has been overruled by this court and exceptions duly allowed as grounds for appeal, and which motions are made part of this order;

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Order.

It is therefore on this 29th day of August, 1929, ORDERED, that the foregoing order be entered and made part of the record and State of Case for appeal in the above cause.

10 William Greenfield, Esquire, counsel for the defendant, Harry Frieland, moved that the afore-said plaintiff be non-suited on the following grounds:

1. Since the defendant, Harry Frieland, is a bona fide purchaser of the property in question in good faith, without notice of any lien claim, particularly, this lien claim, and paid the consideration money therefore, and was not made a party defendant to the lien claim filed nor to the summons originally issued within the period of four months in accordance with the Mechanics' 20 Lien Act, the plaintiff therefore cannot succeed in this suit, as that being a statutory proceeding, the statute must be strictly followed. Hence, there should be a non-suit entered in favor of the defendant, Harry Frieland and the property be discharged of the Mechanics' Lien Claim.

2. The defendant, Harry Frieland moves for a dismissal of the proceedings on the further ground that the Court was without jurisdiction or authority to allow an order amending the Mechanics' Lien Claim after the expiration of four 30 months' period, by making Harry Frieland a party defendant, as the application was made six months after the last work was done. Hence, the building by virtue of our Mechanics' Lien Act, section 16, page 208, and section 18, page 216, Luce's 1928 supplement, is freed and discharged of the said lien. Therefore, the order allowing the amendment making Harry Frieland a party defendant was illegal and contrary to our statute 40 made and provided in such cases.

Order.

3. The defendant, Harry Frieland moves for a dismissal of the proceedings upon the further ground that all mechanics' lien claim suits must be prosecuted to judgment within one year or an order obtained and entered within the year extending the time for the entry of final judgment. The plaintiff having failed to do so and having failed to obtain or enter such order of the Court extending the time for the prosecution of the suit within the year, therefore, under our Mechanics' Lien Act, the property is freed and discharged of said Mechanics' Lien Claim. 10

4. The plaintiff having stipulated and agreed that Harry Frieland is an innocent purchaser for value without notice of any mechanics' lien, and not having been made a party defendant within the time provided, by virtue of our Mechanics' Lien Act, section 18, page 216, Luce's 1928 supplement, which provides that a lien claim must be filed and summons must be issued within four months from the date of last item of claim and suit prosecuted to judgment within the year, all of which conditions were not performed in the case at bar, and the property is therefore discharged of the lien claim and this suit should be dismissed. 20

Motion denied and exception allowed as grounds for appeal. 30

William Greenfield, Esquire, counsel for the defendant, Harry Frieland, moved at the closing of plaintiff's and defendant's case, for a judgment in favor of the defendant Harry Frieland and against the plaintiff and a discharge of the Mechanics' Lien Claim against said land and premises, on the same grounds as set forth in the motion of non-suit.

Motion denied and exception allowed as grounds for appeal. 40

NOTICE TO DISMISS.

Filed September 5, 1929.

ESSEX COUNTY CIRCUIT COURT.

10	NEWARK WOODWORKING Co., INC., a corporation of New Jersey, <div style="text-align: right;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> R. BOESCH, INC., Owner, <i>et als.</i> , <div style="text-align: right;"><i>Defendants.</i></div>	}	<i>Action at Law.</i> <i>On Mechanics' Lien.</i> <i>Notice to Dismiss.</i>
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To Kessler & Kessler, Esquires, attorneys for
the above named plaintiff:

20 SIRs:

PLEASE TAKE NOTICE that I shall on Saturday, February 9, 1929, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard thereon, apply to the Honorable William A. Smith, one of the Judges of the Essex County Circuit Court at the County Court House, Newark, New Jersey, to move to dismiss the mechanics' lien as to Harry Frieland, present owner, on the following grounds:

- 30
1. That said Harry Frieland was not made a party defendant within the four months' period limited by the statute in such case made and provided.
 2. That the said plaintiff did not prosecute the said action to judgment within one year from the date of the last work done on said building or material supplied.

Notice to Dismiss.

3. That the said plaintiff was guilty of laches in failing to prosecute said action.

WM. GREENFIELD,
Attorney of Harry Frieland,
Present Owner.

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Service of a true copy of the within notice is hereby acknowledged this first day of February A. D. 1929.

KESSLER & KESSLER,
Attys. of Plaintiff.

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ASSIGNMENT OF REASONS.

Filed September 5, 1929.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

ESSEX COUNTY CIRCUIT.

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NEWARK WOODWORKING Co., INC.,
a corporation, and GEORGE
D. HENDRICKSON, receiver,
Plaintiffs-Appellees,

vs.

20

R. BOESCH, INC., owner, RU-
DOLPH BOESCH, owner and
builder, HARRY FRIELAND,
present owner, FEDERAL
TRUST COMPANY, a corpora-
tion, HARRY. HIRSCH and
GEORGE OLLENDORF, mort-
gagees,

Defendants,

and

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HARRY FRIELAND,
Defendant-Appellant.

*Action at
Law.*

*On Mechan-
ics' Lien.*

On Appeal.

*Assignment
of Reasons.*

To Kessler & Kessler, Esquires, attorneys for
plaintiffs.

The following are the reasons upon which the
defendant, Harry Frieland, will seek to reverse
the judgment entered in the Essex County Cir-
cuit Court in the above cause.

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1. That the Court erred as a matter of law
in allowing the amendments to the mechanics'

Assignment of Reasons.

lien, wherein it permitted the plaintiff to make Harry Frieland, one of the defendants, said application having been made more than four months after the last material was supplied and work done, which was allowed over the objection of the defendant, Harry Frieland.

2. That the Court erred as a matter of law in entering an order on the application of the plaintiff for the extension of the time to prosecute said action, which said order was applied for and granted more than a year after the suit had been instituted.

10

3. That the Court erred as a matter of law in overruling the motion for non-suit, whereas the motion for non-suit should have been granted.

4. The Court erred as a matter of law in denying the motion for a verdict in favor of the defendant, Harry Frieland and against the plaintiff.

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5. The Court erred as a matter of law in rendering a judgment over the objection of the defendant, Harry Frieland, in favor of the plaintiff and against the defendant, whereas there should have been a judgment in favor of the defendant, Harry Frieland and against the plaintiff.

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6. That the judgment in favor of the plaintiff was contrary to law on the admitted facts in this cause.

7. The Court having found that the said defendant, Harry Frieland, being a bona fide purchaser for value without notice of any claim at the time of the purchase should have as a matter

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Assignment of Reasons.

of law rendered a verdict in favor of the defendant, Harry Frieland and against the plaintiff.

WM. GREENFIELD,
Attorney of Harry Frieland,
Defendant-Appellant.

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Service of a true copy of the within assignment of reasons is hereby acknowledged this 4th day of September A. D. 1929.

KESSLER & KESSLER,
Attorney of Plaintiffs-Appellee.

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JUDGMENT.

ESSEX COUNTY CIRCUIT COURT.

40129

NEWARK WOODWORKING Co., INC.,
a corporation of New Jersey,
Plaintiff,

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vs.

*Action at
Law.*

R. BOESCH, INC., owner, RU-
DOLPH BOESCH, owner and
builder, HARRY FRIELAND,
present owner, FEDERAL
TRUST COMPANY, a corp.,
HARRY HIRSCH and GEORGE OL-
LENDORF, mortgagees,

*On Me-
chanics' Lien
by Default.*

20

Defendants.

Judgment entered July 30, 1929.

Damage\$707.00

Costs 75.23

Total\$782.23

Judgment on Mechanics' Lien by Default in
the above entitled action was rendered thirtieth
day of July A. D. nineteen hundred and twenty-
nine in favor of the plaintiff George D. Hendrick-
son, receiver for the Newark Woodworking Co.,
Inc., and against the defendant Harry Frieland
for the sum of seven hundred seven dollars dam-
age and seventy-five dollars and twenty-three
cents costs of suit; specially to be made of the
lands and building in the complaint described as
follows:

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Judgment.

“The said building is a one family frame dwelling and is located on a lot of land or curtilage situated in the City of Newark, County of Essex and State of New Jersey more particularly described as follows:

10 Beginning at a point on the northeasterly side of Chancellor avenue distant southeasterly along said side of Chancellor avenue 300.65' from southeasterly side of Bergen street; thence north 46° 27' east 103.79 ft. thence south 41° 49' east 50.02 ft. thence south 46° 27' west 105.34 ft. to Chancellor avenue thence along same north 40° 3' west 50.09 ft. to point and place of beginning.

Judgment entered and signed July 30, 1929.

WILLIAM S. GUMMERE,
Judge.

20 JOHN H. SCOTT,
Clerk.

Book 108 Circuit Court Judgments page 219.

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ORDER AMENDING LIEN CLAIM.

Filed July 2, 1926.

ESSEX COUNTY CIRCUIT COURT.

NEWARK WOODWORKING Co., INC.,
a corporation of New Jersey,
Plaintiff,

vs.

R. BOESCH, INC., owner; RUDOLPH BOESCH, owner and builder; HARRY FRIEDLAND, present owner; FEDERAL TRUST COMPANY, a corporation; HARRY HIRSCH and GEORGE OLLENDORF, mortgagee,
Defendants.

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*Order
Amending
Lien Claim.*

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Application being made to this court by claimant, R. Boesch, Mr. Rudolph Boesch, Federal Trust Co., Harry Hirsch and George Ollendorf, on due notice to all the defendants for an order to amend the lien claim and complaint filed in the above cause in the County Clerk's Office of Essex County by adding the name of "Harry Friedland" as present owner thereto, and to change and amend the name of "Rudolph Boesch, Inc.," to "R. Boesch, Inc.," and affidavits having been read by claimant in support of said application and argument of William Greenfield appearing of counsel for Harry Friedland, present owner, having been heard, and it appearing to the satisfaction of this court that the lien claim and complaint as filed should be amended, it is on this 1st day of July, 1926, on

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Order Amending Lien Claim.

motion of Kessler & Kessler, attorneys for the claimant,

10 ORDERED that the claimant have leave, and leave is hereby given to amend the lien claim and complaint filed by adding the name of "Harry Friedland" as present owner and to change and amend the name of "Rudolph Boesch, Inc.," to "R. Boesch, Inc.," and it is

FURTHER ORDERED that service of a copy of the amended complaint be served on Harry Friedland, present owner, within four days from the date of filing the amended complaint.

Let the above rule be entered on the minutes.

WORRALL MOUNTAIN,
Circuit Court Judge.

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LIEN CLAIM.

ESSEX COUNTY CLERK'S OFFICE.

NEWARK WOODWORKING Co., INC., a corporation of New Jersey, <i>Claimant,</i>	10
<i>vs.</i>	
RUDOLPH BOESCH, INC., owner; RUDOLPH BOESCH, owner, and builder; FEDERAL TRUST COM- PANY, a corporation of New Jersey, HARRY HIRSCH and GEORGE OLLENDORF, mort- gagees, <i>Defendants.</i>	20

Lien Claim.

COUNTY OF ESSEX, ss.

BE it known that the Newark Woodworking Co., Inc., a corporation of the City of Newark, County of Essex and State of New Jersey, claims a lien on the building and lands hereinafter described, pursuant to the statute in such case made and provided for a debt contracted and owing to the said corporation for material furnished in the building of a certain new building described as follows: 30

First: the said building is a one-family frame dwelling and is located on a lot of land or curtilage situate in the City of Newark, County of Essex and State of New Jersey, more particularly described as follows:

"BEGINNING at a point on northeasterly side of Chancellor avenue distant southeasterly along said side of Chancellor avenue 300.65' from southeasterly side of Bergen street; thence north 40

Lien Claim.

46° 27' east 103.79 ft., thence south 41° 49' east 50.02 ft., thence south 46° 27' west 105.34 ft. to Chancellor avenue thence along same north 40° 3' west 50.09 ft. to point and place of BEGINNING."

10 Second: The name of the owner of the land and the estate therein upon which the lien is claimed, is Rudolph Boesch, Inc.

Third: The Federal Trust Company, a corporation of the State of New Jersey, holds a mortgage upon the said premises, upon which this lien is claimed in the sum of Fifteen Thousand (\$15,000.) Dollars.

20 Harry Hirsch of the City of Newark, State of New Jersey held a mortgage upon the said premises, upon which this lien is claimed in the sum of Eight Thousand (\$8,000.) Dollars.

The said lien held by Harry Hirsch in the sum of Eight Thousand (\$8,000.) Dollars has been assigned to George Ollendorf who now holds the mortgage on the premises, upon which this lien is claimed.

30 Fourth: The name of the person who contracted the debt and for whom and at whose request the materials were furnished and for which this lien is claimed is Rudolph Boesch.

Fifth: The following is a bill of particulars of the aforesaid materials furnished, the amount and kind of materials furnished and the price at which and the times when the same were furnished, and given credit for all the payments thereon and the deductions that ought to be made therefrom, and exhibiting the balance justly due to the plaintiff corporation, viz:

40 Materials furnished according to the annexed agreement which is a true copy of the agree-

Lien Claim.

ment entered into between the claimant corporation and the said owner from April 17th, 1925 to December 2nd, 1925, furnishing all trim, frames, sash and doors in the construction of the said house.

In addition to the foregoing contract claimant supplied builder and owners extra material as listed under Schedule B. hereto annexed, which amounted to the sum of Two Hundred Seven (\$207.00) Dollars. 10

Amount of contract	\$1,250.00	
Extra materials	207.00	

Total	\$1,457.00	
Credits, Oct. 27, 1925	750.00	

Balance due	\$ 707.00	20

All of the above materials were furnished between April 17 and December 2, 1925, which said mentioned debt is a debt for materials furnished, for which said debt is due.

NEWARK WOODWORKING CO., INC.,

By Maurice Levin,
President.

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Lien Claim.

CONTRACT.

NEWARK WOODWORKING CO. INC.
 265 HILLSIDE AVENUE
 NEWARK, N. J.

April 17, 1925.

10 R. BOESH, INC.
 To Rudolph Boesch
 196 Market St.
 Newark, N. J.

We agree to furnish you with the material necessary for interior trim, frames, sash, and doors as per plans submitted for a One Family Dwelling to be erected at #37 Chancellor Avenue, Newark, N. J.

20 Material Whitewood Trim One Panel Miracle or
 Wedgewood Doors 1-3/4" (Birch)
 1 Linen Closet 2 Bookcases and Columns (L.
 G. Doors)
 1 Breakfast Nook
 1 Pair French Doors & Sidelights (B.P.G.)
 1 Front Door and Sidelights (B.P.G.)
 All Frames, Sash & Trim
 All Interior Doors & Trim
 All Base, Base Mldg., Floor Mldg. Picture
 Mldg. and all interior trim for completion
 30 of House. First Floor Chestnut Balance
 W. W.

Terms One Third on Delivery of Frames & Sash
 One Third on Delivery of Standing Trim
 Balance on Completion of contract.
 For the sum of Twelve Hundred Fifty Dollars
 (\$1250)

NEWARK WOODWORKING CO. INC.
 R. Boesch, Inc.

40 Accepted by (signed) By R. Boesch, Pres.

Lien Claim.

NEWARK WOODWORKING CO. INC.
265 HILLSIDE AVENUE
NEWARK, N. J.

To R. BOESCH
37 Chancellor Ave.
Newark, N. J.

10

March 26, 1926.

3/26/26

2 Miracle Doors & Trim...	18.00	36.00	
2 Pair Garage Doors.....	16.00	32.00	
1 Door & Frame Garage....	14.00	14.00	
1 Door & Frame Cellar.....	14.00	14.00	
1 Leaded Glass 7 x 2.....	16.00	16.00	
2 Frames & Sash.....	8.00	16.00	
9 Brackets	4.00	36.00	
4 Brackets Large	6.00	24.00	20
1000' Wall Moulding.....	15.00	15.00	
1 Louvre	4.00	4.00	
		<hr/>	
Total		207.00	

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

MAURICE LEVIN, being duly sworn, according to law on his oath deposes and says:

30

That I am the president of the Newark Woodworking Co., Inc., a corporation, the claimant named in the foregoing claim; that the bill of particulars and statements therein set forth are all within my knowledge and are true; that the same are for materials furnished by the said plaintiff corporation in the construction of the building as described in the said claim and that the time therein specified is correct; that the sum

40

Lien Claim.

of seven hundred and seven dollars (\$707.00) as claimed thereunder is justly due and owing.

MAURICE LEVIN.

10 Subscribed and sworn to before
me this 31st day of March,
A. D. 1926.

MEYER C. ELLENSTEIN,
Attorney at Law of N. J.

Indexed

Book 18

Page 63 E. C.

20 ESSEX COUNTY CLERK'S OFFICE

Newark Woodworking Co., Inc., a corporation of New Jersey,

Claimant,

vs.

Rudolph Boesch, Inc., *et als.*,

Defendants.

LIEN CLAIM

30

Law Offices
Kessler & Kessler
Union Building
9 Clinton Street,
Newark, N. J.
Attys. for Claimant

Filed March 31, 1926 3:41 P. M.
John H. Scott, Clerk.

40

Clerk's Certificate.

Summons issued on the within Lien
Claim first day of April A. D. 1926.

John H. Scott, Clerk.

Amended Summons & Complaint filed
July 8/1926.

10

John H. Scott, Clerk.

ESSEX COUNTY CLERK'S OFFICE

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

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

20

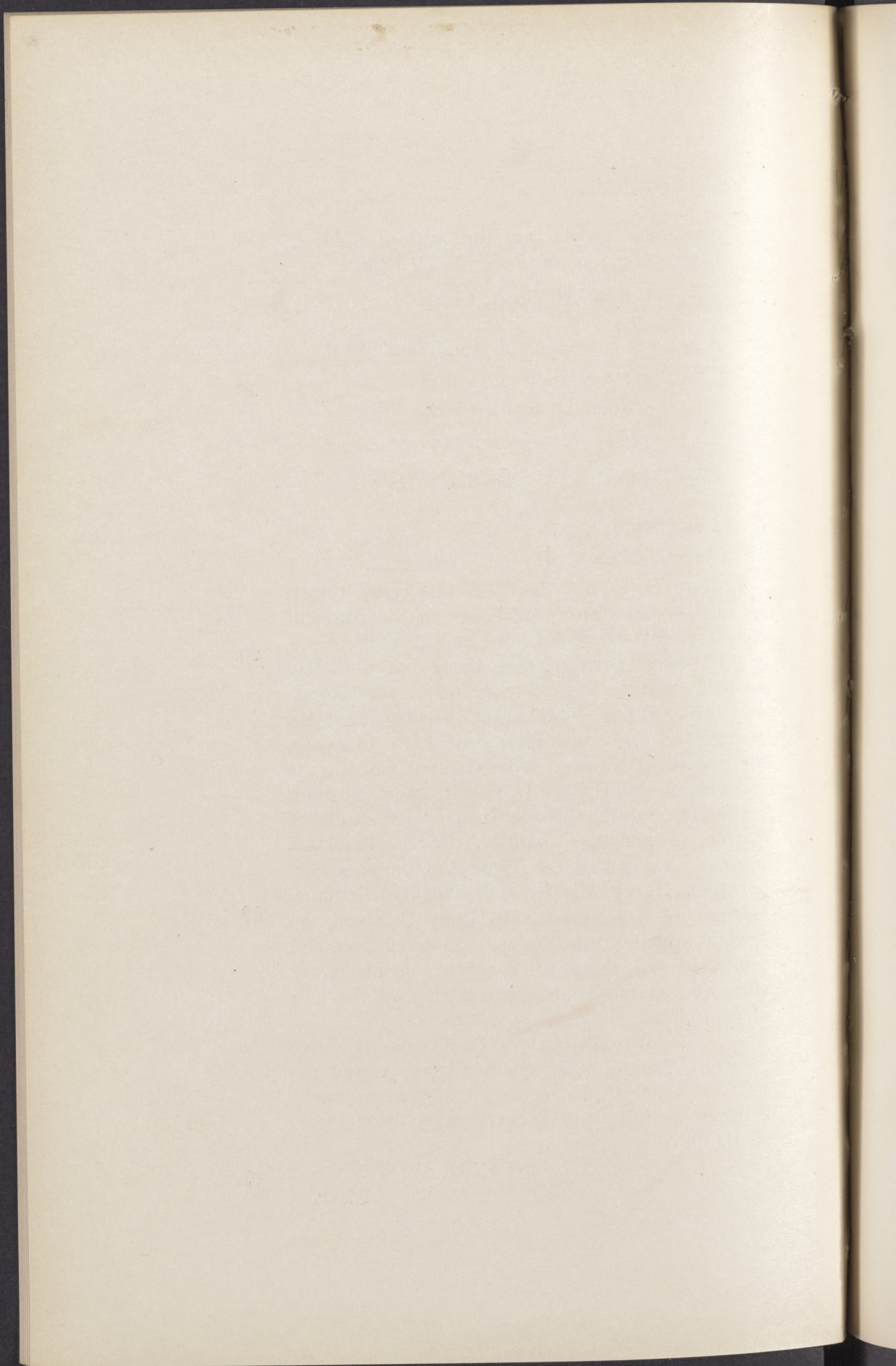
Do HEREBY CERTIFY, that the annexed instru-
ment is a true and correct copy of all the records
and proceedings together with the judgment
record and copy of Mechanics' Lien Claim in
the matter of Newark Woodworking Co., Inc., a
corporation and George D. Hendrickson, receiver,
plaintiffs, and R. Boesch, Inc., owner, Rudolph
Boesch, owner and builder, Harry Frieland,
present owner, Federal Trust Company, a cor-
poration, Harry Hirsch and George Ollendorf,
mortgagees, defendants and Harry Frieland, de-
fendant-appellant and the same is taken from and
compared with the original records on file in my
office and as the same now remains on the files
of said office.

30

IN TESTIMONY WHEREOF, I have
(SEAL) hereunto set my hand and affixed the
official seal of said Court and County
at Newark, N. J., this eleventh day of September,
A. D. 1929.

JOHN H. SCOTT,
Clerk.

40



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

New Jersey Court of Errors and Appeals

GEORGE D. HENDRICKSON, Receiver, substituted plaintiff for the NEWARK WOODWORKING Co., INC., a corporation of New Jersey,
Plaintiff-Appellee,

vs.

R. BOESCH, INC., Owners, RUDOLPH BOESCH, Owner and Builder, HARRY FRIELAND, present Owner, FEDERAL TRUST COMPANY, a corporation, HARRY HIRSCH and GEORGE OLLENDORF, Mortgagees,

Defendants,

and

HARRY FRIELAND,
Defendant-Appellant.

*Action
at Law.*

*On
Mechanics'
Lien.*

BRIEF FOR THE PLAINTIFF-RESPONDENT.

The facts in this matter have been agreed upon by stipulation of counsel for both parties as set forth in the State of the Case herein, and we do not deem it necessary to comment further upon them in this brief.

POINT I.

There was no error in law in the Court's granting the amendment to the lien claim.

Counsel for defendant contends that the lower Court was in error in allowing the original lien

claim to be amended so as to include the name of the true owner at the time the claim was filed. Such an order to amend was entered in this case upon motion, and counsel now argues that this was improper, claiming that the lien claim was discharged and nullified at the expiration of the four months' period in so far as it affected the defendant Frieland.

That the lien claim is not discharged and nullified at the expiration of the four months' period is clearly evidenced by the language of the Court in the case of *American Brick Co. v. Drinkhouse*, 59 N. J. L. 467, as follows:

“The defective lien claim is not a nullity and may be amended at any time before judgment is entered, although the application to amend is delayed until after the expiration of the time limited by Section 18 for filing a claim.”

This case was also followed in *Guerber v. Stafford*, 96 N. J. L. 180.

Defendant further urges that the Act and its provisions must be construed strictly and literally in favor of the builder and owner and that the amendment should not be allowed. The tendency of the Courts regarding amendments and in construing the Act is evidenced by the recent cases as favoring more liberal construction, so as to give full effect to both the language and spirit of that Act. The case of *Rizzolo v. Poysner*, 89 N. J. L. 622, holds as follows:

“Though the earlier cases leaned toward a strict construction of the Act, recent adjudications are to the contrary. Great liberality has been exercised by the Courts in permitting amendments * * * even after the expiration of the time for filing the lien. Such cases indicate the tendency of the Courts to give full effect to the law within

its language and spirit, without working injustice.”

Citing:

Buchanan v. Einstein, 87 N. J. L. 307;
Gardner Meeks v. Herald, 76 N. J. L. 524;
Vreeland v. Knickerbocker, 75 N. J. L. 551;
American Brick Co. v. Drinkhouse, 59 N. J. L. 467.

In the case at bar the lien claim was filed at approximately 3 o'clock in the afternoon. The deed to Frieland was recorded at 10 o'clock in the morning of the same day. After the expiration of the four months' period, the lower Court allowed the lien claim to be amended so as to include the name of Frieland, the true owner. As to the propriety of such procedure, we submit the case of *Vreeland v. Knickerbocker*, 75 N. J. L. 551:

“Where the wrong person is named as owner, the error may be corrected either by amendment or by filing a new claim.

“The claimant cannot, without amendment, bind any estate or interest other than that of the person named in the claim as owner; *but there is nothing in the letter or spirit of the Act that renders an error made in stating the name of the owner fatal to a subsequent attempt, either by amendment or by the filing of a separate claim, to reach estates or interests in the land owned by parties other than him who is named as owner in the claim first filed.* The party sued as owner in a mechanics' lien suit cannot discharge his interest in the land from the lien by saying that the claimant has formerly contemplated to subject the interest of another party in the land to a lien for the same debt.”

From the above cases it is clear that a defective lien claim may be amended at any time, whether before or after expiration of the four

months' period. The reason for this rule is expressed in the language of the Court in the case of *Edwards v. Derrickson*, 29 N. J. L. 471.

"It is objected that making of S— and S— defendants in this suit is fatal to it, the reason for said fatality being that they were not the owners at the time of the doing of the work and the furnishing of materials, but became the owners afterwards and before the lien claim was filed. This objection would seem to be well taken if a builder or owner can destroy the lien contemplated by the Act by selling or encumbering the property after the work is done or the materials furnished, but before the lien claim is filed. Can he do this? I will not discuss this question as it has not been raised, *and to admit it is to concede the law to be powerless nonsense*. I can make no such concession."

In this case title to the property was transferred between the time that the work was done, etc., and the claim filed, as in the case at bar.

"The persons who took that transfer, although they were bound at the time to know that the land was subject to the lien, for the new erections had just been made, yet they had no notice from the record or otherwise, that we know of, that proceedings would be instituted to enforce that lien; and when such proceedings were commenced by filing the claim and prosecuting it to judgment, it was not only right but necessary that they should be made parties. * * * There is no other way in which it properly could be done, and if it is not right in its present form, it must be, because a person who is the builder and owner at the time the contract is made and the work done, may wholly defeat the lien in all cases by a transfer of the premises between the time of the doing of the work and the filing of the lien claim, which he certainly cannot be permitted to do."

Defendant relies upon the case of *American Brick Co. v. Drinkhouse*, *supra*, as holding that an amendment is improper if it enlarges the claim, either in the amount of the debt, in the estate to be charged or in the persons to be effected. In this connection we quote from Luce on Mechanics' Liens, page 224, to show the comments of this authority upon the case cited:

"In this latter case the Court of Appeals held that the statute authorized an amendment which did not enlarge the claim, either in the amount of the debt, the estate to be charged or in the persons affected, but we think it clear that the Court did not intend to express the opinion that the power of amendment was limited to such amendments only, as was the one there allowed. *The error of naming the wrong person as owner is undoubtedly amendable under certain circumstances.*"

Citing:

Doty v. Auditorium Co., 56 Atl. 720;
Vreeland v. Knickerbocker, *supra*.

Defendant also cites Section 20 of the Mechanics' Lien Act, which provides:

"That the amendments authorized in this and in the next preceding section shall not affect the rights of any bona fide purchaser or mortgagee, acquired between the time of filing the original lien claim and that of filing said amendments."

This section clearly applies to rights acquired *between the time of filing of the claim and the time of making the amendment*. Such was not the situation in the case at bar. The defendant acquired whatever right he had in the property, and became the owner thereof, before the lien claim was first filed, and this is admitted in the stipulation of facts. Defendant's deed was recorded at approximately 10 o'clock in the morn-

ing, and the lien claim filed at 3 o'clock in the afternoon of the same day, after defendant had acquired title to the property. Defendant does not, therefore, come within the section above cited, and there is nothing in any of the other sections of the Act nor in the cases thereunder which prevents an amendment from affecting rights acquired before the filing of the lien claim.

Counsel, in objecting to the amendment allowed herein, stresses the point that his defendant was a bona fide purchaser and seems to rely upon Section 10 of the Mechanics' Lien Act. This section is quoted as follows:

"The lien given by this Act shall be and is hereby extended to all buildings of whatever description, erected or to be erected in this State, and the lots or curtilages whereon the same are erected, for all debts contracted by the owners thereof or by any other person with the consent of the owner or owners, in writing, for work done or materials furnished in and for the *repairing* or *alteration* of any such building";

"Provided, however, that said lien shall not be valid against a bona fide purchaser or mortgagee before said lien is filed in the office of the Clerk of the County, etc."

It is admitted that Frieland was a bona fide purchaser for value of the premises in question. But the language of this section above quoted clearly applies only to liens arising from *repairs* and *alterations* to buildings, and not to debts incurred in the erection of new buildings, as was the fact in the case at bar. The cases cited under this section also refer only to liens for repairs and alterations. The case of *Rugarber v. Potter*, 86 N. J. L. 177, holds as follows:

"This section provides that a contractor who has done work or furnished materials in the *repairing* or *alteration* of a building,

shall have a lien thereon for such work done, etc.”

And in the case of *Murphy v. Hussa*, 70 N. J. L. 381, cited in *Grantwood Lumber Co. v. Abbott*, 80 N. J. L. 564, the Court holds:

“The statute above mentioned (Section 10) gives a lien for a debt owing for work and materials used in *repairing* or *altering* a building, when the debt is contracted by the owner or some other person with the written consent of the owner.”

In the instant case it is admitted that the building was a new one and we respectfully urge that this section and the proviso therein contained would not apply to the case at bar.

The amendment objected to was merely to cure a defect in an otherwise valid lien claim so as to include the name of the true owner. We think it clear from the cases above cited and the construction which the Courts have put upon the statutes bearing on the question, that the lower Court was well within its legal rights in allowing an amendment so as to include the name of the true owner, even after the four months' period had expired. We think it equally clear that neither Section 10 nor Section 20 of the Mechanics' Lien Act, both cited by the defendant, applies to the case at bar.

For these reasons we respectfully urge that there was no error in the ruling of the lower Court in allowing the amendment referred to.

POINT II.

There was no error in the granting by the lower court of the motion to extend the time to prosecute this action.

The facts relating to this motion are as follows: Suit was regularly instituted and the case called for trial before the Honorable William A. Smith on the 23rd day of May, 1927. In open Court, after some discussion, attorney for plaintiff and attorney for defendant informed Judge Smith that the matter was entirely a question of law. It was then agreed that the case be taken out of call and that a stipulation of facts be signed and submitted to Judge Smith for determination without a jury. Some months thereafter, after numerous telephone calls and conversations, attorney for defendant prepared a state of facts which did not, however, meet with the approval of the attorney for plaintiff. After considerable conversation and conferences, attorney for defendant agreed to prepare a new state of facts, but failed to do so. Thereafter attorney for defendant moved to dismiss the action on the ground that plaintiff failed to prosecute. Plaintiff thereupon made a counter-motion to extend the time to prosecute. Upon the hearing, Judge Smith decided, as a matter of fact, that there was no lack of diligent prosecution on the part of plaintiff and granted plaintiff's motion.

Counsel for defendant disputes the propriety of the order thus made, contending that since the claimant did not reduce its claim to a judgment within one year, nor procure an extension of time within that period, the land is *ipso facto* discharged of the lien. We respectfully submit that there is nothing in the wording or spirit of the Mechanics' Lien Act which would indicate

this to be the case. It is, however, well settled that an order extending the time to prosecute may be made in any case before the expiration of the year, and may be made after the period of one year has elapsed when, as a matter of fact, there has been no lack of due diligence on the part of plaintiff. This factual question the Court decided in plaintiff's favor in granting said motion. In the case of *Buchanan v. Einstein*, 87 N. J. L. 307, the Court says:

"A lien claim does not of itself fail at the expiration of the year; and if there has not been a lack of diligence, *an extension order may be made after the year has expired.*

"And a finding that there has been diligent prosecution will not be set aside if there was any evidence to support it."

Section 18 of the Act provides that the lien shall be discharged only when claimant fails to prosecute his claim diligently within one year from the issuance of the summons, or such further time as the Court may by order direct.

Justice Dixon, in the case of *Ennis v. Eden*, 48 Atl. 610, referring to Section 18 says:

"It is quite possible that the section may be so construed as to allow the owner of the land, *after the expiration of the year*, to have from the Circuit Court an order fixing the time within which the claimant shall prosecute his claim, where he has prosecuted it diligently but not successfully within the year."

The Court in granting the motion to extend the time to prosecute, and later in sitting as a jury at the trial of this case found, as a matter of fact, that there was no lack of due diligence on the part of plaintiff.

Counsel for defendant quotes, incompletely, Section 18 of the Act and interprets this section

to mean that in no case could the time be extended for a further period than four months after the expiration of one year. There is nothing in the wording of Section 18 to afford any basis for such an interpretation.

This section provides that the lien be discharged if plaintiff fails to prosecute diligently within one year "or such further time as the Court may by order direct." And in a later paragraph, which counsel for defendant quotes incompletely in his brief, is the following proviso:

"Provided that the time within which such lien may be enforced by summons may be extended for any further period, not exceeding four months, by a written agreement for that purpose, signed by the landowner and such claimant * * *"

This is, undoubtedly, the four months' period to which defendant refers in his brief, and it clearly applies only to an extension of time agreed upon, in writing, between the landowner and claimant. We respectfully submit that these paragraphs are not inconsistent with each other, nor does the latter paragraph in any way limit the power of the Court, by order, to extend the time for a further period when there has been no lack of diligent prosecution on plaintiff's part.

For the reasons above given we, therefore, respectfully submit that there was no error in the granting by the lower Court of the motion to extend the time to prosecute this action.

POINT III.

There was no error in law in the lower Court's refusal of the defendant's motions for a non-suit and for a directed verdict in favor of the defendant, nor was there any error in the lower Court's entering judgment over the objection of defendant.

Defendant, in his motion for a non-suit and for a directed verdict, and in his objection to the entering of judgment in favor of plaintiff, urged as points of law essentially the same matters which were raised in the preliminary motions in the case. These points of law were all raised in the motions to amend the lien claim and to extend the time to prosecute the action; and were decided by the lower Court upon these motions. Inasmuch as these matters have been heretofore argued in this brief, we do not deem it necessary to re-state the law pertaining to them at this time.

We respectfully urge, therefore, that there was no error in the rulings of the Circuit Court denying the defendant's motions for a non-suit and for a directed verdict, nor in the entering of judgment in favor of the plaintiff over the objection of the defendant.

POINT IV.

The judgment in favor of the plaintiff was not contrary to law on the admitted facts in the case.

The lien claim in this case was not outlawed or nullified as counsel for the defendant contends. The claim was properly filed, and all the requirements of the statute were met. There was however, a defect in naming the owner of the prem-

ises. To cure this defect the plaintiff moved to amend the lien claim so as to include the name of the true owner at the time the claim was filed. Plaintiff did not here attempt to revive an outlawed or discharged lien claim, but to cure a defect in an otherwise valid claim. From the cases previously cited, and from the construction which these cases have placed upon the statute, we contend that the Circuit Court was well within its rights in permitting the amendment in this case.

Neither was the claim outlawed when the motion was made to extend the time to prosecute. The Circuit Court having found, as a question of fact, that there was no lack of due diligence on plaintiff's part in prosecuting this action, it cannot be argued that the lien claim was outlawed or nullified at that time.

If the lien claim in this case was not discharged at the time of the amendment referred to, or at the time the extension of time was granted; and if, as we contend, the Circuit Court had power to both grant the amendment, and extend the time to prosecute as was done in this case, there was no error in the Circuit Court's entering judgment in favor of the plaintiff.

Defendant, in support of his contentions, cites the case of *Wheeler v. Almond*, 17 Dutcher 468. We refer to the very language of that case to show that it has no bearing on the matter in hand:

“The defect here complained of is *not in the claim*. It is in the want of a notice entirely distinct from the claim.”

Defendant also cites the case of *Bartley v. Smith*, 14 Dutcher 468. In that case an amendment was applied for to change the name of the builder, the person who contracted the debt. This

is a different situation from the case at bar, where we endeavored to change, by amendment, the name of the person named as owner, and we do not think that the case cited bears directly upon the case at bar.

Defendant urges that to permit the judgment to stand would work undue hardship upon the defendant. That he is a bona fide purchaser for value without notice is admitted in the agreed stipulation of facts, but the mere fact that he is such a bona fide purchaser cannot destroy plaintiff's right of lien. If the defendant suffers any hardship by reason of his not having had notice, we respectfully submit that he might have avoided such hardship before taking title. The building was new, as is admitted, and the work done was recent, and for this reason defendant should have been aware that there might be possible lien claims against the property at the time of his purchase. He made no attempt to secure a release of mechanics' lien from the plaintiff in this case. Furthermore, he is not without his legal remedy upon the affidavits and warranties which he admitted he procured at the time he purchased the premises. At the time of the filing the lien claim, he was the owner of the property, and cannot escape liability by merely asserting that he took title without notice of any claims.

On the other hand, if the amendment in this case were not permitted to stand, it would open the door to an easy if not fraudulent method of circumventing the true intent and spirit of the Mechanics' Lien Act. It would then be possible for the builder or owner to destroy the lien contemplated by the Act by selling or encumbering the property after the work is done or the materials furnished, but before the lien claim is filed. This situation was foreseen by the Court in the case of *Edwards v. Derrickson*, cited above.

POINT V.

It is therefore respectfully submitted that the judgment of the Circuit Court should be affirmed.

Respectfully submitted,

KESSLER & KESSLER,
Attorneys for Plaintiff-Appellee.

SAMUEL I. KESSLER,
Of Counsel.

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

New Jersey Court of Errors and Appeals

GEORGE D. HENDRICKSON, Receiver, substituted plaintiff for the NEWARK WOODWORKING Co. INC., a corporation of New Jersey,

Plaintiff-Appellee,

vs.

R. BOESCH, INC., Owners, Rudolph Boesch, Owner and Builder, Harry Frieland, present owner, FEDERAL TRUST COMPANY, a corporation, Harry Hirsch and George Ollendorf, Mortgagees,

Defendants,

and

HARRY FRIELAND,

Defendant-Appellant.

Action at Law.

On Mechanics' Lien.

BRIEF IN BEHALF OF HARRY FRIELAND, Defendant-Appellant.

William Greenfield, of Counsel with Harry Frieland, Defendant-Appellant.

Statement of Facts.

This is an appeal from the judgment entered in the Essex County Circuit Court by His Honor, WILLIAM A. SMITH, before whom said cause was tried, the jury having been waived and the cause submitted on a stipulation of facts. (See statements of facts set out in Judge Smith's findings

of the facts, on pages 52-55 inclusive of the Printed State of the Case.)

The defendant, Harry Frieland, purchased the property in good faith, (which was admitted by plaintiff), without knowledge or notice of plaintiff's lien claim or any other claim, and the first time defendant had knowledge of the plaintiff's lien was when he was served with notice that on Saturday, June 5, 1926, application would be made to the court to amend the lien claim by making Harry Frieland, the appellant, one of the defendants. The last alleged work done or material supplied was December 2, 1925, a period of almost seven months having elapsed since the last work done and material supplied, although the statute requires that all liens must be filed, summons and complaint issued within four months from the last work done. The defendant, Harry Frieland, resisted the order allowed by His Honor, Worrall F. Mountain, who heard the motion. See page 25 of the Printed State of the Case, in his opinion in allowing the order, wherein he says:

“The power to amend the lien claim in matters of substance, as well as in matters of form, is set forth in P. L. of 1911, page 47. Reference to the record would tend to indicate that Harry Frieland obtained his deed before the claim was filed, but that is not conclusive. Section 10 of the Mechanics' Lien Law provides that the lien given by the act *shall not be valid against the bona fide purchaser* or mortgagee before the lien was filed in the office of the County Clerk. Whether Harry Frieland was a bona fide purchaser or not is a jury question.”

His Honor, Judge Smith, found as a fact from the agreed statement of facts by counsel that Harry Frieland was a bona fide purchaser for value without notice of any lien claim. That

said lien claim as to the appellant, Harry Frieland, was not filed nor summons and complaint issued against appellant within four months from the last work done and performed, nor was the lien claim reduced to judgment within one year or an application made to extend the time to reduce such lien claim to judgment within one year as the statute requires, (see page 49 of the Printed State of the Case) which application was made and an order allowed to reduce said lien claim to judgment three years after the lien was filed and summons issued. No reason or excuse was shown for this unreasonable delay. Hence, the Court erred in allowing judgment for the plaintiff and against Harry Frieland, appellant.

POINT 1.

That the Court erred as a matter of law in allowing the amendment to the mechanics' lien wherein it permitted the plaintiff to make Harry Frieland one of the defendants, said application having been made more than four months after the last material was supplied and work done, which was allowed over the objection of the defendant, Harry Frieland.

It is an elementary principle of law that all lien claims must be filed and summons issued after the endorsement on the lien claim within four months from the date of the last work done and material supplied. That is the statute, and being a statutory proceeding, it must be strictly followed. (Section 18 of Mechanics' Lien Act, Luce's Second Edition, 1910, page 100.)

"No debt shall be a lien by virtue of this act unless a lien claim is filed as hereinbefore provided within four months from the date of the last work done or material furnished

for which such debt is due; nor shall any lien be enforced by virtue of this act unless the summons in the suit for that purpose shall be issued within four months from the date of the last work done or materials furnished in such claim."

The Act further sets forth:

"If such claimant shall fail to prosecute his claim diligently within one year from the date of issuing of such summons, or such further time as the court may by order direct, such lien shall be discharged."

That the appellant was not made a party defendant nor summons and complaint issued within four months was admitted, and the Court so found. That the defendant-appellant was a bona fide purchaser for value is admitted and so found as a fact by his Honor, Judge Smith. (See the findings on pages 52-55 of Printed State of the Case.) Hence the finding of a judgment against Harry Frieland is error as a matter of law.

Counsel desires to call the Court's attention to the case of *American Brick Co. v. Drinkhouse*, 59 N. J. Law, page 462, at page 466, cited in the case of *Vreeland Building Co. v. Knickerbocker Sugar Co.*, 75 N. J. Law, page 551, Court of Errors and Appeals, PITNEY, J. at page 557, says:

"This court held that the power of amending the lien claim continues up to the time of entering judgment, and that it may be amended even after the time of filing a new claim has expired, *provided, the amendment does not enlarge the claim either in the amount of the debt in the estate to be charged, or in the persons to be affected.*"

Can it be said that the amendment does not affect a person who is an innocent purchaser of the land without any knowledge either directly or indirectly?

Hence the allowing of the amendment was *error* in law and therefore the court should set aside the judgment.

Section 20 of the *Mechanics' Lien Act*, page 108, specifically provides as follows:

“At any time before the entry of final judgment in a suit under this act, it shall be lawful for a Justice of the Supreme Court (at the present time application may be made to the Circuit Court) upon the application of either the owner, builder, or lien claimant, and upon reasonable notice to the others to alter the description of the curtilage as set forth in the lien claim, and, in the form of a rule of court, in the suit, to determine the true size and description of the curtilage; etc. Further, provided, that the amendments, authorized in this and in the next preceding section, *shall not affect the rights of any bona fide purchaser or mortgagee, acquired between the time of filing the original lien claim and that of filing said amendments.*”

That expression of the act is in plain, unequivocal language, that the Court had no right or power to allow an amendment to the lien claim seven months after appellant purchased the property and was in possession of same. That he is an innocent purchaser for value, and that *it does affect a third person, goes beyond saying.*

Hence the judgment should be reversed and the suit dismissed.

POINT 2.

That the Court *erred* as a *matter of law* in allowing an order on application of the plaintiff for the extension of time to prosecute said action, which said order was applied for and granted more than a year (three years) after the suit had been instituted. That the statute provides that all suits must be prosecuted to judg-

ment within a year unless the Court grants further time.

The question is, what does it mean that the Court should extend the time, if suit is not prosecuted to judgment in one year?

Can the Court extend the time after the year has expired, or must the plaintiff for the purpose of protecting his interest and rights apply for and obtain an order extending the time before the expiration of the year, or can he lay dormant for any indefinite time and then without any reason for his (plaintiff's) negligence, apply and get an order to extend the time to prosecute the lien claim after it became outlawed.

It is respectfully submitted that that is not the spirit or intention of the act, but that the act requires that the order should be obtained before the expiration of the first year. That the lien cannot be revived after it has been outlawed by the statute of limitation. Section 18 of Luce's Mechanics' Lien Act, Second Edition, on page 100, provides as follows:

"Or if such claimant shall fail to prosecute his claim diligently within one year from the date issuing such summons, or such further time as the Court may by order direct, such lien shall be discharged and all suits now pending where a claim has been filed and a summons issued within four months from the date of the last work done or materials furnished for which said debt is claimed shall be included within the provisions of this act; provided, that the time in which such lien may be enforced by summons may be extended for any further period, not exceeding four months."

What is the intention of this act?

That unless a judgment is entered within one year from the institution of the suit, it shall be

discharged unless the time has been extended by an order of the Court and such extension of time shall not exceed four months.

Four months from when?

Surely it means from one year of the institution of the suit.

Can it be said that the Court had power to grant an extension of time three years after the suit was instituted and suit became outlawed by the Mechanics' Lien Act.

It is respectfully submitted that that is an error of law and an error in contravention of the legislative act and the Court should reverse the judgment with the direction to grant a judgment of dismissal.

POINT 3.

The Court erred as a matter of law in overruling the motion for nonsuit, whereas the motion for nonsuit should have been granted.

If the Court had power to amend the lien claim by making Harry Frieland a party defendant in contravention of the act, Section 20, of Luce's Mechanics' Lien, page 108, at any time before entry of final judgment, the Court has a right to amend.

That is true, but it makes a further provision in the same section, wherein it provides that it shall not affect the rights of any bona fide purchaser or mortgagee, acquired between the time of filing the original lien claim and that of filing said amendments.

It has affected an innocent purchaser for value (Harry Frieland being an innocent purchaser for value.) Hence, it goes without saying that the

judgment should have been in favor of Harry Frieland, after the admitted facts by counsel of plaintiff and so found as a matter of fact by his Honor, Judge Smith, the motion of non-suit should have prevailed and the denial was error in law.

On that point it is respectfully submitted that the judgment should be set aside. Referring again to the power to amend, counsel desires to call the Court's attention to the case of *McNab & Harlin Mfg. Co. v. Paterson Building Co.*, 72 New Jersey Equity, page 929, at page 932.

Opinion by DILL, J., speaking for the Court of Errors says:

"The question whether other provisions of our Mechanics' Lien Law should be construed liberally or otherwise is not foreclosed by the decision in the Beckhard Case, nor by this decision. It may be argued, and with force, that Mechanics' Lien laws are, as a rule, to be construed strictly against the claimant and in favor of the owner of the land in so far as they require the owner to pay a debt that he did not contract and for a consideration that he may have already paid to the contractor."

In this case, Mr. Frieland, purchased the property in good faith, bona fide, and paid the full value.

Would it be equitable and just to make Mr. Frieland pay it over again, a debt of another, not his own?

It was *seven months after the last work was done* and performed and material supplied that the Court allowed an order that Harry Frieland, appellant, be made a party defendant.

Counsel desires to call the Court's attention to the case of *Dean v. Anderson*, 34 N. J. Equity, 503, Court says:

"To be a bona fide purchaser without notice the purchaser must not only have agreed to purchase without notice, but he must also have actually paid the purchase money, and taken his deed without such notice."

Harry Frieland agreed to purchase, did purchase, and paid the consideration money therefore and took possession of the property, all of which was done without any notice or knowledge of any lien claim either direct or indirect.

See also *Toplan v. Hoover, et al.*, Vol. 5, Pamphlet 3, of January 15, 1927.

The defendant-appellant purchased the property under an agreement dated February 8, 1926, took title, paid the consideration money therefore, and entered into immediate possession of the premises on March 30, 1926. See agreement for the purchase of property, pages 56-65 inclusive, of the Printed State of the Case.

POINT 4.

That the Court erred as a matter of law in denying a motion for a verdict in favor of the defendant, Harry Frieland, and against the plaintiff. The Court not having jurisdiction or power to amend so as to revive an outlawed lien claim as to the defendant-appellant, and the Court not having the power or right to extend the time for the purpose of prosecuting the action to judgment when it did (three years after suit had been instituted), affecting an innocent, bona fide purchaser, hence the Court having lost jurisdiction of the subject matter, the Court therefore committed error in rendering judgment in favor of the plaintiff and against defendant-appellant.

As no debt is a lien by virtue of the mechanics' lien act unless suit had been instituted, mechanics' lien filed against the proper parties and summons and complaint issued within four months of the last work done, an order entered to extend the time within which judgment final be entered within one year and no longer than four additional months, hence the property was freed and discharged of the lien claim and since appellant had not contracted the debt, but was an innocent purchaser for value of the land without any notice, the property has been discharged of the lien as set forth in Section 18 of Mechanics' Lien Act wherein it provides:

"No debt shall be a lien by virtue of this act, unless a lien claim is filed as hereinbefore provided within four months from the date of the last work done and material furnished, for which such debt is due; nor shall any lien be enforced by virtue of this act unless the summons in the suit for that purpose shall be issued within four months from the date of the last work done and materials furnished in such claim, and prosecuted to judgment within one year."

The statutory requirements not having been followed in this suit in so far as the appellant is concerned, and not having observed the requirement of the mechanics' lien act, which is a statutory proceeding and must be strictly construed and followed against the claimant, judgment should have been in favor of the defendant and against the plaintiff.

In the case of *Wheeler v. Almond*, 17 Vroom, 161, Court of Errors and Appeals held:

"That the failure to endorse on the lien claim the date of the summons, within the statutory period (then of one year now of four months from the date of the last work done) or within thirty days after due notice to sue, discharges the lien as effectually as

payment of the debt; and that the power of amendment conferred by Sections 19 and 25, cannot be invoked to cure such failure."

The lien claim became outlawed, and the Court cannot and should not revive an outlawed claim as held in the Court of Errors and Appeals in the case of *Wheeler vs. Almond*, *supra*. If the Court had no power to amend, surely the Court below committed error in rendering judgment in favor of the plaintiff and against defendant-appellant, therefore it should be reversed.

That the statutory proceedings and requirements must be strictly construed and followed has been held in the case of *Beckhard v. Rudolph*, 68 N. J. Equity, page 315.

That suit was instituted on a stop notice and Vice Chancellor Stevenson, at page 326, says:

"The statute says that the lien may be acquired when there is a refusal 'upon demand.' There can be no lien acquired unless there is a refusal upon demand. It is the intention of the act that the claimant shall go to the contractor and make legal demand of his money so as to put the contractor in default. A refusal may be made without any demand. I am not satisfied with the ingenious argument of Mr. Slocum that the word 'refusal' implies a demand-means, by its own force, a denial on demand. The statute expressly provides that the refusal must be upon demand, and the notice is to be of such refusal, *i. e.*, of a refusal upon demand and of the amount due and so demanded. I think it is plainly the intention that the demand shall be made, and that the notice shall inform the owner that the contractor has been put in default by having the demand actually made of him. This construction is accepted without question."

Since the statutory act is to be followed strictly the lien claim must be filed within four months

after the last work was done and material furnished. It is true that in the case at bar, the lien claim was filed within the four months, or rather on the last day of the four months, but appellant, who became an innocent purchaser, had the deed placed on record and entered into possession before any lien was filed. It was the plaintiff's duty to look to the records so as to make the proper parties defendants. If he had done so, this case would not be in this court, but not having done so, he waited three months after the right to a lien claim has expired before he applied for an order to amend the lien claim and issue the summons and complaint against the appellant, an innocent purchaser for value, after it was outlawed.

It is respectfully submitted that the Court below should have rendered a judgment in favor of the appellant, Harry Frieland, and against the plaintiff below.

Counsel is not unmindful of the case which respondent may cite of *Ennis v. Eden, etc. Co.*, 48 Atl. Rep. 610, wherein the Court granted an order extending the time in which to reduce the claim to judgment after the year, but the Court will perceive in that case that a receiver was appointed for the building concern. The receiver negotiated the settlement, and did not dispute the lien claim and he, acting in the place of the owner, consented to all the proceedings, and when the property was sold, it was expressly and particularly sold and purchased subject to that lien, the purchaser assuming the payment thereof. After such a purchase, he, the purchaser, moved to set the judgment aside and cancel the lien, by reason of the fact that it was not reduced to judgment within one year, and the Court held that he was estopped by the very fact that he

assumed the payment of the amount due on the lien.

Surely, the Court would not allow such fraudulent conduct. He assumed the payment and the property was sold with that condition, that he pay. No court would listen to any such attempt, as that would be not only a fraud but an imposition on the court. It has no bearing on the case at bar.

The Court has no power not only to revive a lien that has become outlawed, but more so that will effect a third innocent party and such application to amend was made after the land became discharged of the lien. *Vreeland Building Co. v. Knickerbocker Sugar Co.*, 75 N. J. Law, page 556, Court says:

“Previous decisions in the courts of this State have no close bearing upon the question now determined.”

Citing *Derrickson v. Edwards*, 5 Dutcher, 468, held the lien claim not amendable. This decision, however, was prior to the enactment of the section permitting such amendment. This section first appeared in the Revision of 1874.

In the case of *Bartley v. Smith*, 14 *Id.* 321, the Supreme Court advised the Circuit Court to refuse an application first made at the trial to amend a lien claim with respect to the name of the builder (the party who contracted the debt), when the claimant, with full knowledge of the facts, had named as builder a party other than him with whom he had contracted, it appearing that the party sued as builder had paid the greater part of which was due from him to plaintiff's debtor.

It is respectfully submitted that the Court had no power to grant the order for the amendment of the lien claim and the Court was without jurisdiction to render judgment for plaintiff against appellant.

Citing the case of *Wheeler v. Almond*, 17 *Id.* 161, Court says:

“The Supreme Court held that the power of amendment *does not enable the Court to restore* a lien when it has been discharged by the *express terms of the statute for non-compliance with statutory requirements*, and that when a claimant has been notified by the owner to sue within the limited time prescribed by the statute, he cannot escape the obligation arising from the notice by thereafter filing a new claim for the same debt.”

In the case at bar the lien was discharged so far as appellant was concerned. That property was discharged two years prior to the order granting the extension of time. Hence the property was free of the lien claim as the lien claim was outlawed, and the Court was without power to render judgment against the defendant-appellant.

POINT 5.

The Court erred as a matter of law in rendering a judgment over the objection of Harry Frieland in favor of the plaintiff, whereas there should have been a judgment in favor of the defendant, Harry Frieland, and against the plaintiff.

If the Court had no power to amend, and the lien was outlawed and the property discharged of the lien claim, surely it could not render a judgment in favor of the plaintiff and against the defendant-appellant.

POINT 6.

The judgment in favor of the plaintiff was contrary to law on the admitted facts in this cause.

The plaintiff-appellee having admitted, and so found by the trial court, that appellant was an innocent, bona fide purchaser for value without notice of the lien claim, as it was and is apparent on the admitted facts, that the appellant had no notice of any lien affecting the property at the time of the purchase, hence the allowance of the order amending the lien three months after the lien was filed and seven months after the last work was done, was improper, illegal, and contrary to law, and should have been denied and the proceedings dismissed.

That he paid full value therefore, was admitted, and therefore it is respectfully submitted on the law heretofore cited, that the judgment should be reversed.

The Court in its findings on pages 52-55 inclusive, of the Printed State of the Case, determined the fact that Harry Frieland purchased the property, took title thereto, and entered into possession on March 30, 1926. That on March 31, 1926, at 10:22 A. M. the deed to Harry Frieland was placed on record. That appellant had no knowledge or notice, either directly or indirectly of the alleged claim of the plaintiff. That on March 31, 1926, appellant was in possession of the property, at the time the lien claim was filed, which was at 3:45 P. M. That Harry Frieland purchased the property for value without actual notice of the claim of the plaintiff at the time of taking title. That he, appellant, in order to fortify himself in every possible way obtained an affidavit of title, setting forth that the prop-

erty was free and clear of all liens and claims of every nature or description, except as therein stated, and also referred to the fact that all persons who signed the release of mechanics' lien are the only persons who have done any work or supplied material. See affidavit of Rudolph Boesch, president of R. Boesch, Inc., the grantor, pages 18-20 of the Printed State of the Case.

It seems to counsel on the authorities herein cited and on the admitted facts, that this property was discharged of the lien claim at the time when the amendment was granted, in so far as appellant is concerned. That the lien claim became extinct within one year, by reason of the plaintiff's failure to prosecute the action to judgment. On that the law is well settled as provided in Sections 18, 19 and 20 of Luce's Mechanics' Lien Law, Second Edition, 1910, page 100. The claim having become outlawed, the amendment is not permissible where it affected an innocent purchaser or mortgagee.

It is respectfully submitted that the judgment should be reversed.

Respectfully submitted,

WM. GREENFIELD,
Attorney and of Counsel for
Defendant-Appellant, Harry Frieland.

