

TENNIS, SQUASH, BOWLING, CLAY PIGEON SHOOTING, etc., will be given special consideration.

It is hoped to make the ROCK SPRING COUNTRY CLUB the leading all-round sports Club in this section.

CLUB HOUSE. While the location of the Club House has not yet been determined, it will be on the shore of the Lake and near enough to the brook to command a view of the valley in all directions, which will be a source of never-ending pleasure and entertainment to members.

While sports of all kinds are being emphasized, due attention will be given to the social side of Club Life.

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SUMMONS.

(Filed July 6, 1921.)

COURT OF COMMON PLEAS.

ATLANTIC COUNTY.

The State of New Jersey, to Julia Bennis:

10

(L. S.) You are summoned to answer the annexed complaint of Minnie Liebeck, in an action at law in the Court of Common Pleas, Atlantic County. And take notice that unless you file your answer to the said complaint with the clerk of the Court of Common Pleas, at Mays Landing, New Jersey, 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.

20

Witness, HONORABLE ROBERT H. INGERSOLL, Judge of the Court of Common Pleas, Atlantic County at Mays Landing, this thirteenth day of April, nineteen hundred and twenty-one.

EDWIN A. PARKER,
Clerk.

EUGENE G. SCHWINGHAMMER,
& REPETTO,
Attorneys.

30

COMPLAINT.

(Filed July 6, 1921.)

COURT OF COMMON PLEAS

ATLANTIC COUNTY.

10

MINNIE LIEBECK,

v.

JULIA BENNIS,

Plaintiff,

Defendant.)

Action at Law.
Complaint.

20

The plaintiff, Minnie Liebeck, of the City of Atlantic City, County of Atlantic and State of New Jersey says that:

30

1. Defendant, Julia Bennis, was on the 15th day of September, A. D. 1920, the owner of and had control of premises situate at and known as No. 10 S. Morris Avenue, Atlantic City, New Jersey; prior to said date the defendant leased the said dwelling to Mrs. Carrie Murphy for the summer months of the year 1920.

2. In the rear of the building aforesaid, No. 10 S. Morris Avenue, there is a back porch which adjoins the kitchen which porch is about six feet above the ground; that around the porch there was a railing about three and a half feet high, to protect persons

from falling off the porch; that the said railing had been newly painted by defendant, making it appear as if the railing was in good condition, when, as a matter of fact, defendant knew that the joists and uprights in said railing had become so rotten that they were unsafe for the purposes for which they were erected, and knowing such fact, defendant carelessly and negligently permitted the said railing to remain on the porch without repairing the same.

10

3. On September 15th, plaintiff who was employed by Mrs. Carrie Murphy, as a cook, while in the performance of her duties had occasion to go on the back porch and while so engaged she happened to lean against the said railing which gave away and she was precipitated to the concrete walk below with great force and violence.

20

4. As a result thereof, plaintiff's right arm was severely injured, her right wrist bone broken, her right ankle badly wrenched and both legs bruised and swollen, her face severely lacerated and bruised, her teeth broken, the eyeglasses she wore completely smashed, and she was injured internally to such an extent that she had several hemorrhages, and thereafter for a considerable time has undergone great pain and suffering.

30

By reason thereof plaintiff has been unable to perform her usual work as a cook and has suffered loss of wages amounting to \$25.00 a week, and also has been obliged to expend large sums of money for medicine and medical attention.

Plaintiff demands \$5000.00 as damages.

SCHWINGHAMMER & REPETTO,
Attorneys of Complainant.

[ENDORSEMENT]

Duly served within summons and complaint, July 2nd, 1921, personally on Julia Benis, at 10 South Morris Avenue, Atlantic City, Atlantic County, New Jersey.

10

MALCOLM B. WOODRUFF,
Sheriff, by
HOWARD R. CLOUD,
Under Sheriff.

Sheriff's fees \$3.72.

ANSWER.

(Filed July 9, 1921.)

20

ATLANTIC COUNTY COURT OF COMMON PLEAS.

MINNIE LIEBECK,

Plaintiff,

v.

JULIA BENNIS,

Defendant.

Action at Law.
Answer.

30

The defendant, Julia Bennis, answering the complaint in the above stated cause, says that:

1. She admits that she was on the 15th day of September, A. D. 1920, the owner of premises in the City of Atlantic City, New Jersey, situate at and known as No. 10 South Morris Avenue, but defen-

dant denies that she had control of the said premises at that time, or at any other time between the first of June, A. D. 1920, and a time subsequent to the 15th day of September, A. D. 1920. Defendant, further answering said paragraph, says that the said premises were under the domination, management and control of one, Michael E. Murphy, lessee of said premises.

2. Defendant denies paragraph 2 of the complaint. 10

3. Defendant neither admits nor denies paragraph 3 of the complaint, but says that she has no knowledge or information thereof sufficient to form a belief.

4. Defendant neither admits nor denies paragraph 4 of the complaint, but says that she has no knowledge or information thereof sufficient to form a belief. 20

AFFIRMATIVE DEFENSES.

1. Whatever damages and injuries were sustained by the plaintiff, Minnie Liebeck, at the time and place mentioned in the complaint were caused and contributed to by her negligence, and she negligently exposed herself to the risk of such an accident, and she neglected to take precautions or to exercise care to guard and protect herself against such an accident, and at the time and place mentioned in the complaint she was conducting herself in a careless and reckless manner and was not exercising care or taking precautions in using the porch in the complaint mentioned. 30

2. The defendant owed no duty to the plaintiff.

THEO. W. SCHIMPF,
Attorney of Defendant.

ORDER FOR SUBSTITUTION.

(Filed February 13, 1924.)

10 ATLANTIC COUNTY COMMON PLEAS.
ATLANTIC COUNTY.

MINNIE LIEBECK,	}	Action at Law. Order for Substitution.
v.		
JULIA BENNIS,		
	<i>Plaintiff,</i>	
	<i>Defendant.</i>	

20

It is on this eighth day of October, 1924, ordered that Jacoby & Deull, be substituted as attorneys of record for the plaintiff.

WM. H. SMATHERS.

We hereby consent to the above order of substitution.

30

SCHWINGHAMMER & REPETTO.

ORDER FOR SUBSTITUTION.

(Filed October 10, 1924.)

ATLANTIC COUNTY COMMON PLEAS.

ATLANTIC COUNTY.

10

MINNIE LIEBECK,	}	Action at Law. Order for Substitution.
v.		
JULIA BENNIS,		
	<i>Plaintiff,</i>	
	<i>Defendant.</i>	

20

It is on this eighth day of October, 1924, ordered that Samuel Morris, Esq., be substituted as attorney of record for the plaintiff.

WM. H. SMATHERS,
Judge.

We hereby consent to the above order of substitution.

30

JACOBY & DUELL.

ORDER.

(Filed October 13, 1924.)

ATLANTIC COUNTY COMMON PLEAS.

10	MINNIE LIEBECK,	}	Action at Law. Order.
	v.		
20	JULIA BENNIS,		
		<i>Plaintiff,</i>	
		<i>Defendant.</i>	

Application having been made to this Court for an amendment of the complaint in the above entitled cause, by Samuel Morris, attorney for the plaintiff and due notice thereof having been served on S. Paul Ridgway, attorney for the defendant, the Court having heard arguments of both counsels therefor:

It is on this 20th day of October, 1924, ordered that the complaint in the above entitled cause be amended by adding a second count to read as follows:

SECOND COUNT.

30 The plaintiff repeats all allegations of complaint and particularly the part to be known as first count as if they were fully set with herein.

1. In the year 1919 or 1920 the defendant had the front porch of the above mentioned premises re-

paired and the old lumber remaining repaired therewith the back porch.

2. The defendant permitted the said repairs to be made in such a negligent manner and permitted the use of such poor quality of old lumber to be used, that the premises became unsafe.

3. On September 15th, plaintiff who was employed by Mrs. Carrie Murphy, as a cook, while in the performance of her duties had occasion to go on the back porch and while so engaged she happened to lean against the said railing which gave away and she was precipitated to the concrete walk below with great force and violence. 10

4. As a result thereof, plaintiff's right arm was severely injured, her right wrist bone broken, her right ankle badly wrenched and both legs bruised and swollen, her face severely lacerated and bruised, her teeth broken, the eyeglasses she wore completely smashed, and she was injured internally to such an extent that she had several hemorrhages, and thereafter for a considerable time has undergone great pain and suffering. 20

By reason thereof plaintiff has been unable to perform her usual work as a cook and has suffered loss of wages amounting to \$25.00 a week, and also has been obliged to expend large sums of money for medicine and medical attention.

Plaintiff demands \$5000.00 as damages. 30

Wm. H. SMATHERS,
Judge.

ANSWER TO AMENDED COMPLAINT.

(Filed Dec. 24, 1924.)

ATLANTIC COUNTY COMMON PLEAS COURT.

10

MINNIE LIEBECK,	}	Action at Law. Answer to Amended Complaint.
v.		
JULIA BENNIS,	}	
<i>Plaintiff,</i>		
<i>Defendant.</i>		

20

ANSWER TO SECOND COUNT.

The defendant, answering the amended complaint of the plaintiff, whereby a second count is amended to said complaint, says that:

1. The defendant repeats all the allegations of answer filed to the original complaint herein.
2. She denies each and every allegation contained in the amended complaint known as count two filed herein.

30

AFFIRMATIVE DEFENSES TO COUNT TWO.

1. The said premises were under the domination, management and control of one, Michael E. Murphy, lessee, of the said premises.

2. Whatever damages and injuries were sustained by the plaintiff, Minnie Liebeck, at the time and place mentioned in the complaint were caused and contributed to by her negligence and she negligently exposed herself to the risk of such an accident, and she neglected to take precaution or to exercise care to guard and protect herself against such an accident, and at the time and place mentioned in the complaint she was conducting herself in a careless and reckless manner and was not exercising care or taking precaution in using the porch in the said complaint mentioned. 10

3. The defendant owed no duty to the plaintiff.
S. PAUL RIDGWAY,
Attorney of Defendant.

I hereby consent to the filing of the above answer 20 out of time.

SAMUEL MORRIS,
Attorney of Plaintiff.

30

ORDER.

(Filed Jan. 6, 1925.)

ATLANTIC COUNTY COMMON PLEAS.

10

MINNIE LIEBECK,

Plaintiff,

v.

JULIA BENNIS,

Defendant.

Action at Law.
Order.

Application having been made to this Court for an amendment of the complaint in the above entitled cause, by Samuel Morris, attorney for the plaintiff and due notice thereof having been served on S. Paul Ridgway, attorney for the defendant, the Court having heard arguments of both counsels therefor:

It is on this 29th day of December, 1924, ordered that the complaint in the above entitled cause be amended by adding a third count to read as follows:

THIRD COUNT.

30

The plaintiff repeats all allegations of the first and second counts and says that:

1. In the year 1919, or 1920, the defendant had the front porch of the above-mentioned premises repaired and with the old lumber remaining repaired the back porch and then painted it.

2. The defendant permitted the repairs to the back porch to be made in such a negligent manner and permitted the use of such poor quality of lumber to be used and to remain, and the defect in the lumber was so concealed by the paint, that the premises became unsafe.

3. The defendant knew or should have known by a reasonable inspection, that the joists, beams, and railing were rotten.

4. On September 15, 1920, the plaintiff, who was employed by Mrs. Carrie Murphy, the tenant of the premises, as a cook, while in the performance of her duties had occasion to go on the back porch, which slants, and while so engaged and standing in a careful and prudent manner near the edge of the porch, near the railing, the joists and uprights suddenly sank and the railing gave way and she was precipitated to the concrete walk with great force and violence.

5. As a result thereof, plaintiff's right arm was severely injured, her right wrist bone broken, her right ankle badly wrenched and both legs bruised and swollen, her face severely lacerated and bruised, her teeth broken, the eyeglasses she wore completely smashed, and she was injured internally to such an extent that she had several hemorrhages, and thereafter for a considerable time has undergone great pain and suffering.

6. By reason thereof plaintiff has been unable to perform her usual work as a cook and has suffered loss of wages amounting to \$25.00 a week, and also has been obliged to expend large sums of money for medicine and medical attention.

Plaintiff demands \$5000.00 as damages.

It is further ordered that the second count in the above entitled cause be amended by inserting the following words and figures.

1. Paragraph 3, after the word "September 15," insert "1920."

2. Insert in paragraph 3 after the word "lean," words, "in a careful and prudent manner."

10

W.M. H. SMATHERS.

ANSWER TO AMENDED COMPLAINT.

(Filed Jan. 17, 1925.)

ATLANTIC COUNTY COURT OF COMMON PLEAS.

20

MINNIE LIEBECK,

Plaintiff,

v.

JULIA BENNIS,

Defendant.

Action at Law.
Answer to Amended
Complaint.

30

The defendant, answering the amended complaint of the plaintiff, whereby a third count is amended to the said complaint, says that:

1. The defendant repeats all the allegations of the answer filed to the original complaint hereto and to the second count of the amended complaint.

2. She denies each and every allegation contained in the amended complaint known as count three filed herein.

AFFIRMATIVE DEFENSES TO COUNT THREE.

1. The said premises were under the domination, management and control of one, Michael E. Murphy, lessee of the said premises.

10

2. Whatever damages and injuries were sustained by the plaintiff, Minnie Liebeck, at the time and place mentioned in the complaint were caused and contributed to by her negligence, and she negligently exposed herself to the risk of such an accident, and she neglected to take precaution or to exercise care to guard and protect herself against such an accident, and at the time and place mentioned in the complaint she was conducting herself in a careless and reckless manner and was not exercising care to taking precautions in using the porch in the said complaint mentioned.

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3. The defendant owes no debt to the plaintiff.
S. PAUL RIDGWAY,
Attorney of Defendant.

30

REPLY.

(Filed March 10, 1925.)

10 ATLANTIC COUNTY COMMON PLEAS.

MINNIE LIEBECK,	}	Action at Law. Reply.
v.		
JULIA BENNIS,		
	<i>Plaintiff,</i>	
	<i>Defendant.</i>	

20

1. The plaintiff denies every allegation in answer to complaint and amended complaint.

2. The plaintiff denies every allegation in affirmative defence to count two.

SAMUEL MORRIS,
Attorney for Plaintiff.

30

NOTICE.

(Filed June 2, 1925.)

ATLANTIC COUNTY COMMON PLEAS COURT.

MINNIE LIEBECK,	}	Action at Law. Notice.
v.		
JULIA BENNIS,		
	<i>Plaintiff,</i>	
	<i>Defendant.</i>	

10

To Samuel Morris, Esquire, attorney of plaintiff:

Take Notice that at the time of the trial of the 20
above case, I shall move to strike the amended
complaint filed herein, and known as count two be-
cause (1) the said amended complaint does not set
forth a cause of action (2) it does not apprise the
defendant when such alleged negligent repairs were
made to the premises; (3) it does not set forth the
negligence of the defendant; (4) the said complaint
sets forth conclusions not based upon facts; (5)
it set forth a new cause of action separate and dis-
tinct from the original complaint filed herein and 30
the statute of limitations has run against such an
amendment; (6) the said complaint does not set
forth the date or place when and where the said
plaintiff sustained injuries.

12370 MORRIS 6

S. PAUL RIDGWAY,
Attorney of Defendant.

NOTICE.

(Filed June 2, 1925.)

ATLANTIC COUNTY COURT OF COMMON PLEAS.

10 MINNIE LIEBECK, *Plaintiff,* }
 v. } Action at Law.
 JULIA BENNIS, *Defendant.* } Notice.

20 *To Samuel Morris, Esquire, attorney of plaintiff:*

Take Notice that at the time of the trial of the above case, I shall move to strike the amended complaint filed herein, and known as count three because (1) the said amended complaint does not set forth a cause of action (2) it does not apprise the defendant when such alleged negligent repairs were made to the premises; (3) it does not set forth the negligence of the defendant; (4) the said complaint sets forth conclusions not based upon facts; (5) it sets forth a new cause of action separate and distinct from the original complaint filed herein and the statute of limitations has run against such an amendment; (6) the said complaint does not set forth the date or place when and where the said plaintiff sustained injuries.

S. PAUL RIDGWAY,
Attorney of Defendant.

ORDER.

(Filed June 17, 1925.)

ATLANTIC COUNTY COURT OF COMMON PLEAS.

10 MINNIE LIEBECK, *Plaintiff,* }
 v. } Action at Law.
 JULIA BENNIS, *Defendant.* } Order.

Whereas, the plaintiff herein did on the twentieth day of October, 1924, make application to Honorable William H. Smathers, Judge of the Common Pleas Court of Atlantic County to amend the complaint filed herein, and the matter coming on to be heard, the Court ordered said amendment to be filed on the eighth day of December, 1924, and

Whereas, at the aforesaid time, it was reserved to the defendant the right to renew her objection to said amendment, and the right to make a motion for the purpose of dismissing said amendment at the time of trial as though no answer had been filed, and

Whereas, on the twenty-ninth day of December, 1924, the plaintiff did make further application to said Court to amend the complaint filed herein and the matter coming on to be heard on the sixth day of January, 1925, the Court ordered said amendment to be filed, and

Whereas, at the aforesaid time, it was reserved to the defendant the right to renew her objection to said amendment, and the right to make a motion for the purpose of dismissing said amendment at the time of trial as though no answer had been filed, and

Whereas, this action came regularly on for trial before Honorable William H. Smathers, Judge of the Common Pleas Court of Atlantic County at May's Landing, New Jersey, on June 2nd, 1925, and the defendant by her counsel, and in the presence of Samuel Morris, attorney of plaintiff, having moved that the amended complaint of plaintiff be stricken, the Court ordered that the amendments to plaintiff's complaint filed as aforesaid be stricken, and the plaintiff by her counsel having submitted to a voluntary non-suit upon the original complaint filed herein, the Court ordered said judgment of non-suit to be entered upon the original complaint filed herein:

And It Is Hereby Ordered and Adjudged that a judgment of non-suit be entered upon the original complaint filed herein:

Whereupon, It Is on this eighth day of June, A. D. 1925, Adjudged that the defendant recover of the plaintiff the taxed costs herein.

WM. H. SMATHERS,
Judge.

On motion of
S. PAUL RIDGWAY,
Attorney of Defendant.

Dated June 8th, 1925.

NOTICE OF APPEAL.

(Filed June 19, 1925.)

ATLANTIC CITY DISTRICT COURT.
ATLANTIC COUNTY COMMON PLEAS.

10

MINNIE LIEBECK, *Plaintiff,*
v.
JULIA BENNIS, *Defendant.* } Notice of Appeal.

20

To S. Paul Ridgway, Esquire, attorney for defendant:

Take Notice that plaintiff appeals to the New Jersey Supreme Court from the order entered in this cause, striking out the amended second and third counts of complaint, on the following grounds:

1. An order for amendment of original complaint, by adding separately the second and third counts, having been made by the Court, the Court erroneously revoked said orders.

30

2. The Court erred in striking out the second and third counts which were amendments to the original complaint.

3. The second and third amended counts having been substantially the same as, though formally different from the original complaint, the Court erred in striking out the additional second and third counts even though they were made more than two years after the filing of the original complaint.

SAMUEL MORRIS,
Attorney for Appellant.

Dated June 5, 1925.

10

Due and legal service acknowledged this 16th day of June, 1925.

S. P. RIDGWAY,
Attorney of Defendant.

MOTION TO STRIKE AMENDED COMPLAINT.

20 ATLANTIC COUNTY COURT OF COMMON PLEAS.

MINNIE LIEBECK,

Plaintiff,

v.

JULIA BENNIS,

Defendant.

Action at Law.

30

May's Landing, N. J., June second, 1925.

Before HON. WILLIAM H. SMATHERS, Judge.

APPEARANCES:

For plaintiff: SAMUEL MORRIS, ESQ.

For defendant: S. PAUL RIDGWAY, ESQ.

Mr. Ridgway: If your Honor please, I wish to make a motion to strike the amended complaint. I move that the two amended complaints be dismissed because they set forth different causes of action than the original complaint. The original complaint sets forth that we had control of the premises and that we concealed certain defects in the premises. The amended complaint sets forth that we attempted to repair the premises, but repaired them in a negligent manner, which we say is a different cause of action, because there is no negligence alleged in the original complaint, whereas there is negligence alleged in the amended complaint. The amendment being made two years after the original complaint was filed, it is barred by the Statute of Limitations, it being an action for personal injuries.

10

The Court: I am constrained not to permit the filing of the amended complaint, on the ground that it sets forth a new cause of action and, having been filed after the Statute of Limitations has run, it can not possibly be set forth.

20

(Whereupon the plaintiff, by her counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

(Seal)

The Court: Proceed on your original complaint.

30

Mr. Morris: I think I cannot prove the first count, and, since your Honor has decided to strike out the second and third counts, all I can do is ask for an exception and suffer a non-suit as to the first count.

SAMUEL MORRIS,
Attorney for Plaintiff-Appellant.

RULE AFFIRMING JUDGMENT AND
REMITTITUR

NEW JERSEY SUPREME COURT.

10 MINNIE LIEBECK, }
Plaintiff-Appellant, }
 v. }
 JULIA BENNIS, }
Defendant-Respondent. }
 On Appeal from Atlantic County Court of Common Pleas. Rule Affirming Judgment and Remittitur.

20 This cause having been duly argued as the May Term of this Court by S. Paul Ridgway, of counsel for the defendant-respondent and Samuel Morris, and John C. Reed, of counsel for the plaintiff-appellant, and the Court having considered the same, and finding no error in the record or proceedings in the Atlantic County Court of Common Pleas.

It is thereupon, ordered and adjudged that the judgment of the Atlantic County Court of Common Pleas be in all things affirmed, with costs, and that the record be remitted to the Atlantic County Court of Common Pleas to be proceeded with in accordance with the judgment and the practice of said court.

On motion of

S. PAUL RIDGWAY,
Attorney of Defendant-Respondent.

NOTICE OF APPEAL FROM THE SUPREME
COURT AND REASONS FOR REVERSAL

NEW JERSEY SUPREME COURT.

10 MINNIE LIEBECK, }
Plaintiff-Appellant, }
 v. }
 JULIA BENNIS, }
Defendant-Appellee. }
 Notice of Appeal from the Supreme Court and Reasons for Reversal.

To S. Paul Ridgway, Attorney for the Defendant.

Take notice that the plaintiff-appellant, by Samuel Morris, her attorney, hereby appeals from the judgment of the Supreme Court in the above entitled cause and hereby presents the following reasons for the reversal of the judgment of the Supreme Court appealed from, herein: 20

1. The said Supreme Court erred in affirming the judgment of the Court of Common Pleas of the County of Atlantic for the reason that said Court upon the record in said Court should have reversed said judgment of the Court of Common Pleas. 30

2. Because of the reasons assigned in the Supreme Court by the appellant for the reversal of the judgment of the Court of Common Pleas of Atlantic

26 *Notice of Appeal from Supreme Court
and Reasons for Reversal*

County appealed from the said Court should have
reversed said judgment and not affirmed same.

SAMUEL MORRIS,
*Attorney for Minnie Liebeck,
Plaintiff-Appellant.*

10

[ENDORSED.]

Due and legal service of the within
notice acknowledged this 25th day of
May, 1926.

S. Paul Ridgway,
*Attorney for Julia Bennis,
Defendant-Appellee.*

20

30

Opinion

27

OPINION.

(Filed May 5, 1926.)

NEW JERSEY SUPREME COURT.

No. 71.

Oct. T., 1925.

10

MINNIE LIEBECK,
v.
JULIA BENNIS.

Appeal from Atlantic Common Pleas.

20

Argued before GUMMERE, Chief Justice, and
JUSTICES KALISCH and CAMPBELL.

For the appellant, SAMUEL MORRIS.
For the respondent, S. PAUL RIDGWAY.

30

PER CURIAM:

The appeal in this case is taken from an order,
and judgments thereon, directing the third count

of the complaint filed by the plaintiff to be stricken out and judgment for the defendant entered accordingly. The averment of this count was that the plaintiff had been employed as cook by a Mrs. Murphy, who was a tenant in occupation of premises belonging to the defendant; that, in the performance of her duties as the employee of Mrs. Murphy, she had occasion to go to the back porch of the premises, and that while standing there the edge of the porch suddenly gave way, precipitating her to the walk below, the fall resulting in the injuries for which she seeks compensation from the defendant. The fact upon which liability on the part of the defendant is predicated is that some time prior to the happening of the accident the defendant caused this porch to be repaired in such negligent manner, and used such a poor quality of lumber in making the repair, as to render the porch dangerous, and that in doing this he violated a duty owing by him to the tenant and her employees.

We concur in the view expressed by the trial Court that this count discloses no cause of action in favor of the plaintiff and against the defendant. It contains no averment that these repairs were made during the continuance of the lease under which Mrs. Murphy was in possession. It is entirely settled in this state that the landlord is not bound to repair leased premises during the term unless he has contracted to do so. No obligation will be implied on the part of the landlord, in the absence of such contract, that he shall make repairs because of the premises being in a dangerous condition. And the exemption of a landlord from liability for injuries sustained by a tenant under the conditions named applies as well to mem-

bers of the family of the tenant. *Clyne v. Helmes*, 61 N. J. L. 358, and cases cited.

This principle of law does not apply where a landlord undertakes to make repairs to the leased premises during the continuance of the lease, and performs the work of repair so negligently that injury results to the tenant, or a member of his family by reason of such negligence. But, as has already been pointed out, there is no averment in the count of any repair on the part of the landlord during the continuance of the lease, and, in the absence thereof, the presumption is that the contrary is the fact. It is elementary law that, in the absence of an averment of the existence of a material fact, the presumption is that it does not exist.

The judgment under review will be affirmed.

NEW JERSEY COURT OF ERRORS AND
APPEALS

MINNIE LIEBECK,
Plaintiff-Appellant,

v.

JULIA BENNIS,
Defendant-Appellee.

ACTION AT LAW.

ON APPEAL FROM THE NEW JERSEY SUPREME COURT.

BRIEF OF DEFENDANT-APPELLEE.

FACTS.

The facts are as follows:

On April 13th, 1921, the plaintiff-appellant filed a complaint in the Atlantic County Common Pleas Court, alleging the following cause of action:

"1. Defendant, Julia Bennis, was on the 15th day of September, A. D. 1920, the owner of and had control of premises situate at and known as No. 10 S. Morris Avenue, Atlantic City, New Jersey; prior to said date the defendant leased

the said dwelling to Mrs. Carrie Murphy for the summer months of the year 1920.

2. In the rear of the building aforesaid, No. 10 S. Morris Avenue, there is a back porch which adjoins the kitchen which porch is about six feet above the ground; that around the porch there was a railing about three and a half feet high, to protect persons from falling off the porch; that the said railing had been newly painted by defendant, making it appear as if the railing was in good condition, when, as a matter of fact, defendant knew that the joists and uprights in said railing had become so rotten that they were unsafe for the purposes for which they were erected, and knowing such fact, defendant carelessly and negligently permitted the said railing to remain on the porch without repairing the same.

3. On September 15th, plaintiff, who was employed by Mrs. Carrie Murphy, as a cook while in the performance of her duties had occasion to go on the back porch and while so engaged she happened to lean against the said railing which gave away and she was precipitated to the concrete walk below with great force and violence."

The said complaint and the summons attached thereon was duly served upon the defendant, and the defendant filed an answer to the same.

On October 10th, 1924, Samuel Morris, Esquire, was substituted as attorney of record for the plaintiff-appellant.

On October 13th, 1924, plaintiff-appellant made application to amend her complaint, and the matter being heard, and the defendant entering her objections to said complaint, it was ordered that said

amendment be filed and that the right be reserved to the defendant to renew her objections to said amendment, and the defendant be given the right to make a motion for the purpose of dismissing said amendment at the time of the trial, as though no answer had been filed, which amended complaint reads in part as follows:

"1. In the year 1919 and 1920, the defendant had the front porch of the above mentioned premises repaired and the old lumber remaining repaired therewith the back porch.

2. The defendant permitted the said repairs to be made in such a negligent manner and permitted the use of such poor quality of old lumber to be used, that the premises became unsafe.

3. On September 15th, plaintiff who was employed by Mrs. Carrie Murphy, as a cook, while in the performance of her duties had occasion to go on the back porch and while so engaged she happened to lean against the said railing which gave away and she precipitated to the concrete walk below with great force and violence."

On or about December 29th, 1924, plaintiff-appellant made application to amend her complaint, and the matter being heard, and the defendant entering her objections to said complaint, it was ordered that said amendment be filed and that the right be reserved to the defendant to renew her objections to said amendment and that the defendant be given the right to make a motion for the purpose of dismissing said amendment at the time of the trial, as though no answer had been filed, which amended complaint reads in part as follows:

"1. In the year 1919 or 1920, the defendant had the front porch of the above-mentioned

premises repaired and with the old lumber remaining repaired the back porch and then painted it.

2. The defendant permitted the repairs to the back porch to be made in such a negligent manner and permitted the use of such poor quality of lumber to be used and to remain, and the defect in the lumber was so concealed by the paint, that the premises became unsafe.

3. The defendant knew or should have known by a reasonable inspection that the joists, beams and railing were rotten.

4. On September 15, 1920, the plaintiff, who was employed by Mrs. Carrie Murphy, the tenant of the premises, as a cook, while in the performance of her duties had occasion to go on the back porch which slants, and while so engaged and standing in a careful and prudent manner near the edge of the porch, near the railing, the joists and uprights suddenly sank and the railing gave way and she was precipitated to the concrete walk with great force and violence."

At the time of trial the defendant renewed her objections to the amended complaints, known as the second and third counts, and moved to strike out said second and third counts on the ground that said counts did not set forth a cause of action. The Court granted said motion to strike the amended complaints and the plaintiff-appellant, by her attorney, suffered a non-suit as to the original complaint and stated to the Court that he could not prove the same.

ARGUMENT.

I.

The original complaint and amended complaints of the plaintiff-appellant do not contain any statement or allegation that the repairs were made by the landlord during the term of the lease or that the landlord had entered into any agreement with the tenant to repair the premises and repaired them in a negligent manner; and the original complaint does not state when the repairs were made and does not state that they were made during the term of the lease. The amended complaints of the plaintiff-appellant known as the second and third counts allege that in the year 1919 or 1920, the defendant had the front porch of the premises repaired and the lumber therefrom was used to repair the back porch; that there is no statement either in the original complaint or in the amended complaints that the repairs were made during the term of the lease; and the presumption is, no statement being made to the contrary, that they were not made during the term of the lease, and the landlord is not liable for any repairs made before the lease was entered into with the tenant.

"The landlord is not liable for any injuries sustained by the tenant or his family, servants or guests by reason of the ruinous condition of the premises and there is no implied warranty on the part of the landlord to repair said premises."

Clyne v. Helmes, 61 N. J. L. 358;
Maunberg v. Young, 44 N. J. L. 344;
Mullen v. Rainear, 45 N. J. L. 520;
Land v. Fitzgerald, 68 N. J. L. 28.

II.

“Application to amend the complaint is addressed to the discretion of the Court, and its decision cannot be made the subject of review on writ of error.”

Luthopt v. Heckmann, 70 N. J. L. 272;
Reed v. Director General, 95 N. J. L. 525;
Goodyear Tire & Rubber Co. v. Kruvant,
 96 N. J. L. 352.

The refusal of the trial Judge to allow the amendments of the complaint was entirely within the discretion of the Court, and as the amended complaints known as second and third counts did not set forth a cause of action, the trial Judge did not abuse his discretion in refusing to allow the amended complaints.

III.

The plaintiff suffered a voluntary non-suit as to the original complaint filed in the cause and stated to the Court, by her counsel, that she could not prove said counts. The plaintiff having suffered a voluntary non-suit as to the first count thereby admitted that she could not prove the allegations of the first count. The second and third counts do not disclose a cause of action in that they do not show that there was any relation of invitee or tenant between the plaintiff and the defendant, or, that the defendant had any control or dominion over the premises, and for all that appears in the plaintiff's amended complaints, the plaintiff may have been a trespasser upon the premises in question, to whom

the defendant owed no duty, but to abstain from inflicting wilful injuries to the plaintiff.

It is, therefore, respectively submitted that the lower Court should stand affirmed in this matter.

Respectfully submitted,
 S. PAUL RIDGWAY,
Attorney of Defendant-Appellee.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

MINNIE LIEBECK,
Plaintiff-Appellant,

v.

JULIA BENNIS,
Defendant-Appellee.

ACTION AT LAW.

ON APPEAL FROM THE NEW JERSEY SUPREME COURT.

BRIEF OF PLAINTIFF-APPELLANT.

The question before the Court is whether the Supreme Court erred in sustaining the judgment of the Atlantic County Common Pleas, in striking out the second and third counts of the amended complaint in the above entitled cause.

The facts are as follows:

On the thirteenth day of April, 1921, the plaintiff commenced on action in the Atlantic County Common Pleas Court alleging in part that:

"1. Defendant, Julia Bennis, was on the 15th day of September, A. D. 1920, the owner of and

had control of premises situate and known as No. 10 S. Morris Avenue, Atlantic City, New Jersey; prior to said date the defendant leased the said dwelling to Mrs. Carrie Murphy, for the summer months of the year 1920.

2. In the rear of the building aforesaid, No. 10 S. Morris Avenue, there is a back porch which adjoins the kitchen which porch is about six feet above the ground; that around the porch there was a railing about three and a half feet high, to protect persons from falling off the porch; that the said railing had been newly painted by defendant, making it appear as if the railing was in good condition when, as a matter of fact, defendant knew that the joists and uprights in said railing had become so rotten that they were unsafe for the purpose for which they were erected, and knowing such fact, defendant carelessly and negligently permitted the said railing to remain on the porch without repairing the same.

3. On September 15th, plaintiff who was employed by Mrs. Carrie Murphy as a cook, while in the performance of her duties had occasion to go on the back porch and while so engaged she happened to lean against the said railing which gave away and she was precipitated to the concrete walk with great force and violence."

The defendant duly filed an answer, but the plaintiff through her counsel was dilatory in prosecuting the action.

The case was dormant until about October, 1924, when the present attorney for plaintiff was engaged. Two applications to amend the complaint were made and were granted subject to the right of counsel for

defendant to renew his objections thereto at the time of the trial.

The amended second count reads in part as follows:

"1. In the year of 1919 or 1920, the defendant had the front porch of the above-mentioned premises repaired and the old lumber remaining repaired therewith the back porch.

2. The defendant permitted the said repairs to be made in such a negligent manner and permitted the use of such poor quality of old lumber to be used, that the premises became unsafe.

3. On September 15th, plaintiff, who was employed by Mrs. Carrie Murphy, as a cook while in the performance of her duties had occasion to go on the back porch and while so engaged she happened to lean against the said railing which gave way and she was precipitated to the concrete walk below with great force and violence."

The third count reads in part as follows:

"1. In the year 1919 or 1920, the defendant had the front porch of the above mentioned premises repaired and with the old lumber remaining repaired the back porch and then painted it.

2. The defendant permitted the repairs to the back porch to be made in such a negligent manner and permitted the use of such poor quality of lumber to be used and to remain and the defect in the lumber was so concealed by the paint, that the premises became unsafe.

3. The defendant knew or should have known by a reasonable inspection, that the joists, beams and railing were rotten.

4. On September 15, 1920, the plaintiff who was employed by Mrs. Carrie Murphy, the tenant of the premises, as a cook, while in the performance of her duties had occasion to go on the back porch, which slants, and while so engaged and standing in a careful and prudent manner near the edge of the porch, near the railing the joists and uprights suddenly sank and the railing gave way and she was precipitated to the concrete walk with great force and violence."

On the date set for the trial, the defendant by her counsel, moved to strike out the amended second and third counts, principally on the ground that a new cause of action was set forth in said amendment, and that the statute of limitations had run against such amendment. The Court granted the motion, and the plaintiff suffered a non-suit as to the first count, not being able to prove same.

It is submitted that the Court should have permitted the amended second and third counts to stand, even though they were filed more than two years after the original cause of action accrued.

Paragraph twenty-three of the Practice Act of 1912 provides that:

"No civil suit or proceeding in any court of common law shall fail or be dismissed on the ground that the plaintiff or any party therein has mistaken the remedy or procedure, if the court in which the matter is pending shall have jurisdiction to grant the proper remedy by any procedure; but in such case, the Court shall, upon terms, order the writs, pleadings, or other proceedings to be so amended, or new writs, pleadings or other proceedings to be respectively so issued, filed or taken, that the Court

may completely and finally hear and determine the whole matter in controversy between the parties and grant the proper remedy."

In *Reed v. Parker*, 43 L. 430, Justice Reed permitted an amendment to stand, even though the Statute of Limitations had run, where the amendment made the cases as stated originally and as amended, "formally different though substantially identical."

The general rule of law involved herein is that if the landlord, though under no obligation to repair the premises repairs same in a negligent manner, he is liable therefor, *Schau v. Lynn*, 1 N. J. Misc. R. 326; *La Brasca v. Hinchman*, 81 L. 367. In the case at hand, the landlord, as alleged in the original complaint, attempted to repair the porch; for painting is a repair, L. R. A. 1916 A. 197, 198. Having repaired it partly, that is, painted it, concealing the defective wood, it is for a jury to say whether he was not careless in only partly repairing same.

The Supreme Court in its opinion says:

"There is no averment in the count of any repair on the part of the landlord during the continuance of the lease and in the absence thereof, the presumption is that the contrary is the fact."

If the Court will refer to the original complaint filed in the case, it is submitted that it will find on page 2, of the state of the case, an allegation in the first paragraph of said complaint of a lease between the defendant and her tenant. The amended second and third counts refer to all the allegations of the first count and make it a part thereof.

The allegations of the second and third count are substantially the same, though formally dif-

ferent from the first count. Regardless of the formal difference of the theories of counts, the substance is the same. A person was injured due to the negligence of the defendant and under conditions where the defendant owed a duty to the plaintiff to have properly repaired the porch, she having partly undertaken to perform same.

It is therefore earnestly submitted that the lower Court should be reversed, that the second and third counts be permitted to stand, and that the case be remitted.

Respectfully submitted,
 SAMUEL MORRIS,
 Attorney for Plaintiff-
 Appellant.

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