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Summons.

New Jersey Supreme Court

ESSEX COUNTY.

10

THE STATE OF NEW JERSEY, SS.:

THE STATE OF NEW JERSEY, To
JERROLD H. MEYER.

(SEAL) You are summoned to answer
the annexed complaint of Decker
Building Material Company, a cor-
poration, in an action at law in the
Supreme Court.

20

AND take notice that unless you file your an-
swer to said complaint with the Clerk of the Su-
preme Court at Trenton, 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, WILLIAM S. GUMMERE, Chief Justice of
the Supreme Court, at Trenton, this First day of
July, Nineteen Hundred and Thirty-One.

30

FRED L. BLOODGOOD,
Clerk.

KANTER & KANTER,
Attorneys of Plaintiff,
1060 Broad Street,
Newark, N. J.

TO THE DEFENDANT:

Take notice that if the summons and complaint
be served upon you personally and you intend to
make defense, then you must file an affidavit of

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Complaint.

merits within ten days of such service and must file an answer within twenty days of such service; and that in default thereof judgment will be entered against you. Lawful service upon a corporation is deemed personal service.

10

KANTER & KANTER,
Attorneys of Plaintiff.

Complaint.

(Filed July 1, 1931.)

NEW JERSEY SUPREME COURT,

20

ESSEX COUNTY.

DECKER BUILDING MATERIAL COM-
PANY, a corporation,
Plaintiff,

v.

JERROLD H. MEYER,
Defendant.

Action at Law.

30

The plaintiff, Decker Building Material Company, a corporation, having its principal office at #513 Lyons Avenue, in the Town of Irvington, County of Essex and State of New Jersey, says that:

FIRST COUNT.

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1. On or about June 2nd, 1930, the defendant, Jerrold H. Meyer, entered into a written contract, of that date, with Philco Construction Company, a corporation, by the terms whereof the latter

Complaint.

agreed to erect and finish a four-story (and basement) building and ten garages, at the northwest corner of Sixth Avenue and Ninth Street, in the City of Newark, County of Essex and State of New Jersey, and whereby the defendant agreed to pay, in the manner and at the times in said written contract specified, the sum of Fifty Five Thousand Dollars (\$55,000.00), in installments during the progress of the work, with the final payment of Fifteen Thousand Dollars (\$15,000.00) to be made upon the completion of said contract.

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2. The defendant was the owner of the lands whereon the buildings, referred to in paragraph 1 hereof, were to be erected, and has ever since continued to be, and still is, such owner.

20

3. Subsequent to October 11, 1930, and prior to the institution of this suit, the defendant accepted the work mentioned in the contract, referred to in paragraph 1 hereof, and thereupon there became due from the defendant to said Philco Construction Company a sum in excess of \$2,142.19.

4. The plaintiff, in furtherance of the performance and completion of the contract, referred to in paragraph 1 hereof, furnished materials to the said Philco Construction Company, a corporation, as the result of which, on October 9th, 1930, there was due to the plaintiff from the said Philco Construction Company, a corporation, the sum of \$2,142.19.

30

5. The contract, referred to in paragraph 1 hereof, with the specifications thereunto annexed, or a duplicate original thereof and of said specifications, was, on June 3, 1930, filed in the office of the Clerk of Essex County, N. J.

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Complaint.

6. Prior to the service and filing of the notice, referred to in paragraphs 8 and 9 hereof, the plaintiff demanded from the said Philco Construction Company, a corporation, the sum of \$2,142.19, mentioned in paragraph 4 hereof.

10 7. Said Philco Construction Company, a corporation, failed and neglected to pay the aforesaid sum of \$2,142.19.

8. On October 9th, 1930, the plaintiff filed in the office of the Clerk of Essex County a notice, a true copy whereof, marked Exhibit A, is hereunto annexed and expressly made a part hereof.

20 9. On October 11th, 1930, the plaintiff served upon, and delivered to, the defendant, a notice, a true copy whereof, marked Exhibit B, is hereunto annexed and expressly made a part hereof.

10. The defendant was satisfied of the correctness of the claim and demand made in the notice, Exhibit A, hereunto annexed.

30 11. Subsequent to the service and filing of the aforesaid notice, and prior to the institution of this suit, said Philco Construction Company, a corporation, paid to the plaintiff the sum of Five Hundred Dollars (\$500.00) on account of the \$2,142.19, mentioned in paragraph 4 hereof, but has failed and neglected to pay the balance of \$1,642.19.

12. The defendant has also failed and neglected to pay said balance of \$1,642.19.

SECOND COUNT.

40 13. The allegations of paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of the first count are hereby repeated.

Exhibit A Annexed to Complaint.

14. The defendant, in advance of the terms of payment specified in the contract made by him with Philco Construction Company, a corporation, paid to said Philco Construction Company, a corporation, or caused to be paid to it or for its account, large sums of money in excess of the sum for which this suit is brought. 10

15. The defendant has also failed and neglected to pay said balance of \$1,642.19.

Judgment will be claimed, in the alternative, on either the first count or the second count, in favor of the plaintiff and against the defendant, for the sum of \$1,642.19, together with interest and costs of suit to be taxed.

KANTER & KANTER, 20
Attorneys of Plaintiff.

EXHIBIT A.

To Mr. Jerrold H. Meyer. (Owner.)

YOU ARE HEREBY NOTIFIED, that Philco Construction Co., (A Corporation of New Jersey) is justly indebted to Decker Building Material Co. in the sum of Two thousand one hundred forty two dollars and Nineteen cents for material furnished by us at its request, in erecting and constructing a certain building owned by you, situate, lying and being upon the North corner 6th Ave and 9th Street, in the City of Newark, County of Essex, and State of New Jersey, and that we have demanded payment from the said Philco Construction Co. of the said sum of money so due and owing to us as aforesaid, and that it the said Philco Construction Co. have refused to pay the same or any part thereof. 30 40

Exhibit A Annexed to Complaint.

10 YOU ARE THEREFORE HEREBY NOTIFIED and re-
quired to retain the amount of money so due and
claimed by us out of the amount owing by you to
the said Philco Construction Co.; and upon being
satisfied of the correctness of our demand to pay
the said sum of money to Decker Building Mate-
rial Co., 513 Lyons Ave. Irvington, N. J., Phone,
Frontenac 3-3600.

DECKER BUILDING MATERIAL CO.

By WM D. DECKER

Pres.

Dated, Oct. 9th, 1930

At Irvington, N. J.

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Affidavit of Merits.

(Filed July 6, 1931.)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

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DECKER BUILDING MATERIAL COM-
PANY, a corporation,
Plaintiff,

v.

JERROLD H. MEYER,
Defendant.

Action at Law.

State of New Jersey, }
County of Essex, } ss.:

20

JERROLD H. MEYER, of full age, being duly sworn
on his oath, according to law, deposes and says:

That he is the defendant in the above entitled
matter, and that he believes that he has a just and
legal defense to the said action on the merits of
the case.

JERROLD H. MEYER.

30

Sworn and subscribed to before me, }
this 6th day of July, 1931. }

MICHAEL SILVER,
M. C. C. of N. J.

40

Stipulation Amending Complaint.

(Filed July 10, 1931.)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

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DECKER BUILDING MATERIAL COM-
PANY, a corporation,
Plaintiff,

v.

JERROLD H. MEYER,
Defendant.

Action at Law.

20

The parties to the above stated cause, by their respective attorneys, hereby stipulate and agree:

FIRST.—Paragraph 9 shall be taken to be amended and to read as follows: On October 11th, 1930, the plaintiff served upon, and delivered to, the defendant, a notice, a true copy whereof, marked Exhibit A, is hereunto annexed and expressly made a part hereof.

30

SECOND.—This stipulation shall have the same force and effect as a consent order embodying the above provision.

KANTER & KANTER,
Attorneys of Plaintiff.

SAUL AND JOSEPH E. COHN,
Attorneys of Defendant.

Newark, N. J.,
July 8th, 1931.

40

Demand for Bill of Particulars.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

DECKER BUILDING MATERIAL COM-
PANY, a corporation,
Plaintiff,

v.

JERROLD H. MEYER,
Defendant.

Action at Law.

10

KANTER & KANTER,
Attorneys of Plaintiff,
1060 Broad Street,
Newark, New Jersey.

20

Gentlemen:

Please take notice that the defendant in the above entitled cause demands, within ten days from the service hereof, a bill of particulars in reference to paragraph 14 of the Second Count to the following questions, to wit:

1. On what date or dates did the defendant pay to said Philco Construction Company, or cause to be paid to it or for its account, large sums of money in excess of the sum for which this suit is brought?

30

2. What sums of money, if any, were paid on said dates?

SAUL AND JOSEPH E. COHN,
Attorneys of Defendant.

Dated July 10th, 1931.

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**Notice of Motion to Strike Demand for Bill
of Particulars.**

(Filed August 10, 1931.)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

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DECKER BUILDING MATERIAL COM-
PANY, a corporation,
Plaintiff,

v.

JERROLD H. MEYER,
Defendant.

Action at Law.

20

To the defendant in the above entitled action, or
whom it may concern:

30

PLEASE TAKE NOTICE that on Monday, July 20th,
1931, at ten o'clock in the forenoon, or as soon
thereafter as counsel can be heard, before the New
Jersey Supreme Court, at the Essex County Court
House, Newark, N. J., before the Hon. William S.
Gummere, Chief Justice thereof presiding thereat,
or such other Justice thereof as shall then and
there preside, we shall move for an order to strike
out the demand for bill of particulars heretofore
served by the defendant upon the plaintiff, upon
the grounds (first) that such demand calls for in-
formation peculiarly within the knowledge of the
defendant and not within the peculiar knowledge
of the plaintiff, (second) that particulars demand-
ed are unnecessary in order to enable the defend-
ant to answer the second count of the complaint,
(third) that the particulars demanded are an im-
proper attempt to pry into the plaintiff's case, the
extent of its knowledge and its evidence, and

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Order Striking Defendant's Demand for Bill of Particulars.

(fourth) that the particulars demanded are not justified in law.

Yours, etc.,

KANTER & KANTER, 10
Attorneys of Plaintiff.

Newark, N. J.,
July 13th, 1931.

Order Striking Defendant's Demand for Bill of Particulars.

(Filed August 10, 1931.)

NEW JERSEY SUPREME COURT, 20

ESSEX COUNTY.

DECKER BUILDING MATERIAL COM-
PANY, a corporation,
Plaintiff,

v.

JERROLD H. MEYER,
Defendant.

Action at Law.

30

This matter being opened to the Court by Messrs. Kanter & Kanter, attorneys of the above named plaintiff, on due notice to and in the presence of Messrs. Saul & Joseph E. Cohn, attorneys of the above named defendant, on motion of said plaintiff's attorneys to strike out the demand for bill of particulars served (on July 10, 1931) by said defendant upon said plaintiff; and the Court having heard and considered the arguments of respec-

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Order Striking Defendant's Demand for Bill of Particulars.

tive counsel, and being of opinion that the plaintiff's motion should prevail and that the defendant's demand for a bill of particulars should be stricken out,

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It is thereupon, on this Tenth day of August A. D. 1931, ORDERED that the demand for bill of particulars heretofore served by the defendant upon the plaintiff be, and the same hereby is, stricken out, with costs to be taxed in favor of the plaintiff and against the said defendant.

It is further ORDERED that the defendant's answer, if any, shall be filed within 10 days from the date hereof.

20

Let this rule be entered in the minutes of the Court.

WM. S. GUMMERE,
C. J. S. C.

30

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Costs of Plaintiff on Order Striking Out Demand.

(Filed August 11, 1931.)

NEW JERSEY SUPREME COURT.

DECKER BUILDING MATERIAL COM-
PANY,

Plaintiff,

v.

JERROLD H. MEYER,

Defendant.

Action at Law.

10

COSTS

20

Allowance by Statute 8 00

Total Costs 8 ..

Total Disbursements 3 25

Total 11 25

DISBURSEMENTS

Order striking out demand for

bill of particulars 2 00

Taxing costs 1 25

Total Disbursements 3 25

Taxed at 11 dollars 25 cents

August 11, 1931.

FRED L. BLOODGOOD,
Clerk.

40

Answer.

(Filed Aug. 14, 1931.)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

10

DECKER BUILDING MATERIAL COM-
PANY, a corporation,
Plaintiff,

v.

JERROLD H. MEYER,
Defendant.

} Action at Law.

20

The defendant, Jerrold H. Meyer, answering the
complaint filed in this cause, says:

ANSWER TO FIRST COUNT.

1. This defendant, answering Paragraph 1 of
the First Count, neither admits nor denies the
same, but refers to the contract therein mentioned
for more certainty of the exact agreements re-
ferred to therein.

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2. This defendant denies Paragraph 2 in the
manner and form pleaded.

3. This defendant denies Paragraph 3.

4. This defendant denies Paragraph 4.

5. This defendant neither admits nor denies
Paragraph 5, but leaves the plaintiff to its proof
thereof.

40

6. As to Paragraph 6, this defendant has no in-
formation or knowledge, but leaves the plaintiff to
its proof thereof.

Answer.

7. As to Paragraph 7, this defendant has no information or knowledge, and leaves the plaintiff to its proof thereof.

8. As to Paragraph 8, this defendant has no information or knowledge, but leaves the plaintiff to its proof thereof. 10

9. As to Paragraph 9, this defendant has no information or knowledge, but leaves the plaintiff to its proof thereof.

10. As to Paragraph 10, this defendant has no information or knowledge, and leaves the plaintiff to its proof thereof.

11. As to Paragraph 11, this defendant has no information or knowledge, and leaves the plaintiff to its proof thereof. 20

12. As to Paragraph 12, this defendant has no information or knowledge, and leaves the plaintiff to its proof thereof.

ANSWER TO SECOND COUNT.

13. Answering Paragraph 13 of the Second Count, this defendant reiterates the answers set up in Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12 of the First Count. 30

14. This defendant denies Paragraph 14.

15. This defendant denies that he owes anything to the plaintiff.

SEPARATE SPECIAL DEFENSES.

1. This defendant, by way of separate special defenses to the complaint filed herein, denies that 40

Notice of Motion.

he owes any sum or sums of money to the plaintiff herein.

2. He denies that he owes any sum or sums of money to the Philco Construction Co.

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SAUL AND JOSEPH E. COHN,
Attorneys of Defendant,
Jerrold H. Meyer.

Notice of Motion.

(Filed Sept. 21, 1931.)

NEW JERSEY SUPREME COURT.

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ESSEX COUNTY.

DECKER BUILDING MATERIAL COM-
PANY, a corporation,
Plaintiff,

v.

JERROLD H. MEYER,
Defendant.

Action at Law.

30

To the above named defendant, or whom it may concern:

PLEASE TAKE NOTICE that on Saturday, September 5, 1931, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, before the New Jersey Supreme Court, the Hon. Wm. S. Gummere, the Chief Justice thereof presiding thereat, or such other Justice of the New Jersey Supreme Court as shall then and there preside, at the Court House, Newark, New Jersey, we shall

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Notice of Motion.

move for an order striking out the answer of the defendant and for summary judgment in favor of the plaintiff and against the said defendant, for the sum of Seventeen Hundred and Twenty-Nine Dollars and Ninety-One Cents (\$1,729.91), besides costs of suit to be taxed, on the ground that the answer of the said defendant is sham; and in support of said motion, we shall read the affidavits hereunto annexed. 10

Please take further notice that at the aforesaid time and place, if the foregoing motion should not be granted, we shall move for such further and other order as shall be just and proper, including the striking out of such portions of said answer as are either untrue or otherwise improper, in not presenting any issuable fact or facts, and permitting the defendant to defend this action only upon such terms as shall be prescribed by the court. 20

Please take further notice that at the aforesaid time and place, in the alternative, if the foregoing motions, or either of them, should not be granted, we shall make the following motions:

A. For an order to strike out paragraph 1 of the answer to the first count on the ground that said paragraph is evasive and in violation of Rule 46 of the Supreme Court. 30

B. For an order to strike out paragraph 2 of the answer to the first count on the ground that said paragraph is neither direct, precise or specific, but is argumentative and hypothetical and is in violation of Rule 47 of the Supreme Court.

C. For an order to strike out paragraph 13 of the answer to the second count, re- 40

Notice of Motion.

iterating the answers set up in paragraphs 1 and 2 of the answer to the first count on the same ground as set forth with respect to paragraphs 1 and 2 of the answer to the first count.

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D. For an order to strike out the first separate special defense on the ground that the allegations thereof are conclusions only, do not set up any facts and present no defense to the averments of the complaint or either count thereof.

20

E. For an order to strike out the second separate special defense on the ground that the allegations thereof are conclusions only, do not set up any facts and present no defense to the averments of the complaint or either count thereof.

Please take further notice that at the aforesaid time and place if any or either of the foregoing motions should be denied, we shall move for such further and other order as may be just and proper upon the denial of such motions.

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Yours, etc.,

KANTER & KANTER,
Attorneys of Plaintiff.

Newark, N. J.,
August 27th, 1931.

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Affidavit of William D. Decker.

(Filed September 21, 1931.)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

DECKER BUILDING MATERIAL COM-
PANY, a corporation,

*Plaintiff,**v.*

JERROLD H. MEYER,

Defendant.

} Action at Law.

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State of New Jersey, }
County of Essex, } ss.:

20

WILLIAM D. DECKER, of full age, being duly sworn, according to law on his oath, deposes and says:

1. I am the president of Decker Building Material Company, a corporation, am duly authorized to make this affidavit in its behalf, and have personal knowledge of the facts in this affidavit stated. On or about June 2nd, 1930, the defendant, Jerrold H. Meyer, entered into a written contract, of that date, with Philco Construction Company, a corporation, by the terms whereof the latter agreed to erect and finish a four-story (and basement) building and ten garages, at the northwest corner of Sixth Avenue and Ninth Street, in the City of Newark, County of Essex and State of New Jersey, and whereby the defendant agreed to pay, in the manner and at the times in said written contract specified, the sum of Fifty-Five Thousand Dollars (\$55,000.00), in installments during

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Affidavit of William D. Decker.

the progress of the work, with the final payment of Fifteen Thousand Dollars (\$15,000.00) to be made upon the completion of said contract. The specific terms of payment, as embodied in said contract, are as follows:

10

FIRST: Up to and until roof is covered and finished and all stud partitions set and all rough plumbing and steamfitting installed and all electric wiring installed, and made ready for lathing, and all sash installed, \$8,000.00, to be advanced at the option of the party of the first part from week to week;

20

SECOND: When the entire building is whitecoated, and the bathtubs set and the garages fully constructed, \$9,000.00, to be advanced at the option of the party of the first part from week to week;

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THIRD: Until and up to when all standing and hanging trim is installed and elevator rails installed, \$5,000.00, to be advanced at the option of the party of the first part from week to week;

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FOURTH: Up to and including when all plumbing and steamfitting fixtures are set, and all tile and marble completed, first coat of paint throughout the building applied, \$8,000.00, to be advanced at the option of the party of the first part from week to week;

FIFTH: Up to and until when all finished flooring is laid, Frigidaire or Kelvinators installed, lighting fixtures installed, and second coat of paint throughout the building is completed, \$10,000.00, to be advanced at the

Affidavit of William D. Decker.

option of the party of the first part from week to week;

SIXTH: The balance of \$15,000.00 when the building is fully completed in compliance with the plans and specifications.

10

The party of the first part, as mentioned in said contract, is the defendant, Jerrold H. Meyer, the owner of the building. Said contract contains the following further term, with reference to payments or advances:

"It is expressly understood and agreed that the party of the first part shall have the right to advance all the aforesaid payments, which advances so made shall be in pursuance of and not in modification or derogation of the terms of the within contract."

20

2. The defendant was the owner of the lands whereon the buildings, referred to in paragraph 1 hereof, were to be erected.

3. Subsequent to October 11, 1930, and prior to the institution of this suit, the defendant accepted the work mentioned in the contract, referred to in paragraph 1 hereof, and thereupon there became due from the defendant to the said Philco Construction Company the sum of \$55,000.00, less any sums that had been previously paid by said defendant. As the affidavit of Miss Rose Sevrin, furnished together with this affidavit, will indicate, such balance so then remaining due from the defendant to said Philco Construction Company was a sum in excess of the amount set forth in the stop notice, marked Exhibit A, hereunto annexed and expressly made a part hereof.

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40

4. The plaintiff, in furtherance of the perform-

Affidavit of William D. Decker.

10 ance and completion of the contract, referred to
in paragraph 1 hereof, furnished materials to the
said Philco Construction Company, a corporation,
as the result of which, on October 9th, 1930, there
was due to the plaintiff from the said Philco Con-
struction Company, a corporation, the sum of
\$2,142.19. Annexed hereto, marked Exhibit B, is
the account of the plaintiff with said Philco Con-
struction Company, showing the dates whereon the
aforesaid materials were furnished, the quantities
and kinds of materials furnished, and the prices
at which same were furnished, and all credits
against said account, and further showing that, on
October 9, 1930, for such materials so furnished,
20 there was due to the plaintiff, from said Philco
Construction Company, a corporation, the sum of
\$2,142.19.

5. The contract, referred to in paragraph 1
hereof, with the specifications thereunto annexed,
or a duplicate original thereof and of said specifi-
cations, was on June 3, 1930, filed in the office of
the Clerk of Essex County, N. J. Said contract is
now numbered as #492, in said Essex County
Clerk's office.

30 6. Prior to the service and filing of the notice,
referred to in paragraphs 8 and 9 hereof, the plain-
tiff (acting by me) demanded from the said Philco
Construction Company, a corporation, the sum of
\$2,142.19, mentioned in paragraph 4 hereof.

7. Said Philco Construction Company, a corpo-
ration, failed and neglected to pay the aforesaid
sum of \$2,142.19.

40 8. On October 9th, 1930, the plaintiff (acting
by me) filed in the office of the Clerk of Essex

Affidavit of William D. Decker.

County a notice, a true copy whereof, marked Exhibit A, is hereunto annexed and expressly made a part hereof. Said instrument has been on file with the Clerk of Essex County since October 9th, 1930, and the same is now in his office.

9. I am informed, and truly believe, that on October 11th, 1930, the plaintiff (acting by Mr. William A. Decker) served upon, and delivered to, the defendant, a notice, a true copy whereof, marked Exhibit A, is hereunto annexed and expressly made a part hereof. On the subject of the service of such stop-notice, I refer to the affidavit of Mr. William A. Decker, served together with this affidavit. I am quite sure that such stop-notice was served upon Mr. Jerrold H. Meyer on October 11, 1930, because, within a week thereafter, I spoke to Mr. Michael Silver about this matter and Mr. Michael Silver informed me that Mr. Jerrold H. Meyer had sent such stop-notice, served upon Mr. Jerrold H. Meyer, to the law firm of Messrs. Saul & Joseph E. Cohn, of which Mr. Michael Silver then was and (as I believe) still is a member.

10. The defendant was satisfied of the correctness of the claim and demand made in the notice, Exhibit A, hereunto annexed.

11. Subsequent to the service and filing of the aforesaid notice, and prior to the institution of this suit, said Philco Construction Company, a corporation, paid to the plaintiff the sum of Five Hundred Dollars (\$500.00) on account of the \$2,142.19, mentioned in paragraph 4 hereof, but has failed and neglected to pay the balance of \$1,642.19.

12. The defendant has also failed and neglected to pay said balance of \$1,642.19.

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Affidavit of William D. Decker.

13. I am informed and truly believe that in advance of the terms of payment specified in the contract made by him with Philco Construction Company, a corporation, the defendant paid to said Philco Construction Company, a corporation, or
10 caused to be paid to it or for its account, large sums of money in excess of the sum for which this suit is brought. For verification of this fact, I refer to the affidavit of Miss Rose Sevrin, furnished together with this affidavit.

14. Subsequent to the filing of the stop-notice with the Clerk of Essex County, as stated in paragraph 8 hereof, I spoke to Mr. Jerrold H. Meyer, the defendant, on the telephone, and informed him
20 of the fact of the filing of such stop-notice on October 9th, 1930, and asked him for his street and city address (in Oceanport, N. J.) at which service of a duplicate original stop-notice might be made upon him; I also asked Mr. Meyer how much money had been paid out by him on account of the contract price for the erection of this building. Mr. Jerrold H. Meyer stated that he did not want to be bothered by being served with any papers, that the matter of paying for the erection of this
30 building had been left entirely in the hands of Messrs. Saul & Joseph E. Cohn, a law firm of the City of Newark, and that if I would call up Mr. Michael Silver, a member of that law firm, who had particular charge of the matter, Mr. Silver would give me all the details, as he, Mr. Meyer, was but slightly acquainted with the facts; Mr. Meyer further stated, however, that the Philco Construction Company had not at that time been paid the entire contract price, and "there is still some
40 money coming to it," the quoted language being

Affidavit of William D. Decker.

the defendant's exact language. I pressed Mr. Meyer to tell me how much the remaining balance was, but Mr. Meyer stated that he did not know. My conversation with Mr. Meyer, to which I have referred in this paragraph, occurred after the stop-notice had been filed in the office of the Essex County Clerk but before a duplicate original thereof had been served upon Mr. Jerrold H. Meyer.

10

15. On numerous occasions, before the institution of this suit, I have spoken to Mr. Michael Silver, in order to ascertain from him the unpaid balance due from Jerrold H. Meyer to Philco Construction Company. Mr. Silver told me that nothing was due from Mr. Meyer to the Philco Construction Company, and that the entire balance of the contract price had been paid to the Philco Construction Company before my firm's stop-notice had been filed with the County Clerk of Essex County or served upon Mr. Jerrold H. Meyer. I endeavored to ascertain from Mr. Silver the details of such payments to the Philco Construction Company, but he refused to give me such details, although I ascertained, from another source prior to the institution of this suit, that at least part of the contract price had, in fact, been paid long after filing and service of the stop-notice.

20

30

16. The amount now due Decker Building Material Company from the defendant, Jerrold H. Meyer, by reason of the facts and circumstances herein stated or referred to, is the sum of \$1,642.19, together with interest thereon from October 11, 1930, which interest (calculated to September 5, 1931) amounts to the sum of \$87.72; both sums aggregate \$1,729.91.

40

17. I believe that the defendant has no defense

Exhibits Annexed to Foregoing Affidavit.

to this action and that his answer is sham and filed only for the purpose of delay.

WM. D. DECKER.

10 Subscribed and sworn to before me }
 this 27th day of August A. D. 1931. }

CECELIA FRIEDMAN,
 A Notary Public
 of New Jersey.

EXHIBIT A.

To Mr. Jerrold H. Meyer. (Owner.)

20 YOU ARE HEREBY NOTIFIED, that Philco Construc-
 tion Co., (A Corporation of New Jersey) is justly
 indebted to Decker Building Material Co. in the
 sum of Two thousand one hundred forty two dol-
 lars and Nineteen cents for material furnished by
 us at its request, in erecting and constructing a
 certain building owned by you, situate, lying and
 being upon the North corner 6th Ave and 9th
 Street, in the City of Newark, County of Essex,
 and State of New Jersey, and that we have de-
 30 manded payment from the said Philco Construc-
 tion Co. of the said sum of money so due and
 owing to us as aforesaid, and that it the said Philco
 Construction Co. have refused to pay the same or
 any part thereof.

 YOU ARE THEREFORE HEREBY NOTIFIED and re-
 quired to retain the amount of money so due and
 claimed by us out of the amount owing by you to
 the said Philco Construction Co.; and upon being
 40 satisfied of the correctness of our demand to pay
 the said sum of money to Decker Building Material

Exhibits Annexed to Foregoing Affidavit.

Co., 513 Lyons Ave. Irvington, N. J., Phone,
Frontenac 3-3600.

DECKER BUILDING MATERIAL CO.

By WM. D. DECKER

Pres.

10

Dated, Oct. 9th, 1930
At Irvington, N. J.

EXHIBIT B.

DATE	MATERIAL	UNIT	DEBIT	CREDIT	BALANCE
1930					
June 17 MC	5 Yds. Mixture	3.60	18.00		
19	30 Bags Cement	.70	21.00		20
	25 Bags Com. Lime	.45	11.25		
	8500# Briksand	2.50	10.63		
20	13680# Sand	2.50	17.10		
	80 Bags Cement	.70	56.00		
20 MC	4 Yds. Mixture	3.60	14.40		
MC	4 Yds. Mixture	3.60	14.40		
	5 Yds. Sand	2.50	12.50		
23	50 Bags Com. Lime	.45	22.50		
	50 Bags Cement	.70	35.00		
	11880# Sand	2.50	14.85		
	9300# Sand	2.50	11.63		
25	1M. 5x8x12 Bakups		100.00		
	40 Bags Com. Lime	.45	18.00		30
	30 Bags Cement	.70	21.00		
	50 Ft. 20x20 Sq. Flue	2.28	114.00		
	25 Bags Cement	.65	16.25		
	Own				
26	25 Bags Cement	.70	17.50		
	50 Bags Com. Lime	.45	22.50		
30	20 Bags Cement	.70	14.00		
	30 Bags Com. Lime	.45	13.50		
July 1	350—5x8x12 Bakups	100.00	35.00		
	10 Bags Cement	.70	7.00		
	20 Bags Com. Lime	.45	9.00		
	20 Bags Cement	.65	13.00		
	Own				
	10 Bags Com. Lime	.40	4.00		40
	"				

Exhibits Annexed to Foregoing Affidavit.

DATE	MATERIAL	UNIT	DEBIT	CREDIT	BALANCE
1930					
3	20 Ft. 8" Wall Coping "	.25	5.00		
	4 Pcs. 8" W. C. Corners "	.75	3.00		
	20 Bags Cement "	.65	13.00		
10	10 Bags Com. Lime	.45	4.50		
	40 Bags Cement	.70	28.00		
14	25 Bags Cement	.70	17.50		
	15 Bags Com. Lime	.45	6.75		
18	10 Bags Cement Own	.65	6.50		
	10 Bags Com. Lime "	.40	4.00		
21	30 Bags Cement	.70	21.00		
	30 Bags Com. Lime	.45	13.50		
	1 Bag Pl. Paris Own		1.20		
	2 Bags Fin. Lime "	.60	1.20		
23	3 Bags Fin. Lime "	.60	1.80		
	1 Bag Pl. Paris "		1.20		
	20 Bags Cement	.70	14.00		
20	50 Bags Com. Lime	.45	22.50		
25	100 Pl. Boards Own	.20	20.00		
28	7/24—500—1/4" Pl. Boards	.19	95.00		
30	3 Bags White Cement Own	2.00	6.00		
	1 Yd. White Sand "		4.50		
	10 Bags Pl. Paris "	1.20	12.00		
	50 Bags Fin. Lime "	.60	30.00		
	20 Bags Cement	.70	14.00		
	20 Bags Com. Lime	.45	9.00		
Aug. 1	6 Bags Cement Own	.65	3.90		
	10 Bags Pl. Paris "	1.20	12.00		
	30 Bags Fin. Lime "	.60	18.00		
	50 Pl. Boards "	.20	10.00		
30	15—4" Part. Tile "	.12	1.80		
4	125 Bags Fin. Lime	.65	81.25		
	10 Bags Pl. Paris Own	1.20	12.00		
	10 Bags Cement "	.65	6.50		
	10 Bags Com. Lime "	.40	4.00		

Forwarded \$1,168.61

Exhibits Annexed to Foregoing Affidavit.

SHEET #2

DATE	MATERIAL	UNIT	DEBIT	CREDIT	BALANCE
1930					
	Forwarded		\$1,168.61		
Aug. 5	125 Bags Fin. Lime	.65	81.25		
6	5 Bbls. Textone (1500#)	.21	315.00		10
	35 Bags Pl. Paris Own	1.20	42.00		
8	30 Bags Pl. Paris "	1.20	36.00		
	6 Bags Pl. Paris "	1.20	7.20		
	1200# (4 bbls.) Textone	.21	252.00		
	1 Box Retarder		.25		
	20 Bags Pl. Paris Own	1.20	24.00		
11	8/5—2 Bbls. Textone (600#)	.21	126.00		
12	30 Bags Cement Own	.65	19.50		
14	6 Pl. Boards "	.20	1.20		
	20 Bags Cement "	.65	13.00		
18	60 Bags Cement "	.65	39.00		
19	3 Bags Bondcrete "	1.75	5.25		
	30 Bags Fin. Lime "	.60	18.00		20
	10 Bags Pl. Paris "	1.20	12.00		
20	30 Bags Fin. Lime "	.60	18.00		
	10 Bags Pl. Paris "	1.20	12.00		
	150 Buff V. C. #124 Brick "	42.00	6.30		
	20 Yds. 2.2 Exp. Wire Lath	.25	5.00		
21	30 Bags Fin. Lime Own	.60	18.00		
	10 Bags Pl. Paris "	1.20	12.00		
	50 Bags Cement "	.65	32.50		
	10 Bags Com. Lime "	.40	4.00		
22	3 Bags Com. Lime "	.38	1.14		
23	8/10—3 Bbls. Textone (900#)	.21	189.00		
23	12 Ft. 3" Land Tile Own	.08	.96		
	1 Bag Pl. Paris "		1.20		30
	1 Bag Fin. Lime "		.60		
25	100 Bags Cement	.65	65.00		
	14 Ft. 4" Sewer Pipe Own	.18	2.52		
26	4 Bags Adamant "	.75	3.00		
27	3 Bags Neat "	1.00	3.00		
	100—4" Part. Tile "	.12	12.00		
	8/19—3 Bags Bondcrete "	1.75	5.25		
	200—4" Part. Tile	.13	26.00		
28	20 Bags Fin. Lime Own	.60	12.00		
29	1 Bbl. (300 Lbs.) Textone	.21	63.00		

Exhibits Annexed to Foregoing Affidavit.

	DATE	MATERIAL	UNIT	DEBIT	CREDIT	BALANCE
	1930					
	Sept. 3	15 Bags Cement Own	.60	9.00		
	4	20 Yds. Dia. 2.2 Wire Lath	.25	5.00		
		20 Bags Fin. Lime Own	.60	12.00		
10		4 Ft. 4" Sewer Pipe "	.18	.72		
		10 Ft. 4" Sewer Pipe "	.18	1.80		
		1—4" Ell		.72		
		1—6" Ell		.72		
		15 Bags Cement Own	.60	9.00		
		15 Bags Cement "	.60	9.00		
	5	50 Pl. Boards	.20	10.00		
		15 Bags Cement "	.60	9.00		
		20 Bags Cement "	.60	12.00		
	8	4 Bags Adamant (paper) "	.65	2.60		
		10 Bags Cement "	.60	6.00		
	9	15 Bags Cement "	.60	9.00		
	10	15 Bags Cement "	.60	9.00		
20		15 Bags Cement "	.60	9.00		
	11	20 Bags Cement "	.60	12.00		
		20 Bags Cement "	.60	12.00		
		100# Textone	.26	26.00		
	12	15 Bags Cement "	.60	9.00		
		1 Bag White Cement		2.00		
		20 Bags Cement "	.60	12.00		
	13	500—4" Part. Tile "	.12	60.00		
		Forwarded		\$2,900.29		

Exhibits Annexed to Foregoing Affidavit.

SHEET #3

DATE	MATERIAL	UNIT	DEBIT	CREDIT	BALANCE
1930					
	Forwarded		\$2,900.29		
Sept. 13	125—4" Part. Tile Own	.12	15.00		
	125—4" Part. Tile "	.12	15.00		10
15	5 Bags Pl. Paris "	1.20	6.00		
	15 Bags Cement "	.60	9.00		
16	100 Pl. Boards "	.20	20.00		
	75—4" Part. Tile "	.12	9.00		
17	100 Pl. Boards "	.20	20.00		
19	20 Bags Adamant (Paper) "	.65	13.00		
20	10 Bags Adamant " "	.65	6.50		
	9/10—4 Boxes (100#) Textone	.26	26.00		
23	9/11—6 Boxes (150#) Textone	.26	39.00		
26	10 Bags Fin. Lime Own	.60	6.00		
	3 Bags Pl. Paris (100#) "	1.45	4.35		
Oct. 6	12 Bags Adamant	.70	8.40		
	1 Bag Pl. Paris		1.50		20
	20 Yds. 2.2 P. M. Lath	.39	7.80		
7	5 Pl. Boards Own	.20	1.00		
Aug. 21	Cr. 90 #124 Buff V. C. Face Brick	40.00		3.60	
4	Cr. Check A/C			62.05	
15	" Check A/C			300.00	
Sept. 3	" Check A/C			300.00	
5	" Check A/C			300.00	
			3,107.84	965.65	
					\$2,142.19
Nov. 19	Cr. Check A/C			500.00	
					30
					\$1,642.19

Affidavit of William A. Decker.

(Filed September 21, 1931.)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

10

DECKER BUILDING MATERIAL COM-
PANY, a corporation,
Plaintiff,

v.

JERROLD H. MEYER,
Defendant.

Action at Law.

20

State of New Jersey, }
County of Essex, } ss.:

WILLIAM A. DECKER of full age, being duly sworn, according to law, on his oath, deposes and says:

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1. On Saturday, October 11th, 1930, at about 6 o'clock in the afternoon, I did serve upon Jerrold H. Meyer the original of the paper, whereof a copy, marked Exhibit A, is hereunto annexed and expressly made a part hereof. Said paper was served upon Mr. Meyer upon the front staircase of his home at Oceanport, N. J., in the presence of Mr. E. Berger.

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2. Prior to my actually handing such paper to Mr. Meyer, I told him who I was and also explained to him the contents of the paper which I had in my hand. Mr. Meyer stated that I should serve the paper on his lawyers, Messrs. Saul & Joseph E. Cohn. I stated to Mr. Meyer that as he was the owner of the building, the notice should be served on him. I then handed him the notice,

Exhibit A Annexed to Foregoing Affidavit.

and actually touched his hand with the paper. Mr. Meyer said he would not take it and allowed the paper to fall at his feet on the staircase. He requested that I should pick it up, but I did not do so, and I then left the premises.

WM. A. DECKER.

10

Sworn and subscribed to before me }
this 24th day of August, A. D. 1931. }

CECELIA FRIEDMAN,
A Notary Public of New Jersey.

EXHIBIT A.

20

To Mr. Jerrold H. Meyer. (Owner.)

YOU ARE HEREBY NOTIFIED, that Philco Construction Co., (A Corporation of New Jersey) is justly indebted to Decker Building Material Co. in the sum of Two thousand one hundred forty two dollars and Nineteen cents for material furnished by us at its request, in erecting and constructing a certain building owned by you, situate, lying and being upon the North corner 6th Ave and 9th Street, in the City of Newark, County of Essex, and State of New Jersey, and that we have demanded payment from the said Philco Construction Co. of the said sum of money so due and owing to us as aforesaid, and that it the said Philco Construction Co. have refused to pay the same or any part thereof.

30

YOU ARE THEREFORE HEREBY NOTIFIED and required to retain the amount of money so due and claimed by us out of the amount owing by you to the said Philco Construction Co.; and upon being

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Affidavit of Rose Sevrin.

satisfied of the correctness of our demand to pay the said sum of money to Decker Building Material Co., 513 Lyons Ave. Irvington, N. J., Phone, Frontenac 3-3600.

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DECKER BUILDING MATERIAL CO.

By WM. D. DECKER
Pres.

Dated, Oct. 9th, 1930
At Irvington, N. J.

Affidavit of Rose Sevrin.

(Filed September 21, 1931.)

20

NEW JERSEY SUPREME COURT,
ESSEX COUNTY.

DECKER BUILDING MATERIAL COM-
PANY, a corporation,
Plaintiff,

v.

JERROLD H. MEYER,
Defendant.

30

} Action at Law.

State of New Jersey, }
County of Essex, } ss.:

ROSE SEVRIN, being duly sworn according to law on her oath, deposes and says:

40 1. I am a stenographer and typist. In connection with the examination in supplementary proceedings of the defendant, Philco Construction

* *Affidavit of Rose Sevrin.*

Company, a corporation, on a judgment recovered by Decker Building Material Company, a corporation, against Philco Construction Company, a corporation, for the sum of \$1,795.31, damages and costs, docketed in the New Jersey Supreme Court, I was duly sworn to transcribe the evidence to be taken before Lionel Kristeller, Esq., a Supreme Court Commissioner, before whom such examination was conducted. I attended such examination, took the evidence stenographically and am able to state what was testified to by the several witnesses at such examination.

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2. One of the witnesses who testified at the aforesaid examination was Jerrold H. Meyer. On August 20, 1931, said Jerrold H. Meyer testified as follows, and I am here reducing his testimony to narrative form, using the pronoun "I" in place of the name, Jerrold H. Meyer:

20

I live in Oceanport, N. J. I signed a contract for the erection of the building at the northwest corner of Sixth Avenue and Ninth Street, Newark, N. J., agreeing to pay the sum of \$55,000.00, as in that contract specified, but I left practically all the details to Mr. Silver. I had engaged the firm of Messrs. Saul & Joseph E. Cohn, with Mr. Michael Silver of that firm, to act as my disbursing agent in connection with that transaction. Decker Building Material Company "tried to serve me with a stop-notice, but I didn't accept it, and I wouldn't take it." The minute I heard that there was a paper to be served upon me, I ran into the house. I wouldn't take the paper; I thought that the acceptance of that paper might involve

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Affidavit of Rose Sevrin.

10 me in some difficulty, and for that reason, I refused to accept it and walked back into the house. I told Messrs. Saul & Joseph E. Cohn that a man, by the name of Decker, tried to serve me with a paper and they said they would take care of it. I didn't make any inquiry in order to ascertain whether the claim made by Decker Building Material Company against Philco Construction Company was correct or not. Even after consulting my counsel, I can't say anything against the claim. I have heard Mr. Silver testify today and his version of the facts is correct.

20 3. Another witness who testified at the aforesaid examination was Michael S. Silver, Esq. His testimony was given on August 20, 1931, in the presence of Mr. Jerrold H. Meyer. Mr. Michael S. Silver testified as follows, and I am here reducing his testimony to narrative form, using the pronoun "I" in place of the name, Michael S. Silver:

30 I am a member of the bar, and a member of the firm of Saul & Joseph E. Cohn. I am familiar with the contract made by Jerrold H. Meyer with Philco Construction Company. The building is at the northwest corner of Sixth Avenue and Ninth Street, Newark, N. J. I haven't the contract but it is on record. My firm represented Mr. Meyer in that transaction, and I am familiar with the facts that the contract called for a payment or payments of \$55,000. My firm and I personally handled the disbursements. I have here and am now producing the checks showing the advancements made by Mr.

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Affidavit of Rose Sevrin.

Meyer in connection with that transaction. These checks, together with an additional sum for the difference, represent the advancements made by Mr. Meyer on account of the contract. I will read into the record the checks representing the payments made by Jerrold H. Meyer, or in his behalf, in discharge of the contract price mentioned in the contract made by Mr. Jerrold H. Meyer with Philco Construction Company for the construction of the building at the northwest corner of Sixth Avenue and Ninth Street, Newark, N. J., such contract being dated June 2nd, 1930 and calling for the payment of \$55,000.00, by Mr. Jerrold H. Meyer. The following are the details:

No.	Date of Check	Date of Payment	Amount	
10251	6-23-30	6-24-30	\$900.00	
10257	6-24-30	6-26-30	400.00	
10258	7-3-30	7-5-30	1,000.00	
10259	7-3-30	7-5-30	500.00	
10265	7-11-30	7-12-30	1,850.25	
10266	7-14-30	7-15-30	700.00	
10269	7-18-30	7-19-30	2,642.62	
10289	7-24-30	7-25-30	700.00	30
10290	7-25-30	7-26-30	2,616.75	
10291	7-28-30	7-30-30	200.00	
10294	7-31-30	8-1-30	300.00	
10295	8-1-30	8-2-30	3,025.95	
10300	8-9-30	8-9-30	2,549.75	
10301	8-11-30	8-12-30	295.00	
10305	8-15-30	8-16-30	2,670.75	
10307	8-18-30	8-19-30	192.40	
10326	9-9-30	9-10-30	1,500.00	
10332	9-9-30	9-12-30	300.00	40

Affidavit of Rose Sevrin.

No.	Date of Check	Date of Payment	Amount
10333	9-13-30	9-15-30	679.00
10336	9-17-30	9-18-30	153.75
10339	9-19-30	9-24-30	450.00
10371	9-10-30	11-15-30	2,000.00
10444	2-3-31	3-4-31	2,290.00
10484	5-11-31	5-12-31	2,000.00
10452	3-16-31	3-17-31	2,000.00

The following checks were drawn on the United States Trust Company and were made by Jacob Meyer:

No.	Date of Check	Date of Payment	Amount
216	6-13-30	6-14-30	\$972.50
219	6-27-30	6-28-30	1,000.00
245	9-4-30	9- -30	2,500.00

The following checks were drawn on the United States Trust Company were made by the United States Mortgage and Title Guaranty Company:

No.	Date of Check	Date of Payment	Amount
14141	8-22-30	8-23-30	\$6,000.00
14367	9-5-30	9-6-30	1,984.65
14392	9-9-30	9-10-30	1,000.00
14526	9-12-30	9-12-30	1,500.00
14667	9-20-30	9-22-30	1,500.00
14790	9-27-30	9-29-30	650.00
14945	10-7-30	10-14-30	600.00
14946	10-7-30	10-20-30	100.00
14947	10-7-30	10-9-30	200.00
14948	10-7-30	10-15-30	350.00
14949	10-7-30	10-11-30	155.00
14950	10-7-30	10-9-30	250.00

40	TRUST ACCOUNT		
	842	12-24-30	1,000.00

Affidavit of Rose Sevrin.

There was also an additional check which I have not been able to locate, made by United States Mortgage & Title Guaranty Company on September 19, 1930, drawn on the United States Trust Company, that check being numbered #14654, which was for the sum of \$4,000.00.

10

Some of these checks were executed and delivered subsequent to October 9th, 1930. Mr. Meyer had brought me the stop-notice of Decker Building Material Company. I had a copy thereof from Decker Building Material Company on the 10th in the mail. I got a copy from Mr. Meyer. There is no doubt about the fact that Jerrold H. Meyer was the owner on October 9th, 1930. I have examined the records and I have found the stop-notice of Decker Building Material Co. I disbursed monies subsequent to October 10th, 1930 because Jerrold H. Meyer, through his attorneys, Saul & Joseph E. Cohn, had guaranteed payment of certain claims against Philco Construction Company to certain people who had furnished materials or performed labor in connection with this building, and we, on that account, felt justified in paying those creditors notwithstanding the service of the stop-notice by Decker Building Material Company. There were also assignments from the Philco Construction Company of the funds that were to grow due to it from Jerrold H. Meyer, but I have not those assignments with me. The assignments were made direct to Jerrold H. Meyer, authorizing and directing him to pay certain creditors certain sums due on those contracts.

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Affidavit of Rose Sevrin.

4. For the purpose of ready reference, I have made a recapitulation of the payments or advancements (testified to by Mr. Silver) which were made subsequent to October 9, 1930; such payments are as follows:

10

No.	Date of Check	Date of Payment	Amount
10444	February 3, 1931	February 4, 1931	\$2,290.00
10484	April 11, 1931	April 12, 1931	2,000.00
10452	March 16, 1931	March 17, 1931	2,000.00
TRUST ACCT.			
842	December 24, 1930		1,000.00
			\$7,290.00

5. On Tuesday, August 25th, 1931, Mr. Michael Silver further testified, as hereinafter stated, and produced certain documents which were marked in evidence and which are hereinafter referred to.

20

6. Mr. Michael Silver produced, and there was marked in evidence, as Exhibit 1, 1-A and 1-B, three papers, a copy of each of which, marked Exhibit 1, Exhibit 1-A and Exhibit 1-B, is hereunto annexed and expressly made a part hereof.

7. Mr. Michael Silver produced, and there was marked in evidence, as Exhibit 2, a paper, a copy of which, marked Exhibit 2, is hereunto annexed and expressly made a part hereof.

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8. Mr. Michael Silver produced, and there was marked in evidence, as Exhibit 3 and 3-A, two papers, a copy of each of which, marked Exhibit 3 and Exhibit 3-A, is hereunto annexed and expressly made a part hereof.

9. Mr. Michael Silver produced, and there was marked in evidence, as Exhibit 4 and 4-A, two papers, a copy of each of which, marked Exhibit

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Exhibits Annexed to Foregoing Affidavit.

4 and Exhibit 4-A, is hereunto annexed and expressly made a part hereof.

10. Mr. Michael Silver produced, and there was marked in evidence, as Exhibit 5 and 5-A, two papers, a copy of each of which, marked Exhibit 5 and Exhibit 5-A, is hereunto annexed and expressly made a part hereof.

10

11. Mr. Silver also stated that the foregoing exhibits were the guaranties to which he had referred in his testimony on Wednesday, August 19, 1931, as having been signed by Saul and Joseph E. Cohn for Jerrold H. Meyer and that, as far as he could recall, there were no other papers, other than those so offered in evidence.

20

ROSE SEVRIN.

Subscribed and sworn to before me }
this 27th day of August A. D. 1931. }

CECELIA FRIEDMAN,
A Notary Public of New Jersey.

EXHIBIT 1.

Newark, N. J., July 22, 1930.

30

Mr. Gerrold H. Meyer,
972 Broad St.,
Newark, N. J.

Dear Sir:

We have this day placed contract with the Elin Appliance Company for the refrigeration equipment to be installed at premises located at No. 66-72 North Ninth St., Newark, N. J., which equip-

40

Exhibits Annexed to Foregoing Affidavit.

ment is part of the general contract between this company and yourself.

10 We hereby authorize you to withhold from the contract price for the work done by us the sum of \$2290.00, which represents the agreement between ourselves and the Elin Appliance Company for said refrigeration equipment, which amount you are hereby authorized to pay direct to the said Elin Appliance Company upon completion of their contract, which funds are to be deducted from the last payment of \$15,000.00 evidenced in the contract between us.

Yours very truly,

20 PHILCO CONSTRUCTION Co.
PHILIP KANTER

President
(Corporate
JOSEPH A. COHEN Seal)
Secretary

30 I accept the above authorization and direction and will hold out the sum of \$2290. for the entire completion of the above work, which sum is not to be paid however, until the final payment of \$15,000. is due and payable to Philco Construction Co.

Very truly yours,

JERROLD H. MEYER (Signed)
by SAUL and JOSEPH E. COHN Attys.

Exhibits Annexed to Foregoing Affidavit.

EXHIBIT 1-A.

ELIN APPLIANCE COMPANY

328 Washington St.,

Newark, N. J.

September 2, 1930

10

Mr. Saul & Jos. E. Cohn,
972 Broad Street,
Newark, New Jersey.

Att: Mr. Jos. E. Cohn

Gentlemen:

In connection with our contract with the Philco
Construction Company, for electrical refrigeration
at 66-72 North 9th Street, Newark, New Jersey,
we enclose their order directing Mr. Meyer to with-
hold \$2290. to take care of payment of our con-
tract.

20

Upon your acceptance of this order we shall pro-
ceed with our work.

Yours very truly,

ELIN APPLIANCE COMPANY

F. X. HUGH

Credit Department

F. X. HUGHES

30

FXH:HB

enc.

Exhibits Annexed to Foregoing Affidavit.

EXHIBIT 1-B.

INVOICE

ELIN APPLIANCE COMPANY

328 Washington Street

Newark, N. J.

10

A 9453

Sold to

Sept. 29, 1930

Philco Construction Co.,
66 No. 9th Street,
Newark, New Jersey.

Invoice No. A-2943
Your Order No.
Our Order No. AF 1881
Shipped Via
Terms Webb

- 1 Model I Compressor
17 Cooling Units F6V
20 19 Sets Manifolds
Rex Flexible Copper Tubing
Iron Conduit Pipe \$2290.00
19 Panel Boxes
1 20 x 36 Manifold Box
19 #2158 Cabinets, Porcelain interior,
Duco exterior
1 L-25 Cabinet complete with Compressor,
Supt. Apt.

30

ELIN APPLIANCE CO.

PAID

3-3-31

Per HUGHES

40

Exhibits Annexed to Foregoing Affidavit.

EXHIBIT 2.

Newark, New Jersey,
August 1, 1930.

Mr. Jerrold H. Meyer,

Dear Sir:

10

This is to authorize and direct you to pay to Harry Scherl the sum of \$2,000 due him which he advanced for pay roll re: premises, 66 North 9th Street, Newark, New Jersey, out of the fund of \$55,000 due us on the general contract entered into between you and ourselves on building located at 66 North 9th Street, Newark, New Jersey.

Very truly yours,

20

PHILCO CONSTRUCTION COMPANY
By Philip Kanter (Signed)
Pres.

Attest:

JOSEPH A. COHEN (Signed)
Secy.

EXHIBIT 3.

August 1, 1930.

30

Mr. Jerrold H. Meyer,

Dear Sir:

This is to authorize and direct you to pay Colonial Woodworking Company the sum of \$2,000 on account of materials furnished by you in connection with premises 66 North 9th Street, Newark, out of the fund of \$55,000 due us under general contract entered into between you and ourselves

40

Exhibits Annexed to Foregoing Affidavit.

on building located at 66 North 9th Street, Newark,
New Jersey.

Very truly yours,

PHILCO CONSTRUCTION COMPANY

By PHILIP KANTER (Signed)

President

10

Attest:

JOSEPH A. COHEN (Signed)

Secretary

EXHIBIT 3-A.

August 5, 1930.

20 Colonial Woodworking Company,
62 Cordier Street,
Irvington, N. J.

Gentlemen:

30 We are in receipt of an authorization dated
August 1, 1930 addressed to our client, Mr. Jerrold
H. Meyer, signed by Philco Construction Company,
authorizing and directing Mr. Meyer to pay you
\$2,000 for materials furnished in connection with
property, 66 North 9th Street, out of the fund of
\$55,000 due them under general contract.

40 From my telephone conversation with your rep-
resentative, it appears there is more than \$2,000
due you. In pursuance to our telephone conversa-
tion, all we will guarantee in behalf of Mr. Meyer
is \$2,000, and we do hereby guarantee this sum to
you in behalf of our client, Jerrold H. Meyer, and
will retain said sum and pay it to you when the
small balance of material is delivered, as per in-
structions of Mr. Kanter.

Very truly yours,

MICHAEL SILVER

MS:RM

For: SAUL and JOSEPH E. COHN

Exhibits Annexed to Foregoing Affidavit.

EXHIBIT 4.

Newark, New Jersey, August 1, 1930.

Mr. Jerrold H. Meyer,

Dear Sir:

10

This is to authorize and direct you to pay to Watson Elevator Company the sum of \$4100 due it for installation of elevators at 66 North 9th Street, Newark, New Jersey, out of the fund of \$55,000 due us on the general contract entered into between you and ourselves on building located at 66 North 9th Street, Newark, New Jersey.

Very truly yours,

PHILCO CONSTRUCTION COMPANY

20

By PHILIP KANTER (Signed)

Pres.

Attest:

JOSEPH A. COHEN

Secy.

EXHIBIT 4-A.

30

August 5, 1930

Watson Elevator Co.,
407 W. 36th St.
New York City.

Gentlemen:

We are in receipt of an authorization dated August 1, 1930 addressed to our client, Mr. Jerrold H. Meyer, signed by Philco Construction Company, authorizing and directing Mr. Meyer to pay you \$4,100 for elevators and equipment in connection

40

Exhibits Annexed to Foregoing Affidavit.

with property, 66 North 9th Street, out of the fund of \$55,000 due them under general contract.

10 Pursuant to conversation had with you representative, beg to advise that we will and do hereby guarantee in behalf of our client, Jerrold H. Meyer, said sum of \$4,100 to be paid you when installation is fully completed. In the meantime, said sum is being retained by our client as your agent.

Very truly yours,

MICHAEL SILVER

MS:RM

For: SAUL and JOSEPH E. COHN

20

EXHIBIT 5.

August 2, 1930.

Mr. Jerrold H. Meyer,

Dear Sir:

30 This is to authorize and direct you to pay to Geo. Snyder, Inc. the sum of \$2,000 for installation of steamheating and plumbing at 66 North 9th Street out of the fund of \$55,000 due us under general contract entered into between you and ourselves on building located at 66 North 9th Street, Newark, New Jersey.

Very truly yours,

PHILCO CONSTRUCTION COMPANY

By PHILIP KANTER (Signed)

President

Attest:

40 JOSEPH A. COHEN
Secretary

Exhibits Annexed to Foregoing Affidavit.

EXHIBIT 5-A.

August 4, 1930.

Geo. Snyder, Inc.,
537 Clinton Avenue,
Newark, N. J.

10

Dear Sirs:

We are in receipt of an authorization dated August 2nd from Philco Construction Company addressed to our client, Jerrold H. Meyer, wherein they authorize us to pay you \$2,000 on account of steamheating and plumbing installed by you at No. 66 North 9th Street, Newark, New Jersey, out of the fund of \$55,000 due them under their general contract with our client.

20

When the writer spoke to you last, you told him that there was considerable more than that sum coming. However, as the writer heretofore informed you, our client will only guarantee to you the payment of \$2,000, and in his behalf, we hereby guarantee to you that we will retain and pay you the sum of \$2,000 out of the sum due Philco Construction Company. You will have to look to them for any sum above this item of \$2,000.

30

Very truly yours,

MICHAEL SILVER

MS:RM

For: SAUL and JOSEPH E. COHN

40

Affidavit of Elias A. Kanter.

(Filed September 21, 1931.)

NEW JERSEY SUPREME COURT,
ESSEX COUNTY.

10	DECKER BUILDING MATERIAL COM- PANY, a corporation, <i>Plaintiff,</i> <i>v.</i> JERROLD H. MEYER, <i>Defendant.</i>	} Action at Law.
----	---	------------------

20 State of New Jersey, }
 County of Essex, } ss.:

ELIAS A. KANTER, of full age, being duly sworn,
 according to law, on his oath, deposes and says:

1. I am a member of the bar of the State of
 New Jersey, and a member of the law firm of
 Kanter & Kanter, attorneys of the plaintiff in a
 certain action instituted by Decker Building Ma-
 terial Company, a corporation, as plaintiff, against
 30 Philco Construction Company, a corporation, as
 defendant, in the Essex County Circuit Court, of
 the conduct of which suit I had, and still have, per-
 sonal charge.

2. In the suit, mentioned in paragraph 1 here-
 of, final judgment was recovered by Decker Build-
 ing Material Company, a corporation, against
 Philco Construction Company, a corporation, on
 July 22nd, 1931, for the sum of \$1,720.18 damages
 and \$75.13 costs of suit. Said judgment was re-
 40 covered on a book account and for goods sold and
 delivered, a copy of which account is annexed to

Answering Affidavit of Michael Silver.

the affidavit of Mr. William D. Decker, marked as Exhibit B; Mr. William D. Decker's affidavit precedes this affidavit and is in connection with the motion, made in the above entitled cause, to strike the answer of the defendant therein.

ELIAS A. KANTER.

10

Sworn and subscribed to before me }
this 27th day of August, A. D. 1931. }

CECELIA FRIEDMAN,
A Notary Public
of New Jersey.

Answering Affidavit of Michael Silver.

20

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

DECKER BUILDING MATERIAL COM-
PANY, a corporation,
Plaintiff,

v.

JERROLD H. MEYER,
Defendant.

Action at Law.

30

State of New Jersey, }
County of Essex, } ss.:

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

That he is a practicing counsellor at law of the State of New Jersey, and a member of the firm of Saul and Joseph E. Cohn, with offices located at

40

Answering Affidavit of Michael Silver.

972 Broad Street, Newark, New Jersey; that he is fully familiar with the contract entered into between Jerrold H. Meyer and the Philco Construction Company, for the erection, alteration and completion of a certain four story brick building at the northwest corner of Sixth Avenue and Ninth Street, Newark, New Jersey, at the agreed price of \$55,000.00, which contract is in writing and on file in the Essex County Clerk's Office, in the Hall of Records, Newark, New Jersey.

Deponent further says that the firm of Saul and Joseph E. Cohn was retained by Jerrold H. Meyer to handle the entire disbursing of funds in connection with the said contract and that deponent was actively in charge of all of the payments and details in connection with the erection and completion of said work; that the said Jerrold H. Meyer knew nothing of the details and payments, but left the same entirely in the hands of deponent.

Deponent further says that he is fully conversant with, and has personal knowledge of all the transactions relative to the payments in the said contract, and that he has read the affidavit of William D. Decker, and begs leave to refer to the original contract entered into between the parties for more certainty as to the exact phraseology and terms thereof, and in answer to paragraph 3 of said affidavit, admits that there was due from Jerrold H. Meyer, the defendant, to the Philco Construction Company, the sum of \$55,000.00, but that the said sum of \$55,000.00, under said contract, was entirely paid to the said Philco Construction Company prior to the filing of the stop notice, in the Essex County Clerk's Office, marked Exhibit A in said affidavit, and prior

Answering Affidavit of Michael Silver.

to service thereof on deponent, and also prior to service thereof on the defendant, Jerrold H. Meyer, as alleged in said affidavit, and denies the balance of said paragraph relative to the allegations in the affidavit of Miss Rose Sevrin, and reiterates that there was nothing due on said contract of \$55,000.00 from the defendant, Jerrold H. Meyer, to the Philco Construction Company at the time of the service of the aforementioned notice marked Exhibit A. In answer to paragraph 12 of said affidavit, deponent says that it is true that this defendant has not paid \$1,642.19 to the plaintiff herein, due to the reason that this defendant owes nothing, or had any dealings with the plaintiff herein outside of being served with the notice, as alleged. In answer to paragraph 13 in said affidavit, this deponent says that it is not true that large sums of money, or in fact any sum of money, was paid after the service of the aforementioned stop notice, but in fact says that any money that was paid thereafter, was money that had already been acknowledged as being due and owing to other sub-contractors on said job and that this deponent, as agent, and in behalf of the said Jerrold H. Meyer and with his consent, agreed to the payment of said sums, and so informed the said sub-contractors in writing, copies of which writings are attached to the affidavit of William D. Decker, and denies that there is any verification of fact as referred to in said paragraph 13 in the affidavit of Miss Rose Sevrin. This deponent, in answer to paragraph 15 of William D. Decker's affidavit, admits that he spoke to William D. Decker, and that deponent refused to give any details of the transaction to him, and further stated at the time that the details of the transaction were

Answering Affidavit of Michael Silver.

entirely a matter between the defendant, Jerrold H. Meyer, and the Philco Construction Company, and that they had received the sum of \$55,000.00, as agreed under the contract and again reiterate that said sums of money were paid after the filing
10 of the said stop notice by the plaintiff herein, but that said sums were paid in compliance with written directions and authorizations of Philco Construction Company to defendant, and by written agreements wherein the firm of Saul and Joseph E. Cohn, acting by deponent as agent and counsel for Jerrold H. Meyer, and with his consent, agreed and guaranteed to retain said sums until the work was completed and then, in compliance with that
20 agreement, paid out said sums as per the dates and amounts hereinafter set forth, and marked Schedule A and made a part hereof as if herein set forth in full, all of which directions, authorizations and written guarantees were made long prior to October 9, 1930.

Deponent further says that prior to October 1, 1930, the building in question had been completed in compliance with the contract of \$55,000.00 referred to herein, and was accepted as completed by the defendant, Jerrold H. Meyer; that several
30 of the apartments were leased to tenants commencing October 1st, 1930, and numerous tenants did move in and take possession and occupy said premises between the 1st and 3rd of October, 1930; that there was nothing due and owing to the Philco Construction Company under its contract with the defendant after October 1st, 1930, the obligation having been extinguished by payment of the balance due by virtue of the contract aforementioned
40 upon completion of said building.

Answering Affidavit of Michael Silver.

Deponent further says that the aggregate sum paid out as set forth in the Schedule hereto annexed, is the sum of \$55,678.37; that the excess, to wit, the sum of \$678.37, was for additional extras in changing certain apartments to suit the tenants prior to their moving in on October 1, 1930.

10

Deponent, answering paragraph 4 of the affidavit of Rose Sevrin, says that it is true that the sum of \$7,290.00 was paid out in checks, after the said stop notice was received. Check No. 10444 dated February 3, 1931, was in payment of the sum of \$2,290.00, due to the Elin Appliance Company for refrigeration equipment installed in said building, which payment was guaranteed by the defendant, Jerrold H. Meyer, by Saul and Joseph E. Cohn, his agents, under date of July 22nd, 1930, as evidenced by a copy of said guaranty marked Exhibit 1 in the affidavit of Rose Sevrin; that check No. 10484 in the sum of \$2,000.00, dated April 11, 1931, is in reality dated May 11, 1931, and made to the order of Geo. Snyder, Inc. and was for plumbing materials and work performed in installing the plumbing on said job, which sum Jerrold H. Meyer was directed to hold out by the Philco Construction Company and pay to Geo. Snyder Inc. when the work was completed as per Exhibit 5-A; that check No. 10452, dated March 16, 1931, in the sum of \$2,000.00, was due the Colonial Woodworking Company for lumber, frame and trim used in the erection of said building and that the defendant was directed by the Philco Construction Company, under date of August 1, 1930, to hold out said sum, as set up in Exhibit 3, which authorization was confirmed by Saul and Joseph E. Cohn, deponent

20

30

40

Answering Affidavit of Michael Silver.

10 acting in its behalf, for the defendant, Jerrold H. Meyer, under date of August 5, 1930, as set up in Exhibit 3-A. Trust Account check No. 842, dated December 24, 1930, in the sum of \$1,000.00, was endorsed over to the Watson Elevator Com-
 20 pany, the defendant having been authorized and directed, under date of August 1, 1930, by Philco Construction Company, to pay the sum of \$4,100.00 to said Watson Elevator Company for the installation of the elevators, as evidenced by Exhibit 4. Under date of August 5, 1930, deponent, acting for Saul and Joseph E. Cohn, agents for the defendant as set up in Exhibit 4-A, did notify said Watson Elevator Company that it was retaining said sum, as its agent. Deponent, as agent for
 20 Jerrold H. Meyer, further says that the last four mentioned items, covering the sum of \$7,290.00, were sums retained by the defendant because they had been guaranteed by him and were in his hands as funds belonging to the various sub-contractors and not as funds belonging to the Philco Construction Company.

30 Deponent further says that the defendant, Jerrold H. Meyer, has a just and legal defense to this action and denies that the answer filed herein is for the purpose of delay.

MICHAEL SILVER.

Sworn and subscribed to before me, }
 this 10th day of September, 1931. }

MILTON LOWENSTEIN,
 A Master in Chancery of
 N. J.

Schedule A Annexed to Foregoing Affidavit.

SCHEDULE "A."

The following is a list of the payments made by Jerrold H. Meyer, through Saul and Joseph E. Cohn, acting by Michael Silver, on account of the \$55,000.00 contract entered into between Jerrold H. Meyer and the Philco Construction Company for the alteration, erection and completion of a four story brick building located on the northwest corner of Sixth Avenue and Ninth Street, Newark, New Jersey:

Total sum \$55,678.37

No.	Date of Check	Date of Payment	Amount	
10251	6-23-30	6-24-30	\$900.00	
10257	6-24-30	6-26-30	400.00	20
10258	7-3-30	7-5-30	1,000.00	
10259	7-3-30	7-5-30	500.00	
10265	7-11-30	7-12-30	1,850.00	
10266	7-14-30	7-15-30	700.00	
10269	7-18-30	7-19-30	2,642.62	
10289	7-24-30	7-25-30	700.00	
10290	7-25-30	7-26-30	2,616.75	
10291	7-28-30	7-30-30	200.00	
10294	7-31-30	8-1-30	300.00	
10295	8-1-30	8-2-30	3,025.95	30
10300	8-9-30	8-9-30	2,549.75	
10301	8-11-30	8-12-30	295.00	
10305	8-15-30	8-16-30	2,670.75	
10307	8-18-30	8-19-30	192.40	
10326	9-9-30	9-10-30	1,500.00	
10332	9-9-30	9-12-30	300.00	
10333	9-13-30	9-15-30	679.00	
10336	9-17-30	9-18-30	153.75	
10339	9-19-30	9-24-30	450.00	
10371	9-10-30	11-15-30	2,000.00	40

Schedule A Annexed to Foregoing Affidavit.

	No.	Date of Check	Date of Payment	Amount
	10444	2-3-31	3-4-31	2,290.00
	10484	5-11-31	5-12-31	2,000.00
	10452	3-16-31	3-17-31	2,000.00
	216	6-13-30	6-14-30	972.50
10	219	6-27-30	6-28-30	1,000.00
	245	9-4-30	9- -30	2,500.00
	14141	8-22-30	8-23-30	6,000.00
	14367	9-5-30	9-6-30	1,984.65
	14392	9-9-30	9-10-30	1,000.00
	14526	9-12-30	9-12-30	1,500.00
	14667	9-20-30	9-22-30	1,500.00
	14790	9-27-30	9-29-30	650.00
	14945	10-7-30	10-14-30	600.00
	14946	10-7-30	10-20-30	100.00
20	14947	10-7-30	10-9-30	200.00
	14948	10-7-30	10-15-30	350.00
	14949	10-7-30	10-11-30	155.00
	14950	10-7-30	10-9-30	250.00
	TRUST ACCOUNT			
	842	12-24-30		1,000.00
	14654	9-19-30		4,000.00

30

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Answering Affidavit of Joseph A. Cohen.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

DECKER BUILDING MATERIAL COM-
PANY, a corporation,
*Plaintiff,**v.*

JERROLD H. MEYER,

Defendant.

Action at Law.

10

State of New Jersey, }
County of Essex, } ss.:

20

JOSEPH A. COHEN, of full age, being duly sworn on his oath, according to law, deposes and says:

That he is the Secretary of Philco Construction Company; that he knows all about the contract entered into between the Philco Construction Company and Jerrold H. Meyer for the alteration, erection and completion of the four story brick building located on the northwest corner of Sixth Avenue and Ninth Street, Newark, New Jersey; that he has read the affidavit of Michael Silver, filed in this cause; that he knows all about the facts and statements therein contained, and further says that the said facts and statements therein contained are true.

30

JOSEPH A. COHEN.

Sworn and subscribed to before me, }
this 11th day of September, 1931. }

MILTON LOWENSTEIN,
A Master in Chancery
of New Jersey.

40

Answering Affidavit of Jerrold H. Meyer.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

10

DECKER BUILDING MATERIAL COM-
PANY, a corporation,
Plaintiff,

v.

JERROLD H. MEYER,
Defendant.

Action at Law.

20

State of New Jersey, }
County of Essex, } ss.:

JERROLD H. MEYER, of full age, being duly sworn on his oath, according to law, deposes and says:

30

That he has read the affidavit made by William D. Decker, and in particular paragraph 14 of said affidavit and says that it is true that a man called him on the wire purporting to be William D. Decker, and asked him when he could see deponent relative to the North Sixth Street property, and asked this deponent if he was the Jerrold H. Meyer that was interested in the said property. Deponent says, in answer to said inquiry, that he told this party that he was the one interested in the North Sixth Street property; that he could get all the information he desired relative to the matter from Mr. Michael Silver, of the law firm of Saul and Joseph E. Cohn, at 972 Broad Street, Newark, New Jersey, who had entire charge of the matter.

40

Deponent further says that he told the said party who purported to be Mr. Decker, that he did not

Answering Affidavit of Jerrold H. Meyer.

care to be bothered with the matter, and all details of the entire situation were left with his counsel, and further says that it is absolutely untrue that he told the said party purporting to be William Decker that the Philco Construction Company had not, at that time, been paid the entire contract price, and that there was still some money coming to it. 10

Deponent further says that the party in question, purporting to be William Decker, did not even ask him about any funds or contract price because this deponent informed him that he did not care to discuss the situation over the wire; that it was entirely in the hands of his counsel. This conversation was the entire conversation had between him and the party purporting or claiming that he was Mr. Decker; that this conversation took place on the telephone, deponent being located at Oceanport, New Jersey. 20

JERROLD H. MEYER.

Sworn and subscribed to before me, }
this 31st day of August, 1931. }

AGNES E. SEEHUBER,
A Notary Public of N. J. . 30

Rule for Summary Judgment.

(Filed September 21, 1931.)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

10

DECKER BUILDING MATERIAL COM-
PANY, a corporation,
Plaintiff,

v.

JERROLD H. MEYER,
Defendant.

} Action at Law.

20

On motion of Messrs. Kanter & Kanter, attorneys
of the above named plaintiff, on due notice to,
and in the presence of, Messrs. Saul & Joseph E.
Cohn, attorneys of the above named defendant,
and the Court having read and considered the affi-
davits in behalf of the plaintiff and the defend-
ant, and the Court having heard and considered
the arguments of respective counsel and being of
opinion that the answer of the defendant should
be stricken and that summary judgment should be
entered in favor of the plaintiff and against the
defendant,

30

It is, on this Nineteenth day of September, A. D.
1931, ORDERED that the answer heretofore filed by
the defendant be, and the same hereby is, stricken
out.

40

It is further ORDERED that judgment final be, and
hereby is, entered in favor of the plaintiff, Decker
Building Material Company, a corporation, and
against the defendant, Jerrold H. Meyer, for the
sum of Seventeen Hundred and Twenty Nine Dol-

Rule for Summary Judgment.

lars and Ninety One Cents (\$1729.91) damages, besides costs of suit to be taxed.

Let this rule be entered in the minutes of the Court.

WILLIAM S. GUMMERE, 10
C. J. S. C.

Rule actually entered
September 19, 1931.

On motion of
KANTER & KANTER,
Attorneys of Plaintiff.

20

30

40

Notice of Appeal.

(Filed September 23, 1931.)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

10

DECKER BUILDING MATERIAL COM-
PANY, a corporation,
Plaintiff,

v.

JERROLD H. MEYER,
Defendant.

} Action at Law.

20

To:

KANTER & KANTER, Attorneys of Plaintiff, or
To Whom It May Concern:

SIRS:

30

PLEASE TAKE NOTICE that the defendant in the
above entitled cause appeals to the Court of Errors
and Appeals in the last resort in all causes in New
Jersey from the whole of the judgment entered
in this cause.

Respectfully yours,

SAUL AND JOSEPH E. COHN
Attorneys for Defendant.

Service of a copy of the within Notice of Ap-
peal is hereby acknowledged this 22nd day of Sep-
tember, 1931.

40

KANTER & KANTER,
Attys. for Plaintiff.

Grounds of Appeal.

(Filed with Clerk of Court of Errors and Appeals,
October 21, 1931.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

10

DECKER BUILDING MATERIAL COM-
PANY, a corporation,
Plaintiff-Respondent,

v.

JERROLD H. MEYER,
Defendant-Appellant.

On Appeal from
Supreme Court.

20

To:

MESSRS. KANTER & KANTER, Esqs.,
Attorneys for Plaintiff-Respondent,
1060 Broad Street,
Newark, New Jersey.

SIRS:

PLEASE TAKE NOTICE that the defendant, Jerrold H. Meyer, appeals from the whole of the order and judgment entered in this action on the 19th day of September, 1931, and filed in the office of the Clerk of the New Jersey Supreme Court on the 21st day of September, 1931, whereby the answer filed herein by the defendant was stricken out and summary judgment for plaintiff entered on the following grounds:

30

1. The answer filed herein was not sham, but set forth a legal defense to the action on the merits of the case, and which answer was amplified in this respect by affidavits filed herein upon a hear-

40

Grounds of Appeal.

ing before the court on a motion to strike out the answer filed herein and permit summary judgment to be entered.

10 2. Said motion to strike the answer should have been denied.

3. The court erred in awarding summary judgment in favor of the plaintiff and against the defendant.

20 4. The court, on a motion to strike the defendant's demand for bill of particulars, heard on August 10, 1931, erred in striking the defendant's demand for a bill of particulars to the following question addressed to paragraph 14 of the plaintiff's complaint:

On what date or dates did the defendant pay to said Philco Construction Company, or cause to be paid to it, or for its account, large sums of money in excess of the sum for which this suit is brought?

30 5. The court, on the motion mentioned in the preceding ground of appeal, erred in striking the defendant's demand for a bill of particulars to the following question addressed to paragraph 14 of the plaintiff's complaint:

What sums of money, if any, were paid on said dates?

Respectfully yours,

SAUL and JOSEPH E. COHN,
Attorneys for Defendant-Appellant.

40 Service of a copy of the within Grounds of Appeal is hereby acknowledged this 21st day of October.

KANTER & KANTER,
Attorneys of Plaintiff.

New Jersey Court of Errors and Appeals

DECKER BUILDING MATERIAL COM-
PANY, a corporation,
Plaintiff-Respondent,

v.

JERROLD H. MEYER,
Defendant-Appellant.

Action at Law.

On Appeal from
Supreme Court.

BRIEF OF DEFENDANT-APPELLANT.

Statement.

This is an appeal by the defendant from a summary judgment entered in the New Jersey Supreme Court in favor of the plaintiff and from an order striking the defendant's demand for a bill of particulars (State of Case, p. 11).

Summary of the Facts.

The facts are these:

The plaintiff-respondent is a materialman and the defendant-appellant owner of the building in which the plaintiff-respondent's materials were used.

Philco Construction Company, a corporation, entered into a general contract with the defendant-appellant, which contract, together with specifications, was duly filed in the Essex County Clerk's Office on June 3rd, 1930, and which provided for the alteration, erection and completion of a build-

ing and garage, by the Philco Construction Company, at the northwest corner of Sixth Avenue and North Ninth Street, Newark, New Jersey, at the agreed price of \$55,000, payable in installments during the progress of the work, the final payment of \$15,000 to be made at the completion of said contract.

The plaintiff-respondent furnished materials to the said Philco Construction Company in furtherance of the performance and completion of the aforementioned contract, as a result of which, the Philco Construction Company, on October 9th, 1930, owed the plaintiff-respondent for its materials, the sum of \$2,142.19. In compliance with the 1930 revision of the Mechanics' Lien Law, the plaintiff-respondent, on October 9th, 1930, filed in the Essex County Clerk's Office a stop notice, and on October 11th, 1930, served a copy of the same on the defendant-appellant, all because of the refusal of the Philco Construction Company to pay the amount alleged to be due by it to the plaintiff-respondent. Subsequent to the filing and serving of the stop notice, the Philco Construction Company paid to the plaintiff-respondent the sum of \$500 on account, leaving a balance due of \$1,642.19, for which amount the present action against the defendant-appellant is brought.

The complaint contains two counts. The first obviously on the theory of a stop notice (Section 3 of the Mechanics' Lien Law) wherein the plaintiff-respondent, in substance, alleges that the final payment of \$15,000, due the Philco Construction Company from the defendant-appellant, matured after the service of its stop notice, to wit, after October 11th, 1930, so that when the defendant-appellant was served with a stop notice, he owed the Philco Construction Company an amount greater than \$2,142.19. THE ANSWER OF THE APPELLANT DENIES THIS.

The second count is obviously based on Section 5 of the Mechanics' Lien Law, as a recovery is sought on the theory of advances. The theory of this count is that since the \$15,000 final payment could only mature upon the completion of the building, and since, according to the respondent, the building was not completed before the service of a stop notice, the extinguishment by the appellant of his final obligation under the contract, prior to October 11th, 1930, constituted advances.

The important sections of the respondent's complaint are paragraphs 3 and 14 (see State of Case, pp. 2-5) which are denied in the appellant's answer. These denials the respondent charged as sham, and on a notice of motion brought on by the respondent, the answer was struck out and summary judgment awarded.

The important factual question is: When did the final payment mature? or, to put it another way, When was the building completed in accordance with the contract? The respondent contends subsequent to the service of the stop notice, and the appellant, prior to the service of the stop notice, and the affidavits submitted by the appellant completely deny and controvert the respondent's averments.

Prior to the filing of an answer by the appellant, a demand for a bill of particulars (see State of Case, p. 9) was served on the attorneys for the respondent, asking for greater particularity as to paragraph 14 of the complaint. On motion brought on by the respondent, the demand was struck out and appellant, in addition to appealing from the order striking out his answer and awarding summary judgment in favor of the respondent, appeals from the order striking out his demand for a bill of particulars.

Grounds of Appeal.

1. The answer filed herein was not sham, but set forth a legal defense to the action on the merits of the case, and which answer was amplified in this respect by affidavits filed herein upon a hearing before the Court on a motion to strike out the answer filed herein and permit summary judgment to be entered.

2. Said motion to strike the answer should have been denied.

3. The Court erred in awarding summary judgment in favor of the plaintiff and against the defendant.

4. The Court, on a motion to strike the defendant's demand for bill of particulars, heard on August 10, 1931, erred in striking the defendant's demand for a bill of particulars to the following question addressed to paragraph 14 of the plaintiff's complaint:

On what date or dates did the defendant pay to said Philco Construction Company, or cause to be paid to it, or for its account, large sums of money in excess of the sum for which this suit is brought?

5. The Court, on the motion mentioned in the preceding ground of appeal, erred in striking the defendant's demand for a bill of particulars to the following question addressed to paragraph 14 of the plaintiff's complaint:

What sums of money, if any, were paid on said dates?

ARGUMENT.

POINT I.

The stop notice was served after the maturity of the final payment due from the owner to the contractor and when the owner owed no money to the contractor.

The first count of the complaint is obviously based on Section 3 of the Mechanics' Lien Law—1925-1930 Supplement to Compiled Statutes 951 (Case, p. 2) and the second count on Section 5 of same act. The first count will be first taken up and attention need only be directed to paragraph 3 thereof (Case, p. 3) which is *denied* by the appellant in his answer (Case, p. 14). The important facts to be borne in mind are:

1. Stop notice was served on October 11, 1930.
2. Building contract called for final payment of \$15,000 when the building was fully completed in compliance with the plans and specifications.

The respondent charges that subsequent to October 11, 1930, the final payment of \$15,000 became due to its obligor, Philco Construction Company, the general contractor, from the owner, the defendant-appellant. The only sworn statement to support the respondent in its motion to strike the appellant's answer to the first count and particularly paragraph 3 of same appears in the affidavit of the respondent's president, William D. Decker (Case, p. 21, paragraph 3), wherein he reiterates, almost word for word, paragraph 3 of the first count, and it should be observed that he does not

state when the building was completed as per the contract but that "the defendant accepted the work, etc." The answering affidavits vigorously refute this and clearly disprove the charge of the respondent that appellant's answer is sham. Michael Silver in his affidavit for the appellant (Case, p. 54, line 25, bottom of page) states that the building in question was completed in compliance with the contract prior to October 1, 1930 (Stop Notice served October 11, 1930), and also at same time accepted as completed by the appellant, and that leases were made and tenants did move into the apartments of the building prior to the service of the stop notice in question (October 11, 1930). Also that the Philco Construction Company was paid in full all that the appellant owed it and there was nothing due the Philco Company on October 11, 1930. Michael Silver is corroborated by Joseph A. Cohen, an officer of the Philco Construction Company, in an affidavit for the appellant (Case, p. 59) and the affidavit of the appellant himself (Case, p. 60) answers any other statement in the affidavit of William D. Decker (aforementioned) bearing on the question of liability of the appellant to the Philco Company on or after the service of the stop notice.

The answering affidavits submitted by the appellant reveal the maturity of the final payment due from the owner to the general contractor to have been before the filing and service of the stop notice and further that the obligation had been entirely extinguished before the filing and service of the stop notice. Therefore, a fair jury question is presented, if not rendering the first count of the complaint sham itself.

Turning to the second count, it is apparent that the respondent, relying on its belief that the maturity of the final payment was at a date subse-

quent to October 11, 1930, seeks to recover on the basis that the extinction of the final obligation to the general contractor constituted advances on the strength of Section 5 of the Mechanics' Lien Law. If the respondent has any other payments to the contractor in mind, other than the \$15,000 final payment, its affidavits do not show it.

Since the answering affidavits of the appellant show that the final payment of \$15,000 matured before October 11, 1930, the date of service of the stop notice, it is immaterial whether or not portions of \$15,000 were paid by the owner to the general contractor prior to the actual completion of the building, assuming that the respondent has this in mind from the phraseology of paragraph 14 of its second count (Case, p. 5):

Slingerland v. Binns, 56 E. 413;

Person v. Herring, 63 L. 599, Ct. of E. & A.;

J. D. Loizeaux Lumber Co. v. Steinberg, 102

L. 15. (In this case the stop notice was served before the liability of the owner could mature under the contract—but in case at bar stop notice was served on Oct. 11, 1930, which appellant by his affidavits claims to be after his liability under the contract did mature.)

Somers Lumber Co. v. Kaufman, 102 L. 601, Ct. of E. & A. (This case is similar to preceding cited case and distinguished on facts from case at bar.)

Passaic Bergen Lumber Co. v. Peterson, 105 L. 537.

The aforecited cases illustrate that before Section 5 of the Mechanics' Lien Law can be taken advantage of, the stop notice must be served *before the contract has been completed or before the liability of the owner under the contract matures*. The answering affidavits support the appellant's answer in its denial to paragraph 14 of the second count and therefore the answer cannot be struck as sham.

We now come to the most interesting phase of this case from an academic standpoint and additional facts must be presented. At the time of the service of the stop notice, the general contractor had been paid the moneys due it under the contract, the appellant through its agent, Michael Silver, retaining \$7,290, which amount the general contractor had assigned to its other creditors by orders drawn on the appellant which were accepted by Michael Silver, agent of appellant, *before the completion of the contract*. The said amount of \$7,290 represents four items, fuller particulars of which appear in Rose Sevrin's affidavit (Case, p. 40), and in the answering affidavit of Michael Silver (Case, p. 55). The question now presented is whether or not by virtue of Section 6 of the Mechanics' Lien Law the respondent's stop notice attached to the \$7,290, retained by and still unpaid at the time of the service of the stop notice, although not due and owing to the general contractor. Section 6 of the Act gives a special preference to materialmen (and respondent is conceded by the appellant to be a materialman) who serve stop notices in accordance with Section 3 of same Act, over assignments. We have heretofore shown that respondent's stop notice is virtually a nullity because served after the completion of the contract and after the maturity of the final payment thereunder. *Are other materialmen who have assignments from the general contractors accepted by the owner during the existence of the general contract*, to be defeated by a stop notice, which, excluding Section 6, has been shown to be invalid against the owner? We urge that Section 6 cannot apply to tardy stop notice claimants who file and serve stop notices after the completion of the contract and after the maturity of the final payment and that Section 6 must be interpreted in conjunction with Section 5.

The cases in this State are to the effect that assignments prevail over stop notices served after maturity of the owner's obligation. Before going into the cases it is significant that in the 1898 revision of the Mechanics' Lien Law for the first time appeared that portion of Section 6 giving preference to laborers or materialmen who serve stop notices, over assignments. The 1930 revision merely provides for the filing of the stop notice in addition to serving of same, whereas, prior to 1930, stop notices were only served.

In *Taylor v. Reed*, 68 L. 178, the filed contract provided for a final payment of \$1,500. The owner paid the builder \$1,000 of this in advance of its due date. After the due date the plaintiff gave his notice but it was held that the \$1,000 payment was good against him. This case is in point and although it does not mention Section 6, was decided in 1902, four years after the enactment of the "preference" clause. The Court, on page 184. "See also the following decisions in the Court of Chancery: *Booth v. Kiefer*, 15 Dick. Ch. Rep. 57; *Donnelly v. Johnes*, 13 *id.* 442; *Flaherty v. Atlantic Lumber Co.*, *id.* 467. The result of these decisions is that when the final payment matures and becomes due it must be applied first to satisfy the stop notices *previously served* in the order of their priority and any money then remaining is at the disposal of the contractor who is entitled to collect and receive the same from the owner. *Any stop notice thereafter served operates only upon the moneys due at the time of such service, so far as not assigned by the contractor or detained by previous stop notices.*

"In *Blauvelt v. Fuller*, 37 Vroom 46, where the stop notice was served after the completion of the building and maturity of the final payment and after a final settlement of accounts had been made between owner and con-

tractor, as a part of which settlement, \$500 was retained in the owner's hands to meet an order for that amount given by the contractor to a third party about two months before completion of the building and it appearing that the \$500 remained in the owner's hands unpaid to the assignee at the time of the service of the stop notice, this court held that the plaintiffs, under their stop notice, took the place of the contractor, but acquired no higher rights than he had, that their action could not be sustained so far as the \$500 fund was concerned, but they were entitled to judgment to the extent of the other moneys remaining due from the owner upon the contract over and above \$500. It is plain that there exists no distinction in principle between that case and the one now before us."

The *Blauvelt* case referred to in the foregoing opinion is a case on all fours with case at bar. Reported in 66 L. 46, decided in 1901, but does not cite Section 6—Is cited by the Court of Errors and Appeals in the case of *Grunt v. Zapiekov*, 107 L. 144, and lays down the test as to the validity of a stop notice to be whether or not a suit will lie by the contractor against the owner. Applying that test to case at bar, the stop notice is wholly invalid.

Adams v. Wells, 64 E. 211, Court of Chancery 1902, cites *Taylor v. Reed*, *supra*, and the *Blauvelt* case, and, although applying it in another connection, it is significant that Section 6 is mentioned. The second syllabus reads:

"Under the Lien Act when a final payment comes to be due and no effectual stop notice has been served, the contractor may either collect or assign the final payment. Any subsequently served stop notices operate only to detain what remains in the owner's hands, after deducting the amount of such payment to the contractor and of such assignments by him."

On page 217 the Court applies Section 6 but the case on this point is no authority for the one at bar because the claims arose *after* the contract expired. The case is important because of its approval of *Taylor v. Reed* and *Blauvelt v. Fuller*, and the decisions in the latter must, therefore, be deemed to be interpretations of Section 6.

Edge v. McClay, 72 E. 219, is another case in point. In this case the owner's right to discharge his debt to the builder matured on January 2, 1906. Claimant Horner gave his notice on January 3, 1906. It was held that other defendants claiming by assignments given by the builder before January 2, 1906, took the fund to the exclusion of Horner.

From *Bayonne Building Association v. Williams*, 59 E. 617, bottom of page 619: "As the respondent Conklin served no notice before the final payment fell due under the contract, his lien expired and he must stand simply as the holder of an order and subject to all claims under duly served notices and under orders presented before his own." This case was decided in 1899.

Pinsky v. Wike, 101 E. 45, V. C. LEAMING, April 4, 1927, affirmed by Court of Errors and Appeals in 103 E. 18, is the only pertinent case we could find which mentioned and applies Section 6 and is in accord with the foregoing decisions. Although the learned Vice-Chancellor gave a stop notice preference over an assignment, it is because *the stop notice was served in season, and not, as in case at bar, after season*. To quote the Vice-Chancellor, page 47:

"Before the expiration of that period, the owner could not as against them, lawfully discharge that obligation to the contract either by payment to the contractor or by acceptance of an order, or assignment of the contractor."

Observation should be made that the Court set a time limit as to when a stop notice should be served so as to be given preference over orders or assignments. On page 48:

"It necessarily follows that all stop notices served by laborers and materialmen *prior to the expiration of the period referred to* enjoy a lien on that fund in the order of the dates of service of the respective notices—labor claims taking precedence of claims of materialmen as against an assignment of money due or to grow due under the contract made by the contractor at a prior time."

"That is the plain language of Sec. 6 of M. L. Act as contained in the 1898 revision of the Act—Compiled Statutes, page 3299. *It is my recollection of the testimony that construction work on the building has not been completed within sixty days prior to the service of the last stop notice herein questioned. But in any event it must be said that the building was not finished by the contractor pursuant to the contract until after the last stop notice had been served.* With the building unfinished, pursuant to the contract more than sixty days prior to April 24, 1924, the date of the last notice served, it is my determination that all the stop notices otherwise valid are entitled to priority over the assignment."

It, therefore, can be deduced herefrom that if the stop notice had been served after the completion of the building, the assignment would have been given preference.

The foregoing are authorities that the respondent's stop notice in this case, served as it was after the maturity of the final payment, and when nothing was due the general contractor, was and is not a lien on the \$7,290, retained by the owner to meet prior accepted orders and assignments. That the appellant was bound to pay out \$7,290 to the four

assignees. See *Structural Gypsum v. National Commercial Title Co.*, 107 E. 32.

Since the answering affidavits of the appellant disclose that the stop notice was served on the owner after the final payment matured and when nothing was due the general contractor, a jury question was presented as to when the final payment matured and the answer, therefore, should not have been struck out as being sham.

POINT II.

The motion to strike the answer and to permit summary judgment should have been denied.

In Point I we have shown that the facts set out in the answering affidavits in support of the appellant's answer fully and completely deny and controvert the essential allegations of the respondent's complaint, and the affidavits upon which the respondent's cause of action depends. The motion to strike the answer and to permit summary judgment should, therefore, have been denied. *Birkenfeld v. Ginsburg* (Ct. of E. & A.), 106 N. J. L. 377.

POINT III.

Appellant's demand for bill of particulars was proper and should not have been stricken.

Prior to the filing of the answer by the appellant herein, a demand for a bill of particulars in reference to paragraph 14 of the second count of the respondent's complaint (see State of Case, p. 9) was served on the attorneys for the respondent, who moved on a motion duly brought on before the Chief Justice at Essex Chambers, to have same

struck (see State of Case, p. 10), and same was struck by the Chief Justice (see State of Case, p. 11), with costs taxed by the Clerk of the Supreme Court (see State of Case, p. 13), and paid by the appellant.

Grounds 4 and 5 of appeal are directed to the striking out of the appellant's demand for a bill of particulars. The questions, as aforesaid, are directed to paragraph 14 of the complaint and are:

1. On what date or dates did the defendant pay to said Philco Construction Company, or cause to be paid to it or for its account, large sums of money in excess of the sum for which this suit is brought?
2. What sums of money, if any, were paid on said dates?

The respondent had four objections to the above demand:

1. Demand called for information peculiarly within the knowledge of the defendant and not within peculiar knowledge of the plaintiff.
2. That particulars demanded are unnecessary in order to enable the defendant to answer the second count of the complaint.
3. That particulars demanded are an improper attempt to pry into the plaintiff's case, the extent of its knowledge and its evidence, and,
4. That particulars are not justified in law.

Since the aforesaid paragraph 14 is couched in vague and general language, it is apparent that the attorneys for the respondent and the learned Court lost cognizance of the office a bill of particulars serves and confused particulars with interrogatories. That the aforementioned four objections

would apply to interrogatories *but not to demand for particulars* is manifested by the cases.

In *Hopper v. Gillett*, 6 Misc. 63, 65, the Court said:

"If the function of a bill of particulars was confined in a case of this character to the enabling of the defendant to make a suitable answer, I should be disposed to rule that as these inquiries go solely to the measure of damages and not to the fundamental question of liability, the defendant would not be entitled to have them answered; but the rule I believe to be otherwise. The bill of particulars has the two-fold effect of informing the defendant with relation to the details of the plaintiff's case with a view of preparation of a proper pleading in reply to the complaint *and also of limiting the plaintiff's proof on the trial as well as apprising the defendant what is proposed to be set up to the end that the defendant may prepare a proper defense and so it was held by the late Mr. Justice Garrison in the case of Heppard v. Carr & Smith, 12 N. J. L. J. 186, that particulars of cost of materials and help procured by the plaintiff and also the names of the parties furnishing such help and supplying such materials were proper to be given.*"

Hopper v. Gillett clearly shows, and particularly the italicised portion of the quotation from the case (italics by the briefer), that the Second, Third and Fourth objections of the respondent to the appellant's demand for particulars are untenable and not well taken. To quote from *Watkins v. Cope*, the familiar case in New Jersey, 84 L. 143:

"A bill of particulars is appropriate in all descriptions of actions where the circumstances are such that justice demands that a party should be apprised of the matter for which he is to be put for trial with greater particularity than is required by the rules of pleading."

That the questions propounded in the demand are proper for particulars and improper for interrogatories, see *Watkins v. Cope*, *supra*, and *Neske v. Burns*, 6 Misc. 160, which lay down the test to distinguish a bill of particulars from interrogatories—thus—“Does the proponent bear the burden of proof of the subject-matter necessarily involved in the questions?” or, to state the test in a narrative form; that the purpose of interrogatories is to gain from one’s opponent information necessary to build up the case of the party propounding them. If the subject-matter must be proved by the plaintiff, an interrogatory thereto is improper. Hence it follows that were the questions in the appellant’s demand proper interrogatories, the respondent’s aforementioned objections would be well taken. But since they are proper for a bill of particulars, the objections cannot prevail.

The first objection to the demand, to wit, that the information sought is within the peculiar knowledge of the defendant and not within the peculiar knowledge of the plaintiff, is verbatim the same objection to a demand for particulars taken by the plaintiff in *Brady v. Hauenstein*, 7 Misc. 1081, and the Court there overruled same on the authority of *Hopper v. Gillett*, *supra*.

The particulars asked by the appellant for the purpose of limiting the respondent in his proof at the trial and also to apprise the appellant with greater particularity of the respondent’s cause of action, should have been furnished and the Court, therefore, erred in striking the demand. The particulars asked are of ultimate facts which the respondent would have to prove at the trial and are not inquiries as to the manner in which the respondent intends to prove same. A more specific statement of the respondent’s cause of action, and not evidence thereof, is the object of the appel-

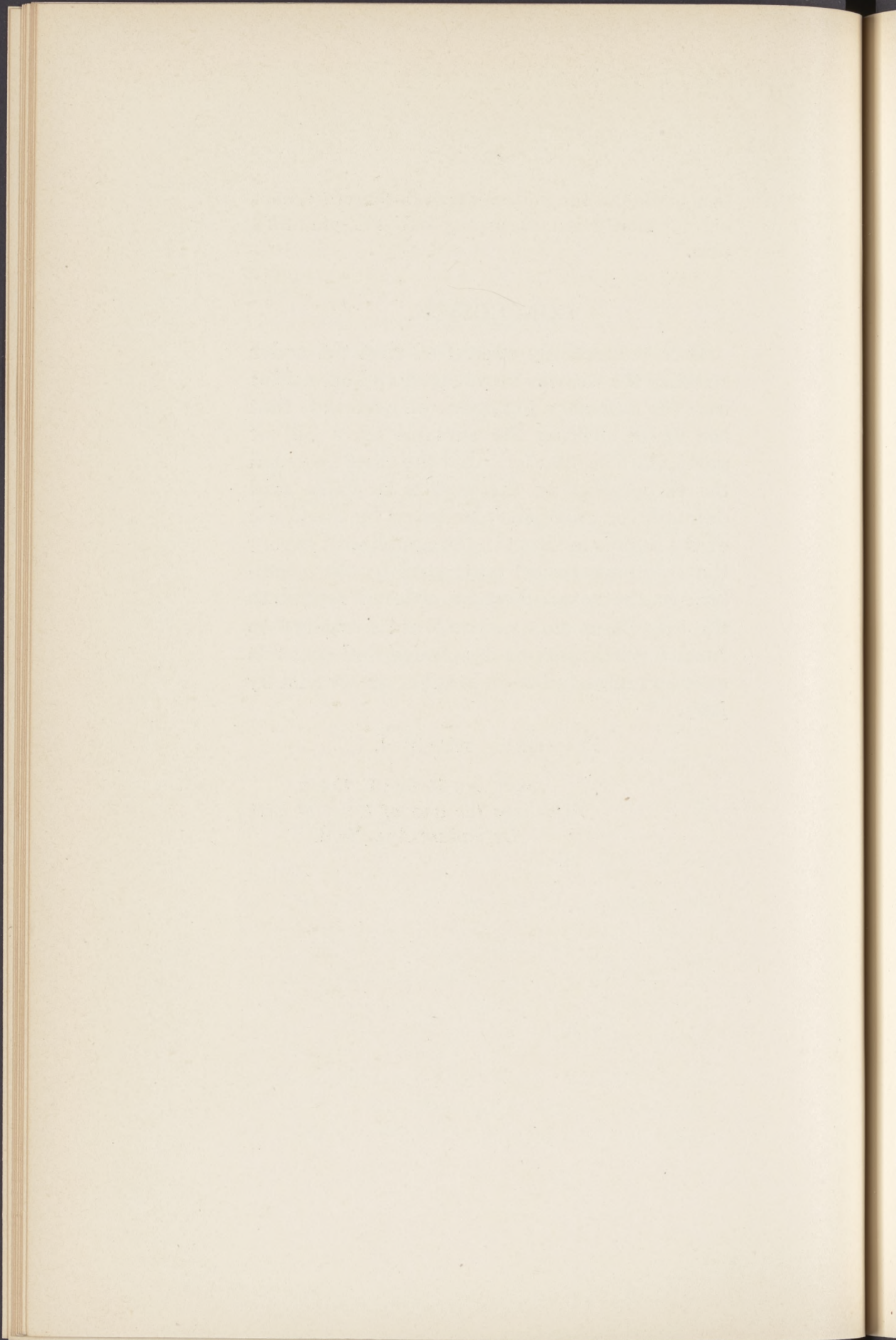
lant's demand for particulars and, therefore, cannot be considered as prying into the plaintiff's case.

CONCLUSION.

It is respectfully submitted that the order striking the answer be vacated and set aside; that the summary judgment be reversed; that the order striking the demand for a bill of particulars be vacated; that the costs awarded the respondent on the motion to strike said demand for particulars be taxed by the Clerk of the Supreme Court in the appellant's favor; that aforementioned costs paid by the appellant to the respondent be ordered repaid to the appellant; that respondent be ordered to furnish particulars as demanded and that this case be remanded to be brought on for trial by jury.

Respectfully submitted,

SAUL AND JOSEPH E. COHN,
Attorneys for and of Counsel with
Defendant-Appellant.



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New Jersey Court of Errors and Appeals

DECKER BUILDING MATERIAL COM-
PANY, a corporation,
Plaintiff-Respondent,

v.

JERROLD H. MEYER,
Defendant-Appellant.

Action at Law.

On Appeal from
Supreme Court.

REPLY BRIEF OF DEFENDANT- APPELLANT.

Foreword.

Due to misstatements of fact in the brief of the respondent relating to the argument of the motion for a summary judgment, a reply brief on the part of the appellant is necessitated. Had counsel for the respondent argued from the record, these misstatements of fact hereinafter referred to could have been avoided. This brief will also answer the respondent's argument on the law.

REPLY TO POINT I.

The evidence contained in the respondent's affidavits would be insufficient to establish a *prima facie* case at a trial.

As pointed out in our main brief, the affidavits of Michael Silver and Joseph A. Cohen, an officer of the building contractor, set forth facts to prove that the building in question was completed as per

the contract on file, before the stop notice in question was filed and served. Therefore it became the function of a jury and not a court to pass upon the truth or falsity of such proofs.

This case presents a paradox in that there is no proof in the respondent's moving affidavits as to when the building was completed. On the other hand, the affidavits submitted by the appellant, not only at the least raise a jury question, but establish that the complaint in this case is sham.

Counsel for the respondent would have this Court believe that the Chief Justice, in deciding the motion, weighed the affidavits submitted on both sides so as to determine when the building was completed. Nothing could be farther from the truth, and, to our mind, casts an unjust reflection on the learned Chief Justice.

Chief Justice GUMMERE, after listening to the opening of the motion by Mr. Elias Kanter, moving the motion for summary judgment, limited Mr. Michael Silver, opposing the motion, to the legal question whether or not the stop notice attached to the seven thousand two hundred ninety dollars (\$7,290) retained at the time of the service of the stop notice for the benefit of the assignees of the contractor regardless of the question when the building was completed. The Chief Justice decided that the stop notice was a lien on the seven thousand two hundred ninety dollars (\$7,290) and accordingly struck out the answer and awarded summary judgment. *The Chief Justice did not go into the factual question as to the completion of the building, for he deemed it immaterial under his conception of the law.*

The whole argument under Point I by the respondent is bolstered up by these misstatements that the Chief Justice reached the conclusion that the building was completed after the service of

the stop notice, and by inferences which counsel dexterously and adroitly draws in his own favor from the affidavits of the appellant. Inferences do not constitute competent evidence, and it is very significant that none of the affiants for the respondent concur therein under oath.

It cannot be doubted that on a trial the evidence contained in the respondent's affidavits would be insufficient to get by a nonsuit, as there is no proof by competent testimony that the building was completed after the service of the stop notice.

REPLY TO POINTS II AND III.

The law applicable to case at bar is no longer an open question. This Court in *Pinsky v. Wike*, 103 N. J. Eq. 18, affirming 101 N. J. Eq. 45, settled all doubts concerning the legal proposition *sub judice*.

In reading the argument of the respondent under Points 2 and 3 of his brief, it is quite apparent that its counsel would have this Court treat the legal proposition involved as still an open one. That this is purposely done is all the more apparent by the lack of a direct criticism or comment on the cases which we have cited to the effect that a stop notice served after the maturity of a final payment is subordinated to the priority of assignments of the final payment by the contractor to whom such final payment was originally due. (For the cases and argument covering same, see original brief.)

The only case cited by the respondent is the case of *Grunt v. Zapeikov*, 107 N. J. Law 730. This case does not raise nor does it in anywise concern the question under consideration. The defense there interposed was that the contractor was paid

before the stop notice was served, and this payment the defendant contended was *by check drawn to the order of the contractor*. The fact was that the check was still in the possession of the owner at the time of the service of the stop notice and this Court held that possession of one's own check did not constitute payment. Therefore, the only question raised and discussed was whether or not the contractor was paid.

The question of an assignment was not in any manner raised or discussed. Grunt v. Zapeikov need not be further distinguished, since it furnishes no parallel to the instant case and does not involve either Section 5 or particularly Section 6 of the Mechanic's Lien Act.

The argument under Point III is without any merit, because if there was no time limit to the filing and serving of stop notices, what security could any owner of a construction have, without the intervention and cost of litigation, about meeting obligations personally incurred by guaranteeing payment to materialmen and laborers of his contractor in order to insure performance by his contractor of the building contract. Furthermore, the argument under Point III, if counsel sincerely believes it to be meritorious, is not one for the judiciary but for the Legislature.

REPLY TO POINT IV.

Respondent's argument thereunder is without any merit.

On page 26 of the respondent's brief, it is argued that it was necessary for the appellant to take an exception to the Court's action in striking the demand for particulars. This argument is of course without merit. *Pannonia Building & Loan Ass'n*

v. *West Side Trust Co.* (Court of Errors and Appeals), 93 N. J. Law 377; 108 Atl. Rep. 240.

The provision of the Practice Act providing that "No judgment shall be reversed, or new trial granted, etc.," P. L. 1912, Chap. 231, page 382, Section 271, is cited as authority by the respondent to sustain the action of the Supreme Court in striking the demand for a bill of particulars. This section of the Practice Act is limited to appeals from a judgment or rules to show cause why new trial should not be granted and does not apply to preliminary motions before trial, as in case at bar, to an appeal, after final judgment from an order striking out a demand for particulars.

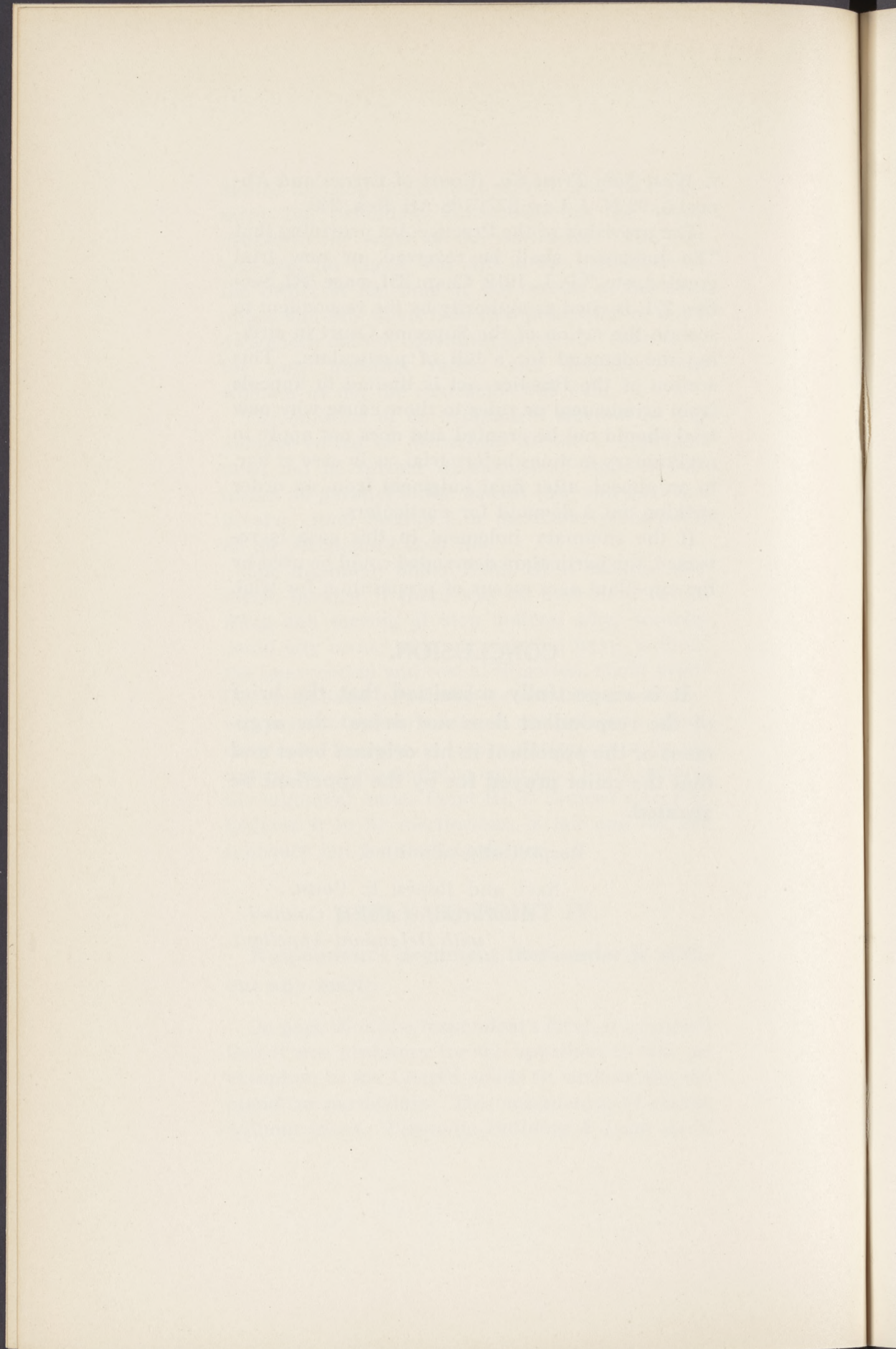
If the summary judgment in this case is reversed, the particulars demanded could be used by the appellant as a means of preparation for trial.

CONCLUSION.

It is respectfully submitted that the brief of the respondent does not defeat the argument of the appellant in his original brief and that the relief prayed for by the appellant be granted.

Respectfully submitted,

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*Attorneys for and of Counsel
with Defendant-Appellant.*



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

New Jersey Court of Errors and Appeals

DECKER BUILDING MATERIAL COMPANY, a corporation, <i>Plaintiff-Respondent,</i> <i>vs.</i> JERROLD H. MEYER, <i>Defendant-Appellant.</i>	}	<i>Action at Law. On Appeal from Supreme Court.</i>
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Kanter & Kanter, attorneys of plaintiff-respondent; Elias A. Kanter, of counsel.

BRIEF OF PLAINTIFF-RESPONDENT.

Introductory Statement of the Facts.

In this case, the plaintiff suing on a "stop notice" under the provisions of Section 3 of the Mechanics' Lien Law, had summary judgment, following a motion made before Chief Justice Gummere, to strike the defendant's answer, the notice of motion for that purpose specifying that such answer was both frivolous and sham. Of course, the motion to strike the answer was properly granted and the judgment properly entered, if the answer was either sham or frivolous. The appellant, in the brief submitted by his counsel, does not contend that the answer was not frivolous, but argues only that the answer was not sham.

The plaintiff was a "materialman" which had furnished materials to Philco Construction Company, the latter having a written contract for the construction of a building for the defendant, Jerrold H. Meyer; that contract was duly filed. The stop notice was "in compliance with the

1930 revision of the Mechanics' Lien Law, the plaintiff-respondent, on October 9, 1930, filed in the Essex County Clerk's Office a stop notice, and on October 11, 1930, served a copy of the same on the defendant-appellant" (Appellant's Brief, p. 2). The question argued by appellant is whether, on the date of the filing and service of such stop notice, the defendant had, or should have had, monies on hand sufficient to pay the stop notice.

A proper analysis of the affidavits before the Chief Justice will demonstrate that the defendant had no defense and the judgment in favor of the plaintiff was correct.

All italics, except where otherwise noted, are ours.

POINT I.

Plaintiff's stop notice was served at a time when the defendant had, or should have had, the final payment to grow due from him to the general contractor, and before the maturity of such final payment.

The salient sections of the statute, applicable in the disposition of this case, are Sections 3 and 6 of the Mechanics' Lien Law, amended in 1930 by Chapter 212, which became effective on September 2, 1930. The pertinent parts of those sections are as follows:

"Whenever any * * * contractor * * * shall upon demand, refuse to pay any person who may have furnished him material used in the erection of any such house or other building, * * * the money or wages due him, it shall be the duty of such * * * materialman * * * to file in the office of the clerk of the county wherein such house

or building is situated a notice in writing of such refusal and of the amount due to him or them and so demanded, specifying said amount as nearly as possible, and the owner or owners of such building shall thereupon be authorized to retain the amount so due and claimed by such * * * materialman * * * out of the amount owing by him or them on the contract or that may thereafter become due from him or them on such contract * * *, giving the master workman or contractor * * * written notice of such notice and demand, and if the same be not paid or settled by said master workman or contractor, such owner or owners, on being satisfied of the correctness of said demand, shall pay the same in the order in which such notices were filed in the office of the county clerk, and the receipt of such * * * materialman * * * shall entitle such owner to an allowance therefor in the settlement of accounts * * * as so much paid on account. After filing the said notice, the claimant may serve a copy of such notice upon the owner * * *. Until service of the notice has been made, as above provided, an owner shall be protected in any payment made in good faith to any contractor or other person having a valid claim under this section. * * *." Section 3, Chap. 212, P. L. 1930, pp. 972, 974.

"In all cases * * * laborers or materialmen filing notices in accordance with the provisions of the third section shall have priority and preference in the disposition of the moneys due and to grow due upon the contract over any persons claiming said moneys or any part thereof by reason of order or orders thereon or assignments thereof." Section 6, Chap. 212, P. L. 1930, pp. 972, 976.

It will be observed that, in the case at bar, the plaintiff-materialman filed the stop notice in the office of the county clerk on October 9, 1930, and also served same upon the owner on October

11, 1930. The owner, therefore, in this case, had both constructive and actual knowledge of the plaintiff's claim but, notwithstanding that fact, paid the monies, to grow due under the contract, *subsequent* to the filing and service of the stop notice.

The statutory sections above cited, as far as the disposition of this case is concerned, are the same as the previously existing identical sections, in that the stop notice attaches to any balance to grow due from the owner, and entitles the stop notice claimant to preference in payment over any assignments made by the owner.

It is elementary, and we believe that the brief of the appellant concedes that, if, at the time of the service of the stop notice, there was (disregarding for the moment the question of the contractor's assignments, which we will hereafter consider) any balance to grow due from the owner to the contractor, the claimant's stop notice attached to such balance. It, therefore, becomes important to analyze whether there were monies to grow due from the owner to the contractor on October 9th and October 11th, 1930. The solution of this question depends first upon the terms of the contract between the owner and the contractor which fixed the time when the monies were to grow due from such owner to the contractor.

The contract between the owner, the defendant, Jerrold H. Meyer, and the builder, Philco Construction Company, provided for installment payments of \$55,000.00 whereof the last installment of \$15,000.00 was to grow due *when the building was fully completed*. The exact lan-

guage of the provisions in that contract, in respect to such last installment, is:

“Sixth: The balance of \$15,000.00 when the building is fully completed in compliance with the plans and specifications.” State of Case, p. 21, ll. 5-10.

That such was the provision of the contract is not denied.

The logical question now presented (as was pointed out by the Chief Justice in the course of the oral argument below) was whether, on October 9, 1930, the building had been “fully completed,” because until such final completion, all persons supplying materials to the contractor were justified in assuming that the owner would observe the terms of the contract by withholding the last \$15,000.00 until “final completion.” In determining this question, the Chief Justice properly disregarded vague and uncertain *conclusions* in defendant’s affidavits, and relied, as we believe he had a right to rely, upon *uncontradicted testimony*, offered in behalf of the plaintiff, and upon the *decisive testimony offered in behalf of the defendant*.

From the *uncontradicted testimony*, in behalf of the plaintiff, it appeared that the last materials delivered by the plaintiff (consisting of mason materials) were delivered on October 6th and October 7th, 1930. This testimony is contained in the affidavit of William D. Decker, *and was in no way denied by the defendant*. See account (annexed to the affidavit of William D. Decker), particularly State of Case, p. 31, l. 20. It follows as a matter of unavoidable logical inference that the building had not been completed as late as October 7, 1930, even disregarding the fact that it would take some time beyond October

7, 1930, for the performance of the labor, necessitated by, or following, the delivery of those materials.

The testimony, *offered in behalf of the defendant*, and upon which the defendant must necessarily rely in arguing against the decision of the Chief Justice, *conclusively showed* that the building was "fully completed" at some time *subsequent* to October 11, 1930. Such testimony is now to be briefly adverted to.

The first of such payments, which establishes conclusively that the building had *not* been completed by October 11, 1930, is a payment made, on December 24, 1930, to Watson Elevator Company. The testimony on that subject, as given on behalf of the defendant, is as follows:

"Deponent, answering paragraph 4 of the affidavit of Rose Sevrin, says that it is true that the sum of \$7,290.00 was paid out in checks, after the said stop notice was received. * * * Trust Account check No. 842, dated December 24, 1930, in the sum of \$1,000.00, was endorsed over to the Watson Elevator Company, the defendant having been authorized and directed, under date of August 1, 1930, by Philco Construction Company, to pay the sum of \$4,100.00 to said Watson Elevator Company for the installation of the elevators, as evidenced by Exhibit 4. Under date of August 5, 1930, deponent, acting for Saul and Joseph E. Cohn, agents for the defendant as set up in Exhibit 4-A, did notify said Watson Elevator Company that it was retaining said sum, as its agent." State of Case, p. 55, ll. 12-16, and State of Case, p. 56, ll. 5-20, in the affidavit of Michael Silver, for the defendant.

In Exhibit 4-A, annexed to the affidavit of Rose Sevrin (as above referred to by Michael Silver) we find that the \$4,100.00 (of which \$1,000.00 was

paid on December 24, 1930) was to be paid to the Watson Elevator Company when its "*installation is fully completed.*"

The second of such payments, to which we shall refer, in this connection, as showing when the building had been "fully completed" is a payment made on February 3, 1931, to Elin Appliance Company. The testimony on that subject, as given in behalf of the defendant, is as follows:

"Deponent, answering paragraph 4 of the affidavit of Rose Sevrin, says that it is true that the sum of \$7,290.00 was paid out in checks, after the said stop notice was received. Check No. 10444 dated February 3, 1931, was in payment of the sum of \$2,290.00, due to the Elin Appliance Company for refrigeration equipment installed in said building, which payment was guaranteed by the defendant, Jerrold H. Meyer, by Saul and Joseph E. Cohn, his agents, under date of July 22nd, 1930, as evidenced by a copy of said guaranty marked Exhibit 1 in the affidavit of Rose Sevrin." State of Case, p. 55, ll. 12-25, in the affidavit of Michael Silver, for the defendant.

In Exhibit 1, annexed to the affidavit of Rose Sevrin (as above referred to by Michael Silver), we find that the assignment and so-called "guaranty" authorized the payment of \$2,290.00 *upon Elin Appliance Company completing its contract*, and the owner expressly stated that said \$2,290.00 was not to be paid until there had been entire completion and until the final payment of \$15,000.00 was to become "due and payable" to Philco Construction Co., the general contractor. See State of Case, p. 42.

The third of such payments, which establishes definitely that the building had not been completed by October 11, 1930, is a payment made on March 16, 1931, to Colonial Woodworking Co.

The testimony on that subject, as given in behalf of the defendant, is as follows:

“Deponent, answering paragraph 4 of the affidavit of Rose Sevrin, says that it is true that the sum of \$7,290.00 was paid out in checks, after the said stop notice was received. * * * Check No. 10452, dated March 16, 1931, in the sum of \$2,000.00, was due the Colonial Woodworking Company for lumber, frame and trim used in the erection of said building and the defendant was directed by the Philco Construction Company, under date of August 1, 1930, to hold out said sum, as set up in Exhibit 3, which authorization was confirmed by Saul and Joseph E. Cohn, deponent acting in its behalf, for the defendant, Jerrold H. Meyer, under date of August 5, 1930, as set up in Exhibit 3-A.” State of Case, p. 55, ll. 12-16, and ll. 32-40, and p. 56, ll. 1-5, in the affidavit of Michael Silver, in behalf of the defendant.

In Exhibit 3-A, annexed to the affidavit of Rose Sevrin (as above referred to by Michael Silver), we find that the \$2,000.00 assigned to Colonial Woodworking Company was to be paid “*when the small balance of materials was delivered.*” State of Case, p. 46, ll. 38-40.

The last of such payments, which points out definitely the date of the completion of the building, is a payment made on May 11, 1931, to George Snyder Inc. The testimony on that subject, as given in behalf of the defendant, is as follows:

“Deponent, answering paragraph 4 of the affidavit of Rose Sevrin, says that it is true that the sum of \$7,290.00 was paid out in checks, after the said stop notice was received. * * * Check No. 10484 in the sum of \$2,000.00, dated April 11, 1931, is in reality dated May 11, 1931, and made to the order of Geo. Snyder, Inc. and was for plumbing materials and work performed in

installing the plumbing on said job, which sum Jerrold H. Meyer was directed to hold out by the Philco Construction Company and pay to Geo. Snyder Inc. *when the work was completed* as per Exhibit 5-A." State of Case, p. 55, ll. 12-16 and ll. 24-32 in the affidavit of Michael Silver, in behalf of the defendant.

Recapitulating the payments, made subsequent to October 11, 1930, it is found, *from the defendant's own affidavits*, that the building had not been completed by that date, because of the following payments made to contractors, *when they had subsequently completed their contracts*:

1. December 24th, 1930, Watson Elevator Company	\$1,000.00
2. February 3rd, 1931, Elin Appliance Company	2,290.00
3. March 16th, 1931, Colonial Wood-working Co.....	2,000.00
4. May 11th, 1931, Geo. Snyder Inc...	2,000.00
	\$7,290.00

We stress the fact that these payments were all made subsequent to October 11, 1930, and that such facts appeared in Mr. Silver's affidavit (for the defendant) entirely negating his *conclusions* that "the obligation (between the builder and owner) having been extinguished by payment of the balance due by virtue of the contract aforementioned upon completion of the building" (State of Case, p. 54, ll. 37-40). The Chief Justice was not misled by Mr. Silver's erroneous *conclusion*, but relied, as he had a right to rely, upon the *facts*.

The appellant's argument, in the case at bar, is akin to the argument made by the appellant in the case of *F. Bowden Co. v. Baier, et al.*, 99 L. 361, and disposed of adversely by the

Supreme Court (Justices Kalisch and Katzenbach), with the opinion by Justice Katzenbach, in part stating:

"The *appellant* first contends that in order to recover from him the amount set forth in the stop notice *the claimant must show that at the time of the service of the notice there was money due the contractor from the owner on the contract. This is not a correct statement of the law.* The third section of the Mechanic's Lien Act (3 Comp. St. 1910, p. 3294) provides that where a stop notice is served, the owner shall be authorized to retain the money so due and claimed out of the amount owing by him on the contract or that thereafter may become due from him on such contract. *The fact that the appellant paid, after service of the notice upon him, over \$1,200 to the contractor, is an admission that the contractor was entitled to these moneys. The owner, as the district court decided, is estopped in this action from contending to the contrary.* His course was to pay the claimant and deduct the amount so paid from the moneys owing or that thereafter might become due and owing to the contractor. *He could not ignore the stop notice."* *F. Bowden Co. v. Baier, et al.*, 99 L. 361, 363.

So, in the instant case, where the appellant-owner paid monies subsequent to the service of the stop notice, it is likewise "an admission that the contractor was entitled to these monies," which he "is estopped in this action from contending to the contrary," and he "could not ignore the stop notice."

As we have already shown above, it is conclusively established, *even from the defendant's own affidavits*, that on October 11, 1930, the date of the service of the plaintiff's stop notice, the building had *not* been fully completed, that at least the sum of \$7,290.00 was still to grow due

from the owner to the contractor for work still to be performed, and that the plaintiff's stop notice was, therefore, seasonably served, *particularly when it appears that the amount of such payments was subsequently made in discharge of the contract price by the owner*. The justification for such payments, as urged in the affidavit of Michael Silver, is that those sums "had been guaranteed by him and were in his hands as funds belonging to the various sub-contractors and not as funds belonging to the Philco Construction Company" (State of Case, p. 56, ll. 25-28). Because such was the justification of the owner, as urged in his affidavits before the Chief Justice, for making such payments for a sum vastly exceeding the amount of the stop notice after the service of such stop notice, we will now point out that such justification is untenable in the law.

POINT II.

The assignments or orders of the general contractor, addressed to the owner, in favor of other creditors, and the guaranties of the owner, do not displace the statutory rights and priorities of the plaintiff as a stop notice claimant; this is true, even if it be found that the debt of the owner had "matured" prior to the service of the stop notice, as long as such stop notice was (as is uncontradicted in this case) served before payment to the assignees or the persons guaranteed.

If our view of the case is correct, as we believe it to be, that the stop notice in the case at bar was served before the building had been completed, and hence before the debt from the owner to the contractor had matured, as we have pointed out under POINT I of this brief, the

correctness of the decision of Chief Justice Gummere seems to be conceded by the appellant, and it will be unnecessary for this court, then, to enter into a consideration of the present point. However, we do not wish to appear as evading a possible issue and hence make this further analysis of the case to show that under the plain provisions of Section 6 of the statute, the plaintiff was entitled to payment in preference to the alleged orders or assignments of the contractor, and in preference to the payments made pursuant to any guaranties signed by the owner, as long as the stop notice was served (as is conceded in the case at bar) before actual payment.

The salient provisions of Section 6 of the Mechanics' Lien Law (as contained in the 1898 Revision) are as follows:

"In all cases journeymen or laborers shall have priority and preferences over any employers of labor, contractors or materialmen for the payment of wages, * * *; laborers or materialmen *giving* notices in accordance with the provisions of the third section shall have priority and preference in the disposition of the moneys due and to grow due upon the contract over any persons claiming said moneys or any part thereof by reason of order or orders thereon or assignments thereof." 3 C. S. p. 3299, Section 6.

The quoted section was amended by Chapter 212, P. L. 1930, but the amending statute did not substantially vary the previously existing statute. The amending statute, in the particular provisions of Section 6 with which we are now concerned, is as follows:

"In all cases journeymen or laborers shall have priority and preferences over any employers of labor, contractors or materialmen for the payment of wages, * * *; laborers

or materialmen *filing* notices in accordance with the provisions of the third section shall have priority and preference in the disposition of the moneys due and to grow due upon the contract over any persons claiming said moneys or any part thereof by reason of order or orders thereon or assignments thereof." Section 6, Chap. 212, P. L. 1930, pp. 972, 976.

It will be observed that the only change in the clause under consideration was the substitution of the word "filing" for the word "giving," such change being due to the fact that section 3, in the later statute, provides for the filing of stop notices, as establishing the order of priority, *inter sese*, instead of the serving thereof. As far as the present case is concerned, the change makes no difference in the result, because, in the case at bar, the stop notice was both *filed* and *served before* any money was paid by the owner to the assignees.

A reading of the appellant's brief indicates that the last assertion of a statement of fact is conceded. However, in order that there may be no misapprehension on this score, we will refer to the testimony. The contract between the owner, Jerrold H. Meyer, and the builder, Philco Construction Company, was entered into on June 2, 1930 (State of Case, p. 19, l. 30); the stop notice was *filed* on October 9, 1930 (State of Case, p. 22, l. 40); the stop notice was *served* upon the owner on October 11, 1930 (State of Case, p. 32, l. 25); the successive payments to the assignees, respectively, were made on December 24, 1930, and on February 3, 1931, and on March 16, 1931, and on May 11, 1931 (see fourth paragraph from the last, in POINT I, recapitulating the dates and amounts of the payments). This case, therefore, presents the

situation where the owner with full knowledge of the stop notice, and *after* the service thereof, disregarded it and, for reasons personal to himself, chose to pay the assignees rather than institute an interpleader suit where the rights of the parties to the unpaid balance might have been properly determined and where, in the course of such interpleader suit, the stop notice claimant, the plaintiff in this action, might have had an opportunity of ascertaining, at least by cross examination, whether the sums claimed by the respective assignees were justly due them.

The justification for the plaintiff pursuing the course which he did, as presented before the Chief Justice below, is taken from the affidavit of Mr. Michael Silver, submitted in behalf of the defendant, and that "justification" is as follows:

"Deponent, as agent for Jerrold H. Meyer, further says that the last four mentioned items, covering the sum of \$7,290.00, were sums retained by the defendant because they had been guaranteed by him and were in his hands as funds belonging to the various sub-contractors and not as funds belonging to the Philco Construction Company." State of Case, p. 56, ll. 20-27.

In other words, the defendant said that he had the legal right to pay the assignees, notwithstanding the service of the stop notice because he, the defendant, had "guaranteed" the payment of those sums to the other materialmen. An examination of the law finds the defendant's position without legal justification.

This subject, the effect of Section 6 of the Mechanics' Lien Law, has been very carefully considered, it seems to us, by Mr. Luce, in his annotation to our statute. In the 1923 edition

of his book, in showing that section 6 and section 5 have different effects, and that the provisions of section 6 were intended to amplify the other statutory provisions, Mr. Luce says:

“The concluding clause of Sec. 6 says—that ‘laborers or materialmen giving notices, etc., shall have priority and preference in the disposition of the money DUE and to grow due upon the contract over any persons claiming said moneys or any part thereof by reason of order or orders thereon or assignment thereof.’ Now it would seem plain that, if Sec. 5 evinces a legislative intent to give laborers and materialmen an inchoate lien by prohibition of advance payment, this clause of Sec. 6 evinces a similar intent just as obviously by giving such claimants the priority and preference which it does. It is suggested therefore, that it is a question which should receive deliberate consideration, and that if an inchoate lien is given by this clause, the duration of such lien must also be a question to be determined by a careful consideration of its terms, in the light of their obvious legislative purpose. Upon that matter the following suggestions are appended:

“Prior to the revision of 1898, * * *, it was, as the law then stood, a proper, if not a necessary inference also, that the duration of such inchoate lien must be co-extensive with the period within which such prohibition operated, and must cease when it ceased, that is, with the maturity of the owner’s liability. But now, if Sec. 6 also gives laborers and materialmen an inchoate lien, by giving them ‘priority and preference in the disposition of the moneys *due and to grow due etc.*’, (italics by Mr. Luce), over persons claiming by order or assignment, the duration of such inchoate lien must be determined by those terms, and the purpose which the Legislature had in view. IT WOULD SEEM THEN TO FOLLOW, THAT SUCH INCHOATE LIEN CON-

TINUES, AS AGAINST ASSIGNEES OR HOLDERS OF ORDERS, AND THEREFORE, AS AGAINST THE BUILDER'S OWN DEMAND FOR PAYMENT, BEYOND THE MERE ARRIVAL OF THE TIME WHEN THE OWNER MAY RIGHTFULLY DISCHARGE HIS LIABILITY TO THE BUILDER, AND UNTIL HE HAS ACTUALLY EXERCISED THAT RIGHT. * * *

"In this view, *the inchoate lien of such claimants* would be liable to be defeated by the owner's exercise of his right to pay before a stop notice came in, but until so (*italics by Mr. Luce*) defeated it *would continue to exist, as against the builder or his assignees.*

"The assertion of such a purpose is not an assertion of something which it is impossible or improbable that the Legislature could intend. * * *

"In the theory above advanced, the right of the owner to discharge his liability, by payment after its maturity to the builder or his assignee, before any stop notice intervened, would be based upon the fact that the statute only forbids him to make any advance payment. On the other hand, the denial of any right, on the part of the builder, to demand the payment of the money earned, so long as there were any unsatisfied laborers or materialmen, would be rested on the express words of the statute, and the reasonable inference therefrom, that the statute intends that he himself may not demand what it forbids him to give another the right to demand.

"From this theory it would result that *any orders or ASSIGNMENTS given by the builder at any time, but NOT IN FACT paid by the owner after his right to discharge his liability has accrued, and before a stop notice intervened, would be DEFEATED BY SUCH A NOTICE COMING IN.*

* * * * *

“* * * The cardinal thing that should be borne in mind, as it seems to the writer, is, that when the Legislature says that laborers and materialmen shall have priority and preference as to the moneys due, it means that they shall have all that is necessary, in order to secure to them such priority and preference.” Luce, *Mechanics’ Lien Law*, 3rd Edit. pp. 176, 178.

The views expressed by Mr. Luce, it seems to us, are entirely logical and are well borne out by the express provisions of the statute. Section 2 of the statute, under well recognized rules and cases, provides that the building shall not be subject to liens, if the contract is properly filed. Section 3 of the statute gives to persons, thus deprived of their statutory liens, a right to proceed by “stop notices.” The statute further provides for the priorities of such claims over other classes, thus:

FIRST: *A stop notice has priority over the claims of the contractor against the owner, under Section 3, because the owner, on being served with the stop notice, is thereupon “authorized to retain the amount so due and claimed * * * out of the amount owing by him or them on the contract or that may thereafter become due from him or them on such contract * * *, and if the same be not paid or settled by said master workman or contractor, * * * such owner or owners, on being satisfied of the correctness of said demand, shall pay the same in the order in which such notices were filed in the office of the county clerk, and the receipt of such journeyman, laborer, materialman or sub-contractor, for the same shall entitle such owner or owners to an allowance therefor in the settlement of accounts between him and such*

master workman * * * as so much paid on account."

SECOND: *A stop notice has priority over any payments made "in advance of the terms of such contract," as provided by Section 5.*

THIRD: *A stop notice has priority over any "order or orders thereon (meaning the balance due or to grow due from the owner)."* This is one of the provisions of Section 6 of the statute.

FOURTH: *A stop notice has priority over any "assignments thereof," (meaning assignments of the monies due or to grow due from the owner).* This also is a provision of Section 6 of the statute.

From the foregoing analysis, it appears to be clear that Section 6 of the statute which creates a priority over a class of claims (to wit, assignments) differing from the claims already subordinated by virtue of either Section 3 or Section 5 of the statute was intended to amplify the provisions of the earlier sections. The amplification consists in making a stop-notice claim prior to "orders or assignments." The statute ought to be given a meaning in accordance with its plain intent.

Furthermore, Section 6 of the statute, it seems to us, as suggested by Mr. Luce, operates to give priority over assignments or orders, upon the fund still "due" from the owner, but, in fact, unpaid, because the wording of the statute is "priority and preference in the disposition of the moneys DUE AND TO GROW DUE" from the owner. In other words, where money is "due" from the owner, but has not been paid,

the right of the stop notice claimant will attach to such unpaid fund.

Clearly, in the case at bar, \$7,290.00 was "due or to grow due" from the owner when the plaintiff served its stop notice. That sum may not have been *payable* to the contractor, because of the contractor's assignment, but it, nevertheless, was *due* from the owner; that fact is conceded, and that such is the fact is best evidenced by the fact that the owner later paid it. The test, as laid down by the statute, is not whether the money is payable to the contractor, but whether the money is "due or to grow due" from the owner. As against such a fund, in the plain words of the statute, the rights of the stop notice claimant attach, and, still in the plain words of the statute, such rights "have priority and preference * * * over any persons claiming said moneys or any part thereof by reason of order or orders thereon or assignments thereof."

While we do not believe that the facts of the case lead to the conclusion that the building was completed prior to the service of the stop notice, yet, if such should be the inference of fact by this court, then the stop notice claimant, the plaintiff in this action, is still entitled to preference and priority over the assignments and orders because the money had not yet been paid by the owner thereof, that is, the moneys were still "due" from the owner, and the statute accords, as against assignments or orders, a preference in favor of the stop notice claimant, against any moneys "due or to grow due" from the owner.

In the course of his brief, counsel for the appellant refers to a number of cases involving the rights of stop notice claimants, necessitating

the service of the stop notice upon the owner before the maturity of the debt from the owner, when the claim is made that the owner made "advance payments," contrary to the provisions of Section 5 of the statute. However, Section 5 of the statute is not involved here. The question in the case at bar is one of priority *over assignments*. None of the cases emphasized by counsel for the appellant decided that question. There are, indeed, some loose expressions in the decisions of the lower courts which fail to observe the distinction between the different classes of priorities that is, a priority over an "advance payment" pursuant to Section 5 and a priority "over an assignment" pursuant to Section 6. We confidently assert that there is no case in the Court of Errors and Appeals which decides to the contrary of our contention, and, as we are about to show, the only case in this court involving precisely the question now being discussed was decided in accordance with our views.

The recent case of *Grunt v. Zapeikov*, 107 N. J. L. 730, which is but casually referred to by the appellant, decided unanimously by the Court of Errors and Appeals, with the opinion written by Justice Bodine, is almost parallel with the facts in the case at bar, and, in our opinion, is controlling of the case at bar. In that case, the stop notice claimant served his stop notice *AFTER* the building had been completed and *AFTER* the final payment thereunder was "due" from the owner to the builder, but had not been entirely, in fact, paid out. As a matter of fact also, *before* the stop notice was served, the owner had drawn a check to the order of the contractor, which was immediately endorsed to the order of another materialman, which held the guaranty of the owner. A judg-

ment in favor of the stop notice claimant against the owner was recovered, and such judgment was affirmed by the Court of Errors and Appeals, with the opinion, in part, stating:

“The trial judge charged the jury that the defendant’s possession of his own check did not constitute payment, and that, although he had drawn this check and the contractor had indorsed it to the order of the Trane Company, still the *defendant had in his possession moneys due on the contract.*” *Grunt v. Zapeikov*, 107 L. 730.

That decision, as already stated, was concurred in by the full bench of this court, with the comment that “the other matters suggested at the argument deserve no further consideration.” Reasoning deductively, from that decision, the following principles of law are thereby decided:

FIRST: A stop notice claim is to be accorded priority and preference over any assignment by the contractor (in the Grunt case effectuated by the contractor endorsing to the order of a creditor a check given to such contractor by the owner in final settlement of the account between them).

SECOND: The stop notice is effective as against the fund DUE from the owner, and not yet paid, notwithstanding the drawing and endorsement of an undelivered check (made AFTER the completion of the work, and hence AFTER the maturity of the owner’s debt, even when the stop notice was served AFTER such maturity).

THIRD: The fact that the owner guaranteed the debt of the builder and is liable thereon (because of his contract of guaranty, to the person guaranteed) does not defeat a stop notice claimant from collecting the amount

of the stop notice, even where the stop notice is served **AFTER** the maturity of the owner's debt to the builder, if service of such stop notice is, in fact, effected before *actual payment* by the owner.

The Grunt case furnishes a complete justification for the comments of Mr. Luce which we have made in the early part of this point and for the analysis of the statute preceding the discussion of the Grunt case. In view of the Grunt case, which is the latest pronouncement, as far as we have been able to find, of the Court of Errors and Appeals upon this precise topic, and as we consider it authoritative, it would be a "weariness of the flesh" further to pursue this subject.

On this point, we submit that, both by reason and authority, the stop notice of the plaintiff in this case was entitled to priority and preference over the assignments, whether guaranteed by the owner or not, when such stop notice (as is undisputed in the case at bar) was served while moneys were still due from the owner and before the actual payment thereof.

POINT III.

The position of the appellant is devoid of an appeal to honest action and justice.

We have thus far in our brief considered the two important aspects of the case at bar, from a strictly "legal" viewpoint, by reference to reason and statutory and judicial authority. It is unfortunate that the State of the Case does not contain the incisive questions and remarks made by the Chief Justice, with his customary clarity of vision, which penetrated the fog of sophistry,

adduced, or attempted to be adduced, in the course of the oral argument below by the defendant. Every justice and judge of the Court of Errors and Appeals is fully acquainted with the almost uncanny shrewdness with which the Chief Justice, by a few pertinent questions, points out the fallacy of a litigant's argument; this keenness of perception is a tradition among the members of the bar which many have learned, to their sorrow, but with no small addition to their wisdom.

The fallacy of the defendant's position was quickly perceived by the Chief Justice below and was so aptly pointed out by question and illustration that we deem it well to repeat a supposititious case suggested during the course of the motion for judgment, which illustrated the unfairness and injustice of the defendant's position.

If the defendant be correct, then the most startling results would follow in the case now about to be used as an example. X, the owner of property, might make a written contract with Y, a builder, calling for the erection of a five-story structure for the sum of \$100,000.00 to be paid for in five installments of \$20,000.00 as each of the five stories was completed. That written contract would be filed, in order to protect the lands and building from liens. The builder would then go to the Mason Material Company in order to obtain masonry materials to be used in the erection and construction of the building, that materialman would then find a contract on record, and would then have the right to conclude that the owner would have, at the conclusion of the building, the sum of \$20,000.00 still to be paid to the builder. Secretly, however, and certainly unknown to the Mason Material Company,

the builder would then make four assignments of \$5,000.00 each to creditors No. 1, No. 2, No. 3 and No. 4, and the owner would "guaranty" the payment of those claims so assigned. Mason Material Company would, during the course of construction, sell \$20,000.00 worth of mason materials to the builder, and not being paid, would file a "stop notice" for that amount. According to the appellant's contention in this case, the stop notice would be futile because there was "nothing due from the owner to the builder," in view of the previous assignments, and because the owner was "obliged to pay the guaranties," and hence, there is nothing left to pay to the Mason Material Company.

Of course, the case which we have supposed is an extreme one, and results in the absurd conclusion that the provisions of the Mechanics' Lien Law, with reference to stop notices, have been entirely nullified, by secret arrangement between the owner and the contractor, in the making of which Mason Material Company had nothing to do and of which it was entirely ignorant. The case supposed offers a fair test of the soundness of appellant's position. The statute certainly never intended such an absurd, unjust and unfair result.

When a building contract is filed, the creditors of the builder have a right to rely upon the owner's compliance therewith, and credit is accordingly extended to the builder largely upon the fact that the builder will be in funds as the contract provides, and at the time specified in the contract. The entire policy of the stop notice provisions in the statute is to prevent both the owner and the builder from dissipating the expected payments by any means whatsoever.

Still, if the position of the appellant be correct, that can be accomplished, secretly and fraudulently, by permitting the owner to honor assignments, and to leave the innocent materialman "high and dry." In the manner suggested by the appellant, the owner and builder not only deprive the materialman from the statutory right of lien (by reason of the filing of the contract), but deprive such materialman from the benefits of a stop notice, given in substitution of the lien.

The position of the appellant, we respectfully submit, is not only contrary to logic and authority, both judicial and statutory, but constitutes an attempt (unconscious, we hope and believe, but none the less mistaken) to justify dishonest conduct, unfair dealing, and injustice.

POINT IV.

Appellant's demands for bill of particulars were improper and should have been stricken; the action of the Chief Justice, even if erroneous, presents no reversible error.

In POINT III of appellant's brief, particularly page 14 thereof, the appellant states that the particulars demanded, and which were stricken out by order of the court, were:

1. On what date or dates did the defendant pay to said Philco Construction Company, or cause to be paid to it or for its account, large sums of money in excess of the sum for which this suit is brought?
2. What sums of money, if any, were paid on said dates?

It will be observed at the outset that, although the Chief Justice struck out the demand for bill

of particulars, the defendant did not except to the action of the Chief Justice, nor did he make any other noted objection to such action. *The State of the Case fails to disclose any such exception or objection*, and, in point of fact, no exception or objection was taken. To find the appellant now urging this as ground of appeal is, therefore, rather surprising. The present ground of appeal, founded on the alleged erroneous action of the Chief Justice in striking out the demand for bill of particulars may, therefore, very well be disposed of adversely to the appellant, on the ground that the appellant did not take exception or note any objection below. A well-known application of this salutary principle is found in the case of *Joseph M. Byrne Co. v. Snead & Co.*, 98 N. J. L. 256, to cite only one of the many cases, decided by this court on this point. See also S. C. R. 144.

The action of the Chief Justice, in allowing or disallowing a bill of particulars is a matter resting within his discretion; and the appellant does not point out, nor even suggest, that the action of the Chief Justice, in disallowing the particulars demanded, was an abuse of discretion. It has been held repeatedly that no appeal will lie from the disposition of a matter lying within the discretion of the lower tribunal. A well-known application of this principle is found in the case of *Cook v. American Smelting & Refining Co.*, 99 L. 81, to cite only one of the many cases decided by this court on this point.

Excluding these technical considerations, the action of the Chief Justice was correct. The function of a bill of particulars is to enable the defendant to answer, so that the defendant will not be surprised at the trial by introduction of

matters which he could not have foreseen. The very particulars demanded by the defendant are such as were fully within the knowledge of the defendant. Certainly, the defendant knew when he paid money in discharge of the contract price, to whom such money was paid, and the amount of each several and respective payments. Perhaps, the best evidence of that fact lies in the circumstance that the defendant actually, by his answering affidavits, set forth when, to whom and in what amounts payments were made by him. The defendant, therefore, cannot be said to have needed the bill of particulars in order to adequately present his answer, and that fact was quite apparent when the demand for bill of particulars was stricken by the Chief Justice. No hard and fast rule can possibly be laid down when a bill of particulars ought to be required and when it ought to be denied. Each case must necessarily be decided according to its particular necessities, in the sound discretion of the judge who hears the motion. It was quite well perceived by the Chief Justice that the matters which the defendant was attempting to elicit from the plaintiff were matters which the defendant himself necessarily had full knowledge of, and did not need for the preparation of an answer, nor for the purpose of furnishing evidence for his own case, and, as the filing of the answering affidavits show, the deprivation of such bill of particulars did not in any manner prejudice the defendant.

The rule is also well established that erroneous action does not necessarily lead to a reversal; the appellant must further show that he was *prejudiced*. The policy of the courts of our State that legal technicalities shall not be cause for reversal where the substantial rights of the

party have not been injuriously affected is enunciated in the 1912 amendment to the Practice Act, the salient provision being:

"No judgment shall be reversed, or new trial granted on the ground of misdirection, or the improper admission or exclusion of evidence, or for error as to matter of pleading or procedure, unless, after examination of the whole case, it shall appear that the error injuriously affected the substantial rights of a party." P. L. 1912, Chap. 231, p. 382, Sec. 27; 1911-1924 Cum. Supp. p. 2819, Sec. 163-303.

By a long line of uniform decisions, it has been ruled time without number, that the appellate court will not reverse a judgment for technical error as to matter of pleading or procedure unless, after examination of the whole case, it shall appear that the error injuriously affected the substantial rights of the appellant. A few of the late cases, so decided in the Court of Errors and Appeals, in purely civil actions, are:

Neff v. Hannan, 85 N. J. L. 382, per curiam opinion.

Kargman v. Carlo, 85 N. J. L. 638, opinion by Justice Trenchard.

Mallery v. Erie Ry. Co., 86 N. J. L. 210, opinion by Justice Garrison.

Ridgeley v. Walker, 86 N. J. L. 590, opinion by Justice Garrison.

Marine Trust Co. v. St. James etc. Church, 85 N. J. L. 272, opinion by Justice Parker.

Higgins v. Egg, 87 N. J. L. 188, opinion by Justice Garrison.

Wickes Bros. v. Straight Filament Lamp Co., 85 N. J. L. 322, opinion by Justice Bergen.

Klein v. Katz, 92 N. J. L. 406, opinion by Justice Trenchard.

- Connolly v. Public Service Ry. Co.*, 94 N. J. L. 157, opinion by Justice Parker.
- Finnie v. Kelsey*, 95 N. J. L. 163, opinion by Justice Minturn.
- Baker v. Fogg & Hires Co.*, 95 N. J. L. 230, opinion by Judge Williams.
- Cook v. American Smelting & Refining Co.*, 99 N. J. L. 81, opinion by Chancellor Walker.
- Berkowitz v. Lyons*, 98 N. J. L. 198, opinion by Justice Minturn.
- Rolfe v. Fingerhut*, 98 N. J. L. 194, per curiam opinion.
- Baus v. Trenton & Mercer etc. Co.*, 100 N. J. L. 364, opinion by Justice Campbell.
- DiBenedetto v. Friedman, et al.*, 102 N. J. L. 161, opinion by Justice Black.
- Altieri v. Public Service Ry. Co.*, 103 N. J. L. 351, opinion by Chief Justice Gummere.
- In re Board of Recreation Commissioners*, 103 N. J. L. 419, opinion by Justice Black.
- Coombs v. Witte*, 104 N. J. L. 519, opinion by Chief Justice Gummere.
- National Surety Co. v. Mulligan*, 105 N. J. L. 336, opinion by Chancellor Walker.

It does seem to us that the appellant has attempted to seize at any straw in an effort to secure a reversal when it is quite clear that he has, in no way, been prejudiced, and when the action of the Chief Justice was, in all instances, correct and just. After all, a legal proceeding is not designed to afford an opportunity for a discussion of abstract questions of law or a formulation of doctrine, but its sole purpose is to give justice. Rules of procedure and discussions of law are only ancillary to the main purpose for which courts exist. This is the spirit of the cases last herein cited and their spirit the appellant seems not to have absorbed.

CONCLUSION.

We respectfully urge that the judgment below be affirmed, and on the grounds hereinbefore urged, summarized as follows:

1. The stop notice was served by the plaintiff upon the defendant-owner before the final payment due from the owner to the builder had matured.
2. The stop notice of the plaintiff is entitled to preference and priority, even if served after the maturity of the debt from the owner to the builder, over the assignments made by the builder, in view of the conceded fact that such stop notice was served before payment of the assignments.
3. The rule urged for by the appellant is in nullification of the statute and to construe the statute, in accordance with appellant's contention, would result in fraud and injustice.
4. The striking out of defendant's demands for bill of particulars was proper and presents no cause for reversal.
5. The defendant has not suffered any prejudicial error.

Respectfully submitted,

KANTER & KANTER,
Attorneys of Plaintiff-Respondent.

ELIAS A. KANTER,
Of Counsel.

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ON BRIEFS

New Jersey
Court of Errors and Appeals

ATTHAN WELITOFF, BEATRICE WEL-
TUFF, administratrix, etc.

Substituted Complainant-Appellant,

and

FIDELITY TITLE AND MORTGAGE
GUARANTY CO., of N. J.

Defendant-Appellee

On Bill, &c.

On Appeal from

Chancery.

State of Case

HELOSH, MUSTEN & HELOSH

Solicitors of Complainant-Appellant

D. TURNER & WEST,

Solicitors of Fidelity Title & Mort-
gage Guaranty Co.

Defendant-Appellee

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