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Notice of Appeal.

ESSEX COUNTY CIRCUIT COURT

MAURICE B. GLUCK,
Plaintiff,

vs.

SERGIO RUIZ-URRUTIA, GABRIEL MORANDI, ERNESTO HERSEN, Jr., AGUIMIRO LANDER, JOSE A. TORRES, HUMBERTO TORRES, FRANCISCO DELGADO and HENRY MENENDEZ, partners, doing business under the firm name and trade name of Ruiz-Urrutia Company, Builders, RYNDA DEVELOPMENT COMPANY (a New Jersey Corporation), and AMELIA R. GLUCK, Owner,
Defendants.

To: Jacob Hauptman, Attorney for Defendant Rynda Development Co.

Please Take Notice, that the plaintiff herein hereby appeals to The Court of Errors and Appeals from a rule, order or decisions of The Honorable Nelson Y. Dungan, filed and entered herein dismissing the Plaintiff's action against the Defendant Rynda Development Company, for failure to diligently prosecute the within action against the Defendant Ryn-

da Development Company within one year from the date of issuing the summons herein, or non-prosessing such action, and appeals from each and every part of such rule, order or decision, for the following reasons, grounds, or points:

1. That the Court erred in deciding that he had the right to dismiss such action of the plaintiff, as against the Defendant Rynda Development Company on the ground that the plaintiff had not diligently prosecuted such action to judgment within one year from the issuing of the summons, as the Act (Mechanic's Lien Law, Rev. of 1898 and amendments, etc.) Sec. 18, does not provide the suit must be diligently prosecuted to "judgment" within one year.

2. That the Court erred in deciding that he had the right to dismiss such action of the plaintiff, as against the Defendant Rynda Development Company on the ground that the Plaintiff had not diligently prosecuted such action within one year from the issuing of such summons herein, as the Act (Mechanic's Lien Law, Revision of 1898 and amendments, etc.), Sec. 18, provides for, "if Claimant shall fail to prosecute his claim diligently within one year" and that whether or not claimant has failed to prosecute his claim diligently is a question of fact, and a matter for the jury, and not a question for the Judge.

3. That the Court Erred in deciding that he had the right to dismiss such action of the plaintiff as against the Defendant Rynda Development Company on the ground that the Plaintiff had not diligently prosecuted such action against the Defendant Rynda Development Company within one year from the issuing of the summons herein, as the Act (Mechanic's

Lien Law, Revision of 1898 and amendments, etc.), Sec. 18, provides for "if Claimant shall fail to prosecute his Claim diligently within one year," must be read in connection with the other Sections of such Act, and does not stand unrelated to Sec. 29 (Rev. 1898, etc.) and Sec. 30 (Rev. 1898, etc.) and where as in this case there has been a marshalling of the Assets, and a sale "by virtue of the Act" before such year has expired, the plaintiff having duly filed his lien claim and duly started his action, he need not prosecute his action in such circumstances unless notified by Caveat to do so, as by operation of the Mechanic's Lien Law, where a sale is had "by Virtue of the Act" and he is to be paid out of such funds obtained by the sale, his lien is barred as against the property and he has in its place a lien against such funds or proceeds of sale, which is a marshalling of Assets, and in such event the first lienor obtaining the sale may stay such subsequent lienor as herein, and the prosecution of such action would prove unnecessary, and the law provides he may leave undone anything that may prove unnecessary, and this Plaintiff could not be claimed to have failed in diligent prosecution in such a case and under such circumstances as a matter of law, and in such case the Judge would have had to so charge the Jury upon the presentation of such facts.

4. The Court Erred in considering on this motion any other question for a dismissal or non-prossessing of the action as the motion was made upon the specific grounds "That the plaintiff lienor has allowed more than a year to elapse without diligently prosecuting his lien to judgment."

5. That the Court Erred in its Decision, rule or

order in non-prossessing the Plaintiff's action against the Defendant Rynda Development Company on the ground that the issues were joined as to these parties without the other parties defendant, and that the action as to these parties should have been placed upon the trial Calendar at next Term after such issue, and more particularly so when the defendant Rynda Development Company, could have itself served its note of issue for such next term and placed in upon such Calendar for trial, and also waived its right to non-pross by not moving, if they had the right, at such next Term upon which it is claimed it should have been placed on Calendar for trial.

Dated, November 12, 1924.

MAURICE B. GLUCK,
Attorney, etc., Pro Se.

Service of a copy of the within notice is hereby acknowledged as having been made on the sixth day of December, 1924.

JACOB HAUPTMAN,
Attorney, etc., *per se.*

Complaint.

State of New Jersey to Sergio Ruiz-Urrutia, Gabriel Morandi, Agimiro Lander, Ernesto Hersen, Jr., Jose A. Torres, Humberto Torres, Francisco Delagdo and Henry Menendez, partners doing business under the firm and trade-name of Ruiz-Urrutia Company, Rynda Development Company (a corporation of New Jersey) and Amelia R. Gluck,

You, Sergio Ruiz-Urrutia, Gabriel Morandi, Agimiro Lander, Ernesto Hersen Jr., Jose A. Torres, Humberto Torres, Francisco Delgado, and Henry Menendez, partners doing business under the firm and trade name of Ruiz-Urrutia Company, Rynda Development Company (a New Jersey Corporation), and Amelia R. Gluck, are summoned to answer the annexed Complaint of Maurice B. Gluck in an action at law upon a mechanics lien claim in the Circuit Court in and for the County of Essex, in which said Maurice B. Gluck claims a lien on certain lands and buildings and the interests in said lands of said Rynda Development Company and Amelia R. Gluck described in the lien as follows:

Situate, lying and being in the Village of South Orange in the County of Essex, and State of New Jersey, more particularly described, Beginning at a point on the Northeasterly side of Rynda Road, distant one Hundred and seventy-seven and 78 hundredths of a foot northerly as measured along said side of Rynda Road from the intersection of said side of Rynda Road produced with the Northeasterly side of Ridgewood Road produced; thence (1) along said side of Rynda Road North 41 degrees 37 minutes west 60 foot; thence (2) North 41 degrees, 33 minutes east 140 feet; thence (3) south 48 degrees, 37 minutes east 60 feet; thence (4) south 41 de-

grees, 23 minutes west 140 feet to the point and place of beginning. Being the westerly thirty feet of lot No. 32 and the easterly thirty feet of lot No. 31 on map of property made by Ira T. Redfern & Bro., Surveyors, South Orange N. J. February 1922, for Rynda Development Company, South Orange N. J.

And Take Notice that unless you file your answer to the said complaint with the Clerk of said Court, at Newark, within twenty days after the service upon you of this writ and the annexed complaint, the plaintiff may proceed in this suit and judgment may be entered against you.

Witness, Worall F. Mountain, Judge of the said Circuit Court at Newark, this 15th day of March, 1923.

JOHN H. SCOTT.

Maurice B. Gluck,
Attorney *per se*

ESSEX COUNTY CIRCUIT COURT.

MAURICE B. GLUCK, Plaintiff, vs. SERGIO RUIZ-URRUTIA, GABRIEL MORANDI, AGIMIRO LANDER, ERNESTO HERSEN, Jr., JOSE A. TORRES, HUMBERTO TORRES, FRANCISCO DELGADO and HENRY MENENDEZ, partners doing business under the firm name of Ruiz-Urrutia Company, Builders, RYNDA DEVELOPMENT COMPANY (a corporation), and AMELIA R. GLUCK, Owners, Defendants.	Action at Law on Lien Claim Complaint.

Maurice B. Gluck, the plaintiff in this action herein sets forth his allegations for and as his complaint, and says:

1. That at all the times hereinafter mentioned the defendants, Ruiz-Urrutia Company, as hereinabove set forth were partners and have not been dissolved, and that they were the Builders on the premises No. 122, etc., Rynda Road South Orange, N. J., and they entered into an agreement to and with this plaintiff by which the plaintiff agreed to superintend the construction of the said premises and to act as disbursing officer for various payments and needs, and for which the defendants agreed to pay for the said services of the said plaintiffs, as more fully hereinafter set forth in the Bill of Particulars hereinafter following and attached hereto and marked "A," and

by which there became due unto the plaintiff from the defendants the full sum of $1,860.92, of which wages at the sum and rate of $60.00 per week amounting to $1,260.00, and still remains due and owing and no part of which has been paid although duly demanded.

2. That the plaintiff has performed each and every the conditions of his agreement to be performed.

3. That at the time of the commencement of the said construction the title to the premises was in Rynda Development Company as for record, and the actual ownership (equitable), was in the name of the Chemtec Co., Inc., a New York Corporation, which had made an agreement to purchase and the said defendant Rynda Development had made and agreed to sell and deliver the said premises, that such agreement was in writing in the usual New Jersey form for the sale of Real Estate, and was duly acknowledged, after due execution although not put on record by agreement, and the said written agreement was given for a good and valuable consideration, and stated a consideration of money as well as "the other mutual covenants hereinafter following," therein for the passing of said title; that such agreement set forth an absolute consent in writing for the said Chemtec Co., Inc., and its subcontractors to build and construct said building, in the words,"

"Permission is hereby given unto the party of the second part by the party of the first part to go into and upon the said premises and to build and construct a house therein, any time prior to taking title."

and in the said contract the party of the second part

was the said Chemtec Co., Inc., and the party of the first part was said Rynda Development Company, and the premises were the same said premises hereinafter following and more fully described as in the said Lien Claim described and the same as contained in the said contract for sale; that the said agreement also provided and absolutely gave possession of the said premises from and after the first day of August, 1922 unto the said Chemtec Co., Inc., and provided "and from thenceforth and forever to have the use and benefit and rents thereof"; and that such agreement in writing also provided for payment of the greatest part of such consideration by the giving of a mortgage upon said premises which should be a second mortgage and lien second to a first mortgage or other liens, etc.; that the said Chemtec Co., Inc., took possession and was given such possession, and that such possession was afterwards sold and assigned to Amelia R. Gluck, with the consent of said Rynda Development Company, which and whose officers also signed, sealed and acknowledged a deed and the delivery of said deed unto her, and that this lien became vested upon said property according to law from the time of the commencement of the construction of said houses.

3. That Abraham Hauptman was and still is president of the Rynda Development Company, and that he is the same person to whom an alleged prior mortgage remains uncancelled as against these premises, and who executed the deed to said Amelia R. Gluck, by aboslute warranty that the said premises were free from any and all manner of incumbrances, and he is legally estopped from claiming any security in said premises for his unpaid balance remaining unpaid

upon such prior mortgage or the bond of said Rynda Development Company. That all other estates have had notice, as well as said Hauptman.

4. That plaintiff claims a preference on part of the above debt which is for wages weekly to the sum and amount of $1,260.00, in accordance with the Mechanic Lien Law, or Act hereinafter more fully described by its acurate title.

5. That such Mechanics Lien Law and Act, entitled, "An Act to secure to mechanics and others payment for their labor and materials in erecting any building," and the supplements and amendments thereto, and in accordance therewith, plaintiff duly filed his said lien claim with full Bill of Particulars, as hereinafter following, on the 15th day of March, 1923, with the Clerk of the County of Essex, at Newark, N. J., which was within four months after the date of last work done, and this suit was started by the issuance of the summons on the same day as the said filing so as also within such period of time after the last work done, and the date will more fully appear hereinafter in said Bill of Particulars made a part hereof, marked "A," which showes the nature and kind of labor performed and moneys furnished, etc., and the date of such issuance of the summons and starting of the suit was duly endorsed upon such lien claim by the County Clerk of the County of Essex, at the time of such issuance of said summons.

6. That the said debt is by virtue of the provisions of an Act entitled "An Act to secure to mechanics and others payment for their labor and materials in erecting any building" (Rev. 1898, etc.). And the

amendments and supplements thereto, a lien, upon such buildings and curtilage, being a two and one-half story frame dwelling with a double car garage upon such curtilage and herewith following described as in said lien claim described, to-wit:

Situate, lying and being in the Village of South Orange in the County of Essex, and State of New Jersey, more particularly described, Beginning at a point on the northeasterly side of Rynda Road, distant one hundred and seventy-seven and 78 hundredths of a foot northerly as measured along said side of Rynda Road from the intersection of said side of Rynda Road produced with the northeasterly side of Ridgewood Road produced; thence (1) along said side of Rynda Road North 48 degrees, 37 minutes west 60 feet; thence (2) North 41 degrees, 33 minutes east 140 feet; thence (3) south 48 degrees, 37 minutes east 60 feet; thence (4) south 41 degrees, 23 minutes west 140 feet to the point and place of Beginning. Being the westerly thirty feet of lot No. 32 and the easterly thirty feet of lot No. 31 on map of property made by Ira T. Redfern & Bro., Surveyors, South Orange N. J. February, 1922 for Rynda Development Company South Orange, N. J.

And plaintiff demands judgments for damages in the sum of $1,260.00 as wages and preferences, and the sum of $600.92 general claim to be ratioed with other liens, together with interest thereon upon each amount from November 24th, 1923.

MAURICE B. GLUCK,
Attorney *per se*.

Answer.

ESSEX COUNTY CIRCUIT COURT.

MAURICE B. GLUCK, Plaintiff, vs. SERGIO RUIZ URRUTIA, GABRIEL MORANDI, AGIMIRO LANDER, ERNESTO HERSEN, Jr., JOSE A. TORRES, HUMBERTO TORRES, FRANCISCO DELGADO, and HENRY MENENDEZ, partners doing business under the firm and trade name of Ruiz-Urrutia Company, Builders, RYNDA DEVELOPMENT COMPANY (a New Jersey Corporation), and AMELIA R. GLUCK, Owners, Defendants.	Action at Law Lien Claim Answer of Rynda Development Company.

The defendant, Rynda Development Company a corporation of the State of New Jersey, with its principal office in the City of Newark and County of Essex for answer to the complaint of the plaintiff says:

1. That this defendant has no knowledge with respect to the truth of the allegations of the 1st, and 2nd paragraphs and leaves the plaintiff to make such proof thereof as he may be advised.

2. This defendant admits so much of paragraph 3 as alleges that the title to the premises was in the Rynda Development Company and the Chemtec Com-

pany, Inc., a New York corporation for the sale and purchase of the said premises.

3. This defendant admits that a deed was executed by this defendant to Amelia R. Gluck but that said deed was never delivered because of the breach of the contract by the said Amelia R. Gluck and the said Chemtec Company.

4. This defendant denies the allegations of paragraphs 4, 5 and 6.

JACOB HAUPTMAN,
Attorney for Defendant.

Affidavit of Maurice B. Gluck.

ESSEX COUNTY CIRCUIT COURT.

MAURICE B. GLUCK, Plaintiff, vs. SERIGO RUIZ-URRUTIA, GABRIEL MORANDI, AGIMIRO LANDER, ERNESTO HERSEN, Jr., JOSE A. TORRES, HUMBERTO TORRES, FRANCISCO DELGADO, and HENRY MENENDEZ, partners doing business under the firm name of Ruiz-Urrutia Company, Builders, RYNDA DEVELOPMENT COMPANY (a corporation) and AMALIA R. GLUCK, Owners, Defendants.	At Law On Mechanic's Lien

State of New Jersey,
County of Essex, ss:

Maurice B. Gluck, being duly sworn, deposes and says, that he is the plaintiff and claimant in the above-entitled action, that this answer is made on a motion by one of the defendants, Rynda Development Company, to dismiss the complaint and discharge Mechanics' Lien upon property described in the complaint on the ground that the plaintiff has failed to diligently prosecute his action to judgment within one year, under Section 18, of the Merchanics' Lien Law, under the provision "or if such claimant shall fail to prosecute his claim diligently within one year from the date of issuing such summons, or such further time

as the Court may by order direct, such lien shall be discharged." That such Section must be read in connection with Section 2930 of the Mechanics' Lien Act, which makes all Mechandics' Liens concurrent and to be paid pro rata out of proceeds, "when sold by virtue of this act." No further action is necessary, on the part of any claimant, when such a sale has been had unless a caveat is filed against such claim.

The defendant, Rynda Development Company, did not build or construct the said building, had no title, interest or ownership therein; the Rynda Development Company, a former owner, which had by Agreement of Sale, given possession and title to Amalia R. Gluck, the owner, and its only interest in the said premises was in the nature of a Vendor's lien for the balance of such purchase price, under such contract; it was made a party to this action because all other lienors had made the said defendant a party thereto, but it was really not the owner, and such interests as it might have had, might possibly affect, is some way, the interests of the real owner or the interests of this lienor in said land, but its interests was very small, being at the most Three Hundred and Eighty Dollars ($380.00) in cash and a second mortgage of Fourteen Hundred Dollars ($1,400.00) or a total at the most of Eighteen Hundred Dollars ($1,800.00), against the ownership of the land and the ownership in the building of very much greater value by very many times.

The Rynda Development Company, this defendant, in another action brought upon a Mechanics' Lien, in the case of "Salmon vs. Chemtec Co., etc.," permitted and allowed a judgment to be obtained against them by consent, and in which action no other person was

served for the purpose of attempting to obtain the property by a sale under an execution under such judgment.

In the Chancery action, involving this property, Jacob Hauptman, the Attorney and Director of the Rynda Development Company, testified as follows:

Page 8, Line 13 to and including Line 6, Page 9.

"Q. And each of these four suits had been entered against the Rynda Development Company? A. Yes, sir—each of these four—I think that those were the four judgments that were entered by consent.

"The Court:

"Q. What do you mean—that they were entered by consent? A. Under the Mechanics' Lien Act—after having looked at the contract between Mr. Gluck and the Rynda Development Company, I found that the Rynda Development had consented to the erection of the building by Mr. Gluck before the passing of title and under Section 7 of the Mechanics' Lien Act. I found that the Rynda Development Company was liable as far as the land itself was concerned."

"The Court: "Under the Lien Law?

"Witness: Under the Lien Act, yes, sir."

On Page 64, Line 7 to and including Line 12, he testified:

"Q. Was not the Sheriff's sale on that judgment? A. Yes, I think it was, yes, sir.

"Q. And the right was sold to the Arlington Realty Company? A. Yes, sir, the right of the Rynda Development Company, I would say was sold out on that judgment. I do not know, though I think so."

On Page 72, Lines 2, 3, 4, 6, 8, 9, 10, 22 to and including 25 and Page 73, Lines 1, 2, 20 to 25 inclusive. On Page 75, Lines 1-5 inclusive he testified:

"Q. And the judgment that was sold on was against the Rynda Development Company only, was not it? A. I think yes.

"Witness: I think that we consented to that judgment—we consented to the entry of that judgment.

"Q. The judgment against the Rynda Development Company as owner? A. As owner.

"Q. Who is builder? A. I don't know—

"Witness: It was a special judgment against the Rynda Development Company as owner.

"Q. There was a special judgment against the Rynda Development Company and nobody else? A. There was a judgment against the Rynda Development Company as owner, but to be specially made out of the lands described in the complaint.

"Q. And at the Sheriff's sale, were you not present? A. I was not. I had no interest in it."

"The Court: Why was not the deed taken?

"Mr. Walker: The deed was not taken because of this photostatic copy of the deed to Amalia R. Gluck on the record and Judge Dungan refused to order the payment of the balance of the purchase price, $6,900.00, until the Chancery Court disposed of this photostatic copy of the deed. He has held that in abeyance pending your decision in this matter.

"THOMAS E. FITZSIMMONS testified in the Chancery Action, Page 86, Lines 19-25, including and Page 87, Lines 10-13 including.

"Q. Well, The Rynda title has been sold, hadn't it,

and acquired by Mr. Walker's client? A. It was a special judgment.

"Q. What? A. A special judgment as to the right title and interest was sold.

"Q. Now, there was no judgment taken against anybody in that suit but the Rynda, was there? A. That shows in the record. That is right."

The execution issued in the said action to the sheriff for the sale contains the words "and have you and pay these moneys before our Circuit Court aforesaid at Newark, aforesaid the 3rd day of August, next, to render unto the said George G. Salmon Company, and of every concurrent lien claimants for the damages aforesaid; and have you there this writ."

The sale in the sheriff's office sold subject to and with notice of the specific rights of the various lienors including the lien of this plaintiff, the ownership of A. R. Gluck, the holding of a mortgage of Frieda Horn upon said premises and the right title and interest to certain personal properties of the Chemtec Company, Inc., and was bought with such notice.

The purchaser, Arlington Realty Company, refused to accept tender of the deed and refused to pay Sixty-Nine Hundred Dollars ($6,900.00) the amount of the purchase at the time of the sale. This lienor action for himself and on behalf of other lienors, insisted that the sheriff require the conditions of sale to be carried out by the purchaser and a cash deposit made as under the terms of the sale that were for the benefit of all concurrent lienors under the Mechanics' Lien Act, but such protest was overruled by the sheriff on the ground that the Arlington Realty Company had purchased and accepted by assignment the judgment

of George G. Salmon Co., and three other lienors being the four actions set forth above as entered into by consent of the Rynda Development Company.

That thereafter, your deponent acting on behalf of himself and such other lienors who desired to join, applied to this Circuit Court for an order compelling the Arlington Realty Company to carry out its purchase and pay the sheriff Sixty-nine Hundred Dollars ($6,900.00) and to enforce the writ of execution, and have the sheriff place the money in the Circuit Court for distribution.

This matter came on regularly on motion to be heard before the Honorable Nelson Y. Dungan, at Circuit Court, and was held in abeyance by the Court, until such time as a Chancery action, which had then been started in the Court of Chancery, in New Jersey, could be heard and determined, which action was to set aside a mortgage and photostatic copy of a deed upon which matter, the Vice Chancellor Backes (informally) decided that the equitable ownership and title to be in A. R. Gluck, that the mortgage she executed was properly executed and regularly on record and the deed had a right to remain there and that the Arlington Realty Company bought subject to and with notice of such right and possession of A. R. Gluck, but permitted an amendment to be had under the theory that the Rynda Development Company, the defendant herein and one of the complainants therein, and the Arlington Realty Company had purchased at sheriff's sale and had bought and taken title and had obtained possession of the premises, turning the action into an action to quiet title, which part of the action had not as yet been determined by the Court of Chancery.

Affidavit of Maurice B. Gluck

That this defendant answers the within action by an answer which practically admitted everything except "this defendant admits that a deed was executed by this defendant to Amalia R. Gluck, but that said deed was never delivered because of the breach of the contract by the said A. R. Gluck and said Chemtec Company." Then it denied the right of the plaintiff for a preference. Denied that it was lien under the Mechanics' Lien Law and that it had been properly filed and denied the lien was by virtue of the Act, a debt against the property described in the complaint.

The cause is not at issue between all the parties.

That your deponent on behalf of himself as one of the defendants in an action against him relating to the same property of "Elizabeth Sash and Door Company vs. Gluck" applied to this Court for an order and rule dismissing the action on the ground that the plaintiff had failed to diligently prosecute such action to judgment within the year. The Court in that action, which at the time when the application was made was within the year after the summons was issued in this action, decided that it would deny the motion and that diligence could not be questioned because of the Chancery action and that what would be diligence in view of the situation and because of the Chancery action, would be hard to say.

Deponent has therefore, assumed that his action upon the Mechanics' lien should await the determination of the question as to the Chancery action.

The situation, as it now stands, is that all the lienors have their interest in the fund that was created by a sale of the sheriff under a special *fi. fa.* under the Mechanics' Lien Law and all costs and expenses can be saved by a direct distribution from this Circuit Court

just as soon as this Court will compel the sheriff and the purchaser to deposit such moneys in this Court. That the purpose of this motion is apparently to place the plaintiff in such a position that he will not be able as a lien claimant to follow up the motion held in abeyance to compel the purchaser to pay such fund into the Court.

MAURICE B. GLUCK.

Subscribed to and sworn to before me
at Newark, New Jersey, this
13th day of June, A. D. 1924.
Harvey W. Kough,
Notary Public,
of New Jersey.

Notice to Dismiss.

ESSEX COUNTY CIRCUIT COURT.

MAURICE B. GLUCK, Plaintiff, v. CHEMTEC CO., RYNDA DEVELOPMENT CO., and AMALIA R. GLUCK, Defendants.	Action at Law. Notice to Dismiss.

To Maurice B. Gluck:

Take Notice that I will apply to Hon. Nelson Y. Dungan, Judge of the Circuit Court at the Court House, Newark, N. J. on Friday, June 20th next at 2 P. M. or as soon thereafter as I can be heard for an order discharging the Mechanics Lien and dismissing the Complaint in the above entitled matter on the following ground.

That the plaintiff lienor has allowed more than a year to elapse without diligently prosecuting his lien to judgment.

Dated, May 19, 1924.

JACOB HAUPTMAN,
Atty. for Rynda Development Co.

Affidavit of Jacob Hauptman.

ESSEX COUNTY CIRCUIT COURT.

MAURICE B. GLUCK, Plaintiff, vs. CHEMTEC CO., RYNDA DEVELOPMENT CO., and AMALIA R. GLUCK, Defendants.	Action at Law. Affidavit.

State of New Jersey,
County of Essex, ss:

Jacob Hauptman, being duly sworn on his oath deposes and says that the above-entitled suit was at issue on April 4, 1923, by reason of his filing answer in which deponent as Attorney for Rynda Development Company denied material allegations contained in the complaint filed in the above-entitled suit.

JACOB HAUPTMAN.

Sworn and subscribed to before me this
25th day of July, 1924, at Newark, N. J.,
Harry Griffinger,
Attorney at Law of N. J.

Affidavit of Jacob Hauptman.

ESSEX COUNTY CIRCUIT COURT.

MAURICE B. GLUCK,
Plaintiff,
vs.
CHEMTEC CO., RYNDA DEVELOPMENT CO., and AMELIA R. GLUCK,
Defendants.

State of New Jersey,
County of Essex, ss:

Jacob Hauptman, being duly sworn deposes and says on his oath that deponent is a practising Attorney of New Jersey and is the Attorney of the Rynda Development Company upon which company a summons and complaint was served in March, 1923, in the above-entitled suit.

Deponent says that prior to said service a mechanics' lien was filed by said plaintiff for $1,800 for carfares, etc., in Book 14, page 307. Deponent filed answer for Rynda Development Co. on April 4, 1923.

Deponent says that no notice of trial has been served on the Rynda Development Company or on deponent as Attorney for the terms of September, 1923, December, 1923, and April, 1924, and no application has been made to the Essex County Circuit Court to extend time to prosecute above Lien Action. Deponent says that the Essex County Clerk's docket of the above-entitled suit contains no record of any paper of any description having been filed since April 4, 1923, except plaintiff's affidavit ordered filed by the Court Deponent has not asked for any delay in above suit.

JACOB HAUPTMAN.

Sworn and subscribed to before me this
21st day of July, 1923, at Newark, N. J.,
Harry Griffinger,
Attorney at Law of N. J.

Decision.

ESSEX COUNTY CIRCUIT COURT.

MAURICE B. GLUCK, Plaintiff, vs. SERGIO RUIZ URRUTIA, *et al.*, Builders and RYNDA DEVELOPMENT COMPANY, *et als.*, Owners, Defendants.	Decision on Motion to Dismiss Mechanics' Lien for failure to diligently prosecute.

Maurice B. Gluck, Attorney, *per se.*
Jacob Hauptman, Attorney of Defendant.

DUNGAN, J.:

This suit was commenced on the 15th day of March, 1923, when the summons was served upon the defendant, Rynda Development Company, no other defendant being served with sumons. The answer of Rynda Development Company was filed April 4th, 1923. Since that time nothing further has been done in the action. It does not appear that any effort has been made to serve any of the other defendants, and although three terms of Court have since passed, no notice of trial has been given for any of those terms, and no good and sufficient reason is given for failure to give such notice.

Judge White, speaking for the Court of Errors and Appeals in the case of Buchanan & Smock Lumber Company vs. Dougherty, 88 N. J. Law, page 356, says: The clause in the Mechanics' Lien Act fixing the one one year period contemplates the reduction of the lien to judgment within that time if diligent prosecution will accomplish that result. Until prosecuted to judgment the lien is *ex parte* and arbitrary

and in view of this extraordinary feature, and of the disadvantage under which the owner naturally labors in defending against a stale, unjust, claim, founded upon a contract to the terms of which he is usually an entire stranger, the one year limitation prescribed by the Act should be strictly enforced unless the claimant is able to set up a most excellent demonstration that it was not only not because of any fault of his, but in spite of the exercise of at least ordinary diligence on his part that he failed in that time to reduce his *ex parte* lien to the litigated lien embodied in the judgment. The burden is on the claimant to excuse his failure to get a judgment within the year. If he allows the year to pass without judgment, and without a Court extension of time Order procured within the year, he does so at his peril."

Since April 4, 1923, the plaintiff has done nothing nor has there been applied for or procured an Order extending the time under the statute.

The Court therefore decides that the lien claim has not been diligently prosecuted within a year, and should be dismissed as to the defendant Rynda Development Company, particularly so in view of the fact that in the affidavit of the plaintiff submitted on this motion, he states that, "The defendant, Rynda Development Company, did not build or construct the said building, had no title, interest or ownership therein." If that be true why should the Rynda Development Company be further continued as a defendant in a suit upon mechanics' lien against a building and lands in which it has no "title, interest or ownership."

NELSON Y. DUNGAN,
Circuit Court Judge.

(Endorsement): Decision on Motion to Dismiss Mechanics' Lien for failure to diligently prosecute. Dungan, Judge. Filed July 26, 1924. John H. Scott, Clerk.

Order.

ESSEX COUNTY CIRCUIT COURT.

MAURICE B. GLUCK, Plaintiff, vs. CHEMTEC CO. RYNDA DEVELOPMENT CO. and AMELIA R. GLUCK, *et als.*	Action at

Upon application of Jacob Hauptman, Attorney for the Rynda Development Company and in the presence of Maurice B. Hauptman, the above-named plaintiff upon good cause shown and a failure of the plaintiff to diligently prosecute the above-entitled action:

It is on this 1st day of August, Nineteen hundred and Twenty-four:

Ordered that the Complaint in the above-entitled action be dismissed and the Mechanic's Lien filed in Book 14 of Mechanics, page 307, in Essex County Clerk's Office by the plaintiff be discharged as against the defendant Rynda Development Company, with costs.

NELSON Y. DUNGAN,
Circuit Court Judge.

(Endorsement): Filed August 4, 1924. John H. Scott, Clerk.

Clerk's Certificate.

ESSEX COUNTY CLERK'S OFFICE.

State of New Jersey,
County of Essex, ss:

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

Do Hereby Certify, That the foregoing is a true and correct copy of all the proceedings in the matter of the Notice of Appeal in the Case of Maurice B. Gluck, Plaintiff vs. Sergio Ruiz Urrutia, Gabriel Morandi, Ernesto Hersen, Jr., Aguimiro Lander, Jose A. Torres, Humberto Torres, Francisco Gelgado, and Henry Menendez, partners doing business under the firm name and trade name of Ruiz Urrutia Company, Builders, Rynda Development Company (a New Jersey Corporation) and Amelia R. Gluck, Owner, and the same is taken from and compared with original copies of all the above proceedings as the same now remains on the files of said office.

In Testimony Whereof, I have hereunto set my hand and affixed the official seal of said Court & County at Newark, N. J., this 13th day of December, A. D., 1924.

JOHN H. SCOTT,
Clerk.

(Seal)

NEW JERSEY COURT OF ERRORS AND APPEALS

MAURICE B. GLUCK,
Plaintiff-Appellant,

against

SERGIO RUIZ-URRUTIA, *et als.*, partners, doing business under the firm name of Ruiz-Urrutia Company, Builders, RYNDA DEVELOPMENT COMPANY, a New Jersey corporation, and AMELIA R. GLUCK, owner,
Defendants.

APPELLANT'S POINTS.

This is an appeal from a final rule filed August 4th, 1924, in the office of the Clerk of the County of Essex, from the Circuit Court dismissing the complaint herein and discharging, as against Rynda Development Company, a mechanic's lien.

The matter came on motion made by Rynda Development Company dated May 19th, 1924, the notice of motion being for an order discharging the mechanic's lien and dismissing the complaint on the ground "the lienor has allowed more than one year to elapse without diligently prosecuting his lien to judgment" (fol. 30, p. 22, Rec.).

The Facts.

The lien was filed March 15th, 1923, for wages as a preference, $1,260, and $600.92 for goods furnished, etc., a total of $1,860.92, and the summons was issued the same day, and served with the complaint,

etc. The only defendant served was the Rynda Development Company, which had title of record at the commencement of the building, as alleged in Paragraph 3 of the complaint (Rec., p. 8). It was made a defendant for the record title, but as seen from Paragraph 3 (Rec., p. 8) its interest was merely as lienor for purchase money, and it in its answer admits Paragraph 3—by Paragraph 2 of its answer (see Rec., pp. 12-13). At no time did the Rynda have any interest in the *building,* only record title in land. The Judge seems to have misunderstood (Rec., p. 26, fol. 30) the statement in appellant's affidavit (Rec., p. 15, fols. 10-20). The builders were a partnership whose members had disappeared and upon whom no process could be served. No other defendant was served.

The defendant Rynda Development Company duly filed its answer herein, denying only the formal statutory allegations in 4, 5 and 6 and admitting everything, practically, in the complaint. The affidavit of Jacob Hauptman, dated July 25th, 1924, and one that the Judge at circuit insisted must be filed on this motion says, "suit was at issue on April 4th, 1923, by reason of his filing answer in which deponent as attorney for Rynda Development Company denied material allegations contained in the complaint" (Rec., p. 23). Another affidavit of Jacob Hauptman shows that no notice of trial was served on Rynda Development Company, etc., for terms of September, 1923, December, 1923, and April, 1924, and no application was made to extend the time to prosecute and that defendant Rynda Development Company has not at any time asked for any delay. The case was not at issue.

The motion was made upon the question of diligent prosecution under Section 18 of the Mechanics' Lien Law. The claimant sets up:

(1) That Section 18—"or if such claimant shall fail to prosecute his claim diligently within one year from the date of issuing such summons or such further time as the Court may by order direct, such lien shall be discharged" was to be read in light of the case of *Ennis vs. Eden* (65 New Jersey Law 579), with the other pertinent paragraphs 29-30 of the Mechanics' Lien Law, and that "where sold by virtue of this Act" it was a marshaling of assets (fol. 10, p. 15, Rec.). Sometime in May, 1923, this defendant Rynda Development Company, had in another action involving the same property, although with very little interest therein, permitted and allowed a judgment to be obtained against them by consent, so that upon an alleged execution, special against the property, all the liens could thereby be discharged and the fund obtained on sale substituted for the property (Rec., p. 15, fol. 30; pp. 16-17 and 18). Such execution was made returnable August 3rd, 1923, and finally sold October 9th, 1923. So that the sale, under the execution special, under the Act (see form of execution, fol. 10, p. 18) placed all the lienors under the Sections 29-30, and their leins were discharged from the property and then attached upon the fund, the proceeds of sale. The lien claimant assumed and had the right to assume that his lien would take concurrently out of such fund and that he need not do anything further, unless served with caveat by other contesting lienors. If he had gone ahead with his suit the judgment-lienor with its consent execution could have stopped him (Sec. 30, *M. L. L.*, Rev. 1898).

(2) This consent judgment and return of the execution was for August 3rd, 1923, before the September term, and sold in October 9, 1923, before the December term, there was nothing for the claimant to do except wait, under the Act. The matter had come about through the action of the Rynda Development Company, desiring to gain an advantage over lienors

had for that purpose consented, by withdrawing its answer in the one case, although it had filed the same technical answer in all other lien cases (same as answer herein, p. 12, Rec.), involving the same property.

(3) The answer (p. 12 Rec.), admitted a deed to Amelia R. Gluck, but claimed it had not been delivered; this was not an issue that could be tried in a mechanics' lien action. The collusive judgment of defendant, Rynda Development Company, its collusive execution and the collusive purchase at Sheriff sale, probably bought for the Rynda Development Company, brought a new tangle; the purchaser refused to complete the sale and pay the Sheriff, claiming that as a chancery action had been started to clear up the question of title it refused to take a Sheriff's deed, *and so claimant made a motion to compel purchaser* to take title or be deemed in contempt of the execution, etc. (see Rec., p. 19, fols. 10-20 and 30), but the Court held that he would hold everything in abeyance until the Chancery Court would decide.

(4) *That claimant* was a defendant in one of the lien actions involving the same property—case of *Elizabeth Sash and Door Company vs. Gluck;* that after the year after the issuance of the summons (line 26, of page 20 should instead of saying "within" say "past the year," a mistake is made in the word "within," it was past the year by some months), applied to this very same Court for an order dismissing the action on the same ground; "that the plaintiff had failed to diligently prosecute such action to judgment within the year"; and the Court refused to grant the motion because of the chancery action—giving this same chancery action as the reason why it was diligence for the claimant in that lien action. The claimant herein rightfully assumed that the chancery action was sufficient reason as well for his ordinary diligence (Rec., p. 20, fols. 20-30).

POINT I.

The claimant was diligent within the law.

The Court herein as his reason for dismissing the complaint and discharging the lien, urges the *obitier* of Justice White, in 88 N. J. Law, page 356 (see decision of Court Record, pp. 25-26), while what the Court of Errors and Appeals held in that case was, that, the Court, setting below in *Buchanan and Smock Lumber Company vs. Dougherty* (*supra*), *was as both Judge and jury,* and that, when as then, a fact is presented, that there was such a neglect of the case as to allow a whole, and in fact, more than a year to go by, beyond the year contemplated by the Act for the possible display of diligence, it was not diligence as a fact and no Judge could determine it to be diligence, or at least the Court of Errors and Appeals would refuse to regard it as diligence. And that is all that case decides, the *obiter* being indeed an instruction to the Judge below to use to guide himself by. That *obitier* did not change the rule about diligence as expressed in *Ennis vs. Eden Mills Paper Co.* (65 N. J. Law 579), in which the Court holds it to be a *fact* to be decided at Circuit in the first instance, and one in which the Court would have no power to make to discharge a lien, as that is a fact to be determined by a jury: "The language of the Statute is * * * 'prosecute his claim diligently' * * * ordinary diligence which men of common prudence generally exercise in their affairs." Applying the reasons given by the claimant herein, set out in length above in the "*facts,*" in this brief and points, can it be fairly said that Claimant was not diligent and was not justified in waiting the outcome of the chancery action, and especially so since he had the right to feel that his claim was *concurrent* in the execution and

would be now a claim against the fund rather than the building. Reading these "facts," above with the "facts" set out in the *Ennis vs. Eden* case (*supra*), they have the same resemblance, the same policy spoken of marshalling assets there is, here made part of the law, Sec. 29, *M. L. L.* (Rev. 1898, etc.). In that case the Court of Chancery's power to injoin, etc., is mentioned, while here it is a fact of the Act, Sec. 30, *M. L. L.* (Rev. 1898).

> "It is not necessary, however, that a final judgment be entered on a mechanics' lien claim in order to make a debt a lien upon the building, lands, etc. The very first section of that act (*P. L. 1898,* p. 538), declares that the debt contracted and owing to any person for labor performed or materials furnished for the erection and construction of any building 'shall be a lien on such building and on the land whereon it stands.'"
>
> "Every debt having the statutory characteristics becomes a lien instantly that it becomes a debt by the express words of the act. The filing of the claim, the suit and judgment thereon, are proceedings to apply the property upon which the debt has already become a lien to the payment of that debt and of others which have like statutory characteristics. If pending these proceedings and before final judgment, there be a foreclosure of a previous mortgage or the like, a sale of the property upon which these debts have become a lien, the lien holders will thereby be relegated to the purchase money for their remedy, and will have to show their right upon an application for it. The procedure upon such antecedent charge, having already converted the property liened upon into money, I can see no reason for thereafter prosecuting the lien claimants to judgment, if they are not disputed."

At page 236:

> *Stiles vs. Galbraith,* 3 Rob. 222, affirmed in Errors and Appeals, 1 Buch. 299.

No case has yet in this state gone so far as to state that a judge on motion may decide a case, where there is doubt at all about diligence, without a jury passing upon the facts. Of course, *a Court,* at trial *may do so if he is sitting as a jury as well.* In the cause herein the Judge attempts to pass upon it on a motion when the facts as to diligence are plainly in doubt and in fact when the uncertainty and doubt of prosecution has been in part caused by its own statement made in another case involving the same property, and in which the claimant was a party.

There is something to be said on the effect of "a sale under the act" and its effect upon the lien in view of Sec. 29 of *M. L. L.* (Rev. 1898). The first purchaser under such a sale could injoin any subsequent judgment and sale (*Murphy vs. Borden,* 20 Vroom 527). All liens are concurrent, and a lienor could thus be compelled to take only his share of the proceeds, so that in practice the lienor has only his lien upon the funds once a sale is had under the act. It is plainly thus intimated that he need not proceed, that the Court will order distribution and he will receive his share automatically, unless his lien be contested by the other lienors by serving him with *caveat* (Sec. 30, *M. L. L.,* Rev. 1898).

Here in this case a judgment was had by consent of this very defendant Rynda Development Company (favoring a lien that was theirs or they had a secret agreement to purchase; it was afterwards assigned to the purchaser at sale, which purchaser was really the Rynda Development Company and which purchaser bought at sale subject to or at least with notice of of this claimant's and other liens) as early as May or June, 1923, the execution was to be returned August 3rd, 1923, the sale under the act was held October 9th, 1923, and from that time the lien of claimant and others were *"hotched potched"* together by law with-

out separate identity and against the fund now, instead of the property. The consent of defendant Rynda to judgment in one had been practically a consent to all; it had that effect. It should not be permitted to come in with a defense to the property and at same time allowing and permitting a consent judgment to one of its favorite lienors to give him and a purchaser the preference, and still claim the strict technical defense against the other lienors. When it did this with one lienor, upon the same property, in which it had given the same answer, then it gave the equal lienors the same; it admitted, its answer was not the truth, it had been merely asserted for delay for the evident purpose of creating harm to the real owner and that there was no longer any real issue. It did this as early as May, 1923, so it might be said, respecting diligence that there was no real issue since May ,1923.

There is a word to, to be said about issue. When an answer in a mechanics' lien action presents an issue. *That is a triable issue.* Sec. 24 (*M. L. L.*, Rev. 1898) says:

> "And all or any of said defendants may, jointly or severally, have any defense or plea to the same that might be had by the builder to an action on said contract without this Act; and in addition thereto, the owner may plead that said building or land are not liable to said debt, and in such case it shall be necessary for the plaintiff to entitle him to judgment against the building and lands, to prove that the provisions of this Act, requisite to constitute such lien, have been complied with."

The answer can only be (1) a defense or plea that the builder had, and (2) in addition that it is not a lien by law, etc. This answer herein (pp. 12-13, Rec.) admits practically everything that a builder might have a defense upon, then sets up a question of delivery of deed to Amelia R. Gluck, which is not an issue in

a mechanics' lien action, and then *denies* the statutory allegations of complaint in Paragraphs 4, 5 and 6. 4 relates to preferences—its denial is of no moment, it is a question of law and he cannot deny it. 5 relates to facts of public record upon which the papers in the action speak for themselves. And 6 is a denial of the fact that the debt is by virtue of the Lien Law a debt upon the land and buildings. To deny it thus raises no issue, especially so since, the facts cannot be denied as set up in 5, because they are matters of public record. And the defendant must *affirmatively plead* "in addition" *that the said land is not liable to said debt* (or building, etc., as the truth may be) giving his reason in fact why it is not. This the answer fails to do. So it can be reasonably said it was never at issue as it does not raise "material issues" by denial of "material allegation" as set forth in Jacob Hauptman's affidavit of July 25th, 1924. In any event to allow judgment by consent upon the same property after putting in this answer is an abandonment of any issue raised by this answer and which occurred as early as May, 1923, and may be and ought to be considered on this question of diligence.

CONCLUSION.

The final order below should be reversed with costs and disbursements.

Dated, Newark, New Jersey, January 19th, 1925.

MAURICE B. GLUCK,
Attorney *pro se*,
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Borough of Manhattan,
City of New York.

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

New Jersey Court of Errors and Appeals

MAURICE B. GLUCK,
Plaintiff-Appellant,

vs.

SERGIO RUIZ-URRUTIA, GABRIEL MORANDI, ERNESTO HERSEN, Jr., AGUIMIRO LANDER, JOSE A. TORRES, HUMBERTO TORRES, FRANCISCO DELGATO and HENRY MENENDEZ, *partners*, doing business under the firm name of Ruiz-Urrutia Company, Builders, RYNDA DEVELOPMENT COMPANY (a New Jersey Corporation), and AMELIA R. GLUCK, Owner,
Defendants.

Brief of Rynda Development Company, answering says:

1. Plaintiff-Appellant submits in his affidavit no evidence of diligence since March 15, 1923.

2. A chancery suit to determine whether the Rynda Development Company had title to property upon which appellant filed lien does not supply appellant with the necessary diligence in a Circuit Court action.

3. The filing of an answer by the Rynda Development Company on April 4, 1923, makes appellant's lien claim a contested claim.

4. The appellant submitted no evidence before the Trial Judge of collusion between the

lienor, George G. Salmon & Co., and the Rynda Development Company.

5. The appellant submitted no evidence before the Trial Judge that the docket record of the above-entitled suit in the Essex County Clerk's office was incorrect.

6. The appellant, a practicing attorney of New York, claims to qualify as a laborer within the provisions of the Mechanic Act.

First: This suit was started on March 15, 1923, by service of summons and complaint on the Rynda Development Company. The appellant says that the builders were a partnership whose members had disappeared. The record shows that appellant made no attempt to serve the members of the partnership by publication, and he offered no explanation as to why Amelia R. Gluck, his own wife, was not served by process. The record of court docket shows that the Rynda Development Company was the only defendant served between March 15, 1923, and August 4, 1924. Appellant's lien claim is based upon a contract made with members of said partnership and who if served might have answered denying any such agreement.

Second: Appellant's claim that he had a right to await the outcome of the Chancery Court action before proceeding with Mechanics Lien suit. This is a mighty poor excuse for not being diligent in a Circuit Court action as it is apparent that if his wife by any chance could establish a title ownership, appellant would not have to continue his lien action. The appellant has used the Circuit Court action as an anchor to the windward to use in the event that the chancery action goes against his wife.

The Mechanics Lien Act, under section 18, requires a claimant to prosecute his claim diligently within one year from date of issuing such summons. The unanimous opinion of this Court in *Buchanan* v. *Smock,* 88 N. J. Law 356, laid down the rule of diligence under section 18 of the Mechanics Lien Act, "The delay of over a year after the expiration of the first year to be absolutely without explanation, and would of itself be abundant cause for discharging the lien even if there had been diligent prosecution within the year. The diligent prosecution duty does not end with the year, but continues at all times until the lien shall be reduced to judgment and a lien claimant who has permitted his year to expire without judgment, or an extension order, in order to defeat an application for the discharge of the lien, must show diligent prosecution on his part, not only within the year but up to the time the application is made."

THIRD: The filing of an answer by the Rynda Development Co. on April 4, 1923, was notice to the appellant that the said Rynda Development Company would contest his lien claim. Under our practice a lienor whose claim is contested in a Circuit Court action must prove his claim before a Judge and jury. Under section 30, Mechanics Lien Act, lienor must prove his claim. The docket record in the Essex County Clerk's office was set forth in the affidavit of Jacob Hauptman and no affidavit was submitted by appellant questioning the correctness of the docket. The record showed that no motion to strike out the answer of the Rynda Development Company on any ground was ever made. The Rynda Development Company was entitled to have its day in court.

FOURTH: The appellant in affidavit submitted to Trial Judge no evidence of collusion between the lienor, George G. Salmon & Co., and the Rynda Development Company. The George G. Salmon & Co. had a bona fide claim for mason materials actually delivered to the premises of the Rynda Development Company and the Rynda Development Company consented to their judgment to avoid unnecessary litigation. The statement at page 7 of appellant's brief, "Here in this case a judgment was had by consent of this very defendant, Rynda Development Company (favoring a lien that was theirs or they had a secret agreement to purchase; it was afterwards assigned to the purchaser, which purchaser was really the Rynda Development Company." The statement that the Rynda Development Company had any secret agreement to purchase is an absolute untruth. The further statement that the Rynda Development Company is in any way connected with or interested in the Arlington Realty Company, the purchaser at sheriff's sale, is also an absolute untruth.

FIFTH: Under the General Statute, Vol. 3, page 4055, paragraph 15, "The clerks of the various courts of appellate jurisdiction shall enter, docket and index all actions and keep a record thereof in conformity with the above provisions, and if the parties fail to comply therewith said clerks shall re-entitle such actions and notify the parties." At the hearing of motion to dismiss complaint and discharge Mechanics Lien the defendant, Rynda Development Company, notified the Clerk of the Essex County Circuit Court to produce the record in the above-entitled suit. During the argument of motion the Trial Judge inspected the said

record. This defendant contends that a Trial Judge has the right to inspect the records kept by the Clerk of the Court in the above-entitled suit where the correctness of said record has not been attacked by affidavit.

SIXTH: This plaintiff-appellant is a practicing attorney of New York City. Appellant in his lien claim alleges that there is due him $1,860.92 under an agreement for superintending the construction of a one-family house at 122 Rynda Road, South Orange, N. J., and acting as disbursing officer for various payments. This agreement was made with builders who have been made defendants in this action and have never been served. The appellant in his Mechanics Lien claim does not state that he furnished any labor or materials necessary to the construction of the buildings on the property in question as required by Mechanics Lien Act. The appellant is not a mechanic within the provisions of the Mechanics Lien Act. Where a practicing lawyer furnishes his services in the construction of a house under an agreement and he is not paid, there results a breach of contract for which appellant had his remedy by bringing a contract action in a court of law.

The defendant, Rynda Development Company, seeks, first, that the appeal from the order of Nelson Y. Dungan, Judge of the Essex County Circuit Court be dismissed with costs; second,

that order of the Essex County Circuit Court of August 4, 1924, be affirmed.

Dated, Newark, New Jersey, March 4, 1925.

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C. HERBERT WALKER,
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