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**Notice of Appeal.**

(Filed November 17th, 1945)

NEW JERSEY SUPREME COURT.

JOSEPH ORIFICE, Assignee of Ed-  
mund Baum and Myron Baum,  
trading as Pennsylvania Tex-  
tile Co.,

*Plaintiff-Respondent,*

vs.

AYVAD WATER-WINGS, INC., a cor-  
poration of New Jersey,

*Defendant-Appellant.*

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Action at Law.

To: FREDMAN & FREDMAN, Esqs.,  
Attorneys of Plaintiff-Respondent,  
No. 591 Summit Avenue,  
Jersey City, N. J.

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TAKE NOTICE that Ayvad Water-Wings, Inc., a corporation of New Jersey, the defendant-appellant above-named, hereby appeals to the Court of Errors and Appeals in the Last Resort in All Causes in New Jersey from the certain judgment entered in this cause in the above-entitled Court, affirming the order of the Hudson County Court of Common Pleas denying the application of defendant-appellant for permission to file its affidavit of merits and for an extension of time within which to answer, and affirming the judgment entered in this cause in the Hudson County Court of Common Pleas.

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Dated: November 15th, 1945.

Respectfully yours,

LICHTENSTEIN & ENGEL,  
*Attorneys of Defendant-Appellant.*

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*Ground of Appeal.*

Service of the within Notice of Appeal is hereby acknowledged this 15th day of November, 1945.

FREDMAN & FREDMAN,  
*Attorneys for Plaintiff-Respondent.*

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**Ground of Appeal.**

(Filed December 4th, 1945)

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

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JOSEPH ORIFICE, Assignee of Edmund Baum and Myron Baum, trading as Pennsylvania Textile Co.,

*Plaintiff-Respondent,*

vs.

AYVAD WATER-WINGS, INC., a corporation of New Jersey,

30

*Defendant-Appellant.*

On Appeal  
from New  
Jersey  
Supreme  
Court.

TO: FREDMAN & FREDMAN, Esqs.,  
Attorneys of Plaintiff-Respondent,  
No. 591 Summit Avenue,  
Jersey City, N. J.

The defendant-appellant states the following ground of appeal:

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*Ground of Appeal.*

The court below erred in affirming the order and judgment of the Hudson County Court of Common Pleas appealed from by the defendant-appellant in this cause, whereas, it should have reversed said order and judgment upon the grounds urged by defendant-appellant, and remanded the cause to the Hudson County Court of Common Pleas for further proceedings. 10

Dated: December 3rd, 1945.

LICHTENSTEIN & ENGEL,  
*Attorneys for Defendant-Appellant.*

Service of a copy of the within Ground of Appeal is hereby acknowledged this 3rd day of December, 1945. 20

FREDMAN & FREDMAN,  
*Attorneys for Plaintiff-Respondent.*

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**Notice of Appeal.**

(Filed August 2nd, 1945)  
 (Served August 1st, 1945)

HUDSON COUNTY COURT OF COMMON  
 PLEAS.

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JOSEPH ORIFICE, Assignee of Ed-  
 mund Baum and Myron Baum,  
 trading as Pennsylvania Tex-  
 tile Co.,

*Plaintiff,*

Action at Law.

vs.

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AYVAD WATER-WINGS, INC., a cor-  
 poration of New Jersey,

*Defendant.*


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TO: FREDMAN & FREDMAN, Esqs.,  
 Attorneys for Plaintiff,  
 No. 591 Summit Avenue  
 Jersey City, N. J.

SIRS:

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TAKE NOTICE, that Ayvad Water-Wings, Inc., a corporation of New Jersey, the defendant above-named, appeals to the New Jersey Supreme Court from the certain order entered in this cause in the above-entitled court denying the defendant's application for permission to file its affidavit of merits and for an extension of time within which to answer, and also from the whole

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*Grounds of Appeal.*

of the judgment entered in this cause in the above-entitled court.

Dated: August 1st, 1945.

LICHTENSTEIN & ENGEL, 10  
*Attorneys for Defendant.*

**Grounds of Appeal.**

(Filed August 31st, 1945)

(Served August 31st, 1945)

## NEW JERSEY SUPREME COURT.

JOSEPH ORIFICE, Assignee of Edmund Baum and Myron Baum, trading as Pennsylvania Textile Co.,

*Plaintiff-Respondent,*

vs.

AYVAD WATER-WINGS, INC., a corporation of New Jersey,

*Defendant-Appellant.*

20  
On Appeal from the Hudson County Court of Common Pleas.

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To: FREDMAN & FREDMAN, Esqs.,  
Attorneys for Plaintiff-Respondent,  
No. 591 Summit Avenue,  
Jersey City, New Jersey.

The defendant-appellant states the following grounds of appeal:

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*Grounds of Appeal.*

1. The court below erred in making an order in the above cause denying the application of defendant-appellant for permission to file its affidavit of merits in said cause as within time, and for an extension of time within which to file its answer to the complaint of plaintiff-respondent.

10

2. The court below erred in entering judgment interlocutory and final against the defendant-appellant for failure to file its affidavit of merits within 10 days after the date of service of summons and complaint, notwithstanding that such failure was the result of mistake and the defendant-appellant has a just and legal defense to the action on the merits of the case.

20

3. The court below abused its discretion in denying the application of the defendant-appellant for leave to file its affidavit of merits as within time.

4. The court below abused its discretion in denying the application of the defendant-appellant for an extension of time within which to file its answer.

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5. The court below erred in finding that the defendant-appellant's failure to file its affidavit of merits in due time was because of neglect on the part of the defendant-appellant.

6. It was error for the court below to enter judgment on the second count of the complaint of plaintiff-respondent for the defendant-appellant's failure to file affidavit of merits, because said second count pleads an action in tort.

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*Grounds of Appeal.*

7. It was error for the court below to assess damages upon the second count of the complaint of plaintiff-respondent upon affidavit, because said second count pleads an action in tort.

Dated: August 30th, 1945.

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LICHTENSTEIN & ENGEL,  
*Attorneys for Defendant-Appellant.*

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**Summons and Complaint.**

(Filed June 9th, 1945)

(Served May 24th, 1945)

THE STATE OF NEW JERSEY

10 To: AYVAD WATER-WINGS, INC., a corporation of  
New Jersey:

YOU ARE SUMMONED to answer the annexed  
complaint of JOSEPH ORIFICE, Assignee  
of Edmund Baum and Myron Baum,  
(L. S.) trading as PENNSYLVANIA TEXTILE Co.,  
in an action at law in the Hudson County  
Court of Common Pleas

20 AND TAKE NOTICE that unless you file your  
answer to said complaint with the Clerk of said  
Court, at Jersey City, New Jersey, within twenty  
days after service upon you of this writ and the  
annexed complaint, the plaintiff may proceed in  
the suit, and judgment may be entered against  
you.

WITNESS, HON. HORACE K. ROBERSON, Judge of  
the Hudson County Court of Common Pleas, at  
Jersey City, N. J., this 23rd day of May, 1945.

30

W. H. GILFERT,  
*Clerk.*

FREDMAN & FREDMAN,  
*Attorneys for Plaintiff.*

TO THE WITHIN NAMED DEFENDANT:

40 PLEASE TAKE NOTICE, that if the within Sum-  
mons and Complaint be served upon you per-

*Summons and Complaint.*

sonally and if you intend to defend this action, that you file an affidavit of merits within ten days of such service and an answer within twenty days of such service, and that in default thereof judgment will be entered against you in the sum demanded herein.

10

FREDMAN & FREDMAN,  
*Attorneys for Plaintiff.*

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 COMPLAINT

 HUDSON COUNTY COURT OF COMMON  
PLEAS.

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 JOSEPH ORIFICE, Assignee of Edmund Baum and Myron Baum, trading as Pennsylvania Textile Co.,
*Plaintiff,*
 Action at Law.  
Complaint.

vs.

AYVAD WATER-WINGS, INC., a corporation of New Jersey,

*Defendant.*

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 JOSEPH ORIFICE, Assignee of Edmund Baum and Myron Baum, trading as Pennsylvania Textile Co., residing in the City of Jersey City, County of Hudson and State of New Jersey, says that:

40

*Summons and Complaint.*

## FIRST COUNT.

10 1. Defendant, Ayvad Water-Wings, Inc., is a corporation duly incorporated and existing under the laws of the State of New Jersey and is engaged in the manufacturing business with its principal office located at No. 505—23rd Street, Union City, Hudson County, New Jersey.

20 2. On or about October 4, 1944, plaintiff's assignor and defendant entered into an agreement whereby defendant agreed to manufacture dish cloths for said assignor, and to ship same to the assignor's customers, at the latter's direction, and the assignor undertook to supply defendant with the raw material and merchandise required for the said manufacture of the dish cloths.

3. It was agreed that defendant would be paid weekly for the work performed by it the previous week, and for which invoices would be submitted to plaintiff's assignor.

30 4. Defendant manufactured and shipped 10,526 dozen dish cloths of Style No. 82, forwarded plaintiff's assignor invoices for 10,716 $\frac{1}{4}$  dozens, and received payment of \$2,060.63. Said amount was an overcharge on 190 $\frac{1}{4}$  dozens at \$.19 per dozen or \$36.15.

40 5. Defendant manufactured and shipped 7,154 dozen dish cloths of Style No. 83, forwarded plaintiff's assignor invoices for 8,875 dozens, and received payment of \$1,768.40. Said amount was an overcharge on 1,721 dozens at \$.20 per dozen or \$334.20.

*Summons and Complaint.*

6. Defendant manufactured and shipped 5,017 dozen dish cloths of Style No. 85, forwarded plaintiff's assignor invoices for 5,055 $\frac{1}{4}$  dozens, and received payment of \$1,213.27. Said amount was an overcharge on 38 $\frac{1}{4}$  dozens at \$.24 per dozen or \$9.18. 10

7. Defendant manufactured and shipped 1,074 dozen dish cloths of Style No. 87, forwarded plaintiff's assignor invoices for 1,331 dozens, and received payment of \$332.59. Said amount was an overcharge on 257 dozens at \$.25 per dozen or \$64.25.

8. Defendant manufactured and shipped 3,046 dozen dish cloths of Style No. 89, forwarded plaintiff's assignor invoices for 3,174 dozens, and received payment of \$934.60. Said amount was an overcharge on 128 dozens at \$.30 per dozen or \$38.40. 20

9. Defendant manufactured and shipped 421 dozen dish cloths of Style No. 92, forwarded plaintiff's assignor invoices for 476 $\frac{1}{2}$  dozens, and received payment of \$170.82. Said amount was an overcharge on 55 $\frac{1}{2}$  dozens at \$.36 per dozen or \$19.98. 30

10. Said defendant shipped 27,238 dozen dish cloths to customers of plaintiff's assignor, but billed them for 29,628 dozen, or an overcharge on 2,390 dozen dish cloths, amounting to an overcharge of \$512.16.

11. Plaintiff's assignor has often demanded payment of said indebtedness, but defendant has failed to pay same. 40

*Summons and Complaint.*

12. On May 21, 1945, the Pennsylvania Textile Co., assigned its claim against defendant to Joseph Orifice, the plaintiff herein.

10 WHEREFORE, plaintiff demands judgment on the First Count of the complaint in the sum of \$512.16 together with interest and costs of suit.

## SECOND COUNT.

1. Plaintiff repeats each and every allegation of the First Count insofar as they are applicable hereto and makes them a part hereof.

20 2. Plaintiff's assignor agreed to supply defendant with the bales of material required to manufacture the dish cloths pursuant to the agreement set forth in the First Count of this complaint.

3. The plaintiff's assignor supplied defendant with 108 bales of material to be used in said manufacture of dish cloths.

30 4. Defendant required 96 bales of material to manufacture the said dish cloths ordered by the assignor and converted the balance of the 12 bales of material to its own use.

40 5. The value of the 12 bales of material supplied by the plaintiff's assignor to the defendant and converted by defendant to its own use, and not accounted for in work performed under the agreement, between said parties, amounted to \$1,560.00, for which defendant is indebted to plaintiff's assignor for \$1,560.00.

*Notice of Motion and Affidavits.*

WHEREFORE, plaintiff demands judgment on the Second Count in the sum of \$1,560.00 together with interest and costs of suit.

FREDMAN & FREDMAN,  
*Attorneys for Plaintiff.* 10

**Notice of Motion and Affidavits.**

(Filed July 19th, 1945)  
(Served June 12th, 1945)

HUDSON COUNTY COURT OF COMMON  
PLEAS.

JOSEPH ORIFICE, Assignee of Edmund Baum and Myron Baum, trading as Pennsylvania Textile Co.,  <p style="text-align: right;"><i>Plaintiff,</i></p> <p style="text-align: center;">vs.</p> AYVAD WATER-WINGS, INC., a corporation of New Jersey,  <p style="text-align: right;"><i>Defendant.</i></p>	}          Action at Law.	20          30
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To: FREDMAN & FREDMAN, Esqs.,  
Attorneys for Plaintiff,  
No. 591 Summit Avenue,  
Jersey City, N. J.

SIRS:

PLEASE TAKE NOTICE, that on Friday, June 15th, 40

*Notice of Motion and Affidavits.*

1945, at the hour of 10:00 o'clock in the forenoon or as soon thereafter as counsel can be heard, at the Court House in the City of Jersey City, N. J., we shall appear before the Honorable August Ziegener or such other judge of the Hudson County Court of Common Pleas as shall then and there be sitting for the purpose of hearing motions, and shall at such time and place move for an order:

1. permitting the defendant to file its affidavit of merits in the above matter as within time;

2. extending the time of the defendant within which to answer or otherwise move with respect to the complaint filed herein,

upon the ground that the defendant has a defense to the above action on the merits of the case, and did not understand that it was required to file affidavit of merits within ten days after service of the writ upon it.

AND TAKE FURTHER NOTICE that upon the argument of said motion, we shall present the affidavit of Paul M. Beebe, which is hereto annexed.

Yours, &c.,

LICHTENSTEIN & ENGEL,  
*Attorneys of Defendant.*

*Notice of Motion and Affidavits.*

## AFFIDAVIT OF PAUL M. BEEBE.

STATE OF NEW JERSEY, }  
 COUNTY OF HUDSON, } ss.:

PAUL M. BEEBE, of full age, being duly sworn according to law, upon his oath deposes and says: 10

1. I am Vice-President and Treasurer of Ayvad Water-Wings, Inc., the defendant in the above-entitled cause, and am duly authorized to make this affidavit in its behalf.

2. Summons and complaint in the above cause was served upon the corporation on or about Friday, May 25th, 1945. I was not in the office at the time of the service, but later in the day arrived there. At that time, I read over the summons and complaint, and ascertained what the suit was about. I noted that the company was required to file answer within twenty days after service, but I did not understand that affidavit of merits was required to be filed within ten days after service. I immediately commenced checking over the records of the company with regard to our transaction with Pennsylvania Textile Co., for the purpose of gathering together the material necessary for defending the action, and I also prepared a detailed statement concerning the facts for presentation to our attorneys. The gathering of this material and the preparation of the statement were done in such time as I had available, and consumed a number of days, not being finished until Friday, June 8th. 20 30 40

*Notice of Motion and Affidavits.*

3. On June 8th, I telephoned Mr. Engel of Lichtenstein & Engel, Hoboken, and told him that a suit had been brought against the company, and inquired whether he would represent us. I told him that we had until the following Wednesday, June 13th, within which to prepare our answer. An appointment was arranged for the following morning, June 9th, at his office.

4. On Saturday, June 9th, I met with Mr. Engel, and handed him the summons and complaint. Mr. Engel then called my attention to the endorsement on the summons that an affidavit of merits was required to be filed within ten days after service, and asked me when the papers had been served. He then telephoned the attorneys for the plaintiff for the purpose of obtaining their consent to the filing of affidavit of merits as within time. At the conclusion of his telephone conversation, he told me that the person in charge of the litigation was not in, but would 'phone him on Monday, June 11th. On June 11th, Mr. Engel 'phoned me, stating that the plaintiff's attorney would not consent to the filing of affidavit of merits as within time.

5. The said Ayvad Water-Wings, Inc., has a just and legal defense to the above action on the merits of the case. The affidavit of merits was not filed herein heretofore, only for the reason that I did not understand the meaning of the endorsement on the summons.

6. The action is in two counts, and arises out of an agreement between Pennsylvania Textile Co. and Ayvad Water-Wings, Inc., under which,

*Notice of Motion and Affidavits.*

Ayvad Water-Wings, Inc., agreed to manufacture certain dish cloths for Pennsylvania Textile Co., using material to be furnished by the Pennsylvania Textile Co. The first count alleges that the defendant charged the plaintiff's assignor, Pennsylvania Textile Co., for 29,628 dozen dish cloths, and alleges that the defendant manufactured and shipped only 27,238 dozen dish cloths. It is alleged that the plaintiff's assignor overpaid the defendant \$512.16. 10

7. The allegations of the first count are unfounded. As a matter of fact, the defendant manufactured 29,630 2/12th dozen dish cloths, for which, invoices were sent to plaintiff's assignor and were paid, and there were some small number of additional dish cloths manufactured and shipped, for which the plaintiff's assignor was not billed. 20

8. Defendant shipped to customers of plaintiff's assignor a total of 27,542 dozen dish cloths, and defendant shipped to the plaintiff's assignor at least 2,088 dozen dish cloths, the latter being seconds, owing to defective material supplied by plaintiff's assignor. The aggregate of the dish cloths shipped to the customers and the dish cloths shipped to plaintiff's assignor at least equals the total for which plaintiff's assignor was billed by the defendant, and there was no overcharge. 30

9. The second count of the complaint alleges that the plaintiff's assignor furnished the defendant with 108 bales of materials for use in the production of dish cloths, and that only 96 bales 40

*Notice of Motion and Affidavits.*

of material were used by defendant in the production of dish cloths. The complaint alleges that the defendant converted the twelve bales not so used. This claim is likewise unfounded in fact. Of the 108 bales shipped to defendant, defendant purchased and paid for one-eighth of a bale to the plaintiff's assignor. An additional 1 16/200th bales were returned to the plaintiff's assignor as utterly unusable because the sheets of material had been used as wrappers and bore printed matter. The defendant, in producing the total of 29,630 2/12ths dozen dish cloths, actually used 106 157/200ths bales of the cloth which, when added to the one-eighth purchased by defendant as aforesaid, and the 1 16/200ths bales returned to the plaintiff's assignor as unusable as aforesaid, totals 108 bales. The defendant at no time converted any part of the said 108 bales of cloth to its own use.

10. It was understood and agreed between plaintiff's assignor and defendant that plaintiff's assignor was to reimburse the defendant for all expressage charges that it would incur in the performance of its agreement, and the plaintiff's assignor paid to the defendant all expressage charges except two items aggregating \$44.98, which amount is still due and owing from plaintiff's assignor to the defendant and has not been paid, although demand has been duly made therefor.

PAUL M. BEEBE.

Sworn to and subscribed before me  
this 12th day of June, 1945.

GRACE V. GROSCH  
A Notary Public of New Jersey.

**Affidavit of Merits.**

(Filed with Court June 15th, 1945)  
(Returned by Court)

HUDSON COUNTY COURT OF COMMON  
PLEAS.

JOSEPH ORIFICE, Assignee of Ed- mund Baum and Myron Baum, trading as Pennsylvania Tex- tile Co.,  <div style="text-align: right;"><i>Plaintiff,</i></div>	}	10
vs.		
AYVAD WATER-WINGS, INC., a cor- poration of New Jersey, <div style="text-align: right;"><i>Defendant.</i></div>	}	20

Action at Law.

STATE OF NEW JERSEY, }  
COUNTY OF HUDSON, } ss.:

PAUL M. BEEBE, of full age, being duly sworn according to law, upon his oath deposes and says:

I am the Vice-President and Treasurer of Ayvad Water-Wings, Inc., a corporation of New Jersey, and as such am duly authorized to make this affidavit. 30

Deponent further says that he verily believes that said Ayvad Water-Wings, Inc., has a just and legal defense to said action on the merits of the case.

PAUL M. BEEBE.

Sworn to and subscribed before me this 9th day of June, 1945.

GRACE V. GROSCH, 40  
A Notary Public of New Jersey.

**Opinion.**

(Unfiled)

HUDSON COUNTY COURT OF COMMON  
PLEAS.

10

JOSEPH ORIFICE, Assignee,  
*Plaintiff,*

vs.

AYVAD WATER-WINGS, INC.,  
*Defendant.*

Action at Law.

20

FREDMAN & FREDMAN, Esqs.,  
Attorneys for Plaintiff,  
591 Summit Avenue,  
Jersey City, N. J

LICHTENSTEIN & ENGEL, Esqs.,  
51 Newark Street,  
Hoboken, N. J.

Gentlemen:

30

I have considered the application of the defendant for an order permitting it to file its affidavit of merits as within time, upon the ground that it had a defense on the merits and did not understand that it was required to file the affidavit within 10 days.

40

It appears from the defendant's affidavit that the summons and complaint were regularly served on May 25, 1945, and that endorsed thereon was a demand for an affidavit of merits. Mr. Beebe, Vice-President of the defendant company, who corresponded with plaintiff's attorney about

*Opinion*

the matter and who was familiar with all the details of the transaction upon which the suit was based, and who was actually assigned to defend the action on behalf of the defendant corporation, read the summons and complaint but did not understand that an affidavit of merits was required. This was clearly neglect on the part of the defendant. Affidavits of merits are required to prevent delay and unless filed the right to maintain a defense is lost. 10

Although Rules 217 and 218 provide that the time may be extended, and the rules relaxed where surprise or injustice would be worked, our courts have consistently refused to grant additional time or relax the rules where there was neglect on the part of the defendant and not on the part of the attorney. 20

The application of the defendant to be permitted to file its affidavit of merits and for an extension of time, is therefore denied.

An order may be presented in accordance with the above.

Dated: July 19, 1945

Yours truly,

AUGUST ZIEGENER,  
*Judge.*

**Order.**

(Filed July 26th, 1945)

10 This matter being opened to the Court by Howard Engel, Esq., attorney for the defendant, in the presence of Fredman & Fredman, Esqs., attorneys for plaintiff, on the defendant's application for permission to file affidavit of merits in the above matter as within time, and for permission to extend the time of defendant within which to answer or otherwise move with respect to the complaint, and the Court having heard the arguments of counsel for the respective parties, and considered the affidavit and memoranda submitted by them;

20 And it further appearing by the affidavit of the officer of defendant corporation in charge of the within transaction, that the Summons and Complaint were regularly served on May 24, 1945, and that a Demand for Affidavit of Merits was regularly endorsed thereon, and that he had read said Summons and Complaint and ascertained what the suit was about, but that he neglected to file an Affidavit of Merits within the ten-day period required by law, or otherwise take any steps in response to the Complaint, and that there was no  
30 neglect on the part of defendant's attorney:

It is on this 25th day of July, 1945, ORDERED that defendant's application for permission to file its Affidavit of Merits and for an extension of time within which to answer, is denied.

AUGUST ZIEGENER,  
*Judge.*

**Plaintiff's Affidavits on Assessment of  
Damages.**

(Filed July 28th, 1945)

AFFIDAVIT.

STATE OF NEW YORK,        )  
COUNTY OF NEW YORK,    ) SS.:                               10

EDMUND BAUM, of full age, being duly sworn according to law, upon his oath deposes and says:

That he is a partner in the firm of Edmund Baum and Myron Baum, trading as Pennsylvania Textile Co., the assignor of the plaintiff in the above-entitled cause, and is familiar with the facts and things contained in this suit.

20

That defendant, Ayvad Water-Wings, Inc., is a corporation duly incorporated and existing under the laws of the State of New Jersey, and is engaged in the manufacturing business with its principal office located at No. 505—23rd Street, Union City, Hudson County, New Jersey.

That on or about October 4th, 1944, plaintiff's assignor and defendant entered into an agreement, whereby defendant agreed to manufacture dish cloths for said assignor, and to ship same to the assignor's customers, at the latter's direction, and the assignor undertook to supply defendant with the raw material and merchandise required for the said manufacture of dish cloths.

30

That it was agreed that defendant would be paid weekly for the work performed by it in previous week, and for which invoices would be submitted to plaintiff's assignor.

40

*Plaintiff's Affidavits on Assessment of  
Damages*

That defendant manufactured and shipped 10,526 dozen dish cloths of Style No. 82, forwarded to plaintiff's assignor invoices for 10,716 $\frac{1}{4}$  dozens, and received payment of \$2,060.63. Said amount was an overcharge on 190 $\frac{1}{4}$  dozens at \$0.19 per dozen or \$36.16.

That defendant manufactured and shipped 7,154 dozen dish cloths of Style No. 83, forwarded to plaintiff's assignor invoices for 8,875 dozens, and received payment of \$1,213.27. Said amount was an overcharge on 38 $\frac{1}{4}$  dozens at \$.24 per dozen or \$9.18.

That defendant manufactured and shipped 1,074 dozen dish cloths of Style No. 87, forwarded plaintiff's assignor invoices for 1,331 dozens, and received payment of \$332.59. Said amount was an overcharge on 257 dozens at \$.25 per dozen or \$64.25.

That defendant manufactured and shipped 3,046 dozen dish cloths of Style No. 89, forwarded plaintiff's assignor invoices for 3,174 dozens, and received payment of \$934.60. Said amount was an overcharge on 128 dozens at \$.30 per dozen or \$38.40.

That defendant manufactured and shipped 421 dozen dish cloths of Style No. 92, forwarded plaintiff's assignor invoices for 476 $\frac{1}{2}$  dozens, and received payment of \$170.82. Said amount was an overcharge on 128 dozens at \$.30 per dozen or \$19.98.

*Plaintiff's Affidavits on Assessment of  
Damages.*

That said defendant shipped 27,238 dozen dish cloths to customers of plaintiff's assignor, but billed them for 29,628 dozen, or an overcharge on 2,390 dozen dish cloths, amounting to an overpayment of \$512.16. 10

That deponent has often demanded payment of said indebtedness, but said defendant has failed to pay same, and the entire amount of \$512.16, together with interest and costs of suit, is due.

The plaintiff's assignor agreed to supply defendant with the bales of material required to manufacture the dish cloths, pursuant to the agreement set forth in the First Count of the Complaint. 20

That plaintiff's assignor supplied defendant with 108 bales of material to be used in said manufacture of dish cloths.

That defendant required 96 bales of material to manufacture the said dish cloths ordered by the assignor and converted the balance of 12 bales of material to its own use. 30

That the value of the 12 bales of material supplied by the plaintiff's assignor to the defendant and converted by defendant to its own use, and not accounted for in work performed under the agreement between said parties, amounted to \$1,560.00, for which defendant is indebted to the plaintiff's assignor for \$1,560.00.

*Plaintiff's Affidavits on Assessment of  
Damages.*

That there is due plaintiff's assignor the sum of \$2,072.16, together with interest and costs of suit, against which there are no set-offs, recoupments or counterclaims.

10

That plaintiff's assignor assigned its claim against said defendant to Joseph Orifice, the plaintiff herein, for good and valuable consideration on May 21st, 1945.

EDMUND BAUM.

Sworn and subscribed to before me this 12th day of June, 1945.

20

ISIDORE ROTHBERG,  
A Notary Public of New York.

STATE OF NEW JERSEY, }  
COUNTY OF HUDSON, } ss.:

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

30

That he is the plaintiff in the foregoing matter.

That the said claim of the Pennsylvania Textile Co. was assigned to him by written Assignment dated May 21st, 1945, for good and valuable consideration.

That he is informed and believes that the sum of \$2,072.16 is justly due and owing by defendant,

40

*Plaintiff's Affidavits on Assessment of  
Damages.*

Ayvad Water-Wings, Inc., in this suit, no part thereof having been paid by the said defendant either to the said plaintiff or the Pennsylvania Textile Co., his assignor.

10

That there is now due and owing to plaintiff, the sum of \$2,072.16 and costs of suit, against which there are no set-offs, recoupments or counterclaims.

JOSEPH ORIFICE.

Sworn to and subscribed before  
me this 12th day of June, 1945.

HARRY FREDMAN,

20

An Attorney at Law of New Jersey.

30

40

**Assessment of Damages.**

(Filed July 26th, 1945)

## ASSESSMENT OF DAMAGES.

I, being satisfied that the following calculations and statement are correct, in pursuance of the  
 10 Statute in such case made and provided, to wit:

Amount due plaintiff by reason or defendant's overcharge on the manufacture of 2,390 dozen dish cloths, as more particularly set forth in the Complaint and annexed affidavit \$ 512.16

Amount due plaintiff by reason of defendant's failure to pay for, account  
 20 for or return twelve (12) bales of material supplied it by plaintiff's assignee under an agreement set forth in the Complaint and annexed affidavit, 1,560.00

Total amount due plaintiff, \$2,072.16

do assess the damages of said plaintiff in the sum of \$2,072.16, against the defendant, Ayvad Water-  
 30 Wings, Inc., besides costs to be taxed.

Dated: July 26th, 1945.

W. H. GILFERT,  
 Clerk.

**Rule for Judgment Interlocutory and Final  
by Default.**

(Filed July 26th, 1945)

The Summons and Complaint in this cause having been duly served by the Sheriff of Hudson County on the defendant, Ayvad Water-Wings, Inc., a corporation of New Jersey, upon its registered agent at its principal office in this State, on May 24th, 1945, as appears by the Sheriff's return, and the said defendant having failed to file an Affidavit of Merits or take any other steps in response to the Complaint within the time limited by law and in accordance with the rules of this Court:

10

IT IS, on this 26th day of July, 1945,

20

ORDERED, that Judgment Interlocutory be entered against the defendant, Ayvad Water-Wings, Inc., in favor of the plaintiff, Joseph Orifice, Assignee of Edmund Baum and Myron Baum, trading as Pennsylvania Textile Co.; and the damages of the plaintiff having been assessed by the Clerk of this Court at the sum of \$2,072.16:

IT IS, on this 26th day of July, 1945,

30

ORDERED, that Judgment Final be entered in favor of the plaintiff, Joseph Orifice, Assignee, against the defendant, Ayvad Water-Wings, Inc., for the sum of \$2,072.16, together with the costs of suit to be taxed.

PAUL J. DUFFY,  
*Judge,*

By W. H. GILFERT, 40  
*Clerk.*

*Assignment of Claim.*

Entered: July 26th, 1945,

On Motion of

FREDMAN & FREDMAN,  
*Attorneys for Plaintiff.*

10

**Assignment of Claim.**

(Filed July 28th, 1945)

Filed  
July 28, 2:50 P. M.                      ASSIGNMENT OF CLAIM.

20        KNOW ALL MEN BY THESE PRESENTS, that Ed-  
 mund Baum and Myron Baum, trading as Penn-  
 sylvania Textile Co., a partnership, in considera-  
 tion of One (\$1.00) Dollar, and other good and  
 valuable consideration, lawful money of the  
 United States of America, to them in hand paid,  
 before the sealing and delivery of these presents,  
 the receipt whereof is hereby acknowledged, do  
 hereby sell, assign and transfer and set over unto  
 JOSEPH ORIFICE, of the City of Jersey City,  
 County of Hudson and State of New Jersey, their  
 30        claims in the respective sums of Five Hundred  
 Twelve (\$512.00) Dollars and interest, for over-  
 payment made to Ayvad Water-Wings, Inc., a  
 corporation of New Jersey, and in the sum of  
 One Thousand, Five Hundred Sixty (\$1,560.00)  
 Dollars, representing the value of a shortage of  
 twelve (12) bales of material converted by the  
 said Ayvad Water-Wings, Inc., to its own use,  
 and they do hereby constitute and appoint the  
 said Joseph Orifice, their attorney, in their name,  
 40        or in his name and for his own use, to demand,

*Assignment of Claim.*

receive, prosecute, sue for, compound, release or discharge the sum at his own cost and charge, as fully as though we were present acting therein, and Edmund Baum and Myron Baum, individuals, trading as Pennsylvania Textile Co., do hereby ratify and confirm all his lawful acts in the premises. 10

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 21st day of May, 1945.

PENNSYLVANIA TEXTILE Co.,  
By EDMUND BAUM,  
EDMUND BAUM, Pr.

Signed, Sealed and Delivered  
in presence of: 20

S. BECKHOFF.

STATE OF NEW YORK, }  
COUNTY OF NEW YORK, } ss.:

BE IT REMEMBERED, that on this 21st day of May, 1945, before me, the subscriber, a Notary Public, personally appeared EDMUND BAUM, a partner of the Pennsylvania Textile Co., who, I am satisfied, is the person named in, and who executed the foregoing instrument, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed. 30

ISIDORE ROTHBERG. 40

**Opinion.**

(Filed Oct. 5, 1945)

## NEW JERSEY SUPREME COURT.

No. 14, October Term, 1945.

10

JOSEPH ORIFICE, Assignee of Edmund Baum and Myron Baum, trading as Pennsylvania Textile Co.,

*Plaintiff-Respondent,*

vs.

20

AYVAD WATER-WINGS, INC., a corporation of New Jersey,

*Defendant-Appellant.*

Argued October 2nd, 1945; decided October 4th, 1945.

On Appeal from Hudson County Court of Common Pleas.

Before BROGAN, Chief Justice, and Justices PARKER and OLIPHANT.

30

For the Plaintiff-Respondent: FREDMAN & FREDMAN (JACOB J. LEVEY, of Counsel).

For the Defendant-Appellant: LICHTENSTEIN & ENGEL (JULIUS LICHTENSTEIN, of Counsel).

PER CURIAM:

Defendant appeals from an order of the Hudson County Court of Common Pleas which denied its application for an extension of time within

40

*Opinion.*

which to file an affidavit of merits and answer and also from the judgment entered against it as the result of said order.

There was no abuse of discretion by Judge Ziegner, who heard the motion. There is nothing in the record upon which the Court could have abused its discretion, it was never called upon to exercise it. There was no testimony or proof upon which the Court could have made a determination in favor of the defendant. Neither was there any proof by which the defendant explained its failure to file an affidavit of merits, that it had been surprised or that it had a meritorious defense. 10

The defendant elected at the hearing before the court below to rely on oral argument and an ex-parte affidavit which could not properly be used. Peer vs. Bloxham, 82 N. J. L. 288; Goldstein vs. Weir, 124 N. J. L. 327. Proper practice dictated that the defendant obtain a rule to show cause why the judgment should not be opened and an opportunity given to file an affidavit of merits and answer. Depositions should then have been taken for use on the argument of the rule. 20

The order and judgment appealed from are affirmed with costs. 30

A True Copy,

JAMES J. GAVIN, *Clerk.*

**Rule for Affirmance and Remittitur.**

(Filed October 8, 1945)

## NEW JERSEY SUPREME COURT.

10 JOSEPH ORIFICE, Assignee of Ed-  
mund Baum and Myron Baum,  
trading as Pennsylvania Tex-  
tile Co.,

*Plaintiff-Respondent,*

vs.

AYVAD WATER-WINGS, INC.,  
*Defendant-Appellant.*

20

This cause having come on to be heard at the October Term, 1945, of this Court, in the presence of Jacob J. Levey, counsel for plaintiff-appellee, and of Howard Engel, counsel for defendant-appellant, and the Court having duly considered the same, and finding no error in the record or proceedings in the Hudson County Court of Common Pleas:

30 IT IS, THEREFORE, ORDERED and ADJUDGED that the judgment of the Hudson County Court of Common Pleas removed by the appeal in this cause be affirmed with costs and that the record and proceedings be remitted to the Hudson County Court of Common Pleas, to be proceeded with in accordance with this judgment and the practice of said Court.

On Motion of:

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FREDMAN & FREDMAN,  
*Attorneys for Plaintiff-Appellee.*

Rule entered October 8th, 1945.

24 FEB 11 1945

**State Jersey Court of Errors and Appeals**

State of New Jersey  
 County of Hudson  
 In and for the City of Newark  
 The People of the State  
 vs.  
 John W. [Name], Defendant

Appellate  
 Division  
 State of New Jersey  
 Trenton, N. J.

**BRIEF OF DEFENDANT APPELLANT**

**Introduction**

This is an appeal from a judgment (Case No. 10) of the Superior Court, affirming, on writ from the Hudson County Court of Criminal Pleas, entered July 2, 1943, the conviction of the defendant for the crime of larceny of a sum of money to wit: \$100.00 and for an attempt to obtain by false pretenses a judgment of case No. 10 for \$22.00 and \$1.00 costs entered in the case on a writ of habeas corpus against defendant's conviction by the trial court in the case of the defendant, John W. [Name], on appeal from the judgment of the Superior Court, affirming, on writ from the Hudson County Court of Criminal Pleas, entered July 2, 1943, the conviction of the defendant for the crime of larceny of a sum of money to wit: \$100.00 and for an attempt to obtain by false pretenses a judgment of case No. 10 for \$22.00 and \$1.00 costs entered in the case on a writ of habeas corpus against defendant's conviction by the trial court in the case of the defendant, John W. [Name].

Rule for Affirmance and Remittitur  
(Filed October 8, 1945)

NEW JERSEY SUPREME COURT

10 Joseph Malin, Assignee of Ed-  
mond Guro and Myron Babin  
trading as Pennsylvania Tex-  
tile Co.  
*Plaintiff-Appellant,*  
  
vs.  
  
Myron Harry Wixom, Inc.,  
*Defendant-Appellee.*

20 This cause having come on to be heard at the  
October Term, 1945, of this Court, by the pres-  
ence of Jacob J. Devy, Justice for plaintiff-  
appellee and of Howard Engel, Justice for de-  
fendant-appellant, and the Court having duly  
considered the same, and finding no error in the  
record or proceedings in the Hudson County  
Court of Common Pleas:

30 It is therefore ordered and adjudged that  
the judgment of the Hudson County Court of  
Common Pleas rendered in the report in this  
case be affirmed with costs and that the record  
and proceedings be remitted to the Hudson  
County Court of Common Pleas to be corrected  
with its certificate with due speed and the  
practice of said Court.

40 In Witness Whereof:  
  
TERRY J. FOSTER,  
Attorney for Plaintiff-Appellee.  
  
Date entered October 10, 1945.

**New Jersey Court of Errors and Appeals**

JOSEPH ORIFICE, Assignee of Edmund Baum and Myron Baum, trading as Pennsylvania Textile Co.,

*Plaintiff-Respondent,*

vs.

AYVAD WATER-WINGS, INC., a corporation of New Jersey,

*Defendant-Appellant.*

Action at Law.  
On Appeal from New Jersey Supreme Court.

**BRIEF OF DEFENDANT-APPELLANT.**

**Introductory.**

This is an appeal from a judgment (Case, p. 34) of the Supreme Court, affirming, on appeal from the Hudson County Court of Common Pleas, an order (Case, p. 22) of the Pleas denying the defendant-appellant's application for leave to file its Affidavit of Merits as within time and for an extension of time to plead, and also a judgment (Case, p. 29) for \$2,072.16 and \$75.03 costs entered in the Pleas, as a result of said order, against defendant-appellant for default in filing Affidavit of Merits. It is the contention of defendant-appellant that the affirmance, on technical procedural grounds (Case, p. 33, ll. 8-29) was erroneous and unjust, and that the action of the Hudson County Court of Common Pleas was unjust, an abuse of discretion and er-

roneous. It is submitted that this court which, in matters of this kind, exercises equitable powers, should afford relief.

### **Statement of Facts.**

In this Brief, the parties will be called plaintiff and defendant, as in the Court of Common Pleas. Plaintiff brought his action at law in the Pleas, as assignee of a partnership known as Pennsylvania Textile Co. (Case, p. 9, ll. 23-26); p. 12, ll. 5-7). His complaint (pp. 9-13) contains two counts. The First Count (Case, p. 10, l. 5 to p. 12, l. 11) alleges: That said Pennsylvania Textile Co. in October, 1944, contracted with the defendant for the latter to manufacture dish cloths out of material to be furnished by the former, defendant to ship the cloths to the Textile Co.'s customers as directed, and to render invoices each week to the Textile Co. for work performed in the previous week (Case, p. 10, ll. 14-26); that the defendant billed the Textile Co. for 2,390 dozen cloths more than it actually manufactured and shipped, which plaintiff claims resulted in an overcharge to his assignor of \$512.16 (Case, p. 11, ll. 33-37; p. 10, l. 28 to p. 11, l. 31). The First Count seeks recovery of the alleged overpayment (Case, p. 12, ll. 9-11).

The Second Count alleges: That the Textile Co. furnished the defendant with 108 bales of material for use in making up the said dish cloths (Case, p. 12, ll. 25-27); that defendant required only 96 bales of said material to make up the cloths ordered by the Textile Co., and converted the balance of 12 bales to its own use (Case, p. 12, ll. 29-32); that the 12 bales of material so converted by defendant had a value of

\$1,560.00, which sum the Second Count seeks to recover (Case, p. 12, l. 34 to p. 13, l. 7).

The Summons and Complaint were served upon defendant on May 24th, 1945 (Case, p. 8, l. 6). Endorsed on the Summons is a notice to the defendant that in the event of personal service, affidavit of merits and answer must be filed within the respective periods of ten and twenty days after such service (Case, p. 8, l. 37 to p. 9, l. 12). Either late that day or the day following, the Summons and Complaint were received by Mr. Paul M. Beebe, defendant's Vice-President and Treasurer, for attention (Case, p. 15, ll. 14-15, 21-23). He then read them over to ascertain what the suit was about. He noted that the company was required to file its Answer within twenty days after service (as shown in the body of the Summons), but he did not understand that defendant was also required to file an Affidavit of Merits (Case, p. 15, ll. 23-29).

Mr. Beebe immediately commenced examining defendant's records of its transaction with the plaintiff's assignor, the Textile Co., in order to gather the material necessary to present the facts to the attorney which the defendant would retain to defend the action, and also prepared a detailed statement of facts for presentation to such attorney for his assistance (Case, p. 15, ll. 29-35). This was a time-consuming task and was not finished until Friday, June 8th (Case, p. 15, ll. 35-39). On that very day that Mr. Beebe was thus in position to proceed, he telephoned the company's present attorneys, stated that a suit had been instituted against defendant which required an Answer by June 13th, and arranged an appointment for the following morning, Saturday, June 9th (Case, p. 16, ll. 5-12).

The appointment was kept, and on that occasion Mr. Beebe's attention was first called to the requirement of the filing of an affidavit of merits by June 3rd (Case, p. 16, ll. 14-20). Such affidavit was prepared and sworn to on said June 9th (Case, p. 19). Defendant's attorneys endeavored (on both June 9th and Monday, June 11th) to obtain the consent of plaintiff's attorneys to the filing of the affidavit within time, but they would not consent (Case, p. 16, ll. 20-29).

Promptly thereafter on June 12th (Case, p. 13, l. 15), defendant's attorneys served upon plaintiff's attorneys a notice of motion (Case, pp. 13-14), returnable Friday, June 15th (the next motion day) for:

1. Leave to file defendant's Affidavit of Merits as within time, and
2. An extension of time within which to plead to the Complaint (Case, p. 14, ll. 12-20), on the grounds of surprise and merit (Case, p. 14, ll. 22-26).

Annexed to the notice of motion was the affidavit of Mr. Beebe (Case, pp. 15-18), setting forth the above circumstances showing that the failure to file the Affidavit of Merits in due time was the result of mistake, and also verifying circumstantially and in considerable detail that the defendant has a meritorious defense to the action. As the claim of plaintiff's First Count, the affidavit shows that the defendant manufactured for the plaintiff's assignor every dish cloth for which it billed said Textile Co. and more, and shipped the same to the Textile Co. customers or to the Textile Co. itself (Case, p.

17, ll. 16-35). It further shows that there was no overcharge (*ibid*). As to the claim of plaintiff's Second Count, the affidavit fully accounts for the use of the entire 108 bales of material furnished by plaintiff's assignor to defendant, and demonstrates that no material whatsoever was converted, as alleged (Case, p. 17, l. 37 to p. 18, l. 23). The affidavit further shows that plaintiff's assignor still owes defendant \$44.98, expressage charges incurred in connection with the transaction in question (Case, p. 18, ll. 25-35).

The motion was argued before Judge Ziegener on its return date, June 15th, at which time the notice of motion and supporting affidavits, as well as Affidavit of Merits, were delivered to the Judge. There was no denial of the facts, as stated by defendant, and no counter-affidavits or other proofs were submitted by plaintiff. Nor did plaintiff at the time object to the procedure adopted or to the competency of the affidavit, nor urge that depositions be taken for use instead of the moving affidavit. Nor did the Judge question the procedure. Decision was reserved, and on July 9th the Judge communicated to counsel his opinion (Case, pp. 20-21), in which the Court, without considering the fact that the defendant presented a defense on the merits, nor suggesting that the submitted affidavit was incompetent as proof, nor that a rule to show cause should be issued, held that the defendant's default was the result of neglect on its part, and that, therefore, its application should be denied. On July 25th, 1945, Judge Ziegener signed an order, denying defendant's said application for permission to file its Affidavit of Merits and for an extension of time to answer (Case, p. 22). On the following day, July 26th,

plaintiff entered a Rule for Judgment Interlocutory and Final by default against defendant for failure to file Affidavit of Merits, in the sum of \$2,072.16 and costs of suit (Case, p. 29). Damages were assessed by the Clerk (Case, p. 28), on the basis of affidavits of plaintiff and his assignor, which merely repeated the allegations of the Complaint (Case, pp. 23-27), and plaintiff's Assignment (Case, pp. 30-31). Costs were taxed at \$75.03.

The defendant appealed to the Supreme Court from both said order denying its application (Case, p. 22), and said judgment (Case, p. 29). The Grounds of Appeal urged in the court below are printed at pages 5 to 7 of the State of Case. The appeal was argued at the October, 1945, term of court. In his answering brief, the plaintiff urged for the first time that the moving affidavit of the defendant was not competent evidence of the factual basis for defendant's application to the Pleas, and that therefore there was no evidence before that court upon which it could have granted the application. Plaintiff cited in support, cases holding that *on rules to show cause* to reopen default judgments and the like, the moving affidavits expend their force upon the granting of such rules to show cause, and that testimony must be taken by deposition, to be used on the argument of the rules.

After hearing argument, the Supreme Court wrote a *per curiam* opinion (Case, pp. 32-33) affirming the order and judgment of the Pleas, with costs (Case, p. 33, ll. 30-31). The opinion was confined to discussion of procedure, adopted the plaintiff's argument, and concluded that "defendant elected at the hearing before the court below to rely on oral argument and an *ex parte*

affidavit, which could not properly be used. *Peer v. Bloxham*, 82 N. J. L. 288; *Goldstein v. Weir*, 124 N. J. L. 327" (Case, p. 33, ll. 19-23.) It went on to say:

"Proper practice dictated that the defendant obtain a rule to show cause why the judgment should not be opened, and an opportunity given to file an affidavit of merits and answer. Depositions should then have been taken for use on the argument of the rule. (Case, p. 23, ll. 23-29.)

Following this opinion, Rule for Affirmance and Remittitur (Case, p. 34) was entered on October 8th, 1945. Defendant now appeals therefrom. Notice of Appeal is printed on page 1, and Grounds of Appeal on pages 2 and 3 of the State of Case.

### Argument.

The defendant's procedure was proper; but if it was not, in view of the fact that objection was first made at the hearing of the appeal, the court below, instead of affirming, should have disregarded the objection or should have directed the Court of Common Pleas to issue a rule to show cause and afford defendant the opportunity to adduce competent evidence. Where a defendant shows a complete defense on the merits, but has become technically in default as to time of pleading, in the circumstances shown in this case, it seems entirely unconscionable for the Court to deprive such defendant of an opportunity of presenting his defense.

## POINT I.

**The affirmance of the order and judgment appealed from upon the ground of incorrect procedure was both erroneous and unjust.**

*A. The affirmance was erroneous.*

The Supreme Court held that the defendant should have obtained a rule to show cause why the judgment should not be reopened, under which depositions might have been taken, instead of proceeding as it did (Case, p. 33, ll. 23 to 29). It also stated that defendant elected to rely on an *ex parte* affidavit, which could not properly be used (Case, p. 33, ll. 19 to 22). With respect to the "election" referred to, it should be pointed out that there can be no election unless an alternative course is open. The Court followed the language of cases wherein, after *rules to show cause* were granted, the moving parties chose to rely, at the argument of the rules, upon the *ex parte* affidavits which had been used to obtain the *rules to show cause*, instead of availing themselves of their opportunity to take depositions thereunder. See, for example:

*Peer v. Bloxham*, 82 N. J. L. 288, and  
*Goldstein v. Weir*, 124 N. J. L. 327,

both cited by the court below (Case, p. 33, ll. 22 and 23).

In those cases, an election was made. But in the instant case, the Court of Common Pleas did not issue a rule to show cause and, therefore, there was no question of election. Had plaintiff objected on the return of the motion, to the procedure or to the use of the *ex parte* affidavit, or

questioned the truth of the affidavit, the Court might have issued a rule to show cause under which depositions would have been taken. Defendant would not then have been embarrassed, as it now is, by the objection as to procedure raised for the first time in the appellate court. Since plaintiff acquiesced in the procedure when the motion was argued, the Common Pleas Court did not issue a rule to show cause, and considered the defendant's application on the basis of the facts stated in the *ex parte* affidavit, as is customary on motions. The order and judgment of the Pleas followed from the consideration of those facts, and did not rest on the basis of lack of competent proof.

As to the Supreme Court's opinion that the proper procedure was a rule to show cause to reopen the *judgment*, it must be emphasized that when defendant made its application to the Court of Common Pleas, no judgment had been entered, and so that course was not available. Defendant first realized its oversight on Saturday, June 9th, 1945, which was but six days after the expiration of time to file affidavit of merits (Case, p. 16, ll. 14 to 20; p. 8, l. 5). The motion papers were served on the following Tuesday, June 12th, 1945 (Case, p. 13, l. 15), which was before answer was due. Judgment was not entered until July 26th, 1945, after disposition of defendant's motion (Case, p. 29, l. 6).

We do not understand the law to require, as the learned court below holds, that a defendant who becomes technically in default must stand inactive until the plaintiff enters judgment, and then seek to reopen the judgment by obtaining a rule to show cause therefor. Rather, we believe that it is incumbent upon him to act to relieve

his default at the earliest opportunity, and thus avoid requiring the Court to reopen an enrolled judgment, and also spare expense and delay to his opponent.

Plaintiff relied upon, in the court below, and that court cited as authority (Case, p. 33, ll. 22 and 23), only cases where relief was sought by rule to show cause after entry of judgment. The necessity of depositions to support the argument upon such rules is both conceded by defendant and well established by decision. But it is respectfully submitted that where the application is for an extension of time *before* judgment, it is not improper to proceed by motion and *ex parte* affidavit, as was done here. Especially so where there is no factual dispute as to the element of surprise or mistake, and the affidavit sets forth a *prima facie* defense on the merits.

We have been unable to find any case before the present one in which a like application was denied because made by motion and affidavit instead of rule to show cause and depositions. On the contrary, we have found some authority in support of the procedure:

In *Trenton Mutual Life Insurance Co. ads. Hodges*, 24 N. J. L. 673 (Supreme Court, 1855), it was held that a motion for time to plead is a special motion requiring two days' notice.

In *Crane ads. Condit*, 16 N. J. L. 349 (Supreme Court, 1838), defendant, after entry of judgment by default and issuance of execution, made a motion, supported by *ex parte* affidavit, to set the same aside, with leave to plead. Plaintiff objected that the affidavit was not taken on notice. Chief Justice Hornblower held:

“The exception to the affidavit is not well taken. The rule requiring notice applies

to cases where a rule to show cause has been granted. Let the judgment be opened, but stand as security for the amount to be recovered." (Page 349.)

And in the recent case of *McDermott v. Paterson*, 122 N. J. L. 81, the defendant, after entry of default judgment against it in the Circuit Court, made a motion to reopen the judgment and for leave to file affidavit of merits and answer. It did not proceed by rule to show cause, but on two days' notice of motion, supported by *ex parte* affidavits. The Circuit Court denied the motion, but, upon defendant's appeal, this Court reversed, and said (on page 86 of 122 N. J. L.):

"The practice followed by the appellant and the trial court is the correct practice."

In *LaBell v. Quasdorff*, 116 N. J. L. 368, wherein application for relief was deferred until after judgment, the Supreme Court said, at page 372:

"The modern method of attack is by summary motion to vacate the judgment. \* \* \*"

It is respectfully submitted that it was error to affirm because of the procedure adopted; and that since the use of the *ex parte* affidavit was not objected to in the Court of Common Pleas, and that Court made its decision on the facts stated in the affidavit, the objection should not have been entertained in the Appellate Court.

*B. The affirmance was unjust.*

Should it be held that the Court below did not err, as a matter of law, and that correct practice requires a defaulting defendant to suffer judgment first, and then proceed by rule to show cause to reopen the judgment, and take depositions thereunder, it is respectfully urged that the affirmance was unjust and oppressive as to the defendant, in that it denies to the defendant a consideration and determination of the merits of its application for leave to defend. In the review of applications to open defaults, the Court does not act as a Court of Errors, but gives relief in accordance with principles of justice and equity.

*McDermott v. Paterson, supra*, 122 N. J. L. 81, 86.

In *LaBell v. Quasdorf, supra*, the Court said (116 N. J. L. 372):

“The modern method of attack is by summary motion to vacate the judgment; and it is well settled that such a motion is addressed to the sound discretion of the court, in the exercise of which considerations of justice and equity govern. *Smith v. Livesey*, 67 N. J. L. 269; *Wright v. Green*, 11 Id. 334; *Freem. Judg.* (5th ed.) 377, 378. This discretionary authority is legal and not arbitrary in character; it must be exercised in consonance with established principles of law. It is not concerned with questions of law which may arise upon the facts; it relates rather to the question of whether, under the particular facts and circumstances, justice and equity require that relief be given. Judicial discretion, to borrow the words of Lord Mansfield, means ‘sound discretion, guided

by law,' and not by whim or humor. Hoffman v. Maloratsky, 112 N. J. Eq. 333, 164 Atl. Rep. 260; State v. Then, 114 N. J. L. 413; Freem. Judg. (5th ed.) 378, 538, 574. Generally, the inquiry is whether the enforcement of the judgment would be unjust, oppressive or inequitable as to the party moving for its vacation. 34 C. J. 371."

We therefore respectfully urge that this Court decide on the present record whether, in justice, defendant should be permitted to defend on the merits of its case. But if the Court is unwilling so to do, then we urge that it at least direct the Pleas to issue a rule to show cause, with leave to take depositions thereunder, in order that defendant have the opportunity to produce a proper record upon which the merits of its application for its day in court may be determined.

## POINT II.

**The denial of the defendant's application for leave to file Affidavit of Merits and for an extension of time to plead constituted an abuse of discretion, and was erroneous and unjust.**

Service of Summons and Complaint was effected on May 24th, 1945. Affidavit of Merits became due, therefore, on June 3rd, and Answer on June 13th. Therefore, when the defendant's attention was first called to the need of filing the affidavit, on June 9th, the time for its filing had already expired, although the time for answering had not yet run. Mindful that an affidavit of merits filed out of time would be considered a

nullity (*Matter of Practice*, 7 N. J. L. 39), defendant's first concern was to obtain authority to file the same as within time, and without delay the consent of plaintiff's attorneys was sought (Case, p. 16, ll. 14-29). The refusal of such consent occurred on June 11th, and the notice of motion to obtain leave of Court and the supporting affidavit were prepared and served immediately thereafter on June 12th (Case, p. 13, l. 15).

Since the rule is that an Answer, although filed in time, will not avail if no Affidavit of Merits has been duly filed,

*Fox v. Simon & Krivit, Inc.* (Sup. Ct. 1920, not officially reported), 109 Atl. 900,

no purpose could be served in filing defendant's Answer pending the Court's decision on the application with respect to the Affidavit of Merits. Therefore, defendant coupled a request for extension of time to plead with the other application (Case, p. 14, ll. 12-20). As above stated, time to answer had not yet expired when the notice of motion was served, and the motion was returnable at the earliest possible motion day.

When the matter was presented to Judge Ziegner, the only question raised was whether the Judge had power to permit late filing of an affidavit of merits, which the Court doubted, and requested counsel to furnish authority on that point, meanwhile reserving decision. After receiving a memorandum as to such authority, the Court wrote a brief opinion, in which he concluded that although he possessed the power to grant the application, he would deny it. The opinion (Case, pp. 20-21) does not discuss the showing of meritorious defense, but states that

the failure of defendant to file Affidavit of Merits in due time was the result of neglect on its part, and that our Courts have consistently refused to grant additional time or relax the rules where there is neglect on the part of the defendant rather than its attorney (Case, p. 21, ll. 11-21).

It is respectfully submitted that the Common Pleas Court, in concluding as he did, erred in two important respects as to legal principles and also in his conclusion that the facts show negligence on the defendant's part.

*A. The issue was not the negligence of the defendant, but whether its default was voluntary.*

We believe that the Courts have made clear that on applications for extensions of time to plead, and even on applications for the reopening of default judgments, the Court is not concerned with the question of whether the defendant's failure to plead in due time was negligent, that is, whether the defendant exhibited reasonable care in attending to the defense of the action brought against him. Rather, the issue which the Courts determine on such application is whether the default was voluntary, in the sense of being intentional, willful or the result of reckless indifference to the consequences of non-attention. This issue has been clearly stated by this Court more than once.

In *Walter v. Keuthe*, 98 N. J. L. 823, Justice Kalisch, for the Court of Errors and Appeals, places the denial of right of appeal from a default judgment in the ordinary case upon the theory that the defendant did not urge before the lower Court that he should be given an opportunity to plead out of time, but in effect,

voluntarily refrained from defending the action, saying on page 827:

“But in the present case, the defendant was duly summoned to appear and to answer the plaintiff’s action in a court of general jurisdiction, which court had not only obtained jurisdiction of the person of the defendant, but also had jurisdiction of the subject matter in controversy; nevertheless the defendant sat supinely by and let judgment go against her by default, and then after waiting till within a day or two of the expiration of the time to appeal, she appeals to this court, and attempts to raise questions of law and fact which by proper pleadings could have been raised at the trial.”

And further, on the same page:

“Now, if the defendant had intended to defend the action against her and her default was not voluntary, and if she had a good and legal defense to the plaintiff’s action upon the merits of the case, her proper course was to apply to the Supreme Court to vacate the judgment and for leave to file an answer, and upon showing that her default was not intentional, and by presenting facts from which it appeared that she had a meritorious defense the court *unquestionably* would have granted the relief asked; but this the defendant did not see fit to do.” (Italics ours.)

And in the recent case of *McDermott v. Paterson*, 122 N. J. L. 81, this Court briefly stated the the only issues involved upon an application for the reopening of a default judgment, as follows:

“Such application calls for the exercise of the discretion of the court in determining whether such judgment was voluntary or involuntary, and, if the latter, then whether the defense proffered is good in law.” (Syllabus.)

It is respectfully submitted that in pursuance with the above rules, the Court does not withhold relief where the defendant has failed to measure up to the standard of reasonable care, which was the standard applied by the Common Pleas Judge in this case.

In practically all the cases where applications for reopening default judgments have been denied, the Courts have found, not mere negligence, but gross neglect, inertia and indifference to the actions in which the defendants were sued. For example:

*Hanover Trust Co. v. Rizzo*, 110 N. J. L. 581;  
*Hirsch v. DePuy*, 11 Misc. Rep. 500 (not officially reported);  
*Walter v. Keuthe*, *supra*;  
*Vanderbilt v. Chioscinski*, 3 Misc. Rep. 584, (not officially reported),

and in cases where the defendants have not been guilty of indifference to the actions, and relief has, nevertheless, been denied, the primary reason for the denial lay in the lack of meritorious defenses.

*Hanover Trust Co. v. Rizzo*, *supra*, 110 N. J. L. 581;  
*Koenigsberger v. Mial*, 90 N. J. L. 695;  
*E. J. Lavino & Co. v. National Surety Co.*, 104 N. J. L. 475.

In the last cited case, Justice Katzenbach for the Supreme Court said on page 478:

“I would, however, overlook the weakness of the testimony as to surprise if I considered that the defendant had shown that it had to the suit a meritorious defense.”

Of course, the affidavit submitted on the application in this case shows a complete defense to the suit on the merits. Thus, only the remaining issue was open, and that is whether the defendant's conduct was such as to exhibit an indifference to the action, and thus amount to a voluntary default.

*B. The defendant's default was not voluntary.*

It is respectfully submitted that the affidavit submitted to the Common Pleas Court did not show indifference to the suit. It did not even show the “clear neglect” which that Court mentioned in its opinion (Case, p. 21, ll. 11-12). Rather, the affidavit showed only excusable mistake and error in judgment. The officers of defendant cannot be expected to be familiar with the Supreme Court Rule requiring the filing of affidavit of merits. That an answer must be filed in any action is a matter of more common knowledge, and Mr. Beebe realized from the Summons that defendant had twenty days within which to answer, but he did not understand that defendant also must file the Affidavit of Merits in order to avoid judgment against it. The notice calling for an affidavit of merits was not endorsed on the Complaint as required by Supreme Court Rule 77, but was typed upon the Summons (Case,

p. 8, l. 37 to p. 9, l. 12). The language of the notice is not free from ambiguity, and further, it mentions the condition that the Summons and Complaint "be served upon you personally," and does not set forth, as is usual, that lawful service upon a corporation is to be deemed "personal service." At any rate, Mr. Beebe did not understand that the defendant was obliged to file an Affidavit of Merits (Case, p. 15, ll. 27-29). He was not indifferent or neglectful of the suit; he immediately set to work, delving among defendant's records in order to collect the documentary proofs necessary to prepare for the defense of the action, and to prepare a comprehensive statement of facts, both of which he justifiably deemed necessary, in view of the nature of the case, in order to present the facts of the defense to an attorney (Case, p. 11, ll. 29-35). Undoubtedly, it would have been wiser to take the Summons and Complaint to an attorney immediately, and to gather the factual material later, but in view of Mr. Beebe's misapprehension as to the time that defendant had within which to take its initial step in the cause, his error of judgment, in pursuing the opposite course, is excusable. In preparing his facts, Mr. Beebe had to cull out from all the defendant's papers a great volume of daily records of production and shipping receipts, etc., over a period of a number of months, as defendant had had no reason to keep segregated the records dealing with the particular matters involved in this action. And this task occupied until June 8th, which itself was beyond the date when the Affidavit of Merits became due (Case, p. 15, ll. 29-39). It should be recalled that in the period between the time that Mr. Beebe received the Summons and Complaint

and the time he completed his preparatory work, there intervened two weekends and a legal holiday—Memorial Day—making a total of five days during the interval on which the defendant's place of business, a factory, was closed. Undoubtedly, these holidays interfered with the task. As soon as he believed he was in a position to present the facts to an attorney, Mr. Beebe retained one, as shown in his affidavit (Case, p. 15, l. 35 to p. 16, l. 12).

It is, therefore, respectfully submitted that Judge Ziegner's conclusion that defendant was guilty of neglect was unwarranted, and that there is no basis for a conclusion that the defendant's default in filing Affidavit of Merits was voluntary. The defendant did not sit idly by and suffer judgment to be entered against it. When it made its application to the Court, judgment had not been entered. The Summons and Complaint were not even filed with the Clerk of the Court until June 9th (Case, p. 8, l. 5), when defendant requested the consent of plaintiff's attorneys to the filing of the Affidavit of Merits. The defendant here shows a defense on the merits, and during the interval between the service of the Summons upon it and the application to the Court, the defendant was not indifferent to the action, but was diligently engaged in preparing to defend the action, albeit the actual measures taken were mistaken. The facts in the case are comparable to those in *McCarthy v. Guire*, 14 Misc. Rep. 795 (not officially reported), in which the Supreme Court reopened a judgment, saying on page 797:

“Surely, it cannot be said that defendant was guilty of laches, indifference or inertia.

Hanover Trust Co. v. Rizzo, *supra*. On the contrary, he appears to have exercised considerable effort, much of which was, perhaps, misdirected, in preparing for trial."

And again on the same page:

"Obviously, there can be no fixed formula by which the necessary element of surprise may be measured in every case. The extenuating factors of each particular situation must be the ultimate determinants. We think that the proofs show the element of surprise."

C. *The Common Pleas Court erred in holding that relief can be granted only where the neglect which occasioned the default is that of an attorney.*

The opinion of Judge Ziegner states:

"Although Rules 217 and 218 provide that the time may be extended, and the rules relaxed where surprise or injustice would be worked, our courts have consistently refused to grant additional time or relax the rules where there was neglect on the part of the defendant and not on the part of the attorney." (Case, p. 21, ll. 15-21).

It is respectfully submitted that the foregoing is not an accurate statement of the applicable law. *McCarthy v. Guire*, 14 Misc. Rep. 795 (not officially reported), quoted from immediately hereinabove, is only one instance where relief was granted in the case of negligence on the part of a party rather than on that of his attorney.

In *Barlow v. Burns*, 70 N. J. L. 631, a rule was granted for the reopening of a default judgment in a libel suit to permit the entry of a plea. There were two defendants, a mother and her daughter. As to the mother, the Court found that she had retained an attorney, but the attorney, convinced that there was no defense to the action, permitted judgment interlocutory to be entered, and appeared on her behalf at the assessment of damages by a jury. On page 632, the Court said:

“As to Mary Burns, daughter of Maria Burns, the case seems upon the affidavit to be somewhat different. She did not employ counsel, her mother undertaking to attend to it all for her. She may have a complete defense, which it would be an injustice to deny her.

“We think that as to Mary Burns, there should be a rule to show cause why the judgment should not be opened, that she may file a plea.”

The above is another instance where the party, rather than her attorney, had been neglectful.

Other cases where judgments have been reopened for causes other than attorneys' neglect, where default occurred by reason of the defendants' mistakes, are:

*Crane ads. Condit*, 16 N. J. L. 349;

*Abrams v. Wood*, 4 N. J. L. 33;

*Den, ex dem. Riker v. Ball*, 3 N. J. L. 528  
(\* 974);

*Den, ex dem. Lee v. Evaul*, 1 N. J. L. 233;

all of which were decided in the early days when practice was far stricter than it is under the

present court rules. See also, *Boyd v. Williams*, 70 N. J. L. 185.

In the Court of Chancery, the rule is that in applying for the reopening of a default, "any reasonable ground for indulgence is sufficient if application be made within reasonable time."

*Tipton v. Randall*, 87 N. J. Eq. 387, 390;  
*O'Neill v. Linowitz*, 92 N. J. Eq. 179, 180;  
*Emery v. Downing*, 13 N. J. Eq. 59.

That there is a dearth of reported decisions in which Courts have extended the time for filing of affidavits of merits and answering pleadings, undoubtedly results from the facts that such rulings are not complained of on appeal; but it is to be doubted that *nisi prius* courts have consistently refused to relax the rules, as stated in the opinion of the Court of Common Pleas.

As Judge Ziegner concluded, he had power both to permit the filing of the Affidavit of Merits as within time and to grant the extension of time to Answer. The Court may extend the time to file affidavit of merits, although it is not a pleading, strictly speaking, and even to reopen a judgment entered for default in filing same.

*McDermott v. Paterson*, 122 N. J. L. 81, 83;  
*Brooks-Wright, Inc. v. Maryland Casualty Co.*, 126 N. J. L. 32, at 36;  
*Shawger v. Cranard*, 64 N. J. L. 219;  
*Fox v. Simon & Krivit, Inc.* (Supreme Court, not officially reported), 109 Atl. 900;  
*Campbell v. Ramsey* (Circuit Court, not officially reported), 24 N. J. L. J. 590.

The requirement of filing affidavit of merits is found in Supreme Court Rule 77.

Supreme Court Rule 217 provides:

“The time limited in these rules for the doing of any act may, for good cause, be extended (either before or after the expiration of the time) by order of the court or a justice or a judge thereof. (Rule 3, Pr. Act 1912),”

and Supreme Court Rule 218 provides:

“These rules shall be considered as general rules for the government of the court and the conducting of causes; and as the design of them is to facilitate business and advance justice, they may be relaxed or dispensed with by the court in any case where it shall be manifest to the court that a strict adherence to them will work surprise or injustice. (Rule 5, Pr. Act 1912).”

Although both the above Rules use the word “may” in a non-mandatory sense (S. C. R. 211a), still it is submitted that they did not vest the Court with an arbitrary discretion, but with a discretion to be exercised in accordance with sound principles to effectuate the purpose of “advancing justice” and preventing “surprise or injustice.”

*Hoffman v. Maloratsky*, 112 N. J. Eq. 333,  
at 335.

The issue in this case is whether the rules of Court are to be so strictly adhered to as to de-

prive the defendant of the right to present its meritorious defense, because it had become technically in default, not voluntarily, but as a result of an honest mistake.

In *Lambert v. Trenton and Mercer, &c. Corp.*, 103 N. J. L. 23, 25, affirmed 104 N. J. L. 175, Justice Minturn spoke thus for the Supreme Court:

“Rules of court, however, are devised as a method of facilitating the correct and orderly exposition of substantive law, and the proper administration of justice, and when for any reason they cease in actual practice to accomplish that function, their efficacy as rules *pro tanto* cease, and such an equitable construction or application will be accorded them, as will effectuate the manifest design and purpose of their framers.”

In *Martin v. Lehigh Valley R. R. Co.*, 114 N. J. L. 243, the Court of Errors and Appeals reversed the ruling of the Circuit Court refusing to set aside a stipulation for discontinuance of an action. The Appellate Court recognized that the matter was within the discretion of the lower Court, but that the ruling constituted an abuse of discretion because the result was to deprive the plaintiff of her day in court, the statute of limitations having run against the cause of action. The Court stated on page 246:

“Obviously unless the widow can be relieved of the order the force and effect thereof would be that ‘the defendant go thereof without day.’ Our study of the proofs leads us to the firm conclusion that an abuse

of discretion, in the discharge of the rule to show cause, is clearly shown.”

In *Kople v. Zalon*, 122 N. J. L. 422, the Court of Errors and Appeals stated on page 423:

“Matters resting in the discretion may not be argued for error. But the rule is otherwise when a party suffering thereby goes without day and abuse of discretion is urged and shown. See *Martin v. Lehigh Valley*, 114 Id. 243, and cases therein cited.”

*D. The Common Pleas decision was not an exercise of discretion, but the application of what the Court erroneously assumed to be a legal rule.*

In our preceding discussion, we have dealt with the theory that even in matters resting within the sound judicial discretion of the Court of first instance, the Appellate Court will grant relief if it finds that such discretion has been abused. The granting or denying of an application for a relaxation of the rules of court is ordinarily a discretionary matter, and we have argued that the Common Pleas Court committed an abuse of discretion in denying to the defendant its day in court in the circumstances disclosed. But we believe it clear from Judge Ziegener's opinion that he did not treat defendant's application as involving his discretion. Rather, the learned Judge considered that he was bound by a hard and fast rule of the Courts, that the only instance in which the rules will be relaxed is where a default occurs by reason of an attorney's negligence and that where a party has himself been negligent, no such relief can be

granted. The fallacy of this assumed rule of law has been demonstrated earlier in this point.

The situation is that, because of mistaken view of the law, the Common Pleas Court has refused to exercise a discretionary power. The case in that respect resembles the cases of *Hite v. Dell*, 78 N. J. L. 239 (Supreme Court 1909), and *McDermott v. Paterson*, *supra*, 122 N. J. L. 81.

In the *Hite* case, a Supreme Court Justice refused to include the cost of certain depositions in the taxed bill of costs, for the reason that he believed he had no statutory authority to tax costs of that nature. On motion to review said order before a branch of the Supreme Court, that Court said that although the power to include the expense of depositions in taxed costs was a discretionary power, and if the Justice had exercised his discretion his decision would have been final, still, as it appeared that the Justice did not treat the matter as discretionary because of an erroneous conception of the law, the Supreme Court would reverse the order.

In the *McDermott* case, *supra*, the Court of first instance refused to reopen the default judgment because it deemed, as a matter of law, that the facts presented by the defendant did not constitute a legal defense to the action. On appeal, the Court of Errors and Appeals remanded the cause to the Circuit, with directions to the Judge to reconsider the defendant's application as based on substantial merit in the defenses proposed.

In both the cited cases, the Appellate Court corrected the erroneous conception of the law entertained by the Court of first instance, and granted relief.

So here, too, since it is not the law that an extension of time will not be granted simply be-

cause the defendant, having a meritorious defense, failed to use reasonable care in filing its Affidavit of Merits within the time limited by Rule 77 of the Supreme Court, and the decision of the Pleas resulted only from the assumption that such was the legal rule, this Court should either grant the relief prayed for originally by the defendant, or remand the case to the Court of first instance for redetermination upon the basis that that Court may, in its discretion, grant relief even where the default occurred through defendant's failure to exercise reasonable care.

### POINT III.

**The Second Count pleads an action in tort, and thus it was error to enter judgment on the Second Count upon the Court's refusal to permit the filing of Affidavit of Merits as within time.**

As mentioned in the Statement of Facts, *supra*, the gravamen of the Second Count of the plaintiff's Complaint is that, requiring only 96 bales of plaintiff's 108 bales of material to manufacture the dish cloths which it made, defendant "converted the balance of the 12 bales of materials to its own use (Case, p. 12, ll. 31-32). It is submitted that the Second Count, therefore, pleads a tort action in trover and conversion.

"Conversion is a tort, a wrongful act, which in the nature of things cannot spring from the exercise of a legal right." 65 Corpus Juris 12.

"An action of trover has always been

classified as an action of tort, and is one form of the action of trespass on the case." 65 Corpus Juris 54.

"Every person is liable in trover, who personally or by agent commits an act of conversion, or who participates by instigating, aiding or assisting another." Reliable Woodworking Co. v. Lindeman, 105 N. J. L. 121."

As the Second Count sounded in tort, plaintiff was not entitled to judgment thereon upon the Court's refusal to permit defendant to file Affidavit of Merits as within time, inasmuch as Supreme Court Rule 77 requires affidavit of merits only in actions upon contract.

The plaintiff urged in the Courts below, and will undoubtedly argue here, that the Second Count does not plead an action in tort, but one in contract. Plaintiff interprets the Second Count as a suit for an indebtedness that plaintiff maintained arose as a result of a breach by the defendant of a contractual liability to account for goods shipped to the defendant by the plaintiff's assignor. He pointed out that the Second Count does not claim damages, but pleads that because defendant allegedly converted goods to its own use, defendant is indebted to plaintiff's assignor for \$1,560.00 (the value of the goods), and demands judgment in that amount and interest (Case, p. 12, l. 34 to p. 13, l. 7). The weakness in plaintiff's position is that the gist of the allegations of the Second Count is conversion, a tort action, to which plaintiff has merely appended a demand similar to that which more properly is found in a contract action. One might as well allege that a defendant injured the plaintiff by negligently operating an automobile and

striking the plaintiff, and then allege that therefore defendant is indebted to plaintiff in a certain sum, for which judgment is demanded.

Plaintiff relies on the theory that where an alleged wrongful conversion of goods occurs, the plaintiff may elect to waive the tort and sue in *quasi* contract for goods sold and delivered on the basis of defendant's unjust enrichment.

See:

*Dallas v. Koehler Sporting Goods Co.*, 86 N. J. L. 651;

*Moore v. Richardson*, 68 N. J. L. 305;

*Scarano v. Scarano*, 132 N. J. Eq. 362 at 368;

*Colton v. Gross*, 3 Misc. Rep. 170 (not officially reported);

*Courter v. Pierson*, 72 N. J. L. 393.

But plaintiff did not frame his Second Count so as to allege a cause of action in contract, as was done by the pleaders in the cited cases upon which he relies. It is submitted that, under the form of the pleading of the Second Count of the Complaint, plaintiff did not allege a waiver of the tort, nor did he sue upon an implied *assumpsit*. Nor does he anywhere in the Complaint allege that defendant agreed to account for or redeliver to plaintiff's assignor any goods which it did not use in the performance of its manufacturing contract with plaintiff's assignor. Furthermore, the Count alleged only that the 12 bales of material were not accounted for "in work performed under the agreement," but fails to allege that the goods were not otherwise accounted for, or that they were not delivered to plaintiff's assignor, after demand. If the pleading had contained allegations such as the fore-

going, it would have stated an action on contract; but such essential elements cannot be read into the Complaint by construction in order to change the gist of the action from tort to contract.

### Conclusion.

It is respectfully submitted that the defendant's procedure to obtain relief against its default was correct; but if incorrect, it would be unjust to deprive it of its day in court for that reason, where the plaintiff did not object to the procedure until it was too late to remedy the defect.

It is further respectfully submitted that the judgment appealed from should be reversed, and the record remitted, and the Common Pleas Court be directed either to reopen the judgment and permit the filing of Affidavit of Merits and Answer, or to issue a rule to show cause for such purpose, with leave to take depositions thereunder, to the end that defendant be given an opportunity to obtain a trial on the merits of the case.

Respectfully submitted,

LICHTENSTEIN & ENGEL,  
*Attorneys for and of Counsel with  
Defendant-Appellant.*

JULIUS LICHTENSTEIN,  
*Of Counsel.*

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This cause will be orally argued by  
MR. HOWARD ENGEL.



**New Jersey Court of Errors and Appeals**

JOSEPH ORIFICE, Assignee of Ed-  
mund Baum and Myron Baum,  
trading as Pennsylvania Textile  
Co.,

*Plaintiff-Respondent,*

vs.

AYVAD WATER-WINGS, INC., a cor-  
poration of New Jersey,

*Defendant-Appellant.*

Action at Law.  
On Appeal  
from  
New Jersey  
Supreme  
Court.

**BRIEF OF PLAINTIFF-RESPONDENT.**

**Introductory.**

This is an appeal from a judgment of the Supreme Court, affirming on appeal, a judgment regularly entered in the Hudson County Court of Common Pleas following an order of said Court denying an application of the defendant-appellant for an extension of time within which to file an Affidavit of Merits and Answer.

In its appeal to the Supreme Court, the defendant-appellant contended that the refusal by the Court of Common Pleas to grant the extension of time constituted an abuse of discretion, for which it asked the Supreme Court to set aside the judgment of the Court of Common Pleas. Said appeal was submitted to the Supreme Court on briefs and oral argument at the opening of the October Term, October 2, 1945. On October 4th, 1945, the Supreme Court in a Per Curiam

opinion (State of Case, pp. 32-33) affirmed the judgment of the Court of Common Pleas.

Defendant-appellant now contends that this affirmance was erroneous and unjust. Plaintiff-respondent urges that the Supreme Court properly determined that the defendant-appellant failed to establish any proofs on its application to the Trial Court that would entitle defendant-appellant to a reversal of the judgment of the Court of Common Pleas. Plaintiff-respondent submits that the judgment of the Supreme Court was in all respects proper and should be affirmed with costs.

### **Argument.**

In the appeal proceedings before the Supreme Court the plaintiff-respondent contended that:

#### **POINT I.**

**An application for leave to file an Affidavit of Merits and an extension of time to plead after defendant's default is addressed to the sound discretion of the Court and an appeal from a judgment entered thereon will not lie to review such determination by the Trial Court.**

#### **POINT II.**

**The defendant failed to produce any evidence before the court below upon its application to reopen the default judgment from which the Court could have determined either the reason for defendant's default or that defendant had a just and meritorious defense.**

All of the arguments now being made by the defendant-appellant, in its brief in this Court, were urged before the Supreme Court. The learned Justices, after carefully considering these arguments, both orally and upon the briefs, determined on the First Point (Case, p. 33, ll. 8-13) that:

“There was no abuse of discretion by Judge Ziegner who heard the motion. There is nothing in the record upon which the court could have abused its discretion, it was never called upon to exercise it. There was no testimony or proof upon which the court could have made a determination in favor of the defendant. Neither was there any proof by which the defendant explained its failure to file an Affidavit of Merits, that it had been surprised or that it had a meritorious defense.”

On the Second Point (Case, p. 33, ll. 19-29), the Supreme Court held that:

“The defendant elected at the hearing before the Court below to rely on oral argument and an ex parte affidavit which could not properly be used. *Peer v. Bloxham*, 82 N. J. L. 288; *Goldstein vs. Weir*, 124 N. J. L. 327. Proper practice dictated that the defendant obtain a rule to show cause why the judgment should not be opened and an opportunity given to file an affidavit of merits and answer. Depositions should then have been taken for use on the argument of the rule.”

The defendant, by his appeal, is endeavoring to have this Court substitute its discretion for that of the Trial Court. Our Courts have decided on countless occasions that applications to reopen defaults are matters which rest in the sound discretion of the Court in which the judgment was entered, and that their determination cannot be reviewed on appeal.

In the case of *Smith vs. Livesey*, Court of Errors and Appeals (1902), 67 N. J. L. 269, Justice Dixon stated:

“By the common law an application to open a judgment regularly entered was addressed wholly to the discretion of the court in which the judgment was rendered, to be there decided as justice and equity should require (Chit. Archb. 883; Reynolds v. Silvers, 18 N. J. Law, 238); and consequently a writ of error would not lie to review the determination of that court.”

The Court further held that the supplement to the practice act, approved March 28, 1895, is incapable of impairing the discretionary nature of the power, so as to make a refusal to open the judgment subject to review on error.

*Benedetto v. Fleckenstein*, Supreme Court (1930), 8 N. J. Misc. 590, affirmed, Court of Errors and Appeals, 108 N. J. L. 184.

*Assets Development Co. vs. Wall*, Court of Errors and Appeals (1922), 97 N. J. L. 468, Gummere, J., in which the Court discussing the question as to reopening a default judgment, said:

“It is equally well settled that by the common law an application to open a judgment regularly entered is addressed wholly to the discretion of the court in which it was rendered, and that consequently a writ of error (an appeal under our present practice) will not lie to review the determination of that court. *Smith v. Livesey*, 67 N. J. L. 269.”

*Jarret v. Diesel Engine Co.*, 124 N. J. L. 429.

See also cases of

*Limpert Bros., Inc. v. Manufacturers' Liability Ins. Co.*, Supreme Court (1927), P. C., 137 A. 712 (not officially reported);

*Barenson v. Zaritsky*, Supreme Court (1933), 167 A. 671 (not officially reported).

Our Courts have on innumerable occasions indicated both the character of proof required and the method by which such proof may be presented, in order to reopen a default judgment.

In the oft cited Supreme Court case of *Peer v. Bloxham*, 82 N. J. Law 288, Justice Parker in discussing the use of ex parte affidavits upon hearings of applications for new trial or reopening default judgments, stated:

“The meritorious question involved in this application relates to the respective priorities of execution creditors as against a fund of money in court, realized by sale under one or more of the executions. But as a matter

of practice we cannot examine into or decide this question for the reason that no evidence appears to have been taken under the rule to show cause from which the rights of the respective creditors to the fund or their priorities can be determined. The plaintiff claiming the prior right to the fund, relies entirely on the affidavit upon which the rule to show cause was allowed, and no depositions have been taken thereunder in support of the rule.

“The present application is typical of numbers of similar ones that are constantly presented, and the frequency of such applications justifies a reiteration of the well established rule that affidavits on which a rule to show cause is founded, lose their efficacy as proof as soon as such rule to show cause is made, and that after this, ex parte affidavits, whether made before or after the granting of the rule, are not competent to prove the facts necessary to support a motion not of course, or to be read on the hearing of a rule to show cause, depending on facts extrinsic to the record. Such facts can be brought before the court only by depositions taken on notice.”

The Court of Errors and Appeals has held that ex parte affidavits are wholly insufficient to support an application made by a defendant to reopen a default judgment. See *Atlantic Casualty Ins. Co. v. Warnock Bros.*, 121 N. J. L. 71. The Court in that case stated:

“If we examine the record we find nothing but the affidavits of the attorneys for the defendant in support of the rule for a new trial, and ex parte affidavits are wholly insufficient for such purpose.”

In the recent case of *Kantor v. City of Perth Amboy*, 122 N. J. L. 588, Justice Parker, speaking for the Supreme Court, stated:

“No rule of practice is better settled than the rule that where a rule to show cause is made based on an affidavit containing statements of fact, the evidential force of the affidavit expires with the making of the rule to show cause, and that the facts alleged in the original affidavit can be brought before the court only by depositions taken on notice; or, perhaps, by stipulation. *Peer v. Bloxham*, 82 N. J. L. 288, 81 A. 659; and cases cited, to which may be added *Morris v. Quick*, 45 N. J. L. 308; *Atkinson v. Prine*, 46 N. J. L. 28, at page 33; *Shaddock v. Marsh*, 21 N. J. L. 434; and *Klein v. Adams Express Company*, 61 N. J. L. 530, 40 A. 445.”

This doctrine was again expounded by the Court in the case of *Goldstein v. Weir*, 124 N. J. L. 327, Supreme Court, 1940, in which the late Justice Trenchard, speaking for the Court, stated:

“While the ex parte affidavits of a party may be the foundation of a rule to show cause, yet they are not competent for the purpose of proving facts necessary to sustain the rule. In all cases where the testimony of a party can be received for such purposes it must be by depositions upon notice. *Galbraith v. Cooper*, 24 N. J. L. 219.

“Now the only proofs submitted in support of the rule are ex parte affidavits, and as we have pointed out it is fundamental

that they cannot be used in support of the rule upon the hearing in this court, as they may possibly be in the Court of Chancery. Peer v. Bloxham, 82 N. J. L. 288, 81 A. 659; Baldwin v. Flagg, 43 N. J. L. 495; Klein v. Adams Express Co., 61 N. J. L. 530, 40 A. 445. The amended rule to show cause provides in part that either party have leave to take depositions upon notice. But no such depositions were ever taken, and to attempt to proceed on ex parte affidavits only, would not only be in violation of the established practice of this court but would deprive parties of the opportunity of cross examination.

“The result is that there was no proof or evidence before this court which could be properly used in a determination of this controversy upon its merits, and the rule and proceedings in question must be dismissed, but without cost; and such will be the order.”

An examination of the record in the instant case discloses an analogous situation. Instead of obtaining a rule to show cause why the default should not be reopened, the attorney for the defendant served a Notice of Motion that he was applying to the Court to reopen the default. Upon the return date of this motion, the attorney for the defendant produced no evidence to support its application, but relied solely on oral argument and an ex parte affidavit, the force of which had already spent itself and lost its efficacy. The result was that there was nothing from which the Court could determine that the defendant was surprised or had a just and meritorious defense.

Before the defendant could expect the Court to exercise its discretion in its favor and reopen the default, the defendant knew that it must produce proof in the form of testimony or other competent evidence showing that it was in fact surprised and that it had a just and meritorious defense. (See Defendant's Brief, page 10, first paragraph.)

*Koenigsberger v. Mial*, Court of Errors and Appeals (1917), 90 N. J. L. 695;

*Schwenk v. De Maio*, 79 N. J. L. 189;

*J. Lavino v. Natl. Surety Co.*, 104 N. J. L. 475;

*Busching v. Vandenberg*, 152 A. 705 (not officially reported in State Reports);

*McCarthy v. Guire*, 187 Atl. 739 (not officially reported).

No proof having been submitted, the Court in accordance with the accepted practice and decisions of our Courts as set out in the cases of *Peer v. Bloxham*, *supra*, and *Atlantic Casualty Ins. Co. v. Warnock Bros.*, *supra*, and the other cases cited, the Court below was left with no alternative but to dismiss the defendant's application.

Notwithstanding the defendant's failure to produce any legal proof before it, the Trial Court very generously took into consideration the oral arguments of defendant's counsel, and the ex parte affidavit of its officer, and after considering the same and the explanation attempted to be made concerning the conduct of the defendant which resulted in its failure to file an Affidavit of Merits, determined that defendant's conduct was clear neglect on its part (State of Case, p. 21, l. 12).

In its brief defendant also urges under Point III, that the complaint in the Court below set forth an action in tort, to wit: an action in conversion; and for that reason, an Affidavit of Merits would not be required.

This argument was likewise unsuccessfully raised in the Supreme Court. In its opinion the Supreme Court dismissed this argument without comment.

This Court has consistently upheld the principle urged by the plaintiff in the Court below, that in an action for trover and conversion, plaintiff may waive the tort and sue in contract.

*Moore v. Richardson*, 68 N. J. L. 305;

*Dallas v. H. J. Koehler Sporting Goods Co.*, 86 N. J. L. 651.

Also see Supreme Court decisions in cases of:

*Hirsch, et als. v. Leatherbee Lumber Co.*,  
69 N. J. L. 509;

*Courter v. Pierson*, 72 N. J. L. 393.

The cases cited make it clear that plaintiff in an action for trover and conversion may waive the tort and sue in contract, in which case the measure of damages is the value of the property at the time of conversion.

The defendant, in fact, recognized that he was being sued upon a contract and not in tort, otherwise its answer would have been filed.

A careful reading of the Second Count can lead one to no other conclusion, but that it is an allegation founded upon debt resulting from the contractual relationship between the parties, and a claim for the indebtedness that plaintiff maintained arose as a result of a breach by the de-

fendant and a failure of the defendant to account for the goods shipped to it by the plaintiff's assignor.

### Conclusion.

In view of these well established principles it is respectfully submitted that the Supreme Court properly affirmed the Judgment of the Court of Common Pleas.

It is, therefore, respectfully urged that the defendant's appeal be dismissed and that the Judgment of the New Jersey Supreme Court be affirmed with costs.

Respectfully submitted,

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\* This State of Case is printed in two (2) volumes—a complete Index in each volume.

