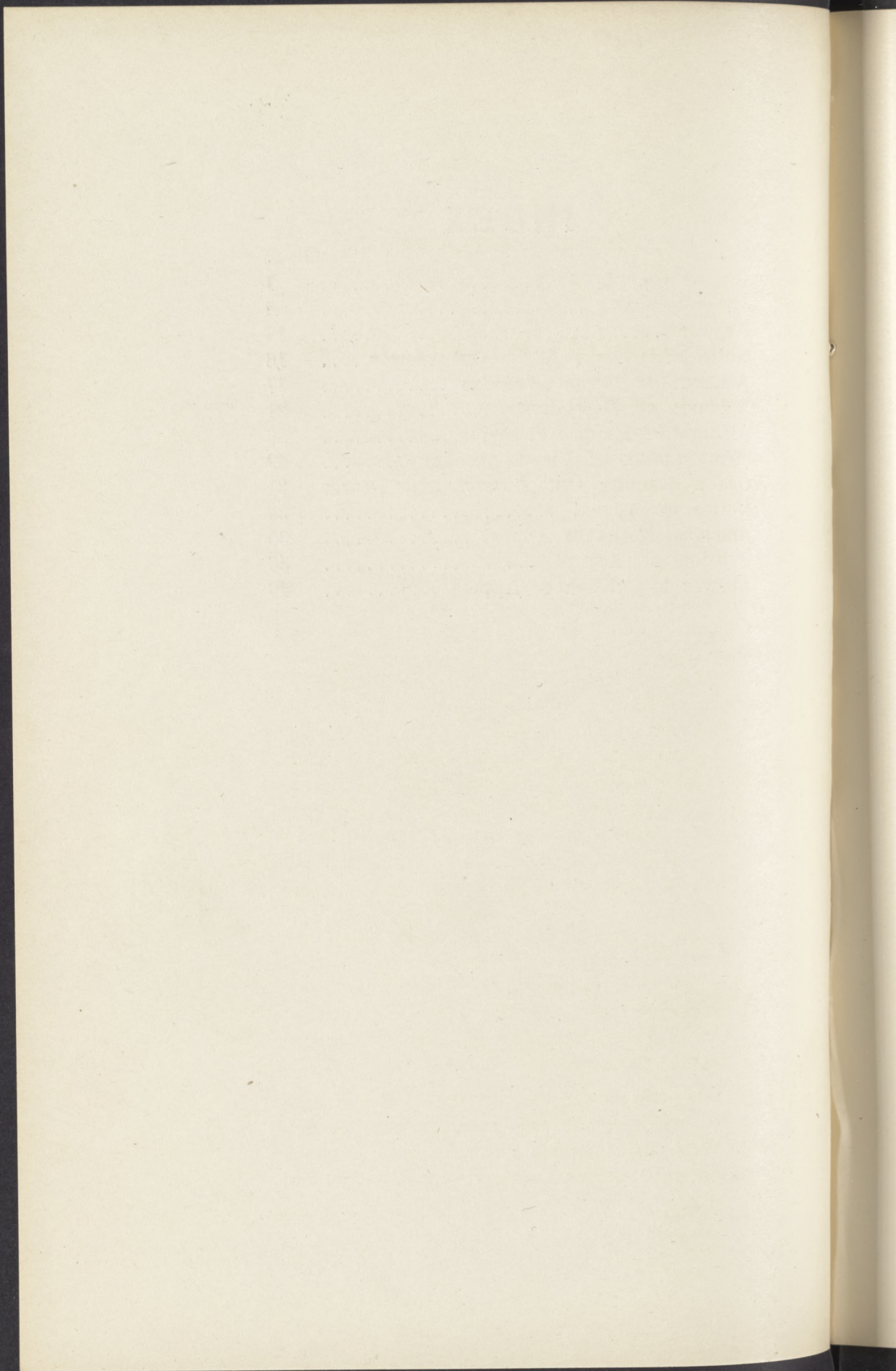


INDEX

	PAGE
Bill of Complaint	1
Agreement	5
Answer	12
Notice of Motion to Strike Out Answer	16
Affidavit of Joseph Bancone	17
Affidavit of Defendants	21
Affidavit of Thomas F. Cogan	26
Memorandum of Vice-Chancellor	29
Order Striking Out Answer and Decree	31
Notice of Appeal	33
Amended Notice of Appeal	35
Petition of Appeal	36
Answer to Petition of Appeal	40



BILL OF COMPLAINT.

Filed July 5, 1929.

In Chancery of New Jersey

To his Honor Edwin Robert Walker, Chancellor 10
of the State of New Jersey:

The complainants, Joseph Bancone and Carmela Bancone, his wife, of the City of Newark, County of Essex and State of New Jersey, respectfully show that:

1. On October 25th, A. D. 1926, complainants were seized in fee simple of all that certain tract or parcel of land and premises situate, lying and being in the City of Newark, County of Essex and State of New Jersey, and particularly described as follows: 20

BEGINNING on the Easterly line of Roseville Avenue at a point therein distant Two Hundred Five feet Northerly from the corner formed by the intersection of the Easterly line of Roseville Avenue with the Northerly line of First Avenue; thence running Easterly at right angles to Roseville Avenue One Hundred Thirty feet; thence Northerly parallel with Roseville Avenue Thirty-five feet; thence Westerly parallel with the first course One Hundred Thirty feet to the Easterly line of Roseville Avenue aforesaid; thence Southerly along the same Thirty-five feet to the point and place of BEGINNING. 30

2. On said last-mentioned date complainants entered into a certain agreement, in writing, with John Pinto and Carmela Pinto, his wife, whereby complainants agreed to convey said lands and 40

Bill of Complaint.

premises by deed of warranty, free and clear of all encumbrances, except as therein stated, on or before December 1, 1926, to the said John Pinto and Carmela Pinto, his wife, in consideration of the payment of \$16,500.00 by the said John Pinto and Carmela Pinto, his wife, who
10 agreed to pay said purchase price of \$16,500.00 by the payment of \$1,000 at or before the execution of said agreement and the payment of the balance of the purchase price in the following manner: The sum of \$1,000.00, in cash, on delivery of deed, the sum of \$10,000.00 by taking the premises subject to and assuming the payment of an existing mortgage of \$10,000.00; said mortgage containing a clause that \$250.00 of the principal thereof to be payable every six months,
20 and the balance of \$4,500.00 by the said John Pinto and Carmela Pinto, his wife, executing to complainants their bond for said sum secured by purchase money mortgage on said lands and premises, payable in ten years with interest at 6% per annum, payable semi-annually; the said deed to be delivered at the office of Rosinger, Mayer & Albano, 31 Clinton Street, Newark, N. J., on said date of closing title; a true copy of said agreement is hereto annexed and made
30 part hereof.

3. The said John Pinto and Carmela Pinto, his wife, paid to complainants the said sum of \$1,000 at the time of the execution and delivery of said agreement in writing.

4. On or about December 1, 1926, the said John Pinto and Carmela Pinto, his wife, paid to complainants the additional sum of \$1,000 on account of the purchase price mentioned in said contract and took possession of the premises with
40 the consent of complainants, and have been in

Bill of Complaint.

possession of said premises and have been collecting the rents, issues and profits thereof ever since said date and are still to the date hereof in possession thereof and collecting the rents, issues and profits of said premises.

5. At the time of the taking of possession by said John Pinto and Carmela Pinto it was arranged between complainants and said John Pinto and Carmela Pinto that title to said premises would be closed on or about January 2, 1927, and John Pinto and Carmela Pinto promised and agreed to accept delivery of title on said date and execute and deliver to complainants their purchase money bond and mortgage in the sum of \$4,500.00 in accordance with the terms of said contract. 10

6. Although said John Pinto and Carmela Pinto have been in possession of said premises since December 1, 1927, they have failed and refused to pay the taxes against said premises, the interest and installments of principal on the mortgage of \$10,000 specified in said contract of sale and other carrying charges during the term of their possession, and complainants have been compelled to pay said taxes for the years 1927 and 1928 and the interest and installments of principal on the mortgage of \$10,000 aforesaid. 20 30

7. On many occasions the complainants have requested said John Pinto and Carmela Pinto to accept title to said premises and execute the purchase money bond and mortgage for the balance of the purchase price aforesaid and to pay to complainants the moneys that complainants were compelled to advance for taxes, interest and installments of principal aforesaid but said John Pinto and Carmela Pinto have refused and failed 40

Bill of Complaint.

to do either of said acts and comply with any of said requests.

8. Complainants have always been ready and willing and now tender themselves ready and willing to perform their part of said agreement and to deliver to said John Pinto and Carmela Pinto a deed of warranty, duly executed conveying said premises to the said John Pinto and Carmela Pinto.

Complainants are without adequate remedy in the courts of law and therefore pray:

1. That John Pinto and Carmela Pinto who are the defendants to this suit may answer this bill of complaint and each statement herein made.

20 2. That said John Pinto and Carmela Pinto may be compelled by the decree of this court specifically to perform the terms of said agreement with complainants and to execute and deliver to complainants the purchase money bond and mortgage provided for in said agreement and to pay to complainants the moneys advanced by complainants for taxes, interest and installments of principal on behalf of said defendants, as aforesaid.

30 3. That in case the said defendants, John Pinto and Carmela Pinto should, within the time limited by this court for such performance of said contract, fail and neglect, upon the tender of said deed, to pay the said remainder of said purchase money as aforesaid, that then and in that event the said sum, together with interest and costs, may be and become a lien upon the said lands and premises in favor of the complainants, and that the said lands and premises may be sold under the direction of this court for the

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Bill of Complaint—Agreement.

satisfaction of such lien so impressed on said lands and premises; and in case a deficiency should arise upon said sale, that the said defendants may be ordered by this court to pay said deficiency, together with interest and costs to these complainants.

4. That a receiver may be appointed to collect the rents, issues and profits of said premises and that said receiver shall have all power that may be proper and necessary for said purpose and that said defendants, John Pinto and Carmela Pinto, may be enjoined from collecting any and all of the rents, issues and profits, of said premises until the further order of this court. 10

5. That a writ of subpoena may issue commanding said defendants to answer this bill of complaint and to abide by such decree as this court may make in the premises. 20

F. D. MASUCCI,
Solicitor for and of Counsel
with Complainants.

(Copy of the agreement not filed with the complaint.)

ARTICLES OF AGREEMENT, made the Twenty-fifth day of October in the year of Our Lord One Thousand Nine Hundred and Twenty-six BETWEEN Joseph Bancone and Carmela Bancone, his wife, of the City of Newark in the County of Essex and State of New Jersey, party of the first part; AND John Pinto and Carmela Pinto, his wife, of the City of Newark in the County of Essex and State of New Jersey, party of the second part; 30

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Bill of Complaint—Agreement.

WITNESSETH, That the said party of the first part, for and in consideration of the sum of sixteen thousand five hundred dollars (\$16,500.00) to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned,
 10 made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that they the said party of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns, by deed of warranty free from all encumbrance except as hereinafter stated, on or before the first day of December next ensuing the date hereof, all that lot, tract, or parcel, of land and premises, hereinafter particularly described situate, lying and being in
 20 the City of Newark in the County of Essex and State of New Jersey;

Being a plot of ground thirty-five feet wide by one hundred thirty feet in depth, located on the Easterly side of Roseville avenue, and known as No. 537 Roseville avenue in said City of Newark, and having thereon a two-family frame dwelling house and garage.

AND the said party of the second part, for himself, their heirs, executors and administrators,
 30 doth covenant, promise and agree to and with the said party of the first part, their heirs, executors, administrators and assigns, that he, the said party of the second part, will pay and satisfy, or cause to be paid and satisfied, unto the said party of the first part, the said sum of sixteen thousand five hundred dollars (\$16,500.00) as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:
 40

Bill of Complaint—Agreement.

On execution of this agreement for which this is also a receipt.....	\$ 1,000.00	
On delivery of deed, cash.....	\$ 1,000.00	
By assuming the mortgage at present a lien on the premises, and paying the same according to the terms thereof	\$10,000.00	10
(and contains a clause that two hundred fifty dollars (\$250.00) of the principal thereof shall be paid every six months).		
On bond and mortgage, same containing usual interest, tax, assessment, insurance and installment default clauses, and an agreement not to claim credit on the interest payable on bond and mortgage, by reason of any tax assessed, or to be assessed against the premises, with interest at 6% payable semi-annually for ten years.....	\$ 4,500.00	20
(said mortgage also to contain a clause that should default be made in the payment of interest or installments due on the first mortgage of ten thousand dollars (\$10,000.00) above mentioned for the space of thirty days, that the said mortgage and bond accompanying same shall become immediately due and payable at the option of the parties of the first part).		30
The conveyance shall also be subject to existing restrictions of record.		
In consideration of these presents it is further agreed that the parties of the first part shall furnish shades for the windows and gas ranges and extra toilet in cellar, the same as are installed in premises known as 533 Roseville ave-		40

Bill of Complaint—Agreement.

nue, Newark, New Jersey. When completed the same should be a duplicate of all work and material of No. 531 Roseville avenue.

10 It is further understood and agreed that taxes, insurance premiums, interest on mortgages and water rents shall be apportioned only to November 1st, and that thereafter the party of the second part shall assume same and shall pay interest on the unpaid balance of this contract at the rate of six per cent. per annum.

The above applies to all the outside work of No. 531 Roseville avenue as to concrete work and all the rest to be according to No. 533 Roseville avenue.

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

And the said party of the first part hereby agrees to pay to a commission of % on the purchase price aforesaid, said commission to be paid in consideration of services rendered in consummating this sale; said commission to become due and payable upon the execution of

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

40 AND IT IS FURTHER AGREED, by the parties hereto, that the said deed shall be delivered and received at the offices of Rosinger, Mayer & Albano, 31 Clinton street, Newark, New Jersey, between the hours of ten in the forenoon and

Bill of Complaint—Agreement.

four o'clock in the afternoon on the said first day of December, next ensuing the date hereof.

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

Gas and electric fixtures, gas stoves, hot water heaters and chandeliers, carpets, linoleum, mats and matting in halls, screens, shades, awnings, ash cans, heating apparatus, if any and all other personal property appurtenant to or used in the operation of said premises is represented to be owned by seller and is included in this sale, 10

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

In case the premises shall suffer injury beyond the ordinary wear and tear, the party of the first part, shall repair the damage before the date set for delivery of said deed or make an appropriate deduction from the purchase price herein stated. 20

It is understood and agreed that the buildings upon said premises are all within the boundary lines of the property as described in the deed therefor, and that there are no encroachments thereon and that the buildings comply with municipal ordinances and regulations and the provisions of the New Jersey State Tenement House Act as enforced by the State Board of Tenement House Supervision, to be shown by the report of the department or board enforcing the same where such ordinances, regulations and said act apply. 30

It is expressly understood and agreed that the title to the land and premises hereby agreed to be conveyed is not derived from any Martin Act proceedings or any Act for the Sale of Land 40

Bill of Complaint—Agreement.

for non-payment of the municipal taxes or assessments, or adverse or color of title possession.

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

10 If at the time for the delivery of the deeds, the premises or any part thereof shall be or shall have been affected by an assessment or assessments which are or may become payable in annual installments of which the first installment is then due or has been paid, then for the purposes of this contract all the unpaid installments of any such assessment, including those which are to become due and payable after the delivery of the deed, shall be deemed to be due and payable and to be liens upon the premises affected thereby and shall be paid and discharged
20 by the seller thereof, upon the delivery of the deed.

AND for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators; and they hereby agree to pay, upon failure to perform the same, the sum of which they hereby fix and settle as liquidated damages therefor.

30 IN WITNESS WHEREOF, the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

JOSEPH BANCONE, (Seal)
CARMELA BANCONE, (Seal)
JOHN PINTO, (Seal)
CARMELA PINTO. (Seal)

Signed, Sealed and Delivered
in the presence of

40 VINCENT ALBANO.

ANSWER.

Filed August 2, 1929.

IN CHANCERY OF NEW JERSEY.

10	73-604	}	<i>On Bill, &c.</i> <i>Answer.</i>
	<i>Between</i>		
	JOSEPH BANCONE and CARMELA BANCONE,		
	<i>Complainants,</i>		
	<i>and</i>		
	JOHN PINTO and CARMELA PINTO,		
20			
	<i>Defendants.</i>		

The answer of the defendants, John Pinto and Carmela Pinto, his wife.

These defendants, John Pinto and Carmela Pinto, his wife, answering the bill of complaint, say that:

1. These defendants have no knowledge or information sufficient to form a belief as to the statements in paragraph 1, and leave the complainants to their proof as to such statements.

2. As to the allegations in paragraph 2 of said complaint, defendants admit that they executed a contract in writing with the complainants for the purchase of "all that lot, tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Newark, in the County of Essex and State of New Jersey.

Answer.

Being a plot of ground thirty-five feet wide by one hundred thirty feet in depth, located on the easterly side of Roseville avenue, and known as No. 537 Roseville avenue, in said City of Newark, and having thereon a two-family frame dwelling house and garage, "but defendants have no knowledge or information sufficient to form a belief as to whether the lands described in said contract are the same lands mentioned and described in complainants' bill." 10

Defendants further answering the statements contained in paragraph 2 of the complaint, admit that they entered into an agreement to purchase certain lands on or before December 1, 1926, and agreed to pay therefor the sum of sixteen thousand five hundred dollars (\$16,500.00), the said payments to be made as specified in paragraph 2 of the complaint, but defendants further say that according to the terms of said agreement, the complainants were obliged to complete the outside work of the building contracted for as a duplicate of the outside work of the building known as No. 531 Roseville avenue, Newark, New Jersey, and should complete the inside work of the building contracted for as a duplicate of the inside work of the building known as No. 533 Roseville avenue, Newark, New Jersey. Complainants failed and neglected to complete said outside work in accordance with the outside work of premises known as No. 531 Roseville avenue, Newark, New Jersey, and the inside and other work in accordance with the work at No. 533 Roseville avenue, Newark, New Jersey. 20 30

3. Defendants admit the statements contained in paragraph 3 of the complaint.

4. Defendants admit the statements contained in paragraph 4 of the complaint as to the pay- 40

Answer.

ment of said additional sum of one thousand dollars, and admit that they are now in occupation of said premises, but deny that they are collecting any rents therefrom, and especially charge that said complainants have directed the former occupant of said premises to cease the
10 payment of any rent to these defendants.

5. As to the statements in paragraph 5 of the complaint, these defendants admit that they agreed to execute and deliver a bond and mortgage of forty-five hundred dollars, in accordance with the terms of the contract with the said complainants, but said bond and mortgage was to be executed and delivered upon the completion of all the work in accordance with the terms of the contract, which said work was never completed, and still remains incomplete.
20

6. Defendants deny the statements contained in paragraph 6 of the complaint.

7. As to the statements in paragraph 7 of the complaint, defendants deny that the complainants requested them to accept title to said premises and execute said purchase money bond and mortgage, and to pay complainants the moneys complainants allege in their said complaint they have paid for taxes, interest, installments of principal on said first mortgage, but on the contrary, defendants allege that they have frequently requested the said complainants to complete said building in accordance with the terms of said contract, all of which complainants failed and neglected so to do.
30

8. Defendants deny the allegations contained in paragraph 8 of said complaint.

Answer.

FIRST SEPARATE DEFENSE.

As a further defense to the bill of complaint, these defendants say:

1. That the complainants herein, did not perform all the terms, covenants and conditions of the agreement so made by them with these defendants, but on the contrary breached the said contract. 10

SECOND SEPARATE DEFENSE.

The said complainants are guilty of laches.

Defendants pray that the bill of complaint be dismissed and that they be allowed their reasonable costs.

FREDERIC H. PILCH, 20
Solicitor of Defendants.

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**NOTICE OF MOTION TO STRIKE OUT AND
AFFIDAVIT.**

~~Not~~ Filed, March 7, 1930.

IN CHANCERY OF NEW JERSEY.

10

Between

JOSEPH BANCONE and CARMELA
BANCONE,

Complainants,

and

JOHN PINTO and CARMELA
PINTO,

Defendants.

*On Bill, &c.
Notice of
Motion to
Strike Out.*

20

*To Joseph B. Gallagher, Esq., solicitor of de-
fendants.*

DEAR SIR:

30

TAKE NOTICE that on Tuesday, September 3rd, next, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, at Chancery Chambers, 1060 Broad street, Newark, New Jersey, I shall apply to the Chancellor for an order striking out the answer filed by defendants in the above-entitled cause for the reason that said answer is sham and frivolous and intended to embarrass and delay the complainant and in support thereof I will use the original of the affidavit copy of which is annexed hereto.

Dated, August 12, A. D. 1929.

Yours respectfully,

F. D. MASUCCI,
Solicitor of Complainants.

40

Affidavit of Joseph Bancone.

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

JOSEPH BANCONE, being duly sworn according to law, upon his oath deposes and says:

1. I am one of the complainants mentioned in the above-entitled cause of action. 10

2. On October 25, A. D. 1926, Carmela Bancone, my wife, and I entered into a written contract with the defendants, John Pinto and Carmela Pinto, for the sale of premises mentioned and described in paragraph one of the bill of complaint whereby said Carmela Bancone and I agreed to sell and convey to defendants said premises by deed of warranty, free and clear of all encumbrances except as therein stated, on or before December 1, 1926, for the sum of \$16,500 to be paid by the said defendants in the following manner: \$1,000 in cash on delivery of deed, \$10,000 by taking the premises subject to and assuming the payment of an existing mortgage of \$10,000 subject to its terms, and the balance of \$4,500 by said defendants executing their bond for said sum, secured by purchase money mortgage, on said lands and premises, payable in ten years with interest at six per cent. payable semi-annually. 20 30

3. On the signing and execution of said contract of sale the said defendants paid to complainants the sum of \$1,000 pursuant to the terms thereof.

4. On October 25, A. D. 1926, the time of the signing of said contract of sale the building on said premises was substantially completed. There remained to be furnished shades for the windows, gas ranges and to be built extra toilet in the cellar and the panel work in both 40

Affidavit of Joseph Bancone.

of the dining rooms and both of the parlors to be done and the concrete sidewalk in front of said premises and the brick stoop to be built. Shortly after the signing, execution and delivery of said contract, I caused the shades to be furnished for all the windows in said building and
10 caused ranges for each flat and had the extra toilet built in the cellar and the panel work done in both of the dining rooms and parlors all in accordance and similar to premises 531 Roseville avenue, Newark, N. J. The only exterior work to be done being the building of the concrete sidewalk and the stoop leading to the front entrance, the same was done within a week from the date of said contract and done similar to and in accordance to the stoop and sidewalk of
20 premises No. 533 Roseville avenue, Newark, N. J.

5. While in the course of doing said work both on the interior and exterior as above stated, both the defendants, John Pinto and Carmela Pinto, would frequently call and see the work as it progressed and express satisfaction to me and after the same was completed they examined the interior and exterior of said building and expressed satisfaction as to the quality of material and workmanship and expressed satisfaction
30 as to the general appearance of said building.

6. Thereafter and on or about December 1, 1926, the defendants, John Pinto and Carmela Pinto, paid to me the additional sum of \$1,000 on account of the purchase price of said contract and entered into possession of said premises and have ever since been in possession of said premises collecting the rents, issues and profits thereof to the date hereof and continue to be in possession thereof until the date hereof without any
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Affidavit of Joseph Bancone.

complaint as to the quality of the material or workmanship of said building.

7. Since said defendants have taken possession of said premises, they have only paid the 1927 taxes and have failed to pay the taxes for the year 1928 or any part of the taxes for the year 1929 against said premises. Since said defendants have been in possession of said premises and on or about May 1, 1927, an installment of principal of \$250 became due and payable on the first mortgage of \$10,000 aforesaid, and the said defendants failed and refused to pay the same and I was compelled to pay said sum of \$250.00 on account of said principal. On August 1, 1928, six months interest became due and payable on said mortgage covering said premises and on February 1, 1929, six months' interest again became due and payable on said mortgage, both of which instalments of interest were unpaid by the said defendants and I was compelled to pay the same to the holder of said \$10,000 mortgage. No interest whatsoever has been paid to me on account of the balance of said purchase price.

8. After said defendants took possession of said premises they kept on putting off the closing of title from time to time, once with one excuse that the son was away afterwards, other flimsy excuses until the matter dragged on for several years and then I insisted that title should be closed but said defendants have refused and still refuse to close title to said premises.

9. My wife and I have always been ready, willing and able to convey said title to said defendants and receive the purchase money mortgage in accordance with the terms of the con-

Affidavit of Joseph Bancone.

tract of sale above-referred to and we are now ready, to convey said premises to the said defendants and receive the purchase money mortgage in accordance with the terms of said contract.

10

JOSEPH BANCONE.

Sworn and subscribed to before
me this 8th day of August,
A. D. 1929.

DANIEL EBER,
A Notary Public of New Jersey.

20

Service of the within notice is hereby acknowledged this 12th day of August, A. D. 1929.

F. R. & F. H. PILCH,
Solicitors of Defendants.

30

40

AFFIDAVIT OF DEFENDANTS.

Filed September 12, 1929.

IN CHANCERY OF NEW JERSEY.

*Between*JOSEPH BANCONE and CARMELA
BANCONE,*Complainants,**and*JOHN PINTO and CARMELA
PINTO,*Defendants.*

10

*On Bill, &c.**Affidavit of
Defendants.*STATE OF NEW JERSEY, }
COUNTY OF ESSEX. }ss.

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JOHN PINTO and CARMELA PINTO, being each severally duly sworn according to law, upon their respective oaths depose and say:

1. We are the defendants in the above-entitled cause.

2. It is true that on October 25, 1926, we entered into a written contract for the purchase of premises as set forth in the answer filed in the above-entitled matter, whereby we agreed to buy, free and clear from encumbrances, except as therein stated, the premises described in said contract for the sum of \$16,500.00, which we agreed to pay in the following manner: \$1,000.00 in cash on signing of the contract; \$1,000.00 in cash on delivery of deed; \$10,000.00 by taking the premises subject to and assuming the payment of an existing mortgage of \$10,000.00, subject to its terms, and the balance of \$4,500.00 by executing

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Affidavit of Defendants.

a purchase money bond and mortgage to the complainants upon said lands and premises, payable in ten years, with interest at six per cent. per annum, payable semi-annually.

10 3. It is true that on the signing and execution of said contract of sale we paid to complainants the sum of \$1,000.00.

20 4. It is not true that on October 25, 1926, and at the time of signing the contract of sale, the building on said premises was substantially completed. The heating and plumbing systems were not completed, the bathrooms were not finished, the electric lighting system was not installed, the floors were just being installed, the stairs were not completed, the panel work in the dining rooms and living rooms had not been started; no painting work or varnishing work of any kind had been started; of course there were no shades, and no gas ranges. No toilet had been installed in the cellar, nor had any toilets been installed in the upper floors. The brick stoop and the concrete sidewalk had not been started.

30 The toilet in the cellar was not installed until long after the 1st of December, 1926; the shades were not installed until January, 1927; the electric system was not completed until after the 20th of December, 1926, and as installed, the electric lighting system was not as called for in the contract of sale.

The heating system was never installed in accordance with the agreement, and is still defective.

40 5. We both unqualifiedly deny the statement in paragraph 5 of the complainants' affidavit, and state that we frequently, in the course of the

Affidavit of Defendants.

work of the building, did call to complainants' attention the fact that the work was not being done in a proper and workmanlike manner, and we frequently expressed dissatisfaction with the quality of the work and material, not only on the premises, but we frequently called at his home and expressed dissatisfaction with the way the building was progressing and the manner in which it was being built. 10

6. It is true that we went into possession of said building on December 1, 1926, but only after repeated promises by the complainant, Joseph Bancone, that he would rectify all mistakes in workmanship which had been previously made, and would complete the house in a good and workmanlike manner and in accordance with the contract of sale; the house, at the time we moved in, was incomplete and it still is in an uncompleted state, and we have frequently called the said Joseph Bancone's attention to the defects in the same, and the fact that the house has not been completed in accordance with the terms of the contract; and it is true that sometime after we moved into the premises, we paid the said Joseph Bancone the sum of \$1,000.00. 20

7. It is true that, as stated in the affidavit of the complainant, Joseph Bancone, we have paid the taxes for the year 1927 assessed against said premises. 30

On August 23, 1927, we paid the installment of interest due on the first mortgage amounting to \$297.10, and we also paid on February 9, 1928, \$292.50 being the interest due on said first mortgage.

We also paid, on March 8, 1928, the sum of \$500.00 on account of the principal sum due on 40

Affidavit of Defendants.

said mortgage, said mortgage being an installment mortgage, and payments of principal of \$250.00 being due every six months.

10 At the time we made these payments, we had been in frequent touch with the complainant, Joseph Bancone, requesting him to complete the work, and he always agreed to finish up the house, and would send around some workmen for a few hours at a time, but never properly completed the house, nor did he ever demand of us interest on the unpaid balance of the purchase price. In fact, we were frequently at his home, requesting him to complete the house, and especially to complete the heating plant in the same, in accordance with his contract.

20 8. We did not put off the closing of the contract on flimsy excuses, but always and expressly requested the said Joseph Bancone to complete the house, telling him that we wanted to close the matter.

It is true that at one time an appointment was made at Mr. Bancone's home to close this title, but when we attended at his home, we were informed that he was unable to close the title, as his brother-in-law was sick and had been unable to draw up the necessary papers.

30 9. At the present time, the roof of the house leaks, and also the window frames in several of the rooms. The plumbing in the bathrooms leaks, so much so that when the water is turned on in either bathroom, for any reason, it flows down through the partitions to the rooms and cellar below. In addition there is and has been, a very offensive odor from the sewer pipes in the building; according to our information, the steam heating plant is so defective that the same

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Affidavit of Defendants.

can only be remedied by an entirely new heating plant; the floor in the bathroom is approximately three inches higher than the other floors in the apartment.

Mr. Bancone frequently sent around plumbers on our complaint, who stated on more than one occasion that the job could only be satisfactorily completed by the installation of a new heating and a new plumbing system in the house. 10

JOHN PINTO,
CARMELA PINTO.

Subscribed and sworn to before
me, this 28th day of August,
1929.

GRACE A. BROWN (nee Hawkins), 20
Notary Public of N. J.

30

40

Affidavit of Thomas F. Cogan.

IN CHANCERY OF NEW JERSEY.

	<p><i>Between</i></p> <p>JOSEPH BANCONE and CARMELA BANCONE,</p> <p style="text-align: right;"><i>Complainants,</i></p> <p style="text-align: center;"><i>and</i></p> <p>JOHN PINTO and CARMELA PINTO,</p> <p style="text-align: right;"><i>Defendants.</i></p>	}	<p><i>On Bill, &c.</i></p> <p><i>Affidavit.</i></p>
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STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.

20 THOMAS F. COGAN, of full age, being duly sworn according to law, upon his oath deposes and says:
I live at No. 116 Belleville avenue, Bloomfield, New Jersey.

I have been in the plumbing business for 42 years, and have been a master plumber for 34 years last past.

30 I have inspected the house No. 537 Roseville avenue, Newark, New Jersey, which is occupied by John and Carmela Pinto, and which they contracted to purchase from Joseph and Carmela Bancone.

40 As a result of my examination, I found that the roof leaks in a number of places, and I doubt if it can be repaired without a new roof being constructed. There are leaks around several of the windows, due to improper construction; the sun parlor windows are so loosely fitted that they let in a large amount of cold air, so that it is impossible to keep the sun parlor warm; the bathtub fixtures on the second floor, are not properly set because the bathroom wall

Affidavit of Thomas F. Cogan.

is out of square; this makes a most unsightly looking appearance; the porcelain waste escutcheon is broken; also the china index on the basin faucet; the waste from the bathroom on the second floor leaks, and comes through the first floor ceiling; both bath showers leak and the water runs down through the partitions, and also leaks through and runs out on the outside of the house. The bathroom waste fixture on the second floor is loose from the frame, and it is doubtful that the same can properly be repaired. 10

The kitchen sink waste is not finished in keeping with the nickel-plated fixtures that come with the sink, and the basin waste is not finished in keeping with the nickel-plated fixtures that go with the basin. 20

The kitchen walls are badly cracked, and the radiator valves are not in proper condition and need to be tightened.

The bathroom on the second floor is not level and the floor itself is approximately two inches above the hall floor, making a dangerous step.

The gas outlet in the kitchens is unfinished. There are no Time-o-Light fixtures to operate the gas water heater in the cellar, as are necessary to operate the heater from the kitchens. 30

The built-in cabinets in the bathroom are halfway down the tile wall, and are separated from the plaster wall, making a very unsightly appearance.

The electric switches are loose from the walls, and the dining room electric fixture is halfway behind the door, so that the door hits the fixture every time the door is opened. The electric switch is halfway in the door casing, so that the appearance is very bad. 40

Affidavit of Thomas F. Cogan.

There is enough radiation in the house to properly heat the rooms, but the branches and risers (steam pipes) leading from the steam mains to the radiators, are not large enough to supply the radiators with steam under ordinary conditions; they must have pounds of pressure to do it,
10 which necessarily means a waste of coal and in some rooms, I believe that they could not get sufficient heat under any circumstances.

THOS. F. COGAN.

Subscribed and sworn to before
me this 30th day of August,
1929.

GRACE A. BROWN (nee Hawkins),
Notary Public of N. J.
20 (L. S.)

A true copy.

FERD GARRETSON,
Clerk.

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MEMORANDUM OF VICE-CHANCELLOR.

Filed December 26, 1929.

IN CHANCERY OF NEW JERSEY.

<p><i>Between</i></p> <p>JOSEPH BANCONE and CARMELA BANCONE,</p> <p style="text-align: center;"><i>Complainants,</i></p> <p style="text-align: center;"><i>and</i></p> <p>JOHN PINTO and CARMELA PINTO,</p> <p style="text-align: center;"><i>Defendants.</i></p>	}	<p>10</p> <p><i>Memorandum.</i></p> <p><i>(Not for print.)</i></p>
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Mr. F. D. Masucci for complainants. 20

Mr. Frederic H. Pilch for defendants.

This memorandum is not to be published in the official or unofficial reports.

CHURCH, *V.-C.*

This matter came before me on motion to strike out the answer in a bill for specific performance. I granted the motion to strike out.

It appears that John Pinto and Carmela Pinto, on or about December 1, 1926, paid \$2,000 to complainants, according to a contract, and entered into possession of a property on Roseville avenue, Newark. They took possession of the premises and have been in possession thereof ever since and have been collecting the rents, issues and profits. It was arranged that the title should be closed on January 2, 1927. Although retaining possession of the property, defendants refused to pay the taxes, the interest and install-

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Memorandum of Vice-Chancellor.

ments of principal on the mortgage specified in contract of sale, and refused to accept the title.

The answer says that complainants did not perform the terms and conditions of the agreement, in that they did not complete the inside work of the building and failed to do some work
10 on the outside.

It seems to me that having been in possession of the property for nearly three years they are not entitled now to set up any such defense. I, therefore, will advise a decree dismissing the answer.

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**ORDER STRIKING OUT ANSWER AND
DECREE.**

Filed November 12, 1929.

IN CHANCERY OF NEW JERSEY.

Between

JOSEPH BANCONE and CARMELA
BANCONE,

Complainants,

and

JOHN PINTO and CARMELA
PINTO,

Defendants.

On Bill, &c.

*Order
Striking Out
Answer
and Decree.*

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This matter coming on to be heard in the presence of F. D. Masucci, solicitor of complainant, and Frederick H. Pilch, of the firm of F. R. and F. H. Pilch, solicitors of defendants, and the Court having considered the affidavits submitted and the arguments of said solicitors and being of the opinion that answer filed by the defendants is sham and frivolous;

It is, thereupon, on this 12th day of November, A. D. 1929, ORDERED, ADJUDGED and DECREED that the answer filed by the defendants be and the same is hereby stricken out, and

It is further ORDERED, ADJUDGED and DECREED that the articles of agreement, mentioned and described in paragraph 2 of the bill of complaint filed herein, dated October 25, 1926, whereby defendants agreed to purchase from complainants lands and premises described in paragraph 1 of said bill of complaint, be in all things specifically performed by said defendants, John Pinto and

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Order Striking Out Answer and Decree.

Carmela Pinto, in accordance with the terms of said agreement, and

It is further ORDERED that this decree be made with costs to complainants against said defendants and a counsel fee of \$100.00 to complainants' counsel to be paid by defendants.

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Respectfully advised,

ALONZO CHURCH,
V.-C.

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NOTICE OF APPEAL.

Filed November 20, 1929.

73-604

IN CHANCERY OF NEW JERSEY.

*Between*JOSEPH BANCONE and CARMELA
BANCONE,*Complainants,**and*JOHN PINTO and CARMELA
PINTO,*Defendants.**On Bill, &c.
Notice of
Appeal.*

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The defendants, John Pinto and Carmela Pinto, hereby appeal from the final decree made in the above-entitled cause on November 12, 1929, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated November 14, 1929.

FREDERIC H. PILCH,
Solicitor for and of Counsel with Defendants,
John Pinto and Carmela Pinto.

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Notice of Appeal.

I conceive there is good cause for appeal in the above-entitled cause.

FREDERIC H. PILCH,
Of Counsel with Defendants.

A true copy.

10 FERD GARRETSON,
 Clerk.

Service of the within notice of appeal is hereby acknowledged this 18th day of November, 1929.

F. D. MASUCCI,
Solicitor of Complainants.

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PETITION OF APPEAL.

Filed December 6, 1929.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

10	<p><i>Between</i></p> <p>JOSEPH BANCONE and CARMELA BANCONE, <i>Complainants-Appellees,</i></p> <p style="text-align: center;"><i>and</i></p> <p>JOHN PINTO and CARMELA PINTO, <i>Defendants-Appellants.</i></p>	<p><i>On Appeal from the Court of Chancery.</i></p> <p><i>Petition of Appeal.</i></p>
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20 *To the Honorable the Court of Errors and Appeals in the last resort in all causes:*

The petition of John Pinto and Carmela Pinto, the appellants in the above-entitled cause respectfully shows that:

30 1. Your petitioners find themselves aggrieved by a final order and decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 12th day of November, 1929, in a certain cause in said Court of Chancery wherein the said Joseph Bancone and Carmela Bancone, were complainants and the said John Pinto and Carmela Pinto were defendants in this respect, to wit: That the said order and decree adjudges that the objection taken by the said complainants by motion to strike out the answer filed by your petitioners as such defendants in said cause on

40 the ground that the said answer was sham and

Petition of Appeal.

frivolous and intended to embarrass and delay the complainants, were well founded and that said answer should be stricken out and that said complainants were entitled to the specific performance of the agreement prayed for in the bill of complaint being an agreement for the sale of certain lands and premises described in paragraph one of said bill of complaint which agreement is alleged to be dated October 25, 1926, and to have been executed between the said Joseph Bancone and Carmela Bancone and your petitioners; and said order and decree adjudges and decrees that said motion of the complainants to strike out said answer be granted and that said answer be stricken out for the reason aforesaid, and that said agreement of sale be specifically performed by your petitioners in accordance with the terms of said agreement and that your petitioners pay to said complainants the costs of said suit including a counsel fee of one hundred dollars which was thereby allowed to said complainants.

And your petitioners appeal from the order and decree of the Chancellor which adjudges and decrees as aforesaid upon the ground that the same is erroneous and that the said order and decree adjudges that the said objection taken by said complainants to said answer upon the ground that said answer was sham and frivolous, were well founded and that said answer should be stricken out and adjudges and decrees that said motion be granted and that said answer and counter-claim be stricken out for the reason aforesaid with the costs as aforesaid, whereas the Chancellor should have adjudged that said answer was not sham nor frivolous but that said answer discloses good grounds of defense to said complainants' bill of complaint and should have

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Petition of Appeal.

adjudged and decreed that said motion of the complainants to strike out said answer and counter-claim should be denied with costs to your petitioners, and the Chancellor should have allowed said cause to be brought on for hearing according to the usual practice of said Court of Chancery and should have made an order and decree in accordance with the evidence adduced at said hearing and the law applicable thereto and also in that said order and decree adjudges and decrees that your petitioners specifically perform said agreement of sale dated October 25, 1926, and that your petitioners pay to said complainants the costs of said suit including a counsel fee of one hundred dollars as aforesaid, and whereas said order and decree was made without a decree being previously made directing that the complainants' bill be taken as confessed against your petitioners, and without any proofs or evidence being presented or taken in said cause,

Whereas the Chancellor should not have adjudged and decreed as aforesaid, but should have, before making a decree in said cause, heard the proofs and evidence of your petitioners in support of their said answer and should have after a full hearing as aforesaid, made such decree as the facts and the law in the case warranted; and also in that the Chancellor, by making said order and decree in the form and manner aforesaid, improperly and erroneously deprived your petitioners of an opportunity to defend said complainants' suit.

Your petitioners therefore pray that the said order and decree of the said Chancellor may be wholly reversed, set aside and for nothing holden and that your petitioners may have such other

Petition of Appeal.

relief in the premises as to this honorable Court shall seem proper.

FREDERIC H. PILCH,
Solicitor for and Counsel with Appellants.

A true copy.

JOSEPH B. FITZPATRICK,
Clerk.

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Service of within petition of appeal is hereby acknowledged this 4th day of December, 1929.

F. D. MASUCCI,
Solicitor of Appellees.

Endorsed: "Filed December 6, 1929, Joseph F. S. Fitzpatrick, Clerk." 20

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ANSWER TO PETITION OF APPEAL.

Filed February 26, 1930.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

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*Between*JOSEPH BANCONE and CARMELA
BANCONE,
*Complainants-Appellees,**and*JOHN PINTO and C A R M E L A
PINTO,
*Defendants-Appellants.**On Appeal.*
Answer to
Petition of
Appeal.

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The answer of complainants, the above-named appellees, to the petition of appeal of the defendants, the above-named appellants.

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1. These appellees, not admitting the truth of all or any of the matters in said petition of appeal contained, for answer thereto nevertheless admit that an order and decree was, on November 12, A. D. 1929, made and entered in the Court of Chancery of New Jersey in the above-entitled cause; as to the substance and form of said order and decree, these appellees beg leave to refer thereto when the same shall be produced.

2. These appellees are advised and believe that the said order and decree is agreeable to equity and they pray that the same may be affirmed with costs to be taxed in favor of these appellees.

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F. D. MASUCCI,
Solicitor for and of Counsel with Appellees.

Answer to Petition of Appeal.

Consent is hereby given to the filing of the
within answer as of time.

FREDERIC H. PILCH,
Solicitor of Defendants-Appellants.

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EDWIN T. BROWN

THE HISTORY OF THE

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

New Jersey Court of Errors and Appeals

Between

JOSEPH BANCONE, *et al.*,
Complainants-Appellees,

and

JOHN PINTO, *et al.*,
Defendants-Appellants.

On Bill, &c.

*On Appeal
from Court
of Chancery.*

BRIEF FOR APPELLANTS.

Facts.

The complainants below, Joseph Bancone and Carmela Bancone entered into an agreement with the defendants below, John Pinto and Carmela Pinto, on October 25, 1926, for the conveyance by the complainants to the defendants of premises known as No. 537 Roseville avenue, Newark, N. J., for the purchase price of sixteen thousand five hundred (\$16,500) dollars.

On July 5, 1929, more than two and one-half years after the time set for the fulfillment of the agreement, complainants filed their bill in the Court of Chancery for the specific performance of said agreement by the defendants.

The defendants filed their answer, admitting the execution of the contract, but denying that the complainants had performed their part of the agreement and setting up as separate defenses, the failure of the complainants to perform the terms of the contract by them to be performed and also the further defense that the complainants were guilty of laches.

On November 12, 1929, the defendants' answer was stricken out on motion on the grounds that

the same was sham *and* frivolous and a decree was entered for the specific fulfillment of the contract by John Pinto and Carmela Pinto. From that decree, this appeal is taken by the defendants-appellants.

FIRST POINT.

The Vice-Chancellor erred in striking out the answer of the defendants on the ground that it was sham AND frivolous: for the answer disclosed good grounds of defense to the bill of complaint and raised a question of fact which could only be properly decided at a trial of the cause.

Sham pleas and frivolous pleas have both been defined by our courts.

“A sham answer is one good on its face but false in fact; a frivolous plea is one which on its face sets up no defense although it may be true in fact.” *In re Bean*, 93 N. J. Equity 593; 121 Atlantic 613.

“A pleading cannot be both sham and frivolous at the same time.” *Fidelity Mutual Life Insurance Co. v. Wilkes-Barre and H. R. Co.*, 98 N. J. Law 507; 120 Atlantic 754.

“The procedure on a motion to strike sham pleadings is merely inquiry as to whether there is a fact issue for trial.” *Lettieri v. Mistretta*, 139 Atlantic 514.

In the present case there was and is a fact issue for trial. The issue is whether the complainants below fulfilled and performed the conditions, covenants and terms of their agreement with the defendants, which were to be performed by them. The answer sets up as a defense, the non-performance on the part of the complainants-respondents (Case, p. 13, ll. 29-35; Case, p. 14, ll. 31-36; Case, p. 14, ll. 37-38; Case, p. 15,

ll. 8-12). Certainly this defense is not frivolous for it goes to the root of the whole case.

Surely, if the complainants come into the Court of Chancery to compel the specific performance of an agreement for the sale of property, it is incumbent upon them to show that they have performed or have been ready, able and willing to perform, all the terms, covenants and conditions of said agreement which were to be performed by them. If they do not, or cannot show performance or a readiness, ability and willingness to perform, on their part, they should not be heard in an attempt to compel performance on the part of the other party.

“A party who seeks a specific performance of a contract, must show that he has performed or has been ready and willing to perform all the essential terms of the contract on his part.” *Thorp v. Pettit*, 16 N. J. Eq. p. 488; *Crane v. DeCamp*, 21 N. J. Eq. 414; *Merritt v. Brown*, 21 N. J. Eq. 401.

“A party who has utterly failed to perform an agreement on his part, can have no claim to specific performance.” *Earl v. Halsey*, 14 N. J. Eq. 332.

The material fact as to the performance of the terms of the agreement by the complainants, are denied by the defendants in their affidavits filed in this cause. They specifically set forth the details in which the complainants failed to perform the terms and conditions of the contract by them to be performed. (See Case, p. 22, ll. 12-37; Case, p. 24, ll. 30-40; Case, p. 25, ll. 1-12.) The affidavits of the defendants in this respect are supported by the affidavit of a third party who is wholly disinterested and who is also an experienced mechanic (Case, p. 26, ll. 19-25). His affidavit also sets forth the details in which the complainants have failed to perform their

portion of the contract (Case, p. 26, ll. 31-40; Case, p. 27, ll. 1-40; Case, p. 28, ll. 1-13).

The denial by the defendants of performance on the part of complainants as set forth in the answer of the defendants, supported as such denial is by the affidavits of the defendants and a disinterested party, raise a question of fact which can only be decided by a trial of the cause.

Bowen v. Purcell, 100 N. J. Eq. 319;

Merken v. Bowker, 133 Atl. 41.

Attention is called to the finding of the Vice-Chancellor that the defendants refused to pay the taxes, the interest and installments of principal on the mortgage as specified in the contract of sale (Case, p. 29, ll. 38-40; Case, p. 30, ll. 1-2).

It is uncontradicted that the defendants paid the taxes for the year 1927; paid \$500.00 on account of the principal of the first mortgage, and paid \$589.60 interest on said mortgage (Case, p. 23, ll. 29-39; Case, p. 24, ll. 1-3).

The defendants ceased paying the taxes, interest on mortgage, and installments of principal on the mortgage, only when it became apparent to them that the complainants had no intention of carrying out their part of the agreement.

The fact that the defendants were in possession of the premises for two and one-half years, should be no greater bar to their setting up as a defense, the alleged non-performance of the agreement on the part of the complainants, than the fact that complainants permitted the defendants to remain in possession of the premises for two and one-half years before alleging a non-performance of the terms of the agreement on the part of the defendants should be a bar to

their setting up the non-performance of the agreement on the part of the defendants. Certainly so far as the lapse of time is concerned the complainants are equally culpable with the defendants. Why should the complainants have a longer time in which to allege a non-performance of the terms of the agreement on the part of the defendants, than the defendants should have in which to allege a non-performance of the contract on the part of the complainants? Perhaps if the defendants had remained acquiescent in their possession of the premises for that period of time, there might be some grounds for holding that they had waived the non-performance of the terms of the agreement on the part of the complainants, but their affidavit sets forth in no unqualified terms the fact that they expressed their dissatisfaction to the complainants frequently, both as to the work which was left undone and the manner in which the work was being done (Case, p. 24, ll. 7-19; Case, p. 22, ll. 37-40; Case, p. 23, ll. 1-12; Case, p. 23, ll. 22-26). The defendants further set forth in their affidavits that they called the said Joseph Bancone's attention to the defects in the house and the fact that the house was not being completed in accordance with the terms of the agreement (Case, p. 24, ll. 7-19). The defendants further say in their affidavits, that the said Joseph Bancone, after having been requested to complete the house in a proper manner, said he would do so, and sent around some workmen frequently (Case, p. 25, ll. 8-12).

But the decision of this matter was not based or decided on whether the answer was sham and frivolous or not, but whether the defendants should be permitted to set up as a defense, the non-performance of the terms of the agreement

by the complainants, no matter how true in point of fact such a defense might be (Case, p. 30, ll. 11-15).

In other words, the question as decided by the Vice-Chancellor was one of estoppel, *i. e.*, that the defendants, after being in possession of the property for two and one-half years, were estopped to set up the facts that the complainants had not properly complied with the terms of the agreement in the construction and completion of the house. But that question was not before the Court and could not properly be before the Court on the motion, as presented by the complainants. The question before the Court was whether the answer was sham, *i. e.*, false and frivolous, *i. e.*, constituting no defense to the action.

The case of *Salter v. Riley* is very much in point. In that case, reported in 147 Atl. p. 778, Vice-Chancellor Fallon in denying a motion to strike out the answer as sham and frivolous, said:

“In *South Camden v. Stiefel*, 101 N. J. Eq. 41; 137 Atl. 91 (*V.-C. Leaming*) it was held, that the Court of Chancery will not entertain a motion to strike out a counterclaim which will, if true, support affirmative equitable relief; also that motions to strike out pleadings as sham are entertained only against defensive pleadings as stated in the cited case (p. 43 of 101 N. J. Eq. 137 Atl. 91), the procedure in this State on motions to strike pleadings is regarded as merely an inquiry whether there is an issue of fact to be tried, a distinction being recognized between the determination whether there is a real issue to be tried and the trial of an issue upon motion, whether what in form is an issue, is a real issue. In *Fidelity Mutual Life Insurance Co. v. Wilkes-Barre H. R. Co.*, 98 N. J. Law, 507; 120 Atl. 734, 735, it

was held that a pleading cannot be both sham *and* frivolous at the same time. The opinion of the Court of Errors and Appeals recites at common law a plea was considered sham when it was palpably or inherently false and from the plain or conceded facts in the case must have been known to the party interposing it to be false. Such a plea, says Chitty, has always been considered a very culpable abuse of justice, and has often been censured and set aside with costs. (1 Chitty Pleading 542; 1 Tidd's Practice 611; 2 Bouv. Law Dict. 680.) A frivolous plea need not be false but is palpably insufficient as a legal defense and hence legally insubstantial or frivolous, and therefore presumably interposed for the purpose of delay. * * * Under the common law practice in New York and the Supreme Court rules, a plea might be condemned as either palpably false (sham) or frivolous, and could be struck out upon either ground, but was never summarily dealt with upon both grounds. (Oakley *v.* Devoe, 12 Wendell (N. Y.) 196; 1 Burrils Pract. 180; 21 R. C. L. 452 and cases cited.)"

Certainly it must be apparent that the defendants' answer was not frivolous, viz., palpably insufficient as a legal defense to the action, neither is it sham, viz, palpably or inherently false, for it is supported by the affidavits of the defendants and a disinterested party, and that being so, the defendants certainly are entitled to a trial of the case on the merits.

Respectfully submitted,

FREDERIC H. PILCH,
Solicitor for and of Counsel
with Defendants-Appellants.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

Between: JOSEPH BANCONE, et al., <i>Complainants-Appellees,</i> —and— JOHN PINTO, et al., <i>Defendants-Appellants.</i>	ON BILL &c. On Appeal from Court of Chancery
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BRIEF FOR APPELLEES.
FACTS.

The complainants below entered into an agreement with defendants below for the sale of premises No. 537 Roseville Avenue, Newark, New Jersey, for the sum of \$16,500.

Defendants below paid on account of the said purchase price the sum of \$2,000 and on December 1st, A. D., 1926, entered into possession, ~~took~~ of said premises and have continued in possession, ~~took~~ collecting the rents, issues and profits thereof to their own use and purpose and are still in possession of said premises.

There only remained to be performed by complainants, below, the delivery of the deed of said premises and by defendants, below, the execution and delivery of their bond and purchase money mortgage covering said premises.

Complainants, below, have always been ready, willing and able to convey said premises to defendants, below, who have refused to accept title and execute their bond and purchase money mortgage and, according to their own affidavit, their only reason for refusing to consummate contract, being that certain minor things remained unfinished and certain repairs should have been done by complain-

ants although defendants, below, during their almost three years of possession of said premises, did not complete said alleged uncompleted work nor repair alleged defective work.

On November 12, 1929, defendants' answer was stricken out on motion on grounds that same was sham and frivolous and a decree entered.

FIRST POINT.

THE VICE-CHANCELLOR DID NOT ERR IN STRIKING THE ANSWER OF DEFENDANT BECAUSE SAID ANSWER WAS SHAM AND FRIVOLOUS.

The answer was sham as to certain features, particularly the denial of collection of rents of said premises by defendants.

The answer was frivolous in its assertion that certain work was unfinished and defective in view of the fact that the answer admits the fact that defendants took possession and retained possession for almost three years without completing said alleged uncompleted work or correcting alleged defective work and without, at any time offering to or rescinding said contract.

A plea may be sham and frivolous where such plea consists of more than one allegation of fact, of which one or more may be sham and one or more frivolous.

YALE ELECTRIC CORP. vs. MORRISSEY, 148 Atl. 721.

But assuming that the answer was merely frivolous or only sham, still it is not cause for reversal.

SCULTHORPE vs. COMMONWEALTH, 121 Atl. 751; 98 N. J. Law 845.

On motion to strike out an answer the question is not whether the facts alleged are sufficient to constitute an answer but whether, taken as a whole, the pleadings and proofs state facts sufficient to constitute a defense to the action.

WARING vs. JOBS, 138 Atl. 889; 104 N. J. Law 158.

Do the pleadings and proofs in the instant case state facts sufficient to constitute a defense to complainants' bill of complaint?

Complainants' bill and proofs show that they are the owners of said premises; that a contract for the sale was entered into between complainants and defendants; that defendants paid on account of said purchase price the sum of \$2,000 and on December 1st, A. D., 1926, defendants entered into possession of said premises and have continued and still continue in possession thereof, that at the time of taking possession it was arranged that title would be accepted by defendants and defendants would execute and deliver their bond and purchase money mortgage and that complainants have offered to convey said title to defendants and defendants have refused to accept same and execute their bond and purchase money mortgage, all of which facts are expressly admitted by defendants.

Their only claim is that certain work was unfinished and other work improperly done.

Certainly their claim cannot be set up to defeat complainants' action after defendants have taken possession of said premises, used and occupied the same and collected the rents, issues and profits thereof to their own use and purpose without rescinding said contract, turning over possession of said premises to complainants and putting them in status quo.

Purchasers who have a right to rescind and do not act promptly and offer to return back the property, are not entitled to rescind.

SCHWEITZER vs. NATIONAL, etc., 93 N. J. Eq. 644; 117 Atl. 701.

It is, therefore, respectfully submitted that said appeal should be dismissed with costs.

F. D. MASSUCI,
*Solicitor for and of counsel with
Complainants-Appellees.*

