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New Jersey Court of Errors and Appeals

METROPOLITAN LUMBER COMPANY, a corporation of New Jersey, claimant, *Plaintiff-Appellee,*	Action at Law.
vs.	Notice of Appeal.
FREDERICK W. MULLER, Builder & Owner, *Defendant-Appellant.*	

To
WINNE & BANTA,
Attorneys for Plaintiff.

Take notice, that the defendant appeals from the whole of the judgment entered into in this cause, on the following grounds:

1. The Court held that the defendant was entitled to recover only the sum of $134.08 under the terms of the contract entered into by the plaintiff and John T. A. Conboy, instead of the sum of $485.46 actually due the defendant.

2. The Court erroneously held that the plaintiff entered into the agreement upon the express understanding that the debt due to the counter claimant was the amount stated in the schedule.

3. The Court gave judgment to the plaintiff instead of to the counter-claimant.

MALEY & MALEY,
Attorneys for Defendant-Appellant.

Summons.

THE STATE OF NEW JERSEY TO FREDERICK W. MUELLER.

You, Frederick W. Mueller, Builder and Owner, are summoned to answer the (L.S.) annexed complaint of Metropolitan Lumber Co., a corporation of New Jersey, in an action at law in the Circuit Court in and for the County of Bergen, in which said Metropolitan Lumber Co. claims a building lien on certain buildings and lands of said Frederick W. Mueller, described in said complaint. And TAKE NOTICE that unless you file your answer to said complaint with the Clerk of said Court at Hackensack 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, Clifford L. Newman, Esquire, Judge of said Court at Hackensack, this 19th day of January, 1924.

WILLIAM P. EAGER,
Clerk.

COHEN & KLEIN,
Attorneys.

Complaint.

BERGEN COUNTY CIRCUIT COURT.

METROPOLITAN LUMBER COMPANY, a corporation of New Jersey, claimant, *Plaintiff*, vs. FREDERICK W. MULLER, Builder & Owner, *Defendant*.	Action at Law. On Mechanics' Lien. Complaint.

Plaintiff, Metropolitan Lumber Co., a corporation of New Jersey, having its principal place of business in the City of Newark, Essex County, New Jersey, says:

1. At the times hereinafter stated, the defendant, Frederick W. Mueller, was the owner of certain lots or curtilage of land situate in the Borough of Dumont, County of Bergen and State of New Jersey, and which are described as follows: Lots #9-10-11 & 12 in Block #87 as shown on Assessment Map of the Borough of Dumont, New Jersey. These lots are also known as lots #9-10-11 & 12 according to map of South Dumont, New Jersey. This map being on file in the office of the Clerk of Bergen County.

2. At the times aforesaid, the defendant was erecting and constructing on said lots or curtilage, two two story frame buildings.

3. On the dates mentioned in the Schedule hereto annexed and marked "Schedule A," and made

part hereof, the plaintiff sold and delivered to the defendant the materials mentioned in said schedule, and the defendant in consideration thereof agreed to pay the plaintiff the price therefor respectively in said schedule stated, and amounting in the whole to the sum of Five hundred forty-two Dollars.

4. The said materials were furnished to the defendant for the erection and construction of said buildings.

5. The defendant is entitled to credits in the sum of Twenty-seven Dollars and Eighty Cents for the return of certain mortor and cement bags, as shown in said schedule, and the balance of Five hundred fourteen Dollars and Twenty Cents, nor any part thereof, has been paid by the defendant, and said balance of Five hundred fourteen Dollars and Twenty Cents is still wholly due and unpaid.

6. The said indebtedness of Five hundred fourteen Dollars and Twenty Cents is a lien upon the said lands and buildings by virtue of the statute entitled "An Act to secure to mechanics and others payment for their labor and materials in erecting any building and in making certain improvements of land (Revision of 1898) and the supplements thereof and the amendments thereto."

COHEN & KLEIN,
Attorneys for Plaintiff.

Schedule A Annexed to Complaint.

SCHEDULE A.

Description	Ft.	Price		Amt.
Dec. 28, 1923.				
2 x 8 Yellow Pine 12/12.30/14	752			
2 x 4 Yellow Pine 225/9	1350			
	2102	38.00		79.88
Dec. 20, 1923.				
30 Bags Cement		.65	19.50	
30 Bags		.20	6.00	
				25.50
Dec. 17, 1923.				
2x4 Yellow Pine 208/16	2219	37.50	83.21	
2 8 x Yellow Pine 85/12	1360	38.00	51.68	
				134.89
Dec. 13, 1923.				
2 x 10 Fir 2/12/1/14, 1/16	90	.04½		4.05
Dec. 15, 1923.				
Lath	16,000	9.25	148.00	
175 Bags Sand & Mortar		.52½	91.88	
1 75 Bags		.10	17.50	
62 Bags Lime		.65	40.30	
				297.68
				542.00

CREDITS

		Price	Amt.	
123	Empty Mortor Bags	.20	24.60	
16	" Cement "	.20	3.20	
				27.80

NET AMOUNT DUE $514.20

Answer and Counterclaim.

BERGEN COUNTY CIRCUIT COURT.

METROPOLITAN LUMBER COMPANY, a corporation of New Jersey, claimant, *Plaintiff,* vs. FREDERICK W. MULLER, Builder & Owner, *Defendant.*	Action at Law. On Mechanics' Lien. Answer and Counterclaim.

By way of answer to the plaintiff's complaint, filed herein, the defendant says:

1. He denies the allegations contained in paragraph 3 of said complaint.

By way of counterclaim against the plaintiff, defendant says that:

1. On the dates mentioned in the schedule annexed hereto and marked "Schedule A," and made a part hereof, the plaintiff sold and de-

livered bills of goods to one John T. A. Conboy, of the Borough of Dumont, County of Bergen, and State of New Jersey, and the said John T. A. Conboy, in consideration thereof, agreed to pay the plaintiff the price therefor stated respectively in said schedule, and amounting in the whole to the sum of Four hundred eighty-five and 46/100 Dollars ($485.46).

2. Said goods were delivered to the lumber yard of the said John T. A. Conboy, located at New Milford Avenue, Sunset Terrace and Manhattan Terrace, in the said Borough of Dumont, and was sold to said John T. A. Conboy in connection with the lumber business conducted at said lumber yard by the said John T. A. Conboy.

3. That on or about November 18, 1922, the plaintiff entered into an agreement with the said John T. A. Conboy wherein and whereby it was agreed that in consideration of the said John T. A. Conboy conveying to the said plaintiff all his right, title and interest in the aforesaid lumber business, lumber yard, buildings, improvements, trucks and automobile, used in connection therewith, and the name and good will of said business, the above named plaintiff agreed, among other covenants, to assume all the obligations and liabilities of the said John T. A. Conboy due and owing on said date, which liabilities had arisen directly from the lumber business carried on by the said John T. A. Conboy. In the execution of the aforesaid agreement, the said John T. A. Conboy has conveyed, assigned and set over to said plaintiff all his right, title and interest in the aforesaid lumber business and lumber yard, and has

performed all the provisions and conditions of said contract on his part.

4. Defendant has demanded of the plaintiff the sum due him from the said John T. A. Conboy, according to the aforesaid "Schedule A," on the date when the plaintiff entered into the aforesaid agreement with John T. A. Conboy, and the plaintiff has refused to pay to the defendant more than twenty-five (25%) per cent. of said claim in settlement thereof, which sum the defendant has refused to accept.

Judgment is demanded by the defendant against the plaintiff in the sum of $485.46.

MALEY & MALEY,
Attorneys for Defendant.

"SCHEDULE A."

1922.

June 28—

6007 sq ft. fir siding at 5½ cts. a ft.			$339.38

Oct. 21—

6 pr. sash 2/0x3/0-6/1 lights			21.00

Nov. 10—

6 pr. sash 2/0x3/0-6/1 lights at	$3.80	$21.00	
8 pr. sash 2/6x4/6-6/1 lights at	4.00	32.00	
4 pr. sash 2/6x3/6-6/1 lights at	3.80	15.20	
4 pr. sash 2/6x4/2-6/1 lights at	3.90	15.60	
1 sash door 2/6x6/6-4 lights at	6.00	6.00	
1 sash door 2/6x6/8-4 lights at	6.00	6.00	
1 fifteen light casement door at	14.50	14.50	
1 pr. sash 3/0x4/6-6/1 lights at	4.10	4.10	
4 hanks sash cord at	1.00	4.00	
396 lbs. sash weights 24/6, 24/5½, 16/5, 8/4½ at	.04	15.68	
		$134.08	
			134.08
TOTAL			$485.46

Answer to Counterclaim and Notice of Motion.

BERGEN COUNTY CIRCUIT COURT.

METROPOLITAN LUMBER COMPANY, a corporation, claimant, *Plaintiff*, vs. FREDERICK W. MULLER, Builder & Owner, *Defendant*.	Action-at-law, on Mechanics' Lien. Reply, Answer to Counterclaim and Notice of Motion.

Plaintiff replying to the answer filed by the defendant herein says:

1. It joins issue with the answer filed by the defendant.

ANSWER TO COUNTERCLAIM.

Plaintiff answering the counterclaim of the defendant says:

1. It denies paragraph one of the counterclaim.

2. It denies paragraph two of the counterclaim.

3. It denies paragraph three of the counterclaim.

4. It denies paragraph four of the counterclaim.

5. It denies the damages demanded.

NOTICE OF MOTION TO STRIKE OUT ANSWER.

At or before the trial of this cause, the plaintiff will move to strike out the answer of the defendant on the following grounds:

1. The same does not disclose a legal defense.

2. The said answer is sham and frivolous and is filed merely for the purpose of delay.

And plaintiff will move for summary judgment.

NOTICE OF MOTION TO STRIKE OUT COUNTERCLAIM.

At or before the trial of this cause, the plaintiff will move to strike out the counterclaim of the defendant filed herein on the following grounds:

1. The same does not disclose a legal or valid cause of action.

2. The allegations contained in said counterclaim are sham and frivolous and said counterclaim is filed merely for the purpose of delay.

COHEN & KLEIN,
Attorneys for Plaintiff.

Stipulation.

BERGEN COUNTY CIRCUIT COURT.

METROPOLITAN LUMBER COMPANY, a corporation of New Jersey, claimant, *Plaintiff,* vs. FREDERICK W. MULLER, Builder & Owner, *Defendant.*	Action at Law. Stipulation.

IT IS STIPULATED AND AGREED by Winne & Banta, Attorneys for the plaintiff, and Maley & Maley, Attorneys for the defendant, as follows:

1. That the plaintiff herein has a just and legal charge against the defendant in the sum of Five Hundred Fourteen Dollars and Twenty Cents ($514.20), representing the cost of material furnished by the plaintiff to the defendant and delivered at the place mentioned in the lien claim, filed in this cause, and used by the defendant for the construction of two buildings upon the premises described in said lien claim, and that said sum has not been paid.

2. That the defendant had a just and legal claim against John T. A. Conboy on the 18th of November, 1922, in the sum of Four Hundred Eighty-five Dollars and Forty-six Cents ($485.46), which has not been paid.

Stipulation.

3. That on November 18th, 1922, John T. A. Conboy made and executed an instrument which is signed by said John T. A. Conboy and Metropolitan Lumber Co., which instrument is attached hereto.

4. That the only question in dispute between the parties hereto, is whether or not, under the terms of said instrument, the defendant is entitled to set off against the plaintiff herein, the sum of One Hundred Thirty-four Dollars and Eight Cents ($134.08), or the sum of Four Hundred Eighty-five Dollars and Forty-six Cents ($485.46).

5. That the construction of said instrument shall be submitted to William A. Smith, Esq., Judge of the Bergen County Circuit Court, as to which sum the defendant is entitled to counter-claim against the claim of the plaintiff.

6. That the plaintiff shall be entitled to judgment on the lien claim filed in this cause, for the sum found to be due after deducting the amount of counter-claim to which the defendant is entitled, under the terms of said agreement, together with interest and costs.

WINNE & BANTA,
Attorneys for Plaintiff.

MALEY & MALEY,
Attorneys for Defendant.

Instrument—Atteched to Stipulation.

THIS INDENTURE, made this 18th day of November, nineteen hundred and twenty-two, between John T. A. Conboy, of the borough of Dumont in the County of Bergen, State of New Jersey hereinafter called the party of the first part, which expression shall include his executors, administrators and assigns wherever the contents so requires or admits, and the Metropolitan Lumber Company, a corporation of the State of New Jersey, hereinafter called the party of the second part which expression shall include its successors and assigns wherever the contents requires or admits.

WITNESSETH, that whereas the party of the first part is indebted to the party of the second part in the sum of Eight thousand five hundred Dollars and is heavily indebted to other parties in a sum aggregating Thirty thousand dollars and whereas the party of the first part is unable to meet any of these obligations and whereas various creditors of the party of the first part have been threatening suit and some have actually instituted suit,

NOW, THEREFORE, in consideration of these presents and in consideration of mutual promises made by the parties hereto each of the other, and in consideration of the sum of One Dollar and other good and valuable considerations each to the other in hand paid, the party of the first part hereby and by these presents does bargain, sell, assign, grant, transfer, convey and deliver unto the party of the second part all his right, title and interest in his lumber business known as a lumber yard, and which lumber yard is in the

Instrument—Attached to Stipulation.

Borough of Dumont and is bounded by New Milford Avenue, Sunset Terrace and Manhattan Terrace, together with all accounts receivable, credits and all assets whatsoever pertaining to the said lumber yard, together with all his causes of action thereunder, including also one Packard six-ton truck, and one Packard one-ton truck and one Studebaker light six touring car, and including the good will and the right to the party of the second part to use the name of John T. A. Conboy in the conduct of the business. And the party of the first part further agrees and hereby covenants and agrees with the party of the second part to deliver to the party of the second part a warranty deed for the premises above described which are used by the party of the second part as a lumber yard; togther with all buildings improvements, etc., thereon, which warranty deed, the party of the first part agrees to deliver to the party of the second part on or before November twentieth, nineteen hundred and twenty-two.

And the party of the second part hereby covenants and agrees in consideration of the above premises to assume all the obligations and liabilities of John T. A. Conboy which obligations and liabilities are now due and owing and which obligations and liabilities have arisen directly and only from the lumber business carried on by John T. A. Conboy, and a schedule of which liabilities and obligations are annexed hereto and are made a part hereof and marked Schedule "A"; it being expressly understood and agreed that John T. A. Conboy shall himself pay all obligations that he may have and which are personal obligations that have not arisen from his

conduct of the lumber business. The party of the second part further covenants and agrees to assume and hereby assumes and agrees to pay a mortgage in the sum of Three Thousand Dollars which mortgage is held by William A. Schultz and which mortgage is on the premises herein above described. The party of the second part further covenants and agrees to assume the obligation of and to pay a note in the sum of Three Thousand Dollars of which the party of the first part is the maker and of which the Dumont National Bank is the holder; and the party of the first part agrees to assign and by these presents does transfer, set over and assign to the party of the second part the collateral held by the Dumont National Bank to secure the payment of the said note and which collateral consists of a mortgage in the sum of Five Thousand Eight Hundred Dollars of which one Harry J. Werner is the mortgagor.

It is further covenanted and agreed between the parties hereto that the house at Dumont Ave., now occupied by the party of the first part and the Cadillac car of the party of the first part are expressly excluded from the conveyance to the party of the second part and are to remain in the ownership and possession of the party of the first part.

The purposes and intentions of these premises are such that the party of the first part assigns all his entire lumber business above described to the party of the second part, together with all rights assets and causes of action and any part thereof in consideration of the assuming by the party of the second part of all obligations and

liabilities of the party of the first part which obligations have arisen directly and only out of the lumber business as maintained by the party of the first part and which obligations and liabilities are now due and owing.

It Witness Whereof the party of the first part has hereto set his hand and seal and the party of the second part has caused these presents to be signed by its President and its seal affixed this 18th day of November, nineteen hundred and twenty-two.

JOHN T. A. CONBOY.

JAMES M. BRADY,
JACOB HAUPTMAN.

SCHEDULE "A."

The following is a list of the obligations and liabilities of John T. A. Conboy which obligations and liabilities the Metropolitan Lumber Company has now assumed and agreed to pay in consideration of the premises of the agreement annexed hereto.

Allison & Daughty	$ 7.59
Bergen Mfg. Co.	68.57
Bergen County Pub. Co.	218.32
Bldg. Supply Co., Englewood	711.58
Fuller Bros. Co.	48.32
James L. Fowler	12.00
Tgoe Bros.	72.50

Schedule "A."

G. B. Iuglis	143.26
Charles Kurzon	27.65
Seghigh Portland Cement Co.	224.54
A. A. Sein	258.00
A. J. Muller Co.	160.41
Chas. T. McKer	36.73
Wm. G. Nerins	609.34
Ohily & Waneu	1401.07
Paterson Glass Co.	239.80
Cooper & Demarest	52.04
Waldo Bros. & Bond Co.	90.00
Christie & Terhune	100.00
F. W. Muller & Co.	134.08
Homan & Puddington	249.14
Insurers Service Corp.	196.20
George Taufer	171.40
O. G. Russell	89.00
Lawson & McMurray	455.57
Vulcan Roofing Co.	50.00
Waldo Bros. & Bond Co. (Storage)	325.62
Amer. Insulation Co. (Storage)	469.30

Also including adjustment with Waldo Bros. & Bond Co. and Amer. Ins. Co. on material now in Independent Warehouse, N. Y. C.

Southern Lumber Co.	3406.80
Central Lumber Co.	4072.24
Standard Lumber Co.	1309.47
Ritter Flooring Co.	400.60
Bankers Commercial	378.05
Metropolitan Lumber Co.	8514.27

Schedule "A."

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

Be it remembered that on this 18th day of November, nineteen hundred and twenty-two, before me, an attorney-at-law, of the State of New Jersey, personally appeared, John T. A. Conboy, who I am satisfied is the person mentioned in and who executed the above instrument; and, I having first made known to him the contents thereof, he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed.

In Witnesseth Whereof I have hereunto set my hand and seal this 18th day of November, nineteen hundred and twenty-two.

JACOB HAUPTMAN,
Attorney at Law of New Jersey.

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

John T. A. Conboy, of full age, being duly sworn, according to law on his oath deposes and says: that he is the John T. A. Conboy the party who is a party to the agreement annexed hereto, and that he has no liabilities of any nature whatsoever other than those specifically mentioned and set forth in Schedule "A" annexed to the and made a part of the agreement herein mentioned;

And the deponent further says that he makes this statement with the purpose of inducing the Metropolitan Lumber Company to become a party to this agreement and to accept his liabilities in

return for the sale of the lumber yard mentioned therein to the Metropolitan Lumber Company.

JOHN T. A. CONBOY.

Sworn and Subscribed
to before me this
18th day of November, 1922.

JACOB HAUPTMAN,
Attorney at Law of New Jersey.

Opinion.

BERGEN COUNTY CIRCUIT COURT.

METROPOLITAN LUMBER COMPANY,
Plaintiff,

vs.

FREDERICK W. MULLER, Builder & Owner,
Defendant.

WINNIE & BANTA for the plaintiff.

MALEY & MALEY for the defendant and counter-claimant.

CONCLUSIONS.

SMITH, J.:

The question involved in this case is whether or not the defendant and counter-claimant can

recover from the plaintiff on his counter-claim the amount actually due to him from John T. A. Conboy instead of being limited in his recovery on his counter-claim to the amount stated to be due to him from John T. A. Conboy in a schedule attached to an agreement wherein and whereby the plaintiff assumed certain obligations of John T. A. Conboy.

The counter-claimant bases his right upon a contract made for his benefit but not made with him, he is not a party to the contract and I do not think he can assert any greater rights under the contract than the party with whom he made the contract can, i. e., clearly the plaintiff entered into the agreement upon the express understanding that the debt due to the counter-claimant was the amount stated on the schedule and the plaintiff can be held for no greater amount. The remedy here asserted is not one under the Bulk Sales Act.

I will, therefore, enter judgment in favor of the plaintiff and against the defendant for the amount agreed upon as it is claimed, less the sum of $134.08.

New Jersey Court of Errors and Appeals

Between METROPOLITAN LUMBER COMPANY, a corporation of New Jersey, claimant, Plaintiff-Appellee, *v.* FREDERICK W. MULLER, Builder and Owner, Defendant-Appellant.	Action at Law. On Appeal.

BRIEF OF PLAINTIFF-APPELLEE.

On November 18th, 1922, John T. A. Conboy, a lumber dealer, made and executed an agreement with the Metropolitan Lumber Company, by which agreement he transferred to the Metropolitan Lumber Company, a lumber yard at Dumont, New Jersey, and certain other chattels used in connection therewith. By the terms of that agreement, the Metropolitan Lumber Company assumed and agreed to pay certain debts due and owing by John T. A. Conboy to others which were specifically set forth in Schedule A (State of the Case, pp. 16 and 17), attached to that agreement. Among these debts was one of Frederick W. Muller & Co. in the sum of One Hundred Thirty-four Dollars and eight cents ($134.08).

Thereafter the Metropolitan Lumber Company instituted suit on Mechanics' Lien Claim, in the Bergen Circuit Court against Frederick W. Muller, the same person mentioned in Schedule A, attached

to the agreement above referred to. That suit was brought for the sum of Five Hundred Fourteen Dollars and twenty cents ($514.20), for materials furnished by that company to the defendant, and delivered at the place mentioned in the Lien Claim, and were used by the defendant for the construction of two buildings on premises in the Borough of Dumont, Bergen County, New Jersey.

The defendant in his answer denied the claim of the plaintiff and filed a counter-claim in which it was set forth that at the time of the execution of the agreement above referred to, John T. A. Conboy was indebted to Frederick W. Muller in the sum of Four Hundred Eighty-five Dollars and forty-six cents ($485.46).

Thereafter this case was submitted on stipulation to the Judge of the Circuit Court without a jury, in which stipulation (State of the Case, p. 11) it recites that the question in dispute between the parties is whether, under the terms of the agreement referred to above, the defendant, Frederick W. Muller, is entitled to set off against the plaintiff the sum of One Hundred Thirty-four Dollars and eight cents ($134.08), the amount stated as due in the schedule annexed to the agreement or the sum of Four Hundred Eighty-five Dollars and forty-six cents ($485.46), the amount actually due from the said John T. A. Conboy to the defendant. The Court decided that the defendant was entitled to set off only the sum of One Hundred Thirty-four Dollars and eight cents ($134.08) against the claim of the plaintiff, which amounted to Five Hundred Fourteen Dollars and twenty cents ($514.20) and rendered judgment accordingly.

Argument.

This is an appeal from the interpretation of the contract as construed by the Court below, appel-

lant contending that the full amount of his counterclaim should have been allowed against the plaintiff's demand.

The contract between the Metropolitan Lumber Company and John T. A. Conboy, dated November 18th, 1922, provided for the transfer and delivery to the Metropolitan Lumber Company by Conboy of all his interest in the lumber yard and business, and the assets pertaining to that business and certain other chattels.

In consideration of that transfer, the contract provides:

> "And the party of the second part hereby covenants and agrees in consideration of the above premises to assume all the obligations and liabilities of John T. A. Conboy, which obligations and liabilities are now due and owing and which obligations and liabilities have arisen directly and only from the lumber business carried on by John T. A. Conboy, and a schedule of which liabilities and obligations are annexed hereto and are made a part hereof and marked Schedule 'A.'"

By reference to Schedule A, we find that it recites the following:

SCHEDULE "A."

> "The following is a list of the obligations and liabilities of John T. A. Conboy, which obligations and liabilities the Metropolitan Lumber Company has now assumed and agreed to pay in consideration of the premises of the agreement annexed hereto."

Beneath this statement, in a list of creditors designated by the name and the amount of their debt, appears the following:

"Frederick W. Muller & Co. $134.08"

A subsequent recital in the agreement following

a specific reference to Schedule A, and the liabilities and obligations therein set forth, is naturally modified by the limitations of that particular recital and must be read in connection with it, in order that the true intention of the parties might be had therefrom.

The Metropolitan Lumber Company must clearly have had in mind by the insertion of Schedule A, and the limitations in the agreement itself, that it was to be bound for the payment of the debts and liabilities of Conboy only to the extent set forth in the schedule.

It has well been said in the case of *Hope Spoke Co.* v. *Maryland Casualty Co.*, 38 L. R. A. (N. S.), 62:

> "Under the maxim, *Expressio unius est exclusio alterius*, the fact that a condition is expressed in one of the clauses of a contract excludes the idea that an unexpressed condition was intended to be declared in another clause."

In this instrument the parties have made it clear that the debts to be assumed by the Metropolitan Lumber Company were not all of the debts and liabilities of John T. A. Conboy but only those set forth in the schedule. This was made doubly plain by giving a detailed statement of each creditor's name and the sum which Conboy owed to that creditor. The head of the schedule states that the list which follows are those "obligations and liabilities the Metropolitan Lumber Company has now assumed and agreed to pay in consideration of the premises of the agreement annexed thereto," and by giving the name of F. W. Muller & Co. and the amount of his debt, $134.08, the company expressly limited its obligation to Muller in that particular amount.

If it could be said htat by the execution of this

agreement the Metropolitan Lumber Company has assumed, not those debts which the parties were careful in making a part of the schedule and consequently a part of the agreement, but all debts which Conboy might owe whether mentioned in the schedule or not then the schedule would serve no purpose whatsoever.

The consideration of the agreement as recited in it was the assumption of those particular debts and not all of the debts of Conboy. It might have been that Conboy owed many thousands of dollars in debts other than those mentioned in the schedule. It surely cannot be said that all such debts were assumed by the Metropolitan Lumber Company. It is conceivable that the debts owed by Conboy might be in such an amount that by their assumption, without limitation, the Metropolitan Lumber Company would become insolvent as a result of it.

Therefore, the agreement must be construed in the light of the intention of the parties as expressed in it, that only those obligations, which were mentioned, should be assumed by the Lumber Company.

The defendant, in his brief, has cited the case of *Joslin* v. *New Jersey Car Spring Co.*, 36 N. J. Law, 141. In this particular case, the agreement, which was construed by the Court, contained no reference to any schedule or to any certain liabilities which were assumed by the party sought to be charged, and that party attempted to confine its liability to such accounts as appeared on the books of the company, the liabilities of which were assumed.

The Court held that the defendants were chargeable with all liabilities because there had been no specification or limitation of them.

In the present case there is a distinguishable

feature that in the agreement now before the Court there is a limitation of liability directly expressed in it.

The rule of construction has been enunciated with clarity in 13 *Corpus Juris*, 537:

> "The court will restrict the meaning of general words by more specific and particular descriptions of the subject matter to which they are to apply. Thus general words following particular or specific terms are restricted in meaning to those things or matters which are of the same kind as those first mentioned. And in like manner general expressions will be restricted by particular descriptions or additions following them."

And the reason for that rule is stated in *Hoffman* v. *Eastern Wisconsin Railroad*, 134 Wisconsin, 603-607, as follows:

> "The rule that particularization followed by a general expression will ordinarily be restricted to the former is based on the fact in human experience that usually the minds of parties, are addressed specially to the particularization and that the generalities, though broad enough to comprehend other fields if they stood alone, are used in contemplation of that upon which the minds of the parties are centered."

It is respectfully submitted that the Court below decided the matter before it in the only way that it properly could be decided and that the three reasons in the notice of appeal (State of Case, p. 1) are without merit and that the judgment below should be affirmed.

Respectfully submitted,

WINNE & BANTA,
Attorneys for and of Counsel
with Plaintiff-Appellee.

New Jersey Court of Errors and Appeals

METROPOLITAN LUMBER CO., a corporation of New Jersey, Claimant, *Plaintiff-Appellee,* vs. FREDERICK W. MULLER, Builder & Owner, *Defendant-Appellant.*	Action at Law.

BRIEF ON BEHALF OF THE DEFENDANT-APPELLANT.

The right of the defendant-appellant to sue the plaintiff-appellee, or to offset a claim against the plaintiff-appellee in this cause, is not dependent upon the contract entered into between John T. A. Conboy and the plaintiff-appellee, but is also granted to the defendant-appellant, or any other claiming party, under and by virtue of Sec. 28 of the Practice Act of 1903 (Comp. St. Vol. 3, page 4059).

The only question in dispute in this case is whether or not under the terms of said contract,

the defendant-appellant is entitled to set off against the plaintiff-appellee's claim, the amount of $134.08, the sum designated in the schedule hereinafter referred to, as the amount due from John T. A. Conboy to the defendant-appellant, or the sum of $485.46, the amount actually due from the said John T. A. Conboy to said defendant-
10 appellant, at the time of the execution of the aforesaid contract (Stipulation, State of Case, page 12, lines 10 to 19).

It is respectfully submitted that the contract between said John T. A. Conboy and the Metropolitan Lumber Co. (State of Case, pages 13 to 16) must be construed according to the expressed intent of the parties as set forth in the sixth paragraph of said contract (State of Case, page
20 15, lines 33 to 40; page 16, lines 1 to 10), which reads as follows: "The purposes and intentions of these premises are such that the party of the first part assigns all his entire lumber business above decribed, to the party of the second part, together with all rights, assets and causes of action and any part thereof in consideration of the assuming by the party of the second part of all obligations and liabilities of the party of the first part which obligations have arisen directly
30 and only out of the lumber business as maintained by the party of the first part and which obligations and liabilities are now due and owing." The parties to this contract have made their intention clear by using and choosing the words used in this paragraph. It is clearly the expressed intention that the said Metropolitan Lumber Company assume ALL OBLIGATIONS AND LIABILITIES of the party of the first part (meaning
40 Conboy), which obligations arose directly and

only out of the lumber business as maintained by the party of the first part, which obligations and liabilities were then due and owing. One of the obligations which arose directly out of the lumber business of the said Conboy and which was due and owing at the time this agreement was entered into, was the sum of $485.46 due from the said Conboy to the defendant-appellant in this cause, and under the clear expressed intention of the parties to this contract, the Metropolitan Lumber Company assumed the payment of said liability of $485.46 to the defendant-appellant (see Stipulation, State of Case, page 11, lines 35 to 40).

The contention of plaintiff-appellee's attorney that the real intention of the parties, was not as set forth in said paragraph, but was that the Metropolitan Lumber Company assume only such liabilities as were set forth in a schedule annexed to said contract, is not tenable for the reason that paragraph six clearly expresses the intention on the part of the Metropolitan Lumber Company to pay all obligations and liabilities of said Conboy, which were then due and owing in just so many words. The fact that in the fourth paragraph of said contract (State of Case, page 14, lines 25 to 40), a schedule of liabilities and obligations of said Conboy is referred to, does not change the intention of the parties as expressed in paragraph six of said contract. In the fourth paragraph the said Metropolitan Lumber Company again agrees "to assume all the obligations and liabilities of John T. A. Conboy, which were then due and owing and which arose directly and only from said lumber business carried on by said John T. A. Conboy." In no part of this paragraph is it

expressed that ONLY such liabilities and obligations as are set forth in the schedule annexed to said contract, are to be assumed by the said Lumber Company and no others, or for no larger amounts than set forth therein. Were such to have been the intention of the parties to the contract, it would be so expressed, but in both the fourth paragraph, as well as in the sixth paragraph, it clearly expresses the intention of the parties, that the Lumber Company is to pay "ALL Liabilities and Obligations."

Were the said Lumber Company to assume only the obligations and liabilities set forth in the schedule annexed to said contract, there would have been no need for the said Lumber Company insisting that said Conboy make an affidavit that he had no liabilities of any nature whatsoever, other than those specifically mentioned in said schedule, which said affidavit is annexed to said contract (State of Case, pages 18 and 19). This affidavit clearly shows that said Lumber Company suspected that there were obligations and liabilities of said Conboy, existing and due and owing, other than those set forth in said schedule and said Lumber Company exacted said affidavit from said Conboy for its own protection and as a recourse against said Conboy by it, in the event of obligations and liabilities being established other than those set forth in said schedule.

The intention designed to be implied from a reading of the third paragraph, to the effect that said Lumber Company only assumed the obligations and liabilities set forth in said schedule is contrary and not in harmony with the intent so expressed in the sixth paragraph of said contract and this being so, the rule of law is as follows:

"The principle that the express mention of one thing implies the exclusion of another thing, is occasionally utilized in construing a contract, but like other rules of construction, it is useful only for the purpose of arriving at the intent of the parties, and it will not be implied if not in harmon with such intent" (Amer. and Eng. Encyl., Vol. 17, page 25). The intent of the parties to said contract, appears clearly from the statements in the sixth paragraph of said contract, and therefore, the fourth paragraph should not be considered so as to destroy the expressed intention of the parties, as made clear in the latter paragraph.

The case of Jacob D. Joslin vs. New Jersey Car Spring Co., 36 New Jersey Law, page 141, is almost in point and extends the principle of law involved in this case, much further than is involved in this case, much further than is involved in the case at bar, by including a disputed claim, as well as an established claim, such as is established in this case by the stipulation of facts. The defendants in the cited case assumed "all liabilities," as did the said Lumber Company in the case at bar. On page 145 of said volume, Mr. Justice Scudder defined liability as follows: "Liability is defined to be a state of being bound or obliged in law or justice." Said Conboy was bound and obliged in law and justice to pay to said Muller his claim, as admitted in the stipulation of facts and when said Lumber Company assumed to pay "all liabilities," then said Lumber Company assumed to pay said Muller the full amount that said Conboy was bound and obliged in law or justice to pay to said Muller. The fact that said Conboy or said Lumber Company had debited a smaller amount than was due to

said Muller in the schedule hereinbefore referred to, does not destroy said Muller's right to recover the full amount due him from the party who assumed "all liabilities."

It is stipulated that the contract in question was "wholly drawn at the direction of said plaintiff and by the agent or attorneys of said plaintiff." Therefore, if the contract is indefinite or ambiguous, it is to be construed most strongly against the party at whose direction it was drawn. In the cited case, Mr. Justice Scudder, on page 147 of said volume, in speaking of the assumption to pay "all liabilities," concerning the party attempting to enforce his claim, said that he "was entitled to a liberal and not narrow construction of the term used.

It is not to be assumed that said Lumber Company would not undertake to pay all liabilities and obligations of said Conboy in return for his real estate, buildings thereon, lumber yard and stock therein, bills receivable, automobile trucks and his right, title and credits and use of his business name, had they known the defendant's claim amounted to $485.46, instead of $134.08, as set forth in said schedule. Such assumption would be reading into the contract, an intention that was not therein so expressed.

In no part of said contract are restricting words used to show that only those obligations set forth in said schedule and no others, were to be assumed by said Lumber Company to offset the expressed intention of the said Lumber Company to assume "all liabilities and obligations of said Conboy."

It is respectfully submitted that the Court above erred under the facts and the law in this case in allowing to the defendant-appellant on his counterclaim, the sum of $134.08, instead of the sum of $845.46, actually due to him.

Respectfully submitted,

Maley & Maley

MALEY & MALEY,

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Augusta E. Maley

of Counsel on Brief.