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BILL OF COMPLAINT.

(Filed April 3, 1925.)

IN CHANCERY OF NEW JERSEY.

PAOLO PILEGGI,
Complainant, } 10
v. } On Bill for Specific
R. HOWARD THORN and } Performance.
wife, } Bill of Complaint.
Defendants. }

*To the Honorable Edwin Robert Walker, Chancellor
of the State of New Jersey:* 20

The complainant, Paolo Pileggi, of the City of Ocean City, in the County of Cape May, and State of New Jersey, respectfully shows that:

1. On March 15, 1920, R. Howard Thorn of said City of Ocean City made a certain written agreement or contract with complainant, a true copy of which is hereto annexed and made a part hereof as Exhibit A. 30

2. Complainant accordingly entered into possession of the lands and premises described in said contract on or about April 1, 1920, and since that time has continued and now is in possession of the same.

3. Since the date of said contract, complainant

has paid to said R. Howard Thorn who has accepted sundry sums of money at divers times, amounting to \$1083, as follows:

	1920:	
	April 8	\$22.—
	May 8	22.—
	June 11	22.—
	Aug. 24	45.—
	Sept. 21	25.—
10	Oct. 16	22.—
	Nov. 24	25.—
	1921:	
	Jan. 5	30.—
	Feb. 3	25.—
	Mar. 8	30.—
	Mar. 29	30.—
	Apr. 23	30.—
	May 23	30.—
20	July 13	30.—
	Aug. 8	40.—
	Aug. 27	20.—
	Sept. 24	30.—
	Oct. 24	30.—
	1922:	
	Feb. 27	40.—
	Mar. 24	25.—
	June 9	30.—
	Aug. 8	50.—
	No date	40.—
30	Nov. 23	40.—
	1923:	
	Mar. 3	100.—
	June 8	40.—
	Aug. 8	30.—
	July 11	30.—
	Sept. 25	30.—
	Nov. 29	30.—

1924:	
June 9	30.—
July 9	30.—
July 24	30.—
	<hr/>
	\$1083.—

4. Complainant has also paid assessments or rents against the premises for sewer and water service; and has kept the property in good repair at his own proper expense. 10

5. After making said agreement (Exhibit A), said R. Howard Thorn agreed with complainant that complainant's claims to the property, to wit, the lands and premises described in said agreement (Exhibit A) should not be forfeited by complainant's default in any payments to be made before April 1, 1925, unless said R. Howard Thorn should first duly notify complainant and give complainant a reasonable time and opportunity to perform said agreement (Exhibit A) after such notice. 20

6. After making said agreement (Exhibit A), said R. Howard Thorn agreed to notify complainant of any claim or demand of said R. Howard Thorn, which said R. Howard Thorn could, at his option, claim or demand because of any default of complainant in any payment in the condition and proviso of said agreement (Exhibit A) mentioned or referred to; and give complainant a reasonable time and opportunity to perform said agreement (Exhibit A) after such notice. 30

7. Complainant has not at any time been notified by said R. Howard Thorn according to agreement above stated in paragraph 5 or 6.

8. On March 18, 1925, complainant tendered to said R. Howard Thorn the sum of fifteen hundred (1500) dollars cash, lawful money of the United States of America, as purchase monies for the lands mentioned and described in said agreement (Exhibit A), and requested the said R. Howard Thorn to convey the premises to complainant subject, as in said agreement mentioned and provided, to a certain mortgage given by said R. Howard Thorn to the Ocean City Firemen's Relief Association, to secure the payment of eighteen hundred (1800) dollars, which mortgage, complainant agreed and assumed to pay as part of the purchase money; and notified said R. Howard Thorn that complainant was ready and willing to perform said agreement and to transact settlement accordingly, requesting said R. Howard Thorn that he make known and state to complainant all his claims and demands according to said agreement that such settlement might be transacted; and that he do so as aforesaid on or before April 1, 1925.

9. Said R. Howard Thorn at the time of said tender thereof, refused to accept said purchase monies, he, the said R. Howard Thorn, declaring that he denied said agreement and contract and therefore would not accept any purchase monies whatever then or at any other time from complainant and would not convey the lands and premises mentioned or described in said agreement to complainant.

10. The said R. Howard Thorn has refused and still refuses to convey to complainant the lands and premises mentioned or described in said written agreement hereto attached as Exhibit A.

11. Complainant tenders himself ready and will-

ing to pay the full amount of said purchase moneys upon the delivery to him of a duly executed deed of conveyance for the said lands and premises, conveying a good and marketable title free and clear of encumbrances except the above mentioned mortgage to secure the payment of eighteen hundred (1800) dollars, which mortgage complainant is ready and willing to assume and agree to pay, or otherwise to perform said agreement as this Honorable Court may order and direct. 10

12. The said R. Howard Thorn is of full age and married, his wife's name is Emma L. Thorn.

Complainant is without adequate remedy in the Courts of Law, and therefore prays:

1. That said R. Howard Thorn and Emma L. Thorn, his wife, who are the defendants to this suit, may answer this bill of complaint and each statement therein made: 20

2. That an account be taken of the purchase moneys paid and to be paid by complainant and that the parties may accordingly be decreed to specifically perform the said agreement hereinabove mentioned and referred to; or that an abatement from said purchase moneys be ascertained and set off to or for the said wife of R. Howard Thorn as and for the value of her inchoate right of dower in the premises. 30

3. That a writ of subpoena may issue, commanding each of said defendants to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

CHARLES K. LANDIS, JR.,
*Solicitor for and of Counsel
with Complainant.*

EXHIBIT A.

PILEGGI vs. Thorn—In Chancery of New Jersey, AGREEMENT made the Fifteenth day of March A. D. 1920, BETWEEN R. HOWARD THORN, of the City of Ocean City, county of Cape May and State of New Jersey, party of the First Part, and Paoli Pileggi, of the City, county and state aforesaid, party of the Second Part, as follows, to-wit:

10 The said party of the first part agrees to sell and convey to the said party of the second part, who agrees to purchase, all that certain lot or piece of ground situate, lying and being in the city of Ocean City, county of Cape May and state of New Jersey, bounded and described as follows, to-wit: BEGINNING at a point in the Northwesterly line of Simpson Avenue, at the distance of Four Hundred and Thirty Five (435) Feet Southwestwardly from
20 the Southwesterly line of Tenth Street, and runs thence (1) Southwestwardly in and along the Northwesterly line of said Simpson Avenue, a distance of Sixty Five (65) Feet; thence (2) Northwestwardly at right angles to the Northwesterly line of said Simpson Avenue, in and along the Northeasterly line of Eleventh Street a distance of Thirty Seven (37) Feet; then (3) Northeastwardly, at right angles to the said Eleventh Street and parallel with the Northwesterly line of said Simpson Avenue, a
30 distance of Sixty Five (65) Feet; thence (4) Southeastwardly, at right angles and parallel with said Eleventh Street a distance of Thirty Seven (37) Feet, to the point or place of beginning.

The above described premises being a part of lots numbered 83 & 84 on the plan of lots of the Ocean City Association.

BEING a part of the same premises which Abel D. Scull and Effie G. Scull his wife, by Deed of Indenture, dated the Twenty Ninth day of January, A. D. 1902, and recorded in the County Clerk's Office at Cape May Court House, New Jersey, in Book of Deeds No. 168 pages 155 &c., granted and conveyed to R. Howard Thorn, his heirs and assigns, forever, subject to the conditions and restrictions of the Ocean City Association.

On the terms and conditions following, to wit: 10
The party of the Second Part agrees to pay to the party of the First Part, Three Thousand Dollars (\$3000.00) for the above described property, in the following amounts and at the specified times; Commencing on the First day of April, 1920, the sum of Twenty Dollars, at least, and the sum of, at least, Twenty Dollars on each and every succeeding month, and as much more as possible, so that the total amount paid during the year shall be equal to at least Thirty Dollars a month or a total of Three 20
Hundred and Sixty Dollars for the year, the SURPLUS, (After paying all fixed charges, including INTEREST on the \$3000.00, purchase price, at the rate of SIX per centum (6%), TAXES, WATER & SEWER RENTS, INSURANCE and REPAIRS) to be credited on account of the purchase price and the balance, after surplus payments are deducted, to be the base for the new year, and so on each year until the sum of Five Hundred Dollars (\$500.00) has been paid on the principal, which 30
\$500.00 must be paid within Five Years, or not later than the First day of April 1925, when the party of the First part is to convey the property to the party of the Second part, subject to mortgage given, by the party of the First part, to the Ocean City Fireman's Relief Association, to secure the payment of Eighteen Hundred Dollars (\$1800.00) which the

party of the Second part agrees to assume and pay as a part of the purchase money, the party of the Second part also agrees, that, at the time of conveying the property, he will execute a mortgage for Seven Hundred Dollars (\$700.00), to secure the payment of a like amount, to the party of the first part, as payment of a part of the purchase money above mentioned, both mortgages to bear interest at the rate of SIX per centum (6%). It is also
10 agreed by the party of the Second part that he will pay at least One Hundred Dollars of the second mortgage, each and every year, on account of the principal, to the party of the First part, until the full amount is paid, payments to be Fifty Dollars (\$50.00) on the First day of April and October of each year.

THE CONDITION OF THIS AGREEMENT IS SUCH, that if the party of the Second part, his
20 heirs, executors, administrators or assigns, or any of them shall and do well and truly pay or cause to be paid unto the party of the First part, his heirs, executors, administrators, or assigns, or his certain attorney, the amounts as set forth in the above agreement, together with all the fixed charges on the property, then this agreement shall remain in full force and virtue; PROVIDED, however, that it is hereby expressly agreed and understood, that if the
30 party of the Second part, shall default in any of the payments, or fails to keep the property in good repair, at his own proper expense, at all times, or does not reduce the principal at least ONE HUNDRED (\$100.00) each and every year, then and in either such case, the whole principal debt aforesaid, shall, at the option of the party of the First part, become due and payable immediately and all the payments made shall be considered as rent and the party of the

Second part shall forfeit all claims to the property, anything herein contained to the contrary notwithstanding.

A policy of Fire Insurance is to be furnished by the party of the Second part, for an amount of not less than THREE Thousand Dollars (\$3000.00).

When the premises are conveyed they are to be clear of encumbrance except the above mentioned mortgages, and the title is to be good and marketable.

10

Possession is to be given on the First day of April 1920. And the said parties hereby bind themselves, their heirs, executors and administrators, for the faithful performance of the above agreement.

IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals the day and year above written.

R. Howard Thorn (Seal)

Emma L. Thorn (Seal)

Paolo Pileggi (Seal) 20

Marie X Pileggi (Seal)

her mark

SEALED AND DELIVERED

in the presence of
Alfred R. Smith
As to the first two
Somers C. Young,
As to the latter two.

Received the day of the date of the above agree- 30
ment, the sum ofDollars,
on account of the purchase money named therein.

WITNESS:

.....(Seal)

6. He denies paragraph six.

7. He admits paragraph seven, and further says that there was no agreement as set forth in paragraphs five and six.

8. He admits paragraph eight.

9. He admits paragraph nine.

10

10. He admits paragraph ten.

11. He admits paragraph eleven, but says that complainant's offer was after he made default in the terms of said agreement.

12. He admits paragraph twelve.

And this defendant makes further answer and says, that the complainant made default in the terms and conditions of said agreement and that complainant should have made payments to carry out his covenants and agreement as follows: From April 1, 1920, to April 1, 1921, complainant should have paid to defendant the sum of \$360.00, but instead he paid the defendant the sum of \$298.00 leaving \$62.00 unpaid for said year; that from April 1, 1921, to April 1, 1922, complainant should have paid to defendant the sum of \$360.00, but instead he paid to defendant the sum of \$275.00 leaving \$85.00 unpaid for said year; that from April 1, 1922, to April 1, 1923, complainant should have paid to defendant the sum of \$360.00, but instead he paid to defendant the sum of \$260.00 leaving \$100.00 unpaid for said year; that from April 1, 1923, to April 1, 1924, complainant should have paid to defendant the sum of \$360.00 but instead he paid to defendant the sum of \$160.00

leaving \$200.00 unpaid for said year; that from April 1, 1924, to April 1, 1925, complainant should have paid to defendant the sum of \$360.00, but instead he paid to defendant the sum of \$90.00, leaving \$270.00 unpaid for said year. That the complainant not only defaulted in the total yearly payments, but he defaulted in the monthly payments.

That by the terms of said agreement that when default shall be made in any of the conditions the complainant shall forfeit all claims to the property.

And this defendant makes further answer and says that the said property has now increased in value and complainant is endeavoring to take advantage of the increased market value although he was satisfied to abandon the terms of the agreement when said property was at the value as set forth by the consideration in said agreement.

That the complainant's bill should be dismissed with defendant's costs.

ANDREW C. BOSWELL,
Solicitor for Defendant.

14 *Answer of Emma L. Thorn—Replication—
Order of Reference*

8. She has no knowledge of paragraph eight.
9. She has no knowledge of paragraph nine.
10. She has no knowledge of paragraph ten.
11. She has no knowledge of paragraph eleven.
12. She admits paragraph twelve.

10 And this defendant makes further answer and says that the said agreement, marked Exhibit A, signed by her was not acknowledged by her, (and she being a married woman and the wife of the defendant R. Howard Thorn at the time she signed said agreement) and for this reason a specific performance of said agreement cannot be made against this defendant; therefore this defendant cannot be compelled to specifically perform the said agreement.

20 That the bill, as to this defendant should be dismissed with defendant's costs.

ANDREW C. BOSWELL,
Solicitor for Defendant.

Filed May 6, 1925.

Replication joining issue on answer of R. Howard Thorn.

30 Replication joining issue on answer of Emma L. Thorn.

Filed May 12, 1925.

Order of reference to Honorable R. H. Ingersoll,
Vice Chancellor.

PAOLO PILEGGI, the complainant, sworn.

Direct examination.

By Mr. Landis:

Q. Mr. Pileggi, where do you reside, where do you live?

A. Ocean City.

10 Q. Did you have any business with Mr. Thorn?

A. Yes.

Q. I will show you a contract here; do you know what that paper is?

A. Yes.

Q. What is it?

A. This contract make for sell me the house. I buy the house.

Q. Mr. Thorn sold you the house, you mean?

A. Yes, sir.

20 Q. Can you read that paper?

A. I can't read. I no can read.

Q. Anyhow you know that to be the paper?

A. Yes, this be the paper, yes.

Q. When did you go into the house?

A. When go into the house?

Q. Yes.

A. Fourth of April, 1920.

Q. First of April, 1920?

A. Yes, sir.

30 Q. By what right? Did this paper have anything to do with your going into the house?

A. I think so.

Q. Did you have any other understanding with Mr. Thorn than this paper?

A. No.

Q. This is the only understanding?

A. Yes, this is the only paper I got.

Q. I am not asking you if it was the only paper you got; did you have any other understanding with Mr. Thorn about going into the house? When you took the house why did you take it?

A. I have been paying rent for a year on the house, you know, and I go in the house 1919, on March and I stay for a year and pay sixteen —

Q. You were already in the house?

A. Yes, I been in the house paying rent for a year in the house for a year making this, sold me the house first of April. 10

(Contract offered and admitted in evidence marked Exhibit C1.)

Q. Did you try to make final settlement with Mr. Thorn? Did you try to pay for the house?

A. What?

Q. Did you try to pay for the house at any time or find out what to pay? 20

A. Well, I going to pay on account of the contract and no pay down on the contract.

Q. When did you try to find out what to pay?

A. I don't know what to pay.

Q. Just tell in your own way how you paid for the house? What did you pay on that contract?

A. I pay so much a month on account of the house you know and for five years wanted to pay much as I can, at the end of the five year, give five hundred dollar cash and give me the deed and mortgage 30 twenty-five hundred dollars.

Q. I am not asking you what the contract was. Did you pay the money?

A. What?

Q. Did you pay the money?

A. No pay all the money, pay some.

Q. Why didn't you pay all the money?

A. Well, I can't pay all the money because last spring I be sick for two months, decide to pay again in the fall, I get sick again and get awful short.

Q. Did you try to pay any money?

A. And before eighteen March I been then for fifteen hundred dollar for to make settlement, no give me a chance.

Q. Before the eighteen of March did you try to make any payment to find out what to pay or anything?
10

A. I go in again give him account, he says "I can't give no chance, for make settlement."

Q. You wanted to make settlement?

A. Yes.

Q. When?

A. I going pay some time in February.

Q. What?

A. Sometime in the last of February.

Q. Last of February?

A. Yes, went up there and says I got nothing to do for the house.
20

Q. Who said?

A. Mr. Thorn.

Q. Said who had nothing to do with the house?

A. Me, he says he can't sell the house to me, can't make settlement on the house to me.

Q. Was that the first time he said anything of that sort to you?

A. Yes, last February, when I going up then for the account.
30

Q. Had he told you before then you ought to settle or something?

A. No, he no wants to settle.

Cross-examination.

By Mr. Boswell:

Q. When did you first go into this property?

A. Me?

Q. Yes.

A. I go in this property in first of March, 1919.

Q. And you made the agreement in April, 1920, didn't you? 10

A. Well, make that agreement in 1920.

Q. And you were in possession, you were living in the house when you make the agreement, weren't you?

A. What?

Q. And you were living in the house when you made the agreement?

A. Yes.

Q. How much rent were you paying?

A. I no pay no rent. 20

Q. How much rent did you pay during the year 1919 per month?

A. Paid him sixteen dollars a month.

Q. And Mr. Thorn told you, in February of this year, that you could not have the property, did he?

A. Yes, he said can have no longer.

Q. Couldn't have it any longer?

A. No.

Q. He told you you couldn't buy it, didn't he?

A. No he says couldn't buy, have to sell to who- 30
ever pay for it.

Q. Did he tell you he was going to sell it to whoever he pleased?

A. Yes.

Q. He told you that in February, did he?

A. Yes, sir.

Q. Did you have that money in check you offered

to pay him anything on this property, did you yourself?

A. Well, after that, after he said the other way, we going to find the lawyer, so the lawyer and I go up there eighteenth March fifteen hundred dollars, he no wants to settle, he no wants to make settlement, that is all I can do.

Q. You lived in this house from 1920 on down and you are living there yet, are you?

10 A. Yes.

Q. Anyone else live in the house with you?

A. Anyone else?

Q. Yes, anyone else living in the house?

A. No.

Q. Do you have a family?

A. Sure I have a family, live with my family.

Q. Have you any daughters that are married?

A. Yes, I got two daughter married, don't live in the house now.

20 Q. They did, didn't they?

A. Yes.

Q. Did they pay you board or pay you rent?

A. No, he is not living at my house.

Q. But when they did live there?

A. When he live with me?

Q. Yes.

A. Well, help much as can, that is all.

30 Mr. Landis: I object.

The Court: Yes.

Q. Do you know how much you said in your bill of complaint, that you paid ninety dollars during the year of 1924 and 1925, I think. You paid during the year from April first, 1925, ninety dollars and you were to pay how much in that year?

Mr. Landis: I object, the contract speaks for itself.

The Court: Was to pay three hundred and sixty.

COMPLAINANT RESTS.

DEFENDANT'S TESTIMONY.

R. HOWARD THORN, the defendant, sworn.

10

Direct examination.

By Mr. Boswell:

Q. Mr. Thorn, you reside in the City of Ocean City?

A. I do.

Q. You know the complainant just preceded you on the witness stand?

20

A. I do.

Q. He was a tenant of yours—was he ever a tenant of yours?

A. He was.

Q. When?

A. From about the first of March 1919 until the present time.

Q. I show you a contract and ask whether or not it is the same contract that you entered into with him for the selling of certain premises in Ocean City?

30

A. It is.

Q. Did you ever have any conversation with Mr. Pileggi as to his defaults?

A. On several occasions I had.

Q. Just tell the Court what you told him?

A. Several times when his daughter brought rent I sent word back by her that they were behind and they would have to do better. The first that I recall talking to Mr. Pileggi personally was in the spring of 1923, two years and more ago, I met him on the corner of Eighth and Asbury, First National Bank corner, and I told him if he didn't do better with the rent he would never get the house and he said he had been sick and he would do better. He did make a good
10 payment following that, I think of about a hundred dollars; then it went on in the old way until the spring of 1924, I said to him "You will have to do better than this, Paolo, or you will never get that house. I think that was along about June or may have been May. Shortly after I got thirty dollars and then shortly after that he paid thirty more, and shortly after that he paid thirty more, I think those three payments were made in June and July, 1924. I haven't had anything since

20 Q. Did you have any conversation with him or statement with him after that as to his default?

A. Not until in February of this year he came into the office and wanted to know how much he owed. I said, "What for?" He said, "I want to get a deed for the property." And I told him he had forfeited his rights, that I never expected to deed it to him, that he had only paid ninety dollars in the last year and I did not propose to put up with that kind of a payment. He became very incensed and went out.

30 The next thing I heard from Mr. Landis.

Q. What was that?

A. Mr. Landis demanded to know how much it was, that they were going to settle. I told Mr. Landis they were not going to settle. I did not propose to deed the property to Paolo at this time. Your Honor, in using Paolo, we always call Mr. Pileggi Paolo.

The Court: I understand.

A. Later Mr. Landis called me on the phone and asked me if I would take, if I would give him, rather fifteen hundred dollars, which was half of the increase in the value, if they would surrender the agreement. I said no and hung up.

Q. Now then do you keep records as to the payments made by Mr. Pileggi to you?

A. Yes.

Q. How did you enter those records?

A. As they were paid.

Q. How were they charged, on the property or —

A. Charged as rent.

10

Cross-examination.

By Mr. Landis:

Q. Mr. Thorn, you understood Mr. Pileggi was buying the property, didn't you?

A. I understood that he entered into an agreement to buy it.

By the Court:

Q. What rent was this man paying from 1919 to 1920?

A. Sixteen dollars. The increased rent was to give him a chance to buy it.

30

DEFENDANTS REST.

COMPLAINANT'S REBUTTAL.

PAOLO PILEGGI, recalled.

Direct examination.

By Mr. Landis:

10 Q. Did Mr. Thorn tell you that if you did not pay more money you would not get the house?

A. Pay more money?

Q. Yes.

A. To get the house?

Q. Did Mr. Thorn ever tell you you were not going to get that house?

A. Yes.

Q. He told you so?

A. He told me what?

20 Q. That you wouldn't get the house, that he wouldn't sell you the house if you didn't pay more money?

A. He no tell me he want more money. I no got no notice. I no got no notice he ask for the money, every time I sent the money there and get his money and say "thank you" make receipt and say "thank you" that is all.

30 Q. Did you understand Mr. Thorn's testimony. Did you understand Mr. Thorn just now to say that he met you on the street in Ocean City and told you that if you didn't pay more money, if you didn't pay up, that you wouldn't get the house?

A. Yes.

Q. Did you hear him say that?

A. He no say nothing to me. I bring as much as I can, see, he no say no time, you know, you must bring that much over here for this time.

Q. Did you go to Mr. Thorn yourself or did you send your daughter who paid him?

A. Sometimes my daughter, sometimes send my daughter.

Q. Did he ever say anything to you?

A. No, no say anything to me.

Q. What did you understand when you were paying this money.

A. Which way I understand.

Q. Yes.

10

A. Well, understand paying account the house, no, account the contract; of course make much as I can.

Mr. Landis: I don't think I can make the man understand, your Honor.

Mr. Boswell: He answered that question very specifically a little while ago when Mr. Thorn told him in March or February.

20

The Court: I don't want any question about this; perhaps we better have an interpreter.

ROCCO DELESANTRO, sworn as interpreter.

(Through interpreter.)

Q. I wish to ask the witness whether at any time Mr. Thorn told him that if he did not do better in making his payments on this property that he, the witness, would lose the house that he was to buy?

30

A. No, he never told me that.

Q. Didn't Mr. Thorn at some time meet you on Asbury Avenue in Ocean City and tell you some-

thing like that? Don't you remember meeting Mr. Thorn?

A. I met him but he never said anything about the house.

Cross-examination.

By Mr. Boswell:

10 Q. Ask him when he met him whether he talked with him?

A. I didn't speak concerning this fact except at his house.

(Question repeated.)

A. No.

Q. Ask him when he was sick, what year he was sick in?

A. Last spring sick again three or four months.

20 Q. Ask him whether or not he did not say to Mr. Thorn, because he didn't make his payments was because he was sick, in his office up here?

A. I didn't say anything concerning these matters to him.

Q. Ask him whether or not he had a talk with Mr. Thorn in February of this year?

A. Yes.

Q. Ask him whether or not Mr. Thorn did not tell him then about the property?

30 A. I went to his house and I told him that I wanted to have settlement on the first of April.

Q. Ask what Mr. Thorn said to him?

A. He said that he couldn't sell it to me any more.

Q. Now then, ask him when, before that time, he told him the same thing?

A. No.

(Question repeated.)

A. No, not to me.

Q. Ask him whether or not he ever had any conversation with Mr. Thorn about his not paying the amount, keeping the amounts up?

The Interpreter: He says he has never spoke to me about it that other time. No, is the answer.

Q. Mr. Thorn never spoke to you about it? 10

A. No.

Q. Ask him whereabouts on Asbury Avenue he saw Mr. Thorn?

A. I don't remember; it has been five years ago.

Q. Do you remember where Mr. Thorn's office used to be?

A. Yes.

Q. Ask him if he ever went in there to see Mr. Thorn? 20

A. I used to go there every month to pay the rent for the house; I was living in Mr. Thorn's house before this agreement.

Q. Ask him whether or not that he paid to Mr. Thorn any more himself after the agreement was made?

A. I paid some and my sons paid some.

Q. Ask him when he paid, if he talked to Mr. Thorn about the property?

The Court: Did he say sons or daughters? 30

The Interpreter: I understood sons.

(Question repeated.)

A. My daughters.

Q. Ask him whether or not, when he made any payment he had any talk with Mr. Thorn about the property?

A. What did I have to say? I brought whatever I could and that was all.

Q. Ask him if he remembers what they talked about in the conversation at any time?

A. I don't remember.

10 Q. Ask him if he just went in and handed the money and went out without saying anything to him?

A. He stated to him "give me a receipt" and say "thank you."

Q. Ask him who he has agreed to sell the property to?

A. No, I haven't any contract.

20 The Court: Question was to whom had he agreed to sell the property.

Mr. Landis: What was the answer to that?

The Interpreter: He said he hadn't agreed to sell it to anyone.

30 Q. Ask him if he ever recalls going into Mr. Thorn's office, his old office, that is before he changed to his new quarters, when the office was on Eighth Street and the alley, between Asbury and Central Avenue?

A. Yes.

Q. Ask him if he knows any conversation they had when he went in there?

A. When I was living in his house and I went there.

Q. Ask him whether or not when he went there

that he knew that he was always behind in his payments?

A. I knew I was a little behind, sickness made me find myself too far behind.

Q. Ask him whether or not he did not tell Mr. Thorn that was the reason because he was sick he was behind?

A. No, I never tell him that.

(Recess taken to 1.45 P. M.)

10

AFTERNOON SESSION.

(Trial of the cause resumed at 1.45 P. M.)

EMILY PILEGGI, sworn for complainant.

Direct examination.

20

By Mr. Landis:

Q. Miss Pileggi, are you related to the witness that was on the stand here?

A. Yes, I am his daughter.

Q. Did you hear the testimony?

A. Yes.

Q. Did you make any of these payments to Mr. Thorn?

30

A. Yes, I did.

Q. Where did you make them?

A. At his office; at his old office and at his new office.

Q. At any of the times when you were there did Mr. Thorn say anything that he intended to cancel the contract?

A. No, never to me.

Q. Or that if you didn't pay up the whole sum at a certain time that he would cancel the contract, say anything of that sort?

A. No, sir.

Q. How many times did you go to make those payments?

A. I just don't remember; quite a few.

10 Q. What did Mr. Thorn ever say to you about the contract at any time?

A. Mr. Thorn never spoke to me about the contract.

Q. What did he do?

A. Well, he never said anything, I just brought in my payments and he made out his receipts and told me "thank you."

Q. That is all.

Cross-examination.

20

By Mr. Boswell:

Q. When did you make the last payment?

A. I don't remember.

Q. You don't remember?

A. When I made the last payment?

Q. Yes, to Mr. Thorn.

A. I really don't remember.

30 Q. Now you remember that Mr. Thorn and you did not have any conversation as to this property and yet you don't remember when you made the payments, is that it?

A. What is that?

(Question repeated.)

A. I don't remember when I made the last payment; it was quite a while ago.

- Q. How long ago?
- A. Well, about, I guess sometime in the winter of 1924.
- Q. 1924, winter of 1924?
- A. Yes.
- Q. And where was that payment made?
- A. At Mr. Thorn's office.
- Q. Where was the office?
- A. Where it is now, I believe, Eighth and Central. 10
- Q. And when do you say it was made, when?
- A. I am not sure about this. I know I never made payments in summer because I always worked.
- Q. You never made the payments in the summer?
- A. No.
- Q. You say the year that you made the, that is the year that you recall going there was the year when you made these payments in the summer time?
- A. Yes.
- Q. Now suppose that there were only three pay- 20
ments made in 1924, only three payments made in 1924, and not any in 1925, then, of course, you couldn't have made any payments in 1924 but it must have been previous to that that you made the payments?
- A. Perhaps.
- Q. Don't you know? Were you working at the same place 1924 as you were in 1923?
- A. No; in the summer 1924 I worked in the gas office. 30
- Q. When you were working in the gas office did you make any payments?
- A. No.
- Q. So it must have been before 1924 that you made any payments to Mr. Thorn, you yourself?
- A. I see.

Q. If you didn't make any payments in 1924, then the payments that you did make to Mr. Thorn must have been before 1924, is that right?

A. I guess; I don't remember when my last payment was made.

Q. No, but I say the year, if you didn't make any in 1924, then you must have made them previous to the year 1924?

A. Yes.

10 Q. How many sisters have you?

A. Four.

EVA PILEGGI, sworn for complainant.

Direct examination.

By Mr. Landis:

20

Q. Are you related to Mr. Pileggi, who testified here?

A. Yes; I am his daughter.

Q. Did you hear the testimony?

A. Yes.

Q. Did you make any of these payments referred to in this testimony?

A. I did.

30 Q. How many of them did you make, do you know, about how many?

A. Quite a number of them I guess.

Q. When?

A. I couldn't tell you the exact amount.

Q. When did you make them, Miss Pileggi?

A. Well, mostly in the fall and winter.

Q. Beg pardon?

A. Well, mostly in the fall and winter, but I

couldn't tell you what year I made these different payments, brought this money.

Q. Did Mr. Thorn at any time say anything that would indicate that he was not satisfied or he would take the property back?

A. No, not to me.

Q. Beg pardon?

A. No, he never said a word to me.

Q. What occurred when you went in?

A. Brought the money, he made out his receipt, 10
thanking me and went out.

Q. Nothing but a mere transaction of paying money?

A. Yes.

Cross-examination.

By Mr. Boswell:

Q. When did you make the last payment?

A. I couldn't tell you that.

20

Q. You couldn't?

A. I couldn't.

Q. What is the amount you made, do you remember that?

A. No, I don't remember the amount either.

Q. Well, was it last year?

A. No, it wasn't. I don't believe it was.

Q. You say you made the payments, when, in the fall and spring?

A. Mostly in the fall and winter.

30

Q. Fall and winter?

A. Yes.

Q. There were only three payments made in 1924, not any in 1925; the payments that were made in 1924 were in June and July; now, if you made payments in the fall, then you didn't make any payments during June and July, did not?

A. No, I didn't make any payments in June and July.

Q. Those payments were made in 1924, so you didn't make any payments in 1924, did you?

A. No, I don't believe I did.

Q. You have heard your sister testify that she made all the payments in 1923, didn't you?

A. Yes.

10 Q. So you didn't make any payments then, did you, if she made them all in 1923, you didn't make any, did you?

A. Well, I couldn't tell you.

Q. You heard her testimony, didn't you?

A. Yes.

Q. And you heard her testify that she made them all in 1923, so, if she made them all in 1923, then, of course, you didn't make any in 1923, did you?

A. No, I didn't.

20 Q. So you must have, payments you must have made were previous to 1923, is that right, if you made any at all it must have been previous to 1923?

A. I believe I did.

Q. Well, I am not disputing the question, but I said if you did you must have made them previous to 1923.

A. Yes.

Q. How many sisters have you?

A. Four.

Q. Younger or older?

30 A. Two younger and two older.

Q. They live at home with you too?

A. No, not now.

Q. Did they in 1923?

A. Yes.

Q. And they did in 1922, didn't they?

A. Yes.

Q. Do you know whether or not they did not make some payments for your father?

A. What was that?

Q. Do you know whether or not they did not make some payments for your father?

A. No, they didn't make any payments.

Q. They didn't make any?

A. No.

Q. When you made payments you just went in and handed him the money and that is all that was 10 said?

A. Yes.

Q. Didn't have any conversation with him.

Q. Where was this, where was the office that you made the payments?

A. He had his office at Eighth and Asbury, his old office, and then I made not very many in his new office Eighth and Central.

COMPLAINANT RESTS.

20

R. HOWARD THORN, recalled.

Direct examination.

By Mr. Boswell:

Q. Mr. Thorn, how long have you been in your 30 present office in Ocean City?

A. I moved in on the second of July, 1923.

Q. When?

A. Second of July, 1923, two years this coming second of July.

Q. Where is the office located now?

A. 426 Eighth Street, corner of Central Avenue.

Q. Where were you previous to that?

A. 408 Eighth Street, at the corner of the alley between Central and Asbury.

Q. You have heard Mr. Pileggi state as to not having any conversation with you; will you just state to the Court —

10 Mr. Landis: I object. Isn't this reopening the former testimony?

The Court: No, I think this is probably in rebuttal of what the two witnesses last called testified.

Q. Will you state as to the question of seeing Mr. Pileggi and the number of times and where and what was stated?

A. What I said to Mr. Pileggi?

20 Q. Yes, and when and in what place and what office it was.

A. The first I said to him was in the spring of 1923 when I met him at the corner of Eighth and Asbury Avenue, at the National Bank corner, and spoke to him then about his slow payments and that he wouldn't get the property unless he done better; I don't know just what the conversation was but that is the substance of what was said. The next time I spoke to him was in the old office, just prior to my moving, probably in May or June, probably more 30 than likely in May, because it was torn out in June, and I had no office at all, and then I spoke to him and told him about the same thing, that he was behind and if he did not do better he would never get the property and then is the time he told me about his sickness. Then —

Q. When the daughters would make payment did you ever make any statements to them at all?

A. I don't know —

Q. You recognize these two?

A. I know all the daughters but I don't know which of them I spoke to one time about the payments not coming up and that they would have to do better; that is the substance of what I said.

Cross-examination.

10

By Mr. Landis:

Q. What was that you spoke to the daughters about it?

A. Sir?

Q. You say you spoke to the daughters about?

A. One of the daughters once about it, yes.

Q. One of these daughters on the stand?

A. I don't remember. I know the girls but I don't know them apart.

20

TESTIMONY CLOSED.

EXHIBIT C1.

(Same as Exhibit A.)

30

CONCLUSIONS.

(Filed June 27, 1925.)

IN CHANCERY OF NEW JERSEY.

10	Between PAOLO PILEGGI, <i>Complainant,</i> and R. HOWARD THORN and wife, <i>Defendants.</i>	}	On Bill for Specific Performance. On Final Hearing. Conclusions.
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20 These conclusions are not to be published in the official or unofficial reports.
MR. CHARLES K. LANDIS, JR., for the complainant.
MR. ANDREW C. BOSWELL, for the defendants.

INGERSOLL, V. C.:

The complainant and defendants on the fifteenth day of March, 1920, entered into an agreement, wherein the defendants agreed to convey certain
30 premises in Ocean City on the terms and conditions following:

“The party of the Second part agrees to pay to the party of the First Part, Three Thousand Dollars (\$3000.00) for the above described property, in the following amounts and at the specified times; commencing on the first day of April,

1920, the sum of Twenty Dollars, at least, and the sum of, at least, Twenty Dollars on each and every succeeding month, and as much more as possible, so that the total amount paid during the year shall be equal to at least Thirty Dollars a month or a total of Three Hundred and Sixty Dollars for the year, the SURPLUS, (After paying all fixed charges, including INTEREST on the \$3000.00, purchase price, at the rate of SIX per centum (6%), TAXES, WATER & SEWER RENTS, INSURANCE AND REPAIRS) to be credited on account of the purchase price and the balance, after surplus payments are deducted, to be the base for the new year, and so on each year until the sum of Five Hundred Dollars (\$500.00) has been paid on the principal, which \$500.00 must be paid within Five Years, or not later than the First day of April, 1925, when the party of the first part is to convey the property to the party of the Second part, subject to mortgage given, by the party of the First part, to the Ocean City Fireman's Relief Association, to secure the payment of Eighteen Hundred Dollars (\$1800.00) which the party of the Second part agrees to assume and pay as a part of the purchase money, the party of the Second part also agrees, that, at the time of conveying the property, he will execute a mortgage for Seven Hundred Dollars (\$700.00), to secure the payment of a like amount, to the party of the First Part, as payment of a part of the purchase money above mentioned, both mortgages to bear interest at the rate of SIX per centum (6%). It is also agreed by the party of the Second part that he will pay at least One Hundred Dollars of the

second Mortgage, each and every year, on account of the principal, to the party of the first part, until the full amount is paid, payments to be Fifty Dollars (\$50.00) on the First day of April and October of each year.

10 THE CONDITION OF THIS AGREEMENT IS SUCH, that if the party of the Second Part, his heirs, executors, administrators or assigns, or any of them shall and do well and truly pay or cause to be paid unto the party of the First part, his heirs, executors, administrators or assigns, or his certain attorney, the amounts as set forth in the above agreement, together with all the fixed charges on the property, then this agreement shall remain in full force and virtue; PROVIDED, however, that it is hereby expressly agreed and understood, that if the party of the Second part, shall default in any of the payments, or fails to keep the property in good repair, at his own proper expense, at all times, or does not reduce the principal at least ONE HUNDRED (\$100.00) each and every year, then and in either such case, the whole principal debt aforesaid, shall, at the option of the party of the First part, become due and payable immediately and all the payments made shall be considered as rent and the party of the Second part shall forfeit all claims to the property, anything herein contained to the contrary notwithstanding."

30

Since the date of the agreement, the sum of \$1083 has been paid. The complainants allege that after making said agreement, the defendants agreed that the lands and premises should not be forfeited by complainant's default in any payments to be made before April 1st, 1925, unless Thorn should first notify complainant and give complainant reasonable

time and opportunity to perform said agreement, and that the said defendant agreed to notify said complainant of any claim or demand which he could at his option claim or demand because of any default by the complainant in any payment.

The complainant has not by proof sustained the allegations even if they could be enforced. *Halpern v. Shurkin*, Vol. III Adv. Rep. No. 25, p. 1164. I am convinced, however, that the complainant has continuously failed in making his payments and that he has for some time considered the contract to purchase as abandoned. 10

The bill for specific performance must be dismissed.

Determined: June 22nd, 1925.

20

30

thereon, ordered, adjudged and decreed that complainant's said bill of complaint be dismissed and that defendant's costs be taxed by the clerk and paid by complainant.

E. R. WALKER,
C.

Respectfully advised.

R. H. INGERSOLL,
V. C.

10

NOTICE OF APPEAL FROM FINAL DECREE.

(Filed June 3rd, 1926.)

IN CHANCERY OF NEW JERSEY.

20

PAOLO PILEGGI,

Complainant,

v.

R. HOWARD THORN, and
wife,

Defendants.

} On Bill for Specific
Performance.

} Notice of Appeal
from Final Decree.

30

The complainant, Paolo Pileggi, hereby appeals from the Final Decree made in the above entitled cause by the Chancellor on the advice of Vice-Chancellor, Honorable Robert H. Ingersoll, March 29, 1926, and from the whole and every part there-

of, to the Court of Errors*and Appeals in the last resort in all causes.

Dated May 29th, 1926.

CHARLES K. LANDIS, JR.,
*Solicitor for and of Coun-
sel with Complainant,
Paolo Pileggi.*

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

CHARLES K. LANDIS, JR.,
*Of Counsel with Complain-
ant, Paolo Pileggi.*

Due and legal service is hereby acknowledged this 20 29th day of May, 1926.

ANDREW C. BOSWELL,
*Solicitor for Defendants
R. Howard Thorn and
wife.*

PETITION OF APPEAL.

(Filed June 3rd, 1926.)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

PAOLO PILEGGI, 10
Complainant-Appellant, }
v. } On Appeal from the
R. HOWARD THORN and } Court of Chancery
wife, } of New Jersey.
Defendants-Appellees. } Petition of Appeal.

*To the Honorable, the Court of Errors and Appeals
of the State of New Jersey:* 20

The petition of Paolo Pileggi, the appellant in the above entitled cause, respectfully shows that:

1. Petitioner is aggrieved by a final decree made in the Court of Chancery of the State of New Jersey by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, on advice of his Honor Robert H. Ingersoll, Vice-Chancellor, dated March 29, 1926, in a certain cause in said Court of Chancery wherein the said Paolo Pileggi was complainant and the said R. Howard Thorn and wife were defendants, in that the said decree orders and adjudges that complainant's bill of complaint be dismissed and the defendants' costs be taxed by the clerk of said Court of Chancery and paid by complainant. 30

And petitioner appeals from the whole of said decree of the Chancellor which decrees as aforesaid, upon the ground that the same was erroneous in that:

1. The defendant, R. Howard Thorn, accepted from complainant many partial payments of the purchase monies at times and in amounts other than when and as specified in the written contract by
10 which said defendant sold and agreed to convey to complainant the lands and premises as alleged in the bill of complaint filed in this cause. By so doing, the terms of payment of said written contract were accordingly altered unless said defendant, R. Howard Thorn, should have first duly notified complainant otherwise and given complainant a reasonable time and opportunity to perform said contract after such notice, which said defendant did not do but kept and retained the purchase monies accepted
20 by him as aforesaid and refused to accept the balance of the same duly tendered by complainant before April 1, 1925, when, according to said contract, said lands and premises should have been conveyed to complainant. The said defendant is estopped by his said conduct from refusing to accept said balance of purchase monies and the parties should have been decreed to specifically perform said contract as mutually altered by them as aforesaid. Said written contract was altered as aforesaid by parol,
30 because the parol contract was executed by acceptance of the partial payments of purchase monies as aforesaid and because the statute of frauds should not be permitted itself to work a fraud.

2. Complainant has been in possession of said lands and premises as purchaser by said contract since its date, March 15, 1920, and paid the purchase

monies as aforesaid, with the knowledge and consent of the defendant, Emma L. Thorn, wife of the defendant, R. Howard Thorn, said wife having signed said contract but not having been named therein as a party nor having acknowledged the same. An abatement from said purchase monies should have been ascertained and set off to or for the said wife as and for the value of her inchoate right of dower in the premises.

10

3. Said decree does not grant any relief to complainant on his bill of complaint filed in said cause.

4. Said decree dismisses said bill of complaint.

Petitioner therefore prays that the said decree of the said Chancellor may be wholly reversed, set aside, and for nothing holden, and that petitioner may have such other relief in the premises as to this Court shall seem proper.

20

CHARLES K. LANDIS, JR.,
*Solicitor for and of Counsel
with Appellant.*

30

ANSWER TO PETITION OF APPEAL.

(Filed July 22, 1926.)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10	PAOLO PILEGGI, <i>Complainant-Appellant,</i>	}	On Appeal from the Court of Chancery.
	v.		Answer to Petition of Appeal.
20	R. HOWARD THORN and wife, <i>Defendants-Appellees.</i>		

The answer of R. Howard Thorn and wife, the above-named appellees, to the petition of appeal of Paolo Pileggi, the above-named appellant.

These appellees, not admitting the truth of all of any of the matters in the said petition of appeal contained, for answer thereto nevertheless admit that a decree was made and entered in the Court of Chancery of New Jersey, in the above entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree, these appellees beg leave to refer thereto when the same shall be produced.

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

ANDREW C. BOSWELL,
Solicitor for Appellees.

W. HOLT APGAR,
Of Counsel for Appellees.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

PAOLO PILEGGI,
Complainant,

v.

R. HOWARD THORN and wife,
Defendants.

ON APPEAL FROM THE COURT OF CHANCERY OF
NEW JERSEY.

BRIEF FOR COMPLAINANT-APPELLANT.

STATEMENT.

Thorn sold certain land at Ocean City, Cape May County, New Jersey to Pileggi by written contract for an agreed purchase price of \$3000 to be paid in monthly payments amounting to \$360 yearly during the first five years so that after deducting interest and certain fixed charges, \$500 should have thus been paid on the principal "not later than the first day of April, 1925," when Thorn was to convey the premises to Pileggi and accept a purchase money mortgage.

Paragraph 1 of bill of complaint, page 1, lines 25 to 30.

Exhibit A annexed as part of bill of complaint pages 6 to 9 inclusive.

*Brief for Complainant-Appellant
Statement*

Admitted by paragraph 1 of answer of R. Howard Thorn, page 10, line 25 and paragraph 1 of answer of his wife, Emma L. Thorn, page 13, line 25.

Payments on the contract were made by Pileggi and accepted by Thorn during said five years, as follows:

1st year—	\$298.
2nd year—	275.
3rd year—	260.
4th year—	160.
5th year—	90.

\$1083.

Paragraph 3 of bill of complaint, page 1, line 36, all of page 2, and page 3, lines 1 to 6 inclusive.

Answer of R. Howard Thorn, page 11, lines 19 to 37 inclusive and page 12, lines 1 to 11 inclusive.

Said contract provided that if Pileggi should default in any of the payments, or did not reduce the principal at least \$100 each and every year, then at Thorn's option, the whole principal debt should become immediately due and payable and all the payments made should be considered as rent and Pileggi should forfeit all claims to the property.

Exhibit A, page 8, lines 27 to 37 inclusive.

Thorn, however, continued during the five years to accept said payments without notice to Pileggi of any intention of exercising his (Thorn's) option upon default, though the yearly totals of payments accepted were less than the terms of the contract required. Thorn testified that in 1923 and again in the spring of 1924 he spoke to Pileggi about his

slow payments and told him that he (Pileggi) would not get the property unless he did better; but Thorn afterwards accepted further payments from Pileggi during the year 1923 and in June and July of 1924. The first open declaration by Thorn was in February, 1925, about one month before April 1, 1925, the date fixed by the contract for settlement. In February, 1925, Thorn refused settlement. On March 18, 1925, Thorn refused \$1500 cash tendered by Pileggi declaring that he (Thorn) denied the contract and therefore would not accept any purchase monies whatever then or at any other time from Pileggi.

Testimony of R. Howard Thorn—direct, page 22, lines 1 to 30 inclusive.

Paragraphs 8 and 9 of bill of complaint, page 4, admitted by paragraphs 8 and 9 of answer, page 11.

Emma L. Thorn, wife of R. Howard Thorn, signed the contract (Exhibit A) but was not named therein as a party and did not acknowledge it. She does however, by her answer, admit the contract and says that she has no knowledge of the other paragraphs of the bill of complaint, thus not denying them.

Answer of Emma L. Thorn, pages 13 and 14.

POINT I.

AFTER A COURSE OF DEALING DURING FIVE YEARS BY WHICH THE DEFENDANT CONTINUOUSLY ACCEPTED PAYMENTS OF LESS THAN THE AMOUNTS DUE ACCORDING TO THE STRICT TERMS OF THE CONTRACT, DEFENDANT COULD NOT ABRUPTLY RESORT TO THE STRICT TERMS OF THE CONTRACT AND DECLARE A FORFEITURE OF THE CONTRACT WITHOUT NOTICE TO COMPLAINANT AND AFFORDING COMPLAINANT A REASONABLE TIME AND OPPORTUNITY TO PERFORM.

During five years after the making of the contract, the defendant continued to receive payments from complainant contrary to the strict terms of the contract without objection or notice. From the manner in which defendant accepted complainant's payments as stated in paragraph 3 of the bill of complaint which is admitted, there arose in equity an implied agreement by defendant that complainant's claim to the property should not be forfeited without affording complainant a reasonable time and opportunity to perform as alleged in paragraph 5 of the bill of complaint and there also arose in equity an implied agreement by the defendant to notify complainant of defendant's intention to exercise his option to declare a forfeiture as alleged in paragraph 6 of the bill of complaint. The answer admits paragraph 7 of the bill of complaint which alleges that complainant has not at any time been

notified by defendant according to such agreements arising in equity as alleged in paragraphs 5 and 6.

Quoting from *Brown v. Ely*, 92 N. J. Equity 487-113 Atl. Rep. 698:

“But while the parties are privileged to make a binding stipulation of that nature, they are equally privileged to unmake it after it has been made.” * * * “From all the testimony it seems clear that the attitude of defendant in relation to this contract and the consequent course of dealing of the parties with reference to it was such as to fully justify complainant in the confident belief which he undoubtedly entertained that it was not necessary for him to pay promptly. It cannot be reasonably doubted that complainant fully believed that he was privileged by defendant to disregard the contract terms touching prompt payment; it seems equally impossible to doubt that defendant’s assurances to complainant, express and implied, not only occasioned that confident belief, but justified it. In these circumstances, complainant was at least entitled to notice from defendant of a change of attitude on his part or a notice that his rights would be terminated unless he should promptly make payments of the then small final balance due. But without warning to complainant the letter of defendant of November, 1919, notified complainant that his rights had been forfeited. Even should it be assumed that complainant received the warning letter of February, 1919, the payment by him of \$36 and its acceptance by defendant on the day named in that letter a payment of less than the amount then due—appropriately jus-

tified complainant's belief that the old relations and course of dealings were re-established."

Even if, as Thorn testifies, he warned Pileggi that "he (Thorn) would have to do better," Thorn's testimony fixes the times of such warning in 1923 and May or June of 1924, after which times in June and July of 1924, he accepted further payments from Pileggi and refused tender of any purchase monies whatever in March, 1925, without in the meantime having given Pileggi any notice and opportunity to save his rights.

The Vice-Chancellor's conclusions are that "The complainant has not by proof sustained the allegations (paragraphs 5 and 6 of bill of complaint, page 3) even if they could be enforced."

Page 41, lines 6 and 7.

The payments as stated in paragraph 3 of bill of complaint are admitted and Thorn's answer summarizes and admits the same in yearly amounts.

Page 11, lines 19, &c.

The fact of the continual acceptance of payments of less than the amounts due on the contract as admitted by the pleadings and proved throughout the testimony, is sufficient to show that by such conduct of the parties there arose such agreements as alleged in paragraph 5 and 6 of the bill of complaint as conclusions of fact so alleged to fairly apprise the defendant of the real complaint, and as basis for the allegations in paragraph 7 that Pileggi was not at any time so notified by Thorn, which Thorn's answer admits.

POINT II.

THE TERMS OF A WRITTEN CONTRACT ARE ALTERED BY PAROL, WHEN THE PAROL CONTRACT HAS BEEN EXECUTED BY THE PARTIES OR WHEN THE STATUTE OF FRAUDS WOULD ELSE BE PERMITTED ITSELF TO WORK A FRAUD.

The actual acceptance by Thorn of payments of less than the amount due was in itself the execution by him of an implied parol agreement not to claim, without notice, a forfeiture of the written contract for such deficiencies.

Halpern v. Shurkin, Vol. III Adv. Rep. No. 25, p. 1164, 129 Atl. Rep. 487.

In the case cited, it was alleged that defendant had orally promised to make up by his bonds a difference in negotiations according to written contract and held that such oral promise could not be enforced because it was executory.

In the present case, the parol contract to accept less than required by the terms of the written contract was executed by acceptance. *Halpern v. Shurkin, Id.* recognizes this distinction and cites many illustrative precedents of the proposition of law above stated under this point. Quoting from *Halpern v. Shurkin, Id.*:

“A substituted performance, agreed upon by parol, actually and fully executed, may be set up in defense at law in a suit on a written contract within the statute of frauds. *Long v. Harwell*, 34 N. J. Law, 116. And at law a parol variation of the mode of performance of a written contract within the statute of frauds

is held * * * to be a defense, if willingness to perform, thwarted by the plaintiff, is shown. * * * *Stryker v. Vanderbilt*, 25 N. J. Law, 482, and *Nissel v. Swinley*, 76 N. J. Law, 288. * * * Equity will enforce a parol variation of a written contract for the sale of land, executed and completed, as it does an unwritten contract, wholly or partly performed by the complaining party, by refusing to allow the statute of frauds to be used to perpetuate a fraud. *Wirtz v. Guthrie*, 81 N. J. Eq. 271, 87 A. 134.”

The debt does not mature until mortgagee exercises his option on default; not, if mortgagee continues to act otherwise. *Van Arsdale v. Gorenflo*, 116 Atl. Rep. 869. 93 N. J. Eq. 486.

POINT III.

DEFENDANT HAVING CONTRACTED TO SELL AN UNINCUMBERED-TITLE, HIS WIFE HAVING SIGNED BUT NOT ACKNOWLEDGED THE CONTRACT, SPECIFIC PERFORMANCE BY THE OWNER OF THE FEE MAY BE DECREED WITH ABATEMENT OF THE PURCHASE PRICE TO THE AMOUNT OF THE VALUE OF THE DOWER INTEREST AS ASCERTAINED BY A TABLE OF MORTALITY.

Binn v. Smith, 93 N. J. Equity 33, 113 Atl. Rep. 69;

Luczak v. Mariove, 92 N. J. Equity 377—112 Atl. Rep. 494—affirmed 93 N. J. Equity 501—116 Atl. Rep. 925.

Most respectfully submitted,

CHARLES K. LANDIS, JR.,

Of Counsel with Complainant-Appellant.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

PAOLO PILEGGI,
Complainant-Appellant,

v.

R. HOWARD THORN and wife,
Defendants-Appellees.

ON APPEAL FROM THE COURT OF CHANCERY OF
NEW JERSEY.

BRIEF FOR COMPLAINANT-APPELLANT IN
REPLY TO BRIEF FOR DEFENDANTS-
APPELLEES.

By leave of Court, reply of complainant-appellant
to brief of defendants-appellees.

STATEMENT.

The statement in the brief for defendants-appel-
lees does not deny the facts stated in the statement
in the brief for complainant-appellant.

The statement in the brief for defendants-appel-
lees is denied except the following which is admitted.

Pileggi, complainant, was in possession of the property before the contract was made and paid rent of \$16.00 per month.

From the date of the agreement to the time Pileggi made tender of payment he had paid the sum of \$1083.

I.

AS TO THE ALLEGATIONS OF THE BILL OF COMPLAINT.

Chancery rules provide that:

1. The bill shall state the facts on which the pleader relies but not the evidence by which they are to be proved. Rule 44.

2. That acts and contracts may be stated according to their legal effect, but, in so doing, the pleading should be such as fairly to apprise the adverse party of the state of facts which it is intended to prove. Rule 50.

Paragraphs 5 and 6 of the bill of complaint state the agreements according to their legal effect and paragraphs 1 and 3 fairly apprise the adverse party of the state of facts intended to be proved. These paragraphs stated the theory on which the case is argued on appeal and appellant does not attempt to resort to any other facts or theory than the same stated in the original bill of complaint.

Paragraphs 5 and 6 do not allege the agreements to have been express or verbal. That these agreements were actual, that is, facts as stated, was proved by evidence of what equity considers the parties in fact intended by their conduct.

The defendants went to hearing at which no such objection was made and which is now made for the first time after hearing, decree, and appeal. When complainant rested (see State of Case, page 21), defendant did not object that a cause had not been alleged and proved, but proceeded with defense testimony. The Court was informed at the hearing of complainant's equities and if such objection had then been made and the case proved differed essentially from that alleged by the bill, amendments should have been allowed upon proper terms.

If an amendment of the bill should be made so that the real merits of the controversy may be settled, the Appellate Court should reverse the decree and send the cause back to the court having original jurisdiction in order that such amendment may be made. *Ogden v. Thornton*, 30 N. J. Eq. 569; *McCharty v. Mullen*, 82 Atlantic Reporter, 933; *Seymour v. Long Dock Co.*, 17 N. J. Eq. 169; *Van Riper v. Claxton*, 9 N. J. Eq. 302; *Hopper v. Sisco*, 5 N. J. Eq. 343.

II.

“Q. Did you have any other understanding with Mr. Thorn than this paper?

A. No.”

In the connection with which this question was asked and answered, (see State of Case, page 16, lines 20 to 37), the word “did” was predicated on the time when witness “first went into the house.” The question was not “Did you *afterwards* have any other understanding, &c.”

The bill of complaint does not allege a waiver by defendants of the terms of the contract, consequently, the complainant is bound by the terms set forth in the contract; the contract declared that default by complainant in any of the payments, that then and in such case the complainant should forfeit all claims to the property. See Exhibit A, page 8, lines 27 to page 9, line 3, of printed case.

That default in payments, as set forth in a written contract, on the part of the purchaser prevents the purchaser from a specific performance of a contract.

In *Collins v. Delaney Co.*, 64 Atl. Rep. 107 (71 N. J. E. 320) was a case in which a demurrer was filed to the bill of complaint. The bill admitted that the complainant was in default as to the payment of an installment. The clause in the agreement read as follows:

“It is mutually agreed, as a further condition for granting this lease an option to purchase, by and between the parties hereto that a single failure to pay the rents stipulated or the amounts due under said option to purchase, upon the day and dates named herein, shall forfeit absolutely for all time the option of purchase and leasehold interest herein contained, and shall make said option of purchase and leasehold interest null and void, and the same as if said option of purchase and leasehold interest had never been written.”

The Vice-Chancellor said:

“If it be possible for parties to a contract of sale to make time an essential of the contract by their express language, I think these parties have done it.”

And his conclusions were that relief could not be granted and the demurrer be sustained.

In *Kennerly v. Aleck*, 98 Atl. Rep. 445 at 446, Vice-Chancellor Backes said:

“The agreement binds the parties to a faithful performance within thirty days of its date, and time was consequently of the essence of the contract.” Citing *Collins v. Delaney Co.*

In *King v. Ruckman*, 21 N. J. E. 599 Errs. & Appls. at page 604 the Court said:

“It is a general rule that in equity time is not deemed to be of the essence of the contract, unless the parties have expressly so stipulated, or it necessarily follows from the nature and circumstances of the contract.”

The declaration of the Court of Errs. & Appls. as to the question of a default made in the contract and where specific performance was asked is found in *Doctorman v. Schroeder*, 92 Equity 676. This Court affirmed the opinion given by Vice-Chancellor Leaming for reasons stated by him.

At page 677 the opinion reads:

“* * * it seems to me a court of equity is powerless to come to the relief of a purchaser of property who has failed to pay at the time specified in the agreement, when the agreement distinctly and clearly provides that time is essential and that the purchaser's rights as purchaser shall cease and become void unless payment is made at the time stipulated.”

Respectfully submitted,
ANDREW C. BOSWELL,
Solicitor for Defendants.
W. HOLT APGAR,
Counsel of Defendants.

NEW JERSEY COURT OF ERRORS
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III.

As to whether a parol modification of a written contract may be made matter of complaint in a suit for specific performance.

The following are again particularly cited:

Brown v. Ely, 92 N. J. Eq. 487, 113 Atl. Rep. 698;

Wirtz v. Guthrie, 81 N. J. Eq. 271, 87 Atl. Rep. 134.

IV.

Defendants-appellees have not disputed Point III in brief of complainant-appellant, that the value of the wife's dower right should be abated from purchase price.

CHARLES K. LANDIS, JR.,
Of Counsel with Complainant-Appellant.



