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NOTICE OF APPEAL AND GROUNDS.

Filed December 11, 1928.

Essex County Circuit Court

R. E. Dudley Co., Inc., a corporation of New Jersey, *Plaintiff-Appellant,* *vs.* Saul Aron and Jacob Wiederhorn, individually, jointly or in the alternative, *Defendants-Respondents.*	*Action at Law.* *Notice of Appeal and Grounds.*

To Abraham M. Herman, attorney of the defendant, or to whom it may concern:

Sir:

Please Take Notice, that the plaintiff in the above-entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause, against the plaintiff and from each and every part thereof, on the following grounds, to wit:

Plaintiff, R. E. Dudley, Co., Inc., a corporation of New Jersey, the appellant in the above-entitled matter find itself aggrieved because the Circuit Court erred in giving judgment to the defendants instead of the plaintiff, in that:

1. The trial judge on January 17, 1928, erroneously refused to enter summary judgment in behalf of the plaintiff and against the defendants.

2. The trial judge erroneously entered judgment in favor of the defendants and against the plaintiff.

3. The judgment entered in this cause is erroneous and contrary to law, and not justified by the facts and law applicable to the facts in the case.

4. That the trial judge erroneously excluded from the verbal stipulation of the facts agreed upon, notwithstanding that those facts were part of the verbal stipulation agreed upon and entered into between the plaintiff and the defendants, the fact that the defendants were, by a decree in the Court of Chancery, ORDERED, ADJUDGED and DECREED, to specifically perform the contract dated December 17, 1925, made between Rialto Realty Company, Inc., a corporation of New Jersey and Saul Aron and Jacob Wiederhorn, for the purchase of property known and designated as 22-24 Rowe street, East Orange, N. J., for which the defendants agreed to pay to the plaintiff a regular commission of five per cent. of the purchase price at the time of passing of title, the subject matter of this suit, on the grounds of the said Saul Aron and Jacob Wiederhorn having waived the restrictions of record. See *Aron et al.* v. *Rialto Realty Company, Inc. et al.*, 136 Atlantic, page 339.

5. By a final decree entered in the Court of Chancery on the 17th day of May, 1927, in the suit between Saul Aron and Jacob Wiederhorn as complainants and the Rialto Realty Company *et als.*, as defendants, it was ORDERED, ADJUDGED and DECREED, that the agreement for the purchase of the property, upon which this suit is based, be and all things specifically performed by the

complainants, Saul Aron and Jacob Wiederhorn, the herein defendants.

6. That subsequent to the entry of the judgment for the defendants, Saul Aron and Jacob Wiederhorn in the above-entitled cause on their appeal to the Court of Errors and Appeals of New Jersey, the final decree of the Court of Chancery was affirmed. See *Sol Aron, et al.* v. *Rialto Realty Company, Inc., et al.*, 140 Atlantic, page 918.

7. That since the affirmance of the Court of Errors and Appeals of the final decree of the Court of Chancery, and since the entry of the judgment for the defendants in the above-entitled cause, the defendants, Saul Aron and Jacob Wiederhorn have accepted a deed, subject to restrictions of record, to the property known and designated as 22-24 Rowe street, East Orange, New Jersey, and have paid to the Rialto Realty Company, Inc., the full consideration therefore, in accordance with the contract for sale entered into between the said parties.

8. The judgment of the Circuit Court in this cause is erroneous and contrary to law in divers other respects.

WILLIAM N. BECKER,
Attorney for Plaintiff-Appellant.

Service of the within notice of appeal and grounds is hereby acknowledged this 8th day of December, 1928.

ABRAHAM HERMAN,
Attorney of Defendants-Respondents.

SUMMONS.

State of New Jersey to Saul Aron and Jacob Weiderhorn, You are Summoned to answer the annexed complaint of R. E. Dudley Co., Inc., a corporation of New Jersey, in an action at law in the Essex County Circuit Court, and Take Notice, that unless you file your answer to said complaint with the clerk of the said Essex County Circuit Court, at Newark, within twenty days after the service upon you of this writ, and the annexed complaint, the plaintiff may proceed in this suit, and judgment may be entered against you.

(SEAL)

Witness, Nelson Y. Dungan, Judge of the Essex County Circuit Court, at Newark, this 7th day of April, Nineteen hundred and twenty-seven.

JOHN H. SCOTT,
Clerk.

W. N. Becker,
Attorney.

COMPLAINT.

ESSEX COUNTY CIRCUIT COURT.

R. E. DUDLEY CO., INC., a corporation of New Jersey, *Plaintiff,* *vs.* SAUL ARON and JACOB WIEDERHORN, individually, jointly or in the alternative, *Defendants.*	*Action at Law.* *Complaint.*

The plaintiff, R. E. Dudley Co., Inc., a corporation of New Jersey, having its principal office in the City of East Orange, New Jersey, being licensed real estate brokers, say that:

1. The defendant, Saul Aron, for himself and for Jacob Wiederhorn duly authorized the plaintiff, by a written agreement, a copy of which is hereto annexed, duly acknowledged the said plaintiff as the licensed and authorized agent in the negotiation of the sale of property from Rialto Realty Company, Inc., a corporation of New Jersey, to the said defendants, Saul Aron and Jacob Wiederhorn for the sale of property located at No. 22-24 Rowe street, East Orange, N. J., agreeing to pay to the plaintiff a regular commission of five per cent. on the purchase price of sixteen thousand five hundred ($16,500) dollars, amounting to the sum of eight hundred and twenty-five ($825.00) dollars as commission for said sale at the time of passing title.

2. The plaintiff duly sold said premises for Rialto Realty Co., Inc., as owners to the defend-

ants, Saul Aron and Jacob Wiederhorn, and the defendants agreed in writing to all the terms of said sale, and paid to the sellers a payment on account of the said purchase price, a copy of said agreement is hereto annexed and made part hereof.

3. Thereafter, plaintiff demanded of the defendants the sum of eight hundred and twenty-five ($825.00) dollars for commission as aforesaid.

4. Defendants have not paid the same.

Plaintiff demands as damages the sum of eight hundred and twenty-five ($825.00) dollars, with interest from the first day of February, 1926, together with costs of suit to be taxed.

W. N. BECKER,
Attorney for Plaintiff.

Dec. 17, 1925.

R. E. Dudley Co. Inc.,
536 Main Street,
East Orange, N. J.

We hereby authorize you to purchase for our account the property located at #22-24 Rowe St. Ampere, consisting of a plot of 50 x 80 with buildings thereon consisting of 3 stores and 2 apartments, on the following terms.

Price $16,500. net. subject to B. & L. mortgage of $12,000. now on said property paid down to about 6 months, total cash investment $5,000.

Seller to take back a second (2nd.) mortgage for the difference, to run for one year, at interest rate of 6%.

Complaint.

Deposit herewith $1,000. balance on passing of title March 1st 1926.

Purchaser agrees to pay R. E. Dudley Co. Inc. a regular commission of 5% on the purchase price at the time of passing title.

Wiederhorn and Aron
Per S. Aron

ARTICLES OF AGREEMENT

MADE the seventeenth day of December, in the year of our Lord, One thousand nine hundred and twenty-five BETWEEN Rialto Realty Company, a corporation of New Jersey, having its principal office in the City of Newark in the County of Essex and State of New Jersey, party of the first part; AND Saul Aron, 62 Durchard street, East Orange, Jacob Wiederhorn, 362 Halstead street, East Orange, of the City of East Orange in the County of Essex and State of New Jersey party of the second part; WITNESSETH, that the said party of the first part, for and in consideration of the sum of sixteen thousand five hundred ($16,500) dollars to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenant and agreements hereinafter mentioned, made and entered into, by the said party of the second part, doth agree to and with the said party of the second part that the said party of the first part, will well and sufficiently convey to the said party of the second part, their heirs and assigns, by deed of warranty free from all encumbrance except as hereinafter mentioned. S.A on or before the first day of February, 1926, next ensuing the date (S. A) hereof, all that lot,

tract, or parcel, of land and premises, hereinafter particularly described, situate, lying and being in the City of East Orange in the County of Essex and State of New Jersey.

KNOWN and designated as lots numbered three and four, Block 180 B, as laid down on a map entitled "Map of Ampere Section of property of the East Orange and Ampere Land Company, in the City of East Orange, County of Essex and State of New Jersey, dated Oct. 11th, 1909, made by William H. V. Reimer, C. E. and filed Jan. 11th 1910 in the office of the Register of the County of Essex, more particularly described as follows:

BEGINNING at a point on the northerly side of Rowe Street, therein distant fifty feet and five hundredths of a foot westerly from a point formed by the intersection of the same with the westerly side of Newfield Street; and from thence running (1) westerly along said side of Rowe Street, fifty feet and five hundredths of a foot to a point distant one hundred feet and ten hundredths feet easterly from Ampere Parkway; thence (2) northerly and parallel with said Parkway seventy eight feet and thirty five hundredths of a foot; thence (3) easterly and at right angles to Newfield Street, fifty feet; thence (4) southerly parallel with the second course eighty feet and forty seven hundredths of a foot to said northerly side of Rowe Street and place of BEGINNING.

It is distinctly understood and agreed by and between the parties hereto that the party of the first part shall not be responsible to any agent or agents for any commissions whatsoever for the consummation of this sale.

Being the same premises known and designated as 22-24 Rowe Street, East Orange, N. J., having a building thereon consisting of three stores and two apartments in the rear thereof.

The seller is to pay all assessments for public improvements completed or under construction at date of this agreement.

And the said Saul Aron and Jacob Wiederhorn for themselves, their heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, its successors and assigns, that they the said party of the Second Part, will pay and satisfy, or cause to be paid and satisfied, unto the said party of the First Part, the said sum of Sixteen thousand five hundred ($16,500.00) Dollars as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

Deposit, receipt of which is hereby acknowledged	$ 1,000.00
Subject to a first mortgage now a lien upon said premises and held by the Senaca Building and Loan Association of Newark, N. J. in the nominal sum of	12,000.00
In cash on delivery of deed	3,500.00
	$16,500.00

Including the withdrawal value of the back shares and also including all apportionments which shall be paid by the party of the second part to the party of the first part.

And it is Further Agreed, by the parties to these presents, that the said party of the second part, their heirs and assigns, may enter into and

upon the said land and premises on the First day of February, 1926 next ensuing the date hereof, and from thence take the rents, issues and profits to and their use.

And it is Further Agreed, by the parties hereto, that the said Deed of Warranty shall be delivered and received at the office of William N. Becker, 185 Market Street, Newark, N. J. between the hours of 9 in the forenoon and 5 o'clock in the afternoon on the said First day of February, 1926 next ensuing the date hereof.

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

In Witness Whereof, the said parties have hereunto interchangeably set their hands and seals the day and year above mentioned.

Signed, Sealed and Delivered
in the presence of

William N. Becker.

RIALTO REALTY COMPANY, Inc. (L. S.)

By Benjamin Harrison, President. (L. S.)

Attest:
Harry D. Hershenson,
Secretary.

SAUL ARON,
JACOB WIEDERHORN.

Witness:
Philip Gladstone.

Complaint.

To the Defendants:

TAKE NOTICE, that the plaintiff demands that the defendants shall file a written specification of defenses intended to be made in said action on or before the time specified for appearance in the process issued in said cause.

WILLIAM N. BECKER,
Attorney for Plaintiff.

I hereby appoint and depute Albert H. Freeman to serve the within writ.

Witness my hand and seal this 7th day of April, 1927.

CONRAD DEUCHLER,
Sheriff.

By RUPERT F. MILLS,
Under Sheriff.
(SEAL)

Served the within summons and complaint upon Saul Aron, within named defendant, by leaving a true copy thereof with his son at his usual place of abode, 62 Burchard street, East Orange, N. J., April 7, 1927. And upon Jacob Wiederhorn, within named defendant by leaving a true copy thereof with his wife at his usual place of abode, 49 Melrose Garden, East Orange, N. J., April 9, 1927.

CONRAD DEUCHLER,
Sheriff.

By ALBERT H. FREEMAN,
Special Deputy.

ANSWER AND COUNTER-CLAIM OF DEFENDANT SAUL ARON.

Filed May 11, 1927.

ESSEX COUNTY CIRCUIT COURT.

R. E. Dudley Co., Inc., a corporation of New Jersey, *Plaintiff,* *vs.* Saul Aron and Jacob Wiederhorn, individually, jointly or in the alternative, *Defendants.*	*Action at Law.* *Answer and Counter-Claim.*

Defendant Saul Aron, who resides in the City of East Orange, County of Essex and State of New Jersey, answering the complaint of the plaintiff, says:

1. Defendant Saul Aron denies the allegations set forth in paragraphs 1, 2, 3 of the complaint.

2. Defendant Saul Aron admits that he has not paid the plaintiff any money, but alleges that he is not indebted to the said plaintiff.

Defendant reserves the right to move at any time before trial, that the complaint filed in this matter be stricken out because it does not disclose a cause of action.

FIRST SEPARATE DEFENSE.

1. Defendant Saul Aron admits authorizing the complainant to purchase property known as

22-24 Rowe street, Ampere, East Orange, N. J., for the price of $16,500, subject to a building and loan mortgage of $12,000 for a cash investment of not more than $5,000, and the balance to be taken back by the seller by purchase money mortgage for one year; with a further agreement that a commission of five per cent. was to be paid on the said purchase price when and if title passed.

2. The plaintiff has failed to purchase the premises in accordance with the terms of the agreement, for the defendants.

3. The owners of the said premises have failed to deliver the premises in accordance with the terms of the contract entered into between the defendants and the Rialto Realty Co., Inc., and title to the said premises are still in the name of the Rialto Realty Company, Inc.

SECOND SEPARATE DEFENSE.

1. Defendant was induced by the plaintiff, through its duly authorized agent, to enter into the contract attached to the bill of complaint, upon the representation by the said plaintiff that the premises were fully leased and rented, the said plaintiff well knowing at the time the said representations were made that the property was not all leased and rented, and well knowing that the defendant relies upon the said representations of the said plaintiff, and had a right to rely upon the said statements of the said plaintiff, and the said statements having been made with intent to induce this defendant to enter into the contract aforesaid.

By way of counter-claim, defendant repeats the allegations in paragraph one of the second separate defense.

By reason of the misrepresentations made by the said plaintiff, defendant was caused great expense for legal services in the preparation of the papers and the search of the abstract of title, and in litigation arising because of and out of the execution of the agreement in the Court of Chancery, and in great loss of rents and profits.

Defendant demands as damages the sum of $5,000.

ABRAHAM M. HERMAN,
Attorney of Defendant, Saul Aron.

Due and timely service of a copy of the within answer is hereby acknowledged this 11th day of May, A. D. 1927, as of time.

W. N. BECKER,
Attorney of Plaintiff.

ANSWER AND COUNTER-CLAIM OF DEFENDANT JACOB WIEDERHORN.

Filed May 11, 1927.

ESSEX COUNTY CIRCUIT COURT.

R. E. Dudley Co., Inc., a corporation of New Jersey, *Plaintiff,* *vs.* Saul Aron and Jacob Wiederhorn, individually, jointly or in the alternative, *Defendants.*	*Action at Law.* *Answer and Counter-Claim.*

Defendant Jacob Wiederhorn, who resides in the City of East Orange, County of Essex and State of New Jersey, answering the complaint of the plaintiff, says:

1. Defendant Jacob Wiederhorn denies the allegations set forth in paragraphs 1, 2, 3 of the complaint.

2. Defendant Jacob Wiederhorn admits that he has not paid the plaintiff any money, but alleges that he is not indebted to the said plaintiff.

Defendant reserves the right to move at any time before trial, that the complaint filed in this matter be stricken out because it does not disclose a cause of action.

FIRST SEPARATE DEFENSE.

1. Defendant Jacob Wiederhorn admits authorizing the complainant to purchase prop-

erty known as 22-24 Rowe street, Ampere, East Orange, N. J., for the price of $16,500, subject to a building and loan mortgage of $12,000 for a cash investment of not more than $5,000, and the balance to be taken back by the seller by purchase money mortgage for one year; with a further agreement that a commission of five per cent. was to be paid on the said purchase price when and if title passed.

2. The plaintiff has failed to purchase the premises in accordance with the terms of the agreement, for the defendants.

3. The owners of the said premises have failed to deliver the premises in accordance with the terms of the contract entered into between the defendants and the Rialto Realty Company, Inc., and title to the said premises are still in the name of Rialto Realty Company, Inc.

SECOND SEPARATE DEFENSE.

1. Defendant was induced by the plaintiff, through its duly authorized agent, to enter into the contract attached to the bill of complaint, upon the representation by the said plaintiff that the premises were fully leased and rented, the said plaintiff well knowing at the time the said representations were made that the property was not all leased and rented, and well knowing that the defendant relies upon the said representations of the said plaintiff, and had a right to rely upon the said statements of the said plaintiff, and the said statements having been made with intent to induce this defendant to enter into the contract aforesaid.

Answer and Counter-claim of Jacob Wiederhorn.

By way of counter-claim, defendant repeats the allegations in paragraph one of the second separate defense.

By reason of the misrepresentations made by the said plaintiff, defendant was caused great expense for legal services in the preparation of the papers and the search of the abstract of title, and in litigation arising because of and out of the execution of the agreement in the Court of Chancery, and in great loss of rents and profits.

Defendant demands as damages the sum of $5,000.

ABRAHAM M. HERMAN,
Attorney for Defendant, Jacob Wiederhorn.

Due and timely service of a copy of the within answer is hereby acknowledged this 11th day of May, A. D. 1927, as of time.

W. N. BECKER,
Attorney of Plaintiff.

NOTICE TO STRIKE OUT ANSWER AND COUNTER-CLAIM.

Filed May 21, 1927.

ESSEX COUNTY CIRCUIT COURT.

R. E. DUDLEY CO., INC., a corporation of New Jersey, *Plaintiff,*	*Action at Law.*
vs.	*Notice to Strike out Answer and Counter-Claim.*
SAUL ARON and JACOB WIEDERHORN, individually, jointly or in the alternative, *Defendants.*	

To the defendants, Saul Aron and Jacob Wiederhorn, or Abraham M. Herman, their attorney.

SIRS:

PLEASE TAKE NOTICE, that on Saturday, the 21st day of May, 1927, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, I shall apply to the Honorable Worrall F. Mountain, Judge of the Essex County Circuit Court, or any of the judges who may be holding said court, at the County Court House, in the City of Newark, for an order striking out the answer interposed by the defendants in the above-entitled action, for the following reasons, namely:

1. The first paragraph of the first separate defense interposed in the answer discloses no defense, in that, it admits authorizing the complainant to purchase property known as 22-24 Rowe street, Ampere, East Orange, N. J., there

being no dispute as to the other terms; and admits a further agreement that a commission of five per cent. (5%) was to be paid upon the said purchase price. Mis-stating the agreement, when it alleges that the commission was to be paid when and if title passed, the agreement calls for a regular commission of five per cent. (5%) on the purchase price at the time of passing title, such defense is false, sham and frivolous.

2. The second paragraph of the first separate defense interposed in the answer is false, for the plaintiff did pay to the Rialto Realty Co., Inc., the deposit for the defendants of one thousand ($1,000) dollars, a copy of said receipt is hereto annexed and made part hereof.

3. The third paragraph of the first separate defense interposed in the answer is false, in that, the defendants refused to take possession of the premises in accordance with the terms of the contract entered into between the defendants and the Rialto Realty Co., Inc., to the date hereof, notwithstanding, that the defendants have been ordered by the Court of Chancery in a suit for specific performance to take said title to said premises.

The first paragraph of the second separate defense interposed in the answer is false, for that, the defendants personally examined the premises before entering into a contract for the purchase of the same, at which time the premises were fully leased and rented, and the defendants well knew at that time, that the property was leased and rented, and that the contract entered into between the defendants and the Rialto Realty Co. does not contain any representation as to leases or rentals, and that the defendants did

not in their bill for recission against the Rialto Realty Co., Inc., allege misrepresentation as to leases and rentals.

I will further move to strike out the counter-claim for the following reason, that the said counter-claim discloses no cause of action.

1. That each and every part of the defendants' answer and counter-claim is untrue, false, sham, frivolous, impertinent and irrelevant, states a conclusion of law, is not germane to the issue, and is so framed as to embarrass and delay a fair trial of this cause.

I will base my application upon the pleadings and the affidavit attached hereto.

Respectfully yours,

WILLIAM N. BECKER,
Attorney for Plaintiff.

AFFIDAVIT.

ESSEX COUNTY CIRCUIT COURT.

R. E. Dudley Co., Inc., a corporation of New Jersey, *Plaintiff,*	
vs.	*Affidavit.*
Saul Aron and Jacob Wiederhorn, individually, jointly or in the alternative, *Defendants.*	

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

Philip Gladstone, of full age, being duly sworn on his oath, deposes and says, that:

On or about the 17th day of December 1925 and for a long time prior thereto, he was a licensed and authorized real estate salesman, employed by R. E. Dudley Co., Inc., the plaintiff in the above-stated cause.

That on the 17th day of December, 1925 in behalf of the plaintiff, he received an authorization from Saul Aron and Jacob Wiederhorn, a copy of said authorization is hereto annexed and made part of this affidavit, wherein the defendants agreed to pay the plaintiff herein, a regular commission of five per cent. (5%) on the purchase price, at the time of passing title. In pursuance with the aforesaid authorization, your deponent gave to the Rialto Realty Co. Inc. the deposit of one thousand ($1,000) dollars and subsequently your deponent had contracts prepared for the sale of the said premises by the Rialto

Realty Co., Inc. as owners to Saul Aron and Jacob Wiederhorn as purchasers, which were entered into between the said parties, a copy of said contract is annexed to the bill of complaint and made part hereof.

That on the 23rd day of March, 1926 the defendants went to the office of the attorney for the Rialto Realty Co. Inc. for the purpose of taking title to the premises, known and designated as 22-24 Rowe street, in the City of East Orange, County of Essex and State of New Jersey, and refused to take title because there was certain land restrictions on record affecting the premises, which were not mentioned in the aforesaid contract.

Your deponent further states, that he testified in the Court of Chancery in the suit, wherein the herein named defendants were claimants to rescind the aforesaid contract, on the ground of restrictions, and wherein the Rialto Realty Co. were defendants and who counter-claimed with a bill of specific performance on the ground of waiver, and that the Court of Chancery ordered the herein named defendants to specifically perform the contract entered into between the said defendants and the Rialto Realty Co. Inc., stating that the defendants had waived their objection to the restrictions covering said premises; and further states that their bill for recission of the contract entered into did not contain any allegation of misrepresentation of rents, on the part of the plaintiff.

Your deponent denies that the plaintiff was to be paid a commission of five per cent. (5%) of the purchase price when and if title passed, but on the contrary states, that the defendants agreed to pay the plaintiff a regular commission of five

per cent. (5%) on the purchase price at the time of passing of the title.

Your deponent further denies that he made any representations to the defendants that the premises were fully rented, but on the contrary states that the defendants personally examined the premises and purchased the same as they saw it at said examination, and that at said time the premises were fully rented, and furthermore, that the contract entered into between the defendants and the Rialto Realty Co. Inc. did not contain any representation as to rentals or of any lease on said premises.

Your deponent further states, that he has made numerous requests of the defendants to pay the commission amounting to the sum of eight hundred twenty-five ($825.00) dollars, which request was refused, and your deponent believes that the answer interposed is no defense to the action, and that the same is false, sham and frivolous, and is so framed as to embarrass and delay a fair trial of this cause.

PHILIP GLADSTONE (L. S.)

Sworn and subscribed to before
me this 13th day of May,
1927.

WILLIAM N. BECKER,
A Master in Chancery of New Jersey.

Affidavit of Philip Gladstone.

Received from R. E. Dudley Co. Inc. check #137 dated December 17th in the sum of $1,000.00 One thousand 00/100..... as deposit on property, 22-24 Rowe St., East Orange, N. J. Contracts are to be exchanged.

Rialto Realty Co. Inc.
Benj. Harrison, Pres.

Dec. 17th 1925.

R. E. Dudley Co. Inc.,
536 Main Street,
East Orange, N. J.

We hereby authorize you to purchase for our account the property located at #22-24 Rowe St. Ampere, consisting of a plot of 50 x 80 with buildings thereon consisting of 3 stores and two apartments, on the following terms.

Price $16,500. net. subject to B. & L. mortgage of $12,000. now on said property paid down to about 6 months, total cash investment $5,000.

Seller to take back a second (2nd) mortgage for the difference, to run for one year, at interest rate of 6%.

Deposit herewith $1,000. balance on passing of title March 1st 1926.

Purchaser agrees to pay R. E. Dudley Co. Inc. a regular commission of 5% on the purchase price at the time of passing title.

Wiederhorn and Aron
Per S. Aron

Service of copy of motion acknowledged this day of May, 1927.

Attorney for Defendants.

ORDER DENYING MOTION.

Filed May 23, 1927.

ESSEX COUNTY CIRCUIT COURT.

R. E. Dudley Co., Inc., a corporation of New Jersey, *Plaintiff,* *vs.* Saul Aron and Jacob Wiederhorn, individually, jointly or in the alternative, *Defendants.*	*Order Denying Motion.*

This matter coming on to be heard upon notice of motion to strike out the answer and counterclaim filed by the defendants, in presence of William N. Becker, attorney for the plaintiff, and Abraham M. Herman, attorney for the defendants, and the matter having been duly argued, it is, on this twenty-first day of May, nineteen hundred and twenty-seven,

Ordered, that the motion to strike out the answer, and the motion to strike out the counterclaim be, and hereby is denied, with costs to be taxed against the plaintiff.

WORRALL F. MOUNTAIN,
Judge.

AFFIDAVIT.

Filed May 23, 1927.

ESSEX COUNTY CIRCUIT COURT.

R. E. Dudley Co., Inc., a corporation of New Jersey, *Plaintiff,* *vs.* Saul Aron and Jacob Wiederhorn, individually, jointly or in the alternative, *Defendants.*	*Action at Law.* *Affidavit*

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

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

That he is one of the defendants in the above stated cause.

That he was approached by Philip Gladstone, a broker in the employ of R. E. Dudley Co. Inc. the plaintiff in the above cause; and that the said Philip Gladstone represented to him that the premises known as 22-24 Rowe Street, Ampere, East Orange, New Jersey, was a good purchase, and further stated that the premises were entirely rented, and that as a matter of fact, there was leases on the premises, consisting of three stores.

Deponent further states that the said Philip Gladstone explicitly represented that each of the stores was leased for a period of from two to three years, and that the rentals were seventy-

five dollars, seventy-five dollars and forty-five dollars respectively. After the contract had been signed, deponent discovered upon investigation that one of the stores was vacant, and that the alleged tenant in the store that was supposed to be paying forty-five dollars a month rent, had an arrangement with the owner of the said premises, whereby the said tenant was to occupy the premises for three months without the payment of any rent, and the lease was then to be conditional upon his acceptance.

Deponent further firmly believes that the said agent was fully aware of the circumstances of the aforesaid lease, and was fully aware of the fact that all the leases were in default, and well knew that this deponent relied upon the representation made by the said broker.

Deponent further states that the said statements were made with intent to induce this deponent to enter into the contract aforesaid.

This deponent further states, that it was the intent of all the parties, that the commission was to be paid when the title was passed, and that the payment of the commission was conditioned upon the passing of title.

Deponent further states that the agreement was drawn up by the attorney for the owner of the property, and did not express the true intent of the parties, deponent not being represented by an attorney at the time; and that deponent finding certain restrictions of record, immediately notified the owners of the premises of his intention to rescind the contract, and immediately started suit for rescission and recovery of the down payment.

JACOB WIEDERHORN.

Sworn and subscribed to before
me this 20th day of May,
A. D. 1927.

ABRAHAM M. HERMAN,
A Master in Chancery of N. J.

REPLY AND ANSWER TO COUNTER-CLAIM.

Filed June 8, 1927.

ESSEX COUNTY CIRCUIT COURT.

R. E. DUDLEY CO., INC., a corporation of New Jersey, *Plaintiff,*	*Action at Law.*
vs.	*Reply and Answer to Counter-Claim.*
SAUL ARON and JACOB WIEDERHORN, individually, jointly or in the alternative, *Defendants.*	

The plaintiff, R. E. Dudley Co. Inc., by way of reply, denies each and every allegation of new matter set forth in the answer and joins issue with the defendant in this cause.

By way of answer to counter-claim, the plaintiff, R. E. Dudley Co. Inc., denies the allegations set forth in paragraph one of the second separate defense; and denies the allegations set forth in the counter-claim.

WILLIAM N. BECKER,
Attorney for Plaintiff.

REPLY TO ANSWER OF COUNTER-CLAIM.

Filed June 10, 1927.

ESSEX COUNTY CIRCUIT COURT.

R. E. DUDLEY CO., INC., a corporation of New Jersey, *Plaintiff,* *vs.* SAUL ARON and JACOB WIEDERHORN, individually, jointly or in the alternative, *Defendants.*	*Reply to Answer to Counter-Claim.*

By way of reply to the answer to the counter-claim, the defendants join issue with the plaintiff.

June 9, 1927.

ABRAHAM M. HERMAN,
Attorney of Defendants.

RULE FOR JUDGMENT.

Filed January 24, 1928.

ESSEX COUNTY CIRCUIT COURT.

R. E. DUDLEY CO., INC., a corporation of New Jersey,
Plaintiff,

vs.

SAUL ARON and JACOB WIEDERHORN,
Defendants.

Rule for Judgment.

This case was tried before Judge Nelson Y. Dungan ~~with~~ without a jury, by consent of both of the parties hereto, at the Essex County Circuit Court, on January 17, 1928, upon an agreed state of facts submitted to the Court in the presence and by the consent of both of the parties hereto, and upon the pleadings filed in this matter.

The attorneys of the respective parties agreed upon the following state of facts:

First. It is agreed and stipulated that the counter-claim filed in this matter by the defendants against the plaintiff, be dismissed without costs to either party.

Second. That the defendants engaged the plaintiff as agent to negotiate for the purchase, in their behalf, of premises at 22-24 Rowe street, East Orange, New Jersey, for the sum of $16,500, free and clear of all encumbrances except a building and loan mortgage of $12,000; and agreed to pay to the said agent five per cent. of the

purchase price, as and for its commission "at the time of passing title."

Third. The contract was made and executed on the same date, between the defendants herein, and the Rialto Realty Company, the owners of the said premises.

Fourth. At the time set for the closing of title, it is admitted that there were restrictions of record, constituting an encumbrance upon the premises in question. Thereupon defendants refused to accept title to the property because of the said encumbrance.

Upon hearing counsel, the Court found that the plaintiff did not perform its contract, and produce a ready, able and willing vendor, in accordance with the terms of its contract with the defendants.

WHEREUPON it is adjudged that the counterclaim be dismissed without costs to either party; and the complaint of the plaintiff be dismissed and judgment be rendered in favor of the defendants, with costs to be taxed against the plaintiff.

January 18, 1928.

NELSON Y. DUNGAN,
Circuit Court Judge.

CERTIFICATE OF CLERK.

ESSEX COUNTY CLERK'S OFFICE.

(SEAL)

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

I, JOHN H. SCOTT, Clerk of the County of Essex in the State of New Jersey

DO HEREBY CERTIFY that the foregoing is a true and correct copy of all the records on file in my office in the case of R. E. DUDLEY CO. INC., a corporation of New Jersey, plaintiff-appellant vs. Saul Aron and Jacob Wiederhorn, individually, jointly and in the alternative, defendants-respondents, Case No. 42818 prepared for removal to the Court of Errors and Appeals, and the same is taken from and compared with original copies of all records and as the same now remains filed on the files of said office.

IN TESTIMONY WHEREOF, I have (SEAL) hereunto set my hand and affixed the official seal of said Court and County at Newark, N. J., this 14th day of December, A. D. 1928.

JOHN H. SCOTT,
Clerk.

NOTICE OF TRIAL.

Filed June 17, 1927.

ESSEX COUNTY CIRCUIT COURT.

R. E. Dudley Co., Inc., a corporation of New Jersey, *Plaintiff,* *vs.* Saul Aron and Jacob Wiederhorn, individually, jointly or in the alternative, *Defendants.*	*Action at Law.* *Notice of Trial.*

Sirs:

Please Take Notice, that the trial of the issue joined in the above cause will be moved before said court, in the presence of such Judge or Justice thereof, as holden at said court in and for the County of Essex, on the fourth Tuesday of June, 1927, at ten o'clock in the forenoon, or as soon thereafter as the said court can attend to the same.

Dated June 10, 1927.

To Abraham M. Herman, attorney for defendants, or whom it may concern.

Yours respectfully,

W. N. BECKER,
Attorney.

Service of a copy of the within notice of trial is hereby acknowledged this 10th day of June, 1927.

ABRAHAM M. HERMAN,
Attorney for Defendants.

DEED.

THIS INDENTURE, made the fifteenth day of February in the year of our Lord One Thousand Nine Hundred and twenty-six.

BETWEEN Rialto Realty Company, Inc., a corporation duly organized and existing under and by virtue of the laws of the State of
having its principal office in the City of Newark, County of Essex and State of New Jersey
of the first part,

AND Jacob Wiederhorn of the City of East Orange, in the County of Essex and State of New Jersey of the second part;

WITNESSETH, That the said party of the first part, for and in consideration of One Dollar and other good and valuable considerations, lawful money of the United States of America, to the Corporation aforesaid well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged and the said party of the first part being therewith full satisfied, contented and paid, has given, granted, bargained, sold, aliened, remised, released, enfeoffed, conveyed and confirmed, and by these presents does give, grant, bargain, sell, alien, remise, release, enfeoff, convey and confirm to the said party of the second part and to his heirs and assigns, forever, ALL that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of East Orange, County of Essex and State of New Jersey.

KNOWN and designated as lots numbered three and four, Block 180-B as laid down on a map entitled "Map of Ampere Section of property

of the East Orange and Ampere Land Company, in the City of East Orange, County of Essex, New Jersey, dated October 11th, 1909, made by William H. V. Reimer, C. E. and filed Jan. 11th 1910 in the office of the Register of the County of Essex, more particularly described as follows:

BEGINNING at a point on the northerly side of Rowe street, therein distant fifty feet and five hundredths of a foot westerly from a point formed by the intersection of the same with the westerly line of Newfield street, and from thence running (1) westerly along said side of Rowe street, fifty feet and five hundredths of a foot to a point distant one hundred feet and ten hundredths feet easterly from Ampere Parkway; thence (2) northerly and parallel with said Parkway seventy eight feet and thirty five hundredths of a foot; thence (3) easterly and at right angles to Newfield street fifty feet; thence (4) southerly parallel with the second course eighty feet and forty seven hundredths of a foot to said northerly side of Rowe street and the place of BEGINNING.

BEING the same premises conveyed to the party of the first part by deed dated September 30th 1925, and recorded in the Essex County Register's Office in Book R 72, page 569.

SUBJECT to a first mortgage held by the SENECA BUILDING & LOAN ASSOCIATION, in the nominal sum of TWELVE THOUSAND ($12,000.00) DOLLARS, also subject to monthly tenancies.

SUBJECT TO restrictions and Zoning Ordinances on record, if any.

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the re-

version and reversions, remainder and remainders, rents, issues and profits thereof.

And also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or the above described premises, and every part and parcel thereof, with the appurtenances.

To Have and to Hold all and singular, the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns, to own proper use, benefit and behoof forever.

And the said party of the first part for itself, its successors in office or assigns does covenant, grant and agree, to and with the said party of the second part, his heirs and assigns, that the said party of the first part at the time of the sealing and delivery of these presents, was lawfully seized in its own right of a good, absolute, and indefeasible estate of inheritance in fee simple, of and in all and singular the above granted, bargained and described premises, with the appurtenances

and has good right, full power and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid.

And that the said party of the second part, his heirs and assigns, shall and may at all times hereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy the above granted premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction or disturbance of the said party of the first part, its successors in office

or assigns, or of any other person or persons lawfully claiming or to claim the same.

And that the same now are free, clear, discharged and unencumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and incumbrances of what nature and kind soever.

And also, that the said party of the first part and its successors in office or assigns, and all and every other person or persons whomsoever, lawfully or equitably deriving any estate, right, title or interest, of, in or to the hereinbefore granted premises, by, from, under or in trust for it or them, shall and will at any time or times hereafter, upon the reasonable request, and at the proper costs and charges in the law, of the said party of the second part, his heirs and assigns, make, do and execute, or cause or procure to be made, done or executed, all and every such further and other lawful and reasonable acts, conveyances and assurances in the law for the better and more effectually vesting and confirming the premises hereby intended to be granted, in and to said party of the second part, his heirs and assigns forever, as by the said party of the second part, his heirs or assigns, or counsel learned in the law, shall be reasonably advised or required.

And the said party of the first part, its successors in office or assigns, the above described and hereby granted and released premises, and every part and parcel thereof, with the appurtenances, unto the said party of the second part, his heirs and assigns, against the said party of the first part, and its successors in office or assigns, and against all and every person or persons whomsoever, lawfully claiming

or to claim the same, SHALL AND WILL WARRANT and by these presents FOREVER DEFEND.

IN WITNESS WHEREOF, the said party of the first part hath caused its corporate Seal to be hereto affixed and attested by its Secretary, and these presents to be signed by its President, the day and year first above written.

RIALTO REALTY COMPANY, INC.

Benjamin Harrison, President.

Signed, Sealed and Delivered
In the Presence of

WILLIAM N. BECKER.

Attest:

HARRY D. HERSHENSON,
Secretary.

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

BE IT REMEMBERED that on this Fifteenth day of February in the year of our Lord One Thousand Nine Hundred and twenty-six, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared HARRY D. HERSHENSON, who, being by me duly sworn on his oath, says that he is the Secretary of the RIALTO REALTY COMPANY, INC. the grantor named in the within instrument; that BENJAMIN HARRISON is the President of said corporation; that dependent well knows the corporate seal of said corporation; and the seal affixed to said Instrument is such corporate seal and was thereto affixed, and said Instrument signed and delivered by said

President, as and for his voluntary act and deed and as and for the voluntary act and deed of said corporation, in presence of deponent, who thereupon subscribed his name thereto as witness.

HARRY D. HERSHENSON (L. S.)

Sworn and subscribed before me,
at Newark the date aforesaid.

WILLIAM N. BECKER,
A Master in Chancery of N. J.

DEED.

RIALTO REALTY COMPANY, INC.

to

JACOB WIEDERHOEN

Dated February 15th, 1926

RECEIVED in the Office of
the County of on
the day of A. D.,
19 , at o'clock, in the noon,
and Recorded in Book of DEEDS
for said County, on page

Return to
WILLIAM N. BECKER,
185 Market Street,
Newark, N. J.

STIPULATION AND TRANSCRIPT OF EVIDENCE.

ESSEX COUNTY CIRCUIT COURT.

Tuesday, January 17, 1928.

R. E. Dudley, Co., Inc., *vs.* Saul Aron and Jacob Wiederhorn, individually, jointly or in the alternative.	*Action at Law.* *Stipulation and Transcript of Evidence.*

Before Hon. Nelson Y. Dungan, *J.*

Without a jury.

For the plaintiffs appeared William N. Becker.

For the defendants appeared Abraham M. Herman.

Mr. Becker: December 17, 1925, Saul Aron and Jacob Wiederhorn retained R. E. Dudley Company, Inc., to act as their agent for the procuring of a contract to purchase a piece of property from the Rialto Realty Company, located at 22 and 24 Rowe street, East Orange—

Mr. Herman: There is a contract here and I would like the contract to speak for itself. It is annexed to the complaint. Philip Gladstone, a salesman for the Dudley Company, the plaintiff in this action, was a real estate salesman for R. E. Dudley Company. The Dudley Company was composed of Mr. Dudley and Mr. Aron, one of the defendants in this action. In pursuance with the instructions received from Mr. Aron,

Mr. Gladstone interviewed the members of the Rialto Realty Company, the owners of this property—

Mr. Herman: I think we are getting far afield. The defendant has agreed that we signed the contract upon which suit is brought; that pursuant to that contract, that we had entered into the agreement with the owners of the property. Subsequently a contract was drawn for this property selling it to Wiederhorn and Aron. This contract was drawn and signed by both parties, and I offer them in evidence.

(The contracts and agreements are marked Exhibits P. 1 and P. 2 respectively.)

Mr. Becker: There were two contracts. There was another contract with Aron and Wiederhorn.

Mr. Herman: We admit there is another contract that bears the other signature.

Mr. Becker: The deposit was given on the date set for closing title, the 15th day of February. The purchasers refused to take title, the vendee—

The Court: The vendee paid what?

Mr. Becker: $1,000 deposit and refused to take title on the ground that there were certain restrictions that the search revealed which were not contained in those contracts. The defendant in this action filed a bill in chancery, Aron and Wiederhorn filed a bill in chancery against the Rialto Realty Company. We are now asking for commission on the agreement, stating that the time has passed for the payment of the commission. I offer the deed.

(Marked Exhibit P. 3.)

The Court: So far as this case is now concerned, the Court of Chancery has decided, as I

understand it, that there was a waiver of restrictions and has decreed specific perfomance. That is, the vendees are obliged to take title, and that the case is now before the Court of Errors and Appeals. So far as this court is concerned, it is obliged to find, is it not, that the refusal of the purchasers to accept title was a wilful refusal?

Mr. Herman: I don't think so. There is a contract by which the vendee is to convey, without encumbrance, and the contract was on the contingence of a vendor who is ready and willing to sell. If the Court of Chancery is correct that we have waived our contract, then we say that these brokers have not earned their commissions because they did not provide us with a deed in accordance with the original contract. In other words, the Court of Chancery has substituted an entirely new agreement, making up a title subject to restrictions of record.

The Court: I do not know whether I know anything about that Chancery suit.

Mr. Herman: I do not think the Court should take cognizance of the Chancery suit.

The Court: Suppose you employ a broker to sell property for you, he is entitled to his commissions, that he had produced a purchaser ready, able and willing to take title. That means that he must prove, in order to recover his commissions, that he has produced a customer who was willing to take the title and who was ready and able to take the title; that is, that he had the money, that he could get the money, if the money was required, or that he could get such securities as the contract calls for; that is, on the terms called for in the contract. Let us reserve that. Here are brokers employed to find a buyer for the purchaser of a tract of land for the intending

vendee. He must produce to the intending vendees a tract of land which the vendor is able, ready and willing to convey—not willing to convey—but is ready and able to convey. This is property at 22 and 24 Rowe street, Ampere. By their contract they say they are willing to convey. By the broker's contract, it is provided that the intending purchasers are willing to pay $16,000 for the property, subject to a building and loan mortgage of $12,000 now on the property, paid down to about six months, and that the sellers take back the mortgage for the difference in six per cent. and they deposit a thousand dollars. That means that there is to be nothing else against the property. If it is subsequently ascertained that there is anything else against that property by way of mortgages or taxes, restrictions which the owner of the property has not removed, then the brokers have not produced the property mentioned in the broker's contract upon the terms fixed in the brokerage contract, because the owner of that property, although he is willing to sell, is not able to convey upon the terms in the broker's contract. Isn't that so?

Mr. Becker: When a broker is entitled to commission, just as soon as the contract has been entered into, he is entitled to commissions unless the party qualifies it—

The Court: There is no question about that, providing the broker has produced a person who is willing and ready to convey and because the title does not convey, that does not prevent the broker from collecting his commissions, because his client refuses to take the title, but he must produce a property which may be conveyed to his client upon the terms mentioned in the agreement, and the terms are plainly stated in this

agreement, and upon your own admission there were other restrictions on that property, so he did not produce property to the intending purchaser which could be conveyed to him by the terms stated in the broker's agreement, and, consequently, he did not finish his part of the contract.

Mr. Becker: They have by their action plainly, it being a decree of chancery.

The Court: You say this has nothing to do with this case?

Mr. Becker: I see now where by your Honor's illustration it does come in. He has brought somebody ready, able and willing to convey. If there is something pops up and they are waiving—

The Court: That is not in this case. Counsel for defendants thought I ought to keep it out.

Mr. Becker: There was admittedly, at the date of closing of title, restrictions on record not contained in our contract.

Mr. Herman: You said it was an agreed state of facts and you have not agreed that the decree of the Court of Chancery should or should not go in.

Mr. Becker: Even if the Court of Chancery did find a decree in a certain other matter, that would not be binding in another case.

The Court: I cannot find upon the Court of Chancery decree. I think the finding of the Court in this case must be in favor of the defendant.

It appears that the plaintiff and the defendants entered into an agreement by which the defendants authorized the plaintiffs to purchase a property on Rowe street, Ampere, at a price of $16,500, subject to a building and loan then on said

property, paid down to six months; that the seller was to take back a second mortgage for the difference, to run for a year, at six per cent. interest. The contract between the Rialto Realty Company, which it appears was the owner of this property, agrees that the Rialto Company will sell to the defendants in this case for the sum of $16,500, acknowledging the receipt of $1,000, subject to a building and loan mortgage of $12,000, which exactly expressed the terms in the brokerage, as I understand it. The effect of the brokerage agreement is to represent to the defendant that there are no other liens or encumbrances upon that property, and to make the earning of commissions by the plaintiffs dependent upon the production of a seller of this property ready, able and willing to convey upon those terms. Those are the terms stated in the brokerage agreement, the property not to be subject to restrictions or encumbrances. It appears that there were other restrictions and encumbrances, and what they were makes no difference; therefore, the defendant refused to take title, and properly so, because as far as the vendor and brokerage were concerned, they were not obliged to take title to property which was not free and clear, except the encumbrances mentioned in the agreement of the sale, and as far as the brokers were concerned, they were not obliged to take a purchaser except one who could take title. It is a well-known principle of law that a broker must produce a purchaser able, ready and willing to purchase, and it is equally well known that the broker must produce a seller upon the same terms.

Mr. Becker: I pray an exception on the ground that under the argument and stipulation mention

was made that the Court of Chancery had decreed that the defendant specifically performed the contract entered into between the defendant and the Rialto Realty Company, and that by their action had waived the restrictions which your Honor finds was contained in the title in the contract introduced in evidence.

Exception noted as ground of appeal.

The Court: In answer to that I will say that there is not before this Court any such stipulation that would justify the Court in finding that there was such a decree. You may have your exception.

Exception noted as ground of appeal.

JUDGMENT.

ESSEX COUNTY CIRCUIT COURT.

Circuit Court Judgment Docket # 104, page 068.

42818 R. E. DUDLEY CO., INC., a corporation of New Jersey, *Plaintiff,* *vs.* SAUL ARON and JACOB WIEDERHORN, individually, jointly or in the alternative, *Defendants.*	*Action at Law.* *Without a Jury, Judgment for Defendants.* *Jan. 17th, 1928.* *Costs, $76.60.*

Abraham M. Herman, attorney for defendant.

This action was tried before Judge Nelson Y. Dungan without a jury at the Essex County Circuit Court on January 17, 1928.

The cause having been heard and submitted to the Court, the Court returned its verdict as follows:

The Court finds in favor of the defendants, Saul Aron and Jacob Wiederhorn, and against the plaintiff, R. E. Dudley Co. Inc., a corporation of New Jersey.

Whereupon it is adjudged that the complaint of the plaintiff be dismissed and the defendants recover of the plaintiff costs, which are taxed at seventy-six dollars and sixty cents.

Judgment entered and signed January 17, 1928.

DECREE FOR SPECIFIC PERFORMANCE.

IN CHANCERY OF NEW JERSEY.

Between	
SOL ARON and JACOB WIEDERHORN, *Complainants,*	*On Bill, &c.*
and	*Decree for Specific Performance.*
RIALTO REALTY CO., INC., a corporation of New Jersey, *Defendant.*	

This cause coming on to be heard in the presence of Abraham M. Herman, solicitor of complainants and William N. Becker, solicitor and Michael Estrin, of counsel of the defendant, the Court having examined the pleadings and having taken proofs orally and in open court and heard and considered the arguments of counsel thereon; and it appearing to the satisfaction of the Court, that the defendant, Rialto Realty Co. Inc. a corporation of New Jersey, were, on the 17th day of December, 1925 seized in fee simple of all that certain lot, tract or parcel of land and premises situate, lying and being in the City of East Orange, County of Essex and State of New Jersey.

BEING known and designated as lots numbered Three and Four, Block 180 B as laid down on a map entitled "Map of Ampere Land Company, in the City of East Orange, County of Essex and State of New Jersey, dated Oct. 11th 1909, made by William H. V. Reimer, C. E. and filed Jan. 11th 1910 in

the Office of the Register of the County of Essex," more particularly described as follows:

BEGINNING at a point on the northerly side of Rowe Street, therein distant fifty feet and five hundredths of a foot westerly from a point formed by the intersection of the same with the westerly line of Newfield Street, and from thence running (1) Westerly along said side of Rowe Street, fifty feet and five hundredths of a foot to a point distant one hundred feet and ten hundredths of a foot easterly from Ampere Parkway, thence (2) Northerly and parallel with said Parkway seventy eight feet and thirty five hundredths of a foot; thence (3) Easterly and at right angles to Newfield Street, fifty feet; thence (4) Southerly parallel with the second course eighty feet and forty seven hundredths of a foot to said northerly side of Rowe Street and the place of BEGINNING.

That on the 17th day of December, 1925, the said complainants, Saul Aron and Jacob Wiederhorn entered into an agreement in writing with the defendant, Rialto Realty Co. Inc. wherein and whereby said defendants agreed to convey the said lands and premises by Deed of Warranty, on or before the 1st day of February, 1926 to the said Saul Aron and Jacob Wiederhorn, and that said Saul Aron and Jacob Wiederhorn agreed to pay therefor the sum of sixteen thousand five hundred ($16,500) dollars, by the payment of one thousand ($1,000) dollars, which was paid at the execution of said agreement, by taking the premises subject to a first mortgage lien upon said premises held by the Seneca Building and Loan Association of Newark, New Jersey,

in the sum of twelve thousand ($12,000) dollars, and by the payment of the remainder of the purchase price upon the delivery of said deed by payment of three thousand five hundred ($3,500) dollars in cash, including the withdrawal value of the back shares of the Seneca Building and Loan Association of Newark and also including all apportionments; the said title to be passed on the 1st day of February, 1926.

And it further appearing to the satisfaction of the Court, that the said complainants have refused and failed to perform the said agreement on their part, and that the defendant has always been and is still ready and willing in all things to comply with the terms of the said agreement on its part, subject to the restrictions of record and the zoning ordinances which were waived by the complainants; and the Court being of the opinion that the defendant is entitled to the specific performance of the aforesaid agreement as prayed for by it in its counter-claim filed therein, subject to the zoning laws and restrictions of record.

And it is on this 17th day of May, 1927, ORDERED, ADJUDGED and DECREED that the said agreement be in all things specifically performed by the said complainants, and that the said complainants on the 17th day of June, at the hour of ten o'clock in the forenoon, at the office of William N. Becker, 17 Academy street, in the City of Newark, County of Essex and State of New Jersey, pay to the said defendant the sum of three thousand nine hundred and eighty-three dollars and seventy-nine ($3,983.79) cents which sum represents the amount of money due to the defendant after apportionments made as of the 1st day of February, 1926 and in addition thereto

the sum of one thousand one hundred and twenty-six dollars and seventy-four ($1,126.74) cents, which represents the additional sum due after apportionments made from the said 1st day of February, 1926 to the 17th day of May, 1927, together with the taxed costs of this suit as hereinafter allowed, and at the same time and place upon the delivery by said defendant, Rialto Realty Co. Inc. to said complainant, Jacob Wiederhorn of the Warranty Deed dated the 15th day of February, 1926 which was duly executed and acknowledged by the said defendant conveying to the said Jacob Wiederhorn the said lands and premises in fee, subject to restrictions of record and zoning ordinances; and subject to the lien of the mortgage held by the Seneca Building and Loan Association.

It is further ORDERED, ADJUDGED and DECREED, that if, at the time and place hereinbefore mentioned, the said complainants shall fail or neglect to pay the said sums of three thousand nine hundred eighty-three dollars and seventy-nine cents ($3,983.79) with interest as hereinbefore mentioned, plus the sum of one thousand, one hundred and twenty-six dollars and seventy-four ($1,126.74) cents, together with said taxed costs as hereinbefore mentioned, upon the tender of said deed, the aforesaid sum of five thousand, one hundred ten dollars and fifty-three ($5,110.53) cents with interest as aforesaid, together with the taxed costs of this suit, as hereinbefore mentioned, shall be and become and are hereby impressed as a lien upon the said lands and premises in fee of the said complainants to the end, that said lands and premises may be sold, pursuant to law, and under the direction of this Court satisfy such lien, and that in case a deficiency should

arise upon such sale, the said complainants may be ordered by this Court to pay for such deficiency.

It is further ORDERED that the said complainants pay to the said defendant the costs of this suit to be taxed, including a counsel fee of three hundred dollars, which is hereby allowed to said defendant.

It is further ORDERED that true, but uncertified copies of this decree and of said taxed costs be served on the solicitor of said defendant within three days from the date hereof.

Respectfully advised,

MAJA LEON BERRY,
V.-C.

Service of a copy Decree is hereby acknowledged this day of May 1927.

ABRAHAM M. HERMAN,
Atty. for Compts.

PER CURIAM OPINION.

NEW JERSEY COURT OF ERRORS AND APPEALS.

No. 55, October Term, 1927.

SOL ARON, *et al.*, *Appellants,* *vs.* RIALTO REALTY COMPANY, INC., *et al.*, *Respondents.*	*Appeal from a Decree of the Court of Chancery.*

PER CURIAM.

The decree appealed from will be affirmed for the reasons stated in the opinion filed in the court below by Vice-Chancellor Berry.

Endorsed:

"Filed Feb. 6, 1928.

JOSEPH F. S. FITZPATRICK,
Clerk."

52 MAY.1.1929

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

New Jersey Court of Errors and Appeals

R. E. DUDLEY CO., INC., a corporation of New Jersey, *Plaintiff-Appellant,* *vs.* SAUL ARON and JACOB WIEDERHORN, individually, jointly or in the alternative, *Defendants-Respondents.*	*On Appeal from Essex County Circuit Court.*

BRIEF FOR PLAINTIFF-APPELLANT.

Facts.

This is a suit by the plaintiff to recover the sum of eight hundred twenty-five ($825) dollars with interest from the first day of February, 1926, as commission, together with costs of suit to be taxed, due the plaintiff as a real estate broker, for negotiating the sale of premises known and designated as 22-24 Rowe street, Ampere, East Orange, New Jersey; from the Rialto Realty Company, Inc., as sellers, to Saul Aron and Jacob Wiederhorn, the herein defendants, as purchasers. Contracts for the sale of said premises were formally entered into between the Rialto Realty Company, Inc., as sellers and Saul Aron and Jacob Wiederhorn as purchasers, on the purchaser's terms (see State of Case, pp. 7 to 10 inclusive).

The broker's commission was provided for in an authorization and agreement, dated December 17, 1925, the clause was:

> "Purchaser agrees to pay R. E. DUDLEY CO., INC., a regular commission of five per cent. (5%) on the purchase price, at the

time of passing title" (see State of Case, pp. 6 and 7).

The defendants, Saul Aron and Jacob Wiederhorn in their respective answers, stated that the plaintiff failed to purchase the premises for them in accordance with the terms of the agreement, (see State of Case, pp. 13 and 16, paragraph 2), notwithstanding that the defendants themselves signed the contract for the purchase of the property, and further stated as a defense, that the Rialto Realty Company, Inc., as sellers of the premises, had failed to deliver the premises in accordance with the terms of the contract entered into between them (see State of Case, p. 13, paragraph 3 and p. 16, paragraph 3). Furthermore, the defendants interposed the defense of misrepresentations regarding certain leases and rentals, which defense they abandoned before trial, and which defense was urgently pleaded to prevent a summary judgment being entered against them, on a motion to strike out their answers, as being false, sham and frivolous (see State of Case, p. 18); and the defendants also filed a counter-claim for damages for legal services, search of the abstract of title, and in litigation in the Court of Chancery arising because of and out of the execution of the agreement, and in great loss of rents and profits, which counterclaim in its entirety was abandoned by the defendants before the trial.

The case was tried before the Circuit Court of Essex County without a jury, on verbal stipulations, and resulted in a directed verdict for the defendants (see State of Case, pp. 40 to 46 inclusive).

On the 17th day of May, 1927, and before the trial had in this cause, in the court below, the

defendants Saul Aron and Jacob Wiederhorn, by an order of the Court of Chancery, had been ordered and decreed to specifically perform the contract to purchase the property known and designated as 22-24 Rowe street, Ampere, East Orange, New Jersey, from the Rialto Realty Company, Inc. as sellers, which sale R. E. Dudley Co., Inc. as brokers, had negotiated, and for which it claimed it had earned and was entitled to the commissions aforesaid (see State of Case, pp. 48 to 52 inclusive).

On appeal, by the deendants Saul Aron and Jacob Wiederhorn, from the decision of the Court of Chancery, the Court of Errors and Appeals affirmed the decision of the Court of Chancery (see State of Case, p. 53).

Since the decision of the Court of Errors and Appeals, Saul Aaron and Jacob Wiederhorn, the herein defendants, as purchasers, accepted a deed to the property involved, from, and paid the full consideration therefor, to the Rialto Realty Company, Inc. as sellers; which deed contained a clause that the conveyance was made subject to zoning ordinances and restrictions of record affecting the property, if any. The defendants chiefly relied upon the restrictions as contained in the title, as a bar to the right of the plaintiff to recover commission for the consummation of the sale of the property involved, setting forth that the Rialto Realty Company, Inc. as sellers, were not able to convey the property in accordance with the contract entered into between the Rialto Realty Company, Inc. and the herein defendants.

LAW.

Plaintiff, R. E. Dudley Co., Inc. appeal:

POINT ONE.

That the trial judge erroneously refused to enter summary judgment in behalf of the plaintiff and against the defendants.

In the matter of *Mahlenbrock* v. *Stonehell Realty Co.,* 138 Atl. Rep., page 875 (not officially reported), the Court of Errors and Appeals affirmed the opinion of the Supreme Court in a directed verdict for the plaintiff, for commission alleged to be due to a real estate broker, the clause in the contract was:

> "Harry Mahlenbrock (the plaintiff) was the agent who consummated this sale, and that there is due him a commission of $1,750 payable at the conveyance of the premises."

The broker's commission was not made contingent upon the actual transfer of title and further states that:

The ruling of the trial court in directing a verdict in favor of the plaintiff, was not error under the principle applied by the trial court to the facts of the case and as illustrated in such cases as *Haber* v. *Goldberg,* 92 N. J. Law 368; *Klipper* v. *Schlossberg,* 96 N. J. Law 397; *Dubrow* v. *Hornstra,* 95 N. J. Law 288; *Dickinson* v. *Walters,* 100 N. J. Law 62; *Ludwig* v. *Aberbach* (N. J. Sup.) 132 A. 241 (not officially reported); *Kislak* v. *Judge,* 102 N. J. Law 506.

The trial court in its opinion (see State of Case, p. 43, l. 10) stated as follows:

> "By the broker's contract, it is provided that the intending purchasers are willing to pay $16,000 for the property, subject to a building and loan mortgage of $12,000 now

> on the property, paid down to about six months, and that the sellers take back the mortgage for the difference at six per cent. (6%) and they deposit $1,000. That means that there is to be nothing else against the property. If it is subsequently ascertained that there is anything else against the property, by way of mortgages, taxes and restrictions which the owner of the property has not removed, then the brokers have not produced the property mentioned in the broker's contract upon the terms fixed in the brokerage contract, because the owner of that property, although he is willing to sell, is not able to convey upon the terms and broker's contract, etc., etc."

The contract for the sale of property which is annexed to the bill of complaint (see State of Case, pp. 7 to 11 inclusive) speaks for itself, it clearly shows that the defendants as purchasers entered into this contract themselves, and that the plaintiff did not enter into this contract for the defendants as their agent. The Court erred, in that it assumed that the plaintiff was the purchaser of the property for the defendants; this condition never existed. The defendants had thoroughly examined their own contract, and entered into the same themselves with the full knowledge of its contents, and the plaintiff did not act in any fiduciary relationship for the defendants.

In re: Rauchwanger, et al. v. *Katzin,* 82 N. J. Law 339.

Where the owner of real estate authorized brokers to sell, agreeing to pay them a stated commission, they are entitled to receive their commissions upon procuring a purchaser ready, willing and able to buy. The commission agreement in this case stated that the commission was "to be paid on day of settlement," etc., etc., and

therefore under the well settled rules of law, were entitled to recover the commission provided for in the contract, and cited *Crowley* v. *Myers,* 69 N. J. Law 245. The Supreme Court in deciding this case, analyzed the case of *Hinds* v. *Henry,* 36 N. J. Law 328, re-emphasizing the opinion in that case, by stating that the vendor to protect himself from the liability and the responsibility of paying commission to a broker, must so qualify his commission agreement to read, that the same was not to be paid except in the event of an actual closing of title, and decided that the brokers as plaintiffs, were entitled to their commission.

In re: Dickinson, et al. v. *Walters,* 100 Law 62.

In the above case, the commission agreement stated that "A commission would be paid for negotiation of sale of premises in accordance with the terms and agreement of sale of even date."

Held, to entitle brokers to commission, although there was no consummation of sale and delivery of deed, and further held that a real estate broker earns his commission when he secured a buyer on seller's terms, either as originally propounded or as settled by agreement between seller and buyer. It was further held "in order to absolve a party from payment of commission to broker when a sale was not consummated, it must clearly appear by contract with broker that payment of commission was made contingent, upon actual transfer of title."

In re: Lehrhoff v. *Schwartzsky, et als.,* 125 Atlantic 495 (not officially reported).

The Court held that a contract for commission of sale of real estate provided for payment "on

day of closing title to said premises," held not to make payment of commissions dependent upon actual passing of title to the property.

In re: Taylor & Rose, Inc. v. *Bounincontri,* 101 N. J. Law 278.

"In consideration of your having negotiated the property of No. 36 Arlington avenue, Newark, N. J.; for me, I hereby agree to pay Taylor & Rose, Inc., a commission of three hundred dollars, this payment to be made in cash at the time of passing of title to the above referred property."

(Signed) John Bounincontri.

The entire case was decided on the simple legal question involved, the construction to be given to the language of the contract, viz: "at the time of passing title to the above referred property."

Judgment was given to the plaintiff on the grounds that he was entitled to commission, there having been no contingency clause contained in said agreement; and re-emphasized and recited the exact words in the *Dickinson, et al.* v. *Walters* case, 100 N. J. Law 62. "To absolve a defendant from payment of commission in such a situation, it must appear that the payment was to be made contingent upon the actual transfer of the title, and that the stipulated remuneration for the services rendered is not to be payable until the title shall have passed."

This case is identical in point, and on all fours with the case at bar, in that, in both cases the brokerage agreement was made by a broker and a vendee, who agreed to pay the commission and that in both agreements, commissions were to be paid "at the time of passing of title" and in line with the above-cited case. The judgment of

the defendant should be reversed and judgment in favor of the plaintiff be entered.

Careful examination of the clause in the commission contract in question, will clearly show that the "purchaser agreed to pay R. E. Dudley Co., Inc., a regular commission of five per cent. (5%) on the purchase price at the time of passing title," and that this clause does not make the broker's commission contingent upon the actual transfer of title.

POINT TWO.

The trial judge erroneously entered judgment in favor of the defendants and against the plaintiff.

In the matter of *Roe* v. *Eggleston,* 142 Atlantic page 367 (not officially reported), a suit was brought to recover a real estate broker's commission, alleged to have been earned under a written agreement. The following are the pertinent clauses: "Five per centum (5%) on the gross amount of the purchase price for effecting this sale, to be paid at settlement."

The trial resulted in a directed verdict in favor of the plaintiff, and the ruling of the trial court in directing a verdict was based upon the construction of the written agreement above stated, viz., that it did not provide a contingency upon which payment is to be made, but falls under that class of cases, where it is held, that it fixed a time merely. The Court cited reported cases from the New Jersey Courts, such as *Mahlenbrock* v. *Stonehell Realty Co.* (N. J. Errors and Appeals), 138 Atlantic 875 (not officially reported); *Haber* v. *Goldberg,* 92 N. J. Law 373; *Steinberg* v. *Mindlin,* 96 N. J. Law 206; *Klipper* v. *Schlossberg,* 96 N. J. Law 397.

A real estate broker earns his commission, when he secures a buyer on the seller's terms. *In re. Steinberg* v. *Mindlin,* 96 N. J. Law 206.

In re. Taylor & Rose, Inc. v. *Bounincontri,* 101 N. J. Law 278. The Court having before it an identical set of facts as in this case, applied the theory that a real estate broker is entitled to his commission from a purchaser when he has procured or secured a seller on the purchaser's terms.

It is the consensus of opinions in the leading cases in this state, that a real estate broker is no guarantor or insurer as to the clearness, want of defect or marketability of the title; or of the ability or inability of either parties to the contract to perform, and that unless his commission contract has been made contingent upon the actual closing of title, he is entitled to his commission when he has procured a buyer or seller ready, able and willing to convey according to the terms agreed upon, and his right to commission is not thereby defeated by a disability of parties or by any difficulties in the title that prevents a consummation of the same.

The contract entered into between the Rialto Realty Company, Inc. as sellers and Saul Aron and Jacob Wiederhorn, the herein defendants, as purchasers (see State of Case, pp. 7 to 11 inclusive), makes no mention of restrictions which the defendants set up as a bar to the right of the plaintiff to recover commission.

In the matter of *Feist & Feist, Inc.* v. *Taub,* 143 Atlantic, page 335 (not officially reported), the trial resulted in a verdict for the plaintiff for commissions alleged to be due to the broker under a commission agreement to sell the prop-

erty therein involved, upon certain terms therein contained.

The Court of Errors and Appeals examined the opinion of the Circuit Court of Essex County, and stated that the liability of the defendant was controlled by such cases as *Hinds* v. *Henry*, 36 N. J. Law 328, which case held, the right of a broker to commission is complete when he has procured a purchaser ready, able and willing to conclude a bargain on the terms on which the broker was authorized to sell, and cited the case of *Steinberg* v. *Mindlin*, 96 N. J. Law 206.

In the case at bar, careful comparison of the broker's commission agreement (see State of Case, pp. 6 and 7) and of the terms contained in the contract for the purchase of the property, entered into by the defendants (see State of Case, pp. 7 to 11 inclusive); will disclose that the terms and conditions are identical, with the exception of a purchase money mortgage term, which the defendants waived, so that the broker did actually induce the sellers to convey their property to the herein defendants, as buyers, according to the terms and conditions of their brokerage commission authorization.

Judgment in favor of the defendants and against the plaintiff was entered, because the property involved had certain restrictions, which were admitted by the Rialto Realty Company, Inc. as sellers, to exist, and to have constituted liens; but an examination of the brokerage commission agreement and the contract for sale, will convince this court that as a matter of law, the brokers had performed all of their work, by producing a seller ready, able and willing and who evidenced their intention to convey by entering into formal contracts with the herein defend-

ants, and were therefore entitled to their commissions, and that the lower court had erred in entering judgment in favor of the defendants and against the plaintiff.

POINT THREE.

The judgment entered in this cause is erroneous and contrary to law, and not justified by the facts and law applicable to the facts in the case.

See *Taylor and Rose, Inc.* v. *Bounincontri,* 101 N. J. Law 278; *Haber* v. *Goldberg,* 92 N. J. Law 368; *Klipper* v. *Schlossberg,* 96 N. J. Law 397; *Dubrow* v. *Hornstra,* 95 N. J. Law 288; *Ludwig* v. *Aberbach,* 132 Atlantic 241 (not officially reported); *Kaslak* v. *Judge,* 102 N. J. Law 506.

POINT FOUR.

That the trial judge erroneously excluded from the verbal stipulation of the facts agreed upon, notwithstanding that those facts were part of the verbal stipulation agreed upon and entered into between the plaintiff and the defendants, the fact that the defendants were, by a decree in the Court of Chancery, ordered, adjudged and decreed to specifically perform the contract dated December 17, 1925, made between Rialto Realty Company, Inc., a corporation of New Jersey and Saul Aron and Jacob Wiederhorn for the purchase of property known and designated as 22-24 Rowe street, East Orange, New Jersey, for which the defendants agreed to pay to the plaintiff a regular commission of five per cent. of the purchase price at the time of passing of title, the subject matter of this suit, on the grounds of the said Saul Aron and Jacob Wiederhorn having waived the restrictions of record. See *Aron, et al.*

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v. *Rialto Realty Company, Inc., et al.*, 100 N. J. Equity 513.

The case was tried before the Circuit Court without a jury on verbal stipulations, which were agreed upon between respective counsel before the opening of the case; that due to the continuous interruptions, the attorney for the plaintiff could not and was prevented from specifically stating to the Court the various terms and conditions of the stipulations agreed upon, with the result that at one time the Court was of the opinion that the Court of Chancery suit was part of the stipulations (see State of Case, p. 41, ll. 39, etc.) and that at another time, that the Court of Chancery suit was not part of the stipulation (see State of Case, p. 42, l. 23), and that the Court confused the remarks of the attorney for the defendants for that of the attorney for the plaintiff, as evidenced by the remark of the Court addressed to Mr. Becker. "You say this has nothing to do with the case" (see State of Case, p. 44, l. 13). That remark was intended for Mr. Herman, attorney for the defendants, who had stated to the Court as follows: "I do not think the Court should take cognizance of the Chancery suit" (see State of Case, p. 42, l. 25).

All through the argument of counsel, the attorney for the plaintiff insisted that the lower court take cognizance of the suit that was decided in the Court of Chancery; and that the Court, hastily and without giving the attorney for the plaintiff an opportunity of proving, by exemplified copy, the record of the Court of Chancery, decided the finding of the Court in this case must be in favor of the defendants; and the Court further decided that it could not find upon the Court of Chancery decree (see State of Case, p. 44, l. 33).

This was error on the part of the Court below, in excluding the admission in evidence or in the stipulations, the decree entered in the Chancery Court action, against the herein defendants.

POINT FIVE.

By a final decree entered in the Court of Chancery on the 17th day of May, 1927, in the suit between Saul Aron and Jacob Weiderhorn as complainants and the Rialto Realty Company, Inc., *et als.*, as defendants, it was ordered, adjudged and decreed, that the agreement for the purchase of the property, upon which this suit is based, be and all things specifically performed by the complainants Saul Aron and Jacob Wiederhorn, the herein defendants. (See *Aron, et al.* v. *Rialto Realty Company, Inc., et al.*, 100 N. J. Equity 513.)

POINT SIX.

That subsequent to the entry of the judgment, the defendants Saul Aron and Jacob Wiederhorn, in the above entitled cause, on their appeal to the Court of Errors and Appeals of New Jersey, the final decree of the Court of Chancery was affirmed. See *Sol Aron, et al.* v. *Rialto Realty Company, Inc., et al.*, 140 Atlantic, page 918 (not officially reported).

POINT SEVEN.

That since the affirmance of the Court of Errors and Appeals of the final decree of the Court of Chancery, and since the entry of the judgment for the defendants in the above-entitled cause, the defendants Saul Aron and Jacob Wiederhorn have accepted a deed, subject to

restrictions of record, to the property known and designated as 22-24 Rowe street, East Orange, New Jersey, and being the same property for which the plaintiff demands its commissions, and have paid to the Rialto Realty Company, Inc., the full consideration therefore, in accordance with the contract for sale entered into between the said parties.

POINT EIGHT.

The judgment of the Circuit Court in this cause is erroneous and contrary to law in divers other respects.

Plaintiff-appellant respectfully submits that the judgment in the above matter be reversed for the reasons stated, and that the matter be remanded to the Essex County Circuit Court below, with instructions to vacate the judgment entered in behalf of the defendants, and to enter judgment in behalf of the plaintiff, together with taxed costs and counsel fee.

WILLIAM N. BECKER,
Attorney for Plaintiff-Appellant.

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

New Jersey Court of Errors and Appeals

R. E. Dudley Co., Inc., a corporation of New Jersey,
Plaintiff-Appellant,

vs.

Saul Aron and Jacob Wiederhorn, individually, jointly or in the alternative,
Defendants-Respondents.

On Appeal from Essex County Circuit Court.

BRIEF FOR DEFENDANTS-RESPONDENTS.

Objections to the State of the Case.

The plaintiff-appellant in its State of the Case and Brief has erroneously included facts not included in the stipulation of facts presented to the Court below. Objection to the inclusion of these facts has been duly filed, as will appear by the record on file in the office of the clerk of this Honorable Court, a true copy of said objection is printed below:

> To WILLIAM N. BECKER, attorney of plaintiff-appellant:
>
> PLEASE TAKE NOTICE, that I hereby object to the State of Case which was served upon me in the above matter, in that it includes matters not properly part of said case, and particularly the following: The decree for specific performance in the case of Saul Aron and Jacob Wiederhorn, complainants, and Rialto Realty Co., Inc., a corporation of New Jersey, defendant, in the Court of Chancery, and the opinion by the New Jersey Court of Errors and Appeals in the same

case, not being part of the records in the Circuit Court case.

ABRAHAM M. HERMAN,
Attorney of Defendants-Respondents.

January 7, 1929.

It is respectfully submitted that the portion of the State of the Case from pages 33 to 53, inclusive, cannot be considered by this Court as the records appearing on these pages are not certified by the clerk of the Court below (see State of Case, page 32).

Facts.

The facts stipulated in open court between the plaintiff-appellant and defendants-respondents before Judge Nelson Y. Dungan, and upon which he rendered his decision, are stated in the rule for judgment signed by said Judge (see State of Case, pages 30-31).

The stipulated facts were:

It is agreed and stipulated that the counterclaim filed in this matter by the defendant against the plaintiff, be dismissed, without costs to either party.

That the defendants engaged the plaintiff as agent to negotiate for the purchase, in their behalf, of premises at 22-24 Rowe street, East Orange, New Jersey, for the sum of $16,500, free and clear of all encumbrances except a building and loan mortgage of $12,000; and agreed to pay to the said agent five per cent. of the purchase price, as and for its commission "at the time of passing title."

The contract was made and executed on the same date, between the defendants herein, and

the Rialto Realty Company, the owners of the said premises.

At the time for the closing of title, it is admitted that there were restrictions of record, constituting an encumbrance upon the premises in question. Thereupon, defendants refused to accept title to the property because of the said encumbrance.

LAW.

Points One, Two and Three.

Points one, two and three of appellant's brief can be considered and argued together. They actually raise only one issue of law.

Upon the stipulated facts is the broker entitled to any commission? Having failed to produce a ready, able and willing vendor obviously the answer is in the negative. He has not performed his contract and is not entitled to his commission. All the cases cited by the appellant in its brief are in accord with this doctrine. It is elementary law that until a broker secures an able and willing seller or buyer, as the case may be, he is not entitled to any commissions.

In all the cases cited by appellant introduction of ready, able and willing vendees or vendors was found as a fact, but liability was disclaimed by reason of alleged contingencies in the brokerage contract. In this case although payment was to be made at the time of passing of title, in accordance with the contract, the Court below did not base its decision upon this ground, nor did it consider it. The brokerage contract in this case provided for the payment of a commission of five per cent. of the purchase price at the time of passing of title. According to the record

in this case, it appears that title had never passed to the respondents.

Since the case of *Hinds* v. *Henry,* 36 N. J. Law 328, it is settled law in this State that parties to brokerage contracts, as well as other contracts, *will be bound by the terms of their special agreement,* and if a contingency is provided, commission will not become due until contingency occurs. See also *Leschziner, et al.* v. *Bauman,* 83 N. J. Law 743; 85 Atl. 205; *Lewis* v. *Morris Realty Co.,* 3 N. J. Law Misc. Rep. 394, affirmed in 102 N. J. Law 119; *Kuligowski* v. *McCullogh,* 4 N. J. Misc. Rep. 449.

These cases, relating to the interpretation of words "at time of passing title" in broker's contracts are cited in passing, although in this case it was not considered by the Court below, and is apparently unnecessary for a decision of this case, although the appellant has raised the question of the proper interpretation of these words in the first three points argued by it in its brief.

The facts and law applicable to this case and in particular to these three points raised by appellant in its brief are best stated by the Trial Court as follows:

"It appears that the plaintiff and the defendants entered into an agreement by which the defendant authorized the plaintiffs to purchase a property on Rowe street, Ampere, at a price of $16,500, subject to a building and loan then on said property, paid down to six months; that the seller was to take back a second mortgage for the difference, to run for a year, at six per cent. interest. The contract between the Rialto Realty Company, which it appears was the owner of this property, agrees that the Rialto Realty

Company will sell to the defendants in this case for the sum of $16,500, acknowledging the receipt of $1,000, subject to a building and loan mortgage of $12,000, which exactly expressed the terms in the brokerage, as I understand it. The effect of the brokerage agreement is to represent to the defendant that there are no other liens or encumbrances upon that property, and to make the earning of commissions by the plaintiffs dependent upon the production of a seller of this property ready, able and willing to convey upon those terms. Those are the terms stated in the brokerage agreement, the property not to be subject to restrictions or encumbrances. It appears that there were other restrictions and encumbrances, and what they were makes no difference; therefore the defendant refused to take title, and properly so, because as far as the vendor and brokerage were concerned, they were not obliged to take title to property which was not free and clear, except the encumbrances mentioned in the agreement of the sale, and as far as the brokers were concerned, they were not obliged to take a purchaser except one who could take title. It is a well-known principle of law that a broker must produce a purchaser, able, ready and willing to purchase, and it is equally well known that the broker must produce a seller upon the same terms'' (see State of Case, pages 44-45).

Point Four.

Point four of appellant's brief seeks to charge the Court below with error in excluding facts. This case was decided upon a stipulation; the Court had no power to amend, add to or subtract from the stipulation entered into by counsel. Appellant cites no authority in support of its

contention. It has been held in a number of cases in this State, that counsel are bound by the facts stipulated between them (see *Decker* v. *George W. Smith & Co.*, 88 L. 630, 96 Atl. 915; *Carter* v. *Public Service Gas Co.*, 100 N. J. Law 374).

It is apparent that counsel for the appellant, anticipating an adverse decision upon the facts stipulated between himself and counsel for the defendants, by reason of remarks made by the Court below during the course of the argument, sought to inject matter not part of the stipulation. He now claims that these facts were erroneously excluded.

As part of the stipulation defendants-appellees withdrew their counter-claim and did not interpose the defenses of fraud and lack of good faith of plaintiff-appellant. That this would have been a good defense and constitute basis of an action for damages cannot be denied (see *Mendelsohn* v. *Baker*. Decided March 28, 1929 and is unofficially reported in 7 Misc. Rep. 359). Now that the defendants-respondents have waived their right to trial upon these defenses and counter-claim relying upon the stipulation, it would manifestly be improper and unjust, in view of the fact that the court below decided adversely, to now permit the plaintiff-appellant to repudiate the stipulation.

Points Five, Six and Seven.

Points five, six and seven can be considered together. None of them raise issues of law but introduce facts not properly part of the State of the Case, and are not facts included in the stipulation submitted to the Court below. They cannot be considered by this Court.

Regardless of what decree may have been entered in our Court of Chancery, it remains as a fact, that appellant has not performed his contract. Plaintiff-appellant has failed to secure the property in questions for defendants-respondents in accordance with the terms of its authorization.

Point Eight.

Appellant alleges that the judgment of the Circuit Court is erroneous and contrary to law in divers other respects. This is frivolous, it does not properly raise any issue of law. It does not refer to or allege any particular error of the Court below and no consideration should be given to it. It is not the duty nor the practice for this Court upon appeal to search the record for trial errors, not specifically pointed out in the grounds of appeal filed by appellant (see Supreme Court Rule 139, 108 Atl. 240).

Defendants-respondents respectfully submit that the judgment in the above matter was correct for the reasons stated and should be affirmed, together with taxed costs and counsel fee.

ABRAHAM M. HERMAN,
Attorney for Defendants-Respondents.