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OPINION OF SUPREME COURT.

Filed May 16, 1927.

New Jersey Court of Errors and Appeals

No. 99, February Term, 1927.

CHARLES SERVENTI,
Plaintiff-Respondent,

vs.

JOHN B. CELLA, JOSEPH A. CELLA and CARLO D. CELLA,
Defendants-Appellants.

On appeal from the New Jersey Supreme Court.

Submitted February Term, 1927.
Decided May 16, 1927.

For the appellants, Carlo D. Cella, John W. Ockford, of counsel.

For the respondent, Edward A. Markley, Otmar J. Pellet, of counsel.

The opinion of the Court was delivered by, KALISCH, *J.*

There was a judgment entered in the Supreme Court upon a verdict directed at the Hudson Circuit, in favor of the plaintiff, against the defendants in an action brought by the former against the latter to recover a certain deposit of one thousand dollars, together with a search fee of $150, with interest, which deposit was made with and paid to the defendants by the plaintiff, at the time of the execution of a certain con-

tract entered into between the plaintiff and the defendants, whereby the latter agreed to convey to the former, certain real estate in the City of Hoboken, but made default in that the defendants were unable to convey to the plaintiff, a marketable title, as was agreed upon in the said contract.

From this judgment the defendants appeal to this court.

The record discloses that according to the terms of the said contract, the defendants agreed to deliver to the plaintiff a certain deed, containing the usual full covenants and warranty, on March 15, 1923. On that date a deed for the premises was tendered by the defendant to the plaintiff, which deed contained, at the end of the description of the premises, being conveyed, the following clause: "Subject, however, to the terms of a certain agreement made between Michael Uhring and Louis Elleau dated May 22, 1878, and recorded in the Hudson County Registrar's office, in Book 322 of Deeds, page 690, (pp. 30-40)."

The plaintiff refused to accept the deed because it contained the clause above quoted, whereas it was expressly provided by the agreement of the sale of the property that it was to be sold "free and clear of all encumberance," and there was no such clause as quoted contained therein; and, secondly, the agreement to which the deed of conveyance referred and was made subject, was an encumbrance, and therefore made the title unmarketable.

It was conceded that the bill for the search fee was reasonable and that there was nothing in the agreement of sale of May 22, 1878, which

made the sale subject to the agreement between Uhring and Elleau.

It is to be observed that the Uhring-Elleau agreement was made forty-nine years ago. The defendants derive their title from Uhring. The agreement referred to in the deed of conveyance, after reciting that Elleau had erected a building upon his lot, the northerly wall of which encroached upon the Uhring lot, then provided that the said wall should stand and be used by the parties to the agreement, as a party wall, so far as Uhring might see fit to use it as such. The agreement also granted to Elleau, his heirs and assigns, the right to have a window in each story of his building above the first story of the party wall and to enjoy the light and air therefrom so long as Uhring did not desire to use that part of his lot for the purpose of erecting a building thereon. The agreement also contained a mutual covenant that the parties thereto would desist and refrain from doing any act or thing to obstruct or hinder the full and free enjoyment of light and air, except by the erection, in good faith, of a building or buildings upon the said lot. In view of this situation, the plaintiff refused to accept the deed which was tendered, and demanded back his deposit money which was refused him. The plaintiff offered no other proof and rested his case.

There was a motion made on behalf of the defendants for a non-suit, which was denied. The defendants adduced no testimony.

The trial judge directed a verdict in favor of the plaintiff and against the defendants upon the theory that the party wall mentioned in the contract, together with the undertakings entered

into by and between the parties in relation to windows, light and air and all such privileges connected therewith, constituted an encumbrance, and hence, the plaintiff was not required to accept the deed tendered and was entitled to recover his deposit money, together with the outlay for search fees. This judicial action was erroneous.

Normally, a party wall is not an encumbrance. It was so held by this court in Feder, et al. *vs.* Solomon, et. al., 131 Atl. Rep., page 290, in an opinion by Judge Newman, which opinion was adopted by this Court, 134 Atl. Rep. 917. There was no circumstance appearing in this case which rendered it an exception to the application of the general legal rule enunciated in the opinion referred to. But whether the mutual easements of light and air constitute an encumbrance upon the property involved in the present litigation was a mixed question of law and fact and would depend upon whether such easements still exist. It must be borne in mind that the contract between Uhring and Elleau was made in 1878, nearly fifty years ago, and under the agreement, the owner of the Uhring lot was entitled to erect a building upon it which would close all the windows in the Elleau building, thus shutting out both light and air. It is quite likely that this was done many years ago. The testimony in the case does not enlighten us on the subject.

In the absence of any testimony tending to show that any window existed in the adjacent lot which had not been obliterated before the making of the agreement, it becomes quite apparent that there is a failure of proof of the existence of the easements mentioned in the contract. The burden of proof rested upon the plaintiff to show that such easements or easement still existed in order to entitle him to a direction of a verdict in his favor and this the plaintiff failed to do.

For the reasons given, the judgment is reversed, and a *venire de novo* awarded.

ENDORSED:

"Filed May 16, 1927.

JOSEPH F. S. FITZPATRICK,
Clerk."

CHECK LIST.

Filed May 16, 1927.
Doc. No. 7339.

STATE OF NEW JERSEY.
COURT OF ERRORS AND APPEALS.

February Term, 1927.

CHARLES SERVENTI, *Respt.*, and JOHN B. CELLA, *et al.*, *Apples.*	*Appeal from Supreme Court.*

No. 99 of Feb. Term.
The Chancellor presiding.
Opinion by Kalisch, *J.*

CHECK LIST.

	Affirm	Reverse
The Chancellor		1
The Chief Justice		1
Mr. Justice Trenchard ..		1
Mr. Justice Parker	1	
Mr. Justice Kalisch		1
Mr. Justice Black	1	
Mr. Justice Katzenbach.		1
Mr. Justice Campbell ..		1
Mr. Justice Lloyd		1
Judge White	1	
Judge Van Buskirk		1
Judge McGlennon		1
Judge Kays	1	
Judge Hetfield	1	
Judge Dear	1	
Totals	6	9

PETITION FOR RE-ARGUMENT.

Filed May 24, 1927.

NEW JERSEY COURT OF ERRORS AND APPEALS.

No. 99. FEBRUARY TERM, 1927.

CHARLES SERVENTI, *Plaintiff-Respondent*, *vs.* JOHN B. CELLA, JOSEPH A. CELLA and CARLO D. CELLA, *Defendants-Appellants.*	*Action at Law.* *On Appeal from Supreme Court.*

To the Honorable Justices and Judges of the Court of Errors and Appeals of the State of New Jersey:

The humble petition of Charles Serventi, the plaintiff-respondent in the above-stated cause, respectfully represents:

He recovered a judgment against the defendants in the Supreme Court, Hudson Circuit, for $1,375.34, representing his deposit and search fee, in an action wherein he sought to recover those items because of the failure of the defendants to carry out a contract for the sale of certain real estate in the City of Hoboken to him.

This Court in an opinion by Mr. Justice Kalisch, filed on May 16, 1927, reversed the judgment of the Supreme Court on the ground that it did not appear at the trial whether or not the encumbrance complained of still continued to exist, and therefore, the plaintiff was not

justified in refusing to take title so far as the evidence disclosed.

The plaintiff respectfully asks a re-consideration of the conclusion stated in said opinion that the judgment should be reversed, because the Court, it is respectfully submitted, overlooked the second point made in the brief of the plaintiff as respondent in this Court, namely, that the defendants presented to him at the time of the closing of title a deed which was improper and not in accordance with the contract for the sale of the real estate.

Assuming that the opinion of this Court is entirely sound that no encumbrance was proven on the trial to exist under the agreement made between Michael Uhring and Louis Elleau, dated May 22, 1878, still the point is clear that the defendants had no right in their deed to make it subject to the terms of the agreement of 1878 when the contract called for a deed free and clear of all encumbrances. This point seems not to have been passed upon by this court and is unassailable.

The contract of sale between the plaintiff and the defendants provided as follows (p. 16, ll. 30-40):

> "The deed shall be in proper statutory short form for record, *shall contain the usual full covenants and warranty,* and shall be duly executed and acknowledged by the seller, at the seller's expense, *so as to convey to the purchaser, the fee simple of the said premises, free of all encumbrances except as herein stated.*"

The contract of sale did not provide that it was to be subject to the agreement of 1878. Therefore the conveyance was to be free and clear of it. On March 19, 1923, the parties met

in the office of Mr. Samuel Besson, counsel for the plaintiff in Hoboken and a deed bearing that date was tendered to the plaintiff and his counsel containing the following subject clause (p. 31, ll. 20-35):

> "Subject however to the terms of a certain agreement made between Michael Uhring and Louis Elleau dated May 22, 1878, and recorded in the Hudson County Registrar's Office, in Book 322 of Deeds, page 690."

It appears when this deed was tendered to the plaintiff and his counsel, Mr. Besson, that Mr. Besson advised the plaintiff to refuse to accept it, first, on the ground that it contained that "subject" clause, and secondly, that the agreement referred to was in fact an encumbrance and made the title unmarketable (p. 31, l. 40, to p. 32, l. 5).

The law is well settled that the tender of a deed must be of one which conforms to the terms of the contract or it will be as if no tender had been made, 39 Cyc. 1549.

In *Waters* v. *Bew,* 52 N. J. E. 787, it was held that under an agreement for the sale of lands, the purchaser is entitled to a deed describing the land in the words of the agreement *without any limitations other than those therein agreed upon.*

In the case at bar, immediately following the description of the property and at the end of the description appeared the "subject" clause, *supra* (p. 31, ll. 25-30).

The purchaser may refuse the deed tendered by the vendor if it contains any condition, restriction or reservation not warranted by the contract. 39 Cyc. 1557.

In *Krah* v. *Wassmer,* 75 N. J. E. 109, 115, affirmed by this Court on the opinion below (78 N. J. E. 305), it was held by Howell, *V.-C.*, that

a purchaser having bargained for land understanding that he was to receive title free of encumbrance, can insist upon a conveyance free of restrictive covenants.

An examination of the authorities cited *supra*, demonstrates that the defendants did not tender a proper deed. Since the contract provided for deed containing full covenants and warranty, which deed should convey to the plaintiff the fee simple of the premises free of all encumbrances, except those stated therein, the defendants plainly had no right to make the conveyance subject to the agreement between Uhring and Elleau of May 22, 1878.

Whether the agreement of 1878 is or is not an encumbrance in point of law is immaterial. If it was not an encumbrance, making the conveyance to the plaintiff subject to its terms and obligations, was improper. Plaintiff had a right to insist upon a deed which was in conformity with his contract and not one which would be subject to the obligations of an agreement which the contract said nothing about. If the plaintiff had accepted the deed, he would have waived the right to object to its form. He would thereby purchase the property subject to the agreement and if it proved in fact as well as in law an encumbrance, he would have no right of action against the defendants, notwithstanding that by his contract he bought free and clear of the encumbrance.

If he had accepted the deed and if a controversy arose with the adjoining property owner over the rights and obligations imposed by the agreement of 1878, the plaintiff alone would have to bear the burden of the lawsuit and he would have no right of action against the defendants

who agreed to convey free and clear of this encumbrance.

If the agreement of 1878 did not impose obligations, it would not be an agreement because the very purpose of the agreement was to give certain rights called grants in the agreement to the owner of the building whose wall encroached. These rights in favor of the adjoining land and obligations against the lot which the plaintiff sought to purchase run with the land because the agreement says it is to bind the heirs and assigns of Uhring. The insertion of the clause in the deed tendered to the plaintiff making the conveyance subject to the agreement of 1878 certainly limits the scope of the covenants and warranty which the defendants were bound to give with their deed, and therefore is a violation of their contract of sale which provided for a full covenant and warranty deed free from encumbrance.

We therefore respectfully submit that for this reason the direction of verdict in favor of the plaintiff was proper.

Counsel for the plaintiff-respondent therefore respectfully pray that a re-argument of this case may be ordered especially in view of the fact that while the record was silent as to whether the terms of the agreement were still in force, that is to say, that the physical layout of the property was such as to come under that agreement and be governed by its terms, the fact nevertheless is (and no question was raised at the time of the trial to the contrary, nor in the brief of the appellants for that matter) that the physical conditions are such as to come within that agreement. It was erroneously presumed by counsel for the appellants that there was a presumption that the agreement continued to apply to the

property and that the physical conditions remained the same as at the time the agreement was executed unless the contrary was urged by the party who was seeking to defend himself against the operation of the terms of the agreement.

Dated, May 21, 1927.

Very respectfully submitted,

EDWARD A. MARKLEY,
OTMAR J. PELLET,
Of Counsel.

COLLINS & CORBIN,
Attorneys for Plaintiff-Respondent.

RULE.

Filed September 21, 1927.

NEW JERSEY COURT OF ERRORS AND APPEALS.

#99, February Term, 1927.

CHARLES SERVENTI, *Plaintiff-Respondent,* *vs.* JOHN B. CELLA, JOSEPH A. CELLA and CARLO D. CELLA, *Defendants-Appellants.*	*Action at Law.* *Rule for Oral Argument as to Why a Re-argument Should Not Be Had.*

The petition of the plaintiff-respondent for re-argument of the above-entitled appeal, having been filed with the Court and same having been duly considered;

It is, on this 20th day of September, 1927, ORDERED that the Court hear oral argument as to why a re-argument should not be had, said argument to be noticed for the October Term, 1927, of the Court.

By the Court,
EDWIN ROBERT WALKER,
Chancellor.

Rule actually entered this 21st day of September, 1927, on motion of

COLLINS & CORBIN,
Attorneys of Respondent.

New Jersey Court of Errors and Appeals

CHARLES SERVANTI,
Plaintiff-Respondent,

vs.

JOHN B. CELLA, JOSEPH A. CELLA and CARLO D. CELLA,
Defendants-Appellants.

Brief for Defendants-Appellants in Opposition to Plaintiff-Respondent's Motion for a Re-argument.

This motion for a re-argument is based upon a point which plaintiff-respondent seems to think this Court did not pass upon in its judgment of reversal.

The point is made that the deed which was tendered included a subject clause not expressly provided for by the contract, and for this reason the purchaser had a right to reject the title as offered, and was, therefore, in turn entitled to a judgment for the amount of the deposit paid by him at the time of the execution of the contract. This is the only point made upon this application for a re-argument of the appeal.

The point is not only lacking in merit but there are also many legal reasons why this fails to justify an affirmance of the decision below which has been reversed by this Court.

A *venire de novo* has been awarded, and a new trial of the issues in this case would probably establish the real facts with respect to the

"paper" objections to the title, which have been made by the purchaser.

The subject clause above referred to relates to a possible easement, and there was a total failure of proof of the actual existence of any easement, and it was for this reason that this Court concluded that the plaintiff had failed to make out a case.

This Court did not say that the agreement was an encumbrance even on paper, and did not pass upon the question of whether or not the mutuality of the benefits would bring the agreement within the party-wall rule, as laid down in

Feder, et al., v. *Solomon, et al.*, 131 Atl. 290.

Bearing in mind that the contract (State of Case on Appeal, pp. 11-17) expressly provided that the premises should be conveyed "subject to such a state of facts as an accurate survey may show" (State of Case on Appeal, p. 14, lines 3, 4 and 5), it is quite clear that the question of the effect of this subject clause in the deed is to be considered in the light of the whole contract and all of the facts of the case, rather than upon the extremely narrow ground taken by plaintiff-respondent for the discussion.

Plaintiff-respondent argues that he had a right to reject the deed because it contained a condition, restriction or reservation not warranted by the contract. The authorities cited are:

Waters v. *Bew*, 52 Eq. 787;
Krah v. *Wassmer*, 75 Eq. 109; Affirmed: 78 Eq. 305 and 31 Cyc.

(State of Case on this motion, p. 9.)

In the first place, the words "Subject, however,

to the terms of a certain agreement", do not necessarily amount to either a condition, a restriction or a reservation. If the agreement in question should be held to be similar to the simple party-wall agreement, they would confer a benefit.

"Subject to" does not necessarily mean or imply an objection. If the plaintiff had met the burden of proof in the trial court, as this Court says he should have done in order to prevail, we would know the facts and it could then be determined whether or not the agreement referred to was either (a) a benefit; (b) a restriction; or (c) a nullity.

Until this be determined by proof, there is no merit to plaintiff's contention, because as this Court has said, the burden of proof was upon him to show something more than the mere paper agreement.

If, in fact, there is nothing but the paper agreement, and this is all that is before the court at the present time, the recital in the deed refers to an agreement that is a nullity, and such a reference in a deed does not in anywise impair or defeat the deed or the estate granted.

18 *C. J.* 362;
Booker v. *Booker*, 119 N. Y. App. Div. 492, s. c. 104 Supp. 21.

The equity cases cited on behalf of this motion do not support the contention argued. Both of the cases were specific performance suits and they hold in an action for specific performance that the purchaser is entitled to a deed in accordance with the words of the agreement.

Of course, no one disputes this proposition of law. It should not be overlooked, however, that "a land sale contract in which performance by one is consideration for performance by the other,

contemplates concurrent performance by both, neither being required to make a tender first."

Caporale v. *Rubine,* 92 N. J. L. 463.

The purchaser rejected the title upon the ground that the agreement referred to was in fact an encumbrance, and made the title unmarketable, as well as upon the ground the deed contained the subject clause. (State of Case on Appeal, page 32, lines 1 to 4.) The purchaser did not make a tender. He did not afford the vendors an opportunity to correct the form of the deed. Had this been the only objection, the vendors were entitled to a reasonable opportunity to correct the deed. The out and out rejection of the title upon the ground that it was unmarketable, deprived the vendors of a reasonable opportunity to correct the form of the deed.

The rule is:

> "If a deed tendered by the vendors is justly liable to objections as to matters of form which may be obviated, it is the purchaser's duty to state his objections, and his unconditional refusal to accept the deed is a waiver of such objections."
>
> 27 *R. C. L.* 526;
> *Gregg* v. *Von Phul,* 17 U. S. (L. ed.) 536.

In other words, the purchaser did not put the vendors in default by a tender and a demand for a deed exactly within the language of the contract. The purchaser, as he had a right to do, relied upon the rule of concurrent objections, dispensing with tender on the part of either. What he did rely upon was his rejection of the title as being unmarketable, and he should now stand or fall upon this objection.

This Court has decided this point and it is not open upon this application for re-argument. It has been decided that the plaintiff failed to sustain the burden of proof upon the question of the alleged unmarketability of the title. This real question is still open because a new trial has been awarded.

As far as the facts that are now before this Court, the title was and is marketable, and the plaintiff having rejected the title as unmarketable, should not be allowed to fall back upon the narrow objection, which, had it been made alone, would undoubtedly have resulted in the correction of the deed as offered.

In view of the conditional rejection of the title, the vendors were relieved from the necessity of doing anything about the form of the deed.

The fact conditions embraced within this agreement would undoubtedly be shown by a survey and the vendors were, therefore, justified in including the recital in question, because this was in fact incorporating the express exception of the contract. The words "subject to such state of facts as an accurate survey may show" are quite customary in contracts, but these words in a deed are translated into the exact condition intended to be covered by the contractual clause.

Even the agreement referred to in the deed standing alone, does not disclose an encumbrance. Mutual easements are a benefit and not a burden.

> *Feder* v. *Solomon,* 134 Atl. 917;
> *Brooks* v. *Curtis,* 50 N. Y. 639.

See also cases cited under Point I of appellants' brief on the appeal herein.

It would seem unnecessary to repeat at this point the entire argument of the defendants-

appellants, as found in their main and reply briefs upon the appeal herein, nor is it necessary to refer at length to the decision of this Court of May 16, 1927. It would seem, however, to counsel, that Point II of plaintiff-respondent, was considered by this Court, although perhaps not expressly disclosed in the opinion of Mr. Justice Kalisch.

Is not the real question whether or not the agreement referred to in the deed, plus the true facts of the condition of the property at the time of the contract between plaintiff and defendants, amounted to such an encumbrance as to make the title unmarketable? If in fact the title was not unmarketable by reason of the nature of the agreement and the facts of the case, the recital in the deed was harmless and could be disregarded, aside from all the other points involved. To hold otherwise would be to attach greater importance to words, without regard to the substance, than the law requires, or the decisions of the courts justify.

In conclusion it is respectfully submitted that the ends of justice will be best served by a new trial of the case as has been ordered by this Court.

CARLO D. CELLA,
Attorney for Defendants-Appellants.

JOHN W. OCKFORD,
Of Counsel.