

87 MAY 7 1932

ON BRIEFS

New Jersey Court of Errors and Appeals

Between:

NATHAN WELITOFF, BEATRICE WELITOFF, administratrix, etc.,

Substituted Complainant-Appellant,

and

FIDELITY TITLE AND MORTGAGE
GUARANTY CO., et al.,

Defendants-Appellees.

On Bill, &c.
On Appeal from
Chancery.

State of Case

MELOSH, MORTEN & MELOSH,
Solicitors of Complainant-Appellant.

DeTURCK & WEST,
Solicitors of Merit Realty & Investment Co.,
Defendant-Appellee.

CORNELIUS DOREMUS,
Solicitor of Fidelity Title & Mtge.
Guaranty Co.,
Defendant-Appellee.

The Otsego Press, Cooperstown, N. Y.

Service of the within

State of Case (3)

is hereby acknowledged the

3rd

day of

May

D. 1932

DeTurck & West

Solicitors of Merit Realty
& Inv. Co.

New Jersey State Library

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New Jersey Court of Errors and Appeals

BILL OF COMPLAINT.

(Filed Feb. 9, 1928)

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The complainant, Nathan Welitoff, of Jersey City, New Jersey, respectfully shows that:

1. By deed dated March 1, 1923, and recorded in the Bergen County Clerk's Office in book 1196 of deeds for Bergen County on page 656, &c., Isaac Greenberg and Rosie Greenberg, his wife, conveyed to complainant certain lands therein described, to wit:

20

All that certain lot or parcel of land and premises hereinafter particularly described situate, lying and being in the Borough of Leonia, in the County of Bergen and State of New Jersey, known and designated as lots numbered one (1) and Two (2) and part of three (3) on a certain map entitled "Map of 26 lots of Cornelius Christie, Leonia, N. J., 1891," and filed in the Bergen County Clerk's Office more particularly described as follows:

30

Beginning at a corner formed by the intersection of the southerly line of Central Avenue with the westerly line of Grand Avenue in said Borough of Leonia, running thence (1) westerly and along the southerly line of Central Avenue one hundred and fifty-six and seventeen one hundredths (156.17) feet to the corner formed by the intersection of the southerly line of Central Avenue with the easterly line of Spring Street; run-

40

Bill of Complaint

ning thence (2) southerly along the easterly line of Spring Street eighty-three and eighty-two one hundred (83.82) feet; thence reverting to point of beginning, and thence (3) southerly along the westerly line of Grand Avenue ninety-two and
 10 forty one hundredths (92.40) feet; thence (4) westerly about one hundred and fifty-five (155) feet to the end of the second course.

2. On October 4, 1924, complainant and his wife made, executed and delivered to the Fidelity Title and Mortgage Guaranty Company, a New Jersey corporation, a bond and mortgage to secure the payment of the sum of \$10,000.00, which mortgage covers the lands and premises described
 20 in paragraph 1 hereof, and is recorded in Bergen County Clerk's Office in book 713 of mortgages for said county, on pages 516, &c.

3. On June 1, 1925, complainant and his wife conveyed to Seda Glass and Rose Hyman a part of the land described in paragraph 1 hereof, the deed being recorded in the Bergen County Clerk's Office in book 1333 of deeds for said county, on pages 161, &c., and the lands so conveyed being
 30 described as follows:

All that certain lot, tract or parcel of land and premises hereinafter particularly described situate in the Borough of Leonia in the County of Bergen and State of New Jersey.

Beginning at the point of intersection of the southerly line of Central Avenue with the westerly line of Grand Avenue and running thence (1)
 40 northerly fifty-three degrees fifty-eight minutes and twenty seconds west eighty (80) feet along

Bill of Complaint

the above mentioned southerly line of Central Avenue to a point; thence (2) southerly forty-three degrees fifty-six minutes and fifty-eight seconds west eighty-two and ninety-six one hundredths (82.96) feet to a point; thence (3) southerly forty-seven degrees nine minutes and thirteen seconds east eighty (80) feet to the above mentioned westerly line of Grand Avenue; thence (4) northerly forty-three degrees twenty-eight minutes and forty seconds east ninety-two and four one hundredths (92.4) feet to the southerly line of Central Avenue, the point or place of beginning. 10

And as part of the consideration for said conveyance the said Seda Glass and Rose Hyman assumed the payment of the entire amount of moneys due on the said mortgage so given by the complainant to said company to secure the payment of the sum of \$10,000.00 as aforesaid. 20

4. On June 1, 1925, the said Seda Glass and Samuel Glass, her husband, Rose Hyman and Isaac Hyman, her husband, made, executed and delivered to complainant a bond and mortgage to secure the payment of the sum of \$5,000.00 conveying the lands described in the last preceding paragraph and is recorded in the Bergen County Clerk's Office in book 751 of Mortgages for said county, on pages 374, &c. 30

5. On November 25, 1925, the said Seda Glass and Samuel Glass, her husband, and Rose Hyman and Isaac Hyman, her husband, made, executed and delivered to the Merit Realty & Investment Company, Inc., a corporation of the State of New Jersey, a deed whereby they conveyed to the said 40

Bill of Complaint

Merit Realty & Investment Company, Inc., the lands and premises so conveyed by complainant to them as aforesaid, which said deed is recorded in the Bergen County Clerk's office in book 1389 of deeds for said county, on pages 65, &c.

- 10 6. In November, 1925, complainant was desirous of having that part which had been conveyed to him as described in the first paragraph hereof released from the lien of the mortgage so given by him to the Fidelity Title and Mortgage Guaranty Company as aforesaid, being all of said lands excepting therefrom so much as had been conveyed by complainant to Seda Glass and Rose Hyman as hereinbefore set forth, but the said
- 20 Fidelity Title and Mortgage Guaranty Company refused to accede to complainant's request, unless and until he should pay off to said company on account of the principal money due on its said mortgage the sum of \$2000.00, and as a result of the demand so made by the said company, complainant did, on January 5, 1926, pay to said company on account of the principal money due on its said mortgage the sum of \$2000.00, and received from said company a release releasing that
- 30 part of the lands described in paragraph 1 hereof which were still owned by complainant from the lien of said mortgage, complainant understanding and believing at that time that the mortgage so given to said company as aforesaid would still remain a lien upon the lands so conveyed to the said Seda Glass and Rose Hyman as aforesaid in the full amount, the said Fidelity Title and Mortgage Guaranty Company holding said mortgage primarily as security for the payment to it
- 40 of the balance of \$8000.00 principal money and

Bill of Complaint

interest, and secondarily as security for the payment to complainant of \$2000.00 and interest, inasmuch as the said conveyance to the said Seda Glass and Rose Hyman by complainant as aforesaid had been made upon the understanding and agreement that they, the said Seda Glass and Rose Hyman, would assume the payment of the said \$10,000.00 mortgage held by the Fidelity Title and Mortgage Guaranty Company as aforesaid, and had assumed the payment of the said \$10,000.00 as a part of the consideration for the conveyance of the lands by complainant to said Seda Glass and Rose Hyman as mentioned in paragraph 3 hereof. 10

7. The Fidelity Title and Mortgage Guaranty Company now claims that it had no understanding or agreement with complainant whereby the said mortgage so given to it as aforesaid by complainant was to remain as security for the payment of the said sum of \$2000.00 so paid by complainant to said company as aforesaid, and the Merit Realty & Investment Company, Inc., have given notice to complainant that it desires to pay off the mortgage so given by said Seda Glass and Rose Hyman to complainant as aforesaid, and complainant is fearful that if the said Merit Realty & Investment Company, Inc., should pay to the said Fidelity Title and Mortgage Guaranty Company the balance due to the said Fidelity Title and Mortgage Guaranty Company, to wit, the sum of \$8000.00 and accrued interest, that the said Fidelity Title and Mortgage Guaranty Company may receipt said mortgage for cancellation and surrender it up to be cancelled, by means whereof complainant will be deprived of all se- 20 30 40

Bill of Complaint

curity for the payment of the said sum of \$2000.00 so paid by complainant to said Fidelity Title and Mortgage Guaranty Company as aforesaid.

10 8. Complainant has requested said Fidelity Title and Mortgage Guaranty Company to hold said mortgage as security for the payment of the said sum of \$2000.00 and interest now due to complainant as aforesaid, but said Fidelity Title and Mortgage Guaranty Company has not signified its willingness so to do, and on the contrary claims that it holds said mortgage as security for the payment of only the sum of \$8000.00 and interest so due to it as aforesaid.

20 Complainant is without adequate remedy in the courts of law, and therefore prays:

1. That the defendants Fidelity Title and Mortgage Guaranty Company, a corporation of the State of New Jersey, and Merit Realty & Investment Company, Inc., a corporation of the State of New Jersey, who are the defendants to this suit, may answer this bill of complaint and each statement therein made.

30 2. That a decree may be made by this honorable court adjudging and declaring that said mortgage is primarily a lien upon the lands and premises so conveyed to the Merit Realty & Investment Company, Inc., as aforesaid, and now owned by it, to the extent of whatever amount may be due to the said Fidelity Title and Mortgage Guaranty Company for principal and interest, and
40 secondarily a lien upon said lands and premises to secure to complainant the said sum of \$2000.00 and accrued interest due thereon.

Answer of Merit Realty & Investment Co., Inc.

3. That a decree may also be made adjudging and declaring that the said Fidelity Title and Mortgage Guaranty Company holds said mortgage in trust for complainant for the payment of the moneys so due to the complainant as aforesaid. 10

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

MELOSH, MORTEN & MELOSH,
Solicitors and Counsel with Complainant.

20

**ANSWER OF MERIT REALTY & INVESTMENT
CO., INC.**

(Filed Mar. 8, 1928)

The defendant, Merit Realty and Investment Company, Inc., a corporation of the State of New Jersey, having its principal office in the City of Paterson, Passaic County, New Jersey, answering complainant's bill, says that: 30

1. It admits paragraphs 1, 2 and 3 of said bill.
2. This defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of said bill.
3. Paragraph 5 of said bill is admitted.
4. This defendant has no knowledge or information sufficient to form a belief as to the truth of 40

*Answer of Defendant Fidelity Title and Mortgage
Guaranty Company*

the allegations contained in paragraphs 6 and 8
of said bill and says that if complainant did pay
the sum of \$2000.00 on account of the \$10,000.00
mortgage described in said bill, he did so volun-
10 tarily and without the knowledge, consent or ap-
proval of this defendant.

DE TURCK & WEST,
Solicitors for and of Counsel with
with Defendant, Merit Realty and
Investment Company, Inc.

(Filed)

20 **ANSWER OF DEFENDANT FIDELITY TITLE AND
MORTGAGE GUARANTY COMPANY.**

(Filed Mar. 14, 1928)

The defendant, Fidelity Title and Mortgage
Guaranty Company, answering the bill of com-
plaint herein, says:

1. It admits the allegations contained in para-
30 graphs one (1) and two (2).

2. It has no knowledge or information as to
the allegations contained in paragraph three (3)
and leaves the complainant to make such proof
thereof as he may be advised.

3. It has no knowledge as to the allegations
contained in paragraph four (4) of the complaint.

4. It has no knowledge as to the allegations
40 contained in paragraph five (5) of the complaint.

*Answer of Defendant Fidelity Title and Mortgage
Guaranty Company*

5. Defendant admits that it receives from complainant on or about January 5th, 1926, the sum of \$2,000.00 on account of the principal of its said mortgage of \$10,000.00 and credited said sum on account of the principal of said \$10,000.00 mortgage, leaving a balance due thereon of \$8,000.00, and further that this defendant, Fidelity Title and Mortgage Guaranty Company, released from the lien of the said \$10,000.00 mortgage the tract of land described in paragraph one (1) of complainant's complaint and this defendant says it has no knowledge or information as to any of the transactions or understandings between said complainant and Seda Glass and Rose Hyman as alleged in said paragraph six (6). 10 20

6. This defendant admits, as stated in paragraph seven (7) of the complaint, that it had no understanding or agreement with complainant. Defendant has no knowledge or information as to the allegations in paragraph seven (7) of the complaint with reference to notice given by the Merit Realty & Investment Company, Inc., to complainant or any other person with reference to payment of any mortgage. 30

7. This defendant admits the allegations contained in paragraph eight (8) of the complaint.

As a further defense this defendant alleges that at no time has it agreed or consented with complainant or any other person to do other than receive and accept the payment of the \$2,000.00 alleged to have been paid by the complainant and apply the same on account of the principal of its said \$10,000.00 mortgage. In consideration 40

Replication

for said payment, it agreed to and did release the premises described in paragraph one (1) of the complaint and has made no other agreements, express or implied, with relation to said \$2,000.00 or to its said mortgage.

10

CORNELIUS DOREMUS,
Solicitor for Defendant, Fidelity
Title and Mortgage Guaranty Com-
pany.

REPLICATION.

20

(Filed Apr. 15, 1928)

The complainant joins issue on so much of the answer of the said defendant, Fidelity Title and Mortgage Guaranty Company, as denies the allegations contained in the bill of complaint herein.

30 Answering the further defense set up in the answer of the said defendant, this complainant avers that the negotiations relative to the execution and delivery of the release and the payment of \$2000.00 therefor, as averred in the bill of complaint herein, were carried on by Mr. H. C. Crane on behalf of the defendant, Fidelity Title and Mortgage Guaranty Company, and by Mr. Charles Barbash on behalf of this complainant; that during these negotiations said Crane agreed with said Barbash that the said defendant, Fidelity Title and Mortgage Guaranty Company, would
40 continue to collect the interest on the mortgage as it became due, retaining a sufficient amount to pay the interest due to the said defendant on the

Replication

balance of \$8000.00 remaining due on said mortgage, and remitting to complainant the interest on the \$2000.00 which had been paid off on account of the said mortgage by complainant, and that said Barbash on behalf of this complainant then and there agreed to pay to the said defendant, Fidelity Title and Mortgage Guaranty Company, the usual collection fee for collecting the interest on the said sum of \$2000.00. 10

Complainant avers that said Charles Barbash acting for this complainant and this complainant both believed and they aver the fact to be, that the agreement so made by said Crane for the collection and payment of the said interest on the said sum of \$2000.00 as aforesaid was made with authority of the said defendant company, and they further believed that even if it was not made with its express authority, yet such agreement would be respected and ratified by the said defendant, Fidelity Title and Mortgage Guaranty Company, when brought to its notice, it having full knowledge that the payment of the said sum of \$2000.00 was not a voluntary payment made by this complainant on account of the moneys due on said mortgage, but a compulsory payment made only after the defendant, the said Fidelity Title and Mortgage Guaranty Company, had refused to release the lands in question from its mortgage until it should have received the sum of \$2000.00 on account of the principal moneys due on its mortgage. 20 30

MELOSH, MORTEN & MELOSH,
Solicitors of Complainant. 40

**ADMISSION OF DEFENDANT MERIT REALTY
& INVESTMENT COMPANY, INC.**

1. That on June 1, 1925, Seda Glass and husband and others executed and delivered to Nathan Welitoff, the deceased complainant in this cause, the bond and mortgage therein mentioned, the mortgage being recorded as therein stated.

NOTICE TO ADMIT.

*To the Defendant, Fidelity Title and Mortgage
Guaranty Company:*

Take notice that the complainant calls upon you to admit, but only for the purpose of the above entitled cause, the following facts:

1. That in the Bergen County Clerk's Office there is recorded in book 1333 of deeds for said county on page 161, &c., a deed dated June 1, 1925, made by Nathan Welitoff and his wife, by which they conveyed to Seda Glass and Rose Hyman a part of the lands described in paragraph one of the bill of complaint herein.

2. That the lands described in book 1333 of deeds for Bergen County, on page 161, &c., are the same as those described in paragraph three of the bill of complaint herein.

3. That in the deed recorded in book 1333 of deeds for Bergen County, on pages 161, &c., it is recited that the grantees therein take title to the lands therein described, to wit, the lands described in paragraph three of the bill of complaint herein "subject to a mortgage for ten thousand (\$10,000.) dollars held by the Fidelity Title and Mortgage Company of Ridgewood,

Notice to Admit

N. J., which mortgage the parties of the second part hereby assume and agree to pay"; that the said parties of the second part mentioned in said deed are Seda Glass and Rose Hyman.

4. That in book 751 of mortgages for Bergen County, on pages 374, &c., there is recorded a mortgage dated June 1, 1925, made by Seda Glass and Samuel Glass, her husband, and Rose Hyman and Isaac Hyman, her husband, to Nathan Weltoff, the original complainant herein, given to secure the payment of the sum of \$5000.00, the lands described in said mortgage being the same as those described in paragraph three of the bill of complaint herein. 10

5. That in the Bergen County Clerk's Office in book 1389 of deeds for said county, on pages 65, &c., there is recorded a deed dated November 25, 1925, made by Seda Glass and Samuel Glass, her husband, and Rose Hyman and Isaac Hyman, her husband, to the Merit Realty & Investment Company, Inc., a corporation of the State of New Jersey, whereby the grantors therein conveyed to said corporation the lands and premises conveyed to said grantors as described in paragraph three of the bill of complaint herein. 20 30

And take notice that in case of your refusal or neglect to make the admission hereinabove called for within five days after service of this notice upon you, you will be required to pay the reasonable expense of proving the facts hereinbefore set forth, to be taxed by the court, whatever the result of the trial of this cause may be, unless the court shall consider your neglect or refusal to have been reasonable. 40

MELOSH, MORTEN & MELOSH,
Solicitors for Complainant.

**ADMISSION OF FIDELITY TITLE AND MORT-
GAGE GUARANTY COMPANY.**

1. This defendant will not require formal proof of the documents referred to in said notice to admit. Said defendant has no knowledge thereof except such as is alleged in the bill. For the pur-
10 poses of this suit, this defendant is willing to admit that the allegations relative to the documents in question are true subject to its right to have the same corrected if it shall appear that there is any error in the recitals contained in said allegations.

CORNELIUS DOREMUS,
Solicitor for Defendant, Fidelity
Title and Mortgage Guaranty Com-
20 pany.

Complainant having died, Beatrice Welitoff, administratrix of the estate of Nathan Welitoff, deceased, was duly substituted as complainant by order of the Court of Chancery filed May 28, 1928.

OPINION.

30

(Filed Aug. 10, 1931)

LEWIS, V. C.:

Complainant owns certain premises in Leonia and as owner executed the mortgage of \$10,000.00 to defendant, Fidelity Title and Mortgage Guaranty Company. Subsequently complainant sold
40 part of the premises to two grantees who assumed this mortgage. These two grantees in

Opinion

turn transferred their part of the premises to defendant, Merit Realty and Investment Company, Inc. The Merit Realty and Investment Company took title to their tract by a deed which provides, *inter alia*, as follows:

“subject to a mortgage for ten thousand (\$10,000.00) dollars held by the Fidelity Title and Mortgage Company, of Ridgewood, N. J., which mortgage the party of the second part hereby assume and agree to pay.”

10

This is the mortgage in question.

Subsequently complainant desired to sell the other portion of the land not deeded to the Merit Company and in fact entered into a contract to do so. Through an agent he approached the Fidelity Company seeking a release from the mortgage of the portion he wished to sell. The Fidelity Company stated that they were unwilling to execute a release unless they received something on account of the mortgage. Complainant suggested two plans to the Fidelity Company—first, that \$2,000.00 be paid with a participation in the mortgage to the extent of \$2,000.00, the \$8,000.00 balance to be preferred to complainant’s \$2,000.00; or secondly, that \$2,000.00 be paid, reducing the mortgage to \$8,000.00. The Fidelity Company accepted the second plan which was consummated. At this time the mortgage was not due and there was no threat or danger of foreclosure. The \$2,000.00 was paid, the amount of the mortgage was reduced to \$8,000.00, and the tract not owned by the Merit Company was released from the mortgage.

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Opinion

The Merit Company was not consulted in any of these transactions, did not consent to what took place between the complainant and Fidelity Company, and in fact knew nothing whatever about the transactions until they had been completely consummated. Upon learning of the reduction of the mortgage from \$10,000.00 to \$8,000.00 the Merit Company claimed and still claims that its obligation has been reduced by the amount paid by complainant.

Complainant contends that as against the Merit Company the amount due on the mortgage is still \$10,000.00, that the Merit Company refuses to admit its obligation to that extent, that the Fidelity Company claims that only \$8,000.00 is due to it, and that there is, accordingly, danger that at some time the mortgage may be foreclosed for the sum of \$8,000.00 which would occasion a loss to complainant of the \$2,000.00 paid by him. In this suit he asks that the court declare that there is a subsisting lien against the Merit Company's property for the full amount of \$10,000.00 and that the Fidelity Company is trustee of this mortgage to the extent of \$2,000.00.

Complainant contends that he was forced to make this transaction, but I can see no evidence of any compulsion. The mortgage was not due and no threat appears to have been made to foreclose it. The mortgage covered not only the Merit Company's property but another tract which complainant wished to sell free and clear of the lien of the mortgage. He paid the Fidelity Company \$2,000.00 in order to get this release. There was no compulsion upon him what-

Opinion

ever except that imposed upon him by his perhaps improvident contract to sell a portion of the land. The effect of the release, about which the Merit Company was not consulted, was to reduce the security held by the Fidelity Company. It is true that the Merit Company assumed the full mortgage, but it nowhere appears either in original deed by which the Merit Company acquired title or elsewhere, that the entire tract originally mortgaged should not be subjected to sale on foreclosure to meet the indebtedness to the Fidelity Company. Complainant, for reasons of his own, saw fit to reduce the security, and thereby changed the status which existed at the time the Merit Company assumed the mortgage. It seems a reasonable inference that the release obtained by complainant was worth to him the \$2,000.00 he paid in reduction of the amount of the mortgage.

Under the circumstances, I cannot find that complainant can now charge the Merit Company with the amount of this payment after complainant and the Fidelity Company voluntarily reduced the amount of the mortgage.

Complainant in effect asks the court to make and enforce the alternative agreement which complainant proposed to the Fidelity Company and which the Fidelity Company rejected, insisting on a simple payment on account of the principal of the mortgage and a simple release of part of the premises.

A decree will be advised accordingly dismissing the bill.

DECREE OF DISMISSAL.

(Filed Sep. 8, 1931)

10 This cause coming on to be heard in the presence of DeTurck & West, solicitors of the defendant, Merit Realty & Investment Co., and Melosh, Morten & Melosh, solicitors of the complainant, and Cornelius Doremus, solicitor of the defendant Fidelity Title & Mortgage Guaranty Company, on bill, answer and oral proofs taken in open court, and whereupon and upon duly considering the said pleadings and proofs and hearing and considering the arguments of counsel, and it appearing to the court that the complainant is not entitled to the relief prayed for in his bill;

20 Therefore, and upon reading the consent of Cornelius Doremus, solicitor of Fidelity Title & Mortgage Guaranty Company, the other defendant to this cause, it is, on this 8th day of September, 1931, ORDERED, ADJUDGED and DECREED that complainant's bill be and the same is hereby dismissed.

30 IT IS FURTHER ORDERED that the bond, heretofore furnished by the defendant, Merit Realty & Investment Co., with the Royal Indemnity Company as surety, at the time of the discharge of the *lis pendens* recorded in Book 9 of *Lis Pendens* for Bergen County, on pages 367, &c., be discharged unless complainant shall, within ten days after the entry of this decree, appeal therefrom and bring said appeal on for hearing in regular course.

E. R. WALKER,
C.

40 Respectfully advised,
VIVIAN M. LEWIS,
V. C.

NOTICE OF APPEAL.

Notice of appeal was duly filed with the Clerk in Chancery.

PETITION OF APPEAL.

10

(Filed Oct. 2, 1931)

To the Honorable the Court of Errors and Appeals in the Last Resort in All Causes:

The petition of Beatrice R. Welitoff, administratrix of the estate of Nathan Welitoff, the appellant in the above entitled cause, respectfully shows that:

20

1. Petitioner finds herself aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 8th day of September, 1931, in a certain cause in said Court of Chancery wherein the said petitioner was complainant and the said Fidelity Title and Mortgage Guaranty Co. and Merit Realty and Investment Company, Inc., were defendants, in this respect, to wit, that said decree orders, adjudges and decrees that the complainant's bill be dismissed.

30

And petitioner appeals from the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous in that said decree should have adjudged and decreed that your petitioner was entitled to the relief prayed for in the bill of complaint, to wit:

40

Petition of Appeal

That the mortgage given by complainant's intestate, Nathan Welitoff, and the complainant as his wife, to the Fidelity Title and Mortgage Guaranty Co., dated October 4th, 1924, in the sum of \$10,000 covering the lands and premises described in paragraph 1 of the bill of complaint, and recorded in the Bergen County Clerk's Office in Book 713 of Mortgages for said county, on pages 516, etc., is primarily a lien upon the lands and premises conveyed by complainant's intestate to the defendant, the Merit Realty and Investment Company, Inc., to the extent of whatever amount may be due to the Fidelity Title and Mortgage Guaranty Company for principal and interest and secondarily a lien upon said lands and premises to secure to complainant the sum of \$2,000 and accrued interest thereon.

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

MELOSH, MORTEN & MELOSH,
Solrs. for and of Counsel with
Appellant.

**ANSWER OF MERIT REALTY & INVESTMENT
COMPANY, INC., TO PETITION OF APPEAL.**

(Filed Oct. 8, 1931)

The answer of Merit Realty & Investment Company, Inc., a corporation of the State of New Jersey, one of the above-named appellees, to the 10
petition of appeal of Beatrice R. Welitoff, Administratrix of the Estate of Nathan Welitoff, the above-named appellant.

This appellee, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto, nevertheless, admits that a decree was, on the 8th day of September, 1931, made and entered in the Court of Chancery of New Jersey, in the above-entitled 20
cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree this appellee begs leave to refer thereto when the same shall be produced.

This appellee is advised and believes that the said decree is agreeable to equity; and it prays that the same may be affirmed with costs to be taxed in favor of this appellee. 30

DE TURK & WEST,
Solicitors for and of Counsel with
Merit Realty & Investment Company, Inc.

**ANSWER OF FIDELITY TITLE AND MORTGAGE
GUARANTY COMPANY TO PETITION
OF APPEAL.**

(Filed Oct. 16, 1931)

The answer of Fidelity Title and Mortgage
10 Guaranty Company, a corporation of the State
of New Jersey, one of the above-named appellees,
to the petition of appeal of Beatrice R. Welitoff,
Administratrix of the Estate of Nathan Welitoff,
the above-named appellant.

This appellee, not admitting the truth of all
or any of the matters in the said petition of ap-
peal contained for answer thereto, nevertheless,
admits that a decree was, on the 8th day of Sep-
20 tember, 1931, made and entered in the Court of
Chancery of New Jersey, in the above-entitled
cause, for the purposes in said petition men-
tioned and as therein set forth; but as to the sub-
stance and form of said decree this appellee begs
leave to refer thereto when the same shall be pro-
duced.

This appellee is advised and believes that the
said decree is agreeable to equity; and it prays
30 that the same may be affirmed with costs to be
taxed in favor of this appellee.

CORNELIUS DOREMUS,
Solicitor for and of Counsel with Fi-
delity Title and Mortgage Guaranty
Company.

DEPOSITIONS.

IN CHANCERY OF NEW JERSEY

Between

NATHAN WELITOFF,

Complainant,

and

FIDELITY TITLE AND MORTGAGE
GUARANTY Co., *et al.*,

Defendants.

On Bill, &c.

10

Depositions taken before me, DOUGLAS D. T. STOREY, named by an order made herein on February 5th, 1929, as the Master before whom the same should be taken. 20

Complainant produced notice which had been served on solicitors for the defendants, designating Friday, March 22nd, 1929, at two o'clock in the afternoon, at my office at 905 Bergen Avenue, Jersey City, N. J., as the time and place when and where said depositions would be taken, at which time the taking of said depositions was continued by counsel for the complainant, upon representations that counsel for the defendants requested the same; the continuance being taken until April 3rd, 1929, at the same hour and place, at which time the depositions were taken. 30

Appearances:

MELOSH, MORTEN & MELOSH, Solicitors of complainant.

CORNELIUS DOREMUS, Solicitor of Defendant, Fidelity Title and Mortgage Guaranty Company. 40

Charles Barbash—Direct

DE TURCK & WEST, Solicitors for Defendant,
Merit Realty and Investment Company.

10 Mr. Morten: Complainant offers in evidence certified copy of deed from Seda Glass and others to Merit Realty and Investment Company, Inc., one of the defendants herein, dated November 25th, 1925, and recorded in Liber 1389 of deeds for Bergen County, page 65.

(Marked Exhibit C-1.)

20 CHARLES BARBASH, a witness called on behalf of complainant, being duly sworn, testified as follows:

Mr. Morten: I offer in evidence certified copy of mortgage made Seda Glass and others to Nathan Welitoff, dated June 1st, 1925, and recorded in Liber 751 of mortgages for Bergen County, page 374.

(Marked Exhibit C-2.)

Examination by Mr. Morten:

30 Q. Mr. Barbash, you were the father-in-law of Nathan Welitoff? A. I was.

Q. Were you familiar with the transaction relating to the property described in the bill of complaint in this cause and the mortgage held by the defendant Fidelity Title and Mortgage Guaranty Company? A. I was.

40 Q. You recall in or about November, 1925, entering into any negotiations with the defendant, the Fidelity Title and Mortgage Guaranty Company, relative to obtaining a release of a part of mortgaged premises from that mortgage?

Charles Barbash—Direct

Mr. De Turck: Objected to as far as the Merit Realty and Investment Company is concerned.

A. I do.

Q. Whom did you see relative to this proposed release? 10

Mr. De Turck: Objected to on the same ground. I object to any testimony of this witness as to any conversation or negotiation with the Merit Realty Investment Company relating to obtaining a release on part of the mortgaged premises from the ten thousand dollar mortgage. This objection shall have the same effect as to every question relative thereto. 20

A. Mr. Crane of the Fidelity Title and Mortgage Guaranty Company—the secretary.

Q. What did you say to him relative to the release and what did he say to you? A. I brought him a check of two thousand dollars, a certified check.

Q. Before that? A. There was correspondence between Mr. Crane and myself as to releasing of the property. 30

(By consent of counsel for the defendant, Fidelity Title and Mortgage Guaranty Company, and for the complainant, it is agreed that the following letters and copies of letters may be offered in evidence as showing the correspondence that passed between these parties relative to obtaining of the release of part of the mortgaged premises.) 40

(Marked Exhibit C-3.)

Charles Barbash—Direct

Mr. De Turck: I object to the offer on the ground that it is not binding on the Merit Realty and Investment Co.

Mr. Morten reading from letters:

10 October 28, 1925—Fidelity to Barbash.
 October 31, 1925—Barbash to Fidelity.
 November 4, 1925—Fidelity to Barbash.
 November 6, 1925—Barbash to Fidelity.
 November 17, 1925—Fidelity to Barbash.
 November 24, 1925—Barbash to Fidelity.
 December 3, 1925—Fidelity to Barbash.
 December 7, 1925—Barbash to Fidelity.
 January 5, 1926—Barbash to Fidelity.

20 Also letters Merit Realty and Investment Company to Fidelity Title and Mortgage Company, and Fidelity Company to Merit Realty and Investment Company.

 April 20, 1926—Defendant Merit Company to Fidelity.

 April 22, 1926—Fidelity to Merit Company.

30 Also a pencil sketch showing a diagram of the premises covered by the ten thousand dollar mortgage.

 Q. Mr. Barbash, as a result of this correspondence between Mr. Crane and yourself in which in the letter of December 3, 1925, the Fidelity Title and Mortgage Guaranty Company offers to give you a release for the premises desired if you will pay two thousand dollars and services amounting to \$4.40, did you make such payment? A. I did.

40

Charles Barbash—Direct

Q. I show you a check dated January 5th, 1926, in the sum of two thousand dollars, payable to the Fidelity Title and Mortgage Guaranty Company, signed by you, and ask you what that is?
 A. That is the check that I made. Two thousand dollars to pay to the Fidelity Title and Mortgage Guaranty Company. 10

Q. To what person did you deliver this check?
 A. Mr. Crane.

Q. Who was with you? A. Mr. Henry C. Casper.

Q. Did you have any conversation with Mr. Crane at the time that you delivered this check, relative to the payment of the interest on this two thousand dollars, or the collection thereof? 20

Mr. De Turck: Objected to as not binding on the Merit Realty and Investment Company, or the other defendant, for the reason that an agreement of this kind would have to be in writing.

Q. You can state what that conversation was?
 A. When I gave the check to Mr. Crane I asked him to collect the interest on my two thousand dollars at the same time he collects the interest of the company on the eight thousand dollars, and I told him I would pay him the regular collection fee. 30

Q. Did Mr. Crane make any reply to you when you asked him? A. He did.

Q. What did he say to that? A. He said all right; I think it is all right.

Mr. Morten: I offer this check in evidence. 40

(Marked Exhibit C-4.)

Charles Barbash—Direct

Q. How did you come to pay this two thousand dollars to the Fidelity Title and Mortgage Guaranty Company?

Mr. De Turck: Objected to as immaterial.

10 A. Because they demanded of me; they didn't want to give a release until I paid the two thousand dollars.

Mr. Morten: Is it agreed that the release described the property for which the witness asked for a release at the time the Fidelity Title and Mortgage Guaranty Company asked for the two thousand dollars?

20

(Agreed upon by counsel.)

Q. Mr. Barbash, after the property that had been conveyed to Glass and Heyman was conveyed to the defendant Merit Realty and Investment Company, do you know whether or not the Merit Realty and Investment Company, the defendant, gave you any notice that they desired to pay off your five thousand dollar second mortgage? A. Yes.

30 Q. After they gave you that notice, did you make any request of the Fidelity Title and Mortgage Guaranty Company respecting the holding of the ten thousand dollars as security for your two thousand dollars?

Mr. De Turck: Objected to as not binding on the Merit Realty and Investment Company.

Mr. Doremus: Objected to as leading.

40

Charles Barbash—Direct

Q. Mr. Barbash, after the property that had been conveyed to Glass and Heyman was conveyed to the defendant Merit Realty and Investment Company, do you know whether or not the Merit Realty and Investment Company, the defendant, gave you any notice that they desired to pay off your five thousand dollar second mortgage? A. Yes. 10

Q. After they gave you that notice, did you have any negotiations with the Fidelity Title and Mortgage Guaranty Company respecting their mortgage?

Mr. De Turck: Objected to as not binding on my client.

Mr. Doremus: I object. 20

A. Yes.

Q. What did you do after you received the notice from the Merit Realty and Investment Company that they wanted to pay off your five thousand dollar mortgage?

Mr. De Turck: I object to this testimony so far as the Merit Realty and Investment Company is concerned.

A. I went to Mr. Crane of the Fidelity Title and Mortgage Guaranty Company and asked him why he didn't send me the interest for my two thousand dollars. He said he never agreed. I said, "What is the remedy now?" He said, "I don't know." I said, "Could you get that mortgage back, not transfer it until we got a *lis pendens* on." He said he didn't know what he would do. I said, "Can I see Mr. Doremus?" He said he was very busy. I saw Mr. Doremus; he was 30 40

Charles Barbash—Cross

very busy and he said that all he could give me was fifteen minutes' time. I told him the whole story about the two thousand dollars. He said he would see what he could do. The next Monday I saw Mr. Doremus and he promised to do
10 everything he can.

Q. Did Mr. Crane or Mr. Doremus signify or say they were willing to hold that ten thousand dollars as security for your two thousand dollars? A. No.

CROSS-EXAMINATION by Mr. De Turk:

Q. Did you ever see any officer of the Merit Realty and Investment Company about paying this two thousand dollars before you paid it? A.
20 No.

Q. Did you ever notify the Merit Realty and Investment Company that you intended to pay two thousand dollars? A. I did not.

Q. At the time you paid the two thousand dollars to Mr. Crane as the representative of the Fidelity Title and Mortgage Guaranty Company did you receive any writing, excepting the release of mortgage? A. No, I didn't receive that; they
30 released it, that is all.

Q. You never attempted to obtain the consent of the Merit Realty and Investment Company to pay off the two thousand dollars? A. No.

Q. You say you received the notice from the Merit Realty and Investment Company of their desire to pay off the second mortgage of five thousand dollars? A. Yes.

Q. Who talked to you? A. I don't remember.

Q. How do you know it was the Merit Realty
40 and Investment Company calling you? A. He said he was an officer.

Charles Barbash—Cross

Q. You didn't recognize the voice? A. No.

Q. You don't know whether it was the Merit Realty and Investment Company? A. No, just what I heard over the telephone.

Q. Didn't ever pay off the five thousand dollars? A. No. 10

Q. All you know is the telephone message from some one you didn't know? A. Yes.

CROSS-EXAMINATION by Mr. Doremus:

Q. You say you asked Mr. Crane to collect the interest on two thousand dollars which you paid for the release of the mortgage at the same time it was paid on the eight thousand dollars? A. I did.

Q. Where was this conversation? A. At Mr. Crane's office. 20

Q. Who was with you? A. Mr. Casper.

Q. Mr. Crane said, "I think it is all right"? A. Yes.

Q. Is that all the conversation? A. Yes.

Q. You said at another interview with Mr. Crane, you asked him then if he would send you interest on two thousand dollars? A. I said I want my interest on my two thousand dollars. 30

Q. What did he say? A. He said, "I don't know anything about it."

Q. What did you say? A. I said I was surprised.

Q. When was that conversation? A. This was the time when the Merit Realty and Investment Company called me up. I found out then it wasn't paid.

Q. You don't know the month? A. No.

Q. Who was with you? A. Myself—alone. 40

Charles Barbash—Cross

Q. What did you say he said further about seeing what could be done? A. I said I wanted to see Judge Doremus about the two thousand dollars. He said, "You better look for somebody else."

10 Q. That was the extent of that conversation? A. Yes.

Q. Now, did Mr. Crane at any time say to you anything about the two thousand dollars excepting that it was wanted by the executive committee on account of the mortgage? A. He sent me a letter to that effect.

Q. There was no conversation about it? A. Yes.

20 Q. That comprises all the negotiations about the payment of the two thousand dollars and the release of the mortgage? A. Yes, up to the time I paid the two thousand dollars.

Q. Was there any other conversation about this two thousand dollars after the money had been paid you? A. Nothing.

Q. What you have now stated as to the conversation, coupled with the correspondence, covers the entire transaction about the ten thousand dollar mortgage? A. Yes, right.

30 Q. Do you know whether Mr. Welitoff saw Mr. Crane? (No answer.)

Q. That takes in all the conversation relative to the two thousand dollars up to the beginning of this action? A. Yes.

Q. I suppose you know nothing about Mr. Crane's powers as secretary of the Fidelity Title and Mortgage Guaranty Company, do you? A.

40 No.

Henry Casper—Direct

By Mr. Morten:

Q. Mr. Barbash, where was Nathan Welitoff after the two thousand dollars was paid to the Fidelity Title and Mortgage Guaranty Company?

A. He went to Europe, and later came back and died.

10

Q. And you were acting for him on the business here? A. Yes.

HENRY CASPER, a witness called on behalf of the complainant, being duly sworn, testified as follows:

Examination by Mr. Morten:

20

Q. Where do you live? A. Tenafly, New Jersey.

Q. In the latter part of 1925 did you have any dealings with Mr. Barbash regarding this property in Leonia?

Mr. De Turk: Objected to as not binding on the Fidelity Title and Mortgage Guaranty Co. or the Merit Realty and Investment Company.

30

A. I had.

Q. What did you do?

Mr. De Turk: Same objection.

A. I purchased a part of it from Mr. Barbash.

Q. Did you have an examination of the title?

A. As far as I remember.

Q. Do you know what it disclosed respecting the first mortgage? A. As far as I know, there was a mortgage of ten thousand dollars held by the Fidelity Title and Mortgage Guaranty Co.

40

Henry Casper—Cross

Q. What did you want? A. We wanted it cleared up.

Q. Did you accompany Mr. Barbash to the Fidelity Title and Mortgage Guaranty Company on the day this two thousand dollars was paid to the
10 Fidelity Title and Mortgage Guaranty Company?

A. I did.

Q. Did you hear the conversation that took place? A. I did.

Q. What conversation passed between Mr. Barbash and Mr. Crane respecting the collection of the interest on this two thousand dollars?

Mr. De Turck: Objected to as far as the
20 Merit Realty and Investment Co. is concerned.

A. Mr. Barbash asked Mr. Crane to collect the interest.

Q. Do you know the reply as to whether they would? A. The only thing I remember was he would see what he could do about it.

CROSS-EXAMINATION by Mr. Doremus:

Q. When was this conversation? A. Some
30 time in January, I think it was January 5th, 1926.

(Complainant rests.)

Howard D. Crane—Direct

HOWARD D. CRANE, a witness called on behalf of defendant Fidelity Title and Mortgage Guaranty Company, being duly sworn, testified as follows:

By Mr. Doremus:

10

Q. You are connected with the Fidelity Title and Mortgage Guaranty Company? A. I am.

Q. In what capacity? A. Secretary.

Q. As such, did you have power under the by-laws and rules to pass on questions such as you have heard testified to with reference to the executive committee?

Mr. Morten: Objected to on the ground that the by-laws are the best evidence. 20

A. No.

Q. You have heard read the correspondence between you as representing the Fidelity Title and Mortgage Guaranty Company and Mr. Barbash as representing Mr. Welitoff, have you not?

A. Yes.

Q. Does that correspondence correctly set forth all the transactions, incidents and agreements had between the Fidelity Title and Mortgage Guaranty Company and Mr. Welitoff? A. 30
It does.

Q. Were you present when Mr. Barbash testified on behalf of the complainant in this cause?

A. I was.

Q. I ask you, what have you to say with reference to the conversation between you and Mr. Barbash regarding the collection of interest on the two thousand dollars? A. I declined to attempt to collect the interest; I told him so. 40

Howard D. Crane—Cross

Q. What did you say at any time, if anything was said, with reference to its being all right as to the interest on two thousand dollars? A. I told him I had nothing whatever to do with that; I could help him in no way whatsoever.

10 Q. Was anything said at any of these conversations or interviews between you and Mr. Barbash with reference to the executive committee? A. Yes; I referred his letter to the executive committee, asking for participation in the mortgage.

Q. Did you at any time say or intimate to Mr. Barbash that the two thousand dollars received as testified by him was to be disposed of in any
20 other way than a payment on the ten thousand dollars first mortgage? A. There was no other question. I told him we would give him a release on account of the ten thousand dollars, and there would be no participation in the mortgage by him or his clients.

Q. Referring to the testimony of Mr. Casper, a witness produced by the complainant today, was the testimony as outlined by him correct as you understand it? A. I do not remember Mr.
30 Casper being present. My recollection is that Mr. Barbash was alone on that day.

Q. Was Mr. Casper present at any time at any interview between you and Mr. Barbash? A. No, I have no recollection of having seen him before today.

CROSS-EXAMINATION by Mr. Morten:

Q. Mr. Crane, when Mr. Barbash paid this two
40 thousand dollars, do you recall if he asked you to collect the interest on it? A. I do not remember if he asked at that time.

Howard D. Crane—Cross

Q. Do you remember whether or not you said to him you would have to refer it to the Board?

A. No.

Q. Do you remember saying, whether or not you said to him, "I will see what I can do about it" or substantially that thought? A. No. 10

Q. Mr. Crane, you have testified that Mr. Barbash asked you whether or not he could participate in the mortgage, and that you told him he could not do so; that is so, as I understand? A. He should have no participation in the mortgage.

Q. You didn't refer that to your Board? A. Yes, I did; it says so in the letter, and I refer to the letter of November 17, 1925.

Q. Mr. Crane, as I understand it, Mr. Barbash asked you to collect the interest on this two thousand dollars, which he was paying off, at the same time that you collected the interest on the balance of eight thousand dollars, and he offered to pay you the regular collection fee for it, and you told him immediately, as I understand you now, that you could not or would not do it; is that true? A. Yes. 20

Q. Why did you not refer that question to your Board? 30

Mr. De Turck: Objected to as not binding on the Merit Realty and Investment Company, and further that the question is argumentative.

Mr. Doremus: I object on the latter ground, also.

A. The matter of collecting the interest didn't enter into the agreement. I didn't have anything to do with it whatsoever. It wasn't a company 40

Howard D. Crane—Cross

matter. The interest on the two thousand dollars, I refer to.

Q. When Mr. Barbash asked your company to collect it and turn it over to him, would not that have been a company matter? A. They never ac-
10 cepted it.

Q. Would it have been?

Mr. De Turck: Objected to as argumentative.

A. I can't answer that question.

Q. Then, without consulting the Board at all as to whether or not they would be willing to undertake the collection of this two thousand dol-
20 lars as requested by Mr. Barbash, you of your own volition rejected it? A. Yes.

Q. Why did you not submit it to your Board?

Mr. De Turck: I object; it is very evident this company is not in business to collect on other peoples' mortgages.

Mr. Doremus: I object on the same ground.

A. Because we were not interested in the two
30 thousand dollars; they were not interested whatsoever.

Q. How did you know? A. We never made it a practice of doing that.

Q. But you do collect interest on mortgages and turn the interest over to the holders of the mortgages? A. Where we guarantee the mort-
gages, we do.

Samuel Jacobs—Direct

SAMUEL JACOBS, a witness called on behalf of defendant Merit Realty and Investment Company, being duly sworn, testified as follows:

By Mr. De Turck:

Q. You are an officer of the Merit Realty and Investment Company? A. Yes. 10

Q. What office? A. President.

Q. Who is the secretary and treasurer? A. Mr. Charney and Mr. Fremark.

Q. Who has charge of the affairs of the company? A. I myself.

Q. Is Mr. Fremark in authority as to payments of mortgages? A. Yes.

Q. Did the Merit Realty and Investment Company at any time call up Mr. Barbash and offer to pay off the five thousand dollar second mortgage? A. Never. 20

Q. Was the payment ever authorized by the directors of the company? A. No.

Q. Did any officer of your company ever phone to Mr. Barbash about the second mortgage?

Mr. Morten: Objected to; it doesn't appear that he has knowledge of his own. 30

A. No.

Q. Did you ever phone Mr. Barbash? A. No.

Q. Did you ever phone to him for any purpose as to the second mortgage? A. Not that I can remember.

Q. On January 5, 1926, did you know that a payment was made on account of the ten thousand dollar mortgage? A. No. I did not.

Q. Were you ever notified that a payment would be made? A. Never. 40

Samuel Jacobs—Cross

Q. Prior to that date, did you ever meet Mr. Barbash? A. No, I don't think so.

Q. Never had any conversation with him? A. No.

Q. When did you first ascertain that the payment of two thousand dollars was made? A. 10 When we sent the letter of April 10th, 1926; we sent the Fidelity Title and Mortgage Guaranty Company a check.

CROSS-EXAMINATION by Mr. Morten:

Q. Mr. Jacobs, has your company ever considered the question of whether or not they are willing to pay the complainant the sum of two thousand dollars which was paid off? 20

Mr. De Turck: Objected to on the ground it is not proper cross-examination; second, it is not evidential it doesn't relate to any of the issues of this cause.

A. How could he? We never knew anything about it.

Q. I mean, at any time since you learned that two thousand dollars has been paid off on the first mortgage, has your company ever considered the question of whether or not they were willing to pay to the complainant the amount which was paid? A. No, never. 30

Q. At the time when the property was searched, and I am talking now of the property owned by Glass and Heyman, you ascertained that there was a first mortgage of ten thousand dollars?

Mr. De Turck: Objected to as not proper cross-examination. 40

A. Yes.

Samuel Jacobs—Cross

Q. And you also ascertained there was a second mortgage for five thousand dollars? A. Yes.

Q. Do you know how much was due on that second mortgage when you took title? A. I don't remember exactly; the original was five thousand dollars.

10

Q. Did you make inquiry to ascertain what was due on it? A. Yes.

Q. You also made inquiry of the Fidelity Title and Mortgage Guaranty Company to ascertain the amount due on their mortgage? A. I did not; we bought it subject to a mortgage of ten thousand dollars.

Q. Did you make inquiry? A. All I know is we bought it subject to a mortgage of ten thousand dollars.

20

Q. You made inquiry as to the amount due on the second mortgage? A. Yes.

Q. And you found it was less than five thousand dollars? A. I think it was.

Q. Why didn't you make inquiry as to the amount due on the first mortgage? A. We bought it subject to a first mortgage of ten thousand dollars.

Q. And also subject to a five thousand second? A. There was something paid off on that; there was nothing paid off on the ten thousand dollars.

30

Q. How did you know that? A. I understood it was a standing mortgage of ten thousand dollars.

Q. You ascertained there was ten thousand dollars due on the first mortgage? A. Yes.

Q. You also knew that this ten thousand dollars covered this piece of property at Leonia, which included your property and other property

40

Samuel Jacobs—Cross

at that time? A. All I know, there was a ten thousand dollar mortgage; I didn't know anything about the details.

Q. You didn't have the title examined? A. Well, the lawyer took charge of that; all I was
10 interested in was that there was a ten thousand dollar mortgage there.

Q. Didn't the lawyer advise you that this ten thousand dollar mortgage covered your property and other property? A. I don't remember.

Q. You do know that the Fidelity Title and Mortgage Guaranty Company claims that the only amount due is eight thousand dollars? A. Yes, that is right.

20 Q. And you received that notice in a letter from the Fidelity Title and Mortgage Guaranty Company to you, dated April 22nd, 1926? A. That is right.

Q. And on April 20, 1926, you sent the Fidelity Title and Mortgage Guaranty Company a check for three hundred dollars representing six months interest on ten thousand dollars? A. Yes, that is right.

Q. And the Fidelity Title and Mortgage Guar-
30 anty Company returned to you thirty dollars of your three hundred dollars which you had paid to them, advising you that two thousand dollars had been paid off on this mortgage in January, 1926? A. That is right.

Q. What did you do to find out who paid off that two thousand dollars? A. I didn't do anything.

Q. When you learned that this two thousand
40 dollars was paid off in April, 1926, you did nothing whatever to ascertain to whom interest might be due on this two thousand dollars?

Samuel Jacobs—Cross

Mr. De Turck: Objected to on the ground that it is not proper cross-examination.

A. I don't remember what I did.

Q. The bill of complaint was filed in this cause about February, 1928, and at no time subsequent to January, 1925, did you pay or make any offer to pay any interest on the two thousand dollars paid off on this mortgage, did you? A. No. 10

Q. You understand I refer to your company?

A. Yes.

Q. When the bill of complaint was filed in this cause and you were served with process, did your company then consider whether or not they were willing to pay this two thousand dollars which had been paid off? 20

Mr. De Turck: Objected to as not evidence.

A. No.

Q. Did they ever have a meeting regarding this matter at all? A. No.

Q. Has this matter ever been discussed at any meeting of the Merit Realty and Investment Company? A. No. 30

Q. Did Mr. Barbash ever attend a meeting of your company? A. No.

Q. After the suit was started, did you and Mr. Charney have a conference with Mr. Barbash regarding this matter? A. Yes, I think we did.

Q. Who was your lawyer? A. Mr. Schulman.

Q. At that meeting did you or Mr. Charney agree to pay the complainant, or the representative of the complainant, the money paid off on the first mortgage? A. No. 40

Samuel Jacobs—Cross

Q. At this meeting with Mr. Barbash, you knew that he represented the complainant, and was insisting that your company should recompense the complainant for the amount that he had paid off on the first mortgage? A. Yes.

10 Q. And you and Mr. Charney refused to do it? A. Yes.

Q. And you never brought that matter to the attention of your company? A. No.

Q. Who composed your company? A. Mr. Charney, Mr. Fremark and myself.

Q. Do you hold stock equally or is there a division in the stock? A. Equally.

20 Q. Did you ever tell Mr. Fremark or other stockholders about this conference with Mr. Barbash? A. I don't know; it was just Mr. Charney and I.

Q. Did Mr. Fremark ever speak to you?

Mr. De Turck: Objected to on the ground it is not proper cross-examination.

A. (No answer.)

30 Mr. Doremus: I offer in evidence extract of the by-laws of the Fidelity Title and Mortgage Guaranty Company so far as they relate to the duties of the secretary.

(Marked Exhibit D-1.)

CERTIFICATE OF MASTER.

I, Douglas D. T. Story, one of the Masters in Chancery of New Jersey do hereby certify that the foregoing depositions were taken by me personally, stenographically; and I believe that the foregoing depositions accurately state the evidence given.

10

DOUGLAS D. T. STORY

EXHIBIT C-1.

17154

Seda Glass and
 Samuel Glass her husband
 Rose M. Hyman and
 Isaac Hyman her husband
 to
 Merit Realty and Investment Company, Inc.

Deed dated November 25, 1925

20

This deed made the twenty fifth day of November in the year one thousand nine hundred and twenty-five Between Seda Glass and Samuel Glass her husband and Rose Hyman and Isaac Hyman her husband all of the City of Englewood in the County of Bergen and State of New Jersey party of the first part And Merit Realty and Investment Company Inc a corporation of the State of New Jersey party of the second part Witnesseth that in consideration of the sum of one (\$1.00) dollar and other good and valuable considerations lawful money of the United States the said party of the first part with general war-

30

40

Exhibit C-1

ranty do grant bargain sell release and convey unto the said party of the second part its successors or assigns forever

10 All that certain lot tract or parcel of land and premises, hereinafter particularly described, situate in the Borough of Leonia, in the County of Bergen, and State of New Jersey. Beginning at the point of intersection of the southerly line of Central Avenue with the westerly line of Grand Avenue and running, thence (1) north fifty-three degrees fifty-eight minutes twenty seconds west (53 deg. 58' 20" W.) eighty (80) feet, along the above mentioned southerly line of Central Avenue, to a point; thence (2) south forty three degrees fifty-six minutes fifty-eight seconds west (S. 43 deg. 56' 58" W.) eighty-two and ninety-six one hundredths of a foot (82.96) ft. to a point; thence (3) south forty-seven degrees nine minutes thirteen seconds east (S. 47 deg. 09' 13" E) eighty (80) feet to the above mentioned westerly line of Grand Avenue; thence (4) north forty-three degrees twenty eight minutes forty seconds east (N. 43 deg. 28' 40" E.) ninety two feet and four tenths of a foot (92.4) ft. to the southerly line of Central Avenue, the point or place of beginning.

20

30

Subject to a mortgage for ten thousand (\$10,000) dollars held by the Fidelity Title & Mortgage Company of Ridgewood, N. J., which mortgage the parties of the second part hereby assume and agree to pay. Subject to a second mortgage in the sum of five thousand (\$5,000) dollars held by Nathan Welitoff and Beatrice Welitoff his wife,

40 which mortgage the parties of the second part

Exhibit C-1

hereby assume and agree to pay according to the terms thereof Subject to a third mortgage in the sum of twenty five hundred (\$2,500) dollars, given to the parties of the first part, which mortgage was given as part of the consideration in this deed mentioned, and is intended to be recorded simultaneously herewith 10

To have and to hold said premises with the appurtenances unto the party of the second part its successors or assigns forever The said Seda Glass and Rose.....Hyman covenant that they will warrant generally the property hereby conveyed that they are lawfully seized of the said land that they have the right to convey the said land to the grantee that the grantee shall have 20
quiet possession of the said land free of incumbrances And that they will execute such further assurances of the said lands as may be requisite

In witness whereof the said party of the first part have hereunto set their hands and seals the day and year first above written

SAMUEL GLASS	(L S)	
SEDA GLASS	(L S)	
ISAAC HYMAN	(L S)	30
ROSE M HYMAN	(L S)	

Signed sealed and delivered
in the presence of
Abram A Lebson

EXHIBIT C-2.

204354

	Seda Glass and	} Mortgage \$5000.00 Dated June 1st 1925
	Samuel Glass her husband	
	Rose Hyman and	
10	Isaac Hyman her husband	
	to	
	Nathan Welitoff	

This indenture made the first day of June in the year of our Lord one thousand nine hundred and twenty five Between Seda Glass and Samuel Glass her husband and Rose Hyman and Isaac

20 Hyman her husband of the City of New York in the County of New York and State of New York party of the first part And Nathan Welitoff of the City of Jersey City in the County of Hudson and State of New Jersey party of the second part Whereas the said party of the first part are justly indebted to the said party of the second part in the sum of five thousand (\$5,000) dollars lawful money of the United States of America secured to be paid by their certain bond

30 or obligation bearing even date with these presents in the penal sum of ten thousand (\$10,000) dollars lawful money as aforesaid conditioned for the payment of the said first mentioned sum of five thousand (\$5,000) dollars lawful money as aforesaid to the said party of the second part his heirs executors administrators or assigns on the first day of June which will be in the year one thousand nine hundred and thirty and interest

40 thereon to be computed from the date hereof at and after the rate of six (6%) per cent per an-

Exhibit C-2

num and to be paid semi-annually on the first days of December and June in each year. It is understood and agreed between the parties hereto that the party of the first part shall pay on account of the principal sum of said mortgage the sum of three hundred (\$300) dollars or any larger multiple thereof on each interest day until the expiration of this mortgage at which time the balance remaining due thereon shall be paid in full 10

And it is thereby expressly agreed that should any default be made in the payment of the said interest or of any part thereof on any day whereon the same is made payable as above expressed or should any tax assessment water rent or other municipal or governmental rate charge imposition or lien be hereafter imposed or acquired upon the premises described in this mortgage and become due and payable or should the said party of the first part their heirs executors administrators or successors in title to said premises fail to keep the building or buildings now or hereafter located thereon insured against loss or damage by fire and assign the policy or policies for such insurance to the said party of the second part his executors administrators or assigns and such insurance be effected and premium or premiums therefor paid by the said party of the second part his executors administrators or assigns pursuant to the agreement contained in this mortgage and should the said interest or any part thereof remain unpaid and in arrear for a period of thirty days or said tax assessment water rent or other municipal or governmental rate charge 20 30 40

Exhibit C-2

imposition or lien or any or either of them remain unpaid and in arrear for a period of sixty days or said insurance premium or premiums so paid by the said party of the second part his executors administrators or assigns remain
10 unpaid for a period of thirty days after demand therefor by the said party of the second part his executors administrators or assigns upon the said party of the first part theirs heirs executors administrators or successors in title then and from thenceforth that is to say after the lapse or expiration of either of the said periods as the case may be the aforesaid principal sum of five thousand (\$5,000) dollars or so much thereof as may
20 then remain unpaid with all arrearage of interest thereon shall at the option of the said party of the second part his executors administrators or assigns become and be due and payable immediately thereafter although the period above limited for the payment thereof may not then have expired anything thereinbefore contained to the contrary thereof in anywise notwithstanding as by the said bond or obligation and the condition thereof reference being thereunto had may
30 more fully appear Now this indenture witnesseth that the said party of the first part for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation with interest thereon according to the true intent and meaning thereof and also for and in consideration of the sum of one dollar to them in hand paid by the said party of the second part at or before the ensealing and delivery of these presents the receipt whereof is
40 hereby acknowledged have granted bargained

Exhibit C-2

sold aliened released conveyed and confirmed and by these presents do grant bargain sell alien release convey and confirm unto the said party of the second part and to his heirs and assigns forever

All that certain lot tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Borough of Leonia, in the County of Bergen and State of New Jersey. Beginning at the point of intersection of the southerly line of Central Avenue with the westerly line of Grand Avenue and running, thence (1) north fifty-three degrees fifty-eight minutes twenty seconds west (53 deg. 58' 20" W.) eighty (80) feet, along the above mentioned southerly line of Central Avenue, to a point; thence (2) south forty-three degrees fifty-six minutes fifty-eight seconds west (S. 43 deg. 56' 58" W.) eighty two and ninety six one hundredths of a foot (82.96) ft. to a point; thence (3) south forty seven degrees nine minutes thirteen seconds east (S. 47 deg.-09' 13" E.) eighty (80) feet to the above mentioned westerly line of Grand Avenue; thence (4) north forty three degrees twenty eight minutes forty seconds east (N. 43 deg.-28'-40" E.) ninety two feet and four tenths of a foot (92.4 ft.) to the southerly line of Central Avenue; the point or place of beginning. This mortgage is second or subordinate to one for ten thousand dollars, now held by the Fidelity Title & Mortgage Company of Ridgewood

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

Exhibit C-2

versions 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
10 part of in and to the same and every part and parcel thereof with the appurtenances To have and to hold the above granted and described premises with the appurtenances unto the said party of the second part his heirs and assigns to them and their own proper use benefit and behoof forever Provided always and these presents are upon this express condition that if the said party of the first part their heirs executors
20 or administrators shall well and truly pay unto the said party of the second part his executors administrators or assigns the said sum of money mentioned in the condition of said bond or obligation and the interest thereon at the time and times and in the manner mentioned in the said condition according to the true intent and meaning thereof that then these presents and the estate hereby granted shall cease determine and be void And the said party of the first part for themselves their heirs executors and administrators do
30 covenant and agree to pay unto the said party of the second part his heirs, executors administrators or assigns the said sum of money and interest as mentioned above and expressed in the conditions of the said bond

And it is agreed that neither the mortgagor nor the heirs executors administrators or successors in title of the mortgagor shall be entitled to
4 any credit on the interest payable on this mortgage for the taxes which may be levied on the

Exhibit C-2

mortgaged premises or for any part of such taxes
 And it is also agreed that the said party of the
 first part their heirs executors administrators or
 successors in title to said mortgaged premises
 shall and will keep the building or buildings now
 or hereafter located thereon insured against loss 10
 or damage by fire in some safe and responsible
 insurance company or companies for a sum not
 less than.....dollars and assign the policy or
 policies therefor to the said party of the second
 part his executors administrators or assigns as
 collateral security for the payment of the prin-
 cipal and interest aforesaid and in default there-
 of it shall be lawful for the said party of the
 second part his heirs executors administrators or 20
 assigns to effect such insurance and the premium
 or premiums paid for effecting the same shall be
 a lien on the said mortgaged premises added to
 the amount of the said bond or obligation and
 secured by these presents and payable by the said
 party of the first part their heirs executors ad-
 ministrators or successors in title on demand of
 the said party of the second part his executors
 administrators or assigns with legal interest

In witness whereof the said party of the first 30
 part have hereunto set their hands and seals the
 day and year first above written.

SEDA GLASS	(L S)
ROSE HYMAN	(L S)
ISAAC HYMAN	(L S)
SAMUEL GLASS	(L S)

Signed sealed and delivered
 in the presence of
 Abram A Lebson

40

EXHIBIT C-3.

(The following are copies of all correspondence included in Exhibit C-3:)

3678

October 28, 1925.

10 Mr. Charles Barbash
209 Washington Street
Jersey City, N. J.

Dear Mr. Barbash:

You called at this office yesterday and talked with Mr. Stevens in regard to obtaining release on the rear lot covered by our mortgage to Wel-

20 toff.

We would like to have you submit your proposition in writing and we will have our Executive Committee examine the property on next Monday and determine how much they will require to be taken up by your client buying Certificates to release this mortgage.

It will be necessary to pay an inspection fee of \$10 for this inspection and we would request

30 that you enclose your check with your letter so that it will have your immediate attention.

Very truly yours,

FIDELITY TITLE AND MORTGAGE
GUARANTY CO.

Asst. Sec.

HDC/WR

40

Exhibit C-2

CHARLES BARBASH

Real Estate

249 Washington Street

Jersey City, N. J.

Oct. 31st, 1925 10

Fidelity Title & Mortgage Co.

41 Main St.,

Ridgewood, N. J.

Attention Mr. H. C. Crane.

Dear Sir:

#3678

In accordance with your letter of Oct. 28th, I herewith enclose check in the amount of \$10.00 to cover inspection fee on mortgage loan. My proposition is as follows: 20

The enclosed map will show property corner Grand and Central Avenue Leonia. There is a building containing four stores and two apartments which was sold by us for \$20,000. I understand that the resale was made at a considerably higher price and inasmuch as your mortgage covers on the entire plot we would like to release the balance of the vacant plot as shown on map, for a consideration of the purchase of \$1000 of your 6% certificates and place the same in escrow with your company as security for the release for the term of your mortgage. 30

If your board of directors will decide that \$1000 is not sufficient I will abide by their decision but I feel that this will be satisfactory to you because the mortgage covers on only 40% of the value of the property.

Trusting I will hear favorably from you, I remain 40
main

Very truly yours,

CHAS. BARBASH.

Exhibit C-2

Ridgewood, N. J.
November 4th, 1925.

Mr. Charles Barbash,
249 Washington St.,
10 Jersey City, N. J.

Dear Mr. Barbash:

The Executive Committee have inspected the property formerly known as the Welitoff property on the corner of Grand and Central Avenues, Leonia, N. J.

After due consideration it was decided that
20 the method suggested by you would not give this Company the protection that was desired. It was therefore voted to allow the mortgage to remain as at present for the full amount of \$10,000. covering the full plot.

However, if you desire to pay off the full mortgage of \$10,000. and re-arrange your finances elsewhere, the Committee would not stand in your way. We would accept payment
30 of this loan and interest in the near future if you will request same in writing.

Very truly yours,

FIDELITY TITLE AND MORTGAGE
GUARANTY CO.

H. D. CRANE,
Ass't. Sec.

HDC/WR

Exhibit C-3

Nov. 6th, 1925.

Fidelity Title & Mortgage Guaranty Co.
21-23 Prospect St.,
Ridgewood, N. J.

10

Attention Mr. H. C. Crane, Asst. Sec.

Gentlemen:

Your letter of Nov. 4th received. I am sorry that my method in regard to the mortgage did not answer the purpose.

Now I desire to suggest another method, namely:- I will give you \$2000.00 in cash and will participate in the \$10,000 mortgage to the extent of \$2000 of which your \$8000 will be preferred to my \$2000, or, I will give you \$2000, reducing the mortgage to \$8000. 20

To be frank with you, if it is possible, I would prefer the first method as suggested.

I trust that either of these methods will be satisfactory because I have sold the vacant land and I cannot see any other way to give title, and I know your honorable board of directors are trying their best efforts to help me in this matter. 30

Very truly yours,

CHAS. BARBASH.

3678

40

Exhibit C-3

Ridgewood, N. J.
November 17, 1925.

Charles Barbash Esq.
249 Washington St.
Jersey City, N. J.

10

Dear Sir:

We beg to advise that the matter of the mortgage on the property of Welitoff at Bogota was again considered at our Executive Committee meeting today.

20 It was voted that this company will release the rear lot on the property provided you will pay \$2000 on account of the principal sum of the original mortgage, which will reduce the same to the sum of \$8000.

It will be necessary to have the property re-surveyed to show the lines between the part which is to be released and the old mortgage.

30 As soon as you have the new survey ready kindly notify us. The prior survey was made by Mr. R. Schweizer, C. E. Ridgefield Park, N. J. and we believe that he will re-survey same for you at a reduced rate.

Very truly yours,

FIDELITY TITLE AND MORTGAGE
GUARANTY CO.

Asst. Sec.

40 HDC/WR

Exhibit C-3

November 24th
1925

Fidelity Union & Guaranty Co.
21 Prospect St.
Ridgewood, N. J.

10

Attention Mr. Crane

Dear Sir:

In regard to conversation we had on Monday with regard to the first mortgage held by your company on property Grand & Central Ave., Le-
onia, I hereby send you through Mr. Winter a 20
description of the plot which we desire released.

Kindly draw up a release at my expense and I will immediately forward you check for the \$2000. I will also sign any other papers you think necessary in order that your company may collect the interest from the mortgagor on my \$2000. share in the mortgage.

Trusting this will be in accordance with our conversation and thanking you in advance, I re- 30
main

Very truly yours,

CHAS. BARBASH.

40

Exhibit C-3

Ridgewood, N. J.,
December 3rd, 1925

Charles Barbash Esq.
249 Washington St.,
Jersey City, N. J.

10

Dear Sir:

This will acknowledge receipt of yours of the 24th inst., and in reply thereto beg to state that we now have your Release ready for you. If you will call at this office with a check for \$2,000.00, we will deliver the same to you.

Our bill for services in the matter come to \$4.40.

20

Yours very truly,

FIDELITY TITLE AND MORTGAGE
GUARANTY CO.

Ass't. Secretary

HDC:DD

Dec. 7th, 1925

30 Fidelity Title Mortgage & Guaranty Co.
21 Prospect St.,
Ridgewood, N. J.

Attention Mr. Crane

Dear Sir:

40 Your letter received. I wish to thank you for your courtesy in this matter. The release for the mortgage on Grand & Central Ave. Leonia, will be ready within a few days, at which time I will telephone you for an appointment.

Very truly yours,

CHAS. BARBASH

Exhibit C-3

Jan. 5th 1926

Fidelity Title & Mortgage Guaranty Co.
 21-23 Prospect St.,
 Ridgewood, N. J.

10

Attention Mr. H. C. Crane

Gentlemen:

I hereby send you check for \$2000. through Mr. Winter for release of mortgage on Leonia property. Mr. Winter will also hand you a check for expenses on this transaction.

20

Very truly yours,

CHAS. BARBASH

P. S. I have placed in the hands of your Hackensack office two searches and it is absolutely necessary for me to have these completed by the 15th of this month. Kindly give this your attention.

30

C. BARBASH

Will you also return the \$3500.00 mortgage from Mr. Winter to Mr. Welitoff, to Winter.

40

Exhibit C-3

MERIT REALTY AND INVESTMENT CO.

191-197 Broadway

PATERSON, N. J.

10

April 20th, 1926

Fidelity Title and Mortgage Guaranty Co.
Ridgewood, N. J.

Gentlemen:

Enclosed please find our check for \$300.00 for
six (6) months interest on Mortgage which you
20 hold on property, corner Grand and Central Ave-
nue, Leonia, New Jersey.

Respectfully yours,

MERIT REALTY & INVESTMENT
COMPANY

Exhibit C-3

678/833

Ridgewood, N. J.
April 22, 1926

Merit Realty & Investment Co.
191-197 Broadway,
Paterson, N. J.

10

Gentlemen:

We have your check for \$300.00 for interest due on your mortgage on April 4th. We beg to advise you that there was \$2,000.00 paid off on this mortgage in January of this year, making the mortgage an \$8,000.00 mortgage at the present time. We mailed to you an interest notice stating the amount due, and we are enclosing herewith our check to your order in the sum of \$30.00 for the difference due you.

20

Yours very truly,

FIDELITY TITLE & MORTGAGE
GUARANTY CO.

Secretary

30

HDC:LED
Enc.

40

Exhibit C-3

Pencil Sketch
(Part of Exhibit 3)

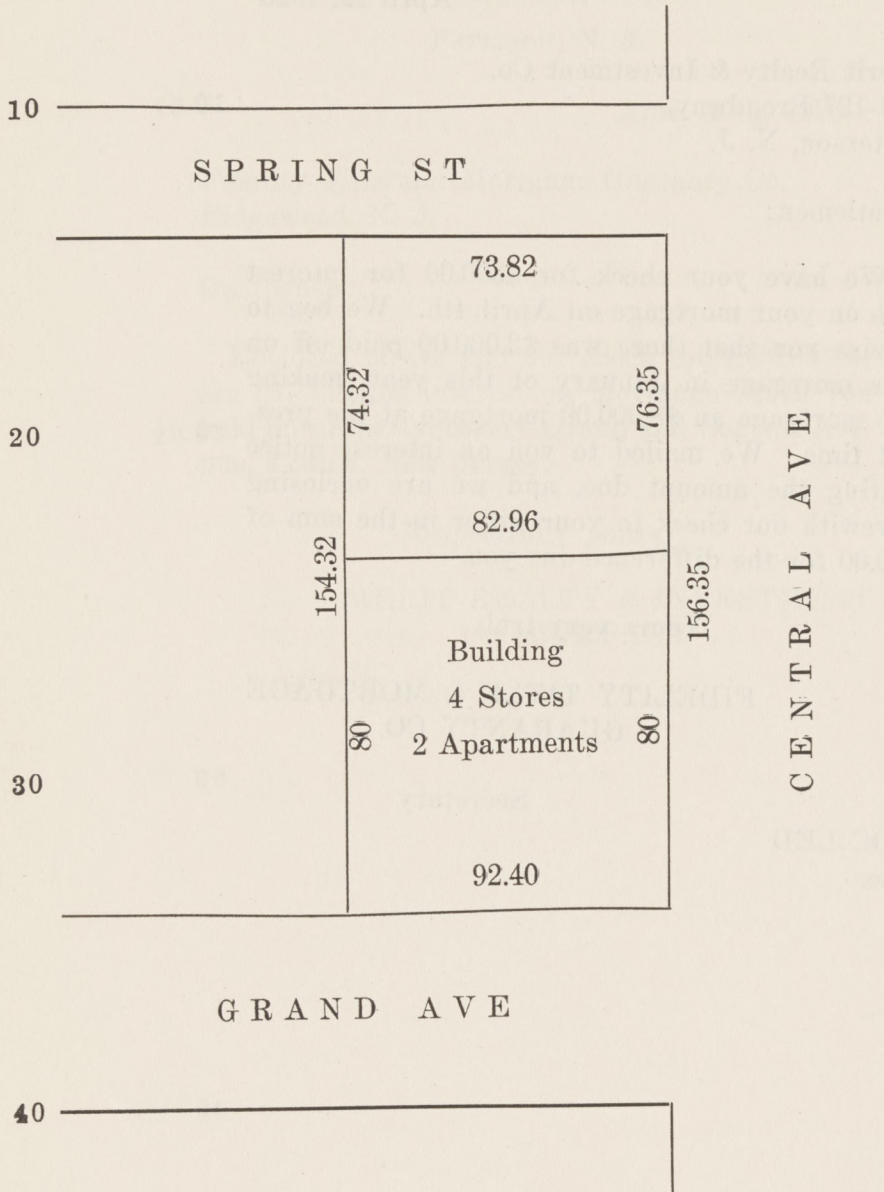


EXHIBIT D-1.

The secretary shall be ex officio clerk of the Board of Directors and of the standing committee; he shall attend all sessions of the Board and shall record all votes and the minutes of all proceedings in a book to be kept for that purpose.

He shall give notice of all calls for install-¹⁰ments to be paid by the stockholders and shall see that proper notice is given of all meetings of the stockholders and of the Board of Directors.

He shall be sworn to the faithful discharge of his duties and shall perform such duties as may be required by the Board of Directors or the President.

It is hereby certified that the above is a true ²⁰extract of the by-laws of the Fidelity Title and Mortgage Guaranty Co.

Signed

CORNELIUS DOREMUS
President

EXHIBIT D

The secretary shall be an officer of the Board of Directors and of the company, and shall attend all sessions of the Board and shall record all votes and the minutes of all proceedings in a book to be kept for that purpose.

10 He shall give notice of all calls for installments to be paid by the stockholders and shall see that proper notice is given of all meetings of the stockholders and of the Board of Directors.

He shall be sworn to the faithful discharge of his duties and shall perform and deliver as may be required by the Board of Directors or the President.

It is hereby certified that the above is a true and correct copy of the by laws of the Liberty Bell and Mortgage Company.

Signed

CONNELL'S DOCUMENTS
President

67 Service of the within
Brief (Three copies)
is hereby acknowledged the
day of
A. D. 19

Service of the within
Brief (Three Copies)
is hereby acknowledged the
Sixth day of May
A. D. 19 32

New Jersey Court of Errors and Appeals

67 MAY. T. 1932

Cornelius Doremus
Sols.

Between

NATHAN WELITOFF (Beatrice
Welitoff, Administratrix of
Nathan Welitoff, deceased),

Subst. Complt.-Appellant,

and

FIDELITY TITLE AND MORT-
GAGE GUARANTY COMPANY, *et*
als.,

Defts.-Appellees.

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

1. The bill of complaint in this case alleges in paragraph 1, that certain lands were conveyed to the complainant's intestate on March 1st, 1923, describing them (1), and this allegation is admitted by both defendants in their respective answers (7-8).

2. In paragraph 2, it is averred that he executed and delivered to the defendant Title Co. a bond and mortgage for \$10,000 covering the lands and premises described in paragraph 1 of the bill (2) and this allegation is admitted by both defendants in their respective answers (7-8).

3. In paragraph 3, it is alleged that he conveyed to Glass and Hyman a portion of the lands described in paragraph 1 (3).

The defendant Realty Co. admits in its answer, the allegations contained in paragraph 3 of the bill (7). The Title Co. avers in its answer that it has no knowledge but in admissions subsequently made, this company also admits the allegations made in paragraph 3 of the bill (14).

4. In paragraph 4, complainant's intestate alleged that his grantees executed a delivered bond and mortgage to him for \$5,000, setting out book and page of record, the mortgage covering the lands described in paragraph 3 of the bill (3).

Both defendants in their answers, aver no knowledge.

The defendant Title Co., however, has admitted the fact to be true in its admissions (14).

In the depositions taken before the Master, a certified copy of this mortgage was offered and received in evidence (48). Thus these allegations have been established.

5. In paragraph 5 of the bill, complainant's intestate alleged that his grantees, Glass and Hyman, conveyed the lands and premises described in paragraph 3 of the bill, to the defendant Realty Co. (3).

The Realty Co. in their answer admit this allegation (7).

The Title Co. avers no knowledge, but in its admissions it admits the allegation to be true, and the fact is further proved by the certified copy of deed offered in evidence (45).

6. In paragraph 6 of the bill of complaint, complainant's intestate set forth the circumstances surrounding the payment of \$2,000 to the defendant Title Co. on account of the said \$10,000 mortgage; he avers an understanding and belief on his part that the mortgage was to remain as security for the sum of \$10,000 principal money and interest, primarily to secure \$8,000 to the Title Co., secondarily, the sum of \$2,000 to complainant.

He further averred that his grantees assumed the payment of the \$10,000 mortgage in the deed which he made (4-5).

In their answer, the Title Co. do not deny any of the statements contained in paragraph 6, averring only that they have no knowledge regarding the transactions between the complainant's intestate and his grantees named in paragraph 3 of the bill (9).

The Realty Co. avers that it has no knowledge whatever as to the facts contained therein (7).

However, the admissions, Exhibit 3 (54), and the depositions taken, amply prove the facts alleged and as there is no denial of these facts, it must be assumed that they are true.

7. In paragraph 7, it is alleged that the Title Co. claims that it had no understanding with the complainant that the mortgage should remain as security for the \$2,000 paid by complainant's intestate on account of the mortgage and that the complainant's intestate is fearful that if the Realty Co. should pay off to the Title Co. the sum of \$8,000 and accrued interest, the mortgage might be receipted for cancellation and cancelled of record and the complainant's intestate there-

by deprived of his security for the payment of the \$2,000 which he paid off on account of the principal money originally due under the mortgage (5).

To these allegations, the Realty Co. makes no response whatever, therefore we presume that the allegations must be taken as true so far as the Realty Co. is concerned.

The Title Co. admits that it makes the claim alleged in paragraph 7 and avers no knowledge as to the remaining allegations. However, these allegations are amply proved by evidence (29).

8. In paragraph 8, complainant's intestate avers that he requested the Title Co. to hold the \$10,000 mortgage as security for the payment of the sum of \$2,000 which he had paid off on account and that the company had not agreed to do so (6). These facts are admitted by the Title Co. (9).

The Realty Co. avers that it has no knowledge as to these facts, but they are proved by the depositions (29). The following facts also appear from the proofs:

(1) The complainant's intestate was represented in all these matters by Charles Barbash, his father-in-law; the complainant's intestate having gone to Europe for his health, returning home and dying during the pendency of this suit (24 & 33).

(2) In 1925, Barbash requested the Title Co. to release a part of the lands covered by its \$10,000 mortgage from the lien of the mortgage (24). Previous to that time, complainant's intestate had conveyed a part of the lands covered by the Title

Company's mortgage to Seda Glass and Rose Hyman and in that conveyance, it was recited that the grantees assumed the payment of the entire amount of moneys due on the Title Company's mortgage (5). That Seda Glass and Rose Hyman had conveyed the premises to the defendant Realty Co. and they, in turn, by their deed likewise assumed the payment of the Title Company's mortgage as appears from Exhibit 1 (45).

However, when the complainant's intestate requested the Title Co. to release the remaining lands from its mortgage, and thus allow the mortgage to cover only the lands then owned by the defendant Realty Co., the Title Co. refused and insisted upon the payment of \$2,000 on account of its mortgage before it would release the lands owned by the complainant's intestate from its mortgage.

This is averred in the bill (4) and is fully set out in the correspondence, copies of which are annexed to the depositions (54).

In the letter of November 6th, 1925, complainant's intestate suggested that he would give the Title Co. \$2,000 in cash and participate in the \$10,000 mortgage *pro tanto*, or that he would give \$2,000 and reduce the mortgage to \$8,000, stating that he preferred the first method (57).

In their reply, the bank did not indicate that it would not be willing to have the complainant participate in the mortgage, other than to say that the mortgage would be reduced to \$8,000 by the payment of \$2,000 (58).

In the letter of November 24th, complainant distinctly said that he will forward the check for \$2,000 and that he would sign any other papers

necessary in order that the Title Co. might collect the interest from the mortgagor on complainant's \$2,000 share in the \$10,000 mortgage (59).

In its acknowledgment under date December 3rd, the Title Co. gave no intimation whatever that it was not satisfied with this arrangement (60).

DEFENSE OF MERIT REALTY CO.

The only defense interposed by the defendant Realty Co. is that the payment by Welitoff of \$2,000 on account of the mortgage made by him, payment of which had been assumed by the Realty Co., was a voluntary payment and therefore it seeks to take advantage thereof and avoid reimbursement to complainant (8).

DEFENSE OF TITLE COMPANY.

The defense interposed by the Title Co. is that it made no agreement, express or implied, with relation to the payment of the \$2,000 paid by complainant's intestate, except to receive the same and apply it on account of the principal of its \$10,000 mortgage which had been given by complainant's intestate to the Title Co. (9).

QUESTIONS INVOLVED.

1. Applying equitable principles to the facts appearing in this case, should equity decree such a payment to be a voluntary payment for which complainant is not entitled to reimbursement by the defendant Realty Co. or should it decree that when the complainant's intestate paid the \$2,000 on account of his \$10,000 bond and mortgage, he did so as a surety, paying a part of a debt which

had been assumed by the Realty Co. and for which, as between him and the Realty Co., the Realty Co. was the principal debtor and he was surety?

2. When complainant's intestate paid the \$2,000 to the Title Co. on its \$10,000 mortgage under the conditions appearing in this case, and defendant Title Co. accepted such payments, did he become entitled to an interest in said \$10,000 mortgage *pro tanto*?

3. Is the defendant Title Co. estopped from denying the right of complainant to an interest in its \$10,000 mortgage to the extent of the \$2,000 paid by complainant's intestate, in view of the circumstances surrounding the payment so made by complainant's intestate?

LAW.

I.

It must be conceded that in equity, the purchaser of lands, subject to a mortgage, who assumes and agrees to pay the mortgage debt, becomes, as between him and the vendor, the principal debtor, and the liability of the vendor, as between the parties, is that of surety.

Binns v. Baumgartner, 105 Eq. 58, 60.

If, by the terms of the purchase, the mortgage debt is by agreement taken as part of the consideration money, equity raises upon the conscience of the purchaser an obligation to indemnify the mortgagor against the mortgage debt.

Friedman v. Zickerman, *et al.*, 104 Eq. 322, 325.

Paragraph 3 of the bill alleges that complainant's intestate conveyed the lands involved to Seda Glass and Rose Hyman,

“and as part of the consideration for said conveyance, the said Seda Glass and Rose Hyman assumed the payment of the entire amount of moneys due on said mortgage * * * of \$10,000 as aforesaid” (3).

Defendant Realty Co. admits this allegation in its answer (7).

Defendant Title Co. admits this allegation in its admissions (14).

The conveyance from Glass and Hyman to defendant Realty Co. provided that such conveyance was

“Subject to a mortgage for ten thousand (\$10,000) dollars held by the Fidelity Title and Mortgage Company of Ridgewood, N. J., which mortgage the parties of the second part hereby assume and agree to pay” (46).

Complainant therefore contends that the conclusion is inevitable that on January 5, 1926, when complainant's intestate paid \$2,000 to defendant Title Co. on the \$10,000 mortgage given to it by him, under the circumstances appearing in this case, the liability as between the parties was as follows:

1. The defendant Title Co. could look to complainant's intestate for payment because he signed the bond and mortgage for \$10,000.

And it could look to Glass and Hyman and to defendant Realty Co. because they had assumed the payment thereof.

2. The relationship between complainant's intestate and the defendant Realty Co. was that of principal debtor on the part of the Realty Co. and of surety on the part of complainant's intestate.

II.

Defendant Realty Co. being, on January 5, 1926, the principal debtor and complainant's intestate being the surety, he, as surety, had the right, without the request of his principal, to pay the debt of his principal before its maturity, and after, but not before, maturity, may sue his principal for the money thus paid.

White v. Miller, 47 Ind. 432.

Ross v. Menefee, 125 Ind. 432; 25 N. E. 545.

The Vice Chancellor states in his opinion, that at the time of the payment of the \$2,000 paid the Title Co. on its mortgage,

“the mortgage was not due and there was no threat or danger of foreclosure.”

However, there is no evidence or proof in the case to substantiate this claim, but even if there were, it would constitute no defense.

If such payment had been made by complainant's intestate before the mortgage matured, the defendant Realty Co. could have interposed such defense to a demand for immediate payment, had such demand been made, but it could not defeat such payment *in toto*.

No such demand for immediate payment, however, has been made by the bill. All that is asked is that complainant be decreed to have an interest in the \$10,000 mortgage held by the Title Co. to the extent of the payment made, to wit, \$2,000.

III.

Inasmuch as complainant's intestate stood in the situation of a surety on January 5, 1926, when he paid the \$2,000 on the \$10,000 bond and mortgage held by defendant Title Co., he was entitled to be substituted in the place of the Title Co. *pro tanto*, as prayed for in the bill of complaint.

It may be conceded in this case that if complainant's intestate was a third person, a total stranger to the transactions mentioned in the bill of complaint, and was entitled to make terms for himself and demand any security he might require, that then he would not have been entitled to be protected by the equitable principle of subrogation.

But such is not the case here. First, he was liable to defendant Title Co. on his bond and mortgage which it held; and second, he was entitled to have the defendant Realty Co. indemnify him against any payment he might make thereon.

The case of *Shinn v. Budd*, 14 N. J. Eq. 234, deals with this question of subrogation, and the Chancellor, on pages 237-238, points out very clearly the rights of one who, being a surety, pays the debt of his principal, and the rights of a mere volunteer.

It is therefore submitted that for the reasons above presented, the complainant is entitled to a decree as prayed for in the bill of complaint.

AS TO DEFENSE OF DEFENDANT TITLE CO.

The only defense interposed by defendant Title Co. in its answer is that it did not agree to accept the payment of \$2,000 on account of its mortgage of \$10,000, and that the complainant's intestate should have an interest *pro tanto* in such \$10,000 mortgage (9).

It is contended that the correspondence (57-60) shows that such was the offer made by complainant's intestate, that it was never rejected by defendant Title Co., and that he was justified in assuming that he was acquiring an interest in such mortgage accordingly. (See also, complainant's testimony, page 27.)

But even if there was no such agreement, he was entitled to an interest in such mortgage and to have it kept on foot for his benefit.

"In cases where the person advancing the money to pay the debt of a third party stands in the situation of a surety * * * a court of equity substitutes him in the place of the creditor as a matter of course without any agreement to that effect."

Shinn v. Budd, 14 N. J. Eq. 234, 238.

The defendant Title Co. has not advanced any reason whatever to justify its position and therefore its defense should be overruled as unwarranted and inequitable.

AS TO DEFENSE OF DEFENDANT REALTY CO.

The only defense interposed by defendant Realty Co. is that complainant's intestate paid the sum of \$2,000 "voluntarily and without its knowledge, consent and approval."

State of New Jersey) ss.
County of Hudson)

HENRY JAY MELOSH, of full age, being duly sworn on his oath according to law,
says:

On May 6th, 1932, I served three copies of the within Brief of Appellant, on DeTurck & West, of counsel with defendant Merit Realty Co. by leaving three copies of the same with a clerk in charge of the office of the said DeTurck & West, at the same time informing her of the contents thereof.

Subscribed and sworn to before :
me this 6th day of May, 1932 : :

Ada DeTurck
Notary Public of
New Jersey

And it is now seeking to take an inequitable and unconscionable advantage because of such payment; a defense which equity should seek every possible means to defeat.

Conceding that the payment of the \$2,000 was made by complainant's intestate voluntarily, as that word is ordinarily understood (and we do not think the proofs justify any such finding) that does not make him a "volunteer," as defined by the cases.

As we have pointed out under Point I hereof, he was in the position of a surety on a debt due primarily from the defendant Realty Co. and therefore any payment he might make on account of such debt could not be considered in equity as a payment by a volunteer.

And, as we have pointed out under Point II hereof, he had the right to make such payment without any request from the defendant Realty Co. It was not necessary that such payment should have been made with its knowledge or its consent or its approval.

Therefore, this defense of the Realty Co. fails to constitute a sufficient answer to the bill of complaint, and it is insufficient to deny the relief prayed for.

We therefore respectfully submit that the decree of the Court of Chancery herein should be reversed with directions to enter a decree in favor of complainant for the relief sought.

Respectfully submitted,
MELOSH, MORTEN & MELOSH,
Of Counsel with Complainant.

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67 MAY.T.1932

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

New Jersey Court of Errors and Appeals

Between

NATHAN WELITOFF (Beatrice
Welitoff, Administratrix of
Nathan Welitoff, deceased),
Subst. Compl.-Appellant,

and

FIDELITY TITLE & MORTGAGE
COMPANY, *et als.*,
Defendants-Appellees.

(Italics Mine.)

**Brief for Fidelity Title & Mortgage Guaranty
Company, Appellee.**

Statement.

In view of the fact that the issue is purely factual, and the elementary rule that great weight is given on appeal to a finding upon questions of fact by the Chancellor, applies, this appellee rests strongly upon the decision of Vice-Chancellor Lewis, 108 N. J. Eq. 555 (State of Case, p. 14).

The dispute in the last analysis is between the complainant and the defendant Merit Construction Company. There appears to be no serious effort to hold the Fidelity Company in any way responsible for the present situation.

The issue is solely whether there was an express agreement on the part of the Fidelity Company that in consideration of the payment of two thousand dollars on a ten-thousand-dollar mortgage it held that it would collect interest

on the two thousand dollars, pay it to the complainant and hold the principal as security for the payment of the sum paid off. This defendant denied the existence of any such agreement.

ARGUMENT.

Point One.

The bill of complaint filed fails to make any direct charge or allegation that the Fidelity Company consented to act as trustee.

Note this language:

“* * * complainant *understanding and believing* at that time that the mortgage so given to said company—would still remain a lien upon the lands so conveyed.” (State of Case, p. 4, ll. 33 to 37.)

“The Fidelity Title and Mortgage Guaranty Company now claims that it had no understanding or agreement with complainant * * *.” (Par. 7 of bill, p. 5, l. 20.)

“Complainant has requested said company to hold said mortgage as security for the payment of said sum of \$2,000 * * * but said company has not signified its willingness so to do, and on the contrary claims that it holds said mortgage as security for the payment of only * * * \$8,000.” (Par. 8 of bill, p. 6, ll. 10 to 18.)

Not only doesn't complainant follow up this language by a direct charge but the bill on its face gives the very impression borne out by the testimony and the learned Vice-Chancellor's findings, e. g., the complainant *desired and wanted* such an agreement but this appellee refused to consent to it.

As remarked in the opening paragraph, this defendant is content to rely upon Vice-Chancellor Lewis' opinion but feels constrained to

file this answering brief because of changes in the last three months in the status of the Fidelity Company. Trustees have been appointed for it by the Court of Chancery; obviously it is no longer in a position where it can hold property as trustee for a third party.

Point Two.

Complainant did not sustain the burden of proof.

Complainant's testimony was furnished by Charles Barbash. He was in charge of all the negotiations in question (Complainant's brief, p. 4, next to last paragraph). On direct examination:

"I went to Mr. Crane of the Fidelity Title and Mortgage Guaranty Company and asked him why he didn't send me the interest for my two thousand dollars. *He said he never agreed.*" (p. 29, ll. 30 to 34.)

(The only statement in the entire record that even approached a direct charge of the existence of agreement had previously appeared when this same witness on direct quoted Mr. Crane as saying the agreement was "all right; *I think it is all right.*" p. 27, ll. 36 and 37. There was no charge that Mr. Crane had any authority to enter into such an agreement, or proof by way of inference. In fact, he had no such power. p. 35, l. 21.)

"Q Did Mr. Crane or Mr. Doremus signify or say they were willing to hold that ten thousand dollars as security for your two thousand dollars?

"A No." (p. 30, ll. 11 to 14.)

On cross examination:

"Q You say you asked Mr. Crane to collect the interest on two thousand dollars

which you paid for the release of the mortgage at the same time it was paid on the eight thousand dollars?

"A I did.

"Q Where was this conversation?

"A At Mr. Crane's office.

"Q Who was with you?

"A Mr. Casper.

"Q Mr. Crane said, 'I think it is all right'?

"A Yes.

"Q Is that all the conversation?

"A Yes.

"Q You said at another interview with Mr. Crane, you asked him then if he would send you interest on two thousand dollars?

"A I said I want my interest on my two thousand dollars.

"Q What did he say?

"A He said, 'I don't know anything about it.'

"Q What did you say?

"A I said I was surprised." [P. 31, ll. 14 to 33.)

"Q Now, did Mr. Crane at any time say to you anything about the two thousand dollars excepting that it was wanted by the executive committee on account of the mortgage?

"A He sent me a letter to that effect.

"Q There was no conversation about it?

"A Yes.

"Q *That comprises all the negotiations about the payment of the two thousand dollars and the release of the mortgage?*

"A Yes, up to the time I paid the two thousand dollars.

"Q Was there any other conversation about this two thousand dollars after the money had been paid you?

"A Nothing." (P. 32, ll. 12 to 26.)

"Q I suppose you know nothing about Mr. Crane's powers as secretary of the Fidelity Title & Mortgage Guaranty Company, do you?

"A No." (P. 32, ll. 36 to 40.)

Henry Casper, the witness referred to by Mr. Barbash, was called on behalf of complainant and testified,

"Q Did you accompany Mr. Barbash to the Fidelity Title & Mortgage Guaranty Company on the day this two thousand dollars was paid to the * * * company?"

"A I did.

"Q Did you hear the conversation that took place?"

"A I did.

* * * * *

"A Mr. Barbash asked Mr. Crane to collect the interest.

"Q Do you know the reply as to whether they would?"

"A The only thing I remember was he *would see what he could do about it.*"

This appellee has cited the testimony above because it conveys forcibly the weakness of the complainant's case. That testimony concluded complainant's proofs. That was all, in substance, that appeared before the court below. While the testimony is to be found in the state of case, of course, I have quoted fully from it because it is more effective argument, I believe, than a mere recital of contentions.

On behalf of the defendant Fidelity Company, Mr. Crane flatly denied any such agreement as intimated by the complainant and pointed to the correspondence as correctly setting forth all the transactions, incidents and agreements had between the company and Mr. Welitoff. (P. 35, l. 31.)

The correspondence in no way alters the situation. That the proposition was made is admitted, *as an alternative plan*. "I will give you \$2,000 in cash and will participate in the \$10,000 mortgage to the extent of \$2,000 of which

your \$8,000 will be preferred to my \$2,000, or, I will give you \$2,000, *reducing the mortgage to \$8,000,*" Mr. Barbash wrote on Nov. 6, 1925. (Exhibit C. 3, p. 57.)

In response, he received a letter from the company on November 18, 1925 (Exhibit C. 3, p. 58),

"It was voted that this company will release the rear lot on the property provided you will pay \$2,000 on account of the principal sum of the original mortgage, *which will reduce the same to the sum of \$8,000.*"

(Note the offer and acceptance in almost identical language.)

Was there any other observation open to the court below, after this correspondence, than,

"Complainant in effect asks the court to make and enforce the alternative agreement proposed to the Fidelity Company and which the Fidelity Company rejected, insisting on a simple payment on account of the principal of the mortgage and a simple release of part of the premises." (P. 17, ll. 30 to 38.)

Yet the appellant cites the correspondence as showing that the offer made by complainant's intestate was never rejected. (Brief, p. 11, second paragraph.)

Even if Mr. Crane, officer of the company, had been shown to have assented to the complainant's proposal, his agreement would not have bound the company under its by-laws. (Exhibit D. 1, p. 65.) More important, of course, is that by the officer's conduct and actions in this transaction, the company was not bound; moreover, it definitely put itself on record by the correspondence as in favor of and accepting the alternative proposal.

Inasmuch as the agreement concerned real estate, it had to be in writing to be effective. In-

asmuch as it was in writing, the slight attempt made by oral conversation to vary and alter it was in contravention of the *Naumberg v. Young*, 44 N. J. L. 331, rule.

Conclusion.

It is difficult to perceive under what theory this appellee can be made a trustee in the light of its not being shown to have consented to the arrangement.

As to the *Shinn v. Budd* case (14 Eq. 234) cited by appellant, it is manifestly irrelevant. The \$2,000 was paid by complainant on account of the bond and mortgage with the company. (Par. two of the bill.) Any reduction would naturally inure to the complainant's advantage. The cited case discusses subrogation and the rights of a third party.

If the contract was improvident, as the learned Vice-Chancellor pointed out (p. 17, l. 2) in not bringing in the Merit Company, the complainant cannot force the Fidelity Company to give any further consideration for the payment of \$2,000 than the reduction of the mortgage. If a wind-fall has resulted to our co-defendant, the Merit Company, complainant must seek its redress, if any, against that company directly.

It will be noted here that the second prayer of the bill asks for a lien primarily upon the lands and premises to the extent of whatever amount may be due to the Fidelity Company for principal and interest and *secondarily* as a lien for \$2,000 in favor of complainant. The third prayer asks that this defendant may be decreed to hold its mortgage in trust for the complainant for the payment of the money due complainant

from the Merit Realty & Investment Company. If the relief actually sought is a lien on the land owned by our co-defendant, *subject to Fidelity's \$8,000 mortgage*, the situation is even more obvious as to why the decree below must be affirmed as to this defendant.

Without acceptance by the alleged trustee of its trust and in the absence of any relationship giving rise to the arrangement, the indirect charge of the existence of a trust must fail.

It is respectfully submitted the decree of the Court below should be affirmed.

WILLIAM HARRIS,
Of Counsel with Defendant Fidelity
Title & Mortgage Guaranty Company.

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67 MAY. 1. 1932

New Jersey Court of Errors and Appeals

Between

NATHAN WELITOFF (Beatrice
Welitoff, Administratrix of
Nathan Welitoff, deceased),
Subst. Compl.-Appellant,

and

FIDELITY TITLE AND MORTGAGE
GUARANTY COMPANY, *et als.*,
Defts.-Appellees.

On Complain-
ant's Appeal
from
Chancery.

BRIEF OF MERIT REALTY AND INVEST- MENT CO.

The Facts.

The complainant, in her brief, has gone to great lengths in her statement of the facts of the case. We believe that we can, in a few sentences, explain the matters in controversy and point out the single issue insofar as the Merit Realty and Investment Company is concerned, as follows:

On October 4th, 1924, Nathan Welitoff owned the lands described in paragraph 1, of the bill of complaint and executed and delivered to the defendant, Fidelity Title and Mortgage Guaranty Company, a \$10,000.00 mortgage to secure a loan of that amount. (Case, p. 2, lines 14 to 23).

On June 1st, 1925, Nathan Welitoff conveyed one

half of the property in question to Seda Glass and Rose Hymen and as part of the consideration for said conveyance Seda Glass and Rose Hymen assumed the payment of the entire mortgage above mentioned. (Case, pp. 2 and 3).

On November 25, 1925 Seda Glass and Rose Hymen conveyed the lands they had purchased on June 1, 1925, to the defendant, Merit Realty and Investment Company. (Case, p. 3).

In December, 1925, Nathan Welitoff desired to release from the effect of the \$10,000.00 mortgage that portion of the lands described in paragraph 1 of the bill of complaint which he still owned and without notifying the defendant, Merit Realty and Investment Company, paid \$2,000.00 to the Fidelity Title and Mortgage Guaranty Company on account of its mortgage and obtained a release of mortgage.

After the payment of said \$2,000.00 by Nathan Welitoff to the defendant, Fidelity Title and Mortgage Guaranty Company, Nathan Welitoff filed his bill making the Fidelity Title & Mortgage Guaranty Company and the Merit Realty and Investment Company defendants and asked that a decree be entered adjudging that the Fidelity Title & Mortgage Guaranty Company holds its \$10,000.00 mortgage in trust for Nathan Welitoff to extent of \$2,000.00. In other words Nathan Welitoff asked that he be subrogated to the original right of the Fidelity Title and Mortgage Guaranty Company to the extent of \$2,000.00.

POINT I.

The Complainant is not entitled to the relief prayed for because the payment made by Nathan Welitoff was a voluntary payment and therefore not recoverable either at law or in equity.

Depositions were taken in this matter on February 5, 1929, before Douglas D. T. Story, a Master in Chancery. They show that Charles Barbash, Nathan Welitoff's father-in-law, entered into negotiations with the Fidelity Title and Mortgage Guaranty Company in November, 1925, for the purpose of securing a release discharging that portion of the property in question still owned by Nathan Welitoff from the lien of the \$10,000.00 mortgage above mentioned.

Barbash testified quite at length as to conversations he had with various officers of the Fidelity Company; letters from said company to Barbash and letters from Barbash to the Fidelity Company were offered in evidence over the objection of the defendant, Merit Realty and Investment Company. (Case, p. 25).

All the transactions and letters by and between Barbash, as a representative of Nathan Welitoff, and the Fidelity Title and Mortgage Guaranty Company were clearly *res inter alios acta* and therefore were not admissible as against the Merit Realty and Investment Company.

We cannot conceive of any possible theory upon which the letters offered in evidence as Exhibits for the complainant could possibly bind our client as Mr. Barbash testified (page 30 of State of Case) that he had not notified the Merit Realty and In-

vestment Company that he intended to make a payment on account of the \$10,000.00 mortgage; that he did not seek the consent of our client, neither was he compelled to make the payments.

Furthermore, the letters and testimony fail to show the alleged agreement on the part of the Fidelity Title and Mortgage Guaranty Company to collect the \$2,000.00 and interest thereon from the Merit Realty and Investment Company.

The evidence shows that suit was started without prior notice to our client and without even giving our client an opportunity to make some reasonable adjustment and thus avoid court costs and fees of counsel for defending this suit.

We specially pleaded that the \$2,000.00 payment by the complainant was voluntary and we contend that it comes within the rule laid down in the following cases:

"In such a transaction there is nothing to take the case out of the general principle, that where a party, without mistake of fact, or fraud, duress or extortion, voluntarily pays money on a demand which is not enforceable against him, he cannot recover it back."

Camden v. Green, 54 N. J. L. 591.

"Is Hildreth entitled to right of subrogation? It is entirely settled that one who volunteers to pay another's debt has no claim to subrogation, but if he has an interest which is menaced by the existence of the debt, he is relieved of the character of a volunteer." *Suydam v. Voorhees*, 58 N. J. Eq. 157. "The complainant is therefore not entitled to be subrogated, and receive from either of the defendants, the amount the deceased or his

executors have paid for taxes and other municipal liens prior to the tax certificate."

Hildreth v. Vineland Trust Co., Vol. 7 N. J. Adv. Rep. p. 570 at p. 573, 104 Eq. 317.

Bellisfield v. Holcombe, 6 N. J. Adv. Rep. page 1 at p. 12, 102 Eq. p. 20.

"We are of the opinion that the verdict for defendant was rightly directed, but find it unnecessary to examine into the question of the meaning of the covenant, because we are clear that the payment was a voluntary one. The appellant was confronted with the alternative of paying or standing a suit for dispossession. To avoid that suit and its possible result appellant exercised the option of paying. Such a case we think indistinguishable in principle from *Sooy ads. State*, 38 N. J. L. 324, in which *Sooy* voluntarily gave a bond as a state official, which the court held not required by law; *Camden v. Green*, 54 Id. 591, where a license fee in excess of the legal fee was paid without mistake of fact, fraud, duress or coercion; *Turner v. Barber*, 66 Id. 596, where plaintiff paid illegal wharfage to release his vessel from a libel in admiralty; *Koewing v. West Orange*, 89 Id. 539, where plaintiff paid excessive taxes under threat of a tax sale claimed to be illegal; or *Byron v. Byron, Hefferman & Co.*, 98 N. J. L. 127, where a receivership was threatened."

McCrary Stores v. Braunstein, 99 N. J. L. 166 at p. 168.

"A person who, without mistake of fact, voluntarily pays money on a demand which is not enforceable against him, cannot afterward recall such payment. * * * There is nothing in the proofs submitted which even suggests that these payments were made by

the plaintiff under a mistake of fact or as a result of fraud, duress or extortion practiced upon it by the borough. On the contrary, it is quite clear that they were voluntarily made, and it is entirely settled in this state that money paid under such circumstances, although in excess of the amount legally due, cannot be recalled. *Camden v. Green*, 54 N. J. L. 591; *Koewing v. West Orange*, 89 Id. 539; *McCrory Stores Corp. v. Braunstein*, 99 Id. 166; *Schaedel v. Liberty Trust Co.*, Id. 380."

Whitall-Tatum Co. v. Vineland, 102 N. J. L. 28.

"The counterclaim amounting to over \$3,000 depended for legal recognition upon proof of an alleged agreement between the parties. Conceding the existence of the agreement, of which there was no proof, and as a result of a breach of which no damages appear to have been proved, it must suffice to say that it is manifest from the record that the amount involved in the counterclaim had been paid by the defendant to the plaintiff upon the settlement of a prior account by the giving of six promissory notes, each of which was paid by defendant at maturity. No consideration seems to exist as a basis for the alleged agreement, nor was such an agreement proved. In any event the payment by the defendant was voluntary in character, and involved a settlement of those items, and as such under the well-settled rule it cannot be made the basis for a counterclaim, or for an original cause of action. *Koewing v. West Orange*, 89 N. J. L. 539."

Loesser Manufacturing Co. v. Schmid. 100 N. J. L., p. 123.

There is no evidence in this case showing that

the \$2,000.00 payment on account of the \$10,000.00 mortgage was made as a result of a mistake of fact or fraud or duress or extortion or compulsion and it comes squarely within the rule above stated. As a matter of fact there was nothing due on the \$10,000.00 mortgage at the time the \$2,000.00 payment was made.

We therefore contend that the decree appealed from should be affirmed for the reasons stated in the opinion of Vice-Chancellor Lewis.

Respectfully submitted,

DE TURCK & WEST,
Solicitors for and of Counsel with
Merit Realty and Investment Co.

The first of these is the fact that the
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