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New Jersey Court of Errors and Appeals

SAVERIO RIZZOLO, trading under the name and style of RIZZOLO CONSTRUCTION COMPANY, *Appellant,*	*Action at Law.*
vs.	*On Mechanic's Lien.*
CHARLES W. POYSHER, BUILDER, and ALFRED STAHL, Owner, *Respondents.*	*Appeal from Supreme Court.*

Appellant's Brief.

Statement of Case.

This is a Mechanic's Lien suit instituted in the Essex County Circuit Court. The case was tried before the Honorable Frederic Adams, Circuit Court Judge, and a jury and resulted in a verdict in favor of the plaintiff against Charles W. Poysher generally for the sum of two thousand, ninety-three dollars and forty-three cents damages, to be made specially of the lands of the defendant Alfred Stahl, described by metes and bounds in the lien claim herein filed.

The following is a brief statement of the facts adduced by the plaintiff and found to be so by the jury, as is evidenced by their verdict.

On October 29th, 1912, the plaintiff entered into a written contract with the defendant Charles W. Poysher, who was then the owner of the lands and premises described in the lien claim, whereby the former, in consideration of the sum of forty-six hundred dollars agreed to erect and construct a building, to be used as a moving picture theatre,

at 653 Bergen street, in the City of Newark, agreeably to the plans and specifications prepared by, and under the supervision of, Hyman Rosensohn, an architect. By the terms of this agreement the defendant Poysher bound himself to pay Rizzolo the above stated consideration in four instalments. The last of these instalments amounting to fifteen hundred dollars was to be paid within three days after the completion and acceptance of the work. The contract provided that *"All payments shall be made upon written certificates of the architect to the effect that such payments have become due."* The contract further provided that the owner would cause no delay in the construction of said building and would do everything necessary to enable the contractor to go ahead as speedily as possible.

The contract further provided that *"No extra work shall be done without a written order from the owner approved by the architect and an express agreement in writing as to the cost, and it shall then form part of this contract."*

It was further agreed upon that the work should be completed on or before the 20th of December, 1912. See Exhibit P. 1, Case p. 250, etc.

(Note: Other parts of the contract not deemed necessary for consideration of this appeal are not herein recited).

WHAT HAPPENED AFTER THE CONTRACT WAS SIGNED?

The plaintiff was ready to proceed with his work, but was instructed by the owner not to go ahead until notified by him so to do. This was not given until the latter part of November, 1912. (See Case, p. 35, fols. 37-40; p. 36, fols. 1-20). Thus a month was lost,—and when he was told to proceed, the plaintiff did so. In the month of February the theatre was nearly completed, so that on Washing-

ton's Birthday the owner took possession. The rest of the work was completed by April 26th, 1913. While the work was proceeding, payments that were earned were irregularly made. (Case, p. 38, fols. 20-30). During the course of the work the defendant Poysher requested the plaintiff to do certain extra work and agreed to pay certain prices for it, but no written order was given therefor. (See Case, p. 50, fol. 30, to p. 52 incl.; p. 55 to p. 57 incl.; p. 58, fol. 20 to p. 62; p. 63, fols. 20-30; p. 115, fol., 20 to p. 120 incl.). Certain changes were made in the plans and specifications by verbal agreement between the plaintiff, the architect, Poysher and Stahl, which changes were necessary because of the nature of the building or requirements of the building code that had been overlooked in the first place, but no charge was made for such alterations.

Upon the completion of the building, the plaintiff demanded of the architect his certificate, to enable him to receive payment for the last instalment then due and for the extra work which had been done. The architect suggested a meeting between the parties, the result of which was, that the defendants wanted the architect to procure an allowance of five hundred dollars on the amount due. This is what took place according to the architect (see Case, p. 131):

> Q Now as to the final certificate. What is the real reason that you did not issue that certificate? A That was the real reason. Mr. Poysher came to my office first and asked me to issue the final certificate to Rizzolo. At that time I asked him if he had the money. He said he was going to get it from Dr. Stahl, who happened to be up in the mountains. I said, "When will you get the money?" "In a couple of days," he said. I said, "All right, when you get the money come down to

the office, and I will settle up your claims." *The reason for my not issuing the certificate at that time was, first, that he did not have the money, and second, there were these sub-contractors on the job.* * * * I met them (meaning Stahl and Poysher) at the building, and after that meeting at the building they came to my office, and that was the time I told them that I could possibly get them one hundred and twenty-five dollars to one hundred and fifty as the loss, and that would be by the sub-contractors, and he thought at that time he wanted five hundred dollars or so, and I wouldn't stand for anything of that kind. That is all.

Q But the final result was— A That he went out of my office absolutely—I won't say what I said to him one way or the other, but it was very unpleasant; I said, "I won't stand for any work of that kind at all. Now, you can get out and do what you please. * * * Then I said to Rizzolo after that. * * * You get after them and get your money. *I hadn't heard from him then until the day before or the day after he started suit; then he came after his certificate, and I said I wouldn't give it to him then.*"

And on page 112 and page 114 of the case, the architect testified that although Rizzolo was entitled to the certificate and demanded it, he failed and later refused to issue it.

THE EXTRA WORK.

As to the extra work, Rizzolo is supported by the architect, and not contradicted by the defendants.

STAHL'S INTEREST IN THE CASE.

Stahl was made a defendant because at the time of the filing of the lien he was the owner.

It is of great importance to note at this point, that Stahl and Poysher are brothers-in-law; that on the date of the contract, Poysher was the sole owner of the property but on the 21st day of November, 1912, before the work was commenced, he took title to one moiety of the realty, and on April 25th, 1913, he became the sole owner.

See complaint and answer.

The contract was filed in the clerk's office of Essex County on November 22nd, 1912. Stahl furnished part of the money with which the building cost was defrayed.

See Stahl's admission. Case, page 225.

Stahl also took an active interest in directing the building operations.

See Case 228.

The importance of noting the above facts, will become apparent in dealing with this appeal.

THE FILING OF LIEN AND COMMENCEMENT OF THE ACTION.

On the 23d of June, 1913, the lien claim was filed.

Attached to the lien claim was the following bill of particulars:

Final payment under contract dated October 29, 1912	$1,500.00
Extra work performed and materials furnished at the request of the owner and architect as follows:	
Change from wood beams to reinforced concrete ceiling	80.00
Concrete between beams and booth floor in place of wood	50.00

One extra door covered with metal in booth completed	15.00
One double iron trap door above iron ladder	8.00
Six brass shore electric chandelier sets	72.00
One ½ shell with brass frame chandeliers	10.00
Extra work cellar drain from rear yard to cellar	68.00
To lower the two rear exists excavating, retaining wall as per submitted estimate	253.00
Total amount claimed	$2,056.00

On the 1st day of July, 1913, summons was issued and was served with the complaint thereto attached on the same date.

The complaint alleged general performance of the contract.

The answer, filed on July 21st, 1913, admitted some of the allegations in the complaint contained, and as to others, general and specific denials were entered.

Notice was given that on the 20th of September, 1913, a motion would be made for judgment of non-suit in the action because no reply had been filed by the plaintiff to the answer of the defendants. After argument the motion was denied. (See Case, pp. 14-15).

THE TRIAL.

The case came to trial on the 4th of January, 1915. Before the jury was impanelled the plaintiff's counsel moved that the plaintiff be permitted to file his reply alleging fraud on the part of the architect in withholding his certificate and waiver as to written orders to do the extra work on the part of the owner.

This motion was opposed not on the ground of lack of notice but *laches.*

See Case, p. 31.

The court granted the motion. Through inadvertence the reply, although a copy was then and there handed to the defendants, was not filed, but was ordered filed *nunc pro tunc* by the Supreme Court.

See Case, p. 17.

The plaintiff proved his case both as to the general contract work and the extra work.

At the close of the plaintiff's case a motion was made to non-suit the action. One of the grounds stated, (and we are now more concerned with this than any of the others) was that the bill of particulars did not specify or enumerate the kind or amount of labor performed or materials furnished and the prices at which and times when same were furnished. The motion was denied and amendments allowed.

See Case, p. 140-145.

The defense was built up largely of technical objections to the lien claim; the failure to produce the architect's certificate for payment; the failure to have an agreement in writing for the extra work; and failure to install the heating system according to the plans and specifications. Other objections to the quality of the work and to the plaintiff's right to charge for certain extra items, were also made.

During the trial certain rulings on the admissibility of evidence, as well as the order by the court permitting amendments and the refusal to nonsuit, were excepted to by the defendants, and these matters formed 46 grounds of appeal, taken by them to the Supreme Court.

THE SUPREME COURT'S JUDGMENT.

The Supreme Court held that as to Poysher it found no error to reverse the judgment, but as to Stahl the owner, the non-suit should have been allowed on the ground that the bill of particulars attached to the Lien Claim, did not meet the requirements of the Mechanic's Lien Law.

THE APPEAL.

For convenience sake, we have divided this brief into two parts, the first dealing with the judgment of the Supreme Court relating to the bill of particulars, and the second with the points raised originally at the trial and which formed the basis of appeal by the respondents to that tribunal.

POINTS RELIED UPON BY APPELLANT.

These are the contentions relied upon by the appellant as grounds for reversal of the judgment of the Supreme Court:

First: The bill of particulars is divisible as to its items and is not an inseparable mass. If one item is properly stated, in satisfaction of statutory requirement, the lien is good as to that item and a motion to non-suit is improperly made. The proper motion is to strike out the items improperly stated or to direct the jury to disregard them. The Supreme Court erred in holding *"That the bill of particulars is a single bill and if it fails to comply with the statute, it cannot support a lien as to a portion only."*

Second: As the lien claim stood before amendment at trial, the bill of particulars was divided into two parts, the first part embraced one item, to wit: "Final payment under contract dated October 29, 1912, $1,500.00." *As to this item the bill satisfied the statutory requirement.* The sec-

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Second: As the lien claim stood before amendment at trial, the bill of particulars was divided into two parts, the first part embraced one item, to wit: "Final payment under contract dated October 29, 1912, $1,500.00." *As to this item the bill satisfied the statutory requirement.* The sec-

ond part contained eight items or extra work, the first seven before amendment, apparently did not comply with the statute, the eighth "To lower the two rear exists, excavating, retaining wall as per submitted estimate, $253," was sufficient.

After amendment the entire bill was sufficient.

Third: The fourth division of section 16 of the mechanic's lien law, must be divided into two parts; one deals with the bill of particulars required when work is done or materials furnished *not under contract,* the other deals with work done or materials furnished *under contract. When a case falls within the former category, the statute requires great particularity.* The reason for this is plain. *But when a case falls under the latter division, the statute establishes a different standard, and by its own terms permits great liberality and generality.* And the reason for this is equally apparent. The Supreme Court, with all due respect to it, confused the two divisions and weighed the lien claim in the case at bar, by the standard of the first division.

Fourth: The Supreme Court failed to square the bill of particulars by the proof in the case. We refer to the facts:

a—That the contract was a matter of record,

b—That Stahl became the owner of one moiety after the contract was made by Poysher and filed with the county clerk, and the other moiety about the time when the work was about to be completed,

c—Stahl furnished part of the money for the erection of the building, in this manner, he deposited the money and in fact the $1,500 for the last payment—to Poysher's credit—the latter to pay Rizzolo,

d—Stahl directed the work, and was perfectly familiar with the claim of the plaintiff,

e—Stahl was not an innocent third party.

Fifth: The Supreme Court held that the bill of particulars was sufficient as to Poysher, but insufficient as to Stahl. This is illogical. If the bill was sufficient against Poysher who at the inception of the contract was builder and owner, it was sufficient as to Stahl, who in process of work became owner, and was not an innocent party but on the contrary had full notice of everything. We cannot distinguish between the two persons.

Sixth: If all our contentions regarding the sufficiency of the bill were founded in error, yet the entire case shows such particular merit in the plaintiff's claim, that the Supreme Court should have held the objections to be too technical to permit the plaintiff's defeat, and should have under the provisions and policy of the new practice act permitted proper amendments.

Seventh: On all the points raised by the respondent's appeal to the Supreme Court, there was no error to warrant reversal. With this view the Supreme Court concurred, excepting as regards the bill of particulars.

POINTS.

I.

The bill of particulars is divisible as to its items and is not an inseparable mass. If one item is properly stated, in satisfaction of statutory requirement, the lien is good as to that item and a motion to non-suit is improperly made. The proper motion is to strike out the items improperly stated or to direct the jury to disregard them. The Supreme Court erred in holding "That the bill of par-

ticulars is a single bill and if it fails to comply with the statute, it cannot support a lien as to a portion only.''

Now the Supreme Court said: ''The plaintiff does not defend this method of setting forth the particulars, but argues that the question was not properly raised by motion to nonsuit, since the lien might be good as to the other items as to which amendments were allowed. The difficulty with this argument is that the bill of particulars is a single bill and if it fails to comply with the statute, it cannot support a lien as to a portion only.'' See Case, p. 279. Earlier in the opinion the Court says: ''At the close of the plaintiff's case, a motion was made to non-suit as against the owner because of the insufficiency of the bill of particulars. Thereupon on application of the plaintiff the Circuit Court Judge allowed amendments specifying the items of $80, $50, $15, $8, $68 and $253 were furnished by agreement in the months of February or March, 1913. No amendment was made as to the items of $1,500, $72 or $10. Clearly the item of $1,500 is not set forth as the statute requires,'' etc.

Let us analyze the opinion of the Supreme Court. Clearly we must gather that the items as to which amendments were allowed complied with the statute, otherwise it would not have been necessary for the court to hold, that a ''bill of particulars is a single bill.'' If then we are right in contending that the court below was in error in holding that a bill of particulars is a single bill, then it follows that we are also right that a motion to non-suit was not proper.

The Supreme Court erred in holding that "the bill of particulars is a single bill, and if it fails to comply with the statute, it cannot support a lien as to a portion only," for the following reasons:

a—There is no statutory warrant for this declaration of law, and there is no precedent. On the contrary the 4th paragraph of section 16 of the Mechanics Lien Law speaks of itemizing the account and provides that if the bill contains any wilful or fraudulent mis-statement of the matters above directed to be inserted therein, the buildings or lands shall be free from all lien, etc., and the matters referred to include the items of account. The 22d section of the same act, provides for an apportionment of items amongst several buildings erected under one contract. Might not one apportionment be good and another bad? Yet the lien as to the good part would be valid.

Culber v. *Lieberman,* (E. & A., 1903), 40 Vroom, 341.

b—There is no legal warrant for holding that a bill of particulars is a single bill. It is not necessary to cite authorities, that in an ordinary action at law, a bill of particulars may be good as to some and bad as to others of its items.

c—The first paragraph of section 16 of the lien law provides that the lien claim contain an accurate description of the curtilage upon which the lien is claimed—suppose, then, more land is described than is proper, is the lien void? The case of *Edwards* v. *Derrickson,* 4 Dutcher 39, on p. 44, held to the contrary. This case was affirmed by this court in 5 Dutcher, 468.

The bill of particulars is less important than the description of the curtilage, and if one mis-state-

ment or improper item in the former invalidates a lien, so should it in the latter case.

In the case of *Edwards* v. *Derrickson, supra,* an objection was made to the lien because the bill of particulars contained an improper charge for building a flume. It was contended that this improper item invalidated the lien, but the Supreme Court, 4 Dutcher, on page 42, says:

> "But the claim was also objected to because it contained a claim for work and materals furnished for a flume. *If the charge for the flume were in the claim wrongly, it would not impair it as a legal evidence to prove the other matters contained in it, and it was therefore properly received.*"

Judge Vredenburgh, who also read an opinion in the same case, says on page 56:

> "It was objected, in the second place, to the lien being read in evidence that it contained a claim for the work and materials for a flume, the law giving no lien therefor. *Even if no lien could be sustained for a flume, yet it was no reason for excluding the whole lien. The court could only have overruled so much of the lien as referred to the flume.*"

The Court of Errors and Appeals affirmed this decision in 5 Dutcher, 468—see pages 473-474.

It has therefore been the adjudicated law of this State that one improper statement of claim in a bill of particulars does not invalidate the lien claim. the judgment of the Supreme Court on this point was in contravention of the law of this State and therefore erroneous. For this reason alone the judgment of the Supreme Court should be reversed. To hold, that because an item in a bill is not so worded as to comply with the directions of the statute, therefore, the entire lien as to the rest of

properly stated items, is void, establishes an unjust and dangerous rule of law.

The amended items of the lien claim, conform with the statute and the decisions.

See order permitting amendments: (Case, p. 16).

Edwards v. *Derrickson,* 4 Dutcher, 39; *affirmed,* 5 Dutcher, 468.

Williamson v. *Railway Co.,* 28 N. J. E., 277; *affirmed on this point,* 29 N. J. E., 311 on page 315.

II.

We now come to an examintion of the lien claim and the bill of particulars; the latter is divisible into two parts. The first item deals with the sum of $1,500 being the last payment under the contract of October 29, 1912, and the remaining eight items deal with extra work performed.

Before amendment was allowed, we admit that it is questionable whether the eight items of extra work, forming the second part, complied with the statute, *but we contend that the first item of $1,500 was sufficiently stated to satisfy the statute, and after amendment the items amended also satisfied the law.*

The fourth paragraph of section 16 of the Mechanics Lien Law, Compiled Statutes Vol. 3, page 3304, reads as follows:

> "A bill of particulars exhibiting the amount and kind of labor performed and of materials furnished and the price at which and times when the same was performed and furnished and giving credits for all the payments made thereupon, and deductions that ought to be made therefrom, and exhibiting the balance justly due to such claimant, which statement when the work or materials or both are furnished by contract, need not state the particu-

lars of such labor or materials further than by stating, generally that certain work therein stated was done by contract at a price mentioned; etc."

Now this paragraph was first enacted in the earliest general mechanics lien law and has been preserved in every subsequent revision.

See Introductory Chapter to Luce's Mechanic's Lien.

We construe the foregoing provision in the following manner:

When a lien is claimed for work done or materials furnished not by contract, then the bill of particulars must with great particularity set forth the following:

1st—Amount and kind of labor.
2d—Amount and kind of materials.
3d—The price for the labor.
4th—The price for the materials.
5th—The time when the labor was performed.
6th—The time when the materials were furnished.
7th—All credits for all payments.
8th—All deductions for all allowances.
9th—Net balance claimed.

But when the work is done by contract, the legislature says, "You need not state the particulars." What particulars? Why, the particulars,—that is the particulars above enumerated. The legislature says, "All you need to do is to attach a statement showing in a general way that certain work therein stated was done by contract at a price mentioned."

Associates v. *Davison,* 29 N. J. L., 415.

Edwards v. *Derrickson,* 4 Dutch, 39; 5 Dutch, 468.

Williamson v. *N. J. R. R. Co.,* 1 Stewart, 296.

"Expressio unius exclusio alterius."

When the legislature provided that it was only necessary to state in a *general* way that certain work in the lien stated was done by contract at a price mentioned, it excluded every other particular contained in the previous portion of the same paragraph.

Now to turn to the case at bar. The bill contains this item:

> "Final payment under contract dated October 29, 1912.....$1,500."

The Supreme Court in its opinion says:

> "The present bill of particulars does not set forth the amount and kind of labor performed and materials furnished, it does not state prices and times, as to the $1,500, even after amendment; it does not give credit for all payments made, and if it can be held to state that the work was done by contract, it does not mention the price."

Clearly, the Supreme Court, with all due respect to it, fell into grave error.

The statute does not require that when work is done or materials furnished under a contract, the bill of particulars should state, "the amount and kind of labor performed and materials furnished, nor the prices and times," neither is it necessary "to give credit."

The Supreme Court says "and if it can be held to state that the work was done by contract," can there be any question about it? Does not the first item refer to the contract? Do not all the other items after amendment state that they were done by agreement? Does not the evidence in the case show these things conclusively?

The defendants, although called as witnesses, failed to deny that the extra work was ordered and done; they failed to deny that the prices were

agreed upon. Stahl was absolutely silent and Poysher testified as follows: See case, p. 233.

> Q Now as to the items which Mr. Rizzolo claimed as extra work. Did he see you every time he did these different items?
>
> A Practically after he had started in onto them, sometimes he talked to me onto it different times.
>
> Q Did you make an agreement for each particular item?
>
> A No not for all, not a written agreement.
>
> Q What? A No written agreement.
>
> Q Did you make any verbal contract? A Not for all; some.

Here he stopped. Has not the extra work been admitted?

Did not the jury so find? The criticism that the price of the contract does not appear is correct as to the first item, but incorrect as to all the rest.

See Order of Amendment.

We then come to consider the question as to whether, with regard to the $1,500 item, the failure to state the amount of the contract invalidates it. We contend that it does not, upon the ground that all that is required is a substantial compliance with the act, and this was performed.

What purpose had the legislature in mind when it provided that the lien claim shall particularize the items upon which it is founded?

> "The doing of work or furnishing of materials gives merely an inchoate lien or the right to acquire a lien and the statutes prescribe the steps to be taken to perfect the lien. A compliance with the statutory requirements is necessary in order to acquire a valid and enforceable lien, but the same rule which makes this essential renders it unnecessary to take any other steps than is thus required. Some

> cases have laid down the rule that the statute must be strictly complied with, but the better opinion seems to be that as such requirements relate to the remedy rather than to the right, *a substantial compliance with the statute is sufficient.*" 227 Cyc., pp. 110-11, and the cases cited.

The case of *American Car and Foundry Co.* v. *Alexandria Water Co., et al.,* 64 Atl. Rep., 683, is a mechanics lien case decided by the Supreme Court of Pennsylvania. The Mechanics Lien Law of Pennsylvania requires that any sub-contractor intending to file a claim must give to the owner written notice to that effect, together with a sworn statement setting forth the contract under which he claims, the kind of labor or materials furnished and the date when the last work was done or materials furnished. The question before the court in this case was whether the lien claim filed therein was defective on the ground that the bill of particulars did not set forth the kind of materials furnished, wherefrom the claim, the bill of particulars and the notice filed, the kind of material furnished could not be misunderstood. The court held that the claim was valid and on this point it said, "it is difficult to say how a notice more strictly complying with the act could be drawn, although substantial compliance is all that is necessary. The object of the notice, it is said in *Thirsk* v. *Evans,* 211 Pa., 239, 60 Atl., 726, 'is to inform the owner of the demand and the act thereof,' in order that he may protect himself in the manner provided in the act. The notice given was amply sufficient for that purpose."

An examination of this Pennsylvania case will show how nearly alike to the case at bar it is.

In our own State, we have the Mechanics Lien case of *Williamson* v. *N. J. Southern Railway*

Co., 28 N. J. E., 277. Chancellor Runyon wrote the opinion. One of the questions raised in the case was that the bill of particulars attached to the lien claim did not comply with the statutory requirements. On this point, the Chancellor says:

> "The question of the validity of the lien claim is therefore to be adjudicated upon here. Various grounds of objection to the claim are urged. It is insisted that it is invalid because the bill of particulars does not state the time when the work was done or the materials provided. The amount demanded by the lien claim is $59,696.76, besides interest. Of this amount all but $395.53 is for work done and materials provided under the contract. The items of the claim are $396.53 are given with all the particulars required by the stature. As to the contract work and materials the claim states that they were done and furnished by contract (within a year last past), and the bill of particulars sufficiently particularizes the amount and kind of labor performed and materials furnished (stating the price) and declares that they were done and provided up to the 21st day of November, 1873, and in that connection states that the work was done and the materials furnished by contract at the prices mentioned in the bill of particulars. The statement thus made is a compliance with the requirements of the mechanics lien law, in a case where a lien is claimed for work done and materials furnished by contract. The act provides that in such case 'the bill of particulars need not state the particulars of the labor or materials, further than by stating generally

that certain work therein stated was done by contract at a price mentioned." In *Associates of the Jersey Company* v. *Davison,* 5 Dutch., 415, 421, the court recognizes the wide distinction in the respect under consideration between the requisites of a bill of particulars where the work was done or materials provided by contract, and its requisites in a case where there was no contract. Under the mechanics lien law of Pennsylvania (Act of June 16, 1836, p. 12), which required that one who filed a lien claim for materials or work should set forth in it the time of delivering the materials or doing the work, it was held that where the work was done or the materials furnished under an entire contract, the different times when the work was performed or the materials delivered need not be stated, but that one date was sufficient, and the claim would be good if the evidence proved that the completion of the contract was within six months from the time when the claim was filed. Fourth Baptist Church *v.* Trout, 28 Pa. St., 153. Certainty to a common intent is all that is required in such case. Besides, in this case, if more particularity were required, an amendment of the lien claim would be permitted, under the provisions of the fourteenth section of the act. Rev., p. 671. The complainant has had full knowledge, from the testimony in the cause, of the particulars of the claim, as fully as they can be furnished."

This part of the Chancellor's conclusions was particularly affirmed by the Court of Errors and Appeals in an opinion written by Judge Depue reported in 29 N. J. E., on page 315.

In the case of *Edwards* v. *Derrickson,* 4 Dutcher 40, this Court said:

> "The act under which these proceedings occur, as well as those of a similar kind which precede it, seem to have been favorites of the legislature, as is manifest from the repeated efforts made by them through supplements as well as new acts to obtain one that was perfect and available; and as it intends to make provision to aid a large class of industries and laborious claimants in the collection of their claims for most meritorious services and outlays, we are bound, I think, to give it a liberal construction, so as to enable it, as far as possible to carry out and accomplish the great object which the legislature had in view, and not to permit mere technical and unsubstantial objections or errors to annul the law and defeat that object."

The policy of the law has been of late years, to hold a party to *substantial* performance of the requirements of a statute. This is evidenced by the decision of this court in the case of *American Soda Fountain Company* v. *Stolzenbach,* 75 N. J. L., 721. In this case, one of the questions was whether the affidavit to a chattel mortgage stated the consideration. This court said on page 723, "In the absence of fraud, instruments so common in the course of commercial transactions by the laity should be sustained *whenever there is an honest and substantial compliance with the statute.*"

From the foregoing cases and argument we deduce the contention that the bill of particulars as amended substantially complies with the statute.

As Chancellor Runyon said in the Williamson case, *supra,*

> "Certainty to a common intent is all that is required in such case. * * * The complainant (the owner) has had full knowledge, from the testimony in the cause, of the particulars of the claim, as fully as they can be furnished."

From the testimony in the case at bar it appears, the defendant Stahl has had full notice of the claim and its items. The first charge is for $1,500, the final payment under the contract dated October 29, 1912, and earlier in the lien claim he and Poysher are charged with having contracted with the plaintiff. Does it make any material difference that the item does not refer to the amount of the contract? Does it not follow that if the final payment is claimed, the other payments are excluded? Is any further account necessary? When Stahl read the lien claim did he not know fully and particularly what it was all about? We submit, therefore, that the bill of particulars served the purpose required by the law, *especially under the circumstances of this case.* These circumstances are as follows:

a—That the contract was a matter of record.

b—That Stahl became the owner of one moiety after the contract was made by Poysher and filed with the County Clerk, and the other moiety about the time when the work was about to be completed.

c—Stahl furnished part of the money for the erection of the building, in this manner—he deposited the money and in fact the $1,500 for the last payment—to Poysher's credit—the latter to pay Rizzolo.

d—Stahl directed the work, and was perfectly familiar with the claim of the plaintiff.

e—Stahl was not an innocent third party.

III.

Next we contend that the decision of the Supreme Court in affirming the judgment against Poysher should have led to an affirmance of the judgment against Stahl. If the bill of particulars was sufficient in one case, it was sufficient in the other.

IV.

The Respondents made two other objections to the lien claim, to-wit:

1—It names Poysher and Stahl as builders.

2—It names Poysher and Stahl as owners.

The facts were as follows:

When the contract was made, Poysher was owner and builder; when the work was commenced Poysher and Stahl were owners and Stahl directed the work and paid for it. Under this confusion there seemed to be some justification in the designation of the parties as made. But when the evidence was in and Stahl was not connected with the contract, and the Court's attention to the erroneous designations was called, leave was asked and granted to amend. See Order to Amend Case, pp. 15-16. After amendment, the lien claim complied with the law declared in the following cases:

Edwards v. *Derrickson, supra.*
Robbins v. *Bunn,* 5 Vroom, 322.
Erdman v. *Moore,* 29 Vroom, 445.
Bates Co. v. *Trenton Co.,* 41 Vroom, 684.

Objection was made to permitting the amendments, and we will discuss the propriety and power of the court to allow these amendments.

The effect of the amendment under discussion was, that the name of Poysher was stricken out of the second paragraph, and the name of Stahl was stricken out of the third paragraph of the lien claim.

Surely, neither of the persons were harmed in the slightest degree by this process.

In the case of *Washburn* v. *Burns,* 5 Vroom, 18 (1869), an amendment to the pleadings in a lien claim suit wherein husband and wife were designated as owners, by striking out the name of the wife erroneously joined, was allowed. Chief Justice Beasley said on page 21:

> "The only question, therefore, is whether, by force of the act authorizing amendments of the pleadings, her name can be struck from the record. Upon reflection, I can perceive no objection to this. Such a course cannot injuriously affect the husband, who will thus be left the sole defendant." On page 22 the Chief Justice says: "But as a matter of correct practice, it seems to me that all questions as to title are to be excluded from these trials taking place under the directions of the lien law. The pleadings do not properly raise any such issue. A defendant who appears in the character of owner cannot set up that he has not such an interest in the land as is amenable to the lien. * * * So far as the owner is concerned the proceeding is *in rem,* and the issue as to his title must be immaterial, for, if he has none, the judgment against the property cannot affect any of his rights."

The lien claim in the Washburn suit was left unamended, because the lien law then in force gave to the courts no power of amendment.

The first power to amend lien claims was conferred upon a Justice of the Supreme Court by the Revision of 1874.

The last word on this subject in this State is the opinion of Mr. Justice Pitney speaking for the Court of Errors and Appeals in Vreeland Building Co. v. *Knickerbocker Sugar Co.,* 46 Vroom (1907) 551. In this case a history of the right to amend and the prior cases on the subject are shortly but effectively reviewed, and we contend that the law therein stated justifies the act of the court below in permitting the amendments to be made.

See also the following cases:

American Brick Co. v. *Drinkhouse,* 30 Vroom, 462 (E. & A.)

Doty v. *Auditorium Pier Co.,* 56 Atl. Rep. (N. J. Chan.) 720.

The case of *Bartley* v. *Smith,* 14 Vroom, 321, relied on by the respondents has no applicability to the case at bar.

Prior to the Revision of 1874 no court had power to amend the lien claim.

Then to eliminate this defect in the law, justices of the Supreme Court were empowered to order amendments. This continued to 1911, when by Chapter 30 of the laws of that year the legislature gave the same power to Circuit Court judges. The legislature had an object in doing this, and it is well illustrated by the case at bar. The object was to facilitate trials under the Mechanic's Lien Law, so that if it were necessary to amend the lien claim during trial, the Circuit Court judge presiding could hear and determine

the application. Otherwise, the trial would stop, go over, and in the interim application would have to be made before a Justice of the Supreme Court.

The respondents made the point that no notice of application to amend was given to Denburg. It will be remembered that Denburg purchased the property after the commencement of the suit. He was not interested at the time of the filing of the lien, and was therefore not entitled to notice. A lien suit, so far as the owner is concerned, is similar to a foreclosure suit. Would it be necessary to give notice of an application to amend the bill, to one who purchased the property after it had been filed? We think not.

Edwards v. *Derrickson,* 4 Dutcher, 39, on p. 61.

None of the amendments allowed, prejudiced the respondents, or altered the issue, or enlarged the claims, or harmed them in the slightest degree. To hold that the amendments could not have been made, would in effect mean, that the plaintiff would lose all his money.

V.

This Court has power to amend the matters under discussion on appeal.

See section 27 Practice Act, 1912.

VI.

One of the points made by the respondents in the motion for non-suit, was the failure to produce the architect's certificate.

The evidence in this case conclusively shows that the architect withheld the certificate without the slightest semblance of legal justification therefor.

He admitted this in court.

See Case, pp. 44, 45, 46, 49, 50, 52, 109, 110, 111, 112.

On page 112 the architect was asked:

Q Was he entitled to his final certificate?

A From all appearances with the owners, yes, sir.

See further, Case, pp. 113, 114, 127, 132, 133 and 134.

Now the law in this State is well settled, that after the architect withholds the issuance of his certificate without just cause, such withholding is fraudulent.

Byrne v. *Sisters of St. Elizabeth,* 16 Vroom 213.

Chisim v. *Schipper,* 22 Vroom, 1.

Bradner v. *Roffsel,* 28 Vroom, 412.

Landstra v. *Bunn,* 81 N. J. L., 680, on page 683.

The respondents contended below that it was necessary for the plaintiff to prove collusion between themselves and the architect. But this has been expressly held not to be the law in this State, in the case of *Chisim* v. *Schipper, supra,* which was approved by this court in *Landstra* v. *Bunn, supra.*

In the case of *Steelman* v. *Ludy,* 77 N. J. L., 446, it was held, that it was for the jury to determine whether the production of the certificate was not waived by the owner in view of the fact that the building was finished and occupied by the owner for a month, then a bill was presented and payment promised.

VII.

Another ground taken by the defendants in their motion for a non-suit was that the plaintiff had failed to produce a written order for the extra work in compliance with the contract.

The testimony relating to the extra work is to be found in the case on pp. 50 to 63 and 115 to 122.

We contend that this portion of the case is governed by the decision of the Court of Errors and Appeals in Headley v. *Cavilleer,* 82 N. J. L., 635.

And again the point raised by the defendants was not proper subject matter for a non-suit, but rather for a motion to strike out or a special request to charge.

VIII.

We now come to consider the question raised by the motion for a non-suit made on the pleadings, which was denied by the Circuit Court. The order appearing in the case on pages 14 and 15. The argument was advanced by the defendants that the non-suit ought to go, because no reply had been filed to the answer. We contend that the court's ruling was correct, because:

As the pleadings stood at the time of the motion, no reply was necessary, for the answer of the defendants simply took issue with the plaintiff's allegations. In effect the plaintiff said, "I entered into a written contract with the defendant, P, and I have performed every requirement demanded of me, and there is therefore due me the sum of so many dollars."

The plaintiff pleaded, as he had a right to, under section 118 of the Practice Act, Rev. 1903, Compiled Statutes, Vol. 3, p. 4089.

Such method of pleading throws upon the defendant the burden of specifying item by item the particulars, in which the plaintiff had failed to perform the contract. A mere general denial will not suffice.

Ottawa Tribe No. 15, etc., v. *Munter,* 31 Vroom (E. & A., 1897) 459.

Vail v. *Penn Fire Ins. Co.*, 38 Vroom (Supreme Court, 1902) 422.

McGlade v. *Home Ins. Co.*, 42 Vroom (Supreme Court, 1904) 40.

Stewart Contracting Co. v. *Trenton, etc., R. R. Co.*, 42 Vroom (E. & A., 1904), 568.

The defendants in the case at bar, complied with the foregoing rules of law and did nothing more than specify the points on which they would rely showing that the plaintiff failed to perform the conditions precedent to entitle him to maintain his suit. In effect the defendants said to the plaintiff: "You have complained that you have performed everything required of you by the contract, but this we deny; in the following particulars, to-wit: You have not procured the architect's certificate; again, you have not an order in writing, etc., regarding the claim you make for extra work, etc."

Under the cases above cited, this special defense simply raised an issue of fact, and no reply was necessary. The plaintiff said, "I have procured the certificate, and I have a written agreement for extra work," and the defendants said, "No, you have not." This was the view taken by the learned judge at Circuit.

The mistake that the defendants made, is that they believed that these two defenses are affirmative and contain new matter. But it is easily seen that this is not so.

Again. As the case stood, at the time of the motion, *it nowhere appeared either from the complaint or from the answer, that the plaintiff was required to obtain the architect's certificate before he could commence an action or that he was required to have a written memorandum for extra work.*

IX.

Another objection made by the defendants and which was made the subject of appeal to the Supreme Court, was the fact that the trial court permitted the filing of a reply to the answer at the commencement of the trial.

This question is properly divided into two parts, but before proceeding with argument on them, let us shortly review the facts that led to the request to file a reply. In the point immediately preceding this, we dealt with the pleadings as they stood when the motion to non-suit was made in December, 1914. At the trial, counsel for the plaintiff discovered that his pleadings were not in proper shape to conform with the evidence he was about to produce. He found that the plaintiff had not procured the architect's certificate, because there was a fraudulent withholding of it. He found further that the plaintiff had not obtained written orders for the extra work as required by the contract, because these requirements were waived by the parties to it. So he resorted to what counsel frequently find themselves called upon to do, to-wit: asked leave to amend the pleadings to fit the case. In the case at bar this amendment could be effected in two ways, that is, either amend the complaint or file a reply to the answer. To do the latter was the simpler and he asked leave of the court to that effect before a jury was called.

No objection was made to the filing of the reply on the ground that the defendants were surprised, but the point was made that the plaintiff was in *laches*. See case, p. 31.

In examining page 31 of the printed case we find that the stenographic report reads as follows:

> "Plaintiff's counsel moves that plaintiff be allowed to add to his reply allegations of fraud, etc.;" and the defendants in their grounds for

appeal to the Supreme Court made the specious point that "no reply was filed, so there was none to amend." It is self-evident that the stenographer made a slight mistake; instead of writing that plaintiff be allowed to add to his reply he should have written "that plaintiff be allowed to file his reply, etc."

We now come to consider the second part of this point. The respondents claimed that the court below ought not to have permitted the filing of the reply because we were in *laches*. This contention is fully answered by the following laws:

Section 126 of the Practice Act of 1903.

Sections 23 and 27 of the Practice Act of 1912.

And because this is a mechanics lien action, it does not follow that there ought to be any different rule to do justice.

We submit that the contention of the respondents that because of *laches*, the court was in error in permitting the filing of the reply, is without force.

We conceive that most of the amendments made to pleadings are necessitated by someone's neglect or mistake.

The definition of *laches* is negligence or omission to assert a right. The rule of *laches* is never enforced in questions of amending pleadings, because if it were, then the express statutory injunction and the strong tendency of the courts, to disregard form and promote and facilitate the meeting out of justice would be defeated.

X.

The respondents in their appeal to the Supreme Court contended that the $80 and $50 items mentioned in the lien claim were required by law and therefore could not be recovered by the plaintiff.

Our answer to this contention is that all the questions of fact in the case were fairly submitted by the court to the jury and that the respondents never proved what the building ordinances of the City of Newark demanded relating to the building in question. Therefore, how could the trial court decide as a matter of law whether or not the items charged were required to be performed by the plaintiff under that provision of the contract whereby he agreed to do all things required by law.

XI.

The defendants contended at the trial and also argued in their appeal to the Supreme Court that there was no evidence or at least not sufficient evidence to show the dates when the work was finished and counsel for the defendants argued from this point that, therefore, the lien claim was not filed within four months after the last work was done. The complete answer to this contention is found in the plaintiff's testimony that he finished the work on April 26, 1913. See case, pp. 37 and 38. This was not denied by the defendants.

XII.

One of the grounds of appeal by the respondents to the Supreme Court was that the lien claim was void because of wilful and fraudulent mis-statements. This claim is unfounded, in fact, and was properly rejected by the trial court.

Williamson v. *N. J. Southern Railway Co.*,
1 Stewart, p. 277.

XIII.

The contention of the defendants that the lien claim was discharged by failure to issue summons in the suit within four months from the date of the

last work done or materials furnished is not borne out by the testimony as pointed out above.

XIV.

A large number of objections were made to the rulings by the trial court on questions of admissibility of evidence and these are embraced in the respondents' grounds of appeal to the Supreme Court numbered 18 to 39 inclusive, but these objections are easily solved by the applicability of the elementary rules of evidence. We contend that the trial court committed no errors in any of the aforesaid rulings.

XV.

The respondents also contend in their appeal to the Supreme Court that the verdict of the jury was excessive. Even if this were so, it would not be the proper subject matter of an appeal. The right course to pursue is a rule to reduce the verdict, but an examination of all the facts is a complete answer to this contention. The verdict of the jury was not excessive.

XVI.

Another point contended for by the respondents in their appeal to the Supreme Court was that time was of the essence of the contract, and it provided that the work should be finished on the 30th day of December, 1912. It will be remembered, however, that the testimony shows that about a month elapsed before the work was started and the reason for this delay is testified to by the plaintiff, and not explicitly denied by the defendants. The plaintiff says that he was told by Poysher not to start work until the end of November. He lost the full month of November. It was properly left to the jury to say whether this delay was chargeable

to the plaintiff or not. No damages were claimed by the defendants. They accepted the work when it was finished.

XVII.

Defendants further excepted to the order of the court amending the judgment record dated and filed January 9th, 1915. See case, p. 19. The judgment entered by the clerk on the 6th day of January, 1915, was substantially in conformity with the statute, but in order to follow the language of the statute explicitly, the plaintiff called the court's attention to the judgment roll and an order was made amending the record. No notice was required for this. The court has control over its judgments and we fail to see what error the trial court committed in amending its record.

Conclusion.

A good part of this brief has been devoted to the construction of matters raised by the respondents in their appeal to the Supreme Court, all of which matters, no doubt, had been considered by the Supreme Court and in its judgment it found no error in the entire cause excepting with regard to the sufficiency of the bill of particulars, and as to this so far as it affected Stahl. We were of opinion that this court has before it the entire cause and so we advance the same argument as to these matters that were placed before the Supreme Court. On the whole case we submit that the judgment of the Supreme Court so far as it directed a non-suit to be entered as against Stahl is erroneous, and should be reversed. We respectfully submit that the defendant Stahl had a fair trial and that the bill of particulars as amended was a substantial compliance with the statutory requirement and served the purpose and reason of the law. There

can be no doubt but what Stahl had all notice of the particulars of the demand.

It is therefore respectfully submitted that the judgment of the Supreme Court be reversed and the judgment entered in the Circuit Court as against Stahl be affirmed.

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New Jersey Court of Errors and Appeals

SAVERIO RIZZOLO, trading under the name and style of Rizzolo Construction Company, *Appellant,*	*Action at Law On Mechanic's Lien.*
vs.	
CHARLES W. POYSHER, Builder, and ALFRED STAHL, Owner, *Respondents.*	*Appeal from Supreme Court.*

Supplement to Appellant's Brief.

I.

After printing the main brief we made a further investigation of authorities on the first point and submit the following result of such examination.

In the case of *Davis* v. *Gordon,* 36 N. J. L. J. 310, Circuit Court Judge Speer at the Hudson Circuit, says:

> "I take it to be well settled in New Jersey that a claim is not necessarily bad, for including illegitimate as well as legitimate claims; for it may stand *quo ad* the good items; but if the good items and the bad are *inseparably* blended the claim will be bad."

We also take the liberty to refer the Court to the following cases in other jurisdictions bearing upon the same subject:

Bank of Charleston v. *Curtiss,* 18 Conn. 342.
Soule v. *Borrelli,* 68 Atl. Rep. 979 (Conn.).
Bolster v. *Stocks,* 43 Pac. Rep. 534 (Wash.).
Culver v. *Schroth,* 39 N. E. 115 (Ill.).
Dennis v. *Smith,* 38 N. W. 695 (Minn.).

Nancolas v. *Haffer,* 112 N. W. 382 (Iowa).

Barnes v. *Colorado R. R. Co.,* 94 Pac. Rep. 570 (Colo.).

Baker v. *Fessenden,* 71 Me. 292.

Ewing v. *Stockwell,* 75 N. W. 657 (Iowa).

Cornelius v. *Washington Steam Laundry,* 100 Pac. Rep. 727 (Wash.).

Ecceles Lumber Co. v. Martin, 87 Pac. 714.

Barret v. *Glass,* 111 Pac. 760.

II.

The respondent contends in his brief that the lien is void because the extra work lumped the charges. By this he means that the labor and materials are combined in one charge. This is permissible by the statute where the work is done under contract.

The respondent says that the time in which the work was done is not properly stated and relies upon the case of *Associates* v. *Davidson* in support of his contention. This point, however, is not well taken because it was expressly held that in a case where work is done under contract it is not necessary to state the time in which the work was done with any greater particularity than already stated in the lien claim.

Edwards v. *Derrickson, supra.*

Williamson v. *N. J. Southern Railway Co., supra.*

III.

In the second point of the respondent's brief, the case of *Buchanon etc. Co.* v. *Dougherty,* 96 Atl. 663, recently decided by this court, is relied upon in support of the contention advanced in said point. We have examined this case and fail to understand

what applicability it has to the case at bar inasmuch as no motion was made to discharge the lien for failure to reduce it within one year after issuing summons.

Respectfully submitted,

SAMUEL F. LEBER.