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Notice of Appeal

Filed November 23, 1926

IN CHANCERY OF NEW JERSEY

Between: WALTER J. FREUND AND JOHN D. CRAVEN, *Complainants.* AND MORRIS WEISMAN AND ROSE WEISMAN, his wife, *Defendants.*	On Bill, Etc. Notice of Appeal.

The defendant, Morris Weisman, hereby appeals from an order made on the 8th day of November, 1926, by Vice Chancellor James F. Fielder striking out the answer of the defendants filed in the above matter, and from the whole and every part thereof, to the Court of Errors and Appeals, in the last resort in all causes.

Dated, November 22nd, 1926.

PESIN & PESIN,
Solicitors for Defendants.

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

SAMUEL PESIN,
Of Counsel with Defendants.

Bill of Complaint

Filed September 23, 1926

IN CHANCERY OF NEW JERSEY

TO THE HON. EDWIN ROBERT WALKER, CHANCELLOR OF THE STATE OF NEW JERSEY.

The complainants, Walter J. Freund and John D. Craven, of Jersey City, New Jersey, respectfully show:

1. On August 20th, 1925, Morris Weisman, being indebted to Rose Blanche in the sum of five thousand ($5,000) dollars, executed to her a bond of that date to secure that sum, payable on August 20th, 1930, with interest at the rate of 6% per annum, and to be paid quarterly from and after the date of said August 20th, 1925, together with an installment on account of principal of two hundred ($200) dollars on each interest payment date, the interest to be calculated on the unpaid balance of principal.

2. To secure payment of the bond, the said Morris Weisman, executed to said Rose Blanche a mortgage of even date, with the bond, and thereby conveyed to her in fee the land hereinafter described, on the express condition that such conveyance should be void if payment should be made according to the terms of the bond. Which mortgage, having been first duly acknowledged and the certificate of acknowledgment duly endorsed thereon, was recorded in the Register's Office of Hudson County in Book 1317 of

Mortgages, on page 251. The said mortgage being a purchase money mortgage to secure part of the purchase price paid to the said Rose Blanche by the said Morris Weisman.

3. The mortgaged premises are described as follows:

"ALL that certain lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey, in Duncan Terrace, more particularly described as follows:

"BEGINNING at a point in the southerly line of Duncan Avenue distant one hundred and twenty-five (125) feet easterly from the intersection of said southerly line of Duncan Avenue, with the easterly line of Delaware Avenue; thence as a beginning point running (1) southerly, and parallel with Delaware Avenue, one hundred (100) feet to a point; thence (2) easterly, and parallel with Duncan, twenty-five (25) feet to a point; thence (3) northerly, and parallel with first line run, one hundred (100) feet to a point in said southerly line of Duncan Avenue; thence (4) westerly along said southerly line of Duncan Avenue, twenty-five (25) feet to the point or place of beginning.

"BEING known as lot number six (6) in City Block two hundred and thirty-three/sixteen hundred and sixty-one (233/1661) on the Official Assessment Map of Jersey City, by L. D. Fowler, 1894.

"BEING the same premises conveyed to the mortgagor, by the mortgagee and her husband, by deed bearing even date herewith, and to be

recorded simultaneously herewith. This mortgage being given to secure a part of the purchase price paid therefor; this mortgage being second and subsequent to two certain mortgages made by the said Morris Weisman and Rose Weisman, his wife, to the N. J. Title Guarantee & Trust Company, dated August 20, 1925, aggregating the sum of $7,500.''

4. Both bond and mortgage contained an agreement that should any taxes, assessment, water rent or other municipal or governmental rate, charge, imposition or lien, hereinafter imposed or acquired upon the said premises described in this mortgage, become due and payable and remain unpaid and in arrears for the space of three months, then the whole of the principal sum, with all arrearages of interest thereon, should, at the option of the mortgagee, her representatives or assigns, become immediately due.

5. By written assignment dated the 8th day of October, 1925, the said Rose Blanche assigned said bond and mortgage to the complainants, which assignment was duly recorded in Book 164 of Assignments for Hudson County on page 202.

6. The said Morris Weisman is married and his wife's name is Rose. Any claim or interest she may have by way of inchoate right of dower, or otherwise, is subject to complainants' mortgage.

7. On the first day of December, 1925, there became due and payable to the City of Jersey City the sum of one hundred and six dollars and forty-eight cents ($106.48), being the second half of taxes for the year 1925, on the said property. Not being paid on that date the said tax becomes delinquent and a lien.

On the first day of June, 1926, there became due and payable to the City of Jersey City the sum of one hundred and forty-three dollars and twenty-four cents ($143.24), being the first half of taxes for the year 1926, on the said property. Not being paid by June 1st, 1926, the said tax becomes delinquent and a lien.

On May first, 1926, there became due and payable to the City of Jersey City the sum of thirty-five dollars and fifty-five cents ($35.55), being the water rents for 1926 on the said property. Not being paid on that date the said water rent becomes delinquent and a lien.

All of the said taxes and water rents have remained unpaid for more than three months since becoming delinquent and a lien. Complainants have elected that the whole principal sum with all unpaid interest shall be now due.

8. The said Morris Weisman has always been in possession of the said mortgaged premises.

9. The said Morris Weisman has paid on account of principal four installments of two hundred ($200) dollars each, so that the sum of forty-two hundred ($4200) dollars, with interest from August 20th, 1926, is due upon complainants' bond and mortgage.

Complainants are without adequate remedy in the courts of law, and therefore pray:

1. That Morris Weisman and Rose, his wife, who are the defendants to this suit, may answer this bill of complaint and each statement therein made:

2. That an account may be taken of the amount due on complainants' mortgage:

3. That the defendants, or one of them, may be decreed to pay complainants the amount so found due, with interest and costs, by a short day, to be appointed by this court, and that in default of such payment they, and each of them, be debarred and foreclosed of all equity of redemption in said lands: or

4. That a decree may be made for the sale of the mortgaged premises to raise and pay to the complainants the amount so found due on their mortgage, with interest and costs:

5. That a writ of subpœna 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.

JOHN D. CRAVEN,
Solicitor and of Counsel with Complainants.

Answer

Filed October 27, 1926

IN CHANCERY OF NEW JERSEY

Between:
WALTER J. FREUND AND JOHN D. CRAVEN,
Complainants,
AND
MORRIS WEISMAN AND ROSE WEISMAN, his wife,
Defendants.

On Bill, Etc.

The answer of the defendants, Morris Weisman and Rose Weisman, his wife, by PESIN & PESIN, their solicitors, to the Bill of Complaint herein, respectfully allege the following:

1. Paragraphs "1" to "6," inclusive, of the Bill of Complaint are admitted.
2. Paragraph "7" is denied.
3. Paragraph "8" is admitted.
4. Paragraph "9" is admitted.

AS AND FOR A FIRST DEFENSE

5. That on or about the 9th day of June, 1926, which day was after the due date of the payment of taxes and water rents mentioned in the Bill of Complaint, this defendant, Morris Weisman, had a conversation with the complainant, Walter J. Freund, wherein the said complainant did agree to and with this defendant, Morris Weisman, who offered to pay the aforesaid water and tax rents

to the City of Jersey City in the event that the said Walter J. Freund did insist thereon, that it was not necessary for this defendant, Morris Weisman, to pay the aforesaid municipal taxes and water rents until the defendant was in a position to do so. That notwithstanding this agreement made between this defendant and complainant, this complainant in utter disregard and violation thereof did commence this foreclosure proceeding, to the great detriment of this defendant, Morris Weisman, who did absolutely rely upon the promises and agreement of this complainant, Walter J. Freund.

6. That this defendant immediately upon service of the subpoena citing him to answer the foreclosure filed herein, did pay the aforesaid municipal liens upon the default of which the complainants seek foreclosure.

AS AND FOR A SECOND DEFENSE

7. That on or about the 20th day of August, 1926, as alleged in paragraph "9" of the complainants' Bill of Complaint when this defendant, Morris Weisman, paid his last interest installment, there was then due the aforesaid municipal tax and water rents, and they remained unpaid and have remained unpaid for over a period of three months, and that these complainants did have full knowledge thereof, but that notwithstanding this, complainants did accept the aforesaid interest installment on August 20th, 1926, from the defendant, Morris Weisman, with the full knowledge at the time of the said acceptance that the aforesaid municipal liens were delinquent and remained so over a period of three months and

that by reason thereof, they did waive their right to foreclose upon such delinquency.

8. That on the 1st day of December, 1925, there became due to the said City of Jersey City the sum of $106.49, being the second half of the taxes on the said property, and these said taxes became delinquent and a lien on the said premises and remained delinquent for over a period of three months, but notwithstanding such delinquency, these complainants did accept an interest installment and installment on principal on or about the 20th day of February, 1926, and did also accept an interest installment and installment of principal on or about the 9th day of June, 1926, and the complainants did also accept an interest installment and installment of principal on or about the 20th day of August, 1926, as aforementioned. That at the time of the acceptance of these various interest and principal installments aforesaid, it was understood between the complainants and defendant and particularly by this defendant, that the default in payment of the last half of the 1925 taxes was to be waived by these complainants and not taken advantage of, and it was reasonably understood between the parties that the default in the payment of the water rents and taxes which were due on the 1st day of May, 1926, and the 1st day of June, 1926, respectively, would also be waived by reason of the acceptance by the complainants of two certain interest installments and principal installments paid subsequent to the defaults herein above-mentioned.

9. This defendant relying upon the conduct of the complainants in accepting the interest installments and installments of principal after default had been made in the municipal liens, did not pay

the said municipal liens but suffered himself to become in default, but immediately upon notification by the complainants that they intended to hold defendant strictly to the covenants of the mortgage, which notice came in the form of this foreclosure, and no previous notice, this defendant did immediately pay the aforesaid delinquent municipal liens.

WHEREFORE, the defendants respectfully pray that the Bill of Complaint filed herein be dismissed with costs for the wrong most unjustly done to these defendants, and that these complainants be decreed to abide by his agreements as set forth herein.

And these defendants will ever pray, etc.

PESIN & PESIN,
Solicitors for Defendants.

Motion to Strike Out Answer

Filed November 8, 1926

IN CHANCERY OF NEW JERSEY

Between: WALTER J. FREUND AND JOHN D. CRAVEN, *Complainants,* AND MORRIS WEISMAN AND ROSE WEISMAN, his wife, *Defendants.*	On Bill to Foreclose. Notice of Motion to Strike Out Answer.

TO MESSRS. PESIN & PESIN,
Solicitors of Defendants,
355 Central Avenue, Jersey City, N. J.

TAKE NOTICE, that on Monday, November 8th, 1926, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, I shall apply to the Chancellor at the Chancery Chambers, No. 1 Exchange Place, Jersey City, New Jersey, for an order striking out paragraph 2, and the first and second defenses of the answer filed in this cause on behalf of the defendants for the following reasons:

1. That the matters and allegations contained therein are sham and frivolous.

2. That the agreement alleged in paragraphs 5 and 8 of the answer, if true, are not in writing and are vague and uncertain and are without consideration.

Motion to Strike Out Answer

3. The acceptance of interest or installments of principal after defaults in payment of taxes and water rents, with full knowledge of the defaults does not constitute a waiver of the default of non-payment of taxes and water rents.

4. That the allegations and matters contained therein are not equitable defenses.

5. Paragraph 2 of the answer denies that there were defaults in the payments of taxes and water rents as alleged in paragraph 7 of the complaint, but paragraphs 7, 8 and 9 of the answer admit the defaults as alleged in paragraph 7 of the complaint and this denial is sham and frivolous.

JOHN D. CRAVEN,
Solicitor and of Counsel with Complainants.

Order Striking Out Answer

Filed November 8, 1926

IN CHANCERY OF NEW JERSEY

Between:

WALTER J. FREUND AND JOHN D. CRAVEN,
Complainants,

vs.

MORRIS WEISMAN AND ROSE WEISMAN, his wife,
Defendants.

On Bill to Foreclose Order.

Motion having been made by the complainants for an order striking out paragraph 2, and the first and second defenses of the answer filed in this cause, on the ground that the allegations contained therein are sham and frivolous, and are not equitable defenses, and it appearing that due notice of said notice has been given to the said defendants, and the court having heard the arguments of John D. Craven, of counsel with the complainants, and Pesin & Pesin, of counsel with the defendants, and being of the opinion that the motion should be granted; it is on this 8th day of November, 1926,

ORDERED that paragraph 2, and the first and second defenses of the answer, being paragraphs 5 to 9, inclusive, filed in this cause be and the same hereby stricken out.

Respectfully advised.

E. R. WALKER,
Chancellor.

JAMES F. FIELDER,
Vice Chancellor.

Petition of Appeal

Filed December 8, 1926

NEW JERSEY COURT OF ERRORS AND APPEALS

Between:

WALTER J. FREUND AND JOHN D. CRAVEN,
Complainants-Appellees,

vs.

MORRIS WEISMAN AND ROSE WEISMAN, his wife,
Defendants-Appellants.

On Appeal from the Court of Chancery.

TO THE HONORABLE THE COURT OF ERRORS AND APPEALS IN THE LAST RESORT IN ALL CAUSES:

The petition of MORRIS WEISMAN and ROSE WEISMAN, appellants in the above-entitled cause, respectfully show that:

1. Petitioners find themselves aggrieved by an order made in the Court of Chancery by his Honor, EDWIN ROBERT WALKER, Chancellor of the State of New Jersey, bearing date of November 8th, 1926, in a certain cause in said Court of Chancery wherein the said WALTER J. FREUND and JOHN D. CRAVEN were Complainants and the said MORRIS WEISMAN and ROSE WEISMAN, his wife, were Defendants, in this respect to wit: that the said order adjudges that Paragraph 2 and the First and Second Defenses of the answer filed by the Defendants, being

Paragraphs 5 to 9, inclusive, be stricken out, and petitioners appeal from the entire part of the order of the Chancellor which order is as aforesaid upon the ground that the same is erroneous in that the First Defense of the said answer as alleged in the said answer filed in this cause, is good and sufficient ground of defense to the Bill of Complaint filed in this cause. The said Defense alleges that on or about the 9th day of June, 1926, which day was after the due date of the taxes and water rents mentioned in the Bill of Complaint, and upon which default, the complainants seek foreclosure of the mortgage, the defendant, Morris Weisman, had a conversation with the Complainant, Walter J. Freund, wherein the said Complainant did agree to and with the said defendant who offered to pay the aforesaid water rents and taxes to the City of Jersey City in the event the said Walter J. Freund did insist thereon, that it was not necessary for this petitioner to pay the aforesaid municipal taxes and water rents until the defendant was in a position to do so, and that notwithstanding this agreement made between this defendant and complainant, complainants did, in violation thereof, commence foreclosure proceedings. That petitioner claims that this defense was good and did constitute a waiver of the default and acted as an estoppal against the complainants. The order of the Chancellor, however, decides to the contrary.

2. Petitioners also complain against the said order on the ground that the same is erroneous in that the Second Defense alleged by the petitioners in their answer states that on or about the 20th day of August, 1926, as alleged in paragraph "9" of the Complainants' Bill of Complaint

when this defendant, Morris Weisman, paid his last interest installment, there was then due the aforesaid municipal tax and water rents, and they remained unpaid and have remained unpaid for over a period of three months, and that these complainants did have full knowledge thereof, but that notwithstanding this, complainants did accept the aforesaid interest installment on August 20th, 1926, from the defendant, Morris Weisman, with the full knowledge at the time of the said acceptance that the aforesaid municipal liens were delinquent and remained so over a period of three months and that by reason thereof, they did waive their right to foreclosure upon such delinquency. That on the 1st day of December, 1925, there became due to the said City of Jersey City the sum of $106.48, being the second half of the taxes on the said property, and these said taxes became delinquent and a lien on the said premises and remained delinquent for over a period of three months, but notwithstanding such delinquency, these complainants did accept an interest installment and installment on principal on or about the 20th day of February, 1926, and did also accept an interest installment and installment of principal on or about the 9th day of June, 1926, and the complainants did also accept an interest installment and installment of principal on or about the 20th day of August, 1926, as aforementioned. That at the time of the acceptance of these various interest and principal installments aforesaid, it was understood between the complainants and defendant and particularly by this defendant, that the default in payment of the last half of the 1925 taxes was to be waived by these complainants and not taken advantage of, and it was reasonably understood between the parties that the default in the payment of the water rents and taxes which were due on the 1st day of May, 1926, and the 1st day of June, 1926, respectively, would also be waived by reason of the acceptance by the complainants of two certain interest installments and principal installments paid subsequent to the defaults hereinabove mentioned.

That this defendant relying upon the conduct of the complainants in accepting the interest installments and installments of principal after default had been made in the municipal liens, did not pay the said municipal liens but suffered himself to become in default, but immediately upon notification by the complainants that they intended to hold defendant strictly to the covenants of the mortgage, which notice came in the form of the foreclosure, and no previous notice, this defendant did immediately pay the aforesaid delinquent municipal liens.

Petitioners have been informed by their solicitors, and verily believe that the said defense is a good and sufficient defense to the Bill of Complaint. The order of the Chancellor, however, decides to the contrary.

3. Petitioners further pray that the said order of the Chancellor may be wholly reversed, set aside and for nothing holden and that petitioners may have such other and further relief in the premises as to this Court may seem just and proper.

PESIN & PESIN,
Solicitors of Appellants.

SAMUEL PESIN,
Of Counsel.

Petition of Appeal

Due and timely service of a copy of the within is hereby acknowledged this 8th day of December, 1926.

JOHN D. CRAVEN,
Solicitor for and of Counsel with Complainants-Appellees.

Answer to Petition of Appeal

Filed December 16, 1926

NEW JERSEY COURT OF ERRORS AND APPEALS

Between: WALTER J. FREUND AND JOHN D. CRAVEN, *Complainants-Appellees,* vs. MORRIS WEISMAN AND ROSE WEISMAN, his wife, *Defendants-Appellants.*	On Appeal from the Court of Chancery. Answer to Petition of Appeal.

The answer of Walter J. Freund and John D. Craven, the above named appellees, to the petition of appeal of Morris Weisman and Rose Weisman, the above named appellants.

These appellees, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admits that an order was, on the 8th day of November, 1926, made and entered in the Court of Chancery of New Jersey, in the above-entitled cause, for the purposes in said petition mentioned and as therein set forth, but as to the substance and form of said order, these appellees beg leave to refer thereto when the same shall be produced.

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

JOHN D. CRAVEN,
Solicitor for and of Counsel with Appellees.

New Jersey Court of Errors and Appeals

WALTER J. FREUND and JOHN D. CRAVEN,
Complainants-Appellees,

v.

MORRIS WEISMAN and ROSE WEISMAN,
Defendants-Appellants.

On Appeal from the Court of Chancery.

BRIEF OF APPELLEES.

Facts.

This suit was instituted to foreclose a mortgage on the property of the defendants-appellants alleging that the second half of the taxes for the year 1925 amounting to $106.48, which became due to Jersey City, and delinquent on December 1st, 1925, the first half of the taxes for the year 1926 amounting to $143.24, which became due to Jersey City, and delinquent on June 1, 1926, and the water rents for 1926, which became due to Jersey City and a lien on May 1, 1926, had remained unpaid for more than three months after becoming delinquent and a lien. The bond and mortgage under foreclosure contained the usual three months' tax default clause. The complainants-appellees elected that the whole remaining principal should become due and payable.

The defendants-appellants filed an answer in which it was alleged that one of the complainants-appellees on June 9th, 1926, told the defendant Morris Weisman that it was not necessary to pay

taxes and water rents until he was in a position to do so; the answer further alleged that on February 20th, 1926, June 9, 1926, and August 20th, 1926, the complainants-appellees accepted installments of principal and interest on the mortgage; the answer further alleged that it was understood between the parties that the defaults in the payment of water rents and taxes would be waived by reason of the acceptance of the interest and installments of principal.

Part of the answer denied the defaults, but other parts of the answer admitted the defaults but alleged that the defaults were waived. It is unquestioned that the defendants-appellants were in default as to the 1925 and 1926 taxes and 1926 water rents.

A motion was then made to strike out the answer on the grounds that it was sham and frivolous, and that the defaults were not waived; after hearing the matter, the Vice-Chancellor struck out the answer, so that the decree *pro confesso* could and was entered against the defendants-appellants.

POINT I.

The acceptance of interest or installment of principal after the default in taxes complained of, with full knowledge of the default, does not constitute a waiver of the default.

This doctrine started with the case of *Bergman* v. *Fortescue,* 74 N. J. Eq., 266, in which it was held as stated above, insinuating, however, that if the default in taxes was known at the time the interest was accepted, then it would operate as a bar and waiver of the default. In later cases the point of knowledge of the defaults was raised, and the

courts, including this Court, have held uniformly that where there is a default in taxes, the acceptance of interest does not operate as a waiver of the default. Vice-Chancellor Lewis held:

> "I am of the opinion that the mere acceptance of the interest by the mortgagee after the default complained of, and with full knowledge of it, does not constitute a waiver of the default."
>
> *Union Trust Co.* v. *New Jersey Water Co.,* 117 Atl., 155, affirmed by this Court 120 Atl., 329.

> "The second point is that by Mrs. Blumenthal accepting the interest after the 30 day interest had elapsed, it operated as a waiver of the default for the non-payment of taxes and water rents. *This is not the law.* The complainants might have accepted the interest and still declared a default for non-payment of the taxes and water rents."
>
> *Derechensky* v. *Epstein,* 130 Atl., 720, affirmed by this Court 131 Atl., 922.

POINT II.

The defaults in taxes and water rents were never waived by an act or agreement of the complainants-appellees.

The defendant-appellant asserted that he was told by one of the complainants-appellees that it was not necessary for him to pay taxes and water rents until he was in a position to do so. It is submitted that he might never be in a position to pay taxes and water rents. His answer does not allege that a particular default was waived until a certain time, but alleges that as the defaults continued they would be waived, presumably because

the defendant was not in a position to pay. In the bill of complaint there are three defaults in payments of taxes and water rents set up. The alleged waiver is so vague, indefinite and uncertain, that if the defendant was never in a position to pay the taxes and water rents, the amount due on municipal liens might amount to so much that the security of the mortgage might be impaired. That the defendant did not have money to pay is no excuse.

> "No excuse was offered for the non-payment of the taxes except that the defendants were pinched for money, and that is not sufficient."
>
> *Newark Trunk Co.* v. *Clark, et al.,* 118 Atl., 263.

The bond and mortgage provided that if any municipal lien remained unpaid for three months, at the option of the mortgagee, the principal sum should become due, according to the terms of the mortgage; at the time of the alleged conversation on June 9, 1926, there had been only one default on the part of the defendant, that is, the taxes for the second half of 1925 due Jersey City on December 1, 1925.

The water rents became due and a lien on May 1, 1926, and three months from that time would be August 1st, 1926. The first half of taxes for 1926 became due to Jersey City and delinquent on June 1st, 1926; three months from that time would be September 1, 1926. It is submitted that by the terms of the bond and mortgage there were defaults on the first days of March, August and September, 1926. The defaults of August 1st and September 1st, 1926, could not be waived by the alleged conversation of June 9, 1926, because at that time the defendants-appellants were not in default in reference to them.

It is not alleged that these last two defaults were waived by any conversation or agreement with the complainants-appellees, but merely that the *defendants-appellants understood* that these defaults would be waived by reason of the acceptance of the interest after these dates. What the defendants-appellants understood in their own minds, is not binding on the complainants-appellees, and cannot be construed as a waiver of their rights.

Even assuming that the default of March 1st had been waived by the acceptance of interest, it has been held that because a mortgagee does not take advantage of the first default in interest or taxes that he is barred forever of taking advantage of any default.

> "By the terms of the foreclosed mortgage, the right was reserved to the mortgagee to demand immediate payment of the principal debt for any default in the payment of interest thereon. This right recurred as each installment of interest fell due, and his failure to enforce it for one default did not operate to deprive the mortgagee of his option to call for the immediate payment of the principal for a subsequent default in the payment of interest, any more than it operated to relieve the mortgagor from the necessity of paying the subsequent installments as they fell due."
>
> *Industrial Land Development Company* v. *Post,* 55 N. J. Eq., 559.

So that even if the conversation as alleged took place, and the complainants-appellees had waived one default, they could still take advantage of the defaults of August 1st, 1926, and September 1st, 1926.

The defendants-appellants asserted in their answer that as soon as they received notice of the foreclosure proceeding, they paid all taxes which

were then due, showing that at all times they were in a position to pay these taxes, and that they could have paid these municipal liens as soon as due, instead of waiting a long period of time to pay them. If they felt that the payment of taxes and water rents could be prolonged indefinitely and the defaults in the payments of taxes and water rents excused and waived indefinitely, why did they rush immediately to pay the accumulated taxes immediately on receiving notice of the foreclosure action?

POINT III.

There was no consideration for the alleged promise to waive previous defaults, and there is nothing in writing to evidence any such alleged agreement.

The defendants-appellants were bound by the terms of their mortgage to pay their taxes and water rents within three months after they became due, and upon their default an absolute right to foreclose became vested in the complainants-appellees. It is urged that as this involved the surrender of a vested right, for the promise to waive the defaults of taxes and water rents, there should be a valid and valuable consideration to support such a promise; but it does not appear anywhere that any consideration of any kind was given for the promise to waive the defaults and surrender a vested right. It is also urged that such a promise should be in writing and set out in such terms that the intent could not be mistaken.

In their brief, the defendants-appellants rely on the case of *Measurall* v. *Pearce,* 4 Atl., 678, that a verbal promise to extend a mortgage is valid without consideration. It is submitted that this case is not authority that a parol agreement without consideration acts as an estoppel to take advantage of a default in taxes. In the first place, waiving a default in taxes would result in the impairment of security, which does not follow in an extension of mortgage; secondly, it is the giving up of a vested and accrued right which might result in damage to the mortgagee; again, it is inequitable that a mortgagor can default in taxes, then assert that the mortgagee has agreed to waive the default orally, and thus by taking advantage of his own wrong, estop the mortgagee from foreclosing. It would also violate the fifth section of the statute of frauds and perjuries (2 Comp. Stat., p. 2612) which provides that no action shall be brought upon any contract or sale of land and hereditaments, or *any interest in or concerning them,* unless the agreement be in writing and signed by the party to be charged therewith, or his lawfully authorized agent.

In *Degheri* v. *Caroline,* 5. N. J. Ad. Rep., 48, the Court had under consideration whether an oral agreement to release part of the mortgaged premises from the terms of the mortgage would be good. The Court inclined to the view that the statute of frauds was a good defense and that the promise to release could not be specifically performed. If an oral agreement to release a mortgage cannot be enforced, where nothing is lost, the Court should be more reluctant in allowing the defense of oral waivers of defaults where it would put the complainants-appellees in a more dangerous position and result in harm to them.

POINT IV.

The defendants-appellants raise several points in their brief which were not before the Court, and should not be considered by this Court.

It is set out in the brief that the complainants-appellees knew of the defaults in taxes (Brief, p. 4, lines 6-14; p. 7, lines 11-21). No replication was filed by the complainants-appellees and as the answer was stricken out, it was not necessary to reply to the sham and frivolous assertions in the answer. On the motion it was not necessary to produce affidavits; there is therefore nothing before the Court to substantiate the statement that the complainants-appellees knew of the defaults.

The complainants-appellees did not require the production of tax bills showing them receipted, and there had never been conversations between the mortgagors and the mortgagees in reference to taxes, paid or unpaid. The complainants-appellees are in the best position to assert whether or not they knew a certain thing, and it is here stated that up to three or four days before the bill of foreclosure was filed, they had no knowledge of the defaults.

Complainants-appellees ascertained from the Tax Collector of Jersey City, that the taxes, aforesaid, were due and unpaid, and upon finding the default in the non-payment of taxes, within three months after they became due and delinquent on the mortgaged premises, the complainants-appellees filed their bill to foreclose.

It is also stated (Brief, p. 7, line 18) that the parties were on rather intimate terms, but it is submitted that there is nothing in the state of case to substantiate this statement, and the complainants-appellees take this opportunity of denying the statement.

It is also stated on page 6, lines 18-23 of the brief that because the mortgagees were lawyers it was a greater assurance to the mortgagors that the mortgagees would not take advantage of the defaults. It is contended that the mortgagors are presumed to know the law and their rights just as much as the mortgagees. The mortgagors knew their rights in respect to all other terms of the bond and mortgage, and were well equipped to take advantage of all their rights.

It is respectfully submitted that the order of the Vice Chancellor in striking out the answer should be affirmed.

JOHN D. CRAVEN,
Solicitor for and of Counsel
with Complainants-Appellees.

New Jersey Court of Errors and Appeals

WALTER J. FREUND AND JOHN D. CRAVEN, *Complainants-Appellees,* vs. MORRIS WEISMAN AND ROSE WEISMAN, *Defendants-Appellants.*	On Appeal from the Court of Chancery.

APPELLANTS' BRIEF

Statement of Facts

This is an appeal from an order of the Court of Chancery striking out appellants' answer.

The complainants filed a Bill against the defendants praying to foreclose a mortgage (S. C., p. 2), made by defendants to complainants' assignor. According to the terms of this mortgage, interest became payable on the 25th day of November, 1925, and quarterly thereafter. There also was contained therein the usual 90-day tax and water default clauses. Sometime in March, 1926, when there had already existed a default in payment of the last half of taxes for 1925, which were due on December 1, 1925, the complainants had accepted an interest installment. On June 9, 1926, the next quarterly interest period, when the

default for payment of December, 1925, taxes had existed for over 4 months, was paid and accepted by the complainants. In September, 1926, the following quarterly interest period, when the December, 1926, taxes were in default for over 7 months, and the default for non-payment of water rents due May 1, 1926, and taxes due June 1, 1926, had come into existence, the interest was paid, and accepted by complainants.

That, notwithstanding the acceptance of the interest installments due February 25, 1926, and May 25, 1926, and which were paid in March and May, respectively, when there had existed a default in payment of taxes for December, 1925; and notwithstanding the acceptance of the interest installment of August 25, 1926, which was paid in September, when already there had existed the former default and the water rent and June tax defaults, the complainants filed this bill to foreclose.

The defendants answered (S. C., p. 7), first: that the acceptance of the various interest installments, after the defaults had accrued, with knowledge on their part, constituted a waiver of the same. Second: that the defaults were occasioned by the acts and conduct of the complainants, in that they have accepted interest installments three times while one of the defaults had existed, and that such conduct gave reasonable assurance to the defendants that they would not take advantage of the failure to pay taxes within the prescribed time; and third, that there was an express understanding and agreement between complainants and defendants that they would not take advantage of defendants if they had failed to pay their taxes.

This answer which had alleged such well established equitable defenses was ordered stricken

out; and it is from that order that this appeal now comes.

Point I.

The acceptance of an interest installment after an existent default in any of the terms of a mortgage, with knowledge on the part of the mortgagee and without acts or declarations indicating a contrary intent, constitutes a waiver of the same.

The first case we find covering a discussion of this principle is in *Post* vs. *Industrial Land Development* Co., 34 Atl., 137, and which was affirmed by the Court of Errors and Appeals, in 37 Atl., 892; 55 N. J. E., 559. Vice Chancellor Bird in deciding that where a previous acceptance of interest had waived an existent default that that waiver did not operate as a continuing waiver for all subsequent breaches of the same nature, never for a moment doubted but in fact it was his unqualified expression that the acceptance of an interest installment while there was an existent default, would act as a waiver of that default.

Mr. Justice Gummere, speaking for the Court of Errors and Appeals in affirming the decree above, did not question the propriety of the Vice Chancellor's expression that the acceptance of an interest installment would act as a waiver of any current defaults.

But we find a later case which fails to mention this Post case, and which introduces a new element of knowledge on the part of the mortgagee. *Bergman* vs. *Fortescue,* 74 N. J. E., 266; 69 Atl., 474, wherein VICE CHANCELLOR LEAMING said that the acceptance of an interest installment after an existent default, did not waive such default because the mortgagee had no knowledge of

the default at the time he had accepted the interest payment. Presumably, the Vice Chancellor's opinion would have been contrariwise had knowledge of the default been shown on the part of the mortgagee, without any extenuating circumstances. But the element of knowledge in our case is not denied by the complainants, nor can they deny the same from the conversations had with them prior to the commencement of their foreclosure proceeding, and from their very acts. So that we are practically confronted with the situation of knowledge of the existent defaults on the part of the mortgagees at the time that they had accepted the various interest installments.

We now come to the next case in point on which the mortgagees seem to rest their contention. In *Union Trust Co. of New Jersey* vs. *N. J. Water & Light Co.*, 117 Atl., 155, Vice Chancellor Lewis says:

> "I am of the opinion that the mere acceptance of the interest by the mortgagee after the default complained of and with full knowledge of it, does not constitute a waiver of the default."

At the conclusion of which he cites the case of *Bergman* vs. *Fortescue,* supra, and the previous Post case. There is no question in our minds that Vice Chancellor Lewis was in accord with the reasoning and determination expressed in the Bergman case; his citation without contradiction or differentiation thereof bespeaks this accord.

To glean the true import of Vice Chancellor Lewis' dictum, we must look to the facts in that case. The mortgagor, pursuant to a covenant in the mortgage, removed certain machinery in its plant, but it failed to replace the machinery so removed with new or similar ones, as provided in the said mortgage. Whereupon, the mortgagor

was given written notice by the mortgagee that if it had failed to replace the machinery removed, it would hold it to the default in this respect contained in the said mortgage. The mortgagor having failed to comply with this request within 90 days, the time set in the mortgage, foreclosure proceedings were commenced.

With these state of facts, we might feel as did Vice Chancellor Lewis, that there could be no waiver of the default by a subsequent acceptance of an interest installment notwithstanding the mortgagee had full knowledge thereof. For there we find inexcusable conduct on the part of the mortgagors in failing to heed the warning that the mortgagees would hold them to the default in the event that the same was not remidied.

Vice Chancellor Leaming in the Bergman case said:

> "Had the defendant continued in default by reason of such an understanding reasonably attributable to the mortgagee's conduct, equity could properly relieve."

and Vice Chancellor Lewis in the Union Trust Company case could not say that such was the conduct on the part of the mortgagees. In fact, there was an express understanding on the part of the mortgagee that it would look strictly to the mortgage in the event that the mortgagors would not remedy the default, and under these circumstances, the Vice Chancellor was prompted to decide that the acceptance of the interest installment by the mortgagees after the default had existed and with full knowledge on their part did not waive the same. Furthermore, as Vice Chancellor Leaming said, citing the case of *Spring* vs. *Fisk,* 21 N. J. E., 175-178:

> "Breaches of such clauses are relieved against when purely equitable grounds incident to the individual case are presented."

Here then, perhaps, was the essence of the situation by which Vice Chancellor Lewis in the Union Trust Co. case was guided: What were the equitable grounds presented in this individual case. Evidently he found none.

And so in the case under consideration, where these defendants allege facts that the mortgagees have accepted interest installments at three various times subsequent to the first default, which occurred on March 1st, 1926, and the second default which occurred on September 1st, 1926; how can it be said that the default was not continued in by reason of an understanding reasonably attributable to the mortgagees' conduct, against which equity could properly relieve? More reason, because they themselves are lawyers and we feel that such conduct on their part of accepting interest after existent defaults, was a greater assurance to the mortgagors that they did not intend to hold them to their default. But assuming for the sake of argument that there was no conduct on the part of the mortgagees reasonably attributable that would excuse the default; we still maintain that the mere acceptance of the interest installment by the mortgagees with knowledge on their part of the existent defaults, would waive the same. It must not be forgotten, however, that the mortgagors in this instance were fortified against a default in both the aforesaid respects.

The mortgagees have stated that it was absurd to think that they would allow a default to continue indefinitely. But we answered that it would justifiably have continued as long as they would have given the mortgagors the right to believe they could continue in default. There are no mitigating circumstances in favor of these mortgagees as there was in the Union Trust Co. case, where the mortgagors were given the best kind of notice of the mortgagees' intentions. They, being lawyers, knew full well what steps to take to give these defendants notice that the defaults could not continue. Evidently, they thought that foreclosure proceedings was the only notice to serve upon the mortgagors, but we can assure them that there was a more equitable and legal notice.

That they had notice of these defaults cannot be disputed. At the argument of the motion, they did not produce affidavits or any other proof that they had no notice. In fact, it was charged in the answer, and they had full opportunity to deny the same. Furthermore, it was alleged in the Answer that there was an agreement made between the parties (both being on rather intimate terms) wherein the mortgagees expressly waived the defaults complained of by agreement not to take advantage of them.

Point II.

A promise by acts and declarations to waive an existent default for non-payment of taxes and the like, creates an estoppel against the promisors from pursuing any action declaring such default.

It is a familiar doctrine in equity that a default for non-payment of taxes and the like occasioned by the acts or declarations of the mortgagee is waived and unenforceable. In one of the earlier cases of *Degroot* vs. *McCotter*, 19 N. J. E., 531, it was said:

> "If the complainant has given further day of payment, or in any other way waived the payment according to the letter of the

bond, the default contemplated and provided against has not happened."

In *Measurall* vs. *Pearce,* 4 Atl., 678, the Court reversing itself in 3 Atl., 92, said that it seemed well established that a verbal promise by the mortgagees, without consideration, to extend the payment of a mortgage, is a good defense in a suit in equity to foreclose the mortgage.

In the case of *Bradley* vs. *Glenmary Co.,* 64 N. J. E., 77; 53 Atl., 49, it has been held that when a mortgagor, on negotiations between him and the first and second mortgagees, pays a sum on the first mortgage, the mortgagor, believing that there is an understanding that in consideration of such payment the time for payment of the second mortgage is to be extended, though no such agreement was made by the second mortgagee, there is a quasi-estoppel against his foreclosing before the time to which the mortgagor believed payment extended. It will be noticed that in this case the Court has invoked the doctrine of quasi-estoppel where no express agreement was had. How much weightier then is the instant case where an express agreement has been alleged. It surely cannot for a moment be said that such an agreement relied upon by the mortgagors to their detriment, would not act as an estoppel against the mortgagees. For every element is present in the instant case to constitute an equitable estoppel.

It has been said in *Mutual Life Ins. Co.* vs. *Norris,* 31 N. J. E., 583, that to constitute an equitable estoppel, the defendant must have done an act or made an omission, the natural effect of which was to influence the conduct of the complainant, and which has induced him to change his position or condition, so that, if the defendant is afterwards

permitted to deny the truth of his words or conduct, the complainant must suffer harm.

Besides the case of *Bell* vs. *Romaine,* 30 N. J. E., 24, there are cases too numerous to cite or mention which would show that such a defense as alleged in defendants' answer was not frivolous as stated in the Court's order striking out the defendants' Answer. We feel that it is too well settled to admit of any doubt that an express waiver constitutes a good defense which will be upheld by the familiar doctrine of estoppel.

Point III.

THE ORDER OF THE VICE CHANCELLOR STRIKING OUT DEFENDANTS' ANSWER ON THE GROUND THAT THE SAME IS FRIVOLOUS, SHOULD BE REVERSED.

For the reasons above stated, the order of the Vice Chancellor striking out defendants' Answer should be reversed.

Respectfully submitted,

PESIN & PESIN,
Solicitors of Defendants-Appellants.

SAMUEL PESIN,
Of Counsel.