

INDEX

	PAGE
Notice of Appeal and Grounds of Appeal.	1
Summons	3
Complaint	4
Schedule "A"	5
Answer and Counter-claim.....	10
Order	12
Appeal Bond	14
Judgment	17
Clerk's Certificate	18
Notice of Motion to Strike Out Answer and Counter-claim	19
Affidavit of William N. Bayles.....	20
Affidavit of Milton M. Unger.....	21
Affidavit of Edward J. Maier	25
Notice of Motion to Amend Answer and Counter-claim	26
Affidavit of Michael Eaton	27

NOTICE OF APPEAL AND GROUNDS
OF APPEAL.

Filed June 20, 1930.

Essex County Circuit Court

10

WILLIAM N. BAYLES,
Plaintiff-Appellee,

vs.

MICHAEL EATON,
Defendant-Appellant.

Action
at Law.

On Appeal
from the
Essex County
Circuit Court
to the

New Jersey
Court of
Errors &
Appeals.

20

Notice of
Appeal and
Grounds of
Appeal.

To Milton M. Unger, Esq., attorney of plaintiff-
appellee;

30

SIR:

TAKE NOTICE that the defendant herein, Michael
Eaton, does hereby appeal from the whole of the
judgment entered in the Essex County Circuit
Court in the above-entitled cause on June 7,
1930, and does hereby set forth the following as
his grounds of appeal:

40

Notice of Appeal and Grounds of Appeal.

1. That the said Essex County Circuit Court erred in entering a judgment in favor of the plaintiff-appellee against the defendant-appellant.

2. That the said Essex County Circuit Court erred in striking out the answer of the defendant-appellant filed herein.

10 3. That the said Essex County Circuit Court erred in ruling that defendant-appellant herein was not entitled to trial by a jury upon the issues raised in the answer duly filed herein.

Dated June 18, 1930.

ABRAHAM RUDENSEY,
Attorney of Defendant-Appellant.

20 Service of a copy of the within notice is hereby acknowledged this 18th day of June, 1930. Milton M. Unger, attorney of plaintiff-appellee.

30

40

SUMMONS.

THE STATE OF NEW JERSEY TO MICHAEL EATON:

YOU ARE SUMMONED to answer the
annexed complaint of WILLIAM N.
(SEAL) BAYLES, in an action at law in the
Essex County Circuit Court. 10

AND TAKE NOTICE that unless you
file your answer to said complaint with the
Clerk of the said Essex County Circuit Court,
at Newark, within twenty days, after the service
upon you of this writ, and the annexed complaint,
the plaintiff may proceed in the suit, and judg-
ment may be entered against you. (And see
Notice endorsed hereon.

WITNESS, NELSON Y. DUNGAN, a Judge of said
Court, at Newark, this twentieth day of January, 20
nineteen hundred and thirty.

JOHN H. SCOTT,
Clerk.

MILTON M. UNGER,
Attorney.

30

40

COMPLAINT.

ESSEX COUNTY CIRCUIT COURT.

10	WILLIAM N. BAYLES, <i>Plaintiff,</i> <i>vs.</i> MICHAEL EATON, <i>Defendant.</i>	}	<i>Action at Law. Complaint.</i>
----	---	---	--

The plaintiff, residing in the Town of West Orange, in the County of Essex and State of New Jersey, says that,

20 1. On December 21, 1928, the defendant, Michael Eaton, entered into an agreement in writing with Edward J. Maier and Euplio DeMarco, a copy of which is annexed hereto marked Schedule "A."

30 2. On June 17, 1929, for a valuable consideration, the said Euplio DeMarco assigned his interest therein to Edward J. Maier and on June 18, 1929, the said Edward J. Maier, for a valuable consideration, assigned his interest therein to plaintiff. Thereupon plaintiff became entitled to all the right, title and interest of the said Euplio DeMarco and the said Edward J. Maier in and to said agreement.

3. Under and by virtue of the terms of said agreement, the said Michael Eaton agreed to pay \$8,500 in monthly installments of \$150, without interest, beginning February 1, 1929.

40 4. The said Michael Eaton has neglected and refused to pay the same or any part thereof,

Complaint—Schedule “A.”

although the plaintiff has duly demanded the same and there is now due and owing from the said Michael Eaton to the plaintiff the sum of \$1,800, being twelve installments of \$150 each, which have become due commencing with February 1, 1929. No part thereof has been paid.

Judgment will be claimed for the sum of \$1,800, together with interest and costs of suit to be taxed.

MILTON M. UNGER,
Attorney of Plaintiff.

SCHEDULE “A.”

MEMORANDUM OF AGREEMENT, made this 21st day of December, One Thousand Nine Hundred and Twenty-eight, By and Between EDWARD J. MAIER and EUPLIO DE MARCO, both of the City of Newark, Essex County, New Jersey, Party of the First Part, AND MICHAEL EATON of the City of Newark, Essex County, New Jersey, Party of the Second Part.

WHEREAS, Edward J. Maier is now the holder and owner of Certificate Number 7 for twenty-six shares of the capital stock of West Orange Estates, Inc., a New Jersey corporation, and

WHEREAS, Euplio De Marco is the owner of twelve (12) shares of the capital stock in said Company evidenced by Certificate Number 5, and

WHEREAS, Michael Eaton, Party of the Second Part is desirous of purchasing the aforesaid shares owned by said Maier and De Marco respectively, Now THEREFORE, THIS AGREEMENT WITNESSETH:

The said E. J. Maier and Euplio De Marco hereby agree to and with Michael Eaton to sell

Complaint—Schedule "A."

the aforesaid thirty-eight (38) shares of stock for the sum of Fifteen Thousand Two Hundred (\$15200) Dollars and the said Michael Eaton hereby agrees to purchase the aforesaid thirty-eight shares and to pay therefore the sum of Fifteen Thousand Two Hundred Dollars in man-

10 ner following:

\$5200. to be paid by the said Michael Eaton to E. J. Maier and Euplio De Marco upon the transfer and delivery of the said shares of stock to said Eaton.

\$1500. being the amount of indebtedness due by E. J. Maier Corporation to West Orange Estates, Inc., which indebtedness said Michael Eaton hereby assumes and agrees to pay to West Orange Estates, Inc., as part consideration
20 hereof.

\$8500. to be paid by the said Eaton in monthly installments of \$150. dollars without interest beginning February 1, 1929, until said balance is fully paid and satisfied. The proceeds of said sale of stock shall be prorated between said Maier and De Marco.

AND IT IS FURTHER AGREED, that the voting trust agreement heretofore existing between said Maier and De Marco is hereby terminated.

30 AND IT IS FURTHER AGREED, by and between the parties hereto that the transfer and the delivery of the aforesaid shares of stock by said Maier and De Marco to Eaton shall be consummated at the office of Abraham Rudensey, #24 Commerce Street, Newark, New Jersey, on Monday, December 24, 1928, at 2:30 P. M.

AND IT IS FURTHER AGREED, that upon the transfer and delivery of the aforesaid shares of stock to said Eaton, that thereupon the said Euplio De Marco will resign as Secretary of
40

Complaint—Schedule "A."

said Company and Director; said resignation to take effect forthwith.

IN WITNESS WHEREOF, the Parties have hereunto set their hands and seals in triplicate, the day and year first above written.

Edward J Maier L S
Euplio De Marco L S
Michael Eaton L S

10

Witnessed by
Abraham Rudensey

* * * * *

June 17, 1929

For value received I hereby sell, assign, transfer and set over unto Edward J Maier, all my right, title and interest of, in and to the within agreement, and of, in and to all money due and to fall due thereunder.

20

Witness;— Euplio De Marco L S
Chester W Fairlie.

* * * * *

June 18, 1929.

For value received I hereby sell, assign, transfer and set over unto William Bayles all my right, title and interest of in and to the within agreement and of, in and to all money due and to fall due thereunder.

30

Edward J Maier L S

Witness;

Chester W. Fairlie

* * * * *

Complaint—Schedule "A."

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

10 Be it remembered, that on this 21st day of December, One thousand nine hundred and twenty eight, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared Edward J Maier, Euplio De Marco and Michael Eaton, who, I am satisfied are the persons mentioned in the within Agreement and to whom I first made known the contents thereof and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed.

20 Abraham Rudensey,
 Master in Chancery of New Jersey.

Notice to the within named defendant:

30 In case the within summons and complaint are served upon you personally, then take notice that if you intend to make a defense to said action, you must file an affidavit of merits within ten days, from the date of service thereof upon you, and must file your answer within twenty days from the date of such service, and in default of the filing thereof judgment will be entered against you. Lawful service upon a corporation is deemed personal service for the purpose of the rule under which this notice is given (P. L. 1912, p. 394, rule 56).

MILTON M. UNGER,
 Attorney of Plaintiff.

Complaint.

Received in the office of Harry L. Huelsenbach,
 Sheriff, Jan. 29, 9:39 A. M. '30. Essex Co., N. J.

I hereby appoint and depute Frank G Dryer to
 serve the within writ.

Witness my hand and seal this 21 day of Jan
 1930

10

Harry L Huelsenbeck
 Sheriff LS

By Louis E Batcheler LS
 Under Sheriff

Served the within summons and complaint
 upon Michael Eaton the within named defenant
 by delivering a true copy thereof to his wife
 January 24, 1930 at 24 So Grove St East Orange
 N J his usual place of abode

20

Harry L Huelsenbeck
 Sheriff

By Frank G Dryer
 Special Deputy

30

40

ANSWER AND COUNTER-CLAIM.

Filed February 17, 1930.

ESSEX COUNTY CIRCUIT COURT.

10	WILLIAM N. BAYLES, <i>Plaintiff,</i> <i>vs.</i> MICHAEL EATON, <i>Defendant.</i>	}	<i>Action at Law.</i> <i>Answer & Counter- Claim.</i>
----	---	---	--

Defendant, Michael Eaton, residing in the City of Newark, County of Essex and State of New Jersey, answering the complaint herein, says:

- 20 1. He denies each and every allegation contained in the complaint.

**BY WAY OF COUNTER-CLAIM AGAINST
THE PLAINTIFF HEREIN, THIS DE-
FENDANT SAYS:**

- 30 1. That prior to June 17, 1929, Edward J. Maier, acting for and on behalf of the West Orange Estates, Inc., as agent of the said West Orange Estates, Inc., collected certain monies for and on behalf of the said West Orange Estates, Inc., in the sum of \$3,679.56.

2. That the said Edward J. Maier was obligated to pay the said monies forthwith to the West Orange Estates, Inc.

3. That the said Edward J. Maier thereupon appropriated and converted the said monies aforesaid to his own use.

Answer and Counter-claim.

Amended at

of motion

May 14/30

Wm. A. Smith

J

4. That the West Orange Estates, Inc., on January 17, 1929, duly assigned the said claim against the said Edward J. Maier to the defendant herein.

10

5. Defendant demands judgment against the plaintiff herein on this counter-claim.

ABRAHAM RUDENSEY,
Attorney of Defendant and Counter-Claimant.

20

30

40

ORDER.

Filed June 7, 1930.

ESSEX COUNTY CIRCUIT COURT.

10 8543

WILLIAM M. BAYLES,

*Plaintiff,**vs.*

MICHAEL EATON,

*Defendant.**Action
at Law.
Order.*

20 Notice having been given by the plaintiff of
an application to strike out the answer and
counter-claim filed by the defendant, and to
enter judgment in favor of the plaintiff, and
the matter coming on to be heard before the
Court, pursuant to said notice, in the presence
of Milton M. Unger, attorney of plaintiff, and
Abraham Rudensey, attorney for, and Messrs.
Gross and Gross, of counsel for the defendant,
and the Court having examined the pleadings,
and read the affidavits submitted by the respec-
30 tive parties, and heard and considered the mat-
ter, and being of the opinion that the answer
and the counter-claim is sham and does not set
forth a defense or present a cause of action as
against the plaintiff, and that the same should
be stricken out, and it further appearing from
the affidavit of the plaintiff that at the time when
suit was instituted herein, there was due and
owing by the defendant to the plaintiff twelve
installments of \$150 each, which said installments
became due beginning February 1, 1929, and on
40 the first of each and every month thereafter,

Order.

It is on this 5th day of June, 1930, on motion of Milton M. Unger, attorney of the plaintiff, ORDERED, that the answer and counter-claim be and they are hereby stricken out, and it is further

ORDERED, that judgment be entered in favor of the plaintiff for the amount now due \$1,800, with interest amounting to \$90.00, aggregating in all the sum of \$1,890.00, besides costs of suit to be taxed. 10

WILLIAM A. SMITH,
Judge.

20

30

40

APPEAL BOND.

Filed June 20, 1930.

10 KNOW ALL MEN BY THESE PRESENTS, That We,
Michael Eaton, of the City of Newark, County
of Essex and State of New Jersey, as principal
and Peter Cavicchia and Frank B. Eaton, both
of the City of Newark, County of Essex and
State of New Jersey, as sureties, are held and
firmly bound unto William N. Bayles, in the sum
of Forty-two Hundred (\$4200.00) Dollars, for the
payment of which we bind ourselves our heirs,
executors and administrators, jointly and sev-
erally, firmly by these presents. Sealed with
our seals and dated the 18th day of June,
nineteen hundred and thirty.

20 The condition of the above obligation is such
that

WHEREAS, a judgment was rendered in the
Essex County Circuit Court on June 7, 1930,
in a suit therein depending wherein William N.
Bayles is plaintiff and Michael Eaton is defend-
ant, for the sum of \$1,890.00 damages, besides
costs of suit, and the defendant Michael Eaton
has appealed from the said judgment in the said
Essex County Circuit Court to the Court of
30 Errors and Appeals of New Jersey: Now, the
condition of this obligation is such that if the
said Michael Eaton do prosecute the said appeal
with effect, and also will pay and satisfy the
said judgment so entered as aforesaid, if the
said judgment be affirmed, together with all dam-
ages and costs awarded on the said judgment,
then this obligation to be void, otherwise to
remain in full force and virtue.

40

MICHAEL EATON	(L. S.)
PETER CAVICCHIA	(L. S.)
FRANK B. EATON	(L. S.)

Appeal Bond.

Signed, sealed and delivered
in the presence of

JEHIEL G. SHIPMAN.

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

10

PETER CAVICCHIA, of full age, being duly sworn on his oath, deposes and says that he is one of the sureties in the within bond named. That he is a freeholder of the County of Essex and has property subject to execution worth the sum of \$4,200.00 over and above all his just debts and liabilities.

PETER CAVICCHIA.

20

Sworn and subscribed to before
me this 20th day of June,
1930.

JEHIEL G. SHIPMAN,

Master in Chancery and Supreme Court
Commissioner of New Jersey.

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

30

FRANK B. EATON, of full age, being duly sworn on his oath, deposes and says that he is one of the sureties in the within bond named. That he is a freeholder of the County of Essex and has property subject to execution worth the sum of \$4,200.00 over and above all his just debts and liabilities.

FRANK B. EATON.

40

Appeal Bond.

Sworn and subscribed to before
me this 20th day of June,
1930.

10 JEHIEL G. SHIPMAN,
 Master in Chancery and Supreme Court
 Commissioner of New Jersey.

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

20 Be it remembered that on this 20th day of
June, nineteen hundred and thirty, before me,
the subscriber, a Master in Chancery of New
Jersey, personally appeared Michael Eaton,
Peter Cavicchia and Frank B. Eaton, who I am
satisfied are the obligors in the foregoing bond,
to whom I first made known the contents thereof,
and thereupon they acknowledged that they
signed, sealed and delivered the same as their
voluntary act and deed, for the uses and pur-
poses therein expressed.

 JEHIEL G. SHIPMAN,
 Master in Chancery of New Jersey.

30 I do hereby approve the foregoing bond as to
form and sufficiency and allow the same to be
filed.

 JEHIEL G. SHIPMAN,
 Supreme Court Commissioner.

JUDGMENT.

ESSEX COUNTY CIRCUIT COURT.

52169		<i>Action at Law.</i>	
WILLIAM M. BAYLES,	<i>Plaintiff,</i>	<i>On Order</i>	10
<i>vs.</i>		<i>Striking Out</i>	
MICHAEL EATON,	<i>Defendant.</i>	<i>Answer and</i>	
		<i>Counter-</i>	
		<i>Claim.</i>	
		<i>Judgment</i>	
		<i>Entered</i>	
		<i>June 7, 1930.</i>	

Damage	\$1,890.00	
Costs	63.13	20
Total	\$1,953.13	

Milton M. Unger, attorney of plaintiff:

Judgment on order striking out answer and counter-claim in the above-entitled action was rendered on the seventh day of June, A. D. nineteen hundred and thirty, in favor of the plaintiff William M. Bayles and against the defendant Michael Eaton for the sum of one thousand eight hundred ninety dollars (\$1,890.00) damage and sixty-three dollars and thirteen cents costs of suit. 30

Judgment signed and entered June 7, 1930.

WILLIAM S. GUMMERE,
C. J.

Book 110, page 517, of Circuit Court Judgments.

Clerk's Certificate.

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

I, JOHN H. SCOTT, Clerk of the Circuit Court,
 in and for the County of Essex in the State of
 New Jersey,

10 Do HEREBY CERTIFY that the foregoing is a true
 and correct copy of the pleadings in the case of
 William M. Bayles, plaintiff *v.* Michael Eaton,
 defendant, together with the judgment record
 entered in Book 110, page 517, of Circuit Court
 Judgments, signed and entered June 7, 1930.
 and the same is taken from and compared with
 original copies of records and as the same now
 remains on the files of said court.

20 IN TESTIMONY WHEREOF, I have
 hereunto set my hand and affixed the
 (SEAL) official seal of said court at Newark,
 N. J., this thirteenth day of September,
 A. D. 1930.

JOHN H. SCOTT,
Clerk.

30

40

NOTICE OF MOTION AND AFFIDAVITS.

ESSEX COUNTY CIRCUIT COURT.

8284

WILLIAM N. BAYLES,

*Plaintiff,**vs.*

MICHAEL EATON,

*Defendant.**Action
at Law.**Notice of
Motion and
Affidavits.*

10

To Abraham Rudensey, Esq., attorney of defendant,
24 Clinton street, Newark, N. J.

SIR:

PLEASE TAKE NOTICE, that on Thursday, the 17th day of April, 1930, I will apply to the Hon. Nelson Y. Dungan, Judge of the Essex County Circuit, at the Hall of Records, City of Newark, New Jersey, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, for an order striking out the answer and counter-claim of the defendant in the above-entitled cause, and entering judgment in favor of the plaintiff and against the defendant. Said application will be based upon the following grounds:

20

30

1. The answer and counter-claim are sham or frivolous.

2. Neither the answer or counter-claim present a defense or state a cause of action against the plaintiff.

In support of the said application, I will use affidavits, copies of which are annexed hereto.

MILTON M. UNGER,
Attorney for Plaintiff.

40

Affidavit of William N. Bayles.

ESSEX COUNTY CIRCUIT COURT.

10	8284 WILLIAM N. BAYLES, <i>vs.</i> MICHAEL EATON, <i>Plaintiff,</i> <i>Defendant.</i>	}	<i>Action</i> <i>at Law.</i> <i>Affidavit.</i>
----	--	---	--

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

WILLIAM N. BAYLES, being duly sworn according to law, on his oath deposes and says:

20 1. I am the plaintiff in the above-entitled cause.

2. On December 21, 1928, Michael Eaton, the defendant, entered into a contract with Edward J. Maier and Euplio De Marco, a copy of which is annexed hereto. Under the terms of this agreement the defendant Eaton agreed to pay \$8,500 in monthly installments of \$150, without interest, beginning February 1, 1929.

30 3. By mesne assignments, this agreement and all the right, title and interest of Euplio De Marco passed to me on June 17, and June 18, 1929.

4. The defendant Michael Eaton has neglected and failed to pay anything to me on account thereof. The entire amount thereof, with interest, is now due and owing to me.

I believe there is no defense to the action.

WILLIAM N. BAYLES.

Affidavit of Milton M. Unger.

Sworn to and subscribed before
me this 4th day of April,
A. D. 1930.

LILLIAN C. HODES,
Notary Public of N. J.

SCHEDULE "A"

10

Same as Schedule "A" attached to complaint
and printed in full on pages 5 to 8.

ESSEX COUNTY CIRCUIT COURT.

8284

WILLIAM N. BAYLES,

Plaintiff,

vs.

MICHAEL EATON,

Defendant.

*Action
at Law.*

Affidavit.

20

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

MILTON M. UNGER, being duly sworn according
to law, on his oath deposes and says:

30

1. On December 6, 1929, I wrote the follow-
ing letter to Michael Eaton, the defendant:

December 6, 1929

Mr. Michael Eaton,
24 South Grove St.,
East Orange, N. J.,

Dear Sir:

This is to advise you that an agreement dated
December 21, 1928, made between E. J. Maier,

40

Affidavit of Milton M. Unger.

Euplio De Marco and you, has passed, by mesne assignments, to William Bayles, whom I represent.

All payments due under said agreement are to be made to him. I will be glad to take the matter up with you at any time.

10

Very truly yours,

MILTON M. UNGER.

2. On December 17th, 1929, I wrote the following:

December 17, 1929

Mr. Michael Eaton,
24 South Grove St.,
East Orange, N. J.,

20

Dear Sir:

I wrote you on December 6th last regarding the monies due from you on the contract made between you and E. J. Maier, dated December 21, 1928. According to the contract installments of \$150. a month have accrued since February 1, 1929. Mr. Bayles instructs me to collect this amount.

Will you please let me hear from you upon receipt of this letter as to what you propose to do in connection therewith.

30

Very truly yours,

MILTON M. UNGER.

U:RS

Affidavit of Milton M. Unger.

3. On December 26, 1929, I wrote the following:

December 26, 1929,

Mr. Michael Eaton,
24 South Grove St.,
East Orange, N. J.,

10

Dear Sir:

It will be necessary for you to let me hear from you at once with respect to the claim of Mr. Bayles, as he instructs me to proceed.

Very truly yours,

MILTON M. UNGER.

4. On January 3, 1930, I wrote as follows:

January 3, 1930

20

Mr. Michael Eaton,
24 South Grove St.,
East Orange, N. J.,

BAYLES vs. EATON. 8284

Dear Sir:

I am instructed by Mr. Bayles to institute suit against you if the installments in arrears on the contract are not paid by Monday, January 6, 1930.

30

Very truly yours,

MILTON M. UNGER.

Affidavit of Milton M. Unger.

5. After January 3, 1930, Mr. Eaton called on me and asked me to give him further time to make some settlement of the matter. He called on me again, a few days later, and asked for more time.

10 6. On none of those occasions did he ever make any mention of the fact that any indebtedness of West Orange Estates, Inc., had been assigned to him, and the date of the alleged assignment is January 17, 1930, three days before the issuance of summons.

MILTON M. UNGER.

Sworn to and subscribed before
me this 12th day of April,
A. D. 1930.

20

LILLIAN C. HODES,
Notary Public of N. J.

Service of the within notice of motion and affidavits is herewith acknowledged this 14th day of April, 1930.

ABRAHAM RUDENSEY,
Attorney for Defendant.

30

40

Affidavit of Edward J. Maier.

ESSEX COUNTY CIRCUIT COURT.

WILLIAM N. BAYLES,

Plaintiff,

vs.

MICHAEL EATON,

Defendant.

*Action
at Law.*

Affidavit.

10

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

EDWARD J. MAIER, being duly sworn according to law, on his oath deposes and says:

I am one of the parties mentioned in an agreement dated December 21, 1928, by the terms of which I and Euplio De Marco sold to Michael Eaton, the defendant, thirty-eight shares of stock of West Orange Estates, Inc.

20

My attention has been called to an answer and counter-claim filed by Michael Eaton in a suit brought by Mr. Bayles against him to recover the amount due, in which Mr. Eaton says that prior to June 17, 1929, I, Edward J. Maier, was indebted to West Orange Estates, Inc., in the sum of \$3,679.56 and that I was obligated to pay these moneys forthwith to West Orange Estates, Inc., and that I appropriated and converted the moneys to my own use. I deny these allegations absolutely.

30

EDWARD J. MAIER.

Sworn to and subscribed before
me this 14th day of May,
A. D. 1930.

RALPH E. LUM,

Master in Chancery of New Jersey.

40

RS. 5/13/30.

NOTICE OF MOTION.

ESSEX COUNTY CIRCUIT COURT.

10	WILLIAM N. BAYLES, <i>vs.</i> MICHAEL EATON, <i>Plaintiff,</i> <i>Defendant.</i>	}	<i>Action</i> <i>at Law.</i> <i>Notice of</i> <i>Motion.</i>
----	--	---	--

To Milton M. Unger, Esq., attorney of plaintiff.

SIR:

20 TAKE NOTICE, that on Friday, April 25, 1930, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, at the Hall of Records, in the City of Newark, New Jersey, I shall apply to the Hon. Nelson Y. Dungan, Judge of the Essex County Circuit Court, for an order permitting the defendant herein to amend his answer and counter-claim heretofore filed herein to allege that the assignment mentioned in paragraph 4 of the said counter-claim was made on January 17, 1929, instead of January 17, 1930, and that upon such

30 motion I will read the affidavit, a copy of which is hereto annexed.

(Granted on argument May 14/30 W. A. S.)

Dated April 19, 1930.

Yours, &c.,

ABRAHAM RUDENSEY,
Attorney of Defendant
and Counter-claimant.

Affidavit of Michael Eaton.

ESSEX COUNTY CIRCUIT COURT.

WILLIAM N. BAYLES,

Plaintiff,

vs.

MICHAEL EATON,

Defendant.

*Action
at Law.*

Affidavit.

10

STATE OF NEW JERSEY, }
COUNTY OF HUDSON. } ss.

MICHAEL EATON, of full age, being duly sworn on his oath deposes and says:

I am the defendant herein. I have read the affidavits of William N. Bayles and Milton M. Unger, annexed to the notice of motion in this matter for summary judgment.

20

I further state that I have a just and meritorious defense to the action herein upon the counter-claim which I have filed based upon the following facts.

That for several months prior to June 17, 1929, Edward J. Maier was indebted to the West Orange Estates, Inc., a corporation in which I hold a controlling interest, in a considerable sum of money which he had collected for the said corporation, being the proceeds of monthly installments due on purchases of lots of land which had theretofore been paid by purchasers from the West Orange Estates, Inc., and which said Edward J. Maier, upon collection thereof from the various purchasers, was obliged to turn over to the West Orange Estates, Inc. The amount of such collections amounts to \$3,679.56. This sum, the said Edward J. Maier appropriated to his

30

40

Affidavit of Michael Eaton.

own use and failed to turn it over to the West Orange Estates, Inc.

10 On January 17, 1929, said West Orange Estates, Inc., assigned to me its claim against the said Edward J. Maier for a valuable consideration and I am now the owner and holder of the said claim against Edward J. Maier.

I stated these facts to my counsel but through inadvertence and mistake, I am informed and verily believe that the date of the assignment as aforesaid, which was set out in my answer and counter-claim, is January 17, 1930. This should be January 17, 1929.

20 It is true that I have received the several letters which the witness Milton M. Unger states were sent to me and it is also true that I visited Mr. Unger's office on certain occasions. When I called on Mr. Unger I advised him that I expected Mr. Edward J. Maier to make payment of the amount which he owed me and that since the original contract, which is the basis of the suit, is made with Mr. Maier as one of the parties, I would attempt to have Mr. Maier make settlement of the amount which he owed to me by virtue of the assignment from the West Orange Estates, Inc., and, if he made such settlement, I would arrange to have such payments apply in
30 discharge of the contract obligations which are the basis of this suit. I at no time stated to Mr. Unger that I personally would make any settlement for the amount sued for unless the claim which I held against Maier was first liquidated.

I further state that the amount so due me from the said Edward J. Maier to the West Orange Estates, Inc., which was thereafter assigned to me
40 as aforesaid, was not known at the time that the

Affidavit of Michael Eaton.

contract annexed to the complaint herein, was made. This was not ascertained until a few weeks later when a new accountant was engaged to examine the books on account of the company and called this to my attention.

I further state that my claim upon the said counter-claim, which has been filed herein, is just and meritorious and that the said answer and counter-claim herein are not interposed for delay. 10

MICHAEL EATON.

Sworn and subscribed to before
me this 18th day of April,
1930.

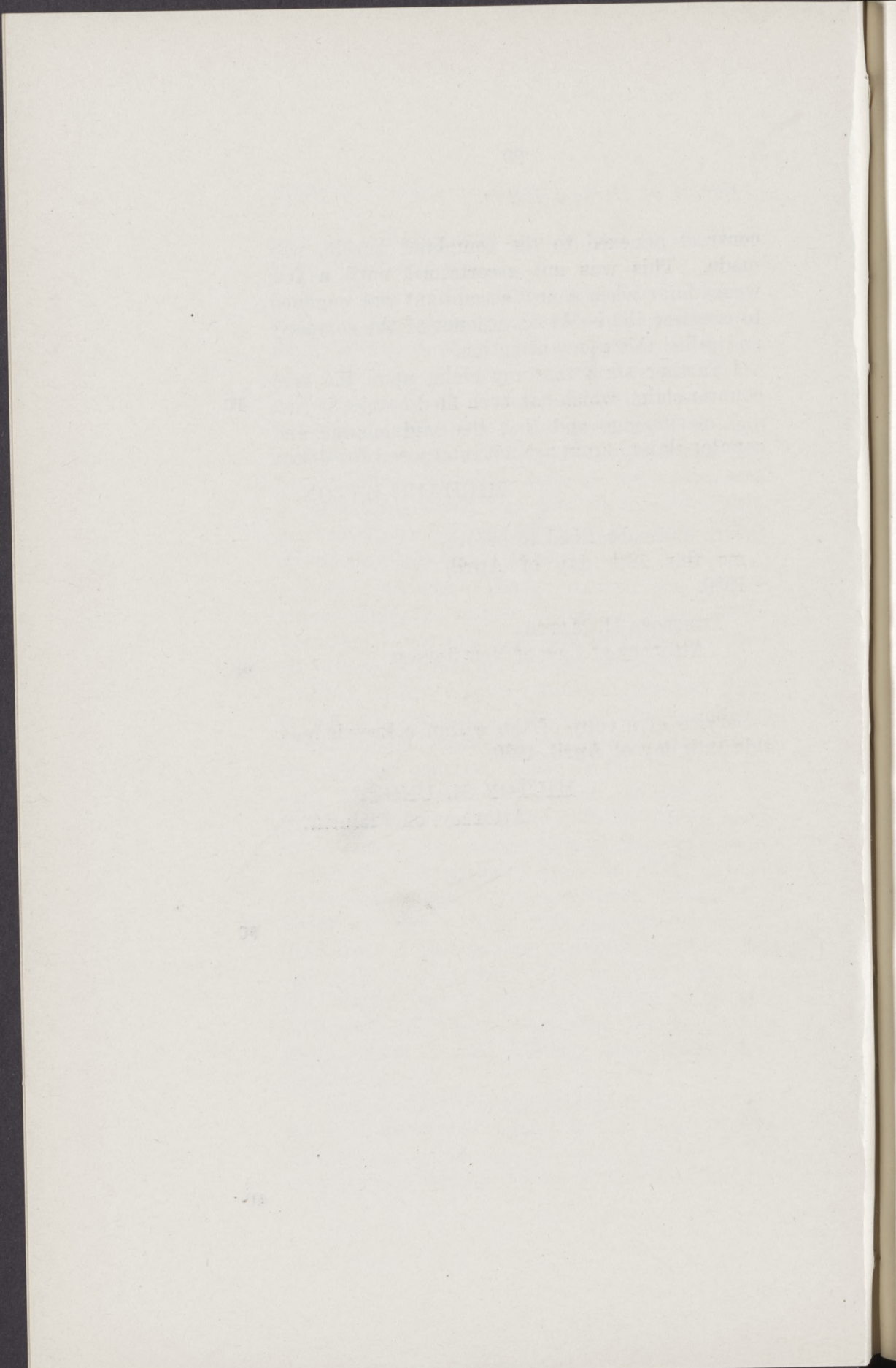
THEODORE H. MATTIL,
Attorney at Law of New Jersey. 20

Service of a copy of the within acknowledged
this 19th day of April, 1930.

MILTON M. UNGER,
Attorney of Plaintiff.

30

40



INDEX

	PAGE
Notice of Appeal and Grounds of Appeal..	1
Summons	3
Complaint	4
Schedule "A"	5
Affidavit of Merits.....	10
Answer and Counter-claim.....	11
Notice	13
Affidavit of William N. Bayles.....	14
Affidavit of Michael Eaton.....	16
Order	18
Judgment	20
Clerk's Certificate	21

INDEX

1	Introduction
2	Chapter I
3	Chapter II
4	Chapter III
5	Chapter IV
6	Chapter V
7	Chapter VI
8	Chapter VII
9	Chapter VIII
10	Chapter IX
11	Chapter X
12	Chapter XI
13	Chapter XII
14	Chapter XIII
15	Chapter XIV
16	Chapter XV
17	Chapter XVI
18	Chapter XVII
19	Chapter XVIII
20	Chapter XIX
21	Chapter XX

NOTICE OF APPEAL AND GROUNDS
OF APPEAL.

Filed August 20, 1930.

Essex County Circuit Court

10

WILLIAM N. BAYLES,
Plaintiff-Appellee,
vs.

MICHAEL EATON,
Defendant-Appellant.

Action
at Law.
On Appeal
from the
Essex
County
Circuit Court,
to the New
Jersey Court
of Errors
and Appeals.
Notice of
Appeal and
Grounds
of Appeal.

20

To Milton M. Unger, Esq., attorney of plaintiff-
appellee.

30

SIR:

TAKE NOTICE that the defendant herein, Michael Eaton, does hereby appeal from the whole of the judgment entered in the Essex County Circuit Court in the above-entitled cause on July 31, 1930, and does hereby set forth the following as his grounds of appeal:

1. That the said Essex County Circuit Court erred in entering a judgment in favor of the plaintiff-appellee against the defendant-appellant.

40

Notice of Appeal and Grounds of Appeal.

2. That the said Essex County Circuit Court erred in striking out the answer of the defendant-appellant filed herein.

10 3. That the said Essex County Circuit Court erred in ruling that defendant-appellant herein was not entitled to trial by a jury upon the issues raised in the answer duly filed herein.

Dated, August 19, 1930.

ABRAHAM RUDENSEY,
Attorney of Defendant-Appellant.

Service of a copy of the within notice is hereby acknowledged this 19th day of August, 1930.

20 MILTON M. UNGER,
Attorney of Plaintiff-Appellee.

30

40

SUMMONS.

The State of New Jersey to Michael
Eaton:

(L. S.) YOU ARE SUMMONED to answer the annexed complaint of William N. Bayles, in an action at law in the Essex County Circuit Court. 10

AND TAKE NOTICE, that unless you file your answer to said complaint with the Clerk of the said Essex County Circuit Court, at Newark, within twenty days, after the service upon you of this writ, and the annexed complaint, the plaintiff may proceed in the suit, and judgment may be entered against you. (And see notice endorsed hereon.)

WITNESS, WILLIAM A. SMITH, a Judge of said Court, at Newark, this 18th day of June, Nineteen Hundred and Thirty. 20

JOHN H. SCOTT,
Clerk.

MILTON M. UNGER,
Attorney.

30

40

COMPLAINT.

ESSEX COUNTY CIRCUIT COURT.

10	WILLIAM N. BAYLES, <i>vs.</i> MICHAEL EATON,	Plaintiff, Defendant.	} Action at Law. Complaint.
----	---	----------------------------------	--------------------------------------

The plaintiff, residing in the Town of West Orange, in the County of Essex and State of New Jersey, says that:

1. On December 21, 1928, the defendant
 20 Michael Eaton, entered into an agreement in writing with Edward J. Maier and Euplio DeMarco, a copy of which is annexed hereto marked Schedule "A."

2. On June 17, 1929, for a valuable consideration, the said Duplio DeMarco assigned his interest therein to Edward J. Maier, and on June 18, 1929, the said Edward J. Maier, for a valuable consideration, assigned his interest therein
 30 to plaintiff. Thereupon plaintiff became entitled to all the right, title and interest of the said Euplio DeMarco and the said Edward J. Maier in and to said agreement.

3. Under and by virtue of the terms of said agreement, the said Michael Eaton agreed to pay \$8,500 in monthly installments of \$150 without interest, beginning February 1, 1929.

4. The said Michael Eaton has neglected and refused to pay the same, or any part thereof,
 40 although plaintiff has duly demanded the same.

Complaint—Schedule “A.”

There is now due and owing from said Michael Eaton to the plaintiff, seventeen installments of \$150 each, which became due commencing with February 1, 1929. No part thereof has been paid.

5. On or about January 20, 1930, the plaintiff commenced a suit in the Essex County Circuit Court, to recover twelve of said installments which had then matured, and judgment has been entered in said court in favor of the plaintiff for the amount claimed in said suit. Since the institution of said suit five installments of \$150 each have accrued and there is now due and owing from the defendant to the plaintiff said additional five installments of \$150 each, amounting to \$750, no part of which has been paid. 10

Judgment will be claimed for the sum of \$750, together with interest and costs of suit to be taxed. 20

MILTON M. UNGER,
Attorney of Plaintiff.

RS 6/17/30

SCHEDULE “A.”

MEMORANDUM OF AGREEMENT, Made this 21st day of December, One Thousand Nine Hundred and Twenty-Eight, By and Between EDWARD J. MAIER and EUPLIO DE MARCO, both of the City of Newark, Essex County, New Jersey, party of the first part, and MICHAEL EATON of the City of Newark, Essex County, New Jersey, party of the second part, 30

WHEREAS, Edward J. Maier is now the holder and owner of Certificate Number 7 for twenty-six 40

Complaint—Schedule "A."

shares of the capital stock of West Orange Estates, Inc., a New Jersey corporation, And

WHEREAS, Euplio De Marco is the owner of twelve (12) shares of the capital stock in said Company evidenced by Certificate Number 5, and

10 WHEREAS, Michael Eaton, Party of the second part, is desirous of purchasing the aforesaid shares owned by said Maier and De Marco respectively, Now THEREFORE, THIS AGREEMENT WITNESSETH:

20 The said E. J. Maier and Euplio De Marco hereby agree to and with Michael Eaton to sell the aforesaid thirty-eight shares of stock for the sum of Fifteen Thousand Two Hundred Dollars, and the said Michael Eaton hereby agrees to purchase the aforesaid thirty-eight shares and to pay therefor the sum of Fifteen Thousand Two Hundred Dollars in manner following:

 \$5200. to be paid by the said Michael Eaton to E. J. Maier and Euplio De Marco upon the transfer and delivery of the said shares of stock to said Eaton.

30 \$1500. being the amount of indebtedness due by E. J. Maier Corporation to West Orange Estates, Inc., which indebtedness said Michael Eaton hereby assumes and agrees to pay to West Orange Estates, Inc., as part consideration hereof. \$8500. to be paid by the said Eaton in monthly installments of \$150. without interest beginning February 1, 1929, until said balance is fully paid and satisfied. The proceeds of said sale of stock shall be pro-rated between said Maier and De Marco.

 AND IT IS FURTHER AGREED, that the voting trust agreement heretofore existing between said Maier and De Marco is hereby terminated.

Complaint—Schedule "A."

AND IT IS FURTHER AGREED, by and between the parties hereto that the transfer and the delivery of the aforesaid shares of stock by said Maier and De Marco to Eaton shall be consummated at the office of Abraham Rudensey, #24 Commerce St., Newark, N. J., on Monday, December 24, 1928, at 2:30 P. M.

10

AND IT IS FURTHER AGREED, that upon the transfer and delivery of the aforesaid shares of stock to said Eaton, that thereupon the said Euplio De Marco will resign as Secretary of said Company and Director; said resignation to take effect forthwith.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals in triplicate, the day and year first above written.

EDWARD J. MAIER (L. S.)

20

EUPLIO DE MARCO (L. S.)

MICHAEL EATON (L. S.)

Witnessed by:—

Abraham Rudensey,

June 17, 1929

For value received I hereby sell, assign, transfer and set over unto Edward J. Maier, all my right, title and interest of, in and to the within agreement, and of, in and to all money due and to fall due thereunder.

30

EUPLIO DE MARCO (L. S.)

Witness:—

Chester W. Fairlie,

40

Complaint—Schedule "A."

June 18, 1929

For value received I hereby sell, assign, transfer and set over until William Baules all my right, title and interest of in and to the within agreement, and of, in and to all money due and to fall due thereunder.

10

EDWARD J. MAIER (L. S.)

Witness:—

Chester W. Fairlie,

STATE OF NEW JERSEY, }
COUNTY OF ESSEK. } ss.

BE IT REMEMBERED, that on this 21st day of December, One Thousand Nine Hundred and Twenty-eight, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared EDWARD J. MAIER, EUPLIO DE MARCO and MICHAEL EATON, who, I am satisfied, are the persons mentioned in the within agreement and to whom I first made known the contents thereof and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed.

30

ABRAHAM RUDENSEY,
Master in Chancery of New Jersey.

Complaint.

Notice to the within-named defendant:

In case the within summons and complaint are served upon you personally, then take notice that if you intend to make a defense to said action, you must file an affidavit of merits within TEN DAYS from the date of service thereof upon you, and must file your answer within TWENTY DAYS from the date of such service, and in default of the filing thereof judgment will be entered against you. Lawful service upon a corporation is deemed personal service for the purpose of the rule under which this notice is given. (P. L. 1912, p. 394, Rule 56.)

MILTON M. UNGER,
Attorney of Plaintiff.

10

20

Service of the within Summons and Complaint is hereby acknowledged this 18th day of June, 1930.

ABRAHAM RUDENSEY,
Attorney of Defendant.

30

40

AFFIDAVIT OF MERITS.

Filed June 20, 1930.

ESSEX COUNTY CIRCUIT COURT.

10	WILLIAM N. BAYLES, vs. MICHAEL EATON,	<i>Plaintiff,</i> <i>Defendant.</i>	} <i>Action</i> <i>at Law.</i> <i>Affidavit</i> <i>of Merits.</i>
----	--	--	--

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

20 MICHAEL EATON, of full age, being duly sworn according to law upon his oath, deposes and says that he is the defendant in the above-entitled action, and he believes that the defendant has a just and legal defense to the said action on the merits of the case.

MICHAEL EATON.

Subscribed and sworn to before me
 this 19th day of June, 1930.

30 CHARLES F. SHELL,
 Notary Public of N. J.

ANSWER AND COUNTER-CLAIM.

ESSEX COUNTY CIRCUIT COURT.

WILLIAM N. BAYLES,	} <i>Plaintiff,</i>	<i>Action at Law.</i>	10
<i>vs.</i>			
MICHAEL EATON,	} <i>Defendant.</i>	<i>Answer and Counter- claim.</i>	

Defendant, Michael Eaton, residing in the City of Newark, County of Essex and State of New Jersey, answering the complaint herein, says:

1. He denies each and every allegation contained in the complaint. 20

By way of counter-claim against the plaintiff herein, this defendant is not seeking an affirmative judgment against plaintiff, except in so far as it affects plaintiff's claim, this defendant says:

1. Prior to June 17, 1929 Edward J. Maier, acting for and on behalf of the West Orange Estates, Inc., as agent of the said plaintiff West Orange Estates, Inc., collected certain moneys for and on behalf of the said West Orange Estates, Inc. in the sum of \$3,679.56. 30

2. That the said Edward J. Maier was obligated to pay the said moneys so collected forthwith to the West Orange Estates, Inc.

3. That the said Edward J. Maier notwithstanding his obligation to pay the said moneys as aforesaid, appropriated and converted the said moneys aforesaid to his own use. 40

Answer and Counter-claim.

4. That the West Orange Estates, Inc., on January 7, 1929 duly assigned said claim against the said Edward J. Maier, for moneys due and to grow due to the said West Orange Estates, Inc., to the defendant herein.

- 10 5. Defendant demands judgment against the plaintiff herein on this counter-claim, to the extent that it sets off the claim of the plaintiff herein.

ABRAHAM RUDENSEY,
Attorney of Defendant
and Counter-claimant.

20

30

40

NOTICE.

Filed July 14, 1930.

ESSEX COUNTY CIRCUIT COURT.

Suit No. 2.

10

8543

WILLIAM N. BAYLES,

*Plaintiff,**vs.**Notice.*

MICHAEL EATON,

Defendant.

SIR:

20

PLEASE TAKE NOTICE, that on Monday, the 21st day of July, 1930, at ten o'clock in the forenoon (Daylight Savings Time), or as soon thereafter as counsel can be heard, I will apply to the Honorable William A. Smith, Circuit Court Judge, for an order striking out the answer and counter-claim in the above-entitled cause and entering judgment in favor of the plaintiff and against the defendant. Said application will be based upon the following grounds:

30

1. That the answer and counter-claim are sham, and do not set forth a defense or state a cause of action.

In support of said application, I will use affidavits, copies of which are annexed hereto.

Respectfully yours,

MILTON M. UNGER,
Attorney of Plaintiff.

RS 6/30/30

40

Affidavit of William N. Bayles.

ESSEX COUNTY CIRCUIT COURT.

Suit No. 2.

10	WILLIAM N. BAYLES, vs. MICHAEL EATON, <i>Plaintiff,</i> <i>Defendant.</i>	}	<i>Action</i> <i>at Law.</i> <i>Affidavit.</i>
----	--	---	--

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

WILLIAM N. BAYLES, being duly sworn according to law, on his oath deposes and says:

- 20 1. I am the plaintiff in the above-entitled cause.
2. On December 21, 1928, Michael Eaton, the defendant, entered into a contract with Edward J. Maier and Euplio De Marco, a copy of which is annexed to the complaint herein.
3. By mesne assignments, this agreement and all the right, title and interest of Euplio De Marco passed to me on June 17 and June 18, 1929.
- 30 4. The defendant Michael Eaton has neglected and failed to pay anything to me on account thereof. The entire amount thereof, with interest, is now due and owing to me.
5. On June 20, 1930, I commenced a suit in the Essex County Circuit Court to recover twelve of said installments and judgment was entered in said court in my favor for that amount. In said action the Court struck out the answer and counter-claim as being sham.
- 40

Affidavit of William N. Bayles.

I believe there is no defense to the action.

WILLIAM N. BAYLES.

Sworn to and subscribed before me
this 10th day of July, 1930.

LILLIAN C. HODES,
Notary Public of New Jersey.

10

RS

Service of the within notice is hereby acknowl-
edged this 11th day of July, 1930.

ABRAHAM RUDENSEY,
Atty of Deft.

20

80

40

AFFIDAVIT OF MICHAEL EATON.

Filed July 21, 1930.

ESSEX COUNTY CIRCUIT COURT.

10 WILLIAM N. BAYLES,

*Plaintiff,**vs.*

MICHAEL EATON,

*Defendant.**Action**at Law.**Affidavit.*STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.20 MICHAEL EATON, of full age, being duly sworn,
on his oath deposes and says:

I am the defendant herein. I have read the affidavit of William N. Bayles annexed to the notice of motion in this matter for summary judgment.

I further state that I have a just and meritorious defense to the action herein upon the counter-claim which I have filed based upon the following facts.

30 That for several months prior to June 17, 1929, Edward J. Maier was indebted to the West Orange Estates, Inc., a corporation in which I hold a controlling interest, in a considerable sum of money which he had collected for the said corporation, being the proceeds of monthly installments due on purchases of lots of land which had theretofore been paid by purchasers from the West Orange Estates, Inc., and which said Edward J. Maier, upon collection thereof from the various purchasers, was obliged to turn over

40

Affidavit of Michael Eaton.

to the West Orange Estates, Inc. The amount of such collections amounts to \$3,679.56. This sum, the said Edward J. Maier appropriated to his own use and failed to turn it over to the West Orange Estates, Inc.

On January 17, 1929 said West Orange Estates, Inc., assigned to me its claim against the said Edward J. Maier for a valuable consideration and I am now the owner and holder of the said claim against Edward J. Maier. 10

I further state that the amount so due me from the said Edward J. Maier to the West Orange Estates, Inc., which was thereafter assigned to me as aforesaid, was not known at the time that the contract annexed to the complaint herein, was made. This was not ascertained until a few weeks later when a new accountant was engaged to examine the books on account of the company and called this to my attention. 20

I further state that my claim upon the said counter-claim, which has been filed herein, is just and meritorious and that the said answer and counter-claim herein are not interposed for delay.

MICHAEL EATON.

Sworn and subscribed to before me
this 17th day of July, 193-. 30

EVERETT B. SMITH,
Attorney at Law of New Jersey.

ORDER.

Filed July 31, 1930.

ESSEX COUNTY CIRCUIT COURT.

10 8543

WILLIAM M. BAYLES,

*Plaintiff,**vs.*

MICHAEL EATON,

*Defendant.**Action
at Law.**Order.*

20 Notice having been given by the plaintiff of an application to strike out the answer and counter-claim filed by the defendant, and to enter judgment in favor of the plaintiff, and the matter coming on to be heard before the Court, pursuant to said notice, in the presence of Milton M. Unger, attorney of plaintiff, and Abraham Rundeney, attorney for the defendant, and the Court having examined the pleadings, and read the affidavits submitted by the respective parties, and heard and considered the matter, and being of the opinion that the answer and the counter-claim are sham and do not set forth a defense or present a cause of action as against the plaintiff, and that the same should be stricken out, and it further appearing from the affidavit of the plaintiff that at the time when suit was instituted herein, there was due and owing by the defendant to the plaintiff five installments of \$150 each, amounting to \$750.

30 It is on this 29th day of July, 1930, on motion of Milton M. Unger, attorney of the plaintiff,
40 ORDERED, that the answer and counter-claim be

Order.

and they are hereby stricken out, and it is further

ORDERED, that judgment be entered in favor of the plaintiff for the amount now due, \$750, with interest amounting to \$11.25, amounting in all to the sum of \$761.25, besides costs of suit to be taxed.

10

WM. A. SMITH,
Circuit Court Judge.

RS 7/23/30

20

30

40

JUDGMENT.

ESSEX COUNTY CIRCUIT COURT.

53630	10 WILLIAM M. BAYLES, <i>Plaintiff,</i> <i>vs.</i> MICHAEL EATON, <i>Defendant.</i>	}	<i>Action at Law. On Order Striking Out Answer and Counter- claim.</i>
-------	---	---	---

Milton M. Unger, attorney of plaintiff.

Judgment entered July 31, 1930.

20	Damage\$761.25 Costs 59.35 Total.....\$820.60
----	--

30 Judgment on order striking out answer and counter-claim in the above-entitled action was rendered on the thirty-first day of July, A. D. nineteen hundred and thirty, in favor of the plaintiff William M. Bayles and against the defendant Michael Eaton for the sum of seven hundred sixty-one dollars and twenty-five cents (\$761.25) damage and fifty-nine dollars and thirty-five cents costs of suit.

Judgment signed and entered July 31, 1930.

WM. S. GUMMERE,
C. J.

Book 111, page 159 of Circuit Court Judgments.

Clerk's Certificate.

ESSEX COUNTY CLERK'S OFFICE.

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

I, JOHN H. SCOTT, Clerk of the Circuit Court,
 in and for the County of Essex in the State of
 New Jersey,

10

DO HEREBY CERTIFY that the foregoing is a
 true and correct copy of the pleadings in the case
 of William M. Bayles, plaintiff, v. Michael Eaton,
 defendant, together with the Judgment Record,
 signed and entered July 31, 1930, in Book 111,
 page 159 of Circuit Court Judgments.

And the same is taken from and compared with
 original copies of records and as the same now
 remains on the files of said court.

20

IN TESTIMONY WHEREOF, I have hereunto set
 my hand and affixed the official seal of said Court
 at Newark, N. J., this thirteenth day of Septem-
 ber, A. D. 1930.

JOHN H. SCOTT,
 Clerk.

(SEAL)

30

40

STATE OF NEW YORK

IN SENATE
January 10, 1901.

REPORT
OF THE
COMMISSIONER OF THE LAND OFFICE
IN RESPONSE TO A RESOLUTION
PASSED BY THE SENATE
MAY 10, 1899.

ALBANY:

83 FEB. 1. 1931

84 FEB. T. 1931

1,880

New Jersey Court of Errors and Appeals

WILLIAM N. BAYLES,
Plaintiff-Respondent,

v.

MICHAEL EATON,
Defendant-Appellant.

Action at Law.
On Appeal from
Essex County
Circuit Court
(Two Cases).

REPLY BRIEF OF DEFENDANT-APPELLANT.

I.

Plaintiff-respondent's criticism of defendant-appellant's affidavits is specious and misleading.

On page 6 of plaintiff-respondent's brief it is stated that defendant-respondent has failed to show any connection with the West Orange Estates, Inc. This is not so because the affiant, Michael Eaton, the defendant-appellant herein, specifically sets forth in his affidavits (p. 27 of State of Case No. 1; p. 16 of State of Case No. 2), that, "Edward J. Maier was indebted to the West Orange Estates, Inc., *a corporation in which I hold a controlling interest,*" etc. It is difficult to imagine how the affiant could possibly show a closer connection than this.

Plaintiff-respondent further states that the affiant had no personal knowledge, hence he was not qualified to swear to the facts. In defendant-appellant's affidavit (p. 29 of State of Case No. 1 and p. 17 of State of Case No. 2) he says that when

his accountant audited the books he ascertained the exact amount due and owing to his corporation by Edward J. Maier. Does plaintiff-respondent take the position that the affiant must audit the books personally to qualify? It is unwarranted to call this kind of testimony hearsay.

In answer to plaintiff-respondent's objection that the affidavit is insufficient in that it fails to set forth the particulars of the claim against him, we wish to point out that the defendant-appellant is not required to expose his entire defense in his affidavit which is filed simply to prevent his counterclaim from being stricken as sham. If the practice were as plaintiff-respondent would have us believe it to be, counsel would make a motion to strike in every case in order that opposing counsel be compelled to expose his entire case in his affidavits, thus leaving him hopelessly vulnerable. This abuse should be guarded against and should not be allowed to creep into our practice in this insidious fashion.

II.

Plaintiff-respondent's contention that the claim which is the basis of defendant-appellant's counterclaim is not assignable is without merit.

The claim which forms the basis for defendant-appellant's counterclaim sounds in tort and contract. A plethora of authority may be found in this State to support this proposition, for example the cases of

Mee v. Montclair, 83 N. J. Law 274 (reversed on other grounds, 84 N. J. Law 400);

Bocchino v. Cook, 67 N. J. Law 467.

And in addition thereto the old case of

Sergeant & Harris v. Stryker, 16 N. J. Law
464,

wherein Chief Justice HORNBLOWER cites numerous English authorities bearing out the principle that an action for money had and received will lie in situations not unlike that in the case at bar.

The above cases also lay down the principle that in these cases the plaintiff may waive the tort and sue in contract. We respectfully submit that the tort was waived in order to give legal effect to the assignment. It is sound policy to construe the acts and intentions of the parties in such a way as to give them legal vitality and force.

The glaring fallacy in plaintiff-respondent's objection lies in the fact that he fails to distinguish between claims which are tortious *simpliciter*, and claims comparable to the one herein involved. The two cases cited by him bear us out perfectly because in both of those cases we have a tort *simpliciter*. We are perfectly willing to admit that under our law such claims are non-assignable, however, we will demonstrate that the claim *sub judice* is assignable.

First, the assignment covered an implied promise in law, by the defaulting agent, Edward J. Maier, in favor of the West Orange Estates, Inc. Our Court of Errors and Appeals has squarely decided that such a claim is assignable, see

Van Pelt v. Schauble, 68 N. J. Law 638, at
640.

Second, the claim herein involved is not a tort *simpliciter*, hence it does not fall within the category of non-assignable tort claims. Lest we be accused of "splitting hairs" we respectfully submit by way of analogy the case of

Wolff v. Lozier, 68 N. J. Law 103,

wherein the Court drew a sharp distinction between torts *simpliciter* as such, and torts arising *ex contractu*, holding the husband liable for his wife's torts of the former type, but not liable for those of the latter type. This case demonstrates the propriety and validity of our distinction, *supra*. As a matter of fact, a still nicer distinction was drawn by our Court of Errors and Appeals, in the case of

Ochs v. Public Service Ry. Co., 81 N. J. Law
661,

wherein it was said:

"It" (the Practice Act) "has made a claim for injury to property assignable, but declined to do so as to claims for personal injuries * * *."

A fortiori, then, the claim in the case at bar is assignable. It manifestly is not a claim for injuries to the person, and it must be apparent that it approaches a contract claim considerably more than does a bare injury to property. Hence there can be no legal objection to its assignability.

In conclusion, we respectfully cite the opinion of Justice SWAYZE, rendered in behalf of this Court in the case of

Weir v. Allen, 89 N. J. Law 597,

in which he points out with great clarity and forcefulness that, under the Practice Act of 1912, defects in form of pleading matter in recoupment or set-off, must be swept aside.

Respectfully submitted,

ABRAHAM RUDENSEY,
Attorney for Defendant-Appellant.

BENJAMIN GROSS,
Of Counsel.

82 84 FEB. T. 1931

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

New Jersey Court of Errors and Appeals

WILLIAM N. BAYLES,
Plaintiff-Respondent,

vs.

MICHAEL EATON,
Defendant-Appellant.

*Action
at Law.*

*On Appeal
from Essex
County
Circuit
Court.*

(Two Cases.)

BRIEF OF PLAINTIFF-RESPONDENT.

History of the Cause.

This brief embraces the argument of the respondent in two appeals from judgments entered in the Essex County Circuit Court in his favor and against the appellant.

Statement of Facts.

The respondent sued on a written contract to recover stated installment payments. The appellant filed an answer and counter-claim. The answer denied the allegations of the complaint. The counter-claim set forth that the plaintiff's assignor had misappropriated certain monies collected on behalf of a corporation and that the claim and rights of the latter was assigned to the appellant, upon which he demanded judgment against the respondent.

Respondent moved to strike out the answer and counterclaim upon the grounds that it was sham or frivolous, and that it failed to set forth a defense or state a cause of action against him.

The answer was accordingly struck out after the court considered the affidavits submitted by

both parties, the court finding the pleading to be sham and further, to be insufficient to set forth a defense or present a cause of action. Judgment was entered for \$1890.00 and costs. This was the first action brought, and may for convenience be called SUIT #1.

The second action, SUIT #2, was brought upon the same contract to recover additional installments which had accrued at the time it was instituted. The complaint in the last mentioned action was substantially the same as that in the first. The answer and counterclaim were likewise similar, except that in the counterclaim the following statement precedes the allegations proper:

“By way of counterclaim against the plaintiff herein, this defendant is not seeking an affirmative judgment against plaintiff, except in so far as it affects plaintiff's claim, this defendant says:”

The pleading then proceeds to set forth a counterclaim similar to the one in the SUIT #1 for \$3,679.56. Judgment was demanded on the counterclaim to the extent that it might set off the respondent's claim.

This pleading was struck upon a notice of motion supported by affidavits, the grounds of the application being that the answer and counterclaim were sham and that they failed to set forth a defense or state a cause of action against respondent. The order of the court striking the pleading recites that it is sham and that it does not set forth a defense or present a cause of action. Judgment was entered for \$761.21 together with costs.

The grounds urged upon each appeal are the same. The brief of the appellant discusses

merely the action of the lower court in striking the pleadings as sham. The states of the case indicates, in each case, that the action of the trial court was predicated upon the additional ground that the pleading lacked sufficiency in law, aside from its deficiency in facts supportable by affidavits or other proofs.

Two points will be made in this brief:

POINT ONE: The lower court committed no error in striking out the answers and counter-claims as sham.

POINT TWO: The lower court committed no error in striking out the answers and counter-claims as insufficient to set forth a defense or present a cause of action.

POINT ONE.

The lower court committed no error in striking out the answers and counter-claims as insufficient to set forth a defense or present a cause of action.

The motion to strike each pleading as sham was based upon the provisions enacted for that purpose in the Practice Act and Rules of the Supreme Court. Rule 80 is in the following language:

“When an answer is filed in an action brought to recover a debt or liquidated demand arising—

(a) Upon contract express or implied, sealed or not sealed; or,

(b) Upon a judgment for a stated sum; or,

(c) Upon a statute;

the answer may be struck out and judgment final may be entered upon motion and affidavit as hereinafter provided, unless the

defendant by affidavit, or other proofs shall show such facts as may be deemed, by the judge hearing the motion, sufficient to entitle him to defend."

In determining whether a defendant has presented proofs entitling him to defend, this court in its decisions has furnished certain tests and measures to be used in the application of this rule which, of course, the trial judge was bound to respect.

In *Waring v. Jobs*, 138 Atl. 889, (not yet officially reported) it was said:

"On motion to strike out an answer the question is not whether the facts alleged are sufficient to constitute an answer to the complaint, but whether, taken as a whole, the pleading and proofs state facts sufficient to constitute a defense to the action. In the present case the Supreme Court thought not, and we concur."

It is the right and duty of the lower court to look to the whole case before it in order to determine whether there be, not merely a formally sufficient answer, but a good defense to the cause of action.

In the case of *Eisele & King v. Raphael*, 90 N. J. L. 219, Justice Bergen speaking for this court said:

"Reading the rules, to which the statute is subject and the statute together, a plaintiff will be entitled to a summary judgment upon presenting an affidavit complying with rule 81, which should set out fully the facts upon which the cause of action is based, unless the affidavit or other proof shall show facts deemed by the judge hearing the motion sufficient to entitle him to defend. This confers upon the judge the power to determine the sufficiency of the facts set up by the defendant, and his conclusion that

they are not sufficient should not be set aside unless the sufficiency clearly appears."

Clearly, latitude is accorded to the lower court to aid it in arriving at a conclusion as to the sufficiency of the answer and proofs to state a defense. The extensiveness of this power conferred upon the judge hearing the motion to strike is evident from the disposition of this court to adopt the action of the lower court, unless it is made to *clearly* appear that there was made out a sufficient defense. As stated by Justice Bergen in the same case,

"The order of the judge in this case declares that the answer filed is frivolous and sham, and that the defendant failed to show such facts as he deemed sufficient to entitle him to defend. The finding of the judge must be assumed to be true until the contrary appears, and, as it does not appear in this case, the finding must be taken as correct."

The affidavits submitted on behalf of the appellant do not support the plain denials which constitute the answer proper in each case. The affidavits do not deny a single allegation of the complaint. They refer merely to the alleged misappropriation by Edward J. Maier of sums of money, and the assignment of the alleged claim arising out of said defalcation. They are clearly insufficient therefore to meet the allegations in the affidavits submitted by the respondent.

Nor do they support in an adequate manner, the counterclaims. They recite that the respondent's assignor collected for West Orange Estates, Inc., \$3,679.56 representing monthly installments due on purchases of lots of land. The affidavits each proceed to state that the respondent's assignor was obliged to turn over these monies to West Orange Estates, Inc. Then follows the statement that he, (the assignor)

appropriated to his own use these funds. In short, the affidavits reiterate in each case of the allegations of the counterclaim.

These allegations are made by the assignee of the claim arising out of the alleged misappropriation. They are not accompanied by any affidavit made by one having personal knowledge of the facts. There is nothing in the affidavit indicating that the respondent was connected with West Orange Estates, Inc., so that his statement would be made from personal knowledge and not hearsay. There was nothing to indicate how the sum of \$3,679.56 is arrived at. There is nothing to indicate that the sums were, in fact, collected by the respondent's assignor, beyond the mere allegation of one who does not show his connection with the assignor or West Orange Estates, Inc. There is nothing to indicate the facts which give rise to the alleged obligation of Mr. Maier, the assignor, to pay over the monies to West Orange Estates, Inc. The appellant failed to perform the most important obligation imposed upon him in resisting the motions, the obligation to present in the form of affidavits or other proofs, *facts*.

In *Beugless v. Thomas*, 1 N. J. Misc. 581, an application was made to set aside an order to hold to bail. The observations of Justice Katzenbach, who spoke for the Supreme Court, are pertinent and applicable to the present proceedings. He said (p. 582):

"The affidavit upon which the order was made is defective. It does not state that the affiant of her own knowledge is possessed of the facts therein stated. From the wording of the affidavit it would appear that the matters referred to therein was information imparted to the affiant by others. The affidavit must contain proof of the facts set

forth. By proof is meant competent and legal evidence, 'testimony which conforms to the fundamental rules.' *Hufty v. Wilson*, 78 N. J. L. 241. This exclude hearsay."

In 2 C. J. 354, it is said:

"Where statements are made positively they are generally presumed to be based upon the affiant's personal knowledge, and it has been held, that the affidavit will be presumed to have been made on his personal knowledge if the facts are of such a character that he may have known them, and it does not appear that he did not; but where it appears that affiant could have had no personal knowledge as to material allegations the affidavit is defective."

Now it is evident that the alleged defalcation took place before the appellant secured control of West Orange Estates, Inc. In his affidavit the appellant says that he knew nothing about the alleged misappropriation until he secured a new accountant to go over the books. There is nothing to indicate that he has personal knowledge of the facts he states in his affidavit respecting the nature and extent of the alleged defalcation. It is quite patent, on the contrary, that he could have no personal knowledge. The appellant recognized this fact when he referred to the alleged disclosures of the accountant as the source of his knowledge.

It is therefore respectfully submitted that the answer and counterclaim in each case were sham and properly stricken out.

POINT TWO.

The lower court committed no error in striking out the answers and counter-claims as insufficient to set forth a defense or present a cause of action.

In Suit #2 the counterclaim, as has already been stated, was submitted only for the purpose of defeating the plaintiff's claim and no judgment was prayed for other than one which would have the effect of off-setting the plaintiff's claim. As a counterclaim, it cannot, under the circumstances, stand. It recites an indebtedness of \$3,679.56. Assuming that in the court below the plaintiff should have been non-suited, the counterclaim would fall, by force of the allegations contained within it.

But its formal deficiency is not its only objectionable feature. It can be said of this, and also the counterclaim in Suit #1 which is formally sufficient, that no cause of action is stated cognizable before the court as a counterclaim to the respondent's suits. The counterclaims set forth a cause of action in tort, namely, the wrongful misappropriation of money. The suit is not for money had and received so that it can be said that the tort was waived. The gravamen of the claim is the alleged defalcation of Edward J. Maier.

Section 19 of the Practice Act of 1903, (3 C. S. 4056) makes only choses in action on contract assignable and it has no application to causes of action based upon tort. Section 20 of the same Act provides that an assignee for a valuable consideration of any choses in action *if the assignor be dead*, may sue and recover in his own name. The assignor here, however, is not shown to be dead by allegation or proof.

The foregoing section was considered in *Gaskill v. Barbour*, 63 N. J. L. 530. There the declaration was in trover, and alleged that chattels were mortgaged to a trustee in possession who lost them and that the defendant found them. It was further alleged that the Court of Chancery discharged such trustee and appointed the plaintiff instead and directed an assignment to him of the mortgage which was accordingly assigned, and that before the plaintiff succeeded to the trust, the defendants converted and disposed of the chattels to their own use. The court held on demurrer, that the action could not be maintained, and Justice Collins said:

“If the plaintiff is to be considered as the assignee of a chose in action, he must fail because there is no authority for his maintaining suit thereon in his own name. Statutes making choses in action assignable at law have been held to include those arising ex delicto if they affect property rights (*Final v. Backus*, 18 Mich. 218; 26 Am. & Eng. Encycl. L. 746); but our statute in that regard is in terms limited to those arising ex contractu, except in case the assignor be dead. Gen. Stat., pp. 2536, 2591, sections 21, 340. That the plaintiff is successor to a trust is immaterial. The trust itself was a mere equity arising out of the convention of parties and not by operation of law. A court of law deals only with legal titles, and the plaintiff must rely on his assignment.”

This decision was followed in *Bofird v. Brylinsky*, 101 N. J. L. at page 146.

It is therefore respectfully submitted that the counterclaims in both of the cases being reviewed failed to set forth a cause of action over which the court was required to assume jurisdiction, but on the contrary the counterclaims permitted

the action taken in the lower court with all propriety.

MILTON M. UNGER,
Attorney for and of counsel with
Plaintiff-Respondent.

LEONARD J. EMMERGLICK,
On the Brief.

