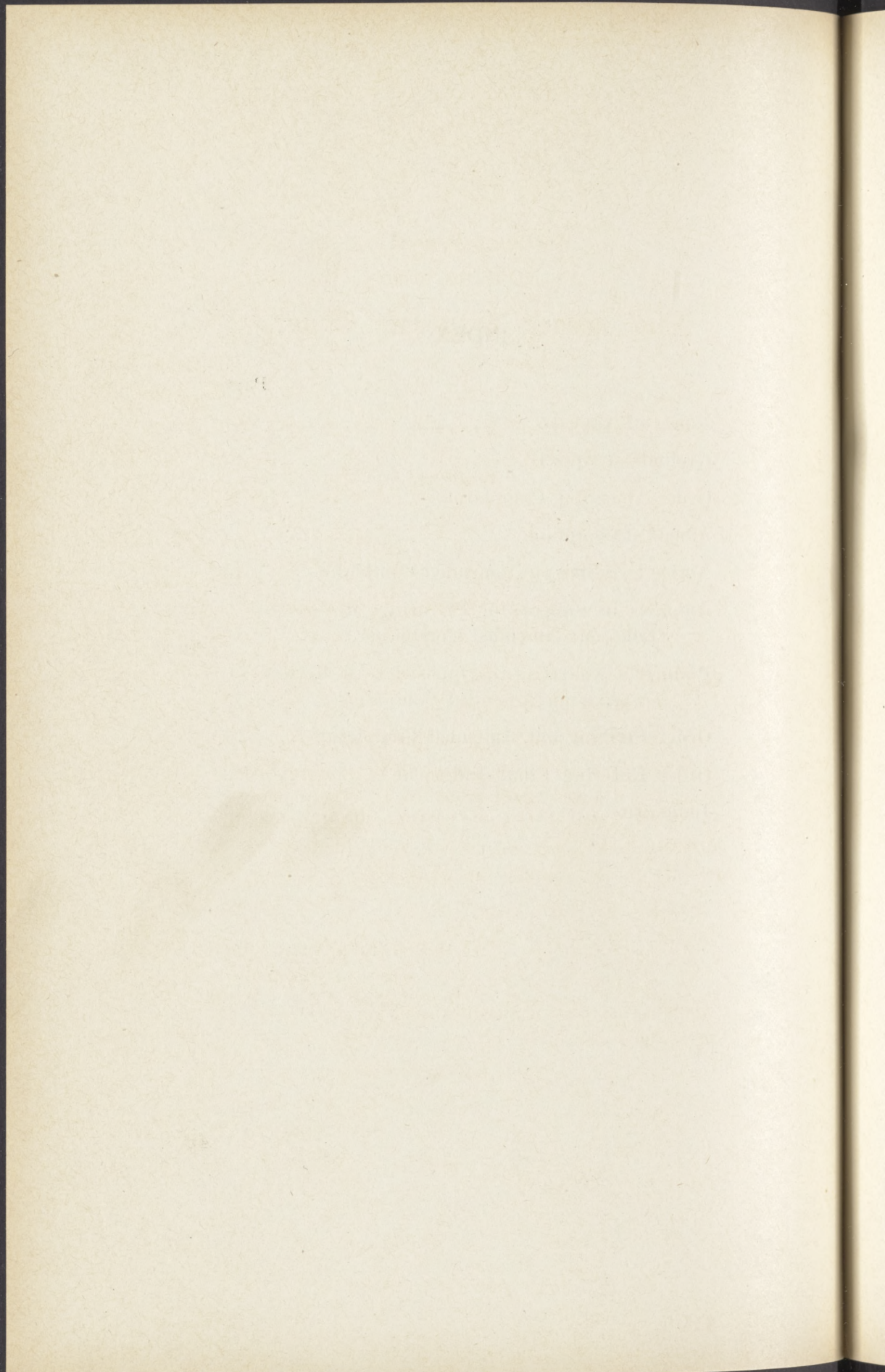


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**Notice of Appeal.**

Filed July 15, 1930.

**New Jersey Supreme Court.**

BERGEN COUNTY.

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FRANK S. SLAFF, trading as GAR-  
FIELD LUMBER Co.,  
Plaintiff.

vs.

RENA M. TRAMONTIN,  
Defendant.

---

10

Action at Law.

Notice  
of Appeal.

20

To: JOHN D. VASILYK, Esq.,  
Attorney of Defendant.

Please Take Notice that the plaintiff hereby ap-  
peals to the New Jersey Court of Errors and Ap-  
peals, the Court of last resort in all causes, from  
the whole and every part of the final judgment  
entered in the above entitled cause in favor of the  
defendant and against the plaintiff.

30

Dated: July 11th, 1930.

FEDER & RINZLER,  
Attorneys of Plaintiff.

Service of the within instrument is hereby ac-  
knowledged this 14th day of July, 1930.

JOHN DE VASILYK,  
Atty. for Deft.-Resp.

40

**Grounds of Appeal.**

Filed July 15, 1930.

**NEW JERSEY COURT OF ERRORS AND  
APPEALS.**

10	FRANK S. SLAFF, trading as GAR- FIELD LUMBER Co., Plaintiff-Appellant,	}	Action at Law.
	vs.		On Appeal.
	RENA M. TRAMONTIN, Defendant-Respondent.		Grounds of Appeal.

To: JOHN D. VASILYK, Esq.,  
Attorney of Defendant.

20 Sir:

Please Take Notice that the plaintiff-appellant hereby assigns the following Grounds of Appeal on his appeal to the New Jersey Court of Errors and Appeals from the whole and every part of the final judgment entered in the above entitled cause in favor of the defendant and against the plaintiff:

- 30 1. The Supreme Court Commissioner erred in ordering that the amended complaint be stricken out on the ground that it discloses no cause of action.
2. The Supreme Court Commissioner erred in his decision that the amended complaint discloses no cause of action.
3. The judgment entered in favor of the defendant-respondent is erroneous, harmful and in-

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*Grounds of Appeal.*

jurious to the plaintiff-appellant in the respect that the amended complaint sets forth a cause of action, and the motion of the defendant-respondent to strike out the amended complaint should have been denied.

Dated: July 14th, 1930.

FEDER & RINZLER,  
Attorneys of Plaintiff-Appellant.

10

Service of the within instrument is hereby acknowledged this 14 day of July, 1930.

JOHN D. VASILYK,  
Atty. for Deft.-Resp.

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30

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**Order Amending Complaint.**

Entered April 10, 1930.

NEW JERSEY SUPREME COURT.

BERGEN COUNTY.

10	FRANK S. SLAFF, trading as GAR- FIELD LUMBER Co., Plaintiff,	}	Action at Law.
	vs.		Order.
	RENA M. TRAMONTIN, Defendant.		

20 Application having been made by the defendant to strike out the complaint filed in this cause as amended, and upon the hearing and argument of the said application, the plaintiff having applied for an order to file an amended complaint; and it appearing that such leave should be granted,

It is thereupon on this 10 day of April, 1930, ORDERED that the plaintiff be and is hereby given leave to file the annexed amended complaint, and it is further ORDERED that the defendant 30 shall have twenty days, after the service of a copy of said amended complaint upon her or her attorney, to answer such amended complaint.

EDWIN C. CAFFREY,  
 Circuit Judge occupying the Office  
 of Supreme Court Commissioner.

**Amended Complaint.**

Filed April 19, 1930.

NEW JERSEY SUPREME COURT.

BERGEN COUNTY.

FRANK S. SLAFF, trading as GAR- FIELD LUMBER CO., Plaintiff,  vs.  RENA M. TRAMONTIN, Defendant.	}	Action at Law.  Amended Complaint.	10
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Plaintiff residing in the City of Passaic, County of Passaic and State of New Jersey says that: 20

1. During the times hereinafter stated, the defendant was the owner of a certain parcel of land and premises, known and designated as lot #13 and one-half of lot #14 or block #200, as same appears on the assessment map of the City of Garfield, New Jersey, and being such owner as aforesaid, the said defendant then and there made and entered into a written contract dated May 13, 1929 with one, James Caravella, a copy hereof is annexed to this complaint, and is hereby referred to and made part hereof; by the terms of the said contract the said James Caravella, as general contractor, agreed to well and sufficiently erect and finish for the defendant a new building on the said lands and premises, and to find and provide such good, common, proper and sufficient materials of all kinds whatsoever, as shall be proper and sufficient for the completing and finishing of all of the works of the said building. 30 40

*Amended Complaint.*

2. Although the said written contract refers to specifications in connection with the said work and the erection and finishing of the said building, in truth and fact there were no specifications used or made for any of the said works or for the erection or finishing of the said building, the fact being that only the contract and the drawings or plans having been made or used for any of the said works or for the erection or finishing of the said building.

2A. The said contract also contained a provision to the effect that the said James Caravella shall do the said work agreeable to the said drawings in a good, workmanlike and substantial manner under the direction of the architect, and to be testified by a writing or certificate under the hand of the said architect as mentioned in the said contract; and that in each case before any payment shall be made by the defendant to the said James Caravella under said contract, a certificate shall be produced and signed by the said architect to the effect that the work is done in accordance with the said drawings, said certificate, however, in no way lessening the total and final responsibility of the said contractor James Caravella, the said contract further providing when, subject to the provisions just referred to, the installments regarding the price shall be paid.

2B. The above mentioned contract was duly filed in the office of the Clerk of Bergen County in which the building mentioned in said contract is situated before any work was done or materials furnished for the said building, and said contract, which a copy is annexed, and which was so filed

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*Amended Complaint.*

constitutes the entire and complete contract there having been no specifications made or used.

3. Between May 31, 1929 and October 5, 1929 both dates inclusive, plaintiff furnished lumber materials to the said James Caravella for which he became justly indebted to the said plaintiff in the sum of Seventeen Hundred Forty (\$1740.87) Dollars and Eighty-Seven Cents, which said materials were furnished by said plaintiff at the special instance and request of the said James Caravella, and used in the erection and constructing of the said building, and being so indebted, the said James Caravella in consideration thereof then and there undertook and promised to pay said sum to the plaintiff on demand but, altho the said plaintiff has demanded payment of said sum from the said James Caravella, the latter has only paid the sum of Two Hundred Fifty (\$250.00) Dollars on account thereof, and has failed, wrongfully refused and neglected to pay the balance of Fourteen Hundred Ninety (\$1490.87) Dollars and Eighty-Seven Cents, the plaintiff being entitled to the payment of the said sum.

4. Notwithstanding the provisions of the annexed contract, the defendant made payments to the said James Caravella of the sums and installments referred to in the said contract, although the architect did not testify by a writing or certificate under his hand that said work was done agreeably to the drawings made by the architect, in a good, workmanlike and substantial manner under the architect's direction, or that said James Caravella did find and provide such good and proper and sufficient materials of all kinds whatsoever, as shall be proper and sufficient for the

*Amended Complaint.*

completing and finishing of all the works of the said building, and although a certificate was not produced and none was issued or signed by the said architect to the effect that the said work is done or was done, in accordance with the said drawings.

10 5. The defendant still has in her possession the moneys referred to in the annexed contract, a sum greater than the balance due the plaintiff from the said James Caravella, and has failed, wrongfully refused and neglected to pay to the plaintiff the amount due him as above alleged, notwithstanding the plaintiff is properly entitled to such payment, and the defendant does not dispute the amount claimed but was satisfied of the  
20 correctness of the plaintiff's said demand.

6. When defendant made the said payments, prematurely and without the certificate or a writing of the architect as above stated, the plaintiff was not aware that such payments were being made, and did not discover the same until some time later.

30 6A. The said defendant paid the said James Caravella installments mentioned in the annexed contract without first obtaining the certificate of the architect, as above alleged, although such certificate was not unreasonably or fraudulently withheld by the architect, and therefore the defendant is liable for the payment of the amount due him as hereinbefore alleged, as though the defendant had not paid said James Caravella.

40 7. Plaintiff demands damages in the sum of Fourteen Hundred Ninety (\$1490.87) Dollars and

*Amended Complaint.*

Eighty-Seven Cents, besides lawful interest and costs of suit.

FEDER & RINZLER,  
Attorneys for Plaintiff.

This Agreement Made the 13th day of May One 10  
Thousand Nine Hundred Twenty-Nine

Between Rena M. Tramontin of the City of Garfield, County of Bergen and State of New Jersey, hereinafter called the "Owner"

And James Caravella, General Contractor, of the City of Garfield, County of Bergen and State of New Jersey, of the Second Part,

Witnesseth, First, The said 2nd part does hereby for himself, his heirs, executors and administrators, covenant, promise and agree to and with the said 1st part, her executors, administrators or assigns, that 2nd part, the said contractor, executors or administrators shall and will, for the consideration hereinafter mentioned, on or before the September 13, 1929, well and sufficiently erect and finish a new Building at Banta Avenue, City of Garfield, on what is known as lot #13 and one-half of lot #14 on Blk. #200 Assessment map of the City of Garfield, N. J., agreeably to the Drawings and Specifications made by Architect (and owner) and signed by the said parties and hereto annexed, within the time aforesaid, in a good and workmanlike and substantial manner, under the direction of the said Architect to be testified by a writing, or certificate, under the hand of the said Architect as hereinafter mentioned and also, shall and will find and provide such good, proper and sufficient materials of all kinds whatsoever, as shall be proper and sufficient for the completing 20  
30  
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*Amended Complaint.*

and finishing of all the premises, works of the said Building mentioned in the Plan and Specification, for the sum of (*Note Last Page*).

10 And the said party of the first part does hereby, for herself, her heirs, executors and administrators, covenant, promise and agree, to and with the said party of the 2nd part, his executors and administrators, that the said party of the 1st part, her executors and administrators, shall and will, in consideration of the covenants and agreements being strictly performed and kept by the said 2nd part as specified, well and truly pay or cause to be paid unto the said 2nd part, his executors, administrators and/or assigns, the sum of (*Note Last Page*).

20 Provided, That in each of the said cases a certificate shall be produced, signed by the said Architect to the effect that the work is done in accordance with said Drawings and Specifications, said certificate, however, in no way lessening the total and final responsibility of the Contractor; neither shall it exempt the Contractor from liability to replace work if it be afterwards discovered to have been done ill or not according to the Drawings and Specifications either in execution or materials.

30 And it is hereby Further Agreed by and between the said Parties:

40 First. The Specifications and Drawings are contended to co-operate so that any works exhibited in the drawings and not mentioned in the specifications or Vice Versa, are to be executed the same as if they were mentioned in the specifications and set forth in the Drawings to the true meaning and intention of said drawings and Specifications without any extra charge whatsoever.

*Amended Complaint.*

Copies thereof certified by the Architect to be true copies shall be furnished to the Contractor.

Third. Should the Owner at any time during the progress of the said Building request any alterations, deviations, additions or omissions from the said contract, shall be at liberty to do so, and the same shall in no way affect or make void the contract, but will be added to or deducted from the amount of the contract, as the case may be, by a fair and reasonable valuation. 10

Fourth. Should the Contractor, at any time during the progress of said work, refuse or neglect to supply a sufficiency of materials or workmen, the Owner shall have power to provide materials and workmen, after three days' notice in writing being given, to finish the said works, and the expense shall be deducted from the amount of the contract. 20

Fifth. Should any dispute arise respecting the true construction or meaning of the Drawings or Specifications, the same shall be decided by and decision shall be final and conclusive; but should any dispute arise respecting the true value of the extra work, or of the work omitted, the same shall be valued by two competent persons—one employed by the Owner, and the other by the Contractor, and those two shall have power to name an umpire, whose decision shall be binding on all parties. 30

Sixth. The Owner shall not in any manner, be answerable or accountable for any loss or damage that shall or may happen to the said work, or any part or parts thereof respectively, or for any of the materials or other things used and employed in finishing and completing the same. 40

Seventh. No alterations or extra work shall be

*Amended Complaint.*

done without a written order from the Owner approved by the \_\_\_\_\_ and an express agreement in writing as to the cost.

10 Eighth. The Owner will insure the building in the joint names and interest of himself and the Contractor against loss or damage by fire, in such sums as may from time to time be agreed upon with the Contractor to cover work and materials used in the building and around the premises, and the policies to be made payable to Owner and Contractor, as their interests may appear. The Contractor shall see to it that this insurance is satisfactorily effected.

20 Ninth. All work and materials delivered on the premises to form part of the work, are to be considered the property of the owner, and are not to be removed without his consent:—but the contractor shall have the right to remove all surplus materials after completion of the work.

Tenth. Neither the Contractor nor the Architect shall, without the written consent of the Owner, have authority to vary, alter, amend or change this contract, or any of the Plans or Specifications herein referred to.

30 Eleventh. Whenever building permits shall be required by any municipality, or be necessary under any law, ordinance or other regulation, to the erection, alteration or repair of any building, the same shall be procured by the owner.

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The party of the 2nd part (contractor) further agrees to the following changes, from plans and specifications:—

The front width of the house to be 24' (same as back).

40 To install a small window in pantry.

*Amended Complaint.*

Peach color tile in the kitchen, bathroom as selected from samples to be submitted for owners okay.

Floors in the Sun Parlor, Living Room and Dining Room to be Parquet Floor, well laid.

The Second Story to be made of the First Grade Stucco guaranteed for a period of at least 10 years—same to be given three coats, color as selected by the owner. 10

It is further agreed that all the rooms are to be finished with Textone wall finish, colors and styles to be selected by the owner.

The contractor to allow \$50 for the fixtures. The second floor to be single floor.

All is to be done in a satisfactory manner, and only the best of materials to be used. 20

*Terms*

The party of the 2nd part agrees built said house per plan and specifications for the sums of \$5200. Cash and one Nash 5 Pass. Sedan Model 467 (Note car contract) free and clear, also clear title to one and one-half plot of ground known as lot #48, and one half of lot #47, Saddle River Township, N. J. (Property of Weinstein & Kanter (Bergen County). The above amount is to be paid as follows: 30

1. First payment when the roof is on, to be (\$1500.) Fifteen, etc.

2. Second payment when all rough plaster is on to be (\$1800.) eighteen, etc.

3. Last payment when the house is entirely complete in every respect and ready to move in (\$1900) one-thousand, nine hundred 00/100.

The car referred to above is to be delivered per terms of contract, when the cellar is completed 40

*Amended Complaint.*

and the first floor frame is on clear title to the above plot in Saddle River Township to be delivered on completion and fulfillment of contract.

In Witness Whereof, the said parties hereto have hereunto set their hands and seals the day and year first above written.

10

(L.S.) LENA M. TRAMONTIN

(L.S.) JAMES CARAVELLA

Signed, Sealed and Delivered

in the presence of

Joseph Caravello

Notary Public of N. J.

Endorsed—13663. Contract for Building. Rena

M. Tramontin with James Caravella. 23433.

20

Filed June 28 1929. James W. Mercer, County Clerk.

30

40

**Notice to Strike out Amended Complaint.**

NEW JERSEY SUPREME COURT.

BERGEN COUNTY.

---

 FRANK S. SLAFF, trading as GAR-  
FIELD LUMBER Co.,

Plaintiff,

vs.

RENA M. TRAMONTIN,

Defendant.

Action at Law.

10

 Notice to  
Strike out  
Amended  
Complaint.

 To: FEDER & RINZLER, ESQUIRES,  
Attorneys for Plaintiff.

Sirs:

20

Take Notice that on Friday, May 16, 1930 at the Court House in Hackensack, N. J. at 10 A. M. daylight saving time, or as soon thereafter as the matter can be heard, I shall apply to Honorable Edwin C. Caffrey, Judge of the Bergen County Circuit Court, to strike out the Amended Complaint in the above-entitled matter, on the following grounds:

1. The said Amended Complaint states no cause of action.

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2. The agreement upon which the complaint is based incorporates and refers to the specifications, they forming a part of the agreement; thus precluding the plaintiff from maintaining his cause of action.

3. Plaintiff must rely upon the agreement in its entirety and not in part, wherefore his cause of action fails.

40

*Affidavit in Support of Plaintiff's Motion to Strike  
Out Amended Answer.*

4. Plaintiff himself used the specifications referred to in the agreement in making up the estimate for the contract.

JOHN D. VASILYK,  
Attorney for Defendant.

10

**Affidavit in Support of Plaintiff's Motion to Strike  
out Amended Complaint.**

State of New Jersey, }  
County of Bergen, } ss.:

Rena M. Tramontin, of full age, being duly sworn according to law upon her oath deposes and says:

20

1. I am the defendant in the attached suit and the party to the building contract mentioned in the Amended Complaint.

30

2. A written contract was made between James Caravella as contractor and myself as owner, on May 13, 1929, based upon plans and specifications made by Daniel P. Conte, Architect. There were four sets of specifications which were used by the contractor, the lumber company (the plaintiff in this case), the plumber, painter, and other sub-contractors and tradesmen supplying work and materials for the erection of this house. The specifications were made by Daniel P. Conte, a registered architect of the State of New Jersey, with offices at 166 Harrison Avenue, Garfield, N. J. They were used by the contractor in giving an estimate in the course of the construction of the building and were used by him and sub-contractors and others, during the course of the erection

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*Plaintiff's Affidavits in Opposition to Motion to  
Strike out Amended Answer.*

of the building. A copy of the contract was filed in the Bergen County Clerk's Office as number 13663 but the party who filed the agreement failed to file the specifications with it.

3. One set of specifications and plans is still in my possession and I will produce them for the inspection of the court when this motion is heard, or at any other time. 10

RENA M. TRAMONTIN.

Sworn and Subscribed to before me  
this 15th day of May, A. D., 1930.

Joseph A. Ritoch,  
Notary Public of New Jersey.

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**Plaintiff's Affidavits in Opposition to Motion to  
Strike out Amended Complaint.**

NEW JERSEY SUPREME COURT.

BERGEN COUNTY.

---

10 FRANK S. SLAFF, trading as GAR-  
FIELD LUMBER CO.,  
Plaintiff,

vs.

RENA M. TRAMONTIN,  
Defendant.

---

Action at Law.  
Affidavit.

20 State of New Jersey, }  
County of Passaic, } ss.:

I, Frank S. Slaff, of full age, being duly sworn according to law upon my oath depose and say:

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

2. It is not true, according to my knowledge and information, that there were specifications made by Daniel P. Conte, architect or by anyone else for the particular job which is involved in this suit.

30 3. When I figured on the material for this job, I did not have any specifications made by Daniel P. Conte, architect, or anyone else; no furnished specifications were used by me or shown to me by the defendant or anyone else; as a matter of fact, the defendant told me that no specifications were made for this job, and I figured on the material for this job from a list made up or furnished by the contractor.

40 4. I am advised that Daniel P. Conte made

*Plaintiff's Affidavits in Opposition to Motion to Strike out Amended Answer.*

specifications for the defendant on some other job, namely: a job in Warren Point, but not for this job, and that no specifications were made or used for this job namely: the one involved in this suit.

5. I did not use any specifications in making up my estimate, but used the list of materials which was furnished by the defendant.

10

FRANK S. SLAFF.

Sworn and Subscribed to before me  
this 17th day of May, 1930.

Morris Dobrin,  
An Atty at Law of N. J.

NEW JERSEY SUPREME COURT.

20

BERGEN COUNTY.

FRANK S. SLAFF, trading as GARFIELD LUMBER Co.,  
Plaintiff,

vs.

RENA M. TRAMONTIN,  
Defendant.

Action at Law.

Affidavit.

30

State of New Jersey, }  
County of Passaic, } ss.:

I, Daniel P. Conte, of full age, being duly sworn according to law upon my oath depose and say:

1. I am an architect, having my offices at No. 166 Harrison Avenue, Garfield, New Jersey.

40

*Plaintiff's Affidavits in Opposition to Motion to  
Strike out Amended Answer.*

2. I know that a new building was erected for the defendant on Banta Avenue, Garfield, New Jersey.

3. I did not make any specifications for this job, and none were ordered or requested from me by the defendant or anyone else.

10 4. I had made some specifications for the contractor on a job in Warren Point, but not for the job on Banta Avenue, Garfield, New Jersey, which according to the information I received, is the job involved in this suit.

20 Subsequent to the construction of the work the contractor requested me to estimate certain extra work that had been done. I did this by using specifications made by me for another job that I had made for him at Warren Point. I never made specifications for this job, nor do I know of any made by anyone else.

DANIEL CONTE.

Sworn and Subscribed to before me  
on this 20th day of May, 1930.

Morris Dobrin,  
An Attorney at Law of N. J.

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40

**Order Striking out Amended Complaint.**

Entered July 3, 1920.

NEW JERSEY SUPREME COURT.

BERGEN COUNTY.

---

FRANK S. SLAFF, trading as GAR-  
FIELD LUMBER Co.,  
Plaintiff,

vs.

RENA M. TRAMONTIN,  
Defendant.

---

Action at Law. 10  
Order Strik-  
ing out  
Amended  
Complaint.

Defendant having moved to strike out the Amended Complaint in the above matter on the grounds that it disclosed no cause of action and that plaintiff's remedy was a special one under the Mechanics' Lien Act, and arguments for plaintiff and defendant by their respective counsel having been heard; 20

It is, on this 3rd day of July, 1930, on motion of John D. Vasilyk, Attorney for Defendant, Ordered that the said Amended Complaint be stricken out on the ground that it discloses no cause of action. 30

EDWIN C. CAFFREY,  
Judge.



**Judgment.**

Entered July 7, 1930.

NEW JERSEY SUPREME COURT.

*Statement.*

FRANK S. SLAFF, trading &amp;c.

vs.

RENA M. TRAMONTIN,

Action at Law. 10

Judgt' entered July 7, 1930.

Attorney \$15.00

Disbursements 8.00

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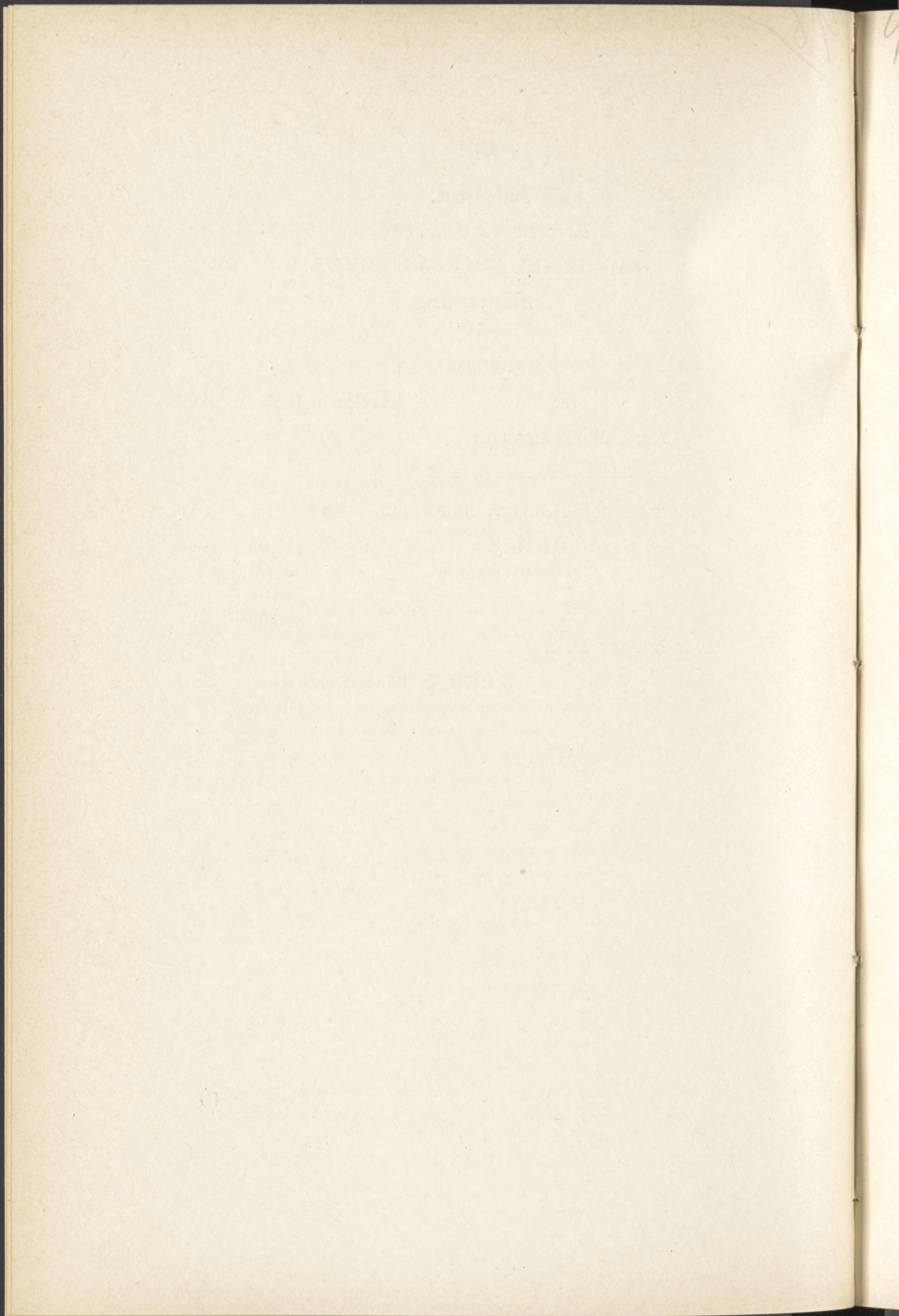
\$23.00 20

Judgt. for Deft.

FRED L. BLOODGOOD,  
Clerk.

30

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## New Jersey Court of Errors and Appeals

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FRANK S. SLAFF, trading as GAR-  
FIELD LUMBER Co.,  
Plaintiff-Appellant,  
  
vs.  
  
RENA M. TRAMONTIN,  
Defendant-Respondent.

---

Action at Law.  
Appeal from  
Judgment of  
Supreme  
Court, Ber-  
gen Circuit.

### BRIEF FOR PLAINTIFF-APPELLANT.

#### Statement.

This is an appeal from a judgment entered in favor of the defendant on an order striking out the complaint filed by the plaintiff in the Bergen Circuit of the Supreme Court. The order was made by Hon. Edwin C. Caffrey, Circuit Judge, acting as a Supreme Court Commissioner.

The theory of the cause of action is, that the defendant, who was the owner of some land, made a written contract, which was duly filed, for the erection of a new building, and that the plaintiff furnished materials to the general contractor, which were used in the erection of the building; that, not being paid for the materials that were delivered, he served a stop notice upon the owner in accordance with the mechanic's lien act. The owner made payments to the general contractor before they were due and without obtaining a certificate from the architect, authorizing the payment, although the contract contained a provision that the contractor shall do the work in a good, workman-

like and substantial manner under the direction of the architect, to be testified by a writing or certificate under the hand of the architect, and that in each case, before any payment shall be made by the defendant to the contractor, a certificate shall be produced and signed by the architect to the effect that the work is done in accordance with the drawings, said certificate, however, in no way lessening the total and final responsibility of the contractor. There is due the plaintiff the sum of \$1490.87, and the defendant has not made any payment notwithstanding he never disputed the amount of the plaintiff's claim, but was satisfied with the correctness of the same.

Although the contract made reference to specifications, the complaint alleges that, in truth and fact, there were no specifications used or made for the erection of the said building, the fact being that only the contract and drawings or plans were made and used.

In opposition to the motion to strike out the complaint, the plaintiff filed an affidavit in which he says that, according to his knowledge and information, there were no specifications made by Daniel P. Conte, the architect referred to in the contract, or by anyone else for this work; that when he figured on the materials ordered for the job, he had no specifications and none were furnished to or used by him, or shown him by the defendant, or anyone else, and that, as a matter of fact, the defendant told him that no specifications were made for this job; that Mr. Conte, the architect, had made specifications for the defendant on some other job, but not for this one; and that no specifications were made or used for the job involved in this suit; that when the plaintiff made an estimate of the cost of the materials ordered by the defend-

ant, he was furnished with a list of materials by the defendant but no specifications.

The plaintiff also produced an affidavit by Mr. Conte, the architect, in which the affiant says that he did not make any specifications for this job, and that none were ordered or requested from him by the defendant, or anyone else; that he had made some specifications for the contractor on a job in Warren Point, but not for the job involved in this suit; *that after the construction of the work*, the contractor had requested him to estimate on certain extra work that had been done; that he did this by using specifications which he had made for another job—a job in Warren Point; that he never made specifications for this job, and does not know of any having been made by anyone else for this job.

These affidavits are of vital importance owing to the fact that there was a provision in the contract to the effect that the work shall be done agreeably to the drawings and specifications made by the architect.

In the affidavit filed by the defendant in support of his motion to strike out the complaint, he says that the contract which he made with the general contractor was "based upon plans and specifications made by Daniel P. Conte, Architect; and that there were four sets of specifications used by the contractor, the lumber company (the plaintiff), the plumber, painter, and other subcontractors and tradesmen supplying work and materials for the erection of this house. The affidavit also says "the specifications were made by Daniel P. Conte, a registered architect of the State of New Jersey, with offices at 166 Harrison Avenue, Garfield, N. J." The defendant then continues to say in his affidavit that the specifications were used by the contractor in giving an estimate in the course of

the construction of the building, and were used by him and sub-contractors and others, during the course of the erection of the building; and that he has one set of specifications and plans still in his possession and will produce them for the inspection of the court, when this motion is heard, or at any other time. So that Mr. Conte, who the defendant says is the Architect referred to in the contract and who made the specifications, says that none were made or used, and no specifications were produced on the argument of the motion, or at any other time.

The question here involved is, whether the plaintiff's only remedy was by filing a lien inasmuch as there were no specifications filed with the contract, although the contract itself was filed.

The claim of the plaintiff is, that there were no specifications accompanying the contract and that none were used or made, and that, therefore, there were none to be filed.

### POINT I.

**The Circuit Court Judge, occupying the office of a Supreme Court Commissioner, committed reversible error in granting the defendant's motion to strike out the complaint, and, accordingly, the judgment entered in favor of the defendant, based upon the order striking out the complaint, is erroneous.**

The three grounds of appeal (Case, pp. 2 and 3) substantially, are, that the Supreme Court Commissioner erred in ordering the amended complaint to be stricken out on the ground that it discloses no cause of action, and his decision that the amended complaint discloses no cause of action, and the judgment entered on the order of the Supreme Court Commissioner is erroneous, harmful and injurious to the appellant in the respect that the amended complaint sets forth a cause of action, and the motion to strike out the complaint should have been denied.

The Supreme Court Commissioner, in striking out the complaint, relied upon section 2 of the Mechanics' Lien Law, 3 Comp. St. 3291, section 2, which provides:

“Whenever any building shall be erected in whole or in part by contract in writing, such building and the land whereon it stands shall be liable to the contractor alone for work done or materials furnished in pursuance of such contract; provided, said contract, or a duplicate thereof, together with the specifications accompanying the same, or a copy or copies thereof, be filed in the office of the clerk of the county in which such building is situate before such work done or

materials furnished; provided further, that it shall not be necessary to file the plans for such building in said clerk's office, whether such plans are referred to in said contract or not."

At the outset, it is essential to observe, that the statute provides that the land and building shall be liable to the contractor alone, providing the contract, or a duplicate thereof, together with the specifications *accompanying the same*, or a copy or copies thereof, be filed, etc. In the case at bar, therefore, *if there had been specifications accompanying the contract*, under the language of the statute, the specifications, or a copy, should have been filed, together with the contract. The question that now arises is, whether under the statute the land and building are liable to the contractor alone, in a case where the contract is filed, but no specifications are filed, because there were none made or used, and consequently there were none accompanying the contract. In the case at bar, at least a question of fact for the jury was presented, if it is not conclusively so shown, that there were no specifications accompanying the contract. The non-existence of any specifications is established by the affidavit of the plaintiff himself and by Mr. Conte, the architect, who, according to the defendant's claim, made the specifications. How could specifications be filed when there were none accompanying the contract, none being made or used?

We are familiar with the case of *Davis vs. Mial*, 86 N. J. Law, 167, where this court, in construing the statute, said:

"A building and land whereon it stands are liable to the contractor alone, when the contract and specifications accompanying

the same are filed in the office of the clerk of the county. Mechanic's Lien Act (Comp. Stat. p. 3291) sec. 2. In this case the contract, but not the specifications, was filed. The plaintiff, therefore, had standing to bring her suit and acquire a special lien against the building and land. Nor was this right at all interfered with by the subsequent filing of an 'addenda' to the contract which altered the unfilled specifications."

But *that* case does not apply to the case at bar, because in *that* case it appears that *the specifications were not filed, although there were specifications accompanying the contract.* In the case at bar, although the contract refers to specifications, the fact is that there were no specifications accompanying the contract, and none were made or used at all. A party cannot be expected to file specifications *accompanying* the contract, if there are no specifications accompanying the same.

The statute, therefore, should be construed to mean that whenever there is a written contract, the building and land shall be liable to the contractor alone, providing said contract, or a duplicate thereof, together with the specifications accompanying the same, *if any*, or a copy or copies thereof, be filed, etc. The Legislature surely did not contemplate the filing of non-existing specifications.

The result is, that since there was a contract in writing, which was duly filed, and since there were no specifications accompanying the contract, or made or used, that the land and building is liable to the contractor alone, just as if there were specifications accompanying the contract and the same were filed together with the contract; and since the lands are liable to the contractor alone, the plaintiff did not have the legal right to file a lien, and,

therefore, he has a right to maintain the present action in lieu thereof, under the statute.

The view of the Supreme Court Commissioner was, that even though there were no specifications made or used, the plaintiff had the right to file a lien against the land and building although the contract was filed. This construction, we contend, is not justified by the language of the statute and the fair intent of the Legislature in enacting the statute. This is demonstrated by the history of the act. Originally, under the old act, the specifications only had to be filed, if the contract was not complete without them.

Thus, in *Babbit vs. Condon*, 27 N. J. Law, 154, although the specifications were by the contract made part thereof, it was held that the specifications form no essential part of the contract with respect to its filing, and since the contract requires the contractor to do *all* the work and furnish *all* the materials, the failure to file the specifications was not fatal.

The second syllabus of the case of *Babbit vs. Condon*, supra, reads:

“Where a house is built by contract, and it is necessary to refer to the specifications to ascertain what part of the labor is to be performed, or what materials are to be furnished by the contractor, the specifications should be filed with the contract, but if the contract provides that the contractor shall do all the work, and furnish all materials, it is not necessary to file the specifications.”

So in *Budd vs. Lucky*, 28 N. J. Law 484, it was expressly decided that the specifications did not need to be filed when the contract was to do *all* the work and furnish *all* the material; and it was, in effect, considered that, to give notice of whether

the material or work in contemplation was with-  
in or without the contract, was the *only* purpose of  
the statutory requirements that it be filed.

In *Hill vs. Carlisle*, 14 N. J. Law, 114, and *Pim-  
lott vs. Hall*, 55 N. J. Law 192, where the contract  
was *partial*, it was fatal that the specifications  
were not filed, following *Ayres vs. Revere*, 25 N.  
J. Law, 474.

In *Neill vs. Watson*, 15 N. J. Law, 138, the con-  
tract being *total*, the failure to file the specifica-  
tions was held of no consequence, and the same was  
held in *Freedman vs. Sandknop*, 53 N. J. Eq. 243,  
and *La Foucherie vs. Knutzen*, 58 N. J. Law 234,  
following *Budd vs. Lucky*, *supra*.

Then came the amendment of 1895, following  
which, in *Weaver vs. Atlantic, etc., Co.*, 57 N. J.  
Eq. 547, it was decided that the failure to file the  
specifications was fatal, the contract there in ques-  
tion being similar to a partial contract; dealing,  
however, with a case where there were specifica-  
tions accompanying the contract, but there was a  
failure to file specifications.

The history of the legislation and the cases con-  
struing the same evinces a legislative intent that  
the document filed should show a complete con-  
tract. So that if the contract, as filed, was com-  
plete without the specifications, it was sufficient if  
the contract alone was filed; whereas, if the con-  
tract was only partial without the specifications,  
then the filing of the contract was not sufficient  
unless the specifications were also filed.

Then comes the act of 1910, which provides that  
the contract shall be filed together with the speci-  
fications *accompanying* the same but that the plans  
need not be filed, and it requires the filing of both  
the contract and the specifications, whether the

contract is complete or partial, *but only in case there are specifications accompanying the contract.*

There being no specifications accompany the contract in the case at bar, the filing of the contract just as effectually limits the liability of the land and building to the contractor alone, as if there were specifications *accompanying* the same.

Now, with regard to the liability of the owner by reason of the payment of installments on the contract in advance of the time when, by the contract, they came to be due, section 5 of the Mechanics' Lien Act, P. L. 1898, p. 539, provides:

"If the owner or owners of any building or other property which, by this act, is made the subject of liens for or toward the construction, altering, repair or improvement of which labor or services have been performed or materials furnished by contract, duly filed, shall, for the purpose of avoiding the provisions of this act, or in advance of the terms of such contract, pay any money or other valuable thing on such contract, and the amount still due to the contractor, after such payment has been made, shall be insufficient to satisfy the notices served in conformity with the provisions of this act, such owner or owners shall be liable in the same manner as if no such payment had been made."

And in construing this statute, this court said in *Somers Lumber Co. vs. Kaufman, et als.*, 102 N. J. Law 601:

1. "Section 5 of the Mechanics' Lien Act (P. L. 1898, p. 539), makes the owner, in case he pays an installment of the contract price in advance of the time when by the contract it comes to be due, liable to any claimant who serves a stop-notice before such installment comes to be due.

2. Where a building contract, duly filed in the county clerk's office, provided that all payments should be made upon the certificate of the architect named therein, the owner is liable to a party furnishing labor or materials who served notice prior to the issuance of any such certificate, to the full amount of his claim, not exceeding the full amount of such advance payments."

(Syllabus by the Court).

The complaint, in the case at bar, alleges that such advance payments were made by the owner, and, accordingly, it charges that the owner is liable to the plaintiff under the stop notice served by the plaintiff, before the installments became due and before the issuance of architect certificates, since the contract provided that no payments should be made except upon the certificate of the architect.

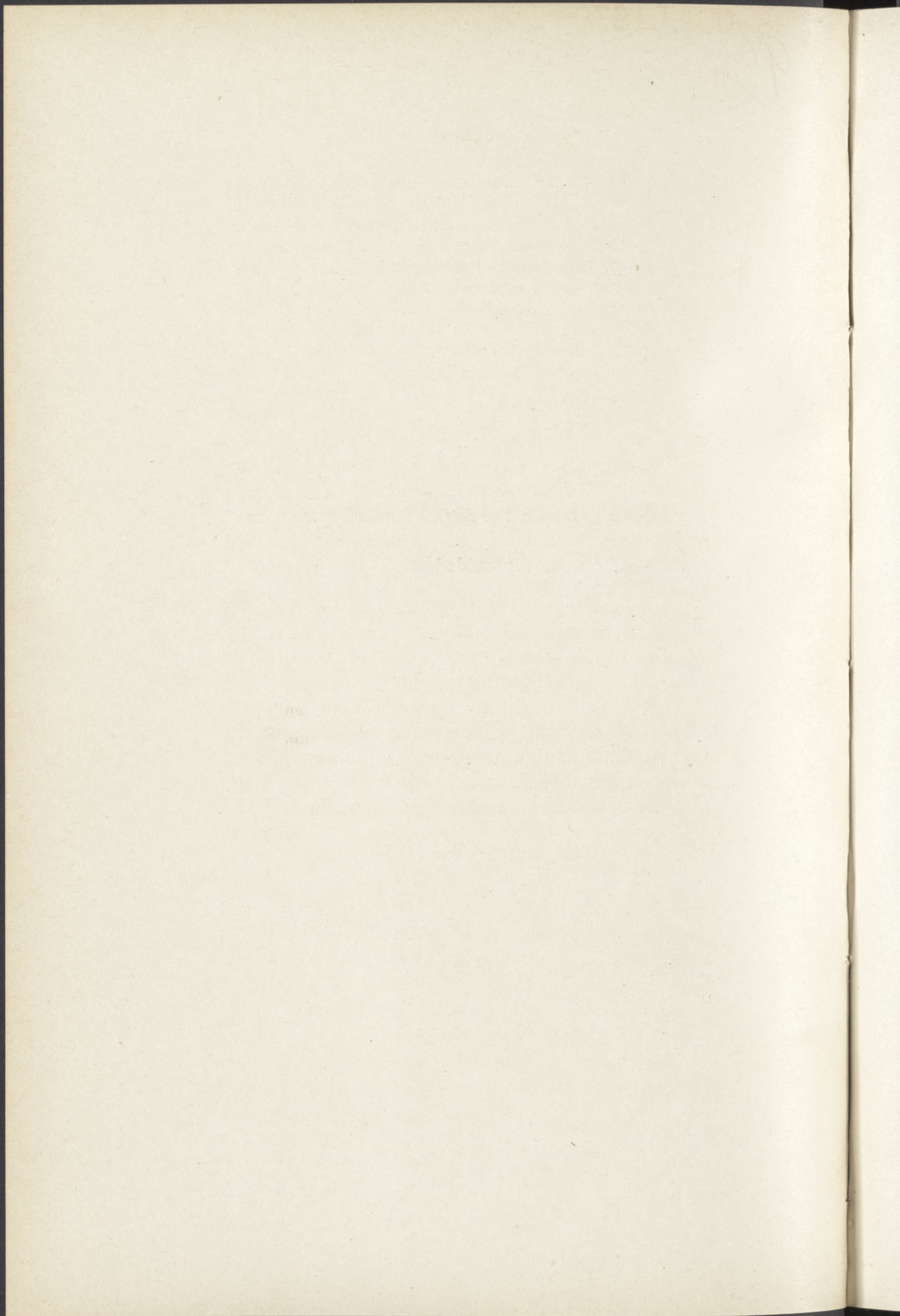
### CONCLUSION.

**We respectfully submit that the judgment for the defendant entered on the order of the Supreme Court Commissioner in striking out the complaint, should be reversed and set aside.**

Respectfully submitted,

FEDER & RINZLER,  
Attorneys of Plaintiff-Appellant.

FEDER & RINZLER,  
Of Counsel.



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## New Jersey Court of Errors and Appeals

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FRANK S. SLAFF, trading as GAR-  
FIELD LUMBER Co.,  
Plaintiff-Appellant,

vs.

RENA M. TRAMONTIN,  
Defendant-Respondent.

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Action at Law.  
Appeal from  
judgment of  
Supreme  
Court Ber-  
gen Circuit.

### BRIEF OF DEFENDANT-RESPONDENT.

#### Statement.

The plaintiff has appealed from a judgment entered by Honorable Edwin C. Caffrey, Circuit Court Judge, sitting as a Supreme Court Commissioner, striking out the amended complaint. An original and an amended complaint had previously been stricken out by the same commissioner and the subject of this appeal is the second amended complaint.

The theory of the cause of action in the first two complaints was that the defendant had entered into a building contract with one James Caravella for the erection of a home on a plot of ground at Garfield, New Jersey; that the contract had been *duly* filed and that the plaintiff had served the defendant-owner with a stop notice setting up the amount of his claim. It was the regular form of action against an owner for failure to recognize and pay a stop notice creditor.

The first two complaints were stricken out because, while the contract had been filed, the speci-

fications accompanying it were not filed so that the plaintiff's remedy was to file a mechanics' lien claim against the premises and start a suit on the same.

The plaintiff's time to institute mechanics' lien proceedings had expired, so he amended the complaint to its present form, suing not under the mechanics' lien law but setting up a cause of action on contract on the theory that the owner was directly responsible to the plaintiff, who had furnished materials on the job, because of an alleged failure to secure architect's certificates prior to making payments.

It will be noticed in reading the complaint that it is not based upon a stop notice, or any other part of the Mechanics' Lien Law, that no stop notice is alleged to have been filed, but a simple allegation is made that the defendant-owner, having failed to comply with one of the printed terms of the contract, viz: the furnishing of architect's certificates, was directly indebted to the plaintiff for an unpaid balance owing to him from a third party—the contractor.

The contract makes constant reference to specifications and it is admitted that plans were used and it is set up in the defendant's affidavit that specifications were used by the contractor and the sub-contractors and also by the plaintiff himself in furnishing the estimate of cost of materials. It is not disputed in any statement or affidavit of the plaintiff that the architect did not draw the plans and specifications used on this job. What they say is that no *particular* plans and specifications were made for a building to be constructed on this owner's land. They do not deny what is the fact, viz: that plans and specifications were drawn by the architect for the contractor who had intended to use them on another job of his own. Instead they were used for the house erected by the same

contractor for the defendant and the architect himself states in his affidavit that he had seen the specifications but that they had been drawn for a house to be erected elsewhere.

We are confronted with the fact that a certain set of plans and specifications were made up by this particular architect and that they had a type-written line stating that they were for a building to be erected at a certain place. This, of course, should not, and cannot, prevent the erection of a building at another location from these same plans and specifications. It will be noticed in reading the architect's affidavit that he was careful to state that he did not draw a set of plans and specifications for the building to be constructed for the defendant but he does not deny that the building was erected from a set made by him, although for another location.

The contract throughout its length refers specifically to *drawings and specifications*. Besides it has the following *typewritten* clauses inserted:

“The party of the second part (i. e. contractor), further agrees to the following *changes, from plans and specifications*”, and then follows a list of changes agreed upon to be made from the plans and specifications showing that the parties intended certain variations from the same.

“The party of the second part agrees built said house per *plan & specifications* for the sum of \$5200, cash,” &c.

It appears in every proper place in the contract, and with the addition of typewritten words, that specifications accompanied the same and were the guide by which the building was to be erected. It is the ordinary practice to construct a new building from plans and specifications and this is confirmed by the wording of the agreement. If the

contrary were true, the specifications would have to be set up in the contract itself. They are not detailed therein, so that there is no foundation for the statement that there were to be none. Further, if such were the case, some building would be described in the contract as the pattern to be followed in erecting this one.

The plaintiff by his bald statement that filing of the contract is enough would lay down the rule that whenever a new building was to be erected it would not be necessary to file the specifications. If such were the intention of the legislature it would have provided for an exception and stated that specifications must be filed with the contract except when an entirely new building is to be erected. The following cases held that omission to file specifications with the agreement for a *new building* was a non-compliance with Section 2:

- Gardner & Meeks Co. vs. Herold (Court of Errors and Appeals, March 1, 1909)  
76 N. J. L. 524, 72 Atl. Rep. pg. 25.
- Schmidt vs. Eitel (Court of Chancery,  
Jan. 2, 1906) 62 Atl. Rep. pg. 558, 70  
N. J. E. 8.
- C. B. Coles & Son Co. vs. Lothridge  
(Court of Errors and Appeals of New  
Jersey, June 28, 1911) 81 N. J. L. 407,  
80 Atl. Rep. pg. 484.
- English vs. Warren, et al (Court of Chan-  
cery, April 20, 1903) 65 N. J. E. 30,  
54 Atl. Rep. 860.

Plaintiff cannot, in order to make out a case, disregard one part of the contract and recognize another part. He here seeks to unburden himself of terms in the contract that were not favorable to him, viz: the references to the plans and specifica-

tions, and seeks to enforce another term that he thinks will help him, viz: the reference to an architect's certificate. He cannot consistently utilize one part of the contract and reject another. It must be taken as a whole.

In reading the agreement, it is plain throughout that it incorporated plans and specifications so that under section 2 of the mechanics' lien act, the "said contract or a duplicate thereof, together with the specifications accompanying the same, or a copy or copies thereof," should have been filed in the office of the Clerk of Bergen County where the building is situate. If section 2 were complied with, the workmen and materialmen could have recourse against the owner only by filing stop notices.

If, however, the section were not complied with, each claimant would have the right to file a mechanics' lien claim against the land and premises and this is the only remedy that he would have against the owner as no election is permitted under the statute or the cases.

In the present instance the defendant's contention is that the specifications not having been filed with the contract, the filing of the agreement was ineffective under section 2 of the Mechanics' Lien Act and that all claimants should have proceeded to file lien claims. The plaintiff in this case not having filed a lien claim, he has no other remedy against the owner, either under stop notice or as he is now asking to do by a direct contract action.

## DEFENDANT'S POINTS.

### POINT 1.

The plaintiff depends on the contract and his case stands or falls upon it. In reading the agreement we must take all its terms as they appear and we cannot arbitrarily reject the references to the specifications, which appear in it as least twelve times, just to suit the plaintiff's fancy, for he is bound by all the terms of this agreement as much as the owner. The allusion to non-existent specifications is without any foundation because the agreement is very specific in mentioning them and is careful to set out certain changes made in the specifications.

All the cases cited by the plaintiff in support of his contention were decided prior to the amendment of 1895. Before that date, the statute did not require the filing of specifications, so that we are now dealing with a changed situation. One of the first cases determined after the amendment, was *English vs. Warren, et al*, (Court of Chancery, April 20, 1903), 65 N. J. E. 30, 54 Atl. Rep. 860. In that case, a complete new building was to be erected the same as the case under discussion. The court said:

*"This is an interpleader suit. The complainant, as owner of 304 Montgomery Street, Jersey City, entered into a contract in writing with James Warren for the erection of a building thereon to cost \$7100. The contract, as usual, referred to specifications, and that they were annexed. The contract only, without the specifications, was filed. Warren proceeded with the erection of the building, and received on account of the con-*

tract price \$4000, then abandoned it, and it was finished by the complainant under a provision in the contract. *These notices were all served under the third section of the Mechanic's Lien Law (Revision 1898, p. 538), all parties supposing that the contract had been filed in such manner as to satisfy the second section of that act. No action was taken to enforce either of those claims until the expiration of the time limited for filing lien claims under the first and sixteenth sections of the act.*

The case so far stated presents the simple question whether the contract was filed in such manner as to satisfy the terms of the second section of the lien act. The section provides that the building and land shall be liable only to the contractor, provided the contract or a duplicate or copy, together with the specifications accompanying the same, be filed, &c. This provision for filing the specifications found its way into our system of legislation by the act of March 14, 1895, (P. L. p. 313), and was intended to clear up the confusion in the law arising out of the old statute, which did not expressly include the specifications, and which is reviewed by Justice Collins in *Murphey-Hardy Lumber Company vs. Nicholas*, 66 N. J. Law, 414, 49 Atl. 447. Probably the immediate occasion of the amendment was the opinion of this court in *Freedman vs. Sandknap*, 53 N. J. Eq. 243, 31 Atl. 232. *Be that as it may, I am clearly of the opinion that the statute is peremptory, and that the failure to file the specifications left the land and building subject to the filing of lien claims under the first and sixteenth sections of that act. Such seems to have been the opinion of Vice-Chancellor Grey in Weaver v. Atl. Roofing Company*, 57 N. J. Eq. 547, 40 Atl. 858. *The same opinion establishes the necessary corollary to this result, namely, that the stop notices served under the third section of the act are value-*

*less.* That section gives the remedy by stop notices only to materialmen (and all of the defendants herein are materialmen) 'which may have furnished materials used in the erection of such house or other building.' The word 'such' confines the section to buildings which are protected from the imposition of the ordinary lien claim by reason of the owner having complied with the terms of the section which immediately precedes it, and that is the second section."

Gardner & Meeks Co. vs. Herold, (Court of Errors and Appeals, March 1, 1909) 76 N. J. L. 524, 72 Atl. Rep. 25, recites:

"It is settled that the remedy by stop notice is not available where there is a right of lien under section 1 of the act. It has also been held in this court that a lien cannot be filed where the building has been erected under a contract duly filed pursuant to section 2."

Davis vs. Mial, et al (Court of Errors and Appeals of N. J., March 16, 1914) 86 N. J. L. 167, 90 Atl. Rep. 315. This was an action upon a mechanics' lien claim by a materialman. The Court said:

"First: a building and land whereon it stands are liable to the contractor alone, when the contract and specifications accompanying the same are filed in the office of the clerk of the county. Mechanic's Lien Act (Comp. Stat. p. 3291) 2. *In this case the contract, but not the specifications, was filed. The plaintiff, therefore, had a standing to bring her suit and acquire a special lien against the building and land. Nor was this right at all interfered with by the subsequent filing of an 'addenda' to the contract which altered the unfiled specifications.*"

To the same effect are:

Schmidt vs. Eitel (Court of Chancery, Jan. 2, 1906) 70 N. J. Eq. page 8, 62 Atl. Rep. 558.

Tuttle vs. Harris (Court of Errors and Appeals of N. J., Oct. 16, 1914) 83 N. J. E. page 666, 92 Atl. Rep. 597.

Boynton Lumber Co. vs. Evans (Court of Errors and Appeals, March 16, 1925), 101 N. J. L. 120, 128 Atl. Rep. 180.

Luce, in his "The Mechanics' Lien Law of New Jersey" third edition, gives a history of the legislation requiring the filing of the plans and specifications, beginning with page 130 and on page 131 says:

"That it is necessary to file the 'specifications' in every case, since the amendment of 1895, was decided in English vs. Warren, and to that extent, the old rule of construction was abrogated by the amendment,"

and on page 132, in referring to a decision of the Court of Errors and Appeals in Campbell & Morrell Co. vs. Lehocky, 83 N. J. L. 505, 73 Atl. Rep. 515, in which it determined that the plans or drawings need not be filed with the specifications, it is stated:

"That the amendment of 1895, therefore, under the maxim, *Expressio unius est exclusio alterius*, indicates conclusively that while the *written specifications must be filed in every case*, the plans or drawings need not be,"

and continues on the same page:

"There is now nothing to add, except to note the subsequent case of Davis vs. Mial, 86 N. J. L. 167, 90 A. R. 315 (Court of Errors and Appeals), as holding that the con-

tract is not sufficiently filed, if the specifications are not."

In the case of *Weaver vs. Atlantic Roofing Co.* cited by the plaintiff (Court of Chancery) 57 N. J. E. 547, 48 Atl. Rep. 859, it is held that where the building contract is not filed (in this case it was insufficiently filed), neither laborers or materialmen can have the remedy by stop notice since they may have a lien on the building under the first section.

## POINT 2.

The plaintiff has taken a directly opposite view in interpreting the contract when he claims that an architect's certificate should have been issued before payments. He then tends to create a non-existent situation. His own architect swears that he had nothing to do with the supervision of the building and yet the plaintiff tried to say that there was an architect whose certificates should have been issued before each payment. If there was an architect in charge, then certainly there must have been the specifications and plans listed in the contract—otherwise he would have no guide. Assuming that there was an architect then, we must continue this premise to its logical end and determine that there were plans and specifications used by him. Thus following plaintiff's argument to its fair, logical and legal conclusion, we find that such specifications were not filed, and under the statute he should have resorted to his remedy of filing a mechanics' lien claim instead of suing on the stop notice or on a contract action.

### POINT 3.

Plaintiff's last amended complaint attempts to set up a cause of action on contract against the defendant. The plaintiff's remedy is purely a statutory one and the complaint not being based on any part of the mechanics' lien act, it must fall for that reason.

In *Boynnton Lumber Co. vs. Evans* (Court of Errors and Appeals) 101 N. J. L. 120, 128 Atl. Rep. 180, the court determined this point when it said that:

"Obviously the contractual relationship of the parties is not the matter in issue, since the right of the plaintiff to recover is based entirely upon the statutory remedy provided for the purpose by the Mechanics' Lien Act."

That was a suit on a mechanics' lien claim in which an order was made striking out the answer.

Here the plaintiff attempts to set up some vague contractual relationship with the defendant saying that because the defendant did not wait for architect's certificates before issuing payments, she was directly responsible to him. These premises are not true because the plaintiff's remedy on this theory is a statutory one and can arise only under section 5 of the mechanics' lien act. This section provides that:

"If the owner or owners of any building or other property which, by this act, is made the subject of liens for or toward the construction, altering, repair or improvement of which labor or services have been performed or materials furnished *by contract, duly filed*, shall, for the purpose of avoiding the provisions of this act, or in advance of the terms of such contract, pay any money or other

valuable thing on such contract, *and the amount* still due to the contractor, after such payment has been made, *shall be insufficient to satisfy the notices served in conformity with the provisions of this act*, such owner or owners shall be liable in the same manner as if no such payment had been made."

This section contemplates three things:

- (a) That a contract has been duly filed.
- (b) That a stop notice has been served "in conformity with the provisions of this act", that is, section 3.
- (c) That a payment should be made in advance of the terms of the contract.
- (d) That if all the elements are present, the claimant may proceed on the stop notice against the owner who shall be liable as if no such payment had been made.

In the case at hand, we have three elements missing:

First: There is no duly filed contract.

Second: There is no proof of service of a stop notice.

Third: The cause of action is not based upon a stop notice.

The leading case, and what seems to be the first case, interpreting section 5 is *Slingerland vs. Binns* (Court of Errors and Appeals) 56 N. J. E. 413, 39 Atl. Rep. 712. There the "*contract with the specifications was duly filed in the Passaic County Clerk's Office.*" The court said this section

"expressly forbids the owner to pay any more in advance of the terms of the contract,

if the effect may be that the amount unpaid will prove insufficient *to satisfy notices served in conformity with the statute.*" And "This enactment, we think, affords a reasonably clear indication of the legislative purpose to give to persons entitled to serve the statutory notice of inchoate lien upon the liability of the owner under the contract, until that liability matures according to the terms of the contract, *such lien to become perfect on service of the notice before the liability matures*, but to expire on such maturity if no notice has been given, for a notice served after maturity derives no aid from this provision."

Daly vs. Somers Lumber Co. (Court of Chancery) 70 N. J. E. 343, 61 Atl. Rep. 731. This is a case where the *contract and its accompanying drawings and specifications* were filed in the County Clerk's Office and stop notices that had been served by materialmen were upheld by the court.

To the same effect is Stevens vs. Robinson, (Court of Chancery) 94 N. J. E. 30, 118 Atl. Rep. 273, where a written contract was duly filed and claims of several defendants based upon statutory stop notices served by them were upheld in an interpleader suit.

In Somers Lumber Co. vs. Kaufman, et als (Court of Errors and Appeals) 102 N. J. L. 601, 133 Atl. Rep. 200, action was brought by a materialman against an owner on a stop notice. The contract having been *duly filed*, judgment on the stop notice was affirmed.

From the above it appears that any suit under section 5 must be based, as stated in the section, upon a stop notice filed pursuant to section 3. This section 5 is construed very strictly. In fact it has been referred to as a penal section.

In Veitch vs. Clerk (Court of Chancery) 67 N.

J. E. 57, 57 Atl. Rep. page 272, the court, in speaking of section 5 says:

"Now, it requires no argumentation to show that the statute in question may be penal in its effect. The payment may have been made in perfectly good faith. If the law required her to pay it over again, it has a penal effect, for anything that makes a person pay money which he does not owe is in its nature penal. That leads one to be careful how they apply the terms of that fifth section.

It is what is called the advance payment section. And the question is whether Mrs. Veitch has made a payment in advance of the terms of such contract. If she has, and made it in good faith, and has not paid Mr. Clark any more money than he has earned for her, and has to pay it over again, that is penal, in my judgment. And hence the courts, in considering this statute, ought to be careful how they carry it to a point where its application will be penal. Now, then, I come to two conclusions:

First, that this gentleman, Mr. Clark, had earned his money; and I hold there was no advance payment, there was no intentional advance payment, there was no conscious advance payment. He had earned that much.

And the answer to that, I think, is twofold. First, what Mr. Dixon says is the custom of the trade, known to everybody; and second, that these gentlemen, who are accustomed to going around buildings and seeing how things are getting along, and watching the time to put in their notices, could not have been deceived by it, if Mr. Dixon's evidence is reliable; and I think it is decidedly reliable. Then, in considering this, I must bear in mind, as I said before, that to make this lady pay it over again, when she has paid it once in good faith, and when Mr. Clark was entitled to it, in justice and equity, as between

them—to make her do that over again to these people is highly penal. I cannot take any other view of it.”

In *Sisters of Charity of St. Elizabeth vs. Smith, et al* (Court of Chancery, Oct. 19, 1899) 46 Atl. Rep. page 598, a bill of interpleader was filed and stop notice creditors made parties defendant. Some of them claimed that payments had been made by the owners before they were due and demanded the benefit of section 5. It appeared that the original contract with the specifications annexed, was filed. The court, in the course of its decision, said of section 5:

“It must be borne in mind that the defendants in the contest now in hand are, in effect, claiming the benefit of the provisions of this contract. They are claiming that the complainants paid certain moneys sooner than, by the terms of the contract, they were bound to pay them; and that the statute gives them a right to require the complainants to enforce against the contractor a strict compliance with the terms of the contract. That position, it seems to me, puts the defendants in the situation of claiming under the contract. If so, they must take it with its burdens, and one of those burdens is the liability of the architect and owner to make an honest mistake.”

In *Hasson vs. Bruzel*, (Court of Chancery) 144 Atl. Rep. 318, it is stated:

“In *McNab & Harlin Mfg. Co. vs. Paterson Building Co.*, 72 N. J. Eq. 929, 67 A. 103, the Court of Errors and Appeals said: ‘It may be argued, and with force, that Mechanics’ Lien laws are, as a rule, to be construed strictly against the claimants and in favor of the owner of the land in so far as they require the owner to pay a debt that

he did not contract and for a consideration that he may have already paid to the contractor.' ”

In *Passaic-Bergen Lumber Co. vs. Petterson* (Supreme Court) 147 Atl. page 198, the court in paragraph 2 of the Syllabus states:

“If payments were made by the owner to the contractor in advance of the terms of the contract, but, when the stop notice was served by a materialman of the contractor upon the owner no money was due the contractor, the owner is not liable under the stop notice. *Slingerland v. Binns*, 56 N. J. Eq. 413, 39 A. 712.”

and in the last paragraph of the decision, says, of the statute:

“The construction of the statute contended for by the plaintiff is too rigid. The owner ought not be subjected to a double payment, unless a reasonable construction of the statute requires it.”

From the above decisions, it appears that the courts are inclined to put a strict interpretation upon the mechanics' lien act and particularly section 5, which it has been aptly said, is a section that requires double payment from the owner. There is also not indicated or suggested in this case any intention of fraud or misleading of the workmen and materialmen by the owner in making the payment without an architect's certificate.

### **In Conclusion.**

1. The specifications not accompanying the contract, the latter was insufficiently filed to comply with Section 2.

2. Plaintiff's remedy was by filing a lien claim.
3. There is no privity between the owner and materialmen upon which to base the cause of action set up in the amended complaint.
4. Plaintiff's suit, if based on section 5, should have been predicated upon a stop notice and not a direct contract action as set up in the amended complaint.
5. Plaintiff's remedy is a statutory one and not a general contract or common law.

Respectfully submitted,

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