Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

ISIDOR ENGEL, *Complainant,* *and* CENTRAL BUILDING AND CONSTRUCTION COMPANY, *et als.*, *Defendants-Respondents,* *and* NEWARK MASON CONTRACTORS CO., *Defendant-Appellant.*	*On Bill of Interpleader.* *On Appeal from Chancery.*

Brief for Appellants.

Statement of Facts.

Appellant, a corporation, was one of the defendants named in the Bill of Interpleader filed by the owner of a building in the City of Orange against the contractor and numerous stop notice claimants against the contractor for work done and materials furnished to the contractor, performed or used in connection with the building.

The contractor failed to complete the work; the owner did complete and after completion held in his hands the sum of Sixteen Hundred and Forty-nine Dollars and Seven Cents, which he offered by Bill of Interpleader to pay into the Court of Chancery and which, upon interlocutory decree, was so paid in. Upon the hearing, which came on before Vice-Chancellor Foster, the claim of the Kawneer Manufacturing Company for $656 was held to be preferred by virtue of having been for extra work for which extra compensation was allowed by the owner

to the contractor and included in the retained sum in the owner's hands. To so much of the decree appellant does not object. The court, however, for the reasons set out in the opinion (Case, pp. 25-29) rejected the claim of the appellant on the ground that the stop notice was defective in that it did not comply with Section 3 of the Mechanic's Lien Act.

If appellant's stop notice is not defective, its claim of $1,199 is first, subject only to the priority of the lien of the Kawneer Manufacturing Company, and will more than exhaust the balance remaining in the hands of the court after satisfying the Kawneer claim.

Argument.

THE SUM OF ELEVEN HUNDRED AND NINETY-NINE DOLLARS WAS JUSTLY DUE FROM THE GENERAL CONTRACTOR TO THE APPELLANT.

This was not seriously disputed in the case.

The manager of appellant, of Italian birth and not especially skilled in the use of English, testified that he, in behalf of his corporation, negotiated a contract with the general contractor, Central Building and Construction Company, through its president, Mr. Goldberg, to do the mason work on the building of complainant. This contract was signed by the manager De Biase of appellant in duplicate, but the copy offered in evidence contained the corporate seal but no other signature of the defendant Central Building and Construction Company. Mr. De Biase testified that Mr. Goldberg, president of the Central Building and Construction Company handed him the contract with the seal imprinted. It was further conceded by the witness Goldberg, later called by appellant, that "there was a balance coming to the contractor of $500," and it appears

that the previous payments called for in the contract had all been made by the general contractor to the Newark Mason Contractors Company; that the work called for in the contract had been done by the Newark Mason Contractors Company; and that the Central Building and Construction Company had given to appellant an order in writing for extra work. The objections first suggested by counsel for some of the lien claimants to the admission of the contract for want of proper execution were never pressed and we assume will not be before this court. If they should be, we will rely upon the presence of the corporate seal; the recognition of the contract by the giving of an order in writing for extras (Case, p. 24); the performance of the work under the contract; and the making of payments therefor up to the last payment. We further urge that any objection resting upon the statute of frauds cannot be raised by any defendant except the Central Building and Construction Company, which is the only one concerned therein, and that no objection was made or entered on its behalf at the hearing of the cause.

Some objection was made at the hearing, also on behalf of lien claimants, on the ground that the orders for extra work were not all in writing as called for in the contract between appellant and the Central Building and Construction Company. As a matter of fact, the items for extra partition plaster board and plaster of $200, and a water pump in cellar of $10 are covered by the written order found in the case at the top of page 24. As to these extras, however, we contend, as we have above contended in regard to the contract itself, that the requirement that they be in writing is one of which only the contractor could avail himself and that the defendant lien claimants may not raise the question.

As to the amount of the various charges for extras, the witness De Biase and the witness Porzio, for the appellant, testified to the doing of all the work in question and to the fact that it was done under the orders of the president of the Central Building and Construction Company; that it was properly done and reasonably charged. The only attempt at attack on this evidence was in the cross examination of Mr. Goldberg (Case, p. 19, ll. 17-40). His complaint seems to be that he did not properly understand from Mr. Porzio, when he gave Mr. Porzio instructions to do the extra brickwork, which amounts to $343 in the bill for extras, that it was going to be an expensive matter. He does not question that he ordered Mr. Porzio to do the work, but simply that he misunderstood the amount involved. He does not challenge the accuracy of any other item as charged. On the face of the record it is clearly proven that there was due on August 7, 1914, the sum of $1,199 from the general contractor, Central Building and Construction Company, to the appellant, Newark Mason Contractors Company.

This brings us to the one matter which was seriously litigated below and upon which the opinion of the learned Vice-Chancellor is based; namely, the sufficiency of the stop notice served by the appellant.

Second.

THE NOTICE SERVED BY APPELLANT UPON THE OWNER MET THE REQUIREMENTS OF SECTIONS 3 OF THE MECHANIC'S LIEN LAW. (Compiled Statutes, p. 3294).

This section has frequently been before the Courts for construction and from the cases the general requirements may be analyzed as by the learned Vice-Chancellor in his opinion in this case (printed case, p. 26-29).

In order to establish the validity of a stop notice, the following must be shown:

1. That a demand has been made upon the contractor.

2. That the contractor has refused to pay the money due the person demanding it.

3. That the creditor has given a notice in writing to the owner which apprised the owner:

(a) Of the contractor's refusal; and

(b) Of the amount due the creditor and demanded by him of the debtor.

The learned Vice Chancellor found in this case that the stop notice was invalid because it did not properly advise the owner of the contractor's refusal to pay. On this point the case turns practically upon the question whether the specific word "refuse," or some of its variantes, must be used in the notice to the owner, or whether advice to the owner of the facts constituting a legal refusal is sufficient.

We contend that appellant proved before the learned Vice Chancellor that all the conditions precedent to the sending of the stop notice had been fulfilled and that the stop notice or notices given satisfied the requirements of the statute.

1. *Demand.* On August 7th, 1914, appellant's *Exhibit D. 11 was forwarded by appellant to the owner Engel . Engel (Case, p. 17, l. 20) admits its receipt and Goldberg, the president of the Central Building and Construction Company, admits that the notice was sent to him by the architect (Case, p. 18, l. 1) and that he thereupon retained Mr. Stein, an attorney-at-law, to protest because he regarded the demand as excessive.

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*This letter of August 7, 1914, was marked Exhibit D. 11 at the hearing and is referred to as Exhibit D. 11 throughout this brief. Through some misunderstanding it appears on page 22 of the printed State of Case as Exhibit D. 16.

2. *Refusal to pay.* Mr. Goldberg, as has already been stated, testifies (p. 18, l. 4-24) that a few days after the receipt of Exhibit D. 11 he retained Mr. Leo Stein, a member of the bar, to represent him in the matter; that he, Goldberg, sent a protest against the claim; and that Mr. Stein, in his behalf, refused to pay the sum demanded.

Mr. De Biase also testified, and Mr. Goldberg admitted, that on August 6th, 1914, or one day before the notice Exhibit D. 11 was forwarded by appellant to Mr. Engel, Mr. Goldberg had tendered Mr. De Biase, on a demand of payment, the sum of $100. It is conceded by the appellant that in that interview, on August 6th, no specific amount was demanded, but it is also admitted that far more than $100 was due, Mr. Goldberg (p. 20, l. 2) conceding that "about $750" was due. Mr. Goldberg testifies (p. 19, ll. 5-19), "Mr. De Biase met me and he expected to get more money and I offered him $100 and he didn't want to take it and we parted; he was angry." Mr. De Biase testifies (p. 12, ll. 10-20) that he told Mr. Goldberg on that occasion how much was owed him but didn't show him the written bill. He stated, "I expected at least $600 or $700," and refused to accept $100.

Clearly three separate refusals have been shown by the appellant. The first, the refusal of August 6th, for the tender of $100 on an account of $1,199 due and owing for two months, followed by a parting in anger, is undeniably a refusal to pay $1,199.

The second is the refusal embodied in the retaining, after receipt of Exhibit D. 11, of counsel to refuse payment.

The third "refusal" and the one which seems to us all sufficient is the neglect, omission and failure of the construction company to pay appellant after the receipt of the letter of Exhibit D. 11. It cannot be, as we shall argue at some length later in the brief, that it is necessary for the debtor to say

to the creditor "I will not pay" in order to constitute a "refusal" within the meaning of this act. If money presently due and payable is withheld after demand, it must constitute a legal refusal to pay, else the whole purpose of the act would be defeated by the contractor's keeping silence or leaving his usual place of business or residence and failing to reply to demands for money. It is true that mere omission and neglect are not "refusal," as has been held in *Beckhard* v. *Rudolph,* 2 Robb., 740, at 747. The Court there does hold, however, that the use of the word "refusal" pre-supposes demand and the logical consequence of the opinion, it seems to us, is that omission or neglect to pay after demand is refusal.

3. *Notice in writing to owner.* It is conceded that notice in writing was given to the owner. The only dispute is as to the sufficiency of that notice.

The learned Vice Chancellor has rested his decree upon the insufficiency of the notice in writing. Reversing, for convenience, the statutory order of precedence, we will first discuss whether the notice given met the requirement above designated as 3 b., namely, whether it was a notice in writing "of the amount due to him and so demanded." The notice of August 7th, Exhibit D. 11, clearly specifies the amount due as $1,199, and the service of this notice through the agency of the owner's architect upon the contractor constituted a demand and was regarded by the contrater Goldberg as a demand of so pre-emptory a character as to require him to retain counsel to dispute it. The letter of August 7th, Exhibit D. 11, therefore is notice in writing to the owner of the amount due appellant from the contractor and becomes, for the further purposes of the case, also a notice to the owner that demand had been made upon the contractor.

We now come to the requirement 3 a, upon which in the main the Vice Chancellor's opinion rests. This requirement is that the notice in writing to the owner must be "of such refusal," referring back to the act of the contractor, after demand, in refusing to pay the money due to the person demanding it.

It is conceded that Exhibit D. 11 does not, in form or substance, set out the making of a prior demand or a refusal to meet that demand. On August 28th, 1914, however, Mr. Cavicchia, an attorney for the appellant, wrote a letter to the owner Engel, Exhibit D. 16 (Case, p. 24), which letter we set out in full:

"Law Offices
PETER A. CAVICCHIA
Essex Building
Newark, New Jersey
August 28, 1914.

Mr. Engel,
Proprietor of The Bee Hive,
297 Main Street,
Orange, New Jersey.
Dear Sir:

Some time ago you were served with a stop notice, whereby the Newark Masons Contractors Company claimed from the Central Building Construction Company, of which Samuel Goldberg is an officer, the sum of $1,199 for work done and materials furnished on your new house.

Since Mr. Goldberg is showing a disposition to prolong the settlement of this claim, I am ready to bring suit for the amount, and I hereby notify you to withhold the amount of $1,199 out of any moneys that are now due, or which might become due to the said Central Building and Construction Company, until such time as the Courts shall have decided the question.

Yours very truly,
PETER A. CAVICCHIA."

This letter called to the attention of the owner the following facts:

First. It recalled to his mind the notice of August 7th, Exhibit D. 11, which he had caused to be served in turn upon the defendant contractor.

Second. It called to his attention that that notice claimed an indebtedness from the Central Building and Construction Company to the appellant Newark Mason Contractors Company of $1,199 for work and materials furnished on his new house.

Third. It called to his attention that Mr. Goldberg, above recited as an officer of the Central Building and Construction Company and known to all the parties as its president and executive head, was "showing a disposition to prolong the settlement of this claim."

Fourth. It called to his attention that Mr. Cavicchia, as attorney, because of Mr. Goldberg's disposition to prolong the settlement, was "ready to bring suit for the amount." And

Fifth. Directed Mr. Engel to retain the sum of $1,199 out of any moneys due or to become due to the Central Building and Construction Company, "until such time as the Courts shall have decided the question."

It has been held specifically, as stated by the Vice Chancellor in his opinion, "no particular form of notice need be served, provided the form used gives in effect the written notice prescribed by statute."

Fehling v. *Goings,* 1 Robb., 377.

The same case is also authority for the proposition that notice by attorney is good. Together with the case of *McNab* v. *Paterson,* 1 Buch., 133, affirmed, 2 Buch., 729, it is authority for the proposition that the notice in writing to the owner does not necessarily have to be found in a single docu-

ment, but if all of the statutory requirements have been fulfilled by a combination of notices the statute is satisfied.

The case of *South End Improvement Company* v. *Harden,* 52 Atl., 1127, at 1128-1129, holds that a refusal of part of what is due is a refusal of all withiin the meaning of the statute, Vice Chancellor Reed stating, "I think, however, under the circumstances, a refusal to pay any part of what was due them was equivalent to a refusal to pay all." This, of course, must be so within the meaning of the Mechanic's Lien Act, else, for example, the tender of $100 on a claim for $1,199, if that be not a refusal within the meaning of the act, would prevent the filing of a stop notice by the holder of the $1,199 claim and perhaps permit other claimants by virtue of the absence of any tender to them to secure preference over the most diligent.

Similarly, it seems clear to us that a failure to pay immediately *when due and after demand* must be a refusal within the meaning of the act, or else by merely promising to pay the next week or the next month or the next year the contractor could stop the service of stop notices by the sub-contractor; secure his whole money from the owner and leave the sub-contractors with no redress. The precise question as to whether the notice to the owner must use the word "refusal" in reference to the contractor's failure to pay has not been heretofore before our courts. We cannot believe that the courts will enforce so hard a rule, particularly in a statute designed for the relief in part of working men and others not skilled in legal terminology.

In the case of *Beckhard* v. *Rudolph,* 2 Robb., 740, at 747, this court, speaking through Mr. Justice Pitney, discussed the meaning of the term "refusal." It is true that his discussion relates more particularly to the necessity of incorporation in the notice

of the fact that a demand has been made and he says that the fact that demand has been made need not be set out in the notice because refusal implies demand. He adopts Webster's definition of refusal, namely, "denial of anything demanded, solicited," and his definition of the verb "refuse" as meaning "to deny a request, demand, invitation or command; to decline to do what is solicited, claimed or commanded." He further cites with approval the language in *Hall* v. *Baldwin,* 18 Stew., 863, "refusal implies some request; it is more than omission or neglect."

The proposition which this case presents seems to us the exact converse of the situation with which Mr. Justice Pitney was there dealing. We here present evidence of a written demand for payment on August 7th, made upon the contractor through the owner; of his refusal to pay; and of his employment of counsel to contest the claim; followed by a second notice to the owner in writing on August 28th, reminding him of the demand previously served by which demand there was claimed as due on August 7th the sum of $1,199, and further informing him that three weeks after the notice of August 7th the contractor is prolonging the settlement of the claim and that the sub-contractor is ready to bring suit therefor and directing the owner to withhold the money from the contractor until the courts have acted. It is true the word "refused" does not appear, but it is equally true that no intelligent man could read in that letter of August 28th, having knowledge of all of the facts connected with the letter of August 7th, therein referred to, anything other than that the Central Building and Construction Company had failed, after demand, to pay money which was due. The letter of August 7th was a demand for $1,199 claimed then to be due and owing from the contractor to the sub-contractor. The notice of August

28th, that the settlement of that claim was still prolonged, meets Mr. Webster's definition of a refusal as "denial of anything demanded, solicited." It is conceivable from the language chosen by the attorney who wrote the letter of August 28th that the Central Building and Construction Company may not have said the specific words "we refuse to pay this claim." They simply may have avoided contact with the sub-contractor after service of the notice of August 7th, or their ingenious counsel, retained to refuse payment, may simply have endeavored from time to time to gain further time for the payment of the money. In either of these cases, the language used in the letter of August 28th would have been an exact statement of the facts, namely, that the Central Building and Construction Company was showing "a disposition to prolong settlement" until patience had ceased to be a virtue and suit must be brought, but that is as clearly a legal "refusal" and the letter is as clearly notice of a legal "refusal" as though the Central Building and Construction Company had in writing said we refuse to pay this claim or any part of it and their written letter had been enclosed to the owner, Mr. Engel. Within ten days after the letter of August 28th, the first of the long series of other stop notices was served upon the owner. The next on September 15th; the third on September 26th; the fourth on October 9th; the fifth on October 14th; the sixth on November 10th; the seventh on December 18th, and the eighth and ninth on January 7th, 1915. Clearly the appellant could not wait any longer for any more definite refusal than the mere prolongation of the settlement of his claim without losing the rights to which his diligence entitled him. His work had been finished for two months before his demand of August 7th; he had on that date demanded pay in writing and

on August 28th he had yet to receive a cent. Of all of these facts he advised the owner in writing. We cannot believe that any greater or other duty was imposed upon him; especially we cannot believe that the statute requires the use of specific language where the general requirements of the act are complied with. We therefore urge that the decree under appeal be reversed insofar as it rejected the claim of the appellant and declared its notice to be defective, and that the cause be remanded to the Court of Chancery with directions to decree to this appellant the sum of $1,199 and its costs, second only to the claim of the Kawneer Manufacturing Company upon the fund in court.

Respectfully submitted,

PETER A. CAVICCHIA,
Solicitor for Appellant.

FRANKLIN W. FORT,
Of Counsel.

New Jersey Court of Errors and Appeals

ISIDOR ENGEL, Complainant, and CENTRAL BUILDING AND CONSTRUCTION COMPANY, et als., Defendants-Respondents, and NEWARK MASON CONTRACTORS CO., Defendant-Appellant.	On Bill of Interpleader. On Appeal from Chancery.

Brief for Respondents

This was a Bill of Interpleader. After the entry of the decree that defendants interplead inter se, $1,649.07 was paid into the Court of Chancery by complainant and upon the hearing to determine the priority of the lien claims of the defendants to this fund, which came on before Vice-Chancellor Foster, the claim of appellant was rejected upon the ground that its stop notice was defective in that it did not comply with the third section of the Mechanics' Lien Act.

If appellant's stop notice be valid, its claim of $1,199 is first, subject only to the priority of the lien of the Kawneer Manufacturing Company, to which appellant does not object. It would more than exhaust the balance of the fund remaining in the hands of the court and all the other claimants would get nothing.

In a very clear and able opinion (case pp. 25-29) the learned Vice-Chancellor decisively and conclusively disposed of appellant's claim and there is little we can say that is not embraced by the Vice-Chancellor's exposition of the law governing this section of the Mechanics' Lien Act. But there are one or two points not anticipated by the lower court which we desire to call to the attention of this honorable court by way of answer to the brief of appellant.

The appellant, Newark Mason Contractors Company, is not entitled to participate in the distribution of this fund because its notices and proofs thereon do not comply with the above-named section of the Mechanics' Lien Act.

The remedy thus afforded to appellant is an extraordinary one. In Donnelly v. Johnes, 58 N. J. Eq. 442 at p. 450 the court says:

> "The privilege of preferential payment out of the contract price fund is purely statutory; it becomes complete only when the statutory conditions are fulfilled. If these are not complied with, the owner has no right to pay and the claimant no right to receive payment from him."

To like effect, vide also Supt. v. Heath, 2 McCart, 22.

The statutory requirements, so far as they relate to stop notice, are:

1 The claimant must make a demand upon the contractor.

2 The claimant's demand must not be for more than is due him.

3 The contractor must refuse to pay the money due the person demanding it.

4 The claimant must give the owner notice in writing.

(a) Of the contractors refusal

(b) Of the amount due to the creditor and so demanded by him of the debtor.

While it is true that no particular form of notice need be used, it is also true that the form used must give, in effect, the written notice prescribed by the statute. Fechlings v. Goings, 1 Robb., 375.

We contend that neither the notices of this claimant, nor the conditions precedent to the sending of the stop notices nor the proofs thereon complied with the statutory requirements as above set forth.

POINT I

The sum of eleven hundred ninety-nine dollars ($1,199) was not justly due but greatly in excess of the sum justly due from the general contractor to appellant.

It is admitted by counsel for appellant that the balance due on the contract entered into between the general contractor and appellant was $500. The sum of $699 is claimed for extra work. Section 7 of the contract expressly provided that no alterations were to be made except upon written order of the contractor. Appellant's manager testified that he knew of the existence of this contract and that it contained this provision requiring the production of written orders before any alterations could be made (case p. 15, 11, 20-40; p. 16, 11, 1-19). The only written order furnished to appellant by the Central Building and Construction Company was Exhibit D-14 (p. 24) and the only extra work for which it was entitled to be renumerated was the extra work performed pursuant to this written order which was, according to appellant's manager himself, $245 to $250 (case p. 16, 11. 20-21). Even Mr. Goldberg president of the Central Building and

Construction Company, the general contractor, called in behalf of this claimant, testified that "the most there should be extra that Mr. Biase is entitled to is about $250" (case p. 19, 11. 39-40).

We then have this situation. Appellant, to whom is owing but $500 on the contract plus $250 for extras or $750 in all, makes a demand for $1,199 or $449 more than to which it is entitled. Demand of a sum in excess of that which is due is fatal to a claimant. Reeve v. Elmendorf, 9 Vroom, 125; Hall v. Baldwin, 18 Stew., 858.

It is true that in 1910 Section 3 under discussion was amended so as now to require the claimant to give notice of the amount due to him *"specifying said amount as nearly as possible."* But if an amount be due, it of necessity means that it is capable of exact ascertainment and determination; otherwise no demand could be made. Aside from that, it is impossible to argue that a demand in excess by $449 of that which is justly due, is compliance with a requirement that claimant must give notice of the amount due to him *"specifying said amount as nearly as possible."*

It is contended by counsel for claimant that the requirement that the orders for extra work be in writing is one of which only the contractor could avail himself and that the other lien claimants may not raise the question.

This contention, however, is wholly without merit. It is admitted by counsel that the general contractor could set up as a defense to this claim that $1199 was not owing to appellant because it did not furnish written orders for the alleged extras. The effect of the notices served by the other lien claimants upon the owner was to assign to them, pro tanto, the right of the contractor to the funds in the owner's hands. They became assignees and, as assignees, any defenses to which the contractor was entitled, are available to them. Wight-

man v. Brenner, 11 C. E. Gr., 489; Anderson v. Huff, 4 Dick., 349. In Wightman v. Brenner, *supra,* the Court says:

> "On the contrary, I think the purpose most conspicuously expressed on its face is, to work a substitution or subrogation of creditor rights; in other words, to put the workman or materialman, whenever the condition of affairs contemplated by the statute exists, exactly in the position of the contractor, so that he can invoke not only the contractor's remedy, but his rights against the owner. This is the effect imputed to the notice by the Supreme Court, in Reeve v. Elmendorf. The Chief Justice, speaking for the court, says: 'Upon notice given, the workman or materialman, to the extent of his demand, takes the place of the contractor.' "

POINT II

The notice served by Appellant upon the owner did not meet the requirements of Section 3 of the Mechanic's Lien Law. (*Compiled Statutes p.* 3294.)

In the first place, the contractor did not refuse to pay appellant. True, Mr. Goldberg retained Mr. Leo Stein, a member of the Bar, to represent him but Mr. Stein did not refuse to pay the sum demanded until after the notice was served and then only because the amount was greatly in excess of that justly due.

Nor does the fact that Mr. Goldberg tendered Mr. DeBiase on a demand for payment, the sum of $100

show a refusal. Appellant concedes that no specific sum was demanded and how can it be said that an offer of $100 is a refusal to pay a sum which the person did not demand but which he only thought and silently expected he would receive? If, as has been held in Beckhard v. Rudolph, 2 Robb., 740 at p. 747 mere omission and neglect are not "refusal," how can an offer to pay $100 when no specific sum is demanded constitute a refusal to pay a sum which a person secretly expects to receive but does not demand?

Counsel for appellant further contends that the neglect, omission, and failure of the Central Building and Construction Company to pay appellant after the receipt of the letter of Exhibit D-11 is a refusal. This is without merit. Refusal requires some word or overt act. It is not enough that money due and payable is not paid. It is more than omission or neglect. It implies some previous request. Hall v. Baldwin, 18 Stew., 863; Buckhard v. Rudolph, 2 Robb., 740.

In the second place, the notice in writing served upon the owner was insufficient in that it did not apprise the owner of a demand made upon the contractor and of the contractor's refusal to pay.

The learned Vice-Chancellor in his opinion points out that our courts have gone so far as to waive the recital of a demand for payment if a statement is used in the notice showing payment to have been refused, as the term "refusal" naturally imports a previous demand or request. Buckhard v. Rudolph, 2 Robb., 740. But to go farther and argue that it is not even necessary for the notice to contain a statement, express or implied, that the contractor has refused to pay the claimant is to attempt to argue out of existence the 3rd Section of the Mechanic's Lien Law.

Counsel for appellant concedes that the notice of August 7th, 1914 (Exhibit D-11) does not, in form or substance, set out the making of a prior demand

or refusal to meet that demand. We, therefore, pass over this without comment. On August 28th, 1914, Mr. Cavicchia, an attorney for appellant, wrote a letter to the owner, Engel, Exhibit D-16 (case p. 24). On this letter counsel now relies as being notice to the owner of a demand upon, and refusal of, the contractor to pay to the claimant the money justly due it.

This letter wholly fails to apprise Mr. Engel of the facts which it is obligatory for a noticing claimant to serve upon an owner. The only statement in it relating to a demand and refusal or even to a refusal which under the cases would embrace a demand is as follows: "Since Mr. Goldberg is showing a disposition to prolong the settlement of this claim I am ready, etc." What is there in this statement which shows that the Central Building and Construction Company had refused, on demand, to pay? Not only is there nothing to show that, but, as is stated by the Vice-Chancellor, it warrants the conclusion that the contractor had, in fact, not refused to pay the claim.

The case of Donnelly v. Johnes 58 N. J. Eq. 442 is directly in point. There the statement in the notice relied upon to inform the owner of the contractor's refusal was "I can't seem to get a settlement with the builder Mr. J." Said the Court at page 451:

> "This phrase does not show any reason why he could not get a settlement. There may have been other reasons than a refusal of payment. Crowther may never have asked for payment. This letter certainly does not give any notice to General Donnelly that Crowther had made a demand for payment upon Johnes and received a refusal from him and must be rejected as insufficient."

For these reasons and for the reasons presented by the learned Vice-Chancellor we urge that the decree of the Court of Chancery be in all respects affirmed.

Respectfully submitted,

I BERNARD DVIN,

Solicitor for Joseph Cheskin.

JOSEPH KRAEMER,
Of Counsel.

LOUIS JEFFREY LINO. CO., 205 W. 19th St.

INDEX.

In Chancery of New Jersey.

Between	
ISIDOR ENGEL, *Complainant,*	*On Bill of Interpleader.*
and	
CENTRAL BUILDING AND CONSTRUCTION COMPANY, *et als., Defendants.*	*State of Case.*

The complainant through his counsel Howe and Davis filed a bill of interpleader in which he alleged that on March 25, 1914, complainant entered into a contract with Central Building and Construction Company, a corporation, wherein the said Central Building and Construction Company did thereby agree to and with complainant that it, the said Central Building and Construction Company should and would, for the consideration thereinafter named, on or before ninety working days after said March 25, 1914, well and sufficiently erect and finish all the works on the alterations and additions to the building No. 297 Main street, in the city of Orange, in the County of Essex and State of New Jersey, agreeably to the drawings and specifications made by David M. Ach, architect, and to provide such good, proper and sufficient materials of all kinds whatsoever, as should be proper and sufficient for the completing and finishing the entire work of said alterations and additions to said building, mentioned in the complete specifications, for the sum of Ten Thousand ($10,000) dollars; and the

said Isidor Engel did thereby covenant, promise and agree to and with the said Central Building and Construction Company, a corporation, as specified, well and truly to pay or cause to be paid to the said Central Building and Construction Company, a corporation, the sum of Ten Thousand ($10,000) dollars, subject to additions and deductions, as thereinbefore provided, and that such sum should be paid by the said Isidor Engel to the said Central Building and Construction Company, in current funds, and only upon certificates of the architect, as follows:

"On or about the first of each month the contractor shall present a requisition to the architect for the amount done, and the contractor shall receive a payment of 85% of the work done the previous month, the 15% balance shall be paid at completion."

This contract was duly filed in the clerk's office together with the specifications. The following payments were made to Central Building and Construction Company on account of the contract, upon certificates of the architect, David M. Ach:

First payment, May 1, 1914	$ 400.00
Second payment, June 1, 1914	4,785.00
Third payment, July 1, 1914	2,415.00
Fourth payment, August 7, 1914	900.00
leaving a balance of	dollars

due upon the contract.

On November 10, 1914, the contract had not been performed, and the architect David M. Ach, at the instance of Mr. Engel, served a notice upon the Central Building and Construction Company, calling upon it to complete the work and perform the specified things named in the notice, and upon failure to comply, it would be considered that the Central Building and Construction Company had

abandoned the work. Copies of all stop notices served up to that time with the exception of that of Levy and Charin were enclosed with the letter which contained this notice.

The Central Building and Construction Company failed to complete the work and abandoned it, and the complainant complete the job, and upon completion, held in its hands in all, on account of the contract and expenses, the sum of sixteen hundred and forty-nine dollars and seven cents. Stop notices were served upon Isidor Engel, the complainant, by the following:

1914.	August	7—Newark Masons Contractors Co., }	
"	August	28—Newark Masons Contractors Co., }	$1199.00
"	September	10—Joseph Permut,	111.81
"	September	15—New York Cornice & Skylight Works,	412.00
"	September	26—Lewis Max,	455.80
"	October	9—Joseph Cheskin,	135.00
"	October	14—Meyer Gendel,	90.00
"	November	10—Abraham Levy & Morris Charin, partners, trading as Levy & Charin,	393.72
"	December	18—Kawneer Manufacturing Company, a corporation,	656.00
1915.	January	7—Robert A. Dorrill,	32.00
"	January	7—Charles S. Menagh,	10.58

Written notice was given by complainant to Central Building and Construction Company of the service of all of the stop notices and demands. No protest was made by the contractor against any of the notices, and the Bill offers to pay the sum of Sixteen Hundred and Forty-nine Dollars and Seven Cents, money held by complainant, into the Court of Chancery, and calls upon all of the defendants, to wit: all of the parties above mentioned as people who served stop notices, to answer the Bill of Interpleader.

A decree was subsequently made, granting the prayer of the Bill of Interpleader discharging the complainant and ordering the sum of Sixteen Hundred and Forty-nine Dollars and Seven Cents, to be paid by the complainant in to the Court of

Chancery, which was subsequently done, and this sum is now there.

The defendants Joseph Cheskin, Newark Masons Contractors Company, Joseph Permut, New York Cornice and Skylight Works, Lewis Max, Levy and Charin, Kawneer Manufacturing Company and Samuel Tobolsky filed statements of their claims, pursuant to Rule 221. The defendants, Meyer Gendel, Robert A. Dorrill and Charles S. Menagh did not appear upon the hearing of the Interpleader.

Appellant admits that the claim of each defendant was properly filed, and is for a correct amount, and that each defendant served a stop notice upon Isidor Engel upon the date above set forth, as alleged in the bill of complaint, and that each of these stop notices is valid. The only question presented is the validity of the stop notice of the appellant, Newark Masons Contractors Company, and if valid, having been served first, this appellant should be first paid.

The hearing upon the priority of claims was held before the Honorable John E. Foster, whose opinion is hereafter printed.

IN CHANCERY OF NEW JERSEY.

ENGEL,

vs.

CENTRAL BUILDING & CONSTRUCTION CO.

Transcript of shorthand notes of proceedings taken in the above entitled cause before Hon. John E. Foster, Vice Chancellor, on Wednesday, the first day of March, 1916.

In re Claim Newark Mason Contractors Co.

JOHN D. BIASE, sworn.

Direct examination by Mr. Fort.

Q What is your business? A Mason contractor.

Q The Newark Mason Contractors Company is a corporation? A I am manager of the company.

Q Did you have a contract to do any work on a building in Orange, known as the Engel Building? A Yes, sir.

Q Who was your contract with? A Central Construction Company, of which Mr. Goldberg was the president.

Q Was that contract in writing? A Yes, sir.

Q Is this it? (Witness shown paper). A Yes, sir.

Q Is that your signature there? A Yes.

Q Was a copy of that contract given by you to the Central Building & Construction Company? A He made two copies of this himself and gave me one and he kept the other one.

Q Did you sign them both? A Yes, sir.

Q Did he sign it? A He didn't sign it, because there is the seal there.

Q Did he sign the other one? A I don't know that he signed it.

Q 31st of March, 1914, is the date of the contract? A Yes.

Q Who handed you this after the seal was put on it? A Mr. Goldberg.

Mr. Fort. I offer it in evidence, for identification.

Mr. Bentley. We would like to reserve our objection to it.

(Marked Exhibit D. 10 for identification).

Q Under that contract were you furnished with any plans or specifications? A Yes, sir.

Q Did you do the work called for by these plans and specifications? A Yes, sir.

Q Were you paid for the work you did? A Not entirely.

Q How much were you paid? A We received $2,900.

Q Your contract price shown in the contract is $3,400? A Yes.

Q When did you get those payments? A (Referring to book, page 11). We received first payment June 3, $1,800 check and $600 note.

Q What else did you get? A On July 3 we received check for $500.

Q Did you ever receive any other money? A No, sir.

Q Did you do any work on this building, other than that called for in the contract? A Yes, sir.

Q What was the work you did? A There was a centre partition which we don't figure for and then Mr. Goldberg give me an order to do that, and put a plaster board on both sides, and

plastered all the way through 100 feet deep and 16 feet high.

Q Is there anything else that Mr. Goldberg gave you any order for? A I cannot remember any other thing; I was sick at the time, and my partner was up there.

Q Was there anything that he gave you an order for? A Some water had to be pumped from the cellar.

Q Did he give you a written order? A They gave it to my partner, because he was on the job, and I was in bed sick at the time.

Q What other extra work, if any, was there done that you know of? A Some brick work, which don't show on the plan. The plans show the roof in a different way from the way it was meant, and then my partner asked—

Q What was done? A I know the brick work was done, but I was not there.

Q Were you at the building to see the work? A I saw the work when it was finished.

Q What did the work consist of that you saw? A An extension of brick work.

Q How much was that? A About three feet all the way around.

Q How far is all the way around? A About 300 feet, I guess.

Q Did you compute the cost of that work at any time; did you figure the cost of that work at any time? A Yes, sir.

Q Work and material? A Yes, about $342 or $346, because there was—

Q You computed that and put it in your book, did you? A Yes, sir.

Q I show you page 8 of book marked Day Book; does that item appear there? A Yes, $342.

Q Is that the item under date of June 30, $342; that is the one you have just been speaking about? A Yes.

Q What else did you do there on that work that wasn't in the plans and specifications? A The ground wasn't level and when the old building was down we found out there was a cellar four or five feet deep and we couldn't hold the water without putting bigger concrete underneath, so we put extra concrete and put the wall on top of that.

Q How much was the cost of the extra concrete? A About $100.

Q How big was it? A My partner was there and he knows more about that than I do.

Q You figured the cost? A Yes, the way it was referred to me from him.

Q You figured it at $100? A Yes.

Q What else was there? A There was some concrete on the toilet, some cement work.

Q What was the cost of that? A $4.

Q What else was there? A He bought some cement and sand off us which we charged $3 for, and there was an extra flue on the chimney, and it was agreed between Mr. Engel and Mr. Goldberg and also agreed with me to pay $25 for it.

Q Who agreed? A Mr. Goldberg and Mr. Engel were there at the same time.

Q What else? A Cement and sand $3, and this brick and sand $5; that was put on the top.

Q Where is this item of $10? A We broke the sidewalk—the leader on the sidewalk to the curbstone.

Q Was that shown in the plan and specification? A No, sir.

Q Did anyone agree to pay you for that? A No, that was done with my partner.

Q Which of these items were you personally told to do by Mr. Goldberg, anything besides the chimney? A No.

Q But you figured all the cost of all these items? A Yes.

Q And the costs which you figured here, how did you figure the cost? A We figured it out in each case.

Q Have you any other record of the way you figured it, than that here in the books which shows the figures? A No, sir.

Q You haven't your original papers on which you did the figuring? A No, sir.

Q Have you ever been paid anything on account of any of these extras? A No, sir.

Q Have you testified as to what the cost of the extra partition was? A Yes, sir; about $200.

Q What was that work?

Mr. Carpenter. The contract between the builder and owner provides there shall be no allowance for extra work, unless authorized in writing, and I object to this.

The Court. I will consider your objection.

Q I show you a notice dated August 7, 1914, addressed to Mr. Engel's Bee-Hive, 287 Main street, Orange, signed Newark Mason Contractors Co., by John Biase as manager, and ask you if that is your signature? A Yes.

Q Did you send that notice to Mr. Engel? A Yes.

Q How did you send it? A I had an apprentice boy, his name is James Magnetta, I send the stop notice through him to Mr. Engel.

Q Did you ever get any proof that that had been delivered?

The Court. Mr. Engel has testified that it was served.

Mr. Bentley. I object to it on the ground that it hasn't complied with the statute in this, that the notice fails to set forth that demand was made by the Newark Mason Contractors Company upon the Central Building & Construction Company for the amount due and that refusal was made.

Court. The paper will be admitted as an exhibit on the part of the claimant for whatever it may be worth.

(Marked Exhibit D. 11).

Objection is also made by counsel for claimant on the ground that the plans and specifications are not annexed to the contract of the claimant Newark Mason Contractors Company.

Q Where are they? A They were used on the job and when the job is finished you never get them back. The architect has a copy.

Q Were there any plans and specifications fastened to this contract—physically fastened to it?

Mr. Newman. I object to that on the ground that it violates the parole evidence rule.

Court. I will allow the question.

(No answer).

Q You say the plans and specifications have been destroyed in the work? A The plan I had, but we can have a copy any time.

Q And the specifications that you had were destroyed? A Yes, and during the time I was sick I couldn't take care of it.

Q Prior to the service of this paper which has been marked Exhibit C. 6 and Exhibit D. 11, being stop notice under date of August 7, signed by the Newark Mason Contractors Company, had you made any demand on the Central Building & Con-

struction Company for the sum of $1,199? A Not directly to him.

Q Whom had you made that to? A When Mr. Engel received the stop notice, I spoke to Mr. Goldberg about this thing.

Q Before you sent the stop notice? A No, after.

Q When did you make a demand on Mr. Goldberg for the money? A Since then I didn't make any more demand, because on April 6 we expected the architect to give a certificate and get the money on August 6.

Q Who was there to get it? A Mr. Goldberg and me.

Q Was Mr. Engel there? A Yes, Mr. Engel was there.

Q What occurred at that time? A The architect didn't show up, but Mr. Goldberg called me up on the phone and he said he saw the architect and he was to be up in Orange; the next morning he give me a check—he offered me a check for $100—

Q Was Mr. Engel there when this happened? A No—he offered me a check for $100 and I refused that, and my work was finished about two months before that and I wanted the money.

Q Had you rendered any statement in writing to either Mr. Engel or Mr. Goldberg? A I sent a stop notice to Mr. Engel.

Q Before that; did you have a statement there on August 6th of how much was due you? A Yes.

Q Had you had before that time; when was this bill made up? A Before that.

Q That was August 5? A Yes.

Q Whom did you hand that to? A I went to take this to Mr. Goldberg when he gave me the check, and when he offered the check for $100 there

was no use offering the check, because I was mad, and I asked Mr. Engel how much he give him; he said $800, and he said, "There will be plenty of money here to pay everybody."

Q Were they both there? A No, first I saw Mr. Goldberg and he offered me $100.

Q What did you say when he offered the $100? A I refused it, because I expect at least six or seven hundred.

Q What did you say to Mr. Goldberg? A That is what I said to him, "I expect at least six or seven hundred dollars."

Q Did you tell him how much he owed you? A No, I didn't show him.

Q Did you tell him? A I did.

Q Why is that bill made out to Mr. Engel? A It was made out to be a copy of the stop notice.

MICHAEL PORZIO, sworn for claimant, Newark Mason Contractors Co., and examined through interpreter, Mr. Valentino.

Direct examination by Mr. Fort.

Q Are you one of the stockholders of the Newark Mason Contractors Company? A Yes.

Q Did you have anything to do with the work done on the property of Mr. Engel on Main street, Orange, during 1914? A Yes.

Q What was your duty there? A I was boss.

Q What part of the work were you boss of? A Masons.

Q Were you the head man there for the Newark Mason Contractors Company? A Yes, sir.

Q Did you do all of the work that was called for under the contract, plans and specifications? A Yes.

Q Did you do any other work? A Yes.

Q What other work did you do? A Plastered a partition in the centre of the old store.

Q Who told you to plaster the partition in the centre of the old store? A Mr. Goldberg.

Q Did he tell you in writing or by word of mouth? A Yes, in writing.

Q I show you a paper signed "C. B. Const. Co. By S. G.," and ask you if that is the writing to which you refer? A Yes, sir.

Q Is there any other work specified in that paper that you were to do? A We were to put in a foundation for a new wall, and we had to remove water from the cellar.

Q Did Mr. Goldberg give you this as an order to do these two pieces of work? A Yes.

Mr. Fort. I offer the paper just shown the witness in evidence.

(Marked Exhibit D. 14).

Q Did you do any other extra work up there? A I built a chimney that was not on the plans.

Q Who told you to do that? A The day after the owner of the house came and called Mr. Goldberg's attention to the fact that it wasn't enough to draw the steam and ordered that a new chimney be built.

Q Who told you, Mr. Porzio? A Mr. Biase gave me the order because Mr. Goldberg gave the order to Biase.

Q What else did you do; did you do anything to the concrete in the cellar? A The inspector looked at the concrete wall in the cellar and said that the foundation wasn't strong enough and ordered that they be dug—made deeper.

Q What did you do when the inspector did that? A I asked Mr. Goldberg.

Q What did Mr. Goldberg say? A Dig until you find hardness, and I will pay afterwards.

Q Did you do any brick work above the ceiling beams? A When I was through with my work Mr. Goldberg came to me and said, "Raise three feet more of the work around the building."

Q How many brick did that work take, do you know? A I don't remember—nineteen to twenty-one thousand.

Q Did you do that work? A Yes.

Q Did anybody say anything about who would pay you for it? A I asked for an order; he said he would give it to me the next day, and the next day he came but I didn't get it, and he told me to go ahead.

Q Did you put any concrete in the toilets? A Yes.

Q How did that happen? A Because Mr. Goldberg ordered me to do it.

Q Did he say anything about pay? A It will be the same as all other extra work.

Q Did you remove any concrete anywhere? A Yes, the front part of the store on Main street.

Q Was that in the contract? A No.

Q Was there anything to be paid for that or how did you come to do it? A He said he would pay; he wouldn't call someone else to do it, so he asked me to do it.

Q Did you furnish any cement and sand for any purpose? A Yes.

Q What was it? A To build a bottom—rough bottom for the tiling.

Q Was that in the contract? A No.

Q How did you come to do it? A Goldberg ordered it.

Q Was anything said about pay? A He said it would all be paid at the end when everything else would be paid.

Michael Porzio, cross.

Q Did you make any leader connection anywhere? A Yes, under the sidewalk we had to make the connection; we had to break the concrete in order to do it.

Q Who told you to do that? A Goldberg.

Q What did he say about it? A It would be paid for extra.

Cross examination by Mr. Dvin.

Q Who did you say told you to do the plaster partition in the store? A Mr. Goldberg.

Q Did he give you any written order to do it? A Yes.

Q By whom was that order signed? A Himself.

Q You did extra work in the concrete foundation? A Yes.

Q Who ordered that work? A Goldberg.

Q Did you have a written order from Mr. Goldberg for any of this extra work? A Not on that foundation.

Q On any outside of the one marked D. 14, did you have any order from Mr. Goldberg? A No.

Q Did you have any written order from Mr. Engel? A No, sir.

Q Did you have any written order from the architect? A No, sir.

Q As a matter of fact, didn't Mr. Engel tell you to make these alterations? A No, Mr. Engel ordered Mr. Goldberg, and Mr. Goldberg ordered me.

Q Did you know of the existence of the contract between the Central Building & Construction Company and the Newark Mason Contractors Company? A Yes.

Q Did you know that in that contract there was an order authorizing the production of a written

order before any alterations could be made? A Yes, but I couldn't make Mr. Goldberg give me the order; he promised it the evening before he would give me one the next day, and the next day he put it off again.

Q You knew that in the contract between the Newark Masons and the Central there was this clause requiring the production of a written order before alterations could be made? A Yes.

Q Still you went ahead and made these alterations without any written orders, except this one D. 14? A As I got the first, I expected the rest of the orders; I didn't know he was going to play me false.

Q Why didn't you wait until you got these orders? A My men were losing time.

Q How much is the charge for the extras ordered by this order? A $245 to $250.

Mr. Fort. $210 out of the extras.

ISIDOR ENGEL, heretofore sworn, called on behalf of Newark Mason Contractors Co.

Direct examination by Mr. Fort.

Q You were the owner of this building? A Yes.

Q Did you ever receive a letter from Mr. Peter A. Cavicchia, dated August 28, 1914, referring to this matter? A I did.

Q Have you that letter with you? A I have.

Q When did you receive the letter? A The day after it was written; I cannot remember the date.

Q That is the letter, the original? A Yes.

Mr. Fort. I offer the letter in evidence.

Objected to.

The Court. It will be admitted as a paper that was received by this witness; it is not admitted for any particular purpose yet. What its significance may be will have to be developed.

Mr. Davis. Unless it is to take the place of a stop notice, it is irrelevant, and if it is to act as a stop notice, it does not show a refusal of a demand, and further, it is not signed by the claimant.

Mr. Carpenter. We object to it as a stop notice.

Court. It will be admitted.

(Marked Exhibit D. 16).

Q You had previously received a notice from the Newark Mason Contractors Company on the 7th of August, which you produced at the last hearing? A Yes.

Q That you had received? A ~~No.~~ Yes

Q When you received that notice, did you communicate the fact that you had received it, to Mr. Goldberg? A I did.

Q Did he ever say anything to you about it after you had communicated it to him? A I don't remember he said anything about it; we were urging him to finish the work.

Q Did he say anything to you about that stop notice? A No.

SAMUEL GOLDBERG, heretofore sworn, recalled in behalf of Newark Mason Contractors Co.

Direct examination by Mr. Fort.

Q Mr. Engel has testified that he gave you this notice dated August 7, 1914, signed by Mr. Biase? A Mr. Engel never gave it to me.

Q Did he tell you there was such a notice? A No, it was sent to me by the architect.

Q But you received word of it? A Yes, and I sent a protest against it.

Q You retained Mr. Leo Stein in that matter to represent you? A After the stop notice was filed.

Q When you say "after the stop notice was filed," do you mean after this paper D. 11? A Yes.

Q And Mr. Stein, in your behalf, refused to pay this sum of $1,199, didn't he?

The Court. After the notice was served.

A Yes, he did.

Q Your talk with Mr. Stein when you retained Mr. Stein in this matter, was shortly after you had gotten this notice or a long time? A You refer to the stop notice?

Q To this paper D. 11? A This is the only one.

Q That is the only one that has been called a stop notice? A Yes, a few days after.

Mr. Dvin. I object to Exhibit D. 11 as not showing a demand and refusal.

Mr. Fort. It has been offered heretofore and I now rely on it as showing a demand upon Mr. Goldberg, and as a refusal, as a part of my chain of evidence, to show the demand and refusal.

The Court. I will permit it.

Cross examination by Mr. Fleischman.

Q Did you ever see this letter of August 28th? A Yes.

Q When did you see it first? Have you ever seen a copy of that letter before today? A No.

Q Did you know of the existence of such a letter as that before today? A No.

Samuel Goldberg, cross.

Cross examination by Mr. Davis.

Q Why did you refuse to pay this sum of money? A At first there was no demand; Mr. Biase met me and he expected to get more money and I offered him $100 and he didn't want to take it, and we parted; he was angry. Then about two days after, I got a copy of this stop notice from Mr. Ash; so naturally, then, there was no question of refusing or not refusing, because it tied up the whole job.

Q I understand you to say that your lawyer, Mr. Stein, refused to pay; why was that refusal? A Because the bill wasn't correct.

Q What was the correct amount of the bill? A There was a balance coming to the contract of $500 and some extras for the wall and plastering and for pumping the water; while there was some work the building was raised higher than it should, but when I would need so much extra, we would get an order from Mr. Engel and Mr. Ash, because it was necessary for the building; the building should have the right pitch, the water should run off, but instead Mr. Porzio—I didn't understand him right, but he spoke about going a few bricks higher, so we went up and I said he should go ahead, and he went ahead and finished it and we never spoke about any price or any extras, and I never saw a bill, what they amount to, until I got a notice from Mr. Ash, the stop notice.

Q He never demanded an account of that stop notice? A He couldn't, because the job wasn't done.

Q Is the amount mentioned in the stop notice too high? A Yes.

Q How much? A The most there should be extra that Mr. Biase is entitled to is about $250.

Samuel Goldberg, cross.

Q And he charged how much for extras? A In the contract is $500, that is about $715, and his stop notice is around $1,190.

Court. About $440 difference?

Witness. Yes.

Q The reason, then, you refused payment is because the bill was too high? A Yes.

Q *(By the Court).* Do I understand the work had not been finished at the time the notice was served? A According to the specification, there should be a paved walk there; Mr. Biase claimed it didn't belong to him, and Mr. Ash thought it belonged to Mr. Biase and he had to do it, and Mr. Ash went and ordered Mr. Biase, and Mr. Biase done it and Engel paid him, but he took it off of the contract.

Q Who paid? A Mr. Engel paid Mr. Biase, but he took it off my contract, but that was done after the stop notice was filed.

Cross examination by Mr. Dvin.

Q I show you a paper dated August 10, 1914, and ask you if that was served on you? A I think I got this from Mr. Biase, but it was a few weeks after the stop notice.

Q When did you get it? A I cannot recall, and I demand he should show me why it is going to make so much money, and then he gave me this paper.

Q Did Biase ever make demand upon you for $1,199 before then? A No.

Q That was the first demand he made upon you? A Yes.

Mr. Dvin. I offer this paper in evidence.

(Marked Exhibit D. 17).

Court. This Exhibit D. 17 is to be limited in its application to the first stop notice of the Newark Mason Contractors Co.

Mr. Fort. I will concede it was given between the first and second notices.

Q Can you say that that was served on you more than twenty-one days after the first notice was served? A That would be about three weeks.

Q Can you say positively that it was at least three weeks, if not more? A I cannot say.

Q I show you a letter signed "David M. Ash," dated August 20, 1914, and I ask you whether that is Mr. Ash's signature? A I cannot say.

Q Have you ever received a letter from Mr. Ash before? A I received about twenty and all were signed in the same way.

Q You received letters from Mr. Ash prior to this one? A Yes.

Mr. Dvin. I offer the letter in evidence.

Court. It will be admitted.

(Marked Exhibit D. 18).

Q I show you another paper, signed in a similar manner; did you receive that, dated November 11, 1914? A Yes.

Mr. Dvin. I offer this in evidence.

Court. It will be admitted.

(Marked Exhibit D. 19).

Adjourned to March 14th, 1916, at 12 o'clock.

Exhibit D. 16.

Appellant's Exhibit.

MARKED EXHIBIT D. 16.

Newark, N. J., August 7, 1914.

Mr. Engels Bee Hive,
297 Main Street,
Orange, New Jersey.

Dear Sir:—

You are hereby notified that by sub-contract entered into by us with the Central Building and Construction Company, they agreed to pay us the sum of thirty-four hundred dollars for mason work concerning the construction of an additional store in the rear of the premises of your property located at No. 297 Main Street, Orange, New Jersey.

That the work has been completed by us in conformity with the said sub-contract, the said Central Building and Construction Company leaving the sum of Eleven Hundred and Ninety-nine dollars still due to us; which includes the extra work. You are therefore notified to retain in your hands any money that is due by you to said Central Building and Construction Company and apply it to the satisfaction of our claim as aforesaid.

NEWARK MASON CONTRACTOR'S CO.
by John Di Biase,
Manager.

Exhibit D. ~~16~~ 17

STATEMENT

Of amount due Newark Mason Contractor's Company, on job No. 297 Main St., Orange, N. J.

Balance on Contract		$ 500.00
Extra	Partition plaster board and plaster	200.00
"	foundation concrete	100.00
"	Ciminy	25.00
"	Water pump in cellar	10.00
"	Removed concrete	5.00
"	Cement and sand	3.00
"	Concrete in toilet	4.00
"	Brick work above ceiling beams No. 19000 $18	342.00
"	Leader connect on sidewalker	10.00
		$1199.00

Exhibit D. 14.

Newark, N. J., April 27, 1914.

Newark Mason Contractors Co.

Plaster partition in Stock; also water pump. This will be extra.

C. B. Const. Co.
By S. G.

Exhibit D 16

House 'Phone 4782-W Market
Office 'Phone 5445 Market

Law Offices
Peter A. Cavicchia
Essex Building
Newark, New Jersey.

August 28, 1914.

Mr. Engel,
Proprietor of The Bee Hive,
297 Main Street,
Orange, New Jersey.

Dear Sir:—

Some time ago you were served with a stop notice, whereby the Newark Masons Contractors Company claimed from the Central Building and Construction Company, of which Samuel Goldberg is an officer, the sum of $1199 for work done and materials furnished on your new house.

Since Mr. Goldberg is showing a disposition to prolong the settlement of this claim, I am ready to bring suit for the amount, and I hereby notify you to withhold the amount of $1199 out of any moneys that are now due, or which might become due to the said Central Building and Construction Company, until such time as the Courts shall have decided the question.

Yours very truly,
PETER A. CAVICCHIA.

Exhibit D. 18.

EXHIBIT D. 18.

DAVID M. ACH
ARCHITECT
1 MADISON AVENUE
NEW YORK

August 20-1914.

Re: Engel Job.

Central Building & Construction Co.,
124 Fairmount Avenue,
Newark, N. J.

Attention, Mr. Samuel Goldberg.

Dear Sir:

I am in receipt of your letter enclosing copy of the extra work of the Newark Mason & Contracting Co. and in reference to same, I wish to advise you that no allowance can be made on plastering of partitions, chimneys, water pumps, cement and sand, cement floor and toilet or any brick work whatever as all of these items were called for in the plans and specifications and cannot be considered as extras under any circumstance.

The question of the leader connection on the sidewalk will probably have to be allowed as it was not provided for in the contract but took the place of the storm sewer which of course the mason had nothing to do with.

Yours truly,
David M. Ach
N.

Exhibit D. 19.

EXHIBIT D. 19.

DAVID M. ACH
ARCHITECT
1 MADISON AVENUE
NEW YORK

November 11-1914.

Mr. Samuel Goldberg,
c/o Central Building & Construction Co.,
124 Fairmount Ave.,
Newark, N. J.

Dear Sir:—
Enclosed please find copies of Stop Notices and the list which you and I made up.

Yours truly,
David M. Ach
N.

— Copy of List Made Up By David M. Ach, Architect and Mr. Samuel Goldberg.

Joseph Permutt—Plumber	$111.81	O. K.
Newark Mason & Contractors Co.—		
Mason	675.00	
Less,	200.00	
	475.00	
Lewis Max—Glass	455.80	O. K.
New York Cornice & Skylight Co.—		
Roof	341.00	
Joseph Cleskin—Painter	135.00	O. K.
Meyer Gendel—Electrician	90.00	O. K.
Allard—Steam	150.00	O. K.
Levy & Charin—Mill	393.72	

Opinion.

Filed.

IN CHANCERY OF NEW JERSEY.

Between ISIDOR ENGEL, *Complainant,* *and* CENTRAL BUILDING AND CONSTRUCTION COMPANY, *et als.*, *Defendants.*	*On Bill of Interpleader.*

Heard on bill, answers, replication and proofs.

Messrs. Howe & Davis for complainant.

Mr. Franklin W. Fort, representing Mr. Peter A. Cavicchia, solicitor for Newark Mason Contractors Co.

Mr. Isaac Fleischman for defendant, A. A. Tallard.

Mr. Peter Bentley for defendant Lewis Max.

Mr. J. D. Carpenter, representing McDermott & Enright, solicitors for defendant, Kawneer Manufacturing Co.

Mr. James R. Stewart, Jr., for defendants, Abraham Ratner and Julius Jader, partners &c.

Mr. Jacob Lubetkin for defendant, Meyer Gendel.

Mr. I. Bernard Dvin for defendant, Joseph Cheskin.

FOSTER, *V. C.*

This is a bill of interpleader and after the entry of a decree of interpleader this cause came on for hearing to determine the priority of the lien claims. I have disposed of all the lien claims except the claim of Newark Mason Contractors Company, the validity of whose notice is attacked.

As to the claim of the Newark Mason Contractors Company, I find that the notice or notices served on the owner do not comply with the requirements of the statute.

The statutory requirements are, that (1) whenever the contractor shall, upon demand, (2) refuse to pay any sub-contractor the money due to him, (3) it shall be the duty of the sub-contractor to give notice in writing to the owner, (4) of such refusal and (5) of the amount due to him and so demanded. If notice to this effect is given, the owner is then authorized to pay the claim, on being satisfied of its correctness, and will be allowed for the amount so paid in his settlement with the contractor. Comp. Stat., 3294, Sec. 3. No particular form of notice need be served, provided the form used gives in effect the written notice prescribed by statute. *Fehling* v. *Goings*, 78 Eq., 375.

By an unexecuted draft of a contract dated March 31, 1914, made between the Central Building and Construction Company and this claimant, the latter agreed to do certain mason and other work under the direction of the owner's architect on the premises in question by June first following, for $3400, to be paid: 80 per cent (presumably of the architect's estimate) on the first day of every month, and the balance was to be paid when the work was completed and accepted by the owner.

On August 7, 1914, claimant served on the owner a notice, in which reference is made to this unexecuted contract, and then the notice proceeds to state:

(1) That the work has been completed in conformity with this sub-contract.

(2) That "the said Central Building and Construction Company, leaving the sum of eleven hundred and ninety-nine dollars still due us, which includes the extra work," and

(3) You are therefore notified to retain in your hands any money that is due by you to said Central Building and Construction Company and apply it as aforesaid to the satisfaction of our claim as aforesaid.

This notice was signed in the name of the claimant by its manager.

It will be observed that this notice did not give the owner of the principal matter mentioned in the statute, *i. e.*, the contractor's refusal to pay the amount claimed.

Having in mind that this section of the statute should be liberally construed in favor of a lien claimant (*Mfg. Co.* v. *Building Co.*, 71 Eq., 133; *affirmed* in 72 Eq., 929), I am unable to place any construction upon this notice that the contractor had refused to pay claimant the amount demanded. Our courts have gone so far as to waive the recital of a demand for payment in the notice, if a statement is used in the notice showing payment to have been refused, as the term "refusal" naturally imports a previous demand or request for payment. *Beckhard* v. *Rudolph*, 68 Eq., 740.

But I know of no case in which it has been held that the stop notice served is good and is authority for the owner to pay the claimant, if the notice contains no statement by which the owner is made aware, either expressly or by necessary implication, that the contractor has refused to pay the claimant. There is nothing in this notice to inform the owner why he should pay the claimant instead of the contractor; there is nothing to show that the contractor is unwilling or unable

to pay the amount demanded, and the owner is left to surmise or to speculate why payment is demanded of him.

Should he make payment under a notice of this effect, I seriously doubt if it would be allowed him in his settlement with the general contractor.

The infirmaties in this notice, which I have mentioned, were pointed out by me in the course of the hearing, and their significance was recognized by counsel for the claimant, who attempted to cure them by the introduction of a so-called second stop notice, which was served on the owner on August 28, 1914.

In this notice which is signed by a lawyer, Peter A. Cavicchia, complainant's attention is first called to the above mentioned notice served on him by this claimant on August 7, and it then states "since Mr. Goldberg is showing a disposition to prolong the settlement of this claim, I am ready to bring suit for the amount and I hereby notify you to withhold the amount of $1199 out of any moneys that become due to the Central Building and Construction Company until such time as the court shall decide the question."

There is nothing in this letter or in the reference it makes to the former notice to indicate that the contractor had refused to pay the claim. On the contrary, the complaint is that the contractor, through Mr. Goldberg, its president, is merely showing a disposition to prolong the settlement of the claim on August 28, certainly had not refused to pay this claim three weeks earlier, when the first notice was served, and it warrants the conclusion that the contractor had not in fact refused to pay the claim; and that the first notice was silent on this point because it could not truthfully charge the contractor with such refusal. This

conclusion is supported by the proof which shows that on August 6th the representative of the claimant became angry at the contractor when he offered to pay him $100 instead of several hundred dollars, which the claimant was expecting to have paid him, and that thereupon the notice of August 7th was served.

Mr. DeBiare, the manager of claimant, testified that prior to the service of the notice of August 7th he had not made a demand on the contractor for the August payment of the sum of $1199; that after he sent this notice to Mr. Engel, he spoke to Mr. Goldberg about it; that when Mr. Goldberg offered him a check for $100 on August 6th he refused it, because he expected six or seven hundred dollars.

No demand for payment having been made until after the notice was served, there certainly could not be a refusal on the part of the contractor to pay the claim prior to the service of the notice, and I find that the notices of this claimant and proofs thereon do not comply with the statutory requirements, and that this claimant is not entitled to participate in the distribution of this fund.

Final Decree

Filed April 5, 1916.

IN CHANCERY OF NEW JERSEY.

ISADORE ENGEL,
Complainant,
vs.
CENTRAL BUILDING AND CONSTRUCTION CO., *et als.*,
Defendants.

On Bill, Etc.
Final Decree.

This cause coming on to be heard in the presence of I. BERNARD DVIN, solicitor for defendant Joseph Cheskin; PETER A. CAVICCHIA, solicitor for defendant Newark Mason Contractors Co.; EDWARD L. DAVIS, solicitor for defendant Joseph Permut; JAMES E. STEWART, solicitor for defendant New York Cornice and Skylight Works; PETER BENTLEY, solicitor for defendant Lewis Max; LEVY & FENSTER, solicitors for defendants Levy & Charin; MCDERMOTT & ENRIGHT, solicitors for defendant Kawneer Manufacturing Co., and HAHN & NEWMAN, solicitors for defendant Samuel Tobolsky, and no person appearing for defendants Meyer Gendel, Robert A. Dorrill, and Charles S. Menagh, and the arguments of the counsel for the defendants having been heard; and,

It appearing to the Court that complainant had in his hands the sum of $1649.07 balance due to the Central Building and Construction Co. under contract with complainant for the erection of certain alterations and additions to complainant's property at No. 297 Main street, Orange, New

Jersey, and that said contract is on file in the County Clerk's office for Essex County; and,

It further appearing that the general contractor, Central Building and Construction Co., was indebted to defendants under sub-contracts with them and that said defendants served stop notices on complainant under the third section of the Mechanics' Lien Act in the following wise and manner, to wit:

(1) Aug. 7 and 28/14, Newark Mason and Contractors Co., $1199.

(2) Sept. 10/14, Joseph Permut, $111.81.

(3) Sept. 15/14, New York Cornice and Skylight Works, $412.00.

(4) Sept. 26/14, Lewis Max, $455.80.

(5) Oct. 9/14, Joseph Cheskin, $135.00.

(6) Oct. 14/14, Meyer Gendel, $90.00.

(7) Nov. 10/14, Levy & Charin, $393.72.

(8) Dec. 18/14, Kawneer Mfg. Co., $656.00.

(9) Jan. 7/15, Robert Dorrill, $32.00.

(10) Jan. 7/15, Charles S. Menagh, $10.00.

(11) Jan. 7/15, Samuel Tobolsky, $65.00.

and,

It further appearing that the Central Building and Construction Co. gave defendant A. A. Allard an order on complainant some time during April, 1914, and that said order is now in possession of said defendant; and

It further appearing that the stop notices served on the complainant by defendants, Newark Mason Contractors Co. and Lewis Max were defective in that they did not comply with Section No. 3 of the Mechanic's Lien Act; and

It further appearing that the stop notice served on complainant by defendant, New York Cornice & Skylight Works, was excessive to the extent of $65; and

Final Decree.

It further appearing that upon payment into this court of $1649.07 and service of copies of interlocutory decree on all answering defendants, the complainant was dismissed from the prosecution of the suit with his costs to be taxed and a counsel fee of $50 to be paid by the clerk of this court out of the fund, and that he was released, acquitted and discharged from all claims of and liabilities to any of the defendants in this suit for, upon, or by reason of said funds, and the defendants and each of them were enjoined and restrained from instituting or prosecuting any proceedings at law against the complainant and his said buildings and lands until the further order of this court; and

It further appearing that by reason of the fact that defendant A. A. Allard had entered into a new and direct contract with complainant, the further order of the court is that said injunction should be vacated as against defendant A. A. Allard; and

It further appearing that Kawneer Manufacturing Co. has a lien as for extra work for $656.00 to be first paid out of the said funds.

It is thereupon, on this 28th day of March, 1916, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED AND AGREED, and the said Chancellor does by virtue of the power and authority of this court hereby order, adjudge and decree that said sum of $1649.07, (less complainant's taxed costs and counsel fee of $50 to be paid by the clerk of this court) by divided and apportioned among, and paid over to defendants by the clerk of this court in the following manner with costs; that is to say,

First: To the Kawneer Manufacturing Co. or its solicitor $656.00 and costs in action in Circuit Ct.

Secondly: To Joseph Permut or his solicitor $111.81 and costs.

Thirdly: To New York Cornice & Skylight Works or its solicitor $347.00 and costs.

Fourthly: To Joseph Cheskin or his solicitor $135.00 and costs.

Fifthly: To Levy & Charin or their solicitor $393.72, or if there be not that amount left after payments made as above ordered, then as much as there shall remain in said funds.

Sixthly: To Samuel Tobolsky or his solicitor $65.00 if there be any money left in said funds after the payments made as above directed; and

It is further ordered, adjudged and decreed that the injunction against defendant A. A. Allard be vacated and that he be permitted to institute and prosecute any proceedings at law against complainant and his said buildings and lands that he may be permitted to do.

Notice of Appeal.

(Filed April 14, 1916).

IN CHANCERY OF NEW JERSEY.

Between ISADORE ENGEL, *Complainant,* *and* CENTRAL BUILDING & CONSTRUCTION CO., *et als.*, *Defendants.*	*On Bill, etc.* *Notice of Appeal.*

The defendant, Newark Mason Contractors Co. hereby appeals from the final decree made in this cause on the third day of April, nineteen hundred and sixteen, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated April 13, 1916.

PETER A. CAVICCHIA,
Solicitor for Defendant, Newark Mason Contractors Co.

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

FRANKLIN W. FORT,
Of Counsel with Defendant, Newark Mason Contractors Co.

To I. Bernard Dvin, Esq.,
Solicitor for defendant Joseph Cheskin.

Edward L. Davis, Esq.,
Solicitor for defendant Joseph Permut.

Notice of Appeal.

James E. Stewart, Esq.,
Solicitor for defendant New York
Cornice & Skylight Works.
Messrs. Levy & Fenster, Esqs.,
Solicitors for defendant Levy & Charin.
Messrs. McDermot & Enright,
Solicitors for Kawneer Manufacturing Co.
Messrs. Hahn & Newman,
Solicitors for defendant Samuel Tobolsky.

Petition of Appeal.

(Filed May 3, 1916).

New Jersey Court of Errors and Appeals

ISADORE ENGEL, *Complainant,* and CENTRAL BUILDING & CONSTRUCTION CO., *et als.*, *Defendants.*	*On Bill, etc.* *Petition of Appeal.*

To the Honorable the Court of Errors and Appeals in the Last Resort in all Causes.

The petition of Newark Mason Contractors Company, the appellant in the above stated cause, respectfully shows that your petitioner finds itself aggrieved by the final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of New Jersey, bearing date the third day of April, in the year nineteen hundred and sixteen, wherein Isadore Engel was complainant and Central Building and Construction Co., your petitioner and others were defendants, in this respect, to wit, that the said decree adjudges that from the sum of sixteen hundred and forty-nine dollars and seven cents, now on deposit in this suit, the Kawneer Manufacturing Company was ordered to be paid first six hundred and fifty-six dollars; and the defendant Joseph Permut was ordered to be paid secondly from this sum; and the defendant Newark Cornice & Skylight Works was ordered to be paid thirdly from this sum; and the

defendant Joseph Cheskin was ordered to be paid fourthly from this sum; and the defendants Levy & Charin were ordered to be paid fifthly from this sum; and the claim to your petitioner was dismissed and disallowed; whereas the said decree should have ordered that the claim of your petitioner, eleven hundred and ninety-nine dollars should be first paid from the said sum of money on deposit in the Court of Chancery as aforesaid before any of the claims of the other defendants in this suit were paid. And your petitioner humbly appeals from the whole of the said decree on the grounds that the same is erroneous and illegal and that the said decree of the said Chancellor may be in all respects reversed, set aside and for nothing holden, and that your petitioner may have such relief in the premises as to this honorable court shall seem meet.

PETER A. CAVICCHIA,
Solicitor for the Appellant.

FRANKLIN W. FORT,
Of Counsel.

Service of copies acknowledged by solicitors of all defendants who are parties hereto on May 5, 1916.