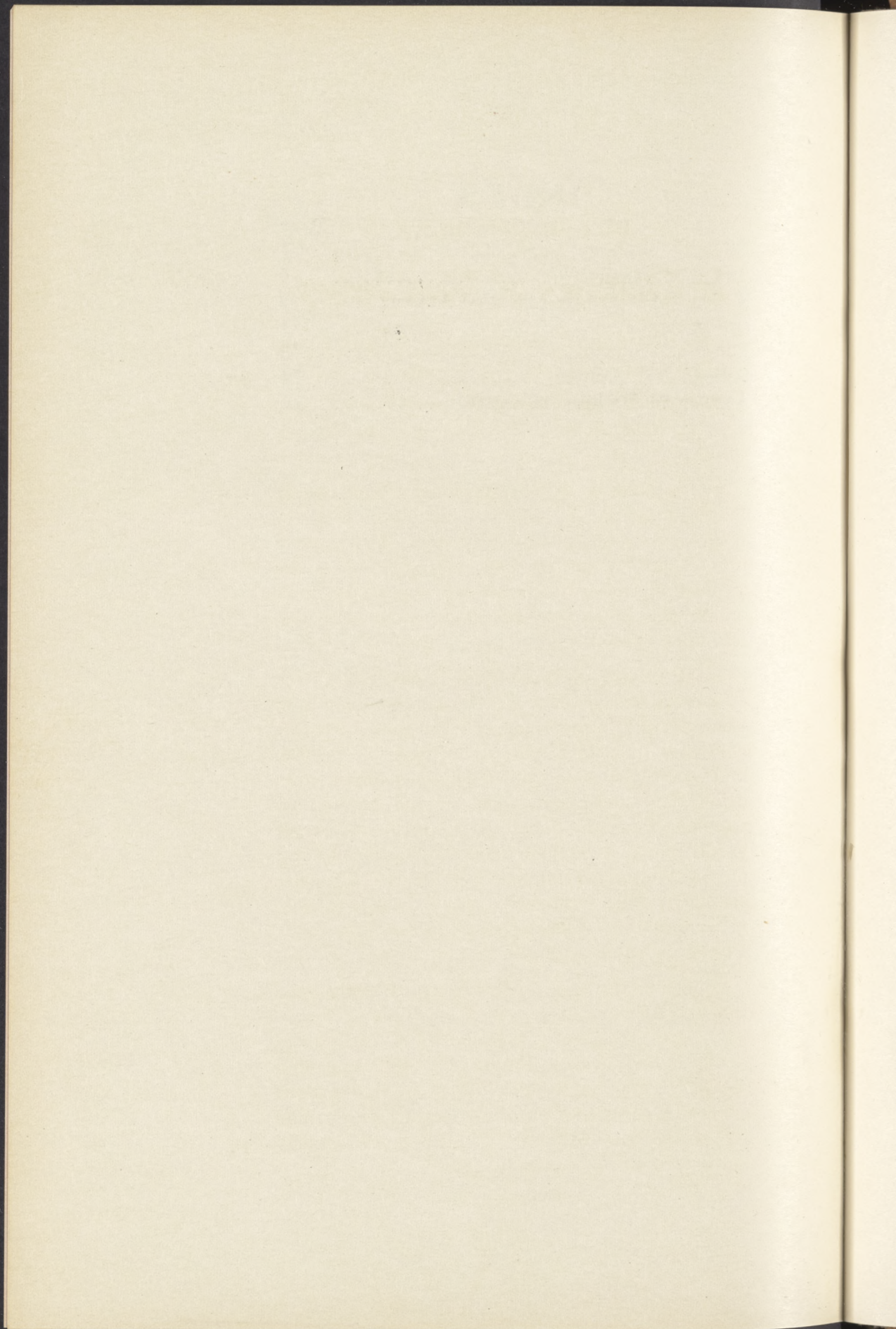


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BILL OF COMPLAINT.

In Chancery of New Jersey

To the Honorable, Edwin Robert Walker, Chancellor of the State of New Jersey:

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The complainant, Oschwald Brick Works, Inc., a corporation of New Jersey, respectfully shows that:

1. On June 6, 1928, Harry Lieberman, being indebted to Hyman Adelman and Louis Sosnow in the sum of \$1,980.00, executed to them a bond of that date to secure that sum payable on the 1st day of June, 1930, with interest at the rate of 6% per annum, payable half yearly from the date of the bond.

20

2. To secure payment of the bond, said Harry Lieberman executed to said Hyman Adelman and Louis Sosnow, a mortgage of even date with the bond and thereby conveyed to them in fee the lands hereinafter described, on the express condition that such conveyance should be void if payment should be made according to the terms of the bond, which mortgage having been first duly acknowledged and the certificate of acknowledgment duly endorsed thereon, was recorded in the Register's Office of Essex County, in Book B 65 of Mortgages, pages 71 and 72.

30

3. The mortgaged premises are described as follows:

BEGINNING at a point on the southeasterly line of Florence Avenue two hundred and fifteen feet southeasterly from a point formed by the intersection of the southeasterly side of Florence Avenue with the southwesterly

40

Bill of Complaint.

10 line of Varsity Road; thence (1) south sixty-two degrees forty-one minutes twenty seconds east one hundred feet and fifty-two hundredths of a foot; thence (2) south twenty-five degrees thirty-nine minutes fifty seconds west thirty-seven feet and one hundredths of a foot; thence (3) north sixty-two degrees forty-one minutes twenty seconds west one hundred and one feet and sixty-two hundredths of a foot to said side of Florence Avenue; thence (4) along same north twenty-seven degrees eighteen minutes forty seconds east thirty-seven feet to point and place of BEGINNING.

20 4. Both the bond and mortgage contained an agreement that if any installment of interest should remain unpaid for thirty days after the same shall fall due, then the whole principal due with all unpaid interest should, at the option of the mortgagee, his representatives or assigns, become immediately due.

30 5. The mortgage also contained an agreement that should any tax assessment, water rent or other municipal or governmental rate charge imposition or lien, be hereafter imposed or acquired upon the premises described in this mortgage, and become due and payable and remain unpaid and in arrears for the space of sixty days, then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods, as the case may be, the whole principal sum with all unpaid interest shall, at the option of the said party of the second part, or their legal representatives, become and be due and payable immediately thereafter, although the period above limited for the payment thereof,

40

Bill of Complaint.

may not then have expired, anything herein before contained to the contrary hereof in any wise notwithstanding.

6. On June 27, 1928, Harry Lieberman and Ida Lieberman his wife, conveyed said lands by deed of that date, to Morris Lieberman, in fee, which deed was on July 21, 1928, recorded in the Register's Office of Essex County, in book K 78 of Deeds, page 299. 10

Any interest which the said Morris Lieberman has in said lands is subject to the lien of complainant's mortgage.

7. The said Morris Lieberman is married, and his wife's name is Sarah Lieberman.

Any claim or interest which she may have by way of inchoate right of dower or otherwise, is subject to the complainant's mortgage. 20

8. By written assignment dated June 12, 1928, Hyman Adelman and Louis Sosnow assigned said bond and mortgage to complainant, which assignment, having been first duly acknowledged and the certificate of acknowledgment duly endorsed thereon, was on August 16, 1928, recorded in the Register's Office of Essex County, as daily No. 14 of Assignments of Mortgages for said county. 30

9. The said Harry Lieberman and Morris Lieberman failed and neglected to pay the taxes levied by the City of Newark against said mortgaged premises for the first half of the year 1928, amounting to \$21.07 which sum with interest at the rate of 9% per annum, was due and payable on June 1, 1928. The said levy for the non-payment of taxes levied by the City of Newark, remained unpaid and in arrears for the 40

Bill of Complaint.

space of sixty days from June 1, 1928. Complainant has elected that the entire principal sum with interest is due and payable.

10 10. The said Harry Lieberman and Morris Lieberman or one of them has always been in possession of the mortgaged premises.

11. The whole amount of principal with interest thereon from June 6, 1928, is due upon complainant's bond and mortgage.

Complainant is without adequate remedy in the courts of law, and therefore, prays:

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

2. That an account may be taken of the amount due upon complainant's mortgage.

3. That the defendants or one of them may be decreed to pay complainant the amount so found due with interest and costs by a short day to be appointed by this Court, and that in default of such payment, that they and each of them be debarred and foreclosed of all equity of redemption in said lands; or
30

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

5. That a writ of subpoena may issue commanding the said defendants to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

40 SAUL & JOSEPH E. COHN,
Solicitor for and of Counsel with Complainant.

AMENDED ANSWER.

IN CHANCERY OF NEW JERSEY.

Between

OSCHWALD BRICK WORKS, INC.,
a corporation,
Complainant,

and

MORRIS LIEBERMAN, *et al.*,
Defendants.

*On Bill to
Foreclose.*

10

*Amended
Answer.*

Defendants, Morris Lieberman and Sarah Lieberman, his wife, do hereby file an amended answer to the complainant's bill of complaint, as follows:

20

(1) They admit paragraph one of the complainant's bill, excepting that they say that the delivery of the bond mentioned therein did not take place until June 26, 1928.

(2) They admit paragraph two, excepting that the delivery of the mortgage therein mentioned did not take place until June 26, 1928.

(3) They admit paragraph three.

30

(4) They neither admit nor deny paragraph four, but leave the complainant to its proof.

(5) They neither admit nor deny paragraph five, but leave the complainant to its proof.

(6) They admit paragraph six.

(7) They admit paragraph seven.

(8) They neither admit nor deny paragraph eight, but leave the complainant to its proof.

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Amended Answer.

(9) They neither admit nor deny paragraph nine, but leave the complainant to its proof.

(10) They admit paragraph ten.

(11) They deny paragraph eleven.

10 FIRST SEPARATE DEFENSE.

That the said complainant is not the valid holder of the mortgage described in the complainant's bill of complaint, as the assignment from Hyman Adelman and Louis Sosnow to the complainant, was executed prior to the time of the actual execution and delivery of the mortgage sought to be foreclosed.

 SECOND SEPARATE DEFENSE.

20 That no tax or assessment was levied or acquired upon the premises described in the complainant's bill, nor was there any tax or assessment, which became due after the execution and delivery of the mortgage set forth in the complainant's bill, which has remained due and unpaid for more than sixty days under the terms and conditions of said bond and mortgage.

 THIRD SEPARATE DEFENSE.

30 That Hyman Adelman and Louis Sosnow, the complainant's predecessors in title to the bond and mortgage described in the complainant's bill of complaint, permitted the taxes for the first half of the year 1928, to remain due and unpaid at the time of closing of title to said premises on June 26, 1928, by the said Hyman Adelman and Louis Sosnow to Harry Lieberman, defendants' predecessor in title to the mortgaged premises, and by their conduct, lead these defendants

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Amended Answer.

and their predecessor in title, to believe that they could pay the taxes for the first half of the year 1928, at any time that they saw fit.

NATHAN ERLICH,
Solicitor for Defendants.

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**NOTICE TO STRIKE OUT AMENDED
ANSWER.**

IN CHANCERY OF NEW JERSEY.

10	<p><i>Between</i></p> <p style="text-align: center;">OSCHWALD BRICK WORKS, INC., a corporation, <i>Complainant,</i></p> <p style="text-align: center;"><i>and</i></p> <p style="text-align: center;">MORRIS LIEBERMAN and SARAH LIEBERMAN, his wife, <i>Defendants.</i></p>	<p><i>On Bill, &c.</i></p> <p><i>Notice to Strike Out Amended Answer.</i></p>
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20 To Nathan Erlich, Esq., solicitor of defendants,
31 Clinton street, Newark, N. J.

SIR:

TAKE NOTICE that on the twenty-seventh day of
November, 1928, at ten o'clock in the forenoon or
as soon thereafter as counsel can be heard, we
shall apply to the Chancellor at the Chancery
Chambers, 1060 Broad street, Newark, New Jer-
sey, for an order to strike out the amended an-
swer and separate defenses filed in this cause by
30 the defendants, for the following reasons:

1. Said amended answer and separate de-
fenses are sham and frivolous and do not con-
stitute an equitable defense to this action.

And take further notice that at the same time
and place, we shall ask for a decree pro confesso
against the defendants, Morris Lieberman and
Sarah Lieberman, his wife,

And take further notice that we shall rely on
the attached affidavits to support this motion.

40 SAUL & JOSEPH E. COHN,
Solicitors of Complainant.

Notice to Strike Out Amended Answer.

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

PAUL OSCHWALD, being duly sworn on his oath deposes and says:

That he is President of Oschwald Brick Works, Inc., a corporation of New Jersey, and is duly authorized to make this affidavit: 10

That the said Oschwald Brick Works, Inc., is the complainant in the above-entitled cause of action;

That it received an assignment of the mortgage set forth in the complaint in this matter by deed of assignment dated June 12, 1928, and recorded August 16, 1928 in book of Assignments of Mortgages and designated as instrument No. 14 on said date, to wit: August 16, 1928, and that the said assignment sets forth that there is due and owing on the original mortgage the sum of \$1,980.00 together with interest thereon from June 6, 1928. 20

Deponent further says that the full amount of \$1,980.00, together with interest thereon from June 6, 1928, is justly due and owing to the Oschwald Brick Works, Inc., the complainant herein, and that defendants are not entitled to any credits, allowances or set-offs as against the same. 30

PAUL OSCHWALD.

Sworn to and subscribed before me
 this 2nd day of November, 1928.

MICHAEL SILVER,
 M. C. of N. J.

Notice to Strike Out Amended Answer.

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

MILTON LOWENSTEIN, of full age, being duly sworn according to law on his oath deposes and says:

10 That he is an attorney at law of New Jersey and is associated with the firm of Saul and Joseph E. Cohn, solicitors for the complainant in this cause of action;

20 That he personally, at the request of the complainant, made inquiry of the Receiver of Taxes of the City of Newark, relative to the taxes due for the year 1928 on premises set forth in the complaint filed in this cause, and received the information on August 20, 1928 that the taxes for the first half of the year 1928, on premises set forth in the bill of complaint filed in this cause, which are known on the tax receiver's map as premises 436 Florence avenue, Newark, New Jersey, were unpaid.

MILTON LOWENSTEIN.

Sworn and subscribed before me
 this 21st day of November, 1928.

30 MICHAEL SILVER,
 M. C. C. of N. J.

ORDER.

IN CHANCERY OF NEW JERSEY.

Between

OSCHWALD BRICK WORKS, INC.,
a corporation,

Complainant,

and

MORRIS LIEBERMAN, *et al.*,

Defendants.

On Bill, &c.
Order.

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This matter being opened to the Court by Saul and Joseph E. Cohn, solicitors of the complainant in the presence of Nathan Erlich, solicitor of the defendants, Morris Lieberman and Sarah Lieberman, upon motion to strike out the amended answer and separate defenses filed herein by the said defendants, upon the ground that same are sham and frivolous and do not constitute an equitable defense to complainant's bill, and the Court having heard and considered the argument of counsel, and being of the opinion that said amended answer and separate defenses should be stricken out for the reasons aforesaid,

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It is hereby on this 11th day of December, 1928, ORDERED, that said amended answer and separate defenses be and the same are hereby stricken out and for nothing holden.

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And it is further ORDERED, that the complainant's bill of complaint be and the same is hereby taken as confessed against the said defendants, Morris Lieberman and Sarah Lieberman, his wife, to the end that such decree may be made

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Order.

against them as the Chancellor shall think equitable and just.

And it is further ORDERED, that complainant be and it is hereby allowed the sum of twenty-five dollars, as counsel fee upon this motion to be included in the taxed costs.

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E. R. WALKER,

C.

Respectfully advised,

MAJA LEON BERRY,
V.-C.

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NOTICE OF APPEAL.

IN CHANCERY OF NEW JERSEY.

Between

OSCHWALD BRICK WORKS, INC.,
a corporation,

Complainant,

and

MORRIS LIEBERMAN and SARAH
LIEBERMAN, his wife,

Defendants.

On Bill, &c.

*Notice
of Appeal.*

10

Notice is hereby given, that the defendants, Morris Lieberman and Sarah Lieberman, his wife, appeal to the Court of Errors and Appeals, in the last resort in all causes, from the order striking out the amended answer filed by the defendants, made by the Chancellor on the advice of Vice-Chancellor Maja Leon Berry, which order bears date December 11, 1928.

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Dated January 10, 1929.

NATHAN ERLICH,
Solicitor of Defendants.

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

NATHAN ERLICH,
Of Counsel with Defendants.

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PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10	<p><i>Between</i></p> <p style="text-align: center;">OSCHWALD BRICK WORKS, INC., a corporation, <i>Complainant-Respondent,</i></p> <p style="text-align: center;"><i>and</i></p> <p style="text-align: center;">MORRIS LIEBERMAN and SARAH LIEBERMAN, his wife, <i>Defendants-Appellants.</i></p>	<p><i>On Appeal from Chancery.</i></p> <p><i>Petition of Appeal.</i></p>
----	---	--

20 *To the Honorable, the Court of Errors and Appeals, in the last resort in all causes:*

The petition of Morris Lieberman and Sarah Lieberman, his wife, the defendants in the above stated cause, respectfully shows:

30 (1) Petitioners find themselves aggrieved by an order made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, which order bears date December 11, 1928, and does order that the amended answer and separate defenses filed by the defendants in the foregoing cause, be stricken out, and for nothing holden, and that the complainant's bill shall also be taken as confessed against the said defendants, Morris Lieberman and Sarah Lieberman, his wife, to the end that such decree may be made against them as the Chancellor shall think equitable and just, and further directs that the defendants shall pay to the complainant, a counsel fee of twenty-five

40 dollars.

Petition of Appeal.

(2) Petitioners' appeal from the said order of the Chancellor decreed as aforesaid, upon the ground that the same is erroneous, for these reasons:

(a) That the defendants' amended answer and separate defenses filed by the said defendants, is not sham nor frivolous, and does constitute an equitable defense to complainant's bill. 10

(b) That the defendants' amended answer and separate defenses constitutes a legal defense to the complainant's bill.

(c) That the affidavits filed by the complainant in support of its motion to strike out defendants' amended answer and separate defenses, in no-wise attacks said amended answer and separate defenses. 20

(d) That the motion of the complainant to strike out the defendants' amended answer and separate defenses, should have been denied, and the cause permitted to go to final hearing upon the complainant's bill and defendants' amended answer and separate defenses.

(3) Petitioners therefore pray, that the said order of the Chancellor may be reversed, set aside, and for nothing holden, and that petitioners may have such other relief as to this Court may seem equitable. 30

NATHAN ERLICH,
Solicitor for and of Counsel with Petitioners.

ANSWER TO PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

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Between

OSCHWALD BRICK WORKS, INC.,
a corporation,
Complainant-Respondent,

and

MORRIS LIEBERMAN, *et al.*,
Defendants-Appellants.

*On Appeal
from
Chancery.*

*Answer to
Petition of
Appeal.*

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The answer of Oswald Brick Works, Inc., a corporation, complainant-respondent, to petition of appeal of the above named appellants, shows:

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This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits, that an order was on the 11th day of December, 1928, made and entered in the Court of Chancery, in the cause for that purpose mentioned in said petition, as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto, when the same shall be produced. And this respondent is advised and believes, that the said decree is agreeable to equity, and it prays that the same may be affirmed, with costs to be adjudged to this respondent.

SAUL & JOSEPH E. COHN,
Solicitors of Complainant-Respondent.

40

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

New Jersey Court of Errors and Appeals

Between

OSCHWALD BRICK WORKS
INC., a corporation,
Complainant-Respondent,

and

MORRIS LIEBERMAN and SARAH
LIEBERMAN, his wife,
Defendants-Appellants.

*On Appeal
from Court
of Chancery.*

BRIEF FOR APPELLANTS.

Abstract of the Case.

This is defendant's appeal from an order striking out defendant's amended answer and separate defenses on the ground that the same were sham and frivolous.

Appellants' predecessor in title executed a bond and mortgage to Hyman Adelman and Louis Sosnow, bearing date June 6, 1928 (which bond and mortgage were however, not delivered to the mortgagees until June 26, 1928), for \$1,980, due June 1, 1930, and which bond and mortgage were assigned by the said Hyman Adelman and Louis Sosnow to the respondent by an assignment bearing date June 12, 1928, and recorded in the Register's Office of Essex County on August 16, 1928 .

The mortgage contained the following clause "Should any tax assessment, water rent or other municipal or governmental rate, charge, imposition or lien, be hereafter imposed or acquired upon the premises described in this mort-

gage, and become due and payable and remain unpaid and in arrears for the space of sixty days'' (p. 2, l. 26 to l. 32), the mortgagees or their legal representatives could at their option demand payment of the principal and interest.

The respondent instituted foreclosure proceedings on the ground that the appellants had not paid the taxes for the first half of the year 1928, which had become a lien on June 1, 1928, and that same had remained due and unpaid for more than sixty days.

Specification of Errors.

1. That the defendants' amended answer and separate defenses filed by the said defendants, are not sham nor frivolous, and do constitute an equitable defense to complainant's bill.

2. That the defendants' amended answer and separate defenses constitute a legal defense to the complainant's bill.

3. That the affidavits filed by the complainant in support of its motion to strike-out defendants' amended answer and separate defenses, in no-wise attacks said amended answer and separate defenses.

4. That the motion of the complainant to strike out the defendants' amended answer and separate defenses, should have been denied, and the cause permitted to go to final hearing upon the complainant's bill and defendants' amended answer and separate defenses.

BRIEF OF ARGUMENT.**1. The defendants' amended answer and separate defenses constitute an equitable defense.**

The third separate defense (p. 6) charges that the complainant's assignors permitted the taxes for the first half of the year 1928 to remain unpaid at the time of the closing of title on June 26, 1928, and by their conduct led these defendants and their predecessors in title to believe that they could pay the taxes for the first half of the year 1928 at any time. This defense, if proved, is a complete defense to the complainant's bill.

Newark Trunk Co. v. Clark, 118 Atl. 263.

In *Newark Trunk Co. v. Clark*, *supra*, which was a foreclosure proceeding for the failure of the defendants to pay taxes in accordance with the terms of the mortgage, Vice-Chancellor Backes says (on p. 264 commencing with l. 7): "A failure, therefore, to meet the terms of the stipulations is fatal, unless it is shown that the lapse is attributable in some manner to the conduct of the complainant." Citing *Baldwin v. Van Vorst*, 10 N. J. Eq. 577 and *Bergman v. Fortescue*, 74 N. J. Eq. 102, 38 Atl. 297. And as an assignee takes a mortgage subject to any and all defenses, the allegations of the third separate defense, if proved, would be a complete defense to complainant's bill.

2. The defendants' amended answer and separate defense constitute a legal defense.

The clause in the mortgage, for the breach of which, the complainant bases its right to foreclose, reads as follows (p. 2, l. 26): "Should any tax assessment, water rent or other municipal or governmental rate, charge, imposition or lien be

hereafter imposed or acquired upon the premises described in this mortgage." The mortgage is dated June 6th, 1928, and the defendants in paragraphs 1 and 2 of their amended answer (p. 5) allege that the bond and mortgage were not delivered until June 26th, 1928, and that therefore the taxes for the first half of the year 1928, which became a lien on June 1st, 1928, were not a tax or assessment "Hereafter imposed or acquired upon the premises described in this mortgage," and that there was no breach in any of the conditions of the complainant's bond and mortgage which entitled it to institute foreclosure proceedings.

As was said by this Honorable Court in the case of *South Camden Trust Co. of Camden v. Stiefel*, 144 Atl. 798 (the Order being affirmed on the opinion of Vice-Chancellor Leaming) on page 799 commencing with line 3:

"The peculiar situation is that the settlement was made in July, as of January, and at the time the settlement was actually made the first half of the taxes of 1927 were due and unpaid. A deduction of the amount of taxes that had accrued in January was presumptively made in settlement, since the burden of taxes would be on the mortgagee up to that time and the burden thereafter would fall on the mortgagor, and it is probably true that since there was a default in June and a settlement was actually made in July, there could be no forfeiture under the tax clause in the mortgage for the non-payment of July."

In the instant case, the taxes for the first half of the year 1928 were in default on June 1st, 1928, and title was not closed and the mortgage delivered until June 26th, 1928 although the mortgage bears date June 6th, 1928.

3. That the affidavits attached to complainant's notice of motion to strike out defendants' amended answer and separate defenses, in no wise attacks the amended answer and separate defenses.

The affidavit of Paul Oschwald (p. 9) is simply a recital of the taking of an assignment of the mortgage in question and of the amount due thereon. The affidavit of Milton Lowenstein (p. 10) shows that on August 20th, 1928, he made inquiry at the tax office in the City of Newark, and was advised that the first half of the taxes for the year 1928 against the mortgaged premises were not paid. In neither affidavit is there any attack made on the allegations set forth in the defendants' amended answer and separate defenses. The averments in the amended answer and separate defenses must therefore be taken as true.

This Court in the case of *Baum v. Canter*, 144 Atl. Rep. 588 (which cause came up on appeal by the complainant from an order striking out his bill), in the second paragraph on page 589, says: "The averments of the bill for the purpose of the motion must be taken as verity and in their entirety." And further towards the end of the paragraph 3 on page 589. "If these facts can be established by the evidence exacted to justify specific performance of contracts for the conveyance of real estate, complainants will have standing in a court of equity, and should be permitted to present their proofs."

I take it that the same rule applies on a motion to strike out an answer on the ground that it is sham and frivolous.

4. That the motion to strike out the amended answer and separate defenses should have been denied and the cause permitted to go to final hearing.

It is respectfully submitted that the order striking out the defendants' amended answer and separate defenses should be reversed with costs, and the record remitted with directions that the cause go to final hearing on complainant's bill and defendants' amended answer and separate defenses.

Respectfully submitted,

NATHAN ERLICH,

Of Counsel with Defendants-Appellants.