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Summons.

(Filed February 21, 1931.)

*The State of New Jersey to Jersey Mortgage &
Title Guaranty Company, a corporation:*

10

(Seal)

YOU ARE SUMMONED to answer the annexed complaint of Alfred Mezzaluna in an action at law in the Essex County Circuit Court. And take notice that unless you file your answer to said complaint with the Clerk of the said Essex County Circuit Court, at Newark within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

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WITNESS, HON. WORRALL F. MOUNTAIN, Judge of the Circuit Court, at Newark this 20th day of February nineteen hundred and thirty-one.

JOHN H. SCOTT,
Clerk.

STEIN, MCGLYNN & HANNOCH,
Attorneys.

30

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Complaint.

(Filed February 21, 1931.)

ESSEX COUNTY CIRCUIT COURT.

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ALFRED MEZZALUNA,
Plaintiff,*vs.*JERSEY MORTGAGE & TITLE GUAR-
ANTY COMPANY, a corporation,
Defendant.

Action at Law.

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The plaintiff, residing in the Town of Irving-
ton, County of Essex and State of New Jersey,
respectfully shows and alleges that:

30

1. At the time hereinafter stated, the defend-
ant was a corporation organized under and carry-
ing on its business pursuant to the provisions of
an Act of the New Jersey Legislature entitled
"An Act to provide for the regulation and incor-
poration of insurance companies and to regulate
the transaction of the insurance business in this
State", and the various acts amendatory thereof
and supplemental thereto, and, among other pow-
ers granted to it by said statute and its charter,
was authorized (1) to examine titles to real estate
in New Jersey; (2) to duly and properly pay and
distribute moneys in connection with the purchase
and sale of real estate and the erection of build-
ings and the making of other improvements
thereon, and in connection with mortgages exe-
cuted by owners of real estate, especially where
the funds raised by such mortgages were to be
used to assist said owners to pay for the erection

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Complaint.

of buildings on their land; (3) to guaranty the payment of principal and interest on mortgage encumbrances affecting such real estate; (4) to insure persons against loss or damage on account of encumbrances upon or defects in title to such real property, or in connection with the order of priority of mortgage encumbrances.

10

2. At the times hereinafter stated, and for a long time prior thereto, the defendant through newspaper advertisements, through solicitors, and through wide-spread mailing of circulars, letters and other literature, advertised and held itself out to all persons who desired to transact business with it, as being peculiarly and specially skilled (1) in the examination of titles to real estate in New Jersey; and (2) in the knowledge of the terms and provisions of an act of the New Jersey Legislature entitled "An Act to secure to mechanics and others, payment for their labor and materials in erecting any building," commonly known and hereafter referred to as the Mechanics' Lien Act, and in the manner of distribution and payment of moneys to builders and others in connection with the erection and construction of buildings on such real estate, and in preparing and procuring the execution and delivery of affidavits, waivers, releases of lien and other instruments and documents, so that when payments were made under its supervision and direction to contractors, builders and others for work done and labor performed in connection with the erection and construction of a building, such payments would be made under such circumstances, terms and conditions that said lands and premises would be released and discharged from all liability of lien created by said act.

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Complaint.

3. By reason of the foregoing, it became and was the duty of the defendant to possess peculiar and special skill and knowledge of the law respecting the title to real estate in New Jersey, the manner of examination of such titles, the liability of such real estate to liens created under the afore-
10 said Mechanics' Lien Act, and the manner of paying out and distributing moneys due in connection with the erection of buildings on such real estate and procuring the execution of releases, affidavits and other instruments, so that such real estate would become released and discharged from all liability to liens under said act.

4. On or about February 10th, 1928, and for some time prior thereto, plaintiff was the owner
20 of a certain tract or parcel of land and premises located at the northeast corner of Chancellor Avenue and Cornell Street, in the Town of Irvington, Essex County, New Jersey, upon which premises a four story apartment house was then being erected, and which premises were free and clear of all encumbrances or liens.

5. On, and for some time prior to February 10th, 1928, plaintiff was aware of the business carried on by the defendant and of the fact that
30 it held itself out to persons desiring to do business with it as being possessed of the peculiar and special skill and ability aforesaid.

6. As a result thereof, and being desirous of procuring a loan of money, to be secured by a mortgage upon said real estate so owned by him, he applied to the defendant company for information as to its fees and charges and the nature and extent of the services to be rendered by it in
40 connection with the granting of said loan, the exam-

Complaint.

ination of the title to said premises, and the distribution of said mortgage moneys.

7. Thereafter, and on or about April 2nd, 1928, plaintiff and defendant agreed that upon the payment by the plaintiff to the defendant of the sum of \$5,940.00, the defendant agreed (1) to loan to the plaintiff the sum of \$132,000.00 to be secured by a mortgage on said real estate, which mortgage would be, and continue to be, a first lien against the same; (2) to examine the title to said property in order to ascertain whether such mortgage would be a first lien against the same; (3) to disburse such mortgage moneys for and on account of the plaintiff and defendant as their respective interests existed, in such a manner that upon the completion of said building, and the distribution of said mortgage moneys, the said lands and premises would be released and discharged of any and all liens and claims arising under said Mechanics' Lien Law, or any other liens, except a first mortgage lien in the sum of \$132,000.00.

10

20

8. In fixing and agreeing upon the amount of defendant's charges, the defendant included a special charge because of the additional labor and risk involved in supervising and distributing said mortgage moneys.

30

9. Thereupon plaintiff and defendant entered upon the performance of said agreement.

10. On April 2nd, 1928, plaintiff and Dora Mezzaluna, his wife, executed and delivered to the defendant their bond and mortgage bearing even date therewith, in the sum of \$132,000.00 covering said lands and premises, which mortgage was recorded by said defendant on April 2nd, 1928, in Book Q 63 of Mortgages for Essex County, on

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Complaint.

page 531, and re-recorded on April 24th, 1928 in Book G 64 of Mortgages for Essex County, on page 190.

10 11. Thereupon, the defendant caused an examination to be made of the title to said premises for the purpose of ascertaining what liens or liability to liens existed, but as a result of its negligence and incompetence, it failed to ascertain that a certain building contract which had been entered into by the plaintiff with one Corrado and Maturi, Inc., on December 29th, 1927, and filed on January 13th, 1928, did not have attached thereto at the time of its filing the specifications referred to in said agreement. As the result of the aforesaid negligence, the said defendant failed to comprehend and ascertain that the said lands and premises were therefore liable to liens in favor of any person or persons who had furnished or might thereafter furnish labor or materials, or both, in connection with the erection and construction of said building.

20 12. Thereafter, the defendant from time to time, as the erection of said building progressed, disbursed the mortgage moneys required to be paid under said agreement of loan and said mortgage.

30 It caused said premises to be examined and inspected and made inquiries of persons for the purpose of ascertaining whether the same was being erected in a manner sufficient to warrant its making further payments under its said agreement, and for the purpose of ascertaining what person or persons had furnished or were furnishing labor or materials, or both, in connection therewith, and what person or persons were or might be entitled to liens against the same under

40 said Act, by reason of their having performed

Complaint.

labor or furnished materials, or both. It prepared and had executed, affidavits, releases and other instruments purporting to release said lands and premises from liability to liens of any character, except the aforesaid first mortgage lien in the sum of \$132,000.00.

13. As a result of the negligence of the defendant, insufficient inquiry with respect to liability to mechanics' liens was conducted, improper releases and discharges were procured, and no releases or discharges at all were procured from all persons and/or firms in whose favor liens against said building existed under said act.

10

14. Plaintiff was and is neither skilled nor familiar with the terms and provisions of said Mechanics' Lien Law, he relied entirely upon the defendant as to the manner in which such payments should be made, to whom they should be made and what inquiries should be made and what affidavits, releases of lien or other instruments should be procured before such moneys were disbursed, in order that said lands and premises would be released and discharged from liability to liens, except said first mortgage of \$132,000.00.

20

15. Thereafter, and after all of said mortgage moneys were disbursed, plaintiff ascertained that as a result of defendant's negligent acts aforesaid, rights of lien still existed under said Mechanics' Lien Act, to the extent of \$17,719.65 in favor of a number of persons, and that the defendant had failed to procure from such persons adequate and sufficient releases and discharges of their respective liens.

30

16. Thereafter, proceedings at law were instituted against the plaintiff by said persons, to wit:

40

Complaint.

10 Branch Iron Works, Inc., George Snyder, Albert & Kernahan, Inc., Pierce, Butler & Pierce Manufacturing Corporation, pursuant to the terms and provisions of said Mechanics' Lien Law, which proceedings had for their object the establishing of liens in favor of said claimants against said lands and premises for the amount of the moneys due them for labor performed and materials furnished, or both, in connection with the erection and construction of the building on said premises. The defendant was a party defendant to all of said suits, all of said claimants alleging that their said lien claims were prior to the first mortgage of the defendant in the sum of \$132,000.00.

20 17. The defendant, recognizing and acknowledging its duties and obligations to the plaintiff as aforesaid, and its failure to perform the same, defended said actions.

18. Judgments were thereafter entered against the plaintiff in said actions as follows:

<i>Date</i>	<i>Name</i>	<i>Amount</i>
November 19, 1930	George Snyder	\$6,682.88
November 20, 1930	Albert & Kernahan, Inc.	3,434.22
November 20, 1930	Branch Iron Works, Inc.	5,195.22

30 In each of said suits said judgment was entered against said lands and premises pursuant to said Mechanics' Lien statute and said judgment was declared to be a lien against the said lands and premises, prior and paramount to the defendant's mortgage of \$132,000.00.

40 19. It was stipulated and agreed between the plaintiff and defendant, without any prejudice to either of their respective rights, that the lien claim filed by Pierce, Butler & Pierce Manufacturing Corporation, in the sum of \$1,882.84 would not proceed to judgment, but would get the same

Complaint.

result as the three claims described in the preceding paragraph and said claimant would be permitted to enter judgment in its suit, if it became necessary, in the same way and manner as the other three claimants. Inasmuch as the other three claimants were successful in obtaining judgments, the claim of Pierce, Butler & Pierce Manufacturing Corporation was treated by the parties hereto in the same way and manner as the three other claimants. 10

20. After the entry of judgments as aforesaid, executions were issued thereon, and the aforesaid lands and premises were advertised for sale by the Sheriff of Essex County. In order to prevent the sale of such property and its loss to the plaintiff, plaintiff was compelled to, and did, on or about January 30th, 1931, pay to the above named judgment lien claimants, and to the above named Pierce, Butler & Pierce Manufacturing Corporation, the sum of \$17,719.65. Payment of the aforesaid sums by the plaintiff were incurred by him as a result of the aforesaid negligent acts of the defendant. 20

21. Plaintiff has demanded that defendant make payment of said sums, but payment has been refused. 30

22. As a result of the negligence of the defendant as aforesaid, plaintiff has suffered damages in the sum of \$17,719.65, and in addition thereto certain other moneys which plaintiff has been compelled to pay for expenses which he incurred in the defense of the litigation described herein, so that the total amount of his damages is in the sum of \$20,000.00.

Answer.

Judgment will be claimed in favor of the plaintiff and against the defendant in the sum of \$20,000.00, besides interest and costs of this suit to be taxed.

STEIN, MCGLYNN & HANNOCH,
Attorneys of Plaintiff.

10

Answer.

(Filed March 13, 1931.)

ESSEX COUNTY CIRCUIT COURT.

20

ALFRED MEZZALUNA,
Plaintiff,

vs.

JERSEY MORTGAGE & TITLE GUAR-
ANTY COMPANY, a corporation,
Defendant.

Action at Law.

30

The defendant, Jersey Mortgage & Title Guaranty Company, a corporation of the State of New Jersey, having its principal office and place of business in the City of Elizabeth, in the County of Union and State of New Jersey, answering the complaint of the plaintiff in the above entitled action, says that:

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1. It admits that at the time stated in the complaint it was a corporation organized under and carrying on its business pursuant to the provisions of an act of the New Jersey Legislature entitled "An Act to provide for the regulation

Answer.

and incorporation of insurance companies and to regulate the transaction of the insurance business in this State," and the various acts amendatory thereof and supplemental thereto, and that the powers granted to it by said statute and by its certificate of incorporation were to carry on the kind of insurance permitted to be transacted by subdivision VIII of Section 1 of the aforesaid Act of the Legislature of the State of New Jersey, to-wit: 10

"Against loss or damage on account of encumbrances upon or defects in titles to real property and against loss by reason of the non-payment of principal and interest of bonds and mortgages, and in addition thereto, with its capital and surplus, to take, buy, sell and deal in first mortgages on real estate and to issue bonds, debentures and certificates against such mortgages." 20

Except as aforesaid, it denies the allegations of Paragraph 1 of the complaint.

2. It denies Paragraphs 2 and 3 of the complaint.

3. It admits that on or about February 10, 1928 and for some time prior thereto plaintiff was the holder of the legal title of a certain tract or parcel of land and premises located at the northeast corner of Chancellor Avenue and Cornell Street, in the Town of Irvington, Essex County, New Jersey, upon which premises a four-story apartment house was then being erected. Except as aforesaid, it denies Paragraph 4 of the complaint. 30

4. It has no knowledge or information sufficient to form a belief as to whether on and for some 40

Answer.

time prior to February 10, 1928 plaintiff was aware of the business carried on by the defendant. Except as aforesaid, it denies Paragraph 5 of the complaint.

5. It denies Paragraph 6 of the complaint.

10 6. It admits that on or about March 15, 1928 the defendant agreed to grant to the plaintiff and the plaintiff agreed to accept from the defendant a first mortgage loan in the sum of \$132,000.00 upon the obligation of the plaintiff to be secured by a first mortgage upon the premises referred to in Paragraph 4 of the complaint, and that the amount paid by the plaintiff to the defendant for said loan was \$5,940.00. Except as aforesaid, it denies Paragraph 7 of the complaint.

20 7. It denies Paragraph 8 of the complaint.

8. It admits that plaintiff and defendant entered upon the performance of their agreement.

9. It admits Paragraph 10 of the complaint.

10. It admits that it caused an examination to be made of the title to the said premises. Except as aforesaid, it denies Paragraph 11 of the complaint.

30 11. It admits that from time to time as the erection of the building on said premises progressed it advanced to the plaintiff the various installments of the said \$132,000.00 pursuant to the terms and provisions of the said mortgage; that it caused said premises to be examined and inspected from time to time and made inquiries of various persons for the purpose of ascertaining whether the said building was being erected in a manner sufficient to warrant its making further advances under the said mortgage; that it

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Answer.

obtained affidavits, releases and other instruments releasing said lands and premises from liability to certain liens which were prior to the lien of the said mortgage. Except as aforesaid, it denies Paragraph 12 of the complaint.

12. It denies Paragraph 13 of the complaint.

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13. It denies Paragraphs 14 and 15 of the complaint.

14. It admits Paragraph 16 of the complaint.

15. It admits that as a defendant in the suits referred to in Paragraph 16 of the complaint, it appeared and defended said suits. Except as aforesaid, it denies Paragraph 17 of the complaint.

16. It admits Paragraphs 18 and 19 of the complaint.

20

17. It admits that after the entry of judgments in the said suits executions were issued thereon and the lands and premises were advertised for sale by the Sheriff of Essex County; that the plaintiff on or about January 30, 1931, paid to the judgment lien claimants and to Pierce, Butler & Pierce Manufacturing Corporation sums aggregating \$17,719.65. Except as aforesaid, it denies Paragraph 20 of the complaint.

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18. It admits paragraph 21 of the complaint.

19. It denies paragraph 22 of the complaint.

LINDABURY, DEPUE & FAULKS,
Attorneys for Defendant.

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Reply.

(Filed March 16, 1931.)

ESSEX COUNTY CIRCUIT COURT.

10

ALFRED MEZZALUNA,
Plaintiff,

vs.

JERSEY MORTGAGE & TITLE GUAR-
ANTY COMPANY, a corporation,
Defendant.

Action at Law.

Plaintiff denies every allegation in the answer.

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STEIN, MCGLYNN & HANNOCH,
Attorneys for Plaintiff.

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Finding of Facts by Court.

(Filed July 22, 1931.)

ESSEX COUNTY CIRCUIT COURT.

ALFRED MEZZALUNA, Plaintiff, <i>vs.</i> JERSEY MORTGAGE & TITLE GUAR- ANTY COMPANY, a corporation, Defendant.	10 Action at Law.
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On or about February 10, 1928, the plaintiff was the holder of the legal title of a certain parcel of land located at the northeast corner of Chancellor Avenue and Cornell Street, in the town of Irvington, Essex County, New Jersey, upon which premises a four-story apartment house was then being erected.

20

At that time the defendant, a New Jersey corporation, was carrying on its business pursuant to the provisions of an act of the New Jersey Legislature entitled "An act to provide for the regulation and incorporation of insurance companies and to regulate the transaction of insurance business in this state", approved April 3, 1902, and the various acts amendatory thereof and supplemental thereto, and that the powers granted to it by said statute and by its certificate of incorporation, were to carry on the kind of insurance permitted to be transacted by subdivision VIII of Section 1 of the aforesaid act of the Legislature of the State of New Jersey, to wit:

30

"Against loss or damage on account of encumbrances upon or defects in title to real

40

Finding of Facts by Court.

property and against loss by reason of the non-payment of principal and interest of bonds and mortgages, and in addition thereto, with its capital and surplus, to take, buy, sell, and deal in first mortgages in real estate and to issue bonds, debentures and certificates against said mortgages."

10 On or about the date aforesaid the plaintiff, through a broker, applied to the defendant for a mortgage loan of \$165,000.00. He signed one of the defendant's application blanks applying "for a guaranteed mortgage loan, * * * secured by first mortgage upon the premises." He further agreed "to pay all fees and expenses incurred in the examination or insurance of the title and in connection with the appraisal of the property, and
20 if a construction loan, the fees of the inspectors employed by the company". It was a construction loan.

 On March 14, 1928, the broker of the plaintiff was informed by letter from the defendant corporation that its Executive Committee had approved a loan upon the aforesaid premises for \$132,000.00 to be amortized at the rate of 3% a year. This letter informed the broker that if this amount was acceptable to his client, then the latter should forward to the defendant his deed, abstract of title and such other papers as he had in
30 his possession in order that the defendant might proceed with the examination of the title. The plaintiff accepted this offer.

 On March 29, 1928, the plaintiff signed an affidavit of title in which he deposed among other things, that he was the owner in fee simple of the aforesaid property and that the property at that time was unencumbered by any contract for the sale thereof, lease or agreement, easement, encroachment, unrecorded mechanic's lien or any
40

Finding of Facts by Court.

tax or assessment, mortgage, judgment or limitation, except a \$12,000.00 mortgage held by the General Building and Loan Association; second half of 1927 taxes; Cornell Street Paving and Curbing Assessment; and building contract with Corrado and Maturi, Inc., dated December 29, 1927. Postponements of any lien were obtained from the general contractor. A bond, secured by a mortgage, was executed by the plaintiff and his wife to the defendant on April 2, 1928. The mortgage contained a warranty of title. 10

The defendant charged the plaintiff \$5,940.00 for examination of the title, in addition to charges for a survey, recording mortgage, recording deed, cancelling mortgage, etc., and \$100.00 for inspection fees. As the building progressed payments were made to the general contractor by checks drawn to the plaintiff which he endorsed to the contractor. These payments were made after the defendant had inspected the property, and except in one or two instances, upon the production of architect's certificates. Between the time that the plaintiff signed the mortgage and the last payment was made upon it by the defendant, the plaintiff saw no one connected with the mortgage company. 20

The building contract between the plaintiff and Corrado and Maturi which had been filed prior to the execution of the mortgage, did not have attached to it at the time of its filing the specifications referred to in that agreement. The general contractor was paid in full, but he neglected to settle with the following sub-contractors for the following amounts of money: 30

George Snyder	\$6682.88	
Albert & Kernahan, Inc.....	3434.22	
Branch Iron Works, Inc.....	5195.22	40
Pierce, Butler and Pierce.....	1882.84	

Finding of Facts by Court.

The three first material-men above named brought suit under the mechanic's lien law and recovered judgments in November, 1930. It was agreed that the lien claim filed by the last material-man would not proceed to judgment, but would be treated as a successful lien claimant if the others prevailed. In the three actions which were reduced to judgment, the latter was entered generally against the defendant and especially against the lands and premises aforesaid. These lien claims were paramount to the mortgage held by the defendant. To save his land from being sold under execution, the plaintiff paid the amount of all judgments and costs to the extent of \$17,-719.65. In addition to that, he paid or is obligated to pay to Azzoli and Krasny, his lawyers, the sum of \$2,500.00 for services rendered from August 20, 1928, to December 30, 1930, in the matter of reducing the four lien claims, which I have mentioned, to judgment. I find this sum is reasonable. Three of these actions were defended. The matter was referred to a Referee. Exceptions were taken to his report, and the exceptions were argued before me.

This action has been brought to recover alleged damages suffered by the plaintiff caused by the negligence of the defendant as revealed in the above facts. It is not an action brought for contract of insurance.

I find that the defendant, though it made a loan to the plaintiff, charged him for the examination of the title of the premises which was to secure it, and that the plaintiff had requested and believed that he had obtained a first mortgage and relied upon the defendant to place that kind of a mortgage upon the property. I find that the defendant was negligent in not doing so.

Finding of Facts by Court.

THE LAW.

A corporation organized, among other things, for the purpose of loaning its surplus funds upon bonds, secured by mortgages and examining the titles thereto and charging a fee for so doing, assumes to discharge the same duties as an individual conveyancer or attorney and is subject to the same responsibilities. Those responsibilities are set forth in *Jacobsen vs. Peterson*, 91 N. J. L. 404. In *1 Joyce on Insurance*, Sec. 309-a, we find the following:

10

“A corporation organized for the purpose, among others, of examining and guaranteeing titles to real estate and which in all matters relating to conveyancing and searching titles holds itself out to the public and assumes to discharge the same duties as an individual conveyancer or attorney, has the same responsibilities and its duty to its employer is governed by the principles applicable to attorney and client.”

20

In this case, the defendant was in the business of insuring titles and loaning money on bond and mortgage from its surplus funds. The plaintiff gave no evidence of having any legal knowledge. The defendant is hardly in a position to state that the plaintiff signed an affidavit that the property was unencumbered by an unrecorded mechanic's lien. That was merely a layman's opinion and in his case it was an honest one, and in any event, the company did not rely upon that affidavit but made its own separate examination, I assume, from the fact that it charged almost \$6,000.00 for its services.

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Rule for Judgment.

The measure of damages in this case is set forth in the case of *Jacobsen vs. Peterson*, above alluded to.

Judgment will be entered for the plaintiff and against the defendant, in the sum of \$20,219.65.

10

WORRELL F. MOUNTAIN,
Judge.

Rule for Judgment.

(Filed July 22, 1931.)

ESSEX COUNTY CIRCUIT COURT.

20

ALFRED MEZZALUNA,
Plaintiff,

vs.

JERSEY MORTGAGE AND TITLE GUAR-
ANTY COMPANY, a corporation,
Defendant.

Action at Law.

Rule for Judgment.

30

This case being regularly on the list for trial at the April, 1931, Term of this court, and the case having been submitted to the court sitting without a jury, and the court having considered the facts and the argument of counsel thereon, does find and determine in accordance with a written finding of facts filed herein, that the plaintiff suffered damages as alleged in his complaint by reason of the negligence of the defendant, and that the defendant, altho it made a loan to the plaintiff, charged him for the examination of the

40

Rule for Judgment.

title of the premises which was to secure said loan, and that the plaintiff had requested and believed that he had obtained a first mortgage and relied upon the defendant to place that kind of a mortgage on the plaintiff's property, and that the defendant was negligent in not doing so; and it is thereupon, on this 17th day of July, nineteen hundred thirty-one, 10

ORDERED that judgment in favor of the plaintiff and against the defendant be entered in the sum of \$20,219.65, together with costs to be taxed.

WORRALL F. MOUNTAIN,
Circuit Court Judge.

On motion of

20

STEIN, MCGLYNN & HANNOCH,
Attorneys of Plaintiff,
Alfred Mezzaluna.

30

40

Judgment.

(Entered July 17, 1931.)

ESSEX COUNTY CIRCUIT COURT.

56065

10

ALFRED MEZZALUNA,
Plaintiff,

vs.

JERSEY MORTGAGE AND TITLE GUAR-
ANTY COMPANY, a corp.,
Defendant.

Action at Law.
Tried Without
a Jury.

Judgment Entered
July 17, 1931.

Damage	\$20,219.65
Costs	\$ 79.30
Total	\$20,298.95

20

STEIN, MCGLYNN & HANNOCH,
Attys. of Plaintiff.

This action was tried before Judge Worrall F. Mountain without a jury at the Essex Circuit Court on July 17, 1931.

30

The cause having been heard and submitted, The Court order a judgment in favor of the plaintiff Alfred Mezzaluna and against the defendant Jersey Mortgage and Title Guaranty Company, a corp., for the sum of Twenty Thousand Two Hundred Nineteen dollars and sixty-five cents (20,219.65) damage.

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of Twenty Thousand Two Hundred Nineteen dollars and sixty-five cents (\$20,219.65) damage and costs which are taxed at Seventy-nine dollars and thirty cents, making in the whole the sum of Twenty Thousand

40

Notice of Appeal.

Two Hundred Ninety-eight dollars and ninety-five cents.

Judgment signed and entered July 17, 1931.

WM. S. GUMMERE,
C. J.

10

JOHN H. SCOTT,
Clerk.

Book #114, Page 381 of Circuit Court Judgments.

Notice of Appeal.

20

(Filed September 24, 1931.)

ESSEX COUNTY CIRCUIT COURT.

ALFRED MEZZALUNA, Plaintiff, vs. JERSEY MORTGAGE & TITLE GUAR- ANTY Co., a corporation, Defendant.	Action at Law.	30
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To: Stein, McGlynn & Hannoch, Attorneys for Plaintiff:

PLEASE TAKE NOTICE that the defendant, Jersey Mortgage & Title Guaranty Company, a corporation, appeals to the New Jersey Court of Errors 40

Notice of Appeal.

and Appeals from the whole of the judgment entered against it in the above entitled action.

Dated: Sept. 23, 1931.

Respectfully yours,

10

LINDABURY, DEPUE & FAULKS,
Attorneys for Defendant.

(Endorsed on back)

Service of the within notice of appeal is hereby acknowledged, this 23rd day of September, 1931.

STEIN, MCGLYNN & HANNOCH
Attorneys for Plaintiff.

20

Grounds of Appeal.

(Filed October 23, 1931.)

NEW JERSEY COURT OF ERRORS
AND APPEALS.

30

ALFRED MEZZALUNA,
Plaintiff-Respondent,

vs.

JERSEY MORTGAGE & TITLE GUAR-
ANTY Co., a corporation,
Defendant-Appellant.

Action at Law.

The above named defendant-appellant, Jersey Mortgage & Title Guaranty Company, assigns the following grounds of appeal from the judgment of the Essex County Circuit Court in the above entitled action, namely:

40

1. There was no evidence to support the findings and judgment of the court below.

Grounds of Appeal.

2. The court below erroneously determined that defendant owed a duty to plaintiff to exercise due care in examining plaintiff's title.

3. The court below erroneously construed the contract between the parties as imposing the duty upon the defendant for the benefit of the plaintiff to use due care in making the examination of the title of the property to be mortgaged by the plaintiff to the defendant.

10

4. The court below erroneously held that because the defendant charged the plaintiff a fee for examining the title of the premises to be mortgaged it owed the plaintiff a duty to make the examination carefully, whereas it should have held that the defendant owed no such duty to the plaintiff.

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5. The court below erroneously construed the contract between the plaintiff and the defendant as imposing an obligation upon the defendant to place a first mortgage upon the plaintiff's property, whereas the court should have held that the contract only imposed an obligation upon the defendant to make a loan of \$132,000 to the plaintiff upon the condition that he give to it a first mortgage on the premises in question.

6. The court below erroneously determined that the provision of the contract between the plaintiff and the defendant that the mortgage to be given by the plaintiff to the defendant should be a first mortgage was inserted for the benefit of the plaintiff, whereas the court should have held that such provision was inserted solely for the benefit of the defendant.

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7. The court below erroneously held that the acceptance by the defendant of plaintiff's mortgage without first causing to be discharged the

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Grounds of Appeal.

mechanics' liens which were prior to such mortgage constituted negligence in the performance of a duty which defendant owed to plaintiff.

10 8. The court below erroneously held that the failure of the defendant to discover the fact that the plaintiff had not filed the specifications with his building contract was negligence for which the defendant was liable to the plaintiff.

9. The court below erroneously held that the amounts paid by the plaintiff in satisfaction of mechanics' lien claims and counsel fees were damages resulting from a failure of the defendant to delay performance of a duty which it owed to the plaintiff.

20 LINDABURY, DEPUE & FAULKS,
Attorneys for Defendant-Appellant.

(Endorsed on back)

Service of a copy of the within Grounds of Appeal is hereby acknowledged, this 23rd day of October, 1931.

STEIN, MCGLYNN & HANNOCH
Attorneys for Plaintiff-Respondent.

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Testimony.

ESSEX COUNTY CIRCUIT COURT.

June 19, 1931.

ALFRED MEZZALUNA, <i>vs.</i> JERSEY MORTGAGE & TITLE GUARANTY COMPANY.	} Action at Law. 10
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Before

Hon. WORRALL F. MOUNTAIN, Judge.

For plaintiff appear STEIN, MCGLYNN & HAN-
NOCH (by EDWARD R. MCGLYNN).

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For defendant appear LINDABURY, DEPUE &
FAULKS (by JAMES E. M. TAMS).

Mr. McGlynn. We claim that the defendant was negligent as conveyancer and abstractor, and by reason of such negligence it was forced to pay the mechanic's lien claim.

The Court. Why?

Mr. McGlynn: Mr. Van Blarcom found the specifications were not attached to the contract at the time of filing, and under that theory the contract not being attached opened the way for material men and contractors to file liens, which they did. They were prior liens, prior to the mortgage.

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Mr. Tams: Our defense to this complaint is that this was a loan transaction whereby the mortgage company was authorized to do two things, primarily which this company was authorized to do, both by its charter and by its statute; namely,

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Opening Statements of Counsel.

to insure titles and to loan money, but in this case loaned to the plaintiff \$132,000; that there was no other duty which the defendant owed to the plaintiff than to loan him this money, which apparently was loaned to him in full.

10 The Court: Was this title insured by the defendant?

Mr. Tams: No.

The Court: Simply loaned \$132,000. No policy?

Mr. Tams: This is not a suit on a policy nor on an agreement to make a policy. As far as it appears from the complaint it is similar to an old-fashioned suit against a lawyer for negligence in making his search because it starts out with the allegation of an agreement to do certain things.

20 The Court: Was the owner of this property the owner for some time before?

Mr. Tams: Yes.

The Court: It was not a purchase money mortgage?

Mr. Tams: No, it was a construction mortgage, but at the time the mortgage was put on the property the plaintiff in this case had owned the property for some time. The building contract had been made several months before and filed.

30 The Court: When you say construction mortgage, did it by its terms set all of that out, the times when the money should be paid, and so forth?

Mr. Tams: No, sir, it did not.

40 Mr. McGlynn: I offer in evidence the application for the mortgage loan, dated February 10, 1928, to the Jersey Mortgage & Title Guaranty Company, signed by Mr. Alfred Mezzaluna, in which I call your Honor's attention to the facts in the printed form on the second line, "Is loan a construction loan? Answer: Yes, sir." The

Opening Statements of Counsel.

next answer is "Building". And also you will notice on the application it says, "Plans are to go to Mr. Clifford, who will make personal inspection in connection with estimate", and I desire to call your Honor's attention also to the last part of the application, which reads, "The undersigned owner agrees to pay all fees and expenses incurred in the examination or insurance of title and in connection with the parcel of property, and if a construction loan the fees of inspectors employed by the defendant. This application to be binding on undersigned owner whether the loan is consummated or not."

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(Same is received in evidence and marked Exhibit P-1.)

Mr. McGlynn. I offer in evidence the statement made to plaintiff by defendenat showing disbursement of the \$132,000, and I call your Honor's attention to the fact that the statement is headed, "Statement: Construction loan," and there appears on the statement, the only two items I am interested in, "April 3, 1928, Title Mortgage Guaranty charge \$5940," and another item of \$660, the total of which makes up the entire charge paid by the owner to the Jersey Mortgage & Title Guaranty Company.

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(Same is received in evidence and marked Exhibit P-2.)

Mr. McGlynn. I offer in evidence a photostatic copy of a bond and mortgage between Mr. Mezzaluna and the Jersey Mortgage & Title Guaranty Company, the bond being dated April 2, 1928, the mortgage being dated the same day, and the mortgage being recorded in Book 63 of Mortgages

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Opening Statements of Counsel.

for Essex County on pages 531 to 533, the principal sum of the mortgage being \$132,000.

(Same are received in evidence and marked Exhibits P-3 and P-4.)

10 Mr. McGlynn. It has been agreed between counsel without proving the record of each one of those mechanic lien suits to which I referred that it will be stipulated that there were three lien suits started in which judgment was entered as follows: November 19, 1930. Claimant, George Snyder, \$6682.88.

November 20, 1930. Albert and Kernahan, Inc., \$3434.22.

20 November 20, 1930. Branch Iron Works, Inc., \$5195.22.

It is also stipulated that each of these judgments was entered separately against the land and premises belonging to the plaintiff pursuant to the mechanic's lien statute and judgment was declared to be a lien against the premises prior and paramount to defendant's mortgage of \$132,000.

30 There was another claim which had been started, the fourth suit, which did not proceed to judgment, but it has been stipulated between the various attorneys in the litigation that that suit would stay in abeyance and await the outcome of the other three, and that the determination of the fourth would take the same effect, and that is the claim of Pierce, Butler & Pierce Manufacturing Corporation in the sum of \$1882.84.

40 It was also stipulated that after the entry of judgment in those cases and executions issued and the land and premises were advertised by the Sheriff for sale, that in order to prevent the sale of such property and its loss to the plaintiff, the

Opening Statements of Counsel.

plaintiff on January 30, 1931, paid off all those judgments in the total amount of \$17,719.65, being with interest and cost and everything else.

I call your Honor's attention that the answer of the defendant makes various admissions which I would like to refer to briefly to avoid the necessity of proving facts covered by the admission, and I am willing to limit the allegations of my complaint in some respects to the limitations defined in the answer. 10

Paragraph 1 of the complaint, it is admitted by the defendant to limit, and that limitation I will accept, namely, that the defendant was a corporation organized under and carrying on business pursuant to an act of the New Jersey legislature entitled, "An Act," etc., and it is permitted to carry on the kind of business defined by subdivision 8 of section 1 of the aforesaid act. 20

Paragraph 3 of the answer admits that the plaintiff for sometime prior to February 10, 1928, was the holder of the legal title to the property located on the northeast corner of Chancellor Avenue and Cornell Street, in the Town of Irvington, upon which premises a four-story apartment house was then being erected.

Paragraph 6 of the answer admits that on or about March 15, 1928, the defendant agreed to grant to the plaintiff, and the plaintiff agreed to accept from the defendant a first mortgage loan in the sum of \$132,000 covering the premises referred to, and the amount paid by the plaintiff was \$5940. The \$660 which was paid as a commission was also part of that charge making 5% of \$132,000. 30

Mr. Tams. No, we do not make that charge. 40

Alfred Mezzaluna, Plaintiff—Direct.

Mr. McGlynn. Also Paragraph 11, the defendant admits that from time to time, as the erection of the building on the premises progressed, it advanced to the plaintiff the various installments of the \$132,000 pursuant to the terms and provisions of the mortgage and caused the premises to be examined and inspected from time to time and made inquiries of various persons for the purpose of ascertaining whether the building was being erected in a manner sufficient to warrant its making further advances under the said mortgage; that it obtained affidavits, releases and other instruments releasing said land and premises from liability to certain liens which were prior to the lien of said mortgage.

20

ALFRED MEZZALUNA, plaintiff, sworn in his own behalf.

Direct examination by Mr. McGlynn:

Q. What was your business on or about the time you made this application to the Jersey Mortgage & Title Guaranty Company of Elizabeth? A. In the restaurant business.

30

Q. Did you have any knowledge at all of the Mechanic's Lien Law of the State of New Jersey? A. I didn't know about that.

Q. After you made the mortgage who had charge or who actually distributed or disbursed the money under that mortgage? Who paid out the money? A. The Jersey Mortgage & Title Guaranty Company.

40

Q. Do you recall how they did that? What would they do? How would they pay the money out? A. They make out the check in my name and I indorse the contract.

Alfred Mezzaluna, Plaintiff—Cross.

Q. After you indorsed the check? A. The check has it.

Q. You simply indorsed the checks they drew? A. Yes, sir.

Q. And they were turned over to whomever they wanted to give them to? A. The contract, yes.

Q. Did they come to you with the check first or did they give the checks to the contractor and he bring them to you for indorsement? A. They give the checks to the contractor and the architect comes to my house and I indorsed the checks. 10

Q. When you made this application for this mortgage, how much were you told you had to agree to pay for the services connected with it? A. Well, the expenses that must be for their—

Q. How much did they tell you it would cost you? A. They told me it would cost altogether \$6600 for to cover all the expenses and the guaranteed mortgage. 20

Q. To cover all expenses. 5% of the amount of the mortgage? A. 5% to cover all of the expenses and the mortgage guaranty.

Q. Whom did you retain to defend you in these mechanic lien suits which were started? Who was your lawyer? A. William Azzoli.

Q. Have you received a bill from Mr. Azzoli for his services in that litigation? A. Yes, sir. 30

Q. Is this the bill you received? A. Yes, sir.

Mr. McGlynn: I ask to have this bill marked for identification.

(Same is marked Exhibit P-5 for identification.)

Cross-examination by Mr. Tams:

Q. With whom did you have your dealings about this loan? Whom did you go to to get this loan? A. Anthony Orlando. 40

Alfred Mezzaluna, Plaintiff—Cross.

Q. Who was he with? A. He was alone when he came to me.

Q. Whom did he represent? A. I don't know who he represents because when he came in he represented nobody.

10 Q. Whom did he tell you he represented? A. After that he says, "I got the mortgage from the Jersey Mortgage & Title Guaranty Company."

Q. Didn't you go to see Mr. Marcel? A. Mr. Orlando went to see Mr. Marcel.

Q. Didn't you go to see Mr. Marcel? A. This fellow took me with him.

Q. You did go to see Mr. Marcel, didn't you? A. Yes, when my application was put in by Anthony Orlando, that is the fellow who made the application for this mortgage.

20 Q. Orlando took you to Mr. Marcel? A. He might be working together with the other fellow. I didn't know that.

Q. The two were working together? A. Yes, sir.

Q. After that did you have your dealings with Mr. Marcel? A. Both.

Q. Where did you sign the application? A. Where I sign the application?

Q. Yes. A. I go to the office.

30 Q. Mr. Marcel's? A. No.

Q. What? A. When I make the mortgage I go in the office in Elizabeth.

Q. Where was the application signed? A. I don't remember the application I signed whether in my home or in his office.

Q. Whose office? Mr. Marcel's office? A. I don't remember that.

Q. After you made the application which has been offered in evidence did you——

40 Mr. McGlynn: That can be agreed on.

Alfred Mezzaluna, Plaintiff—Cross.

Q. I want to make it clear. I show you a letter and I ask you if that is your signature. A. Yes, that is my signature.

Mr. Tams: I offer in evidence, by agreement with Mr. McGlynn, the original letter from Mr. Marcel from the H. H. Marcel Company to Jersey Mortgage & Title Guaranty Company dated March 7, 1928.

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(Same is received in evidence and marked Exhibit D-1.)

Mr. Tams: Also a carbon copy of a letter from the Jersey Mortgage Title & Guaranty Company to Mr. Marcel dated March 14th, the original of which is believed to have been delivered to Mr. Mezzaluna and which cannot be found by Mr. Marcel.

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(Same is received in evidence and marked Exhibit D-2.)

Mr. Tams: A letter on the letterhead of Mr. Marcel signed, "Alfred Mezzaluna", and dated March 15, 1928, to the Jersey Mortgage & Title Guaranty Company.

(Same is received in evidence and marked Exhibit D-3.)

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Q. When did you first go to the title company to see anyone from the title company? A. I go first when I signed the mortgage.

Q. The first time you went there was when you signed the mortgage? A. That is the first time I go there.

Q. Whom did you see when you went there at that time? A. I saw Mr. Conrad.

Q. Referring to Mr. Conrad, the title officer of the company? A. Yes, sir.

40

Alfred Mezzaluna, Plaintiff—Cross.

Q. At that time you signed the bond and mortgage? A. Yes, sir.

Q. You received a closing statement showing the distribution of the money made at that time?

A. The statement they sent me a year after.

10 Q. You were told at that time and shown a statement of what moneys were then distributed. All of it was not paid out at that time, but some was paid out at that time, wasn't it? A. Some of it.

Mr. McGlynn: That is agreed to.

Q. How long before that had the building been started? A. How long before was the building started?

20 Q. Yes. A. The building was started 1927, I think in December.

Q. Before you took title to the property the building was started? A. Yes, sir.

Q. Then you took a deed to the property? A. Yes, sir.

Q. You made a new contract with Corrado and Maturri for the building before you took title?

Mr. McGlynn: That is admitted.

30 Q. Were you interested in the company as owner of the property before you bought it yourself? A. Which company?

Mr. McGlynn: I object as having no materiality in this situation.

The Court: Admit it.

Mr. McGlynn: Withdraw the objection.

Q. The Cornell Construction Company? A. It used to be the Cornell Construction Company.

40 Q. Between the time you bought the property and the time when this mortgage was made that

Alfred Mezzaluna, Plaintiff—Cross.

the building was going on, was it not? A. It was going on.

Q. You had made several payments on account of the contract? A. Yes, sir.

Q. Do you know how many payments you had made? A. I can't remember now.

Q. I have here the original bill from Corrado and Maturri covering the entire contract price of the property. The bill shows that on December 30, 1927, you paid \$4000. On January 19, 1928, you paid \$6000. On January 26th, \$6000. On February 7, 1928, \$6000. On February 27, 1928, \$10,000. On March 17, 1928, \$7000. You had made those payments before you put this mortgage on this property? A. Yes, sir. 10

Q. After you were at the Jersey Mortgage & Title Guaranty Company, when the bond and mortgage was signed, when was the next time you went there? A. The next time? 20

Q. Yes. A. The last payment.

Q. When the last payment on the mortgage was made? A. The last payment.

Q. You did not consult or see anyone from the Jersey Mortgage & Title Guaranty Company between the time the mortgage was signed and the time the last payment was made? A. No. 30

Q. I show you a paper purporting to bear your signature. Is that your signature (indicating)? A. Yes, sir.

Q. Do you know what that paper is? A. I don't know what it is.

Q. It is headed, "Affidavit of title." Do you remember you signed an affidavit at the time you gave the bond and the mortgage that the title to this property was perfectly good and free and clear of liens? A. Yes, sir. 40

Alfred Mezzaluna, Plaintiff—Cross.

Q. You do remember that? A. I remember when I signed this (indicating).

Mr. Tams: I offer the affidavit in evidence.

10 (Same is received in evidence and marked Exhibit D-4.)

Q. In your direct examination you stated that all the checks that were paid out by the company were sent to you, is that right? A. Given to the contractor and the contractor gave to me.

Q. He brought them to you, didn't he? A. Yes, sir.

20 Q. Did he bring any report with them about those checks? Did he? A. No, he bring the checks and certificate of the architect.

Mr. McGlynn. You can state that to the Court.

30 Mr. Tams: So there will be no misunderstanding about this, from the time the bond and mortgage were given until the final payment was made on this mortgage, various certificates, architect's certificates were brought to our company. An application was made for payment on account of this mortgage. When we were satisfied that the amount of money asked for was due on the mortgage we issued a check in each instance drawn to the order of Alfred Mezzaluna. Those checks were in all cases asked for by the contractor who came to the company, but in all cases those checks were drawn to the owner, the mortgagor, and were given to the contractor to take
40 to the mortgagor to be indorsed by him, and

Alfred Mezzaluna, Plaintiff—Cross.

they were so indorsed. This one (indicating, was not indorsed by our people. I do not know who put it on, but the check is to the order of Alfred Mezzaluna. In some instances the indorsement on the top of the check is, "Pay to the order of Corrado and Maturri, Inc.," but they were given to Corrado and Maturri for Scrocco, the architect, or someone to take to Mezzaluna so we lost entire control of them and had nothing whatever to do with the actual indorsement of those checks; that is, Mr. Mezzaluna was entirely able to indorse or not to indorse. We did not hold them and say, "Here, you must sign the checks." That money was due to them and when they went to the owner he could or not sign or could tear the check up. We were never interested about it.

Mr. McGlynn: It might be well at this time for counsel to speak about—I think there were two postponements of liens. I wish that would be put in.

Mr. Tams: I offer in evidence postponement of lien signed by Corrado and Maturri, Inc., dated April 3, 1928, and another postponement of lien signed by Corrado and Maturri, Inc., dated June 25, 1928.

(Same are received in evidence and marked Exhibits D-5 and D-6.)

Q. Between the time the bond and mortgage were made and the final payment was made to the contractor, you made other payments to the contractor, those for which you received checks from the mortgage company, didn't you? A. Made one check \$10,000.

Alfred Mezzaluna, Plaintiff—Cross.

Q. On April 21st you made a check for \$10,000?

A. I don't remember what day it was.

Q. Then you made another check, didn't you?

A. I don't remember another check. What check?

Q. Do you remember the final payment of \$5261.70? A. What?

10 Q. \$5261.70, the final payment on the contract?

A. I was supposed to make that.

Q. That is the payment you made which you did not get from the mortgage company? A. I don't remember this.

Mr. McGlynn: There is no question about it. He has probably forgotten the amount.

20 Q. I show you two checks. They are your checks? A. Yes, sir.

Q. That one is yours and that one is yours (indicating)? A. Yes, sir.

Q. One check dated July 6, 1928, for \$5100 and the other dated July 1, 1928, for \$161.70. They are your own personal checks? A. Yes, sir.

Q. You did not get that money from the mortgage company? A. No, this is my check.

30 Q. Then on June 26th, which is before the final payment was made, or at the same time, you also gave them a check for \$700. You got a check for \$7000 from the mortgage company and gave a check for \$700. Do you remember that? A. I can't remember all those. There were so many checks.

Q. I will withdraw that. I show you a statement and I ask you if that is your signature. A. That is my signature.

40 Q. This statement is dated June 25, 1928, and it is a statement made at the time of the final closing and shows a balance of the loan then due

Alfred Mezzaluna, Plaintiff—Re-direct.

of \$30,433.50, and the manner in which that was distributed. A. Yes, sir.

Q. \$620.20, \$100. Alfred Mezzaluna \$700. Alfred Mezzaluna \$29,013.30. A. Who got that last check? I indorsed that check. Who has that money? I didn't get that money.

Q. It was indorsed by you to the contractor. 10
A. That's different.

Q. It was payable to you. A. Payable to me and I signed to the contractor.

Q. Yes. A. Yes, that's right.

(Statement is received in evidence and marked Exhibit D-7.)

Re-direct examination by Mr. McGlynn:

Q. When the mortgage company began to make 20
payment under this mortgage did you tell them how much money you had already paid the contractor? A. I didn't tell them nothing.

Q. The architect's certificates which were presented, the first architect's certificate which came in on which the mortgage company made payment showed how much money you had already paid on one side of it? A. It showed it was paid every time.

Mr. McGlynn: I understand there is no 30
question about that?

Mr. Tams: I guess that is it.

William V. Azzoli, for Plaintiff—Direct.

WILLIAM V. AZZOLI, sworn in behalf of plaintiff.

Direct examination by Mr. McGlynn:

Q. You are a member of the bar of the State of New Jersey? A. Yes, sir.

10 Q. How long have you been practicing? A. In this state since 1921.

Q. You represented Mr. Mezzaluna in four mechanic's lien suits referred to here? A. I did.

Q. Did you render him a bill for the services you performed in that litigation? A. I did, on January 7, 1931.

Q. Is that the bill (indicating)? A. Yes, sir.

Q. I notice your bill includes another case not talked about here? A. Yes, sir.

20 Q. Just limit your testimony to the four mechanic lien suits that have been referred to, Snyder, Albert and Kernahan, Inc., Branch Iron Works, Inc., and Pierce, Butler & Pierce. What was the amount of the bill you rendered for the services you performed in those four cases? A. \$2,500.

Q. Have you any recollection of how long that litigation was on? A. Yes, from the institution of the first suit August 20, 1928, and I continued my services in those cases until December, 1930.

30 Q. Did you file the pleadings under that for Mezzaluna? A. I did.

Q. Did you participate in the hearings before the Referee? A. I did.

Q. Do you recall whether there were few or many of them? A. There were quite a number of them.

Q. Do you recall whether they were short or long? A. They were long; quite lengthy. I think we had a half a day here in this court room before

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William V. Azzoli, for Plaintiff—Direct.

Mr. VanBlarcom, and then a two hour session and another two hour session. I think we consolidated three cases. I had numerous conferences with Mr. Tams, conferences with my client and witnesses. I talked with all the witnesses and made many trips to Jersey City to find Mr. Maturri. I could not get Mr. Corrado, he was out of the jurisdiction, in Colorado. It takes me weeks at a time to get to Mr. Garrison, the receiver for Mr. Maturri to look over their books and papers and so forth. I had a number of conferences with Mr. Garrison on it, and finally located Mr. Maturri living some place in Jersey City. He changed his address three or four times and we finally got him to come in and had a conference of all the witnesses in Mr. Tams' office one Saturday morning. 10 20

Q. You feel, for the amount of time you spent and the amount involved, that your bill is a reasonable bill? A. I think so. I had a great deal of law to look up and show to Mr. Tams.

Cross-examination waived.

Mr. McGlynn: I offer the bill in evidence, leaving out the amount dealing with other cases.

(Exhibit P-5 for identification is received in evidence and so marked.) 30

PLAINTIFF RESTS.

Warren F. Conrad, for Defendant—Direct.

WARREN F. CONRAD, sworn in behalf of defendant.

Direct examination by Mr. Tams:

10 Q. You are the title officer of the defendant company? A. Yes, sir.

Q. How long have you been title officer? A. Since September, 1927.

Q. Have you had charge of the Mezzaluna matter from the beginning? A. Yes, sir.

Q. When did you first have any dealings with Mr. Mezzaluna? A. At the time he came in he signed the bond and mortgage and all the mortgage papers.

20 Q. Before that, with whom had you had your dealings? A. With Mr. Marcel.

Q. Is Mr. Marcel a broker? A. Yes, sir.

Q. Is he an agent of your company? A. No.

Q. Were your dealings with Mr. Marcel by correspondence? A. I believe they all were.

Q. Did the letters which have been offered in evidence and which you have here referred to constitute the correspondence which you had with Mr. Marcel with reference to the making of this loan? A. Yes, sir, they did.

30 Q. Did you tell Mr. Mezzaluna when he was there at the time of the closing what he was to get and what he was entitled to from the company?

Mr. McGlynn: I object. I do not quite follow that question because it is rather broad in scope. It seems that the documents in evidence now outline pretty generally the contract between the plaintiff and defendant, and I cannot see how this witness can hope to enlarge or limit them.

Warren F. Conrad, for Defendant—Direct.

Mr. Tams: I am perfectly satisfied if I understand that Mr. McGlynn is not intending to rely on Mr. Mezzaluna's general statement of what he agreed to do.

Mr. McGlynn: I do not think Mr. Mezzaluna's testimony is disrespectful to counsel.

The Court: As I have listened to the case the documents before me constitute the contract between the parties. 10

Mr. Tams: That is my contention, but it is my recollection that Mr. Mezzaluna made some statement of what we intended to do.

Mr. McGlynn: I did not listen to that at all.

Mr. Tams: Withdraw the question then.

Q. When making payments on account of this loan to Mr. Mezzaluna, did you always pay the amount shown by the architect's certificates? A. No. In one or two instances the amount authorized by our inspector did not equal the amount on the architect's certificate. 20

Q. Then you paid what? A. We paid the amount our inspection would warrant.

Q. Do you know whether or not Mr. Mezzaluna paid the difference? A. No, the contractor receipted only for the amount we gave him. 30

Q. What do you mean he receipted for the amount you gave him? You did not give him any money, did you? A. No, he furnished us with the architect's certificate, receipted for the check we delivered to Mezzaluna.

Q. He receipted for the check drawn to the order of Mezzaluna? A. Yes, sir.

Q. Which he took to Mezzaluna? A. Yes, sir.

Q. Did you make any report to Mr. Mezzaluna when you sent those checks to him? A. No. 40

Warren F. Conrad, for Defendant—Direct.

Q. You just delivered the checks to Mr. Maturri and let him take them away? A. That's right.

Q. You never knew whether they were given to Corrado and Maturri or not, did you? A. No.

Q. Until they came back for the next payment?

A. Until they came back for the next payment and then the certificate showed the payment.

Q. Did you in any way supervise the other payments that were given by Mr. Mezzaluna to Corrado and Maturri? A. No.

Q. Were you asked to by him? A. No.

Q. The first time you saw Mr. Mezzaluna after the closing of title was when final payment was made, is that right? A. That's right.

Q. In the application reference is made to the fees of the inspector employed by the company. Explain what those inspections were. A. Every time application was made for inspection we sent our own committee out to check over the property and see that enough work was done to warrant our paying that proportion of the mortgage.

Q. What proportion? A. The proportion asked for by the architect.

Q. Is that work done for your protection or for the benefit of someone else?

Mr. McGlynn: I object. It is obvious why it is done.

The Court: Admit it.

Q. (Question read.) A. It is done for our protection. Our mortgage seldom equals the amount of the contract and we cannot pay out as much as the contract calls for.

Q. When did Mr. Mezzaluna first make any claim against your company for right to protection or reimbursement with respect to any of these loans?

Warren F. Conrad, for Defendant—Cross.

Mr. McGlynn: I object. I cannot see what difference it makes when he made them so long as it appears it was within the statutory period.

The Court: Sustain the objection.

Cross-examination by Mr. McGlynn:

10

Q. With the application for the loan in this case there was a copy of the specifications for the proposed building or the building under erection? A. I believe so.

Q. In addition to your inspectors inspecting property for the purpose of determining whether or not the applied for payment should be made it also is for your protection and you want to know that the building is being built in accordance with the plans and specifications on which the loan has been granted? A. Yes, sir.

20

Q. When you made your first payment to Mr. Mezzaluna under this mortgage you took from the general contractor one of these postponements of lien introduced in evidence? A. Yes, sir.

Q. Your subsequent payments were made on the assumption that the general building contract on file only required that you should get such postponement or releases from the general contractor? A. That's right.

30

Q. When you came to make up your final payment you deducted the postponement put in evidence? A. That's right.

Q. Is 5% of the amount of the mortgage your usual charge, or is that charge only made in construction loan cases? A. You have a broker's charge in there which was entered on our statement as disbursement. That is not a charge by the company. I believe our fee in this case was stated on the top of the statement, \$5940.

40

Warren F. Conrad, for Defendant—Cross.

Q. The two items are bound to aggregate 5% of the mortgage loan? A. Yes, sir.

Q. Did you have anything to do with fixing the charge? A. I make the charge, I do not set the charge.

10 Q. Does your charge vary in different cases or is it a fixed charge? A. It varies.

Q. Your company examined the title to this property? A. Yes, sir.

Q. In connection with that examination you also searched the records of the County Clerk's office for building contracts? A. Yes, sir.

20 Q. In the affidavit of title you took from Mezzaluna when he signed the bond and mortgage there was specifically called to your attention in the exhibits in the affidavit this building contract we are referring to here? A. But Mr. Mezzaluna—

Q. In the affidavit he signed, after the bond and mortgage was executed, there is a statement that the property is free and clear with the exceptions, and among the exceptions is the building contract? A. That's right.

30 Mr. Tams: I offer in evidence certified copy of the certificate of incorporation of this company. I say this company because it was originally the Bankers Mortgage & Title Guaranty Company, and by amendment to the certificate the name was changed to the New Jersey Mortgage & Title Guaranty Company. This certificate is a certified record and includes both the original and the amended certificates of incorporation.

Closing Statements of Counsel.

Mr. McGlynn: No objection.

(Same is received in evidence and marked Exhibit D-8.)

(Defendant rests.)

Mr. McGlynn: That completes the facts. 10
We have given your Honor all the material facts that we feel affect our respective clients. I have considerable notes in the examining of cases, and I am wondering whether you would rather have us submit this on brief.

The Court: I would like to listen to you for a while.

(Mr. Tams sums up for defendant.)

(Mr. McGlynn sums up for plaintiff.) 20

The Court: At the time the application for the mortgage was made what was the amount of the building contract that was on file?

Mr. Tams: \$165,000, but there were payments made of \$43,000.

The Court: That building contract with Corrado and Maturri, Inc., is a contract which was postponed by these two postponements you filed?

Mr. McGlynn: The right of the general contractor's lien was postponed. 30

(Argument.)

The Court: I think I will ask you gentlemen to let me think this over. I do not think it will be necessary to submit any brief or anything of that kind.

Exhibit P-1.

**Application for Mortgage Loan
To Jersey Mortgage & Title Guaranty Company,
Elizabeth, N. J.**

Date February 10, 1928.

- 10 The undersigned hereby applies for a guaranteed mortgage loan, at six per cent. interest per annum, (with such amortization of principal payable as may be agreed upon) from the JERSEY MORTGAGE & TITLE GUARANTY COMPANY, Elizabeth, New Jersey, upon the obligation of the undersigned, secured by first mortgage upon the premises described and shown on the diagram attached, and the following representations are made to induce the making of the aforesaid loan:
- 20 Name of borrower Alfreda Mezzaluna
 Amount desired \$165,000 for 5 years.
 Is loan a Construction Loan Yes
 City Irvington
 State New Jersey
 No. Chancellor Ave. N. E. Cor. of Cornell St.
 Building used for Apartments
 Dimension of Ground 100x100
 Dimensions of Building 89x92
 When Built Building
 Building Materials Brick
- 30 No. Stories 4
 No. Stores x x x
 No. Rooms 112
 No. Baths 41
 No. Apartments 41 inc. Jan.
 No. Garages x x x
 Value of Ground, \$50,000
 Value of Buildings, 230,000
 Total, \$280,000
- 40 108 rooms exclusive of janitor at \$25 per room.
 Total annual rent, \$32,400

Exhibit P-1.

Bank Reference Fidelity Union Trust Company

Are you now the actual owner of the property?
Yes

What price was paid, and on what terms? Plot cost \$50,000

Is the property now mortgaged, and for what amounts? No 10

The undersigned owner agrees to pay all fees and expenses incurred in the examination or insurance of the title and in connection with the appraisal of the property, and if a construction loan, the fees of the inspectors employed by the Company, this obligation to be binding on the undersigned owner whether the loan is consummated or not. The principal and interest of the mortgage indebtedness shall be payable at the Home Office of the Company in Elizabeth, New Jersey. The undersigned will arrange with the occupants of the premises for full inspection by the Company's appraisers. 20

Minimum appraisalment fee of \$10.00 must accompany applications

ALFREDO MEZZALUNA

Owner's Signature

85 Bank Street, Newark.

Address

30

H. GATES MARCEL

Broker's Signature

612 Chamber of Commerce Bldg.

Address

Mulberry 4670

(The following lines are a pencil notation on the face of the application)

Plans to Clifford—who will make personal inspection in connection with estimate

W. S. S.

2/11/28

40

Exhibit P-2.

Statement—Construction Loan.

JERSEY MORTGAGE AND TITLE GUARANTY CO.
 #280 North Broad Street
 Elizabeth, New Jersey.

10	Loan No. 647		
	Location: Chancellor Avenue,		
	Irvington, N. J.	Dr.	Cr.
	By amount of Mortgage to Jersey Title		
	Guaranty Co. from Alfred Mezzaluna		
	& wife.....		\$132,000.
	April 3, 1928		
	Title & Mortgage Guaranty		
	charge	\$5,940.00	
	To amount of survey chg.....	40.00	
	To amount of recordg. mtg...	3.50	
	To amount of recordg. deed..	3.00	
20	To amount of cancellg. mtg...	.50	\$ 5,987.00
	To amount of insurance: Burke Bros.		
	(Binder)	348.00	
	To amount of assessments & interest:		
	Tax Collector, Irvington, N. J.....	806.50	
	To amount of First Mortgage: Gen'l		
	B. & L. Assn.....	11,700.00	
	Cancellation (Meyer M. Semel).....	5.00	
	To amount of H. Gates Marcel Co.....	660.00	
	To amount paid to mortgagor: Alfred		
	Mezzaluna (Endorsed to contractor)	6,000.00	
	4/ 4/28 Additional to B. & L.....	60.00	
	4/12/28 Alfred Mezzaluna endorsed to		
30	Corrado Maturi Inc.....	6,000.00	
	4/20/28 Alfred Mezzaluna endorsed to		
	Corrado Maturi Inc.....	23,433.50	
	5/ 3/28 Alfred Mezzaluna endorsed to		
	Corrado Maturi Inc.....	26,566.50	
	6/ 5/28 Alfred Mezzaluna endorsed to		
	Corrado Maturi Inc.....	20,000.00	
	6/25/28 Burke Bros. (Inc.).....	620.20	
	Inspection fees	100.00	
	Alfred Mezzaluna endorsed to		
	Corrado Maturi Inc.....	700.00	
	6/25/28 Alfred Mezzaluna endorsed to		
	Corrado Maturi Inc.....	7,000.00	
40	6/25/28 Alfred Mezzaluna endorsed to		
	Corrado Maturi Inc.....	22,013.30	
		132,000.00	132,000

Exhibit P-3.

THIS MORTGAGE, made the Second day of April,
 One Thousand, Nine Hundred and Twenty-eight
 BETWEEN ALFRED MEZZALUNA and DORA MEZZA-
 LUNA, his wife of the City of Newark, in the
 County of Essex and State of New Jersey of the
 First Part, hereinafter known as the Mortgagor, 10
 AND JERSEY MORTGAGE AND TITLE GUARANTY COM-
 PANY a corporation organized and existing under
 the laws of the State of New Jersey, having its
 principal office in the City of Elizabeth, County
 of Union and State of New Jersey, of the second
 part, hereinafter known as the mortgagee;

WITNESSETH, that the said mortgagor, for and
 in consideration of the sum of ONE HUNDRED
 THIRTY TWO THOUSAND (\$132,000.00) Dollars, law- 20
 ful money of the United States of America, to
 them in hand well and truly paid by the mort-
 gagee, at or before the sealing and delivery of
 these presents, the receipt whereof is hereby ac-
 knowledged, and the said mortgagor therewith
 fully satisfied, contented and paid, have given,
 granted, bargained, sold, aliened, enfeoffed, con-
 veyed and confirmed, and by these presents do
 give, grant, bargain, sell, alien, enfeoff, convey
 and confirm to the said mortgagee and to its suc-
 cessors and assigns, ALL those certain lots, tracts 30
 or parcels of land and premises hereinafter par-
 ticularly described, situate, lying and being in the
 Town of Irvington in the County of Essex and
 State of New Jersey:

Beginning at the Southeast corner of Chancellor
 Avenue and Cornell Street; thence running North
 forty four (44) degrees thirty nine (39) minutes
 East along Cornell Street one hundred (100) feet;
 thence running South forty seven (47) degrees
 forty three (43) minutes twenty (20) seconds 40

Exhibit P-3.

East one hundred feet and eight one-hundredths of a foot (100.08); thence running South forty four (44) degrees thirty nine (39) minutes West one hundred (100) feet to Chancellor Avenue; thence along Chancellor Avenue North forty seven (47) degrees forty three (43) minutes twenty (20) seconds West one hundred feet and eight one-hundredths of a foot (100.08) to Cornell Street and Place of Beginning.

Being Lots Numbers Thirteen (13), Fourteen (14), Fifteen (15) and Sixteen (16) on Map of "Phillips Park" made by C. J. Casey, Jr., Surveyor, Irvington, N. J.

Being the same premises conveyed to the said Alfred Messaluna by deed of Cornell Construction Co., a corporation, bearing date December 29th, 1927 and recorded December 30th, 1927 in Book R-77 of Deeds for Essex County, on pages 171 &c.

TOGETHER with all and singular the profits, privileges and advantages, with the appurtenances to the same belonging or in anywise appertaining. Also all the estate, right, title, interest, property, claim and demand whatsoever of the party of the first part of, in and to the same, and of, in and to every part and parcel thereof,

TO HAVE AND TO HOLD all and singular the above described tracts or lots of land and premises with the appurtenances, unto the said mortgagee, its successors and assigns, to the only proper use, benefit and behoof of the said mortgagee, its successors and assigns forever. Provided always, and it is agreed by and between the parties to these presents that if the said mortgagor, or their executors, administrators or assigns, do and shall well and truly pay, or cause to be paid, to the said

Exhibit P-3.

mortgagee, its successors and assigns the sum of ONE HUNDRED THIRTY TWO THOUSAND (\$132,000.00) Dollars, together with interest on unpaid principal sum to be computed at the rate of six per centum per annum from the date hereof, and payable quarterly said principal sum to be paid as follows:

10

The sum of Three Thousand Nine Hundred Sixty Dollars on the Second day of April, 1930;

The sum of Three Thousand Nine Hundred Sixty Dollars on the Second day of April, 1931;

The sum of Three Thousand Nine Hundred Sixty Dollars on the Second day of April, 1932;

20

Balance of One Hundred Twenty Thousand One Hundred and Twenty Dollars on the Second day of April, 1933;

according to the conditions of a certain bond, bearing even date herewith, in the penal sum of Two Hundred Sixty-four Thousand (\$264,000.00) Dollars, made by said Alfred Mezzaluna and Dora Mezzaluna, his wife, to the said mortgagee, without any deduction or defalcation for taxes, assessments or any other imposition whatsoever, then and from thence forth these presents and said obligation shall cease and be void, anything herein and therein contained to the contrary in anywise notwithstanding. And it is expressly understood and agreed by and between the mortgagor and mortgagee herein that the said covenants and conditions in said bond contained are hereby made a part of this Mortgage as if specifically stated herein.

30

40

Exhibit P-3.

AND THE SAID MORTGAGORS, for themselves, their heirs, executors, administrators and assigns do covenant and grant to and with the said mortgagee, its successors and assigns, that they shall not nor will claim or demand or be entitled to receive any credit or credits on the interest payable hereon, or on the moneys to secure payment of which this mortgage is made, for so much of the taxes assessed against said lands as is equal to the tax rate applied to the amount due on this mortgage or any part thereof.

AND the said Bond contains among other things, covenants on the following subjects:

1. That the amount due on this mortgage shall, at the option of the said mortgagee, become due and payable prior to maturity upon default in payment of interest or of any installment of principal, if said principal is payable in installments, or in the payment of any tax, assessment, water rate, imposition or lien affecting the premises herein described; or if the mortgagor shall fail to comply with any requirement of any department or officer having jurisdiction over said mortgaged premises; or fail to maintain the building or buildings on said mortgaged premises in good repair; or shall remove or demolish any building on said premises, or permit such removal or demolishing; or fail to furnish a statement of the amount due on this mortgage; or fail to keep the buildings insured in the manner in said bond provided; or fail to secure insurance covering rent and occupation, if required; or use or permit the use of the mortgaged premises, or any building thereon, for any purpose forbidden by law; and

2. That in the event of any default in any covenant in said bond contained said mortgagee may

Exhibit P-3.

enter, take possession of the mortgaged premises and collect the rentals therefrom which said rentals are in the event of any such default hereby assigned to the mortgagee, and that in the event of any change in the laws of the State of New Jersey with respect to taxation of the mortgaged premises or this mortgage, or the bond accompanying the same, said mortgagee may anticipate the maturity of said bond; that if the mortgagor fails to insure the building or buildings on the mortgaged premises the mortgagee may effect such insurance, and the premium paid shall be added to the amount due under the terms of the bond; and 10

3. That all covenants herein and in said bond shall bind the heirs, executors, administrators, successors and assigns of the parties hereto. 20

AND the said mortgagor hereby Warrants the title of said lands and premises.

AND IT IS ALSO AGREED by and between the parties to these presents that whereas substantially all the moneys secured herein are to be expended in the construction of a building upon the mortgaged premises now if it should so happen at any time that said party of the first part abandons or deserts the construction of the said building before it is completed or refuses to proceed therewith, or if the said party of the first part for any reason other than strikes or lock-outs permit or suffer the construction work of the said building to lie still after ten (10) days' notice in writing to the said party of the first part, their heirs, executors, administrators or assigns, by the said mortgagee, its successors or assigns to proceed with the said work then, in any of the said events, it shall be lawful for the said mortgagee, its suc- 30 40

Exhibit P-3.

cessors or assigns, to enter in and upon the said premises and to complete the construction of the said building; and the said mortgagee, its successors or assigns, is hereby invested with full and complete authority irrevocable to make such entry and to continue any and all outstanding contracts for the erection and completion of the said building and, either in its own name or in the name of the said party of the first part, their heirs, executors, administrators or assigns, to make and enter into new contracts and obligations wherever necessary, and to pay and discharge all debts, obligations and liabilities incurred thereby. All moneys so expended in excess of said principal moneys shall be a lien on said mortgaged premises added to the amount of said bond or obligation and secured by these presents, payable by the said party of the first part on demand with interest at the rate of six per cent. per annum.

The covenants herein contained of the party of the first part are made for them, their heirs, executors, administrators or assigns and with the said party of the second part and its successors and assigns, and the covenants herein contained of the mortgagee are binding upon the said party of the second part and its successors and assigns.

IN WITNESS WHEREOF, the said mortgagor have hereunto set their hands and seals the day and year first above written.

ALFRED MEZZALUNA (SEAL)
DORA MEZZALUNA (SEAL)

Signed, Sealed and Delivered }
in the presence of: }

WARREN F. CONRAD.

Exhibit P-3.

STATE OF NEW JERSEY, }
COUNTY OF UNION, } ss.:

BE IT REMEMBERED That on this 2nd day of April in the year of our Lord, one Thousand Nine Hundred and twenty-eight, before me, the subscriber a Master in Chancery of New Jersey, personally appeared Alfred Mezzaluna and Dora Mezzaluna, his wife, who, I am satisfied, are the mortgagors mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon they acknowledged that, they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed,

10

WARREN F. CONRAD,
Master of Chancery of New Jersey.

20

Compared by 64 and 24.

MORTGAGE.
#647

Alfred Mezzaluna and Dora Mezzaluna, his wife,
TO
JERSEY MORTGAGE AND TITLE GUARANTY COMPANY

30

Dated, April 2nd, 1928.

Received in the Register's Office of the County of Essex, N. J., on the 2nd day of April A. D., 1928 at 10:17 o'clock, in the forenoon, and re-

40

Exhibit P-4.

corded in Book Q-63 of Mortgages for said County, on pages 531-533.

HOWARD S. DODD
Register

10 JERSEY MORTGAGE AND TITLE GUARANTY COMPANY,
Elizabeth, N. J.

Received Register's office April 24, 1928, 9:23 A. M.

Compared by 12 and 64.

Essex County, Newark, N. J.

20 Received in the Register's office of the County of Essex, N. J., on the 24th day of April A. D., 1928, at 9:23 o'clock in the forenoon, and Re-recorded in Book G-64 of Mortgages for said County, on pages 190-192.

HOWARD S. DODD
Register

Exhibit P-4.

30 KNOW ALL MEN BY THESE PRESENTS, That ALFRED MEZZALUNA and DORA MEZZALUNA, his wife, obligors, are, held and firmly bound unto the JERSEY MORTGAGE AND TITLE GUARANTY COMPANY a corporation organized under the laws of the State of New Jersey, obligee, in the penal sum of Two Hundred Sixty Four Thousand (\$264,000.00) Dollars, lawful money of the United States of America, to be paid to the said JERSEY MORTGAGE AND TITLE GUARANTY COMPANY, its successors or
40 assigns:

Exhibit P-4.

FOR WHICH PAYMENT well and truly to be made, they bind themselves, their heirs, executors and administrators, jointly, severally and firmly by these presents. Sealed with seals Dated the Second day of April, One thousand nine hundred and twenty-eight

THE CONDITION of the above obligation is such that if the above bounden Alfred Mezzaluna and Dora Mezzaluna, his wife, their heirs, executors or administrators, shall well and truly pay, or cause to be paid, unto the above named JERSEY MORTGAGE and TITLE GUARANTY COMPANY, or to its certain attorney, successors or assigns, the just and full sum of ONE HUNDRED THIRTY TWO THOUSAND (\$132,000.00) Dollars, and interest upon the unpaid principal hereof to be computed from the date hereof, at and after the rate of six per cent. per annum, and to be paid quarterly, said principal sum to be paid as follows:

The sum of Three Thousand Nine Hundred Sixty Dollars on the Second day of April, 1930;

The sum of Three Thousand Nine Hundred Sixty Dollars on the Second day of April, 1931;

The sum of Three Thousand Nine Hundred Sixty Dollars on the Second day of April, 1932;

Balance of One Hundred Twenty Thousand One Hundred and Twenty Dollars on the Second day of April, 1933;

without any fraud or other delay, then the above obligation to be void, otherwise to remain in full force and virtue.

Exhibit P-4.

AND IT IS HEREBY EXPRESSLY AGREED that if said obligor shall—

10 (1) Make default in the payment of said interest, or of any instalment of principal, if said principal is payable in instalments, or any part of either, on any day whereon the same is made payable as above expressed, and said default continue for the space of thirty days.

20 (2) Fail to pay any tax, assessment, water rent or governmental rate, charge, imposition or lien hereafter imposed or acquired upon the premises described in the mortgage accompanying this bond and given to secure the payment of the sum mentioned in the condition thereof, or any part or instalment thereof, on or before the last day upon which the same is payable without interest, and such default continue for a period of sixty days.

30 (3) Fail, within sixty days after notice and demand by the obligee, to pay all or any part of any assessment for local improvements heretofore or hereafter laid, which is or may become payable in instalments, and which has affected, now affects, or hereafter may affect said mortgaged premises, notwithstanding that the same be not due and payable at the time of such notice and demand.

(4) Fail to exhibit to said obligee, at its Home office in Elizabeth, within 20 days after any tax, assessment or rate affecting said mortgaged premises has become due and payable, a receipt in full for such tax, assessment or rate.

40 (5) Fail to comply with any requirement of any department or officer of the State of New Jersey, or of the municipality wherein such mortgaged

Exhibit P-4.

premises are situate, having jurisdiction over such mortgaged premises, within three months after an order making such requirement has been issued by any such department or officer.

(6) Fail to maintain the buildings on said mortgaged premises in reasonably good repair.

10

(7) Remove or demolish any building erected, or which may hereafter be erected on said mortgaged premises, or permit the same to be removed or demolished.

(8) Fail to furnish a statement of the amount due and owing for principal and interest upon this bond within thirty days after request or demand by said obligee therefor.

(9) Fail to keep the buildings erected upon said mortgaged premises insured against loss by fire and such other hazard as may be specified by the obligee, for the benefit of the obligee, through such broker or brokers as may be selected or approved by the obligee from time to time, and in an amount and in insurers satisfactory to it, or to assign such policies to it.

20

(10) Fail to procure and assign policy or policies of insurance covering the rent and occupation of the building or buildings on the said mortgaged premises, and assign the same to said obligee, if required by said obligee.

30

(11) Use or permit the use of said mortgaged premises or any building erected thereon or any part thereof for any purpose forbidden by law.

THEN and in any of said events the aforesaid principal sum of One Hundred Thirty Two Thousand (\$132,000.00) Dollars, or the balance due thereon, with all arrearage of interest, shall, at

40

Exhibit P-4.

the option of said JERSEY MORTGAGE and TITLE
GUARANTY COMPANY, its successors or assigns, be-
come and be due immediately thereafter, although
the period first above limited for the payment
thereof may not then have expired, anything here-
inabove contained to the contrary thereof in any-
10 wise notwithstanding.

AND IT IS FURTHER EXPRESSLY AGREED that—

(1) In case of any default in the performance
of any of the covenants of this bond persisted in
thirty days after notice in writing from said
obligee to said obligor, said obligee may enter
upon and take possession of said mortgaged prem-
ises, collect the rentals, let the said premises or
20 any part thereof, in its own name or otherwise,
and receive the rents, issues and profits from said
mortgaged premises and apply the same, after the
payment of all necessary charges and expenses,
on account of the amount hereby secured and in-
terest thereon, and said rents and profits, in the
event of such default as aforesaid, are hereby as-
signed to said obligee.

(2) Said obligor shall not be entitled to any
credit on the interest payable on the principal
sum mentioned in the condition of this bond or
30 any addition thereto under the terms hereof, for
the taxes which may be levied on the premises
covered by said mortgage, or for any part of said
taxes or because of the payment thereof.

(3) In the event of the passage after the date of
this bond of any act of the legislature of the State
of New Jersey deducting or permitting the de-
duction from the value of land for the purpose of
taxation any lien thereon, or providing for the
40 taxation of mortgages or debts secured by mort-

Exhibit P-4.

gage for state or local purposes, so as to affect this bond or the mortgage accompanying same, the obligee shall have the right to give thirty days' written notice to the obligor requiring the payment of the mortgage, and if such notice be given said debt shall become due and payable at the expiration of thirty days.

10

(4) If the obligor fails to insure the mortgaged premises as hereinabove provided the obligee may effect such insurance, and the premium or premiums paid therefor shall be added to the amount due under the terms of this bond.

(5) That all notices and demands or requests herein provided for may be in writing and may be served in person or by mail to the last known address of the party to be served.

20

(6) All the covenants herein contained shall apply to and bind and inure to the benefit of the heirs, executors, administrators and assigns of the obligor, and the successors and assigns of the obligee.

AND IT IS ALSO AGREED by and between the parties to these presents that whereas substantially all the moneys secured herein are to be expended in the construction of a building upon the mortgaged premises now if it should so happen at any time that said party of the first part abandons or deserts the construction of the said building before it is completed or refuses to proceed therewith, or if the said party of the first part for any reason other than strikes or lock-outs permit or suffer the construction work of the said building to lie still after ten (10) days' notice in writing to the said party of the first part, their heirs, executors, administrators or assigns, by the said mortgagee, its successors or assigns to proceed with the said work then, in any of the said events, it

30

40

Exhibit P-5.

shall be lawful for the said mortgagee, its successors or assigns, to enter in and upon the said premises and to complete the construction of the said building; and the said mortgagee, its successors or assigns, is hereby invested with full and complete authority irrevocable to make such entry
 10 and to continue any and all outstanding contracts for the erection and completion of the said building and, either in its own name or in the name of the said party of the first part, their heirs, executors, administrators or assigns, to make and enter into new contracts and obligations wherever necessary, and to pay and discharge all debts, obligations and liabilities incurred thereby. All moneys so expended in excess of said principal moneys
 20 shall be a lien on said mortgaged premises added to the amount of said bond or obligation and secured by these presents, payable by the said party of the first part on demand with interest at the rate of six per cent. per annum.

ALFRED MEZZALUNA (Seal)

DORA MEZZALUNA (Seal)

Signed, Sealed and Delivered }
 in the presence of: }

WARREN F. CONRAD

30

(Endorsement:)

BOND

#647

Alfred Mezzaluna and Dora Mezzaluna, his wife,
 to

JERSEY MORTGAGE AND TITLE GUARANTY COMPANY

Amount,..... \$132,000.00

Date, April 2nd, 1928

Due, April 2nd, 1933

Interest Payable Quarterly

40

JERSEY MORTGAGE AND TITLE GUARANTY COMPANY
 Elizabeth, N. J.

Exhibit P-5.

January 7th, 1931.

ALFRED MEZZALUNA
to
AZZOLI & KRASNY.

To professional services rendered from August 20th, 1928 to December 30, 1930, in following cases:—

10

ESSEX CIRCUIT COURT ACTIONS:

GEORGE SNYDER, Plaintiff, <i>vs.</i> ALFRED MEZZALUNA and JERSEY MORT- GAGE & TITLE GUARANTY Co., <i>et als.</i>	I.	
ALBERT & KERNAHAN, a corp., Plaintiff, <i>vs.</i> ALFRED MEZZALUNA and JERSEY MORT- GAGE & TITLE GUARANTEE Co., <i>et als.</i>	II.	20
BRANCH IRON WORKS, Plaintiff, <i>vs.</i> ALFRED MEZZALUNA and JERSEY MORT- GAGE & TITLE GUARANTEE Co., <i>et als.</i>	III.	30
PIERCE, BUTLER & PIERCE, Plaintiffs, <i>vs.</i> ALFRED MEZZALUNA and JERSEY MORT- GAGE & TITLE GUARANTEE Co., <i>et al.</i>	IV.	
DOMESTIC ELECTRIC Co., Plaintiff, <i>vs.</i> ALFRED MEZZALUNA, <i>et als.</i>	V.	40

BEING numerous conferences with
Mr. Tams, searching County records,

Exhibit P-5.

10	preparing Answers and other Pleadings in the cases, phone calls, filing fees and expenses, Conferences with Mezzaluna and witnesses. Trial of cases before Referee and argument on Exceptions. All in cases of Snyder, Kernahan, Branch Iron Works and Pierce, Butler & Pierce	\$2500.00
In case of Domestic Electric Co.— Conferences with Mr. Tams, numerous conferences with Mr. Harry Green and phone calls, preparing Agreed State of Case, Answer and Brief. Paying filing fees and expenses. Argument before Court.....		
20	Total.....	750.00 \$3250.00
Received Payment.		

30

40

Exhibit D-1.

H. GATES MARCEL COMPANY

MORTGAGE LOANS

Chamber of Commerce Building

Telephone MULberry 4670

Newark, N. J.

10

March 7th, 1928.

Jersey Mortgage & Title Guaranty Co.,
Elizabeth, N. J.

ATT:—*Mr. Thompson.*

Dear Sir:

We have arranged to place mortgage with your
company on the property owned by Alfredo Mez-
zaluna, located on the corner of Chancellor Ave.,
and Cornell St., Irvington, N. J.

20

Mr. Mezzaluna submits as reference the Fidelity
Union Trust Co., and his attorney, William V.
Azzoli, Academy Bldg., Newark.

Very truly yours,

H. GATES MARCEL COMPANY.

H G MARCEL

30

HGM:R

Exhibit D-2.

March 14, 1928.

Mr. H. Gates Marcel,
612 Chamber of Commerce Bldg.,
Newark, N. J.

10

Dear Mr. Marcel:

Our Executive Committee after considering the application of your client, Alfredo Mezzaluna, for a first mortgage loan of \$165,000, covering premises situated on Chancellor Avenue, Irvington, N. J., have approved the loan for \$132,000., to be amortized at the rate of 3% a year.

20

If this amount is acceptable to your client, be good enough to have him notify us of his acceptance of this loan and at the same time forward us his deed, abstract of title and such other papers as he may have in his possession, in order that we might proceed with the examination of the title

If this loan is not accepted within ten days from this date, it will be deemed your client does not care to accept the loan.

30

If the loan is acceptable, the bond and mortgage will be dated fifteen days from the date of acceptance, and your client will be notified when to call here to execute same.

Very truly yours,

Secretary.

WTT:K

40

Exhibit D-3.

H. GATES MARCEL COMPANY

MORTGAGE LOANS

Chamber of Commerce Building

Telephone MULberry 4670 Newark, N. J. 10

March 15th, 1928.

Jersey Mortgage & Title Guaranty Co.,
Elizabeth, N. J.ATT:—*Mr. W. T. Thomson.*

Dear Sir:

I have decided to accept your offer of a first 20
mortgage loan on my property located on the cor-
ner of Cornell St., and Chancellor Ave., Irvington,
N. J., in the sum of \$132,000.

I understand this mortgage is to be for a period
of five years at 6% and that amortization pay-
ments of 3% per annum are to start at the end of
second year.

Dated

Signed ALFRED MEZZALUNA

30

40

Exhibit D-4.

Title #647.

AFFIDAVIT OF TITLE.

10 STATE OF NEW JERSEY }
COUNTY OF UNION } SS

ALFRED MEZZALUNA,

of full age, being duly sworn, according to law, on oath deposes and says that he is the owner in fee simple of certain premises known as Southeast corner of Chancellor Ave. & Cornell St., in the Town of Irvington County of Essex State of New Jersey.

20 DEPONENT further says that the premises afore-
said have been held by him and preceding owners
from whom he derived title for the period of
twenty-years last past and upward, that said pos-
session has been peaceable and undisturbed, and
that the titles have never been disputed or ques-
tioned to his knowledge or belief, nor does depo-
nent know any facts by reason of which said pos-
session or title might be disturbed or questioned,
or by reason of which any claim to any part of
30 said property, or to an undivided interest therein
adverse to deponent might be set up or made; and
that the property is at this time unencumbered by
any contract for the sale thereof, lease or
agreement, easement, encroachment, unrecorded
mechanic's lien, or any tax or assessment, mort-
gage, judgment or limitation, except mortgage,
Book W 61, Page 20, to General Building Loan As-
sociation, Twelve Thousand Dollars (\$12,000.00);
Second half 1927 taxes, \$95.70; Cornell Street pav-

40

Exhibit D-4.

ing, curbing, &c., \$771.77; Building contract with Corrado Maturi, Inc., dated December 29th, 1927.

DEPONENT further says that there are no judgments or decrees remaining unsatisfied of record against him in any of the Courts of Law or equity of the State of New Jersey or of the United States, and that no proceedings in Bankruptcy have ever been instituted against him in any Court or before any officer of any State, or of the United States.

10

DEPONENT further says that he is married to Dora Mezzaluna, who is the same person who executed the mortgage with deponent to Jersey Mortgage and Title Guaranty Company. this affidavit being made at the time of the closing of title and that he is over the age of twenty-one years, and that all parties to the said instruments are fully competent to convey or mortgage said land.

20

This affidavit is made to induce Jersey Mortgage and Title Guaranty Company to accept a mortgage upon said premises and pay the consideration therefor knowing that it relies upon the truth of the statements herein contained.

ALFRED MEZZALUNA.

Sworn and subscribed to before me }
this 29 day of March, 1928. }

30

WARREN F. CONRAD
Master in Chancery of
New Jersey

40

Exhibit D-5.

Title 647.

10 WE, THE UNDERSIGNED, being persons who have
agreed by contracts in writing, duly filed, or to
be filed, to furnish labor and materials for the
erection of a certain building for Alfred Mezza-
luna, owner, described and located as follows to
wit: Apartment building Southeast corner of
Chancellor Avenue and Cornell Street, Irvington,
N. J.,

20 IN CONSIDERATION, That JERSEY MORTGAGE AND
TITLE GUARANTY COMPANY for the purpose of
aiding said owner to erect said building has
agreed to loan to said owner the sum of
One Hundred Thirty-two Thousand Dollars
(\$132,000.00) to be secured by a mortgage or
mortgages upon said building and lands, and for
the further consideration of one dollar to us paid
by the said Jersey Mortgage and Title Guaranty
Company, the receipt whereof is hereby acknowl-
edged,

30 DO HEREBY STIPULATE AND AGREE, That the mort-
gage or mortgages, given or to be given, to se-
cure said loan shall be and remain a lien upon
said building and lands prior and paramount to
any claim or lien we may have upon or against
said building and lands by virtue of the provi-
sions of "An Act to secure to mechanics and
others payment for their labor and materials in
erecting any building," and the supplements
thereto, or otherwise, howsoever, but the forego-
ing stipulation shall not be construed as a waiver
of our lien, except as to the lien of said mortgage.

Exhibit D-6.

WITNESS our hands and seals the 25th day of June, in the year of our Lord One Thousand Nine Hundred Twenty-eight.

CORRADO & MATURI INC
ANTHONY MATURI,
Secy

Signed, sealed and Delivered }
in the presence of }

10

WARREN F. CONRAD

Exhibit D-6.

Title 647.

WE, THE UNDERSIGNED, being persons who have agreed by contracts in writing, duly filed, or to be filed, to furnish labor and materials for the erection of a certain building for Alfred Mezzaluna, owner described and located as follows to wit: Apartment building, Southeast corner of Chancellor Avenue and Cornell Street, Irvington, N. J.,

20

IN CONSIDERATION, That JERSEY MORTGAGE AND TITLE GUARANTY COMPANY for the purpose of aiding said owner to erect said building has agreed to loan to said owner the sum of One Hundred Thirty-two Thousand Dollars (\$132,000.00) to be secured by a mortgage or mortgages upon said building and lands, and for the further consideration of one dollar to us paid by the said Jersey Mortgage and Title Guaranty Company, the receipt whereof is hereby acknowledged,

30

40

Exhibit D-6.

10 Do HEREBY STIPULATE AND AGREE, That the mortgage or mortgages, given or to be given, to secure said loan shall be and remain a lien upon said building and lands prior and paramount to any claim or lien we may have upon or against said building and lands by virtue of the provisions of "An act to secure to mechanics and others payment for their labor and materials in erecting any building," and the supplements thereto, or otherwise, howsoever, but the foregoing stipulation shall not be construed as a waiver of our lien, except as to the lien of said mortgage.

20 BUT IT IS EXPRESSLY STIPULATED, That the undersigned postpones its right or claim to any lien only to the extent that the proceeds of this mortgage loan in excess of present prior incumbrances and above the expenses of obtaining the loan, shall be paid to the undersigned.

WITNESS our hands and seals the 3rd day of April, in the year of our Lord One Thousand Nine Hundred and Twenty-eight.

CORRADO & MATURI, INC.

RUDOLPH CORRADO

President.

30 Signed, sealed and Delivered }
in the presence of }

ANTHONY MATURI

Secretary.

(Corporate Seal)

Exhibit D-7.

JERSEY MORTGAGE & TITLE GUARANTY COMPANY
Elizabeth, New Jersey

OFFICERS

N. R. LEAVITT, President
JOHN KEAN, Vice President
WILLIAM SEFTON, Vice President
L. R. WALLACK, Treasurer
W. TROWBRIDGE THOMSON, Secretary
RUTH B. CLAMER, Asst. Secretary
WARREN F. CONRAD, Title Officer
JOHN J. SMITH, Title Officer
CHARLES F. KELLER, Title Officer
H. D. RAASCH, Auditor

COUNSEL

LINDABURY, DEPUÉ & FAULKS

10

Title #647

June 25th, 1928.

Re: Alfred Mezzaluna Loan
Chancellor Avenue,
Irvington, N. J.

20

Balance of Loan		\$30,433.50
Burke Bros. (Ins.)	\$620.20	
Extra inspection	100.00	
Corrado { Alfred Mezzaluna	700.00	
& Maturi { Alfred Mezzaluna	29,013.30	
	\$30,433.50	\$30,433.50

Approved:

ALFRED MEZZALUNA

30

40

Exhibit D-8.**AMENDED CERTIFICATE OF
INCORPORATION**

OF THE

BANKERS MORTGAGE AND TITLE GUARANTY
COMPANY

10

THIS IS TO CERTIFY that we, the undersigned, intend to form a corporation under an act of the Legislature of the State of New Jersey, entitled "An Act to Provide for the regulation and incorporation of insurance companies and to regulate the transaction of insurance business in this State", approved April 3rd, 1902, and the supplements thereto and acts amendatory thereof, and hereby set forth.

20

FIRST: The name of said company is to be BANKERS MORTGAGE AND TITLE GUARANTY COMPANY.

SECOND: The place where the principal office of said company is to be located and its general business conducted is at 280 No. Broad St., in the City of Elizabeth, in the County of Union and State of New Jersey, and the name of the agent therein and in charge thereof, upon whom process against said Company may be served is Nathan R. Leavitt.

30

THIRD: The kinds of insurance proposed to be transacted by said company are to carry on the kind of insurance permitted to be transacted by subdivision VIII of Section 1 of the aforesaid Act of the Legislature of the State of New Jersey, viz:

40

"Against loss or damage on account of encumbrances upon or defects in titles to real property

Exhibit D-8.

and against loss by reason of the non-payment of principal and interest of bonds and mortgages, and in addition thereto, with its capital and surplus, to take, buy, sell, and deal in first mortgages on real estate and to issue bonds, debentures and certificates against said mortgages", as authorized by subdivisions Eighth of Section one of said Act. 10

FOURTH: The said company is to be a stock company.

FIFTH: The authorized capital stock of said company is One Million (\$1,000,000.) Dollars, divided into twenty thousand (20,000) shares of the par value of Fifty (\$50.00) Dollars each. The company will begin business with a capital paid in of Six Hundred Thousand (\$600,000) Dollars. 20

SIXTH: The period limited for the duration of said company is unlimited.

SEVENTH: The surplus of this company shall be not less than Sixty Thousand (\$60,000.) Dollars, which shall be paid into the treasury of the company for the uses and purposes required from time to time under the laws of the State of New Jersey. 30

IN WITNESS WHEREOF we have hereto respectively set our hands and seals the twenty eighth day of December, A. D., Nineteen Hundred and Twenty-five.

Signed in the presence of:

As to all

ADOLPH ULBRICH

(Signatures of shareholders and number of shares held.) 40

*Exhibit D-8.*CERTIFICATE OF CHANGE OF NAME
OF THEBANKERS MORTGAGE AND TITLE GUARANTY
COMPANY

10 The location of the principal office in this State is at No. 280 North Broad Street, in the City of Elizabeth, County of Union.

 The name of the agent therein and in charge thereof, upon whom process against this corporation may be served, is Nathan R. Leavitt.

RESOLUTION OF DIRECTORS

20 The Board of Directors of the Bankers Mortgage and Title Guaranty Company, a corporation of the State of New Jersey, on this eighth day of January, 1926, do hereby resolve and declare that it is advisable that the name of this corporation be changed to read JERSEY MORTGAGE AND TITLE GUARANTY COMPANY, and do hereby call a meeting of the stockholders to be held at the company's office in the City of Elizabeth, on Friday, January 8, 1926, at nine o'clock in the evening, to take action on the above resolution.

CERTIFICATE OF CHANGE

30 The Bankers Mortgage and Title Guaranty Company, a corporation of the State of New Jersey, do hereby certify that pursuant to the act of the Legislature of the State of New Jersey, entitled "An Act to provide for the regulation and incorporation of Insurance Companies, and to regulate the transaction of insurance business in this state", approved April 3, 1902, and the supplements thereto and acts amendatory thereof, it
40 has changed its corporate name to "Jersey Mort-

Exhibit D-8.

gage and Title Guaranty Company'', said change having been declared by resolution of the Board of Directors of said corporation (above recited) to be advisable and having been duly and regularly assented to by all of the stockholders of said corporation., at a meeting duly called by the Board of Directors for that purpose, and a written assent of all of said stockholders is hereto appended.

10

IN WITNESS WHEREOF, the corporation has caused this certificate to be signed by its President and Secretary and its corporate seal to be hereto affixed the 21st day of January, 1926.

N. R. LEAVITT

President

(C. S.)

DENMAN MULFORD

Secretary

20

(Certificate of New Jersey Commissioner of Banking and Insurance attached.)

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New Jersey Court of Errors and Appeals

ALFRED MEZZALUNA,
Plaintiff-Respondent,

vs.

JERSEY MORTGAGE AND TITLE
GUARANTY COMPANY,
Defendant-Appellant.

Action at Law.

On Appeal from
Essex County
Circuit Court.

BRIEF FOR DEFENDANT-APPELLANT.

Statement of the Case.

This is an appeal from a judgment entered in the Essex County Circuit Court on July 17, 1931, against the defendant-appellant upon a written finding of facts by the court, which tried the case without a jury, in favor of the plaintiff-respondent for \$20,219.65 (R., pp. 20 and 22). The parties are hereafter respectively referred to as "Defendant" and "Plaintiff."

The action is one at common law for damages claimed to have been sustained by the plaintiff by reason of the alleged negligence of the defendant in examining the plaintiff's title and in failing to place a first mortgage on the plaintiff's property.

On and prior to February 10, 1928, the plaintiff owned certain property in Irvington, New Jersey, upon which a four-story apartment house was being erected for him by a general contractor, Corrado & Maturi, Inc. (Complaint, Par. 4, R., p. 4, ll. 18, etc.; Answer, Par. 3, R., p. 11, ll. 28, etc.; R., p. 36, l. 15 to p. 37, l. 5). Before the plaintiff obtained a loan from the defendant he made pay-

ments to the contractor aggregating \$39,000 on account of the contract price (R., p. 37, ll. 10-18).

At that time the defendant, a New Jersey corporation, was carrying on its business pursuant to the provisions of an act of the New Jersey Legislature entitled, "An act to Provide for the regulation and incorporation of insurance companies and to regulate the transaction of insurance business in this State," approved April 3, 1902, and the various acts amendatory thereof and supplemental thereto (Ex. D-8, R., p. 78, ll. 12-19). The powers granted to it by said statute and by its certificate of incorporation were to carry on the kind of insurance permitted to be transacted by Subdivision VIII of Section I of the aforesaid Act of the Legislature, viz.:

"Against loss or damage on account of encumbrances upon or defects in titles to real property and against loss by reason of the non-payment of principal and interest of bonds and mortgages, and in addition thereto, with its capital and surplus, to take, buy, sell, and deal in first mortgages on real estate and to issue bonds, debentures and certificates against said mortgages." (Ex. D-8, R., p. 78, l. 39 to p. 79, l. 9.)

Under date of February 10, 1928, plaintiff through his broker, H. Gates Marcel, made written application to the defendant for a mortgage loan of \$165,000 (Ex. P-1, R., pp. 50 and 51; R., p. 51, l. 31; p. 44, l. 22; Ex. D-2, p. 70, l. 19). As this application is the basis of the entire relationship between the parties, we quote the exact language of the most important parts.

"The undersigned hereby applies for a guaranteed mortgage loan, at six per cent. interest per annum, (with such amortization of principal payable as may be agreed upon) from the JERSEY MORTGAGE & TITLE GUARANTY

COMPANY, Elizabeth, New Jersey, upon the obligation of the undersigned, secured by first mortgage upon the premises described and shown on the diagram attached, and the following representations are made to induce the making of the aforesaid loan:

"Name of borrower Alfreda Mezzaluna

"Amount desired \$165,000 for 5 years.

"Is loan a Construction Loan? Yes" (Ex. P-1, p. 50, ll. 9-22).

Then followed the applicant's answers to many questions concerning the property and the applicant's bank reference. Application concludes as follows:

"The undersigned owner agrees to pay all fees and expenses incurred in the examination or insurance of the title and in connection with the appraisal of the property, and if a construction loan, the fees of the inspectors employed by the Company, this obligation to be binding on the undersigned owner whether the loan is consummated or not. The principal and interest of the mortgage indebtedness shall be payable at the Home Office of the Company in Elizabeth, New Jersey. The undersigned will arrange with the occupants of the premises for full inspection by the Company's appraisers.

"Minimum appraisement fee of \$10.00 must accompany applications" (R., p. 51, ll. 12-26).

The negotiations for the loan were thereafter conducted entirely by correspondence (Exs. D-1, D-2 and D-3, R., pp. 69, 70 and 71; R., p. 35, ll. 31-36; p. 44, ll. 23-29) until the bond and mortgage were executed and the first advances made thereon, when for the first time there was a meeting between the plaintiff and the defendant (R., p. 35, ll. 31-36; p. 44, ll. 15-20).

On March 14, 1928, the defendant wrote to the plaintiff's broker, as follows:

"Dear Mr. Marcel:

"Our Executive Committee after considering the application of your client, Alfredo Mezzaluna, for a first mortgage loan of \$165,000, covering premises situated on Chancellor Avenue, Irvington, N. J., have approved the loan for \$132,000., to be amortized at the rate of 3% a year.

"If this amount is acceptable to your client, be good enough to have him notify us of his acceptance of this loan and at the same time forward us his deed, abstract of title and such other papers as he may have in his possession, in order that we might proceed with the examination of the title.

"If this loan is not accepted within ten days from this date, it will be deemed your client does not care to accept the loan.

"If the loan is acceptable, the bond and mortgage will be dated fifteen days from the date of acceptance, and your client will be notified when to call here to execute same" (Ex. D-2, R., p. 70).

On March 15, 1928, the plaintiff accepted the defendant's offer as follows:

"I have decided to accept your offer of a first mortgage loan on my property located on the corner of Cornell St. and Chancellor Ave., Irvington, N. J., in the sum of \$132,000.

"I understand this mortgage is to be for a period of five years at 6% and that amortization payments of 3% per annum are to start at the end of second year" (Ex. D-3, R., p. 71).

The application for the loan and these letters constitute the entire contract between the parties from which the defendant's duty to the plaintiff arose (R., p. 45, ll. 10-12).

On March 29, 1928, the plaintiff made an affidavit of title (Ex. D-4, p. 72) in which he stated that "the property is at this time unencumbered

by any * * * unrecorded mechanic's lien * * * except * * * Building contract with Corrado Maturi, Inc., dated December 29th, 1927" (R., p. 72, l. 32 to p. 73, l. 5), and further declared:

"This affidavit is made to induce Jersey Mortgage and Title Guaranty Company to accept a mortgage upon said premises and pay the consideration therefor knowing that it relies upon the truth of the statements herein contained" (R., p. 73, ll. 22-26).

Under date of April 2, 1928, plaintiff and his wife executed a bond and mortgage to the defendant for \$132,000 (Ex. P-3, p. 53, and P-4, p. 61). In this mortgage the plaintiff warranted the title of the property (p. 57, ll. 22 and 23).

The fee charged by the defendant pursuant to the agreement in the application was \$5,940 (Ex. P-2, p. 52, l. 15, and R., p. 47, ll. 38-40). At the time the bond and mortgage were executed the defendant obtained from Corrado & Maturi, Inc., the general contractor, a waiver and postponement of its mechanic's lien to the lien of the defendant's mortgage (Ex. D-5, p. 74).

As the building progressed the defendant made advances to the plaintiff from time to time until the full amount of the loan was paid. These payments were made when the defendant was satisfied that the plaintiff was entitled to the amount of the payment. The checks were in all cases drawn to the order of the plaintiff and were given to the contractor to be taken to the plaintiff, who endorsed them to the contractor. The defendant was not present when the checks were so endorsed (R., p. 38, l. 23 to p. 39, l. 22).

In addition to the advances made by the defendant to the plaintiff on account of the mortgage loan, which were endorsed by the plaintiff to the general contractor, the plaintiff made other payments to the contractor amounting to \$15,961.70

subsequent to the date of the mortgage (R., p. 39, l. 36 to p. 41, l. 10).

Between the time that the plaintiff signed the mortgage and the date the last payment was made upon it by the defendant the plaintiff saw no one connected with the mortgage company (R., p. 37, ll. 26-39).

By reason of the fact that the building contract between the plaintiff and the general contractor, which had been filed prior to the execution of the mortgage, did not have attached to it at the time of its filing the specifications referred to in that agreement, four sub-contractors who were not paid by the general contractor acquired mechanics' liens upon the plaintiff's property. These mechanics' liens were prior to the lien of the defendant's mortgage. They were established in prior litigation and were paid by the plaintiff. The damages in the present suit represented the amount paid to these mechanics' lien claimants and to the plaintiff's attorneys for services in defending the previous mechanics' lien suits.

On these facts the trial court found that the defendant, though it made a loan to the plaintiff, charged him for the examination of the title of the premises which was to secure the loan and that the plaintiff had requested and believed that he had obtained a first mortgage and relied upon the defendant to place that kind of a mortgage upon the property and that the defendant was negligent in not doing so (R., p. 18, ll. 34-40). This finding was based upon the legal proposition that:

“A corporation organized, among other things, for the purpose of loaning its surplus funds upon bonds, secured by mortgages and examining the titles thereto and charging a fee for so doing, assumes to discharge the same duties as an individual conveyancer or

attorney and is subject to the same responsibilities. Those responsibilities are set forth in *Jacobsen vs. Peterson*, 91 N. J. L. 404'' (R., p. 19, ll. 7-15).

On behalf of the defendant we respectfully submit that the findings and judgment of the trial court were erroneous and should be reversed.

The Grounds of Appeal Intended to be Argued.

The grounds of appeal will be found on pages 24-26 of the Record. Those intended to be argued fall into the following general classes:

1. There was no evidence to support the findings and judgment of the court below (Grounds of Appeal No. 1, R., p. 24).
2. The evidence failed to show any duty which the defendant owed to the plaintiff to use due care in examining the title of the property to be mortgaged by the plaintiff to the defendant (Grounds of Appeal Nos. 2, 3 and 4, R., p. 25).
3. The trial court erroneously construed the contract between the plaintiff and defendant as creating an obligation of the defendant to the plaintiff to place a first mortgage upon the plaintiff's property, whereas the only obligation of the defendant to the plaintiff imposed by the said contract was to make a loan of \$132,000 to the plaintiff upon the condition that the plaintiff give to it a first mortgage on the premises in question (Grounds of Appeal Nos. 5, 6, 7 and 8, R., pp. 25 and 26).
4. The court below erroneously held that the amounts paid by the plaintiff in satisfaction of mechanics' lien claims and counsel fees were damages which resulted from a failure of the defend-

ant to perform a duty which it owed to the plaintiff (Ground of Appeal No. 9, R., p. 26).

The error committed by the court is contained in its Rule for Judgment wherein it found and determined

“that the plaintiff suffered damages as alleged in his complaint by reason of the negligence of the defendant, and that the defendant, although it made a loan to the plaintiff, charged him for the examination of the title of the premises which was to secure said loan, and that the plaintiff had requested and believed that he had obtained a first mortgage and relied upon the defendant to place that kind of a mortgage on the plaintiff’s property, and that the defendant was negligent in not doing so;” (R., p. 20, l. 35 to p. 21, l. 9).

ARGUMENT.

I.

There is no evidence that defendant owed plaintiff a duty to use care in examining title of property to be mortgaged or to place a first mortgage on plaintiff’s property.

It is fundamental that unless the defendant owes a duty to the plaintiff to use due care in the performance of a particular act the failure to use such care gives rise to no cause of action by the plaintiff.

*Economy Building and Loan Association,
 &c. v. West Jersey Title, &c. Co.*, 64 N.
 J. L. 27;

Fenaille & Despeaux v. Coudert, et al., 44
 N. J. L. 286.

As the Supreme Court said in *Kahl v. Love*, 37 N. J. L. 5, on page 8:

“It is not everyone who suffers a loss from the negligence of another that can maintain a suit on such ground. The limit of the doctrine relating to actionable negligence is, that *the person occasioning the loss must owe a duty, arising from contract or otherwise*, to the person sustaining such loss. Such a restriction on the right to sue for a want of care in the exercise of employments or the transaction of business, is plainly necessary to restrain the remedy from being pushed to an impracticable extreme. There would be no bounds to actions and litigious intricacies, if the ill effects of the negligences of men could be followed down the chain of results to the final effect.” (Italics ours.)

While the action sounds in tort for negligence the relations of the parties and their mutual obligations were fixed by contract.

We submit that there is no evidence that the defendant owed to the plaintiff any duty to carefully examine plaintiff's title or to place a first mortgage on the plaintiff's property.

The judgment of the court below is based upon the finding that the plaintiff had requested and believed that he had obtained a first mortgage and relied upon the defendant to place that kind of a mortgage upon the property.

There is no dispute as to what the plaintiff requested for, as stated by the trial judge, “the documents before me constitute the contract between the parties” (R., p. 45, ll. 11 and 12). These documents were:

1. Application for a mortgage loan (Ex. P-1, R., p. 50).

2. Letter from H. Gates Marcel to the Jersey Mortgage and Title Guaranty Co., dated March 7th, 1928 (Ex. D-1, R., p. 69).

3. The letter from the Secretary of the Jersey Mortgage and Title Guaranty Co. to H. Gates Marcel, dated March 14, 1928 (Ex. D-2, R., p. 70).

4. The letter from Alfred Mezzaluna to Jersey Mortgage and Title Guaranty Co., dated March 15, 1928 (Ex. D-3, R., p. 71).

In his application the plaintiff "applies for a guaranteed mortgage loan, at six per cent. interest per annum * * * from the JERSEY MORTGAGE & TITLE GUARANTY COMPANY, Elizabeth, New Jersey, upon the obligation of the undersigned, secured by first mortgage upon the premises described * * * and the following representations are made to induce the making of the aforesaid loan:" (Ex. P-1, R., p. 50, ll. 9-19). At the end of the application the plaintiff made the following agreement: "The undersigned owner agrees to pay all fees and expenses incurred in the examination or insurance of the title and in connection with the appraisal of the property, and if a construction loan, the fees of the inspectors employed by the Company" (Ex. P-1, R., p. 51, ll. 12-17). This application was submitted to the defendant by the plaintiff's agent (Ex. D-1, R., p. 69).

The defendant did not accept the application as it was made, but made a new offer in its letter to the plaintiff's agent, dated March 14, 1928, in which it said:

"Our Executive Committee after considering the application of your client, Alfredo Mezzaluna, for a first mortgage loan of \$165,000, covering premises situated on Chancellor Avenue, Irvington, N. J., have approved the loan for \$132,000., to be amortized at the rate of 3% a year.

"If this amount is acceptable to your client, be good enough to have him notify us of his acceptance of this loan and at the same time

forward us his deed, abstract of title and such other papers as he may have in his possession, in order that we might proceed with the examination of the title.

"If this loan is not accepted within ten days from this date, it will be deemed your client does not care to accept the loan.

"If the loan is acceptable, the bond and mortgage will be dated fifteen days from the date of acceptance, and your client will be notified when to call here to execute same" (Ex. D-2, R., p. 70).

The negotiations were then closed by the plaintiff's letter of March 15, 1928, in which he said:

"I have decided to accept your offer of a first mortgage loan on my property located on the corner of Cornell St., and Chancellor Ave., Irvington, N. J., in the sum of \$132,000.

"I understand this mortgage is to be for a period of five years at 6% and that amortization payments of 3% per annum are to start at the end of second year" (Ex. D-3, R., p. 71).

In these negotiations the plaintiff requested just one thing, a loan, for which he was to give to the defendant a bond secured by a first mortgage on his property.

The court's statement that the plaintiff had requested a first mortgage and relied upon the defendant to place that kind of a mortgage upon the property gives the impression that the plaintiff was making the loan and had retained the defendant to assure him that he received from the borrower a first mortgage. Had that been the situation the defendant would have been under the duty charged, but that is not the situation. The defendant was lending money to the plaintiff and the plaintiff was borrowing it from the defendant. The plaintiff was giving, not taking a mortgage. It was the defendant which, under the contract,

was entitled to a satisfactory security. In order to obtain the loan the plaintiff was obliged, as is the custom in such cases, to pay the expenses involved in examining the title and making inspections which the lender required to satisfy itself that the security was satisfactory. It was immaterial to the plaintiff whether the mortgage which he gave was a first lien or not so long as he obtained the loan.

The court found that the plaintiff "believed that he had obtained a first mortgage and relied upon the defendant to place that kind of a mortgage upon the property." There is not a scintilla of evidence anywhere that the plaintiff relied upon the defendant for any such thing. The defendant was not asked to nor did it make or issue any guaranty, certificate, abstract or even a report to the plaintiff of its examination of the title nor did it in any way advise or represent to plaintiff that the mortgage which it accepted was prior to all possible liens which were then or might thereafter be placed upon the property.

The plaintiff only saw the defendant upon two occasions, first, when he executed the bond and mortgage, and, second, when the final payment of the mortgage was made by the defendant to the plaintiff. The only correspondence between them was that which has been referred to, namely, Exs. D-1, D-2 and D-3. It was the defendant who asked for, obtained and relied upon assurances from the plaintiff at the time the mortgage was executed. The plaintiff gave the defendant an affidavit of title which he expressly "made to induce Jersey Mortgage and Title Guaranty Company to accept a mortgage upon said premises and pay the consideration therefor knowing that it relies upon the truth of the statements herein contained" (R., p. 73, ll. 22-26). In the mortgage he warranted the title of the lands and premises (Ex. P-3, R., p. 57, l. 22).

The defendant did not mislead the plaintiff nor did the plaintiff rely upon the defendant. Before he made the application for a loan he paid out \$39,000 of the contract price for the building. After the mortgage was given to the defendant the plaintiff paid out to the general contractor \$15,961.70 without consulting the defendant.

The trial court held that the defendant assumed to discharge the same duties as an individual conveyancer or attorney and is subject to the same responsibilities, citing *Jacobsen v. Peterson*, 91 N. J. L. 404. That case is not applicable to the present situation. The plaintiff there sued the defendant, an attorney at law, to recover damages sustained by reason of the negligence of the defendant in examining and reporting upon the title of lands. The Supreme Court said, on page 405:

“It is the duty of an attorney, who is employed to investigate the title to real estate, to make a painstaking examination of the records and to report all facts relating to the title. He is, therefore, liable for any injury that may result to his client from negligence in the performance of his duties—that is, from a failure to exercise ordinary care and skill in discovering in the records and reporting all the deeds, mortgages, judgments, &c., that affect the title in respect to which he is employed.”

In *Economy Building and Loan Association, &c. v. West Jersey Title, &c. Co.*, 64 N. J. L., page 27, which was cited by the court in the *Jacobsen* case as authority for its decision, the action was brought to recover damages alleged to have been suffered by the plaintiff because it made a loan on the security of a mortgage on real estate upon the faith of a certificate of the defendant company that the real estate was free from prior encumbrances, which certificate was untrue there being,

in fact, a prior recorded encumbrance. The facts were that one Moore desired to procure a loan of \$3,000 and applied to the plaintiff therefor. The plaintiff agreed to make the loan on condition that Moore should secure it by a mortgage on certain lands, which mortgage should be certified by defendant to be a first lien on said lands. Moore applied to the defendant and made known to it his agreement with the plaintiff and requested the defendant to make the required search and certificate which it agreed to do. It made the certificate, delivered it to Moore who paid the defendant for it. Moore then delivered it to the plaintiff who thereupon made the loan on the faith of the certificate. The defendant contended that it was under no duty to the plaintiff because there was no privity between it and the plaintiff by reason of the fact that there had been only a contract between the defendant and Moore. The Supreme Court held that the contract was made for the benefit of the plaintiff and that the plaintiff therefore had a right to maintain an action upon it. In his opinion Mr. Chief Justice Magie said, on page 28, that if the defendant possessed the capacity of examining the title to real estate and certifying to encumbrances thereon, "there can be no doubt that, upon being employed to examine and certify, it undertook a duty in favor of the employer, for the breach of which it would become liable to him." In the language of the same Chief Justice, the question here is whether the facts disclosed a duty owed by the defendant to the plaintiff and a breach of such duty.

In both the Jacobsen case and the Economy Building and Loan Association case the action was brought and maintained by the party for whose benefit the title was examined and the abstract or certificate issued. In our case, the Jersey Mortgage and Title Guaranty Company stands

in the same position with respect to the examination of title as the plaintiffs in each of the above mentioned cases. The situation in our case is that of a borrower applying for a loan and agreeing to furnish a certificate of title or guaranty to the mortgagee. It is a matter of common understanding that in such situations the examination of title and the mortgage guaranty are issued to the mortgagee and that the title company or attorney who examines the title in such circumstances only is responsible to the mortgagee.

II.

There is no evidence that plaintiff suffered damages by reason of defendant's negligence.

The trial court found that the plaintiff was obliged to pay the mechanics' lien claims because of the negligence of the defendant in accepting a mortgage which was not a first mortgage. The defendant's mortgage might have been a first lien on the property and the property might still have been subject to the mechanics' liens which the plaintiff would have been obliged to pay in order to protect his interest in the property. The fact that the contract and specifications of the general contractor were not filed in the County Clerk's Office did not prevent the mortgage from being a first lien on the property. If the defendant mortgagee had made its advances in such a way that it could have proved that all of the money so advanced actually went into the building, instead of paying it to the plaintiff, the lien of its mortgage would have been prior to any mechanics' lien claim (Section 15 of the Mechanics' Lien Law, Vol. 3 Comp. Stat. N. J., p. 3303). It was not necessary for it nor would due care have required it to have ascertained whether there were lien

claims against the building at the times when these advances were made and the plaintiff would have been just as much obliged to pay the claimants as he has been in the circumstances which actually existed. In any circumstances it made no difference to the plaintiff whether the mechanics' lien claims were prior or subsequent to the lien of the defendant's mortgage. In either event the plaintiff was obliged to pay such claims or have his property sold for the satisfaction of them. The defendant was the only one interested in the question of priority. If the liens were prior to its mortgage and the property were sold to satisfy the liens it would have been obliged, if it wished to protect its mortgage, to attend the execution sale and make sure that the property was sold for enough to satisfy both the liens and its mortgage.

The defendant respectfully submits that there was no evidence in this case upon which the trial court could properly have found:

(a) That the defendant was guilty of negligence in the performance of any duty which it owed to the plaintiff.

(b) That the damages sustained by the plaintiff resulted from the negligent performance of any duty which the defendant owed to the plaintiff.

For the reasons above stated, we submit that the judgment of the court below should be reversed, with costs.

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New Jersey Court of Errors and Appeals

ALFRED MEZZALUNA, <i>Plaintiff-Respondent,</i> <i>vs.</i> JERSEY MORTGAGE AND TITLE GUARANTY COMPANY, <i>Defendant-Appellant.</i>	}	<i>Action at Law.</i> <i>On Appeal from Essex County Circuit Court.</i>
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BRIEF OF PLAINTIFF-RESPONDENT

Facts.

Respondent sees no necessity of repeating the facts involved in the present case, because not only are they correctly stated in appellant's brief, but they are fully and clearly covered by the learned trial judge, who heard this case, sitting without a jury. (See finding of facts by the Court, State of the Case, pages 15 to 20.)

It will be observed by an examination of the State of the Case that the only testimony which it was found necessary to take, occupied only a few pages of the printed book (State of the Case, pages 27 to 49). Whatever other facts which were not stipulated, were contained in documents or records.

It should be kept in mind that this litigation was the aftermath of three contested mechanic lien suits and a fourth case, which by stipulation, had been held in abeyance, with an agreement that its decision would follow the result of the three contested cases.

See State of the Case, page 7, paragraphs 15 and 16; page 8, paragraphs 17, 18, 19; page 9,

paragraph 20; page 18; page 30, lines 9 to 40; page 31, lines 1 to 3; page 42, lines 30 to 40; page 43, lines 1 to 20.

The cases to which reference has just been made were decided by a Referee, Mr. Andrew Van Blarcom and after exceptions had been filed to his report, the cases were re-tried by the same Circuit Court Judge who heard the case now before this Court and he reached the same result as the Referee.

The basis of the plaintiff's claim in the Court below, as set forth in the complaint filed by him (see State of the Case, pages 2 to 9), was that the defendant, a title company, was negligent in not discovering upon its examination of the title to plaintiff's land, the fact that a building contract recorded in the Essex County Clerk's office did not have a set of specifications attached thereto as provided by statute and that, therefore, material-men and sub-contractors who were the plaintiffs in the four mechanic lien suits just mentioned, had the legal right to file mechanics' liens and obtain special judgments against plaintiff-respondent's land. The lien of their judgments was fixed by the Referee and the Circuit Court Judge as prior to the full amount of the defendant's mortgage. When executions were issued on these four judgments, plaintiff was forced to pay them, in order to protect his property and it was the amount of those judgments, plus the fees of plaintiff's attorney in defending the four suits, which was the amount of the judgment now under review.

ARGUMENT.

There is nothing in the statute under which the defendant corporation was organized (see State of the Case, page 15), nor in the certificate of incorporation filed by it, which prohibited the defendant from entering into an agreement to loan money on bond and mortgage and to guarantee either the payment of the mortgage and interest, if it sold the same, or to guarantee that the mortgage was a first lien on the property of the mortgagor.

Appellant's argument seems to be that inasmuch as the mortgage in this case was taken by it in its own name and originally held by it, therefore there was no duty resting upon it to the plaintiff.

It must be remembered that the respondent paid the defendant five thousand nine hundred and forty (\$5,940.) dollars for

**"TITLE & MORTGAGE GUARANTY
CHARGE."**

See State of the Case, page 52, Exhibit P. 2, line 15. Also see Exhibit P. 1, page 51, lines 12 to 23. See also State of the Case, page 47, lines 33 to 40.

In the same connection the Court's attention is directed to the following paragraphs taken from Exhibit D. 2, which was a letter from the defendant to plaintiff's agent (State of the Case, page 70):

March 14, 1928.

Mr. H. Gates Marcel,
612 Chamber of Commerce Bldg.,
Newark, N. J.

Dear Mr. Marcel:

Our Executive Committee after considering the application of your client, Alfredo

Mezzaluna, for a first mortgage loan of \$165,000. covering premises situated on Chancellor Avenue, Irvington, N. J., have approved the loan for \$132,000. to be amortized at the rate of 3% a year.

If this amount is acceptable to your client, be good enough to have him notify us of his acceptance of this loan and at the same time forward us his deed, abstract of title and such other papers as he may have in his possession, in order that we might proceed with the examination of the title." * * *

Surely with this admitted fact in the case, how can there be the slightest doubt that a duty existed between the defendant and plaintiff for a breach of which the defendant was legally responsible?

Clearly the damage suffered by the plaintiff as the result of the defendant's failure to properly search the records and to distribute the money on the construction mortgage so as to legally place its mortgage on the property as a first mortgage, was the actual amount of money paid by or incurred by the plaintiff to correct and cure the mistake and to place defendant's mortgage as a first lien on the plaintiff's property.

If the defendant in this case were an attorney who had made the same negligent mistake, it would be ridiculous, it seems to the respondent, to argue that if the attorney had placed a similar mortgage in his own name, he would then owe no duty to the plaintiff mortgagor, notwithstanding the fact that he charged and was paid by the plaintiff the same fees and charges that he would have charged and been paid if the mortgage in question had been to a third party, instead of to himself.

Such a line of reasoning, if correct and sound, would provide an easy method for attorneys and title companies to escape liability for negligence, by simply having the original mortgage placed in their own names, instead of in the name of a third party.

In the great majority of cases, the Court, it seems to respondent, can take judicial notice that mortgages placed by mortgage companies and title companies similar to the defendant in this case, are taken originally in the name of the company and then immediately sold to purchasers coupled with a guarantee by the title or mortgage company of principal and interest.

It is well recognized as a matter of practical everyday business, that title companies similar to the defendant in this case engage in many transactions besides those of placing mortgages for third parties and guaranteeing them either as to principal and interest or as to their order of priority.

The responsibilities thus assumed by such companies are recognized by leading legal authorities.

Joyce on Insurance (2nd Edition 1917), Vol. I, par. 309-A.

"A corporation organized for the purpose among others, of examining and guaranteeing titles to real estate and which in all matters relating to conveyancing and searching titles, holds itself out to the public and assumes to discharge the same duties as an individual conveyancer or attorney has the same responsibilities and its duty to its employer is governed by the principles applicable to attorney and client."

38 Cyc., page 354.

"Par. B. Title insurance companies sometimes combine with the business of title insurance the examination of titles and conveyancing and as to the two businesses the duty and liability of the company is radically different. In all matters relating to searching titles and conveyancing the company holds itself out to the public and assumes to discharge the same duties as an individual conveyancer or attorney, and in such transactions its duties and responsibilities are the same."

38 Cyc., page 355—

"The obligation devolves upon the company in such cases to exercise ordinary reasonable skill and knowledge of the profession; and liability can only be predicated on negligence and misconduct in the examination."

Respondent respectfully contends that in the case now before the Court, the defendant title company assumed to perform exactly the same duties that an attorney or conveyancer would ordinarily perform, namely drawing of the bond and mortgage; examination of title; disbursement of the mortgage moneys in connection with the construction and erection of the building on plaintiff's land; obtaining of necessary postponements or releases from the general contractor and that therefore the principles laid down in the case of *Jacobsen v. Peterson*, 91 N. J. L. 404 (affirmed 92 N. J. L. page 631) as set forth by the Supreme Court on page 405 of its opinion, are exactly the same principles which govern the responsibilities, liabilities and duties of the defendant in this case to the plaintiff.

"It is the duty of an attorney, who is employed to investigate the title to real estate, to make a painstaking examination of the records and to report all facts relating to the

title. He is, therefore, liable for any injury that may result to his client from negligence in the performance of his duties—that is, from a failure to exercise ordinary care and skill in discovering in the records and reporting all the deeds, mortgages, judgments, etc. that affect the title in respect to which he is employed.”

This distinction between at least two capacities in which title companies undertake to act, namely that of a conveyancer and that of an insurer, are clearly pointed out in the case of *Glyn v. Title Guarantee and Trust Company*, 117, N. Y. Supreme 424 (Appellate Division 1909).

In the case just quoted the complaint contained two counts, one count on negligence as a title examiner and one on the policy of insurance and it was held that both counts were good. The Court said at page 426:

“It will be observed that defendant undertook to act for plaintiff in two capacities—as a conveyancer who examined the title and undertook to advise her whether it was good and marketable, and as an insurer who undertook to insure that she had a good and marketable title. In the former capacity the defendant assumed the same responsibilities and owed to the plaintiff the same duty as if it had been an individual attorney or conveyancer.”

Respondent fails to see any difference in principle in the case now under review and the case quoted by appellant in its brief to wit, *Economy Building and Loan Association v. West Jersey Title, etc. Company*, 64 N. J. L. page 27.

It will be observed from a reading of this case, that one Moore desired to secure a loan of Three thousand (\$3,000.) dollars and applied to the plaintiff for that purpose. The plaintiff agreed

to make the loan on condition that Moore would secure the loan by a mortgage on certain lands, which mortgage should be certified by the defendant title company to be a first lien. Moore applied to the defendant for that purpose and made known to it his agreement with the plaintiff, who requested the defendant to make the required search and certificate. It made the certificate and delivered it to Moore and paid the defendant for it and Moore then delivered the certificate to the plaintiff, who made a loan on the strength of the certificate.

The contention of the defendant was, that there was no privity of contract between the defendant and the plaintiff, but only a contract between the defendant and Moore, but the court said at page 29:

“But this is too narrow a view of the transaction set out in this count. Upon its averments there is disclosed either a contract between plaintiff and defendant, made through the agency of Moore, by which defendant was employed to examine and certify the title, or a contract of like employment between Moore and defendant, made for the benefit of plaintiff upon which a right of action by plaintiff would arise.”

In the case now under review the defendant granted a loan to the plaintiff and stipulated and insisted that the plaintiff should pay all fees and expenses incurred in the examination of and for the insurance of the title (See Exhibit P. 1, page 51, lines 12 and 14 inclusive) and without the plaintiff having anything to say about who was to search the title or take care of the disbursement of the mortgage money, so as to make certain that the mortgage became a first lien, undertook to search the property itself, for which it charged the plaintiff Five thousand nine hun-

dred and forty (\$5,940.) dollars—Assuredly the same principles apply and defendant's liability should be affirmed in the instant case.

The defendant knew from the application made to it by the plaintiff (See State of the Case, pages 50 and 51) that this was to be a "construction loan" and it is so stated in the application and also in the mortgage drawn by the defendant, which contains the following clause (State of the Case, page 57):

"AND IT IS ALSO AGREED by and between the parties to these presents that whereas substantially all the moneys secured herein are to be expended in the construction of a building upon the mortgaged premises"

* * *

Therefore, if the defendant had carefully searched the records in the County Clerk's office and discovered that there were no specifications attached to the building contract, then on file, it would have known or should have known that all materialmen and sub-contractors who had furnished or who would furnish any labor or material used or to be used in the construction of the building on plaintiff's land, could, within four months from the time they furnished the last material or performed the last labor, file mechanics lien claims. The defendant title company would have then insisted upon each and every one of the materialmen and sub-contractors or laborers executing a release of mechanics lien covering the property of the plaintiff, instead of doing as they did, namely, taking only a postponement of lien from the general contractor (State of the Case, page 47, lines 22 to 30).

It must be borne in mind that the plaintiff, as owner, paid the general contractor the entire contract price for the erection of the building

on his land (State of the Case, page 40, lines 8 to 40; page 41, lines 1 to 20). The general contractor did not pay his creditors and as a result, the lien suits referred to earlier in this brief were instituted against the general contractor as builder and the plaintiff as owner, and the defendant in this case as mortgagee. After the judgments were entered and executions issued, there was nothing for the plaintiff to do, but to pay the judgments or lose his property. He could not force the defendant to pay, except by satisfying the judgments and then starting the suit, which is now being reviewed.

Appellant, under the second point in its brief, argues that its mortgage *might* have been a first lien and then the plaintiff's property *might* have been subject to the mechanics lien claims which the plaintiff would have been obliged to pay. Well, defendant's mortgage was *not* a first lien and the plaintiff *had* to pay.

Of course the fact that the contract did not have specifications attached to it did not, of itself, prevent defendant's mortgage from being a first lien on plaintiff's property. But it was the most important factor after the disbursement of the mortgage money, in determining that defendant's mortgage was not a first lien. The same general answer disposes of practically all of the balance of appellant's argument under the second heading in its brief, except the statement that the defendant was the only one interested in the question of priority. Plaintiff's application to defendant was for a first mortgage loan and defendant granted that application. Plaintiff paid Five thousand nine hundred and forty (\$5,940.) dollars for Title & Mortgage Guaranty charges. For this amount of money he was en-

titled to have, at the close of the transaction, his property encumbered only by a first mortgage. This he did not get. It was encumbered by four mechanics lien claims, aggregating Seventeen thousand seven hundred nineteen dollars and sixty-five (\$17,719.65) cents and the plaintiff was under an obligation to pay legal fees incurred in defending these four mechanics lien suits of Twenty-five hundred (\$2,500.) dollars.

The Court's special attention is directed to the fact that these four mechanics lien claim judgments were first liens on plaintiff's property, thus making the defendant's mortgage, not a first mortgage, but a mortgage subject to prior liens of Seventeen thousand seven hundred nineteen dollars and sixty-five (\$17,719.65) cents.

From every conceivable standpoint of law, equity or justice, the plaintiff was entitled to be reimbursed to the extent of the money paid and incurred by him under these circumstances. Every detail of the transaction from the legal standpoint was left to and was handled by the defendant. It negligently performed its duty to the damage of the plaintiff.

Appellant's argument in its brief apparently concedes that there was negligence on its part, but that it owed no duty to the plaintiff.

The respondent respectfully urges that he paid the defendant Five thousand nine hundred and forty (\$5,940.) dollars for its own charges, as set forth on its own statement, showing the disbursement of the One hundred and thirty-two thousand (\$132,000.) dollars of mortgage money, for

"TITLE & MORTGAGE GUARANTY
CHARGES"

and that this payment created a relationship between the plaintiff and the defendant, which made it the defendant's duty to examine plaintiff's title with the same degree of care and skill possessed by an individual conveyancer or attorney and to handle and consummate the mortgage transaction in connection with the construction of the building on the plaintiff's land, so that when the transaction was completely finished, the plaintiff's land would be encumbered with only a first mortgage lien of One hundred and thirty-two thousand (\$132,000.) dollars. That defendant negligently performed its duty and that damage resulted to the plaintiff and that the damage amounted to, on the date of the entry of the judgment below, Twenty thousand two hundred nineteen dollars and sixty-five (\$20,219.65) cents and that it should be affirmed with costs.

Respectfully submitted,

EDWARD R. McGLYNN,
Attorney for and of Counsel
with Plaintiff-Respondent.

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