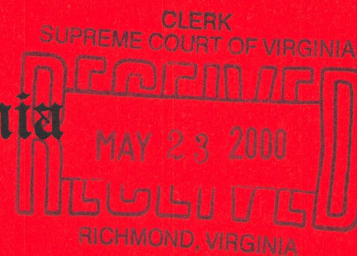


261 Va. 73

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IN THE  
**Supreme Court of Virginia**  
AT RICHMOND

---



RECORD NO. 000115

BRENDA P. CUMMINGS,  
t/a KALEIDOSCOPE,

*Appellant,*

— v. —

JEAN S. FULGHUM,

*Appellee.*

---

**JOINT APPENDIX**

---

CHARLES W. BEDDOW  
BEDDOW, MARLEY, TREXLER,  
& FITZHUGH  
*Attorneys for Appellee*  
Post Office Box 145  
Chesterfield, Virginia 23832  
(804) 748-2277

OLIVER D. RUDY  
(ROBERT B. CONDON, ESQUIRE, ON THE BRIEF)  
RUDY & MIKULA  
*Attorneys for Appellant*  
Post Office Box 58  
Chesterfield, Virginia 23832  
(804) 748-3600

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VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF CHESTERFIELD

JEAN S. FULGHUM,

Plaintiff,

v.

Case No.: \_\_\_\_\_

BRENDA P. CUMMINGS

KALEIDOSCOPE

7501 Iron Bridge Road

Richmond, Virginia (Chesterfield County,

Defendant.

**MOTION FOR JUDGMENT**

Comes now the plaintiff, Jean S. Fulghum by counsel, and moves for judgment against the defendant, Brenda P. Cummings, by virtue of the following:

1. On or about December 21, 1987, Kenneth V. Cummings, Jr. and Brenda P. Cummings executed a Deed of Trust Note payable to "Larry W. Primm or order" in the sum of \$45,000.00 plus interest thereon at the rate of ten percent (10%) per annum. Kenneth V. Cummings, Jr. has since departed this life. (A copy of said Note is attached hereto and incorporated herein).

2. On September 20, 1996, the above mentioned Note was assigned to your plaintiff, Jean S. Fulghum, and her husband, Arthur T. Fulghum, III, as tenants by the entireties with survivorship as at common law. Arthur T. Fulghum, III, departed this life on May 14, 1997, survived by his widow, Jean S. Fulghum.

3. By the terms of the above mentioned Note, defendant and her husband were to pay:

Monthly increments of interest only payable for a term of six years, with the principal and any unpaid interest due and payable at the end of that six year term; said payments of interest to begin upon completion of the improvements on the property utilized to secure this indebtedness, to which document reference is made for a more

particular description. Said six year term and its termination time shall run from the date of the above mentioned completed improvements.

4. The property described in the Deed of Trust securing the indebtedness owed by virtue of the above mentioned Note is the property located on the east side of State Route 10 near its intersection with Kingsland Road on which the business known as the "KALEIDOSCOPE" is located.

5. A Certificate of Occupancy for use of the property described above was issued by the County of Chesterfield on October 11, 1990, indicating completion of construction.

6. By virtue of the terms of the above mentioned Note, monthly interest payments of ten percent (10%) per annum were to begin upon completion of the improvements to the described property; therefore, monthly interest payments were to start in November, 1990.


7. Demand for payment was made by letter dated February 11, 1997, a copy of which is attached hereto.

8. Based on the foregoing, defendant is in default and owes the following amounts:

Annual interest from	
Nov, 1990 through Nov, 1997	\$27,000.
Principal payment	<u>\$45,000.</u>
Through 12/21/97	\$72,000.

WHEREFORE, plaintiff demands judgment against the defendant, Brenda P. Cummings, in the sum of \$72,000 with interest at the rate of ten percent (10%) per annum thereafter, until paid, plus costs.

JEAN S. FULGHUM

By   
Of Counsel

Charles W. Beddow, p.q.  
BEDDOW, MARLEY AND ASSOCIATES  
P. O. Box 145  
Chesterfield, Virginia 23832-0145  
(804) 748-2277

RECEIVED & FILED  
CHESTERFIELD COUNTY  
CLERK'S OFFICE

Dec 3 11 42 AM '97

JUDY L. HEDGECOCK  
CLERK OF COURT  
TESTED: [Signature]  
CLERK DEPUTY CLERK

101317

VALUE DATE PAPERS  
COPY : 9/000038502  
DATE : 12/03/97 TIME: 12:55  
CASE : 041019/001094-00  
PLU : FLSHUM, JEAN S  
FMI : \$136.00

DEED OF TRUST NOTE

BOOK 3000 PAGE 58

\$45,000.00

December 21, 1987

Chesterfield, Virginia

FOR VALUE RECEIVED, the undersigned, promise to pay to LARRY W. PRIMM, or order at his residence or at such other place as the holders hereof may designate in writing, the principal sum of FORTY-FIVE THOUSAND AND NO/100 DOLLARS (\$45,000.00) plus interest thereon at the rate of TEN AND PERCENT (10.00%) per annum, on the unpaid balance, payable as follows:

Monthly increments of interest only payable for a term of six years, with the principal and any unpaid interest due and payable at the end of that six year term; said payments of interest to begin upon completion of the improvements on the property utilized to secure this indebtedness, to which document reference is made for a more particular description. Said six year term and its termination time shall run from the date of the above mentioned completed improvements.

Borrowers shall pay to the Noteholders a late charge of five percent of any monthly installment not received by the Noteholders within fifteen days after the installment is due.

If default be made in the payment of any installment under this note, the entire principal sum shall be at once due and payable without notice at the option of the holder of this note. Failure to exercise this option shall not constitute a waiver of the right to exercise the same in the event of any subsequent default.

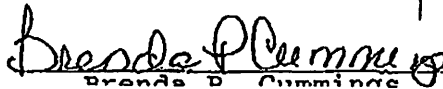
Presentment, protest and notice are hereby waived. The makers and endorsers of this note also waive the benefit of the Homestead Exemption as to this debt, and agree to pay all expenses incident to collecting the same, including a reasonable attorney's fee. Right of anticipation is reserved.

This note is secured by a Deed of Trust of even date herewith on property in Chesterfield County, Virginia, and this note is to be construed according to the laws of the Commonwealth of Virginia.

WITNESS the following signatures and seals:

  
Kenneth V. Cummings, Jr.

(SEAL)

  
Brenda D. Cummings

(SEAL)

# BEDDOW, MARLEY & ASSOCIATES

Attorneys & Counselors at Law

9830 Lori Road

Post Office Box 145

Chesterfield, Virginia 23832-0145

Charles W. Beddow  
Howard S. Marley  
John J. Treder  
William T. Fitzhugh  
William R. Keown

Telephone 804-748-2277  
Telecopier 804-796-6775

February 11, 1997

Mr. Kenneth V. Cummings, Jr., and  
Mrs. Brenda P. Cummings  
KALEIDOSCOPE  
7501 Iron Bridge Road  
Chesterfield, Virginia 23832

Re: Deed of Trust Note to Larry W. Primm

Dear Mr. and Mrs. Cummings:

You will note from the enclosed copy of an Assignment of Deed of Trust Note that Larry W. Primm has assigned your \$45,000 Deed of Trust note to Jean S. and Arthur T. Fulghum. Therefore, all future correspondence and payments are to be made to Mr. and Mrs. Fulghum at 11647 Jefferson Davis Highway, Chester, Virginia 23831.

Since payment of the entire principal sum of \$45,000 plus interest at the rate of 10% per annum was due and payable six years after completion of the improvements at the Kaleidoscope, that time has passed and the entire balance plus interest is now due and payable. Therefore, please take this letter as both a Notice of Assignment and a demand for payment in full.

Please understand that this letter is an attempt to collect a debt and, unless you notify us within thirty (30) days after you receive this Notice, telling us you dispute this debt, or any portion of it, we will assume the debt is valid.

If you notify us in writing within thirty (30) days that the debt, or any portion of it is disputed, we will obtain verification of the debt and mail a copy to you.

We may proceed with suit and/or foreclosure against you without waiting the thirty (30)

12/3/97  
TESTED  
CLEAN  
JULY L. WORTHINGTON  
C. J. HENDERSON  
RECEIVED

### PROOF OF SERVICE

CHESTERFIELD COUNTY

CASE NO. 041CL97001094-00  
SERVICE NO. 001  
SERVICE FILED: 12/03/97

VS BRENDA F. JIMMINGS;

ATTY NAME:

CHARLES W. BEDDOW

748-2277

WESTERN UNION  
TELEPHONE  
COMMUNICATIONS  
CORPORATION  
NEW YORK, N. Y.

RICHMOND VA

RETURNS SHALL BE MADE HEREON, SHOWING SERVICE OF NOTICE ISSUED DECEMBER 03, 1997 WITH A COPY OF MOTION FOR JUDGMENT FILED DECEMBER 03, 1997 ATTACHED:

FOR SHERIFF USE ONLY

☐ NO RECORD OF THE FOLLOWING:  
 12-5-97  
 DATE  
 IN  
 C. C. WILLIAMS, JR., SHERIFF  
 CLINT COUNTY, TEXAS  
 DW. Davis  
 7501 Knowledge Rd.  
 Raleigh, NC  
 7501 Knowledge Rd.  
 Raleigh, NC



**VIRGINIA :**

**IN THE CIRCUIT COURT OF COUNTY OF CHESTERFIELD**

**JEAN S. FULGHUM,**

**Plaintiff,**

**v.**

**BRENDA P. CUMMINGS,  
KALEIDOSCOPE**

**Defendant.**

**Case No. CL97-1049**

**GROUND OF DEFENSE**

COMES NOW, the Defendant, Brenda P. Cummings, by counsel, and for her Grounds of Defense, states as follows:

1. The Defendant admits to the allegations in Paragraphs 1 and 4 in the motion for judgment.
2. Paragraph 3 requires no response since the terms of the note speak for themselves.
3. Paragraph 7 requires no response since the terms of the letter speak for themselves.
4. The Defendant avers that she has no knowledge of the allegations contained in Paragraph 2 of the motion for judgment, and calls for strict proof thereof.
5. The Defendant denies the allegations in Paragraphs 6 and 8 in the motion for judgment.
6. With regard to Paragraph 5, the Defendant admits that the certificate of occupancy was issued on October 11, 1990, but denies that the issuance of the certificate

constituted completion of construction as contemplated by the parties to the note and the contract. The contract explicitly required that the premises be completed in a turnkey fashion.

7. The note in question is a deed of trust note, is payable to Larry Primm in the face amount of \$45,000.00, and is a second deed of trust against the property described therein.

8. There is a first deed of trust against this property, said deed of trust being held by Peoples Bank of Virginia, dated June 24, 1987, recorded June 24, 1987, in the Clerk's Office of the Circuit Court of Chesterfield County, Virginia, in Deed Book 1876, page 1362, which deed of trust was re-recorded in Deed Book 1905, page 1726. A copy of said deed of trust is attached hereto as Exhibit "A." It has a face amount of \$440,000.00.

9. The deed of trust note being litigated grew out of a certain contract dated March 25, 1987, between Larry W. Primm Construction, Inc., Larry W. Primm, individually, and Kenneth V. Cummings, Jr., and Brenda P. Cummings. A copy of this contract is attached hereto as Exhibit "B."

10. The relationship of the second deed of trust and the aforesaid contract is indicated by the terms of the Promissory Note secured by the deed of trust. A copy of which note is attached hereto and marked Exhibit "C", which note reads in pertinent part as follows:

Monthly increments of interest only payable for a term of six years, with the principal and any unpaid interest due and payable at the end of that six year term; said payments of interest to begin upon completion of the improvements on the property utilized to secured this indebtedness, to which document reference is made for a more particular description. Said six year term and its termination time shall run from the date of the above mentioned completed improvements.

11. Your Defendant alleges that the improvements referred to in the aforesaid deed of trust note are the improvements which were contracted for in the contract attached as

Exhibit "B," and that consequently, the deed of trust, promissory note, and the contract must be read together to ascertain the intentions of the parties herein.

12. Your Defendant alleges that Larry W. Primm and Larry W. Primm Construction, Inc., never completed the work called for under the contract, and consequently, it cannot be ascertained, for purposes of instituting collection proceedings, when the six year period referred in the quoted language from the Promissory Note contained in Paragraph 10 hereof in fact began, if at all.

13. Your Defendant alleges that the amount secured by this deed of trust is uncertain and disputed and is not due as alleged by the Plaintiff, Jean S. Fulghum, in her Motion for Judgment and in her attorney's letter to the Defendant dated February 11, 1997, and attached as Exhibit "D."

14. Your Defendant further alleges that as a result of Larry W. Primm's failure to complete the improvements called for in the contract previously referred to herein, your Defendant suffered various damages including, but not limited to:

- (a) the costs to her of completing said improvements;
- (b) her loss of business by not being able to open her business in occupation of said improvements as contracted for;
- (c) expenses incurred by her in the employment of personnel to staff her business in anticipation of being able to occupy said property on a date certain when in fact she was prevented from doing so by failure of the Larry W. Primm to complete the work in a turnkey fashion; and
- (d) interest expense (approximately \$98,312.53) paid by your Defendant to Peoples Bank of Virginia from January of 1988 until the final occupancy permit was issued on

October 11, 1990; this was interest to be paid under the terms of the contract by Larry W.

Primm:

Contractor will pay all loan origination fees, points and interest on Buyer's construction loan that would be generated by a \$325,000.00 loan; said costs to run until completion of the improvements in a turnkey fashion and final occupancy is had.

Larry Primm refused to pay the aforesaid interest during the aforesaid period of time.

15. Defendant denies that she owes the Plaintiff the amount claimed or any amount.

WHEREFORE, Defendant demands that this action be dismissed and that the Defendant recover from Plaintiff its costs expended in this action.

BRENDA P. CUMMINGS

By: Oliver D. Rudy  
Of Counsel

Oliver D. Rudy  
RUDY, EVANS & MIKULA  
P.O. Box 58  
Chesterfield, VA 23832  
Tel: (804) 748-3600  
Fax: (804) 748-4671

12-30-97  
By: Oliver D. Rudy  
RECEIVED  
JUN 1 1998

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was mailed, postage prepaid, this 30th day of December, 1997, to Charles W. Beddow, Esquire, at Beddow, Marley & Associates, P.O. Box 145, Chesterfield, VA 23832.

Oliver D. Rudy  
Oliver D. Rudy

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF CHESTERFIELD

JEAN S. FULGHUM,

Plaintiff,

v.

Case No.: CL97-1049

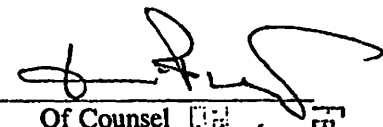
BRENDA P. CUMMINGS  
KALEIDOSCOPE,

Defendant.

**PLEA OF STATUTE OF LIMITATIONS**

Comes now the plaintiff, by counsel, and in response to the defendant's Grounds of Defense claim of damages as a result of Larry W. Primm's or Larry W. Primm Construction, Inc.'s failure to complete certain work alleged to be required, states that plaintiff's claims are barred by the Statute of Limitations.

JEAN S. FULGHUM

By   
Of Counsel

Charles W. Beddow, p.q.  
BEDDOW, MARLEY, TREXLER & FITZHUGH  
P. O. Box 145  
Chesterfield, Virginia 23832-0145  
(804) 748-2277

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CHESTERFIELD COUNTY  
FEB 2 10 43 AM '98

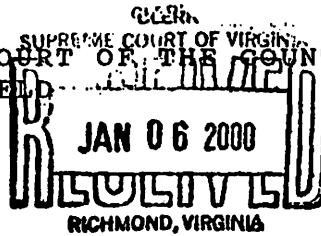
**CERTIFICATE**

I hereby certify that a true copy of the foregoing Demurrer was mailed, postage prepaid, to Oliver D. Rudy, Esquire, RUDY, EVANS AND MIKULA, P. O. Box 58, Chesterfield, Virginia 23832, this 30<sup>th</sup> day of January, 1998.

  
Charles W. Beddow



VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF  
CHESTERFIELD



JEAN S. FULGHUM,

Plaintiff,

v.

BRENDA P. CUMMINGS  
KALEIDOSCOPE,

Defendant.

Case No.  
CL97-1049

Before: HONORABLE T. J. HAULER, JUDGE  
TRIAL PROCEEDINGS

August 25, 1999  
Chesterfield, Virginia

ORIGINAL

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CHESTERFIELD COUNTY  
CIRCUIT COURT  
JAN 13 7 11 PM  
JULY 13 1999  
CLERK OF COURT  
JULY 13 1999

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(804) 730-1222

1     **Appearances:**

2  
3             BEDDOW, MARLEY, TREXLER & FITZHUGH  
4             By: CHARLES W. BEDDOW, ESQ.  
5             attorney, of counsel for Plaintiff

6             RUDY, EVANS & MIKULA  
7             By: OLIVER D. RUDY, ESQ.  
8             attorney, of counsel for Defendant

9  
10            (The trial in this matter began at 10:15  
11            a.m.)

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17                         ooo  
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I N D E X

WITNESSES

Examination By: Page

LARRY W. PRIMM

Direct - Mr. Beddow 27

Cross - Mr. Rudy 29

BRENDA P. CUMMINGS

Direct - Mr. Beddow 31

Cross - Mr. Rudy 40

Redirect - Mr. Beddow 53

Recross - Mr. Rudy 57

JAY H. LOWDEN, JR.

Direct - Mr. Beddow 59

Cross - Mr. Rudy 64

ooo

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(Court reporter sworn)

MR. RUDY: Good morning, Your Honor.

MR. BEDDOW: Good morning, sir.

THE COURT: This is Civil Action 97-1049,  
Jean S. Fulghum versus Brenda P. Cummings  
Kaleidoscope. This matter was originally scheduled  
to be heard before Judge Daffron. I understand that  
there are some outstanding matters that need to be  
addressed before we can get into the merits on this.

I have reviewed the file. I just got it  
this morning, but I have reviewed the file. I see  
that there is an outstanding demurrer to the grounds  
of defense that was filed.

MR. BEDDOW: Yes, sir, the demurrer goes  
to the basis of the claims by the defendant, really  
claims against --

THE COURT: Offset.

MR. BEDDOW: Not offset, sir. That might  
be one of the issues as we go through the case. By  
way of -- we would like to call them offsets if we  
are not, I guess, precise in what we are doing.

THE COURT: It's not pled as a  
counterclaim so is there any way I can consider it  
other than offset if there is merit to it?

MR. BEDDOW: I think it's probably

1 statutory recoupment --

2 THE COURT: Recoupment.

3 MR. BEDDOW: Under 8.01-422.

4 THE COURT: 422.

5 MR. BEDDOW: By way of setoff, the claim,  
6 any setoff claim must be liquidated and everything  
7 that the defendant has alleged are in liquidated  
8 claims. And under statutory recoupment it does not  
9 have to be liquidated. But the statute of  
10 limitations applies in the case of statutory  
11 recoupment. That's 8.01-422. And by way of, by way  
12 of -- I have copies of that code section.

13 THE COURT: I'm getting it up here on the  
14 screen.

15 MR. BEDDOW: The case of Neeley versus  
16 White deals with statutory recoupment.

17 First, let me let counsel have -- ask  
18 Your Honor to consider a break out by Professor Burke  
19 of the characteristics of setoff common law  
20 recoupment, statutory recoupment in a counterclaim.  
21 As Your Honor has indicated clearly it's not in the  
22 form of a counterclaim. And I have some case law to  
23 support that position.

24 Setoff, as I stated before, must be  
25 liquidated. Common law recoupment cannot be used



1 against a sealed instrument. In this case the note  
2 sued on is a sealed document. So the only way that  
3 the defendant could proceed would be under 8.01-422.

4 Now in that case, in that statutory  
5 recoupment, in that case the law says that the  
6 statute of limitations apply. And that's found in  
7 Neeley versus White, 177 Virginia 358. And I think  
8 specifically on page 363 is the principle, started  
9 the principle that I'm talking about. It talks about  
10 those two instructions. And the instructions had to  
11 do with or to the effect that if the three notes  
12 aggregating a thousand dollars were due more than  
13 five years before the special plea was filed then  
14 they were barred by the statute of limitations and  
15 could not be the basis of recovery in favor of White.  
16 This constitutes a legal matter of defense in his  
17 behalf. The plea was filed December 25th, 1939 and  
18 discloses that the last note was due February 2nd,  
19 1940 which of course showed the notes were barred by  
20 the statute. We think the Court should have granted  
21 these instructions. The record discloses clearly  
22 that the notes were barred.

23 So -- and if you read earlier, this case  
24 involves statutory recoupment which -- of which  
25 8.01-422 is the modern version.

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1                   So with that said the statute of  
2 limitations applying to the defendant's grounds of  
3 defense, I believe that as the evidence develops  
4 there will be several critical dates that Your Honor  
5 may be interested in.

6                   Now I understand that from one of the  
7 witnesses that one of these dates may be in error,  
8 but by way of my list I have -- the contract under  
9 which the Kaleidoscope up on Route 10 was constructed  
10 provided both for the construction of the building  
11 and for the purchase of the real estate on which the  
12 building was to be constructed. The note that is the  
13 subject of this litigation is part of the payment for  
14 the real estate purchase. The construction contract  
15 was dated March 25, 1997. The note that we are suing  
16 on was dated December 21, 1987.

17                   I have noted here that the contract to --  
18 Mr. Primm left the job July of 1988. That may be in  
19 error. The temporary occupancy permit, first one I  
20 have is January 26, 1990. But I am told that she  
21 took possession of the building in December of 1987  
22 back when the note was signed.

23                   Then the construction loan final draw was  
24 in October of 1990. The final Certificate of  
25 Occupancy was issued October 10, 1990 and we filed

1 our present action on the note December of 1997.

2 So complaints by the defendant as to  
3 faulty construction or cost or anything associated  
4 with the construction surely is barred by a five-year  
5 statute of limitations. And that 8.01-230 of the  
6 Code talks about when the cause of action would  
7 accrue. And that's when the breach of the contract  
8 occurs.

9 And even if the Court were to look at Ms.  
10 Cummings with a view toward doing equity, the case  
11 law says that the law of equity observes the law.  
12 And as far as statute is concerned, the statute would  
13 apply.

14 Thank you, sir.

15 THE COURT: Thank you, Mr. Beddow.

16 Mr. Rudy, when are you claiming this  
17 contract would breach?

18 MR. RUDY: When am I claiming that it was  
19 breached? When he failed to complete the job.

20 THE COURT: All right. Well, if that's  
21 the case, that has to go back to some time in '88  
22 then.

23 MR. RUDY: Well, we don't know, because  
24 the temporary occupant -- the final occupancy permit  
25 was issued in October of 1990.

1 THE COURT: Correct.

2 MR. RUDY: Between '88 and '90. I mean  
3 there was still an effort to try to get him to  
4 complete the work, which he did not do, so...

5 THE COURT: Well, even if you assume that  
6 it occurred no later or as late as October of 1990  
7 that that's when the breach actually occurred, how do  
8 you reconcile that with the five-year statute?

9 MR. RUDY: Well, you have, Your Honor,  
10 number one, first of all, I think this is just plain  
11 setoff. And I would show the case that -- the Court  
12 the case of City of Richmond versus the telephone  
13 company. In that case the City sued the telephone  
14 company and said they owed a franchise tax which the  
15 city claimed was due and owing. The telephone  
16 company said, We don't owe it, but even if we do, you  
17 have been illegally collecting a tax from us for the  
18 use of your streets in order to hang, to hang our  
19 lines on since 1931 or '32, somewhere in there, and,  
20 and we, we have overpaid that and we, we are setting  
21 that off against what you are claiming.

22 And the Court at page, on page, Your  
23 Honor, that would be the last page, down at the  
24 bottom, says that the defense of recoupment is not  
25 barred by the statute of limitations so long as the

1 main action out of which the claim arose is timely.  
2 There isn't any question --

3 MR. BEDDOW: I'm sorry, what page?

4 THE COURT: Second to the last paragraph.

5 MR. RUDY: Second to the last paragraph.

6 Now if you read about -- and further up  
7 on that page, Your Honor, the fourth paragraph down,  
8 the elements of common law recoupment are set out in  
9 Burke's Pleading and Practice. Recoupment must arise  
10 out of the same transaction. The amount need not be  
11 liquidated. There can be no recovery over -- that  
12 means you can't award us any more than -- you can't  
13 give us a judgment.

14 The right to recoupment must be shown by  
15 a plea in the general issue.

16 Now, I don't know what else we could have  
17 done as far as pleading any more to set up the  
18 setoff. It was to the general issue. We did not  
19 file it as a counterclaim, we did not seek to, to  
20 ask, we didn't ask for any money. We just said, We  
21 don't owe this lady because Larry Primm owes us.

22 We set up -- and, as a matter of fact,  
23 Your Honor, we did set up in there one bit of  
24 liquidated damages and that is in our bill. We claim  
25 that he, that she had had to pay about \$98,000 in



1 interest charges because he had agreed to pay them  
2 until final occupancy, I mean until the final  
3 occupancy permit or the Certificate of Occupancy was  
4 granted.

5 So -- and, and the statute that Mr.  
6 Beddow refers to, this pleading, equitable defenses  
7 in 422, if you read the history of that statute, that  
8 thing was meant to enlarge the rights of people to  
9 claim setoff. It wasn't meant to diminish it.

10 And when you look at that section in  
11 connection with 233, 8.01-233, which I have a copy of  
12 if you don't -- here.

13 See, what happened was, 3.8 or 3:8  
14 recognized the counterclaim as a pleading. And 233  
15 says when a counterclaim is filed. Well, we didn't  
16 file a counterclaim in this case. Consequently, the  
17 statute of limitations as far as that part of it is  
18 not applicable in this case and what we have is just  
19 a simple setoff.

20 Now there are other issues, I grant you,  
21 in the case to get to before we get to the setoff  
22 because you have got hold and due course issues and,  
23 and the like. But as far as the statute of  
24 limitations is concerned it, it doesn't appear to me  
25 under that, in other words, that C&P case and City of

1 Richmond case looks like to me it's right on point.  
2 And particularly that language in that paragraph that  
3 talks about the elements of common law recoupment. I  
4 mean it looks like to me my pleading is on all fours  
5 with that paragraph. And consequently not being a  
6 counterclaim we wouldn't be -- our setoff is not  
7 barred.

8 Now we can't get any money. And we knew  
9 we weren't going to ever get any money from Mr. Primm  
10 in this case anyway. But as far as being able to  
11 setoff, assuming Ms. Fulghum is not a holder in due  
12 course, I think it's clearly allowed by these cases  
13 and, and is envisioned by the statute.

14 THE COURT: How about the provision under  
15 the common law recoupment that it cannot be used  
16 against a sealed instrument?

17 MR. RUDY: That's been changed by the  
18 ordinance, by the statute.

19 MR. BEDDOW: 1965 case, Richmond case,  
20 Richmond telephone.

21 MR. RUDY: Your Honor, the statute has  
22 been changed so that that does not, it doesn't --  
23 that the fact that it's a sealed document doesn't  
24 matter anymore is what I'm saying. And I thought I  
25 had that here somewhere. But I represent to the

1 Court that, I mean, given a few minutes I believe I  
2 could, could point that out. I mean I understand  
3 that's in there, but the law has been changed since  
4 then.

5 MR. BEDDOW: Your Honor, may I ask  
6 counsel, he has mentioned setoff, common law  
7 recoupment, that's the telephone company case. And  
8 then he also refers to 422 which is statute  
9 recoupment. What is he trying to present by way of  
10 his theory, sir, which one?

11 MR. RUDY: My theory is the same theory  
12 that was recognized by the Court in the C&P case.  
13 I'm not, I mean I just, I just plead a common law  
14 recoupment or setoff. I mean I think they are the  
15 same. I don't know that there is, that there is that  
16 much, much difference. And I think that 422 kindly  
17 embodied all of that.

18 And there is a, there is a case, Your  
19 Honor, Doctors Bremner versus -- oh, Bremo versus  
20 Doctors Building Partnership -- you got that one?

21 MR. BEDDOW: I got it.

22 MR. RUDY: Okay. Which is in 251  
23 Virginia 74. Which goes into a discussion of that.

24 MR. BEDDOW: That case only says that --  
25 well --

1 THE COURT: First of all, this telephone  
2 company case is decided on the basis of common law  
3 recoupment. This case, Bremner versus Doctors  
4 Partnership is statutory recoupment.

5 MR. RUDY: That, Your Honor, I got that  
6 case mainly to show about the counterclaim, I mean  
7 trying to make the distinction that we did not file a  
8 counterclaim and therefore we weren't barred by the,  
9 by the statute of statute of limitations because of  
10 the counterclaim.

11 MR. BEDDOW: May I respond, Your Honor?

12 MR. RUDY: And, Your Honor, I refer you  
13 to that page, the final page of that where there is a  
14 discussion of 8.01-422 and what it said and what --  
15 what the changes that were made in the law became. I  
16 think it might be in this case where it talks about  
17 the --

18 MR. BEDDOW: The Bremner case had to do  
19 with a nonsuit and whether the pleading that was  
20 filed under 422 was a counterclaim.

21 THE COURT: To the pleading.

22 MR. BEDDOW: Yet it was not a  
23 counterclaim so therefore the nonsuit could have  
24 taken and was properly granted.

25 THE COURT: That's the way I see it.

1 MR. RUDY: But if you read that language  
2 at the bottom of page 3, the commission recommended  
3 that the title be changed from special pleas of  
4 setoff to pleas of equitable defenses, and then they  
5 changed it even more when they recodified it in  
6 8.01-422.

7 But if the Court would advise me how I  
8 could do any more than, than, than to comply with  
9 the, with the rule 8 down in the C&P case in that  
10 fourth paragraph from the -- on page 4. I mean I  
11 think my pleading is on all fours with the language  
12 of that, of that case. And then it says that a  
13 defense of recoupment is not barred by the statute of  
14 limitations so long as the case she files has been  
15 timely filed.

16 THE COURT: I'm sure Mr. Beddow is going  
17 to tell us both.

18 MR. RUDY: Well --

19 MR. BEDDOW: Judge, I'm trying to  
20 separate the history of section 8.01-422, and it has  
21 remained virtually unchanged. There were some  
22 suggested changes by the Code Commission, but if you  
23 look at starting with the code --

24 MR. RUDY: Overwhelming me with paper,  
25 Charlie.



1           MR. BEDDOW: The top one is the current  
2 code section. And then what I have attached from  
3 starting with the code of 1918 then the code of 1924,  
4 then the 1957 replacement volume. So starting in  
5 1918 at the bottom of the second page is the  
6 predecessor of 8.01-422. And if you read that the  
7 language is almost identical to the current version.

8           Counsel represents to the Court that it  
9 was changed. The Code Commission I think considered  
10 changing it, but did not change it. It was not  
11 changed by the General Assembly.

12           So -- and Your Honor has correctly  
13 pointed out that in the City of Richmond versus  
14 telephone company case cited by counsel dealing with  
15 common law recoupment it clearly says that it cannot  
16 be used against a sealed instrument, and that's what  
17 we have here, sir.

18           MR. RUDY: Your Honor, if it comes down  
19 to that point, I'm representing to you as an officer  
20 of the court that it no longer applies; that thing  
21 about it can't be applied to a sealed instrument is  
22 no longer applicable.

23           Now, I don't, I can't seem to locate that  
24 right here, but I read that in my research on this  
25 thing and I can find that.

1 THE COURT: It seems to be a crucial  
2 issue.

3 MR. RUDY: I mean if that's where you  
4 are.

5 THE COURT: It is.

6 MR. RUDY: Huh?

7 THE COURT: It is.

8 MR. RUDY: In other words, if it doesn't  
9 apply to a sealed instrument you are going to -- and  
10 I am not trying to put words in your mouth -- you are  
11 inclined to say that the plead of the statute of  
12 limitations would be overruled.

13 THE COURT: Let's say I'm leaning that  
14 way.

15 MR. RUDY: Huh?

16 THE COURT: Do you want me to recess and  
17 give you all a few minutes?

18 MR. RUDY: Could you, please?

19 THE COURT: I would be more than happy to  
20 do that. If I am wrong about that, Mr. Rudy, I want  
21 to know that. I certainly don't want to have to  
22 retry this case again.

23 But it would appear that under statutory  
24 recoupment if you are going to rely on that '65 case,  
25 that the statute of limitations defense would apply

1 to that and that cannot be used against a sealed  
2 instrument.

3 Let me know when you all have come up  
4 with a consensus on it.

5 Why wasn't this brought on for any  
6 hearing in front of Judge Daffron? I guess it's  
7 academic at this point, but I mean those things are  
8 not usually --

9 MR. RUDY: Argued on the date of trial.

10 MR. BEDDOW: The demurrer was not charged  
11 and the demurrer did not address the statute of  
12 limitations problems. So the statute of  
13 limitations --

14 THE COURT: It's kind of academic at this  
15 juncture. I was just kind of curious why it hadn't  
16 been brought on earlier.

17 (Recess)

18 MR. RUDY: Your Honor, if I could --  
19 under the notes of 8.01-422, page 443 --

20 THE COURT: Uh-huh.

21 MR. RUDY: -- the law, the, the Code says  
22 that this section, that is the pleading of equitable  
23 defenses, changed the common law rule that no damages  
24 will be allowed to a defendant by way of recoupment  
25 against the plaintiff's demand when the demand is

1 based on an instrument under seal.

2 Now Mr. Beddow and I agree that that is  
3 what this says and, and, and that the statute does,  
4 in fact, enlarge the right so that you can set off  
5 against an instrument under seal.

6 Where we are at odds is Mr. Beddow says  
7 that in order for that to be in effect that my plea  
8 has got to be filed under this code section in order,  
9 in order for that to occur.

10 My argument is that what 422 is, is a  
11 catchall for all setoffs and recoupments and it was  
12 meant in the words of the, of the Code it was --  
13 it -- and in the -- in that case, the doctors case,  
14 it was said the purpose of it was to enlarge the  
15 thing, not to restrict it; to make it more accessible  
16 so that you could get everything that needed to be  
17 tried in one case done in one case.

18 Now that is, that is my argument. And  
19 Mr. Beddow is going to, I'm sure, cite Neeley versus  
20 White which is a 1941 case which he says, says the  
21 opposite.

22 And the other point that I will make to  
23 you is that since the Neeley case and it, the Code,  
24 the rules of court change the provision of the, of a  
25 pleading called a counterclaim. And specifically

1 said what that when a counterclaim was filed, you  
2 know, it was filed as of the day it was submitted and  
3 any, anything that involved a statute of limitations  
4 as far as that plea was concerned would, would arise  
5 as of that date but not as to these equitable claims.

6 And I submit to you that, that if there  
7 is -- and that's not the evidence, but if there is a  
8 judgment-proof debtor out there, and I mean to file a  
9 suit against him would be absolutely senseless.  
10 Nevertheless, it seems equitable to me and that's  
11 what the statute was, was set up to provide was  
12 equitable defenses that you would be able to, if he  
13 all of a sudden was to file suit against you, you  
14 would be able to set off whatever claims he was  
15 making against you regardless of when he filed the  
16 suit. And that's our argument.

17 THE COURT: Thank you, Mr. Rudy.

18 MR. BEDDOW: Your Honor, I think Mr. Rudy  
19 misstated our position. I don't think Mr. Rudy has  
20 yet told us whether he is attempting to assert  
21 defenses under common law recoupment or under  
22 statutory recoupment. He has presented the Court  
23 with the C&P telephone, City of Richmond C&P  
24 telephone company case which involves the common law  
25 recoupment and that's where it is stated that it can

1 not be used against a sealed instrument.

2 Then he wants to shift over and say,  
3 well, statutory recoupment is an enlargement and you  
4 don't have to have a sealed instrument. Or you can  
5 go against a sealed instrument. Well, he is  
6 absolutely right. But under statutory recoupment the  
7 statute of limitations applies to bar. And that's  
8 the Neeley versus White case, 177 Virginia 358. That  
9 says that the statute of limitations applies there.  
10 So if he is in common law recoupment, he can't do it  
11 on a sealed instrument. If he is under statutory  
12 recoupment, he is barred by the statute, sir.

13 THE COURT: Do you want to reply to that?

14 MR. RUDY: Your Honor, the only thing I  
15 would point out is that if you read my plea it seems  
16 to me that the equitable rights available under the  
17 code section have been fairly pled in my, in my  
18 grounds of defense. And to say that at this point in  
19 time that those defenses are barred by the statute of  
20 limitations because we didn't pursue a claim against  
21 somebody that was -- I mean, as an example, who was  
22 judgment proof, seems to me to be very inequitable.  
23 And right in the face of the Code section it says  
24 it's supposed to be made more equitable, that the  
25 idea is to allow all of these things. And it talks

1 about under that Code section, it talks about a mere  
2 enlargement of the common law right of recoupment.

3 At the page top of page 542 --

4 MR. BEDDOW: Your Honor, may I respond?

5 MR. RUDY: I think we have been around,  
6 you know --

7 MR. BEDDOW: I think there is another  
8 misrepresentation, Your Honor.

9 He says there would be no sense in going  
10 off after the contractor because he was insolvent.  
11 Well, he and Ms. Cummings, in fact, went after Larry  
12 and Nancy Primm in a suit filed in this court that  
13 was dismissed on 4-17-1996. So she has had an  
14 opportunity to assert those claims against the  
15 contractor. And I think Mr. Rudy would fess up and  
16 say he remembers that suit.

17 MR. RUDY: I remember the case. That was  
18 an action of foreclosure, to enjoin the foreclosure.

19 MR. BEDDOW: But in it he asks to advice  
20 of the exact amount due under the note and also  
21 determine the exact amount due under the note. But  
22 he also wants, wanted an accounting between the  
23 parties.

24 In my research I did find this statement  
25 in Michie's, no damages were allowed the defendant by

1 way of common law recoupment against the plaintiff's  
2 demand when that demand was based on an instrument  
3 under seal. It cites several, several cases, sir.

4 MR. RUDY: Your Honor, would it make any  
5 sense to just back off and brief this question?

6 THE COURT: Well, that should have been  
7 done a long time ago.

8 MR. RUDY: I understand that. I didn't  
9 know whether it would be helpful to you, that's all I  
10 was asking.

11 THE COURT: It would have been most  
12 helpful to me some time ago.

13 MR. BEDDOW: I don't believe we can get  
14 any more case law than we have given you.

15 THE COURT: Than you have. The Court  
16 will find that this is statutory recoupment under  
17 Virginia Code Section 8.01-422 which has been pled by  
18 the defendants; secondly, the Court will find that  
19 this being the case of statutory recoupment that it  
20 is subject to the statute of limitations defense as  
21 is reflected in Neeley versus White which is 167  
22 Virginia 358, 1941 decision. If that decision is no  
23 longer good law, then I'm wrong.

24 MR. RUDY: We take exception to the  
25 Court's ruling for purposes of the record.



**VIRGINIA:**

**IN THE CIRCUIT COURT FOR THE COUNTY OF CHESTERFIELD**

**JEAN S. FULGHUM,**

**Plaintiff,**

**v.**

**Case No.: CL97-1049- 1094**

**BRENDA P. CUMMINGS  
t/a KALEIDOSCOPE,**

**Defendant.**

**JUDGMENT ORDER**

This matter came on August 25, 1999 for trial on the Motion for Judgment, Grounds of Defense, and Plaintiff's Plea of the Statute of Limitations, with both parties' waiving trial by jury, and was heard upon the appearance of both parties and their counsel.


A copy of the Promissory Note having been made part of the evidence herein and the original Note having been presented to the court, it is ORDERED that the original Note be accepted as part of the evidence herein in place of its copy.

On consideration of evidence *ore tenus* and argument of counsel, it is ORDERED that Jean S. Fulghum have and is granted judgment against Brenda P. Cummings in the sum of Forty-Five Thousand Dollars (\$45,000.00) with interest thereon at the rate of ten percentum (10%) per annum from October 11, 1990 to the date of this judgment and thereafter at the rate of nine percentum (9%) per annum until paid plus plaintiff's costs herein.

Let execution issue hereon immediately.

Nothing remaining to be done herein, this matter is ended.

ENTER: 10 / 19 / 99

  
\_\_\_\_\_  
Judge

Prepared and Objected to only because of the reduced interest rate following entry of judgment. The Note made the subject of this action provides for ten percentum(10%) per annum interest and §6.1-330.54 of the Code of Virginia, as amended, provides for the contract rate of interest.

 , p.q.

Charles W. Beddow, Esquire  
BEDDOW, MARLEY, TREXLER & FITZHUGH  
P. O. Box 145  
Chesterfield, Virginia 23832-0145  
(804) 748-2277  
Fax #(804) 796-6775  
VSB#07176

Seen and Objected to for the reasons stated in the attached statement of objections.

 p.d.

Oliver D. Rudy, Esquire  
RUDY, EVANS AND MIKULA  
P. O. Box 58  
Chesterfield, Virginia 23832

MS  
10/21  
docket

DEED OF TRUST NOTE

\$45,000.00

December 21, 1987

Chesterfield, Virginia

FOR VALUE RECEIVED, the undersigned, promise to pay to LARRY W. PRIMM, or order at his residence or at such other place as the holders hereof may designate in writing, the principal sum of FORTY-FIVE THOUSAND AND NO/100 DOLLARS (\$45,000.00) plus interest thereon at the rate of TEN AND PERCENT (10.00%) per annum, on the unpaid balance, payable as follows:

Monthly increments of interest only payable for a term of six years, with the principal and any unpaid interest due and payable at the end of that six year term; said payments of interest to begin upon completion of the improvements on the property utilized to secure this indebtedness, to which document reference is made for a more particular description. Said six year term and its termination time shall run from the date of the above mentioned completed improvements.

Borrowers shall pay to the Noteholders a late charge of five percent of any monthly installment not received by the Noteholders within fifteen days after the installment is due.

If default be made in the payment of any installment under this note, the entire principal sum shall be at once due and payable without notice at the option of the holder of this note. Failure to exercise this option shall not constitute a waiver of the right to exercise the same in the event of any subsequent default.

Presentment, protest and notice are hereby waived. The makers and endorsers of this note also waive the benefit of the Homestead Exemption as to this debt, and agree to pay all expenses incident to collecting the same, including a reasonable attorney's fee. Right of anticipation is reserved.

This note is secured by a Deed of Trust of even date herewith on property in Chesterfield County, Virginia, and this note is to be construed according to the laws of the Commonwealth of Virginia.

WITNESS the following signatures and seals:



VIRGINIA:

IN THE CIRCUIT COURT OF CHESTERFIELD COUNTY

JEAN S. FULGHUM,

Plaintiff,

v. Case No.: 97-1094

BRENDA P. CUMMINGS  
KALEIDOSCOPE,

Defendant.

NOTICE OF APPEAL

The defendant, Brenda P. Cummings , Kaleidoscope, hereby gives notice of appeal to the Supreme Court of Virginia from the final order of this Court entered on the 19th day of October, 1999, and further gives notice that a transcript or statement of facts, testimony, and other incidents of the case will be filed.

BRENDA P. CUMMINGS,  
KALEIDOSCOPE

By: Oliver D. Rudy  
Of Counsel

Oliver D. Rudy  
Oliver D. Rudy, Esquire  
RUDY & MIKULA  
P. O. Box 58  
Chesterfield, VA 23832  
804/748-3600

CERTIFICATE

I, Oliver D. Rudy, Counsel of Record for Brenda P. Cummings t/a Kaleidoscope, hereby certify that:

1. The name and address of the appellant is: Brenda P. Cummings, Kaleidoscope, 7501 Iron Bridge Road, Richmond, Virginia 23237.

2. The names, address and telephone number of counsel for appellant are Oliver D. Rudy, and Robert B. Condon, Rudy & Mikula, 9910 Wagners Way, P. O. Box 58, Chesterfield, Virginia 23832, (804)-748-3600.

3. The name and address of appellee is: Jean S. Fulghum, 5000 Centralia Road, Richmond, Virginia 23237.

4. The name, address and telephone number of counsel for appellee are: Charles W. Beddow, BEDDOW, MARLEY, TREXLER & FITZHUGH, P. O. Box 145, Chesterfield, Virginia 23832, (804)-748-2277.

5. Counsel for appellant has ordered from the Court reporter who reported the case the transcript for filing as required by Rule of the Supreme Court of Virginia 5:11(a).

6. A copy of this Notice of Appeal has been mailed or delivered to  
opposing counsel this 17th day of November, 1999.

BRENDA P. CUMMINGS

By: Oliver D. Rudy  
Of Counsel

Oliver D. Rudy, Esquire  
RUDY & MIKULA  
P. O. Box 58  
Chesterfield, VA 23832  
804/748-3600

RECEIVED & FILED  
CHESTERFIELD COUNTY  
CIRCUIT COURT  
1999 NOV 17 P 3:17  
JUDY L. WORTHINGTON  
CLERK OF COURT  
11/17/99

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF CHESTERFIELD

JEAN S. FULGHUM,

Plaintiff,

v.

Case No.: CL97-1049

BRENDA P. CUMMINGS  
KALEIDOSCOPE,

Defendant.

**AMENDED  
PLEA OF STATUTE OF LIMITATIONS**

Comes now the plaintiff, by counsel, after recognizing that he erroneously referred to the "plaintiff" rather than the "defendant" in his original plea, and states that defendant's claims asserted in her Grounds of Defense are barred by the Statute of Limitations.

JEAN S. FULGHUM

By 

Of Counsel

Charles W. Beddow, p.q.  
BEDDOW, MARLEY, TREXLER & FITZHUGH  
P. O. Box 145  
Chesterfield, Virginia 23832-0145  
(804) 748-2277

**CERTIFICATE**

I hereby certify that a true copy of the foregoing Amended Plea of Statute of Limitations was mailed, postage prepaid, to Oliver D. Rudy, Esquire, RUDY, EVANS AND MIKULA, P. O. Box 58, Chesterfield, Virginia 23832, this 20<sup>th</sup> day of November, 1998.

  
Charles W. Beddow



### **ASSIGNMENT OF ERROR**

**THE TRIAL COURT ERRED IN ITS RULING THAT CUMMINGS' PLEA OF THE EQUITABLE DEFENSE OF STATUTORY RECOUPMENT UNDER CODE § 8.01-422 WAS SUBJECT TO THE PROVISIONS OF CODE § 8.01-233 AND THUS BARRED BY FULGHUM'S PLEA OF THE STATUTE OF LIMITATIONS.**

### **QUESTION PRESENTED**

**WHETHER THE TRIAL COURT ERRED IN ITS RULING THAT CUMMINGS' PLEA OF THE EQUITABLE DEFENSE OF STATUTORY RECOUPMENT UNDER CODE § 8.01-422 WAS SUBJECT TO THE PROVISIONS OF CODE § 8.01-233 AND THUS BARRED BY FULGHUM'S PLEA OF THE STATUTE OF LIMITATIONS?**

### **STATEMENT OF FACTS**

**In December, 1997, Jean S. Fulghum (Fulghum) filed a motion for judgment against Brenda P. Cummings (Cummings) to enforce payment of a deed of trust note which had been executed by Cummings and her late husband on December 21, 1987.**

**The controversy between the parties was the outgrowth of a March 25, 1987, contract between Cummings and her late husband and contractor Larry W. Primm and his company, Larry W. Primm Construction, Inc. (Primm), whereby the Cummings purchased from Primm's company a parcel of land upon which Primm agreed to construct certain improvements. Under the terms of the contract, \$45,000.00 of the purchase price was to evidenced by the deed of trust note executed by the**

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### **ASSIGNMENT OF CROSS-ERROR**

**The trial court erred in the percentage of interest due after entry of judgement.**

### **QUESTIONS PRESENTED**

- 1. Where a holding claimed by an appellant to have been made by the trial court was not in fact made, may that misstatement serve as the basis for an appeal?**
- 2. Is §8.01-422 of the 1950 Code "almost identical" to §6145 of the 1936 Code?**
- 3. Where a promissory note provides for ten percent interest, is post judgment interest limited to the judgment rate of interest?**

### **STATEMENT OF FACTS**

**In March, 1987, Cummings contracted with Primm to construct a building to be known as the "KALEIDOSCOPE" on real estate to be purchased from Primm. Payment for the real estate was partly by cash and by the promissory note made the subject of this action. Payment for construction of the building was by a construction loan from a local bank.**

**After construction was started late, Cummings signed the subject promissory note as payment for the real estate on December 31, 1987. The promissory note provided for payment in the following terms:**