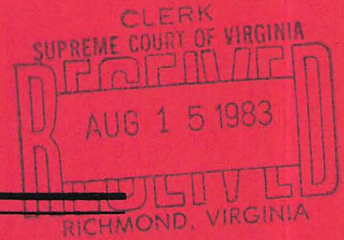


231 VA 312



IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 821067

ADC FAIRWAYS CORPORATION,

Appellant,

v.

JOHN MARK CONSTRUCTION, INC.,

Appellee.

JOINT APPENDIX

Volume I

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320 Maple Avenue East
Vienna, Virginia 22180

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Jeffrey P. Moran
Elizabeth A. Noyes-Palmer
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1250 Connecticut Avenue, N.W.
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Counsel for Appellant

Gary A. Reese
PATTERSON & REESE
4001 Williamsburg Court
Williamsburg Square
Fairfax, Virginia 22032

Counsel for Appellee

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Filed in the Clerk's Office the 22nd day of December, 1982
Ac. Case 13.00 Te lo:

V. 25.00
F. 6.25
D. 30.00
Total Paid \$ 74.25

DAVID A. BELL, Clerk

33327
6151
12/1/82

MOTION FOR JUDGMENT

COMES THIS DAY the Plaintiff, JOHN MARK CONSTRUCTION, INC., A Maryland Corporation, duly qualified to do business in the Commonwealth of Virginia, by counsel, and moves this Honorable Court for the entry of a judgment against the Defendants, A.D.C. FAIRWAYS CORPORATION, A Maryland Corporation; THOMAS DILLON; THOMAS F. DALY; MARA B. ERNESTSONS; and RICHARD J. KISCHE, jointly and severally, in the amount of ONE HUNDRED TWENTY-THREE THOUSAND FOUR HUNDRED TWELVE and No/100 Dollars (\$123,412.00) in compensatory damages; ONE MILLION FIVE HUNDRED THOUSAND and No/100 Dollars (\$1,500,000.00) in civil damages; and TWO MILLION and No/100 Dollars (\$2,000,000.00) in punitive damages, together with interest from the date of judgment, reasonable attorney fees as provided in Count Two, and the costs of this proceeding, for the following wrongs, to-wit:

RECITATION OF FACTS, TO ALL COUNTS:

1. That at all times mentioned hereinafter your Plaintiff, JOHN MARK CONSTRUCTION, INC., was a Maryland Corporation, duly qualified to do business in the Commonwealth of Virginia, and, in fact, doing business within the Commonwealth of Virginia.

2. That at all times mentioned hereinafter the Defendant, A.D.C. FAIRWAYS CORPORATION, was a Maryland Corporation doing business in the Commonwealth of Virginia.

3. That on or about September 20, 1979, the Plaintiff and the Defendant, A.D.C. FAIRWAYS CORPORATION, entered into a contract for the rehabilitation of TWO HUNDRED ELEVEN (211) living units at Heritage Woods, Annandale, Virginia.

4. That at the time of the September 20, 1979, contract, A.D.C. FAIRWAYS CORPORATION was doing business as SPARTA BROOK HOMES OF VIRGINIA.

5. That having completed the work under the Heritage Woods contract, your Plaintiff was further requested to repair fire damages to units of Heritage Woods under similar terms.

6. That having then completed the repair of the fire damage to the units of Heritage Woods a statement for SIXTEEN THOUSAND ONE HUNDRED ELEVEN and 48/100 Dollars (\$16,111.48) was presented to the Defendant, A.D.C. FAIRWAYS CORPORATION, but was dishonored with a remaining balance of ONE THOUSAND THREE HUNDRED THIRTY-ONE and 48/100 Dollars (\$1,331.48), said remaining balance unpaid to date.

7. That on March 12, 1980, your Plaintiff and the Defendant, A.D.C. FAIRWAYS CORPORATION, entered into a new contract for the construction with reference to Ivy Mount, Fairfax County, Virginia. A copy of said contract is hereby attached and incorporated in this Motion for Judgment as Exhibit Number 1.

8. That ONE HUNDRED SEVENTY-ONE (171) units at Ivy Mount were affected at a contract price of FOUR HUNDRED FIFTY-ONE THOUSAND and No/100 Dollars (\$451,000.00) which would have resulted in a profit to JOHN MARK CONSTRUCTION, INC., of SIXTY-SEVEN THOUSAND SIX HUNDRED FIFTY and No/100 Dollars (\$67,650.00).

9. That thereafter your Plaintiff began performing under said contract. However, the Defendants then embarked upon the following course of conduct:

A. The Defendants, A.D.C. FAIRWAYS CORPORATION, THOMAS DILLON, THOMAS F. DALY, MARA B. ERNESTSONS, and RICHARD J. KISCHE, or their agents, servants, or employees would insist upon changing the lighting fixtures, moldings, appliances, etc., after they were installed or ordered, and refused to pay extra for the change or approve the units until the changes had been made.

B. The Defendants, through their agents, servants, or employees, instructed employees "to find something wrong with the units" even if there was nothing wrong, and thereby to avoid or delay paying the Plaintiff.

C. The Defendants embarked, through their agents, servants, or employees, upon a concerted effort to put the Plaintiff out of business by arbitrarily refusing to accept units; delaying payments; making changes; and altering approval procedures.

D. The Defendants, further, delayed payment on the Heritage Woods project based upon alleged problems in the Ivy Mount project, thereby tying up even more of Plaintiff's time and capital.

E. The Defendants, further, delayed payment on the Ivy Mount project based upon alleged problems in the Heritage Woods project, thereby tying up even more of Plaintiff's time and capital. Please see Exhibit Number 2, attached hereto and incorporated.

F. That while tying up funds to be paid to the Plaintiff, Defendants and their agents, servants, or employees, went to Plaintiff's suppliers and subcontractors, and advised these persons or companies that JOHN MARK CONSTRUCTION, INC., had been paid in full and was either refusing to pay the suppliers and subcontractors, or the principals in JOHN MARK CONSTRUCTION, INC., had absconded with the funds. Please see Exhibit Number 3, attached hereto and incorporated.

10. That on July 3, 1980, an authorized agent, servant, or employee of A.D.C. FAIRWAYS CORPORATION informed the Plaintiff that JOHN MARK CONSTRUCTION, INC., was to be put off the job, and further, that JOHN MARK CONSTRUCTION, INC., was not to be paid even for the fire damage work which had been completed at Heritage Woods.

11. That thereafter the reason stated for A.D.C. FAIRWAYS CORPORATION's actions on July 3, 1980, was the failure of the Plaintiff to deliver units at the rate of SEVEN (7) per week. However, by Affidavits to the Defendant, it

was shown that this failure was due to a shortage of materials, and under the contract terms, did not represent therefore a breach.

12. That the Plaintiff returned to the job on July 9, 1980, but on July 24, 1980, the attached Exhibit Number 4 and Exhibit Number 5 terminated the contract. Said Exhibits are hereby incorporated as if set out in their entirety.

13. That the losses involving loss of profits from the Ivy Mount contract; inventory, purchase orders, and remaining balance on the Heritage Woods contract and fire damage work consisted of ONE HUNDRED TWENTY-THREE THOUSAND FOUR HUNDRED TWELVE and No/100 Dollars (\$123,412.00).

14. That as a direct result of Defendants' actions the Plaintiff lost its credit line and was put entirely out of business, a stated objective of the Defendants.

15. That the loss of credit, reputation, and business has created an additional loss to JOHN MARK CONSTRUCTION, INC., of FIVE HUNDRED THOUSAND and No/100 Dollars (\$500,000.00).

COUNT ONE:

16. That the allegations and statements contained within Paragraph 1 through Paragraph 15 are hereby incorporated as if set out in full.

17. That the Defendant, A.D.C. FAIRWAYS CORPORATION, is in breach of its contracts with the Plaintiff, JOHN MARK CONSTRUCTION, INC., resulting in a loss of profits, inventory, purchase orders, and remaining balance on the Ivy Mount contract and fire damage work on the Heritage Woods contract in the amount of ONE HUNDRED TWENTY-THREE THOUSAND FOUR HUNDRED TWELVE and No/100 Dollars (\$123,412.00).

18. That demand for said sum has been made, to no avail.

WHEREFORE, your Plaintiff doth pray for the entry of a judgment against the Defendants, jointly and severally, under this, Count One, in the amount of ONE HUNDRED TWENTY-THREE THOUSAND FOUR HUNDRED TWELVE and No/100 Dollars (\$123,412.00), together with interest from date of judgment and the costs of this proceeding.

COUNT TWO:

19. That the allegations and statements contained within Paragraph 1 through Paragraph 18 are hereby incorporated as if set out in full.

20. That the Defendants and their agents, servants, and/or employees, did combine, associate, agree and mutually undertake to wilfully and maliciously injure your Plaintiff in its business by informing Plaintiff's suppliers and subcontractors that the principals in your Plaintiff had absconded with funds meant to pay the suppliers and subcontractors; and, further, that by wilfully and maliciously delaying payment or refusing to pay the Plaintiff for work performed there was a resulting loss in the Plaintiff's credit lines.

21. That the actions of the Defendants and their agents, servants, and/or employees was in direct violation of Section 18.2-499, et sequence, Code of Virginia, and resulted in damages to Plaintiff in the amount of FIVE HUNDRED THOUSAND and No/100 Dollars (\$500,000.00).

22. That Section 18.2-500, Code of Virginia, requires treble damages and awarding of attorney fees and costs for said violation as civil damages.

WHEREFORE, your Plaintiff doth pray that it be granted a judgment under this, Count Two, against the Defendants, jointly and severally, in the amount of ONE MILLION FIVE HUNDRED THOUSAND and No/100 Dollars (\$1,500,000.00), together with reasonable attorney fees, interest from date of judgment, and the costs of this proceeding.

COUNT THREE:

23. That the allegations and statements contained within Paragraph 1 through Paragraph 22 are hereby incorporated as if set out in full.

24. That the Defendant, A.D.C. FAIRWAYS CORPORATION, fraudulently induced the Plaintiff to enter into contracts for the renovation and rehabilitation of the interiors of various apartment projects with no intent

to ever honor those contracts. In light of Defendant A.D.C. FAIRWAY CORPORATION's conduct with previous and subsequent contractors and subcontractors and its conduct in regard to the contracts which are the subject matter of this action, Defendant A.D.C. FAIRWAYS CORPORATION had no intention of honoring the original contract rate.

25. The Defendant executed the contract with the Plaintiff, waited until the Plaintiff had substantially performed according to its terms and committed itself to its employees and to increased overhead, and then refused to perform under its obligations to the Plaintiff, unless the Plaintiff agreed to accept a reduced price on its service and equipment.

26. As a result of Defendant A.D.C. FAIRWAYS CORPORATION's failure to meet its obligations under the contract, Plaintiff could not meet commitments to its suppliers and employees for the projects. Plaintiff's business reputation has been damaged, and Plaintiff has lost its ability to establish lines of credit with its suppliers. Plaintiff has been unable to continue its business, and has suffered damages in the amount of FIVE HUNDRED THOUSAND and No/100 Dollars (\$500,000.00).

27. The actions of Defendant, A.D.C. FAIRWAYS CORPORATION, in fraudulently entering into contracts were intentionally coercive and oppressive amounting to actual malice, thereby entitling Plaintiff to punitive damages in the amount of TWO MILLION and No/100 Dollars (\$2,000,000.00).

WHEREFORE, your Plaintiff, JOHN MARK CONSTRUCTION, INC., doth pray that it be granted a judgment under this, Count Three, against the Defendants, jointly and severally, in the amount of TWO MILLION and No/100 Dollars (\$2,000,000.00), together with reasonable attorney fees, interest from date of judgment, and the costs of this proceeding.

JOHN MARK CONSTRUCTION, INC.

By: 
6 RICHARD E. McCARTY, President

PATTERSON, REESE & BOYKIN
2020 N. 14th Street, #210-220
Arlington, Virginia 22201

By: 

GARY A. REESE, Esquire
Co-Counsel for Plaintiff

By: 

JERRY WILLIAM BOYKIN, Esquire
Co-Counsel for Plaintiff

Filed 5/10/12

AMENDED ANSWER and GROUNDS OF DEFENSE

COMES NOW the Defendants, by counsel, and in answering Plaintiff's Motion For Judgment filed herein against them, state as follows:

1. The Defendants admit Plaintiff was a Maryland Corporation but deny all other allegations contained in paragraph 1 of the Recitation of Facts.

2. Defendant ADC FAIRWAYS CORPORATION admits the allegations contained in paragraphs 2, 3 and 4 of the Recitation of Facts.

3. Defendant ADC FAIRWAYS CORPORATION admits that the Plaintiff repaired fire damage to units of Heritage Woods but denies all other allegations of paragraph 5 of the Recitation of Facts.

4. Defendant ADC FAIRWAYS CORPORATION denies the allegations contained in paragraph 6 of the Recitation of Facts.

5. Defendant ADC FAIRWAYS CORPORATION admits the allegations contained in paragraph 7 of the Recitation of Facts.

6. Defendant ADC FAIRWAYS CORPORATION denies the allegations contained in paragraph 8 of the Recitation of Facts.

7. Defendants ADC FAIRWAYS CORPORATION, THOMAS DALY, THOMAS DILLON, RICHARD KISCHE and MARA ERNESTSONS deny that the Plaintiff performed under said contract and specifically deny each and every allegation contained in paragraphs 9 A, B, C, D, E and F.

8. Defendants ADC FAIRWAYS CORPORATION, THOMAS DALY, THOMAS DILLON, RICHARD KISCHE and MARA ERNESTSONS deny the allegations contained in paragraph 10 of the Recitation of Facts.

9. Defendant ADC FAIRWAYS CORPORATION denies the allegation contained in paragraph 11 of the Recitation of Facts.

10. Defendant ADC FAIRWAYS CORPORATION denies the allegations contained in paragraph 12 of the Recitation of Facts.

11. Defendants ADC FAIRWAYS CORPORATION, THOMAS DALY, THOMAS DILLON, RICHARD KISCHE and MARA ERNESTSONS deny the allegations contained in paragraphs 13, 14 and 15 of the Recitation of Facts.

COUNT ONE

First Defense

1. Responses to paragraphs 1 through 15 of the Recitation of Facts are hereby incorporated as if fully set out as responses to paragraphs 1 through 15 of Count One of the Motion For Judgment.

2. Defendant ADC FAIRWAYS CORPORATION denies the allegations contained in paragraph 17 of the Motion For Judgment.

3. Defendant ADC FAIRWAYS CORPORATION denies the allegations contained in paragraph 18.

4. As an affirmative defense, Defendant ADC FAIRWAYS CORPORATION further states that the Plaintiff failed to perform under the terms of the contracts as modified with ADC FAIRWAYS CORPORATION thereby breaching said contracts as modified by Plaintiff's failure to perform and pursuant to letter communication of July 24, 1980.

5. Defendants ADC FAIRWAYS CORPORATION, THOMAS DALY, THOMAS DILLON, RICHARD KISCHE and MARA ERNESTSONS deny that the Plaintiff was damaged in the manner and to the extent alleged and call for strict proof of each and every item of damages complained of.

6. Defendants ADC FAIRWAYS CORPORATION, THOMAS DALY, THOMAS DILLON, RICHARD KISCHE and MARA ERNESTSONS deny they are indebted to Plaintiff in any amount or any event.

Second Defense

7. Defendants ADC FAIRWAYS CORPORATION, THOMAS DALY, THOMAS DILLON, RICHARD KISCHE and MARA ERNESTSONS' previous responses to the Recitation of Facts and Count One of the Motion For Judgment are incorporated herein by reference as if fully set forth.

8. On or about June 18, 1980 the Plaintiff and Defendant ADC FAIRWAYS CORPORATION freely and voluntarily entered into a written Modification Agreement of the September 20, 1979 Heritage Woods contract and the March 12, 1980 Ivymount contract.

9. That Plaintiff's act of entering into the Modification Agreement, and the terms and conditions contained in the Modification Agreement, constitute a waiver by Plaintiff of any and all claims, disputes, actions and or causes of action that Plaintiff had or may have had against Defendant ADC FAIRWAYS CORPORATION prior to June 18, 1980.

Third Defense

10. Defendants ADC FAIRWAYS CORPORATION, THOMAS DALY, THOMAS DILLON, RICHARD KISCHE and MARA ERNESTSONS' previous responses to the Recitation of Facts and Count One of the Motion For Judgment are incorporated herein by reference as if fully set forth.

11. As a material inducement to Defendant ADC FAIRWAYS CORPORATION to enter into the aforesaid Modification Agreement, the Plaintiff was to provide Defendant ADC FAIRWAYS

CORPORATION a list or schedule of major suppliers and sub-contractors owed in excess of \$1,000.00 as of May 10, 1980.

Said list or schedule was attached, incorporated and made a part of the Modification Agreement and became known as "Schedule C".

12. Plaintiff warranted to Defendant ADC FAIRWAYS CORPORATION the accuracy of "Schedule C" and further warranted that no other suppliers or subcontractors were owed in excess of \$1,000.00 as of May 10, 1980.

13. Defendant ADC FAIRWAYS CORPORATION relied upon the accuracy of the aforesaid "Schedule C" and deposited \$61,889.32 with Real Title Company as escrow agent. Real Title disbursed said funds pursuant to "Schedule C" and in accordance with the terms of the Modification Agreement directly to the suppliers and or subcontractors and the balance of \$19,384.86 directly to the Plaintiff.

14. "Schedule C" was not, in fact, accurate. Plaintiff omitted at least five suppliers or subcontractors who Plaintiff owed in excess of \$1,000.00 as of May 10, 1980 on account of work at either the Heritage Woods North or Ivymount Condominiums in Annandale, Fairfax County, Virginia.

15. Plaintiff's failure to list in "Schedule C" all subcontractors or suppliers owed in excess of \$1,000.00 as of May 10, 1980 constituted a false and fraudulent act by the Plaintiff inducing Defendant ADC FAIRWAYS CORPORATION to enter into the Modification Agreement.

Fourth Defense

16. All of Defendants ADC FAIRWAYS CORPORATION, THOMAS DALY, THOMAS DILLON, RICHARD KISCHE and MARA ERNESTSONS' previous responses to the Recitation of Facts and Count One of

the Motion For Judgment are incorporated herein by reference as if fully set forth.

17. As a result of Plaintiff's breach of the Heritage Woods North and Ivymount contracts as modified, Defendant ADC FAIRWAYS CORPORATION incurred certain additional costs to complete the work which it claims as offset to monies, if any, that are owed Plaintiff.

WHEREFORE, having fully answered, the Defendants ADC FAIRWAYS CORPORATION, THOMAS DALY, THOMAS DILLON, RICHARD KISCHE and MARA ERNESTSONS, by counsel, move this Honorable Court to dismiss Count One of the Motion For Judgment filed herein against them and for their costs in this behalf expended.

COUNT TWO

1. Defendants ADC FAIRWAYS CORPORATION, THOMAS DALY, THOMAS DILLON, RICHARD KISCHE and MARA ERNESTSONS' previous responses to the Recitation of Facts and paragraphs 1 - 18 of the Motion For Judgment and all Defenses to Count One are incorporated herein by reference as if fully set forth.

2. Defendants ADC FAIRWAYS CORPORATION, THOMAS DALY, THOMAS DILLON, RICHARD KISCHE and MARA ERNESTSONS deny the allegations of paragraphs 20 and 21 of Count Two of the Motion For Judgment.

3. Defendants ADC FAIRWAYS CORPORATION, THOMAS DALY, THOMAS DILLON, RICHARD KISCHE and MARA ERNESTSONS deny that the Plaintiff was damaged in the manner and to the extent alleged and call for strict proof thereof.

WHEREFORE, having fully answered, the Defendants ADC FAIRWAYS CORPORATION, THOMAS DALY, THOMAS DILLON, RICHARD KISCHE and MARA ERNESTSONS, by counsel, move this Honorable Court to

dismiss Count Two of the Motion For Judgment filed herein against them and for their costs in this behalf expended.

COUNT THREE

1. Defendants ADC FAIRWAYS CORPORATION, THOMAS DALY, THOMAS DILLON, RICHARD KISCHE and MARA ERNESTSONS' previous responses to the Recitation of Facts and paragraphs 1 - 22 of the Motion For Judgment and all Defenses to Counts One and Two are incorporated herein by reference as if fully set forth.

2. Defendant ADC FAIRWAYS CORPORATION denies the allegations in paragraphs 23, 24, 25, 26 and 27 of Count Three of the Motion For Judgment.

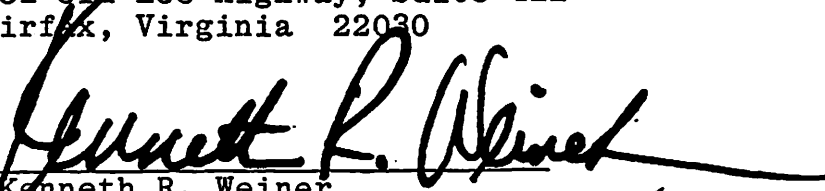
3. Defendant ADC FAIRWAYS CORPORATION denies that the Plaintiff was damaged in the manner and to the extent alleged and calls for strict proof of each and every item of damage complained of.

WHEREFORE, having fully answered, the Defendants ADC FAIRWAYS CORPORATION, THOMAS DALY, THOMAS DILLON, RICHARD KISCHE and MARA ERNESTSONS, by counsel, move this Honorable Court to dismiss Count Three of the Motion For Judgment filed herein against them and for their costs in this behalf expended.

ADC FAIRWAYS CORPORATION
THOMAS DALY
THOMAS DILLON
RICHARD KISCHE
MARA ERNESTSONS
By Counsel

WEINER, WEINER & WEINER, P.C.
3251 Old Lee Highway, Suite 411
Fairfax, Virginia 22030

By


Kenneth R. Weiner

By


Michael A. Mays

Counsel for Defendants

On February 23, 1982

PRE-TRIAL ORDER

CAME THIS DAY the Plaintiff, by counsel, and the Defendants, by counsel, upon Pre-Trial and, it appearing to this Honorable Court that Count One of Plaintiff's Motion for Judgment should be severed for trial from Counts Two and Three, said trial to be non-jury and to take place on February 23, 1982, with no prejudice to the Plaintiff for a jury trial as to Counts Two and Three; and, it further appearing that Defendants should supply in good form to Plaintiff's counsel by close of business February 16, 1982, thereby giving Plaintiff's counsel adequate notice, an itemized statement reflecting the following:

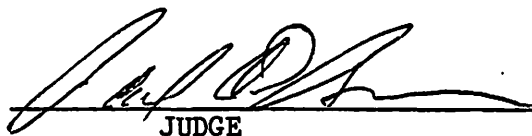
(a) All charges for completion by unit, ~~(b) All backcharges by unit;~~ ~~(c) All work claimed by the Defendants to have been done by unit;~~ (d) All work claimed by Defendants to have been incomplete per unit, along with statements of costs for a-d; no amendment of said itemized statement will be allowed after close of business February 16, 1982, it is, accordingly,

ORDERED that Count One of Plaintiff's Motion for Judgment is hereby severed from Counts Two and Three for trial without a jury on February 23, 1982, and it is further

ORDERED that Defendants will, by close of business February 16, 1982, supply the above itemized statements to Plaintiff's counsel subject to no amendment thereafter as noted, and,

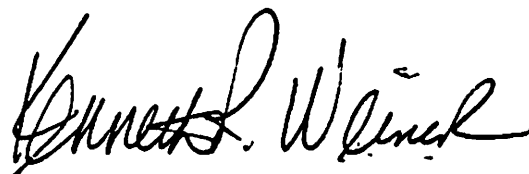
THIS CAUSE IS CONTINUED FOR TRIAL TO FEBRUARY 23, 1982.

ENTERED this 23rd day of Feb., 1982.


JUDGE

I ASK FOR THIS:


Gary A. Reese, Esquire,



JUDGMENT ORDER

CAME THIS DAY the Plaintiff, JOHN MARK CONSTRUCTION, INC., by counsel, and the Defendant, ADC FAIRWAYS CORPORATION, a Maryland corporation, d/b/a Sparta Brook Homes of Virginia, by counsel, and upon the Motion for Judgment (Count One) filed in this cause, Answer of Defendant, Pre-Trial Order bifurcating Count One from the remaining Counts of the Motion for Judgment, and Amended Answer of the Defendants, trial was begun whereupon the Plaintiff presented its case in chief subject to cross-examination by the Defendant's counsel;

WHEREUPON the Defendant presented its case in chief subject to cross-examination by Plaintiff's counsel, and thereafter the Defense rested,

WHEREUPON Plaintiff's counsel moved to strike Defendant's claim for attorney's fees and loan interest,

WHEREUPON the Court granted Plaintiff's Motion to Strike as it pertained to the claim for attorney's fees, but denied the Motion as it pertained to a claim of loan interest,

WHEREUPON Plaintiff presented its Case in Rebuttal subject to cross-examination by Defendant's counsel;

WHEREUPON Plaintiff rested its Case in Rebuttal and renewed its Motion to Strike Defendant's claim for loan interest,

WHEREUPON said Renewed Motion being denied, closing arguments on behalf of the Plaintiff and Defendant were presented,

WHEREUPON after considering the evidence presented by the Plaintiff and Defendant and the argument of counsel it was the opinion of the Court that Plaintiff's claim under Count One of the Motion for Judgment should be granted in the amount of ONE HUNDRED TWENTY-THREE THOUSAND FOUR HUNDRED TWELVE DOLLARS (\$123,412.00), free of any off-sets, together with interest from the date of this Order at ten percent (10%) per annum and the costs of this proceeding; it is, accordingly,

ORDERED, ADJUDGED and DECREED that judgment is hereby granted the Plaintiff, JOHN MARK CONSTRUCTION, INC., against the Defendant, ADC FAIRWAYS CORPORATION, in the amount of ONE HUNDRED TWENTY-THREE THOUSAND FOUR HUNDRED TWELVE DOLLARS (\$123,412.00) together with interest from the date of this Order at ten percent (10%) per annum and the costs of this proceeding, and, it is further

ORDERED that the transcript of this proceeding is hereby made a part of the record, and, it is further

ORDERED that should an appeal not be taken from this Judgment, the Clerk shall return all transcripts and depositions to the parties forthwith, and it is further,

ORDERED that the Clerk shall forward certified copies of the Judgment Order to all counsel of record, and,

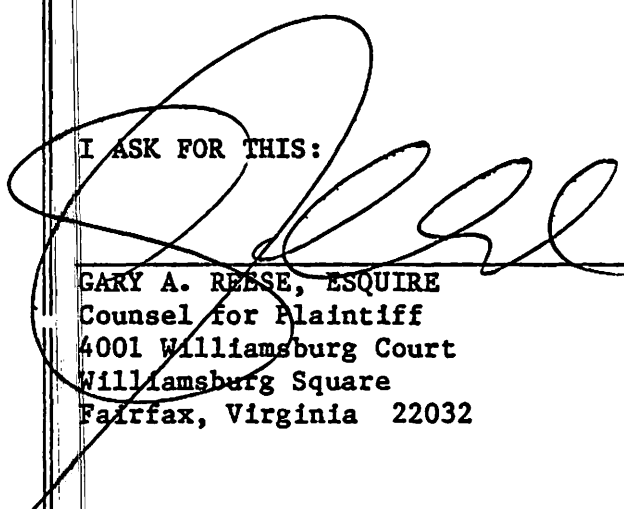
THIS ORDER IS FINAL *as to Court Case,*

ENTERED this 19th day of Mar, 1982.



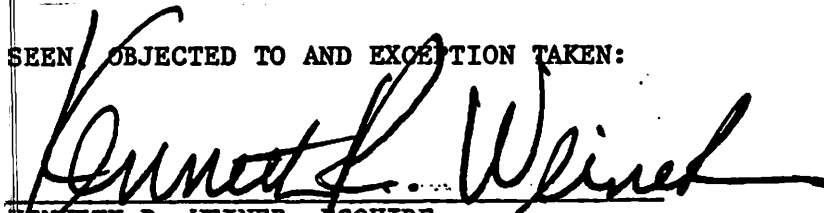
JUDGE

I ASK FOR THIS:



GARY A. REESE, ESQUIRE
Counsel for Plaintiff
4001 Williamsburg Court
Williamsburg Square
Fairfax, Virginia 22032

SEEN / OBJECTED TO AND EXCEPTION TAKEN:



KENNETH R. WEINER, ESQUIRE
Counsel for Defendant
5251 Old Lee Highway
Fairfax, Virginia 22030

ASSIGNMENTS OF ERROR

ADC assigns the following rulings of the trial court as error:

(1) The trial court's finding that Johnmark properly performed under the contract between ADC and Johnmark;

(2) The trial court's award of lost profits to Johnmark in the amount of \$47,781.13, plus lost profits included in the amount awarded to Johnmark for partially completed units;

(3) The trial court's failure to award an offset for increased interest costs incurred by ADC due to delays in completion of work under the contract.

P R O C E E D I N G S

*

*

*

THE COURT: To save me looking through 200 pages, was the Motion for Judgment ever amended?

MR. REESE: No, Your Honor.

THE COURT: All right.

(Pause).

THE COURT: Now, this is the case that severed Counts Two and Three.

MR. REESE: Your Honor, I believe an order has been submitted with reference to the pretrial.

THE COURT: Yes, there were several last minute papers presented. Let's turn the pages and see what we find. Some are subpoenas.

Here is a notice to today of an Order which does sever, and does other things.

Now, I've got to separate the notice from the attached Order because you're going to enter those that's in the book; another time, put it to a copy, then the copy stays in the file.

Mr. Weiner, it's not endorsed. Do you object to

1 it?

2 MR. MAYS: Your Honor, we don't object to the
3 severance, but there is another matter addressed in the
4 Order that's the subject of a Motion this morning which, I
5 assume, Mr. Reese wants to take up initially.

6 THE COURT: I saw that, but first let's get a
7 correct record of what was ordered to be done.

8 Do you disagree with Items A through D?

9 MR. MAYS: Your Honor, as I recall what Your Honor
10 asked for was a statement by unit of the individual items
11 that were not completed by the contractor, which we have
12 prepared.

13 THE COURT: Well, we knew we'd be here for a week
14 or two if somebody didn't make a list that would simplify
15 the issues so that you could say I'm talking about conver-
16 sion unit 602 and I'm talking about cove molding which is
17 Item Four on the sheet. So, that was my goal.

18 MR. MAYS: That's what we did, Your Honor.

19 THE COURT: So, I wanted -- well, let's see. The
20 Plaintiff did the work for Fairways.

21 Oh, even before all this. I take it that both of
22 these companies have Virginia Contractor's Licenses, so we
23 don't have that issue raised, because that would just cut it

1 to complete the work per contract. Is that what you're --

2 MR. WEINER: What it did cost, Your Honor.

3 THE COURT: I see. All right. That's what I
4 wanted and that is sufficient, so, I think you strike out --
5 well, you have charges per completion by unit. Back charges,
6 I don't even remember talking about. Strike that out. All
7 work claimed to have been done, strike that out because it's
8 indirectly covered under all those claims that would have
9 been incomplete. So, A and D remain in.

10 That's what I'm after. We can look at this and
11 say here are the trial issues. Now, I assume the date
12 February 16th is something that I gave you all?

13 MR. REESE: That's correct, Your Honor.

14 THE COURT: All right. The Order is entered.

15 Mr. Weiner, endorse on the first page. And when
16 you get a signature, secretaries do this; they're requiring
17 the Clerk to put whole 'nother page in an Order book and you
18 know, they --

19 MR. WEINER: I will sign on the --

20 THE COURT: And I guess next is Mr. Reese's Motion
21 to Exclude Evidence.

22 MR. WEINER: Well, Your Honor, with regard to this
23 Order, Mr. Reese's Motions is reflected within this Order

1 going to stipulate; isn't that right?

2 MR. KLEIN: That's correct.

3 THE COURT: We'll get the stipulation on first
4 because I've seen these things break down, Mr. Klein. We'll
5 let you know in a few minutes.

6 MR. KLEIN: All right. Thank you, Your Honor. I
7 will go to the Witness Room.

8 THE COURT: Yes. Yes.

9 All right. Opening?

10 MR. REESE: Good morning, Your Honor.

11 (Discussion off the record.)

12 MR. REESE: If Your Honor please, I represent
13 JohnMark Construction Company, the Plaintiff in this case.
14 The Defendant in this case is a company by the name of ADC
15 Fairways. Now, ADC Fairways is the -- was the owner and the
16 developer of two apartment complexes that were being con-
17 verted from apartments into condominium units. Now, these
18 particular developments that we will be dealing with today
19 are known as -- and I will put up here ADC Fairways, which
20 is the Defendant and it's the owner and it's the developer of
21 Heritage Woods. And, it's actually Heritage Woods North,
22 but for brevity sake, I will simply say Heritage Woods. And
23 Ivy Mount.

1 Now, both of these apartment complexes, and these
2 are basically four and five story apartment complexes, both
3 of them were in Fairfax County around Annandale. Now, these
4 are 16-17 year old apartments that were being converted into
5 condominium units for sale as real estate to individuals.

6 THE COURT: What makes the suit here? Just the
7 new vending laws?

8 MR. REESE: Well, in this particular case, I think
9 the registered agent was in this area, if Your Honor please,
10 or served in this area.

11 THE COURT: I see. All right.

12 MR. REESE: Now, the situation was, of course,
13 that ADC Fairways as the owner and developer needed someone
14 to rehabilitate, and we are going to hear the word rehab a
15 lot, to rehabilitate these particular units. And I think
16 Your Honor will find that basically what was asked for them
17 -- was asked by ADC was a cosmetic job, just to make the
18 units look clean and bright so that they could be sold.

19 Now, for this purpose, ADC Fairways contracted
20 with JohnMark which, of course, is the Plaintiff in this
21 case. Now, JohnMark was a small business, certainly by no
22 means General Motors. It was a small business whose job
23 principally was the conversion of apartment units into

1 condominiums, the rehab job. So, by the way of definition,
2 ADC Fairways as the owner and the developer contracted with
3 JohnMark who became then a subcontractor of ADC Fairways for
4 the rehab of these particular units.

5 Now, at Heritage Woods, you are looking at approxi-
6 mately 211 units; at Heritage Woods. At Ivy Mount, you are
7 looking at 171 units. Now, the numbers should not give us
8 that much fear, because in the end, Mr. Weiner and I have
9 narrowed down these units to a miniscule number in compari-
10 son of what we might have started out with.

11 The evidence will be that JohnMark entered into a
12 contract with ADC for the rehab of Heritage Woods, and
13 towards the end of completing that particular job, they
14 contracted with ADC Fairways for the rehabilitation of Ivy
15 Mount. Now, this contract, the Ivy Mount contract, was
16 entered into in March of 1980, at which time there were not
17 that many units really left in Heritage Woods to be done.
18 They entered upon the job at Ivy Mount and the evidence will
19 be by late May of 1980 they had at least 207 of the 211
20 units at Heritage Woods finished and accepted and they had
21 fourteen units at Ivy Mount finished and accepted; and this
22 is actually by way of the Defendant's own records that these
23 particular figures are -- can be spoken of at this point.

1 Unfortunately, the evidence will show that ADC
2 Fairways had not paid for all 207 of the 211 units and had
3 not paid one penny for the Ivy Mount units, the 14 Ivy Mount
4 units that had been completed, had been accepted by them,
5 and needless to say, this led to a dispute; a dispute between
6 JohnMark and ADC with reference to why haven't you paid me.

7 Well, on June 18, an expression used by Mr. Weiner
8 in one deposition, the parties kissed and made up, as it were
9 and they entered into a Modification Agreement. Now, by
10 this Modification Agreement, it was acknowledged on behalf
11 of ADC Fairways that the units at Heritage Woods were in a
12 high state of completion and that 19 units at Ivy Mount now
13 had been presented. It was also stipulated in that Modifi-
14 cation Agreement, which Your Honor will have before him, as
15 to amounts that had been paid by ADC Fairways towards
16 Heritage Woods and also it had been stipulated within the
17 Modification Agreement as to the billings by JohnMark at
18 that time with reference to Heritage Woods and Ivy Mount and
19 they arrived at a figure for some \$61,000 that had not in
20 fact been paid by ADC at that particular date. And by the
21 Modification Agreement, ADC was to pay to JohnMark through
22 Real Title, whose testimony Mr. Klein will be stipulating or
23 we will be stipulating on behalf of him, they paid to Real

1 Title a sum of \$51,000 to be disbursed in accordance with
2 the Modification Agreement.

3 Now, Your Honor will hear a couple of other things
4 today. You'll hear about a fire job at Heritage Woods.
5 There were two units that had been afflicted by a fire and the
6 Plaintiff had contracted with ADC for the repair of these
7 units. And, in fact, on June 26, 1980, the fire job units
8 were presented and accepted by ADC Fairways and invoiced.
9 Unfortunately, ADC Fairways saw fit not to pay the entire
10 invoice, and will admit by stipulations today, that they
11 still owed \$1,331 and I believe it is 48 cents; but if there's
12 some change at that point we'll certainly --

13 THE COURT: You admit they owed that to your client?

14 MR. REESE: They admitted that they owed that.

15 THE COURT: Oh, they admitted.

16 MR. REESE: That's correct, yes. They've admitted
17 through records and they will admit it here, I'm sure, today.

18 All right. Also, on June 26, 1980, the 19 units
19 that had been previously accepted by ADC but which had been
20 a subject of the Modification Agreement were re-presented to
21 ADC and accepted. So, we have the 19 units here at Ivy
22 Mount. Now, the contract provided -- the Modification
23 Agreement provided that on July 3rd of 1980, seven units at

1 Ivy Mount, an additional seven units above the 19 that had
2 already been accepted, an additional seven units would be
3 presented for approval. Now, there had been a dispute in
4 the back with reference to two what you and I might consider
5 trivial items, but they didn't turn out to be trivial to the
6 parties. Cove molding and a kitchen light. Until the
7 Modification Agreement on June 18, 1980, remembering that
8 the contract was entered into in March of 1980, ADC had not,
9 had not instructed JohnMark as to the color or type or width
10 of cove molding to be put around the apartments; and one of
11 their complaints with the apartments was that the cove mold-
12 ing had not been completely installed.

13 THE COURT: Is this the ceiling cove or the floor
14 tile cove or cove where?

15 MR. REESE: I believe it's a floor cove molding
16 that we're talking about.

17 THE COURT: You mean like a vinyl baseboard cove?

18 MR. REESE: I don't believe it was a vinyl base-
19 board cove -- it was vinyl baseboard cove, my client tells
20 me.

21 THE COURT: All right. I wanted to know what kind
22 of cove you're talking about.

23 MR. REESE: All right. Now, there was another

1 item that may seem trivial, and that was the kitchen light.
2 On the original contract, ADC had stipulated a particular
3 model and manufacturer. As it turned out, that model was
4 quite obsolete and totally unavailable. And until June 18,
5 1980, ADC had refused to tell my client what kind of a
6 kitchen light that they would approve.

7 But on June 18, 1980, contained within the
8 Modification Agreement there was a stipulation as to there
9 will be an almond cove molding and it will be a kitchen
10 light of a particular model number. My client then ordered
11 these, but unfortunately, by June 3rd, they were not avail-
12 able. I'm sorry. On July 3rd.

13 On July 3rd, units were presented, they were
14 walked by -- by walked, a representative of ADC would go
15 throughout the unit to see if it was all right. It was
16 walked by Mr. Dillon, a representative of ADC. He came back
17 and informed, the evidence will be, my client that the units
18 had some work still to be done by way of punch-list items.
19 It needed the cove molding and needed the kitchen light, but
20 that he would go speak with Mr. Daly. And Mr. Daly is ADC.

21 THE COURT: What do you mean he is?

22 MR. REESE: He's the owner. He's the president
23 of ADC.

1 THE COURT: Well, it's a corporation, is it not?

2 MR. REESE: It's a corporation, but nothing flies
3 and nothing walks --

4 THE COURT: And he is sued as an individual; isn't
5 he? And the man, I guess it's the same Dillon that you
6 referred to that sued as an individual?

7 MR. REESE: Daly. That's correct, yes.

8 Mr. Daly was the president of ADC Fairways.

9 Mr. Daly was the president of ADC Fairways, and as
10 I said, nothing walked or nothing flew but for Mr. Daly, and
11 the evidence will be very abundant as to that; Mr. Daly's
12 approval. Mr. Dillon was the underling to Mr. Daly.

13 Mr. Dillon said he was going to go back and tele-
14 phone Mr. Daly. He went back and telephoned Mr. Daly and he
15 came back and said to my client Mr. Daly wants you off the
16 job. My client said, are we going to be paid for the fire
17 job? That was put in the invoice of June 26th. He said, no,
18 no way are you going to be paid. My client then left the
19 job.

20 Now, if Your Honor will bear with me for a minute.
21 Punch-list items, this is a phrase that we're going to hear
22 a considerable amount about during this particular trial. I
23 believe the evidence will be that punch-list items are those

1 items which are put on a list by a representative of the
2 owner that can be taken care of momentarily. A unit is not
3 turned down for punch-list items, rather, it is accepted
4 contingent to the completion of those punch-list items.

5 THE COURT: So, that's different from other punch-
6 lists.

7 MR. REESE: Yes. And we'll certainly get into
8 that for Your Honor.

9 All right. So, on 7-3-80, JohnMark was thrown off
10 the job. But they did come back on the job. They came back
11 on the job on or about 7-8-1980, and on 7-9, July 9, 1980,
12 they presented to ADC for acceptance-inspection, this time,
13 11 units. These 11 units were walked by a lady by the name
14 of Mara Ernestons. Now, Miss Ernestons was directly under
15 Mr. Dillon. So, if we look at it, we have Daly, we have
16 Dillon, and we have Ernestons, and she was the one that
17 Dillon had delegated to walk the units. She walked the
18 units on July 8th, these 11 units, on July 8, 1980, and gave
19 a punch-list which included cove molding, kitchen lights. On
20 July 9 -- strike that. This was on July 9, I'm sorry.

21 On July 10, 1980, the cove molding had come in.
22 It was installed. Miss Ernestons rewalked the units,
23 rewalked the units, advised my client that they were fine,

1 said she was going to go down and tell Mr. Dillon; once
2 again, we have Daly, Dillon, and Ernestons, and she left.
3 Now, the Modification Agreement provided that ADC in this
4 particular instance had until close of business on that
5 Friday, July 10, to approve or reject the units. And if
6 they didn't do either one of those, they were considered to
7 have been accepted and would be paid for the next Friday.
8 Well, my client, of course, stood around all afternoon as it
9 were and into the night waiting for word from ADC. No word
10 came, so they were confident that the units had in fact been
11 accepted. They come back to work the next week and they
12 start on the lower units, the basement units, what are known
13 to be A-5 through 10 and B-1 through 4 units. And then
14 about the middle of that week, around the 15th or 16th of
15 July, they receive a letter from Mr. Dillon saying that the
16 units have been rejected. One can imagine the consternation
17 that took place at that particular point. Everything else
18 then is pretty much downhill, until July 24, and on July 24,
19 both sides default each other, as it were. Fairways defaults
20 my client and my client defaults ADC on July 24. On July
21 24, Mr. Sauer, who was a co-owner of JohnMark, walked the
22 partial units to find out what work had been done and also
23 a Mr. Purdy; and Mr. Purdy was a foreman of JohnMark. He

1 walked the partial units to make sure they knew what had
2 been done and they compiled a list and, of course, Your
3 Honor will be seeing that list.

4 On July 26th, an inventory was done of all the
5 goods that my client had within the storerooms. And that
6 inventory will be offered to Your Honor. Approximately a
7 week later, my clients while visiting the site noticed that
8 the lock to the storeroom had been opened and that ADC
9 employees were emptying the storeroom out. Approximately
10 two weeks after that, a representative of ADC Fairways did
11 an inventory and came up with a somewhat different figure on
12 the inventory than our figure which was derived on July 26th.
13 And that --

14 THE COURT: Inventory of what?

15 MR. REESE: Of all of the goods of JohnMark, such
16 as the cove molding, the kitchen lights, the locks. These
17 things that would be used in the units were put into a
18 storeroom until such time as they were used.

19 THE COURT: Why were they taking separate inven-
20 tories?

21 MR. REESE: I'm sorry?

22 THE COURT: Why were they taking separate inventor-
23 ies if Mark is back on the job and it's to supply the

1 materials, why is ADC concerning itself with whether Mark
2 has more than the job needs or less?

3 MR. REESE: No, what happened was on July 24 both
4 sides defaulted each other. JohnMark --

5 THE COURT: Claim they default.

6 MR. REESE: Right. Is off the job.

7 THE COURT: Oh, off again.

8 MR. REESE: Finally.

9 THE COURT: I didn't catch that.

10 (Discussion off the record.)

11 MR. REESE: Now, as of July 24th then one way or
12 another, JohnMark is off the job. On July 26th, and remem-
13 bering on the 24th they then went throughout the partial
14 units. The units had not been invoiced as complete, but
15 where a lot of work had been done, and determined what had
16 been done. On July 26th--

17 THE COURT: Now, that's one side that did that.
18 There wasn't a joint --

19 MR. REESE: It was not joint, no.

20 On July 26th then an inventory was done by JohnMar
21 of their storeroom.

22 THE COURT: You say these are supplies that
23 Johnmark had paid for?

1 MR. REESE: That's correct.

2 THE COURT: And they left them on the job even
3 though they had been ordered off?

4 MR. REESE: That's correct. They're under lock
5 and key.

6 THE COURT: All right.

7 MR. REESE: Now, they came back a little less than
8 a week later to find that the locks had been picked and that
9 employees of ADC Fairways were pirating away, as it were,
10 their inventory. Approximately two weeks after that, after
11 that date and inventory was completed by ADC Fairways and
12 needless say, it reflected a somewhat different figure at
13 that particular point.

14 And, if Your Honor please, that is the whole flow
15 of this transaction. And what we're dealing with here today
16 really comes down to this: We say that roughly \$87,000 is
17 owed for completed units, completed invoiced units, for
18 partial units, partially completed units, for the inventory,
19 for the purchase orders; and I think we'll probably have a
20 stipulation with reference to the purchase orders. For the
21 fire job of \$1,331.48, for lost profits, and also for monies
22 that had not been paid with reference to electrical and
23 plumbing permits. So, \$87,000 --

1 THE COURT: What is the genesis of the lost pro-
2 fits?

3 MR. REESE: All right. Now, the genesis of the lost
4 profits is, if Your Honor will note, we started out with
5 171, under the contract, 171 units. Only 30 of which were
6 completed prior to our allegation of default, but prior to
7 July 24, 1980, which left then 141 units remaining on which
8 what is computed at 15 percent profit to my client. So, if
9 Your Honor finds that ADC breached the contract then we
10 would be entitled, I would allege to the Court --

11 THE COURT: You're claiming a loss of profits by
12 failure to complete by X date with a rental figure used to
13 compute the profits lost? Is that your approach to this?

14 MR. REESE: No, if Your Honor please. Under the
15 contract, there was a per unit price given and that per unit
16 price included 15 percent profit. What occurred was --

17 THE COURT: I see. I see. All right. You're
18 talking about a contract determined profit to the contractor.

19 MR. REESE: That's right, yes.

20 THE COURT: And by being put off the job, they
21 couldn't make that profit.

22 MR. REESE: Exactly. And that's approximately
23 \$40,000. The exact figure will be, of course, given to Your

1 Honor. And you come up with approximately that sum. I
2 believe we've asked for 123, which would be the sum beyond
3 which we could not go.

4 Flip the coin over on the other side. ADC
5 Fairways, on the other hand, says that they owe us \$58,000.
6 Now, they aren't adding in, of course, any loss of profit at
7 that point. So, the major argument except for the question
8 of who actually breached the contract comes down to the
9 difference between 87 and 58,000 at that particular point.

10 The evidence will be that we received no payments
11 since the payment on June 18th, 1980, except for an invoice
12 on the fire job which didn't pay us \$1,331.48 which we were
13 due, and according to the total, as indicated to Your Honor.
14 As I say, we have, I believe, narrowed the issues down then
15 to, as Mr. Mays has indicated, the 11 units that were
16 invoiced after June 18, 1980 with reference to Ivy Mount.
17 And there is some contingency with reference to that and we
18 have narrowed the issue down to what work was or was not
19 completed in the partial units. And I think both sides are
20 probably prepared to give testimony with reference to that.

21 THE COURT: All right. We'll recess so I can take
22 the criminal case up.

23 (A short recess was taken.)

1 THE COURT: All right. We'll resume. Let me hear
2 the defense opening.

3 MR. MAYS: May it please the Court. Your Honor,
4 we represent the developer ADC Fairways Corporation in this
5 matter. Your Honor, defense evidence will be that the
6 Defendant, ADC Fairways Corporation purchased the Heritage
7 Woods North and Ivy Mount property intending to convert said
8 properties to condominiums for sale to the public. And as
9 Mr. Reese said, JohnMark Construction Corporation was hired
10 to do the conversion work. Defendant's evidence will be
11 that in September of 1979 JohnMark entered into the contract
12 for the Heritage Woods property, that JohnMark commenced
13 work under this contract to the fall months and into the
14 first part of 1980; and that on or about March 12, JohnMark
15 signed a second contract for the conversion of the Ivy Mount
16 property.

17 For awhile, there was some overlap with reference
18 to the two contracts. JohnMark was finishing work at
19 Heritage Woods North and was beginning its work on the Ivy
20 Mount contract. Defendant's evidence will be that a dispute
21 had developed in Heritage Woods North as to whether certain
22 units there were complete. The Plaintiff will probably
23 introduce evidence that a representative of the developer

1 did accept some units there. However, our evidence will be
2 that JohnMark Construction agreed both by letter and in
3 written amendment to the contract to go back and complete
4 certain units in Heritage Woods North. At the same time,
5 they were attempting to work in the Ivy Mount project.

6 Defense evidence will show that in reference to
7 Ivy Mount the JohnMark Construction was one week late in
8 delivering the first group of units. There was a delivery
9 schedule which became part of a contract whereby JohnMark
10 was to deliver approximately seven units per week in Ivy
11 Mount. And our evidence will show that from the very
12 beginning they were at least one week late in delivering
13 units and continued to be one week late and sometimes two
14 and three weeks late in delivering units in Ivy Mount.

15 Notwithstanding their lateness in delivering units,
16 our evidence will show that we advanced them monies periodi-
17 cally through the months of March, April and May to assist
18 them. Our evidence will show that on or about May 2nd, 1980
19 by letter, ADC Fairways informed JohnMark that Tom Daly, who
20 was the president of ADC Fairways, would be the only individ-
21 ual who could accept units in Ivy Mount. Our evidence will
22 continue to show that JohnMark had difficulty in meeting its
23 delivery schedule. Our evidence will show that units were

1 not complete, that there were numerous problems, that
2 JohnMark was a poorly managed company, that there was a lack
3 of coordination with their work; and that in the month of
4 May, 1980, the parties having disagreed on certain money
5 matters, et cetera, started negotiating an amendment to the
6 contract.

7 On or about June 18, 1980, Your Honor, both the
8 Heritage Woods and Ivy Mount contracts were amended and the
9 document is called the Modification Agreement. As a mate-
10 rial inducement to get the developer to enter into this
11 modification, the developer, ADC Fairways, required JohnMark
12 to produce a list of its suppliers and subcontractors it
13 owed more than \$1,000 to as of May 10, 1980. The developer,
14 the representative of our client will testify that this was
15 a material element of this modification because --

16 THE COURT: You mean, it was preceding the signing
17 of the Modification?

18 MR. MAYS: Yes.

19 THE COURT: All right.

20 MR. MAYS: Yes, it was preceding. It was par-
21 the -- it was required, the developer required this of the
22 contractor.

23 The reason for this was because ADC Fairways had a

1 construction loan with Continental Bank of some \$12,000,000.
2 Pursuant to its construction loan, the developer was
3 required to keep the project free and clear of all mechanics
4 liens and other encumbrances; therefore, it was material to
5 the developer to keep the project -- to keep the project free
6 and clear of liens. Hence, it became a part of the Modifi-
7 cation that monies were to be disbursed directly to the
8 suppliers and subs that JohnMark provided us and it was
9 arranged that monies would be paid into Real Title Company.
10 And the witness from Real Title, Mr. Klein, is here and
11 there will be a stipulation after opening statements that
12 ADC Fairways deposited some \$61,000 upon the execution of
13 this Agreement with Real Title and Real Title disbursed
14 directly to the suppliers and subcontractors provided by
15 JohnMark; and that there was a balance of some \$19,000 that
16 was disbursed directly to JohnMark.

17 Defendant's evidence will show that the list of
18 suppliers and subcontractors was inaccurate, that JohnMark
19 omitted at least three suppliers that we can prove that it
20 owed more than \$1,000 to as of May 10, 1980. This resulted
21 in at least one mechanic's lien being filed on the property.
22 It further resulted in these particular suppliers calling
23 and writing letters to the developer as to why they hadn't--

1 THE COURT: This is some \$3,000 plus where they
2 had reported the total was \$61,000 is that it?

3 MR. MAYS: No.

4 THE COURT: What is the dollar figure they did
5 report? You say they didn't report three that were a little
6 over a thousand a piece. Do you know how many they did
7 report?

8 MR. MAYS: Yes, Your Honor. I can tell you now or
9 --

10 THE COURT: Well, give me an approximation. I
11 won't hold you to it. I'm trying to figure out whether it's
12 a net or whether they reported 2,000 was owing and there
13 really was six or did they report -- miss 3,000 out of
14 200,000. I just want to get the ball park.

15 MR. MAYS: The ball park looks to be about 35,000,
16 Your Honor.

17 THE COURT: All right.

18 MR. MAYS: And I have a letter that will be the
19 subject of the stipulation which has the figures owed that
20 were supplied.

21 THE COURT: All right. Thank you.

22 MR. MAYS: Defendant's evidence will be that this
23 was a material breach of the Modification Plaintiff

1 committed fraud in inducing the developer to enter into this
2 Agreement, that the developer relied upon this list which
3 became known as Schedule C which was attached to and made a
4 part of this Agreement; that in relying upon that Agreement,
5 the developer deposited more than \$61,000 with Real Title
6 and Real Title did disburse that money directly to suppliers
7 and subcontractors and a balance of some \$19,000 was paid to
8 JohnMark Construction.

9 Our evidence will be that this resulted in numer-
10 ous suppliers and subcontractors being not paid and having
11 lien claims against the property. We will show that this
12 was a breach of the underlying Ivy Mount contract. Notwith-
13 standing this, JohnMark attempted to deliver units. Under
14 the Modification Agreement, the first seven units were due
15 July 3rd. Our evidence will show these units were not com-
16 plete, Your Honor. The work was not workmanlike and further,
17 a kitchen light and cove molding was not there and aside from
18 those two items, our evidence will be that they were never-
19 theless incomplete.

20 Now, Your Honor, the focus of this case is going
21 to be Building 4355, Ivy Mount. Our evidence will show that
22 there are 30 units in this building which the contractor
23 claims were completed. Our evidence will show that pursuant

1 to the monies placed with Real Title under the Modification
2 Agreement, that 19 of those became paid in full, and I'll
3 list the 19. (Pause). These 19 units, Your Honor, were
4 paid in full and the monies deposited with Real Title
5 disbursed.

6 And then on July 3rd, another group of units were
7 due, which we will show were not complete and those are the
8 11 that are really in issue today and those units are these.
9 (Pause).

10 THE COURT: For that, can't you later just pull
11 out the pages here?

12 MR. MAYS: Yes, Your Honor.

13 THE COURT: It's all right to put them up.

14 MR. MAYS: The Defendant will show that there was
15 a heavy demand by purchasers for units during the contract
16 period, that under the developer's construction loan, he was
17 paying interest at the rate of two points over prime; that
18 it paramount for the developer to complete units to have
19 them ready to purchase --

20 THE COURT: When you say developer, you're talking
21 about --

22 MR. MAYS: ADC Fairways.

23 THE COURT: ADC? All right.

1 MR. MAYS: That it was paramount to ADC Fairways
2 to have the units in a very completed condition because after
3 units were completed and paid for, or even in some cases
4 before they were paid for, these units would be walked with
5 prospective purchasers and purchasers would pick out certain
6 things that they didn't like. And when this happened, the
7 developer would have to bring in a punch-out crew or other
8 workers to correct these punch-out lists. Therefore, it was
9 extremely important to ADC Fairways Corporation to have these
10 these units nearly 100 percent complete. And our evidence
11 will show that JohnMark just could not do this for one
12 reason or another and this caused ADC Fairways, Number One,
13 to hire other contractors to do their work, it caused a
14 delay in having units ready for sale, it caused increased
15 interest costs on the construction loan; and, Your Honor,
16 it's our position that the Plaintiff committed fraud in the
17 inducement with regard to the Modification Agreement. There-
18 fore, we intend to back up and rely on the Plaintiff's
19 breach of the contract prior to this date, but we will also
20 show that even under the Modification Agreement, they could
21 not have units and did not have units completed which caused
22 the developer to incur expenses.

23 And so, our position is to whatever the Plaintiff

1 can show it's entitled to then we would be entitled to off-
2 set that amount by the costs that we had to incur to complete
3 the contract.

4 THE COURT: All right. What is the stipulation?

5 MR. REESE: There probably are a couple, if Your
6 Honor please. Number One --

7 THE COURT: Let's take Mr. Klein's and get 'em out
8 of here.

9 MR. REESE: I will stipulate this particular letter
10 of December 3, 1981 reflecting the amounts paid to Real
11 Title Company in the amounts disbursed and to where these
12 amounts were sent, which I believe, is all Mr. Klein's
13 testimony.

14 And, 14,750 additional for the fire job.

15 MR. WEINER: For the fire job. Okay.

16 THE COURT: I didn't listen to the colloquy. The
17 paper speaks for itself.

18 MR. REESE: The paper speaks for itself, and in
19 addition to this particular piece of paper, there was an
20 additional check forthcoming from Real Title Company for
21 \$14,750 which represented a part-payment of the fire job.

22 THE COURT: Real Title wrote the check to whom?

23 MR. REESE: To JohnMark. And I believe that's the

1 stipulation with reference to Mr. Klein's testimony.

2 THE COURT: To say what the balance was? I assume
3 that's an issue.

4 MR. REESE: There is no stipulation with reference
5 to the balance.

6 THE COURT: All right.

7 MR. WEINER: Your Honor, this represents the list-
8 ing of suppliers and subcontractors that the contractor
9 supplied pursuant to the Modification Agreement.

10 THE COURT: As well as who got how much.

11 MR. WEINER: Correct.

12 MR. REESE: Ken, I told you about that stipulation.
13 I don't think Mr. Klein was party to that Agreement --

14 THE COURT: Do you stipulate to that? Do you
15 stipulate, Mr. Reese? That it also is a list supplied by
16 JohnMark?

17 MR. REESE: Yes, I believe it is.

18 THE COURT: All right. May I also have the two
19 contracts and Modification? You can agree on those surely.

20 MR. REESE: I have those, Your Honor, I believe.

21 THE COURT: Mr. Lewis, tell witness Klein that he
22 may leave now.

23 MR. REESE: The Court's indulgence, I'd like the

1 Construction Agreement, the Modification Agreement to be
2 marked as --

3 THE COURT: One, Two, and Three.

4 MR. REESE: Well, actually One and Two.

5 Is that Number One, then?

6 THE COURT: No, I haven't marked anything yet.

7 MR. REESE: Okay. Well, here is the Modification
8 Agreement and the Construction Agreement --

9 THE COURT: Now, let's see. Which one is which?

10 MR. REESE: I believe it recites it, if Your Honor
11 please.

12 THE COURT: But you have two contracts, though.

13 MR. REESE: On Heritage?

14 THE COURT: Oh, this is March. What happened to
15 the September, '79 contract?

16 MR. REESE: That's the Heritage Woods contract.

17 THE COURT: Yes.

18 MR. REESE: I did not plan to put that into evi-
19 dence, but --

20 THE COURT: Well, did you?

21 MR. WEINER: Your Honor, we don't intend to put it
22 into evidence.

23 THE COURT: All right, then it's just not going to

1 to be offered. Then the second contract really becomes
2 Exhibit -- let's see. This is Plaintiff's One.

3 (The document referred to was
4 marked as Plaintiff's Exhibit
5 No. 1, for identification and
6 was received into evidence.)

7 THE COURT: Plaintiff's Two is the Modification
8 Agreement.

9 (The document referred to was
10 marked as Plaintiff's Exhibit
11 No. 2, for identification and
12 was received into evidence.)

13 MR. WEINER: Your Honor, the Court's indulgence.

14 I don't doubt Mr. Reese's word that these are true
15 copies, I just want to check the attachments, Your Honor.

16 THE COURT: Sure. Three, is the Real Title letter,
17 part of what was stipulated.

18 (The document referred to was
19 marked as Plaintiff's Exhibit
20 No. 3, for identification and
21 was received into evidence.)

22 MR. REESE: We have Number One being the
23 Construction Agreement?

1 THE COURT: One, is the March 12, Agreement, Two
2 is the Modification Agreement, Three is the stipulated
3 letter.

4 MR. REESE: Three is the Real Title letter?

5 THE COURT: Yes.

6 MR. REESE: Okay. Very good.

7 THE COURT: Any other particular stipulations?

8 MR. REESE: Yes. I believe, if Your Honor please,
9 the Defendant has indicated to me that they stipulate to
10 owing us on the fire job the amount of \$1,331.48.

11 THE COURT: Well, they're not listening so you
12 better get their attention and let them put it on the record.

13 MR. REESE: Can I get your attention?

14 MR. WEINER: Yes.

15 MR. REESE: I've indicated the stipulation of
16 1,331.48 for the fire job.

17 MR. MAYS: Yes.

18 MR. WEINER: That's correct.

19 THE COURT: 1,331?

20 MR. REESE: \$1,331.48.

21 THE COURT: With what now?

22 MR. REESE: That represents the balance due on the
23 fire job, the two units.

1 THE COURT: To Mark?

2 MR. REESE: To JohnMark, yes.

3 THE COURT: Yes. Well --

4 MR. REESE: And also --

5 THE COURT: I haven't really been told in the
6 openings what the issues are on those fire jobs, but --

7 MR. MAYS: There are no issues now, Your Honor.

8 MR. REESE: That takes care of the issue --

9 MR. WEINER: That was actually a separate contract.

10 THE COURT: Well, then there's no issue. All
11 right.

12 MR. REESE: No issue on that.

13 THE COURT: See, I need to know in terms of really
14 on relevance what the issues are.

15 MR. REESE: Sure. There is an agreement as to the
16 amount due and owing JohnMark on purchase orders for Ivy
17 Mount, amount due and owing JohnMark for purchase orders at
18 Ivy Mount of \$4,293 --

19 THE COURT: Now, wait a minute.

20 MR. REESE: I'm sorry.

21 THE COURT: Due JohnMark on purchase orders at
22 Ivy Mount, because something says they're supposed to be
23 paid for their materials and not just have a flat contract

1 price?

2 MR. REESE: That's correct. That's correct.

3 THE COURT: What is it, costs plus?

4 MR. WEINER: No.

5 MR. REESE: No, these would be special items above
6 and beyond the standard contract which would be ordered by

7 --

8 THE COURT: All right. And what is that amount?

9 MR. REESE: \$4,293.95.

10 THE COURT: All right.

11 MR. REESE: These are in accordance with
12 Defendant's Answers or supplemental Answers to our Interroga-
13 tories.

14 THE COURT: There seems to be a bunch of payments
15 listed on these four or five pages pasted on the back of the
16 blackboard. Are those sums of money and the dates the
17 amounts and dates in dispute?

18 MR. REESE: Actually, you'll find them incorpora-
19 ted within the Modification Agreement, if Your Honor please.

20 THE COURT: I see.

21 MR. REESE: So, when the Modification Agreement is
22 put in --

23 THE COURT: Have you looked them over and you say

1 yeah, we agree to that?

2 MR. REESE: I have not compared that. We have,
3 however, an agreement with reference to the Modification
4 Agreement stipulations. So, I cannot stipulate to any of
5 the flow charts.

6 THE COURT: I see,

7 MR. WEINER: Your Honor, in reviewing the documents
8 Mr. Reese tenders to the Court as representing the Modifica-
9 tion Agreement, the attached Schedule B, that does not con-
10 form with the Schedule B that we have.

11 THE COURT: Have you discussed it? Let's straight-
12 en this out. Do that first.

13 Off the record.

14 (Discussion off the record.)

15 THE COURT: May I ask you all to retire to the
16 hall with those papers and I'll start getting my people set
17 up for this verdict.

18 And when you come back, Mr. Reese, I want you to
19 tell me why you sue these individuals, unless it's over in
20 Count Two.

21 MR. REESE: It is, Your Honor.

22 MR. MAYS: It is.

23 THE COURT: I see. I'll quit worrying about that.

1 (A short recess was taken.)

2 THE COURT: All right. Did you resolve the pro-
3 blem in the Exhibit?

4 MR. REESE: Actually, if Your Honor please, I
5 think we have agreed to disagree, but by way of agreement to
6 disagree, Plaintiff's Number One, the Construction Agreement,
7 would come in. Plaintiff's Number Two, the Modification
8 Agreement, would come in with the attachment of what
9 Defendant says Schedule B is as opposed to what our Schedule
10 B is; and it has been so marked and isolated and we would
11 simply offer as, I guess, a joint Exhibit both of these.

12 THE COURT: Then that will be Two A.

13 MR. REESE: Two A.

14 Is that correct?

15 MR. WEINER: Yeah.

16 THE COURT: That's subject to proof.

17 Is that this new page?

18 MR. WEINER: Your Honor, that is the Schedule B
19 that we have that we claim is the correct one.

20 THE COURT: I thought you were saying -- oh, it's
21 B, not D?

22 MR. WEINER: B, as in boy.

23 THE COURT: All right. That will be Plaintiff's

1 Two A for ID.

2 (The document referred to was
3 marked as Plaintiff's Exhibit
4 No. 2-A, for identification.)

5 THE COURT: All right. Anything else you stipu-
6 late in the Exhibits?

7 MR. REESE: I don't believe so, at this time, Your
8 Honor.

9 THE COURT: All right. First witness.

10 *

11 *

12 *

13 *

P R O C E E D I N G S

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THE COURT: All right. First witness.

MR. REESE: I would call Mr. McCarty.

Mr. McCarty, would you take the stand, sir?

Whereupon,

RICHARD EUGENE McCARTY,

a witness herein, was called as a witness by counsel for the Plaintiff, and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. REESE:

Q Mr. McCarty, if you would simply address your answers to His Honor.

Mr. McCarty, what is your full name, sir?

A Richard Eugene McCarty.

Q All right, sir. And with reference to JohnMark Construction, the Plaintiff in this case, what relationship do you have?

A I am President and majority stockholder.

Q All right, sir. Were you President and majority

1 stockholder of John Mark Construction Company when it
2 entered into the contracts with ADC for work at Heritage
3 Woods North and the Ivy Mount project?

4 A Yes, I was.

5 Q What kind of work did JohnMark do?

6 A Principally, it was rehabilitation of
7 apartments into condominiums; and this is the inside work
8 that we were doing. The cosmetic inside work within the
9 walls.

10 Q All right. Now, where was Heritage Woods or
11 the Heritage Woods project and the Ivy Mount project?

12 A They are located on Little River Turnpike,
13 just inside the Beltway in Annandale, I believe.

14 Q Now, how many units did you all work on at
15 Heritage Woods?

16 A At Heritage Woods, there were 212, I believe.

17 Q All right, sir. And at Ivy Mount?

18 A At Ivy Mount, there were -- did we work on or
19 were we --

20 Q How many did you contract to do at Ivy Mount?

21 A One hundred and seventy-one.

22 Q All right, sir. Now, let me ask you if you are
23 familiar with the following names and persons, and if you

1 would indicate to His Honor who these individuals are
2 so that we can get something like a program of names that
3 will be mentioned in this particular case.

4 A. Certainly.

5 Q. All right. John Sauer.

6 A. John Sauer was Vice President of JohnMark
7 Corporation and operating -- chief operating officer on
8 site.

9 Q. Wait a minute for His Honor to complete --

10 A. Yes, sir.

11 (Discussion off the record.)

12 THE COURT: All right. You are asking him to
13 list the people whose names are going to come up, is that
14 it?

15 MR. REESE: I'm asking him to -- I'm giving him
16 some names of the people who were involved in this
17 particular case, so as to give Your Honor --

18 THE COURT: Sower, S-O-W-E-R?

19 THE WITNESS: S-A-U-E-R, Your Honor.

20 THE COURT: S-A-U-E-R.

21 BY MR. REESE:

22 Q. A Gary Sturgill, S-T-U-R-G-I-L-L.

23 A. Gary Sturgill was a subcontractor to JohnMark

1. for plumbing.

2. Q The plumbing subcontractor?

3. A The plumbing subcontractor.

4. Q A Ray Purdy, P-U-R-D-Y.

5. A Ray Purdy was a -- we brought him along as a
6 supervisor later on in the Ivy Mount project.

7. Q Would that have been after the modification
8 agreement?

9. A That would have been just after the modification
10 agreement, yes, sir.

11. Q A Barry Mates, M-A-T-E-S.

12. A Barry Mates is an officer and owner, I think,
13 of B.T. Electrical, which was our electrical subcontractor.

14. Q All right. A Jean Sumney, S-U-M-N-E-Y; is
15 that correct?

16. A Sumney.

17. Q Sumney.

18. A S-U-M-M-E-Y.

19. Q All right.

20. THE COURT: What is his first name?

21. THE WITNESS: Jean. J-E-A-N, Your Honor.

22. THE COURT: A man?

23. THE WITNESS: No, woman, Your Honor.

1 THE COURT: Oh, woman. J-E-A-N, sure.

2 THE WITNESS: She was with us before as
3 secretary, then later on in the Heritage Woods project
4 she assumed the duty of on-site supervisor. And then
5 over to the Ivy Mount section, she was the on-site
6 supervisor to start with until we brought Ray Purdy in,
7 and then we made her the office manager.

8 BY MR. REESE:

9 Q A Carroll, C-A-R-R-O-L-L, a man, Macabee,
10 M-A-C-A-B-E-E.

11 A Carroll Macabee was our painting subcontractor.
12 Painting and drywall.

13 Q Okay. A Walter Quatmam, Q-U-A-T-M-A-N-N.

14 A Walter Quatmann was the ADC representative on
15 the Heritage Woods -- the last part of Heritage Woods
16 and the first part of the Ivy Mount project.

17 Q A Carroll, C-A-R-R-O-L-L, Cunningham,
18 C-U-N-N-I-N-G-H-A-M.

19 A Carroll Cunningham was, again, an employee of
20 ADC and was a project manager later on in the Ivy Mount
21 project.

22 Q A Tom Dillon?

23 A Tom Dillon --

1 THE COURT: Just a minute. No, stop. I don't
2 understand. Cunningham was an ADC employee, but you
3 said a project manager?

4 THE WITNESS: Yes.

5 THE COURT: For what project?

6 THE WITNESS: I'm not sure of the titles,
7 Your Honor, but he was on the -- late in the Ivy Mount
8 project.

9 THE COURT: Go back to Quatmann. What did he
10 do with ADC?

11 THE WITNESS: He was a project manager, also.

12 MR. MAYS: Your Honor, for the record, we would
13 object to this witness's conclusions as to the titles
14 of these ADC Fairways employees.

15 THE COURT: He said he doesn't know the titles.
16 He's describing what they do.

17 MR. MAYS: Well, he's calling them project
18 managers and construction coordinators, and those names
19 may have significance and this could only be his opinion
20 as to what their job was.

21 THE COURT: I'm listening to them as descriptive
22 words, not as job titles. That's what he says they just
23 did for them. That's all.

1 Okay. Any more?

2 BY MR. REESE:

3 Q A Tom Dillon; he's present here today.

4 A Tom Dillon, as far as I'm -- in our capacity,
5 he was Mr. Dillon's direct --

6 Q Mr. Daly?

7 A Pardon?

8 Q Mr. Dillon's or Mr. Daly's?

9 A Mr. Dillon was Mr. Daly's direct employee. In
10 other words, Mr. Dillon worked and reported directly to
11 Mr. Daly and he was overseer of all the projects.

12 Q And who was Mr. Daly? Tom Daly.

13 A Tom Daly, as far as I know, was owner and
14 President of Sparta Brooke Homes, ADC Fairways, residential
15 resources group --

16 Q You name it?

17 A You name it.

18 Q Okay. Mara Ernestsons, E-R-N-E-S-T-S-O-N-S.

19 A I don't know her job title or her description
20 or anything. All I know is that she came up and walked
21 units at the Ivy Mount project and a few at Heritage Woods.

22 Q And who did she report to?

23 A As far as I know, she reported to Tom Dillon.

1 That was every indication I had.

2 THE COURT: So, she worked for ADC?

3 THE WITNESS: She worked for ADC, yes, Your
4 Honor.

5 BY MR. REESE:

6 Q And finally, a Mr. Kische, K-I-S-C-H-E?

7 A Mr. Kische at the start was over all -- directly
8 over the Heritage Woods project, and that meant sales
9 and construction and so forth. And again, right on site,
10 direct supervisor.

11 He then went over to Ivy Mount project as the
12 same. I assume the same --

13 Q He was an employee of ADC?

14 A An employee of ADC.

15 Q All right, sir. Very good.

16 Now, on March 12, 1980, did JohnMark enter
17 into a contract for the rehabilitation of Ivy Mount?

18 A Yes, we did.

19 Q And is that Plaintiff's Exhibit Number One,
20 the construction agreement that has already been entered
21 into evidence?

22 Did you take a look at that?

23 A I didn't take a look at it.

1 THE COURT: That's what you offered.

2 BY MR. REESE:

3 Q All right. Now, was that based upon a scope
4 of work that JohnMark had been supplied by ADC?

5 A It was similar, but not the same.

6 Q All right, sir. Let me show you this document
7 and ask you if you recognize it.

8 A Yes, I recognize it.

9 Q All right. Would you explain to His Honor
10 what that document appears to be?

11 A This is the scope of work in which we were given
12 to bid the job with, and this is actually the instrument
13 we negotiated the contract price with.

14 Q All right. Now, I note some hand scribbling or
15 handwriting at the top.

16 A Yes.

17 Q Of this particular document.

18 Whose handwriting is that?

19 A That's Mr. Daly's handwriting.

20 Q Did he write this in your presence?

21 A Yes, he did.

22 Q All right, sir.

23 MR. WEINER: Your Honor, if this is the same.

1 writing that is part of the contract, it speaks for
2 itself. I don't know what this is being identified for.
3 It appears to be a --

4 THE COURT: It hasn't been offered yet.

5 MR. REESE: If Your Honor please, we would
6 offer it as the scope of work that was provided my client
7 which was the basis of the construction agreement.

8 THE COURT: You mean he bid the job before he
9 knew what the contract was going to be?

10 MR. REESE: He bid it on the basis of the
11 scope of work, if Your Honor please. That was proffered
12 by --

13 THE COURT: That's not part of the contract?

14 MR. WEINER: But, Your Honor, he entered into --

15 THE COURT: You mean he bid on one paper and
16 then you get a contract that's entirely different; is
17 that what they did?

18 MR. REESE: If Your Honor please, I will be more
19 than willing to go into --

20 THE COURT: No. Is that what they did?

21 MR. REESE: That's what ADC did.

22 THE COURT: All right.

23 MR. REESE: They gave him the scope of the work

1 and he agreed to that, and then they came in and said
2 sign this contract.

3 MR. WEINER: Well, Your Honor, I would object
4 to that, because there is a signed contract, and it
5 makes no difference what the negotiations were prior to
6 that execution of the contract. He reads the English
7 language; I think he does. He signed his name to it.

8 THE COURT: It will be marked for identification.
9 Let me have it to mark it.

10 THE WITNESS: He has it, Your Honor.

11 MR. REESE: I think Mr. Weiner has it.

12 THE COURT: Plaintiff's Exhibit Number Four
13 for I.D.

14 (The document referred to
15 was marked as Plaintiff's
16 Exhibit No. 4 for
17 identification.)

18 THE COURT: At this time, I sustain the
19 objection.

20 MR. REESE: I'm sorry, Your Honor?

21 THE COURT: At this time, I sustain the
22 objection because the contract would speak for the
23 relationship between the parties.

1 MR. REESE: All right.

2 THE COURT: But sometimes those papers become
3 admissible. If the contract is silent or ambiguous, then
4 the surrounding facts of the situations of the parties
5 may become relevant.

6 BY MR. REESE:

7 Q All right, sir. Now, sir, after entering into
8 the contract at Ivy Mount, did you then start work over
9 at the Ivy Mount project?

10 A Yes, we did.

11 Q And by the end of May 1980, how many units
12 had been accepted by ADC at -- well, let's start off with
13 Heritage Woods.

14 A Heritage Woods was 207 of 211.

15 Q All right.

16 MR. WEINER: Your Honor, apparently the witness
17 has documents in front of him, and I'd like to know what
18 he is reading from.

19 MR. REESE: You can certainly examine the
20 notes.

21 THE COURT: You may -- what are the notes?

22 MR. WEINER: What are the notes?

23 THE WITNESS: Just my notes.

1 MR. WEINER: Well, I don't think he's
2 permitted --

3 THE COURT: The instruction is that witnesses
4 are not allowed to use notes.

5 THE WITNESS: Oh.

6 THE COURT: Unless they can't remember an
7 answer, then the use of the notes depends what happens
8 after that. So, do what you can from memory first.

9 THE WITNESS: Okay.

10 BY MR. REESE:

11 Q You say 207 units were accepted at Heritage
12 Woods?

13 A That's correct.

14 Q Out of 211 by the end of May?

15 A Correct.

16 Q All right.

17 THE COURT: Is this in dispute?

18 MR. REESE: I don't know if it's in dispute or
19 not, Your Honor.

20 MR. MAYS: Your Honor, I think we can agree --
21 well, Your Honor, our position is that all Heritage Woods
22 units were paid for and therefore what happened in
23 Heritage Woods is really not an issue, as far as we're.

1 concerned.

2 THE COURT: All right. Go ahead.

3 BY MR. REESE:

4 Q Now, at Ivy Mount, by the end of May 1980, how
5 many units had been accepted?

6 A According to my recollection, 14.

7 Q All right, sir. Now, do those figures that you
8 have just given us concur with this note dated May 28th,
9 1980, which was obtained from the Defendant in accordance
10 with our Motion to Produce. And let me just show you
11 this document.

12 MR. MAYS: Your Honor, we object to that
13 document.

14 THE COURT: Well, I don't know what it is and
15 it hasn't been offered, so just sit tight.

16 THE WITNESS: Yes, sir.

17 BY MR. REESE:

18 Q And how was this document obtained?

19 A It was offered to us as -- their lawyer's
20 office as things that we could look over and make copies
21 of.

22 THE COURT: What is the paper?

23 THE WITNESS: The paper is a letter from

1 Sparta Brooke Homes, which is one of the names, Your
2 Honor, of ADC Fairways, and so forth.

3 THE COURT: A letter from them to whom?

4 THE WITNESS: To their lawyer, Sandy Weissbard
5 at the time.

6 THE COURT: All right. And you offer it for
7 what purpose?

8 MR. REESE: If Your Honor please, I offer it
9 as, number one, it was the subject of a Motion to Produce,
10 and this document was produced by the Defendant out of
11 its own records.

12 Number two, I offer it as corroborating evidence
13 of the units that had been accepted at Heritage Woods
14 and had been accepted at Ivy Mount as of the date of that
15 note.

16 It's showing as a statement against interest
17 at this particular point that the Defendant admitted to
18 have accepted 207 out of 211, and 14 units -- that's at
19 Heritage Woods; and 14 units at Ivy Mount as of the date
20 of that note, May 28, 1980, coming directly from the
21 Defendant's own files and records.

22 MR. WEINER: Your Honor, the fact that something
23 may be discoverable does not in and of itself make it

1 admission. It could have been the handiwork of someone
2 who had no right to admit.

3 MR. REESE: But if Your Honor please --

4 THE COURT: Now, what was the production demand?
5 How was that couched as regards to this document?

6 MR. REESE: It was couched in terms of all
7 documents reflecting amounts of monies that are owed to
8 my client and amounts that have been paid by their client.

9 THE COURT: At this point, the objection is
10 sustained. It's marked Five for I.D.

11 MR. REESE: Thank you.

12 (The document, Letter dated
13 5/28/80, was marked as
14 Plaintiff's Exhibit No. 5 for
15 identification.)

16 BY MR. REESE:

17 Q Coming forward, sir, by June 18, 1980, how
18 many units had been accepted by ADC at Ivy Mount?

19 A I believe at that time there were about 19.

20 Q Nineteen units?

21 A (Nodding head, indicating in the affirmative.)

22 Q On June 18, 1980, did JohnMark and Ivy Mount
23 enter into a modification agreement?

1 A Yes, we did.

2 Q And that's the one that has been introduced
3 into evidence here today?

4 A I didn't see it, but --

5 Q Well, it's been so stipulated.

6 Let me draw your attention to a couple of
7 provisions in that particular agreement that may need
8 some explanation.

9 Let me show you the agreement, sir.

10 A Uh-huh.

11 Q And ask you to turn to the filing provisions.
12 Now, the agreement on the first page cites that it deals
13 with 40 units at Heritage Woods North. How is that
14 particular figure -- you have indicated that there were
15 a lot more than 40 units that had been completed at
16 Heritage Woods. How was that figure arrived at?

17 A Well, it was very difficult for us because --

18 MR. WEINER: Your Honor, I think this document
19 speaks for itself. I mean, it says 40 units at Heritage
20 Woods, and now he's asking how is it derived.

21 THE COURT: I don't know enough about the
22 document to get the feel for it.

23 MR. REESE: It doesn't, if Your Honor please.

1 THE COURT: Do you remember?

2 THE WITNESS: I think -- I don't know how it
3 is in this context here.

4 You're talking about the first page here?

5 MR. REESE: Yes.

6 THE WITNESS: (Pause.)

7 BY MR. REESE:

8 Q Well, perhaps it's page two, paragraph five.
9 Reconciliation of prior billings and advances. I'm sorry.

10 A Oh, okay. Okay. Like I say, it was -- I
11 started to say, Your Honor, it was very difficult for us
12 to find out what units were paid for and what units
13 were not, because --

14 THE COURT: No, that isn't the question. The
15 question is how did the number 40 get to go into that
16 paragraph?

17 THE WITNESS: These are the number of units
18 we calculated were -- had not been paid for at the time.

19 BY MR. REESE:

20 Q All right. Now, I note that there is no
21 reference to the number of Ivy Mount units within that
22 statement.

23 A Correct.

1 Q Now, how many units at Ivy Mount had been
2 completed but unpaid for as of that date?

3 A As I stated, approximately 19.

4 Q All right. And they had been accepted by whom?

5 A By Mr. Quatmann and Mr. Kische.

6 Q Okay. Now, I note that there is also --

7 THE COURT: Now, just a minute. The 40 units
8 were in what project?

9 THE WITNESS: Heritage Woods, Your Honor.
10 Heritage Woods North.

11 THE COURT: Nineteen, is Ivy Mount?

12 THE WITNESS: Yes.

13 BY MR. REESE:

14 Q I note, I believe it's on the next page where
15 it has deals with material selections. Drawing your
16 attention to the paragraph having to do with material
17 selections.

18 A I'm sorry?

19 MR. MAYS: What material?

20 MR. REESE: I'm sorry. It's page one,
21 paragraph two. Material selections.

22 THE WITNESS: Oh, yes.
23

1 BY MR. REESE:

2 Q Sir, now that refers to a schedule, does it
3 not?

4 A Yes, it does.

5 Q All right. Would you turn over to that
6 schedule.

7 A Yes. I have it.

8 Q Now, on that schedule there are references to
9 cove moldings and kitchen lights; is that correct?

10 A That is correct.

11 MR. WEINER: Your Honor, this is the schedule
12 B that we have differences about. There are two schedule
13 Bs that have been submitted.

14 MR.. REESE: Sure.

15 THE COURT: Well, schedule B, I don't think is
16 even in front --

17 MR. REESE: I don't think really that Mr. Weiner
18 will have any difficulty with my questions along this line.

19 THE COURT: Well, continue with your question.

20 MR. REESE: Thank you.

21 BY MR. REESE:

22 Q Now, with reference to the cove molding -- well,
23 let's just take them both, the cove molding and the kitchen

1 lights. Why was that made a subject of a modification
2 agreement that was entered into some three months after
3 the original contract?

4 A Because the original lights and so forth were
5 not available, so we had to get other lights. They asked
6 us to bring in different lights and they insisted we put
7 them up so that they could take a look at them to see
8 whether they liked them or not. We did this. We would
9 bring certain lights in, we would put them up. Some of
10 them -- some of the people, Mr. Kische, would like it, but
11 Mr. Adashek would not --

12 MR. WEINER: Your Honor --

13 THE COURT: He's given you an answer, because
14 the originals weren't available.

15 All right. Next question.

16 BY MR. REESE:

17 Q All right. Now, on the cove molding, why was
18 that on this material selection situation?

19 A Because they told us to put in white cove
20 molding and then later changed to beige cove molding.

21 Q All right, sir. Had you had, prior to June 18,
22 1980, any statement from ADC reflecting an agreement on
23 kitchen lights and agreement on cove molding?

1 A No.

2 Q Now, I also note a reference in the agreement
3 to back charges for Heritage Woods. I believe that's
4 on page two of the agreement, paragraph four, if you will
5 turn to that.

6 A Four, okay.

7 Q All right, sir. Now, prior to -- now, that
8 particular paragraph says that they are to provide you
9 the figures of back charges based on invoices or other
10 reasonable evidence of payment. That's what this language
11 is, isn't it?

12 A Correct.

13 Q All right. Prior to January of this year,
14 January of 1981, had ADC given you any such invoices or
15 other evidence of payment?

16 A None whatsoever.

17 Q All right, sir. Now, let's go, if we can,
18 back to that paragraph on prior billings. Have you got
19 that? The reconciliation of prior billings?

20 A (Pause.)

21 Q I believe it's on page two in the middle of the
22 agreement. Page two, paragraph five.

23 A Okay.

1 December of 1980.

2 THE COURT: Yeah. Yeah.

3 MR. MAYS: And there's been no amendment, and
4 we are not on notice --

5 THE COURT: Yeah. I sustain the objection.
6 The objection is sustained.

7 MR. REESE: Note our exception, Your Honor.

8 THE COURT: Yes.

9 (Discussion off the record)

10 THE COURT: All right. We resume.

11 BY MR. REESE:

12 Q Mr. McCarty, directing your attention once
13 again to the Modification Agreement. Now, that Modification
14 Agreement refers to a Schedule C.

15 Now, sir, were you the one who prepared
16 Schedule C?

17 A Yes, I was.

18 Q All right, sir.

19 Now, do you have the Modification Agreement
20 before you right now?

21 A No. The judge has it.

22 Q Would you be kind enough to find that Schedule C
23 in here and point it out to the Court.

1 A This is Schedule C, Your Honor.

2 Q Now, is that your handwriting, sir?

3 A Yes, it is.

4 Q Was that reduced to typewriting, then -- it was
5 just in your handwriting?

6 A Yes, sir.

7 Q Okay, sir.

8 Now, sir, you were asked under Schedule C to
9 prepare a list of all creditors over \$1,000 that existed
10 as of May 10, 1980; is that correct?

11 A That's correct.

12 Q All right.

13 It has been alleged in the defendant's Pleadings
14 that you did not list Sears with reference to being owed
15 more than \$1,000.

16 All right. Was Sears owed as of May 10, 1980,
17 more than \$1,000?

18 A Yes, they were.

19 Q All right.

20 And they did not appear on that list; is that
21 correct?

22 A Not on this list, no.

23 Q All right, sir.

1 Now, when you received monies from Real Title,
2 what did you do with reference to the Sears debt?

3 A I immediately got a cashier's check of which
4 I have a copy with me.

5 Q Have you brought the check?

6 A I made a copy of the cashier's check.

7 Q And how much was that check for?

8 THE COURT: Are you saying you paid?

9 THE WITNESS: Yes, Your Honor; uh-huh.

10 THE COURT: Okay.

11 BY MR. REESE:

12 Q All right, sir.

13 Now, sir, it has been alleged that you owed, on
14 May 10, 1980, a sum in excess of \$1,000 to a Carroll
15 Macabee. Now, you've indicated he was your painting
16 contractor; is that correct?

17 A That's correct.

18 Q All right.

19 When did you receive a bill from Carroll
20 Macabee?

21 A On the 23rd of May.

22 Q All right, sir.

23 Now, it has also been alleged that you owed in

1 excess of \$1,000 to a Saint Claire Appliances.

2 A Correct.

3 THE COURT: To whom?

4 MR. REESE: Saint Claire Appliances.

5 BY MR. REESE:

6 Q Now, as of May 10, 1980, were there any checks
7 outstanding to Saint Claire Appliances?

8 A Yes. There was a \$9800 check outstanding to
9 Saint Claire.

10 Q All right.

11 And would that have wiped the account out as
12 far as Saint Claire was concerned?

13 A Yes, it would have.

14 Q And if you had been paid by ADC --

15 MR. WEINER: I object, Your Honor.

16 THE COURT: Okay. Let me hear the question.

17 Don't answer until I rule, sir.

18 MR. REESE: I was about to say if --

19 THE COURT: Start over. Start the question
20 over.

21 BY MR. REESE:

22 Q And if you had been paid by ADC, would that
23 check have been good?

1 MR. REESE: That was my question, Your Honor.

2 THE COURT: I lost the first part of the
3 question.

4 MR. REESE: That was all the question.

5 The first part of the question was, Was there
6 a check --

7 THE COURT: If he had been paid by ADC, would --

8 MR. REESE: Yes. Would the check to -- He said
9 that they had a check outstanding for \$9,000 to Saint
10 Claire Appliances. And the next question is, If they had
11 been paid, "they" meaning JohnMark had been paid by ADC
12 the monies owed them, would that check have been good.

13 THE COURT: Oh. He had a bad check outstanding;
14 is that what you're saying?

15 MR. REESE: Yes.

16 THE COURT: I didn't catch that.

17 MR. REESE: Yes.

18 THE COURT: And therefore if the plaintiff --

19 MR. REESE: Whether or not there was a check
20 outstanding to Saint Claire Appliances, he's already said
21 there was.

22 THE COURT: Well, "outstanding" just means --

23 MR. WEINER: And cleared.

1 THE COURT: -- you delivered it to somebody
2 and they haven't cashed it yet. But it doesn't suggest
3 that it is a bad check.

4 MR. REESE: I understand that.

5 THE COURT: So what you're trying to develop
6 is he gave them a bad check, he did list them, but if he
7 had been paid, he wouldn't have had to list them because
8 then he would have made the check good. Is that it?

9 MR. REESE: You've got it.

10 MR. MAYS: No. They weren't listed. They were
11 not listed, Your Honor.

12 THE COURT: I understand that. That isn't
13 what he's developing.

14 MR. WEINER: Well, we object to what he's
15 developing.

16 THE COURT: Well, he can develop apples -- you
17 can complain of oranges and he can develop apples if he
18 wants to. That's all right.

19 MR. WEINER: But, Your Honor --

20 THE COURT: It's his case.

21 Next question.

22 MR. WEINER: Are you allowing the --

23 THE COURT: The answer's in.

1 MR. WEINER: But the check bounced.

2 THE COURT: The man said if somebody paid me
3 some money, then I would have been able to pay Saint Claire
4 Appliances; but Saint Claire Appliances was not paid. He
5 agrees with you, implicitly, and you're complaining.

6 Next question. Come on. We've got to get this
7 case over in two days.

8 BY MR. REESE:

9 Q All right.

10 Now, it has also been alleged, sir, that you
11 owed -- was it D. C. Supply?

12 A District Supply.

13 Q District Supply, over \$1,000 on May 10, 1980.

14 A Yes, sir.

15 Q All right.

16 Do your invoices reveal that on that date, you
17 did in fact owe over \$1,000

18 A No. My invoices reflect that as of that date,
19 we owed him \$890.29.

20 Q All right.

21 Now, sir, did you later ascertain, after May 10,
22 1980, that there were one, perhaps two, creditors that you
23 did in fact owe more than \$1,000 to?

1 A Yes.

2 Q All right.

3 And which creditors would these have been?

4 A I believe it was General Electric and Laurel
5 Building Supply.

6 Q And these are the only two?

7 A That I can --

8 THE COURT: What is the significance of this
9 over a thousand dollars?

10 MR. REESE: I really don't know, Your Honor.

11 MR. MAYES: It's in the Modification Agreement.

12 MR. WEINER: Your Honor, the Modification
13 Agreement states that the contractor, JohnMark, is to list
14 in a Schedule C any and all suppliers or subcontractors
15 owed in excess of \$1,000.

16 THE COURT: All right. The contract sets the
17 standard. All right.

18 MR. REESE: Why that was significant, I don't
19 know; but that was the standard, yes.

20 BY MR. REESE:

21 Q All right.

22 Now, let's turn, if we can, then, sir, to the
23 delivery schedule. Do you have the Modification Agreement

1 before you?

2 A No, I don't.

3 THE COURT: I have it. Do you want to look at
4 it?

5 MR. REESE: Your Honor, I can simply just give
6 him a copy and Your Honor can use the original up there
7 to go over with.

8 THE COURT: All right.

9 I find generally trying cases, it's easier to
10 comprehend evidence if you don't defend against an attack
11 until the other party has actually made it.

12 MR. REESE: I understand.

13 THE COURT: It's a matter of my ability to absorb
14 the evidence. Or inability, sometimes.

15 MR. WEINER: Thank you, Your Honor.

16 MR. REESE: I understand.

17 BY MR. REESE:

18 Q Okay. Now, let's turn, if we can, to the
19 delivery schedule.

20 (Pause)

21 Have you turned to that?

22 A The delivery schedule?

23 THE COURT: Page 3. Item 7.

BY MR. REESE:

Q The delivery schedule. That would be Item 7 on Page 3.

A Okay.

Q All right, sir.

Now, the delivery schedule recites that -- the contract recites that you were to deliver two fire job units at Heritage Woods and also 19 units at Ivy Mount that were to be redone, partially.

A Correct.

Q When did you turn over to ADC the fire job units?

A I believe it was the 26th of June.

Q Of June. All right.

1980?

A 1980.

Q All right.

And were those units walked by representatives of ADC?

A Yes, they were.

Q And who would that representative have been?

A I believe it was Carol Cunningham at the time.

Q And was ADC invoiced for the total bill on that?

A Yes, they were.

1 Q And to this date, does ADC still owe \$1331, and
2 some odd cents? By stipulation, really, they do.

3 A (Affirmative gesture)

4 Q All right.

5 Let's turn to the 19 units, then, at Ivy Mount
6 that were to be somewhat redone.

7 A Correct.

8 Q When were those units turned over to ADC?

9 A I believe the 26th of June, also.

10 Q All right.

11 And to which representative of ADC were they
12 turned over?

13 A Mara Ernestsons walked them.

14 Q All right, sir.

15 A Mr. Kische -- or, no, I'm sorry. Those were
16 walked by Walter Quatmann and --

17 Q No. I'm dealing with on the 26th of June now,
18 not -- the previous walks that were done, you have indicated
19 him.

20 A Okay.

21 Q On June 26, 1980 --

22 A Uh-huh.

23 Q All right.

1 THE COURT: Who accepted them?

2 BY MR. REESE:

3 Q Who accepted the units?

4 A Mara Ernestsons.

5 Q All right.

6 And did you have a conversation with Tom Dillon
7 about those units?

8 A Those on the 26th of June?

9 Q Yes.

10 A Did I have a conversation with him at the time?
11 Yes.

12 Q All right, sir.

13 And did it concern those particular 19 units?

14 A These 19 units that we're talking about, I
15 think we're talking about the call-backs on them, are we
16 not? Is that what you're referring to, Mr. Reese?

17 THE COURT: How much money do you claim you're
18 owed in connection with these 19 units?

19 THE WITNESS: I claim \$87,700 and some dollars,
20 Your Honor.

21 THE COURT: And why? Isn't that really what
22 we're coming to?

23 MR. REESE: Well, perhaps, Your Honor. I think

1 you may be jumping ahead just slightly.

2 THE COURT: All right. Go ahead, then.

3 BY MR. REESE:

4 Q These 19 units at Ivy Mount that were to be
5 redone, were they a subject of the Modification Agreement?

6 A Yes, they were.

7 Q And the monies paid under the Modification
8 Agreement were paid in part for those 19 units?

9 A Correct.

10 Q All right.

11 Now, you then turned these units over again to
12 ADC on June 26, 1980?

13 A Correct.

14 Q And were they accepted?

15 A Mr. Dillon said yeah, they're fine. They're
16 okay.

17 Q Okay. All right, sir.

18 THE COURT: Who is Mr. Hillon?

19 THE WITNESS: Mr. Dillon is --

20 THE COURT: Oh, Dillon.

21 THE WITNESS: Dillon, uh-huh.

22 THE COURT: Accepted the units on when?

23 THE WITNESS: The 26th of June.

1 THE COURT: That's three days before Ernestsons
2 walked them; is that correct?

3 THE WITNESS: Well, I'm a little confused right
4 here, because the 19 units were call-backs and they were
5 accepted before.

6 THE COURT: You mean by call-back, there was a
7 complaint? The work wasn't properly done?

8 THE WITNESS: Yes, Your Honor.

9 THE COURT: All right.

10 MR. REESE: The units had, in fact, been accepted
11 before.

12 THE COURT: Let's go back to my question. You
13 say Mr. Dillon accepted them on the 26th, but it was the
14 29th when they were "walked" by Mara Ernestsons?

15 THE WITNESS: I believe on the 26th in both
16 cases, was it not?

17 MR. REESE: You're the witness, sir.

18 THE WITNESS: To the best of my recollection,
19 Your Honor.

20 THE COURT: All right.

21 BY MR. REESE:

22 Q All right.

23 Now, turning your attention, if we can, to

1 Unit 4355 -- that's the building number; 4355 is a building
2 number, is it not?

3 A Yes.

4 Q But Unit No. 33, was that also presented on
5 June 26?

6 A Yes, it was.

7 Q All right.

8 Was it accepted by a representative of ADC on
9 that date?

10 A It was accepted by one representative. It wasn't
11 accepted by another.

12 Q Okay.

13 And who didn't accept it?

14 A Mr. Dillon.

15 Q And did he indicate to you why?

16 A Yes; because it didn't have cove molding and
17 kitchen lights.

18 Q All right, sir.

19 THE COURT: You said he accepted or rejected?

20 THE WITNESS: Rejected, Your Honor.

21 THE COURT: Rejected. Okay. For cove and light.

22 All right.

23 What kind of a light are you talking about, and

1 where?

2 THE WITNESS: We're talking about the kitchen
3 light, Your Honor, which is in the kitchen by the stove
4 and sink.

5 THE COURT: A ceiling light?

6 THE WITNESS: Yes, Your Honor. Florescent
7 fixture.

8 BY MR. REESE:

9 Q All right, sir.

10 Now, the cove molding that you're talking about
11 and the kitchen light that you're talking about --

12 THE COURT: Let me ask this: Again, I don't
13 want you to defend eleven units before they have made their
14 complaint.

15 MR. REESE: I understand.

16 THE COURT: All right. Because it sounds like
17 that's exactly what you started into.

18 All right.

19 BY MR. REESE:

20 Q All right.

21 The cove molding and the kitchen light, was
22 that the subject of the Modification Agreement, also?

23 A That was the subject -- a subject of the

1 Modification Agreement, yes.

2 Q And had you ordered the kitchen lights?

3 A We ordered them after they were approved on
4 the Modification Agreement.

5 Q Sure.

6 All right, sir. Now let's come forward, if we
7 can, to July 3, 1980.

8 A Yes, sir.

9 Q Now, under the Modification Agreement, you were
10 to present seven units on that date?

11 A Correct.

12 Q All right, sir.

13 Did you in fact present any units on that day?

14 A No.

15 Q All right.

16 And would you give us the reason why.

17 A Well, the reason was that early in the morning
18 there were a lot of people from ADC around the project.
19 Mara Ernestson, Mr. Dick Adashek, and Mr. Dillon were all
20 up inspecting the project, wanting to know how the project
21 was coming. Someone -- One of them or all of them decided
22 that we were not going to have them finished by noon, which
23 was the time you formally present them according to the

1 Modification Agreement.

2 Therefore, Mr. Dillon called me and said, "I
3 don't think you're going to have them ready."

4 I said, "Listen, they're almost ready and I
5 would like you to come up and inspect them and walk them
6 with me and I'll show you that they're almost ready," and
7 he agreed.

8 He came up. We walked them, and he looked
9 around and he said, "Well, they're almost complete. It
10 will only take you a couple hours to do the punchout items
11 that are left to be done."

12 And I said, "That's correct."

13 He said, "Well, I will go and call Mr. Daly
14 and tell him as much."

15 He came back out of the office from presumably
16 talking to Mr. Daly --

17 MR. WEINER: Object to that, Your Honor.

18 MR. REESE: I would ask that that be struck,
19 Your Honor.

20 THE COURT: All right.

21 BY MR. REESE:

22 Q Did he leave your office and then come back to
23 your office?

1 A Yeah. I actually went down to his office with
2 him. I went down to his office with him and he went into
3 the other office.

4 He came back out and said that because the units
5 were not 100 percent complete except for the cove molding
6 and the lights, that Mr. Daly wanted us off the job.

7 Q All right.

8 And did you then, on that instruction, leave
9 the job?

10 A On that instruction, we left the job.

11 We actually didn't leave; we were still there,
12 but we had discontinued work.

13 Q Sure.

14 Now let's deal, if we can, with a definition
15 here. You said a punchlist. Would you tell His Honor what
16 a punchlist is.

17 A A punchlist is a list of small touchup items
18 like a little touchup paint here, a little touchup paint
19 there, small items that can be corrected almost as you walk
20 the unit. A little dirt on the window that you have to
21 wash the window; a little dirt on the bathtub you clean
22 off. Just little items that can be corrected very easily.

23 Q Sure. All right.

1 Now, did you then ask of Mr. Dillon whether or
2 not you all were going to be paid for the fire job?

3 A Yes, I did.

4 Q And what was his reply?

5 A Well, first of all, I said, "Well, that's fine;
6 we're off the job." I said, "Fine. Are we going to get
7 paid?"

8 And he said, "No way."

9 I asked him about the fire job; they accepted
10 that. And he said no, we were not --

11 Q All right, sir.

12 A -- going to get -- and I cannot use the words.

13 Q I understand.

14 Now, sir, did there come a time thereafter when
15 you obtained certain documents from Brothers and Justice
16 and Branch Electrical Supply Company?

17 A Yes, I did. At that time, I felt it imperative
18 that I get the affidavit stating that we had ordered these
19 supplies and that they were not yet available to us.

20 Q Now, Mr. McCarty, I show you these documents
21 purporting to be statements by Marjorie Brothers and a
22 Robert Winstead and ask you if you obtained those statements.

23 A Yes, I did.

1 Q All right, sir.

2 MR. REESE: If Your Honor please, I would
3 move this into evidence.

4 THE COURT: Plaintiff's 6.

5 MR. REESE: Thank you.

6 THE COURT: Three pages attached.

7 MR. REESE: Actually, the first page can be
8 ripped off. It is simply for the identity of the exhibit
9 number.

10 THE COURT: All right. Two pages, then, dated
11 July 7, 1980, addressed To Whom it May Concern from Brothers
12 and Justice, Inc.

13 All right.

14 (Document referred to was
15 marked Plaintiff's Exhibit
16 No. 6 for Identification
and received in evidence)

17 BY MR. REESE:

18 Q All right, sir.

19 Now, sir, did there come a time when you
20 returned to the job at Ivy Mount?

21 A Yes.

22 Q All right.

23 And about when was that?

1 A That was approximately the 8th of June.

2 Q All right, sir.

3 Now, on July 9 --

4 A 8th of July. I'm sorry. 8th of July.

5 Q All right.

6 On July 9, 1980, did you present units to Mara
7 Ernestsons for her inspection and approval?

8 A We presented units and Mara walked them, yes,
9 sir.

10 Q All right.

11 And would that be the 11 units which are the
12 subject matter of this particular suit?

13 A Eleven units, correct.

14 Q All right, sir.

15 Were you present when Mara walked the units?

16 A Yes.

17 Q Give us what transpired during that walk.

18 THE COURT: Now, what units are these?

19 MR. REESE: Most certainly.

20 THE COURT: This is not the 19? This is another
21 group that you're talking about now?

22 THE WITNESS: That is correct, Your Honor. It
23 is the following eleven.

1 THE COURT: Eleven out of the 40; is that it?

2 THE WITNESS: Making 30 in all, Your Honor --

3 BY MR. REESE:

4 Q Would it be these on the board, 21, 22, 23,
5 24, 25, 26, 27, 28, 32, 33, and 38?

6 A Correct.

7 Q All right, sir.

8 Now, when she walked those units with you, what
9 transpired?

10 A She was very picky with the units and was
11 actually looking for very small items to put on her walk
12 sheet. Even though we had our crew with us correcting
13 things as we went, she would still write them down on the
14 sheet.

15 Q All right, sir.

16 And did she give you a punchlist?

17 A Yes, she gave me -- that, in effect, was a
18 punchlist. Uh-huh.

19 Q Surely.

20 And what occurred after that particular walk?

21 A After that walk -- Let me get it straight here
22 and I'll --

23 Q Now, she's given you a punchlist of things that

1 she's found to be incorrect in the units?

2 A Right. Right.

3 Q What did you all do then?

4 A After that, we went through and corrected the
5 items.

6 Q Okay.

7 Now, with reference to the cove molding, were
8 you able to install that?

9 A We picked up the cove molding -- it was either
10 on the 10th or the 11th -- and we immediately installed it
11 the same day.

12 Q All right, sir.

13 And did you then re-present those units on
14 July 10 to Ms. Ernestsons for her approval?

15 A Yes, we did.

16 Q And, once again dealing with 21 through 28,
17 plus 32, 33, and 38, what did she indicate to you?

18 A She okayed them. She said they were fine.

19 Q All right.

20 And did you ask her to sign off on them?

21 A I asked her to sign off on them and she said
22 she couldn't; that she had to take them to Mr. Dillon,
23 Mr. Dillon was the only one who could sign off on them.

1 Q All right, sir.

2 And did you hear from Mr. Dillon on that day,
3 then?

4 A No, not at all.

5 Q Now, I note under the Modification Agreement
6 that units were to be presented and then they had until
7 the close of work on the Friday to advise you as to
8 whether or not those units were to be accepted; is that
9 correct?

10 A Correct.

11 Q And if they did not advise you, they were
12 deemed to be accepted?

13 A Under the Modification Agreement, they were
14 accepted and could be paid for the following Friday.

15 Q All right, sir.

16 And you didn't hear anything from them, then --

17 A I did not.

18 Q -- that Friday?

19 A I did not.

20 Q All right.

21 And what did you assume at that point, then?

22 A I assumed that they were fine; that they would
23 be signed off; they would be sending us a copy back; and

1 that everything was fine; we would be paid the following
2 Friday.

3 Q All right, sir.

4 Now, did you in fact -- you and your crew --
5 come back on the job then the next Monday and start work
6 again?

7 A We were back on the job.

8 Q And did there come a time, oh, about the
9 middle of that week, when you received a letter from
10 Mr. Dillon?

11 A About in the middle of the week, we received
12 a letter backdated to the 11th, that all of these units
13 were rejected.

14 Q All right.

15 Now I show you this letter dated July 11, 1980,
16 but received by you, as you indicated, in the middle of the
17 next week, and ask you if that is the letter that you
18 received signed by Mr. Dillon.

19 A Yes, it is.

20 MR. WEINER: (Pause) No objection.

21 MR. REESE: If Your Honor please, move that
22 into evidence.

23 THE COURT: All right. Plaintiff's 7; letter,

1 July 11, 1980, Dillon to McCarty.

2 Let's pause while I read it.

3 (Pause)

4 All right.

5 (Document referred to was
6 marked Plaintiff's Exhibit
7 No. 7 for Identification
8 and received in evidence)

9 BY MR. REESE:

10 Q Now, Mr. McCarty, I note in that letter it says
11 that you and Mara agreed that the units were not ready.
12 Is that true?

13 A No, that is not true.

14 Q Now, sir, did you then receive a letter there-
15 after from Mr. Dillon authorizing a certain type of cove
16 molding?

17 A Yes.

18 Q I show you this letter dated July 16, 1980,
19 and ask you if you received that letter.

20 A Yes, I did.

21 MR. REESE: All right, sir.

22 If Your Honor please, move that into evidence.

23 THE COURT: Plaintiff's 8; letter, Dillon to
JohnMark Construction, July 16, 1980.

1 certain of the units?

2 A Yes, I did.

3 Q And did you yourself walk some of the units?

4 A Some of them, yes, sir.

5 Q All right, sir.

6 And based upon your own observations and based
7 upon what Mr. Purdy came back and told you, did you compile
8 a list of the partially completed units and what had been
9 done in those units as well as under the contract, the pro-
10 rating of the amount that you would be due?

11 A Yes, I did.

12 Q All right.

13 Now, if I can --

14 BY MR. REESE: First, if Your Honor please, for
15 identification purposes, I would like to have this list
16 marked, if Your Honor please, for identification purposes
17 only.

18 (Document referred to was
19 marked Plaintiff's Exhibit
No. 10 for Identification)

20 THE COURT: Now, what do you say this is; 10
21 for I.D.

22 THE WITNESS: Oh, those are the partially
23 completed units. They were not --

1 THE COURT: You drew the list?

2 THE WITNESS: Yes. Yes, I do, Your Honor.

3 THE COURT: You did?

4 THE WITNESS: I did the list; my handwriting.

5 THE COURT: All right. Then it's plaintiff's
6 list of units partially done, claim made; and it's No. 23I.

7 MR. REESE: All right.

8 BY MR. REESE:

9 Q Now I show you these lists of partially completed
10 units wherein there had been a list of what work allegedly
11 had been completed, along with the dollar amount.

12 A Yes.

13 Q Do you recognize these lists?

14 A Yes, I do.

15 Q All right.

16 Who compiled these lists?

17 A I did.

18 Q And who put the dollar figures?

19 A I did.

20 Q And was that based upon a pro-rating of the
21 contract?

22 A That was based upon the pro-rating of the
23 contract.

1 THE COURT: What is the difference between that
2 list and this one, No. 10?

3 THE WITNESS: This is an itemized list, Your
4 Honor, of everything that was done in those units and their
5 dollar value.

6 THE COURT: In the same ones as 10?

7 THE WITNESS: Of the same units, yes, only it's
8 an expansion of that. That's exactly what was done, what
9 we say was done, and the dollar value of what we say was
10 done.

11 MR. REESE: All right, sir.

12 If Your Honor please, if we could take these
13 as a whole, it might be a little easier, I think. If you
14 could mark that for identification purposes at this time.

15 THE COURT: Where did these come from? Are
16 these the ones that he just finished talking about?

17 MR. REESE: That is correct.

18 THE COURT: All right. Then it's 11 for I.D.

19 MR. REESE: Yes, sir.

20 (Documents referred to were
21 marked Plaintiff's Exhibit
No. 11 for Identification)

22 BY MR. REESE:

23 Q Now, sir, if I could draw your attention to

1 these for the time being, I note, sir, that we have in
2 several instances for the following units: B-1 -- Well,
3 first, your B-1 and A-1 units, where were they located?

4 A They were on the level just below the floor,
5 the level as you walked in on the ground level from the
6 front.

7 Q All right, sir.

8 And what building did these go to?

9 A These were Building 4355.

10 Q All right.

11 Now, all these other units we've been talking
12 about over here are also 4355?

13 A Yes.

14 Q Is that correct?

15 So these were the basement level units; is that
16 correct?

17 A Yes. Yes.

18 Q All right, sir.

19 Now, I also note in here, in addition to the
20 B-1 through 4 and A-5 through 10, that we have a unit 31.

21 A Yes.

22 Q Now, was that also in building 4355?

23 A Yes, it was.

1 Q All right.

2 And I then note that we have a different
3 building or different buildings at 4345 and 4360 for work
4 that had been done in these particular buildings; is that
5 correct?

6 A That is correct.

7 Q All right.

8 I also note that you had put a dollar amount
9 for each and every one of these services performed in those
10 units, also.

11 A That is correct.

12 Q Is that correct?

13 A Uh-huh.

14 Q All right, sir.

15 Now, the total of the partial work indicated on
16 these sheets is how much, sir?

17 A May I refer?

18 Q Have you totaled it?

19 A Huh?

20 Q Have you totaled it?

21 A Yes, I have. I have a summary sheet.

22 Q All right. What is that total, then, sir?

23 A The total is \$26,022.99.

1 Q All right, sir.

2 And that's represented by these units?

3 A Partially completed, yes.

4 Q All right.

5 Now, the units that you have noted in there,
6 other than A and B units, the building units; all right,
7 sir, the work that you have reflected on those particular
8 units, was that work done of your own knowledge?

9 A Yes, sir.

10 Q All right, sir.

11 It's only in the A and B units that you received
12 some reports back from Mr. Purdy; is that correct?

13 A Yes, correct.

14 MR. REESE: All right, sir.

15 Your Honor, please, for the purposes at this
16 time of the building units, and I believe they've already
17 admitted in their Interrogatories as to those units, as
18 to the building units themselves, we would ask that the
19 document be admitted, that portion of the document be
20 admitted into evidence.

21 With reference to the A and B units which are
22 the basement units of 4355, we will not move the admission
23 at this time but we will wait until Mr. Purdy testifies.

1 THE COURT: I'm confused. This man did the
2 work, he walked the job. Can't he tell me what he did all
3 at once and just say, "I did it and I claim so-much,
4 whether they agree with me or not"?

5 MR. REESE: All right, sir.

6 THE COURT: I have the impression you only
7 want to introduce those things that your opponents agree to.

8 MR. REESE: No, Your Honor.

9 THE COURT: At this stage.

10 Everything on these sheets totals to the 26,000?

11 THE WITNESS: Yes, Your Honor.

12 THE COURT: And you claim that amount of money?

13 THE WITNESS: Yes, Your Honor.

14 THE COURT: And you say the work was properly
15 done?

16 THE WITNESS: Yes, Your Honor.

17 THE COURT: Then why not wait for your opponent
18 now to tear it down?

19 MR. REESE: Well, then, I will move it into
20 evidence, if Your Honor please.

21 THE COURT: All right. That's his detail of his
22 testimony, really. Rather than have him say every little
23 thing, and give every little dollar figure, it's just a

1 form of testimony. So I will do that.

2 MR. REESE: All right.

3 MR. MAYS: Your Honor, please note our objection
4 to the units which Mr. Purdy walked and not Mr. McCarty
5 and the information that was reported to Mr. McCarty from
6 another.

7 THE COURT: But Purdy worked for the other side
8 so it wouldn't make any difference.

9 MR. MAYS: No, he works for JohnMark.

10 THE COURT: He says he did the work and he
11 looked it over and he -- Well, I was given this, that Purdy
12 was supervisor of I.M. after the Modification. That's for
13 ADC.

14 THE WITNESS: No.

15 THE COURT: Well then you've thrown me.

16 MR. REESE: He works for us, if Your Honor
17 please. Mr. Purdy works for us.

18 THE COURT: Well then we better change it.
19 He's a supervisor for --

20 MR. REESE: JohnMark.

21 THE WITNESS: JohnMark.

22 THE COURT: -- JM. That didn't come out.

23 Are you saying you did not know the truth of

part of this exhibit? Is that what you're really saying?

THE WITNESS: Well, I'm saying that I asked my supervisor to walk and report to me what was done.

THE COURT: Did he do that in the course of business?

THE WITNESS: He did this in -- this is in the course --

THE COURT: Are these figures his figures or yours, as to the person who put them on the piece of paper?

THE WITNESS: I did, sir.

THE COURT: You put them all down?

THE WITNESS: Yes.

THE COURT: Where did you get the papers that he reported to?

THE WITNESS: Well, we have a walk list.

THE COURT: From his walk list, then?

THE WITNESS: Yes.

THE COURT: All right.

Don't they come in under the shop book rule?

MR. REESE: If Your Honor please --

THE COURT: The boss says, "Employee, work it up for me," and then the boss says, "Here's the grand total; some I note myself, the other I note from employees who are

1 under my direction and control who make the records in the
2 ordinary course of business."

3 MR. WEINER: Correct --

4 MR. REESE: It may go to the weight of the
5 situation, really, more than anything else.

6 MR. WEINER: But, Your Honor, he is unable to
7 provide the sheets that Mr. Purdy supposedly gave him.

8 MR. REESE: No, that's incorrect, if Your Honor
9 please. Mr. Purdy --

10 THE COURT: Well, that comes in cross. I
11 receive it in toto.

12 MR. REESE: Thank you, Your Honor.

13 MR. WEINER: Please note our objection, Your
14 Honor.

15 THE COURT: Okay.

16 (Document previously identified
17 as Plaintiff's Exhibit No. 11
was received in evidence)

18 BY MR. REESE:

19 Q All right, sir. Following this particular
20 list, did you then also -- did you and Mr. Sauer then make
21 an inventory of your storeroom?

22 A Yes, we did.

23 Q Now, explain to His Honor what was in that

1 storeroom, in general terms. We'll get to specifics in a
2 moment.

3 A Oh, there were lights, dining room lights,
4 hall lights, chandeliers, kitchen lights; locks, all
5 different kinds of locks. There was lumber for building
6 headers. There was metal. There was a crosscut saw.

7 Q And to whom did all of this material belong?

8 A It all belonged to JohnMark Construction.

9 Q And where was the storeroom located?

10 A In building 4355 in two -- three different
11 apartment units which were set aside for our use as storage
12 rooms and offices.

13 Q And did these storerooms have locks on them?

14 A Yes; they had double locks.

15 Q All right.

16 And who had the keys to these locks?

17 A We had the keys.

18 Q All right, sir.

19 Now, on July 26, two days after that letter,
20 did you and Mr. Sauer go into your storeroom and make an
21 inventory?

22 A Yes, we did.

23 Q All right.

1 I show you this document which purports to
2 be an inventory and ask you if you can identify that
3 document.

4 A Yes, I can.

5 Q Is it in your writing, in your hand?

6 A Yes, it is.

7 Q All right.

8 And the figures that appear on here, appear
9 as an item, a quantity, a unit price, and a total price.
10 Did you put all those figures down?

11 A Yes, I did.

12 Q All right.

13 From what did you obtain the quantity of the
14 items?

15 A Quantity, Mr. Sauer would count them; I would
16 write the number down, and that's how we obtained the
17 quantity.

18 Q You all were working hand in glove at that
19 point?

20 A Yes. He would count them and I was writing
21 them down.

22 Q All right.

23 With reference to the unit price --

1 A Yes.

2 Q -- how did you obtain that?

3 A I went back as far as possible to the suppliers
4 and found out how much the suppliers charged us for that
5 particular item.

6 Q All right. And then you multiplied it to get
7 the --

8 A Multiplied it by the number of quantity and
9 came out with the total price.

10 Q And is this what you found in your storerooms
11 on the 26th day of July?

12 A Yes, it was.

13 (Pause)

14 MR. WEINER: Your Honor, I note for the record
15 that this penciled four-page document is undated, unsigned
16 by either Mr. McCarty or Mr. Sauer, the individuals who
17 allegedly had taken the inventory, and we object to its
18 admission into evidence.

19 MR. REESE: Your Honor, he has stated for the
20 record who did it.

21 THE COURT: Overruled. It is received as
22 Plaintiff's 12 in evidence.

23 MR. REESE: Thank you, Your Honor.

1 THE COURT: Are these totals just by the page,
2 sir?

3 THE WITNESS: Yes, Your Honor, I believe they
4 are.

5 THE COURT: No; it's the recapitulation of the
6 total of the four pages.

7 THE WITNESS: There should be the total of
8 \$16,000. It should be the total of all of them, if that
9 appears on there.

10 THE COURT: Is this figure before you record
11 tax?

12 THE WITNESS: Yes, that is the total of all
13 figures.

14 THE COURT: It is the total of these subtotals?

15 THE WITNESS: Yes, Your Honor.

16 THE COURT: All right.

17 So you're saying you claim, then, \$16,021.30
18 for supplies; is that it?

19 THE WITNESS: Yes, Your Honor.

20 (Document referred to was
21 marked Plaintiff's Exhibit
22 No. 12 for Identification
23 and received in evidence)

1 BY MR. REESE:

2 Q All right.

3 Now, sir, you have indicated the partial units;
4 you have indicated the supplies that have been claimed.
5 Let's turn our attention if we can to these 11 units at
6 the bottom.

7 Now, these are all in 4355 building number; is
8 that correct?

9 A That's correct.

10 Q All right.

11 Let's start out with No. 21. Now, did you
12 issue an invoice to ADC with reference to that unit?

13 A Yes, we did.

14 Q I show you this invoice dated July 10, 1980,
15 and ask you if you can identify that document.

16 A Yes, I can.

17 Q All right.

18 Is that the invoice that was issued --

19 THE COURT: Are you going to have to go through
20 this eleven times?

21 MR. REESE: That's up to them, if Your Honor
22 please.

23 THE COURT: Well, why don't you hand him the

1 pack of sheets and say, "Do all these," and then if they
2 want the details, they certainly can cross on it; but this
3 is no more than a case in chief. It's like a suit on a
4 debt. I loaned the debtor \$10,000 and then the debtor says,
5 But I paid back this and I paid back that.

6 Can you step up, and you're going to match what
7 he says with these pages, aren't you?

8 MR. MAYS: No, Your Honor. This is just, really --

9 THE COURT: It's the same building.

10 MR. MAYS: -- to aid the Court when our
11 witnesses testify that these things weren't done.

12 THE COURT: But it's for this building.

13 MR. MAYS: Yes.

14 THE COURT: And you're not going to give me all
15 27 or 30 or whatever there are pages here; you're only
16 going to use the same eleven, 21, 22, and so on that he
17 uses.

18 MR. MAYS: Yes.

19 THE COURT: Well, let's pull them out because
20 you're only going to -- in other words, I've got a lot of
21 surplus in here; right?

22 MR. MAYS: Well, Your Honor, these sheets I
23 prepared to aid the Court to understand the defendants'

1 Q All right, sir. What do those invoices
2 represent?

3 A Those invoices represent the price -- the price
4 of the standard contract plus the add-ons plus extras for
5 a total price per unit for these units.

6 Q All right, sir.

7 Now, I have attached to the invoice the list
8 of extras for each one of the units; is that correct?

9 A That's correct.

10 Q All right.

11 Who authorized those extras?

12 A Mr. Dillon.

13 Q All right, sir.

14 Now, the total then --

15 A Excuse me.

16 Q Yes, sir?

17 A June Dunn did some of them. I'm sorry; I should
18 have looked.

19 Q All right. Who is Ms. Dunn?

20 A Ms. Dunn was a -- well, again, you'd call
21 titles; they called her project manager for Ivy Mount when
22 we first started Ivy Mount, sir.

23 Q All right.

1 If I could have those again. . .

2 A She was in charge of the Ivy Mount. These
3 others back here (indicating) are signed by Mr. Dillon.

4 Q If I could have those exhibits and show them
5 to other counsel --

6 These are the invoices for Units 21, 22, 23,
7 24, 25, 26, 27, 28, 32, 33, and 38?

8 A I didn't look through all of them, but if you
9 say they are all there.

10 Q I believe they are.

11 While he is examining these invoices, have you
12 computed what the total of these invoices is, as far as the
13 standard contract and the extras?

14 A Yes, sir.

15 Q All right.

16 Do you have that figure with you?

17 A I do not.

18 THE COURT: Step down and get it.

19 MR. REESE: Yes, why don't you step down and
20 get it.

21 THE COURT: Do you have it on the table there
22 somewhere?

23 THE WITNESS: I think I have it in my notes,

1 if I may refer to my notes.

2 THE COURT: All right.

3 THE WITNESS: Yes.

4 BY MR. REESE:

5 Q All right. What is the total, then, sir?

6 A \$29,659.15.

7 Q Does that include the extras?

8 A That is the invoice price which are the standard
9 and the extras.

10 MR. REESE: Very good, sir. Thank you.

11 If Your Honor please, I would move these into
12 evidence.

13 THE COURT: This represents what he claims?

14 MR. REESE: That's correct.

15 THE COURT: All right. That's a group of --
16 What are we up to? 13, Plaintiff's 13.

17 (Documents referred to were
18 marked Plaintiff's Exhibit
19 No. 13 for Identification
and received in evidence)

19 BY MR. REESE:

20 Q Now, sir, directing your attention to the
21 construction agreement --

22 If I might have the original, if Your Honor
23

1 please.

2 I think you may be looking at it.

3 (Discussion off the record)

4 BY MR. REESE:

5 Q Now, sir, directing your attention to the
6 original construction agreement which had been placed into
7 evidence, and this is noted as an attachment to the contract
8 which carries your signature and signature for ADC Fairways.

9 It says the completed and accepted unit price
10 of \$2562.50 -- was that the unit price that you all
11 contracted for?

12 A Yes, sir.

13 Q All right, sir.

14 And your computations as you bid this particular
15 job, what did you compute per unit as the profit?

16 A Approximately 15 percent.

17 Q Fifteen percent of that figure of \$2,562.50;
18 is that correct?

19 A Correct.

20 Q Now, you were able to complete only 30 units
21 at Ivy Mount.

22 A Correct.

23 Q And there were a total of 171 units?

1 A That's right.

2 Q All right.

3 So profit would have been computed on that
4 particular ratio then?

5 A Yes.

6 Q All right.

7 THE COURT: Where does this figure come from
8 in the agreement? What page? Do you know?

9 THE WITNESS: It's not in the agreement, Your
10 Honor. It's when we bid the job, we figured in the profit.

11 THE COURT: You mean the agreement doesn't give
12 a standard unit price?

13 MR. REESE: Yes, it does, Your Honor.

14 THE WITNESS: Yes. I'm sorry.

15 MR. REESE: It's identical to this page
16 (indicating).

17 THE WITNESS: It's an addendum.

18 THE COURT: Is JohnMark one word or two?

19 THE WITNESS: One word, Your Honor.

20 THE COURT: It's not a person's name, then?

21 THE WITNESS: Yes. It's John and Mark who
22 originally formed the company.

23 THE COURT: Oh, I see. But they've made it a

1 single word.

2 THE WITNESS: Yes, Your Honor.

3 THE COURT: Now, let me look for this figure.

4 Well, under Payment Schedule, Completed and
5 Accepted Units, that's 2562, not 68, 50.

6 Now, Counsel, you have indicated at an earlier
7 time that -- well, let me stop and mark this exhibit.

8 Does the contract carry this 15 percent profit
9 provision in it somewhere?

10 MR. REESE: Oh, no, I don't -- no, it does not.
11 It doesn't make any provision for guarantee, Your Honor.

12 THE COURT: That's what your client testified
13 he anticipated he would make; is that it?

14 MR. REESE: That's right. Under the contract,
15 that was his computed profit of 15 percent.

16 THE COURT: Not under the contract, but for this
17 work, you mean.

18 MR. REESE: I understand. That's correct.

19 THE COURT: Yeah. All right. I think that's
20 where we got off the track before.

21 BY MR. REESE:

22 Q All right, sir.

23 Now, a couple of days after you took that

1 inventory, which has been placed into evidence, did you and
2 Mr. Sauer return to the job site?

3 A Yes, we did.

4 Q And did you go over to your storeroom?

5 A Yes, we did.

6 Q What did you find at that time?

7 A We found --

8 THE COURT: Wait a minute.

9 Before you leave all of that, are you going to
10 have him compute the amount he claims for lost profit?

11 MR. REESE: Your Honor, I can give you the
12 figure. We have it computed here.

13 THE COURT: Well, did you compute 15 percent
14 of 2562.50 times 171?

15 THE WITNESS: My counsel did.

16 THE COURT: All right. So you did not?

17 Well, we'll get to the math later. I'm just
18 waiting for the shoe to drop, how much do you claim.

19 MR. REESE: That figure has been supplied --
20 that figure has been supplied to opposing counsel and it
21 comes out to \$47,605.47. The math has already been supplied
22 to them as well as the breakdown as to how that figure was
23 arrived at.

1 MR. MAYS: Your Honor, let me state an objection
2 to this evidence, if that is what it is.

3 As the Court knows, evidence regarding profits
4 must be clear and convincing, or something close to that.
5 I don't believe that Mr. McCarty is in a position to know
6 what his profit would be per unit unless he can tell us
7 what his expenses were, and we --

8 THE COURT: Well, that's what you are going to
9 go into on cross. You are going to say, "How do you know
10 it was 15 percent?" Right?

11 MR. MAYS: Well, we know that as of June 16
12 when he signed the Modification Agreement, he didn't know
13 what all his bills were. He's already told us that.

14 I think that just based on his own admission
15 so far, the Court can make a ruling that he didn't know
16 what his profit was going to be.

17 THE COURT: Overruled.

18 MR. REESE: Okay. Thank you, Your Honor.

19 BY MR. REESE:

20 Q Now, with reference to the inventory, you said
21 you went back a couple of days after you took the inventory
22 and you went back to your storeroom.

23 A Yes.

1 Q What did you find?

2 A We found our storeroom, all of our storerooms,
3 opened, all the apartments opened. We found a gentleman,
4 Dennis Wolfe, who was an employee by ADC Fairways, using
5 our handtruck loaded full of supplies going out the door
6 with our handtruck and our supplies.

7 Q All right, sir.

8 And did you talk with him, Mr. Wolfe, the
9 employee?

10 A Yes, we did.

11 MR. MAYS: Your Honor, we object to this. This
12 was after the date of his notice of default and it was
13 after the date that he took his inventory and I object to
14 the relevancy of it.

15 THE COURT: Well, I assume somebody's going to
16 say after awhile I claim so-many dollars for inventory that
17 I bought and they took.

18 MR. REESE: It's all --

19 MR. MAYS: He's already put in his figure for
20 inventory.

21 MR. REESE: They took it all. You see, the
22 problem is, Your Honor, that --

23 THE COURT: Let's see. Did I get an inventory

1 figure?

2 MR. REESE: Yes. It's in evidence. It is a
3 document, if Your Honor please.

4 THE COURT: \$16,000, plus. Yeah, I did get
5 that figure.

6 What's the purpose of showing this now if he
7 claims everything that was on his list? Why do I have to
8 hear that somebody took them out?

9 MR. REESE: You would be quite right in the
10 theory that I am anticipating.

11 THE COURT: Yeah. Sustained. I don't want
12 you to anticipate. I cannot follow the value of the
13 evidence.

14 MR. REESE: I understand. I understand.

15 BY MR. REESE:

16 Q Did you receive any additional payments from
17 ADC after June 18, 1980?

18 A I received \$14,780 as partial payment for the
19 fire job.

20 Q Other than that, no additional payments?

21 A Other than that, nothing.

22 Q All right, sir.

23 And the amount that you have been claiming here

1 today, the amount that you have specified to the Court
2 with reference to the partial units, with reference to
3 the completed units, with reference to the inventory, with
4 reference to the purchase orders which were stipulated in
5 at the very beginning of this case, and with reference to
6 the fire job, all are outstanding bills to ADC; is that
7 correct, sir?

8 A Yes, sir.

9 Q All right, sir.

10 And are you claiming loss of profits by their
11 breach of the contract?

12 A Yes, I am.

13 Q As indicated.

14 I don't think I have any further questions at
15 this time, Your Honor.

16 MR. WEINER: Your Honor, at this time, could
17 we ask the Court to give us about five minutes?

18 THE COURT: Yeah. Recess, five minutes.

19 MR. WEINER: Maybe I should have asked for ten.

20 THE COURT: No. Five is long enough. We've
21 got to finish the case.

22 (Discussion off the record)

23 (Recess)

1 (A prospective witness, Marjorie Brothers,
2 was duly sworn and agreed to return the following day)

3 THE COURT: All right.

4 Now, do all of the lawyers agree that the
5 witnesses now standing up here can be excused until
6 tomorrow morning?

7 You're not going to reach them any sooner.

8 All right. You are excused until tomorrow
9 morning --

10 MR. MAYS: No, Your Honor, I'm not -- I can't
11 say that. We might need Mr. Sauer today.

12 THE COURT: Today? You won't get to your case
13 today.

14 MR. MAYS: I don't know when you're going to
15 finish.

16 MR. REESE: Well, I've indicated that I will
17 call two additional witnesses and then Mr. Sturgill, then
18 Mr. Sauer, then Ms. Summay, and Mr. Macabee --

19 THE COURT: But you say that the present witness
20 and two more will fill the day?

21 MR. REESE: I think so.

22 THE COURT: We can rely on that?

23 MR. REESE: Yes. They're all my people.

1 THE COURT: Okay. So I would just direct you
2 to come back tomorrow morning at 10:00. There's no use
3 waiting here until 5:30.

4 Okay?

5 Somebody must have -- I had a big stack of
6 exhibits sequentially numbered. They seem to have
7 disappeared; 7, 8, 9, 10, and so on. I was keeping them
8 right here. Is it me or is it perhaps an attorney?

9 Oh, it's me. It's me.

10 (Pause)

11 THE COURT: All right. Does that finish your
12 direct?

13 MR. REESE: Yes, it does, Your Honor.

14 THE COURT: You may have the witness.

15 MR. MAYS: Thank you, Your Honor.

16 CROSS-EXAMINATION

17 BY MR. MAYS:

18 Q Mr. McCarty, in September of 1979, you entered
19 into the Heritage Woods North contract; is that correct?

20 A That's correct.

21 Q And under that contract, isn't it true that you
22 expected to make little or no profit?

23 A On the basic contract, that's true.

1 Q And the only profit you expected to make, if
2 any, was on the extras; is that correct?

3 A Correct.

4 Q And you worked under the Heritage Woods contract
5 from September up through March of 1980?

6 A Yes, but there was a modification.

7 Q There was a modification of the Heritage Woods
8 contract?

9 A Yes, sir.

10 Q All right.
11 March 12, you entered into the Ivy Mount
12 contract?

13 A 1980, correct.

14 Q 1980?

15 A (Affirmative gesture)

16 Q You were still working in Heritage Woods North
17 at that time?

18 A Finishing up, yes.

19 Q And JohnMark Construction, Inc., as a
20 corporation was -- in other words, you were still incurring
21 debts in reference to Heritage Woods when you entered into
22 the Ivy Mount contract; is that correct?

23 A Yes. Correct.

1 Q And isn't it a fact that JohnMark did not keep
2 accurate and up-to-date books and records in reference to
3 the two contracts?

4 A No, not correct.

5 Q Do you recall testifying at a deposition in
6 our office?

7 A Yes, I do.

8 Q And isn't it a fact that you told us in your
9 deposition that JohnMark did not keep up-to-date and
10 accurate books of its receipts and disbursements?

11 A I did not enter it daily, and that was -- I
12 thought the question you asked was -- I did not enter daily,
13 every day, the receipts and disbursements, no. So I guess,
14 therefore, you would say it was not up to date.

15 Q In fact, in June of 1980 when you signed the
16 Modification Agreement, you didn't know what all your debts
17 were to suppliers and subcontractors at that time; isn't
18 that true?

19 A I knew approximately. I did not know as of
20 that day exactly what I owed everyone.

21 Q Because your books and records were not up to
22 date and accurate?

23 A I said -- told you that I did not enter daily.

1 I am not an accountant. I did not enter my receipts and
2 disbursements daily, no; so, therefore, I guess you would
3 say they were not up to date.

4 Q Before signing the Ivy Mount contract, did you
5 make a list of what your estimated expenses would be?

6 A Yes, we did.

7 Q Per unit?

8 A Yes, we did.

9 Q And what were your expenses going to be per
10 unit?

11 THE COURT: Now, are you talking about the
12 contract of September '79 or the one in issue of March 1980?

13 MR. MAYS: The March contract, Your Honor.

14 THE COURT: All right.

15 THE WITNESS: I can't recall right now.

16 BY MR. MAYS:

17 Q So you don't know?

18 A I can't recall.

19 Q You have no records or documents to indicate
20 what your expenses would be per unit in Ivy Mount?

21 A No.

22 Q Mr. McCarty, in November of 1979, isn't it true
23 that JohnMark Construction borrowed \$15,000 from Kennedy

1 Bank?

2 A No, that's correct -- That's incorrect.

3 Q Well, when did you borrow the money from
4 Kennedy Bank?

5 A I borrowed personally, on my signature,
6 \$15,000 which was deposited in JohnMark's account.

7 Q That was in October of 1979?

8 A Around that time, yes.

9 Q Mr. McCarty, isn't it a fact that -- Well,
10 strike that.

11 When did you purchase the stock of JohnMark
12 Construction, Inc.?

13 A In April of '79.

14 Q Isn't it true that on that date, you did not
15 have full knowledge of JohnMark Construction's financial
16 condition?

17 A I did not have full knowledge of the taxes owed.

18 MR. REESE: If Your Honor please, I'm afraid I
19 don't know the relevance of this line of questioning.

20 THE COURT: Proffer?

21 MR. MAYS: The relevance is, Your Honor, this
22 is going to tie into the profits which JohnMark is claiming
23 on this Ivy Mount contract. I'm trying to develop the point

1 and I think I have been successful --

2 THE COURT: Well, how is anything about a '79
3 contract relevant to the profit on a 1980 contract?

4 They're different buildings, different work.

5 MR. MAYS: Because, as I've developed initially,
6 Your Honor, work -- there was an overlap of work.

7 THE COURT: In point of time.

8 MR. MAYS: In point of time.

9 THE COURT: Okay.

10 MR. MAYS: And the same corporation doing two
11 jobs that were right next to each other, almost, in Fairfax
12 County. So that his receipts and disbursements, his debts
13 that he was incurring in Heritage Woods has a definite
14 bearing on his ability to make a profit in Ivy Mount.

15 MR. REESE: Not as per the contract, if Your
16 Honor please.

17 THE COURT: No. You can have a loser on one job
18 and a winner on the next or a break-even.

19 I sustain the objection to questions that relate
20 to September '79, profit or loss.

21 BY MR. MAYS:

22 Q Well, let me ask you this, Mr. McCarty: Did you
23 segregate between the new job as to your receipts and

1 disbursements?

2 A No.

3 Q You didn't?

4 A No.

5 MR. MAYS: So then it is relevant, Your Honor.

6 THE COURT: Well, how did you break it out to
7 know what a profit would be at Ivy Mount?

8 THE WITNESS: As I said, Your Honor, we
9 calculated the profits going into the job. We built that
10 into the price that we bid the job at.

11 THE COURT: In March of 1980?

12 THE WITNESS: In both contracts, Your Honor.

13 THE COURT: Well, I thought you said on the
14 first one of September '79, you had no profit margin planned.

15 THE WITNESS: Well, it turned out -- It turned
16 out that way, Your Honor.

17 THE COURT: Well, you planned a profit but had
18 none; is that it?

19 THE WITNESS: Yes, Your Honor.

20 THE COURT: Well, then that becomes relevant.

21 What did you plan as the profit in the
22 September '79 contract?

23 THE WITNESS: In the September '79, we planned

1 about seven-and-a-half percent.

2 THE COURT: All right.

3 Go ahead, Counsel. I withdraw my ruling then.

4 MR. MAYS: I forgot where I was. Could you read
5 back my last question?

6 (The following portion of the record was
7 read by the Court Reporter:

8 "Question: Isn't it true that on that date
9 you did not have full knowledge of JohnMark
10 Construction's financial condition?"

11 MR. MAYS: Yes. I remember I was, Your Honor,
12 since the reporter has read it back.

13 BY MR. MAYS:

14 Q I was asking you about when you purchased the
15 stock of JohnMark, and I believe you said it was April '79.
16 The question was, Isn't it true that on that date, you
17 did not have full knowledge of JohnMark's financial condi-
18 tion?

19 MR. REESE: If Your Honor please, by his
20 testimony, I can see how it might be relevant, the profit
21 that was computed on Heritage Woods and Ivy Mount, but for
22 the life of me I can't see how going back to April of
23 1979 when no contracts were in being when he purchased

1 I don't see how it could help me decide this
2 case as to what the profit was on a March contract.

3 MR. MAYS: Well, proffer, Your Honor --

4 THE COURT: By further questions, you convinced
5 me to change a ruling earlier, but it will take further
6 questions to convince me on this one.

7 MR. MAYS: Yes, Your Honor.

8 BY MR. MAYS:

9 Q Mr. McCarty, in September of '79, isn't it true
10 that you did not have full knowledge of all the assets and
11 liabilities of JohnMark?

12 A No. That is not correct.

13 Q What was the net worth of JohnMark in September
14 of '79?

15 THE COURT: No. Again, that's getting away
16 from profit on a given contract. Ford may be running
17 behind, but if they make \$10 on a given, selling a given
18 car, then that's the profit on that contract. See?

19 So I don't want to get digressed into the net
20 worth.

21 MR. MAYS: But Your Honor --

22 MR. REESE: The question is unfair, if Your
23 Honor please. That's like asking --

1 BY MR. MAYS:

2 Q In reference to the Ivy Mount contract,
3 Mr. McCarty, I believe you testified that you have no
4 documents to indicate what expenses you estimated you would
5 incur per unit.

6 A I do not have the document. We did it, but I
7 don't have the documents. They were scratched -- the
8 documents which have been misplaced or destroyed.

9 Q Did you reach the March 12 Ivy Mount contract
10 before you signed it?

11 A Yes.

12 Q Did you sign it voluntarily?

13 A Yes.

14 Q Now, it's true, isn't it, Mr. McCarty, that
15 white cove molding is nowhere mentioned in the scope of
16 work in the Ivy Mount contract?

17 MR. REESE: If Your Honor please, that scope
18 of work -- Are we talking about the construction agreement
19 or the scope?

20 THE COURT: He just wants to know is it
21 mentioned in the Ivy Mount agreement.

22 MR. MAYS: It's part of the construction agree-
23 ment.

1 THE COURT: Do you know, sir?

2 THE WITNESS: Yes, Your Honor.

3 THE COURT: Is the color mentioned in the --

4 THE WITNESS: In the basic contract, Your Honor?

5 THE COURT: In Exhibit P-1?

6 THE WITNESS: No. No. It was approved by the
7 project manager at the time.

8 THE COURT: All right.

9 MR. MAYS: Your Honor, may I refer to the
10 construction agreement that's been admitted into evidence?

11 THE COURT: Yeah.

12 Here's the page that says "almond," if that's
13 what you want.

14 BY MR. MAYS:

15 Q Mr. McCarty, I refer you to the construction
16 agreement which has been admitted as Plaintiff's Exhibit
17 No. 1. Is that the Ivy Mount contract?

18 A Yes, it is.

19 Q Does it not have a scope of work attached to
20 the contract?

21 A Yes, it does.

22 THE COURT: Now, Schedule B is not what you've
23 handed me.

1 MR. MAYS: No. I'm not asking about Schedule B,
2 Your Honor.

3 THE COURT: That was Plaintiff's 2-A for
4 Identification, because that -- It's labeled Scope of Work
5 and it, too, has a description of color.

6 MR. MAYS: Right. This Schedule B was attached
7 to the Modification, Your Honor, and I'm asking him about
8 the original --

9 THE COURT: Oh, I see.

10 MR. MAYS: -- March 12 contract.

11 BY MR. MAYS:

12 Q White is not mentioned in there, is it,
13 Mr. McCarty?

14 A I don't believe so.

15 Q You don't see it in there, do you?

16 A I don't see it in here. I don't know. I do not
17 see it in here, no.

18 Q All right.

19 Now, in reference to the cove molding which you
20 have testified to earlier, you knew that in April of 1980
21 the developer wanted almond cove molding; isn't that true?

22 A April. No.

23 Q It is not true?

1 A No.

2 Q Didn't you tell us in your deposition that you
3 knew in April that the developer wanted almond cove molding?

4 A I don't believe so, no.

5 THE COURT: Counsel, it's moot if the agreement
6 calls for almond, and I called your attention to the page,
7 construction agreement.

8 MR. MAYS: Your Honor, he just testified --

9 THE COURT: Part of what's stapled to it,
10 Attachment 4. It says -- that's April 1, 1980, provides
11 the original agreement, the appliance color will be almond.
12 So --

13 MR. REESE: He's talking about cove molding,
14 not appliances, Your Honor.

15 THE COURT: Oh, wait a minute.

16 MR. MAYS: I'm referring to cove molding at this
17 point, Your Honor.

18 MR. REESE: I think the problem is that the
19 agreement doesn't address cove molding.

20 THE COURT: Then do you both agree it's not in
21 this multipage document?

22 MR. MAYS: I haven't found it.

23 MR. REESE: I haven't found it, either, sitting

1 here.

2 THE COURT: All right. Continue your questions.

3 BY MR. MAYS:

4 Q Mr. McCarty, you knew in April of 1980 that
5 the developer's choice was almond for the cove molding,
6 didn't you?

7 A I don't believe so, no.

8 Q Didn't you tell us that in your deposition?

9 A I don't believe so, no.

10 MR. MAYS: If Your Honor would indulge me for
11 a moment.

12 THE COURT: Yes.

13 MR. MAYS: I'm referring to Page 116.

14 THE COURT: One -- one six --

15 MR. MAYS: 116, Your Honor.

16 THE COURT: All right.

17 MR. MAYS: In Mr. McCarty's deposition.

18 MR. REESE: Okay.

19 THE COURT: All right.

20 MR. MAYS: Well, it actually starts on Page 115,
21 at the bottom of the page.

22 BY MR. MAYS:

23 Q I asked you: "Mr. McCarty, you mentioned a

1 problem of cove molding and kitchen lights." Exactly.

2 And then on Page 116, about in the middle of
3 the page, you told us: "Then we were told that Mr. Daly
4 had seen it and didn't like it. He liked the beige. Then
5 and only then did we know that the beige is what he wanted."

6 And I asked you: "Do you recall the month that
7 happened?"

8 And at the bottom of the page, you said: "To
9 the best of my recollection, we started, I think, in March.
10 This would be in April. To the best of my recollection, it
11 would be in April."

12 Didn't you testify to that in your deposition?

13 A If it's in the -- yes.

14 Q So you knew in April that almond was what the
15 developer wanted; isn't that true?

16 A I said to the best of my recollection it might
17 be in April. I believe it states that in my deposition.

18 Q And you concede, don't you, that almond was the
19 designated color in the Modification Agreement which came
20 along in June of 1980?

21 A Yes.

22 Q Now, in reference to the kitchen lights, isn't
23 it true that you called a supplier to make sure that the

1 kitchen light requested was available before you signed the
2 Modification Agreement?

3 A No. He had not -- Mr. Daly had not picked out
4 one. In fact, to my recollection, he picked out the model
5 number out of a book after -- at the same time or just
6 after we signed the Modification Agreement. We had to take
7 the progress books and Starlight, the catalogs, to him and
8 let him look through and pick one that he liked. And he,
9 at that time picked a model number and only at that time
10 did we know what he wanted.

11 Q Did you ever request or did you ever make
12 application to ADC Fairways Corporation for a writing
13 prior to July 16, 1980, to confirm what materials were
14 required?

15 A Did I ask for it in writing?

16 Q Yes.

17 A We had a project manager with us at the time
18 who was to make day-to-day decisions for us that had to be
19 made all the time.

20 THE COURT: Just answer yes or no.

21 THE WITNESS: Oh, I'm sorry.

22 THE COURT: Did you ask them to put it in
23 writing?

1 THE WITNESS: No, Your Honor.

2 BY MR. MAYS:

3 Q And isn't it true that you never made a request
4 in writing for an extension of time to complete units?

5 A No, we never did.

6 Q The first group of Ivy Mount units was due
7 April 18; isn't that true, Mr. McCarty?

8 A I do not recall the date. If you have it there,
9 you can refresh my memory.

10 Q I show you what is labeled Construction Assign-
11 ment Group and ask if you can identify that.

12 A Yes, sir.

13 MR. WEINER: Would Your Honor like me to move
14 this? (Indicating)

15 THE COURT: That's all right.

16 BY MR. MAYS:

17 Q And was that not the construction schedule that
18 was provided to you by ADC Fairways Corporation?

19 A Yes, it was.

20 Q And under that schedule, the first group of
21 Ivy Mount was due April 18?

22 A According to this schedule, yes.

23 Q And your own invoices show that you did not

1 present those, that first group, until April 25.

2 A That is correct.

3 Q So you were a week late with the first group
4 of units and you remained at least a week late on delivering
5 units until you walked off the job. Isn't that true?

6 A Correct.

7 Q Between March 12, 1980, and June 18, 1980,
8 ADC Fairways paid you approximately \$160,000; is that
9 correct?

10 A I don't know the exact figure, but if you have
11 them --

12 Q I refer you to the diagram on the board.

13 MR. REESE: If Your Honor please, that diagram
14 is not in evidence.

15 THE COURT: But he can still ask questions from
16 it as a way to give dates and figures.

17 BY MR. MAYS:

18 Q For example --

19 MR. REESE: If he has the invoices and the
20 checks, I would think that would be the proper way to do it.

21 THE COURT: I let you phrase your questions and
22 I'm going to let him phrase his.

23 MR. REESE: All right.

1 BY MR. MAYS:

2 Q This chart indicates that JohnMark received a
3 payment March 24, 1980, for \$37,272.15.

4 THE WITNESS: Your Honor, may I refer to my
5 book?

6 THE COURT: I think the question is did you
7 get that.

8 MR. MAYS: Yes, that is the question.

9 THE COURT: And now I am asked may he refer to
10 his book, and that answer is yes.

11 Do you have a calculator with you, Mr. McCarty?

12 THE WITNESS: No, I don't, Your Honor.

13 MR. WEINER: I have one with a tape, Your Honor.

14 THE COURT: Mr. McCarty, the question is going
15 to be -- How much was he paid in total? Is that right?

16 MR. MAYS: Well --

17 THE COURT: Well, what are you ultimately getting
18 at?

19 MR. MAYS: Ultimately, yes.

20 THE COURT: All right. Then you're talking
21 about under the March 12 agreement as modified.

22 MR. MAYS: Well, Your Honor, I'm also offering
23 this to show a schedule of payments as well.

1 dollar damages because of that, so I'm not going to have
2 to decide an issue on that.

3 MR. MAYS: All right. All right.

4 I'll leave this for awhile.

5 THE COURT: So we will leave that out, yes.

6 BY MR. MAYS:

7 Q Mr. McCarty, in reference to the June 18
8 Modification Agreement, isn't it true that when ADC paid the
9 monies into Real Title, that that brought us up to date with
10 you, based on your own records as of that date?

11 A Based on my own records as of that date, yes.

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1 Q So, the only money you are claiming today
2 would be for work performed subsequent to the modification
3 agreement?

4 THE COURT: Well, as counsel indicated, that
5 through the bookkeeping applications of money, there was
6 a claim of -- I forget now, a couple thousand dollars
7 back into the first contract.

8 MR. MAYS: Well, now --

9 MR. REESE: Your Honor has struck that.

10 THE COURT: That's right. I did, because it
11 wasn't shown.

12 MR. REESE: So, the answer to that has already
13 been made.

14 MR.. MAYS: Well, I think the point is that we
15 were up to date.

16 THE COURT: He just said that. Yeah.

17 MR. MAYS: He said that, all right.

18 THE COURT: All right.

19 BY MR. MAYS:

20 Q And you have admitted in direct examination
21 that St. Claire Appliances was owed more than a thousand
22 and they were omitted from schedule C.

23 A Yes.

1 Q All right. And Laurel Building Supplies was
2 owed more than \$1,000 and they were omitted from schedule
3 C.

4 A Yes.

5 Q Do you recall the amount owing to Laurel
6 Building Supply as of that date?

7 A As of the 10th of May?

8 Q Yes, sir.

9 THE WITNESS: May I refer to my book, Your
10 Honor?

11 THE COURT: Yes, sir, if you need to refer to
12 your own records.

13 THE WITNESS: According to my records, at that
14 time they were owed \$6,836.70.

15 BY MR. MAYS:

16 Q And you admitted that you owed General Electric
17 more than \$1,000?

18 A Yes.

19 Q And do your records indicate how much you owed
20 General Electric as of May 10, 1980?

21 A Yes. As of May 10th, \$3,265.48.

22 Q How much did you owe St. Claire Appliances as of
23 that date?

1 THE COURT: Now, the \$800 check outstanding?

2 THE WITNESS: Correct.

3 THE COURT: Was that the same amount you owed
4 them?

5 THE WITNESS: The same amount we owed?

6 THE COURT: Was the check for the amount of
7 your bill, or was it different?

8 THE WITNESS: It was the amount of the bill,
9 Your Honor.

10 THE COURT: Okay.

11 BY MR. MAYS:

12 Q The check -- you're testifying you had a check
13 outstanding to St. Claire?

14 A Correct.

15 Q And that check bounced, didn't it?

16 A Yes, it did.

17 Q Do you have that cancelled check with you?

18 A Pardon?

19 Q Oh, not cancelled; do you have a copy of that
20 check? The check that bounced?

21 A No. It has not been paid for and St. Claire
22 still has it, I believe.

23 Q Do you have any record or document to indicate

1 the amount of that check? A bank statement?

2 THE WITNESS: I have my bank statement with me,
3 Your Honor, if you want me to take the time to look it
4 up.

5 THE COURT: If counsel wishes.

6 MR. MAYS: Yes, we want to know that, Your Honor.

7 THE WITNESS: Let me find out what date it is
8 and I'll go to my cancelled checks.

9 (Pause.)

10 I have it entered in my book as April 18.

11 BY MR. MAYS:

12 Q As the date of the check?

13 A As the date of the check. Would you like me to --

14 Q When were you notified that the check did not
15 clear or was --

16 A I don't recall.

17 Q Do you have any records or documents to refresh
18 your recollection?

19 A You may ask Mr. -- someone from St. Claire
20 Appliances. I think they called and notified us that it
21 bounced and I don't recall the date. Maybe you can get
22 that from them.

23 Q Well, you owed Carroll McAbee more than a thousand

1 and you testified that you did not receive his bill
2 until May 23rd.

3 A Oh, I don't know that I owed him more than a
4 thousand. I don't think I testified that I did.

5 Q Well, do you know how much you did owe him?

6 A I didn't owe him anything until he submitted a
7 bill, and then I owed him \$3,100 and some dollars,
8 according to the bill.

9 Q And what was the date of that bill?

10 A 23 May 1980.

11 Q Now, when did Mr. McAbee begin working for you
12 as a subcontractor?

13 A He worked for us in 1978 when we were on another
14 project, and through this project.

15 Q Well, when did you receive a bill prior to
16 this bill?

17 A I don't know. I would have to look in his file,
18 which I don't have complete files on.

19 MR. REESE: How come?

20 THE WITNESS: I don't have a complete file
21 because while they were copying them, they never returned
22 it, Mr. McAbee's files to me.
23

1 BY MR. MAYS:

2 Q So, you are not able to say what you owed
3 Mr. McAbee as of May 10, 1980?

4 A If you will let me look at his file or return
5 my files, I shall probably be able to tell you.

6 Q It's material to this case. Would you please
7 look at your records?

8 (Pause.)

9 (Discussion off the record.)

10 BY MR. MAYS:

11 Q So, Mr. McCarty, if our records show that your
12 painter owed his supplier over \$1,000 as of May 10th,
13 you wouldn't have any knowledge of that; is that what
14 you are saying?

15 A I'm sorry. I didn't hear you.

16 Q I'm saying if our records indicate that
17 Mr. McAbee owed his supplier more than \$1,000 to
18 McCormick PaintStore as of May 10, 1980, you don't know
19 about that?

20 A That's none of my responsibility.

21 Q Mr. McCarty, directing your attention to on or
22 about May 2nd, 1980, did you receive a notice from ADC
23 Fairways that as of that date, Tom Daly was the only

1 individual who could accept units?

2 A Yes, sir.

3 Q You do recall receiving that notice?

4 A Yes, sir.

5 Q And that remained the situation until JohnMark
6 left the job; isn't that true?

7 A There was no other notice.

8 Q There was no other notice.

9 So, what Mara Ernestsons had to say about the
10 units still didn't matter, did it?

11 A I have no idea.

12 Q Mr. McCarty, I'd like to show you a letter
13 dated May 2nd, 1980, and ask you if you can identify that.

14 A (Pause.) Yes, sir.

15 Q What is it?

16 A It is a letter to Mr. Daly from Mr. Sauer.

17 THE COURT: From who?

18 THE WITNESS: From Mr. Sauer, John C. Sauer.

19 My partner.

20 THE COURT: Who is he?

21 THE WITNESS: My partner in JohnMark. Vice
22 President of JohnMark.

23 THE COURT: He's Vice President.

1 BY MR. MAYS:

2 Q And is that a writing which acknowledges that
3 Mr. Daly is the only person who can accept units from
4 May 2nd, 1980 on?

5 A Yes, sir.

6 Q Do you recall when you first saw the letter?
7 Was it shortly after May 2nd?

8 A Shortly after that, yes.

9 MR. MAYS: Your Honor, I'd like this marked
10 and I would offer it as Defendants' Exhibit -- whatever
11 number we are on. Number One.

12 THE COURT: It would be the first.

13 MR. MAYS: Number One.

14 MR. REESE: No objection.

15 THE COURT: Received, Defendants' One.

16 (The document, Letter dated
17 5/2/80, was marked as
18 Defendants' Exhibit No. 1 for
19 identification and was
20 received into evidence.)

21 THE COURT: A letter with an attachment,
22 May 2, 1980; Sauer to Daly.
23

BY MR. MAYS:

Q Mr. McCarty, did you, at any time, make any effort to revoke or repudiate this letter? The letter I just showed you.

A No.

Q Did there come a time during the contract period when JohnMark Construction borrowed approximately \$30,000? I'm asking you did JohnMark borrow --

Well, let me ask you this. Did JohnMark Construction borrow monies from any bank during this contract period?

A During --

Q Either contract.

MR. REESE: If Your Honor please, I'm not quite sure I know the relevance behind that question. We are dealing with a contract case here. The fact is that my client, because these people didn't pay him, had to go out and borrow money.

THE COURT: What do you wish to show, Mr. Mays?

MR. MAYS: Again, this relates to the company's financial condition, Your Honor, and its ability to make a profit. Through discovery, we learned of numerous loans, not only that Mr. McCarty made personally, but JohnMark

1 and why loans were made, in that sense. You may inquire
2 and present evidence on -- it would help me believe your
3 theory that they would not have made a profit and therefore
4 have no damage, in that category.

5 Go ahead.

6 BY MR. MAYS:

7 Q Mr. McCarty, isn't it true that JohnMark
8 Construction, Inc. borrowed approximately \$36,000 from
9 the Bank of Brandywine on or about May 15th, 1980?

10 THE COURT: All right. What is the question?

11 MR. MAYS: The question is, is that a true
12 statement?

13 THE COURT: Oh, okay.

14 THE WITNESS: May I explain, Your Honor?

15 THE COURT: Yeah, but just yes or no.

16 THE WITNESS: Oh, fine.

17 THE COURT: Did JohnMark borrow so much money
18 from this bank?

19 THE WITNESS: No.

20 THE COURT: Did you borrow it and put it in?

21 THE WITNESS: No, Your Honor.

22 THE COURT: All right. Next question.
23

1 BY MR. MAYS:

2 Q JohnMark did borrow monies from the Bank of
3 Brandywine?

4 A Yes, sir.

5 Q And explain -- well, how much?

6 THE COURT: After June 18th, 1980.

7 MR. REESE: Listen to the Judge. After June 18th.

8 MR. WEINER: Well, Your Honor --

9 THE WITNESS: Uh-huh, yes, I understood.

10 THE COURT: All right. Go ahead.

11 THE WITNESS: And I believe, to the best of my
12 knowledge, Your Honor, it's around \$10,000.00.

13 THE COURT: All right. Next question.

14 BY MR. MAYS:

15 Q JohnMark had borrowed monies from the Bank of
16 Brandywine prior to June 18, 1980; isn't that true?

17 A Yes.

18 Q And -- well, do you recall the date of the loan?

19 A Not offhand, no.

20 Q Well, it was in 1980, wasn't it?

21 A I would have to refer to my records.

22 Q All right. Didn't JohnMark refinance or attempt
23 to borrow more money and the initial loan amount increased?

1 I'm referring to the Bank of Brandywine situation.

2 A Correct.

3 Q And the total amount got up to somewhere
4 around \$36, \$37,000; isn't that true?

5 A Correct.

6 Q And during the contract period, JohnMark
7 Construction paid the Bank of Brandywine, made loan
8 repayments out of its general fund; isn't that true?

9 A The Bank of Brandywine?

10 Q Yes.

11 A No repayments were made that I can recall --

12 Q None at all?

13 A -- on the Bank of Brandywine loan.

14 Q All right. Now, let me ask you this,
15 Mr. McCarty. You yourself lent money to JohnMark
16 Construction, Inc. during the contract period?

17 A Correct.

18 Q And during the Ivy Mount contract period, you
19 made repayments to yourself; isn't that true?

20 A Correct.

21 Q And instead of paying yourself directly, you
22 made payments to some of your other companies; isn't that
23 a fact?

1 A. (No response.)

2 Q Like Spectro Systems, doesn't that ring a bell?

3 A. Correct.

4 Q And repayments to yourself into your other
5 companies would have been somewhere in the neighborhood
6 of about \$20,000; isn't that true?

7 MR. REESE: If Your Honor please, I must be
8 totally blind at this point. I just don't see the relevance
9 of this --

10 THE COURT: He wants to show that the company
11 was so broke they never would have made a profit.

12 MR. REESE: But, you don't show that in that
13 particular manner. That would be irrelevant --

14 THE COURT: Well, it's one of many indicia.

15 MR. REESE: Well, if Your Honor please, I think
16 that would be irrelevant to show if the company was so
17 broke it wouldn't have made a profit. The question is,
18 as far as I can determine, was the contract structured
19 in such a fashion as to bring a profit.

20 THE COURT: That's the ultimate question.
21 That's true. But you have to prove it by whatever field
22 is available. Overruled.

23

14

1 BY MR. MAYS:

2 Q Mr. McCarty, isn't it a fact that repayments
3 to yourself and to your other companies during the Ivy
4 Mount contract would have been somewhere in the
5 neighborhood of \$20,000?

6 A I don't have those figures with me.

7 Q Does that sound like an accurate estimate?

8 A I can't tell without the figures.

9 Q Well, you recall testifying about this at your
10 deposition, don't you?

11 A Yes, I do.

12 Q And you don't deny that substantial payments
13 were taken from the ADC Fairways monies and paid back
14 to yourself and your other companies?

15 A Correct.

16 Q You don't deny that?

17 A No.

18 Q And this was done frequently when you had bills
19 outstanding to suppliers and subcontractors?

20 A Yes.

21 Q Mr. McCarty, from monies JohnMark received
22 from ADC Fairways on the Ivy Mount -- Heritage Woods and
23 Ivy Mount contracts, did JohnMark withhold money for

1 withholding taxes? Income taxes?

2 A Yes.

3 Q But JohnMark never paid any taxing authority
4 any money?

5 A Yes, we did.

6 Q When did you make those payments?

7 A I'd have to refer to my records.

8 Q Didn't you tell us in your deposition that
9 John Mark paid no taxes for '78, '79, and '80 of any
10 kind?

11 A I don't recall that, but if I did, I was wrong,
12 because I did pay some.

13 Q Well, could you tell me how much you paid and
14 when? Because our information is you paid no taxes.

15 A I would have to go to my records.

16 Q Well, would you please?

17 And, Your Honor, there is a provision in the
18 contract about paying taxes. So, it is relevant.

19 A You are talking about what period?

20 THE COURT: You want to show he didn't pay
21 taxes and he says he did; is that right?

22 MR. MAYS: I'm asking him when he paid --

23 THE COURT: So, if he did, it doesn't go anywhere.

1 But, all right. Look at the records.

2 MR. WEINER: Your Honor, paragraph 20 of the
3 agreement -- construction agreement, relates to the
4 taxes that Mr. Mays is referring to.

5 THE WITNESS: My records indicate that on
6 April the 14th, 1980, I paid IRS \$5,000.

7 BY MR. MAYS:

8 Q Do you have the cancelled check or a copy of
9 the check?

10 A Yes.

11 Q Could we see it?

12 A Yes, sir.

13 THE COURT: Do you expect to have a series of
14 these questions, Mr. Mays?

15 MR. MAYS: Not too many, Your Honor.

16 THE COURT: Let me suggest that you just
17 present them informally to the witness so he can look
18 up those answers, and we'll take about a ten to fifteen-
19 minute recess.

20 MR. MAYS: Yes, Your Honor.

21 (Discussion off the record.)

22 (Brief recess.)

23 MR. REESE: Your Honor, I think we are at a

17

1 point of inquiry as to the payments made to the Internal
2 Revenue, and my client was asked to retrieve checks
3 representing payments.

4 THE COURT: Yeah. For \$5,000.00.

5 BY MR. MAYS:

6 Q Mr. McCarty, am I correct, then, that you say
7 that you paid \$5,000 to the IRS?

8 A Yes.

9 Q And for what purpose?

10 A For withholding taxes.

11 Q All right. It's true, isn't it, that that is
12 the only payment you made to the IRS during the contract
13 period, for either contract?

14 A I made another payment, sent another check in
15 for another \$5,000 which bounced because we were not paid.

16 MR. MAYS: Object to the last statement, Your
17 Honor.

18 THE COURT: Your question developed it, though.
19 All right.

20 MR. REESE: If Your Honor please, for the record,
21 since the recess was for my client to obtain these
22 evidences, I'd like the record to reflect that he has the
23 evidences there and they have been exhibited to the other

1 side.

2 THE COURT: That, to me, was obviously why he
3 didn't say show me.

4 MR. REESE: Yes.

5 THE COURT: All right. Go ahead. Let's move
6 right along, now, gentlemen. We've got a lot of facts
7 to hear.

8 BY MR. MAYS:

9 Q Mr. McCarty, that \$5,000 check payable to IRS,
10 you don't know what that's for exactly, do you?

11 A Yes, it's for withholding taxes.

12 Q But you do not have any tax return or other
13 document that would indicate that it was for withholding
14 taxes?

15 A Not with me. I do not have my tax files with
16 me now.

17 Q And it's true, is it not, that notwithstanding
18 these payments, that just during the contract period you
19 owed approximately \$62,000 in withholding taxes?

20 A I don't have the figures with me.

21 Q Well, didn't you tell us that at your deposition?

22 A That should be a round total, not the contract
23 period.

1 Q I refer you to page 82 of your deposition, and
2 the question was -- we were asking you about your
3 bankruptcy petition. The question, "And you personally
4 have stated in your bankruptcy that you are owing money by
5 way of withholding taxes?"

6 Answer: "Yes, sir."

7 Question: "And the figure is \$62,000, correct?"

8 Answer: "At that time, it was, approximately.
9 I think it's gone up with penalties and all that, and I
10 think that it's about \$85,000, something like that, now."

11 Is that what you told me?

12 A Yes.

13 MR. REESE: If Your Honor please, that's what he
14 said. He said it wasn't during the contract period, but
15 it was the total.

16 You're cross-examining on something he just
17 said in the record that was correct.

18 I think he'd be more accurate to the question
19 to ask him if during -- between March and June, how much
20 did you owe on withholding. If you're asking --

21 THE COURT: This would be so much quicker
22 if you wait until redirect and just say wasn't that figure
23 outside the contract time, and then I'd get it in a flash.

1 But, you know --

2 MR. REESE: I just don't want to leave any
3 false impressions.

4 THE COURT: I know. But that's the quickest
5 way to correct it. And it's just by a rightful question
6 on redirect. It's not inadmissible. It's just of lesser
7 value.

8 All right. Next question.

9 BY MR. MAYES:

10 Q Mr. McCarty, let's get this straight. The
11 \$62,000, was that during the contract period or not?

12 A Which, the Ivy Mount contract?

13 Q Both contracts.

14 A It was for the total that JohnMark owed.

15 Q From what date?

16 A From the beginning it started until present.

17 Q Okay. And the \$5,000 is the only payment made
18 by JohnMark during the ADC Fairways Corporation contracts?

19 A Except the other payment which was made that
20 bounced because we weren't paid in time.

21 Q All right. During the two ADC Fairways contracts,
22 did you withhold monies from your employees --

23 A Yes.

1 Q -- payroll checks?

2 A Yes.

3 Q And you only paid \$5,000 of that money?

4 A Correct.

5 Q And isn't it true that you have not filed your
6 personal or corporate income tax returns since 1979?

7 A No.

8 THE COURT: Corporate, I'll hear the answer.

9 BY MR. MAYS:

10 Q When was the last time you filed a JohnMark
11 income tax return?

12 A JohnMark income taxes are at the moment current.

13 Q Now, didn't you tell us at your deposition that
14 you hadn't filed one since 1979?

15 A I was in error, if I did.

16 Q But can you tell me when it was filed?

17 A A lot of them were filed just recently when I --
18 I'm trying to work things out with Internal Revenue Service
19 now.

20 Q And taxes are owed?

21 A Yes.

22 Q And taxes were owed during the two contracts?

23 A Yes.

22

1 Q Now, Mr. McCarty, earlier I had asked you some
2 general questions about loans that you had made to
3 JohnMark Construction, Inc., and you told me a few things
4 in general.

5 I now ask you specifically about a payment made
6 May 14, 1980 in the amount of \$1,300 to Solar Conditioning
7 drawn on a JohnMark Construction check.

8 Was such a payment made?

9 A Yes.

10 Q And who was Solar Conditioning?

11 A Solar Conditioning is another corporation that
12 I was President of.

13 Q And at the time this payment was made, John-
14 Mark had outstanding bills to its suppliers and sub-
15 contractors, correct?

16 A In May? Yes.

17 Q And I ask you about a JohnMark Construction
18 check dated April 10, 1980, also payable to Solar
19 Conditioning in the amount of \$2,000. Was such a
20 payment made?

21 A Yes, sir.

22 Q And from JohnMark funds?

23 A Yes, sir.

1 Q From monies received from ADC Fairways
2 Corporation?

3 A Yes.

4 Q Now, Mr. McCarty, isn't it a fact that during
5 the Heritage Woods and Ivy Mount contracts, that's the
6 only work that JohnMark Construction had at that time?

7 A Yes.

8 Q Now, I ask you about a check dated April 11,
9 1980. A JohnMark Construction check, in the amount of
10 \$1,000, payable to Richard E. McCarty.

11 Do you have that check, sir?

12 A Yes.

13 Q And that check represents payment of JohnMark
14 funds in the amount of \$1,000 to Richard McCarty?

15 A No.

16 Q It's made payable to Richard E. McCarty, is it
17 not?

18 A Yes.

19 Q Drawn on JohnMark Construction, Inc.'s bank
20 account?

21 A Yes. For \$2,000.

22 Q All right. What is the date of the check?

23 A 11 April '80.

1 Q In the amount of \$2,000?

2 A Correct.

3 THE COURT: If it wasn't for the payee, what
4 was it for?

5 THE WITNESS: It was for cash for payroll,
6 Your Honor.

7 THE COURT: All right. Next question.

8 BY MR. MAYS:

9 Q And one more check, Mr. McCarty, dated
10 April 14, 1980?

11 A Yes.

12 Q That was a check also in the amount of \$2,000?

13 A \$1,000.

14 Q One thousand. Made payable to Richard E. McCarty?

15 A Yes.

16 Q From JohnMark funds?

17 A Yes, sir.

18 Q And this was not -- this was not part of your
19 salary, was it?

20 A No.

21 Q Now, in June of 1980, you borrowed \$25,000
22 to purchase a sailboat; is that correct?

23 A Correct.

1 MR. REESE: Objection, Your Honor. That's
2 personal financing and has nothing to do with this
3 particular case.

4 THE COURT: Response?

5 MR. MAYS: Well, Your Honor, he's already
6 testified that he's repaying himself money from the John -
7 Mark Construction account, so his personal finances
8 have come into it.

9 THE COURT: Maybe he advanced the money. Maybe
10 he's got to eat. Maybe it's a salary. Maybe it's a loan.
11 It's a transaction that involves that company's checking
12 account or bank account, but it doesn't, without more,
13 tell me that they failed to make a profit or could not have
14 made a profit on the contract and modification.

15 MR. MAYS: Very well, Your Honor.

16 BY MR. MAYS:

17 Q Mr. McCarty, in connection with the modification
18 agreement, Real Title disbursed monies to the suppliers
19 in schedule C and shortly thereafter JohnMark Construction
20 received \$19,384.86; is that correct?

21 A Correct.

22 Q And you cannot account for that money?

23 A I just accounted for part of it today.

1 Q What part was that?

2 A \$7,600 for Sears.

3 Q Is that the only part you can account for?

4 A At the present moment. Working out a cash
5 flow now.

6 Q Now, in fact, you yourself kept some of that
7 money; isn't that true?

8 A I don't know until I work out -- finish working
9 it out.

10 Q You received \$19,384 in June of 1980; is that
11 correct?

12 A Yes, sir.

13 Q And other than the one payment to Sears, you
14 still, as of this date, cannot account for the rest of the
15 money?

16 A Correct.

17 Q Under the modification, the first seven units
18 were due July 3rd, 1980; is that right?

19 A Correct.

20 Q And you knew that almond cove molding was
21 required; is that true?

22 A Yes.

23 Q In fact, it was in the modification agreement;

1 was it not?

2 A Yes.

3 Q And on July 3 when the units were due, JohnMark
4 did not have the cove molding and the kitchen light
5 installed?

6 A Correct.

7 Q Now, isn't it a fact that JohnMark did not
8 even place an order for the cove molding until June 30th?

9 A I believe that was the date.

10 Q If that is what the affidavit says, you would
11 agree with that?

12 A Yes.

13 Q And I am correct that you delegated the
14 responsibility of obtaining the cove molding to Jean Summey,
15 one of your employees?

16 A I delegated the responsibility of checking around
17 to finding where we could get it.

18 Q To one of your employees?

19 A To one of my employees.

20 Q And it's true, is it not, that on July 3, 1980,
21 the date the first seven units were due, you did not
22 have the affidavits at that time; is that correct?

23 A Correct.

1 Q You did not obtain those until July 7, 1980?

2 A Correct.

3 Q Mr. McCarty, I'm going to show you what has been
4 marked as Plaintiff's Exhibit Number -- whatever it is.
5 It is your compilation of the work done on the partial
6 units.

7 Your Honor, may I refer to the Exhibit that's
8 been admitted?

9 THE COURT: Uh-huh. Here are all of them. I
10 think they are all of them.

11 MR. MAYS: Okay. Yes, I have it right here.

12 BY MR. MAYS:

13 Q Mr. McCarty, let me refer you to the originals
14 which have been admitted into evidence.

15 Now, those are what you claim was the work that
16 John Mark did in the partial units; is that right?

17 A Yes, sir.

18 Q Now, I am going to show you another document
19 which has not been offered into evidence but it's titled
20 "Partially Completed Units," and I ask you if you can
21 identify it. Is that not your handwriting?

22 A Yes, it is.

23 Q And you prepared that document, didn't you?

1 A I guess.

2 Q And does not that document also purport to
3 claim a dollar value as to what work was done on the
4 partial units?

5 A Correct.

6 Q And now, would you compare that with the
7 document that's been admitted into evidence?

8 My question to you is, isn't it true that the
9 amounts are different?

10 A (No response.)

11 Q Let me refer you to a specific unit.

12 Refer to unit B-1.

13 THE COURT: Are you crossing on this typed
14 document or --

15 MR. MAYS: It's his list on the partial units.

16 THE COURT: Oh, no. I see. The yellow one.

17 All right.

18 BY MR. MAYS:

19 Q Can you find that unit, B-1?

20 A Yes.

21 Q Now, what is the figure that you claim for work
22 done under the standard contract in that unit?

23 A \$1,899.47.

30

1 Q And what is the amount that shows on your
2 other list?

3 A \$1,943.31.

4 Q Now, just the standard contract work on this
5 sheet.

6 A \$1,560.81.

7 Q And that amount is less than what you're now claim-
8 ing?

9 A Yes.

10 Q So, Mr. McCarty, basically, you're just guessing
11 as to what work was done on those units, aren't you?

12 A No.

13 Q Well, how do you account for the difference?

14 A This was the worksheet that I started with,
15 and these are what I come up with.

16 Q Okay. The worksheet was prepared earlier in
17 time; is that correct?

18 A I would assume so, yes. Uh-huh.

19 Q And the other sheet was prepared after you hired
20 Mr. Reese; is that right?

21 A No.

22 Q The yellow sheet?

23 A No.

31

1 Q And how many of these units do you claim you
2 personally walked?

3 A Oh, four or five.

4 Q Four or five?

5 A Yes.

6 Q Of all the partials?

7 A Of all the partials.

8 Q And so, the information is what you obtained
9 from others?

10 A That's correct.

11 Q Do you have any notes or documents that
12 Mr. Purdy made as to what work was done?

13 A He reported to me and I wrote it down.

14 Q He reported it to you verbally?

15 A Yes.

16 Q When did this take place?

17 A The day we were leaving the job. 24th of
18 July.

19 Q So, it's your testimony that on that date,
20 Mr. Purdy came to you with no notes and told you what
21 was done in the partial units?

22 A Well, he had walk sheets with him. He made his
23 notes. He made his notes on his pad, came to me and told

1 me these, and I wrote them down on worksheets that you
2 see.

3 Q You don't have his notes?

4 A No.

5 Q Do you know whether he has them?

6 A You must ask Mr. Purdy.

7 Q We will.

8 Prior to purchasing the stock of JohnMark
9 Construction, did you have any experience in the
10 construction field?

11 A No.

12 Q And during the month of say April, May, June,
13 you were not present on the job site every day, were you?

14 A Yes, I was; almost every day.

15 THE COURT: Now, go back. You say this was a
16 brand new company and a new experience for you in going
17 into the renovation field?

18 THE WITNESS: Your Honor, the company started
19 in March of '79.

20 THE COURT: Yes.

21 THE WITNESS: I, with two contracting people.

22 THE COURT: So, the company was new?

23 THE WITNESS: Yes, sir.

1 THE COURT: Was the work new to you, also?

2 THE WITNESS: It was new to me, but not to my
3 partner, Your Honor.

4 THE COURT: Right. Okay.

5 THE WITNESS: He is a construction man, for
6 years. I'm a businessman.

7 THE COURT: Uh-huh.

8 BY MR. MAYS:

9 Q Mr. McCarty, didn't you tell us at your
10 deposition --

11 THE COURT: You what? Excuse me. I didn't hear
12 his answer.

13 THE WITNESS: Oh, I'm sorry.

14 THE COURT: You said, "I am" what?

15 THE WITNESS: A businessman.

16 THE COURT: All right. Go ahead.

17 BY MR. MAYS:

18 Q Didn't you tell us at your deposition that you
19 were only present at the job about 20 hours a week?

20 A Approximately, yes.

21 Q Mr. McCarty, on March 12th, 1980, when you
22 entered into the Ivy Mount contract, did you obtain
23 contracts from your -- the subcontractors that you use.

1 A When we got into the project, yes. Before they
2 did any work, we hired them, contract company, yes.

3 Q You had written contracts?

4 A Yes.

5 Q And did you show your subcontractors the Ivy
6 Mount construction agreement?

7 A Showed them their portion that they had to do,
8 yes.

9 Q Did you have any agreement, or was there a
10 provision in these contracts that the prices they were
11 charging would not increase during the contract period?

12 A We had no provision, but it was understood.

13 Q Well, in fact, the prices your subcontractors
14 charged did increase during the contract period?

15 A Not that I know of.

16 Q Didn't you tell us that at your deposition?

17 A Not that I know of.

18 Q The cost of materials increased during the
19 contract period, didn't they?

20 A Oh, yes.

21 Q And you had no control over that, did you?

22 So, if you computed a 15 percent profit on
23 March 12 and the price of your materials increased, then

1 your profit margin decreased during the contract period;
2 isn't that true?

3 A There were certain contractors, like Sears,
4 which would give us a six-month contract at no increase in
5 price. Other contractors would not, and we had no
6 control over that.

7 Q So, other than Sears, how many other suppliers
8 agreed to hold their prices in line?

9 A None that I know of.

10 Q Do you know what percentage of increase you had
11 in materials? Cost of materials?

12 A No, I don't.

13 Q And Mr. McCarty, JohnMark Construction, Inc.,
14 entered into the modification agreement dated June 18,
15 1980, freely and voluntarily; is that correct?

16 A Correct.

17 Q And you felt that that would resolve the
18 differences JohnMark had with ADC Fairways?

19 A Correct.

20 Q Up to that point?

21 A (Nodding head, indicating in the affirmative.)

22 Q Mr. McCarty, I believe you testified that Mr. Dillon
23 was the person that ordered JohnMark off the job; is that

1 correct?

2 A Mr. Dillon told me Mr. Daly had said that he
3 wanted us off the job.

4 THE COURT: Was that both times or just --

5 THE WITNESS: Both times, yes, Your Honor.

6 Mr. Daly is the only one who had the authority.

7 BY MR. MAYS:

8 Q But at that point, you did not have knowledge
9 of what Mr. Dillon's authority was to make such a statement,
10 did you?

11 A No.

12 MR. MAYS: Your Honor, I think I'm almost
13 finished, if you would just indulge me for a moment.

14 THE COURT: All right.

15 (Pause.)

16 BY MR. MAYS:

17 Q Mr. McCarty, with regard to the partial units,
18 isn't it a fact that ADC Fairways requested that you
19 provide invoices, vouchers, receipts, or other
20 documentation to establish the extent of work in the
21 partial units?

22 A No.

23 Q So, if your former attorney says that, then

1 that's not true?

2 A That's right.

3 Q You're saying that ADC never requested that of
4 you?

5 A No.

6 Q Other than your handwritten notes as to what you
7 claim was done, you don't have any receipts, vouchers,
8 invoices, or anything of that nature to establish the
9 extent of the partial work?

10 MR. REESE: If Your Honor please, that invades
11 my proper time. I have to have Mr. Mates, the electrician;
12 Mr. Sturgill, the --

13 THE COURT: The question was other than invoices,
14 you don't have anything to what?

15 MR. MAYS: No. Other than the written notes
16 he has on his sheet --

17 THE COURT: Yeah.

18 MR. MAYS: The question is --

19 THE COURT: Does he have what?

20 MR. MAYS: Does he have any receipts, like, for
21 example, he told you he paid --

22 THE COURT: No, just repeat the question.

23 MR. MAYS: Receipts, vouchers, invoices.

1 THE COURT: Well, that's a proper question.

2 Do you have any, other than your tally?

3 THE WITNESS: I have invoices, my subcontractors,
4 which charged me for the work, that I put in here. I have
5 the invoices from the suppliers where I ordered the
6 equipment that went in here. I have payroll from the
7 workers who worked on the units, Your Honor.

8 MR. REESE: I might indicate for the record,
9 I have the subcontractors that are present in our case,
10 will put them on with reference to the work that they did.
11 I don't know what more we can add.

12 THE COURT: I get a feeling, Mr. Mays, that
13 you are going to want to examine all of these papers.
14 Am I right?

15 MR. MAYS: Yes, Your Honor.

16 THE COURT: Why don't you all spew them out
17 here now and sit and look them over for an hour or so in
18 my absence, because you may not have any questions about
19 them, and then you may have a lot. But I have the
20 impression you are talking about dozens and dozens of
21 papers.

22 MR. REESE: If Your Honor please, we have
23 produced them for them before. They have examined every one

P R O C E E D I N G S

THE COURT: Mr. McCarty was on the stand.

MR. WEINER: Your Honor, I believe there are witnesses in the courtroom.

THE COURT: The witnesses are again excluded. Go back to the Witness Room.

All right. Resume the questions.

CROSS EXAMINATION

BY MR. MAYS:

Q Your Honor, I need to refer to an exhibit. Mr. McCarty, I refer you to what has been marked Plaintiff's Exhibit No. 2 it looks like. That is your list of partial work.

THE COURT: That's the wrong number. Two is the contract.

MR. MAYS: Eleven, then.

BY MR. MAYS:

Q That's your list of partial work?

A Yes, sir.

Q Is that correct?

A Yes, sir.

Q Mr. McCarty, yesterday you testified that you computed a 15 percent profit per unit at Ivymount?

1 THE COURT: He did.

2 BY MR. MAYS:

3 Q Now, your list of partials which were introduced
4 into evidence yesterday indicates a 20 percent markup on
5 each unit; is that correct?

6 A That's correct.

7 Q Did you just forget about that? Or were you
8 trying to mislead the Court?

9 A I didn't understand the question. Will you say
10 it again, please.

11 Q You told us yesterday you computed a 15 percent
12 profit on a unit price.

13 A Yes, sir.

14 Q Now, you have a 20 percent markup on each of these
15 partial units?

16 A Yes.

17 Q And I'm asking you --

18 THE COURT: Why the difference?

19 BY MR. MAYS:

20 Q -- why the difference?

21 A When we went into the contract, as I said, we
22 find out how much it's going to cost us to do the job.
23 Then we add our 15 percent profit, and that is the price

1 we bid to do the job. I do not know why I put 20 percent
2 on here, but there is 20 percent added here.

3 Q So, that's incorrect?

4 A Yes. It should be 15 percent.

5 Q So, from the figure you testified to yesterday
6 as your total figure on partials which was \$26,022.99 should
7 be reduced by 5 percent.

8 MR. REESE: I don't believe that is the case,
9 Your Honor. Those figures also include tax, and I don't
10 think you would be reducing the tax.

11 THE COURT: That's a matter of mathematics to
12 argue later to decide the difference between markups,
13 markdowns, percentages of profits. What he said yesterday
14 was that he computed the job on a 15 percent profit. He
15 didn't say added cost plus 15 percent, but I'll leave that
16 to the questioners to develop further.

17 BY MR. MAYES:

18 Q To make this clear, Mr. McCarty, it was 15 percent
19 markup of the unit price; is that correct?

20 A Fifteen percent markup. I have 20 percent markup
21 of the unit price.

22 Q But you told us --

23 THE COURT: How did you compute the 15 percent?

1 THE WITNESS: To compute the 15 percent, Your
2 Honor, I -- we added up what it would cost us to do the
3 job; the cost of appliances; the cost of materials and
4 labor and so forth, and then took 15 percent of that and
5 added it to that price.

6 THE COURT: So, it's 15 percent added for profit?

7 THE WITNESS: For profit. Yes, Your Honor.

8 THE COURT: All right. And there was a
9 standard price on those apartments?

10 THE WITNESS: There was a negotiated price on
11 those apartments. Yes, Your Honor.

12 THE COURT: Which became a standard price for each
13 unit and the 15 percent you described came to how many
14 dollars?

15 THE WITNESS: We figured about twenty-two hundred.

16 THE COURT: Not about.

17 THE WITNESS: Pardon?

18 THE COURT: How much was the 15 percent?

19 THE WITNESS: About \$300.

20 THE COURT: I won't hear an about. Can't you do
21 the math?

22 THE WITNESS: Yes, Your Honor.

23 THE COURT: You're suing for the money.

1 THE WITNESS: Yes, Your Honor.

2 THE COURT: You're not suing for about money.
3 You're suing for what you sued for. How much would you
4 claim?

5 THE WITNESS: I would have to figure it out,
6 Your Honor.

7 THE COURT: You may.

8 (Pause.)

9 THE WITNESS: \$330, Your Honor, per unit.

10 THE COURT: All right.

11 BY MR. MAYS:

12 Q Mr. McCarty, I'd like to direct your attention
13 to what was marked as Plaintiff's No. 1, the construction
14 agreement and the attachment thereto. I'll find it for
15 you.

16 Specifically, I'd like to direct your attention
17 to Attachment 1 --

18 THE COURT: What's the question?

19 BY MR. MAYS:

20 Q -- which is attached and made a part of the
21 construction agreement. Now, the particular items listed
22 in Paragraph 3 and the cost of those items, those figures
23 are included in the unit price.

1 THE COURT: Phrase it as a question, sir.
2 You were making a statement. Just ask a question.

3 BY MR. MAYS:

4 Q Are the figures listed in Paragraph 3 included in
5 the unit price?

6 A Are the figures included in the unit price?

7 Q Yes.

8 A All material including appliances are included
9 in the unit price.

10 THE COURT: Repeat the last question and answer.
11 I'm sorry.

12 MR. MAYS: The question, Your Honor, was were
13 the material prices listed in Attachment 1 included in the
14 unit price, the standard unit price. He said they were.
15 He said cost of all materials were included in the standard
16 unit price.

17 THE COURT: All right.

18 BY MR. MAYS:

19 Q So, when you were paid the unit price, you had
20 to reimburse or pay for the materials first on a dollar for
21 dollar basis; is that correct?

22 A Most of the time we paid for our own and then
23 were reimbursed when we would pay.

1 Q So, any profits that you could make on a unit
2 would have to be -- you would have to deduct the price of
3 your materials first; isn't that true?

4 A Correct.

5 Q So, then, your 15 percent per unit would not be
6 the unit price stated in the contract. It would be that
7 price less the cost of your materials?

8 MR. REESE: Your Honor, please, that's not the
9 way he testified.

10 THE COURT: Sustained. He said he computed the
11 cost and then added 15 percent for profit. The costs are
12 labor and materials.

13 MR. MAYS: Your Honor, I thought he said he just
14 took the unit price and added 15 percent.

15 THE COURT: But what is the unit price made up
16 of? What is it made up of?

17 THE WITNESS: Material, labor, plus 15 percent
18 profit.

19 THE COURT: Okay.

20 BY MR. MAYS:

21 Q All right. Mr. McCarty, in Attachment 1,
22 Paragraph 3 then why is it spelled out that the contractor
23 shall furnish the cost of the specific items listed there?

1 A Would you -- did you say we would furnish it at
2 cost?

3 Q No. I'm asking you why was that put in the
4 contract, then? What's the significance of that?

5 A I don't know because it was all changed.

6 Q Would you read Paragraph 3 for the record.

7 MR. REESE: The document --

8 THE COURT: It's all in evidence. If there's
9 something you want me to look at, I'll do that; but the
10 whole contract's in evidence. There is no need to put it
11 in a second time.

12 MR. MAYS: Your Honor, I'm not asking that. I think
13 there's a point to be made here.

14 THE COURT: If there's a point, then you argue
15 it to me that the contract provides and you point out.

16 MR. MAYS: Very well, Your Honor.

17 Mr. McCarty, with regard to the partial units
18 those would be one through ten and Unit 31?

19 THE COURT: Excuse me. The witnesses are
20 excluded to wait in the Witness Room down the corridor.
21 Sorry.

22 BY MR. MAYS:

23 Q Yesterday afternoon after the Court adjourned,

1 we looked at invoices from certain subcontractors.

2 A Correct.

3 Q And isn't it true that you did not have most of
4 those invoices available to you when you computed your
5 figures for your partial work?

6 A May I answer that?

7 THE COURT: That's the question.

8 THE WITNESS: Yes. As I explained -- you said it
9 was after Court. As I explained, my records were made
10 available to you to copy, and you copied them all, and
11 my records are not complete anymore.

12 THE COURT: But the question is did you have
13 all of your cost figures and papers when you made up your
14 claim?

15 THE WITNESS: Yes, Your Honor.

16 BY MR. MAYS:

17 Q Not the claim. Those yellow sheets. Did you
18 have them when you made those sheets?

19 A That's when I made up the claim, Your Honor.

20 Q Didn't we -- didn't you see bills, invoices
21 yesterday that you hadn't seen before?

22 A No.

23 Q How about Mr. Sturgill's bill?

1 A What about it?

2 Q Did you have his complete billings when you made
3 up --

4 A Yes. There's a copy in Mr. Sturgill's file.

5 Q Mr. McCarty, I'd like to ask you a couple questions
6 about the eleven units in Ivymount which Johnmark
7 claims are complete, specifically 21 through 28 and 32,
8 33, and 38.

9 Now, those units include the first seven that
10 were due on July 3rd under the modification agreement; is
11 that correct?

12 A Not these units, no. On July 3rd the model
13 units, I believe, which were eleven and twelve.

14 Q Now, all of our records show that the models
15 were part of the 19 and Schedule 1, Mr. McCarty. Does
16 that refresh your recollection?

17 A You're correct.

18 Q Now, isn't it a fact that of the first seven
19 units due on July 3rd that those units did not have the
20 cove molding or the kitchen lights required by the
21 contract?

22 A That is correct.

23 Q There's no question about it?

1 A No question.

2 Q And you did not on that date have affidavits
3 to show the developer that the material was not available?

4 A No.

5 Q And isn't it also true that as of that date
6 those units had not passed final Fairfax County inspections?

7 A I do not have the records with me. If I may
8 refer to my records.

9 Q Do you have -- well, you don't know; is that
10 what you're saying?

11 A I don't know.

12 Q Directing your attention to Paragraph 10 in
13 the construction agreement, isn't it true that a unit
14 is not completed until it's passed all Fairfax County
15 inspections?

16 A Paragraph 10?

17 Q The last sentence in Paragraph 10.

18 THE COURT: Counsel, just read it to me and go on
19 with your question whatever it relates to cause it's in
20 evidence. You don't have to ask the witness if he
21 agrees.

22 MR. MAYS: The last sentence I'm referring to
23 says, "No work shall be deemed complete until final

1 inspection is made and approval is received from every
2 governmental authority whose approval is required."

3 THE COURT: All right. Now, what's your
4 question?

5 MR. MAYS: Well, the question is under that
6 paragraph the unit was not deemed complete --

7 THE COURT: What do you want to ask him? You can
8 make those arguments to me in closing arguments.

9 MR. MAYS: Yes, Your Honor.

10 No further questions, Your Honor.

11 REDIRECT EXAMINATION

12 BY MR. REESE:

13 Q Redirect, if Your Honor please.

14 Mr. McCarty, there have been some instances wherein
15 in April and May of 1980 some checks were made out to you
16 and/or corporations in which you had interest in from
17 Johnmark. What do those checks represent?

18 A They represented repayment of loans.

19 Q Had you --

20 A That myself and my other company had made to
21 the --

22 Q Checks that were alluded to earlier in cross
23 examination, that's what they consisted of?

1 A Yes, they did.

2 Q As a total figure, how much money had you
3 personally loaned to Johnmark?

4 A Approximately \$75,000.

5 Q All right, sir.

6 Now, sir, you were questioned concerning that
7 Mr. Daly after a May date was the only one who could
8 approve units. How many units did Mr. Daly walk, to your
9 knowledge?

10 A None that I know of. Nor did he approve any.

11 Q How many times a week was Mr. Daly even in this
12 area?

13 A He normally came in around mid-morning on
14 Tuesday and stayed the rest of the day.

15 Q All right, sir.

16 Now, it has also been questioned of you that you
17 didn't order the cove molding for these eleven units,
18 which seems to be the major question in this particular
19 case -- these are the eleven units that were presented on
20 or about July, I guess, July 10, 1980 -- and it's been
21 indicated that you did not order those cove moldings until
22 June 30, 1980. Would you explain to the Court why that
23 order wasn't placed until then?

1 A We could not get anyone to approve exactly what
2 kind of molding they wanted. Mr. Sauer, I believe it was,
3 had to get all kinds of samples, bring them back for
4 them to choose one that would be proper.

5 Q Was that finally done by them on the 30th of
6 June?

7 A Approximately that date. Yes, sir.

8 Q Who was the one who finally said go ahead and
9 order this particular kind of molding?

10 A It was done by Mr. Kische, I believe, but you
11 must ask Mr. Sauer because he was there.

12 Q Now, it has also been stated that you were
13 a week behind in the delivery of units at Ivymount
14 under the original contract, and I believe the question
15 put to you was that the first units that you delivered
16 were on April 25, 1980, rather than on the 18th of April.

17 A Correct.

18 Q I see. Would you explain to the Court the
19 conditions that led to such a delay, a one week delay as
20 it ended up?

21 A There were several, but the most important was
22 that almost immediately after signing the contract they
23 decided they wanted to buy the cabinets. They wanted to

1 buy them from a vendor that they knew.

2 THE COURT: They being A.D.C.?

3 THE WITNESS: Yes. Mr. Daly, Mr. Dillon, and
4 especially Mr. Barry Mates who actually signed our contract.
5 It was a friend of Mr. Mates.

6 THE COURT: Continue, then.

7 THE WITNESS: Okay. And if you'll notice on
8 the scope of work Mr. Daly had written up there that the
9 seven units completed -- to be completed by that first
10 schedule date was continued upon the delivery of the
11 cabinets which had to be ordered after the contract
12 was signed.

13 BY MR. REESE:

14 Q All right. Were there other matters that led to
15 that delay?

16 A There were other things like broken pipes,
17 flooded apartments.

18 Q Why would you have broken pipes in the apartment
19 complex?

20 A It was 17 year old buildings, and pipes would
21 break and freeze at that time because no heat, because
22 the power was turned off.

23 Q Who turned the power off?

1 A Well, they were fixing the air conditioning units
2 and heating units.

3 THE COURT: The question is who.

4 BY MR. REESE:

5 Q Who turned the power off?

6 A A.D.C. Fairways or their other contractors.

7 Q You certainly didn't?

8 A Oh, no, we didn't.

9 Q But be that as it may on April 25, 1980, you
10 did deliver some units; didn't you?

11 A Yes, we did.

12 Q Would it be fair to say that you delivered
13 units eleven, two, thirteen, fourteen, 15, 16, 17, 44,
14 47, and 48 on that date?

15 A I don't have the records in front of me, but that
16 sounds correct.

17 Q Let's take a look at these invoices if we can.
18 Are these the invoices that you all delivered on April 25?

19 (Handing documents to the witness.)

20 A Yes, they are.

21 Q All right, sir. Who accepted those units?

22 A Mr. Quatmann.

23 Q Mr. Quatmann you identified as the on-site

1 supervisor for A.D.C.?

2 A Correct.

3 Q He's here today; isn't he?

4 A Yes, he is.

5 Q He accepted the units on April 25?

6 A Yes, he did.

7 Q All right. When were you paid for those units?

8 A According to A.D.C. records, which I don't agree
9 with, I was paid for them on 18 June, 1980.

10 Q June 18, two months --

11 A Yes, sir.

12 Q -- elapsed?

13 MR. REESE: Your Honor, please, I'd like to have
14 these introduced into evidence after counsel's had a
15 chance to look at them.

16 (Handing documents to counsel.)

17 MR. REESE: Your Honor, I believe this might be
18 our fourteen.

19 THE COURT: Correct.

20 MR. REESE: Is that correct? No. 14?

21 THE COURT: Plaintiff's 14, series of invoices.
22 Are there seven in number, counsel? You rattled them off
23 here.

1 MR. REESE: There are ten in that number if
2 Your Honor please. There were ten units --

3 THE COURT: Let's go back and inquire of the
4 witness, then, because you've accepted that seven were
5 delivered but now you say ten were approved, and that
6 confuses me.

7 MR. REESE: If Your Honor please, under the
8 modification agreement which was June 18, seven units were
9 going to be presented beginning with the third day of
10 July. This comes before that.

11 THE COURT: That's right, and you asked the
12 witness -- you're just going to have to clear it up. You
13 said weren't you due to deliver seven units a week before
14 April 25th, that is the 18th. Yes. You didn't deliver
15 them until the 25th. Right. But now you seem to show
16 that he delivered more than that. He delivered ten; is
17 that it?

18 MR. REESE: Mr. McCarty, on April 25, 1980, did
19 you all deliver units eleven, two, thirteen, fourteen,
20 15, 16, 17, 18 --

21 THE COURT: I can't write them that fast. How
22 many units are you talking about?

23 MR. REESE: There are ten units. There are ten

1 invoices, ten units.

2 THE COURT: Who is the person you said accepted
3 these ten?

4 THE WITNESS: Mr. Quatmann, Your Honor. Walter
5 Quatmann, Q-u-a-t-m-a-n-n.

6 THE COURT: Quatmann.

7 THE WITNESS: Double "n", Your Honor.

8 THE COURT: All right. I'll hook these together.

9 (Whereupon, Plaintiff's Exhibit No. 14 was
10 received into evidence.)

11 BY MR. REESE:

12 Q Now, sir, on May 9, 1980, did you all deliver
13 Unit 4355-41? I show you the invoice of that.

14 (Handing document to the witness.)

15 A Yes, we did.

16 Q All right, sir. Was that unit walked by
17 Mr. Kische on May 16, 1980? And I show you this walk
18 sheet.

19 (Handing document to the witness.)

20 A Yes, it was.

21 Q And he indicated there that the unit was fine
22 except for cove molding and kitchen light?

23 A And scribe molds.

1 Q And scribe molds. We're back to the same
2 problem that we had before?

3 A Yes.

4 THE COURT: Now, stop and spell this man's
5 name. Kische.

6 MR. REESE: K-i-s-c-h-e, I believe is the
7 correct spelling.

8 THE COURT: You say he approved what unit number?

9 THE WITNESS: Forty-three 55-41, I believe,
10 Your Honor.

11 THE COURT: But you say he didn't really
12 approve because he noted it wasn't complete; is that
13 right?

14 THE WITNESS: Yes, Your Honor.

15 THE COURT: So, then, it was partially approved?

16 THE WITNESS: Correct, Your Honor.

17 THE COURT: All right.

18 MR. REESE: If Your Honor please, No. 15, I
19 believe.

20 (Whereupon, Plaintiff's Exhibit No. 15 was
21 received into evidence.)

22 BY MR. REESE:

23 Q When were you finally paid for that unit?

1 A Again, there is a question. However, A.D.C. has
2 noted that I was paid for it on the 18th of June.

3 Q All right, sir. Now, on May 16 did you then
4 deliver Units 42, 43, 45, and 46?

5 MR. WEINER: Your Honor, I just -- I have to
6 object to the fact that the work that was done prior to
7 the modification agreement, as Mr. Reese said in his opening
8 there was a kissing and making up of differences, and there
9 was full payment, and everybody loved each other as of
10 June 18th.

11 MR. REESE: If Your Honor please, I might
12 respond to that.

13 THE COURT: I don't understand why I'm hearing
14 evidence of who approved some units that were paid for
15 because this is a suit for things that weren't paid for.

16 MR. REESE: Exactly, Your Honor.

17 THE COURT: So, it's like saying you know the
18 two roads, you know this one goes down here, so we don't
19 take that road. I just don't want to hear about it.

20 MR. REESE: I'm prepared to respond if Your
21 Honor please. Yesterday's cross examination by Mr. Mays,
22 fully 85 percent of that examination had to do with the
23 financial situation that Johnmark found itself in in late

1 BY MR. REESE:

2 Q Rather than introduce the rest of the invoices,
3 you indicated on May 26th, 1980, you presented Units 42,
4 43, 45, and 46?

5 A Correct.

6 Q All right. And when were you paid for those
7 units?

8 A 18 June.

9 Q All right, sir. And on May 28 did you present
10 Units 34, 35, 36, and 37?

11 A Yes, we did.

12 Q When were you paid for those units?

13 A Again, I'd have to say there is a question,
14 but according to A.D.C. records 18 June.

15 MR. MAYS: Your Honor, we object to that
16 because that's just an opinion of the witness as to when
17 he thinks he was paid.

18 THE COURT: Save that for cross.

19 BY MR. REESE:

20 Q Now, sir, what did this delay -- the first
21 units you presented April 25 you weren't paid for until
22 June 18. What did that delay do to Johnmark during
23 that period of time?

1 A It had destroyed our credit. We had to pay for
2 all our material.

3 MR. WEINER: Your Honor, that's totally without
4 outside the scope of anything on direct -- on our cross.
5 This is his redirect.

6 THE COURT: The cross, as I understood the
7 proffer yesterday, was to show that while the
8 contractor lost, or did not make any money on the first
9 contract, he made -- he claimed he made 15 percent on the
10 second one; and the cross examination, as I understood
11 it, was to show that he couldn't make money on it, and
12 he was broke.

13 Now, the rebuttal today is if I was broke, it
14 was your fault.

15 MR. REESE: That's the reason why --

16 THE COURT: To put it bluntly, that makes it
17 all relevant for redirect.

18 MR. REESE: Thank you, Your Honor.

19 MR. WEINER: Your Honor, that is a subject
20 matter of Counts 2 and 3 that have been severed.

21 MR. REESE: You made it a subject matter
22 yesterday, Mr. Weiner. I didn't bring it in my direct.
23 You're quite correct, but you brought it in on cross.

1 THE COURT: I had held it admissible, and the
2 presence of it is admissible, too. Anything else?

3 BY MR. REESE:

4 Q What else happened to Johnmark? You said that
5 it destroyed your credit.

6 A Destroyed our credit. Our workers were very
7 disgruntled. They didn't want to work. They didn't know
8 whether they were going to get paid or not. We had to pay
9 them in cash. They wouldn't take our checks anymore. We
10 couldn't get any more appliances to put in. It just
11 completely destroyed it.

12 Q Now, turning to this chart that has been prepared
13 by defense, I do note, however, that during this period
14 of time that late April and May you were being paid some
15 moneys by A.D.C.

16 A Correct.

17 Q Is that correct? All right.

18 But you also had the Heritage Woods contract
19 going at the same time; didn't you?

20 A Correct, and all the payments were from Heritage
21 Woods.

22 Q Were for Heritage Woods projects but nothing from
23 Ivymount during that period?

1 A None.

2 THE COURT: You mean these last two exhibits
3 were for Heritage Woods units and not for Ivymount?

4 THE WITNESS: No. Those are Ivymount's.

5 MR. REESE: Those are Ivymount's. I was
6 referring to the chart where he received some moneys, but
7 it was for the Heritage Woods project he received moneys;
8 not for the Ivymount project.

9 THE COURT: But weren't you saying that these
10 Ivymount moneys were received late?

11 THE WITNESS: Yes, Your Honor.

12 THE COURT: What is it -- well, we will resume
13 in a minute.

14 (Pause.)

15 BY MR. REESE:

16 Q Mr. McCarty, you indicated that on April 25 ten
17 units had been presented and accepted by A.D.C. on the
18 Ivymount project; is that correct?

19 A Correct.

20 Q But you weren't paid for those units until
21 June 18, 1980; is that correct?

22 A Correct.

23 Q All right. As a matter of fact, you weren't paid

1 for any of these Ivymount units until June 18, 1980?

2 A Again, I say there's a question, but according
3 to A.D.C. records, correct.

4 Q All right, sir.

5 Now, according to A.D.C. records, however, they
6 did make you certain payments in April and May; is that
7 correct?

8 A Correct.

9 Q All right. During that period of time, did
10 you also have the Heritage Woods project being wound up
11 and completed?

12 A Yes. Uh-huh.

13 Q And these moneys here did they allocate them?
14 Did A.D.C. when they sent you the checks say these moneys
15 were applicable to Ivymount and these moneys were
16 applicable to Heritage Woods?

17 A No. They called it charity.

18 Q Charity?

19 A Yes, sir.

20 Q I see.

21 THE COURT: Were the checks labeled? Or did a
22 letter accompany them saying apply this money to "x"
23 debt?

1 THE WITNESS: They would not, Your Honor. They
2 wouldn't.

3 THE COURT: All right. Then the rule of law is
4 the creditor may apply them to any debt he chooses.

5 BY MR. REESE:

6 Q As a matter of fact, you applied them to the
7 Heritage Woods project?

8 A Correct.

9 Q All right, sir.

10 MR. REESE: I think that -- I don't think I have
11 any further questions.

12 THE COURT: You may step down.

13 MR. WEINER: Your Honor, may we have an
14 opportunity?

15 THE COURT: Well, you did a cross.

16 MR. WEINER: Well, he did a recross.

17 THE COURT: If you believe you have something
18 special or unusual, but it doesn't go on forever.

19 MR. WEINER: Your Honor, I just --

20 THE COURT: Next.

21 (Witness excused.)

22 MR. BOYKIN: Raymond Purdy.
23

1 Whereupon,

2 MELVIN RAYMOND PURDY,

3 was called as a witness by and on behalf of the Plaintiff,
4 having been previously duly sworn, was examined and
5 testified as follows:

6 DIRECT EXAMINATION

7 BY MR. BOYKIN:

8 Q State your name for the record, Mr. Purdy.

9 A Melvin Raymond Purdy.

10 Q What's your address, Mr. Purdy?

11 A 3311 Melwood Road, Upper Marlboro, Maryland.

12 Q How are you employed?

13 A At the present time?

14 Q Yes, sir.

15 A I'm employed by a construction firm.

16 Construction.

17 Q Did there come a time when you were employed by
18 Johnmark Construction?

19 A Yes, sir.

20 Q When was that?

21 A That was in June of '80.

22 Q What was your position with them at that time?

23 A I was a foreman.

1 Q What is your relationship to Johnmark now?

2 A None whatsoever.

3 Q Were you involved in building 4355 at the Ivy-
4 Mount project?

5 A Yes, sir, I was.

6 Q What units were you involved with there?

7 A All units within the building, all levels.

8 Q You worked on all the units in that particular
9 building; is that correct?

10 A Yes, sir.

11 Q What were the conditions of the original 19
12 units in Ivymount when they were delivered on June 26th,
13 1980?

14 A Well, the units were just about complete. There
15 was a slight punch list on them, and there was an item --
16 there were two items that were missing. Cove molding and
17 kitchen lighting.

18 Q Other than that what was the condition of the units?

19 A They were in good condition.

20 Q What about the condition of the second and third
21 floor units that were delivered on July the 3rd, 1980?

22 A Well, they were also in good condition.

23 Q How long have you been in the rehabilitation
business?

1 A I've been in the construction field for twelve
2 years.

3 Q Would you explain what a punch list is?

4 A Punch list --

5 Q As you understood it for that particular project.

6 A A punch list is after you finish the majority
7 of the work in the unit, and it's walked, and such items
8 are picked up like someone puts a mark on the wall after
9 it's been painted and you have to touch up the paint, or
10 perhaps the cleaners missed -- windows something to clean
11 that they didn't thoroughly clean well, or some small item.
12 Nothing major.

13 Q In your experience, are units turned down because
14 of a punch list item?

15 A No, not normally.

16 Q What is the normal practice?

17 A Well, a punch list is given on what items are in
18 need of correction, and you, in turn, go back into the
19 unit and correct these small items within a small amount
20 of time usually --

21 ~~MR. MAYS: Your Honor, we object to the relevance~~
22 ~~of this because what may have happened in other contracts~~
23 ~~in different situations doesn't help the Court in this~~

1 outside his province.

2 THE COURT: Sustained. He's shown to be a
3 foreman, but not one who handles the billings.

4 BY MR. BOYKIN:

5 Q Your Honor, going back to the situation of the
6 kitchen lights and the cove molding, what -- who had
7 knowledge that these things were not available on July
8 the 3rd?

9 A All parties involved in the job knew that the
10 lights and the molding were not available for installation.

11 Q Did they know that it had been ordered?

12 A Yes. They knew they were on order for instal-
13 lation.

14 Q Okay. On July 9th did Mara Ernestsons walk the
15 eleven units in question?

16 A Yes, she did.

17 Q What was the result of that walk through?

18 A What is --

19 MR. WEINER: Your Honor, I don't think he's laid
20 the foundation work whether or not he was with her. He's
21 asking results of a walk. I think he has to find out --

22 MR. BOYKIN: I withdraw the question.
23

1 BY MR. BOYKIN:

2 Q Did you personally walk units on July the 9th,
3 1980?

4 A Yes, sir. I was present.

5 Q Who was the representative from A.D.C. that
6 accompanied you?

7 A Mara.

8 Q Is that Mara Ernestsons?

9 A Yes, sir.

10 Q Who else was present in that walk through?

11 A Mr. McCarty.

12 Q Just the three of you?

13 A Yes, sir.

14 Q What were the results of that walk through?

15 A Well, the results of the walk through were that
16 there was a minor punch list made of all the apartments
17 that we viewed that day, and that was the results. We
18 had a minor punch list to go back and correct some minor
19 things within the units.

20 Q What happened, then?

21 A Well, we corrected the minor problems.

22 Q When was that done?

23 A That was done on the following morning.

1 Q What about the cove molding? When was that put
2 in?

3 A Well, after walking the units with Mara and
4 Mr. McCarty, the following day we received a call saying
5 that the molding was in; that they had received it. So,
6 we picked the molding up that particular day and installed
7 it in the units.

8 Q Okay.

9 THE COURT: Installed it when?

10 THE WITNESS: The next day, Your Honor.

11 THE COURT: Same day?

12 THE WITNESS: No, sir. The following day.

13 BY MR. BOYKIN:

14 Q Would that have been July the 10th, 1980?

15 A Yes. That would be July 10th.

16 Q Isn't that the day after the first walk through
17 you had with her?

18 A Yes, sir, it is.

19 THE COURT: So, then, what's left is the kitchen
20 light fixture.

21 THE WITNESS: Your Honor, we had received some
22 kitchen lighting. So, we had put some lighting also, but
23 we had a back order for some additional fixtures and they

1 hadn't came in. So, we had put some lighting plus some
2 cove molding into the units, but we didn't have all the
3 fixtures that we needed because they weren't available.

4 Q Did you, again, walk the units with
5 Miss Ernestsons?

6 A Yes. We walked the units on the next day after
7 we walked them. We walked them on the 10th, the next day
8 after; and when we got to the last unit, Mara indicated
9 that the units were okay; they were acceptable. And
10 Mr. McCarty asked her to sign the approval sheets.

11 THE COURT: What day was that?

12 THE WITNESS: Pardon me?

13 THE COURT: What day was that?

14 THE WITNESS: That was the 10th, Your Honor.
15 The following day. In other words, we walked the units
16 twice. We walked them on the 9th. Then we in turn
17 walked them, again, on the 10th.

18 BY MR. BOYKIN:

19 Q You had done all the work on the 10th?

20 A Yes, sir.

21 Q So, the same day that you did the worksheet
22 you walked back through; is that correct?

23 A Yes, sir. The very day we did the work on it; the

1 day we performed the punch-out list.

2 Q Did she sign off on the units?

3 A No. She refused to sign off on the units. She
4 said that they were acceptable. That she couldn't sign them.
5 She would have to return to the office and tell Mr. Daly.

6 Q What happened then?

7 A Upon that, me and Mr. McCarty went back to our
8 office, which was on the premises, and we waited for some-
9 thing from Mr. Dillon stating that the units were
10 satisfactory; and he was going to accept them all.

11 Q Did you get any word?

12 A No, we didn't.

13 Q Did you hear anything from Mr. Dillon?

14 A No, we didn't.

15 Q Hear anything from anybody else at A.D.C.?

16 A No, sir.

17 Q Okay. What did that mean to you?

18 A Well, it meant to me that the units were
19 satisfactory, and they had no rejections since we had already
20 been through two walks, and we went through the punch
21 list, did the items they indicated they weren't satisfied
22 with. It meant to me the units were satisfactory under their
23 standards.

1 Q When did you think you'd get paid?

2 MR. WEINER: Objection, Your Honor.

3 MR. BOYKIN: Your Honor, he can answer that.

4 THE COURT: And when did what?

5 MR. BOYKIN: You expect to be paid.

6 MR. WEINER: He's not -- he's just the foreman.

7 THE COURT: Sustained.

8 MR. BOYKIN: Why can't he talk about when he's
9 supposed to be paid on the job?

10 THE COURT: If you talk about his salary, you
11 may answer that; but as foreman he is not management in
12 the sense of payment of bills. If he had a special
13 relationship, you can show that; but prima face it's not --

14 BY MR. BOYKIN:

15 Q Were you familiar with the walk through procedure
16 at that point in time under the modification agreement?

17 A Yes. I was familiar with the procedure because
18 I understood what the contract was requiring me to perform
19 in order to receive payment for units. So, therefore, I
20 was under the -- I knew the knowledge and had the knowledge
21 of the modification agreement to know that I had to turn
22 the units. They had to be accepted in order for us to get
23 payment on the following Friday.

1 THE COURT: Did you receive the checks?

2 THE WITNESS: No, sir, Your Honor, I didn't.

3 THE COURT: Your boss got them?

4 THE WITNESS: Yes, sir. Mr. McCarty.

5 THE COURT: Your job was simply get the units to
6 satisfy A.D.C. that they were --

7 THE WITNESS: Acceptable.

8 THE COURT: Per contract?

9 THE WITNESS: Yes, sir. Were per contract
10 acceptable units.

11 BY MR. BOYKIN:

12 Q After you waited on that Friday and received --
13 on the 10th and received no word from anyone at A.D.C.,
14 what happened after that?

15 A After that I returned to the job on Monday morn-
16 ing as a regular routine, and we started working on units
17 on B and A level.

18 THE COURT: Let me interrupt and ask -- I'm
19 hearing evidence of how the parties fought, but I
20 thought the suit was for we did so much work and we
21 want money for it. Now, whether they were entitled to be
22 paid earlier or not, it's irrelevant. It's how much did
23 you do, and how much is it worth.

1 man says they agreed we did it; but the rejections are just
2 irrelevant until they produce them. They might want to
3 say well we reject them because --. Otherwise, I'm going
4 to simply hear a daily chronology of what went on, but
5 that isn't the issue before me, is was work done for which
6 payment was to be made. All right, continue.

7 BY MR. BOYKIN:

8 Q The following week did you, in fact, do work on
9 the basement apartments?

10 A Yes, we did.

11 Q Which apartments did you work on?

12 MR. WEINER: What week are we speaking about, Your
13 Honor?

14 THE COURT: Following week from July 10th, and
15 I guess that's 1980. That would be July 17. Now -- all
16 right.

17 BY MR. BOYKIN:

18 Q Did you, during the week that began somewhere,
19 I believe, that would be about July 12th or 13th, do work
20 on the basement apartments?

21 A Yes, sir, I did.

22 Q Is that 1980?

23 A Yes, sir.

1 Q What work -- what apartments did you work on?

2 A I worked on B level and A level.

3 Q What kind of work did you do during that period?

4 A The actual work in the units, you know.

5 Q Which included what?

6 A Well, their rehabilitation of them. The rehab
7 of them.

8 THE COURT: Did you finish them?

9 THE WITNESS: No, Your Honor.

10 THE COURT: Is there a schedule of what you
11 did do and the percentage of work done and not done?

12 THE WITNESS: Yes, sir. There is a schedule.

13 THE COURT: All right. Can you direct me to
14 something that I should be able to look at that tells me
15 where you claim how many dollars for some basement units?

16 MR. BOYKIN: Yes, Your Honor.

17 THE COURT: I can't put it in on context right
18 now.

19 MR. BOYKIN: I'm trying to get to that point,
20 Your Honor. It's Exhibit 11 in the list of partials that
21 were completed on each and every one of the units in
22 question.

23 THE COURT: Where would I look? This is about

1 20 pages. Where would I look for those?

2 MR. BOYKIN: Those are all the units, Your
3 Honor; and they are listed individually from Page 1 on.
4 It's B1 through B4, and then A5 through 10.

5 THE COURT: Now, he just said B level. Now,
6 what does that mean compared to B1 and 2?

7 THE WITNESS: There are so many apartments on
8 the floor, Your Honor; and I worked on both floors which
9 was A level so many apartments, and B level so many
10 apartments.

11 THE COURT: What is unit B1, then?

12 THE WITNESS: That's Apartment B1.

13 THE COURT: That's one apartment?

14 THE WITNESS: Yes, sir.

15 THE COURT: I see. All right.

16 BY MR. BOYKIN:

17 Q Did there come a time when you understood that
18 you would be leaving the job? That Johnmark would be
19 leaving the job?

20 A Yes, sir, there was.

21 Q Do you remember when that was?

22 A That was in a week or so.

23 Q Would that have been July 24th, 1980?

1 A Yes. Approximately.

2 Q What happened after that in regard -- now relate
3 to the judge's question -- in regard to these particular
4 units.

5 A Well, the units we were working on that time
6 Mr. McCarty asked me to go back through the units since
7 we weren't fully completed, and take the checklist I have
8 on each unit, individual unit and indicate the items that
9 were complete, only complete on each unit; and I did this.

10 Q You did. What did you do after you had
11 completed those checklists?

12 A I returned them to Mr. McCarty.

13 Q Do you know what Mr. McCarty did with them?

14 A No. I don't have any idea.

15 Q But you did walk each unit and the level of
16 completion was noted on your checklist; is that correct?

17 A That's correct.

18 MR. BOYKIN: Your Honor, may I see Exhibit 11.

19 Now, this is a document that has been marked
20 Plaintiff's Exhibit 11, and I'd like you to look over
21 the sheets there and --

22 MR. WEINER: Your Honor --

23 THE COURT: Let him finish his question.

1 MR. BOYKIN: -- and I ask you to determine whether
2 or not these are the units that you walked for which you
3 provided information to Mr. McCarty regarding their degree
4 of completeness.

5 MR. WEINER: Your Honor, that's improper, now.
6 If we just go back and hear what -- Mr. Purdy just testified
7 that he went back to certain units upon Mr. McCarty's
8 direction. He compiled a list, and tendered that list to
9 Mr. McCarty from which Mr. McCarty testified he compiled
10 this list (indicating).

11 THE COURT: So, he's now asking if this list is
12 correct.

13 MR. WEINER: Well, he can't testify as to this
14 list. He can only testify as to the list that he prepared.

15 THE COURT: If he remembers they did the
16 toothbrush holder in Apartment B11 in Building 4455 or
17 whatever, he may say so. It may have less weight to him
18 than what you suggest, but it's a proper method.

19 MR. BOYKIN: Go ahead, Mr. Purdy.

20 (Pause.)

21 BY MR. BOYKIN:

22 Q Mr. Purdy, in terms of that list some of the things
23 on there you had nothing to do with; is that correct?

1 A That's correct.

2 Q But there are other items --

3 A As best I can tell from this list, it's what I
4 would say was complete, as best I can tell.

5 MR. WEINER: Your Honor, he said --

6 MR. BOYKIN: I show you another document which
7 has been labeled --

8 MR. WEINER: Your Honor, he just testified that
9 he does not have full knowledge of everything there. Then
10 he testifies that the best he can tell it's correct. Now,
11 that's not --

12 MR. BOYKIN: What's the objection?

13 MR. WEINER: We're not exactly compatible.

14 THE COURT: That's for cross examination.

15 BY MR. BOYKIN:

16 Q Let me show you an item that's been labeled as
17 Plaintiff's Exhibit 10.

18 (Handing document to the witness.)

19 Now, is this the information -- also contain the
20 information that you took back to Mr. McCarty?

21 A Yes.

22 Q And this was from your walk through and
23 inspection of the apartments; is that correct?

1 A Yes. That's right.

2 Q And Exhibit 11 was prepared in part based on
3 Exhibit 10, or the initial list; is that correct?

4 A That is correct.

5 THE COURT: Who prepared ten?

6 MR. BOYKIN: Answer the question.

7 THE WITNESS: I did.

8 THE COURT: That's your handwriting? Is that the
9 list you say you gave to Mr. McCarty?

10 THE WITNESS: Yes, sir.

11 THE COURT: I see. Let me look at it.

12 (Pause.)

13 THE COURT: Then your list is of things not done,
14 and the other list is the things that have been done; is
15 that the real difference between ten and eleven?

16 THE WITNESS: I indicated things that were done
17 in the apartments.

18 THE COURT: All but cleaning means the cleaning
19 was not done.

20 THE WITNESS: Right.

21 THE COURT: All right.

22 THE WITNESS: But that's the list I've prepared;
23 but I prepared another list indicating items that were done

1 and gave Mr. McCarty that list.

2 THE COURT: Was it as long and detailed as
3 No. 11?

4 THE WITNESS: It wasn't really written down in
5 that form, Your Honor. It was a check sheet. We had
6 sheets that we went through the units that already had
7 the toilet paper hanger or mirror installed. You know,
8 it had workout sheets on each unit, and you just checked
9 it; and I went through and checked the sheets that
10 indicated -- just put checks by them, indicated that these
11 things, these items were installed in the apartment. Then
12 I, in turn, gave Mr. McCarty a list stating things that
13 wasn't done in the apartment.

14 THE COURT: All right.

15 BY MR. BOYKIN:

16 Q After July 4th, 1980, did you have any further
17 contact with A.D.C., Mr. Daly, or Mr. Dillon?

18 A After July 4th?

19 Q July 24th.

20 A I'm sorry.

21 Q After you left the job, after Johnmark left?

22 A Yes. I spoke to Mr. Dillon sometime after that.

23 Q Will you tell us what happened.

1 A Well, I was --

2 MR. WEINER: Your Honor, I object to that. It
3 has no basis. We're off the job.

4 MR. BOYKIN: Your Honor, he has a right to --

5 THE COURT: What is the proffer? What are you
6 going to show the conversation produced that is relevant?

7 MR. BOYKIN: I intend to show that Mr. Dillon
8 discussed the fact that he wanted Mr. Purdy to bid on
9 additional work, and that he discussed the Johnmark
10 project, and he discussed the quality of work that had been
11 done by Johnmark during the period of time that they were
12 on the job.

13 THE COURT: What evidence will come out that will
14 help me decide an issue?

15 MR. BOYKIN: Well, Your Honor, if one of the
16 defenses -- and I believe it is -- is that they did not
17 perform in a workmen-like manner. This is evidence from
18 a foreman and an admission against interest by A.D.C.

19 THE COURT: You were defending a defense that
20 hasn't been presented, yet. Is that it? I don't want to
21 hear it, now. Let him go back later. All judges have
22 this trouble. If lawyers just try cases once, you'll see
23 what the problem is. We don't know how to put a defense in

1 context, a defense to a defense, because the original
2 defense hasn't been presented.

3 MR. BOYKIN: Your Honor, it is the plaintiff's
4 position that they performed in a workmen-like manner, and
5 that's the evidence I'm trying to put in.

6 THE COURT: All they have to do is say it once.
7 Did you do it in a workmen-like -- yes. Then lie back and
8 wait for the other side if it comes in and says it wasn't
9 and how. Then bring this witness on and say now, didn't
10 Mr. Dillon tell you everything you worked on was first
11 class. You're so good I'd like to hire you. Don't want
12 Johnmark, but I want you. That's the way to sell a
13 judge on what the case is about.

14 But to me I'll say well, I don't care whether he
15 talked to Dillon or not. It's irrelevant at this stage.

16 Now, it's true all lawyers do a little bit of
17 anticipating, but please don't put the entire defense
18 on to something that hasn't been presented, yet. If you
19 want to say Dillon said your work was generally great,
20 that's fine. I'll hear that, now.

21 BY MR. BOYKIN:

22 Q Did he say that you had performed -- Johnmark
23 had performed in a workmen-like manner?

1 A Yes, he did.

2 MR. BOYKIN: I have nothing further, Your Honor.

3 CROSS EXAMINATION

4 BY MR. WEINER:

5 Q Mr. Purdy, you said that you have about twelve
6 years of experience in construction?

7 A Yes, sir.

8 Q What type of construction?

9 A All types of construction.

10 Q Okay. Had you, prior to coming to work with John
11 mark in June of 1980, had you ever done a rehab before?

12 A Quite a few rehabs on homes and everything. Yes.

13 Q Had you done a rehab in an apartment? A
14 situation similar to the Johnmark job?

15 A Certainly.

16 Q Where?

17 A Well, in aspects to that, I used to work for
18 rental properties in fixing up apartments after people
19 would move out which there was extensive damage in, a
20 great deal more damage than you would consider a
21 rehabilitation to an apartment such as A.D.C. Fairways.

22 Q I'm asking you if you had rehabeted apartments
23 into condos specifically.

1 A Specifically? Directly? No.

2 Q Now, you said you were presently working in the
3 construction field; is that right?

4 A Yes, I am.

5 Q Who are you working for?

6 A Rosslyn Construction Company.

7 Q What are you doing for them?

8 A Rough form carpentry work.

9 Q Are you a foreman?

10 A No, I'm not a foreman.

11 Q Prior to Johnmark, working for Johnmark, had
12 you ever been a foreman?

13 A Yes. I've been a foreman before.

14 Q When?

15 A Well, prior to Johnmark I was a contractor
16 myself for a little bit and did some contract work myself.

17 Q Were you a licensed contractor?

18 A No. I didn't need to be licensed because I
19 worked under someone else. Someone else.

20 Q Now, you said you came to work for Johnmark
21 June, 1980. Do you remember the date?

22 A No. I can't recall the date exactly.

23 Q Was it early part of June? Late part of June?

1 A I would seem to think it was early part of June,
2 best I can remember.

3 Q Do you remember if it was before June 18th?

4 A I can't recall to tell you the truth.

5 Q When you came to work for Johnmark, what were
6 your duties?

7 A My duties at that point were to take the units
8 and oversee them and work, and I also worked with my own
9 tools, also, in the units; was just not strictly supervision
10 over everyone. I did supervise everyone, but I also
11 worked myself.

12 Q So, you used to supervise the plumber?

13 A Yes. I was -- if I needed him for a certain time,
14 I was to tell him to go in and put in the items that they
15 needed to do.

16 Q Were you to supervise the electrician?

17 A Well, if I needed him. When I needed him, yes,
18 I could call for him.

19 Q Who else were you supposed to supervise?

20 A The men that were involved in the rehabilitation
21 of the units, the rehabing of the units.

22 Q Who was --

23 THE COURT: Were you the foreman for the entire

1 job? For Johnmark or just one of several foremen, team
2 foremen?

3 THE WITNESS: No, sir. There was only actually
4 one foreman. That was me, and in the sense of getting
5 the units approved and making sure the items were done
6 and the units.

7 THE COURT: Was there a job superintendent for
8 Johnmark --

9 THE WITNESS: No, sir.

10 THE COURT: -- at that time?

11 BY MR. WEINER:

12 Q So, it would be fair to say that you would be in
13 one unit doing some work. You said you were doing work
14 with your own tools.

15 A Not every day. On occasions I will choose to
16 work with my tools because I knew we were at a point that
17 I could work with my tools, and things were under hand.
18 I didn't actually work with my tools every day, no.

19 Q On the day that you worked in a certain unit,
20 you had the duty of supervising work that was going on
21 in other units; is that correct?

22 A Well, under the conditions we were all on the
23 same floor because all you had to do was go out one door

1 and go in the other doors. They are all on the same floor.

2 Q When you came on board, did you read the
3 construction contract?

4 A What construction contract? The demanding --

5 Q I'm just asking you if you read a document called
6 the construction contract.

7 A The provisions of the contract, yes. I was
8 aware of --

9 Q Did you read them?

10 A Yes. I knew that we had a certain amount --

11 Q No. Mr. Purdy, I'm asking you if you read them.

12 A Yes.

13 Q You read that document?

14 A Not that exact document. I don't know --

15 Q What exact document?

16 A I haven't seen it. So, I don't know. I can only
17 see it from a distance.

18 (Handing document to the witness.)

19 A I didn't read the whole contract as it's presented
20 here.

21 Q What did you read?

22 A I read the scope of work. What is intentions
23 of -- well, what we were supposed to do in the scope of

1 work.

2 Q Did you read a document called the Modification
3 Agreement?

4 MR. BOYKIN: Your Honor, I'm going to object. It
5 just seems to me that we're getting beyond the scope of
6 direct, and we're really getting outside the scope of
7 relevance, here.

8 MR. WEINER: Your Honor, I think it's extremely
9 relevant. This man supposedly went back, looked at units,
10 made out a list that has disappeared, presented that list
11 to Mr. McCarty; and Mr. McCarty offered those handwritten
12 notes based on information received from his foreman who
13 was supposed to be familiar with the job.

14 MR. BOYKIN: The answers to the question if he
15 says yes I read the Modification Agreement, how would that
16 help me reach a conclusion?

17 MR. WEINER: They're claiming that certain work
18 was done. If he doesn't know what was supposed to be
19 done, obviously the reliability --

20 THE COURT: You say his failure to read the
21 Modification Agreement would show he didn't know --

22 MR. WEINER: I say it may. It's one thing I'm
23 presenting for your consideration.

1 THE COURT: You may answer. Objection's
2 overruled. Did you read that document?

3 THE WITNESS: No, Your Honor. This is the
4 Modification Agreement.

5 THE COURT: Just answer yes or no.

6 THE WITNESS: Yes, Your Honor, I read the
7 contents of this Modification Agreement because --

8 THE COURT: Did you read all of it or just part
9 of it?

10 THE WITNESS: This is what I read, Your Honor.
11 This one.

12 THE COURT: The whole thing?

13 THE WITNESS: This one here, the original
14 contract; and this is the modification. When I came aboard,
15 there was a mass confusion when I came aboard because
16 they were trying to come to some kind of agreement on what
17 was to be provided by Johnmark Construction Company.

18 THE COURT: You've answered the question. Next.

19 THE WITNESS: So, I have --

20 THE COURT: Wait for another question. You've
21 answered well.

22 BY MR. WEINER:

23 Q You say when you came on board there was mass

1 confusion. What did you mean by that?

2 A Things were disrupted. When I came on board,
3 Johnmark had -- there was confusion due to, you know --
4 I don't know what at that time it was, but I later
5 understood there was a problem with the contract.

6 So --

7 Q Now, you made the statement that there were
8 problems, of course, getting certain supplies.

9 A Yes, sir.

10 Q And in particular we are talking about that
11 cove molding and the light fixture.

12 A Yes, sir.

13 Q Did you personally try to obtain any of this
14 material?

15 A Did I personally try to?

16 Q I mean did you make a call to some supplier and
17 say he, do you have some cove molding? This almond
18 molding?

19 A Yes, I did.

20 Q You did?

21 A Yes, sir.

22 Q Who did you call? Do you remember? How many
23

1 people did you call?

2 A Not too many because basically my job was --
3 Mr. McCarty was aware of it. So, it was basically in his
4 hands and his secretary's hands that was there every day
5 because she sat near the phone.

6 Q Okay. Now, that kind of cove molding, is that
7 some type of special order type material? Is it unique?

8 A Well, that type of molding, I believe, the color
9 was the problem (indicating) in that molding. It's a
10 basic molding, but the color wasn't available.

11 Q But this type of molding is generally carried by
12 most suppliers in the field; isn't that true?

13 A Cove base is a general type of molding, yes.

14 Q Were you aware that the cove molding, base cove
15 molding could have been -- was in stock by -- was
16 available from Cherokee Suppliers in Alexandria?

17 A No, sir, I wasn't.

18 Q You said that the molding was installed on
19 June -- July the 11th? Tenth, 11th?

20 A Tenth.

21 Q Okay. Now, aside from putting in the cove molding,
22 wouldn't that necessitate another clean job, cleaning up
23 the apartment?

1 A Yes. We also did that, I recall.

2 Q That would be -- in other words, you had to go
3 in. So, you had to go in and do another cleaning after
4 some more work was done?

5 A Yes, we did. And that -- very light, though.

6 Q Very light. Now, the type of work that had to
7 be done to rehabilitate these units, we're talking about
8 basic cosmetic type of rehabilitation; is that right?
9 What was required?

10 THE COURT: Is there a list in the contract of
11 what shall be done over? Can't somebody point to a list,
12 please?

13 MR. WEINER: Yes.

14 THE COURT: What page is it on?

15 THE WITNESS: Would you like me to answer the
16 question?

17 THE COURT: No.

18 MR. WEINER: Your Honor --

19 THE COURT: P1?

20 MR. WEINER: Attachments 1 through 4.

21 THE COURT: To P1?

22 MR. WEINER: Yes, sir.

23 THE COURT: P1 is that where we're starting?

1 MR. WEINER: Yes.

2 THE COURT: Now, it just begins with the word
3 kitchen cabinets. Is there something else that said you
4 should do things according to the attachment?

5 MR. MAYS: Attachments are made part of the
6 contract, Your Honor.

7 THE COURT: By some reference?

8 MR. WEINER: Yes.

9 THE COURT: It says in accordance with the
10 drawing and/or specifications for the project. They have
11 not been identified, yet. Drawings and specifications.

12 MR. WEINER: Well, Your Honor, it says there
13 is a provision in the contract that the --

14 THE COURT: Contrary to that it says the scope of
15 the work shall be attached to and made a part of this
16 agreement as Attachment 2, and there is an Attachment 2.

17 MR. WEINER: Yes.

18 THE COURT: What does the GSI receptacle do in
19 the bathroom?

20 MR. BOYKIN: It's ground, if Your Honor please.

21 THE COURT: Ground fold. I know what you were
22 talking about. I get the feel for it.

1 BY MR. WEINER:

2 Q Basically we're talking about really cosmetic
3 type of work to the apartments or the units; is that
4 correct?

5 A Yes, sir. I would say it was cosmetic.

6 Q And a large part of it had to do with cleaning
7 work, actually cleaning windows?

8 THE COURT: I've read what it says. They've got
9 to replace the refrigerator, range, dishwasher, kitchen
10 countertops, cabinets, hardware, light fixtures.

11 BY MR. WEINER:

12 Q Now, you looked at that list, Plaintiff's
13 Exhibit 11, and you said that this was basically accurate
14 with regard to the information you relayed to Mr. McCarty.

15 A Yes, sir.

16 Q Then, I believe, that Judge Brown asked you
17 if this -- if Plaintiff's Exhibit No. 10 was a list that
18 you supplied.

19 THE COURT: That's one of the things he gave
20 McCarty. He also gave McCarty a very detailed list that
21 he put checkmarks on.

22 THE WITNESS: Right. This is something else.
23 The dos and the don'ts, in other words, yes, it is done;

1 and no it's not done. I supplied him the two lists.

2 BY MR. WEINER:

3 Q But, did you write this? Is this your
4 writing?

5 A No. That's not my handwriting in the sense --

6 THE COURT: Whose handwriting is it on ten?
7 If you know.

8 THE WITNESS: I'm not sure, Your Honor, whose
9 handwriting it is. I know I supplied him two lists.

10 BY MR. WEINER:

11 Q Did you just hand Mr. McCarty this list, or these
12 two lists that you gave him? Did you just hand it to
13 him? Or did you read it out to him?

14 A I just gave Mr. McCarty the list, and we went
15 over some things on the list. I mean, he's asking me
16 were these items done, and these not done; and I told him
17 so much of the major things such as cleaning is not done.
18 We had everything installed or -- about everything installed
19 in the units, and I checked off what I had installed, and
20 I told him the cleaning's not done in that unit.

21 Q Okay. Now, let me ask you this. Would you please
22 refer to what's titled in Plaintiff's Exhibit No. 11 to
23 Unit A6. Now, you stated before to be perfectly honest you

1 didn't walk all the units.

2 MR. BOYKIN: I object. I don't believe he said
3 that at all. He's putting words in his mouth.

4 THE COURT: Sustained. He didn't use the phrase
5 "to be perfectly honest."

6 MR. WEINER: I'm sorry, Your Honor.

7 THE COURT: He also said he did not go through
8 every unit. That's what he did say. He did not go through
9 every unit.

10 BY MR. WEINER:

11 Q Did you go through A6?

12 A I went through every unit in the building, okay.
13 I'm sorry if I've confused myself in word.

14 Q Upon his direction?

15 A Upon Mr. McCarty's direction he asked me to walk
16 the units, and I walked them.

17 Q So, you did go through A6?

18 A Yes, sir, I did.

19 Q Now, was not A6 used as a storage unit?

20 A There was a storage unit in the building. Yes,
21 it was. Correct.

22 Q Now, when you went into A6, was it -- still a
23 storage unit; right?

1 A Well, we were just about finished with it. Yes,
2 there was still some things stored in there.

3 Q Now, notwithstanding the things that were
4 stored in there, you were able to list these items as
5 being complete?

6 A Well, there was not that much left in there
7 because of the building, you know, we were on the last
8 phases. So, there wasn't that much material in it. So,
9 certain items such as -- that you could put up in the
10 bathrooms -- we didn't have anything stored in the
11 bathrooms, you know, there was a certain amount of work to
12 be done.

13 Q Well, was it painted?

14 A Yes. It had been painted once. I recall it
15 had been painted.

16 Q The entire unit had been painted?

17 A Well, there was a lot of problems with the
18 painting on that, as I recall, because of electrical work
19 being done in the unit; and they came in and busted holes
20 through the ceilings to run wires, and there was some units
21 involved in that, and so, they had to be repainted.

22 Q So, there was still holes in the wall?

23 A Well, they had been patched -- to the best of my

1 knowledge, they had been patched at that point, but they
2 had holes in the walls because of electrical wiring
3 problems to the furnace units, and they had to rewire the
4 units and run the wires through the ceilings.

5 Q So, if we go through this list on A6 -- look
6 at A.

7 A Yes, sir.

8 Q This is an accurate list?

9 A Well, the walls were patched and what not, and
10 the units were repainted because of the electrical
11 problems and what not; but to the best of my knowledge,
12 this is correct as to what work was done in the units.

13 Q Now, is there a certain procedure that John-
14 mark Construction company would use a flow -- a schedule
15 how things were to be done? An order? A procedure?

16 A Yes. You have to have procedure.

17 Q Would you mind telling us what, in your mind,
18 was the Johnmark's procedure in rehabing the unit. What
19 was the flow? What was the schedule? What was the
20 procedure? Who goes first? What goes first?

21 A Well, the stripping of the unit is first to
22 remove items that, you know, you were going to replace.

23 Q Were you involved -- when you came on the job,

were you involved in any of the stripping?

A No. I would say that the units were stripped. A lot of them. The job was in different phases when I came on the job.

Q What's the next phase after the stripping?

A Well, you repair the walls and paint the unit.

Q So, A6 would have been painted?

A What I tried to indicate to the Court here, and to you, sir, is these units were painted; but on numerous occasions we had to come back into them because long after these units were turned over for our acceptance there were electrical problems, and they had to knock the wall out and run new wiring into the furnaces.

Q I'm saying to you in A6 was one of the first things that was done was painting; is that right?

A Not the first thing, no. I told you the stripping of it was the first thing.

Q Then the drywall, the painting you said.

A Yes, sir.

Q So, the third thing that would be done would be the painting?

A Yes, sir. Normally.

Q Then, what comes after the painting?

1 A Usually after the painting you might put your
2 cleaners in there a little, but not for the final clean,
3 but to clean up some of the excess paint and whatever and
4 clean up; and you start installing your new products.

5 Q Then what? When does the plumber come in?

6 A Well, there's phases in there. You'll need
7 the plumbing once you remove your cabinets and everything
8 and the kitchen and everything, the plumber has to come
9 in and run new traps and whatnot for the set ups. Your
10 kitchen cabinets and sink hookups and stuff, and your
11 dishwasher.

12 Q What about the electrician?

13 A The electrician had GSI to run the switch.

14 Q So, that's all taken care of, is that what
15 you're saying, before the painting?

16 A Well, the plumber would come in and run his work,
17 and then you would have your drywall man if there were any
18 holes in the wall, take care of the plumber and the
19 electrician, and then you basically paint the place.

20 Q Then what?

21 A Once you were at that point, you were at the
22 point where you could put your fixtures in. Your light
23 fixtures and minor things, you know, things that you

1 wouldn't just --

2 Q Tell me what the minor things are. Everybody's
3 talking about minor punch out, minor things. What are
4 minor things? Tell me. List them. What are the minor
5 things?

6 A A toothbrush holder, a soap dish, a doorknob,
7 a door lock assembly were minor things.

8 Q What's a major thing?

9 A Well, major thing is kitchen cabinets which
10 was probably one of the items that was -- one of the
11 major items.

12 Q What else was a major item?

13 A Well, your plumbing to make sure it's right
14 for your hookup for your cabinets, your traps.

15 Q Now, in a unit like -- you still have A6 there.
16 How are you able to tell that the plumbing and electrical
17 was done in that unit?

18 A You can see it's done when you walk in and you
19 see the GSI switches in, and certain fixtures are in that
20 were to be put in, you know that the items were done.
21 The electrical was done.

22 Q Did you test it? See if it worked?

23 A In reference to what? Test what?

1 Q Did you hit a light switch or put a light bulb --

2 A Certainly. You turn the light on.

3 Q I'm asking you if you did it.

4 A Yes, I checked it.

5 Q Did you flush the toilet?

6 A Yes, I've flushed toilets in units.

7 Q No. I'm talking about A6.

8 A Well, to tell you the truth --

9 MR. BOYKIN: Your Honor --

10 THE WITNESS: I can't answer.

11 THE COURT: Let me hear the objection.

12 MR. BOYKIN: The objection is that counsel

13 has not put it in context in the framework. If he's

14 talking about when he inspected the partials on July 10th,

15 let him say that so the witness --

16 MR. WEINER: I'm referring to that list, Your

17 Honor, and that was the list that he --

18 THE COURT: When you prepared your information

19 for Mr. McCarty after his firm had been put off the job,

20 on that trip around did you flush every toilet is the

21 question. Or the one in A6?

22 BY MR. WEINER:

23 Q In A6, and you started saying to be perfectly

1 honest.

2 A Well, I can't tell you that I actually went in
3 A6. I can't remember whether I did. I went by the punch
4 list that, was on the units, and I went by and checked
5 everything on them. But to recall whether I flushed the
6 toilet in A6, no, I can't testify to that.

7 Q Okay, sir. How did you -- did you check the
8 plumbing? What method did you use? I mean did you just
9 walk in the door and look and say --

10 A If you let me interrupt for a minute.

11 Q Please.

12 A None of this material that I have before me I
13 have -- when you do a unit, you have a list on it, and it
14 indicates kitchen, bedroom, broke-down list. Faucets,
15 everything.

16 Q It's a form you're talking about?

17 A It's a format, and all you have to do is go
18 through and check each one, and it has the building number,
19 and the apartment indicated on it; and if it's not there,
20 you go down a punch list -- not punch list, but it's a
21 format on each apartment. I went down this list and
22 checked those items which were done and which were not and
23 presented those lists, okay?

1 THE COURT: Now the lawyer's asking you did you
2 check the operational quality in the unit --

3 THE WITNESS: Yes, I checked the operation of
4 things.

5 THE COURT: You are not listening to the question.
6 By turning on the water, by flushing every toilet, by
7 turning on every electrical switch, and by turning on the
8 refrigerator to see if it would run, by turning on the
9 stove to make sure it was hooked up. Did you go to that
10 much detail?

11 THE WITNESS: Yes, sir, I did.

12 THE COURT: Last walk through?

13 THE WITNESS: Yes, sir, on the walk through I
14 did. I checked the items.

15 THE COURT: For operation as well as installation?

16 THE WITNESS: Operation as well as installation.

17 BY MR. WEINER:

18 Q Then, the form that you used for this apartment,
19 A6 -- I'm just using this as an example -- you got there,
20 was the form a blank form when you started your walk? Or
21 was this a form that had been used on the unit as it
22 progressed?

23 A This was a form that was used for final

1 inspection upon me. I always use this form.

2 Q But had other -- had there been writing on this
3 form previous to your walk?

4 A No. It was a blank form.

5 Q It was a blank form, and you filled out or
6 checked various items on it; right?

7 A I checked various items on it. It had a
8 building number, and apartment at the top of it, and I
9 checked the items.

10 Q Then you gave it to Mr. McCarty?

11 A Yes, sir.

12 Q Did you sign it?

13 A No, sir. I didn't see any reason to sign it.

14 Q Did you date it?

15 A No. I didn't see any reason to date it at that
16 time.

17 Q Now, still with your A6 unit, isn't it so that
18 the work that is listed to have been done on this could
19 not have been done, and then a full paint job take place?

20 A There wasn't a full job that took place on any
21 of the units in question. What happened was it was in the
22 living room area. So, therefore, the bedrooms and the --
23 the bedrooms and bathrooms are not involved, and the

1 damages usually it was just the immediate living room area
2 that they had to run the wires through. So, it was never
3 a full paint job on the units that had electrical work or
4 electrical problems. They had to rewire them.

5 Q You never did a full paint job and --

6 A Maybe I'm confusing you. We did a full paint
7 job on the units, but after they had problems with wiring
8 the furnaces, we had to go back and do a partial paint
9 job after they touched up -- plastered the walls and
10 corrected the drywall problems.

11 Q Now, let me ask you this. You went -- you
12 ended your employment with Johnmark on -- would it have
13 been the 24th of July?

14 A Approximately there, yes. Sometime in that time
15 period.

16 Q So, you worked for them for about a little more
17 than 30 days?

18 A About a month-and-a-half.

19 Q Month-and-a-half. Were you paid in cash or
20 check? Your salary.

21 A Well, I was supposed to be paid by check, but
22 things were --

23 Q Did you get -- just check or cash?

1 THE COURT: Or both.

2 BY MR. WEINER:

3 Q Or both.

4 A Well, at times I was paid with a little cash, and
5 at times I was paid with a check.

6 Q Now, were you paid a -- I mean on hourly basis?

7 A I was on an hourly basis.

8 Q Were withholding taxes taken out of your salary?

9 A Yes, sir, as far as I know.

10 Q Did you receive a W-2 form regarding your salary
11 for 1980 from Johnmark?

12 A I can't recall. I'd have to check my tax
13 records. I don't remember.

14 Q Did you get back the money withheld from your
15 wages? Did you get -- was there a problem with that?

16 A Well, the problem was I was never paid period.
17 To a certain degree.

18 Q You never got any money from Johnmark?

19 A I received a little money, but the problem
20 was -- my understanding that there was, they were
21 operating, and I chose to help him work, and, you know,
22 there was no money available.

23 Q And you worked on how long, then, without getting

1 paid.

2 A Three or four weeks. Three weeks, approximately.

3 Q So, does he owe you money?

4 A Yes, he does.

5 Q How much money does he owe you?

6 A Well, I've never sat down to actually compute
7 it at this point.

8 Q Do you go around working for nothing?

9 A No. I would say around \$1,100 or \$2,000,
10 \$1,500, something like that.

11 Q Wait a second. Eleven hundred, 2,000, 1,500.
12 Do you know what it is?

13 A Approximately \$1,500 in salary.

14 Q Did you work for him because you were his
15 friend?

16 A No. I went over there with the intentions of
17 working with him on an hourly basis to make an income.

18 Q And you continued working without getting paid?

19 A Yes, I did.

20 Q Did you, for 1980, file an income tax return?

21 A Did I file a return?

22 Q Yes.

23 A Yes. I filed returns for every year.

1 Q Did you get money back?

2 A I don't recall 1980. I don't think I received
3 any money back. I'm not sure.

4 THE COURT: He's talking about getting money
5 back last spring or early summer cause you filed your '80
6 return in '81. So, the question is did you get any tax
7 refund in the spring of last year?

8 THE WITNESS: No. I don't believe I received a
9 refund.

10 BY MR. WEINER:

11 Q Just one final question. While you were on the
12 job as a foreman -- is that what your title was?

13 A Yes.

14 Q -- do you recall any injuries on the job? Anybody
15 getting hurt?

16 A Not to my knowledge.

17 Q Well, if somebody did get hurt, they would
18 probably report to you; is that correct?

19 A Yes, sir. They would have. I think they would
20 have.

21 Q In conclusion, if you had a problem during the
22 month or so you were on the job, who would you go to?

23 A With a problem about the job?

1 Q Yes, sir.

2 A Mr. McCarty. He was on the job.

3 Q But what was he? He was the man to ask the
4 question?

5 A He was the man to go with if there was a
6 problem on the job. Yes.

7 Q - What about Mr. Sauer?

8 A Mr. Sauer I didn't answer to. Mr. Sauer, he
9 wasn't on the job at the time. Mr. McCarty was on the
10 job. I just reported to him.

11 Q He was there every day?

12 A Yes, sir.

13 Q Did you go to Mr. McCarty with problems or
14 questions?

15 A Yes. I went to him with some questions about
16 certain things that were done or, you know, procedures
17 of the job. You know, there's things you have to talk
18 over.

19 Q Sure. But you would not go to Mr. Sauer?

20 A No, sir.

21 MR. WEINER: I have no other questions of this
22 witness.

23 MR. BOYKIN: Nothing further, Your Honor.

1 Q No. Just as briefly as possible.

2 THE COURT: Give an overview of it.

3 THE WITNESS: We were there to rebuild certain
4 plumbing devices inside the space, and we were also there
5 to install new kitchen appliances and a kitchen center.

6 BY MR. BOYKIN:

7 Q Did you agree on a per unit price with John-
8 mark?

9 A Yes, I did.

10 Q What was that amount?

11 A That amount was \$178.

12 Q Were there provisions in your agreement with
13 Johnmark for extra items?

14 A Yes, there were. There was a supplemental
15 worksheet that covered other possibilities of repairs on
16 the job. Our contract with them was for at that list
17 price less 25 percent. In other words, if there was a
18 water closet for instance that needed to be replaced,
19 we would take the list price that was agreed upon by
20 A.D.C. Fairways and Johnmark, and I would charge 75
21 percent.

22 Q Do you recall how many units you completed
23 between April and June of 1980?

1 A Roughly 30.

2 Q Well, let me take you back. That would be the
3 entire job; wouldn't it? Thirty units.

4 A I'm sorry. I must have misunderstood your date.

5 Q Between April and June.

6 A Between April and June. First of June?

7 Q Yes.

8 A Probably something in the line of 20 units or
9 so.

10 Q Could it have been 19?

11 A Very possibly.

12 Q Did you complete or -- in those units were those
13 units, the 19 units that you completed, were they
14 approved?

15 A By whom?

16 Q Were they approved by Johnmark?

17 A They were approved by Johnmark and by Fairfax
18 County.

19 Q You did receive county approval, also --

20 A That's right.

21 Q -- on all the work you had done on those 19;
22 is that correct?

23 A That's correct.

1 Q Were they approved by A.D.C. Fairways?

2 A Not to the best of my knowledge.

3 Q Those 19 were never approved?

4 MR. WEINER: Your Honor, I think that's a
5 confusing question. Now, are they talking about his work
6 or the units being approved? There's two different things.

7 MR. BOYKIN: I asked him whether or not his
8 work on the units had been approved by A.D.C. Fairways,
9 Your Honor.

10 THE COURT: When you say, "were they", "they"
11 sounds like complete units, but make your question a
12 little more clear, sir.

13 BY MR. BOYKIN:

14 Q On the first 19 units, did a time come when
15 those units, the plumbing work had been finally approved
16 by A.D.C. Fairways?

17 A On those 19 units, to the best of my
18 recollection of it, I'm not sure that those 19 were
19 actually ever approved. That's a very confusing thing.
20 Those units were approved at one point in time, but then
21 they were disapproved afterwards.

22 Q Disapproved by whom?

23 A As I recall --

1 Q All right. I'm going to show you an exhibit
2 that's been admitted into evidence. It's Exhibit 11, and
3 this is a list which relates to the partial units that
4 were done in the basement.

5 MR. WEINER: Your Honor, I am not sure that the
6 witness -- my note -- did he say he got paid on the 19
7 units, and there are other units?

8 THE COURT: No. The question was related to the
9 19 units. He says were you paid? He says I'm owed, and
10 I have a lien on it.

11 MR. WEINER: On the 19?

12 THE COURT: Wait for cross.

13 MR. BOYKIN: Let's go back.

14 MR. WEINER: I'm sorry, Your Honor.

15 THE COURT: You can be correct, but that's what
16 he said.

17 BY MR. BOYKIN:

18 Q You worked on and completed approximately how
19 many units? Completed units from your standpoint.

20 A Completed units they would be approximately, I
21 guess, 30 units off the top of my head. Thirty-one units
22 in that building which were complete. There were a matter
23 of eleven units. As I recall, there were 42 units in that

1 building, and I can be wrong about that.

2 Q Now, of the 30 -- on the 30 units you completed
3 some of those prior to May or June of 1980, and some
4 afterwards; is that correct?

5 A That's correct. That's correct.

6 Q When you say you haven't been paid, are you
7 talking about the total package of 30?

8 THE COURT: What haven't you been paid for? You
9 tell us.

10 THE WITNESS: On the job in question, we were
11 owed moneys for work that we performed on the project. We
12 were paid some moneys. Now --

13 THE COURT: For how many units weren't you paid?
14 Or does it go a different way?

15 THE WITNESS: There's two ways to look at that.
16 We did work in two buildings. We placed a lien on the
17 first building, and that's the one that involves these
18 units. When you say -- when we are talking about whether
19 I've been paid for specific units, as a company we don't
20 recognize that as specific units. We look at it as payments
21 toward the amount owed. Payments toward the indebtedness.
22 I'm not really trying to mislead anybody, but that's how
23 we perceive it.

1 BY MR. BOYKIN:

2 Q So, there are still moneys owing you?

3 A That's correct.

4 Q How long have you been in the plumbing business?

5 A I've been in the plumbing business about 17
6 years. I've had my own company, now, for about five.

7 Q Did you perform your work in this building in a
8 workman-like manner?

9 A That's correct.

10 Q In accordance with industry standards?

11 A In accordance with industry standards, and also
12 Fairfax County and the state plumbing code.

13 Q It's your testimony, then, that all of these
14 30 units that you completed were approved by Fairfax
15 County?

16 A That's correct.

17 Q Now, going back to Exhibit 11 which relates to
18 other units. These would be partially completed units.
19 Now, do you recall doing work on Units B1, 2, 3, and 4,
20 and Units A5, 6, 7, 8, 9, and 10?

21 A That's correct.

22 Q Where were they located in Building 4355?

23 A They were in the two lower levels, basement

(1:30 p.m.)

AFTERNOON SESSION

Whereupon,

GARY A. STURGILL,

having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION (Resumed)

BY MR. BOYKIN:

Q Mr. Sturgill, during the break, did you have an opportunity to review the figures on the partial units completed that are reflected by Exhibit Number 11?

A Yes, sir. I believe so.

Q Now, will you go over those units for the judge starting with B1 and tell him whether or not those figures are accurate that are listed on there, and if they're not, tell him what the difference is.

THE COURT: As regards your area of work.

BY MR. BOYKIN:

Q As regards plumbing work. Thank you.

A On Unit B1, the amount that's on this exhibit differs from our billing amount by the amount of \$30. There was additional work there concerning some broken pipes in the common area that was performed, and it is not

1 reflected in this statement. So, the amount should be \$30
2 more than what's shown.

3 Q What's the total amount there that should be on
4 this figure?

5 A Two nine six nine three.

6 Q What about B2?

7 A The amount that we have on our billing agrees
8 at \$241.59.

9 Q What about Unit B3?

10 A B3 we have two four one five nine, and that agrees
11 with the exhibit.

12 THE COURT: I suggest you only develop testimony
13 of what is different. If it agrees, don't bother with all
14 the figures. Just say "the same."

15 BY MR. BOYKIN:

16 Q Unit B4.

17 A We -- our amount on Unit B4 is two five four two
18 six.

19 Q And is that \$10 more than is listed here?

20 A That is.

21 THE COURT: You say they have billed \$10 less
22 than they should for that work, therefore, you were saying
23 add \$10?

1 THE WITNESS: Yes, Your Honor.

2 THE COURT: Use that terminology from now on
3 because you've got 30 some more. Add \$10.

4 BY MR. BOYKIN:

5 Q A5.

6 A On A5 --

7 Q Would that be add \$10?

8 A That would be add \$10 on A5.

9 Q And A6 is the same; isn't it?

10 A Yes, sir. A7 is the same.

11 Q A8?

12 A A8 we have --

13 THE COURT: Add or subtract how much?

14 THE WITNESS: Roughly \$2.

15 THE COURT: We won't stop to fine tune that
16 figure.

17 BY MR. BOYKIN:

18 Q A9?

19 A It's a correct -- it's the same.

20 Q A10.

21 A The amount should be -- \$10 should be added to
22 the amount.

23 Q Is that all?

1 A Unit 31.

2 Q Unit 31.

3 A That was --

4 Q That was an agreement?

5 A That's right.

6 Q Thank you. Now, Mr. Stargill -- Sturgill, I'm
7 sorry, again we are talking about partially completed units.
8 The figures you just gave us are partially complete; is
9 that correct?

10 A That's correct.

11 Q Now, the billings on the 30 units that you did
12 complete, have you been paid for those?

13 A This is that thing we were discussing.

14 THE COURT: How is that relevant?

15 MR. BOYKIN: Your Honor, eleven of the units
16 we're claiming have not been paid for.

17 THE COURT: If the contract -- the issue is
18 should the contractor be paid. Not his subs.

19 MR. BOYKIN: I'll withdraw the question.

20 BY MR. BOYKIN:

21 Q Did you do any work on Building 4345?

22 A Yes, sir, I did.

23 Q Do you have any records that would indicate the

1 amount of work that you did on partials in that building?

2 A Yes, sir.

3 Q What amount of work did you do, or what is the
4 amount that's due to you on those buildings?

5 A The total amount that's due to me?

6 Q Yes, sir.

7 A \$5,363.21.

8 THE COURT: I didn't hear your figure.

9 MR. BOYKIN: Say the money again.

10 THE WITNESS: \$5,363.21.

11 MR. BOYKIN: That's on Building 4345?

12 MR. MAYS: Your Honor, note our objection to this
13 testimony on the grounds that the information provided us
14 up to this point shows no plumbing work in that building
15 that Johnmark's making a claim for.

16 MR. BOYKIN: It's cross examination, Your Honor.

17 MR. MAYS: In his own exhibit there is no
18 plumbing work in reference to that building that I can see
19 on here.

20 MR. BOYKIN: Still cross examination, Your
21 Honor. I'm trying to elicit whether or not he did any
22 plumbing, and they can cross examine.

23 THE COURT: We're still on your case.

1 MR. BOYKIN: Yes, sir.

2 THE COURT: What do you mean --

3 MR. BOYKIN: His objection relates to cross
4 examination not to any technical difficulty.

5 THE COURT: Is it true that you want to show
6 what a sub bills a contractor on a billing where the
7 contractor's not claiming any money?

8 MR. BOYKIN: I'm trying to find out, Your Honor,
9 whether or not he did any plumbing work on Building 4345.

10 THE COURT: He says he did, then you ask him was
11 his bill paid.

12 MR. BOYKIN: I asked him how much was the
13 bill.

14 THE COURT: But your opponents say that's not an
15 issue in the case. Tell me how it is an issue in the
16 case.

17 MR. BOYKIN: Well, Your Honor, in regards to these
18 partial lists, Exhibit 11 that was listed in essence for
19 Building 4345, there were some partial figures that were
20 done.

21 Now, what I'm trying to determine is the same
22 thing that we determined on all the other units whether
23 or not plumbing work was done, and whether or not this

1 exhibit accurately reflects what his work was on those
2 buildings. And that's certainly relevant, Your Honor.

3 THE COURT: I'm not concerned with his bill or
4 the accuracy of your first witness's list.

5 MR. BOYKIN: Yes, Your Honor. That's what I am
6 trying to determine. Thank you for helping me out with
7 that.

8 MR. MAYS: Your Honor, we still object because
9 on the first set of partials at least, plumbing wasn't an
10 item listed.

11 THE COURT: On the first set of what?

12 MR. MAYS: One through ten, the partial units
13 that we're talking about, now, in Building 43 --

14 THE COURT: One through ten of what? You see,
15 I don't have any one paper I can refer to to find out
16 what the plaintiff claims other than the Motion for
17 Judgment.

18 MR. MAYS: Plaintiff's exhibits on the yellow
19 sheets reflecting the partial work. I'm sorry I don't --

20 THE COURT: I have Exhibit 11 in my hand. They
21 make a claim for Building 4345.

22 MR. MAYS: Right. But they do not specify any
23 plumbing work, and through the discovery process, Your

1 Honor, they have never once indicated that they are making
2 a claim for any plumbing work in that building.

3 MR. REESE: If Your Honor please, during the
4 recess with Mr. Sturgill, myself, and Mr. Weiner, it was
5 determined that the yellow sheets that were introduced into
6 evidence through Mr. McCarty were inaccurate in one area,
7 and they were inaccurate in that Johnmark had been billed
8 by Mr. Sturgill for plumbing work that had been done in
9 4345 that does not appear on the yellow sheets.

10 THE COURT: Is that a long way to say we want
11 to add to our claim?

12 MR. REESE: Exaclty.

13 THE COURT: Do the Pleadings permit you the
14 way they are drawn?

15 MR. REESE: The Pleadings are drawn in the
16 general so that we're asking for \$123,000 for partial work
17 at Ivymount.

18 THE COURT: All right. So, it's an add-on. Go
19 ahead.

20 MR. REESE: Thank you.

21 BY MR. BOYKIN:

22 Q Did you do plumbing work on Building 4345 prior
23 to July 24th, 1980?

1 A Yes.

2 Q Do you know the amount of work that you did on
3 4345 alone?

4 A Yes, I do.

5 Q Will you please tell the Court what the amount
6 of plumbing on that building was that you billed to
7 Johnmark?

8 A \$2,251.92.

9 THE COURT: What was the \$5,300?

10 THE WITNESS: That is the total amount that I'm
11 under --

12 THE COURT: You mean work you did not only for
13 Johnmark but directly for someone else?

14 THE WITNESS: No, sir. It involves the
15 contractor -- it involves several buildings. We performed
16 work in two of the buildings there. This ends up being
17 the amount of money that we're owed on the project.

18 THE COURT: So, then, when the lawyer asked you
19 how much were you owed for Building 4345, you were not
20 correct when you said 5,300 and some dollars for that one
21 building?

22 THE WITNESS: I thought he had asked me how much
23 was I owed.

1 MR. BOYKIN: No. On 4345. The Judge is perfectly
2 correct on that.

3 THE COURT: So, would you take back that bit of
4 testimony?

5 THE WITNESS: Yes. I guess I do.

6 THE COURT: So, what is your answer, now, as
7 to plumbing, heating, and air conditioning work that you
8 did before July 24 on Building 4345?

9 THE WITNESS: \$2,251.92.

10 MR. BOYKIN: We have nothing further, Your Honor.

11 CROSS EXAMINATION

12 BY MR. MAYS:

13 Q Mr. Sturgill, when was the first date that you
14 inspected the units in Building 43 -- well, any building
15 in Ivymount?

16 A Probably on or around the 1st of April, 1980.

17 Q Did you enter into a contract -- a written
18 contract with Johnmark Construction for the plumbing work?

19 A Yes.

20 Q Do you have that with you?

21 A Yes.

22 Q May I see it, please?

23 (Handing document to the attorney.)

1 24th; isn't that what you said?

2 A No.

3 Q That's not what you're saying?

4 A No. That's not what I said. I said that the
5 only thing we had to do there was we had everything
6 completed other than a fifteen-minute job of connecting
7 the range and the dishwasher. I think that's what I said.

8 THE COURT: All right. Excuse him from the
9 case?

10 MR. REESE: Yes, Your Honor.

11 THE COURT: You may leave, sir.

12 (Witness excused.)

13 MR. REESE: Call Barry Mates.

14 Whereupon,

15 BARRY T. MATES,

16 was called as a witness by and on behalf of the plaintiff,
17 having been first duly sworn, was examined and testified
18 as follows:

19 DIRECT EXAMINATION

20 BY MR. REESE:

21 Q Mr. Mates, what is your full name, sir?

22 A Barry T. Mates.

23 THE COURT: M-a-t-e-s?

1 THE WITNESS: Yes, sir.

2 BY MR. REESE:

3 Q How are you employed, sir?

4 A I'm the president of BT Electrical Enterprises
5 Incorporated, state licensed contractor.

6 Q How long have you been a state licensed
7 contractor in the electrical field?

8 A March 13, 1978.

9 Q All right, sir. You were so licensed in 1979,
10 1980; is that correct?

11 A Uh-huh.

12 Q Did there come a time when you performed
13 work under a subcontract with Johnmark at a project known
14 as Ivymount?

15 A Yes, sir.

16 Q All right, sir. Let me take you back, if I
17 can, to Building 4355 at Ivymount. Does that building
18 ring a bell with you?

19 A Yes, it does.

20 Q All right, sir. Let me show you, if I can,
21 Plaintiff's Exhibit 11 which is the partial list, again,
22 to be much used today. Have you had an opportunity to
23 examine the figures recited on this list with reference

1 to the electrical work done in the units identified?

2 A Yes, I have.

3 Q All right, sir. Comparing your records with
4 these records, do they differ in any way with reference
5 to Units B1, B2, B3, B4, A5, 6, 7, 8, 9, and 10?

6 A To my knowledge, they're all consistent.

7 Q - They're all consistent to that point. All right,
8 sir.

9 Now, let's go, if we can, to the following units.
10 Those would be units once again in Building 4355, Units 21,
11 22, 23, 24 --

12 THE COURT: Stop. If you have consecutive numbers,
13 say 21 through something. Don't make the clients pay for
14 reading single numbers.

15 BY MR. REESE:

16 Q Units 21 through 28 and 32, 33, and 38. Have
17 you compared your records with reference to the work that
18 you performed in these units?

19 A Yes, I have.

20 Q Do your records reflect these units all were
21 finalized by you?

22 A Yes, they were. Did you mention 31? Did you
23 exclude it?

1 Q I did.

2 THE COURT: He excluded that.

3 BY MR. REESE:

4 Q Thirty-two, 33, 38, the 30 numbers. These were
5 all finalized by you?

6 A Yes, sir.

7 Q That was under the contract with Johnmark; is
8 that correct?

9 A Yes, it was.

10 Q As part of the work that you were doing, did
11 you run what is known as an electrical test within each
12 and every one of those units?

13 A Yes. My function was under my contract to make
14 sure that a light switch functioned, that a receptacle had
15 power to it.

16 THE COURT: Are you saying, then, you did all of
17 the contract work?

18 THE WITNESS: As per my contract.

19 THE COURT: Wasn't sure about the finalized.

20 MR. REESE: Not only were these units finalized
21 but --

22 THE COURT: Don't use that term. I don't think
23 it's a term applied in the building world. Did you do the

1 work?

2 BY MR. REESE:

3 Q Having completed all the work, were these units
4 approved by Fairfax County?

5 A Yes, they were.

6 Q Were you present when they were approved?

7 A Yes, I was.

8 Q You walked them, also?

9 A (Witness nodding in the affirmative.)
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1 THE COURT: What about 21 through 28?

2 THE WITNESS: Yes, they were --

3 THE COURT: Did you do all of that work?

4 THE WITNESS: They were finalized.

5 THE COURT: Was it ever approved?

6 THE WITNESS: Yes, they were. Can I insert some-
7 thing?

8 THE COURT: If it's correct testimony or make your
9 testimony more accurate.

10 THE WITNESS: Upon trying to get the actual dates
11 on some of the finals, the -- my office called Fairfax
12 County trying to get the specific dates that the Defendants
13 needed on the finals for the 20 series, and as of right now,
14 it's -- Fairfax County is like a year behind in their filing
15 system. So, they're trying to locate it with the new
16 inspector. So, it's possible it will be there at a later
17 date.

18 BY MR. REESE:

19 Q Now, sir, all the work that you performed on these
20 11 completed units -- that would be the 20-series plus the
21 3 in the 30 series and work completed on the partial units --
22 was that done in a workman-like fashion?

23 A I would like to think so.

1 Q All right.

2 MR. REESE: No further questions.

3 THE COURT: Ask him about Unit 31 since that's in
4 issue.

5 MR. REESE: If Your Honor please, I don't believe
6 any electrical work --

7 THE COURT: Did you do --

8 THE WITNESS: I don't think so. The unit on my
9 records was notified -- I mean it was noted as being occu-
10 pied.

11 THE COURT: Then you did not do any work?

12 THE WITNESS: I don't believe so.

13 MR. REESE: None is claimed, if Your Honor please.
14 Your witness, gentlemen.

15 CROSS EXAMINATION

16 BY MR. MAYS:

17 Q Mr. Mates, you testified that in reference to
18 Building 4355, Units 21 through 28, 32, 33, and 38, that
19 those at some point passed Fairfax County inspections?

20 A Yes, I did.

21 Q Now, is it not true that for most of those units
22 it was after July 3rd, 1980?

23 A The last day I had recorded on my checkout sheet

1 was 7/30; and that is why we can't find a specific date.

2 But they were finaled after that date, yes. I finaled them
3 when the other contractor was in there functioning. The
4 county called me up and said we have to have these finals.
5 So, I went in on my own and got my portion of it finaled.

6 THE COURT: When you say finaled, that's not good
7 English; but do you mean you did the work you were supposed
8 to do? Is that what you mean?

9 THE WITNESS: It was approved by the inspection
10 authority of that area.

11 THE COURT: They may have approved it, but did you
12 do what you were supposed to do? If you do half, they can
13 still approve that house.

14 THE WITNESS: There was one situation where maybe
15 a light fixture wasn't available because it wasn't on the
16 job. So, it was finaled with like a blank plate installed
17 on the outlet so it would pass.

18 BY MR. MAYS:

19 Q So, you were talking about a unit where the actual
20 fixture was not installed?

21 A You've got the fixture -- I mean you've got the
22 list. Just tell me what you need, and I'll say yes or no.

23 Q I was just trying to understand your previous

1 statement that you would just put a plate over something.

4 2 A In order to final it, to get a final inspection
3 on it, on a unit, if a unit doesn't have a light fixture,
4 it's going to be projected for a week later or two weeks
5 later. I don't want to hold up my end of it. So, I have
6 my end checked out, and it can be caught in the tail end;
7 come back at a later date when it's readily available to
8 install it.

9 Q I just wanted to be clear, but your records indi-
10 cate, and you've looked at your records, but Fairfax County,
11 their actual inspections had to have been after July 30th?

12 A On some of the units.

13 Q How about the units I just asked you about?
14 21 through 28; 32, 33, and 38?

15 A Well, my stuff is in there. We went over that
16 earlier. I think the 21 units was finalized the 3rd day of
17 July, and the rest of them, as you looked at them previously,
18 they showed they were ready on 7/17; but it didn't show the
19 inspection date which we're trying to find out right now.
20 The problem being is, when a permit was issued, the permit
21 was issued for the building as one whole unit, and the
22 individual apartments are an intricate part of the whole
23 package. So, they are not individual permits for each unit.

1 Q Mr. Mates, was it part of your contract with
5 2 Johnmāskx to hang the light fixtures?

3 A Yes, it was. They were to furnish them, and I was
4 to install them.

5 Q All right. Am I correct that in Units 21 through
6 28; 32, 33, and 38 in those units some of the fixtures were
7 not hung?

8 A It's possible. I'll have to look at my sheets
9 and find out which ones they were.

10 MR. REESE: I have the sheets.

11 BY MR. MAYS:

12 Q Would you please -- this was part of the contract.

13 A These sheets you turned up here are for the
14 lower levels. They only included 21 through 400 series
15 which I have in the other room.

16 THE COURT: I'm not disposed to stop the case
17 again to have the witness prepare his testimony.

18 THE WITNESS: Let's put it this way: if there
19 weren't one or two or three or four, to me, that's not a
20 big deal. That's a trivial item. In other words, if you
21 want credit, I'll give you credit for it. If, in fact, it
22 wasn't there, then I couldn't perform my function. It's
23 as simple as that, and I'm not disputing the fact that they

1 might not have been there.

2 BY MR. MAYS:

3 Q Mr. Mates, after being employed by Johnmark's,
4 did you read Johnmark's construction agreement with ADC
5 Fairways?

6 A Not to my knowledge. No, I haven't.

7 Q Were you aware that the unit was not complete for
8 acceptance until it passed all Fairfax County inspections?

9 A No. As far as I was concerned, when I finished
10 my unit, I sent an individual bill to their representative
11 who signed it; and I forwarded it on to their office for
12 payment. Their internal functions were none of my business.

13 Q All right. Mr. Mates, again, Building 4355 in
14 reference to B-1 through 4 and A-5 through A-10, and Unit 31,
15 do your records show whether or not you had hung all the
16 fixtures in those units?

17 A Okay. You want a specific unit?

18 Q Yes.

19 A Okay. Want to start with A-10?

20 Q All right.

21 A I think the bathroom fixture was not installed
22 from what it looks like here. The bathroom fixture wasn't
23 installed, and there was no final on the unit.

1 Q And your bill --

2 THE COURT: What do you mean by no final?

3 THE WITNESS: In other words, the county inspection
4 was not performed on this unit.

5 THE COURT: No inspection?

6 THE WITNESS: Right.

7 MR. MAYES: We have no further questions, Your
8 Honor.

9 REDIRECT EXAMINATION

10 BY MR. REESE:

11 Q Mr. Mates, just one. Is the units that you were
12 discussing, the very last, those were the partial units;
13 is that correct?

14 A Yes, they were.

15 Q And you had billed them accordingly; is that
16 correct?

17 A I billed what I felt was my unit pricing for the
18 work that was performed in that unit.

19 MR. REESE: No further questions.

20 THE COURT: Can the witness be excused from the
21 case?

22 MR. MAYES: It's agreeable.

23 THE COURT: Can the witness be excused from the

1 case?

2 MR. REESE: As far as we're concerned

3 MR. MAYS: It's agreeable.

4 THE COURT: You're excused. You may leave.

5 (Witness excused)

6 MR. BOYKIN: Carroll McAvee, Your Honor.

7 Whereupon,

8 ~~Mr.~~ CARROLL McAVEE

9 was called as a witness by counsel for the Plaintiff, having
10 been previously duly sworn, was examined and testified as
11 follows:

12 DIRECT EXAMINATION

13 BY MR. BOYKIN:

14 Q Would you state your full name and address for the
15 record.

16 A My full name is Carroll Jasper McAvee; 2506 Larry
17 Avenue, Fort Washington, Maryland.

18 Q How are you employed?

19 A I'm a painter.

20 Q What's your relationship -- what was your relation-
21 ship to Johnmark Construction in June of 1980?

22 A I was the -- I did paint and dry wall repair for
23 Johnmark.

1 Q Are you familiar with the Ivymount Project?

2 A Yes, sir.

3 Q Did you do the painting and dry wall for that
4 project?

5 A Yes, sir.

6 Q And as a subcontractor to Johnmark; is that correct?

7 A Yes, sir.

8 Q You're not their employee?

9 A No, sir.

10 Q What's your relationship with them, now? With
11 Johnmark.

12 A None whatsoever.

13 Q On the units your contract with Johnmark and
14 Ivymount, how much were you to be paid per unit?

15 A I was to be paid \$220 per unit. That covered the
16 painting and limited amount of dry wall repair.

17 Q Were there any extras that were added to that?

18 A Yes, sir.

19 Q How did they come about?

20 A Well, some places walls had to be replaced. One
21 unit we had was a flooded out unit, and we had to replace,
22 I'd say roughly, a little over 500 feet of dry wall in that
23 one unit.

1 Q Do you remember the unit number on that one?

2 A Basement flooded. It would be B-1.

3 Q All right. How many units did you complete at
4 Ivymount; do you recall?

5 A Yes, sir. I completed the complete building.

6 Q While you were working for Johnmark?

7 A Yes, sir. With the exception to one unit that was
8 a storage type. It was an apartment, but it was used as a
9 storage type.

10 Q Did you perform your work in a workman-like manner?

11 A Yes, sir.

12 Q In accordance with industry standards?

13 A Yes, sir.

14 Q Any complaints about the way you did your work?

15 A No, sir.

16 Q I'm going to draw your attention, once again, to
17 famous Exhibit 11, and ask you to take a look at this
18 exhibit which relates to partially completed units, B-1
19 through 4; and A-5 through 10.

20 Now, have you had a chance to look at that
21 document before?

22 A No, sir.

23 Q Do you recall -- again, take a look at that.

1 Have you observed --

11 2 A Yes, sir. I was shown this document. Yes, sir.

3 Q And did you --

4 A It's --

5 Q Did you review the charges that are contained on
6 this document for painting and dry wall per unit?

7 A Yes, sir.

8 Q And you've gone over each and every unit; is that
9 correct?

10 A Yes, sir.

11 Q Are those charges accurate insofar as they reflect
12 your billings to Johnmark?

13 A Yes, they do.

14 MR. BOYKIN: I have nothing further, Your Honor.

15 CROSS EXAMINATION

16 BY MR. MAYS:

17 Q Mr. McAvee, did you ever run into the situation
18 where you had painted a unit in Building 4355 and then other
19 Johnmark workers or subs came in and did work and messed up
20 some of the painting which caused you to go back into a unit?
21 Did that ever happen?

22 A Did I ever do a unit and bill --

23 THE COURT: Because other people had messed up

1 your work.

2 THE WITNESS: Yes, sir.

3 BY MR. MAYS:

4 Q Other Johnmark people?

5 A No, sir.

6 Q That had never happened?

7 A Not with their employees, no, sir.

8 Q How about their subcontractors?

9 A Well, Your Honor, I had one occasion; and I don't
10 know if that was their people, which I don't believe it was.

11 THE COURT: Have you ever had the electrical-
12 guys punch holes in the ceiling?

13 THE WITNESS: Yes, sir.

14 THE COURT: Did you ever have water damage that
15 occurred afterwards? After you'd done the painting? Or was
16 that only before?

17 THE WITNESS: I can't recall if I had water damage
18 after the work was done, but I had like --

19 THE COURT: Have you ever had damage 'cause they
20 stored materials in the apartment living room, and then when
21 they took the materials out, the walls were damaged?

22 THE WITNESS: No, sir. Not that.

23 THE COURT: Go ahead, Mr. Mays.

BY MR. MAYS:

Q But you do admit having to go back and repaint some of the units in Building 4355?

A Yes, sir.

Q At what stage in the progress of the work did you do your painting?

A At what stage?

Q Yeah. Per unit. Was the painting the first thing that happened? The last?

A No. They had a crew which they would call the name the strippers more or less. They would go in and take out -- clean out the apartments. Trash them out. Get all the trash out of them; leftovers from the people moving out; would clear all that stuff out of the places. They would take out like, if doors were going to be replaced, cabinets were going to be replaced, they would tear all that stuff out; get all that stuff out of there.

Then I would send my dry wall crew in, and that would do what was necessary in dry wall line, and I had an employee who did nothing but go through the units and more or less what you call spackling and prep work to get it ready for painting. Then we would go in and paint the units.

Q So, the painting occurred before the cabinets

1 were put up, kitchen cabinets?

2 A No, sir. Kitchen cabinets were put in.

3 Q You didn't say that before. The painting occurred
4 before the kitchen medicine cabinet was put up?

5 A There's no kitchen medicine cabinet.

6 Q I'm sorry. Bathroom.

7 A At the time the medicine cabinets were there.

8 Q They were already up?

9 A They were. They were up, yes.

10 Q Now, the unit you said was a storage room, I
11 believe, you said it was B-1?

12 A No. Not B-1. B-1 was the basement unit that was
13 entirely gutted out from flooding.

14 Q Was there not a unit in Building 4355 that
15 Johnmark used for storing materials in?

16 A Yes, sir.

17 Q Do you know which unit that was?

18 A It was -- no, I'm not sure what number it was.
19 It was downstairs. It was cabinets and things.

20 Q If someone said six, would that sound right?
21 Unit 6?

22 THE COURT: Regardless, go ahead with the question.
23

BY MR. MAYS:

Q Do you recall seeing any work done in that unit?

A Oh, yes, sir.

Q Despite the fact that cabinets were stored?

A Yes, sir.

Q Did you paint that unit?

A No, I didn't paint it. I had my dry wall people do their work and everything.

Q I want to just clarify one thing. Are you testifying that the kitchen cabinets were up, the bathroom medicine cabinet was up, all the fixtures were up before you painted?

A Not all the fixtures, no.

Q I see. But all the kitchen cabinets and the bathroom medicine cabinets?

A Yes, sir. They were in when I went in and painted. We had to be specifically careful of damages.

Q What date did you begin working at the Ivymount Project?

A I believe it was in February.

Q Do you recall what Johnmark owed you as of May 10th, 1980?

MR. BOYKIN: Your Honor, I'm going to object.

1 You've already made rulings as to testimony regarding what's
2 owed subcontractors.

3 THE COURT: I suggest it's irrelevant except that
4 if a witness is still owed by somebody who's claiming money,
5 then that's impeachment.

6 MR. MAYS: Your Honor, this is part of the schedule
7 C of the modification where the contractor had to supply
8 the developer a list of all subcontractors it owed.

9 THE COURT: I see. Over a certain amount. For
10 that purpose, you may answer.

11 BY MR. MAYS:

12 Q Do you know --

13 A The question?

14 Q Do you know what Johnmark owed you for your work
15 at Ivymount as of May 10th, 1980?

16 THE COURT: Why do you pick May 10 when the
17 modification agreement was signed --

18 MR. MAYS: That was the day specified in the modi-
19 fication.

20 THE COURT: It was? All right.

21 THE WITNESS: I don't know what you mean, but any-
22 way, my bills were turned in the 23rd. They owed me nothing
23 on the 10th.

1 BY MR. MAYS:

2 Q You're quite sure of that?

3 A Positive.

4 Q How much did you owe McCormick Paint Store on May
5 10th, 1980?

6 MR. REESE: He said he turned his bills over the
7 23rd. They owed him nothing until the 23rd. I don't know
8 how much more explicit he can be.

9 THE COURT: It's cross. You may not accept the
10 answer fully.

11 BY MR. MAYS:

12 Q Isn't it true you owed McCormick Paint Store over
13 \$1,000 as of May 10th, 1980?

14 A It's possible, sure. McCormick got paid cash
15 money or, you know -- most of the time I would go up to the
16 store to pick up paint, and I would pay them. I've got
17 receipts and dates on the receipts, you know, when I made
18 my payments.

19 Q But you can't tell me right now that as of May 10th,
20 1980 you did not owe McCormick Paint Store --

21 A Well, you said \$1,000. I probably owed McCormick
22 \$1,000 on that particular date.

23 Q And if we got a letter from them saying that you

1 did, you wouldn't disagree with that; would you?

2 A No, I wouldn't. But --

3 MR. REESE: That's all right. There's no question
4 pending.

5 THE COURT: He wanted it for another reason.

6 MR. MAYS: No further questions.

7 REDIRECT EXAMINATION

8 BY MR. BOYKIN:

9 Q Just briefly on the Exhibit 11. Again, on Unit B-1,
10 what is the charge -- I'm sorry, on Unit A-6, which was the
11 storage room --

12 A That is the storage.

13 Q -- what is the charge for painting and dry wall?

14 A For painting that? Without --

15 Q What's the charge here for painting and dry wall?

16 A \$36.00.

17 Q So, you didn't really do very much in that?

18 A No. Like I said, no.

19 Q You said you had to go back on some of these units
20 and redo some work, some holes that had been put in by
21 electricians?

22 A Yes, sir.

23 Q Who employed those electricians? Were they

1 Johnmark?

19 2 A No, sir.

3 Q Did they belong to ADC?

4 A Yes, sir.

5 Q Thank you.

6 MR. BOYKIN: Nothing further.

7 MR. WEINER: Your Honor, just one brief question.

8 Did you read the Johnmark contract with ADC?

9 MR. BOYKIN: Your Honor, it's beyond the scope.

10 THE COURT: You asked him if the ADC people did it.

11 MR. WEINER: You asked about who did it.

12 THE COURT: Other testimony was B.J. was in there.

13 I'll permit another question.

14 RECROSS EXAMINATION

15 BY MR. WEINER:

16 Q Did you read the Johnmark contract with ADC
17 Fairways, and the modification agreement?

18 A Pertaining to electricians and stuff?

19 Q Pertaining to the job to be performed at Ivymount.

20 The Ivymount Construction --

21 THE COURT: Did your employers ever show you their
22 contract with ADC?

23 MR. WEINER: These documents, have you ever read --

1 been shown and read those documents?

2 THE COURT: You can thumb through them if you want.

3 THE WITNESS: Only thing I believe I have seen
4 on these is work -- what work was, you know, what was required
5 for me to do.

6 BY MR. WEINER:

7 Q Do you see what work is required from you in there?

8 A For me?

9 Q Yeah.

10 A I'm saying I don't know. I haven't even looked
11 through them. That's the only thing I have seen is what
12 I'm saying.

13 MR. WEINER: Just turn and see if there's some-
14 thing in there.

15 THE COURT: Just turn to the -- find it for him.
16 There's a page under there that's an attachment. I think
17 it's attachment Roman II, starts with "install cabinets."

18 BY MR. WEINER:

19 Q Have you ever seen this?

20 A No, sir. I don't think I've seen that. No, sir.

21 Q How do you know what you were supposed to do?

22 A How do I know what I'm supposed to do?

23 THE COURT: Were you shown a writing or just told?

1 THE WITNESS: I had a writing, what my contract
21 2 would require me to do.

3 THE COURT: Just by chance, do you have it with
4 you today?

5 THE WITNESS: I probably do.

6 MR. WEINER: Could you get it?

7 THE COURT: Take a stretch or break while he gets
8 it.

9 (A brief recess was taken.)

10 BY MR. WEINER:

11 Q Is this your contract?

12 A Yes, sir. This is what I agreed to do on the units.

13 (Pause).

14 Q Now, this is dated April 4th, 1980; is that correct?

15 A Yes, sir. 4/4/80, I think it says.

16 Q Did you start right away?

17 A I believe so.

18 Q But you never saw those documents that we looked
19 for before? That you looked through?

20 A Not to my knowledge I haven't seen them. No, sir.

21 Q Okay.

22 MR. BOYKIN: What documents are you referring to?

23 MR. WEINER: I'm referring to Plaintiff's Exhibits

1 1 and 2.

2 MR. BOYKIN: Thank you.

3 THE COURT: Now, on the paint bill, was that all
4 for paint used on Johnmark's jobs?

5 THE WITNESS: No, sir, it was not.

6 THE COURT: Any further questions?

7 (No response)

8 THE COURT: May he be excused from the case?

9 One lawyer per side on a given witness. Once a lawyer
10 examined, that same lawyer is the only one who may examine
11 later.

12 MR. BOYKIN: Your Honor, unfortunately we may
13 need Mr. McAvie for rebuttal of some of their witnesses.
14 As much as we'd like to let him go, we'd have to ask him to
15 come back.

16 THE COURT: You may get off the stand.

17 MR. WEINER: Your Honor, he said -- he just said
18 something when you asked him, was your bill just for --

19 THE COURT: That's right. At the bench he said,
20 Judge, there's something that just didn't come out right.

21 THE WITNESS: You didn't say, was my paint bill
22 just for Johnmark.

23 MR. BOYKIN: This is for McCormick's Paint Store.

1 THE WITNESS: Right. You were talking about
2 McCormick's Paint Store. I deal with McCormick's Paint and
3 other paint companies.

4 THE COURT: Did you have other jobs going at the
5 time?

6 THE WITNESS: Yes, sir.

7 THE COURT: Do you have other employees working at
8 different locations?

9 THE WITNESS: Yes, sir.

10 MR. WEINER: We have no questions.

11 MR. BOYKIN: Nothing further.

12 THE COURT: You may step down.

13 MR. REESE: Gene Summey.

14 MR. BOYKIN: Gene Summey.

15 In regards to Mr. McAvee, Your Honor, I don't think
16 we'll need him until tomorrow. Would it be okay to release
17 him today until tomorrow morning?

18 THE COURT: Wait anyhow 'cause I might have a
19 night session. I don't know what tomorrow's docket is for
20 right now. I don't like the idea, but I've got to see what
21 hardships are occurring.

1 Whereupon,

2 FRANCES JEAN SUMMEY

3 was called as a witness by counsel for the Plaintiff, having
4 been previously duly sworn, was examined and testified as
5 follows:

6 DIRECT EXAMINATION

7 BY MR. REESE:

8 Q Ms. Summey, what is your full name, please.

9 A Frances Jean Summey.

10 Q Ms. Summey, where do you reside, now?

11 A I live in Dale City.

12 Q All right. Are you employed at this time by
13 Johnmark?

14 A No, I'm not.

15 Q Were you employed by Johnmark in June, July of
16 1980?

17 A Yes, sir.

18 Q How were you so employed?

19 A I was more or less like a foreman, run the office.

20 Q Did there come a time -- first, do you recall
21 there being some discussion about a modification agreement
22 between Johnmark and ADC Fairways?

23 A Yes.

1 Q Did there come a time after that modification
5 2 agreement was supposedly entered into that you were requested
3 by Mr. McCarty to make some calls to some suppliers?

4 A Yes, sir.

5 Q Was that with reference to the cove moulding and
6 kitchen lights?

7 A Yes, sir.

8 Q What was the purpose for making those calls?

9 A What was that again, sir?

10 Q What was the purpose for making those calls?

11 A To try to locate the cove and the lights that they
12 wanted.

13 Q Did you, in fact, make a number of calls?

14 A Indeed I did.

15 Q What did you find out?

16 A They were hard to get. They had to order what we
17 needed.

18 Q Did you, in fact, then make or place an order for
19 cove moulding and also the kitchen lights?

20 A Yes, sir.

21 Q For the kitchen lights, was that through Branch
22 Electric?

23 A Yes, sir.

1 Q And the cove moulding was through?

2 A Brothers. Justice and Brothers Store.

3 Q Were you able to ascertain that those particular
4 items were readily available at the time you were making the
5 calls?

6 A They were not readily available, no.

7 MR. REESE: No further questions of this witness.

8 CROSS EXAMINATION

9 BY MR. WEINER:

10 Q Ms. Summey — is it Summey or Summey?

11 A Summey.

12 Q Summey, excuse me. Ms. Summey, prior to working
13 for Johnmarks, what type of work did you do?

14 A I was a credit manager. Odds and end jobs I had
15 done.

16 Q You were a credit manager?

17 A Years back, yeah.

18 Q How many years back?

19 A Oh, a few years back. I've done a little bit of
20 everything.

21 Q Did you have a vocation where you -- before coming
22 to Johnmark, did you consider yourself a secretary, a
23 construction coordinator?

1 A No.

27 2 Q Prior to working with Johnmark, had you done --
3 had any relationship or any employment by any construction
4 company?

5 A No, sir.

6 Q Mr. McCarty described you as being his project
7 manager for Johnmark; is that correct?

8 A Yes, sir.

9 MR. REESE: Your Honor please, that's far beyond
10 the scope of examination. I have simply asked her about
11 the phone calls she made with reference to the cove moulding
12 and kitchen lights.

13 MR. WEINER: He asked her what she did for
14 Johnmark.

15 THE COURT: He asked her. She said she was like
16 a foreman, running the office.

17 BY MR. WEINER:

18 Q Now, when Mr. McCarty described you as his project
19 manager, would you agree with that?

20 A Yes.

21 Q They said that your job as project manager you were
22 taken off that sometime in June when Mr. Purdy came in?

23 A Right.

1 Q He took over your responsibilities?

2 A Right.

3 Q So, up until June 18th or June say, you were --
4 your job was the same thing that Mr. Purdy was doing in
5 June and thereon; is that correct?

6 A Yes, sir.

7 Q What were you doing prior to June, from March
8 to June?

9 A I walked the units.

10 Q Excuse me?

11 A Before June?

12 Q Yeah. From March 12th to June, what were you
13 doing for Johnmark with regard to the Ivymount Project?

14 A I did the office work. I walked the units with
15 the other project managers of Fairways.

16 Q You walked the units?

17 A Yes. Walked them to turn them over. I made sure
18 that they were ready.

19 Q How did you make sure they were ready?

20 A I have the list they had walked when they turned
21 them over to us, and I made sure that the crew had done
22 their work that had to be done in there.

23 Q Prior to March 12, you had never really done any

1 construction work; had you?

29 2 A Yes. I had been with them before on another job.

3 Q What did you do on the other job?

4 A I run in the office, did their ordering.

5 Q -But your job as far as knowing whether a job --
6 a construction task has been completed, what expertise do
7 you have in that, I'm asking?

8 A None. I didn't have any until I started with them.

9 Q Now, --

10 MR. WEINER: Your Honor, there's a letter that's
11 been marked for identification. A letter of July 11th.

12 Do you recall receiving a letter -- a hand delivered
13 letter in this form?

14 THE COURT: You mean a copy of it? You say hand
15 delivered in this form. I don't know what you mean in this
16 form.

17 MR. WEINER: Your Honor, this will -- I believe
18 the witness will be able to testify that she received an
19 original with a copy stapled to it. On the copy, she typed
20 in -- or was typed in that she received it such and such a
21 time and signed her name.

22 THE COURT: What do you mean in this form? You
23 mean a copy of it or something else?

1 MR. WEINER: She received the original, and this
2 copy was attached to the original.

3 THE COURT: You have to ask her did you get the
4 attachment. That's all.

5 MR. WEINER: She didn't get the attachment. She
6 only got the original. She signed the attachment as a
7 receipt.

8 THE COURT: I don't understand the use of that
9 phrase "in this form," so just reask your question.

10 THE WITNESS: Did I accept this letter?

11 BY MR. WEINER:

12 Q Yes.

13 A Not to my knowledge.

14 Q Can you identify this, please?

15 A It's my signature.

16 Q Can you read what you signed to? What the
17 statement is?

18 A Yes.

19 Q Would you please read it?

20 A "Dear Mr. McCarty --"

21 Q Not the letter. Read where you signed in your
22 name.

23 A "The original of the attached received at 11:30

1 on July 11th, 1980."

2 Q Now, does that refresh your recollection as to your
3 receipt of --

4 A Yes, it reminded me that I signed.

5 THE COURT: You did what?

6 THE WITNESS: Signed that I received.

7 BY MR. WEINER:

8 Q On that date July 11th?

9 A Yes.

10 Q The original?

11 THE COURT: Received the second page? Or the
12 first page you were talking about? I guess I better look
13 at the pieces of paper, 'cause one of them is not even an
14 exhibit.

15 THE WITNESS: It's the same as that. It's a copy
16 of it.

17 THE COURT: What's --

18 MR. WEINER: Your Honor, on direct examination
19 Mr. McCarty -- Mr. Reese said that July 11th letter was
20 dated July 11th. Mr. McCarty made the point very well that
21 he hadn't received it for several days thereafter, and he
22 alluded to the fact that it was probably backdated.

23 MR. REESE: What time is it?

1 MR. MAYS: 11:30.

2 THE COURT: Your question is of the witness in
3 regard to P-7, do you know whether you got it?

4 MR. WEINER: Yes.

5 THE COURT: All right. Do you know when you got
6 P-7?

7 THE WITNESS: I can't remember the date, no. But,
8 I did sign the McCarty notice within the office. They did not
9 stay at the office.

10 THE COURT: What does that got to do with this
11 unmarked piece of paper when you say original received?
12 What's the connection?

13 THE WITNESS: This means that I received this.

14 THE COURT: Are these the same letters?

15 MR. WEINER: Yes. They're exactly the same.

16 THE COURT: They don't look the same.

17 MR. WEINER: One is a copy.

18 THE COURT: I see. All right.

19 MR. REESE: May I take a look at it?

20 THE COURT: All right. It's as simple as saying
21 you don't remember the original, but didn't you sign on this
22 copy you got it on a certain date?

23 MR. WEINER: Thank you.

1 THE COURT: I was trying to make more of it. I
2 shouldn't do that.

3 MR. WEINER: I would ask the Court to -- I'd like
4 to have this identified.

5 THE COURT: You are offering this next paper?

6 MR. WEINER: Yes.

7 THE COURT: Defendant's Three. Any objection?
8 It's a copy of the letter of July 11th showing when this
9 lady said she received it.

10 MR. REESE: It's been put in for identification
11 purposes.

12 THE COURT: No. It's being offered in.

13 MR. REESE: I think he said for identification.

14 THE COURT: They already put something else in.
15 So, that kills a Motion to Strike. It's in.

16 (The document marked Defendant's
17 Exhibit No. 3 was received
18 into evidence.)

19 BY MR. WEINER:

20 Q Ms. Summey, you were at the job every day from
21 March -- every working day from March 12th?

22 A Yes, sir.

23 Q And your job as the project manager and then as

1 office manager you were charged with knowing who was at the
2 job and what work was being done at certain times?

3 A Yes, sir.

4 Q Could you please tell us what days of the week
5 Mr. McCarty was at the job?

6 MR. REESE: When?

7 BY MR. WEINER: --

8 Q Was he there every day in the months of March,
9 April, May, June?

10 A Did he have a routine that he be there in the
11 mornings? In the afternoons? Just a couple hours a day?

12 THE COURT: How much was he on the job?

13 THE WITNESS: He was there quite a bit, but wasn't
14 constant all the time. Some days he was tied up, but he
15 was there the next day, stayed -- went over things.

16 THE COURT: Was he there more days than not?
17 Was he there four days out of five? Was he there three
18 mornings a week? How long was he there?

19 THE WITNESS: I would say he was there three or
20 four days a week.

21 BY MR. WEINER:

22 Q What about Mr. Sauer?

23 A Every day.

1 Q Now, were you also in your job as running the
35 2 office, did you have the duty of writing payroll?

3 A Yes, sir.

4 Q When you -- I'm not talking about subcontractors,
5 I'm talking about employees.

6 A Right.

7 Q There would be times that you would pay employees
8 by cash or by check or sometimes a combination of both?

9 A Right.

10 Q Were you withholding taxes and social security?

11 MR. REESE: Your Honor --

12 THE WITNESS: Yes, sir.

13 MR. REESE: -- this is so far beyond.

14 MR. WEINER: That was her job.

15 THE COURT: I'll agree it's all far beyond.

16 Unfortunately, the door is opened. You both put things in
17 on the subject, and I'm not sure how it's going to help me
18 decide the case.

19 MR. REESE: I'm not either. I certainly didn't
20 open doors.

21 THE COURT: The door's opened. Both sides asked
22 questions about it.

23 MR. REESE: Even though -- are you ruling that

she's his witness at this point? Because I certainly didn't go into this area in my direct. If he wants to make her his witness, that is his job.

MR. WEINER: If you don't want to go in it now, I'll just reserve her for my case.

THE COURT: The objection is sustained. Would exceed the scope of direct.

MR. REESE: Thank you.

MR. WEINER: In that case, Your Honor, would the Court allow me to call Mrs. Summey as our witness when we put on our case? She's not under our subpoena.

THE COURT: Anybody you wish.

MR. WEINER: Then I ask that she not be released, and I have no further questions of her at this time.

REDIRECT EXAMINATION

BY MR. REESE:

Q Ms. Summey, do you remember this letter?

A You want me to be truthful?

Q Of course.

A No, I do not. Because like I said, it was -- what went on papers and -- but I do not remember, no.

Q I understand. Do you remember specifically this document? Specifically that document?

1 A No.

2 Q All that you remember is that one time you signed
3 some documents that -- because Mr. McCarty wasn't there?

4 A Yes, sir.

5 Q -And you don't know whether it was this document
6 or whatever document it was?

7 A No. 'Cause I told him, should I sign --

8 Q Sure.

9 A -- and I did.

10 Q I understand.

11 MR. REESE: No further questions.

12 THE COURT: If you'll return to the witness room
13 and wait.

14 (Witness excused)

15 MR. REESE: Call Ms. Brothers.

16 Whereupon,

17 MARGORIE BROTHERS

18 was called as a witness by Counsel for the Plaintiff, having
19 been previously duly sworn, was examined and testified as
20 follows:

21 DIRECT EXAMINATION

22 BY MR. REESE:

23 Q Ms. Brothers, what is your full name?

1 A Marjorie Brothers.

2 Q How are you employed?

3 A Brothers and Justice, Incorporated.

4 Q What is that?

5 A - It's a flooring company.

6 Q What?

7 A Flooring company.

8 Q All right. Were you so employed on or about

9 July 7, 1980?

10 A Yes, sir.

11 Q Now, I show you this document which has been
12 admitted into evidence as Plaintiff's-No. 7, and ask you if
13 you have seen this document before?

14 A Yes, sir.

15 Q Does it carry your signature?

16 A Correct.

17 Q Does the information cited within that document,
18 is that accurate information?

19 A Yes, sir.

20 Q Now, was an order placed for this almond cove
21 base by Johnmark?

22 A Johnmark Construction, yes. By telephone.

23 Q Yes. At the time that that order was placed by

1 telephone, did you have -- you didn't have it in stock;
2 did you?

3 A (Witness responded in the negative)

4 Q No?

5 A No, sir.

6 Q To your knowledge, did anyone have it in stock
7 in this area?

8 A Not to my knowledge.

9 Q Okay. You ordered it through a Cherokee --

10 A Cherokee Wholesalers, Incorporated.

11 Q Cherokee Wholesalers. And they didn't have it
12 until -- until it came time for your order; is that correct?

13 A Correct. It was a back order.

14 Q It was a back order. And this had to do with
15 the almond cove base; is that correct?

16 A Yes.

17 Q Why did you have to place an order for it, then?
18 Is it odd shape, or color, or size?

19 A We don't stock anything but the black and the
20 brown because those are standard colors to use in most all
21 of our work. We really aren't completely retail. We do
22 our own work, our own installation. Those are the two items
23 we use. However, we can order it and sell it retail.

1 Q Is that almond shade, is it a standard shade
2 to be used? Or is it somewhat different?

3 A Well, they're all standard colors that are designed
4 to go with the colors of flooring and appliances at a par-
5 ticular time. However, they're not always in stock.

6 Q Those were not in stock?

7 A Those were not.

8 Q And they were not in stock at Cherokee, either,
9 at the time the order was placed?

10 A Correct.

11 MR. REESE: No further questions of this witness.

12 CROSS EXAMINATION

13 BY MR. WEINER:

14 Q Ms. Brothers, had you, prior to July 7th -- well,
15 June 30th, had you done business with Johnmark?

16 A I know that we did business for an organization.
17 I'm not sure whether Johnmarks name was changed, but we were
18 doing the selling and ordering for two individuals and
19 Johnmark just picked up on that same project, or whatever
20 it was. I really am not involved in that part of it.

21 Q Now --

22 A There had been previous orders. I'll put it that
23 way.

1 Q You said in this statement that you signed that
41 2 you certified on 30 June 1980, an order was placed -- you
3 didn't say by telephone, but you said just now -- and were
4 you able -- you accepted the order by phone; is that correct?

5 A - Correct.

6 Q Now, at that time when you got the order, were you
7 able to tell the party that called you when you would be
8 able to -- or when you thought you would be able to deliver
9 this material?

10 A We didn't know. We placed the order, and then we
11 wait until it goes to whoever the shipping company is, and
12 then we find out when we get the material.

13 Q What I'm asking you is this --

14 A We assume --.

15 Q When the order is placed to you on the phone,
16 you said, I imagine, we don't have it in stock.

17 A But we assume it's available.

18 Q But we can get it for you?

19 A We assume at the time we take an order that it's
20 available.

21 Q Did you get back by phone or letter to Johnmark
22 subsequent to June 30th?

23 A I personally can't answer that because there are

1 other people in our office. So, I can't --

2 Q On June 30th when the order was placed or you
3 took the order, did you communicate to Johnmark or
4 Johnmark's representative when you thought delivery could
5 be made? -

6 A Probably not June 30th. It might have been a week
7 from then due to the fact that we get called back on any
8 order.

9 Q So, would it be fair to say that on June 30th
10 the party that placed the order would have no idea when they
11 could expect delivery?

12 A Not unless we gave them a definite date that we
13 got from our distributor.

14 Q You just told me on June 30th you didn't know.
15 So, you couldn't communicate --

16 A We don't know until we get a response from the
17 person that we order from.

18 Q So you --

19 A There are three people involved in ordering.

20 Q But you did not -- on June 30th you could not have
21 told Johnmark --

22 A We could assume that it's available until we get
23 a call back from who we order from, and it's going to be

delivered.

Q When did you get the call; do you know?

A Let me check. Let me see if we wrote that down.

MR. WEINER: The call from her supplier.

THE COURT: From Cherokee.

THE WITNESS: Cherokee Wholesalers.

First ticket I have is June 30th. That's when we were asked to order the base and corners, not just base; and then I don't have anything written down on the ticket as to a call to Johnmark saying that the material could not be gotten within a week or seven days. I don't have any date marked down on the ticket.

Then on -- it was supposed to be to us on the 2nd of July.

BY MR. WEINER:

Q How do you know that?

A Because that's the way it's promised on Cherokee's ticket. They say that the promised date is July 2nd to our shop. It did not come. So, we obviously called to find out why doesn't it come. Then we're informed that it's a back order. Then we have to inform Johnmark that it's a back order.

Q That's what I wanted to know. Did you?

1 A Yes.

2 Q Do you have a notation that Johnmark was notified?

3 A I don't know. No, not in writing I do not.

4 Q Did you notify --

5 A - Not personally because I'm not the one that does
6 the ordering.

7 Q So, on July 3rd Johnmark did not know, according
8 to your records: that you have in front of you, when they
9 could have gotten that material; is that correct?

10 A I don't know because I don't know whether they
11 called us or we called them. I have no records whatsoever
12 saying we called them or they called us. That I can't
13 answer yes or no.

14 Q On July 7th Mister -- someone asked you to give
15 this written statement, the one that's in -- someone asked
16 you to type -- did you type that up?

17 A I typed it because I couldn't get the material.

18 Q That was at someone's request; is that right?

19 A Right.

20 Q Did you -- was this request done by telephone or
21 in person?

22 THE COURT: It's P-6? The request is P-6?

23 MR. WEINER: Yes.

1 THE WITNESS: I believe that I was told and asked
2 if he could come over and type up the statement saying I
3 couldn't get the material, and then he came in person.

4 MR. WEINER: You, of course --

5 THE COURT: That took you over to Maryland and
6 have you swear to it before a Notary?

7 THE WITNESS: No. I signed this at my office.

8 MR. WEINER: That's what I was getting to, Your
9 Honor.

10 BY MR. WEINER:

11 Q Now, when you typed this at your office, did you
12 type in the bottom section, here?

13 A No, sir.

14 Q In other words --

15 THE COURT: You mean this person said you swore to
16 it before them, and that's not true?

17 THE WITNESS: I typed this, and I signed it and
18 gave it to Mr. Summey, I suppose was the person that was in
19 there. I really didn't --

20 THE COURT: Did you ever go to Maryland in con-
21 nection with this paper?

22 THE WITNESS: No.

23 THE COURT: Did any person or woman ask you to come

1 over to Virginia and talk about taking an oath?

2 THE WITNESS: No.

3 THE COURT: All right.

4 BY MR. WEINER:

5 Q So, this sworn and subscribed section you did not
6 type on there?

7 A That isn't my typewriter.

8 Q That isn't your typewriter; nor did you go to
9 Maryland and swear to this in front of Nancy --

10 A No.

11 THE COURT: Or anybody else at any one time.. I
12 understand.

13 MR. WEINER: Nothing else of this witness.

14 MR. REESE: One question, Your Honor.

15 But the information contained --

16 THE COURT: Mark the record so you can get back
17 to it two weeks later.

18 REDIRECT EXAMINATION

19 BY MR. REESE:

20 Q But the information contained within that document
21 was, in fact, true; was it not?

22 A To the date. Every day that's marked in that
23 letter is fact. I have Cherokee proof, my proof, and my

1 ledger proof.

2 Q And if you had been asked to swear to that state-
3 ment, you would have done it with no questions?

4 A I'd sign it with no questions asked. It was fact.

5 Q And when you signed it, you, yourself, were making
6 representation it was true?

7 A Absolutely.

8 Q Sure.

9 MR. REESE: No further questions.

10 THE COURT: All right. Finished? May she leave,
11 now?

12 MR. REESE: Yes. She may be excused.

13 (Witness excused)

14 MR. REESE: John Sauer.

15 If Your Honor please, may I have Defendant's
16 Exhibit 1. It's a letter. Here's 2, I think this is it.

17 THE COURT: May 2nd, 1980 letter to Daly from
18 Sauer.

19 MR. REESE: This is marked May 2nd, 1980 but it's
20 marked as Defendant's 2.

21 THE COURT: Do you have notes for Defendant's 1?

22 THE CLERK: Defendant's 1 is a letter to Mr. Daly
23 from Mr. Sauer. I have no number 2.

1 THE COURT: Do you have a D-2?

2 THE CLERK: No, sir, I do not.

3 THE COURT: All right. There's no D-2.

4 Whereupon,

5 JOHN C. SAUER

6 was called as a witness by counsel for the Plaintiff,
7 having been previously duly sworn, was examined and testi-
8 fied as follows:

9 DIRECT EXAMINATION

10 BY MR. REESE:

11 Q Mr. Sauer, what is your full name, sir?

12 A John C. Sauer, Calvin.

13 Q Mr. Sauer, taking you back to April, May, June of
14 1980, you had a relationship at that time with Johnmark
15 Construction Company?

16 A Yes, sir, I did.

17 Q What was your position with them?

18 A Vice President and Supervisor.

19 Q And you were also minority stockholder in the
20 company; is that correct?

21 A Yes, sir.

22 Q And today you are still a minority stockholder in
23 the company?

1 A Yes, sir.

2 Q Now, let me bring you forward to a time -- well,
3 Johnmark entered into a contract with Ivymount; is that
4 correct?

5 A Yes, sir.

6 Q Did there come a time when there was a question
7 with reference to cove moulding and kitchen light situation?

8 A Yes, sir.

9 Q Would you explain to His Honor how that question
10 came about and when it came about?

11 A I don't remember the date, but the cove
12 moulding we was putting in there they changed a couple
13 times, and then they finally come down to color which we
14 couldn't get at the time, ordered it, have it on call,
15 couldn't -- we didn't receive it at the time.

16 Q It has been said that you all produced your first
17 unit at Ivymount on the 25th day of April, and that that
18 was one week late. Would you tell His Honor what, if anything,
19 created such a delay?

20 A Well, we had -- the county had turned off the
21 power, electricity, and bursted water pipes. That was it
22 mostly.

23 Q What was the reason why the county had turned off

1 the electricity?

2 A Well, they -- some of the people had moved out, and
3 they hadn't changed it back over, and then I heard -- I
4 wasn't sure --

5 MR. WEINER: Objection to any of this.

6 MR. REESE: Just tell us what you know of your
7 own knowledge.

8 THE COURT: You mean personal knowledge of why
9 they turned it off?

10 THE WITNESS: Some of them, the people move out
11 and they didn't -- hadn't turned it back on.

12 BY MR. REESE:

13 Q Now, sir, did there come a time when there were
14 19 units at Ivymount that had been completed?

15 A Yes, sir.

16 Q And you were the supervisor on the job at that
17 point; is that correct?

18 A Yes, sir.

19 Q Was this before that modification agreement was
20 entered into?

21 A Yes, sir.

22 Q You presented them, and they were accepted as per
23 invoices that we've already put in?

1 A Yes.

2 Q Now, were you present when the modification agree-
3 ment was entered into?

4 A Yes.

5 Q Now, there was a question with reference to those
6 19 units within that modification agreement; is that correct?
7 If you recall.

8 A I really don't remember, to tell you the truth.

9 Q As of the date of the modification agreements, what
10 condition were those 19 units in? The first through nineteen.

11 A The 19 was finished.

12 Q They were finished?

13 A Yes, sir.

14 Q Now, let's come forward if we can -- let's stop in
15 May of 1980. Did you send such a letter to Mr. Daly? This
16 is Defendant's 1.

17 (Handing document to the witness)

18 A Yes.

19 Q You did. All right, sir. Now, would you tell
20 us the circumstances that brought about this letter?

21 A Well, the big thing is they wouldn't turn the
22 units 'cause we needed money; weren't being paid.

23 Q All right, sir. Now, that letter comes from you;

1 is that correct?

2 A Yes, sir.

3 Q Who dictated the terms of that letter, however?

4 A ADC Fairways.

5 Q They told you what to put in that letter?

6 A Yes.

7 Q When you gave them that letter, did they give you
8 some money?

9 A This particular letter, yes, I think so.

10 Q All right, Did they make sure that if you
11 didn't sign that letter --

12 MR. WEINER: Objection, Your Honor.

13 MR. MAYS: It's a leading question, Your Honor.

14 MR. REESE: I'll rephrase the question.

15 MR. BOYKIN: Your Honor, could we please have one
16 lawyer per witness rather than --

17 THE COURT: The objection may come from either,
18 but when they examine, it's just one.

19 MR. REESE: Would you tell us in your own words
20 the transactions -- the discussions between you and repre-
21 sentatives of ADC, and please identify those representatives
22 if you can recall, that led to this letter being issued by
23 you. You've already indicated the terms were dictated by

1 ADC --

2 MR. WEINER: Your Honor, I think Mr. Reese, now,
3 is going into a situation that's really objectionable. The
4 letter basically speaks for itself. He's identified his
5 signature on the letter.

6 THE COURT: It's not a contract. Parole evidence
7 rule does not apply here.

8 MR. WEINER: Well, there are certain statements,
9 certain obligations that are contained in there that are as
10 an officer of the corporation he is representing that he is --

11 THE COURT: He may say I had a gun to my head,
12 when -- I don't know what he's going to say. I'll hear.

13 MR. REESE: All right, sir.

14 THE COURT: Who told you what to write?

15 THE WITNESS: Tom Dillon.

16 THE COURT: Tom who?

17 THE WITNESS: Dillon.

18 BY MR. REESE:

19 Q What did he tell you would happen if you didn't
20 write that?

21 A Well, they more or less held a check in one hand
22 and a letter in the other.

23 Q Sign it or you don't get it?

1 THE COURT: Let me see the letter so I know what
2 you all are talking about.

3 MR. REESE: Were all of the items in that letter
4 correct as far as you were concerned?

5 Well, we'll wait for you to get the letter back.
6 I understand.

7 THE COURT: What's your last question, now?

8 BY MR. REESE:

9 Q Were the items set forth in that letter, and I
10 believe we have numbered paragraphs -- were those items true
11 as far as you were concerned?

12 A Well, the 23 units in Heritage Woods was accepted
13 but not paid for.

14 Q All right, sir.

15 A I'm not sure about this ten units, now; but I would
16 assume that was the first ten. I guess they was done and
17 not paid for, yes.

18 THE COURT: So, you're saying it's not all true?

19 THE WITNESS: Yes, it's true.

20 BY MR. REESE:

21 Q What is true, sir? It says here paragraph one,
22 is that true? They were unaccepted? 23 units.

23 A I'm sorry. They was accepted, but not paid for.

1 Q Paragraph one?

2 A Yes, sir.

3 Q On paragraph two, it said that you agreed that they
4 were still considered unaccepted and not due for payment?

5 A No, sir. They were accepted.

6 Q So, that was not true?

7 A That was not true.

8 Q All right. I understand.

9 Now, I note down here "we have been advanced the
10 amount of \$20,000 for completion of the units of Items 1 and
11 2 above." Is that how you thought the money really --
12 personally how you thought the money should be treated?

13 A No.

14 Q All right. Mr. Sauer, this wasn't the first such
15 instance where they --

16 MR. WEINER: Objection, Your Honor.

17 MR. MAYS: It's a leading question, Your Honor;
18 and I object to the characterization.

19 MR. REESE: I don't know how else you can character-
20 ize it from the testimony.

21 MR. WEINER: You are not testifying, Mr. Reese.
22 I just don't --

23 THE COURT: I will solemnly instruct myself not to

1 consider the adjective of the question.

2 BY MR. REESE:

3 Q Your answer, sir?

4 A Would you repeat it again.

5 Q This was --

6 THE COURT: Had this happened before? The letter
7 for a check?

8 THE WITNESS: We had one other one. I forget the
9 date on it, whether it was before or after. It must have
10 been -- there was one other letter. I just can't remember
11 what the date was.

12 BY MR. REESE:

13 Q Same circumstances?

14 A Yes.

15 Q I see. All right, sir.

16 Now, let's come forward, now, as I was about to do
17 to July 3, 1980. Do you remember that particular date as the
18 date when you and Tom Dillon and Mr. McCarty were discussing
19 the presentation of some units?

20 A Yes. We had a meeting, yes.

21 Q Would you tell His Honor what happened at that
22 meeting?

23 A Well, I guess it really boiled down to get off the

1 job.

2 Q Who told you to get off the job?

3 A Mr. Dillon.

4 Q Had you walked some units that day?

5 A Yes.

6 Q What had he indicated to you about the units?

7 A That it was not done; wasn't going to turn them
8 over.

9 Q Did he then -- did he place a call to someone?

10 A That I can't remember.

11 Q But he then ordered you off the job?

12 A Yes, sir.

13 Q I understand. Now, there came a time when you
14 all came back on the job. I understand that, but let's
15 come forward, then, to July 24th. On or about July 24th,
16 did you walk the partial units, units that had been partially
17 completed?

18 A Yes, sir.

19 Q Let me show you a -- what is going to become, soon,
20 I'm sure, a dog-eared document, and this is Plaintiff's
21 Exhibit No. 11; and ask you if you have had a chance to
22 examine this document -- first, if you had a chance to
23 examine it?

1 A Yes. This is the -- yes, actually me and
2 Mr. McCarty had walked it one time.

3 Q All right, sir. Now, does that sheet accurately
4 depict, in your memory, at least, the condition of the units
5 in the basement of 4355?

6 A Yes, sir.

7 Q You physically walked those units?

8 A Yes, sir.

9 Q Is that correct?

10 A Yes, sir.

11 Q All right, sir. Now, did there come a time on or
12 about July 26th, 1980 when you and Mr. McCarty did an
13 inventory?

14 A Yes, sir.

15 Q Please, I think, that's Plaintiff's Exhibit 12.
16 Let me show you this document which has been admitted into
17 evidence as Plaintiff's Exhibit 12, and ask you if you can
18 identify that document.

19 A Yes, sir. This is the one me and Mr. McCarty made
20 up.

21 Q All right. Did you have a storeroom at the site?
22 At the job site?

23 A Yes, sir.

1 Q Did that storeroom have a lock on it?

2 A Yes, sir.

3 Q Who had the keys to that lock?

4 A Well, we had one set, and -- well, we had the keys
5 to the storage room.

6 Q Now, when you did the inventory on July 26th, was
7 all that material there in the storeroom?

8 A Yes. What we put down, yes.

9 Q All right, sir. And both you and Mr. McCarty
10 did the inventory together; is that correct?

11 A Correct.

12 Q Now, did there come a time thereafter when you and
13 Mr. McCarty went back to the storeroom and saw some ADC
14 employees?

15 A Yes, sir. They got a locksmith, two occasions
16 that I know of that I actually seen them, to open the door.

17 Q What did you -- approximately how much after
18 July 26th was this that you came back?

19 A It was a few days, I think, a week, something like
20 that.

21 Q What -- now, you said that your storeroom was
22 locked. Was it locked or unlocked when you came back?

23 A It was unlocked when we came back.

1 Q What did you see?

2 A Well, their people was taking stuff out of the
3 storage room.

4 Q Their people meaning ADC's people?

5 A Yes, sir.

6 Q Did you tell them anything?

7 A I told the boys that was wheeling the cart to
8 inform Mr. Kische if I caught either one of them in there
9 again I was going to have them locked up.

10 Q I understand.

11 ~~MR. REESE: No further questions of this witness~~
12 ~~at this time, Your Honor.~~

13 CROSS EXAMINATION

14 BY MR. MAYS:

15 Q Mr. Sauer, didn't an ADC Fairways representative
16 request that you remove your inventory from the units that
17 it was in?

18 A I really don't remember.

19 Q What date did you say you took your inventory?

20 A It was right after we closed down which was the
21 24th, within a day or two or three. Dates I don't recall.

22 Q Mr. Sauer, what procedure did you use to take
23 this inventory? Did you count the items? Or how did that--

1 A We went through the storage area. I done the
2 counting and the different items, and Mr. McCarty jotted it
3 down on paper.

4 Q Now, is that the original paper that Mr. McCarty
5 was writing on? Or was that document prepared later on
6 down the road?

7 A I don't think this was original. I think we
8 copied it back down again.

9 Q Do you know where the original -- do you have any
10 idea where the original paper is?

11 A No, I don't know. I'm saying I'm not sure whether
12 this is the original or not. It could be, but I don't think
13 so, but it might be. I don't know.

14 Q Mr. Sauer, in reference to the May 2nd letter which
15 you looked at, now, the Ivymount units listed there, do you
16 have the letter? Plaintiff's No. 1? Here it is.

17 The Ivymount units listed on the second page, had
18 you personally inspected those units on May 2nd, 1980?

19 A May 2nd, yes, sir.

20 Q Did you inspect them on that date?

21 A Yes.

22 Q Was there not a punch list prepared in reference
23 to those items?

1 A They all had punch lists. Yes, sir.

2 Q Do you know whether or not those units had passed
3 all required Fairfax County inspections as of that date?
4 Do you know that, Mr. Sauer?

5 A I'm trying to think whether they -- all of them
6 I'm not too sure about the permits at that date.

7 Q Isn't it true --

8 A The plumbing and electrical.

9 Q Isn't it a fact that those units did not have the
10 cove moulding and kitchen light installed in them?

11 A Them units, yes. They had lights and cove moulding.

12 Q You think they did?

13 A Yeah. The wrong kind I might add.

14 Q Did you ever walk units with Richard Kische?

15 A Yes. I'll tell you -- can I go back on there?

16 THE COURT: If it's to correct something.

17 THE WITNESS: Yes. That ten you asked me if I
18 walked, I don't remember whether I walked them for sign-off
19 for sure. For turn them over. I have walked --

20 THE COURT: He's asking you -- not this lawyer,
21 but the other one's asking you if you walked them on July 24
22 when you were put off the job to record the completeness.

23 THE WITNESS: Yes, sir.

1 THE COURT: Do you stick to that?

2 THE WITNESS: Yes, sir.

3 MR. REESE: Your Honor, please, those are
4 different units. Those are partial units.

5 THE COURT: That's what you asked him about.
6 Right.

7 MR. MAYS: I'm asking him about the units listed
8 in the letter.

9 MR. REESE: Which is entirely different units.

10 THE COURT: What are listed in the letter?

11 MR. MAYS: I'm only asking about Ivymount units.
12 The 11-12 series.

13 THE COURT: I don't know whether the ones are
14 partially completed or not. You all know, but no one's
15 told me.

16 MR. REESE: The partial units were 1 through 10
17 that begins at 11, 12, 13 -- those were the units that were
18 produced for Mr. Quatmann on April 25.

19 MR. MAYS: Those were substantially completed,
20 Your Honor.

21 THE COURT: This would be back in May too. So,
22 what's the question now?

23 MR. MAYS: The question --

1 THE COURT: This is what I wanted in an opening
2 statement that I haven't gotten. I did get a great help
3 on who the people were, where the project was, but the
4 proof to look for and the things to look for in the evidence,
5 I'm having a terrible time. It's coming, but very slowly.
6 Repeat your question.

7 BY MR. MAYST:

8 Q Mr. Sauer, I asked you before whether you walked
9 those Ivymount units on May 2nd. Now, are you saying you
10 didn't?

11 A What I'm saying is I walked them units, but I'm
12 not sure about that date, and I'm not sure it was for the
13 idea of turning them over. I mean, I don't -- with the
14 girl to turn them over that particular day.

15 Q And I also asked you whether you can state those
16 units had the cove moulding and the kitchen light installed.
17 I believe your answer was yes, they did. Is that still your
18 testimony?

19 A No. I'm going to take that back a bit, too, 'cause
20 I'm not too sure about those particular units.

21 Q In fact, those were the units that were missing
22 the cove and the kitchen light; isn't that a fact?

23 A I just can't remember.

1 Q Just can't remember.

2 A We had put the lights and the cove moulding in
3 some of them, and some of them was in when they started
4 talking about changing. There's confusion about which ones
5 at this time and date, which ones did, and which ones didn't.

6 Q Mr. Sauer, didn't Mr. Daly tell you that if you
7 ever had a problem with getting units complete or if you
8 ever -- if there was ever a problem in ADC accepting units,
9 to come talk to him about it? Didn't he tell you that one
10 time?

11 A I believe he did say something about that.

12 Q You never did come back and talk to him about
13 that; did you?

14 A It never really got to that point. What I mean
15 by -- the money situation and the changing every other day,
16 each person that would come in would change something else,
17 and they really got to us before we could get to them.

18 Q All right. Now, do you -- I believe your testimony
19 was you don't recall when you walked those Ivymount units
20 listed on the letter.

21 A No, I don't.

22 Q So, in fact, they may not have been complete when
23 you signed that letter; correct?

1 A If I signed them complete, they was complete.
2 Yes.

3 Q You don't know whether you signed them complete
4 or not. Are you saying they were not complete by signing
5 this letter?

6 A No. Anything I signed we walked. What we said
7 was complete at the time was complete. Any one I said was
8 complete, was complete, and I'm just not sure whether these
9 particular numbers at this time, the units.

10 Q Now, you're not telling us, are you, that ADC
11 wouldn't give you money unless you signed that letter? Is
12 that what you were saying?

13 A That's more or less it. Yeah.

14 Q Did they say that to you in words?

15 A Well, when you hold a piece of paper in one, and
16 a check in the other, I don't think you got to say too much.

17 Q So, nothing was said?

18 A No. Not to my knowledge.

19 Q Mr. Sauer, the months of May, June, July, 1980
20 how -- were you at the Ivymount job every day?

21 A I was there every day up to middle of June.

22 Q Then what happened?

23 A I had other jobs to take care of other than that,

1 and Mr. McCarty started going on every day.

2 Q These were not Johnmark's construction jobs; were
3 they?

4 A No. We had another corporation working.

5 Q So, about the middle of June you sort of dis-
6 appeared from the Ivymount project?

7 A No. I didn't disappear. I just wasn't there
8 every day.

9 Q How often were you there?

10 A Whenever it warranted it. Whenever I had time to
11 get over there.

12 Q Once a week? Twice a week?

13 A Two, three times a week, twice a week; sometimes
14 once.

15 Q Isn't it true that you were drinking pretty
16 heavily about that time?

17 A I was drinking, yes. Never on the job.

18 Q But you drank during lunch; didn't you, John?

19 A Very seldom. I very seldom had lunch.

20 Q Do you recall how long the power was off in
21 Ivymount which you claim caused you to be delayed?

22 A The power was off maybe half a dozen different
23 times at different units at different intervals.

1 Q I see. So, there was never an entire building
2 where the power was off?

3 A Oh, yes. Complete units, complete buildings.

4 Q Which? Do you recall which buildings?

5 A Well, 55 was one, was off. I do remember that
6 because the first building we got into. I know it was off
7 a good week, maybe more.

8 Q Isn't it a fact that you did not request ADC
9 Fairways for an extension of time to complete units?

10 A We did ask for an extension, and we asked them to
11 get the power back on so we could do our job.

12 Q Do you have any writing or document? A letter
13 requesting any such extension?

14 A No. Not that I know of. We didn't think we'd
15 need anything.

16 Q Didn't think you'd need anything.

17 Mr. Sauer, do you recall being over at our office
18 about a month ago, in Fairfax?

19 A Lawyer's office?

20 Q Yes.

21 A Yes.

22 Q Didn't you tell us, then, that there was a
23 problem in Heritage North, and you did agree to go back and

1 complete units?

2 A I'm sorry. Say again?

3 Q Didn't you tell us that you agreed to go back into
4 Heritage Woods North and complete units that had been
5 previously accepted?

6 A Yes.

7 Q And aren't those the units listed in this letter?

8 A Again, I just don't remember the unit numbers.
9 There's quite a few units there, and to remember the numbers,
10 I just can't. That was a standard thing from the day we
11 started working for them. Anything that wasn't done, we
12 would go back in in good faith and do it, regardless of who
13 missed it.

14 MR. MAYS: I have no further questions, Your Honor.

15 MR. REESE: No redirect, if Your Honor please, but
16 the witness, I'm afraid, will have to be --

17 THE COURT: Turn to Exhibit 11. That's the long
18 yellow list.

19 Now, your knowledge of this list is limited to
20 the partially completed units; is that right?

21 THE WITNESS: I think this is, yes. This is the
22 partial finished units, partially finished.

23 THE COURT: Everything in here is only partially

1 done; is that it?

2 THE WITNESS: No, sir. All that was done. It's
3 just some of the things, a few things in the units was not
4 complete.

5 THE COURT: Do you have knowledge of the things
6 that are on every page in this exhibit?

7 THE WITNESS: I did at the time, Your Honor. Now,
8 I don't. At the time we walked them.

9 THE COURT: All right. So, your knowledge about
10 this document is total knowledge, not some of the pages?

11 THE WITNESS: At the time, yes, sir.

12 THE COURT: All right.

13 MR. REESE: No further questions.

14 MR. MAYS: Nothing further.

15 MR. REESE: We'll have to reserve him for rebuttal.

16 THE COURT: All right. If you'll return to the
17 witness room.

18 MR. REESE: Call Mr. Quatmann.

19 THE COURT: Let's take the afternoon recess.

20 (Whereupon, the hearing adjourned at 3:35 o'clock
21 p.m. for the afternoon recess and reconvened at 3:51 o'clock
22 p.m.)
23

1 MR. REESE: I'd like to call Mr. Quatmann.

2 THE COURT: All right.

3 Whereupon,

4 WALTER HOWARD QUATMANN

5 was called as a witness by counsel for the Plaintiff,
6 having been previously duly sworn, was examined and testi-
7 fied as follows:

8 DIRECT EXAMINATION

9 BY MR. REESE:

10 Q Good afternoon, Mr. Quatmann, what is your full
11 name, sir?

12 A Pardon?

13 Q What is your full name?

14 A Walter Howard Quatmann.

15 Q Mr. Quatmann, are you employed by Johnmark, today?

16 A No, sir, I'm not.

17 Q Have you ever been employed by Johnmark?

18 A No, sir, I have not.

19 Q Have you been employed by ADC Fairways?

20 A Yes, sir.

21 Q Were you so employed on the Ivymount Project in
22 March and April of 1980?

23 A Yes, sir, I was.

1 Q What was your job description with ADC Fairways,
2 the Defendant in this case, at Ivymount?

3 A Basically, construction coordinator. It was my
4 job to produce units, to get the work completed on them
5 ready for settlement.

6 Q With reference to the accepting of units, who would
7 be the one during that period of time who would be accepting
8 units for ADC Fairways?

9 A I would be accepting them for ADC Fairways.

10 Q Was that part of your job description?

11 A Yes, sir, it was.

12 Q What's your background in construction and rehabili-
13 tation of apartment units? How long have you been involved
14 in this?

15 A In the construction business for 20 years.

16 Q Are you pretty familiar with the customs and terms
17 and usages in the trade?

18 A Yes, sir, I am.

19 Q Let me take you back, if I can, to on or about
20 April 25, 1980 and ask you if you would be kind enough to
21 take a look at Plaintiff's Exhibit No. 14, a series of
22 invoices.

23 THE COURT: Give me your title, again, for ADC.

1 THE WITNESS: I believe I was referred to as the
2 construction coordinator.

3 THE COURT: All right.

4 BY MR. REESE:

5 Q Have you ever seen those invoices before?

6 A Yes, sir.

7 Q All right. Would you indicate for the record what
8 units at Ivymount those invoices were for.

9 A Units 4355-11, 4355-12, 4355-13, 4355-14, 4355-15,
10 16, 4355-17, 4355-44, 4355-47, and 4355-78. Basically the
11 model units and small units.

12 Q Now, those invoices were presented to you by
13 Johnmark; is that correct?

14 A That's correct.

15 Q For what purpose?

16 A To walk the units to be accepted as being completed
17 and approve the bill for payment.

18 Q All right. Did you, in fact, then, walk those
19 units on behalf of ADC Fairways?

20 A Yes, sir, I did.

21 Q Now, I note there is a red pen on each and every
22 one of those invoices. Is that pen in your handwriting
23 bearing your signature?

1 A Yes, sir, it is.

2 Q What does that signify?

3 A It signifies I have written the acceptance. My
4 signature indicates that I had accepted the unit.

5 Q So, on behalf of ADC Fairways you accepted each
6 and every one of those units on April 25, 1980?

7 A That's correct, sir.

8 Q Now, you say you walked the units?

9 A Yes, sir, I did.

10 THE COURT: What was the date that you did this?

11 THE WITNESS: April 25th, 1980, sir.

12 THE COURT: All right.

13 BY MR. REESE:

14 Q Would you describe for the court the condition of
15 those units on the date that you accepted them.

16 A Well, the condition was that the units -- I walked
17 the units first the morning of the 25th. Some units at that
18 time were perfectly acceptable to me. Other units were not
19 because of minor things that had to be done that I thought
20 was no reason why they weren't done, yet; and I made a list
21 of those things noting, when these items are completed, I'll
22 be back this afternoon. If those items are completed, I'll
23 accept those units; if not, I'll have to turn them down.

1 The units were absolutely acceptable at that time
2 to what was acceptable. I mean no problem with them.

3 Q Ivymount. It's a former apartment complex; isn't
4 it?

5 A Yes, sir, it is.

6 Q Do you know how old an apartment complex that was?

7 A About 14 or 15 years old, if I recall correctly.

8 Q So, we're dealing with 14 or 15 year old units?

9 A Yes, sir. They're quite abused.

10 Q Yes, sir. I understand.

11 Now, do you believe that the job that you accepted
12 there was done in a workman-like fashion?

13 A Yes, sir.

14 Q Now, sir, do you know a gentleman by the name of
15 Tom Daly?

16 A Yes, sir, I do.

17 Q You've indicated that you're no longer employed
18 with ADC, but when did you terminate your employment with
19 ADC?

20 A I believe I resigned on April 25th, 1980.

21 Q All right, sir. Now, prior to your resignation,
22 had you had any discussions with him concerning what he was
23 going to be doing with Johnmark?

1 A Yes, sir. I was in the discussions.

2 Q Did these discussions concern the manner in which
3 he was going to pay Johnmark?

4 A Well, the manner of paying Johnmark was the same
5 manner of paying any other subcontractor. You wouldn't pay
6 them unless they were far enough behind; you paid when the
7 pressure was on enough to pay, otherwise we held the money --
8 they held it.

9 Q They being ADC held the money?

10 A Yes, sir.

11 Q This was the policy that Mr. Daly enunciated for
12 you?

13 A Yes, sir, it was.

14 Q And it was to be applied to Johnmark?

15 A To Johnmark and to all the other subcontractors.

16 Q To all other subcontractors. Did he tell you why
17 he was not going to pay them until they really put on the
18 pressure?

19 A The reason I resigned from the company, I told
20 my employer when I resigned was I didn't like the way he
21 managed the company; and the idea that you could break
22 someone, you're going to have someone do what you're going
23 to tell someone to do. It's not the kind of philosophy I

1 like to work by.

2 Q Was that the kind of philosophy Daly enunciated
3 with reference to Johnmark?

4 A Yes, sir.

5 Q Did he ever indicate that you wanted to break
6 Johnmark?

7 THE COURT: Sustained. That's another count.

8 BY MR. REESE:

9 Q I'm sorry, Your Honor. With reference to payment,
10 however, did he ever indicate to you that he was going to
11 pay them up current?

12 A Never, sir.

13 Q Did he indicate the contrary?

14 A Yes, sir. Continually.

15 THE COURT: Continue what?

16 THE WITNESS: Continually. A general reminder.

17 MR. REESE: No further questions of this witness
18 at this time. Your witness, gentlemen.

19 CROSS EXAMINATION

20 BY MR. MAYS:

21 Q Mr. Quatmann, do you recall when you had that
22 conversation with Mr. Daly you referred to?

23 A Which conversation, sir?

1 Q The conversation regarding his philosophy of
2 paying Johnmark.

3 A Shortly after the time I resigned from the company.

4 Q Where did the conversation take place?

5 A Down in ADC's offices which were right there in
6 the Ivymount complex.

7 Q Do you recall what time of day or night?

8 A It was in the afternoon.

9 Q Was anyone else present?

10 A Yes, sir, there was.

11 Q Could you identify the other person present?

12 A Mr. Tom Daly was present; Mr. Adashek was present;
13 Mr. Kische was present; and a gentleman from a project,
14 I believe, in Richmond, Virginia was present; and a book-
15 keeper by the name of Tony was present.

16 Q Now, on that date do you know how much money had
17 been advanced to Johnmark?

18 A Advanced, sir?

19 Q Paid.

20 A No, sir.

21 Q And you left the employment of ADC Fairways on
22 April 25th, 1980?

23 A On or about that date. That's correct.

1 Q And you had no idea what took place after that;
2 is that correct?

3 A I heard rumors, but I had no facts.

4 Q I note that you accepted certain units on the same
5 day that you resigned.

6 A Yes, sir, I did.

7 Q Was there any significance to that?

8 A No, sir, there wasn't. I mean the units were
9 ready for inspection. I inspected them; I approved them,
10 and at the time I accepted them I informed Johnmark
11 Construction Company is going to be, you know -- this is
12 going to be questioned because it's an obvious thing, but
13 this is my job. This is it.

14 THE COURT: Hadn't you resigned? Had you told your
15 boss you were resigning before you marked acceptance?

16 THE WITNESS: No, --sir, I did not.

17 THE COURT: That conversation came after the
18 acceptance?

19 THE WITNESS: Yes, sir.

20 BY MR. MAYS:

21 Q Do you know whether or not the units that you
22 accepted on April 25th had passed Fairfax County inspections
23 as of that date?

1 A All Fairfax County inspections?

2 Q Yes.

3 A That wasn't absolutely necessary.

4 Q Oh, it wasn't.

5 THE COURT: Question was not was it necessary.

6 Had it passed --

7 THE WITNESS: No, sir. I do not know.

8 BY MR. MAYS:

9 Q You do not know?

10 A No, sir, I do not.

11 Q Prior to April 25th, 1980 had you read the con-
12 struction agreement between Johnmark and ADC Fairways?

13 A No, sir, I had not.

14 Q You had not?

15 A No, sir.

16 Q So, would it be correct, then, that you did not
17 know what the scope of work was that was required?

18 A I knew the scope of work on which I had been
19 operating, yes, sir.

20 Q Had you ever read any documents which outlined
21 the scope of work?

22 A We had made several documents as to what the scope
23 of work was for all the contractors.

1 Q Did anyone -- did you discuss the Fairfax County
2 inspections with anyone at ADC as to what was in a contract
3 or what was required? What was your knowledge of what was
4 required of the contractor when you were accepting units?

5 A The unit had to be acceptable to me; had to be
6 completed and ready for transfer to a purchaser ready for
7 a settlement.

8 Q Your Honor, may I refer to Plaintiff's No. 1?
9 Mr. Quatmann, I ask you to read paragraph ten,
10 the last sentence of paragraph ten.

11 THE COURT: To himself. If it's for me, you
12 read it.

13 THE WITNESS: Do you want me to read it out loud?

14 THE COURT: Just read it to yourself, and then
15 he'll ask you questions something about the contract.

16 THE WITNESS: Okay, sir.

17 BY MR. MAYS:

18 Q And you were not aware of that paragraph --

19 A No, sir.

20 Q When you accepted the units?

21 MR. MAYS: Your Honor; I will read it for your
22 benefit, the paragraph I am referring to. It says, "No
23 work shall be deemed complete until final inspection is made

1 and approval is received from every governmental authority
2 whose approval was required."

3 BY MR. MAYS:

4 Q Now, Mr. Quatmann, if you had been aware of this
5 paragraph, would you have accepted the units you referred to
6 on April 25th, 1980?

7 A If I had been instructed to obey that sentence,
8 yes, sir, I would not have accepted them. Previous units
9 I had accepted, and previous units which had gone to settle-
10 ment for ADC Fairways had not passed all government --

11 THE COURT: You had not what?

12 THE WITNESS: Had not passed all governmental
13 inspections, and in fact, were inspected after occupied.

14 BY MR. MAYS:

15 Q Was that at Ivymount?

16 A No, sir. That was in Heritage.

17 Q Were these the only units you apparently accepted
18 in Ivymount?

19 A To the best of my memory, yes, sir. No, I had
20 accepted previous units in another building that had been
21 done by another contractor, Jack Jones.

22 Q I'm referring to the Johnmark contract building,
23 4355.

1 A To the best of my recollection, these are the only
2 ones. Yes, sir.

3 Q Are the only ones?

4 A Yes, sir.

5 MR. MAYS: Nothing further, Your Honor.

6 REDIRECT EXAMINATION

7 BY MR. REESE:

8 Q Just a few. Mr. Quatmann, from whom did you
9 receive your instructions concerning --

10 A Most of my instructions came directly from
11 Mr. Kische.

12 Q Mr. Kische?

13 A Yes, sir.

14 Q Now, when it came -- now, you indicated you worked
15 at Heritage Woods, also?

16 A That's correct, sir.

17 Q For how long a period of time did you work there?

18 A About three months, sir.

19 Q In a similar role?

20 A Yes. Exactly the same role.

21 Q Did you accept units there?

22 A Yes, sir.

23 Q When they transferred you to Ivymount, did they give

1 you any additional instructions other than the instructions
2 you had received at Heritage?

3 A No, sir. Nothing changed.

4 Q Nothing changed?

5 A No, sir.

6 Q You looked for the same things, and operated in
7 the same manner; is that correct?

8 A Yes, sir.

9 Q There's been a word that's been used, and I think
10 in your -- in the cross you were referring to the same
11 kind of situation, punch list. Are you familiar with that?

12 A Yes, sir, I am.

13 Q What is a punch list in the terms of the trade
14 that you know?

15 A A punch list is just a list of items that are
16 agreed to be corrected that are usually insignificant items
17 that really don't amount to a whole lot, and in my case,
18 the subcontractor would be, you know, you correct these
19 little things; and that's it. Depending, it could be major
20 items. You would put on a punch list, then they would have
21 to be corrected before you accepted them. If it was a minor
22 item, it would be just -- be noted and look, you got to go
23 back and finish this.

1 The same thing with the punch list made by a --
2 a purchaser of a unit and I would walk it. With one of the
3 purchasers, I'd make a punch list. If it was something
4 major, then I would take care of it, and they would reinspect
5 before they went to settlement. If it was something minor,
6 then they had my word it was taken care of.

7 THE COURT: On this job, were any punch lists made
8 up before the contractor said they are ready for your
9 inspection? You know, on some jobs you had progress pay-
10 ments, when you were ten percent done, you go through and
11 get a punch list.

12 THE WITNESS: No, sir, not in that aspect. No,
13 sir.

14 THE COURT: You mean there were times when you'd
15 go through and a punch list would be created even though
16 Johnmark didn't pretend that they were ready to be accepted?

17 THE WITNESS: Yes, sir. There were times.

18 THE COURT: What would bring about creating a
19 punch list if they didn't say they were ready for delivery?

20 THE WITNESS: I had a rush and deliver a large
21 amount of units, and I found that it saved my time if I were
22 to walk through the units, note things that were wrong, note
23 things that weren't correct; and inform the subcontractor,

1 look, fix these things before I make my inspection. It
2 would make it easier for me.

3 THE COURT: Give them an advance warning, so to
4 speak?

5 THE WITNESS: Yes, sir.

6 MR. REESE: Nothing further.

7 THE COURT: Give me the chain of command in that
8 ADC company. Daly is the president, the top boss?

9 THE WITNESS: He was the top man.

10 THE COURT: Who's next?

11 THE WITNESS: Mr. Adashek was next.

12 THE COURT: Adashek?

13 THE WITNESS: Adashek.

14 THE COURT: Was he on this job?

15 THE WITNESS: He was on all of them.

16 THE COURT: What was his title?

17 THE WITNESS: I believe he was the vice president,
18 or executive vice president, something like that.

19 THE COURT: Who was next?

20 THE WITNESS: After that was when it got cloudy,
21 sir. It could be Mr. Dillon.

22 THE COURT: What was his title?

23 THE WITNESS: I honestly don't know, sir.

1 THE COURT: Did he boss you? Or you boss him?
2 Or neither?

3 THE WITNESS: Neither, sir.

4 THE COURT: All right. Who else above you that
5 you took orders from?

6 THE WITNESS: Well, Mr. Kische.

7 THE COURT: What was his title?

8 THE WITNESS: I believe it was project manager.

9 THE COURT: Anybody else above you in the
10 descending order of --

11 THE WITNESS: No, sir, not that I can think of.

12 THE COURT: Who was under you? Next person down?

13 THE WITNESS: Subcontractors.

14 THE COURT: I see. Did any of these other people
15 undertake approving units, accepting them for payment until
16 the time when some letter went out and said, from now on,
17 Daly will have to approve them all? Were you it, or did
18 other people do it? That's all.

19 THE WITNESS: Well, I have to answer the question
20 honestly. That depended on the mood and depended upon the
21 amount of money available, and depended who was going to get
22 paid.

23 THE COURT: What other people who approved units

1 besides you?

2 THE WITNESS: Sometimes Mr. Kische would, then
3 sometimes Mr. Dillon would, and at one point Mr. Daly said
4 he was going to be the only one that would approve; but
5 that depended on the circumstances of the day, I guess.

6 THE COURT: Were your -- was your power to approve
7 ever limited before the letter that said from now on Dillon
8 does it?

9 THE WITNESS: I never seen any letter that
10 Mr. Dillon was concerned. As far as being limited --

11 THE COURT: Put it this way: do you know of
12 personal knowledge if anybody at Johnmark was told, well,
13 you can't count on Quatmann's approval anymore, it's got --
14 he can give a preliminary approval, but it's got to go up
15 the line before it's really approved? Was your authority
16 ever limited to --

17 THE WITNESS: No, sir.

18 THE COURT: That they were told that? All right.
19 Thank you.

20 Further questions at this time? Since I stirred
21 them up, I figure you're entitled to a cross.
22
23

RECROSS EXAMINATION

BY MR. WEINER:

Q Mr. Quatmann, could I ask you to look at the Exhibit No. 1, Plaintiff's Exhibit No. 1; is that what you have in front of you?

A Yes, 'sir.'

Q Could you please turn to what's known as Attachment 1?

A Yes, sir.

Q Would you please -- last paragraph where it says, "billing."

A Yes, sir.

Q. Would you read that.

A "Billing to be once a week upon completion of the
aforementioned work. All invoices must contain unit iden-
tification and be approved by the project manager."

Q Is that you? Or was that you?

A No, sir. That wasn't my title.

Q Who was the project manager?

THE COURT: He said Kische was.

THE WITNESS: Mr. Kische was, sir.

BY MR. WEINER:

Q So, would that mean that your approval was only

1 conditional approval? In other words --

2 A Number one, I'm not an attorney.

3 Q I'm just asking --

4 THE COURT: Sustained. 'Cause you're asking him
5 to construe it.

6 THE WITNESS: This is not what took place if that's
7 what you're asking me.

8 THE COURT: You may ask him further questions
9 about, did he turn his papers over to Kische. He has said
10 on previous approvals nobody else approved them for the
11 company, but there might have been -- or you can dig up
12 something else that I haven't heard yet.

13 BY MR. WEINER:

14 Q I'm asking you, then, once you approved -- are
15 those documents that you saw before with your initials on
16 them with 4/25?

17 A Yes, sir.

18 Q There's a -- on the Xerox copy, there's another
19 notation; isn't that so?

20 A Yes, sir. There is.

21 Q Do you have any -- well, you were on the job,
22 then; right?

23 A Yes, sir.

1 Q Where would that invoice go, then?

2 A When I turned the invoice in?

3 Q Yeah. Who did you turn it in to?

4 A I turned it in to the main office to Tony.

5 Q Then what happened?

6 A I don't know what happened with it after I turned
7 it in; not this invoice I don't.

8 Q Well, those were the only ones you were involved
9 in in Ivymount; is that correct?

10 A Yes, sir. That's correct.

11 Q Now, every one of these that -- the ones with the
12 red markings on it -- is followed by a Xerox of another
13 document with additional writing; isn't that correct?

14 A Yes, sir.

15 Q And you have no idea what that -- those additional
16 writings are about?

17 A Okay. Let's take them one at a time. You want
18 me to identify each one of these?

19 Q Yeah. Tell me what unit.

20 A 4355, number 11, it has my approval to it, and it
21 says subject to -- what I interpreted in my writing as --
22 punch check. Next to it I have written okay.

23 Q What date?

1 A Same date, 4/25/80.

2 Q (Indicating to the witness)

3 A No, sir. What you pointed to is not my writing.

4 Q That's what I thought you were talking about.

5 A You asked me what I wrote on there, and that's what
6 I wrote. Okay. On 4355-12, unit number 12, I approved it
7 subject to the punch list check; and I have next to it, okay,
8 which means I reinspected the property, and it was okay.

9 4355, number 11, I have my name subject to punch
10 list check. I have written okay to it. 4355-14, same thing,
11 subject to punch check. I do not have written okay next to
12 the punch check. Same thing applies to 4355-15; 4355-16;
13 4355-17. Okay, they were the ones that I had the punch
14 checks on.

15 Q So, then, is it your testimony that you were
16 accepting units that were not complete?

17 A No, sir, it is not.

18 Q Well, you say that there are some in there that
19 you say okay after punch check, and some that are silent as
20 to punch check.

21 A If it says subject to punch check, it meant that
22 I reinspected subject to that punch list.

23 Q But --

1 A It did not mean that the unit was not fully
2 acceptable. I mean, we had a problem there with light
3 fixtures with them making a decision about. We had a
4 problem there with --

5 Q In April?

6 A Yes, sir, in April. We had a problem there with --
7 at one point saying some anger arose and Mr. Kische said
8 that he wanted all the carpet changed. These were things
9 that were beyond my control.

10 Q That's not a punch list item, carpet change; is it?

11 A Pardon?

12 Q That's not a punch check. That's not the Johnmark
13 area, carpeting; is it?

14 A No, sir. I was trying to give you an example.
15 Okay? These things that were beyond my control had not yet
16 been decided. I had -- that was for them to decide further
17 down the road. All other work was completed to my satis-
18 faction.

19 Q You told us on direct examination about punch
20 checks -- well, punch lists that these were minor things
21 that when a unit was accepted by you, it was ready for a
22 purchaser to go into. Those were your words from that
23 witness stand.

1 THE COURT: What is your question?

2 MR. WEINER: My question being now is: if you had
3 subject to punch check or punch list, it means approval
4 subject to; and you never okayed it on some of those; is
5 that correct?

6 MR. REESE: If Your Honor please, the problem I've
7 got is that you have two sets of documents. One is a Xerox --

8 THE COURT: You may come back on re, again.

9 MR. REESE: I realize that --

10 THE COURT: He can ask his own questions.

11 MR. REESE: He's got two sets of invoices. One --

12 THE COURT: I understand that. You each ask your
13 own questions. I may have a few myself on it.

14 THE WITNESS: Could I ask for the question to be
15 repeated, please?

16 BY MR. WEINER:

17 Q You said that a punch list -- a unit -- for you
18 to accept the unit it had to be completed so that a purchaser
19 could walk into it the next day right away. Now, some of
20 these invoices you gave a conditional approval to, or a
21 conditional acceptance.

22 A That's correct, sir.

23 Q And then further, there is a group that have a

1 conditional acceptance that you later okayed.

2 A Yes, sir.

3 Q Then there are those with the conditional acceptance
4 that apparently you never later okayed.

5 A Yes, sir.

6 Q That is the group to which I'm addressing myself.

7 A Okay.

8 Q And I ask you, and I ask you again, does that mean
9 that you accepted the units that were not complete?

10 A Not to my interpretation of it. No, sir.

11 MR. WEINER: I have no other questions.

12 THE COURT: On previous approvals, were there ever
13 times when you had an approval subject to a punch list, and
14 you learned that the company got paid anyhow?

15 THE WITNESS: No, sir.

16 THE COURT: May I see these papers?

17 (Witness handed documents to the Judge)

18 THE COURT: What the lawyers have referred to as
19 carbons have different writings on them from the yellow
20 copy; do you agree? The red ink on the yellow copy is
21 different. That looks like --

22 THE WITNESS: No, sir. This is my writing.

23 THE COURT: You say that's an actual carbon?

1 THE WITNESS: No, I would not say that's a carbon,
2 sir.

3 THE COURT: The lawyers call it a carbon, but it's
4 not.

5 MR. WEINER: I think we called it a copy.

6 THE WITNESS: I can't say which ones are a photo-
7 stat or what or where.

8 THE COURT: Do you agree that the red ink on the
9 yellow page is different from the black ink on the obvious
10 photocopy page?

11 THE WITNESS: Yes, sir.

12 THE COURT: So, then, it's not a carbon of what
13 you put on the yellow page?

14 THE WITNESS: No, sir.

15 THE COURT: It may be your writing, but it's not
16 a carbon.

17 THE WITNESS: That's correct, Your Honor.

18 THE COURT: When would you put writing on this
19 paper that all I've got is a photocopy? When would you
20 put the writing on this photocopy of the original; what
21 they call --

22 THE WITNESS: This writing here, Your Honor, this
23 would be one that I would turn over to the company.

1 THE COURT: I see. The yellow sheet you would
2 give to Johnmark?

3 THE WITNESS: Right. I would give to Johnmark,
4 and if I had a question --

5 THE COURT: That was the only one of its particu-
6 lar type that went to them?

7 THE WITNESS: Yes. I would give them one copy
8 along with the punch list.

9 THE COURT: You would write over. You didn't
10 use carbon paper, but you would repeat that information --

11 THE WITNESS: This notifies the office that it's
12 subject to a punch list check, and then I okayed it.

13 THE COURT: Now, what was the reason you put it on
14 your boss' copy but not on Johnmark's copy? Subject to.

15 THE WITNESS: Johnmark's copy had the punch list
16 attached to it. It was just an understanding -- to the
17 punch list.

18 THE COURT: I see. The yellow sheet had some-
19 thing else that I don't have?

20 THE WITNESS: Yes, sir.

21 THE COURT: All right.

22 THE WITNESS: But this was the one that went to
23 the company, and it did not have a copy of the punch list

1 to it. So, I would put it on there so it would not slip
2 into the company as being approved without any -- if it had
3 a punch list, there was a note. If this goes in and it
4 doesn't have any okay to it, it's not approved.

5 THE COURT: All right.

6 REDIRECT EXAMINATION

7 BY MR. REESE:

8 Q Taking a look at these particular units, however,
9 do you have any -- your recollection as to whether or not
10 all of these units were, in fact, finished on the afternoon
11 of April 25, 1980?

12 A I would have to honestly say to you Unit No. 4355,
13 number 13, something remained to be done. I don't know what
14 it was. Something remained to be done; it had to be minor.
15 I don't know what it was. I can't honestly say what it was.

16 On Unit 4355-14, the same condition existed;
17 4355-15, the same condition existed; 4355-16, the same
18 condition existed; 4355-17, the same condition existed.

19 No, sir, that's not my signature.

20 Q All right, sir. But as far as the others are
21 concerned, no such condition?

22 A No such condition.

23 Q Those were punch list items; were they not?

1 A They were all minor items.

2 Q All minor. All right. So, you were accepting
3 these subject to the punch list items indicated on those?

4 A They were accepted whether -- if the punch list
5 wasn't completed that day, it could be completed next week.

6 Q I understand.

7 Was that pretty much the standard of the trade as
8 far as how these items would be accepted?

9 THE COURT: Standard on this job.

10 MR. REESE: Standard on this job.

11 THE WITNESS: Yes, sir.

12 BY MR. REESE:

13 Q Was it office standard on Heritage Woods?

14 A Yes, sir, it was.

15 Q That was -- those are two projects that you were
16 employed by ADC for; is that correct?

17 A Yes, sir.

18 MR. REESE: No further questions.

19 RECROSS EXAMINATION

20 BY MR. WEINER:

21 Q Mr. Quatmann, are you aware of the Heritage Woods
22 contract?

23 A What contract? Which contract?

1 Q Construction contract for Heritage Woods. Is it --
2 are you aware of it? Have you seen one?

3 THE COURT: You mean as it existed, or has he
4 read it, or what?

5 BY MR. WEINER:

6 Q Are you aware of a Heritage Woods Johnmark
7 contract?

8 A Yes, sir.

9 Q Have you ever seen it?

10 A Yes, sir. I believe I did once see it.

11 Q Do you know if it's a similar document to this
12 for the one you've seen? The Plaintiff's Exhibit No. 1.

13 A I couldn't honestly answer that. No, I could not
14 identify it as being the same contract. No, sir, I could
15 not.

16 Q Well, the Heritage Woods situation you accepted
17 units there that were not complete; right?

18 A You would have to define what is not completed.
19 Yes, sir.

20 Q Well, units with doors missing.

21 A Pardon?

22 Q Doors missing.

23 A Oh, that's not a completed unit. Not a door missing.

1 Q Did you ever accept the unit with a door missing
2 in Heritage Woods? Closet door? That's a minor item.

3 A I don't believe that I did.

4 THE COURT: Why bother to mark something accepted
5 as to a unit if they couldn't get paid because there was
6 more work to be done? Why go through the process?

7 THE WITNESS: Your Honor, I couldn't answer that
8 question for you. I realize what you are asking, but I
9 didn't control the funds.

10 THE COURT: Okay.

11 BY MR. WEINER:

12 Q So, is it correct, then, that that group of
13 11 and 13 through 17 --

14 A May I say something?

15 Q Not unless --

16 A To the Judge's question.

17 THE COURT: Why? Did you not answer me correctly?

18 THE WITNESS: No, I just remembered something.

19 THE COURT: All right.

20 THE WITNESS: Part of the reason I accepted them
21 was because I had to fill out a production report that went
22 out to the bank.
23

1 BY MR. WEINER:

2 Q Which guy?

3 A Pardon?

4 Q Who?

5 A Went to the bank.

6 Q Who did?

7 THE COURT: He wants the name of the bank.

8 THE WITNESS: I don't know.

9 BY MR. WEINER:

10 Q No, who had to fill out something?

11 A I had to fill out a production report as to what
12 I had accepted so when the inspectors would come down, I had
13 accepted certain units, and these were the units the inspector
14 was going to go to.

15 Q Now, we're talking about -- you were questioned
16 about approximately ten units, I believe; 11, 13-17, and
17 44, 47 and 48. So, of those ten units -- is that correct?
18 Those are the ones we're talking about?

19 A Yes, we are.

20 Q So, of those ten units that you have indicated
21 you accepted, at least five were conditional acceptances;
22 is that not so?

23 A Conditionally accepted to minor things; yes, sir.

1 Q Now, you're stating minor things.

2 A Yes, sir.

3 Q But when asked what those things were, you said
4 a moment ago that you cannot remember what they were.

5 A I don't recall specifically what they were. I
6 know what my standards are, and I know what I stand arises
7 as being a minor thing and major thing.

8 Q How many minor things add up to a major thing?

9 A I don't go into that.

10 Q Number 13, you said subject to punch list item,
11 but you don't know what it is.

12 A That was two years ago, sir. I don't recall
13 everything.

14 Q But yet you're able to qualify it by saying it's
15 a minor thing?

16 A I do the same thing today. I've done it for 20
17 years.

18 Q But you're on the stand, now --

19 THE COURT: Can't remind him you're under oath.

20 MR. WEINER: I didn't say that, Your Honor.

21 THE COURT: You say you are on the stand. That's
22 the same thing.

23

1 BY MR. WEINER:

2 Q Well, you're here today, and you understand --
3 and you cannot tell us why there was a conditional accep-
4 tance?

5 A The reason it was a conditional acceptance, there
6 remained something minor to be completed.

7 Q One thing minor, two things, or five things?

8 A Certainly not more than five, six.

9 Q Up to six things?

10 A Yes, sir.

11 Q Now, I want to show you on this Ivymount attachment
12 two, scope of work, what's a minor thing? I'm sorry. That's
13 not your exhibit. Use your exhibit.

14 You tell me what's a minor thing.

15 THE COURT: I don't think I really care to get
16 into this anymore. I've heard enough. No matter what he
17 answers, it isn't going to help me decide the case one way
18 or the other. You're both entitled to start into it. You
19 covered this field two, three times.

20 MR. WEINER: Your Honor, I have learned to --

21 THE COURT: We all know the lawyer solemnly draw
22 contracts, and the two parties go out and do what they please,
23 and they come back to Court and lawyers construe the contract;

1 and they tell people what they did. That's all construction
2 cases are. I knew that before we started.

3 MR. WEINER: To construe construction.

4 THE COURT: What they said, and what they did,
5 are normally divergent positions.

6 MR. WEINER: Mr. Quatmann, just -- you say that
7 you resigned on April 25th?

8 THE COURT: He did.

9 THE WITNESS: If that were a Friday, that is the
10 day I resigned; and I don't have a calendar on me. That's
11 why I say on or about.

12 BY MR. WEINER:

13 Q And this was before -- or this was actually after
14 a conversation you say you had with Mr. Daly?

15 A Oh, yes. This was after.

16 Q How far after that conversation?

17 THE COURT: Was it during it, or was there a time
18 break?

19 MR. REESE: Which conversation?

20 MR. WEINER: The conversation where --

21 THE WITNESS: It was approximately two weeks after
22 my last conversation with Mr. Daly.

23 THE COURT: All right.

1 BY MR. WEINER:

2 Q That was the conversation where you heard about
3 his feelings or his alleged feelings toward Johnmark?

4 A No, sir. I heard that before. That was the last
5 conversation.

6 Q The last time. And that was the conversation you
7 made up, in your mind, that you weren't going to work for
8 this man anymore?

9 A No, sir, that was not the sole factor.

10 Q Was there something that occurred between that last
11 conversation and your approvals on April 25th that determined
12 that you were going to leave the company?

13 A Yes, sir, there was.

14 Q What was that?

15 A I had subcontractors that I had secured for the
16 company to complete work at Heritage Woods on a rush basis;
17 work that had to be completed, and these men were promised
18 payment. A week before the payments were due on the 25th
19 of the month, I was told that they were not going to be paid,
20 and I asked, and I, you know, Daly said, well, so and so has
21 to approve it; this one has to approve it; and I can recog-
22 nize a game once it starts, and I didn't want any part of
23 it.

1 Q But did you see what was going on? Did you see why
2 they weren't going to be paid? Was there a reason that was
3 given to you?

4 A Specific reason?

5 Q Yeah.

6 A Yes. I don't feel like paying them.

7 Q That was the reason?

8 A Yes, sir.

9 MR. WEINER: I have no other questions.

10 THE COURT: You may step down.

11 MR. REESE: Your Honor, I'd like to know who told
12 you.

13 THE COURT: But you're trying another case, counsel.

14 MR. REESE: Your Honor please, that's evidence in
15 this case right now. It stands right on the record, and I
16 think Your Honor ought to know the attitude that Mr. Daly
17 took to this particular contract, and to the way he paid his
18 subs.

19 THE COURT: If they said we hate doing this work
20 but we did 50 percent, we want to be paid for 50 percent,
21 then they get it. If somebody else says I hate having them
22 around, but they did 50 percent, I'll pay 50 percent. It's
23 how much work was done, and what's the dollar value. Not the

1 my other cases.

2 MR. WEINER: I understand, Your Honor.

3 THE COURT: I have to push you all. Otherwise you
4 won't finish tomorrow.

5 MR. WEINER: We'll finish tomorrow.

6 THE COURT: I admit that I'm going to be here
7 every day, but I do have a responsibility to push cases
8 along.

9 MR. WEINER: Call Mr. Dillon.

10 Whereupon,

11 THOMAS EDWARD DILLON

12 was called as a witness by counsel for the Defendant, having
13 been previously duly sworn, was examined and testified as
14 follows:

15 DIRECT EXAMINATION

16 BY MR. WEINER:

17 Q Would you please state your full name.

18 A Thomas Edward Dillon.

19 Q Mr. Dillon, where do you presently reside?

20 A Fairfax, Virginia.

21 Q Who are you presently employed by?

22 A Residential Resource Group.

23 Q Is Residential Resource Group the successor to

1 ADC Fairways?

2 A Yes, it is.

3 Q Do you hold any corporate office with R.R.G.,
4 Residential Resource Group or ADC?

5 A No, I do not.

6 Q Have you?

7 A No, I have not.

8 Q Mr. Dillon, how long have you been involved in
9 the construction field?

10 A From 1963.

11 Q To the present?

12 A To the present time.

13 Q Has that been in -- in what areas of the construc-
14 tion field is that?

15 A I started in New York City in heavy construction
16 involving building schools, office buildings, commercial
17 buildings. And in 19 --

18 THE COURT: What did you do with regard to those
19 items?

20 THE WITNESS: Heating and air conditioning.

21 THE COURT: What did you do with regards to heating?
22 Were you a contractor? Were you a workman?

23 THE WITNESS: I was a workman.

1 THE COURT: What did you do -- a workman. All
2 right.

3 MR. WEINER: Then --

4 THE COURT: Then advanced to what?

5 THE WITNESS: In 1975 I went with a real estate
6 company that had 3,000 -- 30,000 rental units, and I was --
7 held the position of regional engineer which took in
8 rebuilding of apartment houses, fire jobs that occurred to
9 apartments.

10 BY MR. WEINER:

11 Q Did you say rebuilding? You talking about similar
12 type situations as Ivymount? Or refurbishing? Or --

13 A Very similar, yes.

14 Q Where was this?

15 A This was in the Washington area.

16 Q How long ago was this?

17 A 1975.

18 Q And you were involved, did you say, 30,000 units?

19 A My responsibility was about 30,000 rental units
20 around the Washington, Baltimore and Delaware area.

21 THE COURT: What company did you work for there?

22 THE WITNESS: Arlen Realty.
23

BY MR. WEINER:

Q Did there -- when did you come to work for ADC Fairways?

A I believe it was June of 1979.

Q What capacity did you come to work for them?

A As a construction coordinator.

Q Is that the same title that Mr. Quatmann just testified?

A Yes.

Q What were your duties as a construction coordinator when you came to work for ADC?

A Basically to coordinate the general contractor that was performing the rehab of the unit, and also the common areas which are outside the unit coordinating the fact that they get done in a right manner.

Q What was your first job -- was that -- when you came with ADC?

A My first job was Heritage Woods South.

Q Okay. Did there come a point in time when you became involved with the Ivymount condominium conversion?

A Yes. I became involved in Ivymount, I believe, around March or April of '80.

Q That would -- would it have been at the time --

1 were you involved in the negotiation of the -- what's been
2 labeled Plaintiff's Exhibit No. 1, the contract?

3 A Yes. I was consulted on in making up the scope of
4 work --

5 Q Now --

6 A -- that was involved in this.

7 Q Could you tell His Honor -- we've heard that this
8 is a rehab unit, but when we -- under the scope of work,
9 we've heard about cosmetic treatment, et cetera. What would
10 you describe -- what is your concept, your description with
11 regard to the scope of work, and what was supposed to be
12 done within a rehab unit at Ivymount?

13 THE COURT: It's well stated in the contract.

14 MR. WEINER: You yourself, Your Honor, from the
15 bench, has said what the contract says and what's done.

16 THE COURT: But you're asking him to tell me what's
17 in the contract.

18 MR. WEINER: No.

19 THE COURT: And I have read that.

20 MR. WEINER: I understand that. I'm asking --
21 okay, strike that. Let me come at it a different way.

22 THE COURT: Originally, I couldn't tell what was
23 going on until somebody said the nature of the work to be

1 done isn't in the contract, it's in an attachment. It's just
2 the way they do things, sort of like New York City. Get
3 down in the country, you know, and they just say, I agree
4 to do the following things for so many dollars. "X" will
5 approve, and you pay me so much in the following stages and
6 sign it. We'll get there. I was just a little slow on
7 this, but I have read the scope of the work.

8 BY MR. WEINER:

9 Q Now, these units were selling for how much? Can
10 you give us a price range?

11 A I would say between 40 and \$60,000.

12 Q With regard to the general condition of the unit
13 as existed before the rehab, was it poor condition, good
14 condition?

15 A Well, the project had, I believe, been vacant, or
16 somewhat partially vacant for about two years. Some of the
17 apartments were in worse shape than others, but I guess the
18 majority of them were somewhat in a rental stage.

19 Q Now, Mr. Dillon, when Johnmark comes on a job,
20 comes on this job pursuant to this contract, and we're going
21 to go into the 4355 building, can you tell us please what
22 the procedure is for ADC Fairways and Johnmark to decide
23 what is to be done in unit -- let me give you a unit. I'll

1 give you 11.

2 THE COURT: You say the contract describes the
3 work. Are you saying what was actually done?

4 MR. WEINER: No. I'm saying they go in and decide.
5 There is a procedure that takes place. It's a walk.

6 THE COURT: Is that in the contract?

7 MR. WEINER: No. They do a walk in the beginning,
8 Your Honor, because of certain extra things that have to be
9 done.

10 THE COURT: You're saying was there a practice
11 of looking over each unit in advance?

12 MR. WEINER: Yes. Excactly.

13 THE COURT: All right. Tell me about that.

14 THE WITNESS: When the contract and scope for the
15 property is decided upon, each unit is not identical.

16 THE COURT: What was done, here, then?

17 THE WITNESS: Excuse me?

18 THE COURT: What was done, here? Johnmark is
19 already employed. You're there, they're on the job the
20 first day, what did you do?

21 THE WITNESS: My first step is to -- a representa-
22 tive of Johnmark and myself walk a unit -- walk all units
23 before any work is performed to decide what work -- extra

1 work is needed in the unit to make them all typical.

2 THE COURT: All right.

3 BY MR. WEINER:

4 Q Now, there is -- the Judge has said, and we all
5 understand, there is the basic scope of work.

6 A Yes.

7 Q That is understood to take place in all the
8 units?

9 A Exactly.

10 Q Okay. Then there is what's known as the walk
11 for extras; right?

12 A Well, walk for extras, yes.

13 Q What does that mean?

14 A That is where I go with a representative of the
15 contractor, Johnmark, and walk each unit and mark down if
16 a window is broken; if a door is missing, or walls are
17 knocked in. We measure, mark down a walk for extra sheet.

18 Q Now, these things could be such -- as great as
19 several hundred feet of dry wall, as Mr. McAvee said, in a
20 particular unit that would be a typical. One unit requires
21 extensive dry wall work where that would not be so in another
22 unit.

23 A No, the bottom --

1 THE COURT: What is the question? You've made a
2 four sentence statement, but what is the question?

3 MR. WEINER: The point I'm trying -- the question
4 is, there is particularity with regard to the extras that
5 have to be put into units, is that --

6 THE COURT: He said that.

7 THE WITNESS: Yeah.

8 THE COURT: Instead of arguing after the work's
9 done, they agree on it in advance.

10 MR. WEINER: Hopefully.

11 BY MR. WEINER:

12 Q Now, are there costs that are given to you for
13 this extra work?

14 A Cost for extras is submitted with the contract
15 prior to the walking of the extras. It's submitted along
16 with the contract.

17 THE COURT: You know what extras you were going
18 to pay for them. It's just a question of whether you agree
19 it was an extra and authorize what you are doing?

20 THE WITNESS: Exactly.

21 BY MR. WEINER:

22 Q Is there ever a time that a particular extra's
23 not covered in the contract? What do you do?

1 A I can only tell you the procedure of the company,
2 and that is where as you decide on a contract the scope of
3 work and the contractor is responsible for the unit after
4 him and I walk the unit.

5 Q Okay. You and a representative from Johnmark
6 walk a unit; you've gone through the extras. At that point
7 in time, what's the position of ADC with regard to getting
8 that work done?

9 A Just basically perform the extras that are on
10 the sheet, and also the scope of work that applies to each
11 unit.

12 Q What happens if something unforeseen occurs and
13 there is a toilet that becomes broken after your walk?

14 A Well, unless it's brought to the attention of the
15 project manager, the cause being vandalism or something
16 happened, then it's the contractor's responsibility.

17 Q Once you have gone through that initial --

18 A Walk for extras, yes.

19 Q Now, to your knowledge, was there ever a -- during
20 the course of the Ivymount contract -- anything brought to
21 your attention that there was a need for additional time to
22 have work completed?

23 A No. I don't recall.

1 Q But for the July 3rd situation with cove moulding
2 and the light?

3 A Yes.

4 Q Was there any other situation that was brought to
5 your attention where there was a request for additional time?

6 A No, there was not.

7 Q That was never either oral or written?

8 A No, not to me.

9 Q Now, when does -- at what point in time is a
10 delivery schedule given to the contractor?

11 A At the signing of the contract. I mean, when the
12 contract is agreed upon.

13 THE COURT: Let me ask you a question. Does the
14 contract provide dollar penalties for late performance?

15 MR. WEINER: There's a -- there are several
16 clauses that address that.

17 THE COURT: You talk about it, but is there a
18 money label on it?

19 MR. WEINER: No.

20 THE COURT: Assume they're late, it isn't going
21 to affect the verdict; is it? Assume they're early, it
22 isn't going to affect the verdict; is it?

23 MR. WEINER: Late could.

1 MR. WEINER: Mark this for identification,
2 Your Honor. I don't know what number Defendant's.

3 THE COURT: Defendant's 4 or 5. This will be
4 Defendant's 4, marked for identification.

5 (The document previously referred
6 to was marked Defendant's Exhibit
7 No. 4 for identification.)

8 MR. WEINER: That's going to be -- that's a
9 delivery schedule, Your Honor.

10 THE COURT: It's a group of papers. They all
11 dated March? The memorandum from Johnmark Construction --
12 to Johnmark from June Dunn, D-u-n-n, dated March 13, 1980
13 giving some completion dates.

14 BY MR. WEINER:

15 Q Now, Mr. Dillon, can you please -- could you
16 identify the group of papers that I've given you?

17 A Yes. It's a construction schedule made up by the
18 project manager for delivery of units, and it's made for
19 the purpose of contracts that the project manager has taken
20 of the sale. That's how they decide the construction
21 schedule.

22 Q So, there is a method to the construction schedule,
23 is that --

1 A Yes, it's to coordinate with the sales of the
2 units.

3 Q Now, the first group of units consist of seven;
4 is that correct?

5 A Yes.

6 Q And they're all in building --

7 A 4355.

8 Q What seven are they?

9 A 11 through 17.

10 Q What is the delivery date?

11 A April 18th, 1980.

12 Q Those are -- those pieces of paper show delivery
13 dates from April 18th through what date?

14 A October 10th, 1980.

15 Q Okay. Now, according to the contract -- do you
16 still have that in front of you?

17 A No. I'm sorry. Your Honor, I have another --

18 THE COURT: Who is June Dunn, by the way?

19 THE WITNESS: She was a previous project manager.

20 THE COURT: All right. Better state these things.

21 MR. WEINER: I'd like to move those in at this
22 time. I move those into evidence, Your Honor.

23 THE COURT: All right. Do you wish to Voir Dire

1 THE COURT: How?

2 MR. WEINER: Time of the essence contract.

3 Number one.

4 THE COURT: That's in the contract?

5 MR. WEINER: Oh, yes.

6 MR. MAYS: Absolutely.

7 MR. WEINER: Several places.

8 MR. MAYS: And the modification also.

9 THE COURT: How is it raised by the pleadings?

10 MR. WEINER: Our answer.

11 THE COURT: They say you breached by putting off
12 the job. You say they breached, then; and part of your
13 claim is they breached because they were not timely; is that
14 it?

15 MR. WEINER: Yes.

16 THE COURT: And it's time is of the essence
17 contract, then. To that extent, I certainly do hear evidence.
18 All right.

19 MR. WEINER: You'll hear the evidence what?

20 THE COURT: I admit the evidence.

21 MR. WEINER: Paragraph number 35, time is of the
22 essence; this agreement, each provision herein contains

23 THE COURT: All right. Go ahead.

1 on them?

2 MR. REESE: Just a moment's worth, if Your Honor
3 please.

4 VOIR DIRE EXAMINATION

5 BY MR. REESE:

6 Q Were these attached to the contract?

7 A Yes, I believe they were.

8 Q At the time the contract was entered into, they
9 were attached to that contract?

10 THE COURT: They're dated March 13th, 1980.

11 MR. REESE: Okay.

12 THE COURT: Contract is dated March 12th.

13 MR. REESE: Answer is they weren't attached to the
14 contract, then?

15 THE COURT: Doesn't necessarily mean that either.

16 BY MR. REESE:

17 Q Were you present when the contract was signed?

18 A No. I don't believe I was.

19 Q So, you don't know what was attached to the con-
20 tract when it was signed?

21 A No. Not on March 12th, no.

22 Q So, your answer is: was it attached to the con-
23 tract at the time, and your answer is, I don't know?

1 A Yeah. That's true.

2 Q All right, sir. You don't know if that was hand
3 delivered at another time?

4 A No, I do not.

5 Q You don't know how it got to Johnmark?

6 A No. I can only assume the project manager --

7 ~~Q~~ You assume?

8 A Yeah.

9 MR. REESE: If Your Honor please, I have to object.
10 It may come in for identification purposes.

11 THE COURT: Let's stop for a minute. First,
12 counsel, tell me on what page there's the business about
13 having seven units ready by April 18 or whatever it was.

14 MR. REESE: There's a schedule, I believe.

15 THE COURT: Is that an attachment in the contract
16 or not?

17 MR. REESE: On that attachment I, effective date
18 down at the middle of the page, the first seven units shall
19 be completed no later than April 18, 1980.

20 MR. WEINER: Then it goes the first seven units --

21 THE COURT: Can you all wait until I turn the page?
22 Thank you. It's under effective dates which really is com-
23 pletion dates; right?

1 MR. REESE: That's the only place I can find it.

2 THE COURT: Now, I wanted to read that before I
3 rule on whether it's admissible, and what's your response,
4 now, counsel?

5 MR. WEINER: The --

6 THE COURT: Most of these pages seem to have
7 seven units on them.

8 MR. WEINER: Your Honor, I think there is -- I've
9 read in here that a schedule would be provided, and I'm
10 submitting that that's the schedule; and then Mr. Reese puts
11 out the effective dates. I would, if the Court wants to give
12 me a few minutes, I can pull out the --

13 THE COURT: I'm going to let it in.

14 (The document marked Defendant's
15 Exhibit No. 4 was received into
16 evidence.)

17 MR. REESE: My exception noted.

18 THE COURT: Whether it varies or not, it's what
19 was delivered, and obviously the owner could tell the con-
20 tractor which unit to do next.

21 MR. REESE: The difficulty, of course, if he
22 doesn't say that he made up the list, or that he delivered
23 them.

1 MR. WEINER: I'm just asking if that was the
2 list that he knew about.

3 THE COURT: That's all right.

4 MR. REESE: All right.

5 THE COURT: We're at a good point to end for the
6 night.

7 MR. MAYS: Your Honor please, what number are we
8 up to with this exhibit?

9 THE COURT: This is Defendant's 4, recalling
10 there's no Defendant's 2.

11 (Whereupon, the hearing in the above-entitled
12 matter was concluded at 5:30 o'clock p.m., to reconvene
13 at 10:00 o'clock a.m. on Thursday, February 25, 1982.)

14 - - -