

205 VA 397

Record No. 5763

In the
Supreme Court of Appeals of Virginia
at Richmond

W. T. MAY, INDIVIDUALLY, ETC.

v.

WESLEY W. MARTIN

FROM THE CORPORATION COURT OF THE CITY OF LYNCHBURG

RULE 5:12 BRIEFS

§5. NUMBER OF COPIES. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. SIZE AND TYPE. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a.m., Adjourns at 1:00 p.m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 5763

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 16th day of October, 1963.

W. T. MAY, individually and trading as
May Construction Company, Plaintiff in error,

against

WESLEY W. MARTIN, Defendant in error.

From the Corporation Court of the City of Lynchburg
O. Raymond Cundiff, Judge

Upon the petition of W. T. May, individually and trading as May Construction Company, a writ of error and *superseas* is awarded him to a judgment rendered by the Corporation Court of the City of Lynchburg on the 22nd day of May, 1963, in a certain motion for judgment then therein depending wherein Wesley W. Martin was plaintiff and the petitioner was defendant; upon the petitioner, or some one for him, entering into bond with sufficient security before the clerk of the said corporation court in the penalty of two thousand dollars, with condition as the law directs.

RECORD

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MOTION FOR JUDGMENT

Comes now the plaintiff, Wesley W. Martin, and moves the Corporation Court for the City of Lynchburg, Virginia, for judgment against the defendant, W. T. May, individually and trading as May Construction Company, in the amount of **THREE THOUSAND ONE HUNDRED THIRTY SEVEN DOLLARS (\$3,137.00)**, with interest at Six Per Cent (6%) from November 15, 1962 for this, to-wit:

1. Plaintiff is a licensed builder, doing business in and around the vicinity of Lynchburg and Campbell County, Virginia.

2. On or about April 1, 1961, plaintiff entered into two written contracts with defendant, whereby plaintiff was to construct two houses on two lots owned by defendant, and situate in Campbell County, Virginia. The originals of said contracts are attached hereto, marked "Plaintiff's Exhibit A" and "Plaintiff's Exhibit B," and prayed to be read as a part of this motion.

3. Under the terms of said contract, defendant was to pay to plaintiff for said construction the sums of **FIFTY THREE HUNDRED FORTY SIX DOLLARS (\$5,346.00)** and **FIFTY TWO HUNDRED SIXTY FIVE DOLLARS (\$5,265.00)**, respectively, for a total of **TEN THOUSAND SIX HUNDRED ELEVEN DOLLARS (\$10,611.00)**.

4. Defendant has paid to plaintiff the sum of
page 2] **SEVEN THOUSAND FOUR HUNDRED SEVENTY FOUR DOLLARS (\$7,474.00)**, but a balance of **THREE THOUSAND ONE HUNDRED THIRTY SEVEN DOLLARS (\$3,137.00)** is long past due and owing to plaintiff by defendant. Although said sum is and has been justly due and owing, defendant has refused, and does now refuse, to satisfy this debt.

WHEREFORE, plaintiff moves this Court for the judgment against defendant in the amount of **THREE THOUSAND ONE HUNDRED THIRTY SEVEN DOLLARS (\$3,-**

137.00) with interest from November 15, 1962, and the costs of this suit.

WESLEY W. MARTIN
By Counsel

Hickson, Davies & Lyle
By Joseph L. Lyle, Jr.
1003 Church Street
Lynchburg, Virginia
Attorneys for plaintiff

Filed in the Lynchburg Corporation Court Clerk's Office
the 8th day of March, 1963.

Teste:

M. M. MALLAN, D. C.

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RESPONSE AND COUNTER-CLAIM
of
W. T. MAY

The defendant, W. T. May, in response to the allegations contained in a Motion for Judgment heretofore filed against him in the Corporation Court for the City of Lynchburg, Virginia by Wesley W. Martin, plaintiff, comes and says:

1. He neither admits or denies that the plaintiff is a licensed builder or duly licensed contractor as required by law and calls for proof thereof.

2. He admits the allegations contained in paragraphs 2 and 3 of said Motion for Judgment but alleges that the said plaintiff agreed and promised that he would fully perform his obligations set forth in said contract within 90 days from the date of the said contracts, time of performance being of the essence.

3. He denies that he is indebted to the plaintiff in the sum alleged to be due in said Motion for judgment for the reasons hereinafter set out in this, the defendant's Counter-Claim.

COUNTER-CLAIM

Defendant, W. T. May, by his attorney, by way of Counter-Claim, comes and moves the Court for judgment against the plaintiff, Wesley W. Martin for the sum of Two Thousand Thirty Dollars and 31/100 (\$2,030.31) which said sum is justly due and owing to the defendant, or which sum ought to be allowed as a set off against the claim of the plaintiff, by reason of the following, to-wit:

1. That this defendant entered into two separate agreements with the plaintiff, on the 1st day of April, 1961, whereby the plaintiff agreed to erect two "package homes," on two separate lots owned by the defendant in Campbell County, Virginia, as will more fully appear from Plaintiff's Exhibit A and B, filed with the Motion for Judgement.

2. That the said package homes were purchased from Lester Brothers, Inc., of Martinsville, Virginia, and paid
page 7] for by this defendant; that during the period in which the two houses were to be constructed by the plaintiff this defendant was required to arrange for interim financing and to pay interest on the cost of the packaged homes to Lester Brothers, Inc., at the rate of 6% per annum until the said houses were completely erected, as to all of which the plaintiff had full knowledge and knew that failure, on his part, to perform his contracts, with the defendant, would damage the defendant and that the time of performance thereof was of the essence.

3. That the said plaintiff agreed and promised that he would complete the work in erecting said houses, as provided for in the said contracts with this defendant, within a period of not more than 90 days from the date thereof; that the said plaintiff wholly failed and refused to complete said houses according to the terms of his contract and did not complete the same until November 15, 1962; that as a proximate result of the plaintiff's failure to abide by the terms of his contract and of his failure to complete the erection of the houses as he agreed to do, this defendant was required to pay unto Lester Brothers, Inc., interest on the purchase price of said houses at the rate of (6%) six per centum per annum and that the daily interest rate on one of the said interim financing loans was \$1.53 per day and on the other \$1.59 per day.

4. That the defendant repeatedly requested the plaintiff to abide by the terms of the contract and attempted to have him perform the same without avail; that the plaintiff was notified

that any loss or damage caused him by the plaintiff's delay would be off set against the agreed contract price.

5. That as a direct and proximate result of the breach of the contracts by the plaintiff, this defendant was required to pay interest for the purchase price of one of the said packaged homes at the rate of \$1.53 for at least 470 days and was required to pay interest at the rate of \$1.59 per day for at least 470 days on the second house which the plaintiff obligated to erect within a period of 90 days and was caused to lose a total of at least \$1,466.40, by way of said interest payments, that he would not have lost had the plaintiff performed the contracts according to his agreement with the defendant.

6. That while the said plaintiff was working and erecting the two said houses he requested and authorized this defendant to pay, out of any sums due him under the terms of the aforesaid contracts, unto the following persons and companies the sums hereinafter set out, to-wit:

page 8]	Appalachian Power Company	
	(electric current during construction)	\$43.53
	Falwell Well Corporation	
	(water meters for both houses)	164.00
	Lynchburg Ready Mix Concrete Company	
	(concrete for sidewalks)	83.38
	G. S. Burton (gravel for driveways)	48.00
	Cantrell Nursery Sales (shrubs for both houses)	70.00
	May Brothers, Inc., (back filling and grading)	155.00
		<hr/>
		\$563.91

that all of the aforesaid sums were due and owing by the plaintiff who entered into sub-contracts with the parties hereinabove named for the services and materials herein set out; that the said May has paid or has obligated himself to pay all of the aforesaid sums direct to those sub-contractors.

7. That by reason of the plaintiff's failure to perform his contract as aforesaid and his failure to pay the sub-contractors herein set out the defendant has been required to pay interest, over and above the sum that he would have had to pay had the plaintiff performed his contract according to his agreement with the defendant, the sum of, at least \$1,466.40 in interest to Lester Brothers, Inc., and has paid or has obligated himself to pay the sum of \$563.91 to the sub-contractors herein above set out.

WHEREFORE, the defendant moves the Court for judgment against the plaintiff in the sum of Two Thousand Thirty and 31/100 dollars (\$2,030.31).

W. T. MAY
By J. MURRELL DANIEL
His Attorney
516 Peoples Bank Building
Lynchburg, Virginia

I hereby certify that I delivered (mailed) a copy of the foregoing response and counter-claim to Joseph W. Lyle, 1003 Church Street, Lynchburg, Virginia, attorney for the plaintiff, this 14th day of March, 1963.

J. MURRELL DANIEL
Attorney for the defendant

Filed: Mar 15 1963

H. H. MARTIN, Clerk

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MOTION FOR SUMMARY JUDGMENT

Comes now the defendant, W. T. May, Etc., and moves the Court for Summary Judgment against the plaintiff, Wesley W. Martin, for the sum of Two Thousand Thirty and 31/100 Dollars (\$2,030.31) for the reason that the allegations of his Counter-Claim filed in this action, are admitted and there is therefore no genuine dispute either as to the amount claimed or to any other material fact.

I certify that a copy of the foregoing Motion for Summary Judgment was delivered to Joseph W. Lyle, Esq., Attorney for the plaintiff, on this the 22nd day of May, 1963 at the same time the Motion was presented to the Court.

J. MURRELL DANIEL
Attorney for the Defendant

Filed 5/22/63 & refused.

O.R.C., Judge

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REPLY TO THE ALLEGATIONS OF THE
DEFENDANT'S PLEADINGS UNDER
§8-238

Comes now the plaintiff, Wesley W. Martin, by his attorney, and for his response to the allegations of the defendant's pleadings under §8-238, Code of Virginia 1950, the defendant having paid to the clerk of this court the sum of \$1,106.69 pleading that he is not indebted to the plaintiff in excess of said sum under §8-237 of said Code, and says:

1. That he admits the allegations contained in paragraph 1 of the pleading of the defendant entitled "Counter-Claim;"
2. That he denies the allegations contained in paragraph 2 of said pleading;
3. That he denies the allegations contained in paragraph 3 of said pleading;
4. That he denies the allegations contained in paragraph 4 of said pleading;
5. That he denies the allegations contained in paragraph 5 of said pleading;
6. That he denies the allegations contained in paragraph 6 of said pleading;
- page 11] 7. That he denies the allegations contained in paragraph 7 of said pleading;

8. That he denies that the sum of \$1,106.69 is the full sum of money owing the plaintiff by the defendant as alleged in the letter dated May 17, 1963 to H. H. Martin, Clerk, from J. Murrell Daniel, Attorney for the defendant, and here alleges that the defendant is indebted to the plaintiff for the full amount alleged in plaintiff's motion for judgment herein; that the written contracts filed herein as Plaintiff's Exhibit A and B with the motion for judgment provide no time for the completion of the houses by the plaintiff; that the plaintiff fully performed his part of said contracts by completing erection of said houses within a reasonable time under the circumstances; and that he adopts the allegations contained in his original motion for judgment.

WHEREFORE, plaintiff accepts the sum of \$1,106.69 as part satisfaction of the amount due him by the defendant and

moves the court for judgment against the defendant for the balance thereof or \$1780.40.

WESLEY W. MARTIN
By JOSEPH L. LYLE, JR.
His Attorney

Joseph L. Lyle, Jr.,
Hickson, Davis & Lyle,
Co-Operative Building,
Lynchburg, Virginia,
Attorney for the Plaintiff.

CERTIFICATE OF SERVICE

I, Joseph L. Lyle, Jr., certify that I delivered a true copy of the foregoing Reply to the Allegations of the Defendant's Pleadings to J. Murrell Daniel, Attorney for the Defendant, on this 22nd day of May 1963.

JOSEPH L. LYLE, JR.

Filed by leave of Court 5/22/63

O.R.C., Judge

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May 17, 1963

Mr. H. H. Martin
Clerk of the Corporation Court for the City of Lynchburg
Lynchburg, Virginia

Re: Wesley W. Martin, Plaintiff vs. W. T. May, Etc.,
Defendant

Dear Mr. Martin:

Pursuant to Code Section 8-237 the defendant, by counsel, herewith, pays into Court, to your order, the sum of One Thousand One Hundred Six and 69/100 Dollars (\$1,106.69), that being the full sum of money owing the plaintiff, Wesley W. Martin, on his claim against the defendant, W. T. May. The defendant owes the plaintiff no other sum of money

whatever and asks that you dispose of the money herein tendered only in accordance with the orders of the Court.

This is to notify you that there are garnishment proceedings and memorandum of Mechanic Liens pending which may constitute a lien against the sum of money herein paid and to advise you not to pay the same to the plaintiff until all matters have been finally settled.

Very truly yours,

J. MURRELL DANIEL

JMD:jl

CC:

Joseph Lyle, Esq.
Co-Operative Building and Loan Association Building
Church Street
Lynchburg, Virginia

William B. Smith, Esq.
309 Eighth Street
Lynchburg, Virginia

Rec'd May 22 1963

H. H. M., Clk.

Ck. for \$1,106.69 deposited in Clk's Sp'l a/c

May 23 1963

H. H. M., Clk.

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INSTRUCTION 3

The Court instructs the jury that if they believe from a preponderance of the evidence that the plaintiff performed his contracts with the defendant within a reasonable time under the circumstances then they should find their verdict for the plaintiff in the sum of \$1466.40.

May 22, 1963

O.R.C.

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INSTRUCTION 4

The court instructs the jury that in order for the defendant May to hold the plaintiff Martin responsible for expenses incurred during the delay in the construction of the houses, the law requires that he should have taken reasonable steps on his own to minimize the expense incurred. And if the jury believe from a preponderance of the evidence that the defendant May failed to take such reasonable steps, then the plaintiff Martin is not responsible for the expenses to May caused by such failure.

O.R.C.

Object by Def. & Given.

O.R.C.

May 22, 1963

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INSTRUCTIONS 5

The Court instructs the jury that if you believe from a preponderance of the evidence that the defendant W. T. May, either by words or actions, acquiesced in the delay in the construction of the houses, then the defendant may not hold the plaintiff responsible for interest incurred during such acquiescence.

O.R.C.

Object by Def. & Given

O.R.C.

May 22, 1963

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page 26] Wesley W. Martin, Plaintiff,
vs. **May 22, 1963.**
W. T. May, individually, and
trading as May Construction Co., Defendant.

We the jury find for the plaintiff — Martin in the Amount of \$1466.40.

J. SAM HUDSON
Foreman

page 27] Virginia: At Lynchburg Corporation Court, May 22, 1963.

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This day came the parties by their attorneys, and the defendant paid into court, to the clerk thereof, \$1,106.69, and pleaded that he is not indebted to the plaintiff, and the said defendant moved the court for summary judgment against the said plaintiff, Wesley W. Martin, for \$2,030.31, which motion the court denied, and the defendant by his attorney excepted, and leave is given the plaintiff to file his reply to the allegations of the defendant's pleadings under Sec. 8-238 of the Code, to which the defendant by his attorney objected, and the court overruled said objection, and the defendant by his attorney excepted, and the plaintiff refused to accept said payment into court in full payment of his claim and demand, but accepts it in part satisfaction thereof, and prays that what, if any, further sum be due him on his claim and demand be inquired of by the country, and the defendant likewise, and said parties demanding a jury, there came a jury, to-wit, William Chewning, David H. Cyrus, Jr., Lawrence B. Dougan, Wilmer L. Hicks, J. Sam Hudson, Marvin J. Penny and Danny M. Shaver, who having been duly summoned, selected, tried and sworn according to law, and having heard the evidence of the plaintiff, the defendant by his attorney moved the court to strike the plaintiff's evidence on the ground that it is not sufficient to support a verdict for the plaintiff against said defendant, which motion the court overruled, and the defendant by his attorney excepted, and said jury having further heard the evidence in full, the said defendant by his attorney renewed his motion to strike on the ground aforesaid, which motion the court overruled, and the defendant by his attorney excepted, and the said jury having heard the evidence and argument of counsel, and having received the instructions of the court, were sent to their room to consult and consider of their verdict, and after some time returned into court and presented their verdict, written on a blank sheet of paper, in the words and figures following, to-wit, "We the jury find for the Plaintiff, Martin, in the amount of \$1,466.40. J. Sam Hudson, Foreman." There-

upon the defendant by his attorney moved the
page 28] court to set aside said verdict on the ground that
it is contrary to the law and the evidence, and
on the further ground of improper instruction of the jury,
which motion the court overruled, and the defendant by

his attorney excepted. It is therefore considered by the court that the plaintiff, Wesley W. Martin, recover against the defendant, W. T. May, individually, and trading as May Construction Co., the sum of \$1,466.40, the amount of the damages by the jury in their verdict aforesaid ascertained and assessed, with legal interest thereon from this day until paid, and his costs by him about his motion for judgment in this behalf expended. At the instance of the defendant who by his attorney intimated his intention to apply for a writ of error and *supersedeas*, the court doth order that execution of said judgment be suspended for the term of sixty days from this date, provided that the said defendant or some one for him execute a proper suspending bond in the penalty of \$2,000.00, with surety approved by the clerk of this court.

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NOTICE OF APPEAL
AND
ASSIGNMENTS OF ERROR

To: The Honorable H. H. Martin, Clerk of the Corporation Court for the City of Lynchburg, Virginia.

TAKE NOTICE, that pursuant to Rule 5:1 Section 4 of the rules of the Supreme Court of Appeals of Virginia, the defendant, W. T. May, Etc., by counsel, files his Notice of Appeal from the final judgment rendered against him in favor of the plaintiff, Wesley W. Martin, in the Corporation Court for the City of Lynchburg, Virginia on the 22nd day of May, 1963, and within sixty days from the date of the final judgment, and assigns error as follows:

(1) The Court erred in failing to grant the defendant's motion for summary judgment;

(2) The Court erred in permitting the plaintiff to file Responsive Pleadings to the defendant's counter-claim after more than twenty-one days had elapsed from the date of the filing of the Counter-Claim;

(3) The Court erred in permitting the sub-contractors to testify as to their dealings with the defendant;

(4) The Court erred in refusing to grant the defendant's motion to strike the plaintiff's evidence after the plaintiff had rested;

(5) The Court erred in refusing to grant the defendant's motion to strike the plaintiff's evidence at the conclusion of all of the evidence;

(6) The Court erred in giving any instructions on behalf of the plaintiff;

(7) The Court erred in giving instructions 4 and 5 for the plaintiff; and

(8) The Court erred in refusing to set aside the verdict of the jury because the same was contrary to the law and the evidence and without evidence to support the same.

J. MURRELL DANIEL,
Counsel for the Defendant
516 Peoples Bank Building
Lynchburg, Virginia

page 33] I, J. Murrell Daniel, Counsel for the Defendant,
hereby certify that a copy of the foregoing Notice
of Appeal and Assignments of Error, was mailed to Joseph
L. Lyle, Jr., 1003 Church Street, Lynchburg, Virginia, Counsel
for the plaintiff, Wesley W. Martin on this the 18th day of
July, 1963.

J. MURRELL DANIEL,
Counsel for the Defendant
516 Peoples Bank Building
Lynchburg, Virginia

Filed

July 19, 1963

H. H. MARTIN, Clerk

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STATEMENT OF FACTS

page 1] The parties will be referred to herein according
to the position they occupied in the trial Court,
that is, Wesley W. Martin, as Plaintiff and W. T. May as
defendant.

On the 8th day of March, 1963, the plaintiff filed a Motion
for Judgment against the defendant for the sum of \$3,137.00

with interest at 6% from November 15, 1962, that being the principal amount unpaid under the contracts entered April 1, 1961 between the plaintiff and the defendant.

On the 15th day of March, 1963 the defendant filed a response to the Motion for Judgment served on him denying that he was indebted to the plaintiff in the amount claimed and a Counter-Claim asking for judgment against the plaintiff for the sum of \$2,030.31 which the defendant claimed page 2] he had paid for the benefit of the plaintiff. He specifically claimed a total sum of \$1,466.40 as interest and \$563.91 for sub-contractors paid under authority of the plaintiff who, admittedly, according to the terms of the contracts he was primarily obligated to pay.

The case was duly set for trial in the Corporation Court for the City of Lynchburg, Virginia on the 22nd day of May, 1963 and on that same day the defendant, by counsel, by letter to the Clerk of the Court dated May 17, 1963 but not actually handed to the Clerk until May 22, 1963, paid into Court, pursuant to Section 8-237 of the Code of Virginia, the sum of \$1,106.69 and informed the Clerk that that was the full sum of money owing the plaintiff by the defendant. After the jury had been called but not sworn and selected, the defendant filed a written Motion for Summary Judgment based on the theory that since the rules of Court require a Counter-Claim to be pleaded to just as is required in the case of a Motion for Judgment, and that since the plaintiff had not filed Responsive Pleadings to the defendant's Counter-Claim there was no dispute as to the amount claimed in the Counter-Claim or as to any other material fact. The Court refused to grant the defendant's Motion for Summary Judgment, and the defendant objected and excepted to the action of the page 3] Court.

The plaintiff moved the Court that he be allowed to file pleadings responsive to the defendant's pleadings and to the defendant's action in paying the money into Court, and such a pleading was tendered to the Court. The Court permitted the plaintiff to file his Responsive Pleadings which was entitled "Reply To the Allegations of the Defendant's Pleadings under Section 8-238," over the objection and exception of the defendant on the ground that the pleading referred to was simply a response to the defendant's Counter-Claim and was not filed within the twenty-one (21) days as is provided by the rules of Court. The Court was of the opinion that the defendant's alleged Counter-Claim was actually a set off and need not be pleaded to; that the plaintiff was entitled to reply pursuant to Code Section 8-238; and that it was in the

Court's discretion to permit the plaintiff to file the pleading tendered. The Plaintiff's Responsive Pleadings were then filed over the objection and exception of the defendant and the Court offered to grant the defendant a continuance, which the defendant refused.

The jury was then selected and sworn and the evidence was as follows:

Sometime in the month of February of 1961 one G. S. Medieros, an employee of Lester Brothers Inc. of Martinsville, Virginia, who manufactures and sells what
page 4] are known as Lesco Homes, contacted the defendant in this action, W. T. May at his office in the City of Lynchburg, Virginia and proposed to sell two pre-cut Lesco Homes to the defendant; one of the pre-cut homes to cost \$6,049.00 and the other to cost \$6,400.00. The representative of Lester Brothers told the defendant at that time that he would arrange for a contractor to erect the houses on the lots of the defendant in Campbell County, Virginia and that his company would arrange for interim financing for both the cost of the "package homes" and for the cost of construction; that the same would be constructed within four months from the date construction began and that Lester Brothers had "arrangements" with "builder dealers" whereby Lester Brothers would procure a party to erect the houses so purchased from Lester Brothers.

On the 1st day of April, 1961 the defendant met with the representative of Lester Brothers, Medieros, and the plaintiff, W. W. Martin, at the lots, owned by the defendant and on which the two houses were to be erected in Campbell County and there signed the contracts which were introduced in evidence in this action as Plaintiff's Exhibits Nos. A and B.

Prior to that time the plaintiff and defendant had not met each other nor had they had any business dealings with each other. The plaintiff had an agreement, contained
page 5] in Defendant's Exhibit 1, with Lester Brothers, Inc., whereby he was given the privilege of selling or building the homes of Lester Brothers in a certain area as described therein. The agreement, however, expressly provided in paragraph 11 that the plaintiff was not an employee or agent of Lester Brothers and expressly provided that the plaintiff, in effect remained an independent contractor.

After the contracts between the plaintiff and defendant were entered into on April 1, 1961, the defendant entered into an interim financing arrangement with Lester Brothers of Martinsville, Virginia, whereby he was given credit at a Martinsville Bank to withdraw in installments, sums necessary for

the payment of the packaged homes and for the construction work to be performed by the plaintiff, Martin. There was no dispute that the interim financing arrangement was set up on a four month plan and that any extension beyond four months would require that the defendant pay interest on any money borrowed at the rate of 6% per annum.

All of the evidence was that the two houses were not completed before November 15, 1962. There was some evidence that the houses were not completely finished until January of 1963 but the defendant accepted the houses as being complete on November 15, 1962 though no third final inspection report was marked clear as provided for in the contracts mentioned.

page 6] In January of 1963 the defendant borrowed money, secured by deed of trust on both houses from a Lynchburg lending institution to pay off the interim financing loan at Martinsville and at that time had to pay interest on those two loans to the Martinsville Bank at the rate of 6% which amounted to a \$1.53 per day on one loan and \$1.59 per day on the other loan which he claims he would not have had to pay had the contracts been performed by the plaintiff according to his claim that the contracts should have been performed not later than August 1, 1961. No dispute was involved as to the amount of interest paid and no dispute was involved as to the daily interest charged to the defendant by Lester Brothers. Approximately one month before the plaintiff instituted suit against the defendant, one of the sub-contractors, L. T. Overstreet, instituted suit against the plaintiff for work performed on the two houses mentioned for the sum of \$2,000.00 and recovered judgment against the plaintiff for that amount and caused a garnishment to be issued against the plaintiff and to attach any funds in the hands of the defendant that might be owing to the plaintiff. That garnishment was removed to the Corporation Court and evidence was introduced in the trial of this action that that garnishment

lien was pending and that the other sub-contractors who later testified for the plaintiff had filed memorandums of Mechanic's Liens and had served the defendant with copies thereof in which they claimed that the plaintiff was indebted to them in various sums.

The plaintiff testified that after he and the defendant were brought together by the employee of Lester Brothers, Inc., on April 1, 1961, they then and there at the site of the proposed construction signed the contracts which have been introduced in evidence and labeled Plaintiff's Exhibits A and B; that the contracts were prepared by the employee of Lester Brothers;

that no time for the completion of the contracts was stated in the contracts and that no oral agreement as to the time of completion was made; that he commenced erecting the houses on or shortly after April 1, 1961; that there was some delay in receiving the materials for the houses and some delay caused by rain but that he completed 2/3rds of the construction on both houses by mid-June of 1961 and that there had been two inspections marked clear on each of said houses and that he had been paid two installments by the defendant according to the terms of the contracts, in the total amount of \$7,474.00. He testified that he had built other Lesco Homes and knew that the interim financing arrangements were customarily set up on a four month period and due to be closed within four months.

ADDENDA TO PAGE 8, 2ND. PARAGRAPH OF
STATEMENT OF FACTS

He further testified on cross examination that after the delays due to weather and delays due to shipment of material that the reason that he did not complete the erection of his houses sooner was that he was prevented from performing his contracts with the defendant by an agent of Lester Brothers who would call him from the jobs and have him work on other houses sold by Lester Brothers; that he was not prevented for any other reason or by any act of the defendant, *Mary*; that he saw the defendant frequently at the sites of construction and advised him regularly that Lester Brothers was requiring him to work on other houses and that was the reason for the delay. He testified that he saw he was going to lose money on the construction if he performed according to the terms of his contract and requested the defendant to get another contractor to complete the performance of the houses and that if it cost the defendant any extra money to have the same completed that he would pay him therefor by giving a promissory note that would bear interest at the rate of 6% per annum

page 8] He further testified that during the course of construction he was delayed by the failure of Lester Brothers to ship the proper materials. He stated that on occasions he attempted to have the proper materials sent, but that he was advised by Lester Brothers that they could not honor his request, but that the request must come from Mr. May or Mr. Medieros. He further testified that during the course of construction of the houses for Mr. May he was requested by Medieros from time to time to work on other jobs

for Lester Brothers. He testified that on each occasion that he was called on to work on other jobs for Lester Brothers, he would personally notify the defendant, and that on each such occasion the defendant would merely ask him to get to the work when he could.

The plaintiff further testified that at no time during the course of construction of the houses did the defendant state that he was holding the plaintiff personally liable for any expense to the defendant, nor that the defendant would withhold any sums from the agreed contract price. He testified that only on one occasion, in July of 1962, did the defendant even inform him that he was paying interest on these houses. He testified that had he known there would be a contest about the contract price he would have filed a mechanic's lien to protect his interests, but that he was not notified of
page 9] any claim offset until more than 60 days after completion of the houses, when, on February 9, 1963, he received a letter from the defendant's attorney. He further testified that the defendant never employed another contractor to complete the houses, although there were contractors available.

Plaintiff further testified that there was never any third inspection as provided by the terms of the contract, but that the defendant accepted the houses on November 15, 1962. He said that he authorized the defendant to pay certain subcontractors out of the sum that the defendant had agreed to pay him under the terms of the contract, because certain subcontractors would not give him credit and he owed the cement company for cement and they would not deliver the material at his order. He therefore requested that the defendant pay that sum directly to the company and credit any amount due him for such sums so paid. He testified that there was no dispute about the \$563.90 which the defendant claimed to have paid, or obligated himself to pay to certain subcontractors.

The next witness for the plaintiff was G. S. Medieros, Regional Agent for Lester Brothers, Inc., who testified that he was present when the contracts between plaintiff and defendant were signed, and that there was no conversation relating to the time within which the houses
page 10] were to be completed.

The next witness was Carl B. Mills, Jr., a subcontractor who was engaged by the plaintiff to grade and seed the lawns of the two houses. He testified, over the objection and exception of the defendant on the ground that his testimony was irrelevant and immaterial and was apt to be

prejudicial to the defendant, that he had completed his work on November 15, 1962 and that he contacted the defendant to see about payment of his bill, and that the defendant advised him to send his bills to him and that he would settle up when he closed the transaction. He said that although he had had several conversations with the defendant, the defendant never notified him that he was claiming damages or offset against the plaintiff, or that the plaintiff would receive any sum less than the contract price; in fact the subject was not discussed. He further testified that the defendant never bound himself to pay his bills over and above any amount that he had originally contracted with Martin to pay, and that the defendant did not personally promise to pay the debt of the plaintiff and that his bills were rendered in the name of the plaintiff. The plaintiff then rested.

The defendant, May, testified that the employee of Lester Brothers arranged the entire transaction and
 page 11] introduced him to Martin as a builder dealer of Lester Brothers; that he was to pay off his interim financing loans and that the houses were to be completed not later than August 1, 1961 that he finally accepted the house on November 15, 1962 and arranged for local financing shortly thereafter and that his local financing arrangement was completed in January of 1963 that he paid the Martinsville Bank on the interim financing loans interest at the rate of 6% from August 1, 1961 to November 15, 1962 and that the total interest payments for that period of time was \$1,466.40. He introduced in evidence, without objection, plaintiff's exhibits 2 and 3 and it was admitted that he had paid that amount of interest for that period of time.

The defendant further testified that when the contracts were signed that it was discussed in the presence of the defendant and the agent of Lester Brothers that Lester Brothers would advertise, promote, show and help sell the two homes in the first part of July, 1961, and that the houses would be completed at the time of such showing.

On cross-examination he stated in response to questions by plaintiff's counsel that he never employed another contractor to complete the houses, although he was aware of the provisions in the the contracts giving him this right,
 page 12] and stated that the reason he did not was that on one occasion he hired two contractors to look at the job, and their price for completing the contract would have been far in excess of the original agreed total price of completion agreed to by him and the plaintiff. He testified that he repeatedly asked the plaintiff to complete the con-

struction of the houses; that he informed the plaintiff that he was paying this interest or was going to be required to pay this interest and that he "just could not stand it." He stated that he was constantly after the plaintiff to get him to complete the erection of the houses and that the plaintiff would simply advise him that Lester Brothers was calling him off and putting him on other jobs. He testified that he, at this time, knew that the plaintiff's credit was not good and that the sub-contractors would not extend credit to him and that that was the reason that he agreed to pay the contractors that he had alleged in his Counter-Claim. He further testified that he and the plaintiff were together in defendant's counsel's office in the early part of July, 1962 and was then again informed that he would hold him personally liable for any damages caused him by failure to complete the erection of the houses by August 1, 1961. That he never told him the exact amount of interest by the day because he did not know

what that amount was until he received the state-
page 13] ments which were introduced as Defendant's Exhibits 2 and 3 and that he was going to hold the payment of the third installment of the money owing to the plaintiff until the rights in the matter were determined.

The defendant, upon questioning by the Court, stated that the purpose for his counter-claim was not to obtain a judgment against the plaintiff, but only to set off the amount claimed against the amount claimed by the plaintiff in the motion for judgment.

The next witness for the defendant was G. S. Medieros who testified that he had worked with Lester Brothers for a number of years; that he was familiar with the type houses involved and that in no event should it take over 120 days to have completely erected both houses and that that period of time would include time off for bad weather and normal delays.

Barney Bowen the third witness for the plaintiff, testified that he was in charge of sales of Lesco Homes for Lester Brothers and had been employed by them for nine years. That in no event should it have taken more than 90 days to completely erect the two houses; that the houses are pre-cut and much simpler and easier to put up than conventional houses. He testified that his estimate of the time to complete the houses included any reasonable delays including weather and delivery on materials.

page 14] The final witness for the plaintiff, Rex Hoyle testified that he was an employee of Lester Brothers and that the two houses should be erected within 45 to 90 days and allow an additional 30 days for any slow

up due to weather or delays in shipment of materials. He testified that the delay in receipt of certain parts of the homes would not tie up the whole job because work could be done on another part of the house.

All three of the foregoing witnesses testified that once the houses were 2/3rds complete that the remaining time for full completion should not exceed 30 days. They stated that their estimate was based on the assumption that the builder would devote his full working time to the completion of the houses.

In rebuttal the plaintiff called two witnesses, both sub-contractors who had billed the plaintiff for their costs on the two jobs and both of whom were employed or contracted with by the plaintiff and stated that they on several occasions, when concerned about receiving payment for their work, called the defendant who advised them to send him copies of their bills. One of them testified that he was led to believe that May would personally pay the bill but never said why he was so led. Both testified that May never assumed
page 15] any personal responsibility for their bills and advised them that he would settle if there was money available with which to pay them.

Both testified that although they had several conversations with the defendant regarding completion of and payment for these houses, he never told them he was claiming any off set against the plaintiff, or that the plaintiff would receive any less than the contract price; in fact the subject was not discussed.

At the conclusion of the Plaintiff's evidence the defendant made a motion to strike the evidence of the plaintiff as being insufficient in law to support a verdict for the plaintiff for the reason that his delay in performance had cost the defendant the amount of money he claimed as an off set and that his explanation, that the agent of Lester Brothers had caused him not to complete the same, was no valid excuse since he was not an agent or employee of Lester Brothers or an agent or employee of the defendant and that the plaintiff having failed to file a timely responsive pleading to his Counter-Claim had admitted the allegations therein so that in law the plaintiff would not be entitled to recover any sum of the defendant other than the amount of \$1,106.69, that day paid to the Clerk of the Court. The Court overruled the motion of the defendant and the defendant, by counsel, objected and
excepted for the reasons stated.

page 16] At the conclusion of all the evidence the defendant again made a motion to strike the evidence of the plaintiff for the reason that the same was in-

sufficient in law to sustain a verdict for the plaintiff and upon the further ground that there was no evidence to dispute the defendant's contention that a reasonable time for the completion of the houses was not in excess of four months and that since the plaintiff only claimed interest after four months until completion there was no matter in dispute and that the delay was not occasioned by any act or conduct of the defendant and that as a matter of law the plaintiff was not entitled to recover any sum of the defendant. The Court again overruled the motion of the defendant and the defendant objected and excepted to the action of the Court.

The Court gave five instructions for the plaintiff. The defendant objected to the giving of any instructions on the grounds that, as a matter of law, the plaintiff was not entitled to a judgment against the defendant for the reasons stated in his motions to strike the plaintiff's evidence and objected to instruction 4 on the grounds that there was no evidence that the defendant did not take reasonable steps to minimize his own expense since he had attempted to have other contractors complete the job but could not do so without
page 17] incurring ever greater expense and that there was not a shred of evidence in dispute of the defendant's contention that he did take those steps on his own behalf.

The defendant objected to the giving of instruction 5 at the instance of the plaintiff on the ground that there was no evidence upon which a jury could find that the defendant has acquiesced in the delay in the construction of the houses since he had attempted to have at least two other contractors complete the erection of the two houses and had been advised that it would cost him far in excess of what he had contracted with the plaintiff to pay for the construction of the same and that it was not a matter of acquiescence on his part but simply a matter of choosing the only practicable course left for him to follow since he knew that the plaintiff was not financially able to pay him for any loss or damages and the only remedy he could reasonably expect to have would be to withhold any damages from the final payment due the plaintiff.

The Court gave the instructions numbered 1 through 5, including instructions 4 and 5 which were objected and excepted to by the defendant and the jury found a verdict for the plaintiff for the sum of \$1,466.40.

The defendant by counsel moved the Court to set aside the judgment against him on the grounds that the same was
contrary to law and the evidence was without

page 18] evidence to support it; for the erroneous action of the Court in granting instructions 4 and 5; for the action of the Court in failing to grant the defendant's motion for summary judgment; for the action of the Court in permitting the plaintiff to file Responsive Pleadings more than 21 days after service of the Counter-Claim on him and for the erroneous action of the Court in permitting the sub-contractors to testify about their dealings with the defendant on the grounds that their testimony was irrelevant, immaterial and prejudicial to the defendant. All of which objections and exceptions were taken during the course of the trial. The Court overruled the defendant's Motion and the defendant objected and excepted for the reasons stated.

The undersigned, Counsel for plaintiff and defendant, respectively, in the case of *Wesley W. Martin*, Plaintiff, v. *W. T. May, etc.*, Defendant, lately pending in the Corporation Court for the City of Lynchburg, Virginia, final judgment wherein was rendered on the 22nd day of May, 1963, hereby affix their signatures to the foregoing statement of facts, to the end that the same may become a part of the record on appeal.

page 19] Given under our hands this 19 day of July 1963.

JOSEPH L. LYLE
Counsel for Plaintiff

Counsel for Defendant

Tendered on this the 19th day of July, 1963, and within 60 days after final judgment.

O. RAYMOND CUNDIFF
Judge of the Corporation
Court for the City of
Lynchburg, Virginia

Signed on this the 25 day of July, 1963, and within seventy days after final judgment.

O. RAYMOND CUNDIFF
Judge of the Corporation
Court for the City of
Lynchburg, Virginia

I, H. H. Martin, Clerk of the Corporation Court for the City of Lynchburg, Virginia, do hereby certify that the foregoing statement of facts of the trial of the case of *Wesley W. Martin v. W. T. May, Etc.*, was received by me on this the 25 day of July, 1963.

HUBERT H. MARTIN
Clerk of the Corporation
Court for the City of
Lynchburg, Virginia

A Copy — Teste:

H. G. TURNER, Clerk.

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