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Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 6737

In the Supreme Court of Appeals of Virginia at Richmond

PORTSMOUTH GAS COMPANY

v.

MARTIN SHEBAR, ET AL.

FROM THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

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. 6737

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 14th day of June, 1967.

PORTSMOUTH GAS COMPANY, Plaintiff in error,

against

MARTIN SHEBAR, IRVIN H. COHEN, SIDNEY W. COREN, JOSEPH J. GARNER AND H. LEE KANTER, Defendants in error.

From the Circuit Court of the City of Portsmouth
Henry W. MacKenzie, Jr., Judge

Upon the petition of Portsmouth Gas Company a writ of error and *supersedeas* is awarded it to a judgment rendered by the Circuit Court of the City of Portsmouth on the 23rd day of January, 1967, in a certain motion for judgment then therein depending, wherein Martin Shebar and others were plaintiffs and the petitioner was defendant.

And it appearing that a suspending and *supersedeas* bond in the penalty of $35,000, conditioned according to law, has heretofore been given in accordance with the provisions of sections 8-465 and 8-477 of the Code, no additional bond is required.

RECORD

* * * * *

page 1 }

* * * * *

MOTION FOR JUDGMENT

TAKE NOTICE that the undersigned hereby move the Circuit Court of the City of Portsmouth, Virginia, for a judgment against Portsmouth Gas Company, a Virginia public service corporation, in the sum of One Hundred Thousand Dollars ($100,000.00), together with the costs of this proceeding for the following, to-wit:

1. That on or about April 26, 1963, you, the said Portsmouth Gas Company, contracted with the undersigned to sell, deliver and install all of the gas, air conditioning and heating equipment together with the appliances, fully installed, in the apartment project known as Patio Plaza in the city of Portsmouth, Virginia, for the total sum of Sixty-Five Thousand, Two Hundred Seventy-Two Dollars and Sixty-Five Cents ($65,272.65).

2. In said contract, you included all heating and air conditioning equipment, chilled water piping, gas piping and duct work, excluding the electrical work in connection therewith.

3. In said contract, you expressly warranted that the goods and chattels sold were of sound and good merchantable quality.

4. In said contract, you impliedly warranted at law that said goods and chattels were reasonably fit for the purposes for which they were intended, namely, to heat and air condition the apartments in the said Patio Plaza.

page 2 } 5. In breach of the aforementioned express and implied warranties, you sold and delivered to the undersigned defective and unsuitable chilled water piping, same being the improper type of piping for the air conditioning system installed.

6. As a result of said breach, the said chilled water piping has cracked and split, causing the said air conditioning system to fail to work properly, causing property damage to the apartments owned by the undersigned, causing property damage to the personalty of the tenants of said apartments, reimbursement therefor having been made by the undersigned to

such damaged tenants, and further causing loss of tenants to the undersigned because of the lack of air conditioning and the continual leaks in said apartments.

7. The undersigned further allege that the aforementioned damages have constantly been brought to your attention and demand for repair and payment therefor having been made on numerous occasions, all to no avail.

8. That as a result of the breach of said contract, the undersigned have incurred damages as aforementioned and will in the future be caused further damage until said defective piping is replaced with proper piping and said leaks are stopped.

WHEREFORE, the undersigned move the Circuit Court of the City of Portsmouth, Virginia, as aforesaid, for a judgment against you in the sum of One Hundred Thousand Dollars ($100,000.00), together with the costs of this proceeding.

Respectfully,
MARTIN SHEBAR, IRVIN
H. COHEN, SIDNEY W.
COREN, JOSEPH J. GARNER
AND H. LEE KANTER
By H. LEE KANTER
Of Counsel

Filed in the Clerk's Office the 16th day of Aug., 1965.

Teste:

K. L. DIETRICK, Clerk
DORIS V. MAJOR, D.C.

* * * * *

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* * * * *

ANSWER AND GROUNDS OF DEFENSE

The defendant, Portsmouth Gas Company, appearing by counsel, herein files its Answer and Grounds of Defense to the Motion for Judgment heretofore filed against it, stating as follows:

1. This defendant admits only that on or about April 26, 1963, it agreed and contracted to sell and deliver certain gas,

air conditioning, heating equipment and appliances as alleged in paragraph one of the Motion for Judgment but this defendant expressly denies that it agreed or contracted to install the aforesaid equipment and further denies all remaining allegations of the aforesaid paragraph.

2. This defendant denies each and every allegation as made in paragraph two of the Motion for Judgment.

3. This defendant admits only that it warranted the goods and chattels which it was to furnish, sell and deliver but expressly denies that it was to furnish or install any chilled water piping and further denies that it issued any warranty of any nature with regard either to the installation of the goods and appliances it sold and delivered or of the chilled water piping or any other piping or equipment.

4. This defendant denies each and every allegation as made in paragraph four of the Motion for Judgment.

5. This defendant denies each and every allegation contained in paragraph five of the Motion for Judgment.

page 5 } 6. This defendant denies each and every allegation contained in paragraph six of the Motion for Judgment.

7. This defendant denies each and every allegation contained in paragraph seven of the Motion for Judgment.

8. This defendant denies each and every allegation contained in paragraph eight of the Motion for Judgment.

9. This defendant denies that it has been guilty of any breach of contract as alleged in the Motion for Judgment.

10. This defendant denies that it has made any warranty whatsoever, express or implied, regarding the piping, equipment and installation thereof alleged to be defective in the Motion for Judgment.

11. This defendant denies that the plaintiffs have suffered or incurred the damage either in the manner or to the extent as alleged in the Motion for Judgment

12. This defendant denies that it is indebted to the plaintiffs in any sum whatsoever.

13. This defendant reserves the right to file further or amended pleadings at any appropriate time herein.

WHEREFORE, having fully answered, this defendant prays henceforth to be dismissed and awarded its costs.

PORTSMOUTH GAS COMPANY
By HARVEY E. McCOY
Of Counsel

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MOTION FOR SUMMARY JUDGMENT

Now come the plaintiffs and move the Court for entry of a summary judgment against the defendant on the issue of liability only on the grounds that there is no genuine issue of fact as to the contract between plaintiffs and defendant and the express and implied warranties arising therefrom; and there is no genuine issue of fact as to the proximate cause of the damage sustained by plaintiffs.

Plaintiffs further move the Court following entry of summary judgment for them as aforesaid to impanel a jury to determine the amount of damages to which plaintiffs are entitled from defendant.

In support of this motion, there is attached hereto the contract between the parties and correspondence forwarded to plaintiffs by defendant's counsel, same constituting admissions whereby the defendant is estopped from denying that the defective chilled water piping system sold plaintiffs by defendant was the proximate cause of plaintiff's damages.

Respectfully,
MARTIN SHEBAR,
IRVIN H. COHEN,
SIDNEY W. COREN,
JOSEPH J. GARNER and
H. LEE KANTER

Of Counsel

Filed Circuit Court Portsmouth, Va., Sep. 13, 1965.

H. L. DIETRICK, Clerk
By J. A. G.

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MOTION FOR SUMMARY JUDGMENT

The defendant, Portsmouth Gas Company, hereby files its Motion for Summary Judgment pursuant to Rule 3:20, Rules of Court, alleging as follows:

1. As alleged in paragraph one of the plaintiff's Motion for Judgment, the claims and allegations asserted by plaintiff in this proceeding are founded on a contract dated April 26, 1963, made between the plaintiffs and this defendant. A copy of the said contract is attached to the plaintiffs' Motion for Summary Judgment heretofore filed in this proceeding.

2. In paragraphs one and two of plaintiff's Motion for Judgment, plaintiffs allege that under the terms and conditions of the aforesaid contract of April 26, 1963, the defendant was to

(1) Sell,
(2) Deliver, and
(3) Install

all of the gas, air conditioning and heating equipment, including all

(4) Chilled Water Piping,
(5) Gas Piping, and
(6) Duct Work.

3. The defendant has filed its Answer to plaintiffs' Motion for Judgment and has admitted that under the con-
page 13 } tract of April 26, 1963, Portsmouth Gas Company contracted and agreed to

(1) Sell and
(2) Deliver

the specific items listed and enumerated in the said contract. However, the defendant has denied in paragraphs one, two and three of its Answer that it agreed in the said contract to

(1) Furnish or
(2) Install

any chilled water piping.

On the contrary, under the terms of the contract of April 26, 1963, Portsmouth Gas Company agreed only to *finance* the installation of heating and air conditioning equipment, including the financing of the chilled water piping, gas piping and duct work.

4. This defendant is advised and verily believes that the damages allegedly suffered by the plaintiffs were caused by inadequate chilled water piping installed in the walls of the apartment project known as Patio Plaza, said piping being connected to the air conditioning units furnished by Portsmouth Gas Company under the contract of April 26, 1963.

5. Portsmouth Gas Company did not contract or agree to furnish the aforesaid chilled water piping and said chilled water piping is not included as an item in the contract of April 26, 1963. On the contrary, the aforesaid chilled water piping was furnished and installed by Irwin Spindel, apparently trading as Spindel Plumbing and Heating Company, 3216 Victory Boulevard, Portsmouth, Virginia.

6. Portsmouth Gas Company did not enter into or have any contract with the aforesaid Irwin Spindel and/or Spindel Plumbing and Heating Company to furnish or install any chilled water piping.

page 14 } 7. The plaintiffs in this proceeding made and entered into their own contract with the aforesaid Irwin Spindel and/or Spindel Plumbing and Heating Company under which the aforesaid Spindel was to furnish and install the chilled water piping and was to install the items of personal property which the plaintiffs purchased from Portsmouth Gas Company pursuant to the contract of April 26, 1963.

8. Portsmouth Gas Company only financed the aforesaid work by Spindel, making payment therefor pursuant to the contract of April 26, 1963, in which it had agreed to finance the same. Said payments which were made solely on the instructions and authorization of the plaintiffs, acting through their agent, Martin Shebar.

9. As further evidence of the materials and services to be furnished under the contract of April 26, 1963, the plaintiff's herein executed a Chattel Mortgage dated April 26, 1963, covering all of the items to be furnished by Portsmouth Gas Company. A copy of the said Chattel Mortgage is attached hereto and adopted and incorporated herein. The aforesaid Chattel Mortgage does not include any chilled water piping, gas piping or duct work.

Therefore, the aforesaid contract of April 26, 1963, and the plaintiffs' Chattel Mortgage of April 26, 1963, being the best evidence available, speak for themselves and clearly state the equipment to be sold and delivered by Portsmouth Gas Company to the plaintiffs. As the aforesaid documents do not relate or pertain any way to the

(1) Furnishing of chilled water piping, gas piping and duct work or

(2) The actual installation by Portsmouth Gas Company of any equipment,

there is no genuine issue of fact based on a breach of the aforesaid contract.

page 4 } Accordingly, Summary Judgment should be entered for Portsmouth Gas Company and this proceeding dismissed.

PORTSMOUTH GAS COMPANY
BY ROBERT W. JOHNSON

* * * * *

Filed Circuit Court Portsmouth, Va., Oct. 21, 1965.

K. L. D., Clerk
By L. K. B., D.C.

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CIRCUIT COURT
of the
CITY OF PORTSMOUTH
Virginia

November 3, 1965

H. Lee Kanter, Esquire
Attorney at Law
Suite 1106 Plaza One
Norfolk, Virginia

Harry E. McCoy, Esquire
Attorney at Law
936 Wainwright Building
Norfolk, Virginia

RE: MARTIN SHEBAR, ET AL VS. PORTSMOUTH GAS COMPANY

Gentlemen:

After close consideration of the pleadings, documents and

argument of counsel, I am of the opinion that both motions for summary judgment should be overruled.

Insofar as the present controversy is concerned, I cannot say that the written contract of April 26, 1963, makes clear provision for the rights and duties of the parties. The first paragraph provides for the sale of certain enumerated chattels for $65,272.65, of which $6,527.26 was paid in cash and the balance of $58,745.39 to be paid in quarterly installments. The following paragraph says that the seller will finance the installation of the heating and air conditioning equipment which includes chilled water piping, gas piping and duct work, not including electrical work. There follows a warranty "that the goods and chattels are sound" and a provision that the balance of the purchase price of $58,745.39 is to be evidenced by a note and secured by a chattel mortgage.

The following ambiguities and questions occur to the Court at this point:

(1) There being no expressed provision that the seller is to install all of this equipment, was such installation to be without charge? Was the installation price included in the price of the equipment? Was installation to be separately paid for by the buyers?

page 24 } (2) What was meant by the provision that the sellers would "finance" installation of the listed equipment "which includes chilled water piping, gas piping and duct work, not including electrical work," where the dollar balance to be financed was the unpaid purchase price of the enumerated articles of equipment?

It, thus, does not appear to this Court that the written agreement either does or does not provide the responsibility for installation, and it will be necessary that evidence be presented of the surrounding facts, circumstances and conduct of the parties themselves in order that the proper basis for a decision may be provided.

Very truly yours,

H. W. MacKenzie, Jr.

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ORDER

This cause came on this day to be heard on plaintiffs' and defendant's separate motions for summary judgment and was

argued by counsel; and upon mature consideration, it appearing to the Court that the written contract of April 26, 1963, contains ambiguities and leaves unanswered certain questions concerning the responsibility of the parties and that it will be necessary for evidence of the surrounding facts, circumstances and conduct of the parties themselves be presented in order that a proper basis for a decision may be provided;

NOW, THEREFORE, it is ADJUDGED, ORDERED and DECREED that plaintiffs' and defendant's respective motions for summary judgment be and they hereby are overruled, to which actions of the Court plaintiffs and defendant respectively except.

Enter 12/9/65. H. W. MacK.

* * * * *

page 56 } INSTRUCTION NO. 1

The Court instructs the jury that if you believe from a preponderance of the evidence in this case that the defendant, Portsmouth Gas Company, undertook to install the heating and air conditioning system at Patio Plaza Apartments through Spindel Plumbing and Heating, then the defendant breached its express and implied warranty of fitness, and you should find your verdict for the plaintiffs.

Granted 5/11/66 H. W. M.

page 57 } INSTRUCTION NO. 3

The Court instructs the jury that in making your determination of what Portsmouth Gas Company agreed to furnish the plaintiffs, you may consider the negotiations between the parties prior to the signing of the contract, any writings expressing their intent even though unsigned, the surrounding circumstances and the oral representations made by the defendant through its agents to the plaintiffs as well as the acts done by the defendant in connection with the job.

Granted 5/11/66 H. W. M.

* * * * *

page 59 } INSTRUCTION NO. A

The Court instructs the jury that the plaintiffs have the burden in this case of proving by a preponderance of the evidence that the defendant entered into a contract not only to furnish the air conditioning equipment for the Patio Plaza project but also to install that equipment.

Therefore, if you believe from the evidence that the plaintiffs have failed to meet this burden of proof or if it appears equally as probable to you that the plaintiffs have not met that burden as that they have done so, then you must return your verdict for the defendant.

Granted 5/11/66 H. W. M.

page 60 } INSTRUCTION NO. B

The Court instructs the jury that in order to constitute a contract, the minds of the parties thereto must meet and come together in agreement on every essential element thereof; until the minds of the parties are fully met, and an intention to be bound exists on the part of both parties, no contractual relation can arise from the negotiations, and no one is bound.

Granted 5/11/66 H. W. M.

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CIRCUIT COURT
of the
CITY OF PORTSMOUTH
Virginia

July 11, 1966

H. Lee Kanter, Esq.
Attorney at Law.
Suite 1106 Plaza One,
Norfolk, Virginia, 23510.

Re: Martin Shebar et als vs. Portsmouth Gas Company.

Dear Mr. Kanter:

Since I have finally had an opportunity to give some con-

centrated consideration to the above case in light of the arguments of counsel on the motion to set aside the jury's verdict, I feel that it is necessary to have a transcript of the testimony of Shebar, Timms, Spindel, and Newsome, Cooper and Johnson, before reaching a conclusion on the second point in your presentation.

The issue is whether, after hearing the complete testimony, the court should have then withdrawn the issue of Spindel's employment from the jury, and ruled as a matter of law that he had been engaged by the Gas Company to install the air conditioning equipment. Although my notes are rather full I am unwilling to rely on their accuracy or completeness in determining this crucial question in the case. The exact expressions of the witnesses could well be controlling.

That Spindel did this work is agreed. One party or the other legally engaged him. It was difficult at the time of trial to assess the relevance of much of the evidence introduced or weight to be accorded it and it is even more difficult to recall with clarity at this date those particular items which are controlling. When the facts are properly marshaled I can then reach a conclusion upon whether there was a jury issue.

I am delaying further action pending receipt of that part of the record.

Very truly yours,

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MEMORANDUM

September 15, 1966

Two grounds have been advanced by the plaintiffs to set aside the jury's verdict for the defendant. They will be dealt with in order.

I

The plaintiffs complain of the refusal of the Court to grant Instruction No. 1 offered by the plaintiff which would have told the jury that failure to produce a material witness creates a presumption that the testimony of such witness would have been adverse. Failure of the Gas Company to call Robbins whom it had subpoenaed to testify as to a meet-

ing at which Spindel says the Gas Company employed him, and the existence of which Newsom of the Gas Company denied, is the basis for seeking this instruction. The instruction states an abstract principle of law correctly but it has no application to this case for two reasons. The existence or nonexistence of the meeting is not an issue of itself in the case; the issue is who employed Spindel. It is inconceivable that the rule would require production of every witness capable of refuting discrepancies in testimony on collateral points under pain of raising an adverse presumption. In the second place, the rule embodied in the

page 69 } instruction is subject to the well-recognized exception that where other qualified witnesses have testified for the party concerning the same matters and the testimony of the uncalled witness would have been merely cumulative or corroborative the rule does not apply. *See Annotation* 135 *A.L.R.* 1375. The Virginia court has had no occasion to state this well-recognized exception to the rule, but the same has been applied in West Virginia and by the Fourth Circuit Court of Appeals. *Montgomery* vs. *Chesapeake & Potomac Telephone Company* (West Virginia) 3 S.E. (2d) 58; *Pacific-Atlantic Steamship Company* vs. *United States* 175 Fed. (2d.) 632.

II

The basic issue in this case is who engaged Spindel to install the air conditioning. That party must bear the responsibility for the loss which has been occasioned. The evidence establishes that Spindel installed the equipment; that he already had the plumbing contract; that he was prominent in the early negotiations between the Gas Company and Shebar, if he did not, in fact, bring these parties together originally for a discussion of the heating and air conditioning in this project. It seems to have been early recognized by all parties that he was the person who was going to do the installation job, and the issue in this case is who employed him?

The so-called agreement of April 26, 1963, designated as Plaintiff's Exhibit #1, does not on its face resolve the question for reasons that the Court has previously pointed out.

Full testimony was taken before the jury on the negotiations and actions leading up to the completion of the heating and air conditioning systems in the project, and the jury has resolved by its verdict that Shebar and his associates engaged Spindel to do the work.

page 70 } If any evidence in this record sustains that de-

termination, it is beyond the power of this Court to interfere with it. *Bond* vs. *Joyner,* 205 Va. 292. On the contrary, if there can be but one conclusion from all the evidence that the Gas Company engaged Spindel to make this installation, then it becomes the duty of the Court to so construe the contract, and no issue is left for the jury's resolution. *Richardson* vs. *Charles,* 201 Va. 426; 4 *Jaeger's Williston on Contracts* 661.

In order to make this opinion more comprehensible, it might be well to summarize certain of the facts which are not in dispute. Martin Shebar, as the sole stockholder of Patio Plaza, Incorporated, had architects' drawings of the Patio Plaza project prepared which purposely omitted any detail with respect to the air conditioning and heating. He proceeded to negotiate subcontracts for the various portions of the work to be accomplished, including a plumbing contract with Irving Spindel.

When the subject of heating, plumbing, air conditioning, refrigerators and ranges was being considered, Shebar conducted essentially parallel negotiations with the Gas Company and with General Electric with the idea of using an all gas or all electric system and getting financing terms from the supplier.

Ultimately, the Gas Company was the successful competitor and Mr. Clyde W. Cooper, attorney for the Gas Company, prepared a form of agreement together with other papers which would carry out the agreed financing arrangements. These were introduced as Plaintiff's Exhibit #2.

What occurred during the course of these negotiations, as well as modifications later agreed upon, is the subject of some divergence in the testimony. Whether such diver-
page 71 } gencies create a jury question requires a close examination and appraisal of the testimony.

If we assume the Gas Company's version, as we must in view of the jury's decision, it would be that Mr. Spindel met with Mr. Shebar and Mr. Newsom of the Gas Company in Mr. Spindel's office where it was made clear that Mr. Spindel was to install the air conditioning equipment whether it be gas or electric, and that the Gas Company was to sell the equipment only and to finance the cost of both after a ten per cent down payment. Written proposals covering these subject were delivered personally by Mr. Newsom to Mr. Shebar at the latter's home. Messrs. Shebar, Newsom and Johnson met in Mr. Cooper's office on or about September 18, 1962, and the agreement and supporting papers were prepared as a result of this conference.

Shortly thereafter the number of units was increased from fifty to fifty-one, the make of gas range was changed, and a unit heater for the laundry room and a gas water heater for the same room were added, the former to be installed and the latter not to be installed.

There the matter rested for several months, and it appearing that Shebar was unable to finance the project alone, he brought several other investors into the same. Irvin H. Cohen on behalf of all the interested parties checked the various bids that Mr. Shebar had secured, including the proposal by the Gas Company for heating, air conditioning, refrigerators and ranges. The matter culminated with the execution of the "agreement" of April 26, 1963.

It should also be noted that Robert W. Johnson, Treasurer of the Gas Company, whose main concern was directed toward the financing arrangements, testified that while he participated in the original conference in Mr. Cooper's office and also in the one which resulted in the agreement of April 26, 1963, his company never intended to undertake the installation of this equipment. Mr. Newsom testified to like effect. However, such intent is not to be considered when not expressed in the agreement itself. 4 *Jaeger's Williston* 500.

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A close examination of its own documentary and other evidence precludes the Gas Company from relying upon this stated version of the case.

The Gas Company's agent, Newsom, admits that Spindel furnished the installation price of Two Hundred Eighty-Seven ($287.00) Dollars per apartment, but professes no knowledge of where he obtained the information on which to base his figure. At that stage of the negotiations only the Gas Company and its supplier—not Shebar—knew what equipment was necessary and what installation was required to accomplish the results Patio Plaza demanded. Regardless of Newsom's alleged non-recollection, the only inference possible in this case is that the Gas Company furnished the data from which Spindel prepared his estimate and received from him the unit bid that was used from the Gas Company's Proposal #1 through the completion of this project. The Gas Company has offered no evidence that it was acting as Patio Plaza's agent in this phase of the transaction or that it informed Patio Plaza that it occupied such role—indeed, its whole position is one of ignorance which could not possibly have been a fact.

Assuming that Mr. Newsom delivered the handwritten proposals designated as Defendant's Exhibits #6 and #7 to

Mr. Shebar, in advance of the conference with Mr.
page 73 } Cooper, the effect must be considered of the *privision* contained in Proposal #1 in this language: "The estimated cost of installation of the aforementioned equipment will be Two Hundred Eighty-seven ($287.00) Dollars per apartment, this being the price quoted by Irving Spindel, plumbing and heating contractor, with whom you have contracted to install said equipment. It is further agreed that in no case shall the installation cost exceed more than Three Hundred ($300.00) Dollars per apartment."

The proposals, simultaneously delivered, are designated Proposal #1 and Proposal #2. Proposal #1 is concerned only with the sale and installation of the equipment and contains the above quoted provision. Proposal #2 is concerned only with the financial arrangements.

If the first sentence of the quoted provision could be taken by itself, it would show a recognition of an agreement between Spindel and Patio Plaza for the equipment installation. It would follow that the whole subject was no longer a matter of concern to the Gas Company, except so far as it affected the amount of the obligation the Gas Company was to finance. But the proposal does not stop there. It then recites that in no case shall the installation cost exceed more than Three Hundred ($300.00) Dollars per apartment. Agreed between whom? It might be arguable that the installation cost being solely between Patio and Spindel, the purpose of the Three Hundred ($300.00) Dollar ceiling was to provide a limit to the amount the Gas Company was obligated to finance. The Gas Company's own testimony precludes any such assumption. Not only is this provision contained in Proposal
#1 dealing with the material and service to be
page 74 } furnished rather than Proposal #2 dealing with
financing where one would expect it to be under such conditions, but Newsom's positive testimony fixes Shebar's *insistance* and not the Gas Company's protection as the reason for its conclusion. Thus the only meaning that can be given it is a guarantee on the part of the Gas Company that the installation cost would not exceed Three Hundred ($300.00) Dollars.

Even taking the Gas Company's version of the preliminary proposal as clear in its favor, nevertheless, the final terms of the agreement were, by all the testimony, worked out at the meeting in Mr. Cooper's office which resulted in Mr. Cooper's letter to the Gas Company of September 18, 1962, with copies to Mr. Drummond and Mr. Olitsky as attorney for Patio Plaza, enclosing draft of an agreement and other legal papers

necessary to carry out the sale and installation of the equipment and the financing thereof. By Mr. Cooper's own testimony, which is not controverted—and he was the attorney for the Gas Company in the transaction—the agreement embodied all of the essential elements of the transaction as he understood them from the discussion in his office. In his letter, he invited from all the parties any modifications and changes to be suggested. This agreement is plain and explicit on its face, and in both its individual provisions and in its collective scope is entirely clear and lucid in its coverage of the transaction.

The papers were received by Mr. Olitsky as Patio Plaza's attorney and by him reviewed with Mr. Shebar and found acceptable to them. The same papers were received by Mr. Newsom as the representative of the Gas Company and there is no evidence in this record that either he or any other official of the Gas Company ever questioned the explicit provision that the Gas Company was to install the page 75 } equipment, or that any objections to this undertaking were voiced either in writing or orally to Mr. Shebar, to Mr. Olitsky, his attorney, or to Mr. Cooper, the Gas Company's own attorney, with instructions to draft a modification. The only modifications discussed, again by the Gas Company's own evidence, had to do with the quantity and make of the equipment.

When the progress of the Patio Plaza project bogged down on account of Mr. Shebar's financial inability to carry it alone and he was rounding up the additional necessary capital in the form of commitments from his subsequent partners, the investigation of the latter as a condition precedent to their becoming involved, was to verify the various subcontracts and other undertakings and commitments that Mr. Shebar had secured. The evidence is likewise uncontroverted that Mr. Cohen on behalf of the new investors approached the Gas Company, not on the basis of negotiating a new and independent arrangement, but rather upon the willingness of the Gas Company to stand on the arrangement it had previously made with Shebar, as amended, and to clarify some of the details not related to the present controversy. There can be but one conclusion from the evidence on this point and that is that both the Gas Company and Cohen knew that they were dealing with a meeting of the minds previously reached between Shebar and the Gas Company and were not undertaking original negotiations on the subject. Again, although the Gas Company through its responsible officials may not have previously voiced their disagreement of the provision

included in Mr. Cooper's proposal that the Gas Company install the air conditioners, they were nevertheless confronted with a second opportunity, or indeed a separate demand, that if they did not recognize the obligation on their page 76 } part of installing this equipment, the fact should have been made known to Mr. Cohen and his associates. But again the evidence is uncontradicted that no protest of this kind was forthcoming from the Gas Company or any of its agents in the dealings looking to the final consummation of the transaction.

When the final conference took place in Mr. Cooper's office, resulting in the "agreement" of April 26, 1963, there was still nothing specific with respect to the installation cost. In the first place, the agreement of April 26, 1963, is in form and substance a bill of sale representing the final consummation of a previously agreed course of action. The only other provisions have to do with what is to be financed and how the payments are to be secured. Since this represents the final transfer of the title to the equipment itself from Portsmouth Gas Company to Shebar and his compatriots, it represents the consummation of a transaction rather than a proposal of mutual undertakings which is the substance of the paper attached to Mr. Cooper's letter of September 18, 1962.

The most potent and unanswerable item which is covered both by the original proposal drafted by Mr. Cooper and by the final paper of April 26, 1963 is that the consideration agreed to be paid by the buyers is not the cost of the gas equipment spelled out in such detail in the exhibits in this case, but the price of this material, plus the cost of installation. In other words, under both the original proposal and under the consummating bill of sale the buyers obligate themselves to pay to the Gas Company a dollar figure which includes the price of the chattels and the cost of installation. Under the Gas Company's contention in this case, if the arrangement for the installation were a matter page 77 } entirely between the builders and Spindel, there has not been a single attempt at explanation by any of the Gas Company's witnesses why they were to be paid the cost of installation or what obligation they were under to see that this fund or any part of it reached Spindel.

All other actions of the Gas Company in requiring certification by the builders that Spindel was entitled to payment from time to time as the work progressed can be laid to the fact that the Gas Company was disbursing as agent for the builders the dollar amount agreed to be financed. They had, in effect, loaned this sum to Mr. Shebar and his associates

not for the purpose of paying to Mr. Spindel the amounts, if any, owed to him by Shebar and associates, but to pay the amount that Shebar and associates were obligated under the bill of sale of April 26, 1963, to pay to the Portsmouth Gas Company.

To summarize the evidence in this case, while the Gas Company takes the position that it never intended to undertake the installation of the air conditioning equipment in Patio Plaza, it none the less originally agreed that the cost of installation would not exceed Three Hundred ($300.00) Dollars; that through its attorney it submitted to the builders a proposed agreement in which it specifically undertook to install the equipment; that even though a number of modifications were subsequently agreed to dealing with the make and quantity of the various installations, the Gas Company at no time objected to the original agreement to install, and did not communicate any such objection either to the builders or to its own attorney who had prepared the original papers; and finally that when the transaction reached final consummation on April 26, 1963, the builders agreed to pay

page 78 } to the Gas Company what they had agreed to pay all along which was the cost of the equipment being sold by the Gas Company, plus the cost of installation. In view of all of the foregoing, it was error for this Court to leave to the jury the issue of whether the Gas Company or the builders undertook the employment of Spindel. Accordingly, the verdict of the jury will be set aside and a new trial granted on the issue of damages only.

H. W. MacKENZIE, JR.

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At this day came again the parties by their Attorneys and the Court having fully heard the motion of the plaintiff heretofore entered herein to set aside the verdict of the jury heretofore rendered herein and enter judgment for the plaintiff and to impanel a jury to assess the damages only, doth sustain the same, to which action of the Court, the defendant, by counsel, excepted.

Enter 9/16/66. H. W. M.

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JUDGMENT ORDER

The Court having ruled in its Memorandum dated September 15, 1966, which is adopted and incorporated herein, that the jury's verdict for the defendant should be set aside and that the plaintiffs are entitled to recover their damages from the defendant as a matter of law; and

The Court now being advised that the parties have stipulated that the plaintiffs' recoverable damages in this action amount to $27,132.11;

It is ADJUDGED, ORDERED and DECREED that the jury verdict for the defendant be and the same hereby is set aside; and,

It is further ADJUDGED, ORDERED and DECREED that the plaintiffs, Martin Shebar, Irving H. Cohen, Sidney W. Coren, Joseph J. Garner and H. Lee Kanter do recover and have judgment against the defendant, Portsmouth Gas Company, in the total amount of Twenty-Seven Thousand, One Hundred, Thirty-Two Dollars and Eleven Cents ($27,-132.11) with interest thereon from the date of this Order and with taxable costs incurred herein.

To which action of the Court the defendant takes due exception.

But, at the instance of the defendant, Portsmouth Gas Company, who desires to present a petition for a writ of error and *supersedeas* to the judgment entered herein in plaintiffs' favor, execution hereof is suspended for a period of sixty (60) days from the date of judgment, upon the said defendant, Portsmouth Gas Company, or someone for it, giving bond before the Clerk of this Court, with surety approved by said Clerk, in the penalty of Thirty-Five Thousand Dollars ($35,000.00) payable to the plaintiffs in this case, page 82 } with a condition reciting said judgment and the intention of the said defendant, Portsmouth Gas Company, to present such petition and providing for the payment of all such damages of such suspension in case a *supersedeas* to such judgment should not be allowed and be effected within the time prescribed above or by law.

Enter: 1/23/67. H. W. M.

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ASSIGNMENT OF ERRORS

1. The Court Erred In Setting Aside The Jury's Verdict And In Entering Judgment For The Plaintiffs.
2. The Court Erred In Admitting And Considering Evidence Of Contract Proposals And Negotiations Which The Plaintiffs Conceded Were Not Acceptable To Or Binding On Them.
3. The Court Erred In Overruling Portsmouth Gas Company's Motions For Summary Judgment Made In October 1965 And At Conclusion Of Plaintiffs' Evidence At Trial.

Given under my hand this 13th day of March, 1967.

PORTSMOUTH GAS COMPANY
By HARRY E. McCOY
Of Counsel

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Filed Circuit Court Portsmouth, Va. Mar. 15, 1967.

K. L. D., Clerk
By L. K. B., D.C.

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page 5 }

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Mr. Kanter: Your Honor please, for the purpose of the record, it should be stipulated that both parties agree that the chill water piping used in the project was the improper type of piping and defective, was it, and was the proximate cause of the alleged damages in this case.

The Court: All right, sir.

Mr. Kanter: Is that so stipulated, Mr. McCoy?
Mr. McCoy: Yes, sir, that's all right.

* * * * *

page 19 } MARTIN SHEBAR, a plaintiff, called as a witness on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Kanter:

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Q. All right, Mr. Shebar, after this contract was signed and your other subcontracts were accepted, what capacity did you operate as on the Patio Plaza apartment job?
A. Well, I was the builder of the—acted as builder and the prime contractor.
Q. You were general contractor?
A. General contractor.

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CROSS EXAMINATION

By Mr. McCoy:
Q. Mr. Shebar, let me refer first to these papers that I referred to as Plaintiff's Exhibit Number 2 and ask you whose handwriting is that up there on top?
A. That's mine.
Q. Would you read that to us, please?
A. "This copy void additions made at later date."
Q. Uh-huh. And that is your handwriting?
A. That is correct, sir.

Q. And you referred to this copy of September 18, 1962, of this proposal at that time? That's the date, is it not, September 18, 1962?

A. I refer to this copy.

Q. And that's what had been sent you in that letter, September 18, 1962?

A. That's right.

Q. And you wrote on the top, "this copy void additions made at later date"?

A. That's right.

page 52 } Q. All right. Now, when did you write that up there?

A. When I had that first copy, the soft paper copy.

Q. I see, sir. Now, that soft paper copy, and it is the proposal that Mr. Kanter asked you-all about, who were the parties to that proposal at that time?

A. I was.

Q. Well, who is I? Read me who were the parties to—

A. Portsmouth Gas Company, Patio Plaza, Incorporated.

Q. And you were Patio Plaza, Incorporated?

A. That's right.

Q. Now, when I come down—and that is the one that you marked "void additions made at a later date"?

A. That's right.

Q. Now, will you look at this agreement of April 26, 1963. That's the one that was actually signed, isn't it?

A. This is the one with the additions. This is the one that was signed, yes.

Q. The agreement of April 26, 1963, is the agreement that was signed?

A. That's right.

page 53 } Q. That is the contract under which the work was done or the materials furnished or however you may want to express it; isn't it, sir?

A. That's correct.

Q. And who are the parties to that contract?

A. That's Portsmouth Gas Company, Mr. Martin Shebar, Irvin Cohen, Sidney W. Coren, Joseph J. Garner and H. Lee Kanter.

Q. So they are entirely different parties than were in this proposal six months previously back in September, 1962, aren't they?

A. Yes, sir.

Q. Now, getting back to the matter of the installation and

design and the engineering, the layout, I understood you to tell Mr. Kanter that you looked to Portsmouth Gas Company as going to do all of that work?

A. Yes, sir.

Q. Under the proposal from September, 1962; is that correct?

A. Yes, sir.

Q. All right. Now, let's look on page two of the proposal that was sent to you as you say in September, 1962, and ask you to read that paragraph right there. What does it say? The gas company does what?

page 54 } A. "The gas company further agrees to furnish engineering assistance for any problem that may arise in layout and installation." And that's what I referred to, changes made.

Q. Now, if they were going to furnish you and your Patio Plaza at the time, if they were going to furnish you any engineering or design layout, why was it necessary to spell out the requirement on their part to furnish this assistance to you if they had the overall responsibility for it?

A. I did not accept that.

Q. You didn't accept that?

A. That was my exception on that particular one for two reasons.

Q. Oh, you didn't accept this proposal of September 18, 1962?

A. Not the soft sheets that you have there.

Q. Just answer my question then. You didn't accept the proposal of September 18, 1962?

A. I did accept the proposal dated September 18, 1962, but it was not that one.

A. Well, is there another one? This is the only one your lawyer has introduced.

A. I will show you what I accepted.

Q. You mean you accepted part of it and you rejected part of it?

page 55 } A. No. I rejected this whole one. I rejected this proposal which called for fourteen of one unit and four of another, and we finally wound up with this one. This is the one I accepted.

Q. All right. Now, what was to be furnished? What type of ranges for example on that agreement were to be furnished, sir?

A. Caloric ranges, fifty-one Caloric ranges.

Q. And what year—what date was that?
A. This is the same date.
Q. And all I want to know, sir, was that in September, 1962?
A. Yes.
Q. Well, now, that was not signed or executed in any way, was it?
A. No, neither was the other one.
Q. Oh. Well, I see. There are two separate agreements here.

Mr. McCoy: I wonder if we could have these numbered a little differently, Your Honor, please. Mr. Kanter introduced the whole batch of papers as Exhibit 2, but this witness draws a distinction between an agreement on soft paper and a proposed agreement on hard paper, and he says he didn't—

page 56 } A. We had a conference after that soft paper.
Q. All right, sir.
A. Which related to the hard paper.

The Court: All right. The one on soft paper will be called 2-A and the hard paper will be called 2-B. They are both parts of Exhibit 2.

(So marked by the Court.)

By Mr. McCoy:
Q. All right, sir. Fine. Now, Mr. Shebar, I understand that the proposal which is 2-A you rejected?
A. That is correct.
Q. And the proposal which is 2-B you accepted?
A. That is correct.
Q. However, it was never signed and never actually executed and never went into effect?
A. That is correct.
Q. That is correct?
A. (Witness nodding head affirmatively.)
Q. All right. So there is a material difference in the terms and conditions of 2-A, which goes on here for some three and a quarter pages of text, as opposed to 2-B; isn't there, which is a little—about one and a half pages?
A. Yes, sir.

Q. Now, you look at me. Don't look over there
page 57 } at counsel. And there is a material difference in those provisions, isn't there?

A. Yes, sir.

Q. Now, sir, the clauses that Mr. Kanter read to you about installation were read to you out of 2-A, weren't they?

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page 58 }

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The Witness: I had my reasons for rejecting 2-A.

By Mr. McCoy:

Q. But you rejected 2-A and you accepted 2-B; isn't that what you told me?

A. That is correct.

Q. All right, sir. So when you rejected 2-A you never reached any agreement with Portsmouth Gas, did you?

A. On 2-B we did reach an agreement.

Q. Well, let's confine ourselves to 2-A now. As to 2-A, you never reached agreement with them, did you, Mr. Shebar?

A. No, sir.

Q. Because you wouldn't agree to the terms of 2-A; isn't that correct?

A. To the contents of 2-A.

Q. To the contents. And you rejected it; is that correct?

A. Yes.

Q. And that's what they wanted, 2-A, and you rejected it. That was the proposal prepared by Portsmouth Gas Company's attorney, Mr. Cooper, and you rejected it; isn't that correct?

page 59 } A. I rejected it because it was an improper proposal with the wrong quantities of material.

Q. All right. And you didn't agree to it?

A. No, I couldn't.

Q. So there couldn't have been a meeting of minds?

A. Not a thing.

Q. All right, sir. Now, we come to the contract which is Plaintiff's Exhibit Number 1, which is dated April 26, 1963. There it is. You signed that, didn't you?

A. Yes, sir.

Q. So I presume that you read it, didn't you?

A. I didn't read it because I took it for granted it was exactly the same as 2-B.

Q. All right. Well, now, just help me out here, Mr. Shebar. You had rejected the proposal in September, 1962, which has been—

A. I—

Q. Let me finish my question. You had rejected the proposal in 1962, which has been identified as 2-A?

A. That's correct.

Q. And thereafter the first paper that you signed, the first thing to which you agreed, was the contract dated April 26, 1963, wasn't it?

page 60 } A. It was not the first contract I agreed to.

Q. It was not the first contract you agreed to?

A. No.

Q. Well then—

A. I agreed to 2-B.

Q. You agreed to 2-B. Is there any place for you to sign 2-B? Is there any place on there for you to reach any agreement as to the—

A. As to the contents. This is different.

Q. Is there any provision on 2-B where you had to sign or agree to it at all?

A. Yes.

Q. There is? On 2-B?

A. No, this is the gas company's proposal to me.

Q. Now, 2-B is nothing but a proposed bill of sale from the Portsmouth Gas Company to Patio Plaza, Incorporated for the equipment, isn't it?

A. That's right.

Q. That's all it is. That's a proposed bill of sale and you got that at the same time you got the proposed agreement, which is 2-A?

A. No, I did not.

Q. You did not?

page 61 } A. I did not.

Q. All right. Is there anything in 2-B—will you point out to me anything in 2-B that calls on Portsmouth Gas Company to install any chilled water piping? Can you find any language in 2-B—

A. 2-B has a different division of chiller systems.

Q. You just answer my question now, Mr. Shebar. Please listen to me and try to answer my question. Is there any-

thing in 2-B that calls on Portsmouth Gas Company to install any chilled water piping?

A. No, sir.

Q. Is there anything in 2-B that calls on Portsmouth Gas Company to furnish any chilled water piping?

A. No, sir.

Q. You said no sir, didn't you?

A. (Witness nodding head affirmatively.)

Q. Now, having agreed to 2-B then—

A. That's a chattel mortgage.

Q. That's a chattel mortgage and a bill of sale. That's all 2-B is, isn't it, and that's what you agreed to? The bill of sale? The proposed bill of sale?

A. Yes, sir.

Q. And you did not agree to 2-A which was the proposed agreement you have told us?

page 62 } A. Because that agreement was not the proper agreement.

Q. All right, sir. I agree with you. That was not the proper agreement. So except for 2-B, the only other thing you have agreed to is the contract dated April 26, 1963, which is Plaintiff's Exhibit Number 1, isn't it? That's the contract you signed?

A. That's the one we signed.

Q. And that's the only thing you have agreed to, isn't it?

A. That's the contract I signed.

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page 80 }

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Q. All right. Now, referring to the invoices, I see that the total amount billed by Spindel to Patio Plaza Apartments for installation was $14,637.00; is that correct?

A. If the addition is right, that's correct.

Q. All right. And this letter that you received in November, 1962, provides that Portsmouth Gas Company will finance the cost of installation, the work to be done by Spindel, at a cost of two eighty-seven per unit, for a total cost of $14,637.00. They are identical, aren't they?

A. Yeah.

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IRVING SPINDEL, called as a witness on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Kanter:

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Q. Mr. Spindel, what is your business?

A. I am in the plumbing, heating and air conditioning business.

Q. How long have you been a plumbing, heating and air conditioning contractor?

A. About fifteen years in this city.

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page 138 }

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Q. All right. Now, Mr. Spindel, I direct your attention to the Patio Plaza apartment project. When was your first contact with this particular project for Martin Shebar?

A. I believe it was sometime in '62. I can't give you the exact date, but I think around August or July, sometime in there.

Q. Have you done any work for Shebar before that?

A. Yes, sir.

Q. Very much, very little or moderate?

A. I would say moderate.

Q. What sort of work did you do for Shebar?

A. Plumbing and heating, and I don't remember how many air conditioning jobs.

Irving Spindel

Q. You did all sorts of work for him in your phase?
A. Anything in my line.

Q. All right, sir. How was it that Shebar
page 139 } came into contact with the Portsmouth Gas Company?

A. Mr. Shebar came to my office with a set of plans for the Patio Plaza apartments and asked me if I would give him a figure for the plumbing. And we got to talking about air conditioning, and I told him that he ought to be—to go to the Portsmouth Gas Company. I got in touch with Bill Newsom and got him to contact Mr. Shebar.

Q. When was it that you got in touch with Bill Newsom and told him to contact Shebar?

A. As I said before, I believe it was July of 1962.

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page 145 }

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Q. Mr. Spindel, did Bryant or Newsom or Timms ever specify the type of plastic piping?

A. No, sir, at no time did either one of them specify.

Q. All right. What experience had you had with the use of plastic piping for a chilled water system up to that point?

A. Very little.

Q. Had you ever used it where you went out and bought the material to use it?

A. Not that I recall. We didn't use it. Whatever jobs we did was furnished by the Portsmouth Gas Company.

Q. What was furnished?

A. The plastic tubing.

Q. Up to that point, always the plastic piping had been given to you by Portsmouth Gas?

A. No. I believe most of it was, and I think we had bought a little. I would have to go into the records for
page 146 } that. I am not very clear. That's about three years ago.

Q. Now, I come back to the question I asked you a minute ago, how did this plastic pipe that was used in this job that turned out to be bad get ordered by you? Tell Judge MacKenzie and the ladies and gentlemen what happened?

A. Well, when Mr. Shebar and the gas company—repre-

sentative of the gas company finally signed their contract, Mr. Newsom notified me that the job would be ready to go ahead. We waited, I think, four or five months before it actually was ready for the job. And at that time I was dealing with Hajoca, plumbing and heating supplies, and their salesman, Mr. Jordan, in my office.

Q. Is Mr. Jordan around now?

A. No, sir, he has since deceased.

Q. When was that Mr. Jordan from Hajoca came to your office?

A. Well, he was in and out all the time, but I think we placed that order in.

Q. Right when the job got started?

A. Well, they were ready for us in June to start piping.

Q. All right. And when Mr. Jordan, the Hajoca salesman, came to your office, what was it that was done?

A. I told Mr. Jordan that we needed so many feet of so many sizes plastic tubing, and Herb—his name
page 147 } was Herb, he ordered that or he called the factory to get the type that was needed.

Q. Did he call it in your presence?

A. He called in my office, and I assumed that he called the factory there.

Q. Called what factory?

A. I can't think of the name of the plastic firm. I have it in here, the name. I can't remember where it is, but it's called Golden Jet—it's called duroflow. That's what they had recommended. Number 70, I believe it was.

Q. All right, sir. And so pursuant to that conversation that Mr. Jordan had with somebody in your office, what did you do?

A. I don't follow that question, sir.

Q. After Mr. Jordan came to your office and called the factory or whoever he called with regard to this pipe, what did you do with regard to the pipe?

A. Well, then we ordered that pipe for the job to be delivered to the job site.

Q. Is that the story as how duroflow got into this job?

A. Yes, sir.

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Irving Spindel

page 149 }

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Q. Now, Mr. Spindel, you ordered material and you started to work. When did you start to work?

A. We started sometime in June of '63.

Q. And who were you working for?

A. Portsmouth Gas Company.

Q. With regard to what on the job?

A. We received our instructions and the go ahead from Mr. Bill Newsom.

Q. All right. Were you doing any work for Shebar on the same job?

A. Yes, sir.

Q. And what was that?

A. That was strictly the plumbing.

Q. All right. Now, Mr. Spindel, during the course of the job—first of all, let me ask you this: when was it that you put your first requisition for payment in?

A. I believe it was June 28th.

Q. All right. You have seen copies of all of these invoices before. I am handing you Plaintiff's Exhibit—Defendant's Exhibit Number 1, in which Shebar was required to okay the invoices for payments. Have you seen those?

page 150 } A. Yes, sir.

Q. Tell Judge MacKenzie and the ladies and gentlemen of the jury what happened with regard to your first bill and how it was that the matter had to be handled that way?

A. Well, the first bill I made out I made out directly to Portsmouth Gas Company.

Q. What did you do with it?

A. I took it down to Mr. Johnson and he explained to me that he wanted them made out to Patio Plaza Apartments because he was spending their money, and I would have to have it checked out by Mr. Shebar before I could get this money, this money for this material and labor. So we went back to the office, made out a new set of bills addressed to Patio Plaza, had to be okayed by Mr. Shebar, and made three copies and then we sent them back to Mr. Johnson and they paid us. The gas company sent us a check.

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page 153 }

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Q. All right. Now, tell the ladies and gentlemen of the jury of the different type of piping systems on that job and who did that piping job?

A. Well, it was the service gasolines that would run from outside each apartment to feed the refrigerators, gas stoves and the heating units. That's part of my plumbing contract. That was in my plumbing contract.

Q. Who paid you for that?

A. Mr. Shebar. And then the gas company gave me orders to hook up the refrigerators, the gas stoves and the heating units separately.

Q. Was that aside from this plastic piping and heating and air conditioning?

A. Yes, sir, that was a separate purchase order completely.

Q. And how much did they pay you for that?

A. I would have to go into the records for that.

Q. Was that something extra than that two eighty-seven?

A. Yes, sir, that had nothing to do with the heating and air conditioning.

Q. What deals did the gas company do down page 154 } there on the job besides pay you?

A. We had to connect a hot water tank and a hot water unit for heating, and they furnished the tank and the unit heater. We did the labor and material for them on a separate purchase order for the Portsmouth Gas Company.

Q. Mr. Spindel, I want to ask you this: at any time on this job, from the day you started until the day you finished, did you ever do any work for Martin Shebar in connection with the heating and air conditioning?

A. No, sir.

Q. Who did you do the work for?

A. Portsmouth Gas Company.

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By Mr. McCoy:

Q. Now, sir, did Portsmouth Gas Company give you a purchase order for everything you did for them?

Irving Spindel

A. No, sir.

Q. They did not?

A. No, sir.

Q. You mean they would give you a purchase order for some things but not for everything; is that correct?

A. Exactly right, yes, sir, and I have it here to prove it.

Q. All right, sir. Let me see it.

A. It's all typed out for you. On two jobs, one in 1962 I did a job for over two thousand dollars for Mr. Bob Johnson on chiller work. There was no purchase order. You asked me if I did get any purchase order.

Q. I am referring to the Patio Plaza project.

A. There was one job I did without a purchase order. That was heating and air conditioners piping. There is another job I did for them in '65 which I never

page 163 } had a purchase order for.

Q. Is this the list of every job you have done?

A. Here's a list of every job I have done.

Q. I said is this the first paper you have?

A. That is for heating and air conditioning and chiller work.

Q. And how many jobs have you been given a purchase order and how many have you not received a purchase order? That's all I asked you.

A. I believe there were two, three. I don't believe that we have ever received a purchase order on.

Q. And how many jobs have you done in connection with Portsmouth Gas Company?

A. I have done quite a few hundred, but they didn't start this purchase order thing, I think, until—I don't know when. I know it was one time they didn't have any purchase order.

Q. I see, sir.

A. But not recently. They have had purchase orders recently.

Q. All right. Now, you had done right many jobs for Portsmouth Gas Company prior to this Patio Plaza project, I believe you said?

A. Yes, sir.

Q. Had you done any job involving the in-

page 164 } stallation of Bryant air conditioners, Bryant gas-fired air conditioners?

Q. Prior to the Patio Plaza project, had you installed any Bryant gas-fired air conditioners?

A. Yes, sir.

Q. Can you tell me how many such Bryant air conditioners you had installed?

A. I have got a list here, but I don't know if they are Bryant. I believe they are. I can't verify that. It mostly would be Bryant, though, because they handle ocular, too. It's the same principle.

Q. All right. Now, can you tell me how many you think you had installed?

A. Yes, sir.

Q. Will you do that, please?

A. I will count them up for you. (Pause.) Sixteen including Patio Plaza or fifteen prior to Patio Plaza.

Q. Fifteen prior to Patio Plaza?

A. Yes, sir.

Q. Now, on how many of those had you used plastic chilled water piping, sir?

A. I know on the Saint John's Church we used about eighty feet of it underground.

page 165 } Q. And how many Bryant chillers did you install at the Saint John's Episcopal Church job?

A. I think there was four in a row. I'm not sure. It's either three or four.

Q. Well, my note indicates you did five, sir.

A. Well, it's been back in '62 and I have done a lot of work since. I'm sorry, but I can't remember that far back.

Q. And you used plastic pipe on that job?

A. Just only as running into the basement, which is a matter of about twenty feet, less than twenty feet.

Q. I thought you said—

A. Well, if you said five it would be about a hundred feet. I said around eighty feet. Now, you correct me then.

Q. All right. Now, did you install a Bryant chiller with plastic pipe in September, 1962, for some people named Dempsey on lot 16, Bingingham Drive, Chesapeake?

A. Not for Dempsey. It was done for the Portsmouth Gas Company and I have their purchase order on it.

Q. And you used plastic pipe on that job, didn't you?

A. I don't remember. That's in '62. That's way back there. It's possible we could have, but if we did it was supplied by the Portsmouth Gas Company. We never bought it.

page 166 } Q. Did you install Bryant chillers at 1010 Sterling Point Drive, a job involving an owner named H. C. Beaver, I believe it is?

A. Sir, we wouldn't be involved with the owners. Here's another purchase order directed from the gas company.

Irving Spindel

Q. I am just trying to identify the job.
A. Yes, sir, we have it listed right here, yes, sir.
Q. All right. Did you install Bryant chillers on lot 15—
A. Belvedere.
Q. It's in Belvedere?
A. That's right, yes, sir, we did that, too.
Q. That involved plastic pipe, didn't it?
A. That I can't answer, sir. That's in 1961 and I can't answer that far back. I don't know. If it was a crawl space house, it was definitely plastic pipe under the house.
Q. Well, I will be fair with you and tell you, sir, we have records that indicate you used plastic pipe on all of these Bryant jobs.
A. Sir, I beg to differ; on the Saint John's Episcopal Church we used three or four hundred feet of copper tubing in that job.

Q. All right, sir. Now, how about at 109 Pete
page 167 } Lane?
A. Pete Lane?

Q. Yes, sir. A Bryant three-ton chiller?
A. Pete Lane?
Q. You installed that job November 30, 1962.
A. I got November 27, but I don't have that here.
Q. Well, I'm not going to quibble over three days.
A. No, sir. I have October 22nd, sir, and October 1st and September 28th, sir.
Q. All right, sir. Now, did you install a job at 302 Lilac Lane, again involving someone named Beaver, of a Bryant chiller and used plastic pipe?
A. What day was that?
Q. I have that March 11, 1963.
A. You may have confused it with someone else. My records show March 27th, 1963. If you give me the purchase order number I can verify that.
Q. I'm not going to quibble whether it was March 11th or March 27th. I will say March, '63. Did you do it, sir?
A. I have got one here for March, '63.
Q. So I have asked you about at least six jobs where you installed Bryant chillers. You did install them,
page 168 } didn't you?
A. Yes, sir.

Q. So I presume you were familiar with the installation of the Bryant chiller, weren't you?
A. Yes, sir.

Q. And in addition to these jobs, which we are going to put into evidence will show you used plastic pipe on those installations—

A. Furnished by the gas company.

Q. Nevertheless, plastic pipe was used?

A. That's right.

Q. You also had installed, I think you said, some fifteen or sixteen Bryant jobs prior—fifteen jobs prior to the Patio Plaza project, so you were familiar with the Bryant chiller?

A. (Witness nodding head affirmatively.)

Q. Now, had you ever read or familiarized yourself with the installation of the manual and specifications for the Bryant chiller?

A. Can I explain that, please?

Q. Just answer my question first, sir.

A. No, I have never.

Q. You have never?

A. There was no need for us to go into the instructions because we don't have to open up that box. We never have to open that box where these instructions are put.

page 169

Q. Do you know whether or not a system which uses copper tubing has to be drained in the wintertime?

A. There are two thoughts in that. You can either drain it, and we always make provisions to drain it, or you can put antifreeze in it, which the manufacturer recommends.

Q. Do you know why plastic tubing is recommended instead of copper?

A. They claim it will not freeze, but that's erroneous. They have frozen.

Q. Have you ever installed a job with Virgin polyethylene plastic piping that froze?

A. I don't know.

Q. Then you are not speaking from first hand knowledge?

A. Well, once we put them in for the gas company I don't know. We never get called back.

Q. All right. Now, the pipe that you installed on these other projects you say was furnished by the Portsmouth Gas Company?

A. What projects are those, sir?

Q. These others that I named?

A. Yes, sir.

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page 171 }

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Q. And you were the one who ordered the plastic pipe from Hajoca Corporation?

A. Yes, sir.

Q. Without getting the specifications from Mr. Newsom?

A. All we were told was to use plastic pipe, certain sizes, and that's what we ordered, sir.

Q. Can you tell me the dates or the approximate dates on which you asked Mr. Newsom for any information concerning the specifications of the plastic pipe?

A. Well, I would say somewhere between February and April before we ordered our piping to make sure he said plastic pipe.

Q. All right. Now, did Portsmouth Gas give you a purchase order for this plastic pipe?

A. No, sir.

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page 172 }

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Q. All right. Now, on this installation, however, you did get a purchase order for the connecting of the gas ranges, didn't you?

A. Yes, sir.

Q. And you did get a purchase order for the connecting of the refrigerators, didn't you?

page 173 } A. Yes, sir.

Q. And you did get a purchase order for the connecting of the Bryant heater to go in the laundry room, didn't you?

A. Yes, sir.

Q. So that the only thing you didn't get a purchase order for was for the purchase and installation of this plastic piping?

A. Yes, sir.

Q. Is that correct?

A. That's correct.

Q. And when you took your bill to Portsmouth Gas Com-

pany to be paid, it was then that Mr. Johnson told you that he was spending Patio Plaza's money?

A. Yes, sir.

Q. It was Patio Plaza's money, not Portsmouth Gas Company's money; is that right?

A. That's correct.

Q. And that was the only thing for which Portsmouth Gas had not given you a purchase order?

A. That's exactly right.

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page 228 }

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IRVIN H. COHEN, a plaintiff, called as a witness on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

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page 279-A }

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CROSS EXAMINATION

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page 300 }

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By Mr. McCoy:

Q. All right. Now, let's get back to the development of this entire transaction, sir. As I understand the situation, sometime in December, 1962, Mr. Shebar approached you with the idea of becoming financially interested in the Patio Plaza project; is that right, sir?

A. That's right.

Q. And you were going away for the Christmas holidays, I believe?

A. I think that's correct.

Irvin H. Cohen

Q. So after you returned, I think you said sometime in January or February, you got all of Mr. Shebar's
page 301 } papers and went through them?
A. Sometime in that area.

Q. Now, did he bring you his complete file, his complete papers?

A. No. He brought them in sort of gradually because some of them were in Mr. Olitsky's office.

Q. Uh-huh.

A. And so he brought in a brief case that he used to carry with him.

Q. Uh-huh. Now, you specifically said that you read what has been introduced as Plaintiff's Exhibit 2, which is a proposal prepared by Mr. Cooper?

A. Yes, sometime in that period.

Q. That's correct. Now, sir, did you also read Defendant's Exhibit 2, which is the letter of November 12, '62, written by Mr. Newsom to Mr. Lincolns at the Equitable? This is the copy that went to Mr. Shebar.

A. Yes, I am pretty positive I read that letter because we commented on Mr. A. H. Newsom, Jr., and he signed it, "Assistant to the president." We thought it was most unusual. Well, sometimes he called himself sales manager and sometimes he calls himself assistant to the president, and sometimes he said he was air conditioning man, and sometimes he said he was an engineer.

Q. All right.

page 302 } A. And so we went through this letter, and this is one of the reasons that I went there to talk to Mr. Newsom, because in this it is an estimate of summer gas and winter gas, and rates. We wanted to discuss the summer and winter gas requirements for the fifty-one apartments.

Q. All right. So you were familiar with this letter then very thoroughly?

A. So what?

Q. Will you read for me, please, paragraph number 5 of page 2 of that letter?

A. It says that "the Portsmouth Gas Company will also finance the cost of installation of the aforementioned equipment, this work to be done by Irving Spindel, plumbing and heating contractor, at a cost of two-eighty-seven per unit, for a total cost of $14,637.00. The total cost of all the equipment to be furnished by the Portsmouth Gas Company will

be $49,997.85. The total amount of the bill of sale will be $64,634.85, including installation costs. The total amount to be financed by the Portsmouth Gas will be $58,171.36 after a down payment of ten per cent. The annual estimated gas requirements and costs are as follows: the gas for air conditioning is based on an estimated one thousand hours of operation, and gas for heating is based on—"

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page 305 }

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Q. Well, you were pretty much guiding and directing this venture at that point, weren't you?

page 306 } A. Pretty much so, sir, yes, sir.

Q. As a matter of fact, I think you have told us that you said that your decision had been that if you could control all items with the subcontractors, then we should go into this project, as we would have a minimum of risk?

A. That's right.

Q. Isn't that correct?

A. Yes, sir.

Q. Isn't that what you said?

A. Yes, sir.

Q. So that you were pretty much calling the shots, weren't you, Mr. Cohen?

A. I would say in conjunction with Mr. Garner and Mr. Shebar. I would say we were controlling the shots, yes, sir.

Q. Right. And as late as February, 1963, when you got that letter from Equitable, you hadn't made up your mind who the contractors were going to be, who the subcontractors were going to be, had you?

A. Mr. McCoy, that is exactly right. I hadn't even made up my mind, absolutely, that I was going in the job myself.

Q. Well, if you hadn't made up your mind, you couldn't have entered a contract with them, could you?

A. Contract with who?

page 307 } Q. With Portsmouth Gas or anybody else?

A. No, sir, I didn't enter into a contract with them.

Q. You didn't enter into a contract with them?

A. Not in February.

Irvin H. Cohen

Q. Not until April, not until April, 1963, did you enter into a contract with Portsmouth Gas, did you?

A. Exactly right.

Q. And when you hadn't made up your mind what you were going to do, there hadn't been a meeting of the minds on an agreement between you and Portsmouth Gas in any way, had there?

A. Meeting of the minds had to be in my mind only. It wasn't going to be any meeting in the minds. When I decided that we were going to go into this job is when we were going to go into it.

Q. Right. So at least in February?

A. I didn't have to meet with anybody.

Q. Well, you had to arrive at an agreement with someone in order to form a contract with that person, didn't you?

A. What kind of contract?

Q. Have you ever entered into any contract with Portsmouth Gas Company since the contract of April 26, 1963?

page 308 } A. I have entered into the contract of April, whatever date it is, in 1963, based on my discussions and the contract that was presented to me—the agreement of contract and the penciled notes and the whole works and my oral discussions with Mr. Newsom, Mr. Johnson, Mr. Ferguson and Mr. Cooper.

Q. And you had not had any such discussions with Mr. Newsom and Mr. Johnson and Mr. Cooper when you were reviewing Mr. Shebar's file and you read the letter—you read the proposal which is here as Exhibit 2-A?

A. No, I had not.

Q. And you had not had any discussions with Mr. Johnson or Mr. Cooper or Mr. Newsom when you read Newsom's letter to Equitable dated November 12, 1962?

A. I cannot remember that, but I will say that I had not had any contact with Mr. Newsom, Mr. Johnson, Mr. Cooper or Mr. Ferguson before I had read that contract.

Q. And when Mr. Shebar brought Equitable's letter to you in February, '63, asking for the layout diagrams, you had not made up your mind exactly who was going to do the heating and air conditioning in Patio Plaza, had you?

A. I hadn't made up my mind whether I was going to be in it myself.

Q. Had you made up your mind who you were going to enter into a contract with to do the heating and

page 309 } air conditioning?

Irvin H. Cohen

A. No, sir.

Q. You had not?

A. No, sir.

Q. And that was when you got the letter from Equitable in February, '63?

A. I hadn't made up my mind exactly until we got—until the financing was worked out for the construction loan financing at the American National Bank, until they told me that they would make the construction loan financing to me, and Mr. Shebar and Mr. Garner and Mr. Kanter, that's when I made up my mind. Now, what date that is I don't know, but until they told me that he would give me the money to build the job, I hadn't—I couldn't make up my mind.

Q. All right. Now, when you go into the purchase of equipment such as was bought from Portsmouth Gas Company here, I think you said that you were interested in several items. They would sell, that they would deliver, that they would install, that they would service, that they would guarantee and that they would finance—

A. I didn't say I was interested in the finance. If I did I was not interested in whether they financed it or they didn't finance it.

Q. All right.

A. It wouldn't have been of any interest to me.

page 310 } Q. Now, the financing however was a rather important part of the transaction to Portsmouth Gas Company, wasn't it?

A. This was being used as an inducement for persons to buy their equipment and to use gas. They are in the business of selling gas and they will do most anything to get you to use gas.

Q. And therefore they were going to make an interest rate, I think you said, available to you of three or three and a half per cent?

A. I think it's three per cent.

Q. And that's what you were charged on the loan, isn't it?

A. Three per cent add on.

Q. Three per cent?

A. Three per cent add on.

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page 315 }

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Q. Who was the contractor that you had on the job?
A. That I had on the job?
Q. Yes, sir.
A. I didn't have a contractor on the job.
Q. Did you act as the contractor?
A. No, sir.
Q. Who was the contractor?
A. Mr. Shebar and ourselves acted, all of us together, as the contractors for the job. I think the city records will show that; that the contractors license was paid for that job in the name of all of us.

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page 351 } ASHTON HARVEY NEWSOM, JR., called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. McCoy:

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page 352 }

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Q. Now, Mr. Newsom, in your capacity as a sales representative for the Portsmouth Gas Company, did you have any contact with the Patio Plaza project?
A. Yes, sir.
Q. What was your first contact with the Patio Plaza project, Mr. Newsom?
A. We approached Mr. Shebar—or I did, in the early summer of 1963 with the idea of selling him on using gas.
Q. 1963 or '62?
A. 1962. Excuse me.
Q. All right.
page 353 } A. Expressly to talk about the use of gas in

this apartment. We had heard about it through the Portsmouth Redevelopment and Housing Authority.

Q. Uh-huh. And did you have any meetings with Mr. Shebar?

A. We talked to him then. We didn't actually go into equipment, just the use of gas at that time. Later on Mr. Spindel arranged a meeting with Mr. Shebar. Mr. Spindel, of course, was the plumber and he was always favorable to gas. And so we met—I met with Mr. Spindel and Mr. Shebar in Mr. Spindel's office.

Q. In Mr. Spindel's office?

A. Yes.

Q. Now, at that time did you discuss what equipment would be necessary?

A. Yes, we discussed air conditioning equipment, heating equipment, that sort of thing.

Q. All right. What, if any, discussion did you have as to who would install the air conditioning equipment?

A. Mr. Spindel was to install the air conditioning equipment. We were to sell it, sell the equipment only, deliver it to the site.

Q. Do you know whether or not Mr. Spindel had any other work on the Patio Plaza project?

page 354 } A. Yes, sir, he was a plumber.

Q. A plumber for whom?

A. For Mr. Shebar.

Q. He was working for Mr. Shebar on the plumbing?

A. Yes, sir.

Q. And you met with Mr. Spindel and Mr. Shebar at Mr. Spindel's place of business?

A. That's right. Mr. Spindel already had a contract on the plumbing and he said at the time he had the contract on the heating and air conditioning.

Q. Now, your interest was selling him gas?

A. Selling him gas.

Q. Now, as a result of that meeting, did you work up a proposal for Mr. Shebar as to what you would sell him?

A. Yes. I worked up—I believe we met again a second time and went into it a little further; then I worked up a proposal of the equipment that we would sell.

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page 355 }

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Q. Did you prepare a written proposal as a result of those meetings with Mr. Shebar and with Mr. Spindel, sir?

A. Yes, I did.

Q. And how was that proposal written or prepared, sir?

A. Prepared in my handwriting, rough handwritten proposal.

* * * * *

Q. Do you know whether or not the proposal ever came into Mr. Shebar's possession?

A. After I wrote the proposal, and this was subsequent to a meeting that Mr. Johnson and Mr. Jamison page 356 } with Commonwealth Natural Gas and Mr. Drummond and Mr. Shebar and I had, as to the financing; and at that time I wrote another proposal concerning the financing. I delivered these two letters of proposals by hand to Mr. Shebar's house on Lanier Drive, I think he lived at the time, one morning, I think it was one morning, and sometime in late September.

Q. Uh-huh. Do you recall that now?

A. Yes.

Q. All right. Now, I hand you two documents and ask you what they are, sir?

A. Proposal number one is the proposal concerning the equipment that was proposed.

Q. Uh-huh.

A. The gas air conditioning, the ranges, the cooling coils.

Q. All right, sir.

A. That sort of thing.

Q. What is proposal number two?

A. Proposal number two concerns the financing of the equipment and financing of the installation.

Q. All right, sir.

A. But, of course, we had nothing to do with it, but we were financing the entire job.

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page 357 }

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Q. Now, referring to proposal number one and two, which are Defendant's Exhibit 6 and 7 respectively, sir, can you distinguish the dates on that? Is that 9-14 or 9-16 or 18, whatever it is?

A. 9-14.

Q. 9-14-62?

A. 9-14.

Q. Now, will you look in proposal number one, please, sir, which is Defendant's Exhibit 6, and tell me what equipment under that proposal Portsmouth Gas was going to furnish?

page 358 } A. The gas air conditioning and heating equipment. There were fourteen model 54450 Bryant gas chillers; there were four model 36450 Bryant gas chillers; fifty thermostat kits with two-speed relays; fifty model 18407 cooling coils; fifty model 54909C06 coil housings; fifty model 50-393 econoflow furnaces; eighteen model 54131 partload controls; eighteen model 675A1003 outdoor thermostats.

Q. Is that it, sir?

A. I said we agreed to furnish this equipment for a cost of $510.00 per apartment.

Q. All right. Now, I notice you refer to fifty—

A. Fifty, that's right.

Q. —of each of those items. How many apartments were in the project, sir?

A. Ultimately?

A. Yes, sir.

A. Fifty-one.

Q. Fifty-one?

A. At this time Mr. Shebar had planned on having one for a maintenance shop or a place for his maintenance men to stay or work. He later changed that to fifty-one.

Q. All right. Now, will you turn to the second page of this proposal number one?

page 359 } A. Yes, sir.

Q. And read to me the paragraph which relates to the installation of that equipment, sir?

A. "The estimated cost of installing the aforementioned equipment will be $287.00 per apartment, this being the price quoted by Irving Spindel, plumbing and heating contractor,

with whom you have contracted to install said equipment. It is further agreed that in no case shall the installation exceed more than $300.00 per apartment." Now, this letter was addressed and delivered to whom, sir?

A. Mr. Shebar.

Q. Mr. Shebar?

A. Mr. Martin Shebar, and I think it's 19 something Lanier Crescent.

Q. And at that time you were going to furnish fifty units?

A. That's right.

Q. Of Hardwick gas ranges?

A. Hardwick gas ranges.

Q. And you say in here that the installation price would be $287.00, "being a price quoted by Spindel whom you have contracted to install the equipment."

A. That's right.

Q. And in no event would it exceed $300.00 per apartment?

page 360 } A. That's right.

Q. Now, who set the figure of $300.00 per apartment as being the top cost of installation?

A. Mr. Shebar.

Q. And when did he set that?

A. At the last meeting he and Irving and I had.

Q. Prior to this proposal?

A. Prior to the proposal, yes, sir.

Q. Now, as a result of the meetings that you and Mr. Shebar and Mr. Spindel had, and this proposal, did you thereafter turn the matter over to Mr. Cooper with the request that he prepare some written documents?

A. Yes, sir.

Q. And in the first documents—

Mr. McCoy: May I see Exhibit 2, please, Your Honor?

By Mr. McCoy:

Q. In the first documents that were prepared, what type of gas ranges were you going to furnish?

A. In the first document we had Hardwick proposed.

Q. Ultimately, was Hardwick the brand that was installed?

page 361 } A. No, Caloric.

Q. Caloric. And in the first documents were you were going to furnish Hardwick, how many units were you going to furnish?

A. Fifty.

Q. And how many did you ultimately furnish?

A. Fifty-one Caloric.

Q. All right. Now, in addition to changing from fifty Hardwick units to fifty-one Caloric units, when you eventually reached agreement on what would be delivered, sold, were there any further additions that were not in this proposal?

A. Yes. After, I guess, an agreement was reached, what we would furnish, we subsequently added a water heater, a Ruud water heater, and a Bryant unit heater to be installed in the laundry room, which wasn't part of the apartments, and this was more or less an afterthought.

Q. All right. Now, sir, are you familiar with the contract of April 26, 1963, that was finally signed?

A. No, sir, I wasn't there.

Q. You were not there when it was signed?

A. No, I wasn't.

Q. But have you read the contract and are you familiar with it?

A. I am not really familiar with it, no, sir.

page 362 } Q. Now, with regard to the additions of the Bryant unit heater that you say was for the laundry room and for the Ruud model water heater for the laundry room, what agreement did you reach when they were added concerning the installation of either the Bryant unit heater or the Ruud water heater?

* * * * *

A. We agreed, as I say, this being an afterthought, and we had more or less agreed on the other equipment. We agreed to install the unit heater. I think it's written in the contract. Install, but only furnish the water heater, not install.

Q. And they were afterthoughts to your earlier proposal?

A. That's right. These were the things Mr. Shebar requested.

Q. Now, sir, for the installation of the air conditioning equipment, the chilled water piping, the gas pip-

page 363 } ing and the duct work, who did that work?

A. Mr. Spindel.

Q. He performed the work?

A. He performed the work. He was the contractor.

Q. And who engaged Mr. Spindel to perform the installa-

tion of that air conditioning, that chilled water piping, that gas piping and that duct work?

A. Mr. Shebar.

Q. And were you present when those arrangements were made?

A. Well, Irving told me that he was going to do the job whether it went electric or gas. One time they were thinking about using electric air conditioning and gas heat, and possibly the electric ranges. And I think at one time they were even considering all electric with, I believe, GE. I believe GE was going to—or were willing to finance the total cost of the equipment, plus the installation. And this is the reason that we got into the financing of the equipment and the installation of the equipment.

Q. In order to compete with GE?

A. That's right, and to get the job. We never actually had any idea of installing this equipment ourselves.

Q. And was this the information that was given you in your two meetings with Shebar?

page 364 } A. Yes.

Q. And Spindel?

A. Yes, sir.

Q. And that's why you financed the installation?

A. That is right.

* * * * *

Q. Now, with regard to the connection of the gas ranges, who performed that work?

A. We connected the gas ranges, but the contractor, Mr. Spindel, ran the fuel lines up to the point of the connection. Now, this is a normal function, a normal gas company policy. We do this for anyone, and we advertise free connection of gas ranges.

Q. All right.

A. And refrigerators, too. Of course, we don't sell refrigerators any more because they aren't being made.

page 365 } Q. Who actually performed that connection for you?

A. Mr. Spindel.

Q. And did you issue a purchase order to him for that work?

A. I believe we did, for that particular thing, that particular item.

Q. Now, how about the connection of the gas refrigerators? Did you have him connect those for you, too?

A. Yes.

Q. And did you issue a purchase order for that?

A. The range and the refrigerator were combined into one purchase order.

Q. Now, with regard to the unit heater, the Bryant heater that was installed, the afterthought that you had added to the contract, and you agreed to install in the laundry room, who made that actual installation?

A. Mr. Spindel.

Q. And was a purchase order issued for that?

A. I believe it was.

Q. Now, at any time, what, if any, purchase order did you issue to Mr. Spindel for the furnishing and installation of the chilled water piping and gas piping and the duct work?

page 366 } A. We never issued any purchase order because we had nothing to do with it.

Q. You had nothing to do with it?

A. No. That was his job. He was the contractor.

Q. Now, Mr. Newsom, what requests, if any, did you receive from Irving Spindel as to the type of chilled water piping which should have been used in this project?

A. I don't expressly remember him asking me at that time. Mr. Spindel had done, as I recall, six previous jobs for a total of ten units using plastic pipe; and I had told him that—on the first job, that he had to use Virgin polyethylene plastic pipe, and I gave him a set of instructions at that time.

Q. That was on the first job he did?

A. First job he did.

Q. And he had done how many previous jobs?

A. Six jobs as I recall for a total of ten units. One job was a five-unit and the rest of them were small units jobs.

Q. I see, sir. Now, why did you specify Virgin polyethylene plastic pipe?

A. Virgin polyethylene plastic pipe is recommended by the Bryant Manufacturing Company who makes the units.

page 367 } Q. And these were Bryant?

A. Yes.

Q. Were they not?

A. Yes.

Q. What connection, if any, did you have with the order

or the purchase of the plastic pipe that was used in the Patio Plaza apartment project?

A. None whatsoever.

Q. Were you ever consulted concerning that pipe?

A. No, sir.

Q. Did you ever discuss it with Mr. Spindel?

A. No, I didn't.

Q. Mr. Shebar?

A. No.

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page 369 } Q. All right, sir. Throughout your negotiations with Mr. Shebar and Mr. Spindel, and such visits as you made to Mr. Cooper's office, what was Portsmouth Gas Company to do and perform in connection with this Patio Plaza project, Mr. Newsom?

A. We sold the equipment and delivered it only, the air conditioning and heating equipment, and placed it on the pad, the concrete pad that was prepared by Mr. Shebar.

Q. And who was to install that equipment?

A. Mr. Spindel.

Q. And by whom was he employed?

A. Mr. Shebar.

Q. And that was the arrangement that you and Shebar and Spindel discussed at your meeting?

A. That's right.

Q. And who set the limit on the cost of installation per apartment?

A. Mr. Shebar.

Q. And why was the limit of three hundred dollars per apartment set, sir?

A. I suppose he wanted to protect himself to make sure that it didn't go above that. Mr. Spindel had arrived at a cost of $287.00 per apartment. He had his profit in this, I suppose, and I suppose Mr. Shebar wanted some

page 370 } protection so that it wouldn't skyrocket and go out of sight.

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Ashton Harvey Newsom, Jr.

CROSS EXAMINATION

By Mr. Kanter:

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page 392 }

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Q. In other words, the deal remained firm with respect to what happened in Cooper's office except you-all changed the quantities and added those two units in?

A. I don't think the deal was ever firm until the contract was signed in April, Mr. Kanter.

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page 402 }

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Q. Wasn't the installation already in this contract of September?

A. This wasn't the contract. That never was signed. I am no attorney, but it's a rough draft.

Q. Mr. Newsom, maybe I am not making myself clear, and I apologize to you for it, sir.

A. Maybe Mr. Cooper left out what I had in there, I don't know.

Q. I want to get back to that second meeting that took place down in October in Mr. Cooper's office?

A. I can't remember every word verbatim, Mr. Kanter.

Q. Were there any discussions concerning the fact that the gas company was to install or not install the gas equipment out there?

A. I don't remember that, but I am sure that we never agreed to install the equipment. I am positive of that.

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page 410 }

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Q. Mr. Newsom, was there any discussion at all at any time in Mr. Cooper's office that the gas company was to furnish the installation of the equipment?

A. No, sir.

Q. None whatsoever?

A. Not as far as I know of. Not in my presence, anyway.

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CLYDE WARREN COOPER, called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. McCoy:

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Q. What was your first contact with the parties involved, principally Mr. Shebar and the representatives from the Portsmouth Gas Company?

A. Well, I am going to have to refer to this, Mr. McCoy.

Q. Yes, sir.

A. I can't recall dates and the number of people interested in this transaction that came to my office, and when they came and what happened. In September, 1962, there was some negotiations going on between the Patio Plaza, Incorporated, which was Mr. Shebar's company, and the gas company, in reference to using gas appliances in the Patio Plaza project. And I prepared this proposed agreement. It's undated, but it must have been written close to the day that I transmitted

it by letter on September 18, 1962, to Mr. Newsom of the gas company, with a copy to Mr. Olitsky, who was at that time Mr. Shebar's—or Patio Plaza's attorney, and Mr. Drummond, who was an official with the Commonwealth Natural Gas in Richmond, who is now dead. Now, I outlined in this agreement, and all I can testify is that which I outlined in this agreement, what I thought was the sum and sub-
page 425 } stance of what they were talking about or what they were about to agree on or what they would agree on. I specifically mentioned in my letter that this agreement is subject to modification, any changes that may be suggested. Now, after that, Mr. McCoy, I cannot recall who came to my office, how many and what time. I know that I do remember Mr. Shebar in my office; I remember Mr. Newsom; I remember Mr. Johnson in my office in reference to this agreement, but whether they came together two or three times or not I don't know. But in April, 1963, after they had reached an agreement as to the gas company furnishing the—selling the equipment and what they proposed to do, it was at that time—in fact, I knew it from other sources because I had been connected with the housing authority ever since it started in 1940, and Mr. Shebar was the first purchaser out of the Urban Renewal project. And he signed the contract with Patio Plaza to purchase a certain part of the land, which I drew. And there were certain time limits in the contract which are not pertinent here, but Mr. Shebar was having—I won't use the word difficulty, but he was not marshaling his assets for construction and for permanent financing. So it was along in April when this contract was finalized that Mr. Shebar had gotten a firm commitment from the Equitable for a permanent financing for the Patio Plaza. I did not have anything to do with that. That building and loan agreement and construction
page 426 } was drawn by some other attorney. However, I represented the American National Bank in furnishing the Patio people three hundred eighty-seven thousand dollars for construction; but at that time, and due to the difficulty and delay he had had, I was compelled to get the housing authority or allow him to reassign his contract to purchase over in Fort Nelson to his partnership, which their commissioners agreed. And subsequently a deed of bargain and sale was executed to the partnership. I was out of the picture. Mr. Shebar and his four partners had bought the property. They had the financing, the American National

Clyde Warren Cooper

Bank was going to lend construction money. So there was no conflict in interest whatsoever when Mr. Shebar and the gas people came to me to finalize this agreement. And that's what I did. I put this agreement, what I believe they told me to put in, I made notes and I drew the contract. And after the agreement was drawn it was presented to them. I don't know whether Mr. Kanter read it before he signed it or not, but all the other—whether they did or not, this is a photostatic copy of it, dated the 26th of April, 1963. Now, because—am I going—

Q. No, sir, that's all right.

A. Because of the fact, as I explained, the gas company said we are going to finance this gas transaction for Mr. Shebar and his partners, I made a memorandum,

page 427 } which that the appliances were going to cost so many dollars, somewhere around forty-nine or fifty thousand dollars. The cost for installation was around fourteen or fifteen thousand dollars. The total cost of it was sixty-five thousand dollars. I am not giving you the odd cents, but this is the sum and substance of it. Ten per cent of that purchase price paid to the gas company, the balance, some fifty-eight thousand dollars, was financed, and it was financed by a chattel mortgage to secure a note that was signed along with the chattel mortgage by the four partners. I don't know where that note is, Judge. It's here somewhere. Now, this was an arrangement that they made themselves. The note was for fifty-eight thousand dollars and the five partners agreed to sign this note and to sign opposite their name what percentage of interest they would be personally liable on this note. Spelled right out in the note, Mr. Shebar took fifty per cent of the fifty-eight thousand dollars and Mr. Cohen and Mr. Coren and Mr. Garner and Mr. Kanter took the other fifty per cent, which was twelve and a half per cent each. That is the note upon which this chattel mortgage was recorded, subordinated to the four hundred and thirty thousand dollar first mortgage that the Equitable had loaned these gentlemen for permanent financing. Now, I am not going to undertake—and I don't think the Court would allow me to, anyway—to express my opinion as to

page 428 } the interpretation of this contract. I can only say, Your Honor, what it reads, and I put in there just exactly what I think I was given, the meeting of the minds as to what to put into this contract.

Q. You are referring to what contract, sir?

Clyde Warren Cooper

A. I am referring to the final contract, Mr. McCoy, because all the rest of it was prior negotiations. I didn't even consider the September, 1962, contract or proposed contract that I had sent out in September, 1962, when I drew this contract in April. And there was no reason for me to. There were changes that had been made. That's been discussed here. There were prices that were changed; there were terms as percentage basis that I am talking to you about was all outlined, and it had changed from a corporation setup to a partnership, so I just disregarded that. I didn't pay any attention to it. I drew a completely new agreement.

Q. Well, with regard to your instructions for the preparation of that April 26th, 1963, agreement, what was the understanding as to the part that Portsmouth Gas was to play with regard to the furnishing of equipment and the installation of equipment?

Mr. Kanter: I object to that, Your Honor. That's the issue that's got to be decided by the jury. Mr. Cooper himself said the Court wouldn't let him testify to that.

page 429 } The Court: I sustain the objection.

Mr. McCoy: I want to be heard. You have permitted every other witness to say what the intent of the parties was. I haven't asked him to interpret this contract. I have asked him what his instructions were.

The Court: Ask him what his instructions were. That's all right.

Mr. McCoy: That's all I have asked him.

By Mr. McCoy:

Q. That's the question.

A. Mr. McCoy, my instructions were that this contract was the total financial deal, including the cost of the equipment, as I explained to you before, and the cost of the installation because they didn't have the money to do it, and the gas company was putting up the money. So that was my instruction, a complete sixty-five thousand dollar deal. And, of course, the seller, which is the gas company, financed the installation as the contract reads.

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Q. Well, did you have a specific instruction as to whether or not Portsmouth Gas was to install this equipment, sir?

Mr. Kanter: Your Honor, I object again. I think Mr. Cooper has answered just what his instructions were before.
The Court: I overrule the objection.
Mr. Kanter: All right, sir. Exception.

A. Well, I can only answer that this way: my impression from the conference was that the installation costs would be borne by the gas company, and the work would be done by someone else. I don't know.

By Mr. McCoy:
Q. All right. That's what I wanted to know. And it was on the basis of that understanding and those instructions that you prepared the contract of April 26th?
A. That's the contract I prepared and that's
page 431 } the one everybody signed, and I didn't find anybody objecting to it.
Q. I believe Mr. Lee Kanter here signed that contract, didn't he?
A. Yes, Mr. Kanter signed it.
Q. And did he ever discuss the contract with you?
A. I don't think so. He may have since this litigation started, but prior to that I don't think so, until he called me up after this trouble happened.
Q. Did he ever discuss it with you prior to the time that he signed it?
A. No, I don't think so.

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ROBERT WORTHINGTON JOHNSON, called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Robert Worthington Johnson

DIRECT EXAMINATION

By Mr. Gore:

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Q. Did you have any contact on behalf of Portsmouth Gas Company with persons dealing with the Patio Plaza project?

A. Yes, sir.

Q. And what was the first contact that you had with that project, sir?

A. Well, the first contact I recollect was a meeting with Mr. Shebar, Mr. Newsom, Mr. Drummond, Mr. Jamison out at—

Q. Sir?

A. Out in the Churchland area, a house which was under construction by Mr. Shebar at the time.

Q. And who are Mr. Drummond and Mr. Jamison?

A. They were officers of the Commonwealth Natural Gas Corporation.

Q. And what relation does that corporation have to Portsmouth Gas Company?

A. Well, they own our voting stock and we also use them as counselors.

Q. And were they here for that meeting?

A. Yes, sir.

Q. And what was the purpose of that meeting?

A. To explore the possibility of selling them
page 441 } gas equipment.

Q. Can you tell us approximately when the meeting took place?

A. September, '62.

Q. Can you tell us whether or not it was—

A. I think it was the 12th of September.

Q. And what was the gist of the meeting, generally?

A. More or less to find out what he proposed to build and in regard to furnishing equipment and just what financing would be necessary on our part.

Robert Worthington Johnson

Q. And as a result of that meeting, did any specific proposals develop?

A. Yes, sir.

Q. Were they the product of discussions at another meeting?

A. Yes, sir.

Q. And where did the next meeting take place?

A. Well, we had a number of meetings from then until April, '63, when the final contract was signed.

Q. Can you tell us whether or not after the meeting, the initial meeting that you have just mentioned, that there was a meeting in Mr. Cooper's office?

A. Yes, sir.

Q. Did you attend that meeting?

page 442 } A. Yes, sir.

Q. And was that meeting for the purpose of arriving at a more detailed arrangement with regard to the financing of the project and the supplying of utilities and equipment?

A. Yes, sir.

Q. At that meeting was there any discussion with regard to the installation by Portsmouth Gas Company of air conditioning units at the project?

A. There could have been. I don't recall any specific reference.

Q. Were you present at the meeting?

A. Yes, sir.

Q. Was any offer made at the meeting on behalf of the Portsmouth Gas Company to install air conditioning units at the project?

A. No, sir.

Q. Was it your understanding as a result of the meeting that an agreement would be made to install air conditioning units at the project?

A. No, sir.

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Q. Uh-huh. Now, when were the instructions given to Mr. Cooper to draft the agreement in 1962 that was finally signed?

A. Apparently it was sometime in April.

Robert Worthington Johnson

Q. Now, did that occur at a meeting at which you were present?

A. Yes, sir.

Q. And at this meeting were the terms and provisions of the contract of April 26, 1963, discussed? That is, the contract that was finally signed?

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page 445 } A. Well, I met with Mr. Cooper at that time and requested that he draw up this final contract, which included the equipment that we were going to supply which we finally did supply.

By Mr. Gore:

Q. And at that meeting, did you give any instructions to Mr. Cooper with regard to the provisions of the contract?

A. Yes, sir.

Q. Did you give any instructions to Mr. Cooper with regard to whether or not the Portsmouth Gas Company would install the air conditioning equipment and the chilled water piping at the project?

A. I instructed him that we would finance equipment, but not install.

Q. Did you tell Mr. Cooper at that time who would install it?

A. No, sir.

Q. Did you tell Mr. Cooper whether or not—or instruct him as to whether or not Portsmouth Gas Company would arrange for the installation?

A. No, sir.

Q. Was it your understanding when you instructed Mr. Cooper that the Portsmouth Gas Company was

page 446 } to do the installation?

A. No, sir, my understanding Mr. Spindel was to do the installation for Mr. Shebar.

Q. During the course of the meeting and the negotiations that took place prior to the finalization of the contract of April 26, 1963, was there every any understanding on your part that Portsmouth Gas Company would install the air conditioning equipment at Patio Plaza and the chilled water piping?

A. No, sir, because Mr. Newsom, when he first came to us—I say us, management, with the proposal that he had a

Robert Worthington Johnson

prospect for this apartment—I mean, the building of this apartment, he stated at the time that competition, which happened to be electric, were willing to furnish the equipment, including the installation of it, and to meet that competition, of course, we were called on to meet those terms; but he also instructed us at the time that Mr. Spindel would be the one who installed it and he was the plumber all the time, and he and Mr. Shebar were friendly. And he also stated that Mr. Spindel had told him that no matter which way the job went, either electric or gas, that he was going to do the work.

Q. And for whom was he going to do the work?

A. Patio Plaza at that time, but, I mean, that was the name of the project—corporation.

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Q. After the air conditioning began to be installed, did Mr. Spindel come to you for payment of the air conditioning?

A. Yes, sir.

Q. Tell us of the circumstances of that and what transpired, and when it took place, if you recall?

A. I don't recall the date, but he presented a bill for payment.

Q. And to whom was the bill directed, if you recall?

A. If I am not mistaken, he delivered the bill to me.

Q. And what then took place?

A. I refused payment of the bill because I believe it was made out to the Portsmouth Gas Company, and I instructed him that he would have to submit his bill to Patio Plaza and have Mr. Shebar approve the bills before I would make payment.

Q. And what did Mr. Spindel do as a result of this?

A. He went to Mr. Shebar, and, of course, made up a new statement and went to Mr. Shebar, got his approval and brought the bill back for payment.

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Q. And when he made up the new statement, do you know who it was made out to?

A. Patio Plaza.

Robert Worthington Johnson

Q. Was the statement then subsequently returned to you?
A. Yes, sir.
Q. Did it carry Mr. Shebar's endorsement?
A. Yes, sir.
Q. Did you then pay it?
A. Yes, sir.
Q. And to whom was payment made?
A. Mr. Spindel.
Q. Were there other invoices besides the first one?
A. Yes, sir.
Q. Did they all follow the same pattern?
A. Well, they were all—from then on they were made out to Patio Plaza and they went to Mr. Shebar who approved them and then they came to me for payment.
Q. And when they were paid, to whom were they paid?
A. Mr. Spindel, except in the case of one invoice requested that the check be made payable to United Sheet Metal, who was doing the duct work, the job for

page 450 } Mr. Spindel.

Q. And what was the course of that invoice?
A. Well, that was made out to Patio Plaza with a written request on there to make the check payable to United Sheet Metal and approved by Mr. Shebar.
Q. And did you make the check out to United Sheet Metal?
A. Yes, sir.
Q. Was Mr. Spindel during the course of this project performing certain services for Portsmouth Gas Company on the project?
A. Yes, sir.
Q. And what was the nature of those services?
A. Well, Mr. Newsom contracted with him to connect the gas ranges and the refrigerators in the apartments, and also to install a piece of equipment in the laundry room.
Q. Were any documents issued in connection with that work showing it was for Portsmouth Gas Company?
A. Mr. Newsom issued him a purchase order.
Q. And was that done for the purpose in each case that he was doing for Portsmouth Gas Company?
A. Yes, sir.
Q. And were invoices submitted for that work for that payment?

page 451 } A. Yes, sir.

Q. And how did those invoices come in?
A. They were billed to the Portsmouth Gas Company.
Q. And by whom were they paid?

Robert Worthington Johnson

A. Portsmouth Gas Company.
Q. And to whom?
A. To Mr. Spindel.
Q. Were any of those invoices sent to Mr. Shebar for approval?
A. No, sir.
Q. Were those services in connection with the equipment that had been sold to the project?
A. Yes, sir.

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Q. Now, I want to direct your attention back to the final contract for Patio Plaza for the sale of the equipment, and ask you what exactly was your basic relationship or what portion of this were you supposed to deal with? The negotiations or the financing or what, what principal part did you play?
A. Well, I would say principally the financier.
Q. And during the course of the handling of this contract, your attention was directed to that purpose; is that correct?
A. Yes, sir. Of course, we are a small organization and we are interested in most all phases of the company.
page 455 } Q. And during the course of your overseeing of this contract and handling the contract, did Portsmouth Gas Company ever agree to a turn-key job with regard to installation of the air conditioning equipment at Patio Plaza?
A. No, sir.

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Q. All right, sir. At any time during the construction of the Patio Plaza project, did Portsmouth Gas Company contract with Mr. Spindel for the installation of the air conditioning equipment?
A. No, sir.

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A Copy—Teste:

Howard G. Turner, Clerk.

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