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Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 7441

In the Supreme Court of Appeals of Virginia at Richmond

AETNA CASUALTY AND SURETY COMPANY, ET AL.

v.

U. S. PLYWOOD, ETC.

FROM THE CIRCUIT COURT OF MONTGOMERY COUNTY

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.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 7441

VIRGINIA

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 10th day of March, 1970.

AETNA CASUALTY AND SURETY COMPANY
and J. E. DAVIS & SONS, INC.,
Plaintiffs in error,

against

U. S. PLYWOOD, a division of U. S.
PLYWOOD CHAMPION PAPERS, INC.,
Defendant in error.

From the Circuit Court of Montgomery County
William S. Jordan, Judge

Upon the petition of Aetna Casualty and Surety Company and J. E. Davis & Sons, Inc., a writ of error and *supersedeas* is awarded them to a judgment rendered by the Circuit Court of Montgomery County on the 9th day of July, 1969, in a certain motion for judgment then therein depending, wherein U. S. Plywood, a division of U. S. Plywood Champion Papers, Inc., was plaintiff and American Steel Equipment Co., Inc., and the petitioners were defendants; upon the petitioners, or some one for them, entering into bond with sufficient security before the clerk of the said court below in the penalty of $7,500, with condition as the law directs.

RECORD

* * * * *

page 1 }

* * * * *

MOTION FOR JUDGMENT

COUNT I

1. Plaintiff, U. S. Plywood, A Division of U. S. Plywood Champion Papers, Inc., a corporation, hereby moves the Circuit Court of Montgomery County, in its Courtroom in Montgomery County, Virginia, for judgment and award of execution against the defendants, jointly and severally, American Steel Equipment Co., Inc., a corporation, J. E. Davis & Sons, Inc., a corporation, and The Aetna Casualty & Surety Company, a corporation, in the sum of Six Thousand Ninety-Six Dollars ($6,096.00), plus interest from February 8, 1968 which said sum is due from the defendants, jointly and severally to the plaintiff for this, to-wit:

page 2 } 2. Defendant, J. E. Davis & Sons, Inc., hereinafter referrred to as Davis, entered into a contract with the Commonwealth of Virginia for construction of Architectural Classroom Laboratory and Office Building, Virginia Polytechnic Institute, Blacksburg, Virginia. Said defendant Davis, along with the defendant, The Aetna Casualty & Surety Company, hereinafter referred to as Aetna, as surety, duly executed and delivered to the Commonwealth of Virginia a payment bond for the protection of all persons supplying labor and material in the prosecution of work provided for in said contract for the use of such person, in accordance with the provisions of §11-20, et seq, of the Code of Virginia, a copy of said standard performance payment bond being attached hereto and made a part hereof as if expressly incorporated herein.

3. Defendant, Davis, entered into a subcontract with American Steel Equipment Co., Inc., hereinafter referred to as American, for the furnishing by American of a portion of the labor and material provided for in said principal contract. On or about January 8, 1968, plaintiff, at the special instance and request of said American, subcontractor, did supply to American various items of its products to American pursuant to Invoice No. 36284 bearing date of January 8, 1968, a copy of said invoice being attached hereto and made a

part hereof, all of which items were used in the prosecution of the work provided for in said principal contract; that said subcontractor, American, contracted and agreed to pay plaintiff therefor the sum of Six Thousand Ninety-Six Dollars ($6,096.00) and that the reasonable value thereof was Six Thousand Ninety-Six Dollars ($6,096.00), of which sum no part has been paid, leaving an unpaid balance as of this date of $6,096.00 plus interest from February 8,
page 3 } 1968.

4. That one year has not elapsed since the material above-described was furnished by the plaintiff. Plaintiff has served a written notice upon the defendants setting forth its claim for the amount owing to the plaintiff for material furnished in the prosecution for the work provided for in the aforesaid prime contract.

Wherefore, plaintiff prays for judgment against all defendants, jointly and severally, in the sum of $6,096.00 plus interest from February 8, 1968, and costs.

COUNT II

5. Plaintiff, U. S. Plywood, a Division of U. S. Plywood Champion Papers, Inc., a corporation, hereby moves the Circuit Court of Montgomery County in its courtroom in Montgomery County, Virginia, for judgment and award of execution against the defendant, American Steel Equipment Co., Inc., in the sum of One Thousand Thirty-Six Dollars and Twenty-Four Cents ($1,036.24), which said sum is due from the defendant, American Steel Equipment Co., Inc., to the plaintiff in addition to the sum set out in Count I of this Motion for Judgment, which said sum is due from the defendant, American Steel Equipment Co., Inc., to the plaintiff by open account for merchandise sold and delivered as per itemized statement and affidavit hereto attached and made a part hereof, making a total due from the defendant, American, to the plaintiff of Seven Thousand One Hundred Thirty-Two Dollars and Twenty-Four Cents ($7,132.24) plus interest from February 8, 1968.

6. That due demand has been made by the plaintiff of the defendant for payment of said amount, but that the
page 4 } defendant has wholly failed and refused to pay unto plaintiff said amount, which is past due and owing from the defendant, American, to the plaintiff.

Wherefore, plaintiff moves for judgment against the defendant, American Steel Equipment Co., Inc., in the sum of One Thousand Thirty-Six Dollars and Twenty-Four Cents ($1,036.24) plus the sum of Six Thousand Ninety-Six Dol-

lars ($6,096.00), making a total of Seven Thousand One Hundred Thirty-Two Dollars and Twenty-Four Cents ($7,132.24) due from the defendant, American, to the plaintiff plus interest and costs as aforesaid.

U. S. Plywood, a Division of U. S. Plywood Champion Papers, Inc., a corporation

By Maurice Steingold
Of Counsel

* * * * *

Filed in the Clerk's Office the 2 day of May, 1968.

Teste:

John B. Myers, Jr., Clerk

* * * * *

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* * * * *

ANSWER

COUNT I

Now comes the defendant, American Steel Equipment Co., Inc., and its answer states as follows:

1. This defendant denies that it is indebted to the plaintiff in the sum of $6,096.00 or for any sum whatsoever.

2. That the allegations in Paragraph 2 in the Motion For Judgment do not pertain to this defendant and are neither admitted nor denied, and this defendant calls for strict proof thereof.

3. That this defendant denies the allegations contained in Paragraph 3 of the Motion For Judgment that it is indebted to the plaintiff for the sum of $6,096 or for any other sum whatsoever.

page 23 } 4. That this defendant denies the allegations contained in Paragraph 4 of the Motion For Judgment.

Wherefore, this defendant moves the Court to dismiss the Motion For Judgment and to be awarded its costs of this proceeding.

COUNT II

5. The defendant, American Steel Equipment Co., Inc., denies that it is indebted to the plaintiff in the sum of $1,036.24 or for any other sum whatsoever.

Wherefore, this defendant moves the Court to dismiss the Motion For Judgment and to be awarded its costs of this proceeding.

American Steel Equipment
Co., Inc.

By Eugene Forrest Gordman
Of Counsel

* * * * *

Filed in Clerks Office
Circuit Court of Montgomery County
28th Day of May, 1968
John B. Myers, Jr., Clerk.

* * * * *

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GROUNDS OF DEFENSE

* * * * *

The defendant, Aetna Casualty & Surety Company, for Grounds of Defense to the Motion for Judgment filed herein says:

I.

Defendant admits that it is surety on the bond given by J. E. Davis & Sons, Inc., to the Commonwealth of Virginia for the construction of the Architectural Classroom Laboratory and Office Building, Virginia Polytechnic Institute, Blacksburg, Virginia.

II.

Defendant denies that any sum is due plaintiff by it or by J. E. Davis & Sons, Inc.

Aetna Casualty & Surety Company
By Counsel

John W. Parsons, p.d.
Independence, Virginia

* * * * *

Filed in Clerks Office
Circuit Court of Montgomery County
28th day of May, 1968
John B. Myers, Jr., Clerk

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* * * * *

GROUNDS OF DEFENSE

The defendant, J. E. Davis & Sons, Inc., for Grounds of Defense to the Motion for Judgment filed herein says:

I.

Defendant admits that it entered into a contract with the Commonwealth of Virginia for the construction of Architectural Classroom Laboratory and Office Building, Virginia Polytechnic Institute, Blacksburg, Virginia, and that it executed and delivered the required bond, with the Aetna Casualty & Surety Company as its surety.

II.

Defendant denies that it had a subcontract with American Steel Equipment Co., Inc., or that the defendant, American Steel Equipment Co., Inc., did anything in connection with defendant's contract with the Commonwealth of Virginia, as a subcontractor.

III.

Defendant is not advised as to whether or not American Steel Equipment Co., Inc., owes plaintiff any sum

page 27 } of money and says that its only relationship with American Steel Equipment Co., Inc., was that of purchaser of certain materials, all of which were paid for by defendant prior to knowledge of any supposed claim of plaintiff.

IV.

Defendant is not advised as to whether or not materials it purchased from American Steel Equipment Co., Inc., had been purchased by American Steel Equipment Co., Inc., from plaintiff, and defendant says that if materials were purchased from plaintiff by American Steel Equipment Co., Inc., there is no privity between plaintiff and this defendant.

V.

Defendant denies each and every allegation of the Motion for Judgment not herein specifically admitted or denied and demands strict proof thereof.

J. E. Davis & Sons, Inc.
By Counsel

John W. Parsons, p.d.
Independence, Virginia

* * * * *

Filed in Clerks Office
Circuit Court of Montgomery County
28th day of May 1968
John B. Myers, Jr.

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JUDGMENT ORDER

This cause came on this day to be heard on the Motion for Judgment filed by the plaintiff and the responsive pleadings of the defendants, The Aetna Casualty & Surety Company and J. E. Davis & Sons, Inc., and was argued by counsel.

It appearing to the Court that the defendant, American Steel Equipment Co., Inc., was a subcontractor of J. E. Davis & Sons, Inc., and it further appearing to the Court that said subcontractor used certain items in the prosecution of the work provided for in the principal contract of J. E. Davis & Sons, Inc. and American Steel Equipment Co., Inc., and it further appearing to the Court that The Aetna Casualty & Surety Company duly executed and delivered to the Commonwealth of Virginia a payment bond for the protection of all persons supplying labor and materials in the prosecution of such work, and it further appearing that The American Steel Equipment Co., Inc. has made payments to the plaintiff herein, reducing the amount of the plaintiff's claim against the general contractor and its surety, to-wit, J.E. Davis & Sons, Inc. and The Aetna Casualty & Surety Company, to the amount of $5,452.80, it is

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Ordered that the plaintiff, U. S. Plywood, a Division of U. S. Plywood Champion Papers, Inc., have judgment against the defendants, J. E. Davis & Sons, Inc. and The Aetna Casualty & Surety Company, in the amount of $5,452.80 with interest from date plus the costs of this action. And the Clerk of this Court shall enter judgment accordingly.

Enter: July 9, 1969
M. S. JORDAN
Judge

I ask for this:
Eli S. Chovitz, p.q.

The Defendants, The Aetna Casualty and Surety Company and J. E. Davis & Sons, Inc., except to this Order on the grounds that American Steel Equipment Company, Inc., was not a subcontractor of J. E. Davis & Sons, Inc., within the meaning of Title 11, Section 20 of the 1950 Code of Virginia, as amended, and further that American Steel Equipment Company, Inc., was a manufacturer or fabricator; and, therefore, the agreement between J. E. Davis & Sons, Inc., and American Steel Equipment Company, Inc., was exempt from the provisions of Title 11, Section 20 of the 1950 Code of Virginia, as amended.

John W. Parsons, p. d.
Independence, Virginia

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

* * * * *

The undersigned, Aetna Casualty & Surety Company and J. E. Davis & Sons, Inc., parties in the above-styled case, hereby give notice of appeal from the order entered in this proceeding on the 9th day of July, 1969, and set forth the following assignments of error:

(1) The Court erred in holding that American Steel Equipment Co., Inc., was not a manufacturer or fabricator and thus exempt from the provisions of Section 11-20 of the Code of Virginia of 1950 as amended.

(2) The Court erred in holding that American Steel Equipment Co., Inc., was a subcontractor of J. E. Davis & Sons, Inc., within the meaning of Section 11-20 of the Code of Virginia of 1950 as amended.

page 76 } The Court erred in the above particulars because:

(a) The evidence was undisputed that American Steel Equipment Co., Inc., was required to fabricate new materials purchased from U. S. Plywood into a movable partition for sale to J. E. Davis & Sons, Inc., and that the partition sold had to be manufactured and were not available for purchase from one other than a manufacturer.

(b) The evidence was undisputed that American Steel Equipment Co., Inc., expressly refused to enter into a subcontract with J. E. Davis & Sons, Inc.

(c) The relationship between American Steel Equipment Co., Inc., to J. E. Davis & Sons, Inc., was that of materialman and purchaser and not that of subcontractor and contractor.

Respectfully,

The Aetna Casualty & Surety Company
J. E. Davis & Sons, Inc.

By Counsel

* * * * *

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* * * * *

Received and Filed August 28, 1969.

John B. Myers, Jr.
Clerk of the Circuit Court of Montgomery County

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STATEMENT OF INCIDENTS OF TRIAL

* * * * *

An action was brought in accordance with provisions of Section 11-20 of the Code of Virginia of 1950, as amended, by U. S. Plywood, a Division of U. S. Plywood Champion Papers, Inc., a corporation, against American Steel Equipment Co., Inc., the Aetna Casualty & Surety Company, a corporation, and J. E. Davis & Sons, Inc., a corporation, in the sum of Six Thousand Ninety-Six and 00/100 Dollars, ($6,096.00), plus interest from February 8, 1968, alleging that U. S. Plywood had sold to American Steel Equipment certain materials which were used by American in performing their subcontract with J. E. Davis & Sons, Inc., pursuant to contract which Davis had with the Commonwealth of Virginia for the construction of a building at Virginia Polytechnic Institute; and that Davis and the Aetna Casualty & Surety Company had entered into a payment bond in accordance with provisions of Section 11-20 of the Code of Virginia of 1950.

page 79 } The answer of American Steel Equipment Co., Inc., was stricken and summary judgment was entered against it.

Davis and Aetna filed an answer denying that American Steel Equipment Co., Inc., was a subcontractor of Davis and that the relationship was that of materialman and purchaser; and further making a general denial that these defendants owed the plaintiff any sum of money.

The discovery deposition of Thomas M. Friedman, which is attached hereto and made a part hereof, was taken. Follow-

ing the taking of the deposition the case was submitted, without intervention of a jury, to the Honorable William Southall Jordan, Judge of the Circuit Court of Montgomery County, upon the said discovery deposition; upon stipulations of counsel made *ore tenus;* and upon oral argument by counsel.

After sometime the Court determined that American Steel Equipment Co., Inc., was a subcontractor of J. E. Davis & Sons, Inc., and that U. S. Plywood was entitled to judgment against the defendants, Aetna Casualty & Surety Company and J. E. Davis & Sons, Inc., in the amount of Five Thousand Four Hundred Fifty Two and 80/100 Dollars, ($5,452.80), and by order entered on July 9, 1969, awarded judgment in this amount together with costs and interest from July 9, 1969.

The defendants, Aetna Casualty & Surety Company, and J. E. Davis & Sons, Inc., excepted to the action of the Court on the grounds that American Steel Equipment Co., Inc., was not a subcontractor of J. E. Davis & Sons, Inc., within the meaning of Section 11-20 of the Code of Virginia of 1950, as amended, and further that American Steel Equipment Co., Inc., was a manufacturer or fabricator and therefore exempt from the mandatory provisions of Section 11-20 of the Code of Virginia of 1950, as amended.

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We, the undersigned of counsel for the plaintiff and the defendants do certify that the foregoing is a true and correct statement of the incidents of trial.

Maurice Steingold
of counsel for U. S. Plywood, a Division of U. S. Plywood Champion Papers, Inc.

Stuart B. Campbell, Jr.
of counsel for The Aetna Casualty & Surety Company and J. E. Davis & Sons, Inc.

CERTIFICATE

I, W. S. Jordan, Judge of the Circuit Court of Montgomery County, Virginia, do certify that the foregoing is a *ture* and correct statement of the incidents of trial, all questions raised and all rulings thereon and exceptions noted in the case of U. S. Plywood, a Division of U. S. Plywood Champion Papers, Inc., a corporation vs. American Steel Equipment Co., Inc., a corporation; The Aetna Casualty & Surety Company, a corporation, and J. E. Davis & Sons, Inc., a corpora-

tion, in said Court, and it appears that the plaintiff had reasonable notice when this agreed statement of the incidents of trial would be presented to me and that said statement was presented to me within sixty days after final judgment and signed by me within seventy days.

Given under my hand this 5 day of Sept., 1969.

M. S. JORDAN
Judge

page 81 } I, John B. Myers, Jr., Clerk of the Circuit Court of Montgomery County, Virginia, do hereby certify that the foregoing agreed statement of the incidents of trial in the case of U. S. Plywood, a Division of U. S. Plywood Champion Papers, Inc., a corporation, vs. American Steel Equipment Co., Inc., a corporation, The Aetna Casualty & Surety Company, a corporation, and J. E. Davis & Sons, Inc., a corporation, was filed with me as Clerk of said Court on the 5th day of September, 1969.

John B. Myers, Jr.
Clerk, Circuit Court of Montgomery County, Virginia

Dep.
page 1 }

* * * * *

Discovery deposition of the defendant taken before Tamra K. Johnson, court reporter, at the offices of Messrs. Steingold, Steingold and Chovitz, Citizens Bank Building, Norfolk, Virginia, at 2:00 p.m., June 7, 1968.

APPEARANCES:

Messrs. Steingold, Steingold and Chovitz (Mr. Maurice Steingold) for the plaintiff.

Mr. Eugene Gordman for American Steel Equipment Company, one of the defendants.

Messrs. Taylor, Gustin, Harris, Fears and Davis (Mr. Terry H. Davis) for J. E. Davis and Sons, Inc., and *Aenta* Casualty Surety Co.

* * * * *

Dep.
page 2 } THOMAS M. FRIEDMAN, called as a witness on discovery, having been first duly sworn, was examined and testified as follows:

Examination by Mr. Steingold:
Q. You are Thomas Friedman?
A. Yes.
Q. What is your present connection—

Mr. Gordman: I would like to note for the record—I am sorry. I don't mean to interrupt, but if the court reporter is not a notary I would object to the taking of the deposition by her.

By Mr. Steingold:
Q. What is your present connection with American Steel Equipment Company, Incorporated.
A. I am an employee.
Q. Are you an officer of that corporation?
A. No, I am not.
Q. At the time that this indebtedness was incurred by American Steel Equipment Company, Incorporated, with U.S. Plywood—that's in November of '67, and during that period of time, that is, let's say for the entire year of 1967 and the early part, that is, of January, February, March
Dep. of 1968—what was your position with American
page 3 } Steel Equipment Company, Incorporated?
A. Initially, I would have been secretary-treasurer and then the president of the corporation.
Q. So during the entire year of 1967 and the first three or four months of 1968, you were either the secretary-treasurer or president of American Steel Equipment Company, Incorporated?
A. That's correct.
Q. You entered into a contract or a purchase order was executed by or with J. E. Davis and Sons, Incorporated, with regard to architectural classroom, laboratory, and office building in Blacksburg, Virginia, did you not?
A. That's correct.
Q. Did United States Plywood Company, the plaintiff, furnish materials for that particular job?
A. That's correct.
Q. Did they furnish materials and bill you for those materials in the sum of $6,096?

Thomas M. Friedman

A. Without records, I could not oblige you with an answer.

Q. All right. Suppose I furnish you with a copy of the invoices, and ask you if you can identify these invoices and statements?

Dep. page 4 } Mr. Gordman: If you know of your own knowledge as to any of those things, you can testify to them. If you don't know of your own knowledge don't go guessing about them.

A. I can't state these are invoices that we have received material from this firm.

By Mr. Steingold:

Q. You did receive materials from United States Plywood?

A. That's correct.

Q. And they aggregated approximately $6,000, is that correct?

A. I could not state so without having any records here to arrive at that.

Q. What is your recollection of what they amounted to?

A. I have no recollection whatsoever.

Q. None at all?

A. None at all.

Q. Were papers served on you in this matter?

A. Yes.

Q. And you did not examine your books at that time or thereafter?

Dep. page 5 } A. No actual notice was served on me. It was served on the firm within the past week.

Q. Well, actually, they were served three or four weeks ago or more?

A. No, no. No papers were previously served on me before the past week.

Q. Have you discussed this with Mr. Faye, who has taken over your firm?

A. No, sir, I haven't.

Q. You have not discussed U.S. Plywood matters at all?

A. No, sir, I haven't.

Q. Would you return that, please? Now, what was the nature of the work which you did for J. E. Davis and Sons, Incorporated, on the architectural building in Blacksburg?

A. This would have been a system of movable partitions—intermovable partitions.

Thomas M. Friedman

Q. Describe those, please?

A. These would have been insulated panels ranging in size from three-foot to four-foot in width and approximately eight to ten feet in height. Also, aluminum extrusions and door facings.

Q. Were these materials that you furnished available on open market, or did you have to do any fabrication?

Dep. page 6 } A. Yes, to both questions. Materials was available on the open market, and we did have to do fabrication.

Q. All right. What did you do to make these materials comply with the specifications furnished you?

A. The material was laminated. It was cut to size and shipped.

Q. Were you furnished with plans and specifications?

A. Yes, we were.

Q. Now, when you say the materials were available on the open market, you mean the raw materials which you used?

A. That's correct.

Q. The steel, the plywood, and what else did you use?

A. These would have been Glasweld.

Q. What is that? What is Glasweld?

A. This particular instance—it is a composition material, that's all.

Q. When you got these materials, that is, the steel, the plywood, the Glasweld, and whatever else you used, did you fabricate that into a movable partition, is that correct?

A. That's correct.

Dep. page 7 } Q. Did you fabricate these items into something which was required under the contract with J. E. Davis and Sons, Incorporated?

A. That's correct.

Q. Was it cut or otherwise manufactured to fit the specifications and plans called for in this building?

A. That is correct.

Q. Mr. Davis could not have walked down to the corner store and bought movable partitions, could he?

Mr. Davis: I object as to what Mr. Davis could do. Go ahead and answer.

A. No, he could not have bought this particular item unless it had been laminated—manufactured or laminated.

Thomas M. Friedman

By Mr. Steingold:
Q. What do you mean by laminated?
A. In effect, taking products and gluing them under pressure to one another.
Q. And then were these panels—were they panels?
A. That's correct.
Q. They were screwed together or were they welded together?
A. They were glued together.
Dep. page 8 } Q. And is that what made the movable wall?
A. That's correct.
Q. Did you do any work in Blacksburg?
A. No, sir.
Q. All the work you did was off the site?
A. That is correct.
Q. And Davis did the on-site work?
A. Yes, sir.
Q. Your contract with Davis amounted to approximately how much?
A. I can't answer that question without figures before me, and I don't have them.
Q. Was it $1,000 or $10,000?

Mr. Gordman: He's answered the question, and I think it is pretty clear.
A. I am giving you an answer.

By Mr. Steingold:
Q. An approximation?
A. I can't give you an answer.
Q. All of the records pertaining to this transaction are at your place of business, is that correct?
A. That's correct.
Q. And your place of business is in the city of Norfolk?
A. My place of employment, yes.
Dep. page 9 } Q. Did you bring the papers with you when you came to your lawyer's office?
A. No, sir.

Mr. Steingold: You may answer Mr. Davis or Mr. Gordman.

Examination by Mr. Davis:
Q. Mr. Friedman, I believe that your first contact with J. E. Davis and Sons, Incorporated, was in connection with

this contract which we are currently discussing. Was it their intention to offer you a subcontract agreement, is that correct?

A. That is correct.

Q. And you as I understand—you declined the subcontract agreement or did you not?

A. I requested a base of a purchase order.

Q. You declined the subcontract or a purchase order? You declined the subcontract?

A. Yes.

Q. And you accepted the job only on the basis that you would furnish them certain goods which they desired by means of a purchase order, is that correct?

A. That's correct.

Dep. page 10 } Q. Do you recognize this letter that I am handing you?

A. Yes.

Q. Is that the letter you wrote to J. E. Davis and Sons?

A. Yes, it is.

Q. Does that—does that letter spell out what was the agreement that you would have with Mr. Davis insofar as your subcontract relationship as opposed to the purchase order relationship with the Davis Company? Does that letter set it out fully?

A. Yes. That basically covers it.

Q. There wasn't a new agreement subsequent to the letter? You all operated pretty much on the letter, is that correct? And later on they submitted a purchase order for certain goods from you, is that correct?

A. When you operate—no work was done before the arrival of the actual purchase order.

Q. Did you receive purchase orders from various contractors for this type of partitions? Is that the business you are in—that you were in?

A. It was a limited business that we were in. This was no normal product or service.

Q. You had done it for other contractors in addition to this?

A. No.

Dep. page 11 } Q. Was this the first time you had laminated any material such as this?

A. No—yes.

Q. How long had you been in business?

A. Fifteen years.

Thomas M. Friedman

Q. And are you still in business? Are you?

A. The firm still exists, yes.

Q. I see. What was it you actually purchased from Plywood, the plaintiff in this action, in connection with this project? Do you recall?

A. As the invoice themselves would indicate, the one I can vouch for would have been—would have been Glasweld.

Q. What is Glasweld?

A. I don't recall specifically any of the products covered by these invoices were meant for that specific job.

Q. So that insofar as your recollection is concerned, the Glasweld would have been the only thing you used?

A. Beg your pardon?

Q. That you sent to J. E. Davis and Sons? What is that, incidentally, Glasweld?

A. I gave it a word, composition. It is a fired composition surface and it has a consistency of glass, but it isn't handled quite as gingerly as glass would be. As a matter of fact, you can pick it up and can cut it, so that word, glass, is a bit of misnomer.

Dep. page 12

Q. Where was this used on the partition?

A. On the exterior of the partition on the panels.

Q. And was this something that you attached by heat—you said glued on?

A. Glue and pressure.

Q. Glue and pressure?

A. It was cemented in—or laminated to an interior core. Beyond this, I can't give you the makeup of the panel.

Q. The panel, of course, consisted of plywood and this—

A. I am not in the position to tell you. I can't answer you truthfully. I would say, no. Plywood was not a part of the panel.

Mr. Davis: All right. Let me introduce this letter that we have been talking about as J. E. Davis Exhibit No. 1—Deposition Exhibit No. 1. That's all.

Examination by Mr. Steingold:

Q. Let me ask you this, if I may. The amount of your agreements with Mr. Davis, whether by purchase or subcontract or what, was for $18,430.65?

Dep. page 13

A. There are no figures—

Q. This would be in order.

A. I am sure I would accept this.

Thomas M. Friedman

Q. So the amount of the purchase order from Mr. Davis to you was approximately $18,000?
A. Yes.
Q. Now, you say you could identify the item of Glasweld?
A. I can only say to you, we used Glasweld on these partitions. This here is an invoice in my hand for Glasweld, but I have no recollection to state this is for this job.
Q. Well, it says for—
A. I can see this.
Q. And you would have used approximately $6,000 worth of Glasweld in this job, would you not?
A. I could not say this is—
Q. You wouldn't deny it?
A. I—no, I could not deny it.

Mr. Steingold: That's all.

Examination by Mr. Davis:

Dep. page 14

Q. Your testimony in regard to the $18,000 is based upon the letter dated April 25, 1967, which has been introduced into evidence?
A. Yes.

Mr. Davis: That's all.
Mr. Steingold: I assume we can waive the signing and the notice of filing.
Mr. Davis: Mr. Gordman, we can't waive signing subject to your objection.
Mr. Gordman: You can't waive filing. It has got to go into the Court.
Mr. Steingold: The Court requires they all be—
Mr. Gordman: We will waive signing.

J. E. Davis & Sons Inc.

Exhibit No. 1

J.K. June 7, 1968

"AMSTEPCO"

Plant, Office and Display Room
2621 Florida Avenue
Norfolk 13, Virginia

Telephone: Area Code 703/855-3346

25 April, 1967

J. E. Davis & Sons Inc.
Mount Airy Highway
Galax, Virginia

Attention: Mr. Steve Senic, Business Manager

Reference: College of Architecture
Building, V.P.I.
Blacksburg, Virginia

Dear Mr. Senic:

We are quite aware that there has been a considerable number of calls and discussions pertinent to this project between the time it was originally quoted and this date. It is a fact that we have received your Sub-Contract Agreement dated 22 April, 1967-today and must respectfully decline accepting it.

In effect, we had asked our Mr. Swimme to convey to you the fact that we would accept a Purchase Order as opposed to the contract. It was explained that in issuing a purchase order that no Sales and Use Tax would be required. (Which was not included in the quotation) nor would the performance bond be required.

We had suggested deductions to you for both the labor and the glass which we thought we had assured you could be furnished by you for considerably less then the deductives offered—$5220.00 for labor and $1490.00 for glass. It is a fact that you can handle both items from your end and place your order for Partition Systems only in the amount of $18,430.65 exclusive of glass and labor, and come out several hundreds of dollars ahead.

Due to the extreme load of erection that continues to pre-

sent a major problem to us through the latter part of October of this year—it is all but impossible for us to accept a labor contract for a job of this nature in your area. Since time is apparently of the essence and you have asked that we proceed with necessary submittals we must recommend that you instigate immediately and provide us with a purchase order for materials delivered to the job site exclusive of glass or labor to install. In addition we have at no time had a complete set of Plans and Specifications fowarded by your office and will require same immediately together with any addendum that may have been issued.

Your immediate attention and compliance with the above will allow us to begin preparing submittals and we look dorward to your cooperation.

Most respectfully yours,

American Steel Equipment Company, Inc.

Tom
Thomas M. Friedman, President

TMF/11w

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

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