223 Va. 59

CLERK SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

RECORD NOS. 79-802, 79-1340

LAWRENCE P. LATAIF

Appellant

Versus

COMMERCIAL INDUSTRIAL CONSTRUCTION, INC.,

DOUGLAS COBB,

LAURENCE O. MYERS

Appellees

APPENDIX

Peter L. Sissman
Attorney for Appellant
2305 Wilson Boulevard
Arlington, Virginia 22201
(703) 522-2220

VOLUME I OF II

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APPENDIX

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VIRGINIA:

ARLINGTON GENERAL DISTRICT COURT

CIVIL DOCKET NO.:_____

TO THE SHERIFF OF ARLINGTON COUNTY; GREETING:

You are hereby commanded to summon:

RESTAURANT EQUITIES, INC., c/o
Lawrence Freedman, Registered Agent
1101 S. Ridge Road, Arlington, Virginia 22202
and
Douglas Cobb, 820 Harriman St., Reston, VA

to appear before the General District Court of Arlington County, at the Arlington County Court House, Virginia, on:

January 6, 1977
(Return Date; Normally Trial Date)

at 2:00 p.m. to answer the complaint of:

LAWRENCE P. LATAIF

for non-payment of $ 3,500.00 with interest from 8/13/76
together with_____ attorney's fee, besides costs. due by:

Money owed on an assignment of wages and money due. Said assignment was executed by L.E.M., Inc. and Laurence O. Myers and accepted by defendants.

GIVEN UNDER MY HAND:

(Date)_____ *Joseph C. Gwaltney, Clerk*

By: *Deputy Clerk, Arlington General District Court*

Counsel for Plaintiff or Plaintiff's Address
PETER L. SISSMAN
1400 N. Uhle Street
Arlington, VA 22201
522-2220

FOR COURT USE ONLY

App. 1

VIRGINIA:

ARLINGTON GENERAL DISTRICT COURT

CIVIL DOCKET NO.: _____

TO THE SHERIFF OF ARLINGTON COUNTY; GREETING:

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GIVEN UNDER MY HAND:

(Date) _____ *Joseph C. Gwaltney, Clerk*

By: _____ *Deputy Clerk, Arlington General District Court*

C *for Plaintiff or Plaintiff's Address*
LAWRENCE L. SISSMAN
1400 N. Uhle Street
Arlington, Virginia 22201
522-2220

FOR COURT USE ONLY

O R D E R

THIS CAUSE came on to be heard on the motion of plaintiff to dismiss Restaurant Equities, Inc. as defendant and to add Commercial Industrial Construction, Inc. as a defendant,

IT APPEARING to the Court that the motion should be granted, it is,

ADJUDGED, ORDERED and DECREED that Restaurant Equities, Inc. is dismissed from this action as a defendant and the civil warrant is amended to add Commercial Industrial Construction, Inc. as a defendant.

Entered: 12/2/77

J U D G E

Date: _____

I ASK FOR THIS:

PETER L. SISSMAN
Counsel for Plaintiff

OBJECTED
SEEN AND EXCEPTED TO:

M. PATTON ECHOLS, JR.
Counsel for Defendant Cobb

Recorded in Common Law Order
Civil Book No. 161 Page No. 461
On December 2nd, 1977

INTERROGATORIES AND ANSWERS

(DEFENDANT COBB)

Interrogatory 2:

Please state:

(a) The name and address of your employer.

(b) The amount of time that you have been employed by the above employer.

(c) The name, address and telephone number of your immediate supervisor.

Answer 2:

(a). Commercial Industrial Construction, Inc., P.O. Box 108, Great Falls, Virginia.

(b). I am the Chief Executive Officer and have been since the corporation was formed in 1969.

(c). Not applicable.

Interrogatory 3:

Please describe in detail your relationship with Commercial Industries, Inc., and Restaurant Equities, Inc.

Please include in your answer the length of time that you have been associated with each of the two entities, the position that you held with them, whether you own stock in either of the entities, whether you are an officer or director of the two entities or have ever been so and any other aspects of your relationships with the entities.

Answer 3:

I have no connection with the companies mentioned.

REQUEST FOR ADMISSIONS

(DEFENDANT COBB)

Request for admissions # 1 into evidence:

That each of the following statements is true:

(a) On July 12, 1976, defendant, Douglas Cobb accepted an assignment by Laurence O. Myers and/or L.E.M., Inc. in favor of Lawrence P. Lataif in the amount of $3,500.00.

~~(b) The defendant, Douglas Cobb, paid funds in excess of $3,500.00 to Laurence O. Myers after accepting the assignment to the plaintiff.~~

Answer to request for admissions # 1:

(a) The first statement is denied but he admits that he did receive in the mail a certain paper purporting to be an Assignment.

~~(b) The second statement is denied.~~

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

LAWRENCE P. LATAIF, Plaintiff,	
v.	LAW NO. L19113
RESTAURANT EQUITIES, INC., Defendant.	Arlington, Virginia
	February 5, 1979

The above-entitled matter came on to be heard before THE HONORABLE CHARLES S. RUSSELL, Judge, in the Circuit Court of Arlington County, Virginia, on the 5th day of February, 1979, commencing at approximately 10:35 a.m.

APPEARANCES:

FOR THE COMPLAINANT:

PETER L. SISSMAN, ESQUIRE
2305 Wilson Boulevard
Arlington, Virginia 22201

FOR THE DEFENDANT:

LINDA S. THOMAS, ESQUIRE
1439 Courthouse Road
Arlington, Virginia 22216

M. PATTON ECHOLS, JR., ESQUIRE
JOSEPH B. HYMAN, ESQUIRE
1419 N. Courthouse Road
Arlington, Virginia 22201

- - -

C O N T E N T S

WITNESS:	DIRECT:	CROSS:	REDIRECT:	RECROSS:
LAWRENCE P. LATAIF	16	31	34	--

E X H I B I T S

NUMBER:	IDENTIFICATION:	EVIDENCE:
Plaintiff's Exhibit One	18	--
Plaintiff's Exhibit Two	23	--
Plaintiff's Exhibit Three	24	--

1 P R O C E E D I N G S

2 MR. SISSMAN: Here for the Plaintiff, Your
3 Honor.

4 THE COURT: Good morning, Mr. Sissman. Is
5 Mr. Echols here?

6 MS. THOMAS: Mr. Hyman is out in the hall.

7 MR. SISSMAN: May I approach the Bench, Your
8 Honor?

9 THE COURT: Yes.

10 (Whereupon, remarks were made off the record.)

11 THE COURT: Mr. Sissman, I gather this comes on
12 your motion for summary judgment.

13 MR. SISSMAN: No, Your Honor. That motion has
14 been denied by Judge Duff. But the matter has been bifur-
15 cated, and we're here on a limited issue. And if I may
16 proceed by way of an opening statement, that may explain
17 things.

18 THE COURT: All right.

19 MR. SISSMAN: This lawsuit -- I think what I'll
20 do, is I'll outline the brief factual issues that you have
21 to know to understand the issue that we're trying this
22 morning. And then I will discuss the procedural history,
23 which is a little bit complicated.

1 Essentially, Lawrence P. Lataif is an attorney
2 in Arlington County. He, as a result of some transactions
3 with Mr. Myers, received from Mr. Myers an assignment. And
4 the assignment was for money owed either Mr. Myers or Mr.
5 Myers' corporation, LEM, for work done, painting work done
6 for Mr. Cobb, the Defendant in this case, or Mr. Cobb's
7 corporation, Commercial Industrial Constructions, Inc.
8 As you'll hear this morning, there was, Mr. Cobb
9 had notice of the assignment; in fact, agreed to the assign-
10 ment, and continually assured Mr. Lataif that he would be
11 paid. However, Mr. Cobb saw to it that either Mr. Cobb or
12 Mr. Cobb's corporation paid Myers and didn't pay Mr. Lataif.
13 And so Mr. Lataif brought suit against Mr. Cobb or Mr.
14 Cobb's corporation on the assignment.
15 Now, the narrow issue, there are allegations in
16 this case involving the circumstances of the assignment.
17 That's not before you today.
18 The only issue before you today involves the
19 misnomer question. What happened is, when Mr. Lataif pre-
20 pared the assignment, Mr. Myers -- he was the man who was
21 owed money by Mr. Cobb, Mr. Cobb's corporation -- he made
22 out the assignment, which we'll put in as an exhibit. And
23 that assignment assigned money due Myers and it said, "Doug

1 Cobb and/or Commercial Industries, Inc."

2 Well, as it turns out, Doug Cobb was not, doesn't
3 have anything to do with Commercial Industries, Inc. His
4 corporation is called Commercial Industrial Construction,
5 Inc.

6 So the real question is the factual circumstances
7 surrounding the assignment. And really the sole issue is
8 whether the difference in name invalidates the assignment.
9 And that's what we're doing here today.

10 Now, the procedural history. I brought a civil
11 warrant against Douglas Cobb and/or Commercial Industries,
12 Inc. Except by the time I brought suit Commercial Industries,
13 Inc., which is a Virginia corporation -- at least, it was
14 at the time I filed suit -- had changed its name to
15 Restaurant Equities, Inc.

16 And, in response, Mr. Echols removed the cause
17 to the Circuit Court. He removed it for his client, but
18 I think that removes the whole thing.

19 In Circuit Court, having found through interroga-
20 tories the problem with the name, I successfully, over opposi-
21 tion, moved to dismiss Restaurant Equities, Inc. and added a
22 party, Commercial Industrial Construction, Inc. And there
23 was opposition to that and we were successful, and Judge

1 Brown granted the motion.

2 I think one of the things Your Honor might
3 consider at this juncture, as the taking of evidence
4 progresses, is whether or not the law of the case is that
5 Commercial Industries, Inc. is here properly. I think
6 essentially the arguments that you'll hear today are not dis-
7 similar to the arguments made to allow us to add Commercial
8 Industrial Construction, Inc. as a party.

9 But, in any event, I just bring that to the
10 Court's attention. In any event, the point of procedural
11 history so far is the Court can be sure we now have the
12 parties we intend to sue before the Court. That's been
13 taken care of.

14 And the style of the case keeps appearing as
15 Lataif versus Restaurant Equities, Inc. But that's not
16 really accurate, because they've been dismissed a long time
17 ago. It's Commercial --

18 THE COURT: Well, it's customary for the Clerk
19 to continue the same style of the case, even though -- I
20 think it was Jarndice v. Jarndice -- even though everyone
21 is dead or gone, the style remains the same. I don't think
22 that is determinate.

23 MR. SISSMAN: Again, Your Honor, the only reason

1 I belabor it is the names get confusing after a while. And
2 I think you now understand we don't have to worry about
3 Restaurant Equities or Commercial Industrial. Just
4 Commercial Industrial Construction, Inc.
5 They're here, and we're happy to be suing them
6 this morning. We'd be even happier if they were paying us
7 our money.
8 Now, there was some discovery -- trial was
9 originally set I think back in October. Mr. Cobb had a
10 conflict. He asked me to continue it. We continued it to
11 November.
12 It was then a further motion for continuance,
13 which was granted over my objection, and some problems with
14 discovery. I think we substantially prevailed on the dis-
15 covery question. As a matter of fact, we prevailed all the
16 way on the discovery question.
17 It was set again for February 5th. And in early
18 January Mr. Cobb moved to add as a Cross-Defendant, that
19 is a third-party defendant, Mr. Myers. Myers, as you may
20 recall, was the man who made the assignment.
21 I think the Court should know that a long time
22 ago Mr. Myers filed bankruptcy. And I believe that Mr.
23 Cobb had notice, and I believe Mr. Echols knows that Mr.

1 Cobb had notice.

2 And I bring that to the Court's attention be-
3 cause I want to be candid with the Court. I think that
4 there is a problem with the federal government under the
5 Bankruptcy Act. I just want that to be on the record, that
6 I have been candid with the Court in that question.

7 I say that because I think that the efforts of
8 the defendant in the case have been largely to blow smoke
9 in what is otherwise a fairly simple matter. In any event,
10 over my objection, that motion to add Mr. Myers as a third-
11 party defendant was granted; however, under the proviso
12 that it wouldn't delay the trial and that he could get in
13 here quickly with counsel. And I then moved for summary
14 judgment.

15 And it became complicated, but that motion was
16 denied, although I'm not sure of the reasons. It may have
17 to do with the issue we're litigating here today. And I think
18 after that's heard, it may once again be right for summary
19 judgment. But essentially, that's our opening statement.

20 THE COURT: Excuse me just a minute, Mr.
21 Echols.

22 (Whereupon, remarks were made off the record.)

23 MR. SISSMAN: One more thing, Your Honor. I, due

1 to the closeness in time of the trial, Judge Duff only
2 last week denied my motion for summary judgment by letter.
3 And we haven't had time to put an order together. But he
4 denied the motion for summary judgment.
5 MR. ECHOLS: Your Honor, to a great deal of
6 what Mr. Sissman says, I have to say "So what?" I assume
7 that Mr. Cobb heard about Mr. Myers going bankrupt. I assume
8 Mr. Lataif perhaps got a notice, but that doesn't have
9 anything to do with what we're here on today.
10 I do not think that Mr. Cobb necessarily --
11 well, whether he accepted or did not accept, in the legal
12 sense, the assignment is a matter of fact to be heard by
13 Your Honor. He certainly had notice and, of course, that
14 is, he did have notice.
15 It was a partial assignment which may or may
16 not have some relevance, if we get beyond this first stage.
17 Because the technical rules of assignment or partial assign-
18 ments seems to be a little different than total assignment.
19 We won't necessarily get to that, but it was
20 not an assignment of the money due. It was an assignment of
21 part of the money that would become due, as we understand
22 it.
23 THE COURT: Myers' bill to Cobb was in a larger

1 than $3500?

2 MR. ECHOLS: That's correct, Your Honor. About

3 twice that.

4 I want to correct any, any mistake Your Honor

5 might make about the order entered by Judge Brown. That

6 has absolutely nothing to do in setting up the law of the

7 case. Because that order -- and frankly I tried to, I

8 tried to force this particular hearing on Judge Brown at

9 that time and he would have nothing of it. He said that the

10 man had a right to add an additional defendant. Absolutely

11 he could, you know, take a non-suit and file over, and it

12 would be silly to make him do that.

13 So the order as written said that Restaurant

14 Equities, Inc. is dismissed from this action as a defendant,

15 and the civil warrant is amended to add Commercial

16 Industrial Construction, Inc. as a defendant.

17 Now, that language is not to be read at all as

18 saying that there was a substitution of parties. One was

19 dropped; another was added.

20 But whether Commercial, whether there is any

21 case against Commercial Industrial is not, was not made at

22 that time. You see, if the language had said that Commercial

23 Industrial was substituted for Restaurant Equities, then I

1 think there might be something of some interest as far as
2 a decision having been made.
3 But no decision was made other than that a
4 plaintiff, under the modern rules, has a right to drop
5 people and add people if he thinks he can prove a case
6 against B and cannot prove a case against A. So we're
7 right back as though he had sued them originally. And no
8 decision that a misnomer had occurred was made at all.
9 Now, we would stipulate I guess, Peter, if you
10 will, that there is a corporation with the precise name
11 used in the assignment. Is that --
12 MR. SISSMAN: I can only stipulate as to the
13 time I filed the lawsuit, which was in late '76. I don't
14 know if there was a corporation, indeed, at the time the
15 assignment was made.
16 MR. ECHOLS: All right. We will ask the Clerk
17 at the appropriate time to bring those books to us, because
18 they are in the Clerk's Office. The charter's down there,
19 and the merger of three or four corporations that created
20 Restaurant Equities is also down there. So we can bring
21 those up and have a look at them.
22 One thing that will appear and we think is
23 interesting is that Mr. Lataif apparently prepared the

1 assignment about a week before it was actually signed by
2 Mr. Myers. This is important we think because any mistake
3 that was made was made by him. Nobody, you know, he could
4 have picked up the phone and said, "Hey, what's the name of
5 your corporation?" He did not do that.
6 We have submitted a little memorandum, and
7 basically our position on the case is in that memorandum.
8 We think the fact will develop as we set them forth there.
9 We did ask to have this issue separated, really,
10 because if plaintiff doesn't get by this business of naming
11 corporation B when he meant to name corporation A, why,
12 then we don't go any further with it and we don't go into
13 the other defenses of the case.
14 THE COURT: I'm still trying to determine who
15 is the moving party this morning. What frames this issue?
16 You told me it was bifurcated. How did it get bifurcated?
17 I suppose there's something in the order which isn't in the
18 file.
19 MR. SISSMAN: Well, there's actually, there's
20 no order in the file on bifurcation. But the last --
21 essentially I guess it was the last procedural step, took
22 place when Mr. Echols filed his motion to add Mr. Myers
23 as a third-party defendant. We opposed that. And I guess

1 in response to that, we filed a motion for summary judg-
2 ment. It came on for hearing the same day.
3 I believe either at that time, essentially his
4 motion was granted subject to the summary judgment. The
5 summary judgment was really heard a week later. Judge Duff
6 took it under advisement.
7 And I think at the time summary judgment was
8 heard in late January, Judge Duff I guess ordered that the,
9 or at least suggested, that we keep the February 5th date
10 for the issue of the name. And we didn't oppose that.
11 We're ready to go forward on the whole trial
12 today. I don't think the other side is. But, if they are,
13 we'd like to try this case. We've been trying to get this
14 case on for about two-and-a-half years.
15 THE COURT: No one has filed any motion to
16 frame this issue, I take it.
17 MR. HYMAN: I think, to answer your question,
18 they are the moving party. That is to say, Mr. Lataif is
19 the moving party. What is before you is the second, the
20 second paragraph stating the defenses of the defendant,
21 which is a paragraph that says that the corporate defendant
22 is Commercial Industrial Corporation; whereas, the assign-
23 ment refers to monies to become due by reason of work

1 performed for Commercial Industries, Incorporated, which is
2 or was at that time a proper corporation.
3 That is, it comes, the issue is, is an issue
4 that is raised by the defense of the corporate defendant
5 here. And I would say that, that the plaintiff is the
6 moving party and we have a defense for the corporate defen-
7 dant, and that is the party we're concerned with.
8 So I would suppose that Mr. Lataif would go
9 forward with his case, and we'll make our defense.
10 THE COURT: Would you agree to that, Mr.
11 Lataif?
12 MR. SISSMAN: Yes, Your Honor. We would agree
13 that we are the moving party. We're the plaintiff, and
14 we're trying the second defense. And then we can go on to
15 the other allegations.
16 What I'm, we had a little difficulty, Your
17 Honor. I'd like to submit to the Court some judicial
18 admissions. I'm crossing out some things, and I apologize
19 for that. Due to the tractorcade delay, my secretary got
20 in late and it got typed late, and so the excess got typed.
21 Essentially what I would offer to the Court, I
22 could either read it into the record or I could just have it
23 included in the record. I've taken the defendant Cobb's

1 interrogatory answers and defendant Cobb's answer to re-
2 quest for admission number one, and I'd like it in the
3 record, if there's no objection. I could offer it as
4 Plaintiff's Exhibit One, or I could just read it into the
5 record, or whatever.
6 THE COURT: If there's no objection, I can
7 simply file it. I take it this is a transcript out of some
8 interrogatories and answers and request for admissions,
9 and answers which are in the file anyway.
10 MR. SISSMAN: That's correct, Your Honor.
11 THE COURT: Well, any objection on behalf of
12 the defendant today?
13 MR. ECHOLS: Wait a minute, Your Honor. I'm
14 still looking for pitfalls here.
15 MR. SISSMAN: The crossed out part I would
16 not like included, because it's not particularly relevant.
17 MR. ECHOLS: Oh, yes, Your Honor. I would, yes,
18 yes.
19 MR. HYMAN: I don't have any problem with that,
20 Your Honor.
21 (Whereupon, remarks were made off the record.)
22 MR. ECHOLS: We have no problem with that,
23 Your Honor. Mr. Cobb will be along, Your Honor, as soon as

1 he comes from Great Falls. And I don't think he took the
2 farmers seriously, so I left a message to come up as soon
3 as he gets here.
4 THE COURT: All right.
5 MR. SISSMAN: I would call as my first witness
6 Lawrence P. Lataif.
7 THE CLERK: All who are going to testify, please
8 stand.
9 (Whereupon, the witnesses were sworn.)
10 Whereupon,
11 LAWRENCE P. LATAIF
12 the Plaintiff, was called for examination by his Counsel,
13 having been first duly sworn, was examined and testified
14 as follows:
15 DIRECT EXAMINATION
16 BY MR. SISSMAN:
17 Q Mr. Lataif, would you please state your full
18 name?
19 A Lawrence Phillip Lataif.
20 Q What is your office address?
21 A Suite 407 at 1400 North Uhle Street, Arlington,
22 Virginia.
23 Q What is your profession?

1 A I'm a lawyer.

2 Q And where are you licensed, sir?

3 A In the District of Columbia and Virginia.

4 Q Where did you go to school?

5 A Georgetown Law School.

6 Q And what degrees do you have?

7 A I have a JD degree and a Master of Laws degree

8 in Trial Advocacy.

9 Q And how long have you been in the private

10 practice of law?

11 A Since October of 1973.

12 Q Prior to that time how were you employed?

13 A I was an Assistant U. S. Attorney in Washington

14 from 1970 until October of 1973.

15 Q Now, directing your attention to I believe it's

16 September of 1975, did there come a time when the third-

17 party defendant, Mr. Myers, executed an assignment in your

18 office?

19 A Yes, there did.

20 Q Do you recall that precise date?

21 A I believe it was June 18th of 1976.

22 Q Do you have a copy of that assignment?

23 A I have the original and a copy, yes, sir.

1 Q The original. Who would mark the exhibit,
2 Your Honor?
3 THE COURT: The Clerk.
4 MR. SISSMAN: Could I have this marked Plain-
5 tiff's Exhibit One for identification?
6 (Whereupon, Plaintiff's Exhibit One was marked
7 for identification.)
8 BY MR. SISSMAN:
9 Q Now, Mr. Lataif, I show you Plaintiff's
10 Exhibit One for identification. Could you please identify
11 that document?
12 A Yes. This is dated June 18th, 1976. It's on
13 my office stationery letterhead. It's titled "Assignment
14 of Wages and Money Due," and it's signed by Lawrence O.
15 Myers individually and Lawrence O. Myers as president of
16 LEM, Incorporated.
17 Q And do you know who signed it?
18 A Mr. Myers signed it in my office.
19 Q Did he sign it in your presence?
20 A He signed it in my presence in my office, yes.
21 Q I see. And are you aware of Mr. Myers' cor-
22 porate capacity with the name there?
23 A He is the incorporator and I believe he was the

1 president of the corporation.

2 Q Now, I see in here the name Commercial Indus-
3 tries, Inc. as being the party from whom, the debtor in
4 this case. Is that correct?

5 A The assignment is directed to Commercial
6 Industries, Inc. and/or Doug Cobb.

7 Q Now, where did you get those names?

8 A Those names came from Mr. Myers during the
9 course of our discussions. He had been in my office
10 approximately a week earlier and made some representations
11 at that time and had indicated to me for several months
12 running that he was owed some money by the individual that
13 he was doing the post office job for. I believe he was a
14 subcontractor who was painting the post office in Merryfield,
15 doing part of the painting job.

16 Q And so this money was owed to him by whom?

17 A By Doug Cobb. Mr. Myers made it clear to me
18 that as far as he was concerned he was working for Doug
19 Cobb. And when I came to draw up the assignment, I asked
20 him to provide me with the name of the corporation that Mr.
21 Cobb was using, and that's the name that Mr. Myers gave
22 me at that time.

23 Q After you got the assignment in June of 1976,

1 did there, did you contact Mr. Cobb immediately?

2 A No, I didn't. Mr. Myers asked me not to

3 because he was in effect in the relationship of an employee

4 of Mr. Cobb. And Mr. Myers was trying to raise the money

5 to pay me through other means, and he asked me not to

6 contact Cobb until he had an opportunity to try to raise

7 the money to pay me, so that there would be no need of Mr.

8 Cobb knowing about the indebtedness or the existence of

9 the assignment.

10 Q Was Mr. Myers able to do that, that is, to

11 raise the money?

12 A No, he was not.

13 Q And did there come a time when you contacted

14 Mr. Cobb?

15 A There did.

16 Q Now, did, how did you know how to get in touch

17 with Mr. Cobb?

18 A Mr. Myers gave me his telephone number I be-

19 lieve, and I also verified it through the telephone book,

20 where Mr. Cobb's home number was listed.

21 Q And did you in fact call this number?

22 A Yes. I called and spoke to Mr. Cobb about the

23 situation.

1 Q Did he identify himself as Mr. Cobb?

2 A Yes.

3 Q And when you say "spoke to him about the situa-

4 tion," what do you mean?

5 A At that time, because of the situation --

6 Q Excuse me. Do you recall the date that you

7 talked to him?

8 A July 12th.

9 Q Of 1976?

10 A Of 1976. I spoke to him and discussed the

11 situation with him, verified the fact that Mr. Myers was

12 in fact working for him, verified the fact that the post

13 office job was virtually completed. It was during that

14 phone conversation that Mr. Cobb told me that Larry Myers

15 had $7,000 coming to him.

16 Up until that time, I'm not sure that I knew.

17 I knew it was in excess of $3500, which was the amount of

18 the assignment, but I didn't know how much.

19 Q And what was, was any agreement reached in this

20 conversation?

21 A Yes. I don't recall whether I read the assign-

22 ment verbatim to Mr. Cobb over the phone. But I know that

23 I at least identified to him the amount of the assignment,

1 to whom it was directed -- namely to him personally and/or
2 Commercial Industries, Inc. -- and the amount of it, of
3 course.
4 And he said that that was fine and that he would
5 be willing to disperse the money to me. I asked him to
6 what address he wanted the assignment sent, and he gave me
7 the post office box that it was eventually sent to that same
8 day.
9 We had some discussion during that phone
10 conversation about the fact that Larry Myers had coming to
11 him more money than the amount of the assignment. And I
12 raised that issue with Mr. Cobb, and he indicated that he'd
13 be willing to handle it in any way that would be convenient
14 for all the parties.
15 I made it clear to him that he did not have to
16 send me the whole $7,000. Although, if he did, I would
17 immediately disburse the amount over $3500 to Larry. And
18 I later that same day dictated a letter to Mr. Cobb, which
19 I sent to him certified mail, return receipt requested.
20 Q And do you have a copy of that letter?
21 A Yes, I do.
22 Q May I have this letter marked as Plaintiff's
23 Exhibit Two for identification?

1 (Whereupon, Plaintiff's Exhibit Two was marked
2 for identification.)
3 BY MR. SISSMAN:
4 Q For the record, can you identify Plaintiff's
5 Exhibit Two?
6 A Yes. This is a photocopy of my letter of
7 July 12th, 1976 to Mr. Cobb directed at the post office
8 box 108 in Great Falls, Virginia, which he had provided
9 me. Of course, I don't have the original of that letter,
10 since I sent it to Mr. Cobb. But stapled to the bottom of
11 it is the original receipt and return receipt from the
12 post office.
13 Q Thank you. Along with Plaintiff's Exhibit Two,
14 was anything included?
15 A The, the assignment or copy of the assignment
16 was included in the, in the letter. I believe the letter
17 recites that fact.
18 Q Now, did there come a time when you had occasion
19 to again contact Mr. Cobb or -- excuse me. Did there come
20 a time when there was any subsequent contact with Mr. Cobb?
21 A According to my files, my next contact with
22 Cobb was on August 5th, 1976. And following that phone
23 conversation, I dictated a memo to my files which

1 memorialized that phone conversation that I had with him.

2 Q And what was the substance of that conversation?

3 A Well, my memo indicates that on Thursday,

4 August 5th, 1976 I spoke to Doug Cobb by phone. He indi-

5 cated that the post office job had been completed and that

6 he received Larry Myers' final bill this morning. Cobb

7 indicated that he would be in a position to disburse money

8 to Larry towards the end of next week. He indicated that

9 he would take care of me and insured me that the amount

10 of the assignment would be disbursed separately to me,

11 and a check made payable either to me or to me and Larry

12 Myers jointly. He states he would make a separate check

13 for the balance due to Larry Myers payable to Larry only,

14 so that Larry would have some funds available without the

15 necessity of my signing the check.

16 I suggested that he make my check payable to me

17 directly and solely and note on the bottom of it that it was

18 for Larry Myers. He indicated that this was a good idea

19 and would do it.

20 Q Can I have this marked Plaintiff's Exhibit

21 Three?

22 (Whereupon, Plaintiff's Exhibit Three was

23 marked for identification.)

1 BY MR. SISSMAN:

2 Q Now, what you have just read is Plaintiff's
3 Exhibit Three?

4 A Yes, it is, sir.

5 Q And was that memo made in your ordinary
6 course of business?

7 A Yes, it was.

8 Q And are you the custodian of this record?

9 A Yes.

10 Q And was it dictated at, or was it dictated
11 and/or transcribed at or near the time that the event took
12 place?

13 A Yes, it was.

14 Q Okay. During your conversation, does this
15 memo or does your memory indicate in any way that any
16 mention was made about problems with the assignment?

17 A None whatsoever.

18 Q Was any mention made in this discussion about
19 the name Commercial, the name of the corporation in the
20 assignment?

21 A No, not at all. Doug Cobb, during my phone
22 conversations with him, seemed to corroborate what Larry
23 Myers had told me in my office on numerous occasions. Which

1 was that he, Larry Myers, worked more for Cobb than for
2 any corporation.
3 And Cobb led me to believe that that was true.
4 That he, Cobb, was in complete control of the situation.
5 And during my first phone conversation when I read him the
6 essentials of the assignment, he did not indicate he had
7 any problem with the way it was worded.
8 Q Do you have the next communication with Mr. --
9 A Yes, I do.
10 Q Let me get it identified. I would like this
11 identified as Plaintiff's Exhibit Four for identification.
12 (Whereupon, Plaintiff's Exhibit Four was
13 marked for identification.)
14 BY MR. SISSMAN:
15 Q Thank you. I show you Plaintiff's Exhibit Four
16 for identification. Can you identify that?
17 A Yes. This is the original of a letter I sent
18 to Doug Cobb dated September 7, 1976.
19 Q I notice there's some red writing on the bottom
20 of that. Was that in the letter when you sent it?
21 A No, it was not.
22 Q I see. Now, what is, what is that letter?
23 A Well --

1 Q Can you summarize that letter?

2 A It's very short. I can read it. It says,
3 "Dear Mr. Cobb: Since our last telephone conversation on
4 July 12th, 1976, I have as you requested been waiting
5 for payment from you on behalf of Larry Myers. You
6 indicated on that occasion that you were expecting
7 approximately $7,000 for Mr. Myers and that you would dis-
8 burse to me the amount of the assignment which you ac-
9 cepted some time ago.

10 As I mentioned to you over the phone, I have
11 held off taking other action to collect this fee because
12 of your kind agreement to disburse the funds in accordance
13 with the assignment. I would appreciate knowing how
14 things stand, if payment will not be forthcoming during
15 the month of September. Sincerely yours," and I signed
16 it.

17 And this letter was sent certified mail return
18 receipt requested and was signed for at the destination
19 point. And then a few days later, I don't really recall
20 exactly how much later, the letter, the original letter
21 came back to me in the mail with the handwritten note
22 from Doug Cobb on the bottom of it.

23 Q And what was in that note?

1 A The note which is itself undated says, "Dear
2 Mr. Lataif: Larry Myers indicated the account had been
3 settled, and we paid him in full on August 13th, 1976. I
4 had and have complete faith in Mr. Myers, and assumed you
5 two were in agreement. Sincerely, Doug Cobb."
6 Q Now, prior to the time at and prior to the
7 time of receiving that communication from Douglas Cobb,
8 had there been any indication that Douglas Cobb or his
9 corporation was troubled by the wrong name of the corpora-
10 tion?
11 A Absolutely not. In fact, in retrospect, I
12 could see that my previous contact with Mr. Cobb had been
13 on August 5th, as the memo indicated. And my letter was
14 dated September 7th telling me that on August 13th, a
15 week after I had had my last phone conversation with Mr.
16 Cobb, he disbursed without my knowledge and without saying
17 anything to me the full amount of the money due, and he
18 paid it directly to Mr. Myers.
19 Q What if anything would you have done, had it
20 been brought to your attention that the assignment was
21 invalid because of the wrong name?
22 A Well, if he had --
23 MR. HYMAN: Your Honor, I think I object to

1 that question. I don't see that, that the answer has
2 any relevance. Nor do I understand exactly what he is, he
3 is asking. He's asking I believe what the plaintiff would
4 have done some time in the past if he had known certain
5 facts. And it seems to me that, that that is scarcely a
6 statement of fact that's being asked.
7 There's no possible way to verify what the
8 plaintiff would have done. And it would seem to me it was
9 an improper question.
10 MR. SISSMAN: Your Honor, it's relevant because
11 I think one of the issues here that we're trying to show is
12 essentially estoppel, and I think we require reliance.
13 And I think what his answer will show -- he will testify
14 that he would have either had Myers reexecute the assign-
15 ment correctly and timely with the right corporate name;
16 or else, he would have taken immediate steps against Myers.
17 And I think that the purpose of that question,
18 the reason it's relevant is to show that he relied and he
19 was lulled by the action of Cobb. Because Cobb told him,
20 "The assignment's fine and I'll take care of you." And
21 I think that --
22 THE COURT: The objection is overruled.
23 THE WITNESS: Well, had Mr. Cobb said anything

1 about the assignment, at that time my relationship with
2 Larry Myers was strained but he was still cooperating with
3 me, and I would have asked him to execute another assign-
4 ment with the, with a different name, if that's what Cobb
5 had requested in order to honor the assignment.
6 BY MR. SISSMAN:
7 Q If Myers at that point had refused, would you
8 have taken any other steps?
9 A Yes, I would have. The amount due under the
10 assignment had been accumulating for about nine months,
11 had been due and owing. And during that period of time,
12 because of the things that transpired between Mr. Myers
13 and his stepson and his wife and his stepdaughter and my-
14 self, I felt -- well -- I would have taken other steps to
15 protect the fee and to attempt to get it from Mr. Myers
16 in the event that Cobb had indicated that he would not
17 disburse to me.
18 And I would have considered some kind of
19 garnishment or attachment action. I would have considered
20 a lawsuit, whatever else would have been available to me
21 at that time.
22 MR. SISSMAN: Your indulgence, Your Honor?
23 I have no further questions.

1 CROSS EXAMINATION

2 BY MR. ECHOLS:

3 Q Mr. Lataif, when precisely did you prepare the
4 assignment?

5 A Precisely, I'm not sure. I think --

6 Q Within a day.

7 A Pardon?

8 Q Within a day or so.

9 A I'm not, I can't answer that question positive-
10 ly. I can tell you that it's dated the 18th. My notes
11 reflect that Larry Myers and perhaps other members of his
12 family had been in my office exactly a week before that on
13 June 11th, when Larry at that time signed a promissory
14 note for that same amount of money.

15 So that would indicate to me that, assuming I
16 prepared the promissory note either that day or within
17 a few days before June 11th, I either would have prepared
18 the assignment simultaneously or would have prepared it
19 sometime in the week between the 11th and the 18th.

20 Q Let me read your interrogatory answer. You
21 say, "The assignment was prepared by my firm approximately
22 one week prior to its execution." Is that a true state-
23 ment?

1 A That's my best recollection.

2 Q All right. Now, he told you he was working on

3 the post office in Merryfield.

4 A I believe it was in Merryfield.

5 Q All right. Do you have, do you happen to

6 have the promissory note that Mr. Myers signed with you?

7 A Yes, I do.

8 Q Do you have it with you today?

9 A Yes, I do.

10 MR. SISSMAN: Can I inquire into the relevance

11 of that? I guess there's no pending question.

12 THE COURT: No pending question, and he volun-

13 teered it as a part of his last answer. So I don't know

14 that you're in a position to object to it. It wasn't

15 elicited by any question from the defendant.

16 BY MR. ECHOLS:

17 Q The assignment was about June 18th. And you

18 notified Cobb of it July 12 by phone. Is that right?

19 A That's correct.

20 Q And --

21 A By phone.

22 Q Huh?

23 A By phone.

1 Q By phone, and you followed it with a letter of
2 the same date?
3 A That's correct.
4 Q And you were informed that Myers was paid on
5 the 15th of August or thereabouts?
6 A On the, sometime after the 7th of September I
7 was informed by Mr. Cobb that Mr. Myers had been paid on
8 13 August.
9 Q 13th of August.
10 (Whereupon, remarks were made off the record.)
11 BY MR. ECHOLS:
12 Q Did you, did you try at all to call Mr. Cobb
13 prior to preparing the assignment, so as to verify the
14 employment of Myers or the name of the corporation or
15 anything like that?
16 A No.
17 (Whereupon, remarks were made off the record.)
18 BY MR. ECHOLS:
19 Q All right. You did not really take any
20 steps to check the name of the corporation in any fashion,
21 including not calling Mr. Cobb; is that right?
22 A To me, at that time the name of the corporation
23 was, was incidental. It was, according to Mr. Myers, Doug

1 Cobb that he was dealing with. And no, I did not make any
2 independent efforts until I spoke to Mr. Cobb on the 12th
3 of July.
4 MR. ECHOLS: All right. That's all.
5 REDIRECT EXAMINATION
6 BY MR. SISSMAN:
7 Q Why didn't you call Mr. Cobb prior to preparing
8 the assignment?
9 A Well, as I indicated previously, Larry was
10 asking me not to. He had been telling me for a rather
11 lengthy period of time that he was attempting to get the
12 money together to pay me or at least enough of the money
13 that was owed at that time to show good faith on his part
14 for the work that had been done.
15 And I felt as much as I was concerned and
16 upset over the amount due and the length of time it had
17 been due and some of the things that had transpired, I
18 felt it was fair to wait whatever the time was, the extra
19 couple of weeks -- I guess it was a month, a day short of
20 a month -- to give Larry the opportunity to raise the
21 money independently.
22 Because he seemed, he had indicated to me that
23 he had been working for Cobb for a number of years on

1 different jobs; and that he was very much afraid that if
2 Cobb found out that he was in financial difficulty, it
3 would jeopardize his ability to get future contracts from
4 Cobb on other jobs.
5 And I felt that that was a reasonable feeling
6 for Mr. Myers to have. And so I held off for about a
7 month.
8 Q I would show Counsel Plaintiff's Exhibit One
9 through Four, and I would at this time move them into
10 evidence.
11 MR. ECHOLS: Your Honor, I don't have any ob-
12 jection to One, Two and Four. I think that the, the in-
13 house memo made by somebody to himself, he's already
14 testified to the content of it anyway and I didn't object
15 at that stage. But I don't think that's a proper written
16 exhibit.
17 MR. SISSMAN: I believe that comes within the
18 business record exception, and I believe I laid the founda-
19 tion.
20 THE COURT: I think the objection is moot, it
21 having come in verbatim, so I'll accept it.
22 MR. SISSMAN: Thank you. I have no further
23 questions.

1 THE COURT: All right. You may step down, Mr.
2 Lataif.
3 (Whereupon, the witness was excused.)
4 MR. SISSMAN: If I may have your indulgence
5 for a moment, Your Honor?
6 THE COURT: Yes.
7 MR. SISSMAN: We would at this point rest, Your
8 Honor, on that issue, of course.
9 MR. ECHOLS: Your Honor, I'd move to strike
10 for the reasons set forth in the memorandum that we fur-
11 nished the Court already. It's not a misnomer.
12 If he had signed an assignment of funds due
13 General Motors to General Mills, General Mills could have
14 said nice things over the telephone. And, frankly, I'm
15 sure that when, when Lataif called Mr. Cobb on the 12th of
16 July, Cobb not having then seen the assignment, Cobb assumed
17 the thing named the correct corporation. I don't think
18 there's any doubt about that.
19 But then we would get at the very best an oral
20 promise to be bound for the debt of another, is what it
21 amounts to. Actually, I don't think Cobb ever found the
22 name of the corporation was wrong until this litigation
23 began. It still doesn't make any difference.

1 An assignment, as we point out in our memoran-
2 dum, is a very, very technical sort of thing. It's an
3 odd ball. It makes a man bound for the debt of another.
4 It makes him pay in a direction that he would not neces-
5 sarily choose to pay.
6 And if you're going to live by the sword of a
7 strong document like this, a peculiarity in the law really,
8 then you have to do it correctly. He had a week in which
9 to determine it. He could have found out the name of the
10 corporation without, without in any way imperilling Mr.
11 Myers' painting contracts with the corporation. But he
12 didn't.
13 Myers thereafter -- at least Counsel says and
14 we'll put it on later -- Myers went into bankruptcy, and
15 so it's an unfortunate chain of circumstances. But the
16 point is there and we had -- I won't just read the memoran-
17 dum to you.
18 If Your Honor would take a few moments to take
19 a look at it, I think the arguments are made. It's, it's
20 nobody's, it's nobody's fault but Mr. Lataif's that it
21 wasn't done correctly. It boils down to that.
22 And as far as his being able to get another
23 assignment out of Mr. Myers, that's neither here nor there.

1 It wasn't done, and the recipient of the assignment cer-
2 tainly had no obligation to tell him if, indeed, he knew
3 himself.
4 MR. HYMAN: I'd just like to add one thing to
5 what Mr. Echols has said. In this memorandum we cited
6 case 211 Va. called Rockwell versus Allman. And I call
7 that to your attention because Mr. Sissman likes to refer
8 to this as a matter of misnomer. And I think it goes well
9 beyond misnomer.
10 And in the Rockwell case to which I refer, a
11 plaintiff had brought suit against an administrator who
12 had been improperly appointed. Having later discovered
13 that the administrator he had sued was improperly appointed
14 and chose, sought to substitute administrators who had
15 been properly named and chose to do it on the basis of
16 misnomer.
17 And the Court said that the narrow issue pre-
18 sented on this appeal is whether the name involvement as
19 applied was a misnomer. And then they went on to say that
20 under the facts of the case there was no misnomer, and
21 misnomer is a mistake in name but not in person. Here the
22 wrong person was named, and cannot be corrected in a matter
23 of misnomer.

1 And that seems to me to be quite clear to the
2 case here. And that is, it was not a matter of spelling
3 a name incorrectly. It was not a matter of a mistake of
4 that kind that could be disposed of by what is called the
5 principle of idem sonans. For example, you couldn't say
6 what it sounds like.
7 But here what we are proposing on the part of
8 the plaintiff is to ignore the party named in the assign-
9 ment and to treat the party named in the assignment as
10 another party.
11 And we are saying that we have named the
12 debtor and we have designated a debtor, but we designated
13 the wrong one. And we think that the fact that we named
14 the wrong debtor is a minor matter and that we will simply
15 read in the place of the name that we set out in the assign-
16 ment, the name of a different person.
17 And there was a corporation which bore the name
18 that was used in the assignment, and that was not the
19 name of the corporation that was managed by --
20 THE COURT: That's not in the record.
21 MR. HYMAN: I beg your pardon?
22 THE COURT: That's not in the record.
23 MR. HYMAN: Not as yet, but I think it will be

1 stipulated.

2 Anyhow, on that basis, we would say that we

3 would go well beyond the question of misnomer here.

4 And that since Mr. Lataif is a lawyer and since he has a

5 responsibility of drafting the document himself and since

6 the magic of the, of the assignment depends on the accuracy

7 certainly of, of its name, we feel under the circumstances

8 that no case has been made to hold Commercial Industrial,

9 Commercial, that is, Industrial Construction liable here.

10 And the suit should fail on that account.

11 THE COURT: I think it might be of some sig-

12 nificance as to whether this is a misnomer or not, as to

13 whether there did in fact at that time exist a corporation

14 with the exact name that was used in the assignment. Since

15 that's not a part of the record, I will deny the motion to

16 strike.

17 MR. ECHOLS: Your Honor, may we ask the Clerk

18 or the Bailiff to get us charter books 58 and 75 from down

19 in the Clerk's Office?

20 THE COURT: Ask Mr. McGuire to go get that.

21 THE CLERK: What's the number, sir?

22 MR. ECHOLS: 58 and 75. Send your strongest

23 man.

1 THE CLERK: All right, Your Honor?

2 THE COURT: (Nodded yes.)

3 MR. SISSMAN: I would, in light of Your

4 Honor's comment, I would like to direct your attention to,

5 in our judicial admissions, interrogatory answer number

6 three in which the defendant Cobb, who is chief executive

7 officer of the defendant here, says he has no relation at

8 all --

9 THE COURT: I saw that.

10 MR. SISSMAN: -- with the other misnamed

11 corporation.

12 THE COURT: Do you want to go forward with some

13 testimony at this time, or should we take a recess til the

14 books arrive?

15 MR. ECHOLS: Take a recess until the books get

16 here and maybe Cobb will arive.

17 (Whereupon, a brief recess was had.)

18 MR. ECHOLS: Your Honor, I would show you

19 first charter book 58, page 278, which is the articles of

20 incorporation of Commercial Industries, Incorporated.

21 THE COURT: Let the record show that the Clerk

22 has produced charter book 58 from the records of the Clerk

23 of this Court, and the Court will take notice of the content

1 of it, particularly page 278. Copies of this can be
2 placed in the record, if later needed, to make up the
3 record.
4 But the original book at that page shows
5 articles of incorporation of Commercial Industries, Inc.
6 And the date on it is April 29th, 1971. And the State
7 Corporation Commission issued it on the 20th of May, 1971 --
8 12th of May, 1971 and recorded in the Clerk's Office 20th
9 of May, 1971. All right.
10 MR. ECHOLS: Your Honor, and here is the, in
11 charter book 75 commencing at page 155 is rather long
12 merger documents. But they wind up at book 75, page 169
13 with the certificate merging this corporation, Commercial
14 Industries, Inc., into several others to make Restaurant
15 Equities.
16 THE COURT: The Court will take notice of those
17 documents also.
18 MR. SISSMAN: As long as the Court is taking
19 notice, I would like the Court to also take notice that in
20 none of those documents does the name Douglas Cobb appear
21 or Lawrence Myers or any of those people.
22 THE COURT: All right, sir.
23 MR. SISSMAN: I would say further, Your Honor --

1 THE COURT: Let me finish this.

2 MR.SISSMAN: Yes, sir.

3 THE COURT: This is charter book 75 beginning
4 at page 160 and ending on 168, followed by State Corpora-
5 tion Commission certificate on page 169 showing merger of
6 two foreign corporations.

7 MR. ECHOLS: That's a little tricky, Your
8 Honor. There are two foreign corporations and these
9 domestic corporations.

10 THE COURT: And certain domestic corporations,
11 one of which is Commercial Industries, Inc., are all
12 merged into Restaurant Equities, Inc. as of November 23rd,
13 1976 -- November 15th, '76; recorded in the Clerk's Office
14 November 23rd, 1976.

15 MR. SISSMAN: I'm in a difficult position. I
16 don't think it makes any difference if it was in effect.
17 And so I don't want to overstress it, but I suppose I
18 should argue that although it may have been active Virginia
19 corporation, I think the only way to really prove it
20 would be to have the annual report.

21 I don't think there's enough before this Court,
22 although there was evidence there was a corporation es-
23 tablished in 1971 by that name, and that it merged later.

1 I don't know if the Court knows it was in existence at the
2 time that the assignment was made. I don't think it's
3 real important. I don't know as it would have to decide
4 that, but I'd like the Court to understand our position on
5 that.
6 MR. ECHOLS: Your Honor, I'd simply respond and
7 say that Your Honor knows very well that the State Corpora-
8 tion Commission would not allow a merger of a domestic
9 corporation unless it was in good standing. So that, it
10 certainly was in good standing November 15th of 1976 or
11 the merger would not have been allowed.
12 You have to pay all your fees, all your back
13 charges, get all your reports in in order to be allowed to
14 dissolve, as a matter of fact, or merge or anything else.
15 So actually this is, I think this concludes
16 our case, Your Honor. Because under our view of the case,
17 we don't think that these other peripheral things make any
18 difference. We have Mr. Myers here, but I don't know what
19 he could offer.
20 THE COURT: All right, sir. The defense rests,
21 and I'll be glad to hear your argument.
22 Now, Mr. Sissman, you didn't get a chance to
23 respond to the motion to strike, which is based on -- I

1 guess that's really their whole submission. So I'll be
2 glad to hear from you at this point.
3 MR. SISSMAN: Thank you, Your Honor. Let me
4 start out, well, let me start out by saying that we, too,
5 have briefed the matter. And there is, our effort is in our
6 memorandum in support of motion for summary judgment. And
7 that's in the file, and we rely on two cases.
8 I would like to start out by bringing to the
9 attention of the Court the Rockwell case, Rockwell versus
10 Allman, which they cite. And not only do I believe that
11 case doesn't support their theory but, if anything, it
12 supports ours.
13 I in fact brought it to the Court, because I
14 think if the Court reads it the Court will come to our view.
15 THE COURT: All right, sir. Go ahead.
16 MR. SISSMAN: All that case, it's clearly
17 written between the lines of the statute of limitation
18 problem. The wrong administrator got qualified. Turns out
19 the Court didn't have jurisdiction to appoint him as ad-
20 ministrator of the estate and by the time the, the, you
21 know, it was found out, the statute had run on the real
22 administrator who was floating around in another county.
23 That really involves the issue that Mr. Echols was talking

1 about earlier, the pleading case.

2 In that case, there was an attempt to sub-

3 stitute parties. In this case what we did was drop one

4 party and add another.

5 And what that case says, I think there's a

6 sentence in there in the last, second to the last paragraph,

7 that misnomer talks about the person; not parties. You

8 know, who is the person that you're trying to talk about?

9 In this case, I don't think there's any question as to

10 which person.

11 There aren't too many assignment cases. I

12 think Mr. Echols' memorandum is correct. However, there

13 is one that I think we found. They don't like that, of

14 course, but I think this is really governed by the law of

15 contracts.

16 The case which I have here is Fidelity Mutual

17 Life Insurance Company versus City National Bank of Fairmont.

18 It's a Federal Reporter case from West Virginia. And

19 that involved a life insurance policy.

20 There had been assignment of the life insurance

21 policy to the wife. And there was an assignment, in the

22 assignment there was a mistake in the amounts of the life

23 insurance policy, and it wasn't clear about the number of

1 the policy, so there was some confusion.

2 But the Court there said that the, and in fact
3 the life insurance company's rules, that is being on their
4 forms and a duplicate, had not been followed. But there
5 the Court said that that didn't matter; the assignment was
6 valid.

7 "Any language however informal if it shows the
8 intention of the owner of the chose in action to at once
9 transfer it, so that it will be the property of the
10 transferee, will be sufficient to vest the title in the
11 assignee. No particular form is necessary.

12 While the chose in action must be identified,
13 no greater particularity is required than is actually
14 necessary to do this, with the aid of the attendant and
15 surrounding circumstances."

16 Essentially, contrary to Mr. Echols' or Mr.
17 Hyman's assertion -- I forget which made it -- this is not,
18 this is not, assignments do not require the formality of
19 deeds and wills. It is not magical. It doesn't even have
20 to be written. It can be oral. The key is identity.

21 And I think the Fidelity case is illustrative
22 of that. I have that if Your Honor wants to read it. But
23 I think the Fidelity case binds it.

1 I think that what we do is we look to the law
2 of contracts. I have looked high and low for some cases
3 directly on point, and I have not been able to find some.
4 However, this apparently frequently comes up in the area of
5 contracts.
6 I might add, there is a Virginia case which
7 we cite in the memorandum called Society versus Diggs in
8 which it says that a corporation, even if it makes a
9 contract in the wrong name, is bound by it. So we know,
10 assignment is merely a contract. It's got a third-party
11 beneficiary aspect to it, but it's a contract. It's
12 under contract law.
13 And what, the law on contracts is very clear.
14 There's a Virginia case on point that says we look to who
15 the party in interest is, not whether there's a problem
16 with the name.
17 And in fact it's been held, and I have here a
18 collection from Volume Six of Fletcher's Cyclopedia of
19 Corporations, which is a treatise on corporations. And it
20 says that if you make a mistake in the name in a contract of
21 a corporation or in fact if you give land to a corporation
22 but you use the wrong name, that doesn't make any difference.
23 The transfer is still valid. And it seems to me, Your Honor,

1 if a deed doesn't have to have the right donee, then
2 certainly an assignment doesn't have to have the right
3 donee.
4 Now, another area I think is also analogous --
5 and this is cited in the supplement to this section 24450 of
6 Fletcher's -- involves financing statement cases. Now, the
7 issue that the Court looks to in financing statements, if
8 there's a misspelling in a financing statement, it doesn't
9 hurt unless it's material. That is, if the, someone search-
10 ing the title wouldn't have found it, so if it's misindexed.
11 But if it's a similar name that any diligent searcher would
12 have picked up and put them on notice, then the financing
13 statement holds.
14 And I think that's what we have here. I think
15 if there's been any evidence in this case that anybody had
16 been misled, I think we would have a far different case.
17 In other words, if in fact there had been any showing that
18 either Myers had any involvement with Restaurant Equities,
19 if Mr. Cobb had any showing.
20 But Mr. Cobb's counsel conceded in argument that
21 they didn't figure out this was a problem until the litiga-
22 tion started. So we have a situation where no one was mis-
23 led. And it's surely chicanery to come in here and to argue

1 they were misled.

2 Mr. Lataif has explained I think adequately

3 why he didn't call up. I don't think he had a duty. I

4 think everybody, there's no evidence here to the contrary,

5 and Mr. Lataif has testified, that Myers was doing work

6 for Cobb and Cobb's corporation. Everybody understood

7 that. And what's the basic rule of contract law: look

8 to the intention of the parties.

9 What did Mr. Myers intend? Mr. Myers intended

10 to make assignment of money owed to either him or his

11 corporation by Mr. Cobb or Mr. Cobb's corporation. The

12 interrogatories said Mr. Cobb doesn't have any association

13 with Restaurant Equities or its former name. Mr. Cobb is

14 present and chief executive officer of Commercial Industrial

15 Corporation, Inc. That's the person who Myers was doing

16 work for. Mr. Lataif, that's what he thought. He thought

17 he was getting assignment from Mr. Cobb's corporation.

18 Mr. Lataif called Mr. Cobb. Mr. Cobb -- and

19 all the exhibits indicate that. Mr. Cobb said, "Sure, he

20 did work for me or my corporation, and we'll take care of

21 you." And I think, if nothing else, we have an estoppel

22 theory. I think the law is on our side, and certainly

23 justice is on our side in this case.

1 Who has been prejudiced by the mistake in the
2 name? No one, except Mr. Lataif, and only because Mr.
3 Cobb intended to play games. I think it's valid in law,
4 Your Honor.
5 I don't want to go on and on. I think I made
6 my points. I do have these authorities, if Your Honor
7 would like to examine them. If you have any questions,
8 I'd be happy to answer them.
9 MR. HYMAN: Your Honor, I'd like to comment on
10 a number of things. There's no doubt we'll say true, that
11 a corporation is bound by a contract if it makes it, mis-
12 describes itself. But here we're talking about the effect
13 of an assignment from an assignor to an assignee on a
14 third-party, by the contract.
15 And it would seem to me to be perfectly clear
16 that if you want to bind a third party by a contract, you
17 should name that person and not another person. And I
18 would say again that an assignment is a peculiar kind of
19 contract; that is, it's the reverse of a third-party
20 beneficiary contract. It's a third-party burden contract.
21 It imposes an obligation on a third party. And it's an
22 extraordinary contract in the sense that it makes one per-
23 son liable for the debt of another person without his

1 written agreement.

2 And it would, it would seem to me that the

3 case that Mr. Sissman cites from the Northern District of

4 West Virginia has no bearing whatsoever. That was a

5 matter of assigning a chose in action and this is des-

6 cribing an action. And here we're talking about whether

7 there was a different party named, and not a different

8 party but a different person.

9 And what, what we are attempting to do on the

10 plaintiff's side is to have this Court read this contract

11 as being a contract that relates to a party who's not

12 named in the contract. And we say that assignment, being

13 the kind of instrument that it is, that the assignment has

14 no legal effect.

15 And I go back and ask that you look, that you

16 consider the ruling in the Rockwell case, in which we say

17 that the question is one of misnomer. And the answer is

18 there was no misnomer, because there were different persons

19 involved. And that seems to me the situation here, based

20 on the records of the county which have been tendered to

21 you.

22 MR. SISSMAN: It will serve no purpose to

23 repeat what I've said. I just, as one further example,

1 point out once again, quoting from Fletcher's Section
2 2445:
3 "In the will situation, misnomer of a corpora-
4 tion in a will does not defeat the purpose of the testator
5 if the corporation intended is apparent, or ascertainable
6 by proper proof, for the rule that a bequest or devise will
7 not fail because of a mere inaccuracy in the designation
8 of the beneficiary, where the identity of the latter can
9 be ascertained with reasonable certainty either from the
10 will itself or by extrinsic evidence, applies to corpora-
11 tions as well as to natural persons. . ."
12 What we really have is a rule. In contracts
13 misnomers are not a problem. In wills, it's not a problem;
14 and in deeds it is not a problem. And, yet, we have the
15 authority that I have cited plus general authority that
16 assignments are informal.
17 And we just have a situation here and, Your
18 Honor, I believe the phrase is "We do not have to know
19 as judges what we know as men." It's not real clear who's
20 working for whom, and I think Mr. Lataif wisely intended
21 to cover all bases.
22 It was Larry Myers or Larry Myers' corporation
23 was making assignment what was owed them by either Doug

1 Cobb or Doug Cobb's corporation. And it would be different
2 if anybody relied upon that name problem, but nobody did.
3 Everybody treated the name as being the name in interest.
4 And it's just really unfair to come in here
5 after the litigation and essentially to play games. And
6 I think that's what's being done here. And I would move
7 for judgment on this point.
8 THE COURT: In my view, the judgment would have
9 to be entered for the Defendant in this case. I'm really
10 under a certain sympathy for the Plaintiff's situation,
11 because I think he acted in perfect good faith.
12 This is one of those cases in which a party
13 suffers a harsh result in order that the legal well may not
14 be polluted, I suppose. This is a situation in which it's
15 necessary that a rule be maintained requiring a certain
16 amount of precision in order to avoid horrendous results
17 in other cases. Not in this case. No one would have been
18 much hurt in this case.
19 Mr. Cobb certainly knew what was intended here,
20 and need not have paid Mr. Myers. Could well have paid
21 Mr. Lataif, and there would have been no injury.
22 However, to adopt a rule that would permit that
23 seems to me to be the reason why Rockwell versus Allman was

1 decided. To straighten that sentence out, Rockwell versus
2 Allman was decided in order to prevent the adoption of a
3 ruling which would permit a rather dangerous result.
4 It can be visualized if I have an account, let's
5 say in two banks which no longer exist. I have an account
6 in the Arlington Trust Company and I have an account in the
7 Clarendon Trust Company. And I owe Mr. Sissman $1,000.
8 There's enough money to cover that in my
9 Arlington Trust account. There's not enough to cover it
10 in the Clarendon Trust account. I tell Mr. Sissman that
11 I'm sending him a check for $1,000. And he says, "On what
12 bank?" And I say, "On the Clarendon Trust Bank."
13 So he calls up the Clarendon Trust Company
14 and says, "I have a check coming in from Russell for that
15 amount." And the check that I send him I write on the
16 Clarendon Trust account which doesn't have funds.
17 There is almost idem sonans. The names of the
18 two accounts sound the same. They end up with the same two
19 words or even the last syllable of the first name is the
20 same.
21 I'm sure in actual life those two banks being
22 in the same community had a lot of problems of that kind.
23 I simply had the wrong payee on it. I might have intended

1 to do the right thing, but that doesn't obligate Arlington
2 Trust to make that good. I've named the wrong drawee. The
3 call from the payee isn't going to straighten it out.
4 Mightn't a call from me wouldn't straighten it out.
5 The drawee must be correctly named. Otherwise,
6 we would have endless lawsuits by people who would say in
7 perfect good faith they got oral advice. They got a tele-
8 phone call or some oral communication from somebody not
9 in writing, telling them that this particular operation ex-
10 isted.
11 I can imagine the confused state of the law
12 that would result if that were the rule. And, therefore,
13 I think it's necessary in an assignment the name of the
14 obligator be spelled out with some precision, so that
15 everyone knows exactly where he stands and that parol com-
16 munications attempting to put the parties on notice of the
17 obligation would not suffice to straighten it out.
18 This is true to a large degree because an
19 assignment is a peculiar animal. The obligator under an
20 assignment has no stake in the dispute between the assignor
21 and the assignee and he has no control of it. And he becomes
22 obligated to pay the debt of the assignor without any
23 consent on his part. I think -- and there is a statute, of

1 course, in Virginia which makes that easy to do.

2 But I think it's essential that if that liability

3 is to be fixed on that obligator without any notice to him

4 or consent by him, that he be precisely named. And if it

5 were possible for him to be made liable on the basis of a

6 telephone call or a letter when he wasn't precisely named

7 in the assignment,the confusion and the litigation that

8 could arise is unimaginable.

9 I know of no case precisely in point on one of

10 these things. But it seems logical that a rule of some

11 rigidity be maintained in this kind of a case. So judg-

12 ment will be entered for the Defendant. Will you prepare

13 an order?

14 MR. SISSMAN: Your Honor, if I may, that would

15 go to the Defendant Commercial Industrial Construction. It

16 seems to me we do have the, what we discussed, and I wonder

17 if judgment should properly be entered against him.

18 THE COURT: Well, I did not realize that there

19 was any contention that Mr. Cobb owed Mr. Myers any money.

20 I gathered that it was either stipulated or framed in the

21 pleadings that whatever obligation flowed to Myers came out

22 of the corporation --

23 MR. SISSMAN: No, sir. That certainly --