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SUMMONS.

THE STATE OF NEW JERSEY, to

Morris D. Kaufman and Michael
Weiner, Trdg. as Kaufman & Weiner.

You are summoned to answer the annexed complaint of Somers Lumber Company, a corporation of the State of New Jersey, in an action at law in the Atlantic County Circuit Court. And take notice that unless you file your answer to the said complaint with the clerk of the Atlantic County Circuit Court, at Mays Landing, New Jersey, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, HONORABLE RALPH W. E. DONGES, Judge of the Atlantic County Circuit Court, at Mays Landing, this seventh day of August, nineteen hundred and twenty-three.

E. A. PARKER,
Clerk.

COLE & COLE,
Attorneys.

COMPLAINT.

ATLANTIC COUNTY CIRCUIT COURT.

10	SOMERS LUMBER COMPANY, a corporation, &c., <i>Plaintiff,</i>	} Action at Law. Complaint.
	v.	
	MORRIS D. KAUFMAN and MICHAEL WEINER, tradg. as KAUFMAN & WEINER, <i>Defendants.</i>	

20 The plaintiff, Somers Lumber Company, a corporation of the State of New Jersey, doing business in the City of Atlantic City, County of Atlantic, says that:

1. On September 9, 1922, defendants entered into a written agreement with Willis M. Arbegast, a copy of which is annexed, made a part hereof and marked Exhibit "A."

30 2. By the terms of said agreement said Arbegast was to do certain work and furnish certain materials to defendants for which they were to pay the sum of \$22,426 in manner and at the times set forth in said agreement; it being provided that:

"Payments of all of the above amounts to be made shall be paid upon the certificate of the said architect (said architect being Lewis R. Barber)."

3. Said Arbegast performed work and furnished materials on and for the buildings referred to in said agreement until about March 1st, 1923, when he abandoned his contract, since which time said defendants took over the completion of said contract and have completed it.

4. Plaintiff is engaged in the business of furnishing lumber and materials in the construction of buildings and on September 29, 1922, entered into a contract with said Arbegast to furnish him with lumber, millwork and glass to be used by him in defendants' building named in Schedule "A" according to list furnished by said Arbegast to plaintiff for the sum of \$3100, terms net cash monthly.

10

5. Between October 31, 1922, and March 1, 1923, plaintiff furnished to said Arbegast, lumber, millwork and glass to the amount of \$1086.40 and which was used in defendants' buildings.

20

6. Of the amount stated there was furnished up to and including the 31st day of January, 1923, lumber, millwork and glass to the amount of \$811.70, and between said 31st day of January and the 1st day of March, 1923, to the amount of \$274.70.

7. Notwithstanding that said agreement between defendants and Arbegast provided for payments only upon certificate of the architect, said defendants in advance of receiving such certificate made payments from time to time to said Arbegast to an amount in excess of \$5,000 and said payments were made before the 1st day of March, 1923.

30

8. On the 1st day of March, 1923, plaintiff demanded of Arbegast said sum of \$811.70 which he

failed and refused to pay, and on the 3rd day of March, 1923, demanded of him said sum of \$274.70, which he failed and refused to pay.

9. On the 1st day of March, 1923, plaintiff served on defendants what is familiarly known as a stop-notice, a copy of which is hereto made a part hereof and marked Exhibit "B," and on the 3rd day of March, 1923, served a like stop-notice, a copy of which is annexed, made a part hereof and marked Exhibit "C."

10. Since the service of said stop-notice plaintiff has demanded of said defendants the payment of said sums and they have refused to pay. Since the serving of said stop-notice there has become due to said Arbegast from defendants under the terms of said agreement a sum in excess of \$10,000.

20 Judgment will be claimed for the total of said notices, to wit, \$1086.40, with interest from March 1, 1923, besides costs.

COLE & COLE,
Attorneys of Plaintiff.

EXHIBIT "A."

30 THIS AGREEMENT made this Ninth day of September, A. D. Nineteen Hundred and Twenty-Two, BETWEEN MORRIS D. KAUFMAN, and MICHAEL WEINER, trading as partners, as KAUFMAN AND WEINER, party of the first part, and WILLIS M. ARBEGAST, party of the second part, WITNESSETH, that the said party of the second part, for and in consideration of the sum of TWENTY TWO THOUSAND FOUR HUN-

DRED AND TWENTY SIX (\$22,426.) DOLLARS to be paid as hereinafter set forth, agrees to and with the said party of the first part, to provide and furnish all such labor and materials as shall be necessary for the proper erection and completion of the store and apartment to be erected upon a certain lot situate on the North side of Atlantic Avenue and known as No. 1007 Atlantic Avenue, in the City of Atlantic City, New Jersey, and owned by said Kaufman and Weiner.

10

All of the above labor and materials to be performed and furnished in accordance with the plans and specifications furnished by Lewis R. Barber, Architect, a copy of which plans and specifications are hereto attached and made a part of this contract. Said specifications being modified with changes and alterations, as provided in the sheets attached hereto and marked "changes and alterations in specifications for building to be erected for Kaufman and Weiner," said labor and materials to be performed and furnished subject to the approval of said Lewis R. Barber, Architect.

20

IT IS AGREED between the parties hereto that the second party will entirely complete the erection of said building within four months from the time that possession of the said property is given to the said second party for the purpose of starting the erection of said building.

Party of the second part further agrees as part of the work to be performed by him under this contract, to brace up and support the adjoining building known as No. 1005 Atlantic Avenue.

30

Party of the first part agrees to pay for said labor and materials, the said sum of Twenty-two Thou-

sand Four Hundred and Twenty-six (\$22,426.) Dollars, in manner following:

When foundations are erected	\$2500.
when third story joists are set	3500.
when ready for plastering	4000.

10 In addition to the above provided payments the parties of the first part agree to pay on account of the said contract, as the work shall progress, the sum of Ten Thousand (\$10,000.) Dollars, which shall be for the brick, lumber and materials as same are delivered in Atlantic City. Payments to be advanced for the purchase price of said materials in payment as Bills of Lading for same are delivered and the materials so delivered in Atlantic City shall be immediately placed at the location of the building to be erected and shall become the property of the first party.

20 The balance or sum of Twenty-four Hundred and Twenty-six (\$2426.) Dollars, together with any sum or sums that may not be required for the payment of materials as above provided which remain unpaid on the contract price at the completion of the said building, shall be paid within sixty days after the proper completion and approval of same by Lewis R. Barber, Architect, and payments of all of the above amounts to be made shall be paid upon the certificate of the said Architect.

30 It is further understood and agreed between the parties hereto that heating and plumbing for the said building is excepted from this contract, the owners to supply and install same as the building progresses, at their own cost and expense.

Party of the second part shall furnish the owner full release of Liens when building is completed and before final payment is made.

Complaint

7

WITNESS our hands and seals the day and year above written.

Morris D. Kaufman

Michael Weiner

Trading as

Kaufman and Weiner

Willis M. Arbegast

Signed, Sealed and Delivered)

in the presence of)

Robert M. Johnston)

10

EXHIBIT "B."

Atlantic City, N. J.

Morris D. Kaufman and Michael Weiner, trading as Kaufman and Weiner, Owners.

Willis M. Arbegast, Contractor.

You are hereby notified that Willis M. Arbegast is justly indebted to us for the sum of *Two Hundred Seventy-four Dollars and Seventy Cents* for material furnished by us to him and used in the erection of the store and apartment to be erected upon a certain lot situated on the north side of Atlantic Avenue, west of Virginia Avenue, known as 1007 Atlantic Avenue, Atlantic City, New Jersey, and also in work on the adjacent building known as 1005 Atlantic Avenue, Atlantic City, New Jersey, pursuant to a written contract made between you and him and on file in the Atlantic County Clerk's Office; and you are further notified that he has failed to pay any part of this sum, and you are therefore required to retain the amount so due and claimed by us out of the amount owing by you on the said contract, and that may hereafter become due and owing from you

20

30

on said contract, and on being satisfied of the correctness of our demand, to pay the same to us.

The above mentioned amount represents the amount due us for material furnished during February, 1923, and is in addition to Eight Hundred Eleven Dollars Seventy Cents for which we served notice on March 1, 1923.

SOMERS LUMBER COMPANY

BY: _____

10 Dated this 3rd day of
March, 1923.

EXHIBIT "C."

Atlantic City, N. J.
Morris D. Kaufman and Michael Weiner, trading as
Kaufman and Weiner, Owners.

20 Willis M. Arbegast, Contractor.

You are hereby notified that Willis M. Arbegast is justly indebted to us for the sum of *Eight Hundred*

70

Eleven ——— Dollars for material furnished by us to

100

30 him and used in the erection of the store and apartment to be erected upon a certain lot situated on the north side of Atlantic Avenue, west of Virginia Avenue, known as 1007 Atlantic Avenue, Atlantic City, New Jersey, and also in work on the adjacent building known as 1005 Atlantic Avenue, Atlantic City, New Jersey, pursuant to a written contract made between you and him and on file in the Atlantic County Clerk's Office; and you are further notified that he has failed to pay any part of this sum, and you are therefore required to retain the amount so due and claimed by us out of the amount owing

by you on the said contract, and that may hereafter become due and owing from you on said contract, and on being satisfied of the correctness of our demand, to pay the same to us.

The above mentioned amount represents the amount due us for material furnished to February 1, 1923.

SOMERS LUMBER COMPANY,
BY: _____

Dated this 1st day of
March, 1923.

10

ANSWER.

ATLANTIC COUNTY CIRCUIT COURT.

SOMERS LUMBER COMPANY,
a corp., &c.,
Plaintiff,

20

v.

MORRIS D. KAUFMAN and
MICHAEL WEINER, trad-
ing as KAUFMAN &
WEINER,
Defendants.

Action at Law.
Answer.

30

The defendants, Morris D. Kaufman and Nicholas Michael Weiner, trading as Kaufman & Weiner, both residents of the City of Atlantic City, County of Atlantic and State of New Jersey, answering the complaint in the above cause, say:

1. They admit paragraph 1.

2. They admit paragraph 2.
3. They admit paragraph 3.
4. They have no knowledge or information sufficient to form a belief as to the matters and things set forth in paragraph 4.
- 10 5. They have no knowledge or information sufficient to form a belief as to the matters and things set forth in paragraph 5.
6. They have no knowledge or information sufficient to form a belief as to the matters and things set forth in paragraph 6.
7. They deny paragraph 7.
8. They deny paragraph 8.
- 20 9. They admit paragraph 9.
10. They deny paragraph 10.

FIRST DEFENSE.

- 30 1. They say that at the time the said Arbegast abandoned the work in question, they had paid to said Arbegast, in accordance with the terms of said contract, \$13,460.00.
2. That in the completion of said work, they have expended upon said work, in order to complete the same in accordance with the plans and specifications, after said Arbegast abandoned said work, the sum of \$13,146.03, making a total of \$26,606.03;

whereas, in accordance with the terms of said contract, said work was to have been completed for the sum of \$22,426.00, leaving a balance due from said Arbegast to said Kaufman & Weiner on account of said work of \$4,180.03.

SECOND DEFENSE.

Defendants, Morris D. Kaufman and Nicholas Michael Weiner, partners, trading as Kaufman & Weiner, say: 10

1. That at the time the said stop notice was served upon them, there was no moneys in their hands due or to grow due to the said Arbegast.

Attys. for Defendants.

[ENDORSED]

20

We consent to the filing of the within answer.

Cole & Cole,
Atty. of Pltff.

Aug. 28, 1923.

30

NOTICE.

ATLANTIC COUNTY CIRCUIT COURT.

10	SOMERS LUMBER COMPANY, a corporation, &c., <i>Plaintiff,</i>	} Action at Law. Notice.
	v.	
	MORRIS D. KAUFMAN, <i>et al.</i> , <i>Defendants.</i>	

To Cole & Cole, Esqs., Attorneys of Plaintiff:

20 Sirs:

Please take notice that upon the hearing of the above cause, we shall apply for an order to amend the answer therein, by adding the following thereto:

“Third Defense.

That said Willis M. Arbegast never finished or completed the work he was obligated to finish under and by virtue of the contract and specifications referred to in the complaint.

Fourth Defense.

30

That said defendants say that while they do not admit that it was necessary under and by virtue of the terms of the contract referred to in the complaint to get the certificate of an architect, before making payments, they, nevertheless, say that they attempted to get the certificate of an architect, but were unable to do so by reason of the fact that one of the architects, L. R. Barber,

could not be found by the defendants, and, furthermore, architect L. R. Barber claimed that he was not employed to give or furnish such certificates, and the other architect, C. H. Conover, refused to give a certificate, because he said that he was not familiar either with the contract or specifications, or with the work being done."

Dated February 5th, 1924.

BOURGEOIS & COULOMB,
Attorneys of Defendants.

Above amendment filed by consent and order of Court, October 2nd, 1925.

REPLY.

ATLANTIC COUNTY CIRCUIT COURT.

SOMERS LUMBER COMPANY,
a corporation, &c.,
Plaintiff,

v.

MORRIS D. KAUFMAN and
NICHOLAS MICHAEL
WEINER, trdg. as KAUF-
MAN & WEINER,
Defendants.

Action at Law.
Reply.

Plaintiff joins issue on the answer of the defendant and denies the averments in the several defenses.

COLE & COLE,
Attorneys of Plaintiff.

TESTIMONY.

ATLANTIC COUNTY CIRCUIT COURT.

10	SOMERS LUMBER COMPANY, a corporation, etc., <i>Plaintiff,</i>	} Action at Law.
	v.	
	MORRIS D. KAUFMAN and MICHAEL WEINER, trad- ing as KAUFMAN & WEINER, <i>Defendants.</i>	

20

Mays Landing, N. J.

APPEARANCES:

MESSRS. COLE & COLE, for plaintiff.

MESSRS. BOURGEOIS & COULOMB, for defendants.

The above entitled case was tried on November
 2, 1925, before HON. THEODORE W. SCHIMPF, Judge,
 30 and jury.

(Mr. Cole opened the plaintiff's case to the jury.)

(Mr. Coulomb opened the defendants' case to the
 jury.)

Mr. Cole: I offer in evidence agreement dated September 9, 1922, between Kaufman and Weiner and Arbegast.

(The paper offered is received in evidence and marked as an exhibit for the plaintiff, P1.)

Mr. Cole: I offer in evidence stop notice dated March 1, which the Somers Lumber Company served on Kaufman and Weiner.

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(The paper offered is received in evidence and marked as an exhibit for the plaintiff, P2.)

Mr. Cole: I also stop notice of March third, 1922, from Somers Lumber Company to Kaufman and Weiner.

(The paper offered is received in evidence and marked as an exhibit for the plaintiff, P3.)

20

Mr. Cole: We offer in evidence statement showing the correct amount due us from Arbegast with a thousand dollars credit leaving due \$1086.40.

(The paper offered is received in evidence and marked as an exhibit for the plaintiff, P4.)

Mr. Cole: We offer in evidence statement produced by counsel for the defendant showing date when payments were made and the amount paid to Arbegast which we accept as correct.

30

(The paper offered is received in evidence and marked as an exhibit for the plaintiff, P5.)

Mr. Cole: Now, is it agreed that there was no architect's certificate for any of these payments?

Mr. Coulomb: Correct. It is agreed that there was no architect's certificate for these payments represented there, but it is insisted that for some of them, those for the foundations, \$2500, and the third floor joists there was no necessity for an architect's certificate. It was only for the material.

Mr. Cole: Well, I do not remember about that. Whatever the contract says.

10

Mr. Coulomb: I neglected to ask to have this amendment: Notice was given in February, 1924, when this first came up for trial. It was notice served on Judge Cole. Is there any objection to that amendment, Judge Cole?

Mr. Cole: That is the matter about the architect?

Mr. Coulomb: Yes.

20

Mr. Cole: No.

PLAINTIFF RESTS.

30

DEFENDANT'S CASE.

MORRIS D. KAUFMAN, called as a witness on behalf of the defendants, being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Coulomb:

10

Q. Mr. Kaufman, you are one of the defendants in this suit?

A. Yes, sir.

Q. Are you associated with Mr. Weiner, the other defendant?

A. Yes, sir.

Q. What is your trade name?

A. Kaufman and Weiner.

20

Q. What business are you in?

A. Hardware.

Q. And where is your place of business?

A. 1007 Atlantic Avenue.

Q. Do you recall having a contract with Mr. Arbegast for some alterations to be done on your building there?

A. Yes, sir; I do.

Q. When did you start work?

A. We started in October first.

30

Q. In what year?

A. 1922.

Q. I show you a list of payments and ask you to take them in their order.

A. On October 30th, we gave Mr. Arbegast \$2,500 when the foundation was in.

Q. Was the foundation in at that time?

A. Yes, at that time. Now, at that time Mr. Arbegast came to me for the payment, that the foundation was in.

Q. Just let me ask you questions and you answer.

A. Yes.

Q. Were the foundations in at the time you made that payment?

A. Yes.

Q. What is the next item?

10 A. The next item we have was in November; it was payment due of \$1,200 for brick work.

Q. To whom was that paid?

A. Well, that was paid to Arbegast, also. Then another payment was—

Q. Before you read that payment, did you have any talk with Mr. Arbegast at that time, with respect to the payment of that \$1,200?

20 A. Yes, sir. He came in and wanted the money for the bricklayers, to pay the bricklayers, he said, and then I told him that—I asked him for the certificate—

Mr. Cole: I do not know how far this is going. Of course, I want to object to it. It cannot bind us, conversations between him and Mr. Arbegast. I do not mind the proof going in, but it ought to be subject to my having it stricken if it appears to be an attempt to bind us.

30 The Court: Well, it appears to be irrelevant in this action; isn't it?

Mr. Coulomb: No, if your Honor please. The whole question is whether these payments, not only to the brick contractor but to anybody else, were properly made from a certificate of an architect. It does not make any difference, it seems to me, whether

a payment is to a brick contractor, whether to the Somers Lumber Company, or to anyone else. Of course, they were all paid to Arbegast.

Mr. Cole: The point I make is that I do not want you to bind us by some talk he had with Arbegast. Can't you show the payments that were made without showing that conversation?

Mr. Coulomb: Yes.

10

Q. Now, did you have a certificate from Mr. Barber, an architect, at the time?

A. When Mr. Arbegast—

Q. Just answer that question. Did you have a certificate?

A. No, sir; I didn't have any certificate.

Q. Why not?

A. Because I didn't get it.

Mr. Cole: I object, and I think that raises the crucial question in this case. I think this case is ultimately a question of law. I object to any explanation by the witness as to why he didn't get the architect's certificate. The contract provides that he should have it and my contention is that no excuse can be afforded for not getting it, and that raises the legal question.

20

Mr. Coulomb: I think this is an important feature of this case, but I do not agree with Judge Cole that it is the crucial feature of it. Here is the situation: we will be able to show (at least I think we will be able to show) that Mr. Barber in the first place was never (and, by the way, notwithstanding he was subpoenaed, he is not here; he claims to be ill; that is the word I got this morning. He

30

was regularly subpoenaed and I have the return)—that Mr. Barber was never employed; that is to say, he never considered himself employed to do any supervisory work at all on that building. Now, when the time came for the payment of these material sums to Arbegast, who is a man without very much ability I assume, needed the money to make his payments as they became due to his material men, he had done this amount of work and the
10 money was due him. If an architect's certificate had been withheld from him in my estimation, he could show that it was fraudulently withheld.

The Court: He could have offered testimony to show why it was withheld.

Mr. Coulomb: Yes. Now, as you will recall from the terms of the contract, there was to be paid first a certain amount of money when certain specific
20 things were done; first, \$2,500 when the foundations were in; then a certain amount of money when the second floor joists were in, and then a specific amount when the building was ready for plastering. I think they are the three specific items that did not depend on architect's certificates for payment, and did not depend on the question of the amount of work that had been done; I mean the value of the work that had been done. They were based upon specific stages in the completion of the job. But
30 when it comes to the other items, when the money was due to Mr. Arbegast, of course, the first question to be answered was: Is that money due under the terms of this contract? And if it was he could not have legally withheld his certificate. But the difficulty was that we could not get him. We could not get him; he was not there. We made every effort, as the proof will show if we are per-

mitted to proceed, to get Mr. Barber to give these certificates and he would not give them—I did not mean to say he would not give them, but you could not find him to get them; and in addition to that, he subsequently denied that he was obliged to give them.

Now, that is the situation with respect to him. In order to try to do the best we could we went to his partner or his associate, Mr. Conover, who subsequently had charge of the completion of this building and asked him to give the certificates for this work. He said he would not do that, because he had no knowledge of the specifications and he did not know what had been done there, and he refused to give it. Then as a last resort, on account of the bond, Mr. Kaufman went to Mr. Johnson, Bob Johnson, and asked him about it, and he gave him this advice, good, bad or indifferent. But, however, that was done. From that it seems to me, if your Honor please, the moneys were lawfully paid; that is, they were lawfully paid to the extent that they had been earned, and, as I have said, we could not get the certificate of the architect. 10 20

Mr. Cole: There is no dispute about the fact that the money was earned.

The Court: In other words, the materials had been furnished; the contractor was entitled to the money he received; and the only question presented now is whether he was entitled to it without complying with the terms of the contract to the extent of getting an architect's certificate. 30

Mr. Coulomb: That is it.

The Court: I will take your proof. I will overrule the objection.

Mr. Cole: Your Honor will allow me an exception?

The Court: Yes.

Q. (Repeated by stenographer) Now, did you have a certificate from Mr. Barber, an architect, at the time?

A. No, sir; I didn't have any certificate.

Q. Why not?

10 A. Because I couldn't get it when I went down

Q. Went where?

A. To the architect's, and they told me at the architect's office that he was not there; that he was away; that he was sick. He was away somewhere in Camden or Philadelphia. That I didn't know where he went to, but he was sick at that time. So I asked Mr. Conover, his partner at that time, I said: "Mr. Conover, can you give me a certificate
20 for the money that I have to pay to Mr. Arbegast, the contractor?" He said, "I would, but I don't know anything about the transaction between you and Mr. Barber, and, therefore, I cannot give you any certificate for that." So then I went home and I told Mr. Arbegast. He says, "Well, unless you pay me the first payment——"

Mr. Cole: This is all objected to, may it please your Honor, and I ask an exception.

30

The Court: Yes.

The Witness: "I won't pay you the money," he said; and so I had to pay.

Q. And how much did you pay the men?

A. I paid him at that time \$2,500, for the founda-

tion was in; then the next payment I paid him on November 10th, for brick.

Q. What did you do then?

A. Then I went to the architect's office again for the certificate and I couldn't find him.

Q. Where was he, home?

A. He was not there. I went to the architect's office mostly every day or every other day, but he was never there. I have not seen the architect then afterwards, for a whole year or maybe over a year. 10
Then I met him once; that is all.

Q. Who was the architect?

A. Barber.

Q. And where was his office?

A. His office was in the Guarantee Trust Building.

Q. Was he subpoenaed to be here today?

A. He was, but he is sick.

Q. How do you know that?

A. Because he called up—somebody called up for him and told Mr. Weiner there that he was sick 20
and he cannot come; but Mr. Conover is here.

Q. Now, what other payments were made?

A. After that I paid him a payment of \$1,400 for brick, brick work; he gave it to the bricklayer. Then on November 29th, I paid \$60 for ceiling; on November 30, \$1,000 for iron work.

Q. Who did the iron work?

A. Who was it charged to?

Q. Yes.

A. Charged to Arbegast, and brung the check on 30
to Arbegast, to the contractor. Then on December 9, I gave him \$1,500 for the brick work which he gave to the bricklayers. Then on December 9, again I gave him \$1,000 for lumber; that was given to Somers Lumber Company. He gave it to Somers Lumber Company. All the checks were made out to Mr. Arbegast himself and he gave it to the people

that he owed. On December 16th, we gave him \$200. On December 23rd, we gave him \$1,000. On January 6th, we gave him \$200. On January 12th, we gave him \$2,500. We got all the checks there.

Q. Are these checks which I hand you, the checks represented by the payment which you have just testified to?

A. Yes, sir; except one.

Q. Which one is that?

10 A. That is Robert Johnson's check.

Mr. Coulomb: I offer these in evidence.

The Witness: Yes, sir; these are all the checks that are here.

(The checks offered are received in evidence and marked as one exhibit for the defendant D1.)

20 Q. How much did you pay to Mr. Arbegast at the time that he quit work?

A. \$13,460.

Mr. Coulomb: I understand it is conceded in this case at the time these payments were made, the moneys were due and that the only difference between myself and Judge Cole with respect to the fact of those payments is, that they were paid without an architect's certificate.

30

Mr. Cole: Well, I do not agree that they were due; they were not due until you got the architect's certificate.

The Court: What you mean is, that the amounts were earned?

Mr. Cole: Yes.

The Court: But could not become due until the architect's certificate was furnished?

Mr. Cole: Yes.

The Witness: Well, I could not get an architect's

The Court: Never mind now.

10

Q. Now, there was one more payment of \$900, which I don't think you mentioned?

A. Yes; that was \$900; that was paid also to Mr. Arbegast. The \$900 was paid upon the decision between Gaskill and Johnston. We had a meeting at the office and they were trying to get the carpenters to finish work.

Q. Now, Mr. Kaufman, didn't Arbegast finish this job? 20

A. No, sir; he left it in the middle of it.

Q. What time did he leave it?

A. Why, he left the job about February first; around that time.

Q. Did he do anything at all after that time?

A. Not a thing; no, sir; he only had about one carpenter working at that time and he took this one off and he had no material on the job whatever. There was not a piece of lumber there on the job after he quit work. 30

Q. Did you cause a notice to be served upon him?

A. Yes, sir.

Q. I show you a notice and ask you by whom it is signed?

A. Yes, sir; that is signed by me and my partner.

Q. This is the notice you served upon him?

A. Yes, sir.

(The paper referred to is offered and received in evidence and marked as an exhibit for the defendant D2.)

The Witness: We served this notice when we couldn't do anything with him, because he would not agree——

10

Q. Did you go ahead and complete it yourself?

A. Yes, sir; we had to go and complete it ourselves, which cost us over \$4,000 more than the original contract called for.

Q. At the time that you made your last payment to Mr. Arbegast, which totalled \$13,460, how much was due to him then——

A. Nothing.

20

Q. ——on the contract itself, on the contract price?

A. Nothing was due to him whatever——oh, the balance of it.

Q. What was the balance?

A. The balance was about \$8,000; somewhere in the neighborhood of \$8,000 was the difference; a little over that.

30

The Court: That is what would have been due if he had done the work?

The Witness: Yes, sir; if he had finished the work.

Q. Now, do you recall how much it cost you to finish?

A. Why, it cost over \$12,000 between us.

Mr. Coulomb: Those figures can be agreed upon. The amount of the contract price was \$22,426; the amount paid to Arbegast, as already testified to, was \$13,460, leaving a balance of \$8,966 due on the contract if the contract had been finished. It cost \$13,192.23 to complete the building, for which Mr. Kaufman had in his hand \$8,966. That left a balance over and above the contract price of \$4,226.23.

Cross-examine.

10

Cross-examination.

By Mr. Cole:

Q. Were you familiar with all the provisions of your contract with Mr. Arbegast?

A. Yes, sir.

Q. And did you make the first payment to him?

A. Yes, sir.

Q. And did you remain familiar with all the provisions throughout the payments?

20

A. Well, I don't understand that.

Q. Each time that you made a payment to Mr. Arbegast to the total of \$13,460, were you familiar with the terms of your contract?

A. Yes.

Q. That is what I want to know. You were?

A. I was compelled to know.

Q. And, therefore, you knew that you were not authorized to make any payments to him except upon a certificate of the architect? You knew that you were not authorized to make any payment to him except upon a certificate of the architect? Did you know that?

30

A. I knew that, but I couldn't help it.

Q. Now, Mr. Kaufman, did you know that the

Somers Lumber Company was furnishing material there to your building?

A. I knew they were furnishing some lumber, but I don't know how much or when.

Q. You don't know how much?

A. No, sir; I never knew that.

Q. Yet you knew that Arbegast was buying lumber from the Somers Lumber Company and was delivering it on your property?

10 A. I seen him deliver it, but I didn't know where he was buying it.

The Court: Wait until the question is finished and then answer it.

Q. But you knew that Arbegast was buying lumber from Somers Lumber Company and was delivering it on your property?

A. Yes; I knew that. I seen the wagon come
20 there.

Q. That is the answer.

A. I didn't know where he was buying it, but I seen the Somers Lumber Company truck delivering it; that is all.

Q. Did you have a kind of latent suspicion that he was getting the lumber from Somers Lumber Company?

A. I seen the Somers Lumber Company truck delivering it; that is all I know; but I didn't know
30 anything else about it.

Q. Did you know that the Somers Lumber—did you know that the lumber was coming from the Somers Lumber Company?

A. I didn't know anything about that.

Q. How many times did you see the Somers Lumber Company wagon there?

A. I myself seen it probably two or three times.

Q. It was right next to where you were doing business?

A. Yes, sir.

Q. Where is your place of business?

A. #1007 Atlantic.

Q. Which was right next door?

A. Right next.

Q. You were there all the time this work was going on?

A. I was not there all the time. I was in my place 10
all the time.

Q. Well, did you watch the job as it went along?

A. I used to go in there, yes.

Q. So you did see who was delivering material there; didn't you?

A. I seen the other truck was there a few times.

Q. How do you know that \$1,000 was paid to Somers Lumber Company?

A. I know, because he asked us for the Somers Lumber Company check. 20

Q. To pay the Somers Lumber Company?

A. We gave him a check and we seen the check.

Q. Did he ask you for a check for the Somers Lumber Company?

A. No; he asked us a check for the lumber.

Q. Didn't you say a moment ago, he asked you for a check for the Somers Lumber Company?

A. No; I beg your pardon. He asked us a check for the lumber; he has got to pay for the lumber. 30

Q. Well, you testified in answer to Mr. Coulomb's question, that he got a check of \$1,000 to pay the Somers Lumber Company. How do you know that?

A. I got the check back.

Q. When did you get the check back?

A. I couldn't tell you the exact date, but the check came back to the bank to us.

Q. Did you notice that he had paid the Somers Lumber Company?

A. Yes, sir.

Q. Where is that check?

A. The check is right there.

Q. Now, the check is dated December 9, 1922, and it is stamped December 12, 1922; therefore, you saw it a few days after that?

A. I saw it afterwards; yes, sir.

10 Q. And you knew then, of course, it had gone to the Somers Lumber Company?

A. I knew it from that.

Q. You knew then he was buying the lumber from the Somers Lumber Company?

A. After I received the check; I received the check.

Q. Did you see any other lumber company's truck there other than the Somers Lumber Company?

A. I don't remember that.

20 Q. Well, of course, you would remember if there was?

A. It might have been there; I was not standing there watching all the time.

Q. I am asking you if you remember any other?

A. I don't remember.

Q. Now, did you ever write a letter to Mr. Barber, the architect named in the agreement, and ask him for a certificate?

30 A. Write a letter to him? No, sir; I didn't know where he was; I couldn't write a letter.

Q. I am asking if you wrote a letter?

A. No, sir; I did not. I was only looking for him there most every other day.

Q. Now, did you make any note anywhere of the date when you first saw Mr. Barber and asked him for a certificate?

A. No, sir; I didn't see him there. I only seen him a year later.

Q. You never saw him at all?

A. I seen him about a year afterwards; after when my job was completed I seen him at his office.

Q. Now, let us get it straight. You never personally saw Mr. Barber in order to ask him for a certificate, until a year after the work was completed?

A. Yes.

Q. Is that correct?

10

A. Yes, I have not seen him until a year after the job was completed.

Q. Did you notify the Somers Lumber Company that you could not get an architect's certificate?

Mr. Coulomb: That is objected to.

A. No, sir.

Mr. Coulomb: Just a minute. It is objected to. 20
The answer came rather promptly.

Mr. Cole: Yes; I do not object to it for that.

The Court: It will be stricken, then.

Mr. Coulomb: I suppose Judge Cole insists upon his question and that just the answer be stricken out.

Q. (Repeated by the stenographer) Did you notify the Somers Lumber Company that you could not get an architect's certificate? 30

The Court: I think I will let that stand.

Mr. Coulomb: I cannot see what possible relevancy it can have. The Somers Lumber Company

could not object to his, I mean of themselves—
could not object to his paying Arbegast if Arbegast
was entitled to the money and, as a matter of fact

10 The Court: If it were impossible to get the architect's certificate, then it might be the duty of Mr. Kaufman to notify the Somers Lumber Company that that provision of the contract under the circumstances must be waived.

Mr. Coulomb: Of course, he had knowledge unquestionably, that this lumber was coming from the Somers Lumber Company; but what could the Somers Lumber Company do with respect to a waiver? They might waive it as to themselves, of course; but my contention is that a waiver is not essential under the circumstances of this case if the moneys were earned.

20

The Court: I am inclined to agree with you upon that, but still I think in view of the fact that you are dealing with testimony concerning the waiver and also with the question of law as to whether or not waiver might be had in this kind of a case, that the testimony on both sides of that proposition should be taken.

Mr. Coulomb: All right.

30

Q. Now, have you seen, Mr. Barber recently?

A. I have seen him probably two or three months ago; that is all; just passing along the street, that is all.

Q. And you say that he was subpoenaed to be here today?

A. Yes, sir.

Q. Who told you he was sick?

A. Why, there was a call, called up to our house last night, and saying he was sick.

Q. Where was his place of business during the time that this work was being done?

A. In the Guarantee Trust Building.

Q. Was there somebody in charge of his office?

A. Mr. Conover used to be there.

Q. So that when you went there, as you claim, to get these certificates, you found someone in charge 10 of his office?

A. Yes.

Q. When did you first go there?

A. I went there with the first payment I had to make.

Q. When was that?

A. That was October 30th, I think.

Q. October thirtieth. When did you next go?

A. Well, I don't remember the next date; I couldn't exactly tell you. It is on that little slip 20 of paper; I just read it off a minute ago, but I can't tell when exactly it was. As soon as I—

Q. Did you go there just before each payment was due?

A. Yes, sir; I went there before each payment was due.

Q. And always saw somebody there but didn't see Mr. Barber?

A. Didn't see Mr. Barber; no, sir.

30

Mr. Cole: I think that is all.

Mr. Coulomb: That is all, Mr. Kaufman.

The Court: Before Mr. Kaufman leaves the stand, let me ask a question. Who actually did the work of drawing this contract?

The Witness: Why, this contract was drawn in Gaskill's office.

The Court: In Gaskill's office?

The Witness: Yes, sir.

The Court: That was your attorney?

10 The Witness: Yes, sir, at that time.

The Court: All right.

(Witness excused.)

ROBERT M. JOHNSTON, called as a witness on behalf of the defendants, being duly sworn, was examined and testified as follows:

20 Direct examination.

By Mr. Coulomb:

Q. Do you remember the Arbegast contract, Mr. Johnston?

A. Yes, sir.

Q. You represented some bonding company, didn't you?

30 A. Yes, the National Surety.

Q. Do you remember Mr. Kaufman and Mr. Gaskill or Mr. Kaufman himself, coming to your office with respect to making some payment on account of the contract?

A. Yes; Mr. Kaufman, I think, alone.

Q. What was the difficulty at that time, apparently?

Mr. Cole: I think I will object. I do not see how any conversation between him and Mr. Kaufman would bind us.

Mr. Coulomb: If your Honor please, it seems to me it all goes to show the good faith of Mr. Kaufman; that is to say, he has not just recklessly ignored these provisions, but he has attempted to do what he thought was the thing to do in order to get, if possible, a certificate of the architect or find out what he could do. 10

The Court: I am inclined to think that this testimony which is now offered is wholly irrelevant and I will overrule it; but my suggestion would be that you make the offer on the record as to just what you intend to prove.

Mr. Coulomb: I offer to prove by Mr. Johnston, the witness on the stand, that Mr. Kaufman came to him sometime during the course of the contract while Arbegast was still working on the job, and told Mr. Johnston that he was unable to get a certificate from the architect; that the contractor was claiming his money and threatening to quit unless it was paid; that he explained the situation to Mr. Johnston and Mr. Johnston told him what he thought he could do. 20

The Court: I will overrule the offer. 30

Mr. Coulomb: Allow me an exception. That is all.

(Witness excused.)

CLARENCE CONOVER, called as a witness on behalf of the defendant, being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Coulomb:

10 Q. Mr. Conover, what is your business?

A. Architect.

Q. And where are you located?

A. In the Freeman Building, Atlantic City.

Q. Do you know Mr. Barber?

A. Yes, sir.

Q. And were you at any time associated with him or then have offices with him?

A. Yes, sir.

20 Q. What was the nature of your relationship with him?

A. In partnership.

Q. In partnership?

A. Yes, sir.

Q. Where were your offices?

A. 325 Guarantee Trust Building.

Q. And how long were you associated with him?

A. A little over a year.

Q. And beginning when and ending when?

A. Beginning the latter part of September, 1922.

30 Q. And continuing for a year?

A. Continuing for a little over a year after that time.

Q. Did you know Mr. Kaufman? One of the defendants in this action?

A. Yes.

Q. Did he ever come to your office in the Guarantee Trust Building?

A. Yes.

Q. What was the occasion of his coming there?

A. The first time he came in relation to a certificate for the payment on a contract.

Q. Where was Mr. Barber at that time?

A. Mr. Barber, at that time, was employed by the Bloom Corporation; that is, was a partnership. He was temporarily out of the business, employed as a superintendent.

Q. Where was he?

10

A. He was in New York, at that time.

Q. Do you know whether he was sick or not?

A. No; he was not sick.

Q. Did you tell Mr. Kaufman where he was?

A. Well, I didn't know. I told him I couldn't locate him.

Q. You told Mr. Kaufman that you could not locate Mr. Barber?

A. Could not locate him.

Q. When, if ever, did you finally locate Mr. Barber?

20

A. After that.

Q. Yes.

A. Probably a week or so after that.

Q. Did you tell Mr. Kaufman then that you had found where he was?

A. At that time?

Q. Yes.

A. A week after that.

Q. Where?

30

A. When he stopped in the office.

Q. What did you tell him about Mr. Barber then?

A. Well, I told him in reference to where he was at that time. I told him he was out of town in New York.

Q. Did you give him his address in New York?

A. No; he was just there temporarily; he was just there several days.

Q. Where did he keep himself, sir, from the first of October, when you went with him, or the last of September, until the first of February?

A. Well, he was with the Bloom Corporation, at that time.

Q. Who was the Bloom Corporation?

A. A firm of builders; a firm of builders in Atlantic City.

Q. And where were they working?

A. Well, the work was all over; it was mostly in Atlantic City, some in Egg Harbor.

Q. Well, where was Mr. Barber during that time? You said he was in the Bloom Corporation, but where was he? What part of the world was he?

A. Well, part of the time he was in Atlantic City and part of the time in New York; he was in various places.

20 Q. Do you remember Mr. Kaufman coming there on more than one occasion, for the purpose of getting a certificate?

A. Yes; he came on three occasions.

Q. Were you there at the time?

A. Yes.

Q. Did he say anything to you about getting a certificate from you?

A. Yes.

Q. Did you give it to him?

30 A. No.

Q. Why not?

A. I didn't—

Mr. Cole: This is all objected to on the same theory; that it is not admissible; that it is irrelevant and immaterial.

The Court: I will admit it solely for the purpose of showing where Barber was and whether or not a certificate could have been obtained, and whether he could not be found.

Mr. Cole: Allow me an exception?

The Court: Yes.

A. No; I refused to issue a certificate because I 10
didn't know the nature of the contract.

Q. Did you try to examine the contract and find out the nature of it?

A. No, I didn't examine the contract to find out the nature of it; and, in fact, I didn't know there was such a job the first time he came to me.

Q. But after that you knew; didn't you?

A. I never saw the contract until sometime afterwards.

Q. Well, on these various occasions when he came 20
to your office, with respect to getting a certificate, did he ask you for a certificate each time?

A. Well, at those various times when he came for the certificate he did and I tried to get in touch with Mr. Barber.

Q. And could you?

A. No.

Q. Did you know where he was?

A. No.

30

Mr. Coulomb: Cross-examine.

Cross-examination.

By Mr. Cole:

Q. You were a partner at that time, of Mr. Barber's?

A. Yes, sir.

Q. And didn't know he had this—didn't know of this contract with Kaufman and Weiner and Arbegast?

A. Not at all; he never mentioned it.

Q. Well, when Mr. Kaufman came there you knew it then; didn't you?

A. Yes; that is the first I knew there was a job.

Q. Did you ask him to show you the contract?

A. At that time?

10 Q. Any time?

A. No; I tried to get in touch with Mr. Barber.

Q. Didn't Mr. Kaufman hand you a copy of the contract?

A. No.

Q. Didn't he in any way, offer to show you the contract?

A. No.

20 Q. Well, if you knew that there was a contract between Kaufman and Arbegast and you were a partner of Barber and Mr. Kaufman said he wanted an architect's certificate, why didn't you ask to see a copy of the contract in order that you might know what its terms were?

A. Well, I didn't know; I didn't know that Mr. Barber was doing the work for him; I didn't know whether he agreed to make any or issue any certificate or supervise the work or anything, at that time.

30 Q. You mean to say that Mr. Kaufman didn't tell you?

A. Well, yes; he told me that Mr. Barber was to issue certificates on the work.

Q. Well, having told you that you then knew it; didn't you?

A. Well, yes; I knew it then.

Q. Well, then, having known it and being a partner, why didn't you ask him to show you the agree-

ment and get the facts from it so that you could determine whether you should issue that certificate as a partner?

A. Well, I couldn't have done that unless I had seen the agreement, whether Mr. Barber had agreed to do the work for them.

Q. Exactly, and why didn't you ask Mr. Kaufman for a copy of the agreement?

A. I did. Mr. Kaufman had no copy of the agreement between Mr. Barber and himself as to the architect's certificate? 10

Q. Well, didn't Mr. Kaufman tell you that under the terms of the contract between him and Arbegast, Mr. Barber was required to issue an architect's certificate?

A. Yes.

Q. All right. Now, having told you that, why didn't you ask him for a copy of the agreement in order that you might determine whether you, as a partner of Barber's, should not issue this certificate? 20

A. Well, that is just the point I objected to. Regardless of what the contract is, I don't think I should have issued a written certificate without seeing whether it was advisable to do it, from my point of view; in other words, we usually draw a contract ourselves and we know. I didn't know; that is the reason I hesitated about it and wanted to find out from Mr. Barber.

Q. In other words, you didn't care anything about the provisions in the contract between Kaufman and Arbegast as to Mr. Barber's duty to issue a certificate; is that right? 30

A. No; that is not correct.

Q. I want to see how your mind is operating. You say that Mr. Kaufman came to you and said in effect that he was entitled to have a certificate from

Mr. Barber under this Arbegast contract; is that correct?

A. That is correct.

Q. Then at that time, you knew you were a partner of Mr. Barber?

A. Yes.

Q. Well, now, did you then ask Mr. Kaufman to let you see the contract and also ask him to tell you what had been done in order that you might
10 determine whether he was correct in saying that he was entitled to a certificate?

A. No. I will tell you the first day Mr. Kaufman came in was on a Friday and he asked for Mr. Barber. He didn't ask for a certificate that day. He asked for Mr. Barber and was very anxious to get in touch with him. I told him I would try to locate Mr. Barber, which I did. I called on the long distance phone to his residence at Lower Bank and at the Bloom Corporation and several jobs they
20 were doing and couldn't locate him—

Mr. Coulomb: You could or could not?

The Witness: Could not locate him. The following morning, Saturday morning, Mr. Kaufman stopped in again and explained what it was, that he wanted a certificate. Of course, he must have it that morning, as he explained; the contractor insisted upon having the money. I told him I was
30 not familiar with it at all; I didn't know that there was such a job, didn't know that there had even been drawings made of such a job, and that the only thing I could do under the circumstances, was to find out from Mr. Barber and I tried to locate him again.

Q. All right. That is twice he came. Now, when the next time?

A. Well, the next time after that he had made the payment.

Q. He had?

A. Yes.

Q. All right. When he came Friday, he simply said he wanted to see Mr. Barber?

A. Yes.

Q. When he came Saturday, the following day, without giving you the contract or copy of it, that you might read it, without telling you what the facts were in order that you might determine whether the money was due, he left, and before the third occasion he paid the money; is that correct? 10

A. Before the third occasion.

Q. How do you know he had?

A. He told me he had.

Q. When was the third occasion as related to the second, that he came and told you he had paid the money?

A. Well, the third occasion was something in relation to the construction; he wanted me to go up and look at the job. That was not in relation to the certificate. 20

Q. He had already paid the money to these people, to Arbegast?

A. I don't recall the date now.

Q. Well, now, did you go up there? He asked you to go up?

A. On this third occasion, yes.

Q. Did you see the contract then? 30

A. No.

Q. Never saw it?

A. No.

Q. Did you give any opinion about the property, how it was progressing?

A. Well, as pertaining to the construction of the building, yes.

Q. What did he want to know?

A. Well, he objected to the way the brick work was being laid.

Q. How could you tell if you did not see the contract and specifications?

A. I seen the specifications but not the contract.

Q. Where was Mr. Barber getting his mail? How was it reaching him?

A. Well, at that time part of it was coming
10 through the office and part of it to the Bloom Corporation.

Q. Well, whenever a letter was addressed to him did you take care of it?

A. Yes.

Q. You were taking care of it; you were taking care of the affairs of the firm; weren't you?

A. Yes.

Q. That is what you were there for?

A. Yes.

20 Q. And if you had seen this contract between Kaufman and Weiner and Arbegast and you had been told by Mr. Kaufman what the situation was and just how much work had been done, wouldn't you have told him whether he was entitled to a certificate or not?

A. Yes, if I had seen the contract.

Q. So the reason you didn't, was because you didn't have any facts?

A. Yes.

30 Q. Is that correct?

A. That is correct.

Q. And Mr. Kaufman didn't give you any facts; is that correct?

A. Of course, I attempted to obtain the facts from Mr. Barber; that is all.

Q. I am asking you whether Mr. Barber gave you

any of the facts that you might issue a certificate under this contract, did he?

A. No.

Q. And the reason that you didn't give a certificate was because you did not have the facts?

A. That is right.

Q. And you were trying to get them from Barber?

A. Yes.

Q. Kaufman didn't give them to you?

A. No.

10

Re-direct examination.

By Mr. Coulomb:

Q. What facts were you trying to get from Mr. Barber?

A. Just what the contract was and whether Mr. Barber had agreed to do the work for Mr. Kaufman.

Q. That is, in fact, what you wanted to know? 20

A. Yes.

Q. You were not concerned about whether the work was being done or not?

A. No.

Q. But you were concerned about whether Mr. Barber had agreed to give a certificate?

A. Yes, sir.

Q. That is the fact that you wanted to find out?

A. Yes.

Q. Were you or were you not willing to give a 30 certificate until you knew whether Mr. Barber had agreed to give one?

A. No; I would not have issued a certificate without Mr. Barber's sanction.

Q. Would you have issued a certificate if you had known that all the work had been done upon the contract?

A. No.

Q. What was your answer?

A. No.

Q. Why not?

A. It was Mr. Barber's job. I think I should have had his approval on it.

Q. Is that what you told Mr. Kaufman?

A. Yes.

10 Q. Did you ever attempt to find out from Mr. Barber whether or not he had agreed to give an architect's certificate?

A. Yes, after that time; that is the first time I seen him after that time.

Q. When?

A. Probably a week or so after.

Q. And what was the result of your inquiry?

A. Well, Mr. Barber wasn't sure he was supposed to supervise the job. He said it had been left indefinite so far as he knew.

20 Q. Did he tell you whether or not you were to give a certificate?

A. No.

Q. Well, did you ask him whether you were or not?

A. Yes, at that time.

Q. And what did he say?

A. He said at that time he would see Mr. Kaufman and see if he wanted to. He told him then when the payment had been made.

30 Q. When was this, in the course of the work?

A. Oh, somewhere in November, the first part of November.

Q. Was Mr. Barber in his office between the first of October and the last of September, when you went there and the first of February?

A. Yes.

Q. Did you try to get in touch with Mr. Kaufman when Mr. Barber was in?

A. No; I asked Mr. Barber to go and see Mr. Kaufman.

Mr. Coulomb: That is all.

Re-cross examination.

By Mr. Cole:

10

Q. Mr. Conover, I wish you would try to search your memory and help us a little and fix the date as nearly as you can on this second Friday that you say Mr. Kaufman called.

A. (Referring to papers) I think it was the twenty-ninth of October.

Q. Now, you have already testified he called the following Saturday?

A. Yes.

20

Q. Then you have testified he called the third time and in the meantime he had already paid the money?

A. Yes, sir.

Q. Now, when was the third call?

A. Well, the third call was during the following week.

Q. The following week?

A. I don't remember the day.

Q. So that he paid this money sometime between October 29th and the week following?

30

A. Yes.

Q. Now, when did you first see Mr. Barber after October 29th?

A. It was—I would say it was about a week; I think it was next to the last week. He was in New York.

Q. You saw Mr. Barber about a week after Mr.

Kaufman called. Did you then mention this specific matter to him?

A. Yes.

Q. But at that time the money had been paid; hadn't it?

A. Yes.

Q. Were you sending any mail to Mr. Barber in New York?

A. No; I didn't know he was in New York at the
10 time. I didn't know he was in New York until he returned.

Q. When you saw him on this occasion, about a week after, was that in Atlantic City?

A. Yes.

Mr. Cole: That is all.

(Witness excused.)

20

MORRIS D. KAUFMAN, being recalled, testified as follows:

Further examination.

By Mr. Coulomb:

Q. Now, Mr. Kaufman, the contract provides
30 among other things that you were to pay \$2,500 when the foundations were erected?

A. Yes, sir.

Q. Was that paid?

A. Yes, sir.

Q. And that you were to pay \$3,500 when the third story joists were set. Was that paid?

A. Yes, sir.

Q. And that you were to pay \$4,000 when the building was ready for plastering. Was that paid?

A. No, sir.

Mr. Coulomb: That is all.

Cross-examination.

By Mr. Cole:

Q. When you said the \$4,000 was not paid, what did you mean?

10

A. Because he was not ready for it.

Q. Was no part of the \$4,000 paid?

A. No, sir.

Q. In other words, you paid \$13,460 exclusive of the \$4,000 due for plastering?

A. Yes.

Q. Did you pay the \$3,500 in one sum or in several sums?

A. I don't remember what it is.

Q. Well, you didn't read off any \$3,500; so I am wondering how you paid that.

20

Mr. Coulomb: There are the payments you made.

(Handing paper to the witness.)

Q. Tell us how you paid the \$3,500?

A. \$3,500 was paid in two sums, and that is a \$2,500—

Q. What date?

A. December ninth and January 12th; a \$1,000 and \$2,500.

30

Q. December 9th and January 12th, what amounts?

A. \$1,000 December 9th and January 12th, \$2,500.

Mr. Cole: That is all.

(Witness excused.)

DEFENDANT RESTS.

PLAINTIFF'S MOTION FOR A DIRECTION OF
VERDICT.

Mr. Cole: The plaintiff asks a direction for the sum of six—whatever the figures are, with interest.

Mr. Coulomb: And the defendant asks a direction.

10 Mr. Cole: Under the undisputed legal proof offered the defendants paid to Arbegast in advance of the due date, a sum in excess of the amount due from Arbegast to the plaintiff. It is our contention, first, that no excuse can be offered for not having the architect's certificate; second, if there can be excuse or legal reason neither has been given in this case, and that there is no testimony before the jury which would justify their finding that the defendant has submitted a sufficient legal reason.

20 Mr. Coulomb: It is our contention, aside from that question which I will discuss later, that we are entitled to a direction here, because of these facts: This building was to have cost \$22,000 and some odd dollars. It, in fact, cost \$26,000 and some odd dollars. So that the building has actually cost, and Mr. Kaufman has actually paid, between four and five thousand dollars more than Mr. Arbegast agreed to build this building for. This stop notice was served on March first. At that time the proof is
30 that Mr. Arbegast had quit work; he had abandoned the job.

The Court: March first?

Mr. Coulomb: Yes. The stop notice was served on March first. The notice on Mr. Kaufman was

served on February 26th. Now, it is my conviction that it makes no difference what occurred before this contract was finished. Let us suppose, for instance, that Mr. Kaufman had not paid a cent on account of this contract; that every nickel that was due under this work—it amounts to \$13,460; that is the amount which he had paid according to Judge Cole unwarrantedly. Suppose that he had it in its possession when that stop notice was filed. That is the most, that is the best that can be asked for, it seems to me, according to Judge Cole's theory; that he should have had every nickel of that in his pocket at that time, because of the fact that he had received no architect's certificate. Now, let us see what the result would be. If I read the cases correctly, and they are here for your Honor to read: Stone Post Company v. Corcoran, 80 New Jersey Law; Morristown Supply Company v. Wallace. The reasoning of those cases is to the effect that if there has been a default at the time the stop notice is filed then the owner is entitled to go ahead and complete the building and he is only required to pay such moneys as he has left after the completion of the building, and it seems to me that is logical and reasonable.

The Court: Yes; I have no dispute about that at all.

Mr. Coulomb: If he had \$13,460 in his hand, the total cost of that building was \$22,000. Now, it actually cost him \$13,000 and some dollars to complete it—\$13,146 to complete it. Therefore, he spent to complete that building more than the contract price. If it had only cost him \$8,000 to complete it, that is to say, upon completion it would have been within the \$22,000, then it seems perhaps whatever

52 *Plaintiff's Motion for Direction of Verdict*

balance was remaining over and above might be still due. It seems to me, when the two are added together if they are in excess of the contract price then he has nothing, and that is the case here.

The Court: The motion to direct a verdict for the defendant is denied and an exception allowed.

10 The motion to direct a verdict for the plaintiff is allowed. A sub-contractor and materialman under a filed contract has a right to rely upon the terms of that contract and that the terms will be adhered to by the owner. I think there are circumstances in the law which will excuse the failure to obtain an architect's certificate before payment is made; but such circumstances are not present in this case and I think the failure to obtain the architect's certificate before the payments were made constitute those payments as advances made before they became due according to the terms of the contract.

20 Mr. Cole: I would like to direct your Honor's attention to one thing in this record, and that is that there is no pleading in this case which raises the contention that there was no architect employed.

30 The Court: You might add to what I have said that the proofs of the defendant are bare of any suggestion that the architect mentioned in the contract was ever employed for the purpose of either supervising or issuing certificates. That is really the point on which I am deciding the case.

Mr. Coulomb: I ask an exception to the Court directing a verdict for the plaintiff.

The Court: Ladies and gentlemen of the jury, by direction of the Court you will find a verdict in favor of the plaintiff for the sum of \$1,260.16.

(The jury found as directed.)

JUDGMENT ON VERDICT.

10

ATLANTIC COUNTY CIRCUIT COURT.

October Term, 1925.

SOMERS LUMBER Co.,
Plaintiff,
v.
MORRIS D. KAUFMAN and
MICHAEL WEINER, trad-
ing as KAUFMAN &
WEINER,
Defendants.

Action at Law.
On Verdict. 20
Cole & Cole, Attys.

Judgment entered Nov. 4, 1925, at 8 A. M.

Damages \$1260.16
Costs 62.42

30

Total \$1322.58

This action was tried before Judge Theo. W. Schimpf, with a jury, in the presence of counsel of the respective parties on Nov. 2, A. D. 1925.

The cause having been heard and submitted to the jury, they returned their verdict in favor of the plaintiff and against the defendants.

Whereupon, it is ordered that the plaintiff, Somers Lumber Company, recover of the defendants, Morris D. Kaufman and Michael Weiner, trading as Kaufman & Weiner, the sum of twelve hundred sixty dollars and sixteen cents damages, and sixty-two dollars and forty-two cents, costs of suit.

WM. A. BLAIR,
Clerk.

- 10 Notice of Appeal filed Nov. 30, 1925.
County Circuit Judgment Book No. 14, page 265.

CLERK'S CERTIFICATE.

STATE OF NEW JERSEY,

COUNTY OF ATLANTIC.

- 20 I, WILLIAM A. BLAIR, Clerk of the County of Atlantic, and also Clerk of the Common Pleas, etc., Courts holden therein, said court being a court of record, having a common seal, do hereby certify, that the foregoing is a true copy of a certain Circuit Court Judgment Record—Somers Lumber Co., plttf., v. Morris D. Kaufman, et al., trdg., &c., defts., as the same is entered in my said office.

- 30 (Seal) In testimony whereof, I have hereunto set my hand and affixed my official seal at May's Landing, N. J., this 18th day of December, A. D. 1925.

WM. A. BLAIR,
Clerk.

NOTICE OF APPEAL.

ATLANTIC COUNTY CIRCUIT COURT.

<p>SOMERS LUMBER Co., a cor- poration, &c.,</p>	}	<p><i>Plaintiff,</i></p>	10
v.			
<p>MORRIS D. KAUFMAN and NICHOLAS MICHAEL WEINER, trading as KAUFMAN & WEINER,</p>	}	<p><i>Defendants.</i></p>	<p>Action at Law. Notice of Appeal.</p>

To Cole & Cole, Esqs., Attorneys for Plaintiff:

Sirs: 20

Take notice that the defendants appeal to the Court of Errors and Appeals of the State of New Jersey from the whole and every part of the judgment entered in this cause in favor of the plaintiff, upon the following grounds:

1. The Court erred in directing a verdict in favor of the plaintiff.
2. The Court erred in refusing to direct a verdict in favor of the defendant. 30
3. The Court erred in failing to admit evidence touching and concerning the reason why the defendants did not obtain an architect's certificate.

Dated November 27th, 1925.

BOURGEOIS & COULOMB,
Attorneys for Defendants.

EXHIBIT P1.

CONTRACT.

THIS AGREEMENT made this Ninth day of September, A. D. Nineteen Hundred and Twenty two, BETWEEN MORRIS D. KAUFMAN, and MICHAEL WEINER, trading as partners, as KAUFMAN AND WEINER, party of the first part, and 10 WILLIS M. ARBEGAST, party of the second part, WITNESSETH, that the said party of the second part, for and in consideration of the sum of TWENTY TWO THOUSAND FOUR HUNDRED AND TWENTY SIX (\$22,426.) DOLLARS to be paid as hereinafter set forth, agrees to and with the said party of the first part, to provide and furnish all such labor and materials as shall be necessary for the proper erection and completion of the store and apartment to be erected upon a certain 20 lot situate on the North side of Atlantic Avenue and known as No. 1007 Atlantic Avenue, in the City of Atlantic City, New Jersey, and owned by said Kaufman and Weiner.

All of the above labor and materials to be performed and furnished in accordance with the plans and specifications furnished by Lewis R. Barber, Architect, a copy of which plans and specifications are hereto attached and made a part of this contract. Said specifications being modified with 30 changes and alterations, as provided in the sheets attached hereto and marked "Changes and alterations in Specifications for building to be erected for Kaufman and Weiner," said labor and materials to be performed and furnished subject to the approval of said Lewis R. Barber, Architect.

IT IS AGREED between the parties hereto that the second party will entirely complete the erection

of said building within four months from the time that possession of the said property is given to the said second party for the purpose of starting the erection of said building.

Party of the second part further agrees as part of the work to be performed by him under this contract, to brace up and support the adjoining building known as No. 1005 Atlantic Avenue.

Party of the first part agrees to pay for said labor and materials, the said sum of Twenty-two Thousand Four Hundred and Twenty-six (\$22,426.) Dollars, in manner following: 10

When foundations are erected	\$2500.
When third story joists are set	3500.
When ready for plastering	4000.

In addition to the above provided payments the parties of the first part agree to pay on account of the said contract, as the work shall progress, the sum of Ten Thousand (\$10,000.) Dollars, which shall be for the brick, lumber and materials as same are delivered in Atlantic City. Payments to be advanced for the purchase price of said materials in payment as Bills of Lading for same are delivered and the materials so delivered in Atlantic City shall be immediately placed at the location of the building to be erected and shall become the property of the first party. 20

The Balance or sum of Twenty-four Hundred and Twenty-six (\$2426.) Dollars, together with any sum or sums that may not be required for the payment of materials as above provided which remain unpaid on the contract price at the completion of the said building, shall be paid within sixty days after the proper completion and approval of same by Lewis R. Barber, Architect, and payments of all of the above amounts to be made shall be paid upon the certificate of the said Architect. 30

It is further understood and agreed between the parties hereto that heating and plumbing for the said building is excepted from this contract, the owners to supply and install same as the building progresses, at their own cost and expense.

Party of the second part shall furnish the owner full release of liens when building is completed and before final payment is made.

10 WITNESS our hands and seals the day and year above written.

Morris D Kaufman (Seal)

Mickel Weiner (Seal)

Trading as

Kaufman and Weiner.

Willis M. Arbegast. (Seal)

Signed, Sealed and Delivered

in the presence of

Robert M Johnston

SPECIFICATION OF LABOR AND MATERIAL

20 Operation No. 165

Location 1007 Atlantic Ave. Atlantic City, N. J.

Name Kaufman & Weiner

Date July 1922

Lewis R. Barber, Architect,

324-325 Guarantee Trust Building,

Atlantic City, N. J.

Specification annexed to contract but not printed.

EXHIBIT P2.

Atlantic City, N. J.
Morris D. Kaufman and Michael Weiner, trading as
Kaufman and Weiner, Owners.

Willis M. Arbegast, Contractor.

You are hereby notified that Willis M. Arbegast
is justly indebted to us for the sum of Eight Hun-
dred Eleven 70/100 Dollars for material furnished 10
by us to him and used in the erection of the store
and apartment to be erected upon a certain lot situ-
ated on the north side of Atlantic Avenue, west of
Virginia Avenue, known as 1007 Atlantic Avenue,
Atlantic City, New Jersey, and also in work on the
adjacent building known as 1005 Atlantic Avenue,
Atlantic City, New Jersey, pursuant to a written
contract made between you and him and on file in
the Atlantic County Clerk's Office; and you are fur-
ther notified that he has failed to pay any part of 20
this sum, and you are therefore required to retain
the amount so due and claimed by us out of the
amount owing by you on the said contract, and that
may hereafter become due and owing from you on
said contract, and on being satisfied of the correct-
ntss of our demand, to pay the same to us.

The above mentioned amount represents the
amount due us for material furnished to February
1, 1923.

SOMERS LUMBER COMPANY, 30
BY: Hubert Somers, President

Dated this 1st day of
March, 1923.

EXHIBIT P3.

Atlantic City, N. J.

Morris D. Kaufman and Michael Weiner, trading
as Kaufman and Weiner, Owners.

Willis M. Arbegast, Contractor.

10 You are hereby notified that Willis M. Arbegast
is justly indebted to us for the sum of *Two Hun-
dred Seventy-four Dollars and Seventy Cents* for
material furnished by us to him and used in the
erection of the store and apartment to be erected
upon a certain lot situated on the north side of
Atlantic Avenue, west of Virginia Avenue, known
as 1007 Atlantic Avenue, Atlantic City, New Jer-
sey, and also in work on the adjacent building known
as 1005 Atlantic Avenue, Atlantic City, New Jersey,
pursuant to a written contract made between you
and him and on file in the Atlantic County Clerk's
20 Office; and you are further notified that he has failed
to pay any part of this sum, and you are therefore
required to retain the amount so due and claimed
by us out of the amount owing by you on the said
contract, and that may hereafter become due and
owing from you on said contract, and on being sat-
isfied of the correctness of our demand, to pay the
same to us.

30 The above mentioned amount represents the
amount due us for material furnished during Feb-
ruary, 1923, and is in addition to Eight Hundred
Eleven Dollars Seventy Cents for which we served
notice on March 1, 1923.

SOMERS LUMBER COMPANY

BY:

Dated this 3rd day of March, 1923.

EXHIBIT P4.

Atlantic City, N. J.
July 12th 1923.

Wm. M. Arbegast, Dr.

To Somers Lumber Company

Materials delivered to 1007 Atlantic Avenue

1922			
Oct. 13	To materials delivered)		10
	on account of contract)	200 00	
Nov. 1	60 Pcs 1 x 12 14/0 box)		
	Rgh.)	42 00	
	28 53 Pcs 2 x 10 16/0 N C	67 82	
29	To materials delivered)		
	on account of contract)	500 00	
25	1 Head 2 x 10 12/0)		
	1 Transom bar 12/0)		
	1 Sill 2 x 12 12/0)		
	1 Pc reveal Mldg 12/0)	10 50	20
Dec. 1	4 Box window frames 2/7)		
	x 5/2 1 1/2 sash)		
	5 Plank case window		
	frames 1/0 x 3/0 8" wall)	40 00	
30	To materials delivered on)		
	account of contract)	150 00	
	9 Credit by cash		1 000 00
1923			
Jan. 25	6 6 lb. 2 8 lb. 2 7½ lb.)		
	28 7 " 8 6½ lb. sash)		30
	weights)	11 38	
25	4 Window frames 2/7 5/8)		
	x 5/2 1/4 1½)		
	W. P. 9 lights)		
	5 Pivoted sash 1/0 x 3/0)		
	1½ W P 3 Lts)	40 00	

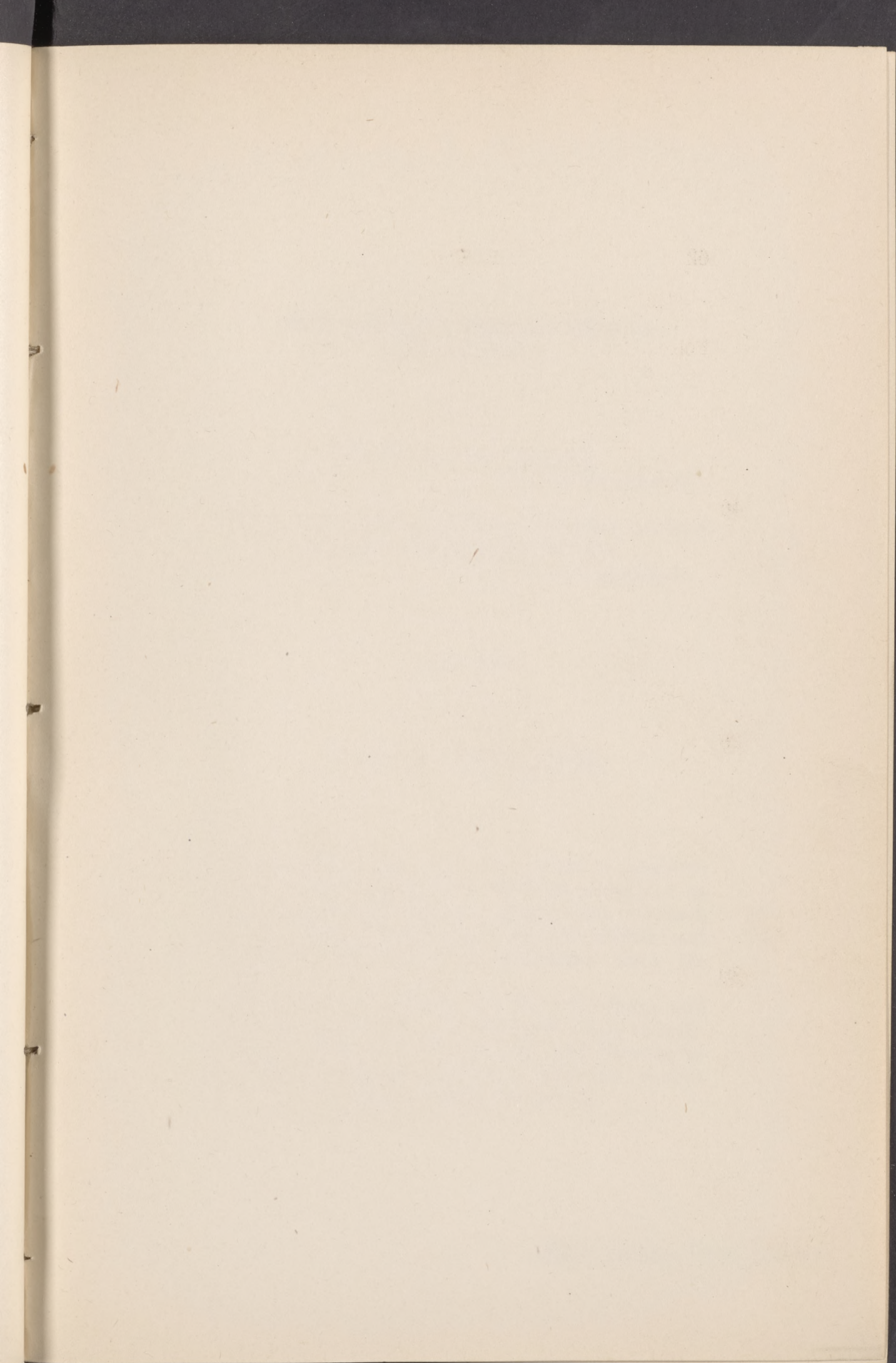
62

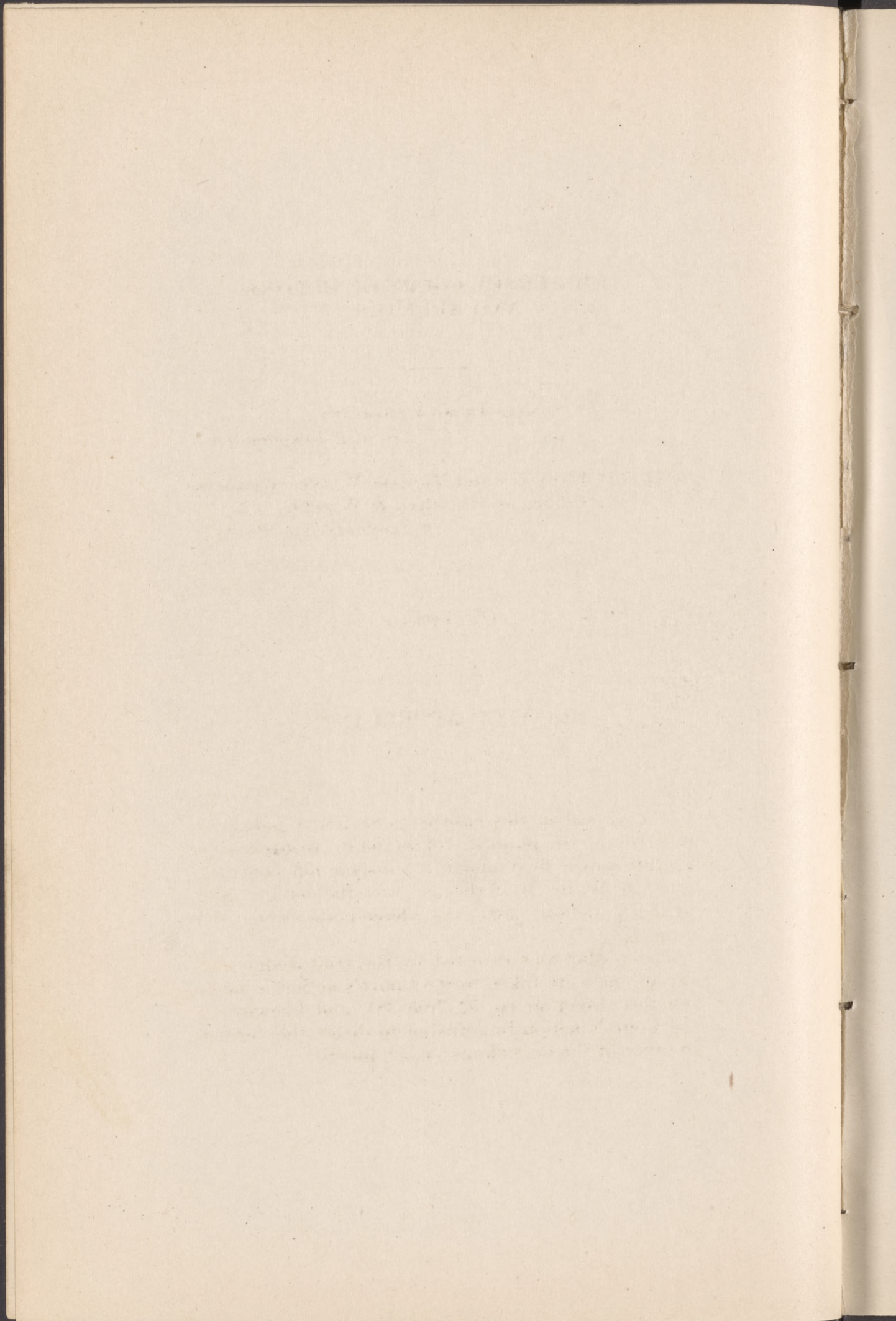
Exhibits

	31 To materials delivered on)		
	account of contract)	750 00	
Feb. 6	125 Pcs shingle lath 14/0	17 50	
	9 5 Pcs 1 x 6 16/0 W P)		
	#2 for pulley stiles)		
	5 Pcs 1 x 6 16/0 W P)		
	#2 for pulley stiles)	7 20	
	28 To materials delivered on)		
	account of contract)	250 00	
10			
		<hr/>	
		2 086 40	1 000 00
	Less credit	1 000 00	
		<hr/>	
	Amount due and unpaid	1 086 40	

20

30





NEW JERSEY COURT OF ERRORS
AND APPEALS.

SOMERS LUMBER COMPANY,
Plaintiff-Respondent,

v.

MORRIS D. KAUFMAN and MICHAEL WEINER, partners,
trading as KAUFMAN & WEINER,
Defendants-Appellants.

ON APPEAL.

BRIEF OF APPELLANTS.

The appeal in this case is to review a judgment in favor of the plaintiff for \$1260.16, recovered on a stop notice filed under a construction contract, wherein Willis M. Arbegast was the builder and primary debtor, and the defendants were the owners.

The verdict was directed by the trial Judge and exceptions were taken to the Court's action in making this direction (p. 52, line 38), and likewise to the Court's action in refusing to direct the verdict in favor of the defendants (p. 52, line 8).

STATEMENT.

Kaufman & Weiner, the defendants, were engaged in the hardware business in Atlantic City. On September 9th, 1922, they entered into a contract with Arbegast for the construction of a building for their business. The contract (p. 56) provides that the price was to be \$22,426, and further provides that said building should be completed within four months from the date of possession (p. 57, line 1).

Arbegast went into possession of the property and began construction on October 1st, 1922 (p. 17, line 30). He abandoned the contract on February 1st, 1923 (p. 25, lines 20-30), and notice was served on him to proceed, but he failed to do so (p. 25, line 38). The defendants thereupon completed the contract.

At the time Arbegast abandoned the work, the defendants had paid him \$13,460. It cost the defendants, in addition to that sum \$13,192.23, making a total of \$26,652.23. The contract price was \$22,426, so that the defendant paid the sum of \$4226.23 in excess of the contract price for the completion of said work. When Arbegast abandoned the work the defendants had in their possession, as the balance of the contract price, the sum of \$8966 (p. 27, lines 1-10).

The contract was prepared in the office of the defendants' attorneys (p. 34, lines 1-10). The specifications were prepared by Lewis R. Barber, architect (p. 38, line 23).

It is conceded that all of the amounts paid to Arbegast, which totalled the sum of \$13,460, were earned at the time they were paid (p. 21, lines 24-33)

and that one of the payments thus made, to wit, \$1000, went to the Somers Lumber Company, the plaintiff (p. 23, line 34). The contract contained a provision reading as follows:

“Party of the first part agrees to pay for said labor and materials, the said sum of twenty-two thousand four hundred and twenty-six (\$22,426) dollars, in manner following:

When foundations are erected	\$2500.
When third story joists are set	3500.
When ready for plastering	4000.

In addition to the above provided payments the parties of the first part agree to pay on account of the said contract, as the work shall progress, the sum of ten thousand (\$10,000) dollars, which shall be for the brick, lumber, and materials as same are delivered in Atlantic City. Payments to be advanced for the purchase price of said materials so delivered in Atlantic City shall be immediately placed at the location of the building to be erected, and shall become the property of the first party” (p. 57, lines 8-25).

The contract also provided that the balance due should be paid within sixty (60) days after the completion of the contract “and approval of same by Lewis R. Barber, architect, and payments of all of the above amounts to be made shall be made upon the certificate of the said architect.”

THEORY OF COURT'S DIRECTION.

The Court directed the verdict in favor of the plaintiff, upon the single ground that there had

been no architect employed for the purpose of either supervising or issuing certificates (p. 52, line 30).

POINTS.

The appellants contend:

1. That the trial Court erred in directing a verdict upon the ground that there was no proof that any architect had been employed to give the certificate, and to supervise.

2. That it should have been left to the jury to determine whether or not the defendants had made every reasonable effort to get the architect's certificate.

3. That there was no moneys due the contractor Arbegast at the time of the service of the stop notice.

ARGUMENT.

1.

The contract and specifications are one entire instrument. Lewis R. Barber, the architect who prepared the specifications, is the architect designated in the contract to give the certificates, etc. There is no allegation in any of the pleadings in the case which would raise the issue that no architect had been employed. The Court determined as a mat-

ter of law, merely from the fact that the contract had been prepared in the attorney's office, that Mr. Barber had not been employed to furnish certificates or to supervise. Mr. Barber was subpoenaed, but unable to come by reason of illness (p. 23, lines 17-20). His partner, Mr. Conover, who was unfamiliar with the contract, does not state anywhere that Mr. Barber was not employed to give certificates. His entire testimony (p. 36) must be read in order to determine Mr. Barber's exact position. He does say, however, at p. 46, line 5:

“It was Mr. Barber's job. I think I should have had his approval on it,”

and further on at p. 46, line 16:

“Well, Mr. Barber wasn't sure he was supposed to supervise the job. He said it had been left indefinite so far as he knew.”

And on p. 40, line 19:

Question: “Well, if you knew that there was a contract between Kaufman and Arbegast and you were a partner of Barber and Mr. Kaufman said he wanted an architect's certificate, why didn't you ask to see a copy of the contract in order that you might know what its terms were?”

Answer: “Well, I didn't know; I didn't know that Mr. Barber was doing the work for him; I didn't know whether he agreed to make any or issue any certificate or supervise the work or anything at that time.

Question: “You mean to say that Mr. Kaufman didn't tell you?”

Answer: “Well, yes; he told me that Mr. Barber was to issue certificates on the work.

Question: "Well, having told you that you then knew it, didn't you?"

Answer: "Well, yes; I knew it then."

It is fundamental that an action at law cannot be determined upon an issue that has not been raised by the pleadings.

Excelsior Electric Co. v. Sweet, 59 N. J. L. 441;

Reaney v. Central Ry. Co., 89 N. J. L. 282.

Notwithstanding that there had been no issue raised in the pleadings as to the employment of the architect, the Court, without even submitting the question to the jury as to whether an architect had been employed, directed a verdict upon the ground that Mr. Barber had not been employed to give certificates, or to supervise.

We submit that there was ample proof in the case from which the jury would have been justified in finding that Mr. Barber was employed to give certificates, furthermore, had the question of Mr. Barber's employment been directly raised, the defendant would have been entitled, in view of his illness, to a continuance of the case until he could have been produced. Not having been advised by the pleadings that the case was to be submitted upon the proposition that no architect had been employed, counsel did not deem his presence absolutely necessary to the defendant's case, in view of the presence of Mr. Conover, his partner, to whom application had been made for certificates.

There is no proof in the case that Mr. Barber was not employed as an architect to give certificates and to supervise the work. The inference is that he was so employed, from the fact that he prepared the specifications and his name appears in the con-

tract as the architect who is to supervise the work and to give certificates. Mr. Conover, his partner, did not refuse to give certificates, because Mr. Barber had not been employed, nor does he say that Mr. Barber refused to give certificates because he had not been employed. On the other hand, we have Mr. Conover's testimony that the defendant Kaufman had told him that Mr. Barber had been employed to give certificates (p. 40, line 31). Therefore, the Court's action in directing a verdict upon the theory that no architect had been employed is contrary to the inference to be drawn from the contract and specifications, and from testimony there is in the case, and is unsupported by any affirmative testimony whatsoever.

We submit that the question of Mr. Barber's employment was not an issue in this case, and if it had been, the determination that he was not so employed would not have justified the Court's action in directing a verdict for the plaintiff upon that proposition. If an architect had been employed and had then been discharged, there would have been no necessity for Mr. Kaufman to have gotten a certificate from the architect, or to have employed another architect in his place. In the case of *Federal Trust Company v. Guignes*, 74 Atlantic 652, it was held that when an architect is discharged by the owner he ceases to be competent thereafter to give the certificate which the contract stipulates for and the claimant is thereby relieved from the obligation to procure it, if the contract makes no provision covering the case. It seems to us that the same principle would apply if no architect had been employed, assuming that such was the case in the present instance. If it be true that an architect's certificate was necessary, and that none had been

obtained, then the plaintiff in the present suit could not have recovered. It has been held in a great many cases in our state that where a contract provides for an architect's certificate as a condition precedent to payment, that there can be no recovery by a stop notice claimant unless an architect's certificate is produced or it is shown that it is unreasonably or fraudulently withheld.

Kirtland v. Moore, 40 N. J. Eq. 106;

Hoffmeir v. Trost, 86 N. J. L. 682;

Luce, *Mechanics' Lien*, 3rd Ed. p. 308.

2.

It is conceded in this case that all of the payments made to Arbegast were earned at the time they were paid. The testimony of both Mr. Kaufman and Mr. Conover will have to be read in its entirety in order to show the effort made by Mr. Kaufman to get the certificate. The testimony discloses that at almost every time a payment became due Mr. Kaufman went to the office of Barber & Conover, and endeavored to get a certificate. It shows that Mr. Kaufman could not find Mr. Barber at any of these times. In this he is corroborated by Mr. Conover, who says that Barber was out of town most of the time. Mr. Kaufman was threatened with a situation whereby Arbegast could refuse to proceed unless the payments were made. As we have shown, the work had been done, the payments were earned, and the only condition that remained to be fulfilled was the obtaining of an architect's certificate. Mr. Barber's neglect or refusal to give the certificate could not have affected Arbegast's

right to recover in an action at law the moneys due for the work then done.

Branworth v. Verona, 94 N. J. L. 194-195;

Rizzolo v. Poysher, 89 N. J. L. 618-625;

Chism v. Schipper, 51 N. J. L. p. 1;

Bradner v. Roffscel, 57 N. J. L. 412.

Both Arbegast and any material man could have recovered for the amount due, even if no architect's certificate had been given (*Hoffmeir v. Trost*, 86 N. J. L. 682).

The case of *Dailey v. Somers Lumber Company*, 70 N. J. Eq. p. 345, is not in point. There was no proof in that case that any effort had been made to get the architect's certificate, and furthermore, the payment involved was the final payment, and therefore the builder could not have jeopardized the owner's position by any refusal to proceed with the work.

We submit that in the present case, it was at least for the jury to determine whether the defendants had used all reasonable effort to obtain the architect's certificate. The trial Court admitted that there are circumstances in the law which will excuse the failure to obtain an architect's certificate before payment is made (page 52, line 14), but the Court then said that he did not think that any such circumstances existed in the present case. We submit that this was not a question of law for him to determine whether the circumstances existed, but was purely one for the jury. It certainly cannot be said as a matter of law that after a payment has been earned and the owner has made all of the effort which was apparent in the present case to obtain the architect's certificate, that it is for the Court to determine whether those facts constitute a jus-

tification on the part of the owner to pay an amount which was admittedly earned at the time it was paid.

3.

We submit that in the present case there were no moneys whatsoever due to Arbegast at the time of the filing of the stop notice. There were two stop notices filed, one on March 1st, 1923, and one on March 3rd, 1923 (p. 25, lines 20-30). At that time the defendants had paid Arbegast \$13,460 (p. 27, line 4), and had in their possession as the balance due on the contract \$8966 to finish the work in accordance with the contract and specifications. This required an expenditure of \$13,192.23, which was an excess of \$4,226.23 over and above the contract price.

If a contract is abandoned by a contractor under such circumstances as give him no right to recover any part of the contract price, a stop notice claimant can have no remedy unless perhaps upon offering himself to complete the contract.

Bernz v. Sayer, 52 Eq. 275-286;

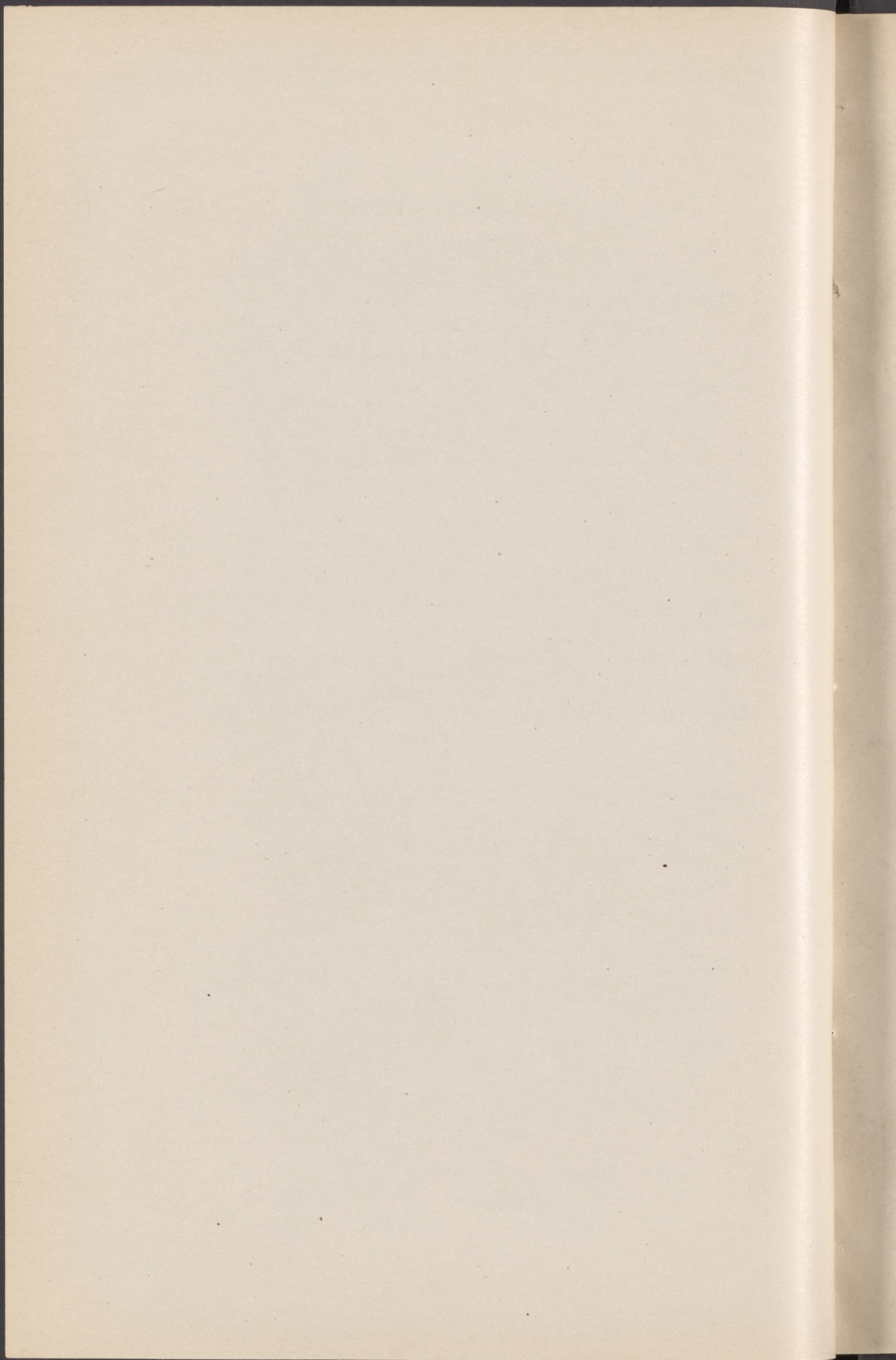
Stone Post Corp. v. Corcoran, 80 N. J. L. 549;

Moorestown Co. v. Burns, 91 N. J. L. 609.

In the present case the contractor abandoned the work when it was half completed. The owner finished it at a cost of over \$4000 in excess of the contract price. The contractor, under these circumstances, could not have recovered against the owner, and therefore the stop notice claimant cannot recover.

We respectfully submit that for the reasons above discussed the judgment should be reversed and a new trial awarded.

BOURGEOIS & COULOMB,
Attorneys for Appellants.



New Jersey Court of Errors and Appeals.

SOMERS LUMBER Co.,
Plaintiff-Respondent

vs.

MORRIS D. KAUFMAN and
MICHAEL WEINER, partners,
trading as KAUFMAN & WEINER,
Defendants-Appellants

On Appeal from
Atlantic County
Circuit.

BRIEF OF RESPONDENT.

STATEMENT.

This is an action brought by the plaintiff pursuant to a stop-notice filed under a construction contract, wherein one Arbegast was the builder and the defendants were the owners. The contract, (p. 57, 1.30), which was duly filed and recorded, contained the following provision:

“Party of the first part agrees to pay for said labor and materials, the said sum of twenty-two thousand four hundred and twenty-six (\$22,426) dollars, in manner following:

- When foundations are erected \$2500
- When third story joists are set 3500
- When ready for plastering 4000

In addition to the above provided payments the parties of the first part agree to pay on account of the said contract, as the work shall progress, the sum of ten thousand (\$10,000) Dollars, which shall be for the brick, lumber and materials as same are delivered in Atlantic City. Payments to be advanced for the purchase price of said materials in payment as Bills of Lading for same are delivered and the materials so delivered in Atlantic City shall be immediately placed at the location of the building to be erected and shall become the property of the first party.

The balance or sum of twenty-four hundred and twenty-six (\$2426) dollars, together with any sum or sums that may not be required for the payment of materials as above provided which remains unpaid on the contract price at the completion of the said building, shall be paid within sixty days after the proper completion and approval of same by Lewis R. Barber, Architect, *and payments of all of the above amounts, to be made shall be paid upon the certificate of the said Architect.*"

It was stipulated and agreed that there were in fact *no architect's certificates issued for any of the payments made, as provided for in said contract.* The lower court directed a verdict for the plaintiff on the ground that the failure to obtain the architect's certificate before the payments were made constituted those payments as advances made before they became due, according to the terms of the contract, (p. 52, 1.10), and upon the ground that the proofs of the defendants were bare of any suggestion that the architect mentioned in the contract was ever employed for the purpose of either supervising or issuing certificates, (p. 52, 1.30).

ARGUMENT.

THE FIFTH SECTION OF THE MECHANICS' LIEN ACT PROHIBITS PAYMENTS BY THE OWNER IN ADVANCE OF THE TERMS OF THE FILED CONTRACT.

The filed contract in issue in this cause contained the provision that:

"Payments of all of the above amounts, (which includes payments for all materials furnished, such as for lumber supplied by plaintiff), to be made, shall be paid upon the certificate of the said architect."

It is conceded that no certificates were ever issued by the architect for the payments made by the defendants, (p. 16, 1.1).

Section five of the mechanics' lien act provides as follows:

"If the owner or owners of any building or other property which, by this act, is made the subject of liens for or toward the construction, altering, repair, or improvement of which labor or services have been performed or materials furnished by contract, duly filed, shall, for the purpose of avoiding the provision of this act, or in advance of the terms of such contract, pay any money or other valuable thing on such contract, and the amount still due to the contractor, after such payment has been made, shall be insufficient to satisfy the notices served in conformity with the provisions of this act, such owner or owners shall be liable in the same manner as if no such payment had been made. (P. L. 1898, p. 539)."

The purpose of section five is to make the owner, in case he pays an installment of the contract price in advance of the time when by the contract it becomes due, liable to any claimant who serves a stop-notice

before such installment comes to be due. Such is the law as interpreted in the case of Kreutz vs. Cramer, 64 N. J. E., p. 648; and in Daley vs. Somers Lumber Co., 70 N. J. E., p. 343. The payments under this filed contract were due "*upon the certificate of the said Architect,*" (p. 57, 1.5).

In the case of Slingerland vs. Binns, reported in 56 N. J. E., at page 413, etc., the Court of Errors and Appeals declared that under this section the owner shall not in any way discharge his liability to pay under the contract, until *according to the terms of the contract*, the time to do so has arrived, in order that until that time such liability may be preserved for the benefit of workmen and materialmen, who served the statutory notice. In the case of Daley vs. Somers Lumber Co., 70 N. J. E., p. 343, *which case is directly on point and controlling in the case at bar*, the court held that "where a building contract, duly filed in the County Clerk's Office, provided for final payment on certificate of the architect, the owner is liable to parties furnishing labor and materials, who served notice prior to the issuance of the final certificate, to the full amount of their claims, not exceeding the full amount of such final payment." The principle laid down in this case is the same whether by the terms of the filed contract a certificate is to be procured before the final payment, before the first payment, or before any payment. The appellants admitted that they made advances without the certificate of the architect, *which the contract required*, but seek to excuse them on the ground that they were never able to locate the architect in order to have him issue the said certificates, (p. 22, 1.10). As to this point, Clarence Conover, partner of Barber, architect, produced by the appellants, testified, (p. 37, 1.3, etc), that the appellant, Kaufman, came to his office but three times in respect to the building operation in question and that on the occa-

sion of the third visit Mr. Kaufman told Conover that he had then already made a payment under the contract.

There is no proof, and it is not contended that the conduct of the architect was either unreasonable or fraudulent regarding the issuing of his certificate to justify the payments made in advance of the terms of the contract, so that the case of Rizzolo vs. Poysher, 89 N. J. L., p. 618, and other cited by appellants are no wise in point or applicable to the issue raised in the case at bar. Furthermore, there is no proof whatsoever that the architect was ever employed to supervise or issue certificates. The contract in question was drawn in the office of the appellants' attorney, Mr. Gaskill. There was *no proof* that Mr. Barber, the architect, was there at that time nor was there any proof that Mr. Barber at any time agreed to or consented to the employment contemplated by the contract. Mr. Conover, produced by the appellants, said, (p. 46, 1.16) :

“Well, Mr. Barber wasn't sure he was supposed to supervise the job. He said it had been left indefinite so far as he knew.”

The testimony of appellant Kaufman, (p. 19 etc.), is absolutely devoid of any statement that Barber, the architect referred to in the contract, was ever employed to either supervise or issue certificates, and the proof convincingly shows that the architect never did in fact supervise the work, much less issue any certificates .

Respondent filed with the appellants two stop-notices, one on March 1, 1923 for \$811.70, and the other on March 3, 1923 for \$274.70. At that time, appellants had paid Arbegast, the builder, \$13,460, (p. 27, 1.4), several times more than the amount required to fully pay and satisfy the claim of the

respondent. In the case of Kirtland vs. Moore, reported in 40 N. J. E., at page 106, the court held:

“Under a building contract containing a clause that the work shall be done under the direction and to the satisfaction of a particular person, to be testified by a writing or certificate under his hand, no right to the money earned under the contract accrues, and no action can be maintained to recover it until the certificate is procured or the contractor is entitled to it.”

This case, cited by the appellants in support of their contention, is no wise in point and constitutes no bar to the right of Arbegast to recover since it is conceded in this case that Arbegast had earned the sum of \$13,460, so paid, and was consequently *lawfully entitled to it*. The respondent, the sub-contractor, by virtue of the stop-notices duly filed, stood in the place and stead of Arbegast and was entitled to payment of the amount represented by the said stop-notices and had the appellants adhered to the terms of the contract, there would have been ample moneys to have paid said claims. The appellants had in contemplation of law enough of the contract price in hand to satisfy the respondent's claim upon it. See *Reeve vs. Elmendorf*, 38 N. J. L., p. 125; *Stone Post Co. vs. Corcoran*, 80 N. J. L., p. 551.

By the clear terms of the fifth section of the mechanics' lien act, supported by a wealth of cases interpreting this provision, the respondent under this filed contract, who furnished materials used in the construction of the building contemplated by the contract, had a right to rely upon the terms of that contract and that the terms would be adhered to by the owner. The failure to obtain the architect's certificate before the payments were made constituted those payments as advances made before they became due, according to the terms of the contract. The trial court cited this fundamental principle in direct-

ing a verdict for the respondent, (p. 52, 1.10). Such is the law as laid down in the controlling cases of Slingerland vs. Binns, 56 N. J. E., page 413 and of Daley vs. Somers Lumber Co., 70 N. J. E., page 343.

That the appellate court will sustain the verdict of the lower court if the verdict of the lower court is proper for any reason, regardless of whether the lower court based its verdict on the proper grounds or not, is Hornbook law and needs no citation of authority.

We respectfully submit that for the reasons above discussed, the judgment should be affirmed.

COLE & COLE,
Attorneys for Respondent.

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