

FORM 1.997. CIVIL COVER SHEET

The civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of reporting judicial workload data pursuant to Florida Statute 25.075. (See instructions on the reverse of the form.)

I. CASE STYLE

(Name of Court) Osceola County court

Plaintiffs Hazel Burgess and Darren Tremain

Case #: _____

Judge: _____

vs.

Defendant Maesbury Homes, Inc.

II. TYPE OF CASE (Place an x in one box only. If the case fits more than one type of case, select the most definitive.)

Domestic Relations	Torts	Other Civil
<input type="checkbox"/> Simplified dissolution <input type="checkbox"/> Dissolution <input type="checkbox"/> Support C IV-D <input type="checkbox"/> Support C Non IV-D <input type="checkbox"/> UIFSA C IV-D <input type="checkbox"/> UIFSA C Non IV-D <input type="checkbox"/> Domestic violence <input type="checkbox"/> Other domestic relations	<input type="checkbox"/> Professional malpractice <input type="checkbox"/> Products liability <input type="checkbox"/> Auto negligence <input type="checkbox"/> Other negligence	<input checked="" type="checkbox"/> Contracts <input type="checkbox"/> Condominium <input type="checkbox"/> Real property/ Mortgage foreclosure <input type="checkbox"/> Eminent domain <input type="checkbox"/> Challenge to proposed constitutional amendment <input type="checkbox"/> Other

III. IS JURY TRIAL DEMANDED IN COMPLAINT?

Yes

No

DATE _____ SIGNATURE OF ATTORNEY FOR PARTY
 INITIATING ACTION _____

Kevin Michael Burke, Esq.
 Bennetts Solicitors & Attorneys

**IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR OSCEOLA
COUNTY, FLORIDA** **CIVIL ACTION**

HAZEL BURGESS AND DARREN TREMAIN
Plaintiffs,

CASE NO:

vs.

MAESBURY HOMES, INC.
A Florida Corporation,
Defendant,

SUMMONS

THE STATE OF FLORIDA:

To Each Sheriff of the State:

YOU ARE COMMANDED to serve this summons and a copy of the complaint or petition in this action on Defendant **MAESBURY HOMES, INC.**

ADDRESS: MAESBURY HOMES, INC
3050 MICHIGAN AVE
KISSIMMEE
FLORIDA 34744
USA

Each Defendant is required to serve written defenses to the complaint or petition on Kevin Michael Burke, Plaintiffs' attorney, whose address is Bennetts Solicitors & Attorneys, High Street, Wrington, Bristol, BS40 5QB, United Kingdom, within 20 days after service of this summons on that Defendant, exclusive of the day of service, and to file the original of the defenses with the Clerk of this Court either before service on Plaintiffs' attorney or immediately thereafter. If a Defendant fails to do so, a default will be entered against that Defendant for the relief demanded in the complaint or petition.

DATED on

(Name of Clerk)
As Clerk of the Court

By _____
As Deputy Clerk

**IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR OSCEOLA
COUNTY, FLORIDA** **CIVIL ACTION**

HAZEL BURGESS AND DARREN TREMAIN
Plaintiffs,

CASE NO:

vs.

MAESBURY HOMES, INC.
A Florida Corporation,
Defendant,

COMPLAINT

COME NOW the Plaintiffs, HAZEL BURGESS AND DARREN TREMAIN, by and through their undersigned attorney, sue Defendant MAESBURY HOMES, INC., and for a cause of action alleges that:

JURISDICTION AND PARTIES

1. The Court has jurisdiction in this matter because this is an action for money damages in excess of \$15,000.00, exclusive of court costs, interest, and attorney's fees.
2. The Plaintiffs, HAZEL BURGESS AND DARREN TREMAIN are residents of the United Kingdom ("UK"), and *sui juris*.
3. The Plaintiffs have in this action posted the requisite foreign Plaintiff's cash bond in accordance with F.S. §57.011.
4. Defendant, MAESBURY HOMES, INC., hereinafter "Maesbury Homes", is a Florida Corporation doing business in the state of Florida, and maintaining its principal office and place of business at 3050 Michigan Ave, Kissimmee, Osceola, Florida 34744.
5. Venue is appropriate in Osceola County, Florida because the land at Bahama Bay Resort which is the subject of this litigation is located in this county and Defendant Maesbury Homes' primary office is there as provided in F.S. §47.051, as indicated by the current

Florida Secretary of State corporate filing;’ of the Defendant (Exhibit “A”).

FACTS GIVING RISE TO CLAIMS

6. Defendant Maesbury Homes sells condominium units at Bahama Bay II A Condominium, located at the Bahama Bay Resort, Orlando, Osceola County, Florida, hereinafter referred to as “Bahama Bay”.
7. Bahama Bay consists of 38 buildings of two or three floors, accommodating 2 to 3 bedroom condominiums.
8. On 27 August 2004, the Plaintiffs, as Buyers, and Defendant Maesbury Homes, as Seller, signed Defendant Maesbury Homes’ standard form contract for the purchase from the Defendant of Unit 556 at Bahama Bay, hereinafter, the “Residence”, at a price of \$270,000
9. The Contract was drafted solely by, or on behalf of, Defendant Maesbury Homes or its affiliates or agents and not by, or on behalf of, the Plaintiffs.
10. A true and correct copy of the contract signed by Plaintiffs and Defendant Maesbury Homes for the sale of the Residence, hereinafter the “Contract”, is attached hereto as Exhibit "B" and incorporated herein by reference.
11. The Plaintiffs’ proposed consideration in their offer was their agreement to pay the purchase price as stated in the Contract for the purchase of the Residence.
12. Defendant Maesbury Homes’ consideration in the Contract is its agreement to construct and transfer the Residence to the Plaintiffs within two years of the date of Plaintiff’s signatures on the Contract.
13. On or about 31 August 2004, the Plaintiffs wired to Defendant Maesbury Homes the sum of Fifty Four Thousand Dollars (\$54,000.00), hereinafter “Deposit” to the Defendant. A copy of a “transfer instruction form” to the currency trader, MoneyCorp, setting out the wire transfer is attached as Exhibit “C” and incorporated herein by reference.

14. Defendant Maesbury Homes received the sum of **\$54,000 USD**, hereinafter the “Deposit” from the Plaintiffs.
15. Pursuant to Clause 11 of the Contract, “... *Closing shall be scheduled within two years of the date of Buyer’s execution of this Agreement...*”
16. Clause 28 of the Contract states that “*Time of Essence: The performance of all obligations on the precise times stated in this Agreement is of absolute importance and failure to perform on time is a default, time being of the essence.*”
17. More than two years have elapsed since the date the Plaintiffs, as buyers, signed the Contract.
18. Despite the Defendant’s agreement to schedule closing within two (2) years of the date of the Plaintiffs’ execution of the Contract, Defendant Maesbury Homes failed to complete construction of the Residence within said period or at all.
19. The Contract does not contain *Force Majeure* provisions, whether within a clause specifically entitled *Force Majeure* or otherwise.
20. The Plaintiffs have been ready, willing, and able to perform under the Contract and have performed all conditions precedent to the institution of this action to be performed by the Plaintiffs under the Contract including but not limited to the timely payment of deposits totaling \$54,000 USD.
21. Clause 15 of the Contract states that “... *If Seller defaults under this Agreement... Buyer will have the choice of either (i) receiving a refund of all deposits actually paid under this Agreement... or (ii) specifically enforcing this Agreement. Buyer agrees that his remedies for Seller’s default will not, however, include damages or any other remedies, unless Buyer proves he is entitled to specifically enforce this Agreement and Seller has already resold the Property....*”
22. Defendant Maesbury Homes has not sought from the Plaintiffs any permission to extend the time for its performance under the Contract and the Plaintiffs have not volunteered or

consented to any such extension.

23. The Plaintiffs has done nothing to prohibit, delay or interfere with the Defendant's performance under the Contract.
24. Defendant Maesbury Homes has not refunded the Plaintiffs' deposit of \$54,000.00 USD.
25. Further to Clause 3 of the Contract, *"Except as permitted below, all of Buyer's deposits will be held in escrow by Vanguard Title, LLC, the Seller's closing agent, ... in accordance with the escrow agreement contained in the Condominium Documents. ..."*
26. A copy of an unsigned escrow agreement between Defendant Maesbury Homes and Vanguard Title as escrow agent is attached as Exhibit "D" and incorporated herein by reference.
27. It is the position of Vanguard Title that what deposit funds it holds in escrow will not be released without written direction for the disposition thereof signed by all parties or until a certified copy of an order from a court directing them to disburse the deposit they hold to into the court or otherwise as the court shall direct.

COUNT I – DECLARATORY RELIEF

28. The Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 27 above of this complaint as fully as if set forth here.
29. This Court has subject matter jurisdiction over this claim because it seeks declaratory relief and the matter in controversy is within the jurisdictional amount of this Court.
30. Plaintiffs request declaratory relief regarding the construction of the Contract and a declaration of Plaintiffs' rights under the Contract.
31. Declaratory relief is proper regarding the subject matter of this action and because Plaintiffs are in doubt about the existence of a right of Defendant Maesbury Homes to limit Plaintiffs' entitlement to damages upon Defendant's default under the Contract.

32. In Clause 15 of the Contract, Defendant Maesbury Homes has limited Plaintiffs' rights to seek any damages upon a default under the Contract by Defendant Maesbury Homes.
33. Defendant Maesbury Homes has sought to limit Plaintiffs' actual damages to only those cases wherein Plaintiffs can prove they are entitled to specifically enforce the Contract and where Seller has already sold the Residence. Defendant Maesbury Homes has sought to expressly restrict Plaintiffs' rights to seek consequential, incidental or other forms of damages to
34. Specific performance calls for the breaching party to render the very performance that it promised.
35. This Contract is not purely a contract for the sale of land but is a contract for the construction of a residence and conveyance of such residence.
36. In accordance with its duties under the Contract, Defendant Maesbury Homes' promised performance is to construct the Residence before the expiration of two years from the date of Plaintiff's signing of the contract.
37. Further to Clause 15, should Defendant Maesbury Homes default under the Contract for failure to construct the Residence before the expiration of the two year period, after the expiration of such period an action for specific performance could not compel Defendant Maesbury Homes to timely perform .
38. Further to Clause 15 of the Contract, Plaintiffs could never prove they are entitled to specifically enforce the Contract as specific performance is discretionary with the Court and not a matter of right.
39. Further to Clause 15 of the Contract, in the event of Defendant Maesbury Homes' default, Defendant can ensure Plaintiffs' remedy is limited to the return of their deposits by choosing not to sell the Residence.
40. Further to Clause 15 of the Contract, the refund to Plaintiffs of all deposits and interest earned on such deposits is not a remedy to a default by Defendant Maesbury Homes as to

its performance under the Contract.

41. Defendant Maesbury Homes has effectively precluded the availability of all damages and any other remedies, including special damages, thereby seeking to render its obligation illusory.
42. Defendant Maesbury Homes has retained to itself the option of fulfilling or declining to fulfill its obligations under the contract.
43. Defendant Maesbury Homes's has sought to make its obligation wholly illusory as further to Clause 15 of the Contract, Defendant could breach contract with impunity.
44. It is unconscionable to permit Defendant Maesbury Homes to enter into a contract which is one-sided as to remedies on a breach and which seeks to make illusory its obligation to construct the Residence within two years as set out in Clause 11 of the Contract.
45. It is unconscionable to permit Defendant Maesbury Homes to maintain a bargain with such extreme disparity in the exchange.
46. Clause 15 of the Contract, or the third paragraph therein is severable from the Contract and the remainder of the Contract is such that the Contract is enforceable.
47. It is equitable that Clause 15 of the Contract, or the third paragraph therein should be severed from the Contract.
48. Failure to sever Clause 15 of the Contract, or the third paragraph therein would be unfair to Plaintiffs.

WHEREFORE, the Plaintiffs HAZEL BURGESS AND DARREN TREMAIN respectfully request declaratory relief in the form of an order that Clause 15 of the Contract, or the third paragraph therein is severed from the Contract, and for such other and further relief as to which Plaintiff may be justly entitled.

COUNT II - BREACH OF CONTRACT

49. The Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 48 above of this complaint as fully as if set forth here.
50. By including a “time is of the essence” clause in the Contract, Defendant Maesbury Homes made its performance of clause 11 of the Contract, in which it effectively agreed to construct the residence within two years, a condition precedent to the liability of the Plaintiffs to perform their part of the Contract.
51. Defendant Maesbury Homes has waived any conditions precedent that were not performed or have not occurred.
52. Defendant Maesbury Homes is in breach of the Contract by reason of its failure to timely deliver the completed residence pursuant to the Contract.
53. Defendant Maesbury Homes has failed to provide consideration relating to a material obligation of the Contract.
54. Defendant Maesbury Homes’ failure to complete construction of the Residence within the said two year period, constituted a material breach of the Contract.
55. Plaintiffs have terminated the Contract based on the default of Defendant Maesbury Homes.
56. The Plaintiffs have been damaged by reason of Defendant Maesbury Homes’ failure of performance in a sum not less than the Deposit, pre-judgment and post-judgment interest, attorneys fees, and other costs to abide this action.
57. Defendant Maesbury Homes is obliged to pay to Plaintiffs the Deposit paid, pre-judgment and post-judgment interest, attorneys fees and costs.
58. Pre-judgment interest is calculated as being \$12,954.08 USD (calculated from 27 August 2006 to 31 October 2008 [796 days]) and \$16.27 USD per day thereafter through judgment.
59. In that Defendant Maesbury Homes is obliged to return to Plaintiffs that part of the Deposit

which is held by Vanguard Title, Defendant Maesbury Homes should be ordered to sign what documents are required by Vanguard Title further to the Escrow Agreement so that Vanguard Title may properly release said deposits and any interest thereon to Plaintiffs.

WHEREFORE, the Plaintiffs HAZEL BURGESS AND DARREN TREMAIN respectfully demand money judgment for the amount of the Deposit, \$54,985.00, plus pre-judgment in the sum of \$12,954.08 USD (calculated from 27 August 2006 to 31 October 2008 [796 days]) and \$16.27 USD per day thereafter through judgment, post-judgment interest, and attorneys fees and costs against Defendant Maesbury Homes and, and for such other and further relief as to which Plaintiff may be justly entitled.

BENNETTS SOLICITORS & ATTORNEYS
Attorney for Plaintiff
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Wrington, Bristol, BS40 5QB
UNITED KINGDOM
Telephone: 011 (44) 1934-862786

BY: _____
KEVIN M. BURKE, Esquire
Florida Bar No. 0007862