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Substantial Performance of Builder's Contracts

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SUBSTANTIAL PERFORMANCE OF BUILDER'S CONTRACTS

The purpose of this undertaking is to set forth the problems encountered when dealing with substantial performance of builders' contracts, what the courts have done about them and a suggested course to be followed on the undecided questions in South Carolina.

An owner or lessee of land decides to build a house and contracts with a builder for its erection. They place a set of conditions and specifications in a contract. The builder agrees to comply with the specifications and the owner in turn agrees to pay accordingly. While ordinarily such promises would be dependent[1] and full performance by the builder a condition of recovery, the rule has been relaxed in reference to builders' contracts.[2] Generally the contracts provide for payment as follows: "Final payment shall be due ..... days after substantial completion of the works, provided the work be then fully completed and the contract fully performed."[3] Here performance is made a condition precedent to payment of the contract price. According to the rule of common law, performance as a condition precedent to a recovery on the contract must be strict performance in accordance with the terms of the contract,[4] and good faith and substantial performance are not enough.[5] The rule has been relaxed in South Carolina as elsewhere so that where there has been substantial performance of the contract by one party, which is of benefit to the other and the benefits are retained by him, there may be a recovery of the contract price by the party substantially performing just as in the case of strict performance, but the recovery is subject to the right of the other party to recoup the damages occasioned to him by the defects in the performance.[6]

Substantial Performance Defined

The perplexing thing in the contract is the appearance of the phrase *substantial performance.* What is this mythical gem *substantial performance?* To determine what the phrase means an exploration of

1. 2 Williston, Contracts §§ 816-818.
2. Leonard v. Peoples Tobacco Warehouse Co., 128 S. C. 155, 178 S. E. 678 (1924).
3. Article V Standard Builders Contract American Institute of Architects.
4. 13 C. J. 690.
5. 17 C. J. S. 1085.
6. Leonard v. Peoples Tobacco Warehouse Co., *supra.*

several definitions is necessary. Substantial performance generally means not doing the exact thing promised, but doing something else that is just as good, or good enough for obligor and obligee.[7] However, in building contracts substantial performance is not full performance in every slight or unimportant detail but performance of all important particulars.[8] "Substantial performance exists where there has been no wilful departure from the terms of the contract, and no omission in essential points and the contract has been honestly and faithfully performed in its material and substantial particulars, and the only variance from the strict and literal performance consists of technical or unimportant omissions or defects."[9] Substantial performance has been defined by the New York courts as full contract performance, the deviation being of a minor, unimportant, inadvertent and unintentional character.[10]

WHAT CONSTITUTES SUBSTANTIAL PERFORMANCE?

No rigid rule can be laid down as to whether a particular situation comes within the doctrine of substantial performance. The doctrine of substantial performance of contract is intended for the protection and relief of those who faithfully and honestly endeavor to perform their contracts in all material and substantial particulars, so that their right to compensation may not be forfeited because of a mere technical, inadvertent or unimportant omission or defect. It is incumbent upon the person invoking the doctrine to present a case in which it is proved that there has been no wilful omission or departure from the terms of the contract.[11] In considering the matter Justice Cardozo has said, "We must weigh the purpose to be served, the desire to be gratified, the excuse for the deviation from the letter, the cruelty of enforced adherence. Then only can we tell whether literal fulfilment is to be implied by law as a condition."[12] An early South Carolina case (1844) where there was an omission to put up a privy, because of the deficiency of space, and the owner expressed his gratification that the contractor had performed his work so well, this evidence in behalf of the contractor was sufficient for the jury to infer that the omissions were waived, and therefore the

7. 17 C. J. S. 1086.
8. 17 C. J. S. 1089.
9. BLACKS LAW DICTIONARY, 3rd Ed. 1671.
10. WOLFE, SUBSTANTIAL PERFORMANCE OF CONTRACTS IN NEW YORK 16 Cornell L. Q. 180 (1930); Note, Substantial Performance of Builders Contracts in New York 31 COL. L. REV. 307 (1931).
11. Morgan v. Gamble, et al., 230 Pa. 165, 79 A. 410 (1911).
12. Jacob & Young v. Kent, 230 N. Y. 239, 129 N. E. 889, 891 (1921).

contract was accepted as complete.[13] Several years later in considering an action of covenant to recover the price of building a house, the court said, "the plaintiff is not bound to shew that he had hung every window shutter right, and that he had placed to exactness every mantel; he cannot be non-suited, if he shews, generally, that the work was done, or that the defendant expressed himself satisfied therewith."[14]

Where a contractor used iron pipe where the contract called for lead pipe for the water system, the owner was allowed to recover damages because such a substitution was not considered within the doctrine of substantial performance. In the same case, where Princess' Metallic paint was used in the place of Acme anti-rust paint as specified by the contract, even though the substituted paint was just as good, it was held that the builder was not relieved from his duty to perform the express stipulations of the contract, and his performance was not substantial.[15] In another case a contract required: "All wrought iron pipe must be well galvanized, lap welded pipe of the grade known as 'standard pipe' of Reading manufacture." Instead a pipe which was of Cohoes manufacture was used, the Cohoes pipe in every way being the same as the 'Reading pipe except for the name. This was held to be substantial performance for the reason that the omission was trivial and innocent.[16] Where cracks, which could be repaired by cleaning and filling with mortar, were found in the walls of a completed building but which did not in any way weaken the structure, it was held to be sufficient to come within the doctrine of substantial performance.[17] Early in South Carolina, while considering the question of substantial performance, the court, citing the ancient case of *Boone v. Eyre,*[18] stated that question was strictly one for the jury, and that even where the plaintiff had performed only one-half of what he convenanted to do, it was deemed a substantial performance.[19] In a later South Carolina case the owner complained that the builder had not placed "crickets" to turn the water from the skylights, when in fact the builder used another

13. Tappan and Noble v. Harwood, 2 Speers 536 (S. C. 1844).
14. Killian v. Herndon, 4 Rich. Law 609 (S. C. 1851).
15. Morgan v. Gamble, *supra.*
16. Jacob & Young v. Kent, *supra.*
17. Graves v. Allert & Fuess, 104 Tex. 614, 142 S. W. 869 (1912).
18. Where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they only go to a part, such that the breach may be paid for in damages, there the defendant has a remedy on his covenant. Boone v. Eyre, 1 H. Blackstone 273 (1777). The question of whether there has been substantial performance of the contract shall go to the jury. *Ibid.*
19. Tappan and Noble v. Harwood, *supra.*

method that did the job just as well. The court held that the evidence tended to show that the building was substantially completed and therefore the question was one for the jury.[20] From the preceding cases it is readily discernible that the primary basis in determining whether substantial performance has been rendered depends upon the peculiar factual situation and should be submitted to a jury.

DAMAGES

Although it is very generally held that proof of substantial performance of a building contract will permit a recovery in an action on the contract, it is obvious that the contractor should not be permitted to recover the full contract price as though he had exactly performed unless the owner has accepted the work and thereby waived full performance.[21] The fundamental principle which underlies the decisions regarding the measure of damages for defects or omissions in the performance of a building or construction contract is that the party is entitled to have what he contracts for, or its equivalent.[22] In general where a substantial portion of the work must be done over and the contractor would be deprived of adequate compensation, the damage allowable to the owner is the amount which the building would have been worth if constructed in entire conformity to the contract, less the amount that it was worth by reason of the defects.[23] In a majority of jurisdictions, where the defects are such that they may be remedied without the destruction of any substantial part of the benefit which the owner's property has received by reason of the contractor's work, the amount which the owner may recover is the cost of making the work conform to the contract.[24] There are two theories upon which damages are awarded to the owner where a contract is substantially, but not exactly, performed. The first is that the damages should be measured by the difference between the value of the property in its defective condition and its value if it had been completed in compliance with the contract.[25] The second is that the measure of damages is the costs and expenses reasonably necessary to make the work conform to the contract, on the principle that the party is entitled to work such as contracted for.[26]

20. Leonard v. Peoples Tobacco Warehouse Co., *supra.*
21. Jacob & Young v. Kent, *supra,* see Note 23 A. L. R. 1435.
22. 9 Am. Jur. 89.
23. Jacob & Young v. Kent, *supra.*
24. 9 Am. Jur. 89.
25. Twitty v. McGuire, 7 N. C. 501 (1819).
26. Leathers v. Sweeney, 41 La. Ann. 287, 5 So. 662 (1899), to remedy the defects in a boat, the damages were the reasonable amount necessary to place

The majority view follows the second theory where the defects are such that no major part of the construction has to be done over.[27] However, where the contractor's failure was intentional the owner is entitled to the cost of making the work conform to such specifications, and not merely the difference between the value of the property if the construction had been performed in accordance with the contract and the value as it now stands.[28] As to recovery by the contractor for the work actually performed, some courts even go so far as to completely bar recovery regardless of the presence or absence of intent to obtain an advantage, where there is an intentional departure or deviation from the contract, or a wilful default in the performance of a substantial stipulation.[29]

OCCUPANCY AND USE AS A WAIVER OF DEFECTS

When a builder has completed a building and the owner moves in and takes possession, the question arises whether the owner has accepted the work and thereby waived any defects contained in the building. The position has been taken in several jurisdictions that mere occupation and use of a building is sufficient to show acceptance of performance, and will waive non-performance of certain stipulations. According to the weight of authority the mere occupancy and use do not constitute an acceptance of the work as complying with the contract, nor amount to a waiver of the defects therein.[30] When the owner has knowledge of the defect in a building,

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the boat in proper condition as contemplated by the contract. Where there was a defective grantholic floor, damages were the amount that it would reasonably take to make the floor conform to the contract. Lambert v. Jenkins, 112 Va. 379, 71 S. E. 718 (1911). Where there was a deviation from the terms of the contract in Morgan v. Gamble, *supra*, such that iron pipe was substituted for lead pipe and a paint different from that specified was used, the owner was allowed to recover the cost of conforming the work to the contract. In Jacob & Young v. Kent, *supra*, where lap-welded pipe was required by the contract, the pipe used was lap-welded but was not made by the company specified, the owner was allowed to deduct from the sum set out in the contract the amount required to make the work conform to the contract. In Moss v. Best Knitting Mills, 190 N. C. 644, 130 S. E. 343 (1925) the damages for improper construction of a building were declared to be the cost of putting it in proper shape. An allowance to the owner of damages for defective work and materials was held not improper where the owner took possession and gave the contractor notice of the defects. N. Y. Indemnity v. Hurst, 252 Ky. 59, 66 S. W. 2d 8 (1933).

27. Jacob & Young v. Kent, *supra*, See Note 23 A. L. R. 1438.

28. Morgan v. Gamble, *supra*, where the builder completely omitted flue linings as called for by the contract and did not install lead water pipes as the contract required, the omission was held to be intentional and the owner was allowed to recover the amount of conforming the work to the contract even though a substantial part of the work had to be done over.

29. Smedley v. Walden, 246 Mass. 393, 141 N. E. 281 (1923).

30. 9 Am. Jur. 40.

his silence in the matter may constitute an implied acceptance of such defect, thereby waiving any objection to it. The result is different where the defect is latent and the owner has no knowledge of the defect. In the latter situation if the defect shows up later the owner may recover damages even though he has already paid for the building.[31] Where the owner of a hotel gave notice to the contractor of the defects therein and moved into the building such a taking was held not to be an acceptance or waiver of the defects.[32] In a similar case where the owner moved into a house the court held that the use of the house is not a waiver of objection to defects nor does such use constitute an acceptance.[33] In *Leonard v. Atkinson,* a South Carolina case, the court held that occupancy and use of a building could not be held to be an acceptance as a matter of law, but is a question of fact to be determined by the jury, whether under all circumstances, entrance into and occupancy of a building constitute an acceptance of the performance.[34]

Conclusion

In South Carolina where a builder sues on contract for the price agreed upon, alleging that he has substantially performed his contract, he may recover the contract price, but the recovery is subject to recoupment of such damages to the owner as were occasioned by the defects in the performance of the builder.[35] But in considering whether such a recovery should be allowed the courts would in all probability follow the New York view, which weighs the purpose to be served, the desire to be gratified, the excuse for the deviation from the letter of the contract, and the cruelty of adherence to it.[36] The South Carolina court has held that the question of whether occupancy and use of a building denote an acceptance of the defective performance is one that must be decided by the jury since it may be determined only by considering the surrounding facts concerning the occupancy.[37] The measure of damages to be allowed an owner in suits under substantial performance has not been decided in South Carolina but generally the better view is as hereinafter stated. The damages that should be allowed to the counterclaiming owner when he is being sued for the remainder of the contract price on a builder's

31. 9 Am. Jur. 39.
32. N. Y. Indemnity v. Hurst, *supra.*
33. Morford v. Mastin, 6 T. B. Monroe 609, 17 Am. Dec. 168 (Ky. 1828).
34. Leonard v. Atkinson, 133 S. C. 249, 130 S. E. 755 (1925).
35. Leonard v. Peoples Tobacco Warehouse Co., *supra.*
36. Jacob & Young v. Kent, *supra.*
37. Leonard v. Atkinson, *supra.*

contract and the builder is alleging substantial performance, should be as follows:

1. If the defects are remedial without doing a major part of the work over, the owner's damages should be the amount reasonably necessary to conform the work to the contract.

2. If the defects are of such a nature as would necessitate the destruction of a substantial portion of the building in order to rectify the defect, the owner's damages should be the difference in value between the building as it is and as it would have been had it conformed to the contract.

3. If the defects are found to be the result of an intentional omission or departure from the letter of the contract, the owner's damages should be the amount necessary to conform the work to the contract.

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