

4.30A BUILDING CONTRACTS — SUBSTANTIAL PERFORMANCE OF BUILDER (Approved 6/71)

A builder who has fully performed a contract in all its details is entitled to recover the entire contract price. Where a builder has substantially performed the contract, although there are some defects or omissions in his/her performance, he/she is entitled to recover the contract price minus a fair allowance for the defects or omissions in performance. Substantial performance has occurred when:

1. There has been such an approximation to complete performance that the owner obtains substantially what is called for by the contract; and
2. The defects in performance are not so serious as to deprive the owner of the intended use of the property.

The builder has the burden of proof as to substantial performance. The owner has the burden of proof as to the amount of fair allowance for defective work or omissions for which the owner is entitled to credit.

Cases and Commentary:

The builder in a construction contract is entitled to recover upon proof of substantial performance. *R. Krevoline & Co., Inc. v. Brown*, 20 N.J. Super. 85 (App. Div. 1952); *Winfield, etc., Corp. v. Middlesex*, 39 N.J. Super. 92 (App. Div. 1956); *Damato v. Leone Construction Co.*, 41 N.J. Super. 366 (App. Div. 1956); *Jardine Estates v. Donna Brook Corp.*, 42 N.J. Super. 332 (App. Div. 1956); *Power-Matics, Inc. v. Ligotti*, 79 N.J. Super. 294 (App. Div. 1963).

However, the burden of proof as to substantial performance and that the defects were not so serious as to deprive the owner of the intended use of the property is upon the builder. *Power-Matics, supra*, at p. 303. The burden of proving the amount of allowance for defective work is upon the owner. *Winfield, supra*, at p. 97; *Globe Home Improvement Co. v. Michnisky*, 120 N.J.L. 233 (Sup. Ct. 1938).