

# Dispute Illustrates 'Substantial Performance' Doctrine

## Courts make judgment calls on contract criteria in construction cases

**Jared Cohane and Peter J. Martin, The Connecticut Law Tribune**

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Construction contracting, unlike most other contractual transactions, often leaves open to interpretation the question of whether a contract has been sufficiently performed to entitle a party to payment. It is virtually impossible to have the equivalent of the Uniform Commercial Code's "perfect tender" in construction contracting. Objectively, construction contracts typically define what constitutes "substantial completion" of a project, the point in a project where the work is sufficiently complete to allow the owner to occupy and use the project for its intended purpose. However, substantial completion, contractually defined or not, does not necessarily mandate the precise performance of every contractual requirement. That is where the doctrine of substantial performance comes into play.

Substantial performance excuses a technical breach of a contract when actual performance is so similar to the required performance that any breach is deemed immaterial. This becomes a critical determination from both the contractor's and owner's perspective. Indeed, substantial performance is a constructive condition of an owner's duty to pay. Concomitantly, if there is an unexcused failure by a contractor to render substantial performance, the contractor cannot maintain an action on the contract for any unpaid balance. It is easy to see how this delicate balance can be the genesis of disputes on a project that often leads to costly, protracted litigation.

The sufficiency of performance often poses a conundrum for lawyers trying to advise their clients in the heat of battle. Is the owner justified in withholding payment to the contractor? Is the contractor justified in demanding final payment where the windows installed are the qualitative equivalent of the brand specified? What constitutes substantial performance in the world of construction contracting? To borrow from Justice Potter Stewart's threshold test for obscenity in *Jacobellis v. Ohio*: "I know it when I see it."

Substantial performance was recently the focus of a lengthy dispute between Coppola Construction Co. and Hoffman Enterprises Limited Partnership over a project known as the Hoffman Auto Park in Simsbury. Coppola's scope of work included site preparation and construction of two paved parking lots, which Hoffman needed as expeditiously as possible for the automobile inventory at its Toyota dealership. A dispute developed over change orders and additional work. On the cusp of the winter shutdown of the asphalt plants, Coppola refused to complete paving work unless Hoffman paid Coppola's outstanding claim for additional compensation. Ultimately, Hoffman hired one of Coppola's subcontractors to complete the work without providing Coppola notice of termination. Coppola brought suit against Hoffman in December 2009 claiming, among other things, Hoffman breached the contract.

After trips to the Appellate Court and Supreme Court on issues relating to preliminary pleadings, the case proceeded to a lengthy bench trial. The court



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issued a 149-page memorandum of decision rendering judgment in favor of Coppola for breach of contract and unjust enrichment for Hoffman's "de facto" termination of the contract for convenience. This entitled Coppola to a different measure of damages than for breach of contract for default. In reaching its decision, the court analyzed whether Coppola substantially performed based on balance to bill on the contract. The remaining contract balance for base contract work was \$42,500, of which \$35,000 was earmarked for screening a gravel bank supposedly on-site. However, it was determined that there was no existing gravel bank on-site. Nonetheless, the court determined that there was substantial additional work required by the original contract, including general cleanup and final inspection with a scheduled value of \$15,000, to support a finding that Coppola had not substantially performed.

The court then turned to whether Coppola's failure to substantially perform was excused either by Hoffman having failed to make progress payments for extra work or by it having made arrangements to complete the project by another contractor. The trial court analyzed the actions of both parties and eventually concluded that both "bore significant responsibility for the breakdown in the parties' relationship, which effectively terminated their contract."

The trial court's reasoning was largely premised on the dispute's rancor. The court stated that the termination was understandable "and to some degree justifiable" because of Coppola's demand for payment in full on the eve of the winter shutdown of the asphalt plants, which would have meant Hoffman would have to wait until the following spring to have its lots paved. However, the termination was not a formal termination for default because it was not preceded by proper notice of deficiency and opportunity to cure, as required by the contract. Nor was it a termination for convenience because Hoffman did not issue a formal notice. Notwithstanding, the trial court found the parties' conduct resulted in a "de facto" termination for convenience.

The trial court found Coppola was entitled to \$562,714 for work in place and lost profit under the termination for convenience provision of the construction contract, and Hoffman was entitled to setoffs of \$344,544 for direct payments made to Coppola's subcontractors, \$40,591 on its counterclaim and \$78,654 in attorney fees for a Connecticut Unfair Trade Practices Act violation. Subtracting Hoffman's total award of damages and setoffs, the court found Coppola was owed \$98,926. Both parties appealed the decision.

The Appellate Court determined the trial court committed reversible error because Hoffman's failure to comply with the notice provision in a termination clause invalidated any attempted termination and amounted to a material breach of the contract. In doing so, the Appellate Court recognized two termination options available to Hoffman under the construction contract—termination for default or termination for convenience—and found no cases supporting the concept of a "de facto" termination for convenience. The Appellate Court rejected Coppola's request for a new trial, but concluded that a new hearing in damages is required to determine the proper measure of damages for wrongful termination, which differs from the liquidated measure of damages available under the termination for convenience clause. Coppola has recently petitioned the Supreme Court for certification, so stay tuned.

The construction lawyer can take several lessons from *Coppola Construction v. Hoffman Enterprises Limited Partnership*, 157 Conn. App. 139 (2015). With respect to evaluating substantial performance, there are several moving parts to consider. It is noteworthy that the trial court did not refer to a contractual definition of substantial completion, although it would seem that would be a logical starting point. Instead, the court looked at the value of remaining work in making the determination that Coppola had not substantially performed. To the trial court, final cleanup and final inspection constituted sufficient remaining work to support a finding that Coppola had not substantially performed its obligations.

Further, the trial court's reasoning suggests that had Hoffman proceeded to terminate Coppola for default under these circumstances, it would have been justified. This case confirms that compliance with notice provisions is imperative in the context of contract termination. In the end, evaluating

whether a contractor has substantially performed its obligations is purely a judgment call based on a specific set of facts. It remains a critical determination in assessing whether to issue final payment, withhold payment or to exercise available contractual remedies such as termination.


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