

This charge is to be inserted on p. 751 of the 2008 edition of Volume 2, before the second full paragraph (that begins “In cases of performance bonds”) with the following introductory text:

In cases involving claims of substantial performance, the following charge may be used. This charge applies to a case in which the plaintiff contractor has not fully performed its obligations under the contract and asserts only a claim of substantial performance. This charge also applies to a case in which the defendant asserts that the contractor did not perform its obligations under the contract and asserts a counterclaim for breach of contract.

**PJI 4:20.2 Contract for Construction – Action by Contractor – Substantial Performance – Counterclaim by Defendant**

**As you have heard, the Plaintiff AB entered into a contract with the Defendant CD to (build a house, remodel a kitchen, install a finished basement) in accordance with certain specifications and additions for a cost of \$\_\_\_\_\_. The contract provided for CD to make specified payments to AB during the course of the work, with the final payment in the amount of \$\_\_\_\_\_ to be made when AB completed the work. AB claims that it substantially performed all of its obligations under the contract and that CD has refused to make the final payment. AB further claims that it is entitled to the final payment due under the contract less the costs to complete the work [where appropriate add: and to correct any defects in its performance].**

**CD claims that AB did not perform the contract and is not entitled to the final payment because** (*[specify defendant's claims as to work not completed or materials not supplied by AB and/or deficiencies in the work performed or materials supplied by AB]*). **CD has made a counterclaim against AB in the amount of \$\_\_\_\_\_, which I will discuss later.**

**You must decide whether or not AB substantially performed its obligations under the contract and is entitled to the final payment less the costs to complete the contract** *[where appropriate add: and to correct any defects in its performance]*. **In order to prove substantial performance, AB must show that any failure to complete the work properly was minor in nature and not intentional.**

**In deciding whether AB substantially performed the contract, you should first compare the work AB performed and the materials AB supplied with what AB was required to do under the contract. If you find that the work not completed or the materials not supplied** *[where appropriate add: and the defects in the work performed or the materials supplied]* **were minor in nature and not intentional, then you will find that AB substantially performed the contract. If you find that the work AB did not complete or the materials AB did not supply** *[where appropriate add: and the defects in the work AB performed or materials AB supplied]* **were important and not minor, then you will find that AB did not substantially perform the contract.**

**AB has the burden of proving that it substantially performed the contract and what the costs would be to complete the work** *[where appropriate add: and to correct any defects in its performance]*.

I am going to provide you with a verdict sheet [See PJI 4:20.2 SV] which will contain certain questions. Question 1 asks, “Did AB substantially perform its obligations under the contract?” If you find that AB proved that it substantially performed its obligations under the contract, you should answer “Yes” to Question 1 and proceed to Question 2. If your answer to Question 1 is “No,” you should not answer Question 2 and proceed to Question 3.

Question 2 asks, “What is the cost to complete AB’s work and to correct any defects in it?” In answering Question 2, you will be deciding how much AB’s final payment is to be reduced. Once you have answered Question 2, you should report to the Court without answering Question 3.

If your answer to Question 1 was “No,” that AB did not substantially perform its obligations under the contract, then you will proceed to consider CD’s counterclaim and Question 3. As you have heard, CD claims that it will cost \$\_\_\_\_\_ to complete the work that AB did not perform and to correct the defects in AB’s work under the contract. CD has the burden of proving (his/her/its) claim. Question 3 asks: “What is the cost to complete AB’s work and to correct any defects in it?” After you answer this question, you should report to the Court.

**CAVEAT:** If an issue as to plaintiff’s intentional failure to complete the work properly is raised, an additional question is necessary: “Did AB prove that its failure to complete the work properly was not intentional?”

#### Comment

Based on *Cawley v Weiner*, 236 NY 357, 140 NE 724; *Jacob & Youngs, Inc. v Kent*, 230 NY 239, 129 NE 889; *Spence v Ham*, 163 NY 220, 57 NE 412; *Security Supply Corp. v Ciocca*, \_\_ AD3d \_\_, \_\_ NYS2d \_\_, 2008 WL 795091; *Garofalo Electric Co., Inc. v New York University*, 300 AD2d 186, 754 NYS2d 227; *Teramo &*

**Co., Inc. v O'Brien-Sheipe Funeral Home, Inc., 283 AD2d 635, 725 NYS2d 87; Windjammer Homes, Inc. v Lieberman, 279 AD2d 411, 717 NYS2d 362; Pilgrim Homes & Garages, Inc. v. Fiore, 75 AD2d 846, 427 NYS2d 851; Turk v Look, 53 AD2d 709, 383 NYS2d 937; Blanchard v City of Saratoga Springs, 241 AD 193, 271 NYS 5.**

**SPECIAL VERDICT FORM PJI 4:20.2 SV**

Answer the following:

1. Did AB prove that it substantially performed its obligations under the contract?

\_\_\_ Yes                      \_\_\_ No

At least five jurors must agree on the answer to this question.

If your answer to this question is Yes, proceed to Question 2. If your answer to this Question is No, proceed to Question 3.

2. What is the cost to complete AB's work and to correct any defects in it as proved by AB?

\$ \_\_\_\_\_

At least five jurors must agree on the answer to this question.

After you answer this question, proceed no further and report to the Court.

3. What is the cost to complete AB's work and to correct any defects in it as proved by CD?

\$ \_\_\_\_\_

At least five jurors must agree on the answer to this question.

After you answer this question, proceed no further and report to the Court.