

## Substantial Performance v. Material Breach

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All breaches are not created equal. A minor, technical breach may be deemed “immaterial.” Other breaches – so-called “material” breaches — deprive the non-breaching party of something important or essential to the purpose of the contract. Whether a breach is material or immaterial is normally a question for the finder of fact. The answer determines what remedy is available to the non-breaching party. A material breach excuses performance by the non-breaching party and may provide a basis to rescind the agreement altogether. An immaterial breach does not excuse performance by the non-breaching party, as one Kansas homeowner learned in a decision released last week.

The case, *Alenco v. Warrington*, No. 125,721, 2024 WL 4576143, at \*6–7 (Kan. Ct. App. Oct. 25, 2024), involved a contract to install new siding on a home. After the siding was installed, the homeowner discovered that the siding installed was different than the siding it had selected. The selected siding was branded “Cedar Ridge” and had an insulation “R-value” of 4. The siding used was “Crane Board 6” with an R-value of only 2.2. The contractor offered to add more insulation at no additional cost or discount its work to reflect lost energy savings. The homeowner rejected those solutions and refused to pay.

In the ensuing litigation, the homeowner contended that the contractor had materially breached the contract thereby excusing its obligation to pay. The jury, and the Kansas Court of Appeals, disagreed.

The court of appeals decision includes this helpful discussion of material breaches, substantial performance, and the remedies available that may be available for each:

Kansas law generally holds people responsible for the agreements they make. But not every breach of an agreement justifies rescinding the entire contract. When a person fails to precisely meet every contract term, their performance may still be considered complete if the essential purpose of the contract is accomplished and they have made a good-faith attempt to comply with the terms of the agreement. The guiding question is whether a person has *substantially performed* their contractual obligations or whether they have *materially breached* the agreement in a way that eviscerates the purpose of the contract.

Substantial performance is performance that, despite deviation or omission, provides the important and essential benefits of the contract. Courts have found that technical breaches of an agreement may be excused if the parties performed the essence of their contractual

obligations. In these instances, the technical breach of the terms of the contract is excused not because compliance with the terms of the contract is objectively impossible, but because the actual performance is so similar to the required performance that any breach is immaterial.

Conversely, a material breach is so substantial as to defeat the object of the parties in making the agreement. When a party materially breaches a contract, they are precluded from enforcing the contract against the nonbreaching party until the material breach has been cured. In this situation, the nonbreaching party is entitled to suspend or terminate performance under that contract until the previous breach is resolved.

The tension between substantial performance and material breaches often arises in construction contracts. Several considerations are relevant to this assessment, including:

whether the contractor performed the construction substantially as promised, and whether the owner can use the property for the purposes it intended when contracting with the builder in the first instance, even though there are minor matters that must be completed or corrected, so that it can be said that the owner obtained substantially that for which it bargained. When a contractor has substantially performed their obligations under a construction contract, they are entitled to be paid the contract price, less damages for any minor deficiencies.

This question — whether a party has substantially performed their obligations or has materially breached the agreement — is a factual determination resolved by the jury. Only when all relevant facts are undisputed does this inquiry become a legal decision for the court.

Applying these principles to the *Alenco* facts, the court of appeals agreed with the jury that the contractor had not materially breached but had made a good-faith effort to comply and substantially performed its obligations under the contract. The contractor was therefore entitled to payment of the contract balance less damages for any minor deficiencies. The deficiencies were valued based on lost energy savings, exactly as the contractor had originally proposed. A copy of the court's decision is available [here](#).

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