THE LEGAL COLUMN

Getting a Fair Shake

by Quenda Behler Story

Suppose you're working on your customer's deck when you shoot yourself in the foot with your nail gun, and you can't finish the job. Or suppose you put on an addition with trim that's supposed to match the existing trim to your customer's satisfaction, but it doesn't. In cases like these, are you totally out of luck for the time and money you put into the job?

Let's start by talking about what you are *not* entitled to. To begin with, you can't successfully get a mechanic's lien when the plain facts are that you didn't finish the job or didn't do it the way you agreed to do it.

Nor can you sue the customer for breach of contract and expect to be paid exactly what the contract said you would be paid. *You* breached the contract, not your customer. In fact, your customer can sue you, although any award would depend upon what damages (if any) were suffered.

Added Value

But what about you? You bought materials, you performed most of the work, and perhaps you even paid some subcontractors on the customer's behalf. Can you get paid for any of this?

The answer is: Maybe.

Despite what some people believe, the goal of our judicial system is to administer as much justice as possible to everybody involved. If you have added value to the customer's property and if your customer will not have to spend substantial money fixing the work you did, simple fairness suggests that you are entitled to something.

Two legal remedies may be available to help you, depending upon the circumstances: One is called *quantum meruit*; the other is an *implied contract*. Some states use one, some use the other, and some states use both.

In general, the concept of *quantum meruit* is that someone who has added value to property that cannot be physically repossessed should be paid for that value. The implied contract remedy focuses more on the actual costs and lost profit that the contractor incurs doing the work. An "implied contract" is not the same as the formal contract between the parties. Instead, it is a contract that the law can construe from the circumstances and the reasonable expectations of the parties (of which the formal contract may be evidence).

The parameters, legal underpinnings, and even the names of these two remedies vary from state to state. But the idea behind each is essentially the same. A Wisconsin judge described it this way: "Substantial performance will allow some kind of recovery, either on an implied contract theory or on a *quantum meruit* basis."

You may be entitled to some payment for incomplete or imperfect work

This is true even if the work has not been entirely completed, or if a contractually required owner's approval or an architect's approval has been withheld. If the contractor acted in good faith (the trim looked to you like it matched, or it was the only trim available and you honestly thought it would work), and if the work has been "substantially performed," the courts will take that into consideration. Keep in mind, however, there may be other factors in state law, such as whether you are properly licensed or whether you have conformed to certain consumer protection laws, that may affect the application of these remedies.

Substantial Performance

These remedies are not intended to get you out of every jam or as a way to slither out of subpar work. If you tore out the customer's bathroom and then he didn't see you again for six months, this is not what the courts mean by "substantial performance." You actually left your customer in a worse position than you found him in.

However, if you not only demolished the bathroom but also installed a new one that was serviceable, you may be entitled to something for your trouble, even if your work fell short in some minor way, or if circumstances beyond your control (that nail in the foot) prevented you from finishing the job.

One court put it this way: "Imperfections will not prevent a finding of substantial performance unless there are such imperfections that require rebuilding the work or where a considerable sum of money would be necessary to remedy the omissions or incompleteness." That court awarded the contractor the original contract payment less a deduction for what it would reasonably cost the property owner to hire someone else to do the job.

The courts recognize that sometimes it's not possible to comply with "the minute specifications in a building contract." If you contract, for example, to build a kitchen island with a customer-selected laminate that turns out to be unavailable, and you select one that looks a lot like it, this minor variation will not excuse the customer from paying for the work. What the courts have often done in those situations is to rule that "the parties are presumed to have impliedly agreed to do what is reasonable under the circumstances."

This all sounds fair enough. But remember that when we're talking about things like "substantial performance," "implied contract," or "reasonable expectations," the only thing you can be sure of is that there's not going to be any quick answer to your questions about what you're entitled to. So if you're in such a situation, pick up your phone and call your attorney. Maybe you didn't finish the job or maybe you didn't do it quite according to the contract — but ordinary fairness may entitle you to *some* recovery. ■

Quenda Behler Story has practiced and taught law for 23 years. She is a partner with her husband in a remodeling company in Okemos, Mich.