PERFORMANCE

As I said earlier, the second element the plaintiff must prove is that (he / she / they / it) performed (his / her / their / its) obligations under the contract [or because of the conduct of the other party, is excused from performance]. Massachusetts law provides that a party must prove their own performance under the contract before (he / she / they / it) can recover against the other party.

The plaintiff cannot recover for a breach of contract (he / she / they / it) has breached (himself / herself / themselves / itself). However, the plaintiff can still recover if (his / her / their / its) departure from the terms of the contract is so minor or trifling as to be insignificant. Although inadvertent or unimportant departures do not defeat the plaintiff's right to recover, substantial performance must always be shown.

To be read in cases where a plaintiff is a building contractor suing under the building contract:

In cases such as this, where a building contract is involved and the plaintiff contractor claims the defendant breached the contract concerning design and construction of the building project, the plaintiff contractor can only recover upon a showing of (his / her / their / its) own

complete and strict performance of all the terms of the contract.

If a contract requires both parties to perform obligations, the plaintiff must show that (he / she / they / it) was ready, willing, and able to perform (his / her / their / its) obligations and would have performed if the defendant also performed. The plaintiff is not required to show this if the defendant had already breached an essential and inducing feature of the contract or announced that (he / she / they / it) would do so before the time came for the plaintiff to perform (his / her / their / its) obligations under the contact. Put another way, a defendant's material breach of contract excuses further performance by the plaintiff.

However, the plaintiff cannot recover if (he / she / they / it) prevented the defendant from performing (his / her / their / its) obligations under the contract.

Duff v. McKay, 89 Mass. App. Ct. 538, 547 (2016) ("A party to a contract generally is relieved of his obligations under that contract only when the other party has committed a material breach, that is 'a breach of an 'essential and inducing feature of the contract''…When a party to an agreement commits an immaterial breach of that agreement, the injured party is entitled to bring an immediate action for damages; it may not stop performing its obligations under the agreement."); *G.M. Abodeely Ins. Agency, Inc. v. Commerce Ins. Co*., 41 Mass. App. Ct. 274, 278-279 (1996); *Lease-It v. Massachusetts Port Auth.*, 33 Mass. App. Ct. 391, 396 (1992).

Frank Fitzgerald, Inc. v. Pacella Bros., Inc., 2 Mass. App. Ct. 240, 242 (1974) ("One who prevents the performance of a contract cannot take advantage of its nonperformance.")

Building Contract Cases: *G4S Tech. LLC v. Massachusetts Tech. Park Corp.*, 479 Mass. 721, 730 (2018); *Peabody N.E., Inc. v. Town of Marshfield*, 426 Mass. 436, 441 (1998). The obligation of a plaintiff builder to show complete and strict performance of all contractual terms is limited to issues relating to the design and construction of the building project. *G4S Tech. LLC*, 479 Mass. at 730-31 ("We clarify today that the complete and strict performance requirements in construction contracts apply only to the design and construction work itself. Other provisions should be analyzed pursuant to ordinary contract principles, including the materiality standard applied under Massachusetts contract law".)

I. TIME FOR PERFORMANCE

When a contract does not specify any particular time in which it must be carried out, there is an implied agreement that it will be carried out in a reasonable time. What is a "reasonable time", of course, depends on the circumstances, including the past dealings between the parties, custom of the industry, and the type of transaction involved.

Dalrymple v. Town of Winthrop, 97 Mass. App. Ct. 547, 555 (2020); *Duff v. McKay*, 89 Mass. App. Ct. 538, 547 (2016) ("where a written agreement fails to specify a deadline by which a contractual obligation or right must be exercised, court may infer that the parties intended a 'reasonable' date if this can be done without changing the essence of the contract"); *Alexander v. Berman*, 29 Mass. App. Ct. 458, 461 (1990); *Charles River Park, Inc. v. Boston Redev. Auth.*, 28 Mass. App. Ct. 795, 814 (1990).

II. PERFORMANCE TO PLAINTIFF'S SATISFACTION

Where a contract requires the defendant to perform to the satisfaction of the plaintiff, unless the contract specifies otherwise, the standard of satisfaction is whether a reasonable person would be satisfied in view of all of the circumstances.

Rooney v. Weeks, 290 Mass. 18, 27 (1935):

> In this [C]ommonwealth contracts to be performed to the satisfaction of another may be divided into three classes: (a) Where fancy, taste, sensibility or opinion is

> involved…(b) where the question of operation, fitness or mechanical fitness is involved…and (c) where the contract does not in any form of words require that the performance of the work to be done or of the services to be rendered shall be to the personal satisfaction of the promisor. Under (c), if the work was performed in a manner that would be satisfactory to a reasonable man in view of all the circumstances, the mere fact that the promisor was not satisfied is not conclusive against a right of recovery, and there is read into the contract the rule that, that which the law says a party ought to be satisfied with, the law will say he is satisfied with.

Smith v. Allmon, 17 Mass. App. Ct. 712, 715 (1984) ("When obligations under an agreement are conditioned on the approval or satisfaction of a contracting party, it is appropriate, because of the self-interest of a party, to test the reasonableness of a declaration of disapproval or dissatisfaction on an objective basis.").

Where a building contract specifies that it must meet the approval of the owner, that approval must be reasonable. *Salem Glass Co. v. Joseph Rugo, Inc.*, 343 Mass. 103, 106 (1961); *Bottini v. Addonizio*, 261 Mass. 456, 457 (1927); *Handy v. Bliss*, 204 Mass. 513, 519-20 (1910).

III. PERFORMANCE BY DEFENDANT

If a party has fully performed (his / her / their / its) obligations under the contract, then there can be no breach of contract.

A party who promises to perform services for another party must perform the services in a reasonably diligent, skillful, workmanlike and adequate manner. It is up to you to decide based on the evidence and your common sense and life experience whether the services were properly performed.

Threlfall v. Coffee Roasters Prods., 306 Mass. 378, 380 (1940); *First Nat'l Bank of Boston v. Cartoni*, 295 Mass. 75, 78-79 (1936). See *Cyganv v. Megathlin*, 326 Mass. 732, 733 (1951) ("when a contract has been executed on one side, the law will not permit the injustice of the other party retaining the benefit without paying unless compelled by some inexorable rule."); *Realty Developing Co., Inc. v. Wakefield Ready-Mixed Concrete Co.*, Inc., 327 Mass. 535, 537 (1951) (plaintiff must prove that defendant failed to perform without a legal excuse to prove breach of contract.)

Negligent performance: *Previews, Inc. v. Everets*, 326 Mass. 333, 335-336 (1950) (whether the services called for by the contract were performed in a reasonably diligent, skillful, workmanlike, and adequate manner should have been submitted to the jury); *Damiano v. National Grange Mut. Liab. Co.*, 316 Mass. 626, 629 (1944).

For instances where the defendant alleges that the plaintiff accepted less than full performance, see Instruction 5.05, Defenses: Waiver.

IV. ANTICIPATORY BREACH

A party cannot refuse to perform a contract because (he / she / they / it) anticipates that the other party will breach it.

K.G.M. Custom Homes, Inc. v. Prosky, 468 Mass. 247, 253 (2014), quoting *Cavanagh v. Cavanagh*, 33 Mass. App. Ct. 240, 243 (1992) ("With few exceptions, '[o]utside of the commercial law context, Massachusetts has not generally recognized the doctrine of anticipatory repudiation, which permits a party to a contract to bring an action for damages prior to the time performance is due if the other party repudiates.'") In *K.G.M Custom Homes, Inc.*, the Supreme Judicial Court held that the remedy for an anticipatory breach in an agreement to purchase real estate is limited to specific performance. *Id.* at 254. See also *Tirrell v. Anderson*, 244 Mass. 200, 203 (1923); *Daniels v. Newton*, 114 Mass. 530, 541 (1874).

Notwithstanding this rule, there are cases that suggest exceptions: when the anticipatory breach is accompanied by an actual breach, *Parker v. Russell*, 133 Mass. 74 (1882); when a party controls the circumstances of a contingency required for his performance and refuses to invoke the contingency that would require performance, *Cavanagh v. Cavanagh*, 33 Mass. App. Ct. 240 (1992); when a contract is partly performed and one party repudiates the contract when the other party is not in default, *Ballou v. Billings*, 136 Mass. 307 (1884); where a party repudiated the contract prior to time of performance, the other party can seek quantum meruit relief, *Johnson v. Starr*, 321 Mass. 566 (1947).