

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
CONSTRUCTION INDUSTRY LICENSING)
BOARD,)
)
Petitioner,)
)
vs.) Case No. 97-0834
)
MARK PETERS,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case by video on January 25, 1999, between Tallahassee and Miami, Florida, before Claude B. Arrington, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Theodore R. Gay, Esquire
Department of Business and
Professional Regulation
401 Northwest Second Avenue, Suite N-607
Miami, Florida 33128

For Respondent: Mark Peters, pro se
452 South Congress Avenue
West Palm Beach, Florida 33406

STATEMENT OF THE ISSUES

Whether Respondent, a certified swimming pool contractor,

committed the offenses alleged in the Amended Administrative Complaint and the penalties, if any, that should be imposed.

PRELIMINARY STATEMENT

On December 30, 1996, Petitioner filed an Amended Administrative Complaint against Respondent, a certified swimming pool contractor. The Amended Administrative Complaint alleged certain facts pertaining to a job performed by Respondent's company for Mary Gonzalez. Based on those factual allegations, Petitioner charged, in four separate counts, that Respondent committed the following violations:

COUNT I: Willful or deliberate disregard and violation of applicable building codes or laws of the State or of any municipality or county in violation of Section 489.129(1)(d), Florida Statutes;

COUNT II: Proceeding on any job without obtaining applicable local building department permits and inspections in violation of Section 489.129(1)(n), Florida Statutes;

COUNT III: Committing fraud, deceit, gross negligence, incompetency, or misconduct in the practice of contracting in violation of Section 489.129(1)(m), Florida Statutes; and

COUNT IV: Failing in a material respect to comply with the provisions of Part I of Chapter 489, Florida Statutes, in violation of Section 489.129(1)(j), Florida Statutes.

Respondent timely requested a formal hearing, the matter was referred to the Division of Administrative Hearings, and this proceeding followed. The parties engaged in extensive efforts to settle this matter, which would have required Respondent to perform certain work for the complaining party. Because those efforts to settle the matter were not successful,

a formal hearing was necessary. At the formal hearing, the Respondent did not dispute the material facts alleged by Petitioner.

At the formal hearing, Petitioner presented the testimony of Gloria Gonzalez, Robert Hevia, and James Gomez. Petitioner presented twenty-four exhibits, numbered 1-7 and 9-25, all of which except Exhibit 24 were admitted into evidence. Pre-marked Exhibit 8 was not moved into evidence. The testimony of James Powers, a consulting engineer, was presented by deposition. The Respondent testified on his own behalf and offered one composite exhibit, which was accepted into evidence.

A transcript of the proceedings has been filed. The undersigned ordered that post-hearings submittals would have to be filed within 20 days of the filing of the transcript with the Division of Administrative Hearings. Petitioner timely filed a Proposed Recommended Order, which has been duly-considered by the undersigned in the preparation of this Recommended Order. Respondent did not file a post-hearing submittal.

FINDINGS OF FACT

1. At all times pertinent to this proceeding, Respondent was licensed by the Construction Industry Licensing Board (CILB) as a certified swimming pool contractor, having been issued license number CP C012912, and at all times material the Respondent was a qualifying agent of Blue Dolphin Fiberglass

Installations, Inc. (Blue Dolphin).

2. On May 4, 1990, Blue Dolphin entered into a contract with Mary Gonzalez to install a fiberglass swimming pool at Ms. Gonzalez's home at 351 Southwest Thirtieth Court, Miami, Florida, for the total sum of \$14,395.

3. The written contract was a form prepared by Blue Dolphin. Among other provisions, the contract required Blue Dolphin to have its work inspected.

4. The property owners paid the \$14,395 contract price as follows: \$1,395 on May 4, 1990; \$10,000 on May 11, 1990; \$2,000 on May 29, 1990, and \$1,000 in March 1992.

5. In June of 1990, Blue Dolphin installed a fiberglass swimming pool at the Gonzalez home.

6. At all times pertinent to this proceeding, the Gonzalez home was located within the City of Miami, where construction, including the installation of swimming pools, was governed by the South Florida Building Code (SFBC).

7. To prevent a fiberglass pool from being moved upward by rises in the groundwater table when the pool was empty, the SFBC required the installation of the subject fiberglass pool to include a 36-inch by 4-inch concrete perimeter walkway strengthened with welded steel wire mesh reinforcement.

8. The SFBC required that Blue Dolphin have the placement of the reinforcing steel wires inspected by the City of Miami

building department before it poured the concrete for the perimeter walkway. Respondent knew of this requirement.

9. When the subject pool was originally installed by Blue Dolphin, steel reinforcement for the concrete walkway was properly placed before the concrete was poured.

10. The pool as originally installed was not level. On June 12, 1990, Blue Dolphin performed work in an effort to correct that condition. Gloria Gonzalez, the daughter of Mary Gonzalez, lives at the subject property and observed the original work and the corrective work. She testified that the corrective work included removal of a portion of the deck along the entire south side and parts of the east and west sides of the pool. She estimated that approximately sixty percent of the entire deck was removed and subsequently replaced. When Blue Dolphin replaced the parts of the deck that it had removed, it did not place reinforcing steel in a substantial portion of the replaced deck. Gloria Gonzalez estimated that eighty percent of the deck that was replaced did not have steel reinforcement.¹

11. Blue Dolphin failed to have the steel reinforcement inspected by the City of Miami as required by the SFBC when it originally poured the concrete deck and when it replaced part of the concrete deck when the corrective action was taken.

12. The SFBC required Blue Dolphin to obtain a satisfactory final inspection for the project by the City of

Miami. As of the time of the final hearing, the project had not passed final inspection.

13. On May 10, 1990, Blue Dolphin obtained two building permits from the City of Miami for the subject project. Blue Dolphin obtained permits to complete the project on June 25, 1992, and, after the first permit expired, it obtained a second completion permit on August 19, 1997. The second completion permit expired on November 14, 1998.

14. At the final hearing, Respondent acknowledged Blue Dolphin's continuing duty to obtain a satisfactory final inspection of the job and expressed willingness to do whatever was necessary in order to pass the final inspection. Respondent also admitted that he and his company were negligent in the completion of this project.

15. Passing final inspection establishes that the pool was legally built and can be legally used.

16. On February 28, 1998, the City of Miami issued a letter to Mary Gonzalez threatening to impose a fine against her in the amount of \$250.00 for failing to obtain mandatory inspections for one of the building permits obtained by Blue Dolphin in 1990. Ms. Gonzalez's daughter, Gloria Gonzalez, was able to get the City of Miami building department to agree to waive the fine by explaining the history of the project to the building officials.

17. The ability of Mary Gonzalez and her family to use the pool was impaired by Blue Dolphin's failure to properly install the pool and to correct defects in the pool so that the project could pass final inspection.

18. Petitioner presented the testimony of a pool contractor² who estimated that the cost of replacing the entire deck would be \$8,975.00. The lack of steel reinforcement could be rectified by the removal of the portions of the deck that do not have the steel reinforcement. Petitioner's expert was not prepared to estimate the cost of replacing only the portions of the deck that had not been reinforced before the concrete was poured. Respondent's testimony established that replacing only the portions of the deck that had not been reinforced would be substantially less than the estimate provided by Petitioner's witness.

19. At the time the subject pool was initially installed, Blue Dolphin was in the height of its busy season and had more jobs going than Respondent could properly supervise. Section 489.1195(1), Florida Statutes, imposed on Respondent, as Blue Dolphin's qualifying agent, the duty to supervise the company's operations, including all field work at all sites.

20. Petitioner's costs of investigation and prosecution of this proceeding, excluding attorney's fees, totaled \$1,436.50 as of April 23, 1998.

21. Respondent has been disciplined by Petitioner on three prior occasions. On December 8, 1994, Petitioner entered a Final Order in Petitioner's case number 92-15716 pursuant to a settlement agreement of alleged violations of Section 489.129(1)(e), (f), and (g), Florida Statutes (1992). By the settlement, Respondent neither admitted nor denied the alleged violations. Respondent agreed to pay a fine of \$100 and costs in the amount of \$625.

22. On August 13, 1990, Petitioner entered a Final Order in Petitioner's case number 101966 that found Respondent guilty of violating the provisions of Section 489.129(1)(d) and (m), Florida Statutes, by failing to obtain a final inspection for a pool installation and for committing negligence, incompetence, misconduct, and/or deceit in the practice of contracting. As a result of the Final Order, Respondent paid an administrative fine in the amount of \$2,500 and his license was suspended from August 13, 1990, to September 18, 1990 (the date he paid the administrative fine).

23. On April 1, 1986, Petitioner entered a Final Order in Petitioner's case number 0058699 pursuant to a settlement agreement of alleged violations of Sections 489.1119, 489.129(1)(g), (j), and (m), Florida Statutes. By the settlement, Respondent neither admitted nor denied the alleged violations. Respondent agreed to pay a fine of \$1,000.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction of the parties to and the subject of this proceeding. Section 120.57(1), Florida Statutes.

25. Section 489.129(1)(d), (m), and (n), Florida Statutes (1989), and Section 489.129(1)(j), Florida Statutes (1991), are the provisions of law that Petitioner alleged Respondent violated.

26. Section 489.129(1)(m) and (n), Florida Statutes (1989), provides, in pertinent part, as follows:

(1) The board revoke, suspend, or deny the issuance or renewal of the certificate or registration of a contractor, require financial restitution to a consumer, impose an administrative fine not to exceed \$5,000 per violation, place a contractor on probation, require continuing education, assess costs associated with investigation and prosecution, or reprimand or censure a contractor if the contractor, or if the business organization for which the contractor is a primary qualifying agent or is a secondary qualifying agent responsible under s. 489.1195, is found guilty of any of the following acts:

* * *

(d) Willfully or deliberately disregarding and violating the applicable building codes or laws of the state or of any municipalities or counties thereof.

* * *

(m) Being found guilty of fraud or deceit or of gross negligence, incompetency, or

misconduct in the practice of contracting.

(n) Proceeding on any job without obtaining applicable local building department permits and inspections.

27. Section 489.129(1)(j), Florida Statutes (1991), provides that a contractor is subject to being disciplined if the contractor fails in any material respect to comply with the provisions of Chapter 489, Florida Statutes.

28. Section 489.129(1)(d), Florida Statutes (1989), has been revoked. Petitioner concedes that Count I should be dismissed.

29. Petitioner has the burden of proving by clear and convincing evidence the allegations against Respondent. See Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112 (Fla. 1st DCA 1989); Inquiry Concerning a Judge, 645 So. 2d 398 (Fla. 1994); and Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996). The following statement has been repeatedly cited in discussions of the clear and convincing evidence standard:

Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief of (sic) conviction, without hesitancy, as to

the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

30. Petitioner established by clear and convincing evidence that Respondent violated the provisions of Section 489.129(1)(n), Florida Statutes (1989), as alleged in Count II of the Amended Administrative Complaint by failing to secure the inspection for the deck and by failing to secure the final inspection for the project.

31. Petitioner established by clear and convincing evidence that Respondent violated the provisions of Section 489.129(1)(m), Florida Statutes (1989), as alleged in Count III of the Amended Administrative Complaint, by his admitted negligence.

32. Petitioner established by clear and convincing evidence that Respondent violated the provisions of Section 489.129(1)(j), Florida Statutes (1991), as alleged in Count IV of the Amended Administrative Complaint by his failure to properly supervise his field crews. Had there been proper supervision when the pool was originally installed or when the corrective work was done, this entire fiasco could have been avoided.

33. Petitioner has adopted penalty guidelines that apply to this proceeding. In 1990, those guidelines were found in Chapter 21E-17, Florida Administrative Code. Now the guidelines

are found in Chapter 61G4-17, Florida Administrative Code. These guidelines provide for a normal range of penalties that may be enhanced if there are aggravating circumstances. In this case, there exist two aggravating factors that justify enhancing the amount of the administrative fines that should be imposed. The first aggravating factor is the length of time the Gonzalez family has been without the benefit of its bargain. The problems with this project should have been corrected years ago. The second aggravating factor is the Respondent's prior disciplinary history. The recommended fines are those contained in Petitioner's Proposed Recommended Order. The fines recommended by Petitioner's Proposed Recommended Order are within Petitioner's disciplinary guidelines and are reasonable, considering all circumstances of this proceeding.

34. Petitioner's Proposed Recommended Order includes the following proposed penalty:

Permanent revocation of the Respondent's license if the Respondent fails, within 90 days following the filing date of the final order, to submit proof to the executive director of the CILB of having either (i) paid restitution to the estate of Mary Gonzalez in the amount of \$8,975.00, or (ii) obtain from the City of Miami a satisfactory final inspection of the Gonzalez pool installation.

35. The option of restitution, as proposed by Petitioner in its Proposed Recommended Order, will not be recommended

because Petitioner did not establish the reasonable cost to replace the portions of the deck that have no steel reinforcement.

36. Instead of recommending that Respondent's license be revoked unless he obtains a satisfactory final inspection within 90 days, the undersigned will recommend that Respondent be ordered to obtain a satisfactory final inspection within 90 days. If Respondent fails to comply with that order, that failure should be addressed pursuant to the provisions of Chapter 120, Florida Statutes, not unilaterally by the executive director of the CILB.

37. Pursuant to Section 455.227(3), Florida Statutes, Petitioner is entitled to recoup the costs of its investigation, excluding costs associated with attorney's time.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a Final Order be entered that dismisses Count I of the Amended Administrative Complaint, but finds Respondent guilty of Counts II, III, and IV of the Amended Administrative Complaint.

For the violation of Count II, Petitioner should impose an administrative fine against Respondent in the amount of \$1,000.

For the violation of Count III, Petitioner should impose an administrative fine against Respondent in the amount of \$2,000.

For the violation of Count IV, Petitioner should impose an administrative fine against Respondent in the amount of \$2,000.

The Final Order should order Respondent to obtain from the City of Miami a satisfactory final inspection of the Gonzalez pool within 90 days of the entry of the Final Order.

The Final Order should place Respondent's licensure on probation for two years and should impose reasonable conditions of probation pursuant to Rule 61G4-17.007, Florida Administrative Code.

The Final Order should order Respondent to pay within 90 days of the entry of the Final Order Petitioner's costs of investigating and prosecuting this matter, excluding costs associated with attorney's time.

DONE AND ENTERED this 21st day of April, 1999, in
Tallahassee, Leon County, Florida.

Hearings

CLAUDE B. ARRINGTON
Administrative Law Judge
Division of Administrative

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Hearings

Filed with the Clerk of the
Division of Administrative

this 21st day of April, 1999

ENDNOTES

1/ At the time of the formal hearing, this problem had not been corrected.

2/ This witness supervised the installation of approximately 14 concrete pools during the seven years he has been licensed. He has never installed a fiberglass pool.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.

¹ At the time of the formal hearing, this problem had not been corrected.

² This witness supervised the installation of approximately 14 concrete pools during the seven years he has been licensed. He has never installed a fiberglass pool.