

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PINELLAS COUNTY CONSTRUCTION)
LICENSING BOARD,)
)
Petitioner,)
)
vs.) Case No. 00-4228PL
)
ROBERT W. DOBSON,)
)
Respondent.)
-----)

RECOMMENDED ORDER

Upon due notice, William R. Cave, an Administrative Law Judge for the Division of Administrative Hearings, held a formal hearing on January 26, 2001, in Largo, Florida.

APPEARANCES

For Petitioner: William W. Owens, Executive Director
Pinellas County Construction
Licensing Board
Suite 102
11701 Belcher Road
Largo, Florida 33773-5116

For Respondent: Robert W. Dobson, pro se
8965 60th Street, North
Pinellas Park, Florida 33782

STATEMENT OF THE ISSUES

Did Respondent commit the violations alleged in the Administrative Complaint dated September 1, 2000, and if so, what discipline is appropriate?

PRELIMINARY STATEMENT

By an Administrative Complaint dated September 1, 2000, and filed with the Division of Administrative Hearings (Division) on October 12, 2000, the Pinellas County Construction Licensing Board (Board) is seeking to revoke, suspend, or otherwise discipline Respondent's Certified Commercial Pool/Spa Contractor's License. As grounds therefor, the Board alleges that Respondent caused financial harm to Louis Alberto and Margaret Alberto and committed fraud or deceit or gross negligence, incompetency, or misconduct in the practice of contracting in violation of Section 24(2)(d)(h)(j)(m) and (3), Chapter 89-504, Laws of Florida, as amended, when he covered the Alberto's existing river rock (stone and epoxy) pool deck with Flo-Crete which voided the manufacture's warranty. By an Election of Rights, Respondent disputed the charges and requested an administrative hearing. By letter dated October 9, 2000, the Board referred this matter to the Division for the assignment of an Administrative Law Judge and for the conduct of an administrative hearing.

At the hearing, the Board presented the testimony of Louis Alberto and Paul Paine. The Board's Exhibits 1 through 5 were admitted in evidence. Respondent testified on his own behalf and presented the testimony of Ronald Davis. Respondent did not offer any documentary evidence.

The Board preserved the record of the hearing using a tape recorder and filed a copy of the tape with the Division upon the conclusion of the hearing. A review of the tape reveals that a portion of Respondent's testimony and all of the testimony of Ronald Davis was not recorded. The Board elected not to file proposed findings of fact and conclusions of law. Respondent filed a letter with the Board, as did the Complainant, which was filed with the Division by the Board. Both of those letters have been considered by the undersigned.

FINDINGS OF FACT

Upon consideration of the oral and documentary evidence adduced at the hearing, the following relevant findings of fact are made:

1. The Board is the agency within Pinellas County, Florida, which is given the authority under Chapter 89-504, Laws of Florida, as amended, to regulate and discipline the license of, among others, certified commercial pool/spa contractors.

2. Respondent is, and has been at all times material hereto, a certified commercial pool/spa contractor in Pinellas County, Florida, having been issued license C-2578 (RP0023937).

3. On September 9, 1999, Respondent entered into a contract with Louis Alberto and Margaret Alberto (Albertoes).

The contract provided for Respondent to:

Remove algae and dirt from Sand Pebble deck. Resurface entire Pebble Deck (1132 sq. ft.) with Flo-Crete. Retexture entire surface and seal with color of choice. Place random pattern. Pressure clean existing deck and acid wash.

4. The contract price was \$3,600.00 with 50 percent to be paid at the beginning of the contract and the balance to be paid upon completion of the contract.

5. Although it is not covered in the contract, both parties agreed that Respondent had verbally agreed to give the Albertoes his personal five-year warranty on the work he was to perform under the contract, which included covering the pool sand pebble deck with Flo Crete.

6. Design Flo-Crete (Flo-Crete) is a product manufactured by Seamco Laboratories, Inc. (Seamco) and used in covering pool decks. Seamco's position on covering a sand pebble deck with Flo-Crete is as follows:

Please be advised that as a manufacturer Seamco Laboratories, Inc., does not recommend going over river rock (stone and epoxy systems) with their product Design Flo-Crete. Going over epoxy stone would encapsulate bacteria, which could cause gases that could cause disruption of the Design Flo-Crete.

Seamco is aware that some of their dealers install Flo-Crete over river rock successfully. However, Seamco's official position is as stated above. Respondent was aware of Seamco's position on the installation of Flo-Crete over river rock at the time he entered into the contract with the Albertoes and advised the Albertoes that Seamco did not recommend going over river rock (stone and epoxy systems) with Flo-Crete. However, Respondent advised the Albertoes that he had previously used Flo-Crete over river rock successfully on several jobs. Respondent's did not seal the sides of the deck which allowed the gases created by the encapsulated bacteria to escape through the sides. There is no mention in the contract that Seamco would warrant Flo-Crete under any condition.

Furthermore, Respondent did not verbally advise the Albertoes that Seamco would warrant Flo-Crete under these conditions.

7. Subsequent to entering into the contract, Respondent proceeded to: (a) remove the algae and dirt from the sand pebble deck by pressure cleaning and acid wash; (b) resurface entire pebble deck with Flo-Crete; and (c) retexture entire surface and seal with color of choice. There were some minor problems but those were corrected. However, the Albertoes were not satisfied with the new textured surface because it tended to show scuff marks and the color was too light.

8. In an attempt to satisfy the Albertoes, Respondent put lines on the deck by applying tape and painting over the entire surface and then removing the tape leaving the lines. Also, in a further attempt to satisfy the Albertoes, Respondent applied a combination of two colors to darken the original color. However, the original color (bone white) continued to bleach through and was not satisfactory to the Albertoes. At this point, Respondent became convinced that he could not satisfy the Albertoes.

9. Apparently, the Albertoes' dissatisfaction with the color of the deck resulted in Respondent not being allowed to apply the polyurethane sealer to the deck. In any event, the polyurethane sealer was never applied to the deck surface.

10. Subsequently, the Albertoes contracted with another contractor to tear out the existing sand pebble deck and refinish the deck to their specifications for a contract price of approximately \$3,600.00

11. There is insufficient evidence to show that Respondent's method of applying Flo-Crete over the sand pebble deck resulted in the disruption of the Flo-Crete or was the cause of Respondent being unable to satisfy the Albertoes as to the color and texture of the deck.

CONCLUSIONS OF LAW

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

13. The burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal, Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). To meet this burden, the Board must establish facts upon which its allegations are based by a clear and convincing evidence. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern Company, 670 So. 2d 932 (Fla. 1996) and Section 120.57(1)(j), Florida Statutes.

14. Sections 24 (1),(2),(d),(h)(3),(j),and (m), Chapter 89-504, Laws of Florida, as amended, provide as follows:

(1) On its own motion or the verified written complaint of any person, the board may investigate the action of any contractor certified or registered under this part and hold hearings pursuant to law . . . The board may take appropriate disciplinary action if the contractor is found to be guilty of or has committed any one of the acts or omissions constituting cause for disciplinary action set out herein or adopted as rules or regulations by the board.

(2) The following acts constitute cause for disciplinary action:

* * *

(d) Willfully or deliberately disregarding and violating the applicable building codes or laws of the state, this board, or of any municipality or county of this state;

* * *

(h) Committing mismanagement or misconduct in the practice contracting that causes financial harm to a customer. Financial mismanagement or misconduct occurs when:

* * *

(3) The contractor's job has been completed, and it is shown that the customer has had to pay more for the contracted job than the original contract price, as adjusted for subsequent change orders, unless such increase in cost was the result of circumstances beyond the control of the contractor, was the result of circumstances caused by the customer, or was otherwise permitted by the terms of the contract between the contractor and the customer.

* * *

(j) Failing any material respect to comply with the provisions of this part.

* * *

(m) Being found guilty of fraud or deceit or of gross negligence, incompetency, or misconduct in the practice of contracting.

15. The Board has failed to meet its burden to show by clear and convincing evidence that Respondent is guilty of the violations as charged in the Administrative Complaint filed herein.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Board enter a Final Order dismissing the Administrative Complaint filed against Respondent.

DONE AND ENTERED this 22nd of February, 2001, in
Tallahassee, Leon County, Florida.

WILLIAM R. CAVE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of February, 2001.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit 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.