

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

STEPHAN A. HUMPHREY,)
)
 Petitioner,)
)
 vs.) Case No. 01-4668
)
 ROBERT P. RYAN, JR., d/b/a)
 PERSONALIZED HOMES OF BREVARD,)
 INC., AND DEPARTMENT OF)
 BUSINESS AND PROFESSIONAL)
 REGULATION, CONSTRUCTION)
 INDUSTRY LICENSING BOARD,)
 CONSTRUCTION INDUSTRIES)
 RECOVERY FUND,)
)
 Respondents.)
 _____)

RECOMMENDED ORDER

A formal hearing was held in this case before Daniel M. Kilbride, Administrative Law Judge, Division of Administrative Hearings, on March 1, 2002, in Melbourne, Florida.

APPEARANCES

For Petitioner: Bruce M. Harris, Esquire
Gray, Harris & Robinson
Post Office Box 3068
Orlando, Florida 32802

For Respondent: Elise Matthes, Esquire
Department of Business
and Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-1039

For Respondent: Charles L. Curtis, Esquire
Robert Ryan, Jr. Doumar, Curtis, Cross,
Laystrom & Perloff
1177 Southeast Third Avenue
Fort Lauderdale, Florida 33316

STATEMENT OF THE ISSUES

Whether Petitioner is eligible to recover from the Construction Industries Recovery Fund, and, if so, in what amount.

PRELIMINARY STATEMENT

Petitioner, Stephen A. Humphrey, applied for recovery from the Construction Industries Recovery Fund (the "Fund") pursuant to the provisions of Section 489.141, Florida Statutes. Petitioner's request was denied by an Order dated April 24, 1998. Petitioner filed a Notice of Appeal and a Request for a Formal Hearing. The case was transferred to the Division of Administrative Hearings ("DOAH"), and a hearing was scheduled before the undersigned Administrative Law Judge ("ALJ"). At the hearing, the parties announced that a settlement agreement had been reached and that there were no material issues of disputed fact for the ALJ to consider. In April 1999, the Construction Industry Licensing Board (the "Board") approved the settlement agreement. In September 2000, the Board entered a Final Order approving Petitioner's Claim. The Board approved payment of \$25,000 to Petitioner from the Fund. Respondent, Robert P. Ryan, appealed this final agency decision to the Fourth District

Court of Appeal. Respondent Ryan urged the appellate court to dismiss Petitioner's claim as to Respondent Ryan. The court declined Respondent Ryan's invitation to dismiss the action, but remanded the matter for a formal DOAH hearing. The case was again transferred to DOAH and a formal hearing occurred on March 1, 2002.

At the formal hearing, Petitioner testified in his own behalf and 15 exhibits were entered into evidence. Respondent Ryan presented the testimony of John Kingsley and offered 16 exhibits, each of which were entered into evidence. The Board offered no exhibits or witnesses. A Transcript of the proceedings was filed, on March 29, 2002. Petitioner and Respondent Ryan timely filed Proposed Recommended Orders. The Board has not filed proposals as of the date of this Order. Respondent Ryan's Motion for Entry of Recommended Order, filed April 22, 2002, is denied as moot.

FINDINGS OF FACT

1. Petitioner entered into a contract with "Personalized Homes" to build his home located in Brevard County, on February 7, 1993. Jack Powell signed the contract on behalf of Personalized Homes. This contract required substantial completion on or before September 15, 1993.

2. Respondent Ryan was the qualifying agent for Personalized Homes, Personalized Homes Corporation, Personalized

Homes, Inc., and Personalized Homes of Brevard, Inc., during all times relevant hereto.

3. Petitioner took the February 1993 Contract to the bank which approved a construction loan. Petitioner used a portion of the proceeds from the construction loan obtained in March 1993 to buy the lot upon which his house was eventually built.

4. Petitioner could not have obtained the construction loan or purchased the lot upon which he built his home without the use of the February 1993 Contract.

5. Petitioner had architectural plans drawn up in February/March 1993, after the February 1993 Contract was signed.

6. Petitioner recorded in the official records of Brevard County a Notice of Commencement of the construction of a home in March 1993. The Notice of Commencement was for the plans drawn up for the house after the February 1993 Contract was signed. No actual construction was begun under the original plans.

7. The initial plans were rejected and new plans were prepared in the summer of 1993. Petitioner sought bids from several contractors but settled on Personalized Homes to complete the project.

8. Petitioner and Personalized Homes, Inc., entered into another written document relating to the construction of Petitioner's home which was dated September 5, 1993. Jack

Powell and John Kingsley signed the September 5 Contract on behalf of Personalized Homes, Inc.

9. An application for a building permit for the construction of Petitioner's house was filed on September 28, 1993, and construction commenced.

10. Problems developed from the construction of Petitioner's house which led to Petitioner filing a civil action in Circuit Court in Brevard County against persons and entities, including Personalized Homes of Brevard, Inc., but not including Respondent Ryan.

11. On August 6, 1996, Petitioner filed an Amended Complaint against Jack Powell, John Kingsley, Personalized Homes, Inc., and Personalized Homes of Brevard, Inc., but not including Respondent Ryan. The Defendants each filed answers and affirmative defenses stating that the February 7 Contract was for financing purposes only and that the September 5 Contract was the applicable contract.

12. On January 8, 1998, the parties to the litigation entered into a settlement agreement. Pursuant to the settlement agreement, Jack Powell, John Kingsley, Personalized Homes, Inc., and Personalized Homes of Brevard, Inc., agreed to pay Petitioner \$17,500. Paragraph 13 of the settlement agreement provides that Petitioner will not prosecute an administrative claim against Jack Powell, John Kingsley, and Personalized Homes

of Brevard, Inc., including any claims with the Board. This covenant expressly does not prohibit any claim against Personalized Homes, Inc. Paragraph 13 further provides that Petitioner "will not institute, maintain, prosecute or continue to maintain or prosecute any claims against the license of qualifying agent for Personalized Homes, Inc., Robert Ryan, with the Construction Industry Licensing Board, however Humphrey shall not be prohibited from pursuing any claim with regard to the Construction Industry Recovery Fund."

13. While Respondent Ryan was neither a named party in Petitioner's prior civil action nor a signatory to the settlement document effectuated therein, Respondent Ryan is specifically mentioned in that document, and the document specifically contemplates actions to be taken with regard to Respondent Ryan and his license with the Board.

14. On January 9, 1998, a final judgment was entered in which the court found: Personalized Homes, Inc., and Petitioner entered into the September 5 Contract; Respondent Ryan was the qualifying agent for Personalized Homes, Inc., during the construction of Petitioner's home; Personalized Homes, Inc., commenced construction on or after September 5, 1993; the construction was defective and performed in such a way that Personalized Homes, Inc., knowingly violated applicable state and local building codes; Petitioner suffered damages in the

amount of \$96,041.75; and the February 7 Contract was not performed, was cancelled before performance began, and is not related to the September 5 Contract.

15. However, in the prior civil action, Petitioner filed pleadings with the court characterizing Petitioner's September 1993 written document as a supplement to the February 1993 Contract.

16. After the settlement of the civil action, Petitioner filed a claim with the Board in 1998 that sought payment of his claim under Chapter 489, Florida Statutes, from the Fund based upon Petitioner's unsatisfied judgment entered in the Circuit Court action in Brevard County. A prerequisite for being paid a claim from the Fund is to successfully obtain an order from the Board. In Petitioner's claim that was filed with the Board, Petitioner represented to the Board that the September 1993 written document is a supplement to the February 1993 Contract. In the Board proceeding in 1998, Petitioner's settlement was made a part of that record.

17. Petitioner's claim was heard and denied by order of the Board, dated April 24, 1998. The Board rejected the claim when it found that (1) Petitioner's contract upon which the claim is based was entered into in February 1993 and his contract pre-dates the effective date (July 1993) of the Recovery Statute under which his claim is governed, and

(2) Petitioner waived his claim against the Fund according to the terms of his settlement in the prior judicial action.

18. Petitioner requested a formal administrative proceeding before DOAH relating to the Board's 1998 order. Respondent Ryan was joined in that action which was, upon Respondent Ryan's unopposed motion, abated and dismissed against Respondent Ryan. No party in that action appealed the ALJ order dismissing Respondent Ryan. The action was terminated by administrative order in 2000 when the remaining parties advised the ALJ that they had entered into a settlement agreement and that there were no genuine issues of material fact and that Petitioner was entitled to recover from the Fund. The Board entered an order in 2000 reversing its 1998 order, adopted the agreed settlement and entered an order approving Petitioner's claim.

19. Respondent Ryan appealed this final agency decision and the Fourth District Court of Appeal reversed the order entered by the Board in 2000 and remanded the case for an evidentiary hearing.

20. Respondent Ryan has filed motions seeking to dismiss and abate this proceeding based upon the doctrines of the law of the case and collateral estoppel. Those motions were denied prior to the hearing and renewed at the formal hearing and again are denied.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction of the parties and the subject matter of this proceeding. Section 120.569 and 120.57(1), Florida Statutes.

22. Section 489.141, Florida Statutes, provides in pertinent part:

(1) Any person is eligible to seek recovery from the Construction Industries Recovery Fund after having made a claim and exhausting the limits of any available bond, cash bond, surety, guarantee, warranty, letter or credit, or policy of insurance, if:

(a) Such person has received final judgment in a court of competent jurisdiction in this state in any action wherein the cause of action was based on a construction contract . . . where the contract was executed . . . on or after July 1, 1993

23. The applicable contract in this proceeding is the Construction Agreement executed February 7, 1993, as supplemented on September 5, 1993.

24. Petitioner's arguments that the September 5, 1993, document nullified the February 7, 1993, Contract or is a separate contract from the February 7, 1993, Contractor Agreement are rejected.

25. A prerequisite for being paid a claim by the Fund is to successfully obtain an order from the Board. There is no

basis shown in this record to recommend changing the findings or conclusions of the Board's April 24, 1998, order.

26. The February 7, 1993, Contract makes Petitioner ineligible to receive any recovery from the Fund under Section 489.141, Florida Statutes, since it was executed prior to July 1, 1993.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that Petitioner's claim be denied.

DONE AND ENTERED this 29th day of April, 2002, in Tallahassee, Leon County, Florida.

DANIEL M. KILBRIDE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of April, 2002.

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.