

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
CONSTRUCTION INDUSTRY LICENSING)
BOARD,)
)
Petitioner,)
)
vs.) Case No. 03-2420PL
)
EDWARD MIDGETT,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the administrative hearing of this case on August 26, 2003, in Fort Myers, Florida, on behalf of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Kimberly Clark Menchion, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

For Respondent: Darrin R. Schutt, Esquire
Seeman & Schutt, P.A.
1105 Cape Coral Parkway, East
Suite C
Cape Coral, Florida 33904

STATEMENT OF THE ISSUE

The issue is whether Respondent violated Subsections 489.129(1)(g), (i), (j), and (m), Florida Statutes (2001), by allegedly engaging in financial mismanagement, abandoning a construction project, engaging in misconduct or being incompetent, and failing to disclose the rights of the consumer in a contract. (Statutory references are to Florida Statutes (2001).)

PRELIMINARY STATEMENT

On or about July 1, 2003, Petitioner filed an Administrative Complaint against Respondent. Respondent requested an administrative hearing. Petitioner referred the matter to DOAH to conduct the hearing.

At the hearing, Petitioner offered the testimony of three witnesses and submitted eight exhibits for admission into evidence. Respondent testified and submitted three exhibits for admission into evidence.

The identity of the witnesses and exhibits, and any attendant rulings, are set forth in the Transcript of the hearing filed with DOAH on September 23, 2003. Petitioner timely filed its Proposed Recommended Order (PRO) on October 1, 2003. Respondent did not file a PRO.

FINDINGS OF FACT

1. On July 18, 1984, the Construction Industry Licensing Board (the Board) licensed Respondent as a Florida State Certified General Contractor pursuant to license number CG C028520. Respondent registered with the Board as doing business in the name of "Midgett Development Inc." (Midgett Development).

2. Respondent conducted business as Midgett Development in 2001. In 2001, Respondent also conducted business as a licensed real estate broker through Sundial Group Enterprises, Inc. (Sundial).

3. On February 20, 2001, Respondent executed a contract with Ms. Linda Luck (Luck) requiring Midgett Development to build a residential home on a vacant lot located at 1510 Northeast 11th Street, Cape Coral, Florida, that Sundial was to purchase from a third party (the contract). The contract identifies Midgett Development as the contractor and Sundial as the purchaser of the lot.

4. The contract violates Subsection 489.129(1)(i). The contract does not contain a written statement explaining the consumer rights to which Luck is entitled under the Construction Industry Recovery Fund.

5. The contract requires the contractor to use its best efforts to deliver the completed residence "on or about 120 days" from the start of construction. The start of construction

is defined as the day footings are poured; or the day rough plumbing is begun if the contractor uses monolithic footings and slab. The contract provides that time is of the essence.

6. The contract price is \$70,000.00 and pays the cost of purchasing the lot and the cost of constructing the residence. The contract requires Luck to pay \$20,000 at the signing of the contract and an additional \$50,000 at the closing for the purchase of the lot.

7. Luck paid Midgett Development the total contract price on February 20, 2001. Luck issued two separate checks to Midgett Development for \$20,000 and \$50,000. Each check is dated February 20, 2001.

8. Sundial closed on the purchase of the lot and deducted a buyer's real estate commission from the closing proceeds. Sundial or Respondent took title to the lot. Respondent testified that he did not apply for the building permit until he had clear title to the lot. The closing date for the lot acquisition is not in evidence.

9. Respondent and Midgett Development failed to begin construction of the residence within 90 days of the date of the contract within the meaning of Section 489.129(1)(j). Respondent applied for a building permit from the City of Cape Coral, Florida (Cape Coral) on January 10, 2002, approximately 324 days after executing the contract.

10. Respondent provided no credible and persuasive explanation for his delay in applying for a permit. On direct examination, Respondent testified that he expended \$19,000 of the \$70,000 shortly after he executed the contract, in relevant part, to purchase the lot. Respondent later testified that he did not apply for a building permit before January 10, 2002, because he did not have clear title to the lot before that date. Respondent's testimony is not supported by other evidence and is neither credible nor persuasive.

11. Cape Coral issued a building permit for the residence on March 11, 2002, approximately 394 days after Respondent executed the contract. By May 2002, approximately 80 days after receiving the building permit, no evidence of construction activity could be observed on the lot. By July 30, 2002, approximately 533 days after executing the contract, Respondent and Midgett Development "began construction," as that phrase is defined in the contract. On July 30, 2002, Cape Coral issued favorable foundation and plumbing inspections.

12. Respondent and Midgett Development abandoned the construction project while each was under contract as a contractor within the meaning of Subsection 489.129(1)(j). Assuming arguendo that Respondent and Midgett Development had legitimate reasons for not beginning construction prior to July 30, 2002, Respondent and Midgett Development abandoned the

construction project on October 30, 2002, approximately 90 days after July 30, 2002, without just cause, and without notice to Luck. After July 30, 2002, Respondent and Midgett Development did not engage in any further construction activity, and Cape Coral rescinded the inspection approval.

13. When Respondent and Midgett Development abandoned the construction project, they committed mismanagement and misconduct in the practice of contracting within the meaning of Subsection 489.129(1)(g)2. At the time Respondent and Midgett Development abandoned the project, the percentage of completion was less than the percentage of the total contract price paid by Luck. Respondent and Midgett Development caused financial harm to Luck. As of the date of hearing, Respondent and Midgett Development had not completed the project and had not refunded any of the money paid to them.

14. Respondent provided no credible and persuasive explanation for the failure to either construct the residence or refund the money paid by Luck. Respondent's testimony that Luck requested Respondent to stop construction is not supported by other evidence, including Luck's testimony. Luck's testimony is credible and persuasive.

15. If it were found that Luck asked Respondent not to complete construction, the purported request is not material to this proceeding. Respondent began construction on July 30,

2002. Respondent testified that Luck asked Respondent on April 1, 3, and 12, 2003, not to complete construction. Respondent had ample time between July 30, 2002, and April 1, 2003, to complete construction. He also had ample time between February 20, 2001, and July 30, 2003, to complete construction.

16. Respondent and Midgett Development misallocated funds entrusted to them by Luck within the meaning of Subsection 489.129(1)(m). Neither Respondent nor Midgett Development has reimbursed Luck or paid restitution to her.

17. Between November 15, 2002, and August 18, 2003, Respondent paid approximately \$13,074 to third parties for living expenses incurred by Luck, including rent, utilities, and similar expenses. Those amounts do not constitute restitution or reimbursement of part of the \$70,000 paid by Luck for the construction of her residence. Luck paid Respondent \$70,000 to build a house and not to pay her living expenses.

18. Luck is a single parent and would have been evicted and "out on the street" unless Respondent paid her living expenses. Luck was unable to pay her living expenses because Respondent had \$70,000 of Luck's money. The payments made by Respondent may, or may not, be treated by the circuit court as a set off against a judgment obtained by Luck in circuit court. That determination, however, is beyond the scope of this proceeding.

19. Respondent testified that he spent another \$19,000 for Luck. However, Respondent expended most of that sum purchasing a lot owned either by Sundial or Midgett Development, earning a commission for Sundial, and constructing some improvements on the lot. None of that money is restitution or reimbursement to Luck.

20. Petitioner previously disciplined Respondent for violations of Chapter 489 in Department of Business and Professional Regulation Case Numbers 200003354 and 200108551. Petitioner conducted each matter as an informal hearing before the agency. In the former case, Petitioner and Respondent entered into a written Stipulation on October 29, 2001. Respondent agreed to satisfy a civil judgment against him but neither admitted nor denied the allegations against him. In the latter case, Petitioner entered a default judgment against Respondent on March 4, 2003, for failure to satisfy another civil judgment against Respondent and placed Respondent on probation for two years.

21. Petitioner has incurred investigative costs in the instant proceeding that exclude costs associated with the time expended by attorneys for Petitioner (investigative costs). The total investigative costs incurred by Petitioner are \$1,429.61.

CONCLUSIONS OF LAW

22. DOAH has jurisdiction over the parties and subject matter of this proceeding. Sections 120.569 and 120.57, Florida Statutes (2003). DOAH provided adequate notice of the administrative hearing.

23. Petitioner has the burden of proof in this proceeding. Petitioner must show by clear and convincing evidence that Respondent committed the acts alleged in the Administrative Complaint and the reasonableness of any proposed penalty. Section 120.57(1)(h), Florida Statutes (2003); Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d. 292 (Fla. 1987).

24. Petitioner satisfied its burden of proof. For reasons stated in the Findings of Fact and incorporated here by reference, Petitioner showed by clear and convincing evidence that Respondent and Midgett Development violated Subsections 489.129(1)(g)2, (j), and (m).

25. Subsection 489.129(1) authorizes the Board to impose a range of penalties for the violations committed by Respondent and Midgett Development. The penalties include revocation, administrative fines, and restitution.

26. Florida Administrative Code Rules 61G4-17.001, 17.002, and 17.003 authorize Petitioner to consider certain aggravating or mitigating factors in determining the appropriate penalty in

this case. Petitioner proposes a penalty that includes revocation of all licenses and registrations, a requirement for restitution to Luck, the imposition of an administrative fine of \$5,000 for each of the violations committed by Respondent and Midgett Development, and an award of investigation costs.

27. The aggravating and mitigating factors evidenced in this case support a penalty that includes revocation, restitution, and an award of investigative costs. However, a single administrative fine of \$5,000 is appropriate because all of the violations arose from the same act or omission.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that Petitioner enter a Final Order finding that Respondent and Midgett Development are guilty of the violations alleged in the Administrative Complaint; revoking the license and registration of Respondent and Midgett Development; imposing an administrative fine of \$5,000; and ordering Respondent and Midgett Development to make full restitution to Luck and to pay investigative costs in the amount of \$1,429.61.

DONE AND ENTERED this 28th day of October, 2003, in
Tallahassee, Leon County, Florida.

S

DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of October, 2003.

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.