

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

KAREN W. SCRAGG, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 04-2076  
 )  
 DEPARTMENT OF BUSINESS AND )  
 PROFESSIONAL REGULATION, )  
 CONSTRUCTION INDUSTRY LICENSING )  
 BOARD, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

On October 20, 2004, an administrative hearing in this case was held in Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: No appearance.

For Respondent: Adrienne C. Rodgers, Esquire  
Department of Business and  
Professional Regulation  
1940 North Monroe Street, Suite 60  
Tallahassee, Florida 32399-2202

STATEMENT OF THE ISSUE

The issue in the case is whether the Petitioner's request for payment from the Construction Industries Recovery Fund meets the requirements of law and should be approved.

PRELIMINARY STATEMENT

By Order dated August 15, 2003, the Department of Business and Professional Regulation, Construction Industry Licensing Board, Construction Industries Recovery Fund (Respondent), denied the application of Karen W. Scragg (Petitioner) for reimbursement from the fund. Petitioner filed a Petition for Informal Hearing to challenge the denial. The Petition was forwarded to the Division of Administrative Hearings.

By Notice of Hearing by Video Teleconference dated July 2, 2004, the dispute was scheduled to be heard on October 20, 2004, at 9:00 a.m., by videoconference between Tampa and Tallahassee.

By letter filed October 13, 2004, Petitioner requested that venue for the hearing be changed to Tallahassee. Petitioner's request was granted and the parties were telephonically notified that the hearing would be conducted in Tallahassee. An Amended Notice of Hearing dated October 14, 2004, stated that the hearing would be conducted in Tallahassee on October 20, 2004, at 9:00 a.m.

On October 20, 2004, at 9:00 a.m., counsel for Respondent and a witness were present at the scheduled hearing time, as was the court reporter and the undersigned Administrative Law Judge. Because Petitioner was not present at the scheduled time, the hearing was delayed to provide additional time for Petitioner to appear. An attempt was made to contact Petitioner at the

telephone number provided to the Division of Administrative Hearings by Petitioner, but there was no answer.

The hearing commenced at 9:30 a.m. with Petitioner absent. Respondent's Exhibits 1 through 17 were admitted into evidence. Prior to the hearing, both parties submitted pre-filed exhibits, and both sets of Exhibits numbered 1 through 17 and submitted by each party were identical.

Petitioner also pre-filed Exhibits numbered 18 through 20. By Objection to Late Filed Exhibits filed on October 18, 2004, Respondent noted that Petitioner's Exhibits 18 through 20 had not been included in an exhibit exchange that was required (pursuant to an Order of Pre-Hearing Instructions dated July 2, 2004) to have occurred by September 30, 2004. Petitioner's Exhibits 18 through 20 were rejected at the hearing.

By the conclusion of the hearing, Petitioner remained absent. Respondent advised that it would not be filing the transcript of the hearing. The Administrative Law Judge advised that proposed recommended orders were due to be filed within ten days of the hearing date.

Apparently at 1:30 p.m. on October 20, 2004, Petitioner arrived at the Tallahassee hearing location, and asserted that the hearing had been scheduled for 2:00 p.m. Petitioner was advised that the hearing had been scheduled for 9:00 a.m., and that it had been conducted as scheduled. By letter subsequently

filed on October 20, 2004, Petitioner requested that the hearing be rescheduled.

In the letter, Petitioner stated that she had "erred" and believed that the hearing was scheduled for 2:00 p.m. There was no explanation for how the error occurred, and Petitioner stated that she was "at a loss" as to how she misunderstood the hearing time. The letter acknowledged that when Petitioner requested the change in venue, she did not request any change to the scheduled time. The letter also acknowledges that when the venue change was confirmed by telephone there was no discussion related to the scheduled time.

By letter filed on October 21, 2004, Respondent noted its objection to Petitioner's request that the hearing essentially be conducted again.

The hearing was initially scheduled for 9:00 a.m., and every subsequent notice related to the time of the hearing, including notices filed by Respondent and copied to Petitioner as to the arrangements for a court reporter to be present confirmed that the hearing would commence at 9:00 a.m. Absent any explanation as to why Petitioner misunderstood the scheduled hearing time, there was insufficient cause to grant Petitioner's request. Petitioner's request to re-hear the case was denied by Order dated October 25, 2004. The Order advised that proposed

recommended orders were due by November 1, 2004, the schedule established at the hearing.

No transcript of the hearing was filed. Both parties filed Proposed Recommended Orders on November 1, 2004.

FINDINGS OF FACT

1. On or about March 20, 1995, Petitioner entered into a contract with Kenneth Boaz (Boaz) doing business as Revival Remodelers. Boaz was licensed as a Certified Residential Contractor, Florida license number CR C035360.

2. The contract was for the remodeling of Petitioner's home. The work appears to have been either uncompleted by Boaz or not completed in accordance with Petitioner's desires.

3. The total amount of the contract, including change orders, was for \$53,370.00.

4. Petitioner paid \$41,755.00 to Boaz, leaving an unpaid amount of \$11,615.00.

5. Petitioner sued Boaz (County Court, Pinellas County, Florida, Civil Division, Case Nos. 96-4335-CO and 96-4343-CO) and received a Final Judgment dated August 26, 1996, against Boaz in the amount of \$5,796.00.

6. Petitioner appears to have initiated an attempt to collect the judgment. By transmittal letter dated December 1, 1997, Petitioner received a check from an attorney in the amount of \$1,501.77. The letter indicates that the forwarded amount

was based on payment by Boaz of \$1,877.21 minus a 20 percent commission of \$375.44. The letter also indicates a "current balance of account" as \$6,126.20.

7. Boaz appealed the County Court decision to the Circuit Court (Sixth Circuit, Appeal No. 96-7707-CI-88B). By Order dated June 29, 1998, the Circuit Court affirmed the determination of liability, but vacated the amount of damages and remanded the case to the trial court for a new trial to determine damages.

8. On remand, the County Court entered another Final Judgment awarding damages, dated October 28, 1998, and the case was again appealed to the Circuit Court (Sixth Circuit, Appeal No. 98-8369-CI-88A).

9. By Order dated June 29, 2000, the Circuit Court again vacated the amount of damages and remanded the case to the trial court for a new trial to determine damages in accordance with directions provided in the Order.

10. At some point during the litigation, Boaz filed for bankruptcy. The United States Bankruptcy Court for the Middle District of Florida, Tampa Division, in Case No. 01-20049-8B7, lifted the automatic bankruptcy stay applicable to Boaz, and by Stipulation for Entry of Final Judgment Liquidating Claims of Plaintiffs executed in April 2003, Petitioner and Boaz reached an agreement that Petitioner's claim was in the amount of

\$15,000. By Order Determining Claim of the Plaintiffs dated April 25, 2003, the County Court accepted the stipulated amount of \$15,000

11. Petitioner filed a claim form seeking reimbursement from the Construction Industry Recovery Fund. The claim form has a signature purporting to be that of Petitioner. The form contains a receipt date of February 17, 1998.

12. By Order dated August 15, 2003, Petitioner's claim was denied by the Construction Industry Recovery Fund Committee and the Construction Industry Licensing Board on the grounds that Petitioner had failed to present a Final Judgment as to the damages and that Petitioner failed to state a claim eligible for compensation from the fund.

#### CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. § 120.569, Fla. Stat. (2003).

14. Petitioner has the burden of establishing by a preponderance of the evidence entitlement to the relief sought. Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (1st DCA 1977). Although, as stated previously, Petitioner did not appear for the hearing or present evidence, Respondent's Exhibits 1 through 17 were identical to those identified by Petitioner, and the exhibits were admitted into

the record of the hearing. Notwithstanding the admission of the exhibits, Petitioner has failed to establish that the claim should be approved.

15. Subsection 489.140(1), Florida Statutes (2003), provides as follows:

The Florida Construction Industries Recovery Fund shall be disbursed as provided in s. 489.143, on order of the board, as reimbursement to any natural person adjudged by a court of competent jurisdiction to have suffered monetary damages, or to whom the licensee has been ordered to pay restitution by the board, where the judgment or restitution order is based on a violation of s. 489.129(1)(g), (j), or (k), committed by any contractor, financially responsible officer, or business organization licensed under the provisions of this part at the time the violation was committed, and providing that the violation occurs after July 1, 1993. (emphasis supplied)

16. There is no evidence that Boaz was ordered by the Construction Industry Licensing Board to pay restitution to Petitioner.

17. Although damages were twice awarded to Petitioner by the Pinellas County Court, the damage determinations were vacated on appeal by the Circuit Court, and there does not appear to have been a third determination. The parties eventually entered into a stipulated agreement assigning a value of \$15,000 to Petitioner's claim. There is no credible evidence permitting a determination that the claim value was based upon a



violation of Subsections 489.129(1)(g), (j), or (k), Florida Statutes (2003), which provide in relevant part as follows:

The board may take any of the following actions against any certificateholder or registrant: place on probation or reprimand the licensee, revoke, suspend, or deny the issuance or renewal of the certificate, registration, or certificate of authority, require financial restitution to a consumer for financial harm directly related to a violation of a provision of this part, impose an administrative fine not to exceed \$5,000 per violation, require continuing education, or assess costs associated with investigation and prosecution, if the contractor, financially responsible officer, or business organization for which the contractor is a primary qualifying agent, a financially responsible officer, or a secondary qualifying agent responsible under s. 489.1195 is found guilty of any of the following acts:

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

1. Valid liens have been recorded against the property of a contractor's customer for supplies or services ordered by the contractor for the customer's job; the contractor has received funds from the customer to pay for the supplies or services; and the contractor has not had the liens removed from the property, by payment or by bond, within 75 days after the date of such liens;

2. The contractor has abandoned a customer's job and the percentage of completion is less than the percentage of the total contract price paid to the contractor as of the time of abandonment, unless the contractor is entitled to retain such funds under the terms

of the contract or refunds the excess funds within 30 days after the date the job is abandoned; or

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) Abandoning a construction project in which the contractor is engaged or under contract as a contractor. A project may be presumed abandoned after 90 days if the contractor terminates the project without just cause or without proper notification to the owner, including the reason for termination, or fails to perform work without just cause for 90 consecutive days.

(k) Signing a statement with respect to a project or contract falsely indicating that the work is bonded; falsely indicating that payment has been made for all subcontracted work, labor, and materials which results in a financial loss to the owner, purchaser, or contractor; or falsely indicating that workers' compensation and public liability insurance are provided.

18. The evidence fails to establish that the project was financially mismanaged. There is no credible evidence of financial harm to Petitioner based upon any liens placed on the property. The percentage of completion was not less than the percentage of the contract amount paid to Boaz. The evidence

fails to establish that the job was completed at a cost in excess of the contract amount as adjusted for change orders. There is no evidence that Boaz abandoned the project. There is no evidence that Boaz made any false representations related to the project.

19. Subsection 489.143(1), Florida Statutes (2003), provides as follows:

Any person who meets all of the conditions prescribed in s. 489.141(1) may apply to the board to cause payment to be made to such person from the Construction Industries Recovery Fund in an amount equal to the judgment or restitution order, exclusive of postjudgment interest, against the licensee or \$25,000, whichever is less, or an amount equal to the unsatisfied portion of such person's judgment or restitution order, exclusive of postjudgment interest, or \$25,000, whichever is less, but only to the extent and amount reflected in the judgment or restitution order as being actual or compensatory damages. The fund is not obligated to pay any judgment or restitution order, or any portion thereof, which is not expressly based on one of the grounds for recovery set forth in s. 489.140(1).  
(emphasis supplied)

20. The evidence in this case fails to prove that any valid damage assessment against Boaz reflects actual or compensatory damages. As set forth previously, the evidence fails to establish that that the stipulated claim value was based upon a violation of Subsections 489.129(1)(g), (j), or (k), Florida Statutes (2003).

RECOMMENDATION

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

RECOMMENDED that Respondent enter a final order denying the claim for reimbursement filed by Petitioner.

DONE AND ENTERED this 18th day of November, 2004, in Tallahassee, Leon County, Florida.

*William F. Quattlebaum*

---

WILLIAM F. QUATTLEBAUM  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675 SUNCOM 278-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 18th day of November, 2004.

COPIES FURNISHED:

Adrienne C. Rodgers, Esquire  
Department of Business and  
Professional Regulation  
1940 North Monroe Street, Suite 60  
Tallahassee, Florida 32399-2202

Karen W. Scragg  
9085 Leisure Lane, North  
Largo, Florida 33773-4707

Leon Biegalski, General Counsel  
Department of Business and  
Professional Regulation  
Northwood Centre  
1940 North Monroe Street  
Tallahassee, Florida 32399-2202

Tim Vaccaro, Director  
Construction Industry Licensing Board  
Department of Business and  
Professional Regulation  
Northwood Centre  
1940 North Monroe Street  
Tallahassee, Florida 32399-0792

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.