

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
CONSTRUCTION INDUSTRY LICENSING)
BOARD,)
)
Petitioner,)
)
vs.) Case No. 04-2272PL
)
TERRY LYNN GALLIMORE,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the administrative hearing of this case on October 22, 2004, in Orlando, Florida, on behalf of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Charles J. Pelligrini, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

For Respondent: Miriam S. Wilkinson, Esquire
McConnaughay, Duffy, Coonrod,
Pope & Weaver, P.A.
101 North Monroe Street, Suite 900
Post Office Drawer 229
Tallahassee, Florida 32302

STATEMENT OF THE ISSUE

The issue is whether Respondent violated Subsection 489.129(1)(m), Florida Statutes (1997), by allegedly committing incompetence or misconduct by "poor soil compaction" and by failing to honor the terms of a written warranty.

PRELIMINARY STATEMENT

Petitioner issued an Administrative Complaint against Respondent on September 17, 2002. Respondent requested an administrative hearing, and Petitioner referred the matter to DOAH to conduct the hearing.

At the hearing, Petitioner presented the testimony of two witnesses and submitted 22 exhibits for admission into evidence, which are numbered 1 through 14, 16, 17, and 21 through 26. Respondent testified, presented the testimony of two witnesses, and submitted one exhibit for admission into evidence.

The identity of the witnesses and exhibits, and any attendant rulings, are set forth in the two-volume Transcript of the hearing filed with DOAH on November 29, 2004. The parties timely filed their respective proposed recommended orders on December 9, 2004.

FINDINGS OF FACT

1. The four-count Administrative Complaint contains factual allegations in 15 numbered paragraphs. Respondent does not dispute paragraphs 1 through 9, 14, and 15.

2. Petitioner is the state agency statutorily charged with regulating pool contracting in the state. At all times material to this proceeding, Respondent has been licensed as a pool contractor pursuant to license number CP C052509. Respondent's business address is Bazar Pools, Inc., 6214 All America Boulevard, Orlando, Florida 32810.

3. On March 6, 1998, Respondent entered into a written contract with Mr. Rex Davidson (the contract). Respondent agreed to construct a residential cantilever deck swimming pool at Davidson's residence located at 2800 Granada Boulevard, Kissimmee, Florida (the pool). Mr. Davidson agreed to pay \$19,300 for the pool.

4. Respondent completed the pool sometime in April 1998. Mr. Davidson paid the full amount due under the contract. The contract warranted the "pool structure" for the time that Mr. Davidson owned the pool.

5. Sometime in July of 2000, a crack emerged around the top edge of the pool above the tiles that lined the upper edge of the pool. As the crack worsened, the tiles began to fall off the pool.

6. Respondent did not repair the crack and tiles. Mr. Davidson paid approximately \$7,025 to a company identified in the record as Blue Diamond to repair the crack and tile.

7. The contract did not include Respondent's license number. Respondent did not obtain a certificate of authority to do business as Bazar Pools, Inc., at the time he entered into the contract. The contract did not contain a written explanation of consumer rights under the Construction Industry Recovery Fund. Respondent does not dispute Counts II through IV of the Administrative Complaint charging that the acts described in this paragraph violated Subsection 489.129(1)(i), Florida Statutes (1997).

8. Respondent disputes the charge in Count I of the Administrative Complaint that Respondent committed incompetence or misconduct. Paragraphs 10 through 12 of the Administrative Complaint contain the only factual allegations relevant to the charge of incompetence or misconduct. The disputed factual allegations state:

10. Around July of 2000, the pool developed a crack which extended around the entire perimeter and caused the tiles to fall off because of poor soil compaction.

11. The pool's structure is warranted to remain structurally sound for the period of time that it is owned by the original owner.

12. Mr. Davidson contacted Respondent to get the pool repaired, but Respondent failed to take corrective action.

9. The literal terms of allegations in paragraph 10 of the Administrative Complaint led the trier of fact to expect

Petitioner to show that Respondent improperly compacted soil under the deck and thereby allowed the deck to settle. However, Petitioner submitted little, if any, evidence pertaining to how Respondent compacted the soil under the deck before Respondent poured the concrete deck.

10. Respondent obtained the three required county inspection approvals before each step in the construction of the pool. The inspections included an inspection to ensure proper soil grade prior to pouring the pool deck. The inspections ensured that Respondent constructed the pool in accordance with stamped engineering drawings that the county required Respondent to file as a prerequisite for a building permit from the county.

11. The vast majority of the evidence that Petitioner submitted during the hearing was relevant to allegations that Respondent committed incompetence and misconduct in two ways. First, Respondent arguably constructed the pool shell and deck as a unitized structure so that the crack and tile problems evolved as the deck settled when underlying soil compacted. Second, Respondent arguably failed to honor the warranty in the contract.

12. As a threshold matter, paragraph 10 in the Administrative Complaint does not allege that Respondent committed incompetence or misconduct by poor pool construction. Rather, paragraph 10 alleges only that a crack developed in the

pool and tiles fell off because of "poor soil compaction." Nevertheless, the parties spent substantial hearing time submitting evidence relevant to allegations of incompetence and misconduct not specifically alleged in the Administrative Complaint.

13. In order to prove that Respondent committed incompetence and misconduct by poor pool construction, Petitioner relies on expert opinion to show that Respondent constructed the pool and deck as a unitized structure. Petitioner's expert opined that Respondent must have connected the concrete pool shell to the concrete deck either by steel rods, identified in the record as rebar, or by a mechanical bond between the top of the pool shell and the bottom of the deck. The expert reasoned that settling of the deck could not have caused the crack in the pool unless the deck and pool shell were connected as a unitized body.

14. Several flaws in the expert opinion offered by Petitioner prevent that testimony from reaching the level of clear and convincing evidence. Petitioner's expert did not relate his opinion to facts in evidence. First, Petitioner's expert never inspected the original construction of the pool. The expert visually inspected only the repaired pool and based his opinion on an hour and a-half inspection of the repaired pool. Counsel for Petitioner illustrated the inherent problem

in such testimony when he objected to the testimony of one of Respondent's experts on the grounds that the opinion was based on a post-repair inspection. Counsel for Petitioner explained the problem as follows:

Objection. Your Honor, [Respondent's expert] is testifying based on his observations of the pool as repaired by Blue Diamond. He never did - he never has made a personal observation of the pool prior to that repair when it was in the condition attributable to [Respondent's] construction method. So, he's testifying without any particular personal knowledge relative to [Respondent's] conduct.

Transcript (TR) at 220-221.

15. When Petitioner's expert inspected the post-repair pool, he did not remove the deck to determine whether the top of the pool shell was, in fact, either connected by steel to the deck or otherwise mechanically bonded to the deck. The only competent and substantial evidence in the record of whether the pool shell and the deck were constructed as a unitized structure came from Respondent.

16. Respondent did not use rebar to connect the pool shell to the pool deck. Respondent stopped the rebar approximately two inches below the top of the pool shell.

17. Respondent used mortar, identified in the record as "mud," to smooth variations or undulations, in the top edge of the pool shell and thereby bring the entire top edge of the pool

shell up to "dead level." The maximum variation in the top edge of the pool shell prior to leveling did not exceed 1.25 inches.

18. After the mud dried, Respondent intentionally did not clean the top edge of the pool shell. The dirt and debris remaining on the top edge of the pool shell would normally prevent a mechanical bond between the top of the pool shell and the bottom of the concrete deck.

19. The construction technique used by Respondent to construct the pool complies with generally accepted standards for the industry. Respondent has constructed over a thousand pools since 1987 using the same or similar construction techniques. He generally constructs large residential pools in "high-end" neighborhoods that cost customers \$40,000 or more, but has constructed some commercial pools. Respondent has never had this problem with his other pools and has never had any previous discipline against his license.

20. The expert opinion offered by Petitioner has another flaw that keeps the testimony from being clear and convincing to the trier of fact. The expert concludes that the deck settled, in relevant part, because "the pool cracked and the tile fell off." In an interrelated ratiocination, the expert concludes that the pool cracked and the tile fell off because the deck settled.

21. Petitioner's expert also concluded that the deck settled because he observed cracks in the deck when he visually inspected the post-repair pool in 2004. He concluded from the cracks he observed in 2004 that settling of the deck in 2000 caused the crack in the pool and the tile problems. Petitioner's expert did not measure the cracks or inspect them to determine if any differential existed in the cracks that would suggest soil compaction under the deck.

22. Petitioner's expert is an expert in pool construction, but is not an expert in pool engineering and design. One of Respondent's expert witnesses is an expert in pool engineering and design. He concluded that the deck did not settle in 2000. The characteristics of the cracks in the post-repair deck in 2004 were consistent with cracks caused by heat expansion and contraction from cooling when joints in the concrete were improperly spaced. The cracks did not exhibit differential settling of the deck.

23. The theory that the crack in the pool and tile problems could not have occurred "but for" the settling of the deck is less than clear and convincing. Faulty installation of the tile by subcontractors is a more likely cause of the problems with the pool and the tile. However, Petitioner neither alleged that Respondent engaged in such acts or that

Respondent's license is subject to discipline for the acts of his subcontractors.

24. Finally, the testimony of Petitioner's expert is based on subjective standards while the testimony of Respondent's experts is based on intelligible standards published for the entire industry. Petitioner's expert opined that Respondent committed incompetence and misconduct in constructing the pool based on the expert's personal experience and on the way the expert has constructed pools for many years. Respondent's two experts opined that Respondent complied with written standards of workmanship published by the National Spa and Pool Institute in June 1996 (Workmanship Standards).

25. Aside from whether the pool and deck were joined as a unitized structure, Petitioner's expert opined that Respondent "shot" the pool shell about two inches short of where it should have been, used mud to build up the pool shell, and applied tile over the resulting "cold joint" between the top of the pool shell and the bottom of the deck. Petitioner's expert opined that laying tile over a cold joint is incompetence and misconduct in his experience.

26. Respondent's experts disagree. They opined that laying tile over a cold joint is the normal practice in the industry. Petitioner's expert agreed that it is commonplace for

contractors to lay tile over a cold joint and that problems arise in only one in fifty jobs.

27. The trier of fact has discussed the competing testimony of the parties' experts to illustrate that the burden of proof is the fulcrum of decision in this case. The applicable burden of proof does not require a preponderance of evidence to show that Respondent constructed the pool in a competent manner. Rather, the trier of fact need only find that the evidence is less than clear and convincing that Respondent committed incompetence or misconduct in constructing the pool.

28. The remaining allegation is that Respondent committed incompetence and misconduct by failing to honor the warranty and repair the pool. The evidence is less than clear and convincing that Respondent failed to honor the warranty.

29. Sometime in June 2001, Mr. Davidson verbally complained to Respondent that a crack around the pool above the tile line had developed and that tiles around the top edge of the pool were detaching from the pool. Respondent sent a company representative to the site to evaluate the problem. Respondent also sent a service representative to the site to retrieve some of the tiles.

30. Sometime in July 2001, Mr. Davidson again verbally complained to Respondent about the crack and tiles. By letter dated August 8, 2001, Mr. Davidson notified Respondent that a

crack had developed behind the tiles sometime in the summer of 2000. The letter stated that the tiles were falling off of the side of the pool.

31. Respondent offered to provide Mr. Davidson with an estimate of the cost of repair. Mr. Davidson elected to have Blue Diamond make the repairs.

32. The pool structure was warranted for the time that Mr. Davidson owned the pool. It is undisputed that the pool shell was well made and water tight. The parties dispute whether the pool structure included the one or two-inch area between the top of the pool shell and the deck, as well as the deck.

33. The contract defined the pool structure by excluding the deck, equipment, tile, and any item other than the pool shell. The definition in the contract is consistent with that in the Workmanship Standards. Petitioner's attempt to rely on a general definition of the term "structure" in a dictionary is not persuasive when considered in the light of the definitions in the contract and the Workmanship Standards.

34. Alternatively, Petitioner argues that the pool structure included the deck and intervening area because all of the parts were constructed as a unitized structure. Based on previous findings, the evidence is less than clear and

convincing that the pool shell and deck were constructed as a unitized structure.

CONCLUSIONS OF LAW

35. DOAH has no jurisdiction over Counts II through IV of the Administrative Complaint and the undisputed facts relevant to those counts. The provisions of Subsection 120.57(1), Florida Statutes (2004), apply only to hearings involving disputed issues of material fact. Respondent does not dispute the foregoing matters, and the parties did not submit evidence relevant to those matters. Petitioner has jurisdiction to consider undisputed issues of material fact and appropriate penalties in a proceeding conducted pursuant to Subsection 120.57(2), Florida Statutes (2004).

36. DOAH has jurisdiction over the parties and subject matter of that part of this proceeding involving Count I of the Administrative Complaint and relevant disputed issues of material fact. §§ 120.569 and 120.57, Fla. Stat. (2004). DOAH provided adequate notice of the administrative hearing.

36. As a threshold matter, the Administrative Complaint alleges, in relevant part, that Respondent committed incompetence and misconduct because of "poor soil compaction." For reasons stated in the findings of fact, the evidence is less than clear and convincing that Respondent committed incompetence and misconduct by "poor soil compaction."

37. Petitioner did not allege in the Administrative Complaint that Respondent committed incompetence and misconduct because of poor pool construction. An administrative agency, including DOAH and Petitioner, cannot find Respondent guilty of committing acts not alleged in the Administrative Complaint.

38. An administrative complaint seeking disciplinary action must allege the specific acts or omissions that form the grounds for the violations charged in the administrative complaint. An agency cannot find a licensee guilty of a charged violation based on evidence of grounds not specifically alleged in the administrative complaint. Ghani v. Department of Health, 714 So. 2d 1113 (Fla. 1st DCA 1998); Cottrill v. Department of Insurance, 685 So. 2d 1371 (Fla. 1st DCA 1996). In Cottrill, Judge Benton explained:

Predicating disciplinary action against a licensee on conduct never alleged in an administrative complaint . . . violates the Administrative Procedure Act. To countenance such a procedure would render nugatory the right to a formal administrative proceeding to contest the allegations of an administrative complaint.

Cottrill, 685 So. 2d at 1372.

39. Assuming arguendo that DOAH has authority to resolve the allegations contested by the parties during the administrative hearing, Petitioner has the burden of proof. 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.

§ 120.57(1)(h), Fla. Stat. (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).

40. Petitioner did not satisfy its burden of proof. In a proceeding under a statute that is penal in nature, the requirement for competent and substantial evidence takes on vigorous implications that are not present in other proceedings under Chapter 120, Florida Statutes (2003). Robinson v. Florida Board of Dentistry, Department of Professional Regulation, 447 So. 2d 930, 932 (Fla. 3d DCA 1984). In order for such evidence to be clear and convincing:

. . . evidence must be found to be credible; the facts to which witnesses testify must be . . . precise and explicit, and 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 a firm belief or 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).

41. Terms such as pool structure, unitized structure, incompetence, and misconduct are terms used by Petitioner to impose discipline pursuant to a penal statute. The terms of such statutes must be construed strictly in favor of Respondent

and against the imposition of discipline. State ex rel. Jordan v. Pattishall, 99 Fla. 296, 126 So. 147 (Fla. 1930); Ocampo v. Department of Health, 806 So. 2d 633 (1st DCA Fla. 2002); Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923 (Fla. 1st DCA 1977).

RECOMMENDATION

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

RECOMMENDED that Petitioner enter a final order finding Respondent guilty of Counts II through IV of the Administrative Complaint and not guilty of Count I.

DONE AND ENTERED this 21st day of December, 2004, in Tallahassee, Leon County, Florida.



DANIEL MANRY
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 21st day of December, 2004.

COPIES FURNISHED:

Charles J. Pellegrini, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

John A. Shughart, Jr., Esquire
Law Offices of John A. Shughart, Jr.
500 North Maitland Avenue, Suite 305A
Maitland, Florida 32751

Miriam S. Wilkinson, Esquire
McConnaughay, Duffy, Coonrod,
Pope & Weaver, P.A.
101 North Monroe Street, Suite 900
Post Office Drawer 229
Tallahassee, Florida 32302

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

Tim Vaccaro, Executive 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.