

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MICHAEL A. CRANE, d/b/a ACCENT)
BUILDERS OF FLORIDA, INC.,)
)
Petitioner,)
)
vs.) Case No. 05-3802F
)
DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
CONSTRUCTION INDUSTRY LICENSING)
BOARD,)
)
Respondent.)
_____)

FINAL ORDER

On October 14, 2005, Petitioner, Michael A. Crane, d/b/a Accent Builders of Florida, Inc., filed a Motion for Reimbursement of Attorney's Fees and Costs. Respondent's Response in Opposition to Petitioner's Motion for Reimbursement of Attorney's Fees and Costs and Memorandum of Law was filed on November 3, 2005, waiving an evidentiary hearing. A final hearing was conducted in the underlying case, DOAH Case No. 04-4040PL, on March 1-3, 2005, in New Smyrna Beach, Florida, before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Daniel J. Webster, Esquire
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For Respondent: Charles J. Pellegrini, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Petitioner Michael A. Crane, d/b/a Accent Builders of Florida, Inc., is entitled to an award of attorney's fees against Respondent, Department of Business and Professional Regulation, pursuant to Section 57.111, Florida Statutes.

PRELIMINARY STATEMENT

This matter was initiated by a Motion for Reimbursement of Attorney's Fees and Costs (Motion) filed by Petitioner on October 14, 2005. Pursuant to the Initial Order, Respondent filed a statement setting forth its defenses to Petitioner's Motion. In its Response in Opposition to Petitioner's Motion for Attorney's Fees and Costs, Respondent admitted that Petitioner was the prevailing party in the underlying action, DOAH Case No. 04-4040PL, and that Respondent was not a nominal party in the underlying action. Respondent disputes the requested reimbursement of attorney's fees and costs and the

assertion by Petitioner that he is a small business party. Respondent further maintains that its actions in bringing the underlying action were substantially justified, and that, accordingly, the issue of whether special circumstances exist that would make the award of fees unjust is a moot point. Respondent waived its right to an evidentiary hearing in this matter. Petitioner did not request an evidentiary hearing within ten days of the filing of Respondent's response. All references are to Florida Statutes (2005), unless otherwise noted.

FINDINGS OF FACT

1. On October 14, 2005, Petitioner filed a Motion for Reimbursement of Attorney's Fees and Costs.
2. Petitioner seeks reimbursement of attorney's fees and costs incurred in DOAH Case No. 04-4040PL, pursuant to Section 57.111, Florida Statutes.
3. Petitioner is the prevailing party in the underlying proceeding, DOAH Case No. 04-4040PL. On September 23, 2005, the Construction Industry Licensing Board entered its Final Order in the underlying case, in which it adopted the Recommended Order entered in the DOAH proceeding, thereby dismissing the charges that Petitioner had violated certain provisions of Chapter 489, Florida Statutes.

4. In the underlying proceeding, Respondent charged Michael A. Crane with violations of Chapter 489, Florida Statutes, in his capacity as a certified general contractor holding Florida license No. CGC8644. Petitioner had entered into the contract which gave rise to the underlying proceeding as Accent Builders of Florida, Inc. (Accent). Respondent's disciplinary action was not directed at Accent Builders of Florida, Inc., but at Petitioner as the qualifying agent for the company.

5. Petitioner is not a sole proprietor of an unincorporated business.

6. Petitioner is neither a partnership nor a corporation.

7. Petitioner does business in Florida as Accent, but at the time the underlying proceeding was initiated, Petitioner had not applied for and been granted a certificate of authority for Accent through himself as the qualifying agent. In September 2004, while the underlying proceeding was pending, Petitioner applied for and was granted a certificate of authority for Accent with Michael A. Crane as the qualifying agent.

8. Despite the fact that Petitioner was granted a certificate of authority for Accent, the underlying proceeding was brought against the certified general contractor, Michael A. Crane, not against Accent as a corporate entity.

9. In order to determine whether the underlying action brought by Respondent against Petitioner was substantially justified at the time it was initiated by the Agency, the information that was before the probable cause panel that directed the filing of the Administrative Complaint must be examined.

10. In the underlying matter giving rise to Petitioner's request for attorney's fees, the Probable Cause Panel had before it a 188-page Investigative Report, as well as three supplemental Investigative Reports related to the alleged defects in the construction performed by Petitioner.

11. The Probable Cause Panel convened on April 27, 2004, at which time it made a finding of probable cause that Petitioner had violated Subsections 489.129(1)(g)1., (i), (k), and (m), Florida Statutes. The panel members reported that they had reviewed the investigative reports and draft complaints, and were advised by a member of the Attorney General's staff regarding their responsibilities in determining whether probable cause existed to file an Administrative Complaint against Petitioner.

12. The consumer complaint accompanying the Investigative Report alleged that the contractor did not properly supervise the project; that the construction has resulted in numerous leaks; that the steam shower was not installed as required by

the manufacturer; that the decking was not installed according to the manufacturer's instructions; and that most of the punch list items had been left unaddressed.

13. The Investigative Report also contained Petitioner's response, which stated that Petitioner was precluded from correcting the deficiencies by the consumer, and that, although responsive to the consumer regarding the leaks, Petitioner saw no damage as a result of the leaks.

14. The Investigative Report contained numerous documents describing the efforts of contractors hired by the consumer to remedy the leaks and alleged defects in construction. The report also included documentation of payments made by the consumer to the various contractors called in to eliminate the problems the consumer was experiencing.

15. The Probable Cause Panel's review of the materials before it resulted in a determination that a reasonable investigation had been conducted, and that a reasonable person could conclude that sufficient evidence existed to charge Petitioner with violations of Chapter 489, Florida Statutes.

16. At the time the Probable Cause Panel reviewed the Investigative Report, it appeared that Petitioner's work had resulted in water damage, and that a valid subcontractor's lien had been placed against the consumer's property resulting in financial harm.

17. The Probable Cause Panel's determination to direct Respondent to file an Administrative Complaint had a reasonable basis in law and fact at the time it was made.

18. Respondent was not a "nominal party" to the underlying proceeding according to the meaning of that term in Subsection 57.111(4)(d)1., Florida Statutes.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Sections 120.569, 120.57(1), and 57.111(4), Florida Statutes.

20. Section 57.111, Florida Statutes, the Florida Equal Access to Justice Act (the Act), provides, in pertinent part, as follows:

(4)(a) Unless otherwise provided by law, an award of attorney's fees and costs shall be made to a prevailing small business party in any adjudicatory proceeding or administrative proceeding pursuant to chapter 120 initiated by a state agency, unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust.

21. In proceedings to establish entitlement to an award of attorney's fees and costs pursuant to Section 57.111, Florida Statutes, the initial burden of proof is on the party requesting the award to establish by a preponderance of the evidence that

it prevailed in the underlying disciplinary action and that it was a small business party at the time the disciplinary action was initiated. Once the party requesting the award has met this burden, the burden of proof shifts to the agency to establish that it was substantially justified in initiating the disciplinary action. See Helmy v. Department of Business and Professional Regulation, 707 So. 2d 366, 368 (Fla. 1st DCA 1998); Department of Professional Regulation, Division of Real Estate v. Toledo Realty, Inc. and Ramiro Alfert, 549 So. 2d 715, 717 (Fla. 1st DCA 1989).

22. Michael A. Crane, d/b/a Accent Builders of Florida, Inc., prevailed in the underlying proceeding. § 57.111(3)(c)3., Fla. Stat.

23. Michael A. Crane is not a "small business party" as contemplated by Subsection 57.111(3)(d), Florida Statutes, which provides, in relevant part, as follows:

(d) The term "small business party" means:

1.a. A sole proprietor of an unincorporated business, including a professional practice, whose principal office is in this state, who is domiciled in this state, and whose business or professional practice has, at the time that action is initiated by a state agency, not more than 25 full-time employees or a net worth of not more than \$2 million, including both personal and business investments; or

b. A partnership or corporation, including a professional practice, which has its

principal office in this state and has at the time the action is initiated by a state agency not more than 25 full-time employees or a net worth of not more than \$2 million. . . .

24. The underlying action was initiated and maintained against Michael A. Crane, a Florida-certified general contractor, not against Accent. Moreover, Accent was not registered with Respondent until September 2004, after a count in the Administrative Complaint charged Mr. Crane with not seeking a certificate of authority with himself as the qualifying agent. At no time did Respondent seek to impose sanctions against Accent as a corporation for violations of Chapter 489, Florida Statutes. All of the issues maintained at the final hearing in the underlying matter (once the certificate of authority issue had been withdrawn) concerned Mr. Crane's alleged failure to perform his duties as a certified general contractor properly under Chapter 489, Florida Statutes.

25. This conclusion is supported by the case of Daniels v. Florida Department of Health, 898 So. 2d 61 (Fla. 2005), in which the Florida Supreme Court, in a review of a decision certified for conflict, held that the owner of a partnership or corporation who prevails in an administrative proceeding initiated by a state agency is not entitled to fees under the Act when the complaint is filed against the owner in his or her individual capacity. Id. at 63. In that case, the Department

of Health charged Daniels with unprofessional conduct in the practice of midwifery. In her petition for attorney's fees under the Act, Daniels stated that she is the sole shareholder of a subchapter-S corporation, through which she treats patients and, therefore, is a small business party. Id. at 64-65. In addressing the issue of whether Daniels qualifies as a "small business party" as defined in Section 57.111, Florida Statutes, when the administrative action was brought against her individually, rather than against her corporation, the court stated:

[T]he administrative complaint in this instance was brought against the individual owner as an employee of the corporation and not against the corporation itself. Although Daniels and South Beach Maternity are one and the same entity in that Daniels controls South Beach Maternity and owns 100% of its stock, strict adherence to the language of section 57.111(3)(d) compels us to reach the conclusion that Daniels is not a small business party, because she is not a sole proprietor of an unincorporated business and because South Beach Maternity was not a party to any of these proceedings.

Id. at 67.

26. The Daniels court would have considered an award of attorney's fees proper under Section 57.111, Florida Statutes (assuming the other requirements of the statute had been met) if the Administrative Complaint had been filed against the corporation rather than the individual licensed professional.

Similarly, in the underlying proceeding concerning Mr. Crane, Respondent brought the action against him individually and not his corporation. The present case is so similar to the Daniels case that the holding in that case leaves no doubt as to how Petitioner should be treated in the present matter. Based on Daniels, Mr. Crane is clearly not a "small business party" pursuant to Subsection 57.111(3)(d), Florida Statutes.

27. Moreover, even had Mr. Crane qualified as a "small business party" under Subsection 57.111(3)(d), Florida Statutes, Respondent's actions were "substantially justified." Subsection 57.111(3)(e), Florida Statutes, provides that a proceeding is "substantially justified" if it had a "reasonable basis in law and fact at the time it was initiated by a state agency."

(Emphasis added.) The "substantially justified" standard falls somewhere between the "no justiciable issue" standard of Section 57.105, Florida Statutes, and an automatic award of fees to a prevailing party. Helmy, 707 So. 2d at 368.

28. In Department of Health v. Cralle, 852 So. 2d 930, 932 (Fla. 1st DCA 2003), the court set forth the following temporal limitation on the required analysis, quoting from Fish v. Department of Health, 825 So. 2d 421, 423 (Fla. 4th DCA 2002):

In resolving whether there was substantial justification or a reasonable basis in law and fact for filing an administrative complaint, "one need only examine the information before the probable cause panel

at the time it found probable cause and directed the filing of an administrative complaint."

See also Agency for Health Care Administration v. Gonzalez, 657 So. 2d 56 (Fla. 1st DCA 1995)(proper inquiry is whether evidence before probable cause panel was sufficient for institution of disciplinary action).

29. The evidence established that Respondent had a reasonable basis in law and fact to find cause to believe that Petitioner had violated certain provisions of Chapter 489, Florida Statutes, relating to his ability to perform general contracting with skill and competence. While the Probable Cause Panel did not itself interview the consumer complainant or Petitioner, it had before it an extensive Investigative Report, including statements from the consumer, its investigators who interviewed the consumer and many of the contractors and subcontractors who were hired by the consumer to remedy the complained-of issues; and it had the response submitted by Petitioner. It does not matter, for purposes of determining substantial justification, that the Probable Cause Panel determined the consumer's complaint to be more credible when it decided to prosecute Petitioner. Department of Health v. Thomas, 890 So. 2d 400, 401 (Fla. 1st DCA 2004)(a decision to prosecute that turns on a credibility assessment has a

reasonable basis in fact and law); Gentele v. Department of Professional Regulation, 513 So. 2d 672, 673 (Fla. 1st DCA 1987).

30. Even though Petitioner prevailed at hearing on the charges levied against him by Respondent, clearly, Respondent acted in good faith, based upon an extensive investigatory record, when deciding to prosecute Petitioner. Petitioner has failed to demonstrate otherwise, or to prove that Respondent was not substantially justified in bringing an action against him for violations of Chapter 489, Florida Statutes.

31. Since Petitioner is not a "small business party" as contemplated by Section 57.111, Florida Statutes, and since, even if Petitioner were deemed to be a small business party, Respondent's prosecution of the matter against Petitioner, at the time it was initiated, was substantially justified, the remaining issues raised by Petitioner are moot. The reasonableness of the fees and costs claimed need not be determined since Petitioner is not entitled to attorney's fees and costs under Section 57.111, Florida Statutes. Further, the issue of special circumstances need not be addressed since Respondent's actions were substantially justified. Finally, Respondent asserted that it was not a nominal party to the underlying proceeding within the meaning of Subsection

57.111(4)(d)1., Florida Statutes, rendering moot the need to make findings under this provision.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Michael A. Crane's Motion for Attorney's Fees and Costs is denied.

DONE AND ORDERED this 13th day of February, 2006, in Tallahassee, Leon County, Florida.



ROBERT S. COHEN
Administrative Law Judge
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Filed with the Clerk of the
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COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of appeal with the Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.