

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
)
Petitioner,)
)
vs.) Case No. 06-4175
)
PAUL MARCHESE, JR., d/b/a PRIMA)
CONSTRUCTION,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Carolyn S. Holifield, held a formal hearing in the above-styled case on January 9, 2007, in Sarasota, Florida.

APPEARANCES

For Petitioner: P. Brian Coats, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32309

For Respondent: R. Jackson McGill, Esquire
Law Offices of R. Jackson McGill
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Sarasota, Florida 34237

STATEMENT OF THE ISSUES

The issues in this case are whether disciplinary action should be taken against Respondent, Paul Marchese, Jr., d/b/a

Prima Construction, for violation of Subsection 489.129(1)(q), Florida Statutes (2006), as alleged in the Administrative Complaint; and, if so, what disciplinary action should be imposed on his license to practice contracting.

PRELIMINARY STATEMENT

On June 8, 2006, Petitioner, the Department of Business and Professional Regulation (Petitioner), Construction Industry Licensing Board, filed an Administrative Complaint in DBPR Case No. 2006-001485, alleging that Respondent, Paul Marchese, Jr., d/b/a Prima Construction, violated Subsection 489.129(1)(q), Florida Statutes (2006), by failing to satisfy within a reasonable time the terms of a civil judgment obtained against the licensee, or the business organization qualified by the licensee, relating to the practice of the licensee's profession.

Respondent disputed the allegation in the Administrative Complaint and elected to have a formal administrative hearing. On or about October 27, 2006, Petitioner forwarded the case to the Division of Administrative Hearings to conduct a hearing pursuant to Section 120.57, Florida Statutes (2006).

At hearing, Petitioner presented the testimony of three witnesses: Susan York, Dan Moody, and Respondent, Paul Marchese, Jr. Petitioner's Exhibits 1 through 8 were offered and admitted into evidence. Respondent cross-examined

Petitioner's three witnesses and offered no exhibits into evidence.

The Transcript of the hearing was filed on January 26, 2007. Both parties filed Proposed Recommended Orders which have been considered in preparation of this Recommended Order.

FINDINGS OF FACT

Based on the evidence and testimony of the witnesses presented and the entire record in this proceeding, the following facts are found:

1. At all times relevant to this proceeding, Respondent was a certified residential contractor, having been issued License No. CRC057007 by the Florida Construction Industry Licensing Board (Board).

2. At all times relevant to this proceeding, Respondent, Paul Marchese, Jr., d/b/a Prima Construction, has been doing business as Prima Construction.

3. ABC Supply Company, Inc. (ABC Supply Company), operates as a roofing supply distributor in the State of Florida.

4. Respondent completed and signed a credit application with ABC Supply Company.

5. The credit application required the applicant to provide the following information: type of business ownership; address of business ownership; officers of business ownership; and credit references.

6. The credit application includes, if applicable, a space to list the applicant's state contractor license number.

7. The credit application includes a personal guaranty that must be completed if the business ownership has less than \$2 million in annual sales, is less than two years old, has less than ten employees, or is a partnership or proprietorship. If the personal guaranty section is completed and signed, the guarantor then becomes responsible and personally liable for any debts incurred by the business ownership.

8. Respondent listed the applicant for the credit application with ABC Supply Company as "P & C Realty (Prima)" and signed the application as the president of the company. Respondent listed his certified residential contractor License No. CRC057007 on the credit application. P & C Realty is owned by Respondent and his wife.

9. On or about January 18, 2002, Petitioner signed the ABC Supply Company credit application as president of "P & C Realty (Prima)." In addition to signing as the applicant, Petitioner signed the "guaranty" portion of the application, in which he agreed to serve as "guarantor" of any indebtedness of the buyer to ABC Supply Company.

10. ABC Supply Company approved the credit application, which allowed P & C Realty to purchase roofing materials from ABC Supply Company.

11. From February 2002 to April 2002, P & C Realty purchased various roofing materials from ABC Supply Company. The materials were used in the repair of houses owned by P & C Realty, and the houses were subsequently sold by P & C Realty.

12. P & C Realty failed to pay for the roofing materials that were purchased between February 2002 to April 2002, and the account became past due.

13. ABC Supply Company filed a civil lawsuit against P & C Realty and Respondent in the county court in Hillsborough County, Florida.

14. On September 13, 2005, Hillsborough County entered a final judgment in favor of ABC Supply Company and against P & C Realty and Respondent, jointly and several, in the amount of \$6,319.68 for P & C Realty and Respondent's failure to pay for roofing materials.^{1/}

15. Respondent did not appeal the final judgment, but failed to satisfy the final judgment within 90 days. Moreover, as of the date of this proceeding, Respondent had not satisfied this judgment.

16. The total investigative costs of this case to the Board, excluding costs associated with an attorney's time, for DBPR Case No. 2006-001485, was \$288.68.

17. On October 28, 2002, Petitioner filed a Final Order in a prior disciplinary case against Respondent in DBPR Case

No. 2000-08685. That Final Order adopted and incorporated by reference the allegations in the Administrative Complaint. The Administrative Complaint alleged Petitioner violated the Standard Building Code of Sarasota County by first performing construction work without first obtaining the required building permit from the Sarasota Building Department, and, as a result thereof, the Sarasota County General Contractors Licensing and Examining Board revoked Respondent's privileges to pull permits in Sarasota County, Florida. Based on the foregoing, the Final Order in DBPR Case. No. 2000-08685 found Respondent guilty of violating Subsection 489.129(1)(h), Florida Statutes (2006), by being disciplined by any municipality or county for any act or violation of this part. Petitioner imposed a \$2,500.00 fine and \$165.51 in costs on Respondent in the case.

18. On December 11, 2001, Petitioner filed a Final Order in a prior disciplinary case against Respondent in DBPR Case Nos. 2000-02105 and 2000-06442. The Final Order reflected that the case was resolved by means of a Settlement Stipulation in which Respondent agreed to pay a \$5,000.00 fine, pay costs of \$436.42, and, in the future, not violate the provisions of Chapters 455 and 489, Florida Statutes (2006), or the rules promulgated pursuant thereto. In the Settlement Stipulation related to the foregoing cases, Respondent neither admitted nor denied the allegations in the Administrative Complaints.^{2/}

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding pursuant to Section 120.57, Florida Statutes (2006).

20. Petitioner is the state agency charged with regulating the practice of contracting pursuant to Section 20.165 and Chapters 455 and 489, Florida Statutes (2006).

21. Pursuant to Section 489.129, Florida Statutes (2006), the Board is empowered to revoke, suspend, or otherwise discipline the license of a contractor who is found guilty of any of the grounds enumerated in Subsection 489.129(1), Florida Statutes (2006).

22. Here, the Board seeks to discipline Respondent's residential contractor's license based on the allegation that he is guilty of the violation of Subsection 489.129(1)(q), Florida Statutes (2006), which provides, in pertinent part, the following:

(1) 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 \$10,000 per violation, require continuing education, or assess costs associated with investigation and prosecution, if the

contractor . . . or business organization for which the contractor is a primary qualifying agent . . . is found guilty of any of the following acts:

* * *

(q) Failing to satisfy within a reasonable time, the terms of a civil judgment obtained against the licensee, or the business organization qualified by the licensee, relating to the practice of the licensee's profession.

23. Subsection 489.105, Florida Statutes (2006),^{3/} defines various terms used in Part I, Chapter 489, Florida Statutes (2006), and provides, in pertinent part, the following:

(3) "Contractor" means the person who is qualified for, and shall only be responsible for, the project contracted for and means, except as exempted in this part, the person who, for compensation, undertakes to, submits a bid to, or does himself or herself or by others construct, repair, alter, remodel, add to, demolish, subtract from, or improve any building or structure, including related improvements to real estate, for others or for resale to others; and whose job scope is substantially similar to the job scope described in one of the subsequent paragraphs of this subsection.

* * *

(c) "Residential contractor" means a contractor whose services are limited to construction, remodeling, repair, or improvement of one-family, two-family, or three-family residences not exceeding two habitable stories above no more than one uninhabitable story and accessory use structures in connection therewith.

24. Petitioner has the burden of proving by clear and convincing evidence the allegations against Respondent.

§ 120.57(1)(j), Fla. Stat. (2006); Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); and Ferris v. Turlington, 510 So. 2d. 292 (Fla. 1987).

25. Petitioner has proven by clear and convincing evidence that Respondent violated Subsection 489.129(1)(q), Florida Statutes (2006).

26. Subsection 489.129(1)(q), Florida Statutes (2006), provides that a licensee may be disciplined by the Board, if the licensee is found guilty of failing to satisfy within a reasonable time, the terms of a civil judgment obtained against the license relating to the practice of the licensee's profession. Reasonable time has been defined by Board rule as 90 days following the entry of a civil judgment that is not appealed. See 2005 version of Fla. Admin. Code R. 61G4-17.001(1)(q).^{4/}

27. The evidence established that it is undisputed that a civil judgment was entered against Respondent and that Respondent failed to satisfy that civil judgment within a reasonable time. The record establishes by clear and convincing evidence that ABC Supply Company obtained a civil judgment against Respondent for his failure to pay for roofing materials purchased on credit from ABC Supply Company. Moreover, it was

established that the civil judgment was never appealed or satisfied by Respondent. The remaining issue in this case is whether the civil judgment relates to the licensee's profession.

28. The civil judgment in this case relates to Respondent's licensed profession. Respondent is licensed with Petitioner as a certified residential contractor as that term is defined in Subsection 489.105(3)(c), Florida Statutes (2006), which is quoted in paragraph 23 above. (Also see definition of "contractor" quoted in the same paragraph above.)

29. The record establishes by clear and convincing evidence that Respondent filled out the credit application with ABC Supply Company and included in the credit application Respondent's certified residential contractor license number and Respondent's contracting company name, Prima, in parenthesis next to P & C Realty as the business organization applying for the line of credit to purchase roofing supplies. In addition, Respondent, acting as president and co-owner of P & C Realty, purchased roofing supplies from ABC Supply Company and used those roofing materials to repair houses owned by P & C Realty that were in turn re-sold. Therefore, by the definition of "contractor" under Subsection 489.105(3), Florida Statutes (2006), Respondent was acting in the capacity of his licensed profession because Respondent, as the president and owner of P & C Realty, utilized the roofing materials purchased under the

line of credit with ABC Supply Company to repair buildings, in this case residential houses, for resale to others.

30. Respondent contends that the indebtedness which resulted in the civil judgment was related to his role as a co-owner of a real estate company and not to his licensure as a residential contractor. Notwithstanding Respondent's assertion, having listed the construction company as an applicant and his contractor's license number, Respondent's argument that the civil judgment against him for debts incurred for the purchase of roofing supplies is not related to contracting, is not persuasive. When viewed in light of the evidence, the approved credit application and the materials purchased pursuant thereto, the civil judgment obtained against Respondent was related to the practice of residential contracting. The fact that he may have been wearing multiple hats (i.e., acting as owner of a real estate company and as residential contractor) does not preclude the conclusion that the civil judgment for the indebtedness for roofing materials relates to the practice of contracting. See White v. Department of Business and Professional Regulation, 715 So. 2d. 1130 (Fla. 5th DCA 1998).

31. Respondent is subject to disciplinary action by the Board pursuant to Sections 455.227 and 489.129, Florida Statutes (2006). The disciplinary action under these statutes includes placing the license on probation, reprimanding the licensee,

revoking, suspending, denying the issuance or renewal of the certificate or registration, requiring financial restitution to the consumer, imposing an administrative fine not to exceed \$10,000.00 per violation, requiring continuing education, and assessing costs associated with investigation and prosecution.

32. Subsection 455.2273(5), Florida Statutes (2006), states the Administrative Law Judge, in recommending penalties in any recommended order, must follow the penalty guidelines established by the board or department and must state in writing the mitigating or aggravating circumstances upon which the recommended penalty is based.

33. Florida Administrative Code Rule 61G4-17.002 provides, in pertinent part, the following:

Circumstances which may be considered for the purposes of mitigation or aggravation of penalty shall include, but are not limited to, the following:

- (1) Monetary or other damage to the licensee's customer, in any way associated with the violation, which damage the licensee has not relieved, as of the time the penalty is to be assessed. (This provision shall not be given effect to the extent it would contravene federal bankruptcy law.)
- (2) Actual job-site violations of building codes, or conditions exhibiting gross negligence, incompetence, or misconduct by the licensee, which have not been corrected as of the time the penalty is being assessed.

- (3) The danger to the public.
- (4) The number of complaints filed against the licensee.
- (5) The length of time the licensee has practiced.
- (6) The actual damage, physical or otherwise, to the licensee's customer.
- (7) The deterrent effect of the penalty imposed.
- (8) The effect of the penalty upon the licensee's livelihood.
- (9) Any efforts at rehabilitation.
- (10) Any other mitigating or aggravating circumstances.

34. Pursuant to Florida Administrative Code Rule 61G4-17.003, a repeat violation is any violation on which disciplinary action is being taken where the same licensee had previous disciplinary action taken against him regardless of whether the violations in the present and prior disciplinary actions are of the same or different subsections of the disciplinary statutes. Additionally, if the repeat violation is the very same type of violation as the first violation, the penalty set out above will generally be increased over what is otherwise shown for repeat violations in the above list.

35. The 2005 version of Florida Administrative Code Rule 61G4-17.001 provides, in pertinent part, the following guidelines that are pertinent to this proceeding:

(1) The following guidelines shall be used in disciplinary cases, absent aggravating or mitigating circumstances and subject to the other provisions of this Chapter.

* * *

(q) Section 489.129(1)(q) F.S.: Failure to satisfy a civil judgment obtained against the licensee or the business organization qualified by the licensee within a reasonable time. First violation, \$1,000 to \$3,000 fine and/or proof of satisfaction of civil judgment; repeat violation, \$3,000 to \$5,000 fine and/or proof of satisfaction of civil judgment, and suspension or revocation.^[5/] For purposes of this section "reasonable time" means ninety (90) days following the entry of a civil judgment that is not appealed.^[6/] The Board will consider a mutually agreed upon payment plan as satisfaction of such judgment, so long as the payments are current.

36. The undisputed evidence established that Respondent had been previously disciplined for violations under Chapter 489, Florida Statutes (2006); therefore, the penalty guidelines that should be used are for the repeat violation.

RECOMMENDATION

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

RECOMMENDED that a final order be rendered as follows:

1. Finding Respondent guilty of having violated Subsection 489.129(1)(q), Florida Statutes (2006), and imposing as a penalty an administrative fine in the amount of \$5,000.00, proof of satisfaction of the civil judgment for Case No. 2003-7188-CC,

and suspension of Respondent's certified residential contractor license until the civil judgment is satisfied; and

2. Requiring Respondent to pay Petitioner's costs of investigation and prosecution, excluding costs associated with an attorney's time, in the amount of \$288.68.

DONE AND ENTERED this 8th day of May, 2007, in Tallahassee, Leon County, Florida.

S

CAROLYN S. HOLIFIELD
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of May, 2007.

ENDNOTES

^{1/} Case No. 2003-7188-CC, Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

^{2/} The Administrative Complaint in DBPR Case No. 2000-2105 alleged that on or about August 3, 1999, Respondent failed to disclose in a Certificate of Change of Status Application to the Board that his license as a contractor in the State of Maryland had been suspended from June 25 through July 24, 1990, and signed the Affidavit in the Certificate of Change of Status Application attesting to the truth and accuracy of the statements. The Administrative Complaint charged that as a result of the alleged conduct, Respondent had committed conduct described in Subsection 489.129(1), Florida Statutes(1997), for

which disciplinary action may be initiated by the Board (i.e., obtaining a certificate, registration, or certificate of authority by fraud or misrepresentation (Subsection 489.129(1)(a), Florida Statutes (1997); committing mismanagement or misconduct in the practice of contracting (Subsection 489.129(1)(n), Florida Statutes (1997); and being disciplined by any municipality or county for an act or violation of this section (Subsection 489.129(1)(i), Florida Statutes (1997)).

The Administrative Complaint in DBPR Case No. 2000-6442 alleged that in 1997, Respondent entered into a contract with certain individuals to perform repair work at a home in Englewood, Florida; that on or about July 2000, the Sarasota General Contractors Licensing and Examining Board found Respondent in violation of Sarasota County ordinances and suspended his permitting privileges for 90 days, except for work on the home noted above. Based on these allegations, the Board charged that Respondent had been disciplined by a municipality or county for an act or violation in Section 489.129, Florida Statutes (1999), and was, therefore, subject to disciplinary action under Subsection 489.129(1)(h), Florida Statutes (1999).

^{3/} These definitions are the same ones in place at the time relevant to this proceeding.

^{4/} In June 2006, when the subject Administrative Complaint was filed, the 2005 version of Florida Administrative Code Rule 61G4-17.001(1)(q) was in effect. Thus, that version of the rule is applicable in this case.

Florida Administrative Code Rule 61G4-17.001(1)(q), as amended on November 2, 2006, changed the definition of "reasonable time" from 90 days to "sixty (60) days following entry of a civil judgment that is not appealed."

^{5/} Subsequently, this provision was amended on November 2, 2006, to establish a maximum fine of \$10,000 and suspension or revocation of license. See Endnote 4.

^{6/} See comment in Endnote 4.

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.