

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
)
Petitioner,)
)
vs.) Case No. 07-0074
)
WILLIS WITTMER, JR., AND JR)
WITTMER'S REMODELING, INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

In accordance with notice this cause came on for formal proceeding and hearing before P. Michael Ruff, a duly-designated Administrative Law Judge of the Division of Administrative Hearings. The formal hearing was conducted in Daytona Beach, Florida, on March 26, 2007, and the appearances were as follows:

APPEARANCES

For Petitioner: E. Renee Alsobrook, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-1007

For Respondent: Garvin B. Bowden, Esquire
Gardner, Wadsworth, Duggar,
Bist & Wiener, P.A.
1300 Thomaswood Drive
Tallahassee, Florida 32308

STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding concern whether the Respondent committed the charged violations of Section 489.127(1)(f), Florida Statutes (2006), and Section 489.531(1)(a), Florida Statutes (2006), and if so, what penalty, if any, is warranted.

PRELIMINARY STATEMENT

This cause arose upon filing of an Administrative Complaint on November 14, 2006, by the above-named Petitioner, the Department of Business and Professional Regulation (Department). In the complaint it is alleged in Count I, that the Respondent violated Section 489.127(1)(f), Florida Statutes, by engaging in the business of contracting or acting in the capacity of a contractor without being duly registered or certified. With regard to Count II it is alleged that subsection 489.531(1)(a), Florida Statutes, was violated by the Respondent engaging in the practice of electrical contracting without being duly certified or registered to do so.

The Respondent availed himself of the right to a formal proceeding, in accordance with Sections 120.569 and 120.57(1), Florida Statutes (2006), to dispute the allegations in the Administrative Complaint. The case was referred to the Division of Administrative Hearings and ultimately to the undersigned

Administrative Law Judge. It was set for hearing for March 16, 2007, in Daytona Beach, Florida.

The cause came on for formal hearing as noticed. At the hearing the Department presented the testimony of Sidney Miller and Kenneth Hatin. The Department's Exhibits 1, 2, 4, and 5, were admitted into evidence. The Department's Exhibit 3 was not admitted into evidence; it was excluded as hearsay. It was determined that the document depicting the time expended and costs of the investigator and attorney working on this case for the Department amounted to matters and information not prepared in the regular course of business, but rather for the purpose of and in anticipation of trial of this same case. Further, the required predicate of admissibility was not established in the sense that the document was prepared because of a duty to report. Thus, the exhibit was determined to be inadmissible within the hearsay exception for public records and reports maintained in the records of the government agency or as a business record, for purposes of the business records exception to the Hearsay Rule. § 90.803(6) and (8), Fla. Stat. (2006). In its Proposed Recommended Order the Petitioner takes the position that the exhibit is admissible as a data compilation setting forth the "activities of the agency" under the Public Records and Reports Exception, referenced above. That argument is accepted, based commentary in upon in Ehrhart, Florida

Evidence, 2002 Edition p.779-780; Gatlin v. State, 618 So. 2d 765 (Fla. 2nd DCA 1993) (state attorney's affidavit concerning costs of prosecution admissible under Section 910.803(8), as written statement of activities of the office). Because of the result reached herein, however, the admission of Petitioner's Exhibit 3 is of no material effect.

The Respondent presented the testimony of Julie Crowley, and cross-examined the Petitioner's witnesses. The Respondent submitted no exhibits into evidence.

Upon concluding the proceeding a transcript thereof was obtained by the parties and they exercised the right to submit proposed recommended orders. The Proposed Recommended Order were timely filed and have been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner is an Agency of the State of Florida charged with regulating the practice of contracting and the licensure of those engaged in the practice of contracting of all types, in accordance with Section 20.165, Florida Statutes, as well as Chapters 455 and 489, Florida Statutes. The Respondent engages in re-modeling and other construction-related work both as his own business and employment by a certified general contractor.

2. This case arose upon a Complaint filed with the Petitioner Agency by Mr. Kenneth Hatin. The Complaint asserted his belief that the Respondent had engaged in a contract to construct an addition on his home, and after being paid substantial sums of money, had wrongfully left the job and never finished it.

3. The residence in question is co-owned by Mr. Hatin and his fiancée, Ms. Beverly White. Ms. White's first cousin is Ms. Julie Crawley. Ms. Crawley is the Respondent's fiancée. Mr. Hatin and the Respondent were introduced by Ms. Crawley and Ms. White. Mr. Hatin and the Respondent thus met socially and as they got to know each other discussed Mr. Hatin's desire to have an addition placed on his home. The addition consisted of a pool enclosure to be constructed on his property located at 33 Botany Lane, Palm Coast, Florida. Mr. Hatin expressed the desire to have the Respondent assist him in constructing the pool enclosure. The Respondent agreed to do so.

4. The Respondent is employed by his brother, who is a Florida-Licensed General Contractor, but neither the Respondent nor his business, JR. Wittmer's Remodeling, Inc., are licensed or certified to engage in contracting or electrical contracting.

5. In accordance with his agreement with Mr. Hatin, the Respondent provided labor and assistance with the renovation project, including digging ditches, picking-up supplies and

being present at the work site. In addition to the Respondent, other friends and family members of the protagonists assisted with the project, including the Respondent's son, Ms. Crawley's son, Mr. Hatin's employer, Ms. White's brother-in-law, and Mr. Hatin himself. This was, in essence, a joint family/friends cooperative construction project.

6. Over the course of approximately five months during the construction effort, Mr. Hatin wrote checks to the Respondent in the total amount of \$30,800.00. All contractors or workmen on the job were paid and no liens were placed on Mr. Hatin's property. The checks written were for the materials purchased and labor performed by tradesmen or sub-contractors engaged by the Respondent and Mr. Hatin for various aspects of the job such as roofing, tile or block laying, etc. The Respondent received no fee or profit in addition to the amounts paid to the material suppliers, contractors, and laborers on the job.

7. It is not entirely clear from the record who prepared the contract in evidence as Petitioner's Exhibit four, or the document that the parties treated as a contract. It is not entirely clear who actually signed it, but the document was drafted relating to the work to be done on Mr. Hatin's home (the contract). Mr. Hatin maintained that the Respondent prepared and signed the contract. Ms. Crawley testified that the contract was actually prepared by herself and Ms. White (for

"tax purposes"). It is inferred that this means that the contract was prepared to provide some written evidence of the amount expended on the addition to the home, probably in order to raise the cost basis in the home to reduce capital gains tax liability potential at such time as the home might be sold. The term "tax purposes" might mean other issues or consequences not of record in this case, although it has not been proven that the contract was prepared for a fraudulent purpose.

8. Ms. Crawley testified that the Respondent did not actually sign the document himself but that she signed it for him. What was undisputed was that there were hand-written changes made to the contract so as to include exhaust fans, ceiling fans, sun tunnels, a bathroom door and outside electrical lighting. Although there was a change to the contract for this additional scope of work, there was no increase in the amounts to be paid by Mr. Hatin for such work.

9. After the project was commenced and the addition was partially built, Mr. Hatin and Ms. White were involved in a serious motorcycle accident. Work was stopped on the project for a period of approximately seven weeks, with Mr. Hatin's acquiescence, while Ms. White convalesced. The Respondent, during this time, dedicated all of his time to his regular job and other work commitments. It was apparently his understanding, expressed in Ms. Crawley's testimony, that, due

to injuries he received in the accident and more particularly the more serious injuries received by his fiancée, that Mr. Hatin was not focused on the project at that time, but let it lapse until the medical emergency was past.

10. After approximately seven weeks of inactivity Mr. Hatin contacted the Respondent requesting that he begin work on the project again. A meeting was set up between Mr. Hatin and the Respondent. The Respondent however, was unable to attend the meeting with Mr. Hatin that day, tried to re-schedule and a dispute arose between the two. Additionally, family disputes over money and interpersonal relationships were ongoing at this time leading to a lack of communication and a further dispute between Mr. Hatin, Ms. White, the Respondent, and Ms. Crawley. A threat of physical harm was directed at the Respondent by Mr. Hatin (he threatened to put out the Respondent's "one good eye" if he came on the subject property again). Because of this, the Respondent elected not to return to the project. Inferentially, at that point the process of filing the subject complaint soon ensued.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2006).

12. The Petitioner is an Agency of the State of Florida charged with regulating the practice of contracting and enforcing the provisions of Chapter 489, Florida Statutes, and Chapter 455, Florida Statutes. The Respondent herein is subject to penal sanctions and the imposition of an administrative penalty. The Department therefore has the burden of proving its position in this proceeding by clear and convincing evidence as to the specific allegations pled in the Administrative Complaint. Department of Banking and Finance Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996).

13. The Petitioner has alleged in Count I of the Complaint that Section 489.127(1)(f), Florida Statutes, has been violated by contracting for or engaging in the practice of contracting without being duly registered or certified by the State of Florida. "Contracting" is defined at Section 489.105(6), Florida Statutes, as follows:

"Contracting" means, except as exempted in this part, engaging in the business as a contractor and includes, but is not limited to, performance of any of the acts as set forth in subsection (3) which define types of contracts. The attempted sale of contracting services and the negotiation or bid for a contract on these services also constitutes contracting. If the services offered require licensure or agent qualification, the offering, negotiation for a bid, or attempted sale of these services require the corresponding licensure.

However, the term "contracting" shall not extend to an individual, partnership, corporation, trust, or other legal entity that offers to sell or sells completed residences on property on which the individual or business entity has any legal or equitable interest, if the services of a qualified contractor certified or registered pursuant to the requirements of this chapter have been or will be retained for the purpose of construction of such residences. (Emphasis added)

As referred to in this statutory definition of "Contracting", a "Contractor" is defined by subsection (3) of 489.105, Florida Statutes, which provides as follows:

"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 other 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. For the purposes of regulation under this part, "demolish" applies only to demolition of steel over 50 feet in height, other than buildings or residences over three stories tall; and building or residences over three stories tall. Contractors are subdivided into two divisions, Division I, consisting of those contractors defined in paragraphs (a)-(c), and Division II, consisting of those contractors defined in paragraphs (d)-(q):. . . . (emphasis added)

14. The record evidence does not show clearly that the Respondent entered into an actual contract or contracted for contracting services, or attempted the sale of contracting services, or negotiated or bid for a contract for such services. The parties did have at least an informal agreement regarding work to be performed and price. The record, in fact, is equivocal concerning whether the Respondent prepared or actually signed the contract entered into, contained in Petitioner's Exhibit 4.

15. Even assuming arguendo that the Respondent entered into the purported written contract, the Department must prove by clear and convincing evidence that he agreed to do such work for compensation. The proof fails to meet that burden. Although evidence was presented that Mr. Hatin paid over \$30,000.00 to the Respondent, the only specific evidence or testimony as to accounting and allocation of these amounts and their purposes was offered by the Respondent's witness, who testified that all funds received by the Respondent went to pay material suppliers and contractors on the job. This evidence was further bolstered by Mr. Hatin's own admission that all contractors on the job were paid in full by the Respondent and no liens were ever placed on Mr. Hatin's property. If the Respondent received no compensation for the job he cannot be found to have acted as a contractor, unlicensed or otherwise,

for purposes of the above- quoted statutory authority controlling in this case. He may, at most, have been a facilitator of the project for a prospective family member. Penal statutes such as this are to be strictly construed in favor of the accused party. Ocampo v. Department of Health, 806 So. 2d 688 (Fla. 1st DCA 2002). The Petitioner's failure to show that the Respondent received any compensation above the costs of materials and labor for the job fails to prove a violation of Section 489.127(1)(f), Florida Statutes (2006). Thus, Count I of the Complaint should be dismissed.

16. Concerning Court II of the Administrative Complaint, the Petitioner alleged that the Respondent violated Section 489.531(1)(a), Florida Statutes, by engaging in the unlicensed practice of electrical contracting. In the context of electrical and alarm system contracting, Section 489.505(9), Florida Statutes, defines "Contracting" as follows:

"Contracting" means, except where exempted in this part, engaging in the business as a contractor or performing electrical or alarm work for compensation and includes, but is not limited to, performance of any of the acts found in subsection (2) and (12), which define the services which a contractor is allowed to perform. The attempted sale of contracting services and the negotiation or bid for a contract on these services also constitutes contracting. If the services offered require licensure or agent qualification, the offering, negotiation for

a bid, or attempted sale of these services requires the corresponding licensure.
(Emphasis added)

17. The record contains insufficient evidence to show that the Respondent entered into a contract for electrical or alarm work, and attempted to sell such services, or negotiated or bid for a contract for such services. The record does not clearly establish whether the Respondent prepared or signed the contract. The provisions related to electrical work, moreover, were hand written and may have been added after the document was prepared. Even assuming arguendo that the Respondent agreed to perform electrical service work, for the reasons found above, it has not been proven that the Respondent undertook such work for compensation, and thus met the definition of "contracting" or "engaging in the business as a contractor."

18. The Petitioner also failed to prove by clear and convincing evidence that the Respondent actually participated in any electrical contracting work. The only evidence or testimony as to that sort of work was that Mr. Hatin and his boss performed the initial electrical work and thereafter hired a licensed electrical contractor. No evidence was presented that the Respondent participated in electrical work on the project in any form. Since the evidence does not show that the Respondent performed or contracted to perform electrical contracting, this allegation of the complaint must fail also. Ocampo v.

Department of Health, supra. Thus, since no violation of Section 489.531(1)(a), Florida Statutes, has been proven, Count II of the Administrative Complaint should also be dismissed.

19. In summary, the allegations of the two counts of the Administrative Complaint have not been established by clear and convincing evidence for the above-determined reasons. In reality, it has not been proven that the Respondent bid on or negotiated or attempted to engage in an arm's length contract with an innocent consumer while being unlicensed. Rather, the reality is that the Respondent, whose fiancée was the first cousin of the fiancée of the complaining witness, the homeowner, Mr. Hatin, engaged in what amounts to a project intended to be constructed by family members and friends. This was in an effort by Mr. Hatin and his fiancée, Ms. White, to save money on the cost of the job. The Respondent, in reality, appears to have been more or less a coordinator or supervisor for the job which was worked on both by contractors or trade persons, as well as members of the family involved and friends.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that the Administrative Complaint filed herein
be dismissed.

DONE AND ENTERED this 12th day of June, 2007, in
Tallahassee, Leon County, Florida.



P. MICHAEL RUFF
Administrative Law Judge
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Filed with Clerk of the
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this 12th day of June, 2007.

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.