

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
CONSTRUCTION INDUSTRY LICENSING)
BOARD,)
)
Petitioner,)
)
vs.) Case No. 07-3123PL
)
MICHAEL HILL,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on August 30, 2007, by Jeff B. Clark, duly-designated Administrative Law Judge of the Division of Administrative Hearings, in Palm Bay, Florida.

APPEARANCES

For Petitioner: Tiffany A. Harrington, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32399-2202

For Respondent: No appearance

STATEMENT OF THE ISSUE

Whether disciplinary action should be taken against Respondent, Michael Hill's, contracting license based on the

violations as charged in the Administrative Complaint in this proceeding.

PRELIMINARY STATEMENT

On March 21, 2007, Petitioner, Department of Business and Professional Regulation, Construction Industry Licensing Board, filed an Administrative Complaint alleging that Respondent, Michael Hill, had violated the laws regulating his professional activities as a certified contractor in the State of Florida. The Administrative Complaint charged Respondent with violating Subsection 489.129(1)(i), Florida Statutes (2006),^{1/} by failing to apply for a Certificate of Authority for Michael Hill Homes, Inc., as a qualified business organization, in violation of Subsection 489.119(2), Florida Statutes; violating Subsection 489.129(1)(i), Florida Statutes, by failing to apply for the necessary permits after receiving, as initial payment, money totaling more than ten percent of the contract price for repair, restoration, improvement, or construction to residential real property, in violation of Subsection 489.126(2)(a), Florida Statutes; violating Subsection 489.129(1)(g) and (2), Florida Statutes, by committing mismanagement or misconduct in the practice of contracting that causes financial harm to a customer, which occurs when 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; violating Subsection 489.129(1)(j), Florida Statutes, by abandoning a construction project in which the contractor is engaged or under contract as a contractor; violating Subsection 489.129(1)(o), Florida Statutes, by proceeding on any job without obtaining applicable local building department permits and inspections; and violating Subsection 489.129(1)(m), Florida Statutes, by committing incompetency or misconduct in the practice of contracting.

On April 17, 2007, Respondent filed an Answer to Administrative Complaint that disputed some allegations contained in the Administrative Complaint, effectively electing to have a formal administrative hearing. The case was transferred to the Division of Administrative Hearings by letter dated July 11, 2007, that requested a hearing pursuant to Section 120.57, Florida Statutes.

An Initial Order was forwarded to the parties on July 11, 2007. Based on Petitioner's response, the case was scheduled for final hearing in Palm Bay, Florida, on August 30, 2007.

The final hearing took place as scheduled. Respondent did not appear. Petitioner offered the testimony of three witnesses: Aldith Rose Farquharson, Edwin Almetes, and John

Brown. Petitioner introduced seven exhibits, which were entered into evidence and marked Petitioner's Exhibits 1 through 7. Official notice was taken of Chapter 489, Florida Statutes, and Florida Administrative Code Chapter 61G4-17.

The Transcript of Proceedings was filed on September 17, 2007. Petitioner timely filed a Proposed Recommended Order.

FINDINGS OF FACT

Based on the evidence and testimony of the witnesses presented and the entire record in this proceeding, the following Findings of Fact are made:

1. Respondent is a certified contractor, having been issued License No. CR C057409 by the Florida Construction Industry Licensing Board. Respondent's license as a certified residential contractor is currently active.

2. Respondent was not certified with the Construction Industry Licensing Board as doing business as "Michael Hill Homes, Inc."

3. On or about April 11, 2005, Kenneth and Aldith Farquharson ("Farquharson") entered into a written contractual agreement with Respondent, d/b/a Michael Hill Homes, Inc., for the construction of a single-family residence at Lot 17, Hattaras Terrace, Palm Bay, Florida.

4. The original contract price of the contract between Respondent and Farquharson was \$240,900.00.

5. The original contract price was subsequently increased, via change orders executed by Respondent and Farquharson, by \$4,500.00, for a total contract price of \$245,400.00, adding the value of the change order for the fill dirt needed for the lot.

6. On June 19, 2005, Farquharson paid a total of \$28,590.00 to Respondent.

7. The scope of work under contract required appropriate permits from the City of Palm Bay Building Department before work could commence.

8. Respondent failed to apply for the permits necessary to commence work under the contract.

9. Respondent delivered some sand to the lot on or before October 2005.

10. After delivering the sand, Respondent failed to continue any more of the contracted work.

11. From November 2005 to December 2006, Respondent performed no work on the project under contract.

12. From October 2005 to February 2006, Farquharson made multiple attempts to contact Respondent regarding the lack of work under the contract.

13. Farquharson did not prevent Respondent from commencing and completing the work under contract or agree to delay the project for any reason.

14. Farquharson did not terminate the contract with Respondent.

15. Respondent did not refund any money to Farquharson.

16. The amount of actual damages that Respondent caused Farquharson is calculated as follows:

Amount paid:	\$28,590.00
Amount of work performed by Respondent (dirt fill):	<u>4,500.00</u>
	\$24,090.00

17. The Petitioner's total investigative cost for the case is \$439.79.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding pursuant to Section 120.57, Florida Statutes (2007).

19. Petitioner is the state agency charged with regulating the practice of contracting pursuant to Chapters 455 and 489, Florida Statutes.

20. Pursuant to Section 489.129, Florida Statutes, the Florida Construction Industry Licensing Board is empowered to revoke, suspend or otherwise discipline the license of a contractor who is found guilty of any of the prohibited acts enumerated in Subsection 489.129(1), Florida Statutes.

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

in the Administrative Complaint. 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). Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, fn. 5 (Fla. 1st DCA 1989), provides the guidance regarding the clear and convincing evidence standard. That standard has been described as follows:

Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence must be precise and explicit and the 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 the firm belief of (sic) 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).

22. The Administrative Complaint alleges that Respondent is guilty of having violated Subsection 489.129(1)(i), Florida Statutes, by failing to comply with Subsections 489.119(2) and 489.126(2)(a), Florida Statutes. §§ 489.129(1)(g)2., 489.129(1)(j), 489.129(1)(o), and 489.129(1)(m), Fla. Stat.

23. Subsection 489.129(1), Florida Statutes, provides, in pertinent part:

(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 or registration, 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:

* * *

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

* * *

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

* * *

(i) Failing in any material respect to comply with the provisions of this part or violating a rule or lawful order of the board.

(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.

* * *

(m) Committing incompetency or misconduct in the practice of contracting.

* * *

(o) Proceeding on any job without obtaining applicable building department permits and inspections.

24. Subsection 489.119(2), Florida Statutes, provides, in pertinent part:

If the applicant proposes to engage in contracting as a business organization, including any partnership, corporation, business trust, or other legal entity, or in any name other than the applicant's legal name or a fictitious name where the applicant is doing business as a sole proprietorship, the business organization must apply for a certificate of authority through a qualifying agent and under the fictitious name, if any.

25. Subsection 489.126(2)(a), Florida Statutes, provides, in pertinent part:

(2) A contractor who receives, as initial payment, money totaling more than 10 percent of the contract price for repair, restoration, or construction to residential real property must:

(a) Apply for permits necessary to do work within 30 days after the date payment is made, except where the work does not require a permit under the applicable codes and ordinances

26. Petitioner has proven by clear and convincing evidence that Respondent violated Subsection 489.119(2), Florida Statutes. Respondent held himself out as doing business as Michael Hill Homes, Inc., but failed to obtain the required Certificate of Authority for Michael Hill Homes, Inc.

27. Petitioner has proven by clear and convincing evidence that Respondent violated Subsection 489.126(2)(a), Florida Statutes. Despite being paid over ten percent of the contract price in his contract with Farquharson, Respondent failed to apply for permits within 30 days of when the payment was made. In fact, Respondent never applied for permits with the City of Palm Bay Building Department, the appropriate authority.

28. Petitioner has proven by clear and convincing evidence that Respondent violated Subsection 489.129(1)(g)2., Florida Statutes, by establishing that Respondent abandoned the contract with Farquharson and that the percentage of the contract price paid exceeded the percentage of the contracted work performed by Respondent, thereby causing financial harm to Farquharson. This occurred when Respondent ceased all work on the project, and the percentage of completion was less than the percentage of the total contract price paid to the contractor as of the time of abandonment. This was evidenced by the fact that Respondent only dropped off sand on the lot despite being paid approximately 12 percent of the contract price. Respondent was

not entitled to retain such funds under the terms of the contract and did not refund the excess funds within 30 days after the date the job was abandoned.

29. Petitioner has proven by clear and convincing evidence that Respondent violated of Subsection 489.129(1)(j), Florida Statutes, by abandoning the project under which Respondent was engaged or under contract as a contractor with Farquharson. 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 reason for termination, or fails to perform work without just cause for 90 consecutive days. In the contract with Farquharson, Respondent abandoned the project when he failed to perform work without just cause for a period of more than 90 days.

30. Petitioner has proven by clear and convincing evidence that Respondent violated Subsection 489.129(1)(o), Florida Statutes, by proceeding on the job without obtaining applicable local building permits and inspections. Respondent failed to obtain permits for the contracted work with Farquharson prior to commencing work on the project, and the work to be performed by Respondent required a permit from the local building department.

31. Petitioner has proven by clear and convincing evidence that Respondent has violated Subsection 489.129(1)(m), Florida Statutes, by committing misconduct in the practice of

contracting, by abandoning the contract, and causing financial harm to his customer.

32. Respondent is subject to disciplinary action by the Construction Industry Licensing Board pursuant to Sections 455.227 and 489.129, Florida Statutes. The disciplinary actions under these statutes includes placing the licensee 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 per violation; and requiring continuing education and assessing costs associated with investigation and prosecution.

33. Subsection 455.2273(5), Florida Statutes, 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.

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

Circumstances which may be considered for the purpose 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 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.

35. 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 other provisions of this chapter.

* * *

(g) Section 489.129(1)(g), F.S.:
Mismanagement or misconduct causing
financial harm to the customer. First
violation, \$1,500 to \$2,500 fine,
restitution and/or probation;

* * *

(i) Section 489.129(1)(i), F.S.: Failing
in any material respect to comply with the
provisions of Part I of Chapter 489 F.S.

* * *

8. Section 489.119, F.S.: Failure to
register qualified business organization.
First violation, \$250 to \$500 fine;

* * *

(j) Section 489.129(1)(j), F.S.:
Abandonment. First violation \$5,000 to
\$1,000 fine and/or probation.

* * *

(m) Misconduct or incompetency in the
practice of contracting, shall include, but
is not limited to:

* * *

2. Violation of any provision of Chapter
61G4, F.A.C., or Chapter 489, Part I, F.S.

* * *

4. The following guidelines shall apply
to cases involving misconduct or
incompetency in the practice of contracting,
absent aggravating or mitigating
circumstances:

* * *

b. Violation of any provision of Chapter 61G4, F.A.C., or Chapter 489, Part I, F.S. First violation, \$1,000 to \$2,500 fine;

c. Any other form of misconduct or incompetency. First violation, \$500 to \$1,000 fine and probation;

* * *

(o) Section 489.129(1)(o), F.S.:
Proceeding on any job without obtaining applicable local building department permits and/or inspections.

* * *

2. Failure to obtain inspections. First violation, \$250 to \$1,000 fine and/or probation or suspension;

36. As stated in paragraph 27, Respondent violated Subsection 489.126(2)(a), Florida Statutes. However, Florida Administrative Code Rule 61G4-17.001 does not list a penalty for this statutory violation. Florida Administrative Code Rule 61G4-17.001(6) contemplates an omission of this kind and states:

(6) The absence of any violation from this chapter shall be viewed as an oversight, and shall not be construed as an indication that no penalty is to be assessed. The guideline penalty for the offense most closely resembling the omitted violation shall apply.

Therefore, an appropriate fine for this violation should range from \$250 to \$1,000.

37. There is no evidence that Respondent has been previously disciplined for any violations under Chapter 489, Florida Statutes, therefore the guidelines that should be used are for the first violation.

RECOMMENDATION

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

RECOMMENDED that a final order be entered as follows:

1. Finding Respondent guilty of having committed one violation of Subsection 489.129(1)(i), Florida Statutes, as alleged in Count I of the Administrative Complaint, for violating Subsection 489.119(2), Florida Statutes, and imposing as a penalty an administrative fine in the amount of \$500.00;

2. Finding Respondent guilty of having committed one violation of Subsection 489.129(1)(i), Florida Statutes, as alleged in Count II of the Administrative Complaint, for violating Subsection 489.126(2)(a), Florida Statutes, and imposing as a penalty an administrative fine in the amount of \$1,000.00;

3. Finding Respondent guilty of having committed one violation of Subsection 489.129(1)(g), Florida Statutes, as alleged in Count III of the Administrative Complaint, and imposing as a penalty an administrative fine in the amount of \$2,500.00;

4. Finding Respondent guilty of having committed one violation of Subsection 489.129(1)(j), Florida Statutes, as alleged in Count IV of the Administrative Complaint, and imposing as a penalty an administrative fine of \$5,000.00;

5. Finding Respondent guilty of having committed one violation of Subsection 489.129(1)(o), Florida Statutes, as alleged in Count V of the Administrative Complaint, and imposing as a penalty an administrative fine in the amount of \$1,000.00;

6. Finding Respondent guilty of having committed one violation of Section 489.129(1)(m), Florida Statutes, as alleged in Count VI of the Administrative Complaint, and imposing as a penalty an administrative fine in the amount of \$2,500.00;

7. Respondent be ordered to pay financial restitution in the amount of \$24,090.00 to Kenneth and Aldith Farquharson;

8. Assessing cumulative cost of investigation and prosecution in the total amount of \$439.79, which excludes costs associated with any attorney's fees; and

9. Permanently revoking Respondent's license as a result of the numerous violations and the financial harm sustained by Kenneth and Aldith Farquharson.

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



JEFF B. CLARK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of October, 2007.

ENDNOTE

^{1/} All references are to 2006 Florida Statutes, unless otherwise indicated.

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.