

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
CONSTRUCTION INDUSTRY LICENSING)
BOARD,)
)
Petitioner,)
)
vs.) Case No. 08-1432PL
)
ARMANDO VICTOR CALLEJA,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on June 20, 2008, in Viera, Florida, before Susan B. Harrell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Scott A. Smothers, Esquire
Robert A. Crabill, Esquire
Wright, Fulford, Moorehead & Brown, P.A.
Post Office Box 2828
Orlando, Florida 32801-2828

For Respondent: Tino Gonzalez, Esquire
1600 Sarno Road, Suite 1
Melbourne, Florida 32935

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent violated Subsections 489.129(1)(g)1., 489.129(1)(g)2., 489.129(1)(j),

489.129(1)(m), and 489.129(1)(o), Florida Statutes (2005),¹ and, if so, what discipline should be imposed.

PRELIMINARY STATEMENT

On July 18, 2007, the Department of Business and Professional Regulation (Department) filed a six-count Administrative Complaint before the Construction Industry Licensing Board (Board), alleging that Respondent, Armando Victor Calleja (Mr. Calleja), violated Subsections 489.119(2), 489.129(1)(g)1., 489.129(1)(g)2., 489.129(1)(j), 489.129(1)(m), and 489.129(1)(o), Florida Statutes. In its Proposed Recommended Order, the Department states that it is withdrawing the allegations in Count I of the Administrative Complaint, which relate to the violation of Subsection 489.119(2), Florida Statutes.

Mr. Calleja requested an administrative hearing, and the case was forwarded to the Division of Administrative Hearings on December 26, 2007, and assigned DOAH Case No. 07-5784PL. A final hearing was commenced, and the parties announced at the final hearing that the parties had agreed to settle. The file of the Division of Administrative Hearings was closed by Order dated March 6, 2008.

On March 20, 2008, the Department filed a Motion to Re-open Case, stating that the parties were unable to resolve the issues. The motion was granted, and the case was re-opened and

assigned DOAH Case No. 08-1432PL. The final hearing was scheduled for May 8, 2008. On April 21, 2008, the Department filed Petitioner's Motion to Continue Final Hearing. The motion was granted, and the final hearing was re-scheduled for June 20, 2008.

At the final hearing, the Department called the following witnesses: Mark Schulse Meyer, Clifford P. Stokes, Patrick J. McDonough, David Bogenrief, and Jack S. Coleman. Petitioner's Exhibits 1 through 5, 8, 9, and 11 through 19 were admitted in evidence. Petitioner's Exhibits 7 and 20 were not admitted in evidence.

At the final hearing, Mr. Calleja testified in his own behalf. Respondent's Exhibits 1, 2, and 3 were admitted in evidence.

The two-volume Transcript was filed on July 21, 2008. The parties agreed to file their proposed recommended orders within ten days of the filing of the Transcript. The Department filed its Proposed Recommended Order on July 29, 2008. As of the date of this Recommended Order, Mr. Calleja has not filed a post-hearing submittal.

FINDINGS OF FACT

1. At all times material to this proceeding, Mr. Calleja had a valid and active license as a commercial certified pool/spa contractor. His license number is CP 1456568. At all

times material to this proceeding, Mr. Calleja was the owner of or did business as Nautica Pools & Spa (Nautica).

2. The Board is charged with regulating the practice of contracting in the State of Florida pursuant to Chapters 455 and 489, Florida Statutes.

3. On April 2, 2005, Mr. Calleja, as the representative for Nautica, entered into a contract with Jack Coleman to renovate Mr. Coleman's existing pool.

4. From April 2005 to July 27, 2005, Nautica installed rebar in the pool and set a new skimmer. Nautica subcontracted with Prestige Gunitite of Melbourne, Inc. (Prestige), to put the gunitite in the pool. Gunitite is concrete that is sprayed out of a hose to form the walls of the pool.

5. Personnel from Prestige arrived on the project site on the afternoon of July 27, 2005, to apply the gunitite, but did not do so because the application would have taken longer to do than one afternoon. The following day, July 28, 2005, Mr. Calleja and a crew from Prestige returned to the project. A representative from Prestige told Mr. Calleja that the steel rebar had not been laid properly. Mr. Calleja told Prestige to apply the gunitite and do what was necessary to cover the steel. Mr. Calleja left the project site, and Prestige began applying the gunitite.

6. During the application of the gunite, it became evident that the first spraying of gunite was not going to cover the steel. Attempts were made to reach Mr. Calleja, but Mr. Calleja was not available to solve the problem. Prestige began applying additional coats of gunite in an attempt to cover the steel.

7. After the gunite was applied, two problems were identified. The first problem was in the fountain area. The gunite had not been applied properly, and there were hollow areas. The second problem was in the wet deck area. The steel rebar was too close to the surface of the floor, and the steel was visible. In order to remedy the problems, the concrete in the areas would have to be jack hammered to remove the concrete, and new gunite would have to be applied.

8. By letter dated August 28, 2005, Nautica requested Mr. Coleman to pay Prestige \$954.57. Nautica advised Mr. Coleman that when that amount had been paid, Nautica would pay the balance owed to Prestige and forward a release to Mr. Coleman. Mr. Calleja claimed that Mr. Coleman owed the \$954.57 because Mr. Coleman had damaged Mr. Calleja's saw. In the letter, Nautica acknowledged that there was additional work which had not been completed. The letter was signed by Mr. Calleja's wife. Mr. Calleja had verbally told Mr. Coleman that he wanted Mr. Coleman to pay him \$2,000.00, and he would take care of paying Prestige.

9. The general specifications in the contract required that the contractor was responsible for "[s]tandard structural engineering plans and permits required by code." Prior to commencing work on the pool renovation, Mr. Calleja did not secure the required building permits for the project.

10. Mr. Coleman called Clifford Stokes, who is the building official with the town of Indialantic, and asked whether a permit had been issued. Mr. Stokes went to the project site. At that time, the gunite had been shot, and there was exposed steel rebar. Since no permit had been pulled, no inspection had been done after the steel was put in place.

11. On September 15, 2005, Mr. Calleja applied for a building permit. Because the steel had been placed, and the gunite shot, it was impossible to do a visual inspection to determine whether the steel had been placed properly. In order to get a permit after the construction had been commenced, certain affidavits had to be submitted to the building official of Indiatlantic. Mr. Calleja had to submit an affidavit stating that the steel had been placed properly. An affidavit stating that the work had been performed properly had to be submitted from an engineer, who had made a site visit to the project and had determined that the work performed had been according to code. Additionally, Mr. Coleman was required to submit an affidavit that stated that he understood that no inspection had

been done of the work by the building official. Mr. Calleja also had to pay a fine to Indiatlantic for commencing work without a building permit.

12. On October 19, 2005, Mr. Calleja and Robert Lee from Lee Engineering came to the project site for the purpose of preparing the affidavits necessary to secure a building permit. Mr. Calleja did not return to the project site after October 19, 2005.

13. Mr. Coleman sent a letter to Mr. Calleja dated October 13, 2005, noting that no work had been done on the project since July 28, 2005, and requesting that Mr. Calleja remedy a number of deficiencies with the work performed on the project and complete the job in accordance with the contract. The letter was returned to Mr. Coleman by the postal service because the time for forwarding mail from the address listed in the letter had expired. When Mr. Calleja came to the project site on October 19, 2005, Mr. Coleman requested a current address from Mr. Calleja, but Mr. Calleja refused to give him one.

14. Mr. Coleman wrote another letter to Mr. Calleja dated October 25, 2005, again stating that no work had been done since July 28, 2005, and requesting that Mr. Calleja correct the deficiencies in the work and complete the contract.

15. Mr. Coleman filed an action in small claims court attempting to recover the money for the lien filed by Prestige. However, Nautica had filed for bankruptcy, and Mr. Coleman did not proceed with the small claim action.

16. A building permit for the project was issued in January 2006. The issuance of the building permit did not relieve Mr. Calleja from the responsibility of assuring that the work in the shallow end of the pool area where the rebar was sticking up was redone properly. After the building permit was issued, neither Mr. Calleja nor Mr. Coleman called for inspections by the Indiatlantic building official. The permit expired in June 2006.

17. After the issuance of the building permit, Nautica performed no further work on the project.

18. The total contract price was \$9,340.00. Mr. Coleman and Mr. Calleja entered into an addendum to the contract on July 27, 2005, which increased the contract price to \$13,000.00.

19. The contract called for a down payment of \$934.00, which was ten percent of the contract amount. After completion of excavation and the form and steel work, a payment of \$3,736.00 was due, representing 40 percent of the total work. After completion of the pool shell, a payment of \$2,802.00 was due, representing 30 percent of the total work. Prior to plastering, which represented 20 percent of the total work, a

payment of \$1,868.00 was to be paid. The contract addendum of \$3,660.00 called for 50 percent of the addendum amount to be paid at the completion of the pool shell, and the remaining 50 percent of the addendum amount was to be paid at the completion of the pool.

20. By check dated April 22, 2005, signed by Mr. Coleman's wife, Mr. Coleman paid Mr. Calleja \$1,000.00 as down payment on the project. In June 2005, Mr. Coleman gave Mr. Calleja a check for \$573.42 for a pool and spa light. Mr. Coleman was to receive a credit of \$380.00 toward the contract for the light. Additionally, Mr. Coleman overpaid Mr. Calleja by \$166.90. By check dated July 27, 2005, and signed by Mr. Coleman's wife, Mr. Coleman paid Mr. Calleja \$7,396.00. This payment was to include half of the addendum amount, but Mrs. Coleman inadvertently included the full amount of the addendum. By check dated August 1, 2005, and signed by Mrs. Coleman, Mr. Coleman paid Mr. Calleja \$739.10. Thus, by August 1, 2005, Mr. Coleman had paid Mr. Calleja, \$9,682.00 on the contract.

21. In December 2005, Mr. Coleman asked a representative of Paradise Pools, Patrick McDonough, to come to the project site and give an estimate to complete the pool. The estimate of \$7,800.00 from Paradise Pools was for a cosmetic plaster of the existing pool, and the work was not warranted against leakage.

Mr. McDonough would not warrant the work, because he saw a lot of potential liability problems with the work performed by Mr. Calleja. Mr. McDonough did not recommend that a cosmetic plaster be performed because of the potential problems.

22. On October 26, 2005, Prestige filed a Claim of Lien against the property of Mr. Coleman for \$4,227.40 plus interest, costs, and attorney's fees. The lien was for the work which Prestige had performed on the project on July 28, 2005, and for which Mr. Calleja had failed to pay. Mr. Coleman called Mr. Calleja and told him that a lien had been filed. Mr. Calleja assured him that he would pay the lien, but he failed to do so. Mr. Coleman satisfied the lien by check dated April 11, 2006, for the amount of \$5,139.58.

23. David Bogenrief, P.E., viewed the project in June 2008 and provided Mr. Coleman with a quote to develop structural plans to repair Mr. Coleman's pool. There was no testimony on the amount of the quote, and the Department did not request that the written proposal be admitted in evidence. Mr. Bogenrief did not know what it would cost to repair the pool.

24. The Department has incurred \$470.49 for costs in the prosecution of this case.

CONCLUSIONS OF LAW

25. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2007).

26. The Department has the burden to establish the allegations in the Administrative Complaint by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996). The Department alleges that Mr. Calleja violated Subsections 489.129(1)(g)1., 489.129(1)(g)2., 489.129(1)(j), 489.129(1)(m), and 489.129(1)(o), Florida Statutes, which provide:

(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, financially responsible officer, or business organization for which the contractor is primary qualifying agent, a financially responsible officer, or a secondary qualifying agent responsible under s. 489.1195 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:

1. Valid liens have been recorded against the property of a contractor's customer for supplies or services ordered by the contractor for the customer's job; the contractor has received funds from the customer to pay for supplies or services; and the contractor has not had the liens removed from the property, by payment or by bond, within 75 days after the date of such liens;

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;

* * *

(j) Abandoning a construction project in which the contractor is engaged or under a 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 local building department permits and inspections.

27. The Department has established by clear and convincing evidence that Mr. Calleja violated Subsection 489.129(1)(g)1., Florida Statutes, by failing to satisfy the lien, which Prestige filed against the property of Mr. Coleman for work and materials which were furnished on the project. Mr. Calleja had received the payment from Mr. Coleman for the work and materials furnished by Prestige, but failed to pay Prestige for them.

28. The Department has established by clear and convincing evidence that Mr. Calleja violated Subsection 489.129(1)(g)2., Florida Statutes, by abandoning the project when the percentage of completion is less than the total of the contract price which had been paid to him. The last work that Mr. Calleja actually did on the project was on July 28, 2005. No further work could be done on the project until a building permit was obtained. He did take action between September 2005 and January 2006 to get a building permit. Mr. Calleja did nothing further on the contract after the building permit was issued in January 2006. Mr. Coleman had paid Nautica \$9,682.00, which represented approximately 75 percent of the contract amount. The pool shell had not been completed at the time that Mr. Calleja abandoned the project because the work was deficient. Thus, the contract completion was 40 percent.

29. The Department has established by clear and convincing evidence that Mr. Calleja violated Subsection 489.129(1)(j),

Florida Statutes, by abandoning the project for over 90 days and failing to provide just cause to terminate work on the project. Mr. Calleja never performed any work on the project after the building permit was issued in January 2006 and never provided just cause for failing to terminate work on the project.

30. The Department has established by clear and convincing evidence that Mr. Calleja violated Subsection 489.129(1)(m), Florida Statutes. Mr. Calleja failed to obtain a building permit prior to commencing work on the project.

31. The Department has established by clear and convincing evidence that Mr. Calleja violated Subsection 489.129(1)(o), Florida Statutes. Mr. Calleja did not obtain a final inspection of the project.

32. Florida Administrative Code Rule 61G4-17.001 provides for the penalty ranges for disciplinary actions taken by the Department. The penalty for a violation of Subsection 489.129(1)(g) ranges from a \$1,500.00 fine and/or probation or suspension to a \$5,000.00 fine and/or probation or suspension. The penalty for a violation of Subsection 489.129(1)(j), Florida Statutes, ranges from a \$2,500.00 fine and/or probation or suspension to a \$7,500.00 fine and/or probation or suspension. The penalty for a violation of Subsection 489.129(1)(m), Florida Statutes, ranges from a \$1,000.00 fine and/or probation or suspension to a \$5,000.00 fine and/or probation or suspension.

The penalty for a violation of Subsection 489.129(1)(o), Florida Statutes, ranges from a \$250.00 fine to a \$1,000.00 fine and/or probation or suspension. Additionally, Florida Administrative Code Rule 61G4-17.001(5) provides that the Board may require the contractor to make restitution to the extent of the financial harm sustained by the consumer.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered finding that Mr. Calleja did not violate Subsection 489.119(2), Florida Statutes, and that Mr. Calleja violated Subsections 489.129(1)(g)1., 489.129(1)(g)2., 489.129(1)(j), 489.129(1)(m), and 489.129(1)(o), Florida Statutes; for the violation of Subsection 489.129(1)(g)1., Florida Statutes, imposing a fine of \$2,000.00, suspending Mr. Calleja's license for six months, and requiring Mr. Calleja to pay Mr. Coleman \$5,139.58 as restitution for the payment of the lien filed by Prestige; for the violation of Subsection 489.129(1)(g)2., Florida Statutes, imposing a fine of \$2,000.00, suspending Mr. Calleja's license for six months, and requiring Mr. Calleja to pay Mr. Coleman \$9,682.00, which represents the amount that Mr. Coleman paid to Mr. Calleja; for the violation of Subsection 489.129(1)(j), Florida Statutes, imposing a \$1,000.00 fine and four years of probation; for the violation of Subsection 489.129(1)(m),

Florida Statutes, imposing a \$1,000.00 fine and four years of probation, which shall run concurrently with the other probation imposed; and, for the violation of Subsection 489.129(1)(o), Florida Statutes, imposing a \$1,000.00 fine and two years of probation to run concurrently with the other probation imposed; and requiring payment of \$470.49 as costs for the prosecution of this case.

DONE AND ENTERED this 29th day of August, 2008, in Tallahassee, Leon County, Florida.



SUSAN B. HARRELL
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 29th day of August, 2008.

ENDNOTE

^{1/} Unless otherwise indicated, all references to Florida Statutes are to the 2005 version.

COPIES FURNISHED:

Tino Gonzalez, Esquire
1600 Sarno Road, Suite 1
Melbourne, Florida 32935

Scott A. Smothers, Esquire
Robert A. Crabill, Esquire
Wright, Fulford, Moorhead & Brown, P.A.
Post Office Box 2828
Orlando, Florida 32801-2828

Ned Luczynski, General Counsel
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-0792

G. W. Harrell, 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.