

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
CONSTRUCTION INDUSTRY LICENSING)
BOARD,)
)
Petitioner,)
)
vs.) Case No. 08-2394PL
)
)
DANNY HENLEY,)
)
Respondent,)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on July 23, 2008, in Stuart, Florida, before Administrative Law Judge Claude B. Arrington of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Brian P. Coats, Esquire
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32399-2022

For Respondent: Danny Henley, pro se
1524 Bob Loftin Road
Panama City, Florida 32405

STATEMENT OF THE ISSUE

Whether Respondent committed the offenses alleged in the Administrative Complaint and, if so, the penalties that should be imposed.

PRELIMINARY STATEMENT

On March 24, 2008, Petitioner filed an Administrative Complaint against Respondent, which alleged certain facts pertaining to Respondent's dealings with a consumer named Ruth Schumacher and, based on those factual allegations, charged Respondent in four Counts with the violations that are at issue in this proceeding.

Count I alleged that Respondent violated Section 489.129(1)(i), Florida Statutes,¹ by having failed to provide written notice of the consumer's rights under Florida Homeowners' Construction Recovery Fund as required by Section 489.1425(1), Florida Statutes.

Count II alleged that Respondent violated Section 489.129(1)(j), Florida Statutes, by abandoning a construction project in which the contractor is engaged or under contract as the contractor.

Count III alleged that Respondent violated Section 489.129(1)(o), Florida Statutes, by failing to obtain the

appropriate permits and resulting inspections necessary to initiate and complete the subject project.

Count IV alleged that Respondent violated Section 489.129(1)(m), Florida Statutes, by committing incompetence or mismanagement in the practice of contracting.

Respondent timely requested a formal administrative hearing, the matter was duly referred to DOAH, and this proceeding followed.

At the formal hearing, Petitioner presented the testimony of Andrew Bruhn (an employee of the Martin County, Florida, Building Department), and Jacqueline Macey (Ms. Schumacher's daughter). Petitioner offered 13 sequentially-numbered Exhibits, each of which was admitted into evidence. Respondent appeared at the final hearing and cross-examined Petitioner's witnesses. Respondent did not offer any exhibits and he presented no testimony.

A Transcript of the proceeding was filed July 31, 2008. The deadline for the filing of post-hearing submittals was set for ten days following the filing of the transcript. Petitioner timely filed a Proposed Recommended Order (PRO), which has been duly-considered by the undersigned in the preparation of this Recommended Order. Respondent has not filed a PRO as of the entry of this Recommended Order.

FINDINGS OF FACT

1. At all times relevant to this proceeding, Respondent has been licensed by the Construction Industry Licensing Board (CILB) as a certified contractor and has held license CGC 13316.

2. At all times relevant to this proceeding, Coastal Structures, LCC (Coastal Structures) has possessed a certificate of authority as a contractor qualified to do business in the State of Florida and has held license QB39088. At all times relevant to this proceeding, Respondent has been the primary qualifying agent for Coastal Structures.

3. At times relevant to this proceeding, Ruth Schumacher was the owner of a residence located in Martin County at 2880 Southwest Brighton Way, Palm City, Florida (the subject property). Ms. Schumacher passed away on June 17, 2008. Prior to her mother's death, Ms. Macey assisted Ms. Schumacher with her affairs. After her death, all of Ms. Schumacher's estate, including the subject property, was placed in a trust with Ms. Macey as the trustee.

4. In late October 2005, a screened porch on the subject property was damaged by Hurricane Wilma. In November 2005, Ms. Macey, on behalf of her mother, contacted Coastal Structures about making repairs to the damaged porch. In November 2005, David and Donna Williams, on behalf of Coastal Structures, visited the subject property, made temporary repairs to the

damaged porch, and discussed with Ms. Macey and Ms. Schumacher the replacement of the porch.

5. On November 28, 2005, Coastal Structures entered into a written contract with Ms. Schumacher to remove the damaged porch and to replace it with a new screened porch over the existing concrete slab.

6. The written contract failed to contain a written statement explaining to Ms. Schumacher her rights under the Florida Homeowners' Construction Recovery Fund as required by Section 489.1425(1), Florida Statutes.

7. When Ms. Schumacher contracted with Coastal Structures on November 25, 2005, her insurance company had accepted her claim, but had not completed the damage assessment. The scope of the work was to be based on the allowances provided in the insurance adjuster's statement of loss once the damage assessment was completed.

8. The insurance company's damage assessment for the damaged porch was completed December 3, 2005. The total replacement cost was valued at \$21,190.10, with a deductible of \$2,960.00, for a net claim value of \$18,230.10.

9. On March 8, 2006, Respondent submitted to the Martin County Building Department an application for a permit for a screen enclosure over an existing slab.

10. The Martin County Building Department approved the permit application and issued permit number BSCE-2006030334 (the subject permit) to Respondent on March 8, 2006.

11. The subject permit required one inspection, which was to be a final inspection after the completion of the work. Respondent failed to request the required inspection and the subject permit expired.

12. After the execution of the contract with Coastal Structures and the completion of the damage assessment by the insurance company, Ms. Schumacher and Coastal Structures agreed to change the scope of the work from a screened enclosure to a glass enclosure with windows. Ms. Schumacher and Coastal Structures did not execute a written change order or any other written amendment to the written contract.

13. Coastal Structures completed its work on the porch in May 2006. Pursuant to its verbal agreement with Ms. Schumacher, Coastal Structures replaced the damaged screen porch with a glass enclosure with windows. On May 17, 2006, Ms. Schumacher paid Coastal Structures the sum of \$25,363.00 in full payment for the work it had done.

14. After payment had been made, Ms. Macey observed several problems with the project including leaks from the ceiling panels and tile work that was not flush with the bottom

of the exterior doorway, which allowed water to seep into the structure.

15. In response to complaints from Ms. Macey, Mr. Williams returned to the subject property in May 2006 and applied caulking to the ceiling and along the floor of the structure. That work did not resolve the problems with the project.

16. Ms. Macey made further complaints to Mr. Williams, but he did not respond to those complaints.

17. Ms. Macey and Ms. Schumacher asked Palm City Screening, LLC (Palm City Screening) to determine the problems with the project and to provide an estimate to repair those problems. On February 13, 2007, Palm City Screening provided Ms. Schumacher with an estimate of \$19,785.00 to replace the existing porch.

18. In May 2007, Respondent visited the subject property in response to complaints from Ms. Macey. Ms. Macey pointed out to Respondent problems with the porch and Respondent inspected the structure. Respondent told Ms. Macey that he would send someone named George to the subject property to make repairs. Respondent left the subject property and Ms. Macey heard nothing further from him. No one returned to the property on behalf of Respondent.

19. At no time did Ms. Schumacher or Ms. Macey terminate the contract with Coastal Structures or prevent Coastal Structures from correcting the problems with the porch.

20. On July 2, 2008, Palm City Screening provided a second estimate to Ms. Macey in the amount of \$23,230.00 to replace the structure. Palm City Screening's representative told Ms. Macey that the structure could not be repaired as built, but would have to be replaced. The scope of work and estimated costs excluded electrical work for the structure.

21. On July 11, 2008, Jimmy Rowell Electric Service provided Ms. Macey with a written estimate in the amount of \$1,520.00 for the electrical work that would be required if the structure were to be replaced.

22. No one on behalf of Palm City Screening or Jimmy Rowell Electric Service testified at the formal hearing.

23. The total investigative costs of this case to Petitioner, excluding costs associated with attorney's time, was \$176.39.

24. On October 8, 1995, Petitioner filed an Amended Administrative Complaint against Respondent in DBPR Case 91-00022. The Amended Administrative set forth certain factual allegations pertaining to Respondent's dealings with a person named Donald H. Shaffer. Based on those allegations, Petitioner charged Respondent with abandonment of a project (Count I);

committing mismanagement or misconduct in the practice of contracting that caused financial harm to a customer by allowing liens to be placed against the project (Count II); failure to supervise (Count III); mismanagement or misconduct in the practice of contracting that caused financial harm to a customer by abandoning the project (Count IV); and by having committed fraud, deceit, gross negligence, incompetence, or misconduct in the practice of contracting (Count V).

25. DBPR Case 91-00022 was resolved by stipulation. As part of the stipulation, Respondent agreed to pay a fine and make restitution to the customer. The stipulation contained the following provision:

Respondent neither admits nor denies the allegations of fact contained in the Amended Administrative Complaint attached hereto as Exhibit "A".

26. The CILB entered a Final Order Approving Settlement Stipulation on August 2, 1966, which ". . . approved and adopted in toto . . ." the settlement stipulation.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

28. Petitioner has the burden of proving by clear and convincing evidence the allegations against Respondent. See § 120.57(1), Fla. Stat.; Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112 (Fla. 1st DCA 1989); Inquiry Concerning a Judge, 645 So. 2d 398 (Fla. 1994); and Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996).

29. Petitioner is the agency of the State of Florida charged with regulating the practice of construction contracting in the State of Florida pursuant to the provisions of Section 20.165, Chapter 455, and part I of Chapter 489, Florida Statutes.

30. Respondent, in his capacity as a licensed contractor, is subject to the provisions of Chapters 455 and 489, Florida Statutes. Petitioner has the authority to regulate Respondent's activities as a contractor.

31. Respondent, as its primary qualifying agent, is responsible for the actions of Coastal Structures pursuant to the provisions of Section 489.1195(1)(a), Florida Statutes, which provides as follows:

(a) All primary qualifying agents for a business organization are jointly and equally responsible for supervision of all operations of the business organization, for all field work at all sites, and for

financial matters, both for the organization in general and for each specific job.

32. Section 489.129(1), Florida Statutes, gives the CILB the authority to discipline the license of any general contractor, if he or she commits certain acts specified in the statute.

COUNT I

33. Count I alleged that Respondent violated Section 489.129(1)(i), Florida Statutes, by having violated Section 489.1425(1), Florida Statutes.

34. Section 489.129(1)(i), Florida Statutes, provides that disciplinary action may be taken by the CILB if a general contractor is guilty of:

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

35. Section 489.1425(1), Florida Statutes, provides as follows:

(1) Any agreement or contract for repair, restoration, improvement, or construction to residential real property must contain a written statement explaining the consumer's rights under the recovery fund, except where the value of all labor and materials does not exceed \$2,500. The written statement must be substantially in the following form:

FLORIDA HOMEOWNERS' CONSTRUCTION
RECOVERY FUND
PAYMENT MAY BE AVAILABLE FROM THE FLORIDA

HOMEOWNERS' CONSTRUCTION RECOVERY FUND IF YOU LOSE MONEY ON A PROJECT PERFORMED UNDER CONTRACT, WHERE THE LOSS RESULTS FROM SPECIFIED VIOLATIONS OF FLORIDA LAW BY A LICENSED CONTRACTOR. FOR INFORMATION ABOUT THE RECOVERY FUND AND FILING A CLAIM, CONTACT THE FLORIDA CONSTRUCTION INDUSTRY LICENSING BOARD AT THE FOLLOWING TELEPHONE NUMBER AND ADDRESS:

The statement shall be immediately followed by the board's address and telephone number as established by board rule.

36. Petitioner established by clear and convincing evidence that Respondent failed to include in the contract between Ms. Schumacher and Coastal Structures the statement required by Section 489.1425(1), Florida Statutes. As alleged by Count I of the Administrative Complaint, that failure constituted a violation of Section 489.129(1)(i), Florida Statutes.

COUNT II

37. Section 489.129(1)(j), Florida Statutes, provides that disciplinary action may be taken by the CILB if a general contractor is guilty of:

(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.

38. Petitioner established by clear and convincing evidence that Respondent abandoned the subject construction project in violation of Section 489.129(1)(j), Florida Statutes, by failing to call for the final inspection of the project, by permitting the building permit to expire, and by failing to correct the defects in the project.

COUNT III

39. Section 489.129(1)(o), Florida Statutes, provides that disciplinary action may be taken by the CILB if a general contractor is guilty of:

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

40. The record is undisputed that Respondent obtained a building permit for a screened porch prior to beginning work on the subject project, but that he never called for the final inspection of the project. That failure established the violation alleged in Count III of the Administrative Complaint.

COUNT IV

41. Section 489.129(1)(m), Florida Statutes, provides that disciplinary action may be taken by the CILB if a general contractor is guilty of:

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

42. Petitioner established by clear and convincing evidence that Respondent violated Section 489.129(1)(m), Florida Statutes, with regard to the subject project. Respondent entered into the subject contract without a written statement explaining the consumer's rights under the Florida Homeowner's Construction Recovery Fund. Respondent thereafter abandoned the project, causing substantial damages to the customer. Respondent's conduct constitutes incompetency or misconduct as alleged in Count IV of the Administrative Complaint.

RESTITUTION

43. Florida Administrative Code Rule 61G4-17.001(5) provides as follows:

(5) For any violation occurring after October 1, 1988, the board shall order the contractor to make restitution in the amount of financial loss suffered by the consumer. Such restitution shall be ordered in addition to the penalties provided by these guidelines upon demonstration of aggravating factors set forth in subsection 61G4-17.002(1), F.A.C., and to the extent that such order does not contravene federal bankruptcy law.

44. Respondent has failed to make any restitution or take any effective action to correct the defective construction on the subject property.

45. The written estimates from Palm City Screening and Jimmy Rowell Electric Service are hearsay evidence. The only evidence that the structure would have to be replaced and could

not be repaired came from a statement made to Ms. Macey by a representative of Palm City Screening. That statement is hearsay. Section 90.801(1)(c), Florida Statutes, defines the term "hearsay" as follows:

(c) "Hearsay" is a statement, other than one made by the declarant while testifying as the trial or hearing, offered in evidence to prove the truth of the matter asserted.

46. Section 120.57(1)(c), Florida Statutes, provides as follows:

(c) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient itself to support a finding unless it would be admissible over objection in civil actions.

47. The hearsay evidence offered by Petitioner to prove the amount of restitution did not supplement or explain other evidence and cannot be the basis of a finding as to the amount of restitution. Unfortunately, without competent proof of the amount of restitution, the undersigned cannot recommend that Petitioner order Respondent to pay restitution to the owner of the subject property.

REPEAT VIOLATIONS

48. Respondent's licensure has been previously disciplined, but that discipline was based on a stipulation. As part of the stipulation, Respondent neither admitted nor denied the alleged violations of the Amended Administrative Complaint

in DBPR Case 91-00022. While it can be concluded that Respondent's licensure has been previously disciplined, it cannot be concluded that Respondent is a repeat offender of any particular statutory violations alleged in the Administrative Complaint that underpins this proceeding. Nevertheless, the disciplinary guidelines set forth above should be applied to Respondent as a repeat offender because of the following definition of the term "Repeat Violations" set forth in Florida Administrative Code Rule 61G4-17.003:

(1) As used in this rule, a repeat violation is any violation on which disciplinary action is being taken where the same licensee had previously had disciplinary action taken against him or received a letter of guidance in a prior case; and said definition is to apply regardless of whether the violations in the present and prior disciplinary actions are of the same or different subsections of the disciplinary statutes.

(2) The penalty given in the above list for repeat violations is intended to apply only to situations where the repeat violation is of a different subsection of Chapter 489, F.S., than the first violation. Where, on the other hand, 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.

COST OF INVESTIGATION

49. Florida Administrative Code Rule 61G4-17.001(4) provides as follows:

(4) For any violation occurring after October 1, 1989, the board may assess the costs of investigation and prosecution. The assessment of such costs may be made in addition to the penalties provided by these guidelines without demonstration of aggravating factors set forth in Rule 61G4-17.002, F.A.C.

THE APPROPRIATE PENALTY

50. Sections 489.1425(2)(a) and (b), Florida Statutes, pertains to violations of Section 489.1425(1), Florida Statutes, and provides as follows:

(a) Upon finding a first violation of subsection (1), the board may fine the contractor up to \$500, and the moneys must be deposited into the recovery fund.

(b) Upon finding a second or subsequent violation of subsection (1), the board shall fine the contractor \$1,000 per violation, and the moneys must be deposited into the recovery fund.

51. Petitioner is authorized, upon finding a violation of Section 489.129(1), Florida Statutes, to impose discipline upon a general contractor's license. In particular, the CILB is authorized to take any of the following actions:

. . . 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 a primary qualifying agent, a financially responsible officer, or a secondary qualifying agent responsible under s. 489.1195

52. Section 455.2273(5), Florida Statutes, requires that the penalty guidelines of the CILB must be followed in determining what disciplinary action to take under Section 489.129(1), Florida Statutes. Those guidelines are set out in Florida Administrative Code Chapter 61G4-17.

53. In relevant part, Florida Administrative Code Rule 61G4-17.001 (1) provides the following:

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

54. For the Count I violation, the recommended guideline for a first offense is for the imposition of an administrative fine from \$250.00 to \$500.00. For a repeat violation, the recommendation is for the imposition of an administrative fine in the amount of \$1,000.00.

55. For the Count II violation, the recommended guideline for a first offense is for the imposition of an administrative fine from \$2,500.00 to \$7,500.00 and the imposition of probation or suspension. For a repeat violation, the recommendation is for the imposition of an administration fine from \$5,000.00 to \$10,000.00 and the revocation of licensure.

56. For the Count III violation, the recommended guideline for a first violation is for the imposition of an administrative fine from \$250.00 to \$1,000.00 and/or the probation or suspension of licensure. For a repeat violation, the recommendation is for the imposition of an administration fine from \$1,000.00 to \$5,000.00 and the imposition of suspension or revocation of licensure.

57. For the Count IV violation, the recommended guideline for a first violation is for the imposition of an administrative fine from \$1,000.00 to \$2,500.00 and/or the imposition of probation or suspension of licensure. For a repeat violation, the recommendation is for the imposition of an administration fine from \$2,500.00 to \$10,000.00 and the imposition of suspension or revocation of licensure.

58. Florida Administrative Code Rule 61G4-17.002 provides the following aggravating and mitigating circumstances to be considered in determining the penalty or penalties to impose on a licensee:

Circumstance 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 to be assessed. . . .

59. Petitioner proved that the homeowner suffered significant financial damage as a result of acts for which Respondent is responsible.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby RECOMMENDED that Petitioner enter a final order finding Respondent guilty of the violations alleged in the Administrative Complaint. It is further RECOMMENDED that the final order impose against Respondent administrative fines as follows: \$500.00 for Count I; \$5,000.00 for Count II; \$5,000.00 for Count III; and \$5,000.00 for Count IV, for the aggregate amount of \$15,500.00. It is further RECOMMENDED that Respondent's licensure be revoked.

DONE AND ENTERED this 20th day of August, 2008, in Tallahassee, Leon County, Florida.



CLAUDE B. ARRINGTON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of August, 2008.

ENDNOTE

^{1/} All statutory references are to Florida Statutes (2008). The provisions of Chapter 489 cited herein have not changed since 2005.

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.