

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
CONSTRUCTION INDUSTRY LICENSING )  
BOARD, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 08-5481  
 )  
THOMAS GEPFRICH, d/b/a ARIZEN )  
HOMES, INC., )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on February 6, 2009, in Ft. Myers, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Lisa Livezey Comingore, Esquire  
Tiffany A. Harrington, Esquire  
Sorin Ardelean, Esquire  
Department of Business and  
Professional Regulation  
1940 North Monroe Street, Suite 42  
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For Respondent: Val L. Osinski, Esquire  
Law Offices of Val L. Osinski  
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Coral Springs, Florida 33065

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent failed to include his professional license number on contractual documents, committed mismanagement or misconduct in the performance of contracting services, abandoned construction projects, and was incompetent or mismanaged work he performed.

PRELIMINARY STATEMENT

In August 2008, Petitioner, Department of Business and Professional Regulation, Construction Industry Licensing Board, issued an Administrative Complaint against Respondent, Thomas Gepfrich, d/b/a Arizen Homes, Inc., containing 16 counts. (At the final hearing, Counts nine through 12 were withdrawn; jurisdiction on those counts was relinquished to Petitioner.) Respondent filed an answer to the Administrative Complaint denying the substantive allegations in the complaint and requesting a formal administrative hearing.

Respondent's request for administrative hearing was forwarded to the Division of Administrative Hearings ("DOAH") on October 31, 2008. At the final hearing, Petitioner called three witnesses: Steve Shanahan, Dornant Hall, and Arthur Gordon. Petitioner's Exhibits 1 through 5, 7 through 9, 11 through 13 and 15 and 16 were admitted into evidence. Respondent testified on his own behalf and offered no exhibits into evidence.

The parties advised the undersigned that a transcript of the final hearing would be ordered. They were given 20 days from the date the transcript was filed at DOAH to submit proposed recommended orders. The Transcript was filed at DOAH on March 6, 2009. Thereafter, an agreed Motion for Enlargement of Time to file proposed recommended orders was filed. The motion was granted. Petitioner timely submitted a Proposed Recommended Order, and it was given due consideration in the preparation of this Recommended Order. As of the date of this Recommended Order, Respondent has not filed a proposed recommended order with DOAH.

#### FINDINGS OF FACT

1. Petitioner is the state agency responsible for, inter alia, licensing general construction contractors in the State of Florida. Its headquarters is located in Tallahassee, Florida.

2. Respondent is a certified general contractor, who has qualified two businesses under his license: Arizen Homes, Inc., and Islander Builders, Inc. Respondent's two licenses, both of which are currently active, are Nos. CG-C1104399 and CG-C1204399. Respondent has two addresses of record with Petitioner: 1862 Pier Point Street, North Port, Florida, and 2700 West Cypress Creek Road, No. B-111, Ft. Lauderdale, Florida.

Shanahan Project

3. On or about December 21, 2005, Respondent contracted with Steve Shanahan to build a home at 3416 6th Street Southwest, Lehigh Acres, Florida. (An amended contract was prepared on January 23, 2006, and an addendum was added on February 8, 2007.) The contract price was \$292,300. The contract did not contain Respondent's license number on it. Shanahan paid Respondent a deposit on the contract amount by way of four checks totaling \$14,865.

4. Shanahan did not own the lot on which the house was to be built by Respondent. One of the checks (in the amount of \$250) Shanahan sent to Respondent was for "lot evaluation." That is, Shanahan paid Respondent to determine the adequacy of the lot for the proposed house, which Respondent presumably did. Shanahan was relying on Respondent to assist him (Shanahan) with the purchase of the lot.

5. Early in 2006, Shanahan began calling Respondent to ascertain why no work was being done on the site. He was advised by "Michael" at Respondent's office that the project was going to take a little longer than expected. An addendum to the contract was prepared in February 2008, extending the deadline for completion from two years to three years. Shanahan signed the Addendum.

6. No work has been done on Shanahan's house. The contract with Respondent was never terminated. None of Shanahan's deposit money was returned to him. Respondent is not financially able to do any work on Shanahan's home at this time.

Hall Project

7. By contract dated October 22, 2006, Respondent agreed to construct a house for Dornant Hall at 1017 State Avenue, Lehigh Acres, Florida. The contract amount was \$372,960. The contract did not include Respondent's license number. Hall paid Respondent a deposit of \$17,648 by way of two separate checks.

8. The contract between Hall and Respondent was never terminated. No work has been done on the proposed house, nor is Respondent financially able to work on the project at this time. Hall did not receive any of his deposit back from Respondent.

Gordon/Suarez Project

9. On June 10, 2006, Respondent contracted with Arthur Gordon and Alma Suarez to construct a house for them at 1311 Southwest 38th Terrace, Cape Coral, Florida. The contract amount was \$404,039 for the lot, the house, and a pool. The contract between Gordon/Suarez and Respondent did not include Respondent's license number.

10. Gordon/Suarez paid for the lot on which the home was to be built. An additional deposit of \$44,411 was paid to Respondent either by way of checks or draws from the

construction loan. Some of that amount may have been for impact fees or permits relating to construction, but the permits were never picked up from the city or county by Respondent.

11. The contract between Respondent and Gordon/Suarez was never terminated. The house called for in the contract was never built. Gordon/Suarez did not receive their deposits back.

12. Gordon/Suarez ultimately contracted with another builder to construct a home on the site. The house built for Gordon/Suarez had more options than the one planned by Respondent and cost less. However, Gordon/Suarez never got their money back from Respondent.

#### Respondent's Position

13. Respondent has been a builder since 1972 and a licensed general contractor in Florida since at least 1990 (the date Island Builders, Inc., was licensed). Respondent was building homes in Lee and Charlotte counties for many years. In total, Respondent built approximately 200 to 300 homes in that geographic area and had plans to expand to other counties as well.

14. For most of its existence, Respondent relied upon a line of credit from lenders to fund construction projects. Once a contract with a client was finalized, Respondent would take a small deposit, then begin construction using money from the line

of credit. The line of credit was sometimes also used to purchase lots on which to build the homes.

15. From September 2006 through July 2007, Respondent began to experience great difficulty closing construction projects. The real estate boom had reached its climax and was beginning to quickly diminish. Appraisals of projects were going down. Respondent could not match competitors which owned their own lots. It was a difficult time for Respondent financially.

16. In 2007, Respondent had approximately 100 houses in various stages of development. About one-half of those homes had received Certificates of Occupancy so that the buyers could move in once the closing was held. However, many buyers did not close on the deals for a number of reasons. Some could not get an appraisal of the home high enough to justify the mortgages for which they had applied. Others simply got "cold feet" as a result of the economic situation in the state. Many buyers simply did not show up at the scheduled closing.

17. Buyers began to ask Respondent for discounts at closing, meaning that Respondent was losing money on many projects. In response, Respondent began negotiating with its lenders, seeking for a discount from them to match the discounts being requested by buyers. Respondent asked its bank for a

30-percent discount; the request was denied. Respondent asked for 16-percent; that was also denied.

18. Finally, in May 2008, negotiations between Respondent and its lenders ended. The banks refused to give Respondent any leeway on the amounts owed on the construction loan lines of credit. The banks refused to enter into an agreement to purchase the houses with Certificates of Occupancy in order to generate capital to pay off the line of credit.

19. The effect of termination of discussions between Respondent and the banks was to place Respondent in bankruptcy. That effectively ended Respondent's ability to do any further work on its clients' houses. And because all of Respondent's funds were tied up in bankruptcy, Respondent could not offer any refunds to his aggrieved clients. Respondent also offered to finish all the pending projects for the banks, allowing the banks to then negotiate settlements with the buyers, but that offer was refused as well.

20. Respondent did not refund the deposits paid by Shanahan, Hall, and Gordon/Suarez. Based on the pending bankruptcy, Respondent does not have the current ability to make such refunds.

#### CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this



proceeding pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes (2008). All references herein to the Florida Statutes shall be to the 2008 codification.

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

23. Pursuant to Section 489.129, Florida Statutes, the 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 grounds enumerated in subsection (1) therein. Subsection 489.129(1), Florida Statutes, states in relevant part as follows:

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 a 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:

\* \* \*

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.

\* \* \*

For the purposes of this subsection, construction is considered to be commenced when the contract is executed and the

contractor has accepted funds from the customer or lender. A contractor does not commit a violation of this subsection when the contractor relies on a building code interpretation rendered by a building official or person authorized by s. 553.80 to enforce the building code, absent a finding of fraud or deceit in the practice of contracting, or gross negligence, repeated negligence, or negligence resulting in a significant danger to life or property on the part of the building official, in a proceeding under chapter 120.

24. Inasmuch as the action being taken in this case against Respondent is penal in nature, Petitioner must prove its case by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292, 295 (Fla. 1987).

25. The clear and convincing evidence standard requires:

[T]hat the evidence be found to be credible, the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts at issue. The evidence must be of such a weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations to be established.

Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

26. The uncontroverted testimony of Shanahan, Hall, and Gordon/Suarez is clear and convincing evidence that Respondent failed to do work on their respective homes for periods in excess of 90 days. Respondent's mitigating fact, that the bank

line of credit was withdrawn, is plausible, but does not excuse Respondent from his responsibility.

27. Respondent admits that his license number does not appear on the contracts in question. There is no finding of intent on Respondent's part to misrepresent or mislead anyone, but the contracts certainly point out this shortcoming. Its importance to this case, on balance, is minimal.

28. The evidence as to the amounts owed by Respondent to Shanahan (\$14,615), Hall (\$17,648), and Gordon/Suarez (\$44,411) is also clear and convincing. Again, the fact that Respondent is in bankruptcy and does not have resources to repay these amounts does not excuse Respondent from its responsibility.

29. The Department expended \$841.09 in costs associated with the investigation of claims against Respondent. The Department is authorized to tax that cost against Respondent.

#### RECOMMENDATION

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

RECOMMENDED that a final order be entered by the Department of Business and Professional Regulation, Construction Industry Licensing Board, finding Respondent guilty of violating Subsection 489.129(1), Florida Statutes, and that: (1) a fine of \$9,750 be imposed and that Respondent be required to pay \$841.09 in costs; and (2) Respondent's license be suspended

until such time as all fines and costs have been paid. All claims for restitution by the aggrieved parties will need to be filed in the bankruptcy court proceeding.

DONE AND ENTERED this 13th day of April, 2009, in Tallahassee, Leon County, Florida.



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R. BRUCE MCKIBBEN  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 13th day of April, 2009.

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.