

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
CONSTRUCTION INDUSTRY LICENSING )  
BOARD, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 09-5212  
 )  
VICTOR HARRIS, d/b/a VICTOR'S )  
ROOFING CO., INC., OF THE FLA )  
KEYS, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge R. Bruce McKibben, held a formal hearing in the above-styled case on October 28, 2009, in Punta Gorda, Florida.

APPEARANCES

For Petitioner: Sorin Ardelean, Esquire  
Department of Business and  
Professional Regulation  
1940 North Monroe Street  
Tallahassee, Florida 32399

For Respondent: Victor Harris, pro se  
Victor's Roofing Company, Inc.,  
of the Florida Keys  
5409 Overseas Highway, Suite 254  
Marathon, Florida 33050-2710

STATEMENT OF THE ISSUE

Whether disciplinary action should be taken against Respondent's license to practice contracting under License No. CCC 057995, based on the violations of Subsection 489.129(1), Florida Statutes (2005).

PRELIMINARY STATEMENT

On February 9, 2007, Petitioner, Department of Business and Professional Regulation, Construction Industry Licensing Board ("Department"), filed an Administrative Complaint on DBPR Case Nos. 2006-003419 and 2006-006820, alleging Respondent, Victor Harris, d/b/a Victor's Roofing Company, Inc., of the Florida Keys, violated the laws regulating his professional activities as a certified contractor in the State of Florida. The Administrative Complaint charged Respondent with violations of Subsection 489.129(1)(j), Florida Statutes (2005), by abandoning a construction project in which the contractor is engaged or under contract; and Subsection 489.129(1)(m), Florida Statutes (2005), by committing incompetency or misconduct in the practice of contracting.

Respondent disputed the allegations contained in the Administrative Complaint and elected to have a formal administrative hearing. Consequently, the case was transferred to the Division of Administrative Hearings ("DOAH") to conduct a

final hearing pursuant to Section 120.57, Florida Statutes (2009).

During the hearing, Petitioner offered the testimony of two witnesses: Bobby McElroy and Larry Mesler. Petitioner introduced 12 exhibits numbered 1 through 12, all of which were entered into evidence. Respondent testified on his own behalf and introduced one exhibit that was entered into evidence.

The parties indicated that a transcript of the final hearing would be ordered. The parties were to submit proposed recommended orders within ten days of the transcript being filed at DOAH. The Transcript was filed on November 18, 2009. Petitioner filed its Proposed Recommended Order on November 25, 2009, and it was duly considered in the preparation of this Recommended Order. No proposed recommended order was submitted by Respondent.

#### FINDINGS OF FACT

Based on the evidence and testimony of the witnesses presented and the entire record in this proceeding, the following facts are found:

1. At all times material hereto, Respondent was a certified general contractor, having been issued License No. CCC 057995 by the Department.

2. At all times material hereto, Respondent was the qualifier of Victor's Roofing Co., Inc., of the Florida Keys.

3. On January 14, 2005, Respondent entered into a contract with Bobby McElroy to re-roof McElroy's residence located in Punta Gorda, Florida. The roof had been damaged during Hurricane Charley the previous year. The contract price was \$23,750, of which McElroy paid \$15,800 in advance. Of the advance funds, \$7,850 was designated as payment to take off the old roof and install felt and metal flashing, and \$7,950 was designated for installing tiles on the roof. The balance (\$7,950) was designated for the remainder of the work, i.e., replacing water damage, installing 90-pound roll-roofing slate over the felt, obtaining permits, and payment of dump fees.

4. Respondent commenced work on the McElroy residence on March 8, 2005, by removing and disposing of the existing roof tiles, doing repair work, installing 30-pound felt paper, and "hot mopping" the roof. The purpose of the "hot mopping" was to protect the roof pending installation of the new roof tiles. Respondent opined at final hearing that the completion of "hot mopping" constituted a new roof. The new roof tiles were, in his opinion, only for aesthetics. McElroy was advised that it would take six weeks or so, and possibly even up to 18 weeks, for the new tiles to arrive.

5. Respondent came to McElroy's house on June 27, 2005, some 12 weeks after Respondent had commenced work on the roof, with a tile order form. The tiles listed on that form, however,

were Capri Pinto Blend tiles, not the Capri Hope tiles that McElroy had decided upon. The tile order form was dated January 20, 2005, but McElroy said he had not even made up his mind about which tiles to order until February 16, 2005. McElroy believes the date on the order form was wrong or had been changed by someone. The date at the top of the tile order form was January 20, 2005. However, the form listed June 27, 2005, as the order date and also as the ship date. The form indicated a check was received from "Victor's Roofing" on June 27, 2005. None of the testimony at final hearing cleared up this discrepancy.

6. Respondent advised McElroy on June 27, 2005, that Capri Hope tiles were no longer being manufactured, but McElroy had reason to believe that representation was in error. The evidence on this point was uncorroborated hearsay from McElroy, who said he was told by the manufacturer that the Capri Hope tiles were still being made. Respondent presented uncorroborated hearsay testimony that a representative from the company told him the tiles had been discontinued. There was no competent and substantial evidence presented as to whether the tiles had been discontinued or were still available.

7. McElroy apparently and reluctantly acquiesced to the Capri Pinto Blend tiles, and the tiles valued at \$4,837.20 were delivered to McElroy's residence on or about June 30, 2005.

However, Respondent did not return to install the tiles and has done no work on McElroy's house since May 26, 2005, i.e., prior to the new tiles being ordered.

8. In October 2005, Respondent apparently picked up the Capri Pinto Blend tiles from McElroy's home pursuant to instructions from McElroy. Another hurricane was approaching, and McElroy was worried that the tiles may blow off the roof where they were stacked. At final hearing McElroy testified that the last time he saw Respondent was when the Capri Pinto Blend tiles were removed from his property. However, in the chronology of events in McElroy's complaint to Petitioner, which McElroy testified was true and accurate, there is no mention of the tiles being removed. This inconsistency was not cleared up at final hearing.

9. In February 2006, McElroy hired a second contractor to "finish" his roof. However, at that time, McElroy decided to upgrade to a metal roof. The cost of the upgraded roof was \$25,200, which included some roof preparation in addition to what Respondent had previously done and the cost of the new metal roof.

10. There was no testimony as to the value of the services that Respondent provided to McElroy before Respondent ceased working at the McElroy's residence, but it is clear that extensive work was done. It is also clear that Respondent did

not complete the job by installing the Capri Pinto Blend tiles and did no work on the job since May 2005 (except for picking up the tiles in October 2005).

11. Petitioner submitted an affidavit indicating that the total investigative cost of this case to Petitioner, excluding costs associated with any attorney's time for DBPR Case No. 2006-003419, was \$297.83. The hearsay affidavit was not corroborated by other competent evidence.

12. On November 8, 2004, Respondent entered into a contract with Larry Mesler to re-roof Mesler's residence located in Punta Gorda, Florida. The roof had been damaged by a hurricane during the previous year. The copy of the contract entered into evidence is essentially unreadable, but the parties stipulated that a contract existed between them. The contract price was \$30,000, of which amount Mesler paid \$20,000 (a \$10,000 down payment and \$10,000 more when the roof tiles were ordered). The down payment covered the removal and disposal of the old tiles, as well as the "hot mopping" process. The second payment covered the purchase and delivery of the tiles for Mesler's roof. The final \$10,000 was apparently to cover the cost of installing the new tiles, but there was no clear evidence presented at final hearing as to that fact.

13. In April 2005, roof tiles for the project were delivered to Mesler's residence. Mesler was concerned about the

number of broken tiles, but no evidence was presented to indicate there were insufficient tiles to complete the job.

14. It took until July 7, 2005, for a building permit to be obtained for commencement of the roofing work. This was during a period of time that numerous roof repair jobs were going on following Hurricane Charley, which had hit the area in 2004.

15. The roof tiles were installed by Respondent, but it is unclear from the evidence as to how much of the job was completed. The testimony at final hearing was extremely sketchy as to whether Respondent installed some or none of the tiles. It is clear, however, that the job was not completed to Mesler's satisfaction. Mesler was unsuccessful in his attempts to contact Respondent to finish the job.

16. At some point Mesler hired another contractor and paid him \$16,550 to complete the roofing job. That amount included purchase of additional tiles, but the contract, as well as Mesler's testimony, is unclear as to how much tile was ordered or the extent of the additional work. Nor is the testimony clear as to when Respondent last performed work on Mesler's home.

17. Petitioner submitted an affidavit indicating that the total investigative cost of DBPR Case No. 2006-006820 to Petitioner, excluding costs associated with any attorney's time,



was \$351.07. The hearsay affidavit was not corroborated by other competent evidence.

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 (2009).

19. Petitioner is the state agency charged with regulating the practice of contracting pursuant to Section 20.165 and Chapters 455 and 489, Florida Statutes (2009).

20. Pursuant to Section 489.129, Florida Statutes (2005), the 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 489.129(1), Florida Statutes (2005).

21. Petitioner has the burden of proving by clear and convincing evidence the allegations against Respondent. § 120.57(1)(j), Fla. Stat. (2009); Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); and Ferris v. Turlington, 510 So. 2d. 292 (Fla. 1987).

22. Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, fn. 5 (Fla. 1st DCA 1989), provides the following guidance regarding the clear and convincing evidence standard:

That standard has been described as follows: [C]lear 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 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).

23. The Administrative Complaint alleges that Respondent is guilty of violating Subsections 489.129(1)(j) and (m), Florida Statutes (2005), which provide, in pertinent part, as follows:

(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:

\* \* \*

(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 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.

24. Petitioner has proven by clear and convincing evidence that Respondent violated Subsections 489.129(1)(j) and (m), Florida Statutes (2005), i.e., that Respondent abandoned the McElroy contract and/or committed incompetency or misconduct in the practice of contracting. The testimony concerning this matter was incomplete, disjointed, and confusing. It is not precise and explicit, nor is it distinctly remembered. It is clear, however, that Respondent did not fully complete the roof project for some reason. It is further clear that McElroy paid for tiles that were not used on his roof, and those tiles were removed from his property. Further, it is clear Respondent did no work on the project from May 2005 until October 2005, a period of well over 90 days.

25. Petitioner has not proven by clear and convincing evidence that Respondent violated Subsections 489.129(1)(j) and (m), Florida Statutes (2005), by abandoning the Mesler project or by committing incompetency or misconduct in the practice of contracting. The evidence is clear that Respondent

performed work pursuant to the contract between the parties. It is also clear Mesler was not happy with the work and that Mesler hired another contractor to work on his roof after giving up on Respondent. However, the evidence is neither clear nor convincing as to whether Respondent abandoned the project or did substandard work.

26. While an action might be warranted concerning repayment by Respondent for a portion of the funds paid by McElroy and/or Mesler, there is insufficient evidence to warrant sanctions against Respondent as set forth in the Administrative Complaint.

27. Florida Administrative Code Rule 61G4-17.001, sets forth guidelines for establishment of monetary fines and penalties for disciplinary cases. It states in pertinent part:

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

\* \* \*

(j) Section 489.129(1)(j), F.S.  
Abandonment. First violation, \$500.00 to \$2,000.00 fine.

28. There is no evidence that Respondent had any other violations in his past concerning the abandonment of a project. There were no aggravating factors, but the existence of

hurricanes causing extensive work for Respondent and like-situated individuals are a mitigating factor.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by Petitioner, Department of Business and Professional Regulation, Construction Industry Licensing Board:

1. Finding that Respondent, Victor Harris, d/b/a Victor's Roofing Company, Inc., of the Florida Keys, abandoned the McElroy project and imposing an administrative fine in the amount of \$1,000; and

2. Dismissing the Administrative Complaint against Respondent as to the Mesler project.

DONE AND ENTERED this 6th day of January, 2010, 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 6th day of January, 2010.

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.