

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
CONSTRUCTION INDUSTRY LICENSING )  
BOARD, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 09-5522  
 )  
STUART C. WINSTON, d/b/a BACK )  
BAY HOMES, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Carolyn S. Holifield conducted the final hearing of this case for the Division of Administrative Hearings (DOAH) on January 5, 2010, in Fort Myers, Florida.

APPEARANCES

For Petitioner: Sorin Ardelean, Esquire  
Department of Business and  
Professional Regulation  
1940 North Monroe Street  
Tallahassee, Florida 32399-2202

For Respondent: Darrin R. Schutt, Esquire  
Seeman & Schutt, P.A.  
1322 Southeast 46th Lane  
Cape Coral, Florida 33904

STATEMENT OF THE ISSUE

The issue is whether Respondent violated Subsections 489.129(1)(g)2., (j), and (m), Florida Statutes (2005),<sup>1</sup> by allegedly engaging in financial mismanagement or misconduct in the practice of contracting that causes financial harm to a customer, abandoning a construction project, or committing misconduct or incompetence in the practice of contracting.

PRELIMINARY STATEMENT

On or about December 11, 2008, Petitioner filed an Administrative Complaint against Respondent. Respondent requested an administrative hearing. Petitioner referred the matter to DOAH to conduct the hearing.

At the hearing, Petitioner offered the testimony of two witnesses and submitted 14 exhibits for admission into evidence. Respondent testified, called one additional witness, and submitted 20 exhibits for admission into evidence.

The identity of the witnesses and exhibits, and any attendant rulings, are reported in the Transcript of the hearing filed with DOAH on January 25, 2010. Petitioner and Respondent timely filed their respective Proposed Recommended Orders (PROs) on February 12, 2010. Pursuant to Subsection 120.57(1)(a), DOAH transferred this matter to ALJ Daniel Manry to write the Recommended Order based on the existing record due to the retirement of ALJ Carolyn S. Holifield.

FINDINGS OF FACT

1. Petitioner is the state agency responsible for regulating the practice of contracting in the state. Respondent is licensed in the state as a certified general contractor pursuant to license number CGC59204. Respondent is the qualifier of South West Florida Development Corporation (South West) doing business as Back Bay Homes (Back Bay).

2. On February 7, 2006, Respondent executed a contract with Gail and Gary Veith to build a residential home on a vacant lot located at 3218 Southwest 11th Place, Cape Coral, Florida. The contract price was \$276,983.00 (the initial contract). The initial contract provided for the construction of a sea wall at a cost of \$17,257.00 in addition to the contract price of \$276,983.00.

3. On February 7, 2006, Respondent entered into a second contract with Mr. and Mrs. Veith. The only difference between the initial and second contracts was the contract price of each contract. The second contract price was \$289,686.00, excluding the sea wall cost of \$17,257.00.

4. Mr. and Mrs. Veith secured payment of the construction project with a construction loan from Market Street Mortgage Corporation (Market Street) in the original approximate amount of \$412,000.00. The total loan amount was intended to be sufficient to cover the second contract price of \$289,686.00 and

the amount contracted by Mr. and Mrs. Veith for acquisition of the vacant lot (construction site), which was \$128,000.00.<sup>2</sup>

5. Clear and convincing evidence shows that Respondent engaged in financial mismanagement or misconduct in the practice of contracting that caused financial harm to his customers in violation of Subsection 489.129(1)(g)2. Clear and convincing evidence also shows that Respondent committed incompetence and mismanagement in the practice of contracting.

6. The percentage of completion of the residence, which was zero, was less than the percentage of the contract price paid to Respondent, which was 29 percent. Respondent received approximately \$84,655.00 in construction loan proceeds from Market Street in two draws. Market Street paid the first draw at closing on May 5, 2006, in the amount of \$42,901.20 and paid the second draw to Respondent on June 26, 2006, in the amount of \$41,754.00. However, Respondent never commenced construction of the residence.

7. Respondent reported a profit of \$48,637.72 on the Veith property and completed only the sea wall at a cost of \$17,257.00. Respondent paid the cost of the sea wall and other expenses on the Veith property to keep the net profit at \$48,637.72. Other expenses included \$420.00 for surveys, \$34.34 for blue prints, \$1,707.75 for plan drafts, \$350.00 for septic engineering, and \$3,138.19 for construction loan interest.

8. Respondent was not entitled by the terms of the contract to retain the funds paid to Respondent by Market Street. The loan agreement provided that draws were to be made at the discretion of Market Street based on work completed and materials incorporated into improvements.

9. Respondent never commenced construction of the residence. Respondent did not obtain permits for the job.

10. Mr. Winston testified that when Market Street transferred a single, lump sum deposit to his company in the amount of \$41,754.00 on June 26, 2006, he did not know that he was appropriating funds he was not entitled to under the contract. When that testimony is weighed against evidence that the work Mr. Winston had performed was limited to a sea wall costing only \$17,257.00, the testimony is persuasive evidence to the trier of fact that Respondent engaged in mismanagement.<sup>3</sup>

11. Respondent billed Market Street for payment of the sea wall when Respondent completed the sea wall. However, the draw schedule in the loan documents does not provide a draw payment for the sea wall.

12. Respondent stopped paying construction interest that Respondent was obligated to pay under the terms of the construction loan. Thereafter, Mr. and Mrs. Veith paid construction interest of approximately \$13,800.00.

13. Clear and convincing evidence shows that Respondent abandoned the construction project within the meaning of Subsection 489.129(1)(j). Respondent failed to perform any work on the residence for 90 consecutive days without just cause.

14. Respondent did not notify Mr. and Mrs. Veith that Respondent had abandoned the project. Rather, Mr. and Mrs. Veith started receiving requests for payment of construction loan interest.

15. Respondent failed to conduct any construction activity on the project site for more than 90 consecutive days. On May 13, 2008, Mr. and Mrs. Veith received notice that their loan had been assigned from Market Street to Gulf Coast Bank & Trust Company (Gulf Coast). Gulf Coast sent Mr. and Mrs. Veith repeated demands for payment of the construction loan principal and interest.

16. Mr. and Mrs. Veith entered into a transaction identified in the record as a "short sale" in which they sold the construction site, which they originally purchased for \$128,000.00, for \$20,000.00. The \$20,000.00 sale proceeds were paid to Gulf Coast.

17. Mr. and Mrs. Veith have been financially unable to make payments to Gulf Coast. They remain liable for the full amount of the loan, including delinquent principal and interest.

18. Mr. and Mrs. Veith brought a civil action against Respondent. They were unable to sustain the action because they could not afford the attorney fees.

19. Petitioner incurred investigative costs in this matter of \$204.26. The investigative costs do not include attorney time.

#### CONCLUSIONS OF LAW

20. DOAH has jurisdiction over the parties and subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2009). DOAH provided the parties with adequate notice of the final hearing.

21. Petitioner has the burden of proof in this proceeding. Petitioner must show by clear and convincing evidence that Respondent committed the acts alleged in the Administrative Complaint and the reasonableness of any proposed penalty. § 120.57(1)(h), Fla. Stat. (2009); 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).

22. Petitioner satisfied its burden of proof. For reasons stated in the Findings of Fact and incorporated herein by reference, Petitioner showed by clear and convincing evidence that Respondent violated Subsections 489.129(1)(g)2., (j), and (m).

23. Respondent's reliance on Hunter v. Department of Professional Regulation, 458 So. 2d 842 (Fla. 2d DCA 1984), is misplaced. The application of the holding in Hunter to this proceeding, if any, has been superseded by subsequent legislative enactment in 1991 in Subsection 489.129(1)(k).<sup>4</sup>

24. Respondent's defense in this proceeding seems to be that the lender and Mr. and Mrs. Veith did not do their jobs in shepherding the construction loan proceeds. Perhaps, but the issue in this proceeding is whether Respondent did his job by complying with his professional licensing requirements. The evidence is clear and convincing that Respondent failed to do so.

25. Florida Administrative Code Rules 61G4-17.001, 17.002, and 17.003 authorize Petitioner to consider certain aggravating or mitigating factors in determining the appropriate penalty in this case. There is no evidence of any prior discipline against Respondent's license.

26. Petitioner proposes a fine of \$1,500.00 for the violation of Subsection 489.129(1)(g)2., a fine of \$500.00 for the violation of Subsection 489.129(1)(j), and a fine of \$1,000.00 for the violation of Subsection 489.129(1)(m). Petitioner also proposes that Respondent pay Mr. and Mrs. Veith restitution in the amount of \$61,747.72.<sup>5</sup> In addition, Petitioner proposes that Respondent be required to pay the costs



of investigation and prosecution in the amount of \$204.26. The proposed fines, penalties, restitution, and recovery of costs are reasonable under the circumstances evidenced in this proceeding.<sup>6</sup>

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that Petitioner enter a final order finding that Respondent is guilty of the violations alleged in the Administrative Complaint; imposing the fines enumerated in paragraph 24 of this Recommended Order; requiring Respondent to pay investigative costs in the amount of \$204.26; and requiring Respondent to make full restitution to Mr. and Mrs. Veith in the amount of \$61,747.72.

DONE AND ENTERED this 12th day of July, 2010, in Tallahassee, Leon County, Florida.



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DANIEL MANRY  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 12th day of July, 2010.

ENDNOTES

- <sup>1/</sup> References to subsections, sections, and chapters are to Florida Statutes (2005), unless otherwise stated.
- <sup>2/</sup> The total of \$289,686.00 and \$128,000.00 is \$417,686.00, rather than \$412,000.00. The record does not explain how the loan proceeds of \$412,000.00 were sufficient to cover the sum of the second contract price and lot cost.
- <sup>3/</sup> Sometime before receiving the second draw in the amount of \$41,754.00 on June 26, 2006, Respondent billed Market Street for completion of the sea wall in the amount \$11,500 (See Respondent's PRO at page 11, paragraph 13). Instead of receiving \$11,500.00 from Market Street, Respondent received \$41,754.00 and never asked why. Respondent's testimony concerning the business climate and the inaccessibility of Mr. and Mrs. Veith is less than credible and persuasive.
- <sup>4/</sup> The subsection has been subsequently renumbered.
- <sup>5/</sup> Petitioner's PRO at page 19, paragraph 4, calculates restitution in the amount of \$61,747.72 as \$84,655.00 reduced by: \$17,257.00 (seawall); \$3,138.19 (construction loan interest); \$420.00 (surveys); \$34.34 (blueprints); \$1,707.75 (drafting); and \$350.00 (septic tank engineering).
- <sup>6/</sup> Mr. and Mrs. Veith paid \$13,800.00 in construction interest out of their pocket, which the evidence shows was the responsibility of Respondent (See paragraph 12, supra). In addition, Mr. and Mrs. Veith suffered a loss of \$108,000.00 on the short sale to Gulf Coast (See paragraph 16, supra). Petitioner does not include the \$13,800.00 or the \$108,000.00 amounts in the amount of restitution requested for reasons unknown to the fact finder, and the ALJ does not include either amounts in the recommended restitution.

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.