

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
CONSTRUCTION INDUSTRY LICENSING)
BOARD,)
)
Petitioner,)
)
vs.) Case No. 10-2463
)
HARRIS M. MILLMAN, d/b/a)
AFFILIATED CONSTRUCTION)
SERVICES, INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Administrative Law Judge, John D. C. Newton, II, of the
Division of Administrative Hearings, heard this case, as
noticed, on July 22, 2010, by video teleconference at sites in
Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Paul R. Waters, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399

For Respondent: Victor Rones, Esquire
Margulies and Rones, P.A.
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North Miami Beach, Florida 33162

STATEMENT OF THE ISSUES

(1) Does the unsatisfied civil judgment in ABC v Millman et al, Case Number 50 2008 CA 006245 XXXX MB relate to practice of Respondent's profession, thus establishing that Respondent, Harris M. Millman, violated section 489.129(1), Florida Statutes,(2009)?

(2) If he committed the violation, what penalty should be imposed?

PRELIMINARY STATEMENT

On January 20, 2010, Petitioner, Department of Business and Professional Regulation (Department), filed an Administrative Complaint (Complaint) in DBPR Case Number 2009-047490. The Complaint alleged that Respondent, Harris M. Millman (Millman), d/b/a Affiliated Construction Services, Inc. (Affiliated), violated Florida laws regulating his professional activities as a certified general and roofing contractor. The Complaint charged that Millman violated Section 489.129(1)(q), Florida Statutes,(2009)¹ by failing to satisfy, within a reasonable time, the terms of a civil judgment obtained against the licensee (Millman), or the business organization qualified by the licensee (Affiliated), relating to the practice of Millman's profession.

Millman disputed the allegations and requested a formal administrative hearing. The Department referred the case to the

Division of Administrative Hearings (DOAH) to conduct a hearing as provided by Section 120.57, Florida Statutes. DOAH conducted the hearing on July 22, 2010, as noticed.

The Department offered the testimony of Silas McHenry, William J. Marell, and Millman. The Department offered eight exhibits. All were admitted into evidence.

Millman testified on his own behalf. He also offered eight exhibits. They were admitted into evidence.

The Department waived making a closing argument. Millman's attorney made a closing argument. Both parties submitted Proposed Recommended Orders. Those Proposed Recommended Orders and the record in this proceeding have been fully considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. The Construction Industry Licensing Board has certified Millman as a General Contractor and a Roofing Contractor under the authority of Chapter 489, Florida Statutes. In 2009 and 2010, he held license numbers CGC 11522 (General) and CCC 1327057 (Roofing). Millman's licenses are presently inactive.

2. Millman has actively practiced the licensed professions of general contractor and roofing contractor in Florida since 1977. The Department and its predecessor agencies have never taken any disciplinary action against him.

3. At all times material to this proceeding, Affiliated was a Construction Qualified Business in the State of Florida, certified under Chapter 489, Florida Statutes, holding license number QB45287.

4. Millman was the Primary Qualifying Agent for Affiliated under Chapter 489, Florida Statutes, at all times material to this proceeding.

5. On December 26, 2005, Millman signed a credit application with American Builders and Contractors Supply Company, Inc., d/b/a ABC Supply Co. Inc. (ABC), on behalf of Affiliated.

6. Millman listed his Certified General Contractor's License (CGC 011522) on the credit application and personal guarantee

7. Although Millman provided his General Contractor's license number on the application, ABC did not require a license number.

8. The application indicates that the account is related to "low and steep slope roofing." The account was for the purchase of roofing materials and supplies.

9. On December 29, 2005, Millman signed a personal guarantee of the Affiliated account with ABC.

10. Millman's personal guarantee made him personally liable for Affiliated's obligation to pay ABC.

11. ABC granted the application and opened a line of credit for Millman and Affiliated.

12. Millman and Affiliated used the account to purchase roofing supplies on credit. They purchased and paid for over \$800,000 worth of supplies from 2006 into 2009. This is separate from the goods and materials that were the subject of the lawsuit described below.

13. Most of the materials and supplies that Affiliated purchased on the ABC account were for specific roofing projects. But some, as Millman acknowledged in his testimony, were to maintain roofing materials in the Affiliated warehouse. He used these on small jobs and to supplement materials purchased for larger, specific jobs. All the goods and materials purchased related to Millman's practice of the roofing contracting profession.

14. In 2007 Millman and Affiliated started having financial difficulties. Millman's business began failing.

15. The failure of a lender that took over a construction project it was financing resulted in the lender not paying Millman for approximately \$500,000 worth of his company's work. This contributed to Millman's business failure. In addition to Millman's problems paying ABC, his landlord was evicting him.

16. Millman worked hard during these difficulties to meet his obligations to ABC. He liquidated his Individual Retirement

Account and his life savings to make sure he paid for all charges for supplies used for specified customers. He did this to protect customers from the risk of liens being placed on their properties.

17. Millman advised ABC that he was being evicted from his warehouse. He told ABC that the warehouse contained materials obtained with his line of credit that had not been paid for. Millman did not have the ability to return the materials to ABC. As eviction neared, he urged ABC to retrieve the materials before eviction. ABC did not act to retrieve the materials. The landlord evicted Millman. What happened to the materials is not known.

18. On March 4, 2008, ABC sued Millman and Affiliated in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida. ABC sought payment for goods and materials purchased on the account and delivered to Millman and Affiliated between January 31, 2007, and January 31, 2008. The court assigned the action Case Number 50 2008 CA 006245 XXXX MB.

19. The goods and materials for which ABC sought payment were roofing goods and materials. They included roofing felt, roofing cement, shingles, plywood, lumber, roofing nails, lead sheets, insulation, roof tile cement, lead boots for pipes, roofing paint, asphalt, and galvanized roof edging. Much, although not all, of the material was delivered to roof tops.

Many invoices for the material describe the roof for which the material is intended by height and pitch. The goods and materials related to Millman's profession of roofing contractor.

20. On June 17, 2008, barely three months after ABC filed suit, Millman entered into a Stipulation for Payment with Judgment upon Default with ABC. Millman agreed in the Stipulation for Payment with Judgment upon Default, that both he as an individual and Affiliated are indebted to ABC in the amount of \$45,617.02. This amount included interest, attorney's fees, and costs.

21. The stipulation included a schedule of eight payments starting with a payment of \$2,500.00 on May 30, 2008, and ending with a payment of \$22,720.02 on December 30, 2008.

22. Millman made payments from January 1, 2007, forward, even during and after the collection litigation. Millman made over \$16,000.00 of those payments. But he did not make all of them.

23. As Millman made payments, he took care to designate payments for supplies allocated to a specific customer and job. He did this to protect his customers from liens and to make sure that documents he signed attesting that supplies for specific jobs had been paid for were honest and correct.

24. On August 3, 2009, the court rendered a Final Judgment After Stipulation in ABC's collection action. The court

adjudged that ABC recover \$29,617.02 together with interest at the rate of 11 percent per annum accruing from May 31, 2008, from Affiliated and Millman, jointly and severally.

25. The judgment is for debt incurred relating to Millman's practice of his licensed profession of roofing contracting. It is not related to Millman's licensed profession of general contracting.

26. ABC continued to actively pursue collecting the judgment. It garnished Millman's bank account with Bank Atlantic and obtained \$662.61.

27. Millman and Affiliated have not fully satisfied the judgment within a reasonable period of time.

28. The Department incurred \$216.00 in costs for the investigation and this action.

CONCLUSIONS OF LAW

29. Section 120.57, Florida Statutes, grants DOAH jurisdiction over the parties and subject matter of this proceeding.

30. Florida law, through Section 20.165 and Chapters 455 and 489, Florida Statutes, charges the Department and the Construction Industry Licensing Board with regulating the practice of contracting.

31. Section 489.129, Florida Statutes, empowers the Board to revoke, suspend or otherwise discipline the license of a

contractor who is found guilty of any of the offenses enumerated in Section 489.129(1), Florida Statutes.

32. The Department must prove Millman's alleged violations with clear and convincing evidence. § 120.57(1)(j), Florida Statutes; Ferris v. Turlington, 510 So. 2d. 292 (Fla. 1987); Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996).

33. Clear and convincing evidence must be credible. The memories of witnesses must be clear and not confused. The evidence must produce a firm belief that the truth of the allegations has been established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). Evidence that conflicts with other evidence may be clear and convincing. The trier of fact must resolve conflicts in the evidence. G.W.B. v. J.S.W. (in Re Baby E.A.W.), 658 So. 2d 961, 967 (Fla. 1995).

34. Clear and convincing evidence proved all of the Findings of Fact in this Recommended Order.

35. The administrative complaint alleges that Millman violated Section 489.129(1)(q), Florida Statutes. That section permits the Department to take action against a certificate holder or registrant such as Millman for:

Failing to satisfy within a reasonable time, the terms of a civil judgment obtained against the licensee, or the business organization qualified by the licensee,

relating to the practice of the licensee's profession.

36. Florida Administrative Code Rule 6IG4-17.001(1)(q), defines reasonable time as 90 days following the entry of a civil judgment that is not appealed.

37. The Department proved by clear and convincing evidence that Millman violated Section 489.129(1)(q), Florida Statutes.

38. Section 489.129(1), Florida Statutes, permits the Construction Industry Licensing Board to impose a range of penalties for a violation of Section 489.129(q), Florida Statutes. They include a fine not exceeding \$10,000 per violation, requiring continuing education, assessing costs, and financial restitution to a consumer, license revocation, and license suspension.

39. Florida Administrative Code Rule 61G4-17.001 establishes disciplinary guidelines and recognizes that aggravating and mitigating circumstances may be considered.

40. Florida Administrative Code Rule 61G4-17.002 lists aggravating and mitigating circumstances as follows:

Circumstances which may be considered for the purposes 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. (This

provision shall not be given effect to the extent it would contravene federal bankruptcy law.)

(2) Actual job-site violations of building codes, or conditions exhibiting gross negligence, incompetence, or misconduct by the licensee, which have not been corrected as of the time the penalty is being assessed.

(3) The danger to the public.

(4) The number of complaints filed against the licensee.

(5) The length of time the licensee has practiced.

(6) The actual damage, physical or otherwise, to the licensee's customer.

(7) The deterrent effect of the penalty imposed.

(8) The effect of the penalty upon the licensee's livelihood.

(9) Any efforts at rehabilitation.

(10) Any other mitigating or aggravating circumstances.

41. The Department did not prove any aggravating circumstances. No customers were damaged. This is the only complaint ever filed against Millman. There are no jobsite code violations. There are no indications of gross negligence, incompetence, or misconduct. There is no danger to the public.

42. The facts establish several mitigating circumstances. In 33 years of business, this is the only complaint against

Millman. His failure to fully satisfy the judgment is not deliberate or the consequence of reckless or negligent actions. All along, from before the civil lawsuit to the final hearing in this matter, Millman has accepted responsibility for his debt and attempted to satisfy it. He communicated with ABC, keeping it informed about his financial problems and his efforts to pay. Millman worked to minimize the effect of his financial problems and his inability to pay the debt on his customers and on ABC. He did everything that he could do to make sure obligations linked to a specific job were satisfied to protect the customer. Millman also advised ABC that he was being evicted and urged it to recover the materials that were purchased with the uncollected debt so that it could mitigate its damages. His efforts amount to vigorous rehabilitation.

43. For the offenses that Millman has committed, the penalty range established by the rule for a first offense is a \$500.00 fine and/or proof of satisfaction of the judgment up to a maximum of a \$5,000 fine and/or proof of satisfaction of the civil judgment. Fla. Admin. Code R. 61G4-17.001(1)(q).

44. The Department seeks a fine of \$5,000.00. That is not supported in a case where there are no aggravating circumstances and there are many mitigating circumstances. In light of the mitigating circumstances and the lack of aggravating circumstances, a fine of \$500.00 is appropriate.

45. The Department also seeks a requirement that Millman must provide proof that he has satisfied the judgment.² The facts do not support this requirement.

46. ABC has demonstrated the ability and willingness to use the many legal tools available to it to satisfy the judgment. Millman has demonstrated that he accepts the duty to pay and will strive to pay to the best of his ability. The facts do not demonstrate the need for the Board and the Department to remain involved in this commercial collection matter.

47. The Department also seeks a requirement that Millman complete seven additional hours of "live continuing education with an emphasis on Chapter 489, Florida Statutes." Florida Administrative Code Rule 61G4-17.001(2) provides that the Board shall require continuing education when the nature of the charge or the facts indicate that the licensee lacks understanding of the laws and rules governing the profession.

48. The facts do not indicate that Millman lacked understanding of the laws and rules governing his profession. Nothing inherent in the charge identifies a lack of understanding of the laws and rules governing the profession. Millman was aware of the governing laws and rules and did his best to comply. One example is his efforts to do everything he could to protect his customers from the risk of a "lien."

Another example is the fact that Millman acknowledged his responsibilities and sought to fulfill them as best as he could in the midst of the financial problems. The very quick resolution of the lawsuit by stipulation is one demonstration of this.

49. The discipline imposed must be limited to the licensed profession to which the judgment is related. The statute must be strictly construed on account of being a penal statute.

Camejo v. Dept. of Bus. & Prof'l Regulation, 812 So. 2d 583 (Fla. 3rd DCA, 2002). Consequently, the Construction Industry Licensing Board may only impose sanctions on Millman's roofing contractor license. The Department did not prove by clear and convincing evidence that the unsatisfied judgment relates to Millman's practice of General Contracting.

50. The Department seeks payment of costs of \$216.00. This payment is supported.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusion of Law, it is recommended that the Department of Business and Professional Regulation, Construction Industry Licensing Board, enter a final order finding that Respondent, Harris M. Millman, violated Section 489.129(1)(q), Florida Statutes, and imposing the following penalties:

1. Payment of an administrative fine of \$500.00 within 180 days of entry of the final order.

2. Payment of costs of investigation and prosecution in the amount of \$216.00 within 180 days of entry of the final order.

DONE AND ENTERED this 27th day of August, 2010, in Tallahassee, Leon County, Florida.



JOHN D. C. NEWTON, II
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of August, 2010.

ENDNOTES

^{1/} All references to Florida Statutes in this order are to 2009 unless otherwise specified.

^{2/} Although the rule identifies requiring proof of satisfaction of the judgment as a penalty, Section 489.129(1), Florida Statutes, does not. It provides only for probation, reprimand, revocation, suspension, financial restitution to a consumer for financial harm directly related to a violation of a provision of this part, an administrative fine not to exceed \$10,000 per violation, requiring continuing education, and assessing costs. Restitution is not available in this case because ABC is not a "consumer." Jonas v. Florida Dept. of Bus. & Prof'l Regulation, 746 So. 2d 1261 (Fla. 3rd DCA, 2000).

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.