

**STATE OF MICHIGAN
DEPARTMENT OF CONSUMER AND INDUSTRY SERVICES
BUREAU OF HEARINGS**

In the matter of

Docket No. 2001-1351

**Bureau of Commercial Services,
Petitioner**

Agency No. 21-00-4139-00

**Agency: Bureau of Commercial
Services**

v

**Russell Allen Swarts
dba Digital Home Design,
Respondent**

Case Type: Sanction

**Issued and entered
this 13th day of September, 2001
by Reneé A. Ozburn
Administrative Law Judge**

HEARING REPORT

PROCEDURAL HISTORY

This matter commenced with a Notice of Hearing (Notice) upon a Formal Complaint (Complaint) dated April 12, 2001, alleging that Russell Allen Swarts, dba Digital Home Design (Respondent), violated the Occupational Code, 1980 PA 299, as amended, MCL 339.101 *et seq.*; MSA 18.425(101) *et seq.*, (Code).

The Notice scheduled a hearing for 9:30 a.m. on September 10, 2001 at the Department of Consumer and Industry Services, Bureau of Hearings, in Grand Rapids, Michigan. The Notice was mailed to the Respondent's last known address of record, which was: 4919 Apple Avenue, Muskegon, Michigan 49442.

The Notice informs all parties to a case that if they fail to appear at a hearing, a default may be entered pursuant to Section 78 of the Administrative Procedures Act, 1969 PA 306, as amended, MCL 24.271 *et seq.*; MSA 3.560(101) *et seq.*, (APA). On September 10, 2001, Attorney Hal Ziegler was present and ready to proceed on behalf of the Bureau of Commercial Services (Petitioner). Neither the Respondent, nor an attorney on behalf of Respondent, appeared for the hearing.

Attorney Ziegler motioned for the Respondent to be defaulted pursuant to Section 78 of the APA. The undersigned Administrative Law Judge granted the motion. A default judgement constitutes a decision that all of the allegations contained in the April 12, 2001 Complaint, are deemed to be true.

ISSUES AND APPLICABLE LAW

The Complaint in this matter alleges that the Respondent violated Code Section 604(c) and Rules 51(2), (4) & (5) of the Residential Builders and Maintenance and Alteration Contractors Board Rules, promulgated thereunder, being 1979 AC R 338.1551(2), (4) & (5), which state:

604 - A person who violates 1 or more of the provisions of an article which regulates an occupation or who commits 1 or more of the following shall be subject to the penalties prescribed in section 602:

(c) Violates a rule of conduct of an occupation.

Rule 51(2) - Upon receipt of a valid and written complaint, the department shall assign a complaint number, acknowledge the complaint and forward a copy of the complaint to the licensee. He shall reply to the department within 15 days from receipt of the complaint and shall confirm or deny the justification of the

complaint. A complaint acknowledged as justified shall be corrected within a reasonable time. If a complaint or a portion thereof is not acknowledged by the licensee as being justified, the department shall notify the complainant of the area of disagreement.

Rule 51(4) - If a complaint is justified by the local building inspector or by a person authorized by the department to make inspections, the builder or contractor shall correct the complaint within a reasonable time. Failure or refusal by the licensee to correct a structural matter that is materially deficient, dangerous or hazardous to the owners shall be presumed to be dishonest or unfair dealing.

Rule 51(5) - Standards of construction shall be in accordance with the local building code, or in the absence of a code in accordance with the building code of the nearest political subdivision having a building code.

FINDINGS OF FACT

1. At all times relevant to the Complaint, Russell Allen Swarts, dba Digital Home Design, was licensed as a residential builder under the Code.
2. On or about June 28, 1999, Respondent entered into a contract with Kimalyn Averill, to perform services regulated by the Code.
3. In performance of the contract, Respondent failed to comply with Sections 903.4 and 910.5 of the 1995 Council of American Building Officials Code, which was adopted by the City of Norton Shores, via Ordinance #601, Section 5-2(a), effective May 1, 1998, contrary to Rule 51(5).
4. Respondent failed to correct those items justified by a local building inspector within a reasonable time, contrary to Rule 51(2).

5. Respondent failed to respond to the Complaint in a timely manner, contrary to Rule 51(2).

6. Respondent's violation of the above rules constitutes a violation of a rule of conduct in practicing an occupation, contrary to Section 604(c).

CONCLUSIONS OF LAW

The principles that govern judicial proceedings also apply to administrative hearings. The burden of proof is upon the Petitioner to prove, by a preponderance of the evidence, that the Respondent violated the Code as alleged and that grounds exist for imposing sanctions.

Having granted a default on behalf of Petitioner, the undersigned Administrative Law Judge concludes that the Petitioner has established, by a preponderance of the evidence, that the Respondent violated Code Section 604(c) and Rules 51(2), (4) & (5), as alleged in the April 12, 2001 Complaint.

RECOMMENDED SANCTIONS

Petitioner submitted Exhibit 1 to establish that the repairs necessitated by Respondent's failure to comply with the Code, totaled \$2,150. Therefore, the undersigned Administrative Law Judge concurs with the following sanctions recommended by the Petitioner:

- 1) The Respondent should make restitution in the amount of \$2,150.
- 2) The Respondent should pay a fine of \$1,000.
- 3) In the event that the restitution and fine are not paid within 60 days

following the issuance of a final order, Respondent's Article 24 license(s) should be suspended.

Renee A. Ozburn
Administrative Law Judge