

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

In the matter of

Docket No. 2001-163

**Bureau of Commercial Services,
Petitioner**

Agency No. 21-00-0236-00

v

**Agency: Bureau of Commercial
Services**

**Empire Builders of Michigan, Inc.
Sameer B. Patel, Q.O.,
Respondent**

Case Type: Sanction

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**Issued and entered
this 21st day of March, 2001
by C. David Jones
Administrative Law Judge**

HEARING REPORT

This matter began with a filing of a Formal Complaint on July 28, 2000.

On January 25, 2001, a Notice of Hearing was mailed scheduling the hearing to commence on March 7, 2001, at 611 West Ottawa Street, Lansing, Michigan.

On March 6, 2001, an Order Denying Request for Adjournment by Respondent was issued and entered. Respondent had not shown good cause for adjournment.

On March 7, 2001, the hearing commenced as scheduled. Attorney D. Lynn Morison represented Petitioner. Respondent did not appear in person or by counsel. However, a letter with attachment was received from Respondent via facsimile that morning (Respondent's Exhibit A).

The Administrative Law Judge allowed Petitioner to proceed in Respondent's absence under MCL 24.272(2); MSA 38.560(172)(2). However, the Administrative Law Judge ordered that Respondent's letter with attachment (Respondent's Exhibit A) would be considered.

Petitioner presented testimony from the following witness: James C. Reed, purchaser.

The following exhibits offered by Petitioner were admitted into the record: Petitioner's Exhibit 1, March 26, 1997, Reservation Agreement; Petitioner's Exhibit 2, April 13, 1998, Building Agreement; Petitioner's Exhibit 3, April 15, 1998, Loan Approval Notice; Petitioner's Exhibit 4, April 13, 1998, check for \$5,000 (photocopy); Petitioner's Exhibit 5, September 27, 1999, letter from S. Patel; Petitioner's Exhibit 6, May 20, 1998, letter from S. Patel; Petitioner's Exhibit 7, November 14, 1998, letter from J. Reed; Petitioner's Exhibit 8, November 25, 1998, letter from S. Patel; Petitioner's Exhibit 9, December 3, 1998, letter from J. Reed; Petitioner's Exhibit 10, June 24, 1999, memo and Addendum to Building Agreement; Petitioner's Exhibit 11, September 24, 1999, letter from J. Reed; and Petitioner's Exhibit 12, December 1, 1999, letter from R. McCoy.

The following exhibit received from Respondent was admitted into the record: Respondent's Exhibit A, March 6, 2001, letter from Respondent and May 22, 2000, letter from Respondent.

ISSUES AND APPLICABLE LAW

The applicable law in this case is the Occupational Code, 1980 PA 299, as amended (Code); MCL 339.101 et seq.; MSA 18.425(101) et seq.; 1979 AC, R 338.1511-1553.

The issues in this case are as follows:

1. Has Respondent abandoned without legal excuse a contract, a construction project, or operation engaged in or undertaken by Respondent in violation of Code Section 2411(2)(a)?
2. Has Respondent practiced fraud, deceit, or dishonesty in practicing an occupation in violation of Code Section 604(b)?
3. Has Respondent failed to remit money coming into his possession which belongs to another in violation of Code Section 2411(2)(c)?
4. What are the appropriate penalties?

FINDINGS OF FACT

1. On March 26, 1997, the purchasers, Celia and James Reed, signed a "Reservation Agreement" with Respondent, builder, to reserve a lot in the Silver Leaf Subdivision No. 1 to build a house. The purchasers gave Respondent a \$1,000 deposit.
2. On April 13, 1998, the purchasers signed a Building Agreement with Respondent. The purchasers agreed to pay \$191,070 for a lot and house to be constructed on the lot in the Silver Leaf Subdivision No. 1. Respondent agreed to endeavor to complete the residence within a reasonable time unless prevented by acts of the purchaser, weather

conditions, strikes, material shortages, fires, or other causes beyond its control. On April 13, 1998, the purchasers gave Respondent a cashier's check deposit (partial down payment) in the amount of \$5,000. The purchasers were to pay the balance at closing. The purchasers were required to obtain a mortgage within 45 days and the balance was to be paid in cash.

3. On April 15, 1998, the purchasers obtained a mortgage loan approval in the amount of \$70,000. The purchasers planned to pay the balance in cash.

4. On May 6, 1998, Respondent cashed the purchasers' \$5,000 deposit check.

5. On May 20, 1998, Respondent wrote the purchasers. Respondent indicated he anticipated beginning construction on the home in October 1998 with completion six to eight months later. Respondent indicated subdivision construction was delayed because of the need to record the development with the state of Michigan. Respondent offered to refund the purchasers' deposit in full if they felt the delay posed a problem.

6. The purchasers did not initially request a refund. However, Respondent did not begin construction in October 1998. On November 14, 1998, the purchasers wrote Respondent requesting a definite date when construction would begin and information on whether Respondent had finalized the recording of the development with the state. On November 25, 1998, Respondent replied to the purchasers. Respondent indicated no definite date when construction would begin and indicated the recording was not finalized, but progress had been made. Respondent indicated construction would begin when the recording was complete.

7. On December 3, 1998, the purchasers wrote Respondent requesting better information on when their home would be built. No reply or other communications between Respondent and the purchasers prior to June 1999 is indicated on record.

8. On June 24, 1999, Respondent submitted to the purchasers a proposed Addendum to the Building Agreement, whereby the purchasers would make periodic payments (draws) to finance their construction. Respondent indicated he had financing problems. The purchasers were willing to finance construction, but only if Respondent would agree to complete construction within nine months, which Respondent refused to do. A dispute also arose over the increased cost of the lot.

9. In early September 1999 the purchasers informed Respondent they were unwilling to accept the proposed addendum. On September 10, 1999, the purchasers requested Respondent return the March 26, 1997, \$1,000 deposit and the April 13, 1998, \$5,000 partial down payment. On September 16, 1999, Respondent informed the purchasers that he did not have the finances to return the money, but would do so when he completed a financial deal in a few months.

10. On September 24, 1999, the purchasers wrote Respondent and requested he return the \$1,000 deposit check (which was uncashed) and the \$5,000 partial down payment.

11. On September 27, 1999, Respondent wrote the purchasers. Respondent indicated he could not find the \$1,000 deposit check and suggested the

purchasers cancel the check. Respondent indicated that his cash flow did not permit him to return any portion of the \$5,000 deposit. Respondent also claimed having incurred several expenses pertaining to the residence including sales commissions, architect fees, engineering fees, site survey, and administrative costs.

12. The purchasers did cancel the \$1,000 deposit check.

13. The purchasers' attorney wrote Respondent on December 1, 1999, and requested Respondent refund the \$5,000 down payment and pay them \$878 in damages. Respondent did not pay any amount to the purchasers.

14. In reference to the Building Agreement Respondent claims to have incurred a sales commission of \$1,500 and unspecified amounts for architect and engineering design and administrative expenses. Respondent has presented no verification of these alleged expenses. In May 2000 Respondent offered to refund the \$5,000 down payment less expenses as soon as he was financially able. In March 2001 Respondent offered to refund the \$5,000 down payment minus his expenses from the sale of property which he anticipated would occur within 30 days of March 6, 2001.

15. The purchasers have requested total restitution of \$8,128. This consists of the \$5,000 down payment verified by Petitioner's Exhibit 4 and \$3,128 in unverified expenses. The unverified expenses include \$2,250 for furniture storage

(apparently \$150 per month for 15 months), \$300 to \$400 for surveyor's fee and \$478 to \$578 for interest.

CONCLUSIONS OF LAW

A. Abandonment

Petitioner accused Respondent of violating the following:

Abandonment without legal excuse of a contract, construction project, or operation engaged in or undertaken by the licensee.

MCL 339.2411(2)(a); MSA 18.425(2411)(2)(a); Code Section 2411(2)(a)

Evidence on record establishes the violation. Respondent signed a Building Agreement on April 13, 1998, (Petitioner's Exhibit 2). One year and five months later (when the purchasers requested that he return the money) Respondent had not even begun construction. Respondent had no "legal excuse." His excuses did not fit within those specified in the Building Agreement (Petitioner's Exhibit 2, paragraph 3). Initially Respondent claimed delay because of a need to record development with the state, but that should have been done before Respondent signed any building agreements. Later he said he had financing problems, but Respondent in his Building Agreement undertook to finance construction himself, and Respondent should have worked that out. Actually in mid 1999 the purchasers were willing to finance construction if Respondent agreed to complete construction within nine months, and Respondent did not increase the cost of the lot, but Respondent would not agree to those things.

B. Fraud

Petitioner has accused Respondent of the following violation:

Practices fraud, deceit, or dishonesty in practicing an occupation.

MCL 339.604(b); MSA 18.425(604)(b); Code Section 604(b)

In support of the claim of fraud Petitioner cited the following statutory provision:

The appropriation by a contractor, or any subcontractor, of any monies paid to him for building operations before the payment by him of all monies due or so to become due laborers, subcontractors, material men or others entitled to payment, shall be evidence of intent to defraud.

MCL 570.153; MSA 26.333

Evidence on record establishes the alleged violation. Respondent appropriated the entire \$5,000 down payment before payment for work on the house. Respondent indicated in his September 27, 1999, letter to the purchasers (Petitioner's Exhibit 5) that his cash flow problem did not permit him to return any portion of the \$5,000. In May 2000 and March 2001 Respondent indicated essentially that he was not financially able to return the money (Respondent's Exhibit A).

C. Failure to Remit Money

Petitioner accused Respondent of the following violation:

Failure to account for or remit money coming into the person's possession which belongs to another.

MCL 339.2411(2)(c); MSA 18.425(2411)(2)(c); Code Section 2411(2)(c)

Petitioner has established the alleged violation. Since Respondent abandoned his construction contract with the purchasers, he had no right to keep their \$5,000 down payment. Nevertheless, as described above, he repeatedly failed to remit the money to the

purchasers.

D. Penalties

A violator of the Occupational Code shall be assessed one or more of certain penalties including license revocation, license suspension, civil fine not exceeding \$10,000 and restitution, MCL 339.602; MSA 18.425(602); Code Section 602.

It is undisputed that Respondent should pay some restitution to the purchasers. Both Respondent and Petitioner agree that the computation of the amount of restitution should begin with the \$5,000 down payment. Petitioner, however, argued that amounts must be added to the \$5,000 for the purchasers' damages. Respondent argued that amounts must be subtracted from the \$5,000 for Respondent's expenses.

I find that based on this record the appropriate amount of restitution is \$5,000. Neither Petitioner nor Respondent has presented any documentation to verify consideration of any other amount. Indeed some of the claims are vague. Respondent indicated he had expenses for architecture and engineering designs and administrative expenses, but specified no amounts. The purchasers said they had expenses for furniture storage, but only estimated the amount as \$150 per month. The purchasers also only estimated their cost of survey as \$300 to \$400.

Petitioner also seeks a \$10,000 fine and license revocation. While I agree that a significant penalty is justified, I do not think the record justifies the most severe of penalties. I recommend a \$4,250 fine and license suspension.

DECISION AND RECOMMENDED SANCTION

Based on the above Findings of Fact and Conclusions of Law the undersigned Administrative Law Judge decides and orders as follows:

1. Respondent has abandoned without legal excuse a contract, construction project, or operation engaged in or undertaken by Respondent in violation of Code Section 2411(2)(a).
2. Respondent has practiced fraud, deceit, or dishonesty in practicing an occupation in violation of Code Section 604(b).
3. Respondent failed to remit money coming into his possession which belongs to another in violation of Code Section 2411(2)(c).

The Administrative Law Judge recommends the following penalties:

1. Restitution to the purchasers in the amount of \$5,000.
2. Payment of a \$4,250 civil fine to the Department.
3. License Suspension.

C. David Jones
Administrative Law Judge