

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

In the matter of

Docket No. 2001-21

**Bureau of Commercial Services,
Petitioner**

Agency No. 21-99-6238-00

v

Agency: Bureau of Commercial Services

**Daniel F. Naimowicz,
Respondent**

Case Type: Sanction

**Issued and entered
this 9th day of March, 2001
by Lauren G. Van Steel
Administrative Law Judge**

HEARING REPORT

PROCEDURAL HISTORY

Appearances: Attorney Kimbal R. Smith appeared on behalf of Respondent Bureau of Commercial Services. Neither Respondent Daniel F. Naimowicz, nor an attorney or representative on behalf of Respondent, appeared at the hearing.

This proceeding commenced with the filing of a Notice of Hearing dated January 3, 2001, scheduling a hearing for February 9, 2001. The Notice of Hearing was mailed to the parties' last known addresses. Further, the Notice of Hearing informed the parties that if either party failed to appear at the scheduled hearing, a default judgment might be entered pursuant to Sections 72 and 78 of the Michigan Administrative Procedures Act, 1969 PA 306, as amended, MCL 24.201 *et seq.*; MSA 3.560(101) *et seq.* (APA).

The Notice of Hearing was issued pursuant to a Formal Complaint filed on September 19, 2000, which alleged noncompliance with the Michigan Occupational Code, 1980 PA 299, as amended, MCL 339.101 *et seq.*; MSA 18.425(101) *et seq.* (Code), specifically Sections 2411(2)(a); 2411(2)(c); 604(b) and 604(c), and Administrative Rule 21(3) [1979 AC, R 338.1521(3)].

At the hearing held on February 9, 2001, Petitioner's representative requested to be allowed to proceed in Respondent's absence pursuant to Section 72 of the APA and that a default be granted for Petitioner pursuant to Section 78 of the APA.

Section 72 of the APA states in pertinent part:

(1) If a party fails to appear in a contested case, after proper service of notice, the agency, if no adjournment is granted, may proceed with the hearing and make its decision in the absence of the party.

Further, Section 78 of the APA states in pertinent part:

(2) Except as otherwise provided by law, disposition may be made of a contested case by...default....

Petitioner's motion for default was granted. As a result of the default judgment, the factual allegations contained in Petitioner's Formal Complaint are deemed true.

During the hearing, the following exhibits were accepted into the record:

Petitioner's Exhibit 1 Residential Construction Contract, dated July 8, 1999

Petitioner's Exhibit 2 Letter to Joe Thorington from Daniel Naimowicz, dated
September 24, 1999 - showing receipt of \$8,400.00

Petitioner's Exhibit 3 Letter to Dan Naimowicz from Joey Thorington, dated
September 23, 1999.

Petitioner's Exhibit 4 Copy of canceled checks - totaling \$8,351.13

No further evidence was offered for the record by Petitioner at the hearing, other than the exhibits.

ISSUES AND APPLICABLE LAW

The issues in this matter are whether Respondent has violated the following Code sections: 2411(2)(a); 2411(2)(c); 604(b) and 604(c) and Administrative Rule 21(3) [1979 AC, R 338.1521(3)], which provide in pertinent part as follows:

Sec. 2411(2) A licensee or applicant who commits 1 or more of the following shall be subject to the penalties set forth in article 6:

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

* * *

(c) Failure to account for or remit money coming into the person's possession which belongs to others.

Sec. 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:

* * *

(b) Practices fraud, deceit, or dishonesty in practicing an occupation.

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

Rule 21(3) An applicant operating under an assumed name or d.b.a. shall submit a certified copy of the assumed name certificate. * * *

FINDINGS OF FACT

Based on the record and the default judgment granted for the Petitioner, the undersigned makes the following findings of fact:

1. On or about July 8, 1999 and August 28, 1999, Respondent entered into contracts with Complainant Joey Thorington to perform services regulated by the Code.
2. Respondent has, without legal excuse, failed to perform the terms of the contracts.
3. From in or around June 1999 through in or around September 1999, on various dates, Joey Thorington did pay Respondent in cash, checks or money orders.
4. Respondent acknowledged receipt of \$8,400.00 from Joey Thorington, but has not performed the services for which payment was accepted.
5. On September 19, 1999, and on subsequent dates thereafter, Joey Thorington requested return of the monies so paid to Respondent, but Respondent has failed to return said monies, thereby engaging in conduct which is fraudulent, deceitful, and dishonest.
6. Respondent failed to remit monies received which belonged to Joey Thorington.
7. Respondent failed to file an assumed name or d/b/a certificate with the Commercial Licensing Division of the Department of Consumer & Industry Services or its predecessor before he commenced doing business as TLC Housing.
8. Respondent has violated a rule of conduct in practicing an occupation.

CONCLUSIONS OF LAW

The principles that govern judicial proceedings also apply to administrative hearings [8 Callaghan's Michigan Pleading and Practice, §60.48, at 230 (2d ed. 1994)]. The burden of proof in this matter is upon Petitioner to prove, by a preponderance of the evidence, that grounds exist for the imposition of sanctions upon Respondent. Under Section 72 of the APA, there is no requirement to provide a full evidentiary hearing when all alleged facts are taken as true. Smith v Lansing School Dist., 428 Mich 248; 406 NW2d 825 (1987).

Based upon the above findings of facts and the default judgment granted against Respondent, Petitioner has proven by a preponderance of the evidence that Respondent violated Sections 2411(2)(a) and (c) and 604(b) and (c) of the Code as well as Rule 21(3), as follows:

1. On or about July 8, 1999 and August 28, 1999, Respondent entered into contracts with Joey Thorington to perform services regulated by the Code.
2. Respondent has, without legal excuse, failed to perform the terms of the contracts, in violation of Section 2411(2)(a) of the Code.
3. Respondent acknowledged receipt of \$8,400.00 from Joey Thorington, but has not performed the services for which payment was accepted, in violation of Section 2411(2)(a) and (c) of the Code.
4. On September 19, 1999, and on subsequent dates thereafter, Joey Thorington requested return of the monies so paid to Respondent, but Respondent has failed to return said monies, thereby engaging in conduct which is fraudulent, deceitful, and dishonest, in violation of Section 604(b) of the Code.

5. Respondent failed to remit monies received which belonged to Joey Thorington, in violation of Section 2411(2)(c) of the Code.

6. Respondent failed to file an assumed name or d/b/a certificate with the Commercial Licensing Division of the Department of Consumer & Industry Services or its predecessor before he commenced doing business as TLC Housing, in violation of Rule 21(3), being 1979 AC, R 338.1521(3).

7. Respondent has violated a rule of conduct in practicing an occupation, in violation of Section 604(c) of the Code.

RECOMMENDATIONS

Based upon the above findings of fact and conclusions of law, the following recommendations are made by the undersigned to the Residential Builders and Maintenance and Alteration Contractors Board:

1. A civil fine of at least \$5,000.00 be assessed against Respondent.
2. Restitution be ordered in the total amount of \$8,400.00, plus statutory interest to be calculated as of the date of issuance of the Final Order, to be paid to Joey Thorington.
2. Any and all licenses or registrations under the jurisdiction of the Code held by Respondent be suspended until such time as restitution has been paid in full.

Lauren G. Van Steel
Administrative Law Judge