

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

In the matter of

Docket No. 2000-187

Bureau of Commercial Services,
Petitioner

Agency No. 21-99-2716-00

v

Agency: Bureau of Commercial
Services

Christopher F. Bidigare
dba Bidigare Construction &
Maintenance Service,
Respondent

Case Type: Sanction

_____ /

**Issued and entered
this 3rd day of April, 2001
by Dennis M. Matulewicz
Administrative Law Judge**

HEARING REPORT

PROCEDURAL HISTORY:

The Department of Consumer and Industry Services, Bureau of Commercial Services (BCS), Petitioner herein, filed a Formal Complaint against Respondent, Christopher F. Bidigare, a licensed residential builder. In its Complaint, BCS alleged that Respondent violated provisions of the Occupational Code and/or certain applicable Administrative Rules. Accordingly, BCS asks that sanctions be imposed upon Respondent for the purported violations.

Pursuant to MCL 339.511; MSA 18.425(511), a hearing was scheduled to address the issues raised in the Complaint. The hearing was conducted on September 7,

2000, November 9, 2000 and December 18, 2000. Ronald Quick, an Assistant Attorney General, appeared on behalf of BCS. Harvey Babcock, Attorney at Law, appeared on behalf of Respondent. Dennis M. Matulewicz presided as Administrative Law Judge (ALJ).

In lieu of closing argument, counsel asked for the opportunity to submit post-hearing briefs and/or summaries of their respective positions. The briefs were to be simultaneously submitted on or before April 1, 2001. A brief was received from Petitioner on April 1, 2001. Respondent submitted a brief on April 3, 2001. The record was closed on April 3, 2001.

WITNESSES:

For Petitioner:

Diane Hargan

Edward Hargan

Debra Matyka

For Respondent:

Fred Wetzel

Rex Spaller

Christopher Bidigare

ISSUES and APPLICABLE LAW:

Whether Respondent, a licensed residential builder, violated the following provisions of the Code and Rule:

MCL 339.604(c), MSA 18.425(604)(c);

MCL 339.2411(2)(d) and (e), MSA 18.425(2411)(2)(d) and (e);

1979, AC, R 338.1551(4) and (5)

EXHIBITS:

Petitioner's Exhibit:

1. Proposal dated 6/24/98
2. Building Inspection Report dated 4/27/99
3. Letter from City of Royal Oak to Bidigare Construction dated 4/27/99
4. Letter from City of Royal Oak to Christopher Bidigare, dated 7/16/99
5. Masonite application instructions
6. Concept One estimate

FINDINGS OF FACT:

Christopher Bidigare, Respondent herein, is a licensed residential builder under the Occupational Code, 1980 PA 299, as amended.

Respondent entered into a contract to perform services regulated by 1980 PA 299, as amended, with Edward O. and Diane K. Hargan, on or about June 24, 1998.

On or about May 10, 1999, the Hargans filed a complaint against Respondent asserting that Respondent, the contractor, left his job unsupervised, two of the three garage doors did not match specifications, downspouts were not modified pursuant to their agreement, nails were left exposed and are now rusting, and that there were cracked and broken trusses.

After investigating the matter, BCS concluded that Respondent had violated provisions of the Occupational Code and/or certain applicable Administrative Rules, to wit:

MCL 604(c), 2411(2)(d) and (2) and Rule 51(4) and (5); accordingly, a Formal Complaint was filed by BCS against Respondent.

On April 27, 1999, a building inspector, Debra Matyka, completed her investigation. Her inspection found as followed:

1. One truss was split northern section of roof;
2. Not built to plan;
3. No data on the microlam beams and trusses;
4. Nontypical siding to be installed;
5. Garage doors not installed per manufacturers specs;
6. Rust resistant nails required exterior trim and siding;
7. Improper grade around foundation.

The Hargans entered into the contract with Bidigare Construction on or about June 14, 1998. The contract was with Chris Bidigare and it was understood that Frederick Bidigare, the father of Chris Bidigare, who is an architect, would draw up the plans. The four parties met; Chris Bidigare, his father, Frederick Bidigare, and the Hargans, and discussed what was to be in the plans. The Hargans did approve of the plans and were very happy with them. The permit was issued on or about September 28, 1998. The delay was due to the necessity to obtain a variance for both the pitch of the roof so that the garage could match the house. The contract was for the construction of the garage.

During the construction, Chris Bidigare was on site approximately 2-3 times per week. He was always in contact with his workers by way of the Nextel 3-way radio. Chris

Bidigare also lived in Royal Oak and was very close to the Hargans and would occasionally check on his employees to see how the job was progressing.

In April of 1999, the garage was almost completed. Bidigare was waiting for the garage doors to come in. Grading of the foundation had to be completed, but it was agreed with the Hargans that this could not be done in the winter and that it would be done in the spring. In January of 1999, Bidigare and the Hargans had picked the garage doors. The Hargans told Bidigare not to worry about that because they were not using the garage that winter anyway because of the concrete that was poured. Bidigare completed a separate contract with the Hargans by putting in a cement driveway. There was a problem with the spring on the doors, but Bidigare was going to take those doors off since they were putting in different Stanley garage doors, pursuant to the Hargans' request. The original doors were supposed to be insulated and the Hargans were not happy with these doors, so Bidigare arranged for them to go to the Home Door Products and to pick up the door that they wanted.

In April of 1999, Bidigare received a letter from the City of Royal Oak. That letter was from Debra Matyka, building inspector. The letter stated that the homeowners were requesting to have Bidigare removed from the job and that the inspection of April 26, 1999, found the following violations:

1. One truss was split;
2. As Built drawing to be submitted;
3. Supply engineer date on all trusses and microlam beams;
4. Properly install siding material, per manufacturers specs;

5. Properly install garage door and repair swing;
6. Remove existing nails on trim, replace with rust resistant nails; and
7. Properly grade around foundation.

Chris Bidigare was surprised to receive this letter, since he had never asked for any final inspection. He attempted to contact the Building Department by phone but was unable to do so. When this letter was received from the City of Royal Oak, Chris Bidigare was out of town and asked his estimator, Fred Wetzell, to contact the Hargans. Fred Wetzell went to Urb Lumber and met with the engineer to inspect the trusses and make a report. Urb Lumber contacted Michigan Timber Truss, the manufacturer of the trusses that were put on the garage. It was agreed that they could sister the truss, and that the company would have an architectural engineer's stamp on it for correction. When Fred Wetzell called and talked to Diane Hargan, he was told that they did not want Bidigare on the property.

Chris Bidigare had a difficult time in dealing with Mr. Hargan because he has a hearing problem and there is a personality conflict between the two of them. At that time, the Hargans still owed approximately \$7,000.00 on the garage.

Rex Spaller worked for Urb Lumber for approximately 15 years. Prior to that time, he had considerable experience in the construction industry. Bidigare Construction was one of his customers. He was the salesman who sold Bidigare Construction the trusses that were pre-manufactured. The company was Timber Field Trusses, out of London, Ontario. In his 35 years experience in sales, he has seen over 10,000 sets of plans. He ordered the microlam beams and wood trusses. He testified that the kind of paneling that was ordered

was primed, which would mean it was ready for paint. He knew that the nails that were sold were galvanized siding nails. He sold Bidigare everything for this job, from the sheeting for the roof, the doors, the trusses, nails and siding. He had it arranged through Bidigare that someone from the manufacturing company would go out and inspect the trusses and take pictures of the problem, and an engineer would come down from their engineering department showing them what was necessary to correct it. The repairs were not made because Bidigare Construction was not allowed back on the property.

Rex Spaller testified that the paneling or stucco was primed. Primed means that there is some primary coat or some kind of primer on it. He remembered selling only galvanized nails on this job. He sold approximately 25 pounds of nails. He estimated that this would contain approximately 10,000 nails. He estimated that perhaps 5,000 nails were used on this garage. He remembered selling Chris Bidigare three Wayne Dawton insulated doors in brown or chocolate. He was advised by Mr. Bidigare that Mr. Hargan did not want those doors. Once he sent the representative out, it was agreed that they would take the Wayne Dawton doors down. Doors were ordered from the Stanley Door Company, but they went bankrupt. Mr. Spaller further testified that in his 15 years at Urb Lumber he sold approximately 5,000-6,000 sheets of paneling, measuring 4x8. The paneling that he sold to Mr. Bidigare for the Hargan job was called staccato. The brand name is Abetico. He remembers that the paneling sold on this job was primed. He testified that they did not stock unprimed, because you would have to have a different skew on the computers and that their system was not made for that. The siding sold was not Masonite, but Abetico. Mr. Bidigare had informed the

Hargans that they do not do any type of painting. Bidigare told the Hargans that when he gave them the proposal. Mr. Hargan's response was that he would take care of it.

Bidigare also testified that he called the Hargans when he was advised that the Stanley Door Company went bankrupt and out of business. It was because of the bankruptcy that they could not supply the doors. When he advised Mrs. Hargan, she became very upset and told him that he would be getting a letter in the mail. The letter in the mail was from Debbie Matyka, the building inspector.

Ms. Matyka was a housing and building inspector for the City of Royal Oak for approximately 5 years before she conducted the investigation on the Hargans' garage. She was instructed by her boss to conduct the investigation, even though there was no request by the builder for a final inspection. When she conducted the investigation of the garage, she had only been a building inspector for approximately two months.

Ms. Matyka conducted the final inspection, even though the builder did not advise that he was ready. She found that the one truss had a split, but does not know when the split occurred. The split could have occurred from installation or at some other time. She admitted on the stand that a truss can be repaired with an engineer approval by sistering that truss. Sistering is taking two pieces of lumber and attaching it by nailing it through on each side of the broken member.

She cited Bidigare for not using galvanized nails. Ms. Matyka's own testimony also substantiated that whatever was done to the overhanging porch was not a violation of

Rule 108, because it was not less than the equivalent of the prescribed suitability quality strength and effectiveness of the Code.

Mr. Bidigare testified at the hearing. During his testimony the representative from the Department admitted that the State's complaint did not involve the trim or the type of siding. The State's complaint was about the improper application of the siding. Mr. Bidigare testified that there is nothing in his proposal or contract that made him obligated to paint and caulk the material. He testified that Mr. and Mrs. Hargan told him that they were going to paint the stucco board. Mr. Bidigare testified that if the board installed is not caulked or painted, the weather could cause it to deteriorate. The material could expand just from absorbing water. The plans indicated that the two overhead doors of the garage were to be insulated. There is no specification of what "R" ratings on the plan, just that they were to be insulated. Mr. Bidigare purchased the doors from Wayne Dawton, which was, according to him, the Cadillac of doors. The purchase was made from Urb Lumber. The Hargans objected to a screen being broken, and he did not think they were insulated enough. Bidigare then called Urb Lumber and Urb Lumber contacted Wayne Dawton, and they sent a representative to meet with the Hargans. The representative said that these doors were insulated but that to get the highest "R" rating in a residential, they would have to go into commercial grade. Mr. Hargan did not want to pay for those doors and told them to take them off. Bidigare told Mr. Hargan that he could go to Home Door Company, in Berkley, Michigan near their home, and pick out any door with the standard of insulation he wanted. He did pick out that door, and they were ordered. Bidigare placed no limit on what could be spent for the door. The doors

were ordered in January 1999. When Bidigare was advised that Stanley Garage Door Company went out of business, not to be confused with Stanley Doors, the Hargans did not want the doors because all three doors would not match. When Bidigare advised Diane Hargan that the doors could not be purchased because of the bankruptcy, Mrs. Hargan became very angry and abrupt and said that he would be getting the letter in the mail, then hung the telephone up on Mr. Bidigare.

Bidigare testified that he was not allowed back on the property to make any corrections to the truss. Had the Hargans submitted a punch list of repairs he would have gladly fixed them. It is customary in the business for the contractor to perform a punch list so that he would be paid the balance of the money owed. Bidigare had made arrangements with Michigan Timber and Truss to repair the truss, and would have had an engineer seal the truss. The work was not finished because they were not allowed on the property.

Bidigare also provided extras on the job that were not paid for, such as cedar trim. Because Mr. Hargan did not want to get that high upon a ladder to paint, Bidigare installed aluminum trim on all the upper part of the gables and the soffits. There is nothing in the proposal on gutters, but Bidigare also supplied them. According to Bidigare, the Hargans still owed for the gutters and aluminum trim. Bidigare did not charge for the ridge vent on the roof. This venting was a concealed venting so that it would basically blend in with the roof and match the house.

CONCLUSIONS OF LAW:

Pursuant to MCL 339.601, a person may not engage in the practice of an occupation regulated under 1980 PA 299 (Occupational Code) unless the person possesses a license or registration issued by the Department for the occupation. One of the occupations that requires a license is a residential builder.

A licensed residential builder is required to comply with the Occupational Code as well as applicable Administrative Rules. If the residential builder violates the Code or rules, penalties may be imposed by the Board. If the builder (Respondent) denies violating the applicable rules and regulations, a hearing is scheduled before an Administrative Law Judge. (ALJ). The ALJ is responsible for evaluating the testimony and evidence and for determining whether there was a violation of any of the applicable rules and regulations.

BCS alleges that Respondent violated certain provisions of the Occupational Code and certain applicable rules. Specifically, BCS charged Respondent with violating:

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:

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

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:

(d) A willful departure from or disregard of plans or specifications in a material respect and prejudicial to another, without consent of the owner or an authorized representative and without the consent of the person entitled to have the particular construction project or

operation completed in accordance with the plans and specifications.

(e) A willful violation of the building laws of the state or of a political subdivision of the state.

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.

The burden of proof is upon Petitioner to prove, by a preponderance of the evidence, that grounds exist for the imposition of sanctions upon Respondent. 1990 AACSB, Rule 339.1763.

Violation of Section 604(c) of the Code

By this charge, Petitioner asserts that Respondent violated builder Rules 338.1551(4) and (5), thereby violating Section 604(c) of the Code.

Builder Rule 338.1551(4) sanctions a builder or contractor who fails to correct a justified item of complaint within a reasonable time. Respondent was cooperative in attempting to correct the complaint items. Respondent made arrangements with the truss company to have the truss repaired, and arrangements had been previously made to supply

the correct garage doors. The parties had agreed that grading would be completed in the spring. When the Hargans refused entry by Respondent, and indicated that they did not want Respondent on their property, that prevented Respondent from making any required repairs. For these reasons, there is no violation of Builder Rule 338.1551(4).

Builder Rule 338.1551(5) requires that the standards of construction be in accordance with the local building code. The building inspector testified that the truss was split and needed an engineered fix, which was the usual course of business. The building inspector testified that it would be acceptable to engineer and sister this truss so as to make the same structurally sound. It is also noted that the garage is still standing and that there are no structural problems with the garage. The building inspector also testified that the "L" bracket could be reinstalled if given the opportunity and that this defect was not a major problem but was a minor repair. Also noted in the testimony is that the inspector based her citation on the type of siding used as being Masonite. The manufacturer's specifications which she relied upon were not the manufacturer of the siding. The testimony is clear that Abetico panel was used. The evidence was also clear that this panel was primed and that it required painting and caulking, for which the contractor was not responsible. Any damage of this panel was the result of the failure to paint and caulk. The testimony was clear that the paneling was installed in a proper manner and that the nails were non-corrosive and rust-resistant. The proofs do not show that there is any violation of Builder Rule 338.1551(5).

Accordingly, Petitioner has not proven any violation of Section 604(c) of the Code.

Violation of Section 2411(2)(d) of the Code

By this charge, Petitioner asserts that there is a willful departure from, or disregard of the plans or specifications in a material respect without the consent of an owner or authorized representative.

The fact that Respondent was prevented from making required repairs does not affect this charge. In Michigan, a builder or contractor is required to do the job right the first time. Arndt v Department Licensing & Regulation, 147 Mich App 97; 383 NW2d 136 (1985). In this particular case, the Respondent never requested a final inspection. The final inspection came about because the homeowners contacted the Building Department and requested their help in getting rid of their contractor. The Petitioner alleges that there was a willful departure from, or disregard of, plans or specifications in a material respect. The building inspector testified that whatever was done to the overhanging porch was not done so as to violate Rule 108 of the ordinance, because an equivalent was prescribed, which was equal in suitability, quality, strength and effectiveness. Accordingly, Petitioner has not proven that Respondent has violated Section 2411(2)(d).

Violation of Section 2411(2)(e) of the Code

Building Code violations are addressed under Section 2411(2)(e) of the Code, and are required to be willful in order to constitute a violation. The Michigan legislature determined that as to building code violations, in order to constitute a misconduct under Section 2411(2)(e) of the Code, the violation must be willful.

In this case, the Respondent was never given the opportunity to finish the job which he had commenced, specifically, to repair the truss and the garage door. The Respondent was refused entry by the homeowners. Also, the Respondent never called for a final inspection. Respondent did arrange for the truss company and the garage door company to go out to the property for purposes of viewing the problems and to correct them, but as indicated above, Respondent was not allowed on the property for any repair. The proofs do not show that there is any violation of Section 2411(2)(e).

DECISION:

It is the decision of this Administrative Law Judge that Respondent did not violate the above cited sections as described in this Hearing Report.

Dennis M. Matulewicz
Administrative Law Judge