

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

In the matter of

Docket No. 2000-275

Bureau of Commercial Services,
Petitioner

Agency No. 21-99-1198-00

v

Agency: Bureau of Commercial
Services

Pattison Construction Co., Inc.
Norman Wright Pattison, Q.O.,
Respondent

Case Type: Sanction

_____ /

Issued and entered
this 13th day of June, 2002
by
STEPHEN B. GOLDSTEIN
ADMINISTRATIVE LAW JUDGE

HEARING REPORT

PROCEDURAL HISTORY:

This matter was properly noticed for a hearing to commence at 9:00 A.M. on January 7, 2002 in the hearing rooms of the Michigan Department of Consumer and Industry Services, Bureau of Hearings, 2501 Woodlake Circle, 1st Floor, Okemos, Michigan.

Stephen B. Goldstein presided as Administrative Law Judge.

Tracy Hampton, Attorney at Law, appeared on behalf of the Bureau of Commercial Services (Petitioner).

Neither Norman Pattison (Respondent), nor Patrick Hanes, Respondent's

attorney, appeared at the hearing.

This matter commenced with the filing by the Petitioner of a Formal Complaint dated November 19, 1999 (Complaint) alleging violations by Respondent of Michigan's Occupational Code, 1980 PA 299, as amended (Code).

The original Notice of Hearing dated January 26, 2000 scheduled this matter for a contested case hearing to commence on April 3, 2000 at 9:00 A.M. Furthermore, the Notice informed Respondent that if Respondent failed to appear at the hearing as scheduled, a Default Judgment may be entered pursuant to Section 78 of the Administrative Procedures Act of 1969, as amended (APA), being MCL 24.201, et seq.; MSA 3.560 (101), et seq.

The April 3, 2000 hearing commenced as scheduled. A representative appeared at this hearing on behalf of Petitioner. However, neither Respondent nor an attorney on behalf of Respondent appeared at this hearing.

Thereafter, a Default Hearing Report was issued and entered on May 2, 2000 by the Hon. Barbara Stump, the Administrative Law Judge then assigned to hear this matter.

On August 29, 2000, the Board of Residential Builders and Maintenance & Alteration Contractors (Board) issued an Order of Remand. The Order of Remand specified that the sole issue to be considered on remand was restitution. It read as follows:

“That the matter is remanded to the Bureau of Hearings solely on the issue of restitution, including the obtaining of new estimates addressing all issues of deficiency and having on the record a determination of to whom restitution should be paid in this matter.”

On October 10, 2000, a Notice of Remand Hearing was issued and entered, scheduling a remand hearing to commence at 9:00 A.M. on October 30, 2000 in Okemos, Michigan.

On October 26, 2000, Respondent, by and through counsel, requested an adjournment of the October 30, 2000 hearing date. Petitioner also requested an adjournment of the October 30, 2000, via memorandum dated October 23, 2000. Thereafter, an Order Granting Adjournment was issued and entered on October 31, 2000, rescheduling this matter to commence at 9:00 A.M. on November 27, 2000. The proof of service indicates that this notice was sent directly to Respondent at his last known address of record, but was not also sent to Respondent's attorney. The hearing file indicates, however, that Patrick D. Hanes, Attorney for Respondent, did not actually enter his appearance until October 31, 2000, the same day the Order Granting Adjournment was issued.

The November 27, 2000 hearing commenced as scheduled. Kimbal Smith III, Attorney at Law, appeared on behalf of Petitioner. Neither Respondent nor his attorney appeared at the hearing. Also present at this hearing were Darcy and Helena Blackmon, who once again traveled from Benton Harbor, Michigan to be present at a hearing for the second time in this matter.

On February 28, 2001, this Judge issued a Hearing Report, finding, by default, that all allegations in the complaint were true. In addition, the hearing report addressed the Board's concerns regarding both the amount of restitution and to whom any restitution should be paid. The February 28, 2001 Hearing Report recommended Respondent be assessed a civil fine in the amount of \$1,500.00, and that he pay restitution in the amount of \$6,340.00 to be made payable jointly to both Darcy and Helena Blackmon and to the housing rehabilitation grant agency which financed the improvement to their home.

On April 2, 2001, Respondent's counsel wrote a letter to the Residential Builders Board, asserting that he never received notice of the November 27, 2000 administrative hearing. Thereafter, the Board requested a rehearing via a letter to Michael Zimmer, Director of the Bureau of Hearings.

On May 9, 2001, a Notice of Remand Hearing was issued, rescheduling a hearing to commence at 9:00 A.M. on June 15, 2001. However, on June 7, 2001, Petitioner requested an adjournment of the June 15, 2001 hearing due to the unavailability of the building inspector. Respondent objected to Petitioner's request for an adjournment via facsimile dated June 11, 2001.

On June 14, 2001, an Order Granting Adjournment was issued, adjourning the June 15, 2001 hearing to 9:00 A.M. on August 3, 2001. However, on July 3, 2001, the Petitioner requested an adjournment of the August 3, 2001 hearing date because Tracy Hampton, its attorney, was unavailable due to a medical leave of absence. By letter dated

July 6, 2001, Respondent voiced no objection the adjournment request.

Therefore, on July 20, 2001, an Order Granting Adjournment was issued. This Order adjourned the August 3, 2001 hearing to October 8, 2001 at 9:00 A.M.

On October 5, 2001, this Judge underwent reconstructive knee surgery. Therefore, the October 8, 2001 hearing date was adjourned. Thereafter, an Order for Adjournment was issued on August 20, 2001, rescheduling the hearing to commence at 9:00 A.M. on October 29, 2001.

On August 31, 2001, Respondent requested an adjournment of the October 29, 2001 hearing date due to a conflict in his attorney's trial schedule. Petitioner objected to the adjournment request.

On October 11, 2001, an Order Granting Adjournment was issued. This Order adjourned the October 29, 2001 hearing date to January 7, 2002 at 9:00 A.M.

The January 7, 2002 hearing commenced as scheduled. Tracy Hampton, Attorney for Petitioner, appeared at the hearing. Darcy and Helena Blackmon, the complaining homeowners also appeared and had once again made the roughly six-hour round trip drive from Benton Harbor, Michigan. And, once again, neither Respondent nor his attorney, Mr. Hanes, appeared for the hearing.

Once the record was taken, it was brought to this Judge's attention that Patrick Hanes' secretary phoned Gisela Chuman, a secretary with the Bureau of Commercial Services, and informed her that Mr. Hanes was ill and therefore would not be present at the hearing. No indication was made as to why Respondent himself was not present at the

hearing. At 9:20 A.M., a facsimile was received by Mr. Hanes office indicating only that he was ill and was therefore unable to attend the hearing.

At the outset of the hearing, Ms. Hampton requested that Petitioner be allowed to proceed in the Respondent's absence pursuant to Section 72 of the APA. In addition, she requested that a Default be granted on behalf of Petitioner pursuant to Section 78 of the APA.

Section 72 of the APA states in pertinent part as follows:

“(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 . . .”

The Judge determined that Petitioner should be allowed to proceed in Respondent's absence, and therefore granted Petitioner's motion for a Default Judgment. Testimonial and documentary evidence was presented for this Judge's consideration, limited solely to the issue of how much, and to whom, any restitution should be awarded.

On January 14, 2002, this Judge received from Respondent's counsel a Request for Reconsideration of Order Denying Request for Adjournment. The request indicated that counsel was admitted to the Ingham Regional Medical Center at approximately 5:30 A.M. on January 7, 2002 due to severe abdominal pains.

On February 14, 2002, an Order was entered by this Judge. The Order granted

Respondent's request for Reconsideration of Order Denying Adjournment. The Order also provided that no further live hearing dates would be scheduled, but that the record would be left open until April 15, 2002. The record was specifically left open in order to provide Respondent with an opportunity to submit documentation in support of his defense to the allegations against him, and to permit Respondent to depose the homeowners, Darcy and Helena Blackmon. The February 14, 2002 Order granted admission into the record of any deposition transcript(s) pursuant to MRE 804(b)(1) and/or (6).

On April 16, 2002, this Tribunal received from Respondent's counsel, Patrick Hanes, a letter and two photographs which are apparently pictures of the outside of Complainants' home. On May 2, 2002, this Tribunal received from Respondent's counsel, Patrick Hanes, a letter with an attached Affidavit of Steven Cox. Both the photographs and Affidavit were marked as Respondent exhibits and are admitted into the record.

ISSUES AND APPLICABLE LAW

The general issue in this matter is whether Respondent violated the Code.

The specific issue is whether Respondent violated MCL 339.2411(2)(m); MSA 18.425(2411)(2)(m), MCL 339.604(c); MSA 18.425(604)(c), and 1979 AC R 338.1551(4).

Those Sections of the Code and Rule provide as follows:

“Sec. 2411. (1) * * *”

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

“ * * *”

“(m) Poor workmanship or workmanship not meeting the standards of the custom or trade verified by a building code enforcement official.”

“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.”

“Rule 51. (1) * * *”

“ * * *”

“(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.”

SUMMARY OF EXHIBITS:

Petitioner Exhibit 1 is a copy of a Promissory Note for Deferred Loan entered into between Darcy and Helena Blackmon (Complainants) and Van Buren County, Michigan, for the repayment of \$20,438.00.

Petitioner Exhibit 2 - Copy of Proposal prepared by Construction Plus for the Complainants in the amount of \$24,760.00, dated November 25, 2000.

Petitioner Exhibit 3 - copy of inspection report compiled by

Daniel J. Poll, South Haven Township Building Inspector, dated October 15, 2001.

Petitioner Exhibit 4 - copy of check issued in the amount of \$12,097.50 by Van Buren County, Office of the County Clerk, to Pattison Construction and Darcy and Helena Blackmon, dated December 19, 1997.

Respondent Exhibit A Affidavit of Steven Cox, dated April 18, 2002.

Respondent Exhibit B - 2 photographs of the outside of Complainants' home.

FINDINGS OF FACT

Respondent was properly served with the Notice of Hearing but did not appear at any of the hearings scheduled in this matter. As a result, Respondent was found in default under Section 78(2) of the APA. Respondent was provided actual notice of the November 27, 2000 hearing date because he received the October 31, 2000 Order Granting Adjournment. Yet, he failed to personally appear for the hearing whatsoever, and appears to rely upon the fact that, because his attorney didn't receive a copy of the notice as well, he didn't have to make an appearance. The fact that Respondent's attorney didn't receive a notice of the hearing date is irrelevant. In fact, in a letter written to this Tribunal by Attorney Hanes on December 7, 2000, Attorney Hanes clearly indicates his client received notice of the November 27, 2000 hearing date. Attorney Hanes provides no legitimate explanation about why Respondent himself failed to appear for the hearing. There is no reason why Respondent could not have personally appeared at the hearing and stated that his attorney never received notice of the hearing date. Rather, Respondent simply failed to appear. In the meantime, the

complaining homeowners were forced to make yet another 300 mile round trip to the hearing room, only to find out that Respondent had failed to appear for yet another hearing.

The Complainants testified at the January 7, 2002 hearing that they owe Van Buren County the full balance of the loan evidenced by Petitioner Exhibit 1, or \$20,438.00, to be paid when they either sell or rent the home.

Based upon the granting of the Default Judgment, the following facts are found:

1. That at all times relevant to this Complaint, Respondent was licensed as a residential builder under the Code, and maintained a place of business in Decatur, Van Buren County, Michigan.
2. That on or about September 25, 1997, Respondent entered into contracts to perform services regulated by the Code with Darcy and Helena Blackmon.
3. That Respondent has failed to perform the requirements of the contract in a workmanlike manner, contrary to MCL 339.2411(2)(m); MSA 18.425(2411)(2)(m).
4. That Respondent failed to correct those items as justified by a validly issued building inspection report, contrary to 1979 AC R 338.1551(4).
5. That Respondent has violated a rule of conduct in practicing his occupation, contrary to MCL 339.604(c); MSA 18.425(604)(c).

CONCLUSIONS OF LAW

The principles that govern judicial proceedings apply to administrative hearings.

8 Callaghan's Michigan Pleading and Practice, 2nd Ed, Section 60.48, p. 280. The burden

of proof is upon the State to prove, by a preponderance of the evidence, that Respondent violated the Code. American Way Service Corporation v Commissioner of Insurance, 113 Mich App 423 (1982). Under Section 72 of the APA, there is no requirement to provide a hearing when all alleged facts are taken as true. Smith v Lansing School District, 428 Mich 248 (1987).

Having granted a Default Judgment on behalf of Petitioner, it is concluded that the above acts establish that Respondent has violated MCL 339.2411(2)(m); MSA 18.425(2411)(2)(m), MCL 339.604(c); MSA 18.425(604)(c), and 1979 AC R 338.1551(4).

Accordingly, Petitioner has established, by a preponderance of the evidence, that Respondent has violated the above Sections of the Code and Rule as alleged in its complaint.

This Judge's February 14, 2002 Order gave Respondent one final opportunity to present evidence in support of his contention that the amount of restitution claimed by Complainants is exaggerated. The affidavit provided by Steven Cox does little to counter Complainants' claim for restitution. Mr. Cox claims the Complainants are unreasonable customers, and states that \$6,000 for repairs to the Complainants' home is exaggerated. Yet, a review of the building inspection report (*Petitioner Exhibit 3*) clearly supports a conclusion that it will cost more than \$6,000 to repair and/or replace all of the items identified in the report as needing attention.

The two photographs provided by Respondent provide absolutely no insight into the interior condition of Complainants' home. They are merely pictures of the exterior of this dwelling. Most, if not all of the problems identified by inspector Poll exist on the inside of the home, not on the outside. Therefore, the photographs are given little weight.

RECOMMENDED SANCTIONS:

Based upon Respondent's violations of the Code and Rule, it is recommended that Respondent be assessed the following sanctions:

1. Imposition of a Civil Fine in the amount of \$1,500.00.
2. Respondent be ordered to pay restitution in the amount of \$20,438.00. This is the amount owed by the Complainants to Van Buren County according to the Promissory Note for Deferred Loan (Petitioner Exhibit 1). This amount shall be made payable jointly to both Darcy and Helena Blackmon and to Van Buren County, the housing rehabilitation grant agency involved in funding the subject matter improvement to the Blackmon home.
3. Any and all licenses held by Respondent in either an individual or corporate capacity shall be suspended if the fine and restitution are not paid within 60 days of the Board's Final Order.
4. No new licenses should be issued to Respondent, in either an individual or corporate capacity, until both the fine and restitution have been paid in full.

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STEPHEN B. GOLDSTEIN
ADMINISTRATIVE LAW JUDGE