

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

In the matter of

Docket No. 2001-1846

Bureau of Commercial Services,
Petitioner

Agency No. 21-01-0100-00

v

Agency: Bureau of Commercial
Services

Ellis EJ Marshall, Jr.
dba Marshall Construction, formerly,
dba EJ's Roofing & Home
Improvement,
Respondent

Case Type: Sanction

Issued and entered
this 15th day of April, 2002
by Robert H. Mourning
Administrative Law Judge

REHEARING REPORT

PROCEDURAL HISTORY

This matter was commenced with the issuance of a Notice of Hearing on a Formal Complaint, dated September 25, 2001, alleging violations by Ellis EJ Marshall, Jr., d/b/a Marshall Construction (Respondent) of the Occupational Code (Code), 1980 PA 299, as amended, MCL 339.101 *et seq.*

The Notice of Hearing scheduled the contested case hearing to commence at 9:00 a.m. on December 10, 2001, in the hearing rooms of the Department of Consumer and Industry Services (Department), Bureau of Hearings, 2501 Woodlake Circle, 1st Floor, Okemos, Michigan.

In the absence of the Respondent, a hearing was held on December 10, 2001. On December 12, 2001, the Respondent requested a rehearing. Bureau of Commercial Services (Petitioner) did not object to the Respondent's request for a rehearing. On January 4, 2002, the Administrative Law Judge issued and entered an Order Granting Rehearing.

The rehearing was scheduled for February 25, 2002. At the rehearing, the Petitioner was represented by Attorney Tracey L. Hampton. The Respondent appeared on his own behalf and testified at the hearing.

The Petitioner offered the testimony of Jacob Kruszka, the building inspector from Branch County, and Patricia and Randy Gates, homeowners. The following exhibits offered by the Petitioner were admitted into evidence:

- Exhibit 1A: Building Inspection Report, December 19, 2000
- Exhibit 1B: Building Inspection Report, May 29, 2001
- Exhibit 1C: Building Inspection Report, August 20, 2001
- Exhibit 2: Proposal for Construction, May 16, 1999
- Exhibit 3: Proposal for Construction, undated
- Exhibit 4A-E: Pictures (5)
- Exhibit 5: Exhibit Not Admitted
- Exhibit 6: Estimate, December 5, 2001
- Exhibit 7: Statement of Complaint, November 15, 2000

The following exhibits offered by the Respondent were admitted into evidence:

- Exhibit A: Pictures (13)
- Exhibit B: Letter from Teresa Marshall, June 24, 2000

Exhibit C: Letter to Ellis Marshall, July 25, 2000

Exhibit D: Letter to Jacob Kruszka, November 1, 2000

ISSUES AND APPLICABLE LAW

The specific issues are whether the Respondent violated Sections 604(c) and 2411(2)(e) and (m) of the Code and Rules 33(1) and 51(5) of the Residential Builders' and Maintenance and Alteration Contractors' Board, promulgated under 1979 AC, R 338.1533(1) and R 338.1551(5). The alleged violations cited by the building inspector are in Petitioner's Exhibit 1C.

Section 604(c) of the Code provides that:
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.

* * *

Section 2411(2)(e) and (m) provides that:

* * *

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

* * *

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

* * *

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

Rule 33(1) provides that:

(1) A builder or contractor shall deliver to his customer fully executed copies of all agreements between them, including specifications, and when construction is involved, both plans and specifications. He shall make certain that all such writings are definite in their terms and sufficient to express the intent of the parties with regard to the transaction, the type and amount of work to be done, and the type and quality of materials to be used, and the parties shall adhere to applicable building, housing, and zoning regulations.

* * *

Rule 51(5) provides that:

(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 Formal Complaint, the Respondent has been licensed as a residential builder under the Code.
2. On or about May 16, 1999, the Respondent delivered an estimate to Randy and Patricia Gates for the construction of a second-story bedroom and a first-story family room (18' x 24'). The Respondent's proposal had a construction price of \$20,543.00. (Exhibit 2). This proposal was never reduced to a written contract and tendered to the homeowners.

3. In a separate handwritten proposal which is undated, the Respondent provided the Gates with the cost to remove and replace windows, siding, and roofing, in the amount of \$8,207.00. Again, the Respondent's proposal was never reduced to a written contract and tendered to the Gates. (Exhibit 3).

4. In July 1999, the Respondent obtained a permit to do the construction project set forth in Petitioner's Exhibit 2. Before August 21, 2000, the building inspector only inspected the footings around the perimeter of the family room in July 1999. The Respondent never had an inspection of the rough framing before completing most of this project.

5. According to the building inspector, the Respondent's construction project was physically inspected on August 21, 2000, and on March 26, 2001. (Petitioner's Exhibits 1A and 1B.) The inspection, on March 26, 2001, was pursuant to an order from small claims court because of civil litigation between the Respondent and the Gates regarding the matters at issue in this case. The violations cited in Petitioner's Exhibit 1C, signed and dated August 20, 2001, are from the prior inspections by the building inspector. The building inspector did not physically inspect the construction project on August 20, 2001.

6. In October 1999, the Gates started having problems with the Respondent in completing the project. The building inspector had visited the construction site on August 21, 2000, and cited the Respondent for several violations. (Exhibit 1A). On or about October 19, 2000, the building inspector sent the Respondent a 30-day notice

regarding the alleged violations on the construction project. On November 1, 2000, the Respondent sent the building inspector a letter in which he requested to be removed from the building permit issued in July 1999. (Exhibit D).

7. On or about November 15, 2000, the Gates filed a complaint with the Petitioner regarding the incompleteness of the construction project by the Respondent. (Exhibit 7). As of November 15, 2000, the Gates had paid the Respondent in the amount of \$27,089.00 for work completed under the proposals in Exhibits 2 and 3. Only the proposal in Exhibit 2 is at issue in this hearing.

8. In 2001, the Respondent sued the Gates for the unpaid balance on the construction project. The Gates counterclaimed against the Respondent. Apparently, a small claims court dismissed the Gates' civil claim against the Respondent. The Respondent was awarded a money judgment of \$1,822.00 against the Gates. That judgment was paid in full with late fees and interest on or about October 30, 2001.

9. Pursuant to Ordinance #4, adopted by Branch County, the building inspector used the 1996 Building Officials and Code Administrators (BOCA) Code in his inspection of the Respondent's construction project at 193 W. Union City Road, Union City, Michigan.

10. In his building inspection report signed and dated on August 20, 2001, Mr. Kruszka cited the Respondent for eight alleged violations. (Exhibit 1C). The Respondent admitted that he had violated Section 1210.2 of the 1996 BOCA Code by failing to install ventilation in the crawl space of the family room. The Respondent could

have met the requirement by providing openings in the exterior foundation walls. The openings for ventilation could have been made either in the sill plate or in the concrete walls of the family room.

11. The building inspector found that the subfloor installed in the family room squeaked at the entrance to the kitchen area. The building inspector determined that the squeak in the subfloor was due to poor workmanship. The Respondent was cited for a workmanship violation, Section 115.1 of the 1996 BOCA Code.

12. The building inspector found that the interior egress doorway of the second-story bedroom did not have a minimum clear width of 29 3/4 inches, contrary to Section 1017.3 of the 1996 BOCA Code. The Respondent does not dispute the accuracy of the building inspector's finding, but he claims that the construction of the size of the door opening was not his responsibility on the construction project.

13. The Respondent was cited with violating Section 2305.6.2 of the 1996 BOCA Code, support and anchorage on walls and beams. The center beam that supports the floor joists is made of 2" x 8" treated wood that is nailed on opposite sides of a 4" x 4" treated post. The floor joists are resting on a beam that is 1 1/2 inches. The building inspector admitted that the Respondent may have been improperly cited for this violation.

14. The building inspector found that the floor joist or header (2" x 8" wood) attached to the wall of the house only spanned one half of the family room. The other half of the header or floor joist was 2" x 4" wood. Mr. Kruszka could not determine

if the 2" x 4" wood was attached to the house as required by Sections 2303.1 and 2305.14.1 of the 1996 BOCA Code. Mr. Kruszka could not inspect the entire crawl space; therefore, he could not see parts of the floor system. If the 2" x 4" wood was properly nailed, then, there would not be a violation.

15. The building inspector could not inspect the entire crawl space under the flooring system. From his vantage point, Mr. Kruszka did not observe that the 2" x 8" wood, making up the center beam, was attached to a 4" x 4" post at both ends as required by Section 2305.6.1 of the 1996 BOCA Code.

16. The Respondent used treated wood for the post, beams, and floor joists in framing the family room. However, the Respondent did not use naturally durable or treated wood for the subfloor. The building inspector observed the untreated subfloor was closer than 18 inches to the exposed ground in the crawl space, contrary to Section 2311.4.1 of the 1996 BOCA Code. (Exhibit A).

17. The building inspector cited the Respondent for not following the fastening schedule in Table 2305.2 of the 1996 BOCA Code. Given the construction materials used for the subflooring, Mr. Kruszka found that Respondent needed to use, as a minimum, a 6d annular or thread nail. The sample of the nails taken from the subflooring by the building inspector shows that the Respondent did not use all annular or spiral thread nails in constructing the subfloor. (Exhibit A).

CONCLUSIONS OF LAW

The principles that govern judicial proceedings apply to administrative hearings. 8 Callaghan's Michigan Pleading and Practice, (2d ed) § 60.48, pg. 230. The burden of proof is on the Petitioner to prove, by a preponderance of the evidence, the matters alleged in the Formal Complaint. 1990 AACRS, R 339.1763.

Violations of Code and Rules

The Respondent has admitted to a violation of Section 1210.2 of the 1996 BOCA Code. The absence of ventilation to the crawl space in the family room can be cured by providing openings in the exterior foundation walls either through the concrete walls or through the sill plate.

The Respondent has established that the squeaking in the subfloor in the area of the entrance from the family room into the kitchen is due to poor workmanship. The Respondent did not offer any evidence that disputes the conclusion reached by the building inspector. Therefore, the Respondent has violated Section 115.1 of the 1996 BOCA Code.

Both Mr. Gates and the Respondent agreed that they let their previous friendship control the construction project at issue in this hearing. As a consequence, there is no written contract for this construction project. The Respondent's proposal contained in Exhibit 2 does not specify who is responsible for making sure that the interior egress doorway to the second-story bedroom opening meets the minimum clear width requirement of 29 3/4 inches. There is no dispute that there is a violation of

Section 1017.3 of the 1996 BOCA Code. The only issue is whether the Respondent is responsible for the violation. It is reasonable to assume that the Respondent was responsible for the opening since he was paid to do the rough framing of this second-story bedroom. Therefore, the Respondent has violated Section 1017.3 of the BOCA Code.

On cross-examination, the building inspector admitted that Section 2305.6.2 of the 1996 BOCA Code may have been cited in error. Therefore, the Petitioner has not established that the Respondent has violated Section 2305.6.2.

The building inspector found that the floor joist or header attached to the wall of the existing dwelling was partially made of 2" x 8" treated wood and the rest of the header was made of 2" x 4" treated wood. The building inspector could not determine if the 2" x 4" was properly attached to the side of the house. Much of the building inspector's inspection of the family room should have been done during a rough framing inspection. The Respondent failed to have the required rough framing inspection by the building inspector. The Respondent claims that the 2" x 4" was attached to the house. The Administrative Law Judge relies on the opinion of the building inspector in this matter. Therefore, the Respondent has violated Sections 2303.1 and 2305.14.1 of the 1996 BOCA Code.

The building inspector did not observe a post at each end of the double center beam. He did not see any nailing. The Respondent claims that the center beam is attached at both ends to 4" x 4" treated post. The Administrative Law Judge relies on

the opinion of the building inspector in this matter. Therefore, the Respondent has violated Section 2305.6.1 of the 1996 BOCA Code.

In constructing the subfloor, the Respondent decided to use untreated subflooring which requires that certain code provisions be met. The subflooring is closer than 18 inches to the ground. This is prohibited by the BOCA Code because of potential problems with moisture and termites. Therefore, the Respondent has violated Section 2311.4.1 of the 1996 BOCA Code.

The Respondent testified that he originally connected the subflooring to the floor joists using treated nails in his nail gun. Then, he went back and used galvanized spiral thread nails. The nails used in the Respondent's nail gun were not an annular or spiral thread nail as required by the 1996 BOCA Code. Therefore, the Respondent has violated the fastening schedule in Section 2305.2 of the 1996 BOCA Code.

In summary, the Respondent has violated Sections 115.1, 1017.3, 1210.2, 2303.1, 2305.14.1, 2305.6.1, 2311.4.1, and 2305.2 of the 1996 BOCA Code. Consequently, the Petitioner has proven, by a preponderance of the evidence, that the Respondent has violated Sections 604(c) and 2411(2)(e) and (m) of the Code and Rules 33(1) and 51(5).

Restitution

The Petitioner has offered an estimate of the costs (Exhibit 6) required to repair, to replace, or to complete the work at issue in the building inspection report (Exhibit 1C). It is undisputed that the following items in Exhibit 6 are not part of this case:

Garage (\$350.00); Exterior (\$50.00); and Windows (\$630.00). Thus, the Petitioner is requesting restitution for the remaining items in the amount of \$3,080.00.

The Respondent disputes some of the itemized costs in the Petitioner's estimate. The building inspector testified that ventilation could be installed in the sill plate, which would be less expensive than installing the ventilation in the concrete foundation. Further, the building inspector testified that the use of treated subflooring would eliminate the need to remove dirt from the crawl space to meet the 18-inch requirement under Section 2311.4.1 of the 1996 BOCA Code.

Therefore, the Administrative Law Judge rejects the itemized cost of \$600.00 for removal of soil underneath the crawl space and reduces the cost to install ventilation in the crawl space from \$550.00 (through concrete foundation) to \$200.00 (through the sill plate). Thus, the homeowners are entitled to restitution in the amount of \$2,130.00.

RECOMMENDATION

The Administrative Law Judge recommends the following:

1. That the Board finds and concludes that the Respondent violated Section 604(c) and 2411(2)(e) and (m) of the Code and Rules 33(1) and 51(5).
2. That the Respondent is assessed a civil fine in the amount of \$500.00.
3. That the Respondent pay restitution to Randy and Patricia Gates in the amount of \$2,130.00.

4. In the event that the civil fine and restitution have not been paid within 60 days following the issuance of a final order by the Board, the Respondent's Article 24 licenses should be suspended. No Article 24 license will be renewed nor will any new Article 24 license be issued until the civil fine and restitution are paid in full.

Robert H. Mourning
Administrative Law Judge