

**STATE OF MICHIGAN
DEPARTMENT OF CONSUMER & INDUSTRY SERVICES
BOARD OF RESIDENTIAL BUILDERS AND
MAINTENANCE & ALTERATION CONTRACTORS**

In the matter of:

**GERALD M. LOSINSKI
D/B/A G L REMODELING & REPAIR
License No. 21-01-130827 (Suspended)**

**Docket No. 2002-1103
Complaint No. 21-01-7033-00**

FINAL ORDER

WHEREAS, this matter having come before the Michigan Board of Residential Builders and Maintenance & Alteration Contractors, hereafter the “Board”, on May 6, 2003 and

WHEREAS, the Board having considered the Findings of Fact and Conclusions of Law in the Hearing Report of Robert H. Mourning, Administrative Law Judge, dated December 23, 2002,

WHEREAS, the Board having received the Hearing Report under MCL 339.514, and Gerald M. Losinski, d/b/a/ G L Remodeling & Repair, Licensed Residential Builder, License No. 21-01-130827, hereafter “Respondent”, having been found in violation of Sections 604(c); 2411(2)(c); 2411(2)(e) and Rules 51(2); 51(4) and 51 (5) and 33(3) of the Michigan Occupational Code, 1980 P.A. 299, *as amended*, hereafter the “Code”, MCL 339.604(c); MCL 339.2411(2)(c); MCL 339.2411(2)(e) of the State Board of Residential Builders and Maintenance & Alteration Contractors General Rules, *promulgated hereunder*, being 1979 AC, R 338.1551(2); AC, R 338 1551(4); AC, R 338.1551(5) and AC, R 338.1533(3).

WHEREAS, the hearing report being hereby incorporated by reference; now, therefore,

IT IS HEREBY ORDERED, that the following penalties authorized by Section 602 of the Code are hereby imposed:

- 1. Respondent shall pay a FINE in the amount of Three Thousand Dollars and 00/100 Cents (\$3,000.00), said fine to be paid to the Department of Consumer & Industry Services within sixty (60) days from the date of mailing of this Final Order. Said fine shall be paid by cashier's check or money order, with Complaint No. 21-01-7033-00 clearly indicated on the check or money order, made payable to the State of Michigan and sent to the Department of Consumer & Industry Services, Bureau of Commercial Services, Enforcement Division, P.O. Box 30185, Lansing, Michigan 48909.**
- 2. Suspension of the residential builder's license of Gerald M. Losinski, d/b/a/ G L Remodeling & Repair, Licensed Residential Builder, License No. 21-01-130827, and any and all other Article 24 licenses of Respondent, if any, shall be and hereby is CONTINUED effective the mailing date of this Final Order, MCL 339.2405(3). No application for licensure, relicensure, or reinstatement shall be granted until the fine imposed by the Final Order is paid-in-full.**
- 3. Respondent shall submit in writing to the Michigan Department of Consumer and Industry Services, Bureau of Commercial Services, Audit Unit, P.O. Box 30018, Lansing, Michigan 48909, proof of compliance, in a form acceptable to the Department, with each and every requirement of this Final Order.**

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

In the matter of

Docket No. 2002-1103

**Bureau of Commercial Services,
Petitioner**

Agency No. 21-01-7033-00

v

**Agency: Bureau of Commercial
Services**

**Gerald M. Losinski
d/b/a G L Remodeling & Repair
Respondent**

Case Type: Sanction

_____ /

**Issued and entered
this 23rd day of December, 2002
by Robert H. Mourning
Administrative Law Judge**

HEARING REPORT

PROCEDURAL HISTORY

This matter is commenced with the issuance of a Notice of Hearing dated July 29, 2002, scheduling a contested case hearing for September 23, 2002. The Notice of Hearing was issued pursuant to a Formal Complaint alleging that the Respondent violated the Occupational Code (Code), 1980 PA 299, as amended, MCL 339.2401-2412. The Notice of Hearing was mailed to the Respondent's last known address.

Attorney Michael Homier appeared on behalf of the Petitioner, Bureau of Commercial Services. Neither the Respondent, Gary M. Losinski, nor an attorney on behalf of the Respondent appeared at the hearing.

The hearing in this matter was held on September 23, 2002. At the hearing, Attorney Homier requested that the Petitioner be allowed to proceed in the Respondent's absence pursuant to Section 72 of the Administrative Procedures Act (APA), 1969 PA 306, as amended, MCL 24.272, and that a default be granted on behalf of the Petitioner pursuant to Section 78 of the APA.

Section 72(1) of the APA states, in pertinent part:

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(2) of the APA states, in pertinent part:

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

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

No witnesses testified at the hearing. The Petitioner offered the following exhibits, which were admitted into evidence:

Exhibit 1: Building Inspection Report, 4/18/01.

Exhibit 2: Statement of Complaint, 12/3/01.

Exhibit 3: Statement of Complaint, 4/5/02.

Exhibit 4: Letter from Gerald Losinski.

ISSUES AND APPLICABLE LAW

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

The specific issues in this case are whether the Respondent violated the following Sections of the Code and Rules: Section 604(c), Section 2411(2)(c) and (e), 1979 AC, R 338.1533(3) and R 338.1551(2), (4), and (5).

Section 604 (c) 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) 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:

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

(b) Diversion of funds or property received for prosecution or completion of a specific construction project or operation, or for a specified purpose in the prosecution or completion of a construction project or operation, and the funds or property application or use for any other construction project or operation, obligation, or purposes.

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

(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.

(f) In a maintenance and alteration contract, failure to furnish to a lender the purchaser's signed completion certificate executed upon completion of the work to be performed under the contract.

(g) If a licensed residential builder or licensed residential maintenance and alteration contractor, failure to notify the department within 10 days of a change in the control or direction of the business of the licensee resulting from a change in the licensee's partners, directors, officers, or trustees, or a change in the control or direction of the business of the licensee resulting from any other occurrence or event.

(h) Failure to deliver to the purchaser the entire agreement of the parties including finance and any other charge arising out of or incidental to the agreement when the agreement involves repair, alteration, or addition to, subtraction from, improvement of, wrecking of, or demolition of a residential structure or combination of residential and commercial structure, or building of a garage, or laying of concrete on residential property, or manufacture, assembly, construction, sale, or distribution of a residential or combination residential and commercial structure which is prefabricated, preassembled, precut, packaged, or shell housing.

(i) If a salesperson, failure to pay over immediately upon receipt money received by the salesperson, in connection with a transaction governed by this article to the residential builder or residential maintenance and alteration contractor under whom the salesperson is licensed.

(j) Aiding or abetting an unlicensed person to evade this article, or knowingly combining or conspiring with, or acting as agent, partner, or associate for an unlicensed person, or allowing one's license to be used by an unlicensed person, or acting as or being an ostensible licensed residential builder or licensed residential

maintenance and alteration contractor for an undisclosed person who does or shall control or direct, or who may have the right to control or direct, directly or indirectly, the operations of a licensee.

(k) Acceptance of a commission, bonus, or other valuable consideration by a salesperson for the sale of goods or the performance of service specified in the article from a person other than the residential builder or residential maintenance and alteration contractor under whom the person is licensed.

(l) Becoming insolvent, filing a bankruptcy action, becoming subject to a receivership, assigning for the benefit of creditors, failing to satisfy judgments or liens, or failing to pay an obligation as it becomes due in the ordinary course of business.

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

R 338.1533 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.

(2) If a purchase or sales agreement is for a new structure which is either substantially completed or in substantial conformance with a model, plans and specifications need not be furnished if the structure is specifically identified or related to the model and any changes, additions to or subtractions from the model are specifically agreed to and noted.

(3) Changes in the agreement shall be in writing, dated and initialed by the parties to be bound.

R 338.1551 provides that:

(1) A complaint shall be in writing, signed by the party filing it and submitted to the bureau of regulation of the department. The department shall provide forms for submitting complaints.

(2) Upon receipt of a valid and written complaint, the department shall assign a complaint number, acknowledge the complaint and forward a copy of the complaint to the licensee. He shall reply to the department within 15 days from receipt of the complaint and shall confirm or deny the justification of the complaint. A complaint acknowledged as justified shall be corrected within a reasonable time. If a complaint or portion thereof is not acknowledged by the licensee as being justified, the department shall notify the complainant of the area of disagreement.

(3) If the complaint or the information submitted by the complaining party is incomplete or disputed by the licensee, the department may require the complaining party to furnish additional information. Such report shall indicate what steps, if any, have been taken by the complaining party before any other governmental agency or any other pertinent information regarding the subject matter of the complaint. Before the department takes any further action it shall obtain a report from local building officials or proper local authorities, and in the absence of such, a person authorized by the department shall make an inspection to determine if the complaint is justified.

(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.

(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

The Petitioner has proven, by a preponderance of the evidence, the following facts:

1. At all relevant times, the Respondent has been licensed as a residential builder under the Code, except as to those events that occurred after May 31, 2001, at which time the license had lapsed.
2. On or about April 18, 2000, the Respondent entered into a contract to perform services regulated by the Code for Harold L. and Edna M. Beals.
3. The Respondent, in performance of the contract, failed to comply with Sections 113.2, 107.1, 1305.1, and 2305.3.1 of the 1996 BOCA Code, which was adopted by the City of Cadillac.
4. The Respondent failed to correct certain items within a reasonable time.
5. The Respondent failed to account for money belonging to Harold L. and Edna M. Beals.
6. The Respondent failed to reduce changes in the agreement to a writing, dated and initialed by the parties.
7. The Respondent failed to respond to Statement of Complaints dated December 3, 2001, and April 5, 2002, respectively.

8. The 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 is upon the Petitioner to prove, by a preponderance of the evidence, that grounds exist for the imposition of sanctions upon the 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).

Having granted a default on behalf of the Petitioner, it is concluded that the above-listed facts establish that the Respondent has violated Sections 604(c) and 2411(2)(c) and (e) of the Code and R 338.1551(2), (4) and (5) and R 338.1533(3).

Restitution

According to Attorney Homier, the Petitioner is not requesting restitution as part of these proceedings because Mr. Losinski may have filed for bankruptcy. (Exhibit 4). Therefore, the Administrative Law Judge has not included restitution in the recommended sanctions.

RECOMMENDATIONS

The Administrative Law Judge recommends the following sanctions:

1. The Respondent will be assessed a civil fine in the amount of \$3000.00.
2. In the event that the civil fine has 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 has been paid in full.

Robert H. Mourning
Administrative Law Judge