

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK ss.

Office of Consumer Affairs
and Business Regulation
Docket No. 2013-021

_____)
IN THE MATTER OF)
)
Richard Smith)
)
)
_____)

ORDER

Procedural History

This matter came before the Office of Consumer Affairs and Business Regulation (“OCABR”) as a result of a complaint filed by **REDACTED** (“complainant”). The complaint alleged that **Richard Smith** (“respondent”) violated M.G.L. c. 142A (“the Home Improvement Contractor Act”).

On May 13, 2013, OCABR mailed notices of the hearing scheduled for June 3, 2013 to the complainant and the respondent’s most recent addresses of record.

As of July 1, 2009, OCABR has jurisdiction and authority to conduct hearings relating to complaints of alleged violations of the Home Improvement Contractor Act, making OCABR the proper venue for the hearing at issue.

Exhibits

Exhibit 1: Home Improvement Contractor (“HIC”) Complaint Form

Exhibit 2: Contract/Scope of Work Document

Exhibit 3: Handwritten Project Timeline Adjustment

Exhibit 4: Photocopies of Checks

Exhibit 5: Notices of Hearing

Exhibit 6: Contract Proposals by Pires Construction

Exhibit 7: Invoice by Pilling Engineering Group, Inc.

Exhibit 8: Purchase Detail – Lowe’s Invoice

Exhibit 9: Photographs

Findings of Fact

1. HIC registration number **168886** was assigned to the respondent in his individual capacity on April 19, 2011. That registration expires on April 19, 2015.
2. On or around August 8, 2012, the complainant contracted with the respondent for residential contracting services.
3. The complainant and respondent had a prior business relationship. On or around July 7, 2012, the respondent constructed a pool deck on the property at issue.
4. The complainant had paid the respondent \$900.00 on or around July 9, 2012.
5. The contract at issue was formed after a lengthy negotiation period, which included visits and explanations from the respondent about the services he offered.
6. Initially, the scope of work included the construction of an addition space that would widen the complainant's kitchen. The respondent submitted a proposal that priced this project at \$23,000.00.
7. At an unknown date, but before the eventual project began, the respondent and the complainant hired an engineer to conduct a land survey and draw plot plans.
8. The total cost for the engineer's services was \$900.00. The complainant and respondent agreed that the complainant would pay \$400.00 immediately, and the respondent would pay the \$500.00 balance.
9. As the discussion progressed, the complainant decided to move away from the construction of an addition and opted for home remodeling and conversion instead.
10. According to the terms of the remodeling and conversion contract, the respondent was to convert an existing playroom into a bedroom by adding a closet, as well as to make major areas of the home, such as the kitchen and bathroom, wheelchair accessible. In addition, the respondent was to construct a porch and an exterior ramp.
11. At no time did the respondent provide the complainant with a written contract for the residential contracting services. Instead, it was the complainant who drafted a scope of work document and presented it for signature.
12. At the time the contract was signed, the property at issue was an owner-occupied home with four or fewer dwelling units.
13. The total contract price was \$10,500.00.

14. On or around August 8, 2012, the respondent accepted a deposit from the complainant totaling \$5,250.00. The respondent used the funds to pay contractors from a previous project not connected to the complainant and purchase materials such as sheet rock, windows, bath tub and lumber for trim work.
15. According to the established payment schedule, the next payment after the deposit was half of the contract balance when work was 75% complete, followed by the remaining 25% upon completion.
16. Work began in the second week of August 2012.
17. As time was of the essence, work was to be substantially completed within six weeks of the project start date, or on or around September 20, 2012.
18. On or around August 24, 2012, the complainant paid the respondent \$1,000.00.
19. Time was of the essence because the complainant's mother was moving into the home after a prolonged stay at a rehabilitative nursing facility.
20. The respondent knew that time was of the essence because the complainant informed him of her situation before agreeing to move forward with the project. The respondent told the complainant prior to contract signing that he would be able to complete the work within the necessary timeframe.
21. The respondent initially planned to have a crew of at least three men to facilitate with the kitchen, tiling and exterior aspects of the project, but the men were not available or took on larger scale jobs. Since the respondent had no other plan, he proceeded to work on the project by himself after August 2012.
22. The respondent also had some issues with laborers that he had introduced to the complainant, because he had not yet paid them for work they performed for him on a previous project. The respondent used some of the funds provided by the complainant to pay the laborers.
23. At times, the respondent had a crew of two other men assisting him. However, by the end of August, only the respondent worked.
24. On or around September 17, 2012, the complainant paid the respondent \$1,650.00.
25. The respondent informed the complainant that the project would not be completed by the end of September. The timeframe was later adjusted so that the project would be substantially complete by October 22, 2012, and then again before the Thanksgiving holiday.

26. The respondent had taken on at least two day-long projects to in an effort subsidize the complainant's project.
27. On or around October 4, 2012, the complainant paid the respondent \$1,400.00.
28. On or around October 26, 2012, the complainant paid the respondent \$500.00.
29. The respondent performed electrical work while he worked for the complainant. The respondent is not a licensed electrician.
30. On November 4, 2013, the complainant and respondent met at the property to discuss the project.
31. The project was not completed by the Thanksgiving holiday, which was on November 22, 2012.
32. The respondent worked on the project until November 27, 2012.
33. The respondent told the complainant that he would return to work the next day, on November 28.
34. The respondent did not return to the project site on November 28.
35. On November 28, 2012, the complainant verbally terminated the respondent from the project when she reached him by telephone. At around the same time, the complainant requested a refund of \$5,000.00 so that she can purchase materials not yet delivered, such as the kitchen countertops.
36. As of November 28, 2012, the respondent was approximately three to four weeks behind on the project.
37. At no time did the complainant receive kitchen countertops or backsplash material.
38. The complainant hired another contractor to complete the project at an additional cost of at least \$13,000.00.
39. As of November 28, 2012, the bathroom remained incomplete. Although the tub was done, neither the required tub seat nor grab bars had been installed. While the bedroom was almost complete, the electrical outlets were uncovered; only a gas line had been moved in the kitchen; kitchen countertops and backsplash had not been ordered or installed; all appliances were either uninstalled or not in working order; kitchen cabinets had not been completely placed; no work whatsoever had begun on the porch or the exterior ramp.
40. In all, the complainant paid the respondent \$11,800.00 towards project completion.

41. On or around January 18, 2013, the complainant received an invoice from the engineer that had been hired several months prior for the land survey and plot plan. The invoice indicated an unpaid balance of \$500.00.

Discussion

The respondent attended the hearing. The complainant and her husband attended the hearing as witnesses only. *See* 201 CMR 18.03 (11).

OCABR has subject matter jurisdiction over this complaint because OCABR has the authority to regulate any person that performs residential contracting services. M.G.L. c. 142A, §§ 1, 17. Residential contracting is defined in part as, “the reconstruction, alteration, renovation, repair, modernization, conversion, improvement, removal, demolition, or the construction of an addition to any pre-existing owner occupied building containing at least one but not more than four dwelling units.” *Id.* at § 1. In this case, the transaction was to renovate and convert the complainant’s primary residence, which was a preexisting building containing one dwelling unit. Therefore, this hearing officer concludes that OCABR does have subject matter jurisdiction over the complaint.

The complainant alleged that the respondent committed **seven** violations of the Home Improvement Contractor Act.

OCABR has the burden of proof to show by substantial evidence that the respondent violated specific provisions of the Home Improvement Contractor Act. *See* M.G.L. c. 30A, §14(7)(e).

In this case, OCABR met the burden of proof for five of the seven allegations.

First, the complainant alleged that the respondent abandoned or failed to perform the project without justification, in violation of M.G.L. c. 142A, § 17(2). A project is considered abandoned when a contractor wholly deserts a project, leaving it unfinished, and is justified only when the contractor has a good cause reason for halting the construction. A failure to perform a project, on the other hand, is found when a contractor fails to start the project or starts working on the project, but fails to take meaningful steps to complete the project. A contractor’s failure to perform is justified only when the contractor has a good cause reason for halting the construction.

Both the complainant and respondent agreed that the complainant verbally terminated the respondent from the project on or around November 28, 2012.

However, the **complainant** testified that it was only after the respondent’s lack of meaningful progress after several months on the project that she decided to terminate him from the project. The complainant testified that, although the respondent began work in the second week of August, the respondent knew that the work had to be substantially completed within six weeks of the project start date, on or around September 20, 2012. The complainant further testified that the respondent knew time was of the essence because, prior to the contract signing, she explained that her mother was to move into the residence after a protracted stay at a

rehabilitative nursing facility; and that the respondent worked by himself intermittently and without a crew between September and November 2012, because an earlier attempt to staff the project with a crew of at least three other contractors proved unsuccessful. The complainant testified that, on September 25, 2012, the respondent signed an updated timeline agreement after he had informed the complainant that the project would not be completed by the end of September, attesting that most of the work would be complete by October 22, 2012, then, when it was not, by the Thanksgiving holiday. The complainant also testified that, as of November 28, 2012, the bathroom remained incomplete as a tub seat and grab rails were not installed; that the bedroom electrical outlets were uncovered; that the kitchen countertops and backsplash materials had not been ordered and therefore had not been delivered; kitchen appliances were either uninstalled or not in working order; kitchen cabinetry had not been placed; and no work whatsoever had begun respecting the porch and the exterior ramp, despite the fact that the complainant paid the respondent \$11,800.00 toward project completion, more than the contract price.

The **respondent** did not refute any significant portions of the complainant's testimony, but stated that, although the work was unfinished, it remained that way because the complainant had fired him, which prevented him from finishing the project. In support of his position, the respondent testified that he had explained that he had been making every effort to complete the job despite the presence of certain issues. The respondent testified that one such matter involved some laborers and contractors that he hoped would work with him on the project, as he owed payment to some of them for a previous project that did not involve the complainant. The respondent admitted that he used some of the funds paid to him by the complainant to satisfy these debts. The respondent testified that, shortly before termination, he and the complainant had agreed to go to a Lowe's home improvement store to select materials. The respondent also took issue with one of the ceiling photographs presented at the hearing, stating that the ceiling was not in his scope of work. The respondent disputed working on only an intermittent basis, and testified that between August and November he only missed a couple of days of work and also worked on weekends to try to keep the project moving, despite the absence of a crew. The respondent testified that, after attempts to obtain a crew proved unsuccessful, he had no other plan in place. The respondent also testified that he occasionally took day jobs to finance the complainant's project. While the respondent acknowledged that time had been of the essence, he also testified that, as of November 28, work was approximately three to four weeks behind schedule.

After careful consideration of all sworn testimony and information contained in the hearing record, this hearing officer must conclude that substantial evidence exists to establish a violation of this provision. Even if this hearing officer were to credit the respondent's testimony regarding his attendance record during the project, the fact that he only missed two or three days would only serve to exacerbate the underlying failure to perform meaningful work within the span of three months, because it is undisputed that the respondent was afforded at least twice the time to perform a project that was originally estimated to be complete within six weeks of the project start date (see Exhibit 3). The failure to complete the project is more difficult to accept given the lack of evidence tending to show work order modifications or plan alterations that would have conceivably extended the project timeline. Given the circumstances and the explanations offered at the hearing, this hearing officer can find no justifiable reason for the

respondent's failure to complete the project within any of the adjusted timeframes, which had been the situation prior to termination.

Second, the complainant alleged that the respondent failed to credit her for a payment made in connection with the residential contracting transaction, in violation of M.G.L. c. 142A, § 17(3). This provision requires contractors to properly account for all payments made by a homeowner. It is not a violation of this provision if a contractor refuses to issue a refund.

In support of this allegation, the **complainant** testified that she believed the respondent violated this provision because he failed to refund her in the amount of \$5,000.00. The complainant testified that she sought the refund to purchase materials not yet rendered by the respondent as of November 28, 2012. However, these facts do not substantiate a violation of this provision. No other testimony was offered on this issue. Therefore, this hearing officer cannot conclude that substantial evidence exists to show that the respondent violated this provision of the law.

Third, the complainant alleged that the respondent made a material misrepresentation in the procurement of the contract or made a false promise of a character likely to induce the complainant to contract with the respondent, in violation of M.G.L. c. 142A, § 17(4). This provision prohibits contractors during the contract negotiation period from making a false, deceptive, or misleading assertion that is reasonably material to the complainant's understanding of the project or the contract.

Both the **complainant** and **respondent** agreed that the respondent was aware that time was a critical factor, and therefore of the essence, prior to the signing of the complainant's written contract. Both the complainant and respondent agreed that the complainant had explained that her mother was to eventually move into the residence after release from a rehabilitative nursing facility and that work should be completed within six weeks of the project start date, or on or around September 20, 2012. The respondent added that he fully intended to complete the complainant's project, but did not anticipate some of the problems that had arisen in the course of it. For example, the respondent did not anticipate having to work by himself after August or experience such difficulty in organizing a crew. The respondent testified that he had already lined up two people, but they declined the work because they had opportunities to work on larger scale projects, and that he unfortunately did not have a back-up plan.

After careful consideration of all sworn testimony and information contained in the hearing record, this hearing officer concludes that substantial evidence exists to establish a violation of this provision. The circumstances surrounding the events leading up to this complaint point to the respondent's apparent willingness to undertake the complainant's project in a reckless or disregarding manner, because the respondent's own testimony indicates a lack of planning that is customarily and reasonably expected from a professional residential contractor. While this hearing officer credits the respondent's testimony that he intended to complete the project at the time of contract signing, intent is not the only element to be considered here. This hearing officer finds that the respondent's attestation that he could complete the complainant's project within the desired timeframe to be a misrepresentation in light of a significant and unusual lack of resources and/or ability to achieve project milestones that had manifested by

September 2012, less than one month from the project start date. Because the complainant expressly stated from the beginning of discussions that time was of the essence, this hearing officer finds that this misrepresentation was reasonably material to the complainant's understanding of her contract with the respondent.

Fourth, the complainant alleged that the respondent knowingly contracted beyond the scope of his registration, in violation of M.G.L. c. 142A, § 17(5). To establish a violation of this provision, it must be shown by substantial evidence that the respondent intentionally contracted for work that required additional licenses, certifications, or endorsements that he did not possess.

Both the **complainant** and **respondent** testified that the respondent performed electrical services for the complainant, particularly in the kitchen and bedroom of the home. The respondent testified that he was not, and is not currently, a licensed electrician. The respondent also testified that he performed this work as a courtesy and a favor to the complainant, and that he did not perform work that was more complicated than the type found in self-help instruction manuals or books and that he has been doing this type of electrical work for a long time.

While this hearing officer acknowledges that the scope of the electrical work may not have been complex or of a sophisticated nature, this hearing officer must nonetheless conclude that the respondent violated this provision of the law. This provision of the law does not distinguish between levels of skill or competency, and exists to ensure that registrants possess appropriate additional licensure where necessary. Through the respondent's own sworn testimony, he indicated that he knew he was not licensed as an electrician when he performed the type of work for the complainant that would reasonably require those services. Therefore, this hearing officer concludes that substantial evidence exists to show that the respondent violated this provision of the law.

Fifth, the complainant alleged that the respondent failed to pay for materials or services rendered in connection with the respondent's operation as a contractor where the complainant gave the respondent sufficient funds to pay for the services or materials that were rendered, in violation of M.G.L. c. 142A, § 17(14). This provision makes it a violation for contractors to deliver construction materials or subcontractor services without eventually paying for those materials and services once they have received adequate funds from the homeowner to do so.

In support of this allegation, the **complainant** testified that, despite having paid \$11,800.00 toward project completion, at no time did she receive kitchen countertops or backsplash materials during the respondent's three months on the project. The respondent did not dispute the complainant's testimony, but added that both he and the complainant had agreed to visit a Lowe's Home Improvement store to purchase those materials shortly before termination.

After careful consideration of all sworn testimony and information contained in the hearing record, this hearing officer cannot conclude that substantial evidence exists to show a violation of this provision. This is because the kitchen cabinets and backsplash materials were not actually delivered or otherwise rendered at any time, which means that this allegation is appropriately incorporated into the determination respecting the respondent's overall failure to perform the project, as discussed under M.G.L. c. 142A, § 17(2).

Sixth, the complainant alleged that the respondent demanded a deposit greater than one-third the value of the contract, in violation of M.G.L. c. 142A, § 17(16). It is permissible for a contractor performing residential contracting to request a deposit greater than one-third the value of the contract only when the amount requested represents the actual cost of custom-made or special-ordered materials.

Both the **complainant** and **respondent** agreed that the complainant paid a deposit of \$5,250.00 prior to the start of the project (Exhibit 4). However, they disagree with respect to the total contract price. The complainant testified that the project price was \$11,000.00, while the respondent stated that he believed the price to be either \$10,000.00 or \$10,500.00. The respondent also testified that the deposit was applied toward the payment of contractors from a previous job that had not involved the complainant and for the purchase of materials such as sheetrock, windows and lumber.

Whether the contract price was \$11,000.00, \$10,000.00, or \$10,500.00, the deposit amount represented more than one-third of each respective price (48%, 53%, or 50%, respectively). This hearing officer finds the contract price to be \$10,500.00 (Exhibit 2). This hearing officer also finds that the respondent accepted from the complainant an impermissibly large deposit amount because, not only was the money used for something other than the complainant's own project, but it was used for materials that were not custom or specially ordered. No evidence was presented to show that the materials were specially ordered or that they were custom made in any way. Therefore, this hearing officer concludes that substantial evidence exists to show that the respondent violated this provision of the law.

Seventh, the complainant alleged that the respondent failed to present a written contract for residential contracting, in violation of M.G.L. c. 142A §17(17)(a) and § 2 of the Home Improvement Contractor Act.

The **respondent** did not dispute the complainant's testimony concerning his failure to provide a written contract; nor did he dispute the fact that it was instead the complainant who drafted a written scope of work document and presented it for signature. The respondent testified that he knew he should have provided his own written memorialization of the contractual agreement, but because he was friendly with the complainant, he did not believe that doing so was necessary.

In light of the respondent's own sworn testimony, as well as the testimony of the complainant and information contained in the hearing record, this hearing officer concludes that there is substantial evidence to show that the respondent violated this provision of the law. The respondent is correct in that he should have provided his own written contract to be signed. This obligation is not waived simply because a homeowner takes the initiative and writes her own contract, and the law provides for no such exception in any event.

Administrative Penalties

For each violation of the Home Improvement Contractor Act that is established by substantial evidence, the hearing officer may impose an administrative penalty of up to two thousand dollars (\$2,000.00). M.G.L. c. 142A, § 18. *See also* 201 C.M.R. 18.03(4). In addition, the hearing

officer may reprimand a registrant or suspend or revoke a registrant's HIC certificate of registration. *Id.* The hearing officer has the authority and discretion to institute any of these measures. 201 C.M.R. 18.03(2). In determining whether to impose an administrative penalty, the hearing officer shall consider the seriousness of the violation, the deleterious effect of the violation on the complainant, any good faith on the part of the contractor or subcontractor, and the contractor's or subcontractor's history of previous violations. M.G.L. c. 142A, § 18.

With regard to failing to perform the complainant's project, this hearing officer assesses an administrative penalty of **\$1,000.00**. This hearing officer found the violation to be serious and the deleterious effect on the complainant to be significant because the complainant was left with a substantial and significant portion of the remodeling and conversion work incomplete and incurred additional expenses in hiring another contractor to finish the work that the respondent was contractually obligated to perform in a timely manner. This hearing officer found no good faith on the respondent's part because the respondent did not provide an explanation as to why he failed to take reasonable steps to keep the project moving in a manner consistent with the complainant's expectations. In mitigation, this hearing officer considered that the respondent has no previous disciplinary activity on file.

With regard to making a material misrepresentation in the procurement of a contract, this hearing officer assesses an administrative penalty of **\$250.00**. This hearing officer found this violation to be serious and deleterious effect on the complainant to be significant because his assurance that he would complete the project within six weeks of the project start date was material to the complainant's understanding of the contract, as time was of the essence. This hearing officer found no good faith on the respondent's part because, although the respondent was aware that time was a critical factor for the complainant, he continued to protract the length of the project for nearly twelve weeks, which is a period twice as long as the original timeframe for completion. In mitigation, this hearing officer considered that the respondent has no previous disciplinary activity on file.

With regard to contracting beyond the scope of registration, this hearing officer assesses an administrative penalty of **\$500.00**. This hearing officer found this violation to be serious and the deleterious effect on the complainant to be moderate, because the respondent performed work for which he did not possess an appropriate license. Without possession of appropriate licensure, there can be no meaningful way to discern whether the respondent demonstrates the requisite level of competence to skillfully and safely work as an electrician. The respondent's actions operated to circumvent public safety requirements as well. Therefore, this hearing officer found no good faith on the part of the respondent. In mitigation, this hearing officer considered that the respondent has no previous disciplinary activity on file.

With regard to demanding a deposit greater than one-third of the contract price, this hearing officer assesses an administrative penalty of **\$250.00**. This hearing officer found these infractions to be serious and the deleterious effect on the complainant to be significant because the respondent requested and received payments contrary to the complainant's contractual and consumer rights. This hearing officer found no good faith on the part of the respondent. In mitigation, this hearing officer considered that the respondent has no previous disciplinary activity on file.

With regard to failing to provide a written contract for residential contracting services in an amount in excess of one-thousand dollars, this hearing officer assesses an administrative penalty of **\$250.00**. This hearing officer found the violation to be serious and the deleterious effect on the complainant to be significant, because the lack of a professionally written contractual agreement can reasonably be viewed as one of the underlying reasons for the dispute that arose between the complainant and the respondent. Further, the failure to memorialize information required under the law effectively denied the complainant access to information that could have been used to decide whether to contract with the respondent. Failing to provide a written contract diminished the complainant's awareness of remedies available under contract and consumer law. This hearing officer found no good faith on the respondent's part because the respondent is presumed to be aware of this requirement for conducting business as a registered contractor in the Commonwealth. In mitigation, this hearing officer considered that the respondent has no previous disciplinary activity on file.

However, in light of the nature and number of violations established by this complaint, this hearing officer finds that a three (3) month suspension is also appropriate.

Conclusion

Accordingly, the respondent, holder of HIC registration number **168886**, is hereby **SUSPENDED FOR THREE (3) MONTHS**. The suspension is effective as of the date of this decision and shall run through the close of business on September 14, 2013. The respondent must IMMEDIATELY surrender the certificate of registration to OCABR at:

**Office of Consumer Affairs and Business Regulation
Home Improvement Contractor Program
Ten Park Plaza, Room 5170
Boston, MA 02116**

An administrative fine in the amount of **TWO THOUSAND TWO HUNDRED FIFTY DOLLARS** (\$2,250.00) is hereby assessed against the respondent. This fine shall be paid in the form of a certified check or money order made payable to the Commonwealth of Massachusetts. This payment must be made within thirty (30) days of the date of this decision. Failure to do so may result in the suspension or revocation of the respondent's certificate of registration and may result in the referral of this matter to the Attorney General's office for prosecution. Payment shall be mailed to:

**Office of Consumer Affairs and Business Regulation
Home Improvement Contractor Program
Ten Park Plaza, Room 5170
Boston, MA 02116**

SO ORDERED

**Office of Consumer Affairs and Business Regulation
by its designee,**

**Jennifer Maldonado-Ong, Esq.
Hearing Officer**

Dated: June 14, 2013

Appellate Rights of the Contractor: The respondent may file a motion for reconsideration within 30 days of the receipt of this decision. Under the pertinent provisions of the Code of Massachusetts Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with M.G.L. c. 30A, § 14(1), for the purpose of tolling the time for appeal. Notwithstanding the foregoing, in accordance with M.G.L. c. 30A, § 14, any person aggrieved by this decision may appeal the decision to a court of competent jurisdiction within 30 days of the receipt of this decision.