

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE COMMISSIONER OF COMMERCE

In the Matter of the Residential Building  
Contractor's License of Sather  
Design/Build Inc. d/b/a Sather Room  
Additions, License No. 20134065

**RECOMMENDATION  
ON MOTION  
FOR SUMMARY DISPOSITION**

By a written motion filed October 12, 2000 the Department of Commerce seeks a recommendation for Summary Disposition in this matter. The Respondent, Sather Design/Build Inc. filed a Memorandum in opposition to the Motion on October 25, 2000. The Department filed a Reply Memorandum on November 3, 2000.

The Department was represented by Michael J. Tostengard, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101-2130. The Respondent was represented by Blake R. Nelson, Esq. of the firm of Hellmuth & Johnson, P.A., 10400 Viking Drive, Suite 560, Eden Prairie, MN 55344.

Based upon the memoranda filed by the parties, all of the filings in this case, and for the reasons set out in the Memorandum which follows:

**IT IS HEREBY RECOMMENDED:** that the Commissioner of Commerce **DENY** the Department's Motion for Summary Disposition of this matter.

Dated this 6<sup>th</sup> day of November, 2000.

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GEORGE A. BECK  
Administrative Law Judge

## NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Commerce will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner of Commerce shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact James C. Bernstein, Commissioner, Minnesota Department of Commerce, 121 Seventh Place East, Suite 200, St. Paul, MN 55101 to ascertain the procedure for filing exceptions or presenting argument.

## MEMORANDUM

The Respondent, Sather Design/Build Inc. was first licensed by the Department of Commerce on May 5, 1998. The application indicated that Kathleen Sather was the sole owner and officer. On May 15, 1998 the Department commenced an investigation of the Respondent upon discovering that Kathleen was married to Steven Sather. Steven Sather was the qualifying person for the contractor license of D.M. Sather Companies Inc. That contractor's license was revoked (by default) in February of 1998. The revocation was based in part on the company's failure to satisfy two outstanding judgments held by subcontractors. Steven Sather states that he presently works as a consultant to Kathleen Sather for Sather Design/Build Inc. in which capacity he reviews, designs and supervises jobs for the company. Kathleen Sather had no ownership interest in D.M. Sather Companies Inc., which was owned by Steven's father Donald Sather.

The Department alleges that the Respondent has engaged in eight violations of state statute or rule which justify disciplinary against its residential building contractor license. The Department contends that there is no genuine issue of material fact in this case and that it is entitled to judgment as a matter of law.

Summary disposition is the administrative equivalent to summary judgment.<sup>1</sup> Summary disposition is appropriate when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law.<sup>2</sup> A genuine

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<sup>1</sup> Minn. Rule 1400.5500(K).

<sup>2</sup> Minn. R Civ Proc 56.03; *Louwagie v. Witco Chemical Corp.*, 378 N.W. 2d 63, 66 (Minn. Ct. App 1985).

issue is one that is not a sham or frivolous and a material fact is one that will affect the outcome of the case.<sup>3</sup> The moving party must demonstrate that no genuine issues of material fact exist.<sup>4</sup> If the moving party is successful, the nonmoving party then has the burden of proof to show that specific facts are in dispute which have an effect on the outcome of the case.<sup>5</sup> It is not sufficient for the nonmoving party to rest upon mere denials; it must present specific facts demonstrating a genuine issue for trial.<sup>6</sup>

The Department first alleges that the Respondent failed to provide it with copies of all of its contracts as the Department requested in its letters written July 20, 1998 and July 31, 1998. The Department also alleges that the Respondent falsely stated in its July 30, 1998 response that Steve Sather was not an owner of D.M. Sather Companies Inc. The Department therefore believes that the Respondent provided false, misleading or incomplete information contrary to the statute at Minn. Stat. § 45.027 subd. 7(3). The Respondent contends that all contracts were provided to the Department as requested. However, it acknowledges that Ms. Sather did not originally provide some contracts that were printed on the old D.M. Sather letterhead, but sent only contracts that were written with her company name, Sather Design/Build Inc. The Respondent acknowledges that it would have been better to have faxed all of the contracts at the same time. They were provided later. Based upon this sequence of events, there is a dispute of material fact as to whether or not the contracts requested were provided.

The Respondent also denies that Kathleen Sather made a false statement regarding ownership of D.M. Sather Companies Inc. The Respondent contends that while Steven Sather was a qualifying person on the license for D.M. Sather Companies, he was not an owner during the license revocation proceedings for that company nor was he an owner of the defunct company at the time of Kathleen Sather's license application. The Department argues in its Reply that Steven Sather was at one time an owner of D.M. Sather and that the July 30, 1998 letter was therefore false. However, the letter could be interpreted to mean that Ms. Sather was referring to the ownership of D.M. Sather at the time of revocation of its license.<sup>7</sup> Accordingly, there is a genuine issue of material fact in that regard.

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<sup>3</sup> *Highland Chateau v. Minnesota Department of Public Welfare*, 386 N.W. 2d 804, 808 (Minn. Ct. Appeals 1984). Review denied February 6, 1985.

<sup>4</sup> *Theile v. Stich*, 425 N.W. 2d 580, 582 (Minn. 1988).

<sup>5</sup> *Highland Chateau*, supra, 356 N.W. 2d at 808.

<sup>6</sup> Minn. R Civ Proc 56.05.

<sup>7</sup> Dept. Ex. H.

The Department also asserts that the Respondent engaged in unlicensed residential building contractor activity by signing a contract with Robin and Marcel Dawes prior to the issuance of its residential builder contractor license. The contract was executed April 29, 1998, six days prior to the issuance of the license. The Respondent denies this allegation. Ms. Sather contends that when the Robin and Marcel Dawes job arose she called the Department inquiring about when she could expect to receive her license. She states that she was advised that the Department was backlogged with license renewal applications and was told that she should go ahead and enter into the contract and to insert the work "pending" on any permit application with the City. The license itself only states that it expires March 31, 1999.<sup>8</sup> The Department contends that any statements of its personnel are irrelevant. However, they might explain Ms. Sather's conduct and would at least relate to appropriate discipline. In light of these alleged facts, there is a genuine issue of material fact.

The Department contends that the Respondent's license application was false, misleading or incomplete in a material respect because it did not disclose a July 31, 1997 Cease and Desist Order against Sather Room Additions and failed to provide an answer to question No. 11. The Department contends that it would have a right to know that Kathy Sather was married to Steve Sather, who was involved with a company that has been disciplined in the past by the Department. Kathleen Sather contends that she called the Department while completing the application and asked whether her husband could serve as a consultant for her company. She states that she was told that he could work for her company as long as he had no ownership interest. She alleges that she then mailed in her application but forgot to mark "no" for question No. 11. When the Department later pointed this out, she returned the original application to the Department with a "no" filled in for question No. 11, and the license was subsequently issued. The Respondent contends that the application does not require disclosure of prior discipline against Steven Sather-affiliated companies. The license application does not request the disclosure of applicants' current or potential employees or consultants.<sup>9</sup> The Respondent contends that the Department has admitted that Steven Sather may work for Respondent as an employee or consultant. The facts alleged preclude a summary disposition in regard to this allegation.

The Department asserts that the Respondent engaged in a fraudulent, deceptive or dishonest practice contrary to Minn. Stat. § 326.91 subd. 1(2) when it entered into contracts with two consumers on forms using the company name and license number of D.M. Sather Companies Inc., whose license had been revoked four months earlier. The Respondent indicates that this occurred

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<sup>8</sup> Resp. Ex. H.

<sup>9</sup> Resp. Ex. D, No. 5.

because of an oversight and that in most contracts incorrect information such as the letters "D.M." and the old license number were crossed out. It contends that there was no intentional misrepresentation and that permits for these contracts were taken out under the name Sather Design/Build Inc. and its license number. Given the facts asserted by the Respondent, it would not be inappropriate to recommend summary disposition on this allegation. If the Respondent is able to prove these facts at the hearing, it would be important to have them in the record before a final decision is made.

The Respondent took out a yellow page advertisement which stated that it has been in business since 1954. The Department suggests that this is false, fraudulent or misleading advertising since Respondent's company was formed in 1998. The Respondent states that the prototype for the ad was a previous ad for D.M. Sather Companies Inc. and that she specifically instructed US West to delete the reference to years of experience, but that US West ran the ad with the years of experience anyway. The Department asserts that any claim of mistake or inadvertence is irrelevant. However, a disposition of this matter without consideration of the facts alleged by the Respondent, if proved, would be made upon an incomplete record. Whether or not intent is relevant to the violation, it is clearly relevant to the question of discipline.

Minnesota law prohibits a licensed building contractor from performing a contract negligently or breaching the contract so as to cause injury or harm to the public. The Department points out that customers Keith and Linda Wankes obtained a judgment against the Respondent on a breach of contract claim and that therefore the statute has been violated. The Respondent states that the Wankes sued Kathleen Sather's company for over \$45,500.00 and that the jury ultimately decided that most of the claims were without merit, but that the Wankes' were entitled to a total of \$7,000.00. Respondent points out that on the special verdict form the jury found it did not breach any warranties to the Wankes. The Respondent believes that the award was made for not relocating an existing window above the new addition. The judgment has now been paid in full. In light of the facts asserted by the Respondent, the mere fact of a judgment having been entered is insufficient to support a summary disposition in regard to this allegation. The Respondent is not entitled to retry the civil case, but it is entitled to attempt to establish additional relevant facts concerning the judgment in order to make a complete record.

The Department makes a separate allegation that the Wankes' judgment has not been paid as of the date of the Department memorandum. A licensed building contractor is required to be financially irresponsible. The Respondent suggests that this point is moot since the judgments have very recently been

paid. Satisfaction of the judgment precludes summary disposition on this issue since those facts should be a part of the record.

Finally, the Department argues that the Respondent is financially irresponsible because it has failed to pay Minnetonka Ceramic Tile and Marble Company a judgment obtained for work on one of the Respondent's projects. Since this judgment has recently been paid it would be inappropriate to recommend summary disposition as to this allegation.

The Respondent has the burden of proof to show a specific facts in dispute which affect the outcome of the case. It has presented, through affidavits, specific facts demonstrating a genuine issue for hearing as to each of the allegations raised by the Department in its Motion for Summary Disposition.

**G.A.B.**