

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of Dan Lang Homes, Ltd. **FINDINGS OF FACT, CONCLUSIONS AND
RECOMMENDED ORDER**

This matter comes before Administrative Law Judge Raymond R. Krause following a hearing pursuant to an Order to Show Cause dated January 10, 2008; and an Order for Hearing and Amended Statement of Charges dated April 28, 2008. The hearing in this matter was held at the Office of Administrative Hearings on May 8, 2008 and the record closed on that date.

Christopher M. Kaisershot, Assistant Attorney General, appeared on behalf of the Department of Labor and Industry (Department). Brian W. Rude, represented Respondent Dan Lang Homes, Ltd. (Respondent).

STATEMENT OF ISSUE

Did the Department demonstrate that Respondent is incompetent, untrustworthy, or financially irresponsible and, therefore, subject negative licensing action?^[1]

Based on the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Respondent has been a licensed residential building contractor since May 8, 1996.^[2]

2. Dan Lang (Lang) is the owner of Dan Lang Homes, Ltd., and is also its qualifying person.^[3]

3. On July 24, 2006, Northern Capital, Inc., d/b/a/ Northern Capital Insurance Group (“Northern Capital”) obtained a judgment against Respondent in Hennepin County in the amount of \$4,970.00.^[4]

4. Respondent has failed to satisfy Northern Capital’s judgment against him.^[5]

5. In January 2004, Respondent hired Andretta brothers (“Andretta”) to perform concrete foundation and flat work for a new home construction project in Inver Grove Heights, Minnesota.^[6]

6. Andretta provided Respondent with a written proposal outlining the scope of work, costs and payment terms of “net 30 days”. The initial work was performed and

paid for as outlined in the proposal. After Andretta completed additional work on the same project in June and July of 2004, Respondent requested that Andretta forego payment of the additional \$10,352.50 owed by Respondent until Respondent could sell the home. Respondent failed to pay Andretta, despite Andretta's refusal of Respondent's request to delay payment.^[7]

7. Andretta also performed concrete work on a construction project for Respondent in April 2004 in St. Joseph, Wisconsin. Respondent failed to pay Andretta \$14,512.00 for work on that project.^[8]

8. As of March, 2006, Respondent had failed to pay Andretta \$29,346, including interest charges, for services Andretta rendered during the spring and summer of 2004.^[9]

9. On April 4, 2006, after receiving a letter of complaint from Andretta, the Department contacted Respondent about its failure to pay Andretta for the work completed in 2004.^[10]

10. In a letter dated April 9, 2006, Respondent sent a letter to the Department acknowledging the debt and stating its intent to pay Andretta, including a statement that "[w]e are happy to sign any document they provide ensuring or reinstating their lien rights, or making payment arrangements."^[11]

11. Despite Respondent's statements of good intentions, and the intervention of the Department to try to resolve the situation, Respondent did not issue full and final payment to Andretta until September 5, 2006, more than two years after Andretta had completed work on the two projects.^[12]

12. On November 11, 2007, Stock Building Supply, Inc. (SBSI), obtained a judgment in the amount of \$15,447.80 against Respondent in Dakota County District Court, which Respondent has not yet satisfied.^[13]

13. On July 9, 2007, A.J. Alberts Plumbing ("Alberts") filed a complaint with the Department regarding Respondent's failure to pay \$15,245, a debt which was then more than 90 days old.^[14]

14. On July 16, 2007, the Department contacted Respondent about its failure to timely pay a number of subcontractors, including Alberts.^[15]

15. Through its attorney, Respondent replied to the Department's July 16 letter on July 28, 2007. In its response, Respondent alleged that the debts at issue did not stem from work subject to licensure by the Department because one of the jobs was in Wisconsin and the other was for Lang's personal residence. Respondent also stated that the amount due for the work at Lang's home was disputed.^[16]

16. On August 1, 2007, Respondent paid \$9,870.00 of the debt to Alberts, leaving the disputed \$5,600.00 unpaid.^[17]

17. Alberts brought a case against Respondent in conciliation court in Washington County in June 2007. That case was settled, with full and final payment made by Respondent on March 6, 2008.^[18]

18. On November 17, 2007, Daniel W. Germann, d/b/a Advanced Flooring (“Advanced”) obtained a \$46,111.59 judgment against Respondent in Ramsey County District Court.^[19]

19. On January 17, 2007, Respondent paid Advanced in exchange for a Satisfaction of Judgment.^[20]

20. On March 27, 2006, Waterproofing, Inc., obtained a \$48,626.00 judgment against Respondent for work on four of Respondent’s properties.^[21]

21. Respondent satisfied Waterproofing, Inc.’s judgment on or about July 12, 2007.^[22]

22. On January 31, 2007, Respondent entered into a settlement agreement with Eischen (Eischen) Cabinet Company, agreeing to pay Eischen \$16,179.38 for services performed by Eischen for Respondent in 2006.^[23]

23. On April 3, 2007, in Dakota County District Court, Eischen obtained a judgment against Respondent in the amount of \$16,179.38, with interest to begin accruing on March 2, 2007.^[24]

24. A Satisfaction of Judgment was filed by Eischen on June 22, 2007.^[25]

25. On December 20, 2007, Northway Irrigation, Inc. (“Northway”) sued Respondent for \$10,272.43 for goods and services provided to Respondent by Northway on or before May 1, 2007.^[26]

26. On March 18, 2008, Northway obtained a judgment in the amount of \$11,235.62 against Respondent in Ramsey County District Court. Respondent has not yet paid this debt.^[27]

27. In May 2006, Schoenfelder Painting, Inc. (“Schoenfelder”) performed work valued at \$16,793.00 for Respondent.^[28]

28. On May 15, 2007, Schoenfelder received \$16,650.00 as partial payment from Respondent.^[29]

29. On November 7, 2007, Schoenfelder sued Respondent in conciliation court in Washington County District Court for the remaining money owed to it.^[30]

30. On January 10, 2008, the parties agreed on a settlement of \$2,500.00, payable by full by April 15 2008.^[31]

31. Respondent has not yet paid the \$2,500.00 due to Schoenfelder.^[32]

32. On February 14, 2008, Accufloor, Inc. obtained a \$2,557.13 judgment against Respondent in Washington County District Court.^[33]

33. Respondent has failed to satisfy Accufloor's judgment.^[34]

34. As of the time of the hearing in this matter, Respondent continued to owe \$34,210.55 in judgments to Northern Capital, Stock Building Supply, Northway Irrigation and Accufloor in addition to the \$2,500 in settlement funds due to Schoenfelder.

CONCLUSIONS OF LAW

1. At all times relevant to these proceedings, Respondent was a licensed residential building contractor pursuant to Minn. Stat. § 326.83, subd. 15.

2. Mr. Dan Lang was, and remains, the qualifying person as required by Minn. Stat. § 326.84, subd. 1c.

3. The Commissioner of Labor and Industry (the Commissioner) is authorized, pursuant to Minn. Stat. § 326.91, subd. 15, to take action against a residential building contractor's license if the Commissioner finds that such action is in the public interest and that the licensee:

has engaged in an act or practice whether or not the act or practice directly involves the business for which the person is licensed that demonstrates that the applicant or licensee is untrustworthy, financially irresponsible, or otherwise incompetent or unqualified to act under the license granted by the Commissioner.

4. Minn. Stat. § 45.027, subd. 7, also authorizes the Commissioner to deny, revoke or suspend the license of a residential building contractor if revocation is in the public interest and if the licensee has been shown to be financially irresponsible.

5. The Department has proven the allegations in Count I of the Amended Order for Hearing and Statement of Charges as follows:

Respondent failed to satisfy judgments obtained by Northern Capital, SBSI, Northway, and Accufloor totaling \$34,210.55. Respondent has therefore been shown to be financially irresponsible.

6. The Department has proven the allegations in Count II of the Amended Order of Hearing and Statement of Charges as follows:

Respondent has engaged in a pattern of delaying payments to its subcontractors and material suppliers, including failing to comply with payment plans and other assurances and forcing subcontractors and material suppliers to obtain judgments before tendering payment. Respondent has therefore, been shown to be financially irresponsible.

7. The Department has not proven the allegations contained in Count III of the Amended Order of Hearing and Statement of Charges because it has not demonstrated that the nonpayment (until March 6, 2008) of the balance owed to Albert's for work done on the qualifying person's personal residence was not a legitimate dispute over the actual amount due.

8. The Department has proven the allegations in Count IV of the Amended Order of Hearing and Statement of Charges as follows:

Respondent failed to fully pay Schoenfelder for services rendered and failed to comply with the Settlement Agreement/Memorandum therefore still owing Schoenfelder \$2,500 for work performed in May 2006. Respondent has therefore, been shown to be financially irresponsible.

RECOMMENDED ORDER

The Administrative Law Judge recommends that the Commissioner take appropriate negative action against the license of Respondent.

Dated: May 29, 2008
RRK/dsc

s/Raymond R. Krause

RAYMOND R. KRAUSE
Chief Administrative Law Judge

Reported: Digitally recorded

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Labor and Industry will make the final decision after a review of the record and may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendation. Under Minn. Stat. § 14.61, the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Nancy Leppink, Deputy Commissioner, Minnesota Department of Labor and Industry, 443 Lafayette Road North, St. Paul, MN 55155 to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. the record closes upon the filing of exceptions to the report and the

presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Pursuant to Minn. Stat. § 14.62, subd. 1, the Commissioner is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

Respondent is a residential building contractor that builds upper bracket homes in and around the Twin Cities and western Wisconsin. Respondent's practice has been to obtain a construction loan for a portion of the construction costs and to pay for some materials and subcontractor services out of the proceeds of the sale of the finished home.

Recently, as the housing market has declined, Respondent has found it more difficult to close on the upper bracket residences than in the past. This has made the normal practice of paying material suppliers and subcontractors out of the sale proceeds problematic at best, and, at times, impossible. As a result, Respondent has attempted to put off payment of legitimate debts to suppliers and subcontractors as long as possible, and in many cases until legal action is initiated to force payment. Although Respondent has frequently told its creditors that they will be paid out of the proceeds of the sale of the house they were involved with, in many cases, other creditors were paid with those proceeds instead.

The pattern that has emerged is one in which those who initiate legal action or complain to the Department are paid first no matter what their priority in time. Other creditors, however, do not get paid even though the house they provided material or services for has sold.

Respondent essentially makes two arguments. First, that "financially irresponsible" is not defined in statute and therefore is a vague notion that must be understood in the context of the practices and demands of the market at the time in question. In other words, to put off payment as long as possible in order to stay afloat economically is a responsible and prudent practice in a down market as is now being experienced.

The ALJ disagrees. It is financial irresponsibility to repeatedly force legitimate creditors to bring legal action in order to receive payment. Such sharp dealing may be more tempting when one's houses are not selling as expected, but that does not make it any more of a responsible business practice. Bad times do not make bad practices acceptable.

The second argument raised is that there is no public interest to be served by taking negative action against the Respondent's licensee or imposing a civil penalty. Respondent argues that the only ones arguably hurt by this practice are the suppliers and subcontractors. These firms are not, so the argument goes, "the public" that the legislature had in mind when it drafted this statute. Therefore, if "the public" is not harmed, how can it be in the public interest to take action against Respondent.

Again, the ALJ disagrees with the premise. While suppliers and subcontractors may not be synonymous or co-extensive with "the public," they certainly are members of the public and are a subset thereof. More to the point, however, the real public interest

to be served here is not bill collecting for subcontractors but rather the public's interest in having an assurance that when the state licenses a contractor, the licensee will be responsible, competent, and qualified. The state and its citizens have an expectation and an interest in people paying their bills in a timely way so as to avoid the social costs and public burdens of bankruptcies, foreclosures, business failures, and excessive use of the judicial process.

While one may have sympathy for a businessman caught in a downward cycle in the housing market, we must not lose sight of the plight of the businesses Respondent has not paid at all or in a timely fashion. They too are in the same market and are no better able to carry Respondent's debt than is Respondent.

R. R. K.

^[1] Minn. Stat. §§ 45.027, subd. 7 (a)(4) and 326.91, subd. 1(6) (2006). The Department cites only to the 2006 versions of these statutes. Section 326.91 was amended effective on August 1, 2007. The equivalent, applicable language in the 2007 version of section 326.91 is now in section 326.91, subd. 1(15).

^[2] Testimony of Chris Williams (Williams Testimony).

^[3] *Id.* See Minn. Stat. §§ 326.83, subd. 14 and 326.84, subd. 1c.

^[4] Hearing Exhibit (Ex.) 2.

^[5] *Id.*

^[6] Ex. 3 at page 1.

^[7] Ex. 3 at page 1.

^[8] Ex. 3 at page 2.

^[9] Ex. 3 at page 2.

^[10] Ex. 4.

^[11] Ex. 5.

^[12] Ex. 6, 7, 8, 9, 10.

^[13] Ex. 24 at page 4.

^[14] Ex. 14.

^[15] Ex. 17.

^[16] Ex. 18 at page 2.

^[17] Ex. 14 at page 9.

^[18] Ex. 23, 23(A) and 32.

^[19] Ex. 12 at page 1.

^[20] Ex. 18 at pages 2-3 and 6-9 and Ex. 29 at page 1.

^[21] Ex. 12 at page 2; Ex. 13, Ex. 17 at page 2.

^[22] Ex. 29 at page 1.

^[23] Ex. 16 at page 2 and Ex. 17 at page 1..

^[24] *Id.*

^[25] *Id.* at page 3.

^[26] Ex. 26 at page 1.

^[27] Ex. 27.

^[28] Ex. 21 at page 2.

^[29] Ex. 21 at pages 3-4.

[\[30\]](#) Ex. 30 at page 2. At that time, Schoenfelder was owed \$2,991.27, which included interest and fees on the debts previously owed.

[\[31\]](#) Ex. 21 at page 5.

[\[32\]](#) Ex. 22.

[\[33\]](#) Ex.25.

[\[34\]](#) *Id.* at page 3; Ex. 28 and Ex. 29 at page 3.