



University of Tennessee, Knoxville
**Trace: Tennessee Research and Creative
Exchange**

Tennessee Department of State, Opinions from the
Administrative Procedures Division

Law

November 2014

Ben Miller dba Miller Enterprises vs.
COMMERCE AND INSURANCE

Follow this and additional works at: http://trace.tennessee.edu/utk_lawopinions

This Initial Order by the Administrative Judges of the Administrative Procedures Division, Tennessee Department of State, is a public document made available by the College of Law Library, and the Tennessee Department of State, Administrative Procedures Division. For more information about this public document, please contact administrative.procedures@tn.gov

**BEFORE THE COMMISSIONER OF COMMERCE AND INSURANCE
FOR THE STATE OF TENNESSEE**

IN THE MATTER OF:

Ben Miller dba Miller Enterprises

DOCKET NO: 12.14-124433J

INITIAL ORDER

This matter was heard on October 15, 2014 in Nashville, Tennessee, before Joyce Carter-Ball, Administrative Law Judge, assigned by the Secretary of State to sit for the Commissioner of the Tennessee Department of Commerce and Insurance (“Department”). Shalina B. Brown, Assistant General Counsel, represented the Department. The Respondent did not appear at the hearing, either in person or through legal counsel.

The issue in this matter is the appropriate penalty to be imposed based upon Respondent’s proposed violation of T.C.A. §§62-6-501 and 502(a) & (b)(1).

After consideration of all of the evidence, arguments of counsel and the entire record in this matter, it is determined that Respondent is assessed a total of \$4,000.00 in civil penalties, and all investigatory and hearing costs incurred by the State herein.

This decision is based upon the following:

FINDINGS OF FACT

1. The Department of Commerce and Insurance, Division of Regulatory Boards (“Department”) is the lawful agent through which the State Home Improvement Contractors Law is enforced, and the Department is authorized to bring this action.

2. Respondent Ben Miller d/b/a Miller Enterprises transacted and engaged in business as a home improvement contractor and/or the business of contracting in Knox County

during 2012. Respondent's last known address at the time was 5110 Harriman Highway, Oliver Springs, TN 37840.

3. On or around March 9, 2012, Respondent submitted a \$14,300 written estimate to Mark and Molly Deuschle for the remodeling of two bathrooms within their home located at 1320 Knightsbridge Drive, Knoxville, TN 37922. Respondent referred to his business as "M.E." within the \$14,300 estimate provided to Mark and Molly Deuschle.

4. The Deuschles accepted Respondent's estimate and paid the Respondent an initial deposit of \$10,010 at the time of their acceptance on April 8, 2012.

5. Respondent worked on the project for two weeks after receiving the initial deposit and worked on and off on the project for nearly eight weeks between April 2012 and late July 2012.

6. The Deuschles made a second payment to Respondent of \$2,200 in June 2012.

7. On July 22, 2012, Mark Deuschle sent the Respondent an e-mail telling the Respondent to stop work on the project.

8. The Respondent contends the Deuschles owe him a remaining balance of \$2,261 due to change orders and admitted he did not complete the remaining work at the time he was discharged by the Deuschles.

9. Respondent transacted business as a contractor in 2012, all without ever being licensed by the Board as a home improvement contractor, as required under TENN. CODE ANN Title 62, Chapter 6, Part 5.

10. The bathroom remodeling services provided, and the contract price is included within the definition of "home improvement" according to TENN. CODE ANN. §§ 62-6-501(4)(A) & (B)(ii), and 62-6-102(4)(A)(i), since the job quote was above \$3,000 and under \$25,000.

11. Respondent was not licensed as a home improvement contractor at the time he entered into this contract, and has never been licensed as a home improvement contractor by the Board as required by TENN. CODE ANN. §§ 62-6-502(a) and (b)(1).

APPLICABLE LAW

1. Respondent’s written agreement with the Deuschles’, and his actions herein as set out in numbered paragraphs 3-8 of the foregoing proposed Findings of Fact, for bathroom remodeling services establishes that: the agreement was for “home improvement;” that the agreement was a “home improvement contract”; that Respondent acted as a “home improvement contractor;” Mr. and Mrs. Deuschle are the “owners;” of the property, pursuant to TENN. CODE ANN. §§ 62-6-501(4)(A),(B)(ii) (5), (6) & (8), and 62-6-102(4)(A)(i), the relevant portions of which read as follows:

62-6-501. Part Definitions. – As used in this part, unless the context otherwise requires:

(4)(A) “Home improvement” means the repair, replacement, remodeling, alteration, conversion, modernization, improvement or addition to any land or building, or that portion of the land or building, that is used or is designed to be used as a residence or dwelling unit for one (1), two (2), three (3) or four (4) dwelling units, and includes the construction, replacement or improvement of driveways, swimming pools, porches, garages, landscaping, fences, fall-out shelters, roofing, painting and other improvements to structures or upon land that is adjacent to a dwelling house for one (1), two (2), three (3) or four (4) dwelling units. Without regard to the extent of affixation, “home improvement includes the installation of central heating or air conditioning systems, storm windows or awnings;

(B) “Home improvement” does not include:

(ii) Any home improvement for which the contract price is three thousand dollars (\$3,000) or less; . . .

(5) “Home Improvement contract” means an agreement between a contractor and an owner for the performance of home improvement, and includes all labor, services and materials to be furnished and performed under the agreement;

(6) “Home Improvement contractor” means any person, other than a bona fide employee of the owner, who undertakes or offers to undertake or agrees to perform any home improvement for the owner, whether or not the person is licensed or subject to the licensing requirements of this chapter; . . .

(8) “Owner” means any homeowner, tenant or other person who orders, contracts for or purchases the home improvement services of a contractor or the person entitled to the performance of the work of a contractor pursuant to a home improvement contract;

62-6-102. Chapter Definitions. -

(4)(A)(i) “Contractor” means any person or entity that undertakes to, attempts to or submits a price or bid or offers to construct, supervise, superintend, oversee, schedule, direct or in any manner assume charge of the construction, alteration, repair, improvement, movement, demolition, putting up, tearing down or furnishing labor to install material or equipment for any building, highway, road, railroad, sewer, grading, excavation, pipeline, public utility structure, project development, housing, housing development, improvement or any other construction undertaking for which the total cost is twenty-five thousand dollars (\$25,000) or more; . . .

2. Respondent’s acts and conduct in transacting a home improvement business with respect to this roof replacement work performed for Mr. and Mrs. Deuschle in Knox County, Tennessee in 2012, without having a license issued by this Board, all as set out in numbered paragraphs 3-8 of the foregoing proposed Findings of Fact, constitute violations of TENN. CODE ANN. §§ 62-6-502(a) & (b)(1), the relevant portions of which read as follows:

62-6-502. Prohibited activities. –

(a) No person may engage in or transact any home improvement business, represent to the public as doing home improvement business or offer to transact any home improvement business in this state, except in compliance with the applicable provisions of this part...

(b)(1) No person shall maintain, own, operate or transact a home improvement business unless a license is first obtained as prescribed in this part.

3. Civil penalties in an amount up to \$1,000 for each separate violation of this Board's statutes based on Respondent's engaging in unlicensed home improvement contracting in violation of TENN. CODE ANN. §§ 62-6-502(a) & (b)(1), and investigative and hearing costs may be assessed by the Board pursuant to TENN. CODE ANN. §§ 62-6-509(c), 56-1-308(a), 56-1-311(a), and TENN. COMP. R. & REGS. 0780-05-11-.01(1), which state in pertinent part as follows:

62-6-509. Grounds for loss of license. –

(c) Notwithstanding the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, relative to the amount of civil penalties that may be imposed, the commission may impose a civil penalty not to exceed one thousand dollars (\$1,000) against any person who engages in unlicensed home improvement contracting.

56-1-308. Penalty for violation of statute, rule or order – Recovery.

(a) With respect to any person required to be licensed, permitted, or authorized by any board, commission or agency attached to the division of regulatory boards, each respective board, commission or agency may assess a civil penalty against the person in an amount not to exceed one thousand dollars (\$1,000) for each separate violation of a statute, rule or order pertaining to the board, commission or agency. Each day of continued violation constitutes a separate violation.

56-1-311. Assessment of investigatory and hearing costs – Rules and regulations.

(a) Notwithstanding any contrary law, the division of regulatory boards or any board, commission or agency attached to the division of regulatory boards may assess the actual and reasonable costs of the investigation, prosecution and hearing of any disciplinary action held in accordance with the contested case provisions of the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, part 3, and in which sanctions of any kind are imposed on any person required to be licensed, permitted registered or otherwise authorized by the division or respective board, commission or agency. These costs may include, but are not limited to, those incurred and assessed for the time of the prosecuting attorneys, investigators, expert witnesses, administrative judges and any other persons involved in the investigation, prosecution and hearing of the action.

0780-5-11-.01 ASSESSMENT OF INVESTIGATORY AND HEARING COSTS.

(1) The Division of Regulatory Boards (“Division”) or any board, commission or agency attached thereto is authorized to assess the actual and reasonable costs of the investigation, prosecution and hearing of any disciplinary action held in accordance with the contested case provisions of the Uniform Administrative Procedures Act, compiled in Tenn. Code Ann. Title 4, Chapter 5, Part 3 in which sanctions of any kind are imposed on any person or entity required to be licensed, permitted, registered or otherwise authorized by the Division or any board, commission or agency attached thereto.

4. The Department has shown by a preponderance of the evidence that Respondent has committed violations of TENN. CODE ANN Title 62, Chapter 6, Part 5 by transacting business as a home improvement contractor, without being licensed by the Board pursuant to Tenn. Code Ann. §§ 62-6-501 and 502(a) & (b)(1).

CONCLUSIONS OF LAW

1. It is **concluded** that the Department has shown by a preponderance of the evidence that Respondent has committed violations of TENN. CODE ANN Title 62, Chapter 6, Part 5 by transacting business as a home improvement contractor, without being licensed by the Board pursuant to Tenn. Code Ann. §§ 62-6-501 and 502(a) & (b)(1).

2. It is **concluded** that Respondent submitted no evidence of material facts which warranted the mitigation of penalty assessment.

3. Based on the evidence presented, it is **ORDERED** that Respondent is **ASSESSED** and **shall pay a total of \$4,000 in civil penalties**, for which execution shall issue if necessary, calculated as follows:

Assessment of a civil penalty in the amount of \$1,000 per month of home improvement contracting work between the period of April, 2012 and July, 2012 without a home improvement contractor’s license at a residence located at 1320 Knightsbridge Drive, Knoxville, TN 37922 in Knox County, constituting unlicensed contracting in violation of TENN. CODE ANN. §§ 62-6-501 & 62-6-502, as described above; and

4. The Respondent **is assessed all investigatory and hearing costs incurred by the State herein.**

IT IS SO ORDERED.

This Initial Order is entered and effective this _____ day of _____, 2014.

JOYCE CARTER-BALL
ADMINISTRATIVE JUDGE

Filed in the Administrative Procedures Division, Office of the Secretary of State, this _____ day of _____ 2014.



J. Richard Collier, Director
Administrative Procedures Division