

**CITY OF NEW YORK
DEPARTMENT OF CONSUMERS AFFAIRS**

KEVIN CROSTHWAITE

-and-

**THE DEPARTMENT OF CONSUMERS
AFFAIRS,**

Complainants,

-against-

ADVANCED INSTALLERS CORP.

-and-

WILLIAM POGUE

-and-

ELISA POGUE

Respondents.

DECISION AND ORDER

Violation No(s):

CD500112346

DD500112346

License No(s):

1269429 (HIC)

1134573 (HIS)

Date: March 11, 2010

A hearing was held on the following dates: August 3, 2009, September 21, 2009, October 27, 2009, November 20, 2009 and January 14, 2010.

Appearances: For the Complainant: Cynthia Crosthwaite, wife of Kevin Crosthwaite, on behalf of him. For the Respondents: William Pogue, licensed salesman and husband of Elisa Pogue, President of the company¹, and Larry Flowers, attorney for respondents, from the law firm of Christopher Cossar.

The Notice of Hearing charged the Respondents with violating the following:

1. **Administrative Code of the City of New York (“Administrative Code”) §20-700 and Title 6 of the Rules of the City of New York (“6 RCNY”) 6 RCNY §1-12** by

¹ Elisa Pogue was not present on September 21, 2009 and November 20, 2009.

engaging in a deceptive trade practice in the negotiation and performance of a home improvement contract, in that respondent received payment for services not performed and by promising to complete the contracted work and failing to do so.

2. **Administrative Code §20-393(2)** by making a substantial misrepresentation in the solicitation or procurement of a home improvement contract.
3. **Administrative Code §20-393(6)** by willfully or deliberately disregarding and violating building, sanitary, fire and health laws of the City.
4. **Administrative Code §20-393(1)** by materially deviating from or disregarding the plans or specifications or any terms and conditions agreed to under a home improvement contract, without written consent of the owner.
5. **Administrative Code §20-393(1)** by abandoning the work they had contracted to perform under the contract prior to the completion of the work.
6. **Administrative Code §20-393(11)** by failing to perform work under a home improvement contract in a skillful and competent manner.
7. **Administrative Code §20-113** by conducting activities under more than one trade name.
8. **6 RCNY §2-221(a)(1)** by failing to include in the contract: the signature by all parties; the license number of the home improvement contractor as on record with the Department; clear identification of the stated license numbers as New York City Department of Consumers Affairs numbers.
9. **6 RCNY §2-221(a)(2)** by failing to include in the contract: the approximate or estimated dates, when the work would begin; the approximate or estimated dates, when the work would be substantially completed; any contingencies that would materially change the approximate or estimated completion dates; and whether a definite completion date has been determined to be of the essence.

10. **6 RCNY §2-221(a)(3)** by failing to include in the contract a description of the materials to be provided to the owner, including make, model number or any other identifying information, and the agreed upon consideration for the work and materials.
11. **6 RCNY §2-221(a)(4)** by failing to include in the contract a notice to the owner purchasing the home improvement that the contractor or subcontractor who performs on the contract and is not paid may have a claim against the owner which may be enforced against the property in accordance with the applicable lien laws.
12. **6 RCNY §2-221(a)(5)** by failing to include in the contract a notice to the owner purchasing the home improvement that the home improvement contractor is legally required to deposit all payments received prior to completion in accordance with subdivision four of § 71-a of the New York State Lien Law and that, in lieu of such deposit, the home improvement contractor may post a bond or contract of indemnity with the owner guaranteeing the return or proper application of such payments to the purposes of the contract.
13. **6 RCNY §2-221(a)(6)** by failing to provide for progress payments which bear a reasonable relationship to the amount of work to be performed, materials to be purchased, or expenses for which the contractor would be obligated at the time of payment.
14. **6 RCNY §2-221(a)(8)** by failing to include in the contract a clause wherein the contractor agrees to furnish the buyer with a Certificate of Worker's Compensation Insurance prior to the commencement of the work.
15. **6 RCNY §2-221(a)(10)** by failing to include in the contract, in immediate proximity to the space reserved for the signature of the buyer and in bold face type of a minimum size of 10 points, a statement that the buyer has the right to cancel the transaction at any time prior to midnight of the third business day after the date of the transaction.
16. **6 RCNY §2-221(b)** by failing to furnish or provide a separate Notice of Cancellation form to the owner.

17. **6 RCNY §1-05** by failing to clearly identify the license numbers as a New York City Department of Consumers Affairs license numbers on all advertising, letterhead, receipts or other printed matter of the licensee.
18. **6 RCNY §223(a)** by failing to secure or see to the securing of a permit necessary to the proper completion of such contract in accordance with applicable state and local building laws.
19. **6 RCNY §223(c)** by failing to treat all funds from a customer pursuant to a home improvement contract as trust funds to be applied solely to the payment of expenses directly related to the home improvement.
20. **6 RCNY §1-13** by failing to respond to a complaint within twenty days of the date that the complaint was filed.
21. **Administrative Code §20-101** by failing to maintain the standards of integrity, honesty and fair dealing required of a licensee. In particular, [William] Pogue abandoned his responsibilities to the consumers and attempted to transact under a new company and license number, so as to avoid having complaints filed against his license.

Based on the evidence in the record, I **RECOMMEND** the following:

Findings of Fact

On or about December 9, 2007, Kevin and Cynthia Crosthwaite (“the consumers”) entered into a written home improvement contract with Advanced Installers Corp. for a total apartment renovation, for a price of \$57,000. The licensed salesman and the person who performed the work, was respondent William Pogue. He, Advanced Installers Corp. and its president, Elisa Pogue, shall be referred to as “the respondents.” Respondents never provided the consumers with a fully executed copy of the contract.

The respondents worked on this job from December 16th, 2007 until on or about May 28, 2008, when the consumers fired them. The consumers had paid respondents the full contract price of \$57,000, as well as approximately \$32,000 to purchase the flooring, cabinets, tiles and other materials on their behalf.² In addition, the consumers paid the respondents \$1,500, on or about January 14, 2008, towards payment of the architect’s fee (only \$1,000 of this sum was paid to the architect) and a \$5,000 loan, on

² It was the consumers’ responsibility to pay for these materials.

or about March 8, 2008, as an advance toward the purchase of the kitchen countertop (which were never purchased by respondents).

On or about May 28, 2008, while the respondents were working on the bathroom and waiting for delivery of additional bathroom tiles and the kitchen countertop, the consumers fired them for doing a substandard job on the bathroom. The consumers, thereafter, hired other contractors to: 1) complete the remaining items of work, which primarily consisted of finishing the bathroom and kitchen; and 2) redo parts of the job that were already completed (flooring and soffit work).

Opinion

The Contract

The preponderance of the credible evidence establishes that respondents entered into a contract with the consumers on or about December 9, 2007 for a contract price of \$57,000. The consumers credibly established that the parties agreed to additional work that was not included in the first draft of the contract, dated November 14, 2007. Respondents failed to provide the consumers with a final copy of the contract and, therefore, must be held to the revised version of the contract, which was the only one agreed to by the consumers (hereinafter referred to as the “contract”).

Consumers’ Claims For Resitution

Flooring

The consumers are seeking restitution for a complete re-flooring job at a cost of \$16,725. Restitution is denied because the consumers failed to establish by a preponderance of the evidence that the work done by respondents deviated from the contract or was done in an unskilled or incompetent manner. The consumers admitted that, while they had originally wanted a hard wood floor, they had agreed to an installation of man-made wood flooring.

The consumers did not establish that the quality of the flooring installed was substandard or that scratches were caused by respondents’ failure to properly protect the floor. The consumers’ photographs actually showed that the floor was fully covered. In addition, the respondent’s floor installer credibly testified that the protective materials used were sufficient. Finally, the consumers admitted that they declined an offer by the floor manufacturer to replace several of the floor boards. The consumers are not

entitled to restitution for a higher quality, hard-wood floor, which was not part of the contract.

Soffits

The consumers did not establish their claim for restitution for all new soffit work costing \$6,200. The consumers, in fact, admitted that the work was done correctly. Their own expert witness, Ben Miele, admitted that the consumers' dissatisfaction was based on esthetics and that there was no problem with the craftsmanship of the soffits. Therefore, the consumers should not be entitled to restitution.

Bathroom

Both parties agreed that the bathroom work was 85% complete before respondents were fired. Respondents had installed all of the tiles that the consumers had selected and actually purchased up until that time. Additional tiles had been ordered but had not yet been delivered while respondents were still on the job.

The consumers credibly established that the bathroom tiles in the shower and at the shower base had been improperly installed. It was also clear that the step installed for the shower was too high (12") and was substandard in that the respondents used a styrofoam rather than a lead pan. I find, however, that the consumers are not entitled to full restitution of the claimed \$14,200 because a substantial amount of this cost for redoing the entire bathroom went beyond necessary remedial work. I find that 15% of the work was substandard and that 15% of the work was not completed. Therefore, the consumers are entitled to 30% of the damages sought, which is \$4,260.

Kitchen

The consumers established by the preponderance of the evidence that they are entitled to \$7,630 to complete the kitchen work, including installation of the kitchen countertop and backsplash, re-hanging cabinets which were installed too high and correcting an island which had incorrectly configured. Therefore, full restitution for the work to the kitchen in the amount of \$7,630 is granted.

Minor Items

When respondents were terminated, there were also some minor things that were not done such as the tiling of a balcony (the tiles had not

yet come). The consumers failed to provide proof of the cost of such damages. The consumers did, however, credibly establish that the bedroom closet, which had not been installed evenly, cost them \$1,476, to repair. They are, therefore, entitled to restitution in the amount of \$1,476.

Work Claims Beyond the Scope of the Written Contract

There were communications, orally and by email, regarding a number of additional items of work, including but not limited to a computer cabinet tower system. Since these things were not included in the written contract, the consumers’ claim for restitution for any such work should be denied.

Claim for Payment Toward the Architect’s Fee

The consumers paid respondents \$1,500 on or about January 14, 2008, towards the architect’s fee. I find that respondents only applied \$1,000 of the \$1,500 to the architect’s fee and therefore must reimburse the remaining balance of \$500 to the consumers.

Refund of Loan/Advance of \$5,000

The consumers made a loan of \$5,000 to the respondents to pay Mr. Pogue’s union dues, which was to act as an advance to the respondents on their expected purchase of the kitchen countertop. Since the kitchen countertop was not purchased by respondents, as contemplated, this money must be must be reimbursed to the consumers.

Combined Total of Restitution Consumers are Entitled to Receive

The consumers are therefore entitled to a total restitution amount of \$18,866 as follows:

Bathroom	\$4,260
Kitchen	\$7,630
Bedroom	\$1,476
Architect’s Fee	\$ 500
Loan/Advance	\$5,000

Contract Deficiencies

The respondents’ contract was deficient as follows: it failed to include a signature on behalf of the respondents; it failed to include the license number of the home improvement contractor and salesman; it failed to state the estimated dates on which the contract would begin or

would be substantially completed; it failed to state whether a definite completion date was of the essence; it failed to include a description of the materials to be provided, including make, model number or other identifying information and the agreed upon consideration for the work and materials; it failed to include a notice that if the contractor or subcontractor is not paid, they may have a claim against the consumers; it failed to include the notice required by subdivision four of 71-a of the New York State Lien Law; it failed to include a clause about furnishing the buyer with a Certificate of Worker's Compensation insurance prior to the commencement of the work; it failed to include a notice about the consumers' right to cancel the contract within three days; and it failed to provide a separate Notice of Cancellation.

In addition to the contract deficiencies listed above, respondents failed to reduce additional work agreed to be performed into a written form (contract) with the cost of the work and all of the necessary formalities as required by the Department's rules for an initial contract.

Other Legal Charges

As for the other legal charges in the Notice of Hearing, there clearly was payment for services not performed which makes respondents guilty of a deceptive trade practice. Respondents are also found guilty of making a substantial misrepresentation in the solicitation of the contract since they failed to make clear which version of the contract they were agreeing to. Respondents are found guilty of failing to perform work in a skillful and competent manner in connection with the bathroom. Respondents are found guilty of failing to treat all funds received as trust funds and they are guilty of failing to answer the complaint in a timely manner. However, respondents should not be found guilty of failing to complete the work since they were terminated. There was insufficient evidence to establish the other stated charges.

Elisa Pogue

No evidence was presented against Ms. Elisa Pogue personally and therefore all of the charges against her individually should be dismissed.

Fitness to Hold Licenses

Because respondents have no other complaints against them and no prior violations of law, I find that their actions do not rise to the level warranting suspension or revocation of their licenses.

DECISION AND ORDER**CD500112346:**

Respondent, Advanced Installation Corp., is found **guilty** of charges numbered 1, 2, 4, 6, 8, 9, 10, 11, 12, 14, 15, 16, 19 and 20 and is hereby

Ordered to pay to the Department a TOTAL FINE of \$3,850, as follows:

<u>Charge</u>	<u>Fine</u>
1. Adm. Code §20-700 and 6 RCNY §1-12	\$ 350
2. Adm. Code §20-393 (2)	\$ 500
4. Adm. Code §20-393 (1)	\$ 500
6. Adm. Code §20-393 (11)	\$ 500
8. 6 RCNY §2-221(a)(1)	\$ 200
9. 6 RCNY §2-221(a)(2)	\$ 200
10. 6 RCNY §2-221(a)(2)	\$ 200
11. 6 RCNY §2-221(a)(4)	\$ 200
12. 6 RCNY §2-221(a)(5)	\$ 200
14. 6 RCNY §2-221(a)(8)	\$ 200
15. 6 RCNY §2-221(a)(10)	\$ 200
16. 6 RCNY §2-221(b)	\$ 200
19. 6 RCNY §2-223(c)	\$ 200
20. 6 RCNY §1-13	\$ 200

DD500112346:

Respondent, William Pogue, is found **guilty** of charges numbered 1, 2, 4, 6, 8, 9, 10, 11, 12, 14, 15, 16, 19 and 20 and is hereby

Ordered to pay to the Department a TOTAL FINE of \$3,850.00, as follows:

<u>Charge</u>	<u>Fine</u>
1. Adm. Code §20-700 and 6 RCNY §1-12	\$ 350
2. Adm. Code §20-393 (2)	\$ 500
4. Adm. Code §20-393 (1)	\$ 500
6. Adm. Code §20-393 (11)	\$ 500
8. 6 RCNY §2-221(a)(1)	\$ 200
9. 6 RCNY §2-221(a)(2)	\$ 200

10.	6 RCNY §2-221(a)(2)	\$ 200
11.	6 RCNY §2-221(a)(4)	\$ 200
12.	6 RCNY §2-221(a)(5)	\$ 200
14.	6 RCNY §2-221(a)(8)	\$ 200
15.	6 RCNY §2-221(a)(10)	\$ 200
16.	6 RCNY §2-221(b)	\$ 200
19.	6 RCNY §2-223(c)	\$ 200
20.	6 RCNY §1-13	\$ 200

CD500112346 and DD500112346

Respondents, Advanced Installation Corp. and William Pogue are hereby **ORDERED** to pay **Restitution in the sum of \$18,866.00** to the consumer complainant, **Kevin Crosthwaite**, for which they **each jointly and severally liable**.

This constitutes the recommendation of the Administrative Law Judge.

Susan Kassapian
Principal Administrative Law Judge,
Consumers Dockets

DECISION AND ORDER

The recommendation of the Administrative Law Judge is approved.

This constitutes the Decision and Order of the Department.

Bruce M. Dennis
Deputy Director of Adjudication

Mail payment in the enclosed envelope addressed to:

NYC Department of Consumers Affairs
Collections Division
42 Broadway, 9th Floor
New York, NY 10004

APPEALS

RESPONDENT(S): You may file an **APPEAL** of this decision **within 30 days from the date of the decision**. You must include with your appeal: (1) a check or money order for \$25 payable to DCA; (2) a check or money order payable to DCA for the full amount of the fine you were ordered to pay in the decision; and (3) a check or money order payable to DCA for the entire restitution amount you were ordered to pay in the decision. If you cannot pay the fine because of financial hardship, you may submit a request for a waiver of the requirement to pay the fine. You must submit a copy of your most recent tax returns along with this request. Send your appeal and any request to: Director of Adjudication, Department of Consumers Affairs, 66 John Street, 11th Floor, New York, NY 10038. **Make sure to send copies of your appeal TO THE CONSUMER at the Consumer's address, AND to DCA'S LEGAL COMPLIANCE AND FITNESS DIVISION** at 42 Broadway, 9th Floor, New York, NY 10004.

CONSUMERS: You may file an **APPEAL** of this decision **within 30 days of the date of the decision**. You must include with your appeal a check or money order for \$25 payable to DCA. Send your appeal to: Director of Adjudication, Department of Consumers Affairs, 66 John Street, 11th Floor, New York, NY 10038. **Make sure to send a copy of your appeal to each of the respondents** listed in the caption on the Notice of Hearing.

IMPORTANT NOTICE TO BOTH PARTIES: YOUR APPEAL MAY BE DENIED IF YOU DO NOT INCLUDE SOME INDICATION THAT YOU HAVE SENT A COPY OF IT TO EACH OF THE OPPOSING PARTIES LISTED IN THE NOTICE OF HEARING.