

**CITY OF NEW YORK
DEPARTMENT OF CONSUMER AFFAIRS**

MIEKO MIYAMOTO

-and-

**THE DEPARTMENT OF CONSUMER
AFFAIRS,**

Complainants,

-against-

MARK PERRY,

Respondent.

DECISION AND ORDER

Violation Nos.:

CD500127055

DD500127055

License Nos.:

1250101(HIC)

1250099(HIS)

Date: July 6, 2012

A hearing on the above-captioned matter was held on May 17, May 24, and June 5, 2012.

Appearances: For the Complainants: Mieko Miyamoto, consumer. For the Respondents: Mark Perry, respondent.

The Notice of Hearing charged the Respondent 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”) §1-12** by 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, or making any false promise of character likely to influence, persuade or induce.
3. **Administrative Code §20-393(3)** by committing a fraud in the execution of, or by materially altering any contract, mortgage, promissory note or other document incident to a home improvement transaction.

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 the written consent of the owner and by abandoning the work they had contracted to perform under the Contract prior to completion of that work.
5. **Administrative Code §20-393(11)** by failing to perform work under a home improvement contract in a skillful and competent manner.
6. **Administrative Code §20-393(6)** of the Code by willfully or deliberately disregarding and violating the building, sanitary, fire and health laws of this city.
7. **6 RCNY §2-223(b)**, by failing to maintain books of accounts, copies of all contracts with buyers and such records as shall properly and completely reflect all transactions involving the home improvement business for a period of either six years or the length of time of the contract guarantee, whichever is longer.
8. **6 RCNY §2-221(a)** by failing to furnish to the buyer a fully completed legible copy of the entire home improvement contract at the time of its execution and before any work is done.
9. **6 RCNY §2-221(a)(1)** by failing to include in the contract the date of the transaction and the salesperson's license number.
10. **6 RCNY §2-221(a)(2)** by failing to include in the contract the approximate dates, or estimated dates, when the work will begin and be substantially completed, including a statement of any contingencies that would materially change the approximate or estimated completion date, and a specification whether or not the contractor and the owner have determined a definite completion date to be of the essence.
11. **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.
12. **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.

13. **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 purpose of the Contract.
14. **6 RCNY § 2-221(a)(6)** by failing to provide a schedule of progress payments showing the amount of each payment as a sum in dollars and cents and specifically identifying the state of completion of the work or services to be performed, including any materials to be supplied before each such progress payment is due; and/or 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.
15. **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 Workers' Compensation Insurance prior to commencement of work pursuant to the contract.
16. **6 RCNY §2-221(a)(9)** by failing to include in the contract a clause wherein the contractor agrees to procure all permits required by local law.
17. **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.
18. **6 RCNY §2-221(b)** by failing to furnish to the buyer at the time he or she signs the home improvement contract, a separate, completed Notice of Cancellation form, in duplicate and attached to the contract, in form and substance as required by this rule.

19. **Administrative Code §20-393(13)** by including a provision in a home improvement contract whereby the owner waives or is barred from asserting any rights, claims, defenses or remedies available to an owner under this subchapter or any rules promulgated pursuant thereto.
20. **Article 2 § 3 of the New York Lien Law** by obtaining two liens against the consumer's property in an amount exceeding the owner's obligations under the home improvement contract.
21. **Administrative Code §20-101** for failing to maintain the standards of integrity, honesty, and fair dealing required of licensees.

Based on the evidence in the record, the following is **RECOMMENDED**:

Findings of Fact

Mieko Miyamoto, the consumer, purchased a four floor brownstone located at 181 Adelphi Street, Brooklyn, New York. The house was in very poor condition. Ms. Miyamoto hired Mark Perry, the respondent, to demolish and renovate the house for \$295,000. The contract was signed by the parties in July 2008. The contract included itemized costs for the demolition, staircase restoration, installation of a new kitchen and the bathrooms, electrical work, plumbing work and materials.

The entire house was gutted before renovations began. The parties agreed that Mr. Perry would be paid via the consumer's bank. Mr. Perry received an initial \$25,000 down payment in July 2008. However, after only two scheduled payments totaling \$67,000, the scheduled payments stopped and Ms. Miyamoto paid Mr. Perry directly when she could and as the work progressed. Mr. Perry continued to work on the project although the payments he received were not in accordance with the agreed terms. This was because Mr. Perry had worked for Ms. Miyamoto prior to this contract and he considered her a friend.

Mr. Perry estimated the renovation would be completed in six months and the work would start as soon as the permits were issued. However, the permits took nearly a year to be issued by the Buildings Department and work on the house began in June 2009. The contract was silent as to who would procure the permits.

Ms. Miyamoto eventually paid Mr. Perry \$295,000, but she added an extension to the original renovations on the house. This was never incorporated into a contract amendment. Ms. Miyamoto's architect told her that her money

would be exhausted if she retained Mr. Perry, who had not agreed to build the extension although the architect had approached him to build it. Mr. Perry did not commit to this additional construction. There was no amendment to the existing contract for the extension but Mr. Perry did extensive excavation for the extension and installed additional plumbing for it. In addition, the Central Air System that he was originally contracted to install was changed to a higher-end system that was much more costly than the central air system.

Mr. Perry completed the renovations on the 4th floor and most of the third floor was completed before Ms. Miyamoto moved into the 4th floor with her two children in March 2010. The walls and closets were framed throughout the building and five of the eight closets were almost finished. A makeshift kitchen had been put in place but was not finished. One of the bathrooms was finished on the fourth floor and all the plumbing throughout the building was completed. Before Ms. Miyamoto fired Mr. Perry the electrical work was completed for the entire building. The floor in the parlor needed to be polished and stained but the labor-intensive work involved in restoring the decorative ceiling medallion was completed. The garden floor required a complete replacement of the floor and this and the new moldings had not been completed before Mr. Perry was locked out. Mr. Perry had installed all but four of the windows and some sheet rocking still was required for the study but all the materials were already purchased and only the work needed to be done.

Ms. Miyamoto conceded that Mr. Perry did quality work but, when she had exhausted all of her money and the extension she wanted done was not near completion, she was advised by her architect to seek a loan. The bank issuing her the loan instructed her to hire a new contractor who was financially able to continue working until the banks engineers and inspectors approved of the work done. This type of loan required these approvals before any payment was to be made to the contractors and Mr. Perry did not have the financial ability to continue work without progress payments. Ms. Miyamoto fired Mr. Perry and changed the locks on the property so Mr. Perry could not complete the work pursuant to the contract. Mr. Perry was not notified that Ms. Miyamoto's was going to fire him and he was never able to retrieve some of the heating and plumbing equipment still in the building.

Although Mr. Perry had been paid approximately \$265,500, there was work still remaining to be completed which if given the opportunity he would have worked with Ms. Miyamoto to complete the job. After Mr. Perry was fired he filed Mechanics Liens against the consumer's property for monies he was owed for the work at the consumer's home for which he was not yet paid. Initially, Mr. Perry filed a lien on his own for just a portion of what he believed he was owed. However, after consulting with an attorney he was advised that he should file a lien for the total amount. Mr. Perry let the first lien lapse and then he filed a

second lien for the total amount of money he believed he was due from the consumer. The parties settled the pending Mechanics Lien prior to the hearing so that Ms. Miyamoto could apply for a loan.

Mr. Perry reviewed the new contract Ms. Miyamoto had obtained with Caribbean Contracting Corp. for completion of the work, which included the cost for the construction of the extension. Mr. Perry never contracted to construct an extension and he rebutted the itemized charges on the new contract that Ms. Miyamoto had obtained to complete the renovation of the house. Mr. Perry pointed out that in many instances he had already done the work that was listed on the contract and that the new contractor overcharged Ms. Miyamoto. Ms. Miyamoto was unaware what work was redone by the new contractor or that the new contractor had overcharged her. Ms. Miyamoto is seeking \$80,000 reimbursement for completion of the original contract with Mr. Perry.

Opinion

The Complainants have not established by a preponderance of the evidence that the respondent violated charges 1 through 5. Ms. Miyamoto fired Mr. Perry and locked him out of the work site without giving him the opportunity to complete the job. Ms. Miyamoto admitted that she had no issue with Mr. Perry's workmanship but that she exhausted all of her money and sought a loan to complete the renovations she wanted done. But, the loan she obtained required the contractor to carry sufficient financial reserves to pay for labor and any materials to continue with the project, thus requiring the contractor to wait to be paid until the approval of each segment of the project by the loan company's inspectors. Ms. Miyamoto asserted that Mr. Perry was not in any financial condition to do work on this basis and so she had to let him go despite the fact she felt the work he produced was good quality. Accordingly, since Ms. Miyamoto prohibited Mr. Perry from completing the contract, no restitution is ordered.

With respect to charge #6, the complainants did not establish the respondent willfully or intentionally violated the law by applying concrete that was not the proper thickness. As soon as Mr. Perry was made aware of the mistake, he replaced the existing concreted with the required thickness. Accordingly, the charge shall be dismissed.

With respect to charge #7, the complainants did not establish the violation since Mr. Perry and Ms. Miyamoto confirmed the record of the list of payments made on the contract and a copy of the contract signed by the parties is in evidence.

With respect to charge #8, the complainants did not establish a violation since the respondent and the consumer confirmed that the contract that they signed was prepared prior to any work being performed. Accordingly, the charge alleging a violation of 6 RCNY Section 2-221(a) shall be dismissed.

With respect to charge #19, the complainants did not produce evidence to establish that there existed a provision in the contract whereby the owner waived or was barred from asserting her rights. The contract does not include such language. Accordingly, the charge shall be dismissed.

With respect to charge #20, the respondent rebutted the charge. Mr. Perry was owed for his labor and for additional work performed outside of the scope of the contract for which he should be compensated. This included but was not limited to the excavation work for the extension and the extra costs for installing the heating system in place of the Central Air. Furthermore, Mr. Perry allowed the first lien to expire because it did not accurately reflect what he was due from the consumer. The second lien Mr. Perry filed included the total amount of what he believed he was due and did not exceed what he was owed. Accordingly, the charge shall be dismissed.

The respondent is not found in violation of Title 20 of the Administrative Code, Section 20-101 in that the respondent presented credible evidence at the hearing that rebutted many of the charges. Mr. Perry described in detail the attempts he made to work with the consumer who was dealing with financial difficulties. Furthermore, since the consumer prohibited the respondent from completing the contract when she could no longer afford to pay him, the respondent is not found in violation of this section. Based on Mr. Perry's willingness and availability to complete the contract, Ms. Miyamoto's decision to hire another contractor will not hold Mr. Perry responsible for any additional expenses Ms. Miyamoto may have incurred. Accordingly, this charge is not sustained and there is no suspension or revocation of the respondent's licenses.

However, the respondent's contract with the consumer is deficient since there are statements, disclosure clauses and the separate Notice of Cancellation Clause that are missing. Accordingly, the respondent is in violation of charges 9 through 18.

ORDER

CD500127055 AND DD500127055

Respondent, Mark Perry, is found **guilty** of charges numbered 9 through 18, and is hereby

Ordered to pay to the Department of Consumer Affairs a TOTAL FINE of \$2,200., as follows:

<u>Charge</u>	<u>Fine</u>
9. 6 RCNY §2-221(a)(1)	\$ 200.
10. 6 RCNY §2-221(a)(2)	\$ 200.
11. 6 RCNY §2-221(a)(3)	\$ 200.
12. 6 RCNY §2-221(a)(4)	\$ 200.
13. 6 RCNY §2-221(a)(5)	\$ 200.
14. 6 RCNY §2-221(a)(6)	\$ 200.
15. 6 RCNY §2-221(a)(8)	\$ 200.
16. 6 RCNY §2-221(a)(9)	\$ 200.
17. 6 RCNY §2-221(a)(10)	\$ 250.
18. 6 RCNY §2-221(b)	\$ 350.
TOTAL FINE	\$2,200.

The charges numbered 1 through 8 and 19 through 21 are dismissed.

This constitutes the recommendation of the Administrative Law Judge.

M. Mirro
Administrative Law Judge

DECISION AND ORDER

The recommendation of the Administrative Law Judge is approved.

This constitutes the Decision and Order of the Department of Consumer Affairs.

Failure to comply with this Order within 30 days shall result in the suspension of the licenses at issue.

James M. Plotkin
Deputy Director of Adjudication

Cc: Mark Perry
Via email: mark.proworks@gmail.com

Mieko Miyamoto
Via email: mishokili@gmail.com

Jennifer Huber, Esq.
DCA Staff Counsel

Via email:
jhuber@dca.nyc.gov **Mail payment**
in the enclosed envelope addressed
to:
NYC Department of Consumer 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. You may file your Appeal by email or regular mail, as follows:

BY EMAIL: Send your appeal to myappeal@dca.nyc.gov and, at the same time, mail the \$25 appeal fee, total fine (if not requesting a waiver) and restitution to: DCA Administrative Tribunal, 66 John Street, 11th Floor, New York, NY 10038. (Make sure to write the violation number(s) on your check or money order.) You may pay the fine online at www.nyc.gov/consumers, or mail a check or money order to: DCA, Collections Division, 42 Broadway, NY, NY 10004.

BY REGULAR MAIL: Send your appeal, appeal fee, total fine (if not requesting a waiver) and restitution to: : Director of Adjudication, Department of Consumer Affairs, 66 John Street, 11th Floor, New York, NY 10038. (Make sure to write the violation number(s) on your check or money order.) You may pay the fine online at www.nyc.gov/consumers, or mail a check or money order to: DCA, Collections Division, 42 Broadway, NY, NY 10004.

CONSUMER: 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. You may file your Appeal by email or regular mail, as follows:

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BY REGULAR MAIL: Send your appeal and the \$25 fee to: Director of Adjudication, Department of Consumer 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.