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RESIDENTIAL BUILDERS, MAINTENANCE AND ALTERATION CONTRACTORS: Filing of Complaints.

WORDS AND PHRASES: Occupancy.

Complaints against residential builders and maintenance and alteration contractors must be filed within 18 months from the time of purchase, occupancy, or completion, whichever occurs later, irrespective of the existence of a warranty.

In reference to a dwelling, occupancy means the presence of persons there as their customary place of abode; that is, their place of usual return and habitual stoppage.

The commission charged with enforcement of the residential builders, maintenance and alteration contractors licensing act may authorize the Department of Attorney General to accept receipt of citizen complaints.

Opinion No. 4782 April 30, 1975.

Mrs. Beverly J. Clark, Director
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You have requested my interpretation of section 9 and 9a of the residential builders and maintenance and alteration contractors licensing act, 1965 PA 383; MCLA 338.1501 *et seq;* MSA 18.86(101) *et seq.* You have asked three specific questions, which will be taken in their proper order.

I

> "Is the term 'occupancy' as used in Section 9 to be interpreted to mean constructive occupancy or right to occupancy, or does it mean actual occupancy by the owner?"

The term "occupancy" is not specifically defined in 1965 PA 383, *supra;* nor do the rules promulgated in conjunction with the act establish a working definition. Thus, the proper determination of the meaning of the term "occupancy" must be derived from its usage within the statute, while keeping cognizant of the statutory intent.

By enactment of 1974 PA 250, effective August 1, 1974, the Michigan legislature adopted a number of amendments to 1965 PA 383, *supra.* Among those provisions which were altered is section 9. While the amended provision, like its predecessor, fails to render a comprehensive definition of occupancy, the new language incorporated attempts to clarify and to fortify the intent of the legislation which focuses upon the protection of the homeowner. As presented in 1965 PA 383, § 9(1); MCLA 338.1509; MSA 18.86(109), the term "occupancy" is used in the following context:

> "The commission may, upon its motion or upon the complaint in writing of a person made within 18 months after *completion, occupancy, or purchase, whichever occurs later,* . . ." (emphasis added)

Clearly, the language of the amended provision serves to afford the homeowner greater latitude by permitting as flexible a time period as possible before the 18-month limitation begins to run. This is most crucial, as it grants the consumer ample opportunity for discovery of possible violations of the act by the builder.

How, then, is occupancy to be defined in keeping with its usage in section 9? When a term is not defined specifically in a statute or the rules accompanying the statute, the ordinary, everyday meaning of the word should be considered the intent of the legislature. RS 1846, ch 1, § 3a; MCLA 8.3a; MSA 2.212(1), states:

> "All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning."

Also, in *People* v *Smith,* 246 Mich 393, 396; 224 NW 402, 403 (1929), the court states:

> ". . . but when the legislature employs a common term as indicative of the purpose of an enactment, without further definition or designation, we must let the term speak its ordinary sense."

And, in *Black's Law Dictionary* (West Publishing Co rev 4th ed 1968), p 1231, "occupy" is defined as:

> "To take or enter upon possession of; to hold possession of; to hold or keep for use; to possess; to tenant; to do business in."

In addition to the common, everyday usage of the word "occupancy," the intent behind the passage of this legislation must be considered if the term's true meaning is to be derived. With regard to 1965 PA 383, *supra,* the courts have consistently held that it is a consumer protection statute. As such, it must be liberally construed in favor of the consumer. The Michigan Supreme Court, in *Tracer* v *Bushre,* 381 Mich 282, 290; 160 NW2d 898, 901 (1968), states:

> "The residential builders law is essentially a consumer protection measure. . . ."

Also, in *Artman* v *College Heights Mobile Park, Inc,* 20 Mich App 193, 199; 173 NW2d 833, 836 (1969), the Michigan Court of Appeals, quoting the Supreme Court in *Tracer* v *Bushre, supra,* states:

> ". . . This interpretation is in harmony with that of the Supreme Court, that the residential builders act is essentially a 'consumer protection measure.' "

Therefore, the term "occupancy" must be interpreted so as to give the homeowner the advantage in the determination of when occupancy is commenced. This is essential if the consumer is to have adequate opportunity to discover possible violations of the act which could give rise to the filing of a complaint.

Constructive occupancy would not grant this opportunity to the consumer. Therefore, the occupancy must be said to be actual before the

18-month time limit may begin to run. This concept receives support in *Morgan* v *Illinois Insurance Co,* 130 Mich 427, 430; 90 NW 40, 41 (1902), where the Michigan Supreme Court, quoting a judge's charge to the jury, states:

> ". . . 'I will tell you what the law means by "vacant or occupied," in reference to a dwelling house. For a dwelling house to be in a state of occupation, there must be in it the presence of human beings as at their customary place of abode; not absolutely and uninterruptedly continuous, but that must be the place of usual return and habitual stoppage. It is not sufficient, therefore, that furniture, tools, or other chattels may be left in the building, or that it is occasionally visited or inspected by some one, or is used and controlled, though not inhabited, by a tenant, or is used temporarily as a place of abode, or that unsuccessful efforts have been made to procure an occupant; . . ."

Again, it is to be understood that actual occupancy does not presume completion. Thus, even though a consumer may be occupying a structure, its degree of completion may yet be a point of controversy, thus affording him protection under 1965 PA 383, § 9, *supra.* This concept is furthered in *American & Foreign Insurance Co* v *Allied Plumbing & Heating Co,* 36 Mich App 561, 565; 194 NW2d 158, 161 (1971), where the court states:

> ". . . Ordinarily a building is not 'completed' until it is ready for the use or occupancy for which it was intended, and is not 'occupied' until it is put to a practical and substantial use for which it was designed. . . ."

This approach must be adopted if the intent of 1965 PA 383, *supra,* is to be served.

II

> "Does Section 9a require that the homeowner submit a verified complaint within 90 days after the termination of an express warranty between the homeowner and licensee, or is it sufficient for the homeowner to make a written complaint to the department and the department proceed in accordance with Rule 51?"

Effective August 1, 1974, the Michigan legislature enacted amendments to 1965 PA 383, *supra.* Among the amended provisions were sections 9 and 9a. Section 9 now provides for the filing of complaints by persons within 18 months after completion, occupancy, or purchase, whichever occurs later. Section 9a in its previous form has been deleted and now establishes the alternative of restricted licenses which may be issued by the Commission.

With the enactment of these amendments, all references to express warranties or warranties of any kind have been deleted. Therefore, all complaints are to be filed according to the language of 1965 PA 383, § 9, *supra;* the Commission to proceed in accordance with rule 51, being Administrative Code 1966 AACS, R 338.1551.

III

"If the homeowner's written complaint was filed by the homeowner with the Attorney General's office and sent by it to the Department, can receipt of the complaint by the Attorney General's office be considered receipt by the Department?"[1]

The complaint filing process is outlined in 1965 PA 383, § 9; MCLA 338.1509; MSA 18.86(109), which states in pertinent part:

"(1) The commission may, upon its motion or upon the complaint in writing of a person made within 18 months after completion, occupancy, or purchase, whichever occurs later, of a residential or a combination of residential and commercial building, investigate the actions of a residential builder, residential maintenance and alteration contractor, salesman, or any person who shall assume to act in such capacity within this state, . . .

"(2) The home owner or occupant or his representative may file a complaint pertaining to faulty workmanship or structural defects of a building which shall be considered by the commission after a written evaluation of the complaint has been submitted, on a form provided by the commission, by the authority charged with the enforcement of the laws governing construction of residential or residential and commercial buildings in the political subdivision in which the building is located. . . ."

And, in rule 51, Administration Code 1966 AACS, R 338.1551, which states:

"(1) A complaint shall be in writing, signed by the party filing it and submitted to the bureau of regulation of the department. The department shall provide forms for submitting complaints.

"(2) Upon receipt of a valid and written complaint, the department shall assign a complaint number, acknowledge the complaint and forward a copy of the complaint to the licensee. He shall reply to the department within 15 days from receipt of the complaint and shall confirm or deny the justification of the complaint. A complaint acknowledged as justified shall be corrected within a reasonable time. If a complaint or portion thereof is not acknowledged by the licensee as being justified, the department shall notify the complainant of the area of disagreement."

Clearly, the intent of the act is to establish a regulatory bureau which is charged specifically with the authority and responsibility of its enforcement. This concept is supported in the language of the title to 1965 PA 383, *supra*:

"AN ACT to provide for the licensing and rights of any person to engage in business as a residential builder or residential maintenance and alteration contractor or salesman; to prescribe the duties and

[1] Please note that due to the recent amendment to 1965 PA 383, §§ 9, 9a, question II as it was originally submitted is now moot. Therefore, the language of question III has been altered from its original form so as to delete any reference made to question II.

powers of the corporation and securities commission relative thereto; to fix the standards of qualifications and eligibility for the practice thereof; *to create a state residential builders' and maintenance and alteration contractors' board,* to authorize the collection for the violation of this act; . . ." (emphasis added)

The state Residential Builders and Maintenance and Alteration Contractors Board together with the Department of Licensing and Regulation constitute the Commission which is the regulatory body which acts upon its own motion or upon receipt of a written complaint.

The role of the Department of Attorney General must be viewed in conjunction with that of the Commission. The Department of Attorney General aids in the enforcement of the act. Specifically, the role of the Attorney General is outlined in 1965 PA 383, § 16a; MCLA 338.1516a; MSA 18.86(116a), which reads in pertinent part as follows:

"(1) All law enforcement officers of this state shall enforce the licensing requirements of this act. The prosecuting attorneys *and the attorney general shall prosecute a person violating the licensing requirements of this act.* . . .

"(2) The *attorney general* or the prosecuting attorney of the county in which a licensing violation occurs *may bring an action in the name of the state* . . .

"(3) The *attorney general,* or with his consent a prosecuting attorney, may accept an assurance of discontinuance of an act or practice deemed in violation of the licensing requirements from a person engaging in, or who has engaged in, the act or practice. An assurance shall be in writing and filed with and subject to the approval of the circuit court of the county in which the alleged violator resides or has his principal place of business. Failure to perform the terms of an assurance constitutes prima facie proof of a violation of the licensing requirements of this act for the purpose of securing an injunction as provided in subsection (2). After commencement of an action by a prosecuting attorney, the attorney general may not accept an assurance of discontinuance without the consent of the prosecuting attorney." (emphasis added)

It is clear that the function of the Commission is to enforce 1965 PA 383, *supra.* It is also plainly evident that by virtue of specific provisions under the act, the Department of Attorney General acts as legal counsel, assisting and advising in any and all legal undertakings, be they in the agency itself or in the courts.

While the Commission is solely concerned with the enforcement of 1965 PA 383, *supra,* the Department of Attorney General acts as the chief law enforcement agency for the state; and it is responsible for overseeing the operations concerning the enforcement of the total spectrum of laws and statutes within the state. As such, the Attorney General, both by virtrue of 1965 PA 383, *supra,* and his duties as the chief law enforcement officer in the state, is necessarily concerned with agency actions as well as those arising in the courts.

More importantly, 1965 PA 383, *supra,* was conceived as a consumer protection measure. In keeping with that objective, every efforts and interpretation should be rendered which will best promote that concept. Thus, a consumer may register a complaint with the Department of Attorney General in the belief that the chief law enforcement agency is the proper place of filing. The time necessitated to re-route the complaint to the Commission's address could result in the expiration of the 18-month statute of limitations for filing complaints. To conclude that the complaint is not properly filed until it reaches the Commission may work a hardship upon the consumer. In such instances where the time expires while the complaint is enroute to the Commission, the consumer would be left without recourse despite the fact that the grievance was brought to the attention of the chief law enforcement agency and counsel to the Commission. Such a result would be unconscionable, causing the regulatory function to turn on matters of insignificant distinction and procedure. The language of the statute is cogent and clear on this issue, and to that extent, any other interpretation is not acceptable. Yet, another alternative may be proposed which serves to protect the consumer interest while adhering to the language of the statute.

While it is required by rule that the complaint be filed with the Bureau of Regulation of the Department of Licensing and Regulation, the Commission may delegate to the Department of Attorney General the authority to accept the complaint on its behalf. Such an authorization is in keeping with the Department of Attorney General's role as legal counsel. Thus, in this agency relationship, the Commission could establish authorization in writing to the extent that receipt of a complaint by the Department of Attorney General would constitute receipt of the complaint by the Bureau of Regulation of the Department of Licensing and Regulation. This would then toll the running of the 18-month statute of limitation provision.

There is support for such action by the Commission in case law. In *Katz* v *Kowalsky,* 296 Mich 164, 170; 295 NW 600, 603 (1941), the court states:

> ". . . Ordinarily, where a client is represented by an attorney, knowledge acquired by the attorney while acting within the scope of his authority is, by fiction of law, the knowledge of the client. . . ."

And, in *Kastle* v *Clemons,* 330 Mich 28, 32; 46 NW2d 450, 451 (1951), the court held:

> "Notice to an attorney relevant to a given matter is notice to the client employing him in relation to such matter. (citation omitted)"

Thus, the Commission may authorize the Department of Attorney General to accept receipt of citizen complaint.

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Attorney General.