

IN THE MATTER OF
MARQUISE CONSTRUCTION CORP.

Prime Contractor

and

MICHAEL KUSNIR d/b/a KUSNIR CONSTRUCTION

Subcontractor

for a determination pursuant to Article 8 of the Labor Law as to whether prevailing wages and supplements were paid to or provided for the workers employed on a public work project known as the construction of additions to, and alterations of, the Vista Firehouse, in South Salem, New York.

**DEFAULT
REPORT
&
RECOMMENDATION**

**Prevailing Rate Case
Case No. 2009001029
PW 2010017075**

Westchester County

To: Honorable Peter M. Rivera
Commissioner of Labor
State of New York

Pursuant to a Notice of Hearing issued in this matter, a hearing was held on June 13, 2012, in Albany, New York and by videoconference with White Plains, New York. The purpose of the hearing was to provide all parties an opportunity to be heard on the issues raised in the Notice of Hearing and to establish a record from which the Hearing Officer could prepare this Report and Recommendation for the Commissioner of Labor.

The hearing concerned an investigation conducted by the Bureau of Public Work ("Bureau") of the New York State Department of Labor ("Department") into whether Michael Kusnir, doing business as Kusnir Construction ("Sub") a subcontractor of Marquise Construction Corp. ("Prime"), complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) in the performance of a public work contract involving the

construction of additions to, and alterations of, the Vista Firehouse, in South Salem, New York (“Project”) for Vista Fire District Number 1 (“Department of Jurisdiction”).

APPEARANCES

The Bureau was represented by Acting Department Counsel, Pico Ben-Amotz, (Louise Roback, Senior Attorney, of Counsel)

There was no appearance made by or on behalf of Sub.

There was no appearance made by or on behalf of Prime.

FINDINGS AND CONCLUSIONS

On April 3, 2012, the Department duly served a copy of the Notice of Hearing on Prime and Sub, via regular and certified mail, return receipt requested. A signed Return Receipt evidencing receipt of the document by Prime was entered into evidence as Hearing Officer Exhibit 2. The regular mail envelope sent to Sub was not returned to the Department. The Notice of Hearing scheduled a June 13, 2012, hearing and required the Respondents to serve an Answer at least 14 days in advance of the scheduled hearing.

Prime and Sub failed to file an Answer to the charges contained in the Notice of Hearing or to appear at the hearing. As a consequence, Prime and Sub are in default in this proceeding.

The Notice of Hearing alleges that Sub underpaid wages and supplements to its workers and that Prime is responsible for Sub’s underpayment pursuant to Labor Law § 223.

At the hearing, the Department produced substantial and credible evidence, including the sworn testimony of the Bureau investigator, employees of Sub, and documents describing the underpayments, which supported the Bureau’s charges that:

Sub willfully underpaid \$132,795.26 to its workers for the audit period weeks ending February 13, 2010 through July 17, 2010; and

Sub falsified its payroll records in connection with that willful underpayment; and

Michael Kusnir was the sole owner of the business called Kusnir Construction;
and

Michael Kusnir knowingly participated in the violation of Labor Law article 8.

On November 23, 2011, the Department issued a Notice to Withhold Payment to the Department of Jurisdiction in the amount of \$186,891.74.

For the foregoing reasons, the findings, conclusions and determinations of the Bureau should be sustained.

RECOMMENDATIONS

Based upon the default of the Respondents in answering or contesting the charges contained in the Department's Notice of Hearing, and upon the sworn and credible testimonial and documentary evidence adduced at hearing in support of those charges, I recommend that the Commissioner of Labor make the following determinations and orders in connection with the issues raised in this case:

DETERMINE that Sub underpaid its workers \$ 132,795.26 on the Project; and

DETERMINE that Sub is responsible for interest on the total underpayment at the statutorily mandated rate of 16% per annum from the date of underpayment to the date of payment; and

DETERMINE that the failure of Sub to pay the prevailing wage or supplement rate was a "willful" violation of Labor Law article 8; and

DETERMINE that the willful violation of Sub involved the falsification of payroll records under Labor Law article 8; and

DETERMINE that Michael Kusnir was the sole owner of Kusnir Construction;
and

DETERMINE that Sub be assessed a civil penalty in the Department's requested amount of 25% of the underpayment and interest due; and

DETERMINE that Prime is responsible for the underpayment, interest and civil penalty due pursuant to its liability under Labor Law article 8; and

ORDER that the Bureau compute the total amount due (underpayment of \$132,795.26, interest at 16% from date of underpayment and 25% civil penalty); and

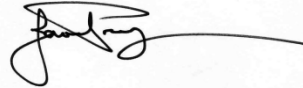
ORDER that Department Of Jurisdiction remit payment of any withheld funds to the Commissioner of Labor, up to the amount directed by the Bureau consistent with its computation of the total amount due, by forwarding the same to the Bureau at: 120 Bloomingdale Road, Room 204, White Plains, NY 10605; and

ORDER that if the withheld amount is insufficient to satisfy the total amount due, Sub, upon the Bureau's notification of the deficit amount, shall immediately remit the outstanding balance, made payable to the Commissioner of Labor, to the Bureau at the aforesaid address; and

ORDER that the Bureau compute and pay the appropriate amount due for each employee on the Project, and that any balance of the total amount due shall be forwarded for deposit to the New York State Treasury.

Dated: August 2, 2012
Albany, New York

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Jerome Tracy', with a long horizontal line extending to the right.

Jerome Tracy, Hearing Officer