

MARYLAND HOME IMPROVEMENT * BEFORE DAVID HOFSTETTER,
 COMMISSION * AN ADMINISTRATIVE LAW JUDGE
 v. * OF THE MARYLAND OFFICE
 HOWARD H. McLEAN, t/a * OF ADMINISTRATIVE HEARINGS
 H.H. McLEAN, * OAH CASE NO.: DLR-HIC-01-10-39749
 RESPONDENT * MHIC CASE NO.: 08 (70) 430

* * * * *

RECOMMENDED DECISION

STATEMENT OF THE CASE
 ISSUES
 SUMMARY OF THE EVIDENCE
 FINDINGS OF FACT
 DISCUSSION
 CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On August 28, 2007, Peggie Protos (Complainant) filed a complaint with the Maryland Home Improvement Commission (Commission or MHIC) against Howard McLean (Respondent), t/a H.H. McLean. On October 20, 2010, the Commission issued charges against the Respondent based on the complaint. In its charging document, the Commission alleged that the Respondent violated Business Regulation Article¹ §§ 8-301(a) and 8-501(c)(1)(iii) and (viii).

On April 8, 2010, I conducted a hearing at the Office of Administrative Hearings (OAH) facility in Wheaton, Maryland. Business Regulation § 8-312(a) (2010). Eric

¹ Throughout this decision, Annotated Code of Maryland, Business Regulation Article §§ 8-101 to 8-702 (2010) are referred to as "Business Regulation." CHECK

London, Assistant Attorney General, represented MHIC. The Respondent did not appear at the hearing.

The contested case provisions of the Administrative Procedure Act, the procedures for hearings on behalf of the Secretary of the Department of Labor, Licensing and Regulation, and the OAH Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009); Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02 and 28.02.01.

ISSUES

1. Did the Respondent act as a home improvement contractor without a valid home improvement contractor's license;
2. Did the Respondent fail to use a proper written home improvement contract that required information regarding approximate start and completion dates of the project and notice which provides the telephone number of MHIC and states that each contractor or subcontractor must be licensed and that anyone may ask MHIC about a contractor or subcontractor; and, if so,
3. What sanction is appropriate?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the Commission:

HIC 1: Notice of Hearing, dated November 10, 2010

HIC 2: Notice of Hearing, dated November 10, 2010; Statement of Charges, dated October 20, 2010; certified mail envelope and "green card," returned to OAH by United States Postal Service as "Attempted -Not Known" and received at OAH on November 15, 2010

HIC 3: Affidavit of Tom Marr, dated March 7, 2011

HIC 4: Statement of Charges, dated October 20, 2011

HIC 5: Letter from the Commission regarding Respondent's licensing status, dated March 21, 2008

HIC 6: Contract between the Respondent and the Complainant, dated October 13, 2006

HIC 7: Complaint Form, dated August 27, 2007

HIC 8: District Court case information print-out, dated March 7, 2011

HIC 9: Respondent's MHIC licensing history, March 7, 2011

The Respondent did not appear for hearing and offered no exhibits.

Testimony

The Commission presented the Complainant, Peggie Protos, as a witness. The Respondent did not appear at the hearing and no one testified on his behalf.

FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. The Respondent has never held a valid Maryland home improvement contractor's license.
2. On or about October 13, 2006, the Complainant and the Respondent entered into a home improvement contract (the Contract) in which the Respondent agreed to remove and replace a concrete driveway at the Complainant's residence at 1310 Midwood Place, Silver Spring, Maryland. (the Property).
3. The total contract price was \$8,500.00 and the Complainant paid the full Contract price to the Respondent in multiple installments.
4. The Contract did not provide for approximate start and substantial completion dates.
5. The Contract did not include the telephone number for the Commission, nor did the Contract advise the Complainant that she had the right to ask the

Commission about the Respondent and any subcontractors used by the Respondent. Additionally, the Contract did not contain any statements indicating that the Respondent and any subcontractors used by him must be licensed by MHIC.

6. The Respondent started the work about one week after the Contract was signed and completed work about ten days later.
7. The construction of the driveway was performed in an unworkmanlike manner in the following particulars: cracks and breakage appeared shortly after he completed the work; the left side of the driveway did not harden properly, leaving the surface unstable and making walking difficult; the driveway was not properly graded and large pools of water appeared after it rained.
8. The Complainant brought the problems with the driveway to the Respondent's attention and he promised to correct the problems, but never did so.
9. After numerous discussions with the Complainant, the Respondent agreed to refund her the money she had paid him.
10. In various payments, the Respondent eventually refunded to the Complainant \$4,800.00 but has made no additional payments.
11. In March 2007, the Complainant hired Jopal Construction, Inc. (Jopal), a licensed home improvement contractor, to correct and repair the Respondent's work. The Complainant paid Jopal \$15,000.00 and Jopal constructed the driveway in a workmanlike fashion.

DISCUSSION

The burden of proof in this case is by a preponderance of the evidence and rests with the Commission as the moving party. Md. Code Ann., State Gov't §10-217 (2009); *Commissioner of Labor and Ind. v. Bethlehem Steel Corp.*, 344 Md. 17, 684 A.2d 845 (1996). The Commission has shown by a preponderance of the evidence that the Respondent violated Business Regulation § 8-301(a) (2010) by performing home improvement work as an unlicensed contractor. The Commission has further shown by a preponderance of the evidence that the Respondent violated Business Regulation § 8-501(c) (2010) by using a written contract that did not contain the minimum required information. Consequently, the Respondent is subject to civil penalties under Business Regulation § 8-620 (2010).

I. Respondent's Failure to Appear

The OAH sent Notice of Hearing, dated November 10, 2010, to the Respondent via first class and certified mail, return receipt requested, to his address at 4401-A Connecticut Avenue, N.W., Washington, D.C. 20008. This is the address printed on the Contract (HIC Ex. 6), as well as the address listed in the records of the Maryland Motor Vehicle Administration (MVA). HIC Ex. 3. The first class mail notice was not returned to OAH, evidencing receipt. The certified mail copy was returned to OAH as "Attempted/Not Known." HIC Ex. 2.

COMAR 28.02.01.05A requires that "reasonable notice of the hearing shall be provided to the parties" in hearings before the OAH. Business Regulation § 8-312(h) provides that, hearings related to the home improvement statute, "[i]f after due notice, the person against whom the action is contemplated does not appear, nevertheless the

Commission may hear and determine the matter.” By sending the hearing notice to the address on the contract supplied by the Respondent himself (which is also the address on record with MVA), I conclude that the Respondent received reasonable and due notice and that the hearing properly proceeded despite his failure to appear.

II. Regulatory Charges

Performing Work as an Unlicensed Contractor

Business Regulation § 8-301(a) provides:

§ 8-301. License required; exceptions.

(a) *Contractor license* -- Except as otherwise provided in this title, a person must have a contractor license whenever the person acts as a contractor in the State.

Business Regulation § 8-101(c) (2010) defines “contractor”:

(c) *Contractor*. – “Contractor” means a person, other than an employee of an owner, who performs or offers or agrees to perform a home improvement for an owner.

Business Regulation § 8-101(g)(1) (2010) defines “home improvement”:

(g) *Home improvement*. – (1) “Home improvement” means:

- (i) the addition to or alteration, conversion, improvement, modernization, remodeling, repair, or replacement of a building or part of a building that is used or designed to be used as a residence or dwelling place or a structure adjacent to that building; or
- (ii) an improvement to land adjacent to the building.

The evidence demonstrates that the Respondent agreed to perform home improvement work without first being duly licensed as a contractor. The demolition of an existing driveway and the construction of a new one is clearly “home improvement” within the meaning of the statute. Consequently, I find that the Respondent’s conduct violated Business Regulation § 8-301(a).

Violations as to the Form of the Contract

Business Regulation § 8-501(c), in pertinent part, states:

(c) *Contents* – (1) In addition to any other matters on which the parties lawfully agree, each home improvement contract shall contain:

...

- (ii) the approximate dates when the performance of the home improvement will begin and when it will be substantially completed;

...

- (viii) a notice that gives the telephone number of the Commission and states that:

1. each contractor and each subcontractor must be licensed by the Commission; and
2. anyone may ask the Commission about a contractor or subcontractor.

The Contract does not contain any information about the Commission, the Respondent's licensure status, the licensure status of any of the Respondent's subcontractors, or information about approximate start and completion dates. Therefore, I find that the Respondent's contract violates Business Regulation § 8-501(c).

III. Penalties

The Respondent is not subject to sanction pursuant to Business Regulation § 8-311 because that section applies only to applicants and licensees. Md. Code Ann., Bus. Reg. § 8-311(a) (2010). The Respondent is neither. Business Regulation § 8-620 (2010), on the other hand, provides that the Commission may impose a civil penalty for any violation of Title 8 of the Business Regulation Article. Specifically, section 8-620 states:

Civil Penalties.

(a) *In general.* The Commission may impose on a person who violates this title, including § 8-607(4) of this subtitle, a civil penalty not exceeding \$5,000 for each violation, whether or not the person is licensed under this title.

(b) *Considerations.* In setting the amount of a civil penalty, the Commission shall consider:

- (1) the seriousness of the violation;
- (2) the good faith of the violator;
- (3) any previous violations;
- (4) the harmful effect of the violation on the complainant, the public, and the business of home improvement;
- (5) the assets of the violator; and
- (6) any other relevant factors.

As the Respondent violated the provisions of Business Regulation §§ 8-301(a) and 8-501(e), he is subject to civil penalties.

Regarding Factor (1), I conclude that the Respondent's violations are serious. He accepted \$8,500.00 from the Complainant and completed the job in an unworkmanlike manner which necessitated completely removing his work and starting the job over from scratch. His failure to be licensed is particularly serious in that it resulted in a loss by the Complainant which is not compensable by the Home Improvement Commission Guaranty Fund.

Regarding Factor (2), the Respondent initially showed some measure of good faith by agreeing to refund the Complainant's payments. Although he did eventually return some of the Complainant's money, the amount returned is far short of both the amount she paid the Respondent and her actual loss. In addition, the Respondent's failure to appear for the

hearing to answer to the charges levied against him is further evidence of bad faith, as is the very fact that he performed home improvement work without a license.

Regarding prior violations (Factor (3)), the Commission presented evidence (HIC Ex. 8) showing that in 2000, the Respondent was charged with a criminal violation for acting as a contractor without a license. Because the charge resulted in a disposition of *nolle prosequi*, I do not consider the criminal charge in recommending an appropriate civil penalty.

Regarding Factor (4), the harmful effect of the violation on the Complainant, the public, and the business of home improvement, the Complainant was significantly harmed by the substantial loss of funds, as well as the inconvenience and annoyance resulting from the Complainant's acts. I conclude that the public was unharmed by Respondent's violations but that the home improvement business was harmed in the same manner and to the same extent that it is always harmed by serious violations of the statute which cause damage to the reputation and status of the home improvement industry and licensees of the Commission.

Regarding Factor (5), there was no evidence of the assets of the Respondent, and therefore I unable to consider this factor. Regarding Factor (6), there was no evidence of any other relevant factors which should be considered in determining a penalty.

The Commission asked that the following penalties be assessed against the Respondent: a \$5,000.00 penalty for the violation of Business Regulation § 8-301(a), and a \$1000.00 penalty for each of the two violations of Business Regulation § 8-501(c)(1)(iii) and (viii). Based on the facts of this case, and after a careful review of the

statutory factors, I agree. Therefore, I recommend that the Commission impose the penalty amounts noted above, for a total civil penalty of \$7,000.00.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Respondent did act in violation of Business Regulation §§ 8-301(a) and 8-501(c)(1)(iii) and (viii) (2010).

I further conclude as a matter of law that the Respondent is not subject to sanctions under Business Regulation § 8-311 (2010).

I further conclude as a matter of law that the Respondent is subject to sanction under Business Regulation § 8-620 (2010).

RECOMMENDED ORDER


I RECOMMEND that the Maryland Home Improvement Commission:

FIND that the Respondent violated Business Regulation §§ 8-301(a) and 8-501(c)(1)(iii) and (viii); and, be it further,

ORDERED that the Respondent pay a civil statutory penalty of \$7,000.00, pursuant to Business Regulation § 8-620; and be it further,

ORDERED that the records and publications of the Maryland Home Improvement Commission reflect this decision.

June 30, 2011
Date Decision Mailed


David Hofstetter
Administrative Law Judge

DH/rbs
#121942

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FILE EXHIBIT LIST

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The Respondent did not appear for hearing and offered no exhibits.

PROPOSED ORDER

WHEREFORE, this 8th day of August 2011, Panel B of the Maryland Home Improvement Commission approves the Recommended Order of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, then this Proposed Order will become final at the end of the twenty (20) day period. By law the parties then have an additional thirty (30) day period during which they may file an appeal to Circuit Court.

Marilyn Jumalon

*Marilyn Jumalon
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION