

IN THE MATTER OF THE CLAIM OF	*	BEFORE YOLANDA L. CURTIN,
RAYMOND A. GABLER	*	AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND HOME	*	OF THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND	*	OF ADMINISTRATIVE HEARINGS
FOR THE VIOLATIONS OF	*	OAH NO.: DLR-HIC-02-08-46301
DAVID B. BARKLEY, T/A OMEGA	*	MHIC NO.: 08 (75) 812
CONSTRUCTION & REMODELING	*	
* * * * *		

RECOMMENDED DECISION

STATEMENT OF THE CASE
ISSUE
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
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CONCLUSION OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On March 5, 2008, Raymond A. Gabler (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$24,448.00 for actual losses suffered as a result of home improvement work performed by David B. Barkley *t/a* Omega Construction & Remodeling (Respondent).

I held a hearing on April 29, 2009, at the Laurel Executive Center in Laurel, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(c)(2) (2004 & Supp. 2008). Jessica Kaufman, Assistant Attorney General, Department of Labor, Licensing and Regulation, represented the

MHIC Fund. The Claimant represented himself. The Respondent failed to appear after proper notice of the hearing was sent to him at his address of record.¹

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department of Labor, Licensing and Regulation (DLLR), and the Rules of Procedure of the Office of Administrative Hearings. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2004 & Supp. 2008), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02.01; and 28.02.01.

ISSUE

Did the Claimant sustain an actual loss compensable by the Fund as a result of the acts or omissions of the Respondent?

SUMMARY OF THE EVIDENCE

Exhibits

The Claimant submitted the following exhibits that were admitted in evidence:

- Cl. #1 - Letter from Claimant to MHIC, dated October 12, 2007
- Cl. #2 - Letter from MHIC to Claimant, dated November 24, 2008, with attachments
- Cl. #3 - Letter from MHIC to Claimant, dated November 19, 2007, with attachments
- Cl. #4 - Claimant's contract with Respondent, with attachments
- Cl. #5 - Letters from Respondent to Claimant, dated February 20, 2007 and October 3, 2007
- Cl. #6 - Email from White Wave Builders to Claimant, dated December 6, 2007

¹ Notices were sent to the Respondent's address of record with the MHIC, by both certified and regular mail. The certified and regular mail was received by the Respondent. See Fund Ex. #1. Therefore, at the hearing I concluded that the Respondent had received proper notice of the hearing and he failed to appear. Accordingly, I proceeded with the hearing without his presence. Md. Code Ann., Bus. Reg. § 8-312(c) (2004).

- Cl. #7 - Letter from White Wave Builders to Claimant, undated
- Cl. #8 - Photocopies of pictures (originals attached)
- Cl. #9 - Copy of check made payable to Cuttery Edge Tree Experts
- Cl. #10 - White Wave Builders Contract

The Fund submitted the following exhibits that were admitted in evidence:

- Fund #1 - Notice of Hearing, dated February 6, 2009, with attached certified mail receipt.
- Fund #2 - DLLR transmittal form to OAH, with attached Hearing Order
- Fund #3 - Licensing history for Respondent through DLLR
- Fund #4 - Letter from MHIC to Respondent, dated March 27, 2008, with attached Claim Form

No exhibits were admitted in to evidence on behalf of the Respondent.

Testimony

The Claimant testified in his own behalf.

No additional testimony was presented by the Fund or on behalf of the Respondent.

FINDINGS OF FACT

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

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor.²
2. On December 15, 2006, the Claimant and Respondent entered into a contract to have the Respondent construct an addition on the Claimant's residence. The scope of the work to be performed included: construct a basement, sunroom and sitting room; demolish and construct a new deck; move outside existing sliding door and install stamped concrete

² DLLR records indicate that the Respondent's license is currently suspended. See GF Ex. #3.

- outside sliding door; install carpet on second and upper level; provide all electrical and HVAC; and install asphalt shingles and vinyl siding.
3. Additional terms of the contract required the Respondent to clean up and remove all debris arising from the construction work.
 4. The total cost of the contract was \$49,360.00.
 5. As required by the terms of the contract, the Claimant made a deposit payment of \$9,872.00 to the Respondent on the date the contract was signed. On June 14, 2007, as required by the terms of the contract, the Claimant made a second payment on the contract in the amount of \$4,936.00.
 6. The total amount paid by the Claimant to the Respondent was \$14,808.00.
 7. Between the period of August 31, 2007 and October 10, 2007, the Respondent performed some work on the contract. He removed two trees, partially excavated the ground, demolished the deck and set up the frame for the footers.
 8. On October 11, 2007, the Claimant received a telephone call from the Respondent who informed the Claimant that he could not complete the contract because of financial constraints. Thereafter, the Respondent sent the Claimant a letter informing him that his company was going out of business.
 9. After October 10, 2007, the Respondent performed no further work on the contract.
 10. After the Respondent abandoned the contract, the Claimant paid \$425.00 to a tree removal company to remove excess limbs and tree trunks that were left on the property by the Respondent.

11. The Claimant hired and paid White Wave Builders to complete the addition and to correct some work performed by the Respondent. The footers that the Respondent had installed were incorrect and had to be modified by White Wave Builders.
12. The total cost of the work performed by White Wave Builders was \$56,000.00.³
13. The value of the work performed by the Respondent is \$3,081.00, which does not include any amount for the incorrect footers.
14. The Claimant suffered an actual loss in an amount greater than \$20,000.00.

DISCUSSION

Section 8-405(a) of the Business Regulation article provides that an owner may recover compensation from the Guaranty Fund, “for an actual loss that results from an act or omission by a licensed contractor[.]” Actual loss means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement. Md. Code Ann., Bus. Reg. § 8-401 (2004).

COMAR 09.08.03.03B governs the calculation of awards from the Fund:

- (1) The Commission may not award from the Fund any amount for:
 - (a) Consequential or punitive damages;
 - (b) Personal injury;
 - (c) Attorney’s fees;
 - (d) Court costs; or
 - (e) Interest.
- (2) The Fund may only compensate claimants for actual losses they incurred as a result of misconduct by a licensed contractor.
- (3) Unless it determines that a particular claim requires a unique measurement, the Commission shall measure actual loss as follows:

³ The contract price was actually \$59,000.00; however, the figure included trim work that the Claimant opted not to have done.

(a) If the contractor abandoned the contract without doing any work, the claimant's actual loss shall be the amount which the claimant paid to the contractor under the contract.

(b) If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor.

(c) If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant's actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to any reasonable amounts the claimant has paid or will be required to pay another contractor to repair poor work done by the original contractor under the original contract and complete the original contract, less the original contract price. If the Commission determines that the original contract price is too unrealistically low or high to provide a proper basis for measuring actual loss, the Commission may adjust its measurements accordingly.

For the reasons discussed below, I find that the Claimant has established that the Respondent abandoned the contract, and that as a result of his actions the Claimant has suffered an actual loss.

The undisputed evidence in this case, which is supported by the testimony of the Claimant and the documentary evidence, establishes that the Claimant paid the Respondent \$14,808.00 on the contract and the Respondent performed \$3,081.00 work on the contract and then he abandoned the contract. In addition, although the Respondent performed some work on the contract, the value of the work performed was less than the full amount paid by the Claimant. Moreover, as the documentary evidence shows, some of the work performed by the Respondent had to be redone because of incorrect work performed by the Respondent. *See* Claimant Ex. #6.

Since the work was left incomplete by the Respondent, the Claimant was forced to hire and pay another contractor to finish the work. In addition, since the Respondent abandoned the job and left debris on the property that had to be removed, the Claimant spent additional monies

in hiring a tree removal service to clean up the debris caused by the Respondent's work. In total, the Claimant spent \$15,233.00 (payments made to the Respondent plus cost of debris removal) on the original contract with the Respondent. Moreover, he spent an additional \$56,000.00 to have White Wave Builders correct the footers and complete the work.

Thus, in light of the evidence presented at the hearing, I find that recovery from the Fund is appropriate. As argued by the Fund, the applicable formula to use to determine the appropriate recovery amount is at COMAR 09.08.03.03B(3)(c), since the Claimant hired another contractor to complete the work abandoned by the Respondent. Using that formula, the following calculation applies:

Amounts paid on the original contract	\$15,233.00
Plus cost to complete the work	+ 56,000.00
	71,233.00
Less the original contract price	- 49,360.00
Actual loss	\$21,873.00

The actual loss suffered by the Claimant exceeds the statutory limit of \$20,000.00.

Accordingly, recovery from the Fund in the amount of \$20,000.00 is appropriate.

CONCLUSION OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Claimant has sustained an actual loss in an amount greater than \$20,000.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401.

RECOMMENDED ORDER


I RECOMMEND that the Maryland Home Improvement Commission:

ORDER that the Claimant be awarded \$20,000.00 from the Maryland Home Improvement Guaranty Fund; and

ORDER that the Respondent be ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Guaranty Fund for all monies disbursed under this Order plus annual interest of at least ten percent as set by the Commission. Md. Code Ann., Bus. Reg. § 8-411 (2004); and

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

July 13, 2009
Date Decision Mailed



Rolanda L. Curtin
Administrative Law Judge

YLC/
#106641

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No exhibits were admitted in evidence on behalf of the Respondent.

PROPOSED ORDER

WHEREFORE, this 31st day of August 2009, 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) duys 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.

Rossana Marsh

*Rossana Marsh
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION