

IN THE MATTER OF THE CLAIM OF	* BEFORE STUART G. BRESLOW,
DAVID P. BRODY	* AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND HOME	* OF THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND	* OF ADMINISTRATIVE HEARINGS
FOR THE ALLEGED ACTS OR	* OAH NO.: DLR-HIC-02-09-09660
OMISSIONS OF DAVID BARKLEY T/A	* MHIC NO.: 08 (05) 824
OMEGA CONSTRUCTION AND	*
REMODELING	*

* * * * *

RECOMMENDED DECISION

STATEMENT OF THE CASE
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RECOMMENDED ORDER

STATEMENT OF THE CASE

On May 15, 2008, David P. Brody (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$12,613.79 for actual losses allegedly suffered as a result of a home improvement contract with David Barkley trading as Omega Construction and Remodeling (Respondent).

I held a hearing on October 20, 2009 at the Office of Administrative Hearings, 2730 University Boulevard, Wheaton, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(c)(2)(i) (2004 & Supp. 2009). Hope Sachs, Assistant Attorney General, Department of

Labor, Licensing and Regulation (Department), represented the Fund. The Claimant represented himself. The Respondent failed to appear after due notice to his address of record.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department of Labor, Licensing and Regulation, and the Rules of Procedure of the Office of Administrative Hearings 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, 09.08.02.01; and 28.02.01.

ISSUE

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

SUMMARY OF THE EVIDENCE

Exhibits

The Fund submitted the following exhibits, which I admitted into evidence:

- Fund Ex. 1 Memo from Sandra Sykes, of OAH, to Legal Services, dated August 5, 2009 attaching the Notice of Hearing and Hearing Order
- Fund Ex. 2 Affidavit of Lynn Michelle Escobar, investigator for MHIC, dated May 5, 2009
- Fund Ex. 3 Licensing history of the Respondent, dated October 15, 2009
- Fund Ex. 4 Letter from John Borz, Chairman, MHIC, to the Respondent, dated May 20, 2008 attaching the Claimant's claim

The Claimant submitted the following exhibits, which I admitted into evidence:

- Clt. Ex. 1 Listing of Expenses Incurred by the Claimant along with a package of invoices, check register pages, and bank statements documenting the expenses incurred, undated
- Clt. Ex. 2 Check Register of home equity loan payments made to vendors by the Claimant, undated

- Cl. Ex. 3 Chevy Chase Bank account statement for the home equity credit line for the period beginning February 10, 2006 through October 7, 2009
- Cl. Ex. 4 Contract between the Claimant and the Respondent, dated October 24, 2005
- Cl. Ex. 5 Letter from Respondent to the Claimant, dated October 3, 2007
- Cl. Ex. 6 Letter Agreement between the Claimant and the Respondent, dated September 20, 2007

Testimony

The Claimant testified at the hearing. The Respondent did not appear at the hearing and presented no witnesses. The Fund offered no witnesses.

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 under MHIC license number 01-70346
2. On October 24, 2005, the Claimant and the Respondent entered into a contract to build an extension onto the Respondent's home for a new master bedroom and convert the old master bedroom into two smaller bedrooms (the Project). The contract did not include a specific start or finish date for the Project.
3. The original agreed upon contract price was \$ 78,240.00.
4. On October 24, 2005, the Claimant paid the Respondent \$23,472.00. The Claimant paid the Respondent two more equal payments of \$23,472.00 and did not make any subsequent payments to the Respondent.
5. Work on the Project progressed slowly. Actual construction work did not fully commence until nearly a year after the contract was signed by the parties.

6. During September 2007, the Respondent experienced financial hardship and requested that the Claimant pay several of its subcontractors directly, instead of the Respondent, for the work to be performed.
7. On September 20, 2007, the Claimant and the Respondent entered into a letter agreement whereby certain credits were given to the Claimant under the contract and the balance of the amount owed under the contract, \$6,383.51, would be paid to subcontractors directly by the Claimant.
8. On October 3, 2007, the Respondent notified the Claimant that they were ceasing all their business activities on October 11, 2007. Included in the letter advising the Claimant of the cessation of business activities was a list of subcontractors that the Claimant could contact to complete the Project at the Claimant's expense.
9. The work performed by the Respondent was not deficient in any way. It was, however, incomplete, resulting in the Claimant incurring additional and unanticipated expenses in the amount of \$18,166.82 to complete the Project as initially designed.
10. The Claimant filed a claim with the Fund on May 15, 2008 seeking reimbursement in the amount of \$12,613.79. (Fund Ex. 4).
11. On July 13, 2009, the OAH sent Notices of Hearing (Notice) by certified and regular mail to the Respondent at his address on file with the MHIC and to the Respondent at his address on file with the Motor Vehicle Administration (MVA). The Notice accurately set forth the date, time, and location of the October 20, 2009 hearing at the OAH in Wheaton, Maryland.
12. The certified letter was returned to the OAH on August 5, 2009 as unclaimed.
13. The Notice sent by regular mail to the Respondent was not returned.

14. The Respondent failed to appear at the scheduled hearing at the OAH in Wheaton, Maryland on October 20, 2009.

DISCUSSION

Legal Framework

An owner may recover compensation from the Fund “for an actual loss that results from an act or omission by a licensed contractor[.]” Md. Code Ann., Bus. Reg. § 8-405(a) (Supp. 2009); COMAR 09.08.03.03B(2). 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).

The record reflects that the notification requirements were met. Md. Code Ann., State Gov’t § 10-208 (2009); Md. Code Ann., Bus. Reg. § 8-312(d), (h) (2004), were met. Accordingly, I directed that the hearing proceed in the Respondent’s absence.

Analysis

For the following reasons, I find that the Claimant has proven eligibility for compensation.

First, the Respondent was a licensed home improvement contractor at the time he and the Claimant entered into the contract.

Second, the Respondent performed incomplete home improvement. The Claimant testified that the work performed by the Respondent was workmanlike; however, it was incomplete due to the fact that the Respondent **did** not have the financial means to complete the Project. The Respondent admitted that he would be ceasing operations in the letter he sent to the Claimant on October 3, 2007 (Cl. Ex. 5). If the Project was to be completed, the Claimant would have to finish the Project himself. Fortunately, the same letter from the Respondent

provided a list of subcontractors that the Respondent was using to perform work on the Project and the Claimant was able to contract with each of them directly to complete the Project.

The Claimant used a home equity line of credit to pay the expenses he incurred to complete the Project. The bank that issued the equity line of credit does not provide copies of the checks the Claimant issued under the home equity line. However, the Claimant was able to substantiate the payments he made by providing copies of the statements showing when the checks were cashed along with a copy of the check register he used to record these payments. The Claimant's testimony was credible and straightforward and there was no reason to suggest that the expenses he incurred and that were listed in Clt. Ex. 1 were illegitimate or not related to the completion of the Project. In fact, the Claimant provided credible testimony to indicate that he tried to reduce the expenses to complete the Project wherever possible, to keep the overall cost of work as low as possible while still conforming to the original design for the Project.

The total cost to complete the Project was \$18,166.82. This figure was calculated based on the total amount of payments the Claimant made to the various former subcontractors of the Respondent to complete the Project. The burden of proof to establish the incomplete home improvement and any actual loss suffered is on the Claimant. Md. Code Ann., Bus. Reg. § 8-407(e)(1) (Supp. 2009). The Claimant has met his burden of proof.

Having found eligibility for compensation, I now turn to the amount of the award, if any. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1).

Unless a claim requires a unique measurement, actual loss is measured by one of the three following formulas:

(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 measurement accordingly.

COMAR 09.08.03.03B(3).

In this case, I used the third option because the Claimant hired the Respondent's former subcontractors to complete the Project. COMAR 09.08.03.03B(3)(c). For the reasons addressed above, I conclude that the full cost of the invoices provided in Clt. Ex. 1 is reasonable and compensable under the Home Improvement Law. In accordance with COMAR 09.08.03.03B(3)(c), the Claimants' actual loss is calculated as follows:

Amount paid to Respondent:	\$70,416.00
Amount paid to complete the Project:	<u>\$18,166.82</u>
Subtotal:	\$88,582.82
Less original contract price:	<u>-\$76,799.51¹</u>
Actual Loss:	\$ 11,783.31

¹ The original contract price was reduced in accordance with the September 20, 2007 letter agreement by \$1,440.49, thereby making the contract price \$76,799.51.

The Claimant has established by a preponderance of the evidence that he has suffered an actual loss in the amount of \$11,783.31 as a result of the Respondent's incomplete home improvement work.

CONCLUSIONS OF LAW

I conclude that the Claimant has established a basis for recovery of \$11,783.31 from the Fund based on the acts and omissions of the Respondent. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405(a) (2004 & Supp. 2009).

RECOMMENDED ORDER

I PROPOSE that the Maryland Home Improvement Commission:

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$11,783.31; and

ORDER that the Respondent is 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 Maryland Home Improvement 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.

December 15, 2009
Date decision mailed



Stuart G. Breslow
Administrative Law Judge

SGB/rbs
#109105

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FILE EXHIBIT LIST

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PROPOSED ORDER

WHEREFORE, this 27th day of January 2010, 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.

James Chiracol

*James Chiracol
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION