

IN THE MATTER OF THE CLAIM * BEFORE JAMES W. POWER,
OF GARY BUNNEY * AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND HOME * OF THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND * OF ADMINISTRATIVE HEARINGS
FOR THE ACTS OR OMISSIONS OF * OAH NO.: DLR-HIC-02-10-30704
CLAYTON CULBERTSON, T/A * MHIC NO.: 08 (90) 939
CLOVERTURE INC.

* * * * *

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 March 20, 2009, Gary Bunney (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$2,600.00 for actual losses allegedly suffered as a result of a home improvement contract with Clayton Culbertson, t/a Cloverture, Inc. (Respondent).

I held a hearing on May 16, 2011, at the Harford County Public Library in Bel Air, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010). Eric London, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department or D.L.R.), represented the Fund. The Claimant represented himself. The Respondent was present and represented by Brian Jablon, Esquire.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the DLLR, 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 & Supp. 2010), Code of Maryland Regulations (COMAR) 09.01.03.01–09.01.03.10; 09.08.02.01-09.08.01.02; and 28.02.01.01-28.02.01.27.

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

I admitted the following exhibits on the Claimant's behalf:

CL #1	Photographs of work
CL #2	Photographs of work
CL #3	Estimate from Respondent
CL #4	Contract

I admitted the following exhibits on the Respondent's behalf:

Resp. #1	Contract
Resp. #2	Letter to Claimant dated December 10, 2006
Resp. #3	Proposed Change order
Resp. #4	Letter to Respondent
Resp. #5	Letter to Respondent
Resp. #6	Letter to Respondent
Resp. #7	Letter to Claimant
Resp. #8	Complaint form

I admitted the following exhibits on the Fund's behalf

Fund #1	Hearing Notice
Fund #2	DLLR Hearing Order
Fund #3	DLLR licensing history for the Respondent
Fund #4	MHIC letter to the Respondent, with attached Fund Claim

Testimony

The Claimant testified on his own behalf and the Respondent testified on his own behalf.

The Fund did not present any testimony.

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 #05-124-282.
2. The Claimant and the Respondent live in the same neighborhood. In the summer of 2006, the Claimant asked the Respondent if he did landscaping work. The Respondent indicated that he did and agreed to install a patio and walkway at the Claimant's house.
3. On July 19, 2006, the Claimant and Respondent entered into a written contract by which the Respondent agreed to install pavers for a patio and walkway. The contract price was \$2,690.00.
4. The Respondent completed the work and installed the walkway and patio. The Claimant paid the full contract price.
5. The Respondent wanted to enclose the walkway with concrete, to provide a fortified border and keep the pavers in place. The Claimant did not want to use concrete and instructed the Respondent to use plastic edging.
6. The patio was in an area where the ground sloped towards the patio. The patio was to be used to park a trailer. The Claimant told the Respondent that the Claimant was going to install a retaining wall at the base of the patio. The Claimant never built the retaining wall.

7. When constructing a retaining wall, one would normally install drainage pipe beneath the wall to divert water away from the slope and any patio. The Respondent did not install the drain, because he was under the belief that the Claimant would install it when he built the wall.
8. On October 26, 2006, the Claimant wrote to the Respondent indicating dissatisfaction with the work. This dissatisfaction was limited to the walkway, which the Claimant said was uneven, debris left on the site and extra charges. No mention was made of the patio being poorly done.
9. The next day, October 27, 2006, the Respondent answered the Claimant's letter and indicated that the walkway was not done according to his plans but was changed by the Claimant. He also addressed the issue of debris and admitted that some gravel had been left on the street due to an emergency he had during the job.
10. After the Claimant's letter of October 2006, the Respondent went to the Claimant's house and knocked on the door to speak with the Claimant about the complaint. The Claimant was home but did not answer the door.
11. In December 2006, the Respondent wrote to the Claimant and offered a "change order", agreeing to redo the walkway at no cost in the spring. The Claimant never responded to the offer.
12. At no time did the Claimant ever indicate to the Respondent or the HIC that he had concerns about the patio being done poorly.
13. On October 26, 2007, the Claimant filed a complaint with the HIC concerning the Respondent's work. Nowhere in that complaint does the Claimant mention the patio as part of the complaint.

14. In April 2008, the Respondent again contacted the Claimant in writing confirm that the Claimant had filed a complaint with the HIC and offering to redo the walkway. The Claimant did not respond to this offer.

DISCUSSION

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) (2010). *See also* 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 (2010). A claim for recovery can be denied, however, if a claimant unreasonably rejects good faith efforts by the contractor to resolve the claim. Md. Code Ann., Bus. Reg. § 8-405(d) (2010).

The burden of proof to establish the unworkmanlike, inadequate or incomplete home improvement and any actual loss suffered is on the Claimant. Md. Code Ann., Bus. Reg. § 8-407(e)(1) (2010). For the reasons discussed below, I find that the Claimant has failed to meet his burden.

The Claimant alleges that the work that was done by the Respondent was inadequate. He supports his claim with pictures depicting work done by the Respondent, showing water accumulating on the patio. The Respondent maintains the patio was not level, resulting in water accumulation.

The Respondent’s work must be looked at in light of the actual agreement between the two parties and the work which each party performed. While the Respondent did some of the work, the Claimant was supposed to do some of it as well.

The Respondent was hired to install a walkway from the house to the patio. The Respondent wanted to border the walk with concrete, to provide stability for the brick pavers. However, the Claimant wanted to use a weaker material such as plastic. Any defect in the walkway was due to the Claimant's insistence to use the weaker material, which failed to hold the pavers in place. The Respondent is certainly not responsible for this decision by the Claimant.

With respect to the patio, the Respondent's work was also affected by the Claimant's involvement in the project. According to the Respondent, the patio was in a sloped area, requiring a retaining wall around some of the patio. The Respondent further explained that normally he would install a drainage pipe under the retaining wall to divert water away from the patio.

However, the Claimant told the Respondent that the Claimant would install the retaining wall himself. Therefore, the Respondent did not install the wall or any drain under the area where the wall was to be installed, since he believed the Claimant would be doing this work himself.

While the photographs submitted by the Claimant do show about one half inch of water on the patio, I cannot conclude from this fact alone that this was due to any poor workmanship by the Respondent. The Respondent testified that when he did the job he used a level and the patio was level when he finished the work. However, the presence of the water could be due to the absence of the retaining wall, which the Claimant never built. As a result, dirt and water from the slope around the patio drained onto the patio. This was not due to the Respondent's work, but the failure of the Claimant to install the drain and the retaining wall.

For these reasons, I cannot find that the work done by the Respondent was poor. However, there is another ground for denial of the claim involving the failure of the Claimant to

convey the real concern about the work and the refusal to allow the Respondent to fix any defects with the work.

In his initial expression of concern with the work, the Claimant mentioned nothing about the patio. Rather, his complaint centered around the walkway and presence of debris after the job. The Respondent made one attempt to visit the site and knocked on the Claimant's door. Although the Respondent could see that the Claimant was in his house, the Claimant did not answer the door.

Based on the information from the Claimant's initial letter, the Respondent prepared a change order to redo the walkway, since this was the only complaint of which he was made aware. The HIC investigator also told the Claimant that the Respondent was willing to do this work for free. The Claimant refused this offer and suddenly indicated on the morning of the hearing that his complaint was with the patio.

A contractor cannot fix that which he was not made aware was poorly done. The Respondent was not allowed to visit the jobsite and was not given the real concern, which the Claimant now maintains was the unevenness of the patio. Given the Claimant's actions of withholding the true complaint until the day of the hearing, and his refusal to allow the Respondent to even inspect the site, the claim is barred.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Claimant has not established that he sustained an actual loss as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. § 8-401 (2010). Therefore, the Claimant is not entitled to reimbursement from the Maryland Home Improvement Guaranty Fund. Md. Code Ann., Bus. Reg § 8-405 (2010).

RECOMMENDED ORDER

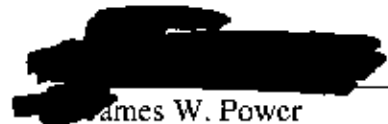
I RECOMMEND that the Maryland Home Improvement Commission:

ORDER that the Claimant is not entitled to an award from the Maryland Home Improvement Guaranty Fund; and

ORDER that the Claimant's claim against the Maryland Home Improvement Commission Guaranty Fund be dismissed; and

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

June 15, 2011
Date Decision mailed


James W. Power
Administrative Law Judge

JWP/kkc
#123537

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PROPOSED ORDER

WHEREFORE, this 4th 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