

IN THE MATTER OF THE CLAIM OF	*	BEFORE STEPHEN J. NICHOLS,
JERRY DIXON, SR.	*	AN ADMINISTRATIVE LAW JUDGE
AGAINST THE	*	OF THE MARYLAND OFFICE
MARYLAND HOME IMPROVEMENT	*	OF ADMINISTRATIVE HEARINGS
GUARANTY FUND ON ACCOUNT OF	*	
HOME IMPROVEMENT WORK	*	
UNDERTAKEN BY	*	OAH NO.: DLR-HIC-02-08-37681
DAVID B. BARKLEY T/A	*	MHIC NO.: 08 (05) 986
OMEGA CONSTRUCTION & REMODELING	*	

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**RECOMMENDED DECISION**

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DISCUSSION  
CONCLUSIONS OF LAW  
RECOMMENDED ORDER

**STATEMENT OF THE CASE**

This case arose because of a complaint filed by Jerry Dixon, Sr. (Claimant) with the Maryland Home Improvement Commission (MHIC) against David B. Barkley t/a Omega Construction & Remodeling (Respondent). The complaint asserts that the Claimant entered into a contract with the Respondent for the performance of home improvement work at his residence. *Inter alia*, the complaint alleges that the Respondent abandoned the home improvement contract without doing any work after obtaining a deposit.

On January 23, 2008, the Claimant filed a claim with the MHIC seeking to recover \$9,780.00 from the Home Improvement Guaranty Fund (Fund). On September 4, 2008, the MHIC issued an order for a hearing on the claim against the Fund.

On June 11, 2009, the above-captioned case was heard before Stephen J. Nichols, Administrative Law Judge (ALJ), on behalf of the MHIC. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(c)(2) (2004 & Supp. 2008). The hearing was conducted at the Administrative Law Building located in Hunt Valley, Maryland.

The Claimant appeared and represented himself. Jessica Berman Kaufman, Assistant Attorney General, Office of the Attorney General, Department of Labor, Licensing & Regulation, represented the Fund. The Respondent failed to appear at the hearing.

On March 18, 2009, the Office of Administrative Hearings (OAH) mailed notice of the hearing to the Respondent by certified and regular mail to his last address of record on file with the MHIC. The notice advised the Respondent of the time, place, and date of the hearing. The U.S. Postal Service returned the certified mail marked "Unclaimed." The U.S. Postal Service did not return the regular mail to the OAH. The Respondent is currently licensed with the MHIC and is required to keep his address updated with the agency.<sup>1</sup>

"In Maryland, a finding that an individual properly mailed a letter raises a presumption that the letter 'reached its destination at the regular time and was received by the person to whom it was addressed.'" *Bock v. Insurance Comm'r*, 84 Md. App. 724, 733, 581 A.2d 857, 861 (1990) quoting *Border v. Grooms*, 267 Md. 100, 104, 297 A.2d 81, 83 (1972), and *Kolker v. Biggs*, 203 Md. 137, 144, 99 A.2d 743, 746 (1953). Based on that presumption and that the regular mail was not returned to the OAH, the notice of hearing sent by the OAH to the

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<sup>1</sup> The Respondent's license is due to expire on August 26, 2009. At the time the notice was issued, the Respondent's license was in a suspended status; nonetheless, the Respondent was required to inform the MHIC if his mailing address changed.

Respondent is deemed to have been received by him at his last known address and provided him with notice of the instant hearing in a timely fashion.

Since notification requirements were met, the ALJ directed the hearing to proceed in the Respondent's absence. Md. Code Ann., State Gov't § 10-209(a) (2004); Md. Code Ann., Bus. Reg. § 8-312(d), (h) (2004).<sup>2</sup>

The Administrative Procedure Act; the procedural regulations of the Department of Labor, Licensing and Regulation; and the OAH Rules of Procedure govern the procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2004 & Supp. 2008); Code of Maryland Regulations (COMAR) 09.01.03, COMAR 09.08.02.01; and COMAR 28.02.01.

### **ISSUES**

The issues are whether the Claimant sustained an "actual loss" compensable by the Fund as the result of an act or omission of the Respondent under a home improvement contract within the meaning of section 8-401 of the Business Regulation Article of the Annotated Code of Maryland, and if so, the amount of the award.

### **SUMMARY OF THE EVIDENCE**

#### **A. Exhibits**

The following items were admitted into the record:

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<sup>2</sup> "Where a licensing statute provides for service other than by regular mail, notice under this subtitle may be sent by regular mail to the address of record of a person holding a license issued by the agency if . . . the person is required by law to advise the agency of the address . . . and . . . the agency has been unsuccessful in giving notice in the manner otherwise provided by the licensing statute. Md. Code Ann., State Gov't § 10-209(a) (2004). "The hearing notice to be given to the person shall be sent at least 10 days before the hearing by certified mail to the business address of the licensee on record with the Commission." Md. Code Ann., Bus. Reg. § 8-312(d) (2004). "If, after due notice, the person against whom the action is contemplated does not appear, nevertheless the Commission may hear and determine the matter." Md. Code Ann., Bus. Reg. § 8-312(h) (2004).

- Fund Exhibit #1 – Copy of a Notice of Hearing and Order for Hearing (eight pages & envelope)
- Fund Exhibit #2 – Dept. of Labor, Licensing & Regulation I.D. Registration Inquiry on the Respondent, dated June 1, 2009 (seven pages)
- Fund Exhibit #3 – Notice from Zvi Guttman, Trustee, dated September 29, 2008, regarding the Respondent's bankruptcy case (two pages)
- Fund Exhibit #4 – Copy of an Order Granting Relief from Stay in the case of *In re Michael Goodman, Debtor, Maryland Home Improvement Commission, Movant v. Michael Goodman and Samuel Friedman*, Case No. 86-B-1700, U.S. Bankr. Ct. Md. (August 28, 1987 J. Schneider) (two pages)
- Fund Exhibit #5 -- Copy of a letter to the Respondent from the MHIC, dated February 25, 2008, and a copy of a Home Improvement Claim Form (two pages)
- Claimant Exhibit #1 – Copy of specifications describing the scope of work to be performed by the Respondent for the Claimant and a color copy of a business card & an advertisement (ten pages)
- Claimant Exhibit #2 – Agreement, dated July 13, 2007
- Claimant Exhibit #3 -- Copy of check #322, dated July 13, 2007
- Claimant Exhibit #4 -- Provident Bank Statement, dated July 31, 2007
- Claimant Exhibit #5 – Letter from the Respondent, dated July 18, 2007 (two pages)
- Claimant Exhibit #6 – Concept drawing for Claimant's addition, sent by facsimile transmission on August 30, 2007 (two pages)
- Claimant Exhibit #7 – Letter from the Respondent, dated October 3, 2007 (two pages)
- Claimant Exhibit #8 – Printout of electronic mail, dated October 19, 2007

No other exhibits were admitted into evidence.

B. Testimony

The Claimant testified on his own behalf. No other witnesses were called to testify.

**FINDINGS OF FACT**

After considering all of the testimony and exhibits, the ALJ finds, by a preponderance of the evidence, the following to be fact:

1. At all times relevant, the Respondent was a home improvement contractor licensed with the MHIC under contractor license number 01-70346 and 05-51578 (trade name).

2. At all times relevant, the Claimant and his spouse owned and lived at the residence located at 8650 Allenswood Road, Randallstown, Maryland (the property).

3. On July 13, 2007, the Claimant and the Respondent entered into a home improvement contract for the Respondent to build an addition to the existing structure at the property. This contract was memorialized in a written agreement between the Claimant and John Nielson, the Respondent's authorized salesperson and agent.

4. The contract price for the work was \$51,000.00.

5. In accordance with the terms of the contract, the Claimant paid \$9,780.00 to the Respondent as a deposit for the work upon signing the contract. This was accomplished by check #322 drawn against the Claimant's checking account with the Provident Bank and given by the Claimant to Mr. Nielson. The Respondent negotiated and cashed that check.

6. On August 30, 2007, the Respondent sent a concept drawing for the addition to the Claimant by facsimile transmission.

7. On October 3, 2007, the Respondent mailed a letter to the Claimant advising that he was not going to build the addition at the property and, that as a result of financial and legal difficulties, his company would be going out of business as of October 11, 2007.

8. After receiving the October 3, 2007 letter, the Claimant telephoned the Respondent's business office and asked for a return of his deposit money. The Claimant spoke with the Respondent's office manger, but he did not obtain a clear and satisfactory answer to his request. Subsequently, the Claimant visited the location of the Respondent's business office on four occasions during normal business hours seeking to obtain a return of his deposit. Although the Claimant could observe the Respondent's

company vehicles parked in the parking lot at the business office, no one was present at the office or no one would answer the office door when he knocked.

9. The Claimant filed a complaint with the MHIC and, on January 23, 2008, a claim against the Fund.

10. The Respondent has never performed any work under the contract for construction of the addition at the property and has not refunded the \$9,780.00 deposit to the Claimant.

### DISCUSSION

In 1985, the Maryland General Assembly enacted legislation that first established the Fund. By this means, the legislature sought to create a readily available pool of money from which homeowners could seek relief for losses sustained at the hands of incompetent or unscrupulous home improvement contractors. Md. Code Ann., Bus. Reg. §§ 8-401 to 8-411 (2004 & Supp. 2008). Under this statutory scheme, licensed contractors are assessed for the monies that subsidize the Fund. Homeowners who are victimized by the actions of licensed contractors may recover their "actual losses" from this pool of money, subject to a \$20,000.00 limitation on the claim of any one aggrieved homeowner because of the work of any one contractor. Md. Code Ann., Bus. Reg. § 8-405(e)(1).<sup>3</sup> A homeowner is authorized to recover from the Fund when he or she sustains an actual loss that results from an act or omission by a licensed contractor. Md. Code Ann., Bus. Reg. § 8-405(a). When the Fund pays money to a homeowner as a result of the faulty performance of a home improvement contractor, the

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<sup>3</sup> Effective October 1, 2008, section 8-405(e)(1) of the Business Regulation Article was amended raising the limit of recovery from the Fund from \$15,000.00 to \$20,000.00. Section 2 in Chapter 272 of House Bill 409 that raised the recovery limit reads, "[t]his Act shall be construed to apply to any claim pending before the Maryland Home Improvement Commission for which the Commission has not issued a final decision prior to the effective date of this Act."

responsible contractor is obligated to reimburse the Fund. Md. Code Ann., Bus. Reg. § 8-410. The MHIC may suspend the license of any such contractor until he or she fully effectuates reimbursement. Md. Code Ann., Bus. Reg. § 8-411.

An action against the Fund does not correspond to a civil claim (in an administrative setting) against an individual contractor for breach of contract. Recovery against the Fund is based on "actual loss" as defined by statute and regulation. "[A]ctual 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. "The Fund may only compensate for actual losses [Claimant] incurred as a result of misconduct by a licensed contractor." COMAR 09.08.03.03B(2).

The uncontradicted evidence establishes that the Claimant and the Respondent entered into a contract on July 13, 2007, for the construction of an addition at the property. On the date the contract was executed, the Claimant paid the Respondent \$9,780.00 as a deposit for the work. The Respondent has never performed any work under the contract for construction of the addition at the property and has not refunded the \$9,780.00 deposit to the Claimant. The Respondent abandoned the home improvement contract and has gone out of business.

Because the Respondent's "misconduct" resulted in an "incomplete" home improvement, the Claimant has established an entitlement to reimbursement on his claim against the Fund. COMAR 09.08.03.03B(2); Md. Code Ann., Bus. Reg. § 8-401. COMAR 09.08.03.03B(3) sets forth the various formulas for determining an "actual loss" as follows:

(3) Unless it determines that a particular claim requires a unique measurement, the Commission shall measure actual loss as follows:

(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 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)(b) and COMAR 09.08.03.03B(3)(c) do not apply to the matter *sub judice*. The ALJ calculates the Claimant's "actual loss" in accordance with COMAR 09.08.03.03B(3)(a). The Claimant paid the Respondent \$9,780.00. The Respondent abandoned the home improvement contract without performing any work. The Claimant, therefore, is entitled to reimbursement from the Guaranty Fund in the amount of \$9,780.00.

### **CONCLUSIONS OF LAW**

Based on the foregoing Findings of Fact and Discussion, the ALJ concludes as a matter of law that the Claimant has sustained an "actual loss" as a result of the Respondent's acts and omissions in the amount of \$9,780.00. Md. Code Ann., Bus. Reg. § 8-401; COMAR 09.08.03.03B(3).

### **RECOMMENDED ORDER**

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Maryland Home Improvement Commission:

ORDER, that the Claimant be awarded \$9,780.00 from the Maryland Home Improvement Guaranty Fund to compensate him for "actual losses" sustained by the "acts and omissions" of




the Respondent under section 8-409 of the Business Regulation Article of the Annotated Code of Maryland; and further,

ORDER, that the Respondent be ineligible for any MHIC license until the Respondent reimburses the Maryland Home Improvement Guaranty Fund for all monies disbursed under this Order plus annual interest of ten percent (10%), pursuant to section 8-411 of the Business Regulation Article of the Annotated Code of Maryland; and further,

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

June 17, 2009  
Date Decision Mailed

SJN:sn  
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Stephen J. Niemis  
Administrative Law Judge

PROPOSED ORDER

*WHEREFORE, this 21st day of July 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) 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.*

*Andrew Snyder*

*Andrew Snyder  
Panel B*

**MARYLAND HOME IMPROVEMENT COMMISSION**