IN THE MATTER OF THE CLAIM OF JOHN MORGAN AGAINST THE MARYLAND HOME IMPROVEMENT GUARANTY FUND ON ACCOUNT OF ALLEGED VIOLATIONS OF BENJAMIN PORTER, II	* * * *	**MARYLAND HOME IMPROVEMENT COMMISSION** **Case No. 1(75) 1193**

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FINAL ORDER

On this **12th** day of **September**, 2016, Panel B of the Maryland Home Improvement Commission ORDERS that:

1) On or about November 13, 2013, the Respondent, Benjamin Porter, II,, entered into a home improvement contract under the Respondent's Maryland Home Improvement Commission license with the Claimant, John Morgan.

2) Pursuant to Business Regulation Article, §8-408(b)(3)(i), Annotated Code of Maryland, the Claimant has provided the Commission with a copy of a final award in arbitration, dated January 25, 2015, with all rights of appeal exhausted. The arbitrator made a total award of $90,089.78 to the Claimant, based upon the cost to repair and complete the Respondent's defective home improvement work. Subsequently, by order dated March 11, 2016, the Circuit Court for Anne Arundel County confirmed the arbitration award as a judgment.

3) Pursuant to Business Regulation Article, §8-405(e), Annotated Code of Maryland, the maximum recovery permitted for a claim against the Home Improvement Guaranty Fund is $20,000.00.

4) The Commission directs payment of $20,000.00 from the Home Improvement Guaranty Fund to the Claimant, John Morgan.

5) Pursuant to Business Regulation Article, §8-411(a), Annotated Code of Maryland, any home improvement licenses held by the Respondent, Benjamin Porter, II, t/a Chesapeake Contractors, LLC, shall be Suspended, and the Respondent shall be ineligible for any home improvement licenses, until the Respondent has repaid any money paid from the Home Improvement Guaranty Fund pursuant to this Order, with 10 percent annual interest.

6) The records and publications of the Maryland Home Improvement Commission shall reflect this decision.

7) The payment to the Claimant from the Home Improvement Guaranty Fund shall be authorized thirty (30) days from the date of this Order. During the thirty (30) day period, any party may file an appeal of this decision to Circuit Court.

Joseph Tunney
Chair - Panel B

ARBITRATION BEFORE JUDGE STEVEN I. PLATT (RET.)

	*	
BLP CONSTRUCTION CO., LLC Plaintiff/Counter Defendant	*	
v.	*	Circuit Court Anne Arundel County Case No. 02-C-14-191228
JOHN P. MORGAN Defendant/Counterclaimant	*	

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DETERMINATION AND AWARD OF ARBITRATOR

INTRODUCTION

This claim was submitted by agreement of the Parties through their counsel to Judge Steven I, Platt (Ret.) for Binding Arbitration. An Evidentiary Hearing was held on July 9, October 1, and October 2, 2015 at which the parties agreed through their counsel that evidence would be presented without a strict application of the Maryland Rules of Evidence. After the Evidentiary Hearing, and at the request of this Arbitrator Plaintiff and Defendant submitted Post Arbitration Memorandums and Written Closing Arguments, along with Proposed Arbitration Awards to the Arbitrator.

PROCEDURAL HISTORY

On November 13, 2013 Defendant John P. Morgan entered into a contract with BLP Construction Co., LLC for the renovation of his real property located at 2723 Cedar Drive, Riva Maryland in Anne Arundel County. The parties specifically entered into a Homeowner/Contractor Agreement with the loan under a FHA 203(k) Rehabilitation Program through Happy Mortgage. That loan was subsequently serviced by M&T Bank.

The contract called for a payment of $115,000 principally for the addition of a second floor on the existing one story residence. The second floor was to be constructed to add two bedrooms and bathrooms. The work also included the framing, electrical, roofing, plumbing, mechanical and HVAC work necessary to complete this addition.

During the contract period the parties had conversations regarding converting the exiting garage into living space, updating flooring, extending the driveway, installation of windows and doors, and updating the kitchen. There is no dispute that during the course of the contract period there were changes made to the scope of the work and the design plans. Items were added and deleted, upgraded and downgraded from the initial desires of the homeowner primarily based on the availability of funds. It is also undisputed that certain items were paid for by the defendant out of pocket and were not included in the contract agreement along with the labor necessary to install these items, which were separate from the contract.

During the course of the contract Defendant contends that he became concerned regarding how long the project was taking and the workmanship of the Plaintiff on the project. As a result of these concerns Defendant engaged independent contractors for various construction areas. County Inspectors also were requested to take a look at the project in September of 2014 to get an opinion as to the quality of the workmanship of the project. Based on the opinions he obtained, which will be detailed later in this opinion, the Defendant sent a text, followed by an email, to Ben Porter, the principal of BLP Construction Co., LLC, the Plaintiff in this case, terminating him from the project and stating that he was not permitted on the property.

In response, Plaintiff sent a letter to Defendant John Morgan advising that he was in breach of their contract by failing to give him 10 days notice, and thereby a right to cure. In addition Mr. Porter advised that he had set up several rough-in inspections for September 5 and 6, 2013 and requested to be present at those inspections and to perform a few tasks necessary to prepare the property and the project for those inspections. Defendant in turn agreed to permit Plaintiff the access requested. The inspections took place and the rough-ins passed.

At this time the parties then began engaging in conversations through counsel regarding the alleged breach and possible settlement options. Defendant John P. Morgan consented and offered to permit BLP Construction to complete the contract. BLP Construction declined and advised Mr. Morgan that he owed money for work performed by BLP Construction and that if the money owed was not paid a lien would be entered. The parties' counsel then further engaged in settlement conversations which also failed. BLP Construction then filed a Mechanic's Lien in the Circuit Court for Anne Arundel County, Maryland.

BLP Construction also filed a breach of contract claim in the District Court for Anne Arundel County, Maryland D-07-CV-14-001652[1]. The Parties further agreed in April 2015 to enter a Consent Interlocutory Order Establishing Mechanic's Lien in the amount of $30,909.70 in favor of BLP Construction and against John P. Morgan. Further proceedings related to this lien were agreed to be stayed pending this arbitration of the parties' disputes.

[1] Defendant states in their Post Arbitration Memorandum that this case is still pending. In the email exchanges between counsel for the parties provided to this Arbitrator there is discussion of this case being dismissed. The status of the District Court matter is unclear to this Arbitrator.

Defendant John Morgan has, or has retained the right, to file a complaint with the Maryland Home Improvement Commission against Mr. Porter pending arbitration[2].

The contract entered into by the parties contains an arbitration clause that reads:

> *6. Binding Arbitration: Claims or disputes relating to the Agreement or General Provisions will be resolved by the Construction Industry Arbitration Rules of the American Arbitration Association (AAA) unless both parties mutually agree to other methods. The notice of the demand for arbitration must be filed in writing with the other party to this Agreement and with the AAA and must be made in a reasonable time after the dispute has arisen. The award rendered by the arbitrator(s) will be considered final and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.*

The parties have agreed to submit the dispute to this Arbitrator. The claims in this arbitration are BLP Construction's original claim that Defendant John P. Morgan breached the contract by terminating BLP Construction and failing to provide time to cure. In addition, BLO Construction claims that Defendant John P. Morgan never provided prior notice of any defective work until the alleged unilateral termination resulting in the breach. Plaintiff is seeking damages in the amount of $41, 642.70 which consists of money owed on draw 3, retainage held under draws 1 and 2, payment for services provided outside of the contract and lost profits.

Defendant John P. Morgan has made a counterclaim alleging that the work performed by Plaintiff was of poor workmanship and not up to industry standards thereby breaching the contract between the parties. Defendant claims that he has incurred expenses in completing the project which was abandoned by BLP Construction and repairing the substandard work completed by BLP Construction. Defendant is seeking damages in the amount of $90,089.78. Defendant John P. Morgan is also seeing attorney's fees in an undetermined amount at this time.

[2] It is unclear whether the complaint was actually ever filed with MHIC.

PLAINTIFF'S CLAIM

BLP Construction Co., LLC contends that it was in compliance with all terms of the contract entered into between the parties on November 13, 2013 and was wrongfully terminated by Defendant John P. Morgan prior to the completion of the project. Specifically, Plaintiff contends that Defendant failed to comply with the terms of the contract when Mr. Morgan unilaterally terminated the contract on September 1, 2014 via text without providing ten (10) working days notice thereby failing to provide Plaintiff with an opportunity to cure. The provision of the contract that Plaintiff asserts to support this claim reads as follows:

> *15. Termination: If the owner fails to make a payment under the terms of this Agreement, through no fault of the contractor, the contractor may upon ten working days written notice to the owner, and if not satisfied, terminate this Agreement. The owner will be responsible for paying the contractor for al work completed. If the contractor fails or neglects to carry out the terms of the contract, the owner, after ten working days written notice to the contractor, may terminate this Agreement.*

Plaintiff contends that it was in full compliance with the contract prior to the termination text on September 1, 2014 from Defendant. In support of this claim BLP Construction provided in evidence numerous text exchanges between Mr. Porter, Defendant Mr. Morgan and Mr. Morgan's significant other Michelle Willis. According to Plaintiff these text messages gave no indication that the defendant or Ms. Willis was dissatisfied with BLP's work, rather they show that they "loved" the work. In addition, the County inspected and passed the rough-in plumbing and mechanical rough-in on September 6, 2014 as well as the electrical rough-in on September 4, 2014. In terminating the contract without the required notice, Plaintiff contends that BLP Construction was not provided with the right to cure any alleged

defects and/or deficiencies alleged to be present by Defendant at the time of the termination.

BLP claims that Defendant's termination of the contract without the right to cure constituted a material breach of the contract. BLP Construction further contends that at the time of the breach there was an outstanding balance owed to BLP Construction for work performed. Specifically, Plaintiff is claiming that Defendant owes BLP Construction $41,642.70. Of this BLP contends that there was a 10% retainage amount withheld in the payment of Draw Requests 1 and 2 for a total amount of $6,915.00. In addition, Draw Request 3 was never paid and is due and owing in the amount of $14,100.00. BLP Construction is also seeking $7,738.00 for change orders and $2,156.70 for work performed outside the scope of the contract but requested by Mr. Morgan. Finally, Plaintiff is seeking $10,733.00 for lost profits.

Under the agreement each draw request was subject to a 10% retainage. The first two draws submitted by Plaintiff were approved by the lender for a total amount of $69,150.00. Of that amount $6,915.00 was held as the agreed retainage which is now due by Defendant. Draw 3 is in the amount of $14,100.00 which includes work performed under the contract up through the termination and breach by defendant. The rough-ins for mechanical, electrical and plumbing were approved and therefore defendant owes BLP Construction $14,100.00 for the final draw. During the course of the project defendant requested numerous change orders for a total amount of $19,710.00. Of that amount $12,233.00 was paid leaving a balance of $7,738.00. BLP Construction states that this consists of $775.00 from the second draw request and $6,963.00 from the third draw request. In addition, during the course of the

project Mr. Morgan requested additional services for which BLP Construction is owed $2,156.70. This figure represents an outstanding window invoice in the amount of $1,556.70 on BLP's account, $200 for the installation of an attic fan, $200 for the installation of 2 Christmas light outlets and $200 for the flood light rough-in.

Finally, BLP Construction is making a claim for lost profits in the amount of $10, 733.00. Plaintiff claims that the contract total was $115,000.00. The total of the three draws without the change orders is $83,250.00 having been billed at 72% completion. The Plaintiff contends that the profit margin of the project was 1/3 of the contract price, or $38, 333.00. Therefore, the remaining 28% of the project that BLP Construction was unable to perform as a result of the defendant's wrongful termination results in a lost profit to BLP Construction in the amount of $10,733.00.

The additional work that BLP Construction contends it performed for Defendant outside the scope of the original contract consists of adding a front porch roof, moving the electrical meter on the outside of the house, adding a slider to the front of the former garage, switching the way the kitchen slider opened, adding a second "cantilevered" deck to the second floor, upgrading the upstairs HVAC unit to a 3 ton unit, adding cathedral trusses, changing the layout of the master bath and three doorways, converting the old garage to living space, adding a new air handler to the first floor, installing 2 sliders in the kitchen and installing 6 window openings.

As to the lost profit claim Plaintiff states that the damages for a breach of contract "is that which will put the injured party in the monetary position he would have been in had the contract been performed" citing *Hall v. Lovell Regency Homes Ltd. Psp,* 121 Md .App. 1 (1998). Further, Plaintiff argues that the "expectation

interest allows the recovery of lost profits from business income which must be proved with reasonable certainty" citing *David Sloane, Inc. v. Stanley G House & Assoc., Inc.*, 311 Md. 36 (1981).

BLP Construction argues and Mr. Porter testified that he has performed several renovations to include other second story additions under the FHA 203(k) rehabilitation program. Mr. Porter testified that those other jobs were performed with a 1/3 profit margin of the contract amount. Therefore, he believes BLP is entitled to receive lost profits for the remaining portion of the contract here that was not completed as a result of defendant's breach.

As to the Counterclaim Plaintiff contends that he was not in breach of the contract and that all work performed by BLP Construction was performed to industry standards with good workmanship. At no time prior to September 1, 2014 did Mr. Morgan ever convey to Mr. Porter that he was concerned about the manner in which the project was being constructed or the time frame in which it was being performed. In fact, plaintiff contends that it was just the opposite. Throughout the project Defendant John P. Morgan and Ms. Willis consistently advised Mr. Porter that they "loved" the work being performed and even requested additional work outside the scope of the contract. BLP Construction contends that it was in fact the constantly changing scope of the work by Mr. Morgan and delays in selecting fixtures that resulted in the delay of the project. Up through the end of August 2014 Defendant was seeking estimates for additional work to the roof, gutters, siding and storage areas.

Defendant claims as part of the counterclaim that BLP Construction's work was poor and as a result caused a serious water infiltration into the house causing damage that had to be cured by other contractors and which was part of the decision to terminate the contract with BLP Construction. The water infiltration was alleged to have occurred on August 12, 2014 and defendant contends that it caused significant damage to the first floor ceilings and walls that needed to be "demolished and rebuilt". However despite this claim, on August 23, 2014 Mr. Morgan was seeking estimates for additional work outside of the scope of the original agreement to include demolishing the kitchen and installing windows. In addition on August 26, 2014 Defendant sought estimates from plaintiff for roof and gutter work.

BLP Construction argues that Defendant John P. Morgan failed to prove damages with any certainty at the arbitration hearing. Defendant failed to prove the nature of the construction defects, the scope of work required to repair the defects and that the cost of those repairs as claimed are fair and reasonable. Rather, Defendant simply subtracted the contract amount of $115,000 from the total amount he spent to finish the house and sought that amount as damages. This damage claim is therefore defective in that the scope of work he had done to complete the house was outside of the scope of work required under the contract.

Plaintiff is not seeking attorney's fees in this case. However Defendant is. Plaintiff argues that there is no contractual or statutory basis for attorney fees in this case. The contractual provision that defendant refers to in their counterclaim is intended for indemnification as to claims by 3rd parties and is not subject to claims between the parties (this provision will be set forth subsequently under Defendant's

counterclaim). The arbitration provision of the contract governs the dispute of the parties and there is no fee shifting provision contained in that section. Therefore, defendant is not entitled to recover attorney fees in this arbitration.

DEFENDANT'S COUNTERCLAIM

Defendant John P. Morgan sought to have renovations performed to his residence. Plaintiff BLP Construction represented that it could assist with all phases of the project to include acquiring properties, arranging financing, develop the design and perform all construction work related to the renovation project. Based on these representations Mr. Morgan entered into a contract with BLP to renovate his residence, which was financed by Happy Mortgage through the FHA 203(k) rehabilitation program. The scope of the work under the contract included adding a second level to the residence and related work to the existing first floor of the residence. During the course of the project additional work to the first and second floor was added to the scope of the work set forth in the original contract. BLP Construction began work on the project in late April to early May of 2014. Two draws were paid to BLP Construction for work performed on the project up through July 2014.

In August of 2014 Mr. Morgan became concerned about the quality of the work and the timeframe within which it was being performed. In addition, in August 2014 there was a significant summer storm that came through the area causing substantial water damage to the home because BLP failed to adequately protect the residence from the weather. Based on his concerns regarding the project Mr. Morgan contacted a consultant, Richard Roeser, and asked him to take a look at the work performed by BLP so far. Mr. Roeser did as requested and at that time Mr. Morga learned that the construction was "subpar" and not to industry standards.

Mr. Morgan was referred to various experts in the construction industry and stopped further work by BLP on the project so that he could obtain an assessment of the work already performed to date. A termination text was sent to Mr. Porter which started a series of email exchanges between the parties and counsel regarding obligations and rights under the contract. BLP refused to return to the project and correct the defective work and by mid to late September of 2014 BLP had abandoned the project. Mr. Morgan in turn retained several experts to inspect the property during which "substantial defective work in the structural framing and HVAC and plumbing systems" were uncovered. Given that BLP had abandoned the project, as well as Mr. Morgan's "lack of confidence" in BLP's ability to complete the project in a workmanlike manner, Mr. Morgan hired several contractors to complete the project. In doing so Mr. Morgan incurred expenses to correct and complete the work.

John P. Morgan is alleging in the counterclaim that BLP Construction breached the contract by failing to complete the work of the project in a workmanlike manner and within industry standards. As a result of this breach, Mr. Morgan has incurred costs to repair and complete the work and is therefore seeking damages in the amount of $90,089.78.

The Defendant is also contending that BLP failed to comply with the FHA 203(k) requirements in that BLP performed additional work not included under the scope of the contract without seeking approval of the lender. Further, Defendant contends that BLP did not comply with the contract requirements of the Maryland Home Improvement Commission in that BLP failed to set forth the additional work in a written contract, failed to include BLP's MHIC license number on the contract, failed to include disclosures in the contract as required by MHIC and failed to have the parties initial the arbitration clause of the contract as required by MHIC.

In furtherance of his claim Defendant John P. Morgan states that BLP portrayed itself as an expert in all fields of construction. However, Mr. Porter is not a master electrician and can only perform work under the control and supervision of a master electrician which was not the case in this project. Further, Mr. Porter was required to have a master plumber and HVAC person present to supervise the work and failed to comply with this requirement.

BLP claims that Mr. Morgan breached the contract by failing to provide plaintiff with the right to cure. Defendant Morgan states that after the initial termination notice to BLP, he granted BLP and Mr. Porter the opportunity to return to the project to cure the defects and complete the project. BLP however failed to return to the job and thereby abandoned the project.

As to the damage claim, BLP contends that it is owed further moneys pursuant to the contractual work performed as a result of a third draw and a Change Order. Defendant Morgan argues that neither of these was submitted and approved by the lender and therefore BLP is not entitled to this relief. Further, Mr. Morgan testified that these change orders were outside of the scope of the original contract and were never reduced to writing in accordance with the contract. They are therefore not recoverable in this action. BLP has also made a claim for lost profits. However because BLP breached the contract and abandoned the project, Morgan asserts that Plaintiff cannot now come forward seeking lost profits from a project it failed to complete.

Defendant John P. Morgan has made a claim for attorney's fees under the contract. Specifically, Defendant contends that the authority lies in the following provision which reads:

> *9. Payments and Completion: Payments may be withheld because of (1) defective work not remedied; (2) failure of contractor to make proper*

payments to subcontractors, workers, or suppliers; (3) persistent failure to carry out work in acceptance with this Agreement or these general conditions, or (4) legal claims. Final payment will be due after complete release of any and all liens arising out of the contract or submission of receipts or other evidence of payment covering all subcontractors or suppliers who could file such a lien. The contractor agrees to indemnify the Owner against such liens and will refund all monies including costs and reasonable attorney's fees paid by the owner in discharging the liens. A 10 percent holdback is required by the lender to assure the work has been properly completed and there are no liens against the property.

Defendant has not submitted an amount for the damage award of attorney's fees and has requested additional time after the Arbitrator's award to furnish such damages if his claim for attorney's fees survives this Determination and Award.

DETERMINATION BY ARBITRATOR

There is no dispute and this Arbitrator finds that the parties entered into a contract in November 2013 for the addition of a second floor and renovations to the first floor of Mr. Morgan's residence located at 2723 Cedar Drive, Riva Maryland. Further, there is no dispute that the work commenced on the project began in late April 2014 by BLP Construction, Co., LLC. There is also no dispute that BLP Construction Co., LLC stopped all work on the project as of September 6, 2014.

BLP Construction argues that Defendant John P. Morgan breached the contract by terminating BLP Construction and failing to provide the right to cure as required under the contract specifically, under Paragraph 15. BLP Construction states that John P. Morgan sent a text message to Ben Porter on September 1, 2014 at 10:33 p.m. stating " Ben, effective immediately please be advised that I have terminated our construction contract for 2723 Cedar Drive, Riva, MD. John Morgan".

Mr. Porter requested this in writing, specifically an email which Defendant agreed to provide. On September 2, 2104 Mr. Morgan sent the requested email to Mr. Porter with a

copy to Tracey Reynolds and Bill Evans. Ms. Reynolds was the M&T bank person servicing the loan and Bill Evans was the lender's inspector based on evidence presented at the evidentiary hearing. Neither of whom testified at the hearing. The email stated "Ben, As stated last evening in my text to you (which you responded requesting the contract termination be in writing) that our contractual agreement is terminated effective immediately at 2723 Cedar Drive Riva MD 21140. I was advised today by Jack Dalziel that you attempted to gain access to my house by way of entering the garage "code" which as you know has been changed. Please do not trespass on my property any longer. M&T Bank, and Bill Evans have been notified of the above termination and are Cc this email. Thank you, John Morgan."

In response to the text sent by Mr. Morgan, Mr. Porter sent a letter dated September 2, 2014 to Mr. Morgan that reads:

> *Dear Mr. John Morgan, I received your text message last night at 10:30 pm stating that "Effect immediately" you are terminating the contract between us for the job at 2723 Cedar Drive, Riva, MD 21140. This is the third or fourth time you have given me a "termination" notice that we had to resolve because your girlfriend was insisting that you fire me for no apparent reason. Each time I worked, I put a lot of time and effort to keep the job on track, knowing it would cost you much more to bring in other contractors to finish the job that we have already promised to do. I am trying to help you in spite of your actions, so I accept your desire to terminate the contract. I cancelled the inspections scheduled for today My final bill is as follows: Draw 3 to date 9.2.14 $14,100, Change order to date $6963, Contingency 10% withheld $6915, Delays, Disruption, Progress Impact $10,000. Total Due upon receipt of this letter $37,978."*

On September 3, 2014 BLP, through Mr. Porter, sent a second letter to Mr. Morgan. This letter reiterated that Mr. Porter had received the text terminating the contract and advising Mr. Morgan that this was a material breach of the contract and violated section 2 of the Agreement. Mr. Porter further advised that he never received any notice of defective

work, and no "demand or opportunity to cure." In addition, Mr. Porter advised Mr. Morgan he had no right to bring in other contractors and that "tampering with our work will void all warranties pertaining thereto." The letter also advised Mr. Morgan that there was an outstanding balance owed to BLP Construction and requested payment within 10 days. Finally, the letter advised Mr. Morgan that inspectors were scheduled for September 4 and September 5, 2014 for the mechanical, plumbing and electrical rough-ins. Mr. Porter requested to be present and have workers there for the inspections to "minimize the legal issues in litigation,". It is noted that all three rough-in inspections passed.

Following the inspections Mr. Morgan sent an email dated September 6, 2014 to Mr. Porter advising that he would provide BLP with the garage door combination if Mr. Porter would like to work on the "punch list" that was generated after the inspections. He thanked Mr. Porter for being present at the inspections and asked if he wished to continue. A second email was sent by Mr. Morgan to Mr. Porter dated September 20, 2014 again asking if Mr. Porter intended to return and complete the "punch list" generated from the inspections. Mr. Morgan advised that Mr. Porter requested to complete these items and that Mr. Morgan granted that request. In the letter Mr. Morgan further advised that he was concerned because when he came home that evening the doors to the house were unlocked, the upstairs sliding doors and windows were open and the area over the master tub was exposed to the elements. Mr. Morgan specifically requested a response regarding completion of the siding, securing the bathroom vents on the second floor and repairing the windows and doors that were not closing properly.

During this time both Mr. Morgan and Mr. Porter had retained attorneys that were also exchanging emails and conversations regarding a "settlement" to the issue. Despite

several emails between the parties and counsel a settlement was not reached. However, it is important to note that Mr. Porter acknowledged that Mr. Morgan wanted BLP to continue with the contract. An email was sent dated September 12, 2014 from Steven Preller, Mr. Porter's counsel, to Mary Penn, Mr. Morgan's counsel, stating "this is to confirm that your client desires to continue with the contract... Ben will be providing me by Monday with a list of any issues that need to be addressed to finalize the project." In an email dated September 16, 2014 to Steven Preller, Mary Penn set forth the items that needed to be addressed as well as expressing concern over the delay in performance under the contract. Ms. Penn further advised that if these issues were not addressed within 10 working days the contract will be terminated. During the "settlement discussions" an impasse was reached in that BLP, through Mr. Porter, refused to return to the property until payment was received for the amount he deemed to be owed to BLP. This amount was not submitted at the time as a draw to the bank rather it was sent via letter to Mr. Morgan. The final amount was not agreed upon by Mr. Morgan. However this Arbitrator notes that Mr. Morgan did respond by email on September 20, 2014 to Mr. Porter stating "I have always had every intention of paying for all work properly completed by BLP Construction" Mr. Morgan then requested a documented list of all costs incurred for work performed outside of the scope of the 203(k) contract. Mr. Porter never returned to the property after the September 5, 2014 rough-in inspections. Mr. Porter also filed the mechanic's lien against Mr. Morgan for the unpaid balance that Mr. Morgan did not pay.

After a review of the evidence submitted and the testimony of the parties at the Evidentiary hearing this Arbitrator finds that Mr. Morgan did terminate the contract via text message on September 1, 2014. Further, at that time no right to cure was provided and in fact

he advised Mr. Porter not to "trespass" on his property. BLP contends that this was a material breach in the contract under Paragraph 15 and thereby he is entitled to damages. This arbitrator does not agree.

Paragraph 15 of the Contract states as follows:

> *15. Termination: If the owner fails to make a payment under the terms of this Agreement, through no fault of the contractor, the contractor may upon ten working days written notice to the owner, and if not satisfied, terminate this Agreement. The owner will be responsible for paying the contractor for all work completed. If the contractor fails or neglects to carry out the terms of the contract, the owner, after ten working days written notice to the contractor, may terminate this Agreement.*

While initially Mr. Morgan did terminate Mr. Porter without 10 days notice, it is clear from the email exchanges between the parties and their counsel that Mr. Porter was provided with the right to cure almost immediately thereafter. In fact, up through September 20, 2014, twenty days after the initial termination, Mr. Morgan is still trying to determine whether Mr. Porter is exercising the right to cure which Mr. Porter in fact requested.

Immediately after the termination notice from Mr. Morgan, Mr. Porter requested to be present at the inspections occurring on September 4 and 5, 2014. Mr. Morgan agreed and Mr. Porter was present. Further, Mr. Porter received a punch list from the County Inspector and requested that he be permitted to complete those items. Again Mr. Morgan agreed. Despite his repeated requests to complete the project and agreement by Mr. Morgan, Mr. Porter never returned to the property and never completed any further work. Thereby, Mr. Porter abandoned the project as of September 6, 2014 and at the latest September 20, 2014 when it became clear that the parties' counsel were unable to resolve the issue.

BLP Construction elected to declare the initial text a material breach and at that juncture failed to make any effort to resolve the situation. BLP Construction contends that

they refused to do any work without payment. There is no allegation or claim in this case that prior to September 1, 2014 BLP Construction had any issues obtaining payment properly submitted to the lender through draws for the work up to date. In fact two draws for a total of $69,150.00 was paid to BLP Construction by the lender prior to this incident.

Therefore, this Arbitrator finds that BLP Construction abandoned the project as of September 20, 2014. As a result the Plaintiff's claim for damages will by Order following this Opinion be denied.

THE COUNTERCLAIM

During the course of performance under this contract Mr. Morgan alleges that work was performed in an unworkmanlike manner and not to industry standards. As a result Mr. Morgan contends that after BLP Construction abandoned the project he was required to hire contractors to come in and repair and complete the project. Mr. Morgan states that he became concerned regarding the time frame of the project. He further testified at the hearing that his concern was also raised after the August rain storm that caused water damage to his house. Mr. Morgan requested several contractors and inspectors to come to the property and review the work that was performed and advise him if the work was being performed satisfactorily.

Richard Roeser testified at the hearing that he was contacted by Mr. Morgan in late August 2014 to inspect the work performed by BLP Construction to date. Mr. Roeser testified that after his inspection he determined there were several deficiencies and advised Mr. Morgan to have a County Inspector come to the property, and to contact an Engineer to inspect the framing, as well as experts to look at the mechanical systems. Mr. Roeser testified that he advised Mr. Morgan to pause work on the project until these inspections

were performed based on the defective workmanship that he observed. Mr. Roeser specifically testified that the framing work appeared to have been performed by "unskilled" laborers, that at the stage the project was at the house should have been closed to the weather, however it was not and water was entering the home, and that he believed there were issue with the plumbing and HVAC system.

Charles Schindler is an Anne Arundel County Building Inspector. He testified at the hearing that he received a complaint and came to the property to perform an inspection. After his inspection he provided a list of items that needed to be repaired or completed, as well as a list of items that an engineer needed to inspect and certify. It is these issues that Mr. Morgan subsequently sought to have repaired by Mr. Porter, which was never accomplished. Mr. Morgan retained also David Wallace, a licensed Engineer, to inspect the property. It should be noted that Mr. Wallace was also initially retained by the parties at the start of this project. In January 2014 Mr. Wallace inspected the foundation of the existing house and certified that the foundation would bear the plans for a second floor and roof. Subsequently, on September 29, 2014 Mr. Wallace advised Mr .Morgan that after his walk through of the property he confirmed "multiple framing defects, which were itemized in the Anne Arundel County Framing Progress Inspection list". He further advised Mr. Morgan that significant upgrades to the framing would need to be completed to meet current standards.

As a result of Mr. Wallace's inspection Mr. Morgan retained John Bonn of Within an Eighth Construction. Mr. Bonn went to the property and observed several issues with the framing. Mr. Bonn testified at the hearing that the quality of the initial framing in the house

was "poor". Mr. Bonn was further retained by Mr. Morgan to complete the framing and correct/finish the items noted on Mr. Schindler's report as well as Mr. Wallace's report.

Michael Johnson of Maximus Heating and Cooling of MD, LLC also testified at the hearing regarding the HVAC system. He testified that he came to the project and inspected the work that had been completed. During his inspection Mr. Johnson noted several issues with the duct work that was installed and that the work performed was not completed within code. In order to perform work at the property Mr. Johnson testified that all of BLP Construction's work would have to be removed and Mr. Johnson would have to start over. Mr. Johnson did state that the installed duct work was only 30% complete at the time he inspected, but that what was installed was deficient. He also testified that the reason that the removal of everything was necessary was because once he performed the work he was warranting the work. Maximus Heating and Cooling of MD, LLC was thereafter retained to complete the HVAC work at the property.

Ronald Rozzano also testified at the hearing. He testified that he is a Master Plumber with 50 years of experience. He was requested to inspect the property. He did so and as a result of that inspection determined that there were multiple deficiencies in the installed plumbing. He noted that the drain pipes were run at a positive slope which could result in a back-up and that pipes were run too close to the end of the floor joist. Rob Merriman of Howard Plumbing, LLC also testified at the hearing and stated that when he inspected the property he also observed the same deficiencies noted by Mr. Rozzano. Mr. Merriman was retained and did complete and repair the plumbing at the project. He testified that the work performed prior to him was unprofessional and of no use to the homeowner.

Having heard the testimony of the defense experts, as well as Ben Porter and Ben Porter, Sr., this Arbitrator finds the defense experts to be credible and to have no personal interest or stake in this matter. This Arbitrator does in fact find that the work performed by BLP Construction was of poor quality and not to industry standards as testified to by the experts presented in the areas of framing, plumbing, and HVAC. It is noted that despite retaining these inspections and expert opinions from the various areas of construction and repeated advice that the work performed was subpar, Mr. Morgan still made efforts to complete the project with BLP and Mr. Porter. It was BLP Construction that declined to repair and complete the deficiencies, again as stated previously, thereby abandoning the project.

Defendant John P. Morgan also raised the issue that BLP Construction and Mr. Porter violated numerous MHIC regulations. This Arbitrator is not going to make any finding or render any opinion as to whether or not that is a fact. The Maryland Home Improvement Commission is a State Regulatory body that has statutory procedures set out for enforcing their regulations. It is neither necessary nor appropriate to make findings as to whether those regulations have been complied with in order to reach a decision on all issues in this case. Accordingly, I decline to do so.

Having made the above findings the issue becomes what, if any, damages is the Defendant entitled to? In the counterclaim Mr. Morgan initially submitted a damage claim for $151,326.85. After the evidentiary hearing and testimony and evidence presented in the Defendant's Post Arbitration Brief and Proposed Decision of Arbitrator that damage claim was amended down to $90,89.78 plus attorney's fees.

The first issue to be addressed will be the claim for attorney's fees. Mr. Morgan argues that he is entitled to recover attorney's fees under the fee shifting provision provided in the contract entered into between the parties on November 13, 2013. Specifically, Mr. Morgan points to Paragraph 9 as the authority for a recovery of attorney's fees. That provision is as follows:

> *9. Payments and Completion: Payments may be withheld because of (1) defective work not remedied; (2) failure of contractor to make proper payments to subcontractors, workers, or suppliers; (3) persistent failure to carry out work in acceptance with this Agreement or these general conditions, or (4) legal claims. Final payment will be due after complete release of any and all liens arising out of the contract or submission of receipts or other evidence of payment covering all subcontractors or suppliers who could file such a lien. The contractor agrees to indemnify the Owner against such liens and will refund all monies including costs and reasonable attorney's fees paid by the owner in discharging the liens. A 10 percent holdback is required by the lender to assure the work has been properly completed and there are no liens against the property.*

In reading this provision there is no specific reference that in any claim between the parties to the contract the prevailing party shall be entitled to attorney's fees. Rather, defense argues that the sentence stating "The contractor agrees to indemnify the Owner against such liens and will refund all monies including costs and reasonable attorney's fees paid by the owner in discharging the liens. " as the authority to award attorney's fees. I do not see this provision providing any authority for the award of attorney's fees to Mr. Morgan as a result of my award in his favor in this case.

In reading this section completely and in context it is clear to this Arbitrator that this provision was intended to apply only when an Owner was required to defend and/or pay liens which were filed by "subcontractors or suppliers" who filed liens against the owner and/or the property as a result of not being paid by the project

contractor. Therefore, Defendant and Counterclaimant's request for an award of attorney fees will by Order following this pinion be denied.

As stated previously Defendant and Counterclaimant John P. Morgan is seeking damages in the amount of $90,089.78 for breach of contract by Plaintiff BLP Construction Co., LLC. Defendant is seeking reimbursement for draw 1 and draw 2 paid to BLP Construction in the amount of $72,150.00; advances to BLP in the amount of $9,430.00; and payment to various suppliers and contractors to repair and complete the project in the amount of $127,667.78. Mr. Morgan also seeks reimbursement for the cost of inspections by Mr. Wallace and Mr. Roeser in the amount of $4,375.00. The total of these damages comes to $214,222.78. To this amount Mr. Morgan has applied a credit of $127,233.00 for the BLP Contract amount bringing the final damage claim to $90,089.78. Damages for a breach of contract are those that will place the injured party in the monetary position he would have held had the contract been performed properly. For defective performance of a real estate contract the measure of damages is the cost of repairing or correcting the defect. *Hall v. Lovell Regency Homes Ltd. Pshp.*, 212 Md. App. 1 (1998).

The testimony at the evidentiary hearing from all of the experts, as well as Defendant John P. Morgan, supports the amended damage claim that these expenses were incurred to complete the project and to repair the deficient work performed by BLP Construction, Co., LLC. This included repairs to the framing, HVAC, plumbing, windows, and drywall. Therefore, this Arbitrator will award Mr. Morgan damages in the amount of $90,089.78.

Accordingly, it is this 25th day of January, 2015 by the below signed Arbitrator

DETERMINED that the Plaintiff BLP Construction Co., LLC claim against Defendant John P. Morgan be and is hereby **DENIED**, and it is further;

DETERMINED that this Arbitrator finds for Counter Defendant John P. Morgan and against Counter Plaintiff BLP Construction Co., LLC as to Counterclaim on all issues except the claim for attorney's fees, and it is further;

DETERMINED that Counter Plaintiff John P. Morgan's claim against Counter Defendant BLP Construction Co., LLC for attorney's fees be and hereby is **DENIED**, and it is further;

DETERMINED that Counter Plaintiff John P. Morgan's is awarded damages in the amount of $90,089.78 against Counter Defendant BLP Construction Co., LLC, and it is further;

ORDERED, that all remaining claims are denied with prejudice for the reasons set forth herein, and it is further;

DETERMINED, that this award is in full settlement of all claims and counterclaims submitted to this Arbitrator and all claims not expressly granted herein are hereby denied.

Signature on File

Judge Steven I, Platt (Ret.)
Arbitrator

Copies to:

Kevin M. Tracy, Esquire
888 Bestgate Road, Suite 304
Annapolis, Maryland 21401

Steven B. Preller, Esquire
130 Holiday Court, Suite 108
Annapolis, Maryland 21401

CIRCUIT COURT OF MARYLAND FOR
ANNE ARUNDEL COUNTY
8 Church Circle
Annapolis, Maryland 21401

Main: 410-222-1397
Civil: 410-222-1431
Criminal: 410-222-1420
Juvenile: 410-222-1427
Trust/Adoption: 410-222-1331
TTY for Deaf: 410-222-1429
Maryland Relay Service: 711

Case Number: 02-C-14-191228

To: **BLP CONSTRUCTION CO LLC**
506 BAYSIDE DRIVE
STEVENSVILLE MD 21666

BLP CONSTRUCTION CO LLC VS JOHN P MORGAN

Date: 3/11/2016

NOTICE OF RECORDED JUDGMENT

I HEREBY CERTIFY that the following Judgment has been recorded in this Court in the above entitled case.

INDEXED IN JUDGMENT INDEX

Judgment Against: BLP Construction Co LLC

Judgment in Favor of: John P Morgan

Judgment Ordered On: 03/11/2016
Judgment Entry Date: 03/11/2016
Amount of Judgment: $90,089.78
Pre Judgment Interest:
Appearance Fee: $
Filing Fee: $

Other Fee: $
Service Fee: $
Attorney Fee: $

Total Judgment: $90,089.78

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of this Court.

Easy Peel® Labels
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Robert P. Duckworth
Clerk of the Circuit Court

dh