

~~IN THE MATTER OF THE CLAIM~~ * ~~BEFORE MARY SHOCK,~~

OF MELINDA MALUGA,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	*
FOR THE ALLEGED ACTS OR	* OAH No: DLR-HIC-02-17-16508
OMISSIONS OF RANDALL SMITH,	* MHIC No: 17 (90) 370
T/A MARYLAND DECK AND SHED,	*
LLC,	*
RESPONDENT	*

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On January 10, 2017, Melinda Maluga (Claimant) filed a claim with the Maryland Home Improvement Commission (HIC) Guaranty Fund (Fund) for reimbursement of \$5,113.00 in alleged actual losses suffered as a result of a home improvement contract with Randall Smith, trading as Maryland Deck and Shed, LLC (Respondent).

On August 1, 2017, I held a hearing at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). Angela Pallozzi, Esquire, represented the Claimant. The Respondent failed to appear for the hearing.

Hope Sachs, Assistant Attorney General, Department of Labor, Licensing and Regulation, represented the Fund.

The contested case provisions of the Administrative Procedure Act, the HIC procedural regulations, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2016); Code of Maryland Regulations (COMAR) 09.01.03; COMAR 09.08.02.01B; COMAR 28.02.01.

ISSUES

1. Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?
2. If so, what is the amount of that loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits for the Claimant:

- CL #1 Contract, April 2, 2016
- CL #2 Claimant's Statement, with photographs, undated
- CL #3 Emails between Claimant and Respondent, February 27, 2016 to July 19, 2016
- CL #4 American Express Transactions, April 25, 2016 to August 20, 2016
- CL #5 Wood Knott, Estimate, June 26, 2017
- CL #6 Holabird Metal Products, Bill, November 4, 2016
- CL #7 Elite Decks, Repair/Replacement Assessment, undated
- CL #8 Elite Decks, Contract, March 16, 2017
- CL #9 Not offered
- CL #10 Not offered
- CL #11 Not offered
- CL #12 Not offered
- CL #13 Photographs, 1 to 29

The Respondent did not offer any exhibits.

I admitted the following exhibits for the Fund:

- FUND #1 Notice of Hearing, June 26, 2017, and Hearing Order, May 23, 2017
- FUND #2 Respondent's Licensing History, July 27, 2017
- FUND #3 Letter from HIC to Respondent, January 12, 2017 and Home Improvement Claim Form, January 10, 2017

The Claimant testified for herself and called Brad Bowling, Elite Decks, to testify.

Neither the Respondent nor the Fund called any witnesses.

FINDINGS OF FACT

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

1. At all times relevant to these proceedings the Respondent was licensed by the HIC. His current license expires on November 16, 2017.
2. The Claimant and the Respondent entered into a contract on April 2, 2016, for the Respondent to perform the following work at the Claimant's residence:
 - a. Lower Deck
 - remove all decking and railing and install new Gorilla Decking
 - build a four foot extension to the deck with rail
 - build a seven foot bar with doors, shelves, and self-draining ice cooler
 - build a ten foot folding countertop along the front of the extension
 - b. Upper Deck
 - replace HVAC surround
 - build two-level storage unit/plant shelf
3. The contract price for the work was \$15,500.00.
4. On April 12, 2016, the Claimant paid the Respondent \$5,113.00 by check.
5. On April 25, 2016, the Claimant paid the Respondent \$5,367.00 through her American Express credit card.
6. On April 20, 2016, the Respondent began work on the project.
7. By the end of June 2016, the Respondent had not completed the work.
8. On July 2, 2016, when the Respondent had failed to complete the work, the Claimant disputed the April 25, 2016 charge she had made on her American Express card. On August 20, 2016, American Express credited the Claimant with \$5,367.00.

9. On July 8, 2016, the Claimant emailed the Respondent stating that it had been two weeks since they met and she had not seen any progress on the items required for completion of the work.

10. On July 9, 2016, the Claimant emailed the Respondent a list of items that required completion.

11. On July 19, 2016, the Respondent emailed the Claimant stating because of the American Express charge dispute, he would not perform further work until the Claimant had paid the second draw on the contract.

12. The Claimant did not pay the draw and the Respondent did not return to the job.

13. When the Respondent left the job, the following conditions existed:

a. Lower Deck

- the deck extension rested on posts that did not have footers
- one post stood on a utility easement with electric lines, as a result, a footer could not be installed
- a beam was not pocketed correctly, which would have obviated the need for a post
- the Gorilla Decking had a water diversion system that did not drain properly because the Respondent did not construct the joist system with a slight slope, water puddled on the deck when it rained
- connections on the aluminum rails were incomplete
- the doors of the bar would not stay closed and had to be tied shut, the sides of the bar top were unfinished, and the bar top and countertop were warping

b. Upper Deck

- the lattice of the HVAC enclosure was bulging and missing a bar
- the storage unit top was warping

14. The cost to replace the deck and construct a new bar was \$14,800.00.

15. The cost to complete the rail, and replace and install an aluminum countertop was \$1,225.00.

16. The cost to build the HVAC enclosure was \$2,426.70.

DISCUSSION

Notice of Hearing

On January 12, 2017, the HIC mailed a copy of the Claimant's claim to the Respondent at his business address of record on Green Tree Court, Elkridge, Maryland. (FUND #3.) There is no evidence the United States Postal Service (USPS) returned the January 12, 2017 notice of the claim. On June 26, 2017, the OAH mailed a Notice of Hearing to the Respondent's business address of record in Elkridge, Maryland. (FUND #1.) On July 27, 2017, the Respondent's business address with the HIC was still in Elkridge, Maryland. (FUND #2.) There is no evidence the Respondent notified the HIC of a change of business address either on or before the June 26, 2017 Notice of Hearing date, or on or before the August 1, 2017 hearing date. Neither the HIC nor the OAH mailed notices to the Respondent at his residence address. The Respondent failed to appear for the hearing. On August 7, 2017, the USPS returned the Notice of Hearing to the OAH with a notation that the Respondent's address had changed to Meridian Way in Frederick, Maryland. Notwithstanding the returned mail, I find the OAH provided the Respondent legally sufficient notice of the hearing.

The Administrative Procedure Act provides that a licensee shall be deemed to have reasonable opportunity to know of service if: 1) the person is required by law to notify the agency of a change of address within a specified period of time; 2) the person failed to notify the agency in accordance with the law; 3) the agency or the OAH mailed the notice to the address of record; and 4) the agency did not have actual notice of the change of address prior to service. Md. Code Ann., State Gov't § 10-209(c) (2014). Maryland law requires a licensee to notify the HIC of a change of address within ten days of the change. Md. Code Ann., Bus. Reg. § 8-309 (2015).

There is no evidence the Respondent notified the HIC of his change of his business address within ten days of the change or even up to and including on the date of the hearing. Although the HIC did have a residential address for the Respondent and neither the HIC nor the OAH mailed any notices to that address, the HIC also did not have actual notice of any change of the Respondent's business address prior to the date of the Notice of Hearing. This claim involves the Respondent's business and service at that address is reasonable. Because the OAH mailed the Notice of Hearing to the Respondent's business address of record and because neither the HIC nor the OAH had notice of any change of the Respondent's business address, the Respondent is deemed to have reasonable notice of the hearing date, time and location and he failed to appear for the hearing. *Board of Nursing v. Sesay*, 224 Md. App. 432 (2015).

Claim

In this case, the Claimant bears the burden of proving the validity of her claim by a preponderance of the evidence. Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3).

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) (2015). 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 (2015). I find the Claimant has proven eligibility for compensation.

The Claimant testified concerning the scope of work the Respondent agreed to complete and the unworkmanlike, inadequate, or incomplete home improvement the Respondent performed. She stated she contracted with the Respondent to extend an existing deck on her home, install a folding counter along the extension rail, build a bar for the lower deck and a

~~storage unit for the rooftop deck, and to construct an enclosure for the HVAC unit on the rooftop~~

deck. The contract price was \$15,500.00. (CL #1.)

The Claimant stated the deck extension was defective. Rain water failed to drain from the deck and, instead, puddled and ran toward the sliding doors to the house. To correct the problem, the Respondent drilled holes underneath the deck and installed trim similar to gutters to drain the water. The water still failed to drain properly and drilling the holes voided the warranty for the Gorilla Decking. The Respondent also failed to properly secure a support post and sections of the railing were missing because the Respondent could not find matching railing.

Further, the Claimant testified the Respondent failed to finish the trim on the bar for the deck and the doors failed to close properly and stay closed; the Claimant used string to tie the doors shut. Also, the bar top, the folding countertop, and the top of the storage unit for the rooftop deck began to warp because the Respondent used Gorilla Decking for those surfaces, which cannot be used for such purposes.

With regard to the HVAC enclosure, the Claimant stated the Respondent failed to complete construction and what he did construct, fell apart because he failed to include a bar on all four sides of the rectangular structure. Finally, the Respondent left construction debris in a common alleyway. The Claimant provided photographs to support her testimony, including pictures of water pooling on the lower deck, the bar doors tied shut, and the collapsing HVAC enclosure. (CL #15.)

The Claimant stated she discussed the construction defects with the Respondent on numerous occasions, but he failed to correct the problems. She stated she paid the Respondent \$5,113.00 by check on April 12, 2016, and charged a \$5,363.00 payment on April 25, 2016. (CL #2 and #4.) On July 2, 2016, after the Respondent failed to properly complete the work, the Claimant contested the charge with American Express and the company recouped the amount

she had paid. After that action, the Respondent would not return any of her calls and he failed to return to complete the work.

Finally, the Claimant testified that she hired Elite Decking to demolish and replace the lower deck and build the bar for \$14,800.00. (CL #8.) She hired Holabird Metal Products for the railing and to install an aluminum countertop along the extension rail for \$1,225.00. (CL #6.) She hired Wood Knott to build and install the enclosure for the HVAC unit for \$2,426.70. (CL #5.)

The Respondent called Brad Bowling, Elite Decking, to testify. Mr. Bowling stated the Respondent built the extension and installed the Gorilla Decking incorrectly. First, the Respondent did not properly secure the support posts in a thirty-inch concrete footer. Mr. Bowling knew of the defect, in part, because the Respondent had placed one post where a utility easement stands and electrical lines ran under the concrete. The Respondent could not go down thirty inches without hitting electrical wires.

Second, the Respondent failed to install the Gorilla Decking as required to activate the water diversion system. He placed the decking over the existing structure, which was not constructed for drainage, but for a wooden deck and, so, not sloped. Mr. Bowling stated that he could not salvage the deck or decking material because the underlying structure required replacement, which the Respondent should have re-built in the first place.

The Claimant demonstrated the Respondent performed an unworkmanlike home improvement. Particularly serious was his failure to properly support the deck and his failure to properly install the Gorilla Decking to activate the drainage system. I accept the Claimant's testimony that rain water ran toward the sliding doors of the house, which could cause significant damage overtime as water continued to pool and leak into the interior of the structure. I find that the Claimant is eligible for compensation from the Fund.

~~Having found eligibility for compensation I now turn to the amount of the award, if any,~~

to which the Claimant is entitled. 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).

The HIC's regulations provide three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). The following formula offers an appropriate measurement to determine the amount of actual loss in this case: if the contractor did work according to the contract and the claimant has solicited another contractor to complete the contract, the claimant's actual loss shall be the amounts the claimant has paid to the contractor under the original contract, added to any reasonable amounts the claimant has paid to 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. COMAR 09.08.03.03B(3)(c).

The Claimant's actual loss is calculated as follows:

Claimant paid Respondent		\$ 5,113.00
Claimant paid to other contractors		
Elite Decks	\$ 14,800.00	
Holabird Metal	1,225.00	
Wood Knot	<u>2,426.70</u>	
		+ <u>18,451.70</u>
		\$ <u>23,564.70</u>
Less contract price		<u>15,500.00</u>
Actual loss		\$ 8,064.70

Finally, Maryland law provides that the maximum recovery from the Fund is limited to the lesser of \$20,000.00, or the amount paid by a claimant to a contractor. Md. Code Ann., Bus. Reg. § 8-405(e)(1), (5) (2015). Because the amount the Claimant paid to the Respondent was \$5,113.00, she is entitled to recover that amount.

CONCLUSION OF LAW

I conclude the Claimant has sustained an actual and compensable loss \$5,113.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405.

PROPOSED ORDER

I PROPOSE the Maryland Home Improvement Commission:

..... **ORDER** the Maryland Home Improvement Guaranty Fund award the Claimant.....
\$5,113.00; and

ORDER 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 ten percent as set by the Maryland Home Improvement Commission;¹ and

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

Signature on File

September 7, 2017
Date Decision Issued

Mary Shock
Administrative Law Judge

MKS/cmg
#169334

¹ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 25th day of October 2017, 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