

IN THE MATTER OF THE CLAIM OF
PAMELA M. RICHARDSON
AGAINST THE
MARYLAND HOME IMPROVEMENT
GUARANTY FUND ON ACCOUNT OF
HOME IMPROVEMENT WORK
UNDERTAKEN BY
CHESTER J. SADOWSKI, T/A
CJS CONSTRUCTION, INC.

* BEFORE STEPHEN J. NICHOLS,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
*
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* OAH NO.: DLR-HIC-02-09-43019
* MHIC NO.: 07 (90) 2781
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RECOMMENDED DECISION

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STATEMENT OF THE CASE

This case arose because of a complaint filed by Pamela M. Richardson (Claimant) with the Maryland Home Improvement Commission (MHIC) against Chester J. Sadowski, t/a CJS Construction, Inc. (Respondent). The complaint asserts that the Claimant entered into a contract with the Respondent for the performance of home improvement work at her residence and that the Respondent's performance of the work was unworkmanlike or inadequate.

On January 29, 2009, the Claimant filed a claim with the MHIC seeking to recover \$15,170.00 from the Home Improvement Guaranty Fund (Fund). On February 4, 2009, the

Claimant amended her claim to \$10,770.00.¹ On October 13, 2009, the MHIC issued an order for a hearing on the claim against the Fund.

On September 2, 2010, 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)(i) (2010). The hearing was conducted at the Office of Administrative Hearings (OAH) located in Hunt Valley, Maryland.

Samuel L. Curry, Esquire, represented the Claimant. The Respondent appeared and represented himself. Matthew A. Lawrence, Assistant Attorney General, Office of the Attorney General, Department of Labor, Licensing & Regulation, represented the Fund.

The contested case provisions of 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 (2009 & Supp. 2010); Code of Maryland Regulations (COMAR) 09.01.03, COMAR 09.08.02.01; 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.

¹ The Claimant amended the claim against the Fund from \$15,170.00 to \$10,770.00. "Once a verified claim has been filed with the Commission, the claimant may not amend the claim unless the claimant can establish to the satisfaction of the Commission that . . . the . . . claimant's proposed amendment would not prejudice the contractor whose conduct gave rise to the claim." COMAR 09.08.03 02C(2). As the proposed amendment meets the exemption criteria for permitting the claim to be amended, and as no objection was raised by Fund, the amendment was permitted.

SUMMARY OF THE EVIDENCE

A. Exhibits

The following items were admitted into the record:

- Fund Exhibit #1 - Dept. of Labor, Licensing & Regulation I.D. Registration Inquiry on the Respondent, dated September 1, 2010 (seven pages)
- Fund Exhibit #2 - Copy of a Home Improvement Claim Form
- Fund Exhibit #3 - Copy of a fax cover sheet and a note, dated February 4, 2009 (two pages)
- Claimant Exhibit #1 - Copy of a Lead Hazard Reduction Spec Work Scope for 1816 Appleton Street, dated December 8, 2005 (eight pages)
- Claimant Exhibit #2 - Copy of a Baltimore City Lead Paint Intervention Grant Agreement (six pages)
- Claimant Exhibit #3 - Copy of an Additional Work change order at 1816 Appleton Street
- Claimant Exhibit #4 - Copy of a Certificate of Payment/Disbursement Request No. 1512
- Claimant Exhibit #5 - Copy of a Certificate of Payment/Disbursement Request No. 1389 (two pages)
- Claimant Exhibit #6 - Copy of a Certificate of Payment/Disbursement Request No. 1388 (two pages)
- Claimant Exhibit #7 - Copies of two Estimates from B D & D Home Improvement, dated March 26, 2009 (two pages)
- Claimant Exhibit #8 - Photographs labeled A through Z (three pages)
- Claimant Exhibit #9 - Photographs labeled A through C
- Respondent Exhibit #1 - Copy of a July 11, 2007 letter from the MHIC to the Respondent and a July 24, 2007 response from the Respondent to the MHIC (two pages).

No other exhibits were admitted into evidence.

B. Testimony

The Claimant testified in her own behalf and presented the testimony of Carolyn Bannerman. The Respondent testified in 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 01-35607.

2. At all times relevant, the Claimant owned and lived at the residence located at 1816 Appleton Street, Baltimore, Maryland (the property).

3. On December 21, 2005, the Claimant and the Respondent entered into a contract for lead abatement services at the property. The scope of work included vacuum-cleaning all surfaces with a High Efficiency Particle Accumulator (HEPA) Vacuum followed by a wet wash with a solution containing one ounce 5% trisodium phosphate per gallon of water and a second HEPA vacuuming of all horizontal services. The work also included painting or waxing all floors and stairs, stabilizing exterior walls, replacing windows and stabilizing window frames, stabilizing interior walls, stabilizing floorboards, stabilizing doors, and stabilizing a fence. Door edges were to be planed and adjusted to minimize door/jamb friction and contact. Interior walls, floorboards, and other surfaces were to be stabilized by lightly scraping all loose paint, caulking, wallpaper and plaster, and then cleaning, followed by applying a prime coat and topcoat. Wood windows were to be removed and replaced with prefabricated vinyl or aluminum replacement windows mounted into a completely wrapped frame. All loose paint was to be lightly scraped, cleaned, deglossed, primed and repainted. The work was to be performed in the basement, lobby, living room, dining room, kitchen, pantry, front bedroom, middle bedroom, hallways, bath, and rear bedroom at the property. The floor in the kitchen was to be replaced with

underlayment grade plywood and vinyl composite tile. 720 square feet of drop ceilings were be removed from the entire first floor and second floor except the living room and front bedroom.

4. In 2005, the Claimant had agreed to participate in the Baltimore City Healthy Start Lead Abatement Action Project (Project). Under Project terms, the Claimant was awarded a grant to pay for the lead abatement services to be performed at the property and she selected the Respondent from a list of Project-approved contractors. In exchange for the grant, the Claimant agreed to the placement of a lien on the property in favor of the Project for that amount. Under the grant terms, if the Claimant remained in the property for three years from the date of the grant, the lien would be released and the grant would not have to be repaid.

5. Prior to the execution of the contract, the Respondent visited the property in order to provide an estimate for the work to be performed. During the estimate process, the Respondent provided the Claimant with a copy of a Lead Hazard Reduction Specifications (written contract) memorializing the scope of the work to be performed, dated December 8, 2005. Every item of work to be performed in the written contract was explained to the Claimant.

6. The December 8, 2005 contract specified a price of \$14,395.00 for the work to be performed at the property. The Respondent was to be paid for performance of the work based on progress of the work and payments had to be authorized by the Claimant and by a Project inspector.

7. On or about February 13, 2007, the Claimant moved out of the property so that the lead abatement services could begin.

8. During the Respondent's performance of the work, there was one change order to the contract in the amount of \$2,550.00.

9. The total contract price for the work to be performed by the Respondent at the property was \$16,945.00.

10. On March 13, 2007, an initial draw against the grant amount was made. The Claimant, the Respondent, and Jeff Conard, Project Coordinator, walked through the property and inspected the work that had been performed. The Claimant and Mr. Conard signed a Certificate of Payment/Disbursement Request releasing \$7,196.00 of the grant to the Respondent.

11. On March 29, 2007, two draws against the grant amount were made. The Claimant, the Respondent, and Mr. Conard walked through the property and inspected the finished work. At that time, the Claimant was satisfied with the work that had been performed and no punch list was prepared. The Claimant and Mr. Conard signed a Certificate of Payment/Disbursement Request releasing the remaining \$7,199.00 of the original grant to the Respondent. The Claimant and Mr. Conard signed another Certificate of Payment/Disbursement Request releasing \$2,550.00 to the Respondent for the additional work that had been specified in the change order.

12. The Respondent returned the keys to the property to the Claimant during April 2007.

13. On or about May 10, 2007, the Claimant moved back into the property.

14. After she moved back into the property, the Claimant noticed what she believed to be discrepancies with the Respondent's workmanship: a skylight was broken, a window ledge in a back bedroom was damaged, a bedroom transom needed repair, the fence needed repair, a basement window could not be opened, and excess drops of paint or thick paint were noticeable on the stairs, on floorboards, in hallways and in the basement.

15. The Claimant contacted the Respondent by telephone and made him aware of her complaints with the work.

16. The Respondent sent his workers back to the property three times to address (touch-up) items that the Claimant had complaints about.

17. Sometime before July 11, 2007, the Claimant filed a complaint with the MHIC. On July 11, 2007, the MHIC sent a letter to the Respondent with a copy of the complaint attached. On July 24, 2007, the Respondent sent a response (Respondent Exhibit #1) to the MHIC that read, in pertinent part:

I have tried to work with [the Claimant] and sent workers over to take care of her complaints. Every time they went to her house they would complete the work that we were responsible for. The skylight was broke from the roof and we were never on the roof and I told her that. The work done in her home was done according to the work scope and she went through everything to be done, before the work was done everything that was to be done was explained to her. I will meet with the investigator and [the Claimant] to try to resolve this but I feel she will not be satisfied with [what] is done for she wants things done that are not part of the work scope, please call me on my cell.

18. On January 29, 2009, the Claimant filed a claim against the Fund in the amount of \$15,170.00.

19. On March 26, 2009, the Claimant obtained two estimates from B D & D Home Improvement to perform work at the property. Each estimate listed a total price of \$10,325.00 for the work to be performed.

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 (2010 & Supp. 2010).² 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

² Unless otherwise noted, all references to the Annotated Code of Maryland, Business Regulation Article are to the version published in the 2010 Replacement Volume.

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).³ 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 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. "By employing the word 'means,' as opposed to 'includes,' the legislature intended to limit the scope of 'actual loss' to the items listed in section 8-401." *Brzowski v. Md. Home Improvement Comm'n*, 114 Md. App. 615, 629, 691 A.2d 699, 706 (1997). "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 Maryland Court of Appeals has defined "workmanlike manner" as that term applies to building and construction contracts. In *Gaybis v. Palm*, 201 Md. 78, 85, 93 A.2d 269, 272 (1952), the Court held, "[t]he obligation to perform work with skill and care is implied by law

³ 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."

and need not be stated in [any] contract.” That rule was reaffirmed in *Worthington Construction Corp. v. Moore*, 266 Md. 19, 22, 291 A.2d 466, 467 (1972). In *K & G Construction Co. v. Harris*, 223 Md. 305, 314, 164 A.2d 451, 456 (1960), the Court compared the express standard “workmanlike manner” with the implied standard of performance discussed in the *Gaybis* case. The *Harris* Court cited the *Gaybis* case for authority that the “workmanlike-manner” wording was equivalent to the “skill-and-care” wording. A “workmanlike manner” has also been defined as “[t]he customary way of doing the work in the vicinity of the place where the work is to be done” and “[a] manner of work adequate for the performance of the particular undertaking.” *Ballentine’s Law Dictionary* 1377 (3d ed. 1969) (citations omitted).

“At a hearing on a claim, the claimant has the burden of proof.” Md. Code Ann., Bus. Reg. § 8-407(c)(1). In order for the Claimant to establish an entitlement to an award from the Fund, she must prove her “actual loss.” Md. Code Ann., Bus. Reg. § 8-401. COMAR 09.08.03.03B(3) sets forth the following formulas for determining an “actual loss:”

(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)(a) does not apply to the facts as found. The Claimant did not submit proof of the value of materials and services actually provided by the Respondent, so her claim cannot be measured under COMAR 09.08.03.03B(3)(b). As the first two possibilities are foreclosed, the ALJ will evaluate the instant claim of an "actual loss" in accordance with COMAR 09.08.03.03B(3)(c).

In order to prove her actual loss, the Claimant submitted over twenty photographs purporting to show poor workmanship by the Respondent at the property. Among other claimed discrepancies, numerous photographs depict excess paint and/or thick paint on walls and floorboards. However, reviewing the written contract, it is clear that the Respondent was performing work other than customary remodeling work. He was not responsible for removing previous layers of paint that had been applied to the surfaces at the property. He was providing lead abatement services that, in large part, called for stabilizing surfaces contaminated with lead paint. There was no expert testimony that the work performed by the Respondent, complained of by the Claimant, was at odds with the customary way of performing lead abatement services as specified in the written contract.

The Claimant maintains that the property looked worse after the Respondent's performance of the work than it did before. This notion is suspect considering the fact that the Claimant and Mr. Conard, the Project Coordinator, approved the three disbursements that the Respondent received for doing the work.

In her claim for actual loss, the Claimant produced evidence -- among her various complaints -- that a front door at the property had fallen off the hinges and work on the door was otherwise unworkmanlike, her skylight was broken, a step at the door entrance to the rear yard was damaged, and her fence needed repair.

In the written contract, the Respondent was not obligated to rebuild the fence at the property, only to stabilize the paint on the fence surfaces. In this measure of her actual loss, the Claimant seeks compensation for an item beyond the scope of work that the Respondent was obligated to perform.

The Claimant maintains that the front door fell off because an improper hinge was used to replace the original heavier hinge for that door. The Claimant also stated that the edges to the front door were planed too much. There is no expert testimony that the replacement hinge at the front door was inadequate for the task it was used for or that the door edges were planed beyond a point required to minimize friction and surface contact as required in performing lead abatement services. The Claimant did not provide a date for when the front door fell off its hinge, only that the front door worked its way loose over some period of time. The Claimant has failed to establish that the Respondent's installation of a new hinge at the front door or his other work on the door was at odds with his contractual obligations, unworkmanlike or inadequate.

In the written contract, the Respondent was not obligated to replace the skylight at the property or to perform work on the step exiting to the rear yard. At the time of the final walk through, the Claimant did not bring a broken skylight or damaged step to the Respondent's attention.⁴ Even if the Respondent's workers were responsible for damaging the step or breaking the skylight, those items would not be recoverable in a claim against the Fund. "Consequential damages," which may arise out of the performance of a home improvement contract, are not reimbursable from the Fund. Md. Code Ann., Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1)(a). Consequential damages are often characterized as being the product of special circumstances or an indirect result of some wrong. Consequential damages have been

⁴ It is unclear when the Claimant noticed that the skylight was broken or the step was damaged. Although the Claimant suggests that the Respondent's workers were responsible for breaking the skylight and damaging the step, no evidence demonstrates this other than the Claimant's conjecture.

defined as "such damage, loss or injury as does not flow directly and immediately from the act of the party, but only from some of the consequences or results of such act." *Black's Law Dictionary* 390 (6th ed. 1990). The skylight and step were not within the scope of work that the Respondent was engaged to perform and, therefore, cannot be a measure of an actual loss within the meaning of section 8-401 of the Business Regulation Article. For the purpose of the claim against the Fund, any damage to the skylight or the step would be treated as consequential damages.

None of the above-described claimed measures of actual loss have merit. However, there are, even the Respondent acknowledges, some remaining touch-up items with the work that was performed that could be corrected.

On March 26, 2009, the Claimant obtained two copies of an estimate from B D & D Home Improvement to perform work at the property. Each copy of the estimate listed a total price of \$10,325.00 for the work to be performed.³ Those copies were entered into the record as Claimant Exhibit #7. The Claimant testified that she showed what she considered workmanship discrepancies to the B D & D Home Improvement estimator and the copies of the estimate were produced. The Claimant admitted that she did not show a copy of the home improvement contract that she had with the Respondent to the estimator. From the Claimant's photographs that depict primarily touch-up items that are in need of correction, it seems that an excessive amount of work is called for in the estimate. Specified line items and prices listed in the \$10,325.00 estimate do not correspond to the touch-up items displayed in the Claimant's photographs. The pricing as listed does not allow for the cost of work on the fence, rear step

³ The two copies of the estimate are confusing and in need of an explanation. For example, one copy reads that a charge of \$1,100.00 will be made to "[r]eplace skylight." The other copy reads, "[s]ecure ball on banister touch-up paint . . . [s]eal around Skylight touch-up paint in area" for the same charge of \$1,100.00. In this regard, the two copies of the estimate appear to be inconsistent.

exiting to the rear yard, front door, skylight, and for correcting claimed excessively painted areas to be excluded from the estimate. The ALJ is unable to recommend an award for even those few touch-up items that are fairly demonstrated by the Claimant's photographs because the specific cost to correct those items of deficiency has not been established in the record.

On a separate footing, there is another reason to reject the instant claim against the Fund. In calculating an actual loss under the circumstances of this case, one must start with "the amounts the claimant has paid to or on behalf of the contractor under the original contract" COMAR 09.08.03.03B(3)(c) (emphasis added). The representative for the Fund points out that the Claimant has paid nothing to the Respondent under the original contract and there is no evidence that the Claimant is obligated to reimburse the Project for the cost of performing lead abatement services at the property. Indeed, the Claimant acknowledged that under the grant terms, if she remained in the property for three years from the date of grant, the lien on the property would be released and the grant would not have to be repaid. Three years have expired and it must be inferred that any lien that was filed against the property for the amount of the grant has expired. As risk posed by lead paint contamination has been removed or abated, the value of the property has most likely increased. Even if all of the alleged discrepancies with the Respondent's work had been proven, the Claimant would not have had an actual loss and any award to the Claimant would amount to an additional windfall. For the reasons already discussed, this case need not be resolved on that basis. However, the merit of the Fund's argument is supported by a strict reading of COMAR 09.08.03.03B(3)(c).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, the ALJ concludes as a matter of law that the Claimant has failed to prove that the Respondent's "acts or omissions" resulted in an "actual loss." 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 DENIED an award from the Fund; and further,

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

October 18, 2010
Date Decision Mailed
#116535v1



Stephen J. Nichols
Administrative Law Judge

PROPOSED ORDER

WHEREFORE, this 6th day of December 2010, Panel B of the Maryland Home Improvement Commission approves the Recommended Order of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, then this Proposed Order will become final at the end of the twenty (20) day period. By law the parties then have an additional thirty (30) day period during which they may file an appeal to Circuit Court.

Andrew Snyder

*Andrew Snyder
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION