

IN THE MATTER OF THE CLAIM OF	*	BEFORE KATHLEEN A. CHAPMAN,
VINCENT AND CRYSTAL DUPREE	*	AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND HOME	*	OF THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND	*	OF ADMINISTRATIVE HEARINGS
FOR THE ALLEGED ACTS OR	*	OAH NO.: DLR-HIC-02-10-02601
OMISSIONS OF DENIS A.	*	MHIC NO.: 07 (75) 913
RICHARDSON, T/A HOME	*	
SPECIALISTS	*	

* * * * *

RECOMMENDED DECISION

STATEMENT OF THE CASE
ISSUE
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On November 7, 2007, Vincent and Crystal Dupree (Claimants) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$6,524.00 for actual losses allegedly suffered by them, as a result of a home improvement contract with Denis A. Richardson, t/a Home Specialists (Respondent).

On April 13, 2010, I held a hearing at the Washington County Office Building, 33 West Washington Street, Hagerstown, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a) (2010) and 8-407(c)(2)(i) (2010). Eric B. London, Assistant Attorney General, Department of Labor,

Licensing and Regulation (Department), represented the Fund. Mrs. Dupree¹ presented on behalf of herself and her husband. The Respondent failed to appear after due notice to his address of record.²

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, and the Rules of Procedure of the Office of Administrative Hearings govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02.01; and 28.02.01.

ISSUE

Did the Claimants sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on the Claimants' behalf:

- Cl. Ex. 1 Home Specialists contract, dated June 1, 1005
- Cl. Ex. 2 Check Register information for check # 512 in amount of \$3,012.00, dated June 1, 2005; and check register information for check # 520 in amount of \$3,512.00, dated November 3, 2005
- Cl. Ex. 3 City of Hagerstown Permits & Inspections Division Field Correction Notice, dated September 7, 2006
- Cl. Ex. 4 Letter to the Respondent from Michael Kemmerer, Housing Inspector, dated April 25, 2007

¹ Hereinafter, the Claimants will be referenced by their initials—"CD" for Crystal Dupree and "VD" for Vincent Dupree.

² I find that the OAH Notice of Hearing sent to the Respondent's address of record was reasonably calculated to give the Respondent notice of this hearing. The Respondent was given adequate notice to appear at the hearing. Accordingly, I considered that the Respondent failed to appear and the case properly could proceed in his absence, adequate notice having been given. *See Border v. Groams*, 267 Md. 100, 104 (1972) (the "mailbox rule"). *See also*, Md. Code Ann., Bus. Reg. § 8-312(h) (2010).

- Cl. Ex. 5 Letter To Whom It May Concern, from Claimant (VD), dated October 3, 2007
- Cl. Ex. 6 BeEco Inspection Report, dated December 16, 2008, with forty photographs of Claimants' deck
- Cl. Ex. 7 Long Fence proposal, dated April 10, 2008
- Cl. Ex. 8 Capitol Home Improvement proposal, dated April 7, 2008

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

- GF Ex. 1 Notice of hearing, dated February 1, 2010
- GF Ex. 2 Affidavit of Michelle Escobar, dated March 24, 2010
- GF Ex. 2A Memorandum to Legal Service from Sandra Sykes, dated March 18, 2010, with attached copy of Notice of Hearing, Hearing Order, Hearing Information and envelope marked "Unclaimed."
- GF Ex. 3 Letter To Whom It May Concern from Steve Smitson, dated March 18, 2010
- GF Ex. 4 Hearing Order, dated November 7, 2009
- GF Ex. 5 Home Improvement Claim Form, dated October 13, 2007 (received November 7, 2007)
- GF Ex. 6 Letter to the Respondent from John Borz, MHIC, dated December 28, 2007
- GF Ex. 7 Letter to Mr. Banks from the Claimants, dated May 2, 2008
- GF Ex. 8 Letter to Claimants from Mr. Borz, dated May 29, 2008

No exhibits were offered on the Respondent's behalf.

Testimony

Mrs. Dupree testified on behalf of the Claimants.

No witnesses testified on behalf of the Respondent or the Fund.

FINDINGS OF FACT

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

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC license number 01-76092.

2. On June 1, 2005, the Claimants and the Respondent entered into a contract to build an elevated, two-level deck. The contract included the removal and replacement of an existing wood deck surface with a composite (Geo-Deck) decking material; addition of a new lower composite deck; installation of a stairway connecting the two decks; and, installation of a white vinyl fence. (Cl. Ex. 1.) Work was to begin in early August 2005 (Cl. Ex. 5.) However, the Respondent did not begin work until November 3, 2005.

3. The original agreed upon contract price was \$9,036.00. (Cl. Ex. 1.)

4. The parties later modified the written agreement to include the installation of lattice around the decking for an additional \$1,000.00. With the modification, the total contract price was \$10,036.00.

5. The Claimants made two payments to the Respondent (\$3,012.00 on June 1, 2005 and \$3,512.00 on November 3, 2005) for a total of \$6,524.00. (Cl. Ex. 2.)

6. The Respondent installed the composite decking material to the existing wood deck and built the new lower deck; however, before completing the rest of the contract terms (lattice and fence) he walked off the job on November 13, 2005.

7. Soon thereafter, the Claimants attempted to reach the Respondent on several occasions by telephone to return and complete the work without success.

8. The Claimants also tracked the Respondent down in their residential community at other job sites, requesting that he return to their home to finish the work. Each time the Respondent agreed to return and complete the contract, but never did.

9. On or about August 2006, the Claimants contacted the City of Hagerstown, Permits and Inspection Division, to perform a final inspection on the work performed by the Respondent.

10. On August 7, 2006, Michael B. Kemmerer, Housing Inspector, performed an inspection which revealed numerous city and national building code violations, including the following: the spacing between the existing and new deck exceeded the proper distance (may be no more than four inches, the space on the Claimants' project was eleven inches); the railing caps and post were not secure; the existing deck was not secure; the deck cantilever was more than twenty-four inches; the use of two 2" x 12" beams are not approved for a ten foot span; and the stairway lacked a continuous handrail. (Cl. Ex. 3.)

11. The Claimants repeatedly called the Respondent on August 7, 2006 to inform him of the various code violations.

12. On September 18, 2006, the Respondent returned to the Claimants' home to review the Field Correction Notice and inspect the deck. The Respondent agreed to fix the problems with the deck and complete the remaining work under the contract.

13. On September 19, 2006, the Respondent returned to the Claimants' home and dug two holes underneath the lower deck. He left the premises without performing any additional work.

14. Mr. Kemmerer returned to the home for a re-inspection of the property on April 19, 2007. Mr. Kemmerer observed no change in the deficiencies from the August 2006 inspection. (Cl. Ex. 4.)

15. On April 25, 2007, Mr. Kemmerer sent the Respondent a letter requiring that he correct all outstanding deficiencies. (Cl. Ex. 4.)

16. The Respondent never returned to the Claimants' home to correct the code violations or complete the deck, lattice or fence.

17. On October 13, 2007, the Claimants filed a claim with the MHIC Fund for reimbursement of \$6,524.00.

18. On December 16, 2008, E. William Ensor, Jr., performed an inspection and issued a report on behalf of the MHIC. (Cl. Ex. 6.)

19. Mr. Ensor's inspection and findings corroborated the earlier findings by the City of Hagerstown, Permits and Inspections Division.

20. Mr. Ensor wrote in his report that the deck was "especially dangerous" and posed a "potential hazard" if used in light of the following numerous structural and safety deficiencies he observed:

a. Structural Deficiencies:

(1) The two plies of three, 2-ply 2" x 12" main beams under the deck joists need to be properly fashioned. Use of three rows of 3" nails at 24" and driving the nails from alternating sides of the beam at every 24" space.

(2) The solid blocking/bridging needs to be fastened between the 2" x 8" joists over the main beam on the cantilever end of the lower deck.

(3) The diagonal bracing on the bottom of the floor joists needs to be properly fastened at all intersecting points.

b. Safety Deficiencies:

(1) The stairways need to be re-made to conform to code on riser height variation.

(2) The stairways must be made safe by replacing the fascia trim to be clear of encroachment and fasten tightly the trim used as riser closures.

(3) Face screws on step treads and anywhere else they may be present on the walking surfaces; must be re-driven to be even with, or below, the surface to protect bare feet.

(4) Railing posts must be reframed above or constructed at ground level to be solidly held in the plumb position when railing loads are applied. (If they extend to the ground they must be founded at a depth equivalent to the posts supporting the main beams. If they, or their footings, are not as deep into the

ground as are the main support posts, any frost heave may cause differential deformation of the deck and possibly break loose vital connections.)

(5) The space between deck levels must be closed by structure of adequate strength and be tight enough to meet code.

(6) All of the railing to post connectors must be made to fit tight and fastened with the full number of the correct screws. Broken or cracked connectors must be replaced.

(7) The sag in the floor coming out of the patio door needs to be corrected. This will probably require removing and replacing those floor planks onto shimmed joists.

(Cl. Ex. 6.)

21. The deck would sway or rock when someone stood on it, making it unsafe to stand on.

22. There were also cosmetic issues concerning the appearance of the work performed by the Respondent, including the following: cracking of the composite deck material; white fascia trim was hanging off the deck, step carriages, and risers; and shoe molding was used to patch sections where white fascia trim was missing. (Cl. Exs. 5 and 6.)

23. The cost to correct the deficiencies (including material and labor for demolition, dismantling and reinstalling the deck utilizing any undamaged dismantled materials, as well as, new materials, as needed) was \$27,798.00. (Cl. Ex. 6.)

24. The Claimant's actual loss is \$27,798.00.

DISCUSSION

An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor." Md. Code Ann., Bus. Reg. § 8-405(a) (2010). *See also* COMAR 09.08.03.03B(2). Actual loss "means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement."

Md. Code Ann., Bus. Reg. § 8-401 (2010). For the following reasons, I find that the Claimant has proven eligibility for compensation.

First, the Respondent was a licensed home improvement contractor at the time he and the Claimant entered into the contract.

Second, the Respondent performed an unworkmanlike, inadequate and incomplete home improvement. CD testified that after approximately two weeks of work, the Respondent walked off the job claiming that the ground was too hard to continue working. At this point, the Claimants understood from the Respondent that he would return to finish the lattice work and fence. CD testified that once the weather warmed, she had an opportunity to review the work performed by the Respondent. According to CD, aside from cosmetic issues (*see* Findings of Fact No. 22), she knew instantly that something was clearly wrong with the deck when it swayed or rocked side-to-side under her weight. In March 2006, the Claimants began calling the Respondent to ascertain when he would return to their home to fix the deck and complete the project. When he did not reply, the Claimant left more messages for the Respondent demanding the return of their \$500.00 deposit toward the fence and informing him that they would find another contractor to complete the project. However, intent on completing the project, the Claimants contacted the City of Hagerstown to obtain a final permit for the deck. Unfortunately, it was at this moment that the Claimants learned that the deck was too dangerous for use. (*See* Findings of Fact No. 10.) Nevertheless, the Claimant made more efforts to reach the Respondent for him to repair the work he had already performed. While the Respondent had returned in August 2006, he fell short of correcting any of the safety and structural deficiencies. (Cl. Exs. 3, 5 and 6.)

The Claimants' presentation and evidence was very persuasive to show that the work performed by the Respondent was abysmal. The photographs taken by Mr. Ensor are the most compelling evidence of the condition of the deck at the time the Respondent abandoned the work. (Cl. Ex. 6.) I can easily see the loose posts, missing rail screws, sagging floor boards, open spaces between decks, loose connectors, unfastened rail posts, loose deck boards, loose fascia trim, and high screw or nail points jutting up from floor surfaces left by the Respondent. As Mr. Ensor found, all of those items presented safety issues for the use of the deck.

I further find that the Claimants demonstrated patience and persistence in attempting to get the Respondent to finish the renovation and correct the unworkmanlike quality of the work already performed, as well as complete the unfinished work. Despite the Claimants' reasonable efforts to resolve the situation, nothing seemed to prompt the Respondent to perform the work he had contracted to perform or to return the money he had taken.

Having found eligibility for compensation, I now turn to the amount of the award, if any. 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). MHIC's regulations offer three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). One of those formulas, as follows, offers an appropriate measurement in this case:

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 under the original contract 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)(c).

CD credibly testified about the hardship she and her family endured as a result of the unusable deck. According to CD, she was pregnant at the time of the contract signing and had hoped to use the deck as a play area for the couple's children. Instead, the family had to rent out halls for family gatherings and for birthdays. The children were also not permitted to freely enjoy the outdoors (from their backyard), because of fear they might injure themselves around the deck.

CD further testified that she and her husband solicited bids from two contractors, Long Fence and Capitol Home Improvement, to remove and replace the deck, as well as finish the lattice and fence work not performed by the Respondent. (Cl. Exs. 7 and 8.) When they solicited the bids, they realized that the Respondent woefully underbid the job to win the contract. This is evident by the contrast in prices from Long Fence (\$25,335.00) and Capitol Home Improvement (\$25,000.00), to the Respondent's initial contract price (\$9,036.00). While some of the cost contained in the solicited bids is for demolition of the Respondent's work, demolition cannot be avoided in light of all the structural and safety concerns. The deck, as it stands now, has no redeeming value. As such, I wholeheartedly agree with Mr. London's assessment that the Claimants be reimbursed \$20,000.00, the full limit of a fund award.

CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual loss of \$20,000.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2004).

RECOMMENDED ORDER

I **PROPOSE** that the Maryland Home Improvement Commission:

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$20,000.00; and


ORDER that 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 at least ten percent as set by the Maryland Home Improvement Commission. Md. Code Ann., Bus. Reg. § 8-411 (2010); and

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

July 12, 2010

Date decision mailed

KAC/ch
113182



Kathleen A. Chapman
Administrative Law Judge

IN THE MATTER OF THE CLAIM OF	*	BEFORE KATHLEEN A. CHAPMAN,
CRYSTAL AND VINCENT DUPREE	*	AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND HOME	*	OF THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND	*	OF ADMINISTRATIVE HEARINGS
FOR THE ALLEGED ACTS OR	*	OAH NO.: DLR-HIC-02-'0-02601
OMISSIONS OF DENIS A.	*	MHIC NO.: 07 (75) 913
RICHARDSON, T/A HOME	*	
PECIALISTS		

* * * * *

FILE EXHIBIT LIST

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No exhibits were offered on the Respondent's behalf.



STATE OF MARYLAND
DLLR

DEPARTMENT OF LABOR, LICENSING AND REGULATION

Maryland Home Improvement Commission
500 N. Calvert Street, Room 306
Baltimore, MD 21202-3651
Stanley J. Botts, Commissioner

**IN THE MATTER OF THE CLAIM OF
VINCENT & CRYSTAL DUPREE**

v.

**DENIS A. RICHARDSON,
t/a HOME SPECIALISTS**

*

**MARYLAND HOME
IMPROVEMENT COMMISSION**

*

MHIC CASE NOS. 07 (75) 913

*

* * * * *

PROPOSED ORDER

**WHEREFORE, this 14TH day of December, 2010, Panel B of the Maryland
Home Improvement Commission ORDERS that:**

- 1) The Findings of Fact of the Administrative Law Judge are Affirmed.**
- 2) The Conclusions of Law of the Administrative Law Judge are Amended as follows:**

A) Pursuant to Business Regulation Article, §8-405(e)(5), Annotated Code of Maryland, which was enacted by the Maryland Legislature, effective October 1, 2010, the Commission may not award to a Guaranty Fund claimant an amount greater than the amount paid by or on behalf of the claimant to the original contractor against whom the claim is filed. Said amendment to the statute applies to any pending Guaranty Fund claim, for which the adjudication of the Commission is not yet final as of October 1, 2010.

B) The Administrative Law Judge found that the Claimants paid a total of \$6,524.00 to the Respondent. (Finding of Fact No. 12). Pursuant to Business Regulation Article, §8-405(e)(5), Annotated Code of Maryland, the Commission may not award more than \$6,524.00 to the Claimants.

PHONE: 410.230.6309 • FAX: 410.962.8482 • TTY USERS, CALL VIA THE MARYLAND RELAY SERVICE
INTERNET: WWW.DLLR.STATE.MD.US • E-MAIL: MHIC@DLLR.STATE.MD.US

MARTIN O'MALLEY, GOVERNOR • ANTHONY G. BROWN, LT. GOVERNOR • ALEXANDER M. SANCHEZ, SECRETARY

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3) The Recommended Order of the Administrative Law Judge is Amended as follows:

A) The Claimants are awarded \$6,524.00 from the Home Improvement Guaranty Fund.

4) Unless any party 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, any party then has an additional thirty (30) day period during which they may file an appeal to Circuit Court.

Andrew Snyder
Chairperson - Panel B
Maryland Home Improvement Commission