

DIN THE MATTER OF THE CLAIM OF	*	BEFORE DAVID HOFSTETTER
PETER SCHULTHEISS	*	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-02-10-28686
OMISSIONS OF FRANCIS MOYNIHAN,	*	MHIC NO.: 08 (90) 1742
IV, T/A F.A. MOYNIHAN BUILDING,	*	
LLC	*	

* * * * *

RECOMMENDED DECISION

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RECOMMENDED ORDER

STATEMENT OF THE CASE

On May 22, 2009, Peter Schultheiss (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of actual losses allegedly suffered as a result incomplete performance under a home improvement contract with Francis Moynihan, IV, trading as F.A. Moynihan Building, LLC, (Respondent).

I held a hearing on February 15, 2010, at the Wheaton Office of Administrative Hearings (OAH), Westfield North, Suite 205, 2730 University Boulevard West, Wheaton, Maryland 20902. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010). Jessica Kaufman, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR or Department), represented

the Fund. The Claimant represented himself. The Respondent failed to appear after due notice to his address of record.¹

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, and the OAH's Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2010); Code of Maryland Regulations (COMAR) 09.01.03.01 – .10, 09.08.02.01, 09.08.01.02, and 28.02.01.01 – 28.02.01.27.

ISSUES

Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions, and, if so, in what amount?

SUMMARY OF THE EVIDENCE

Exhibits

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

CL Ex. 1 – Contract, dated July 24, 2007; Change Order, dated August 20, 2007

CL Ex. 2 – Letter from the Complainant to the Respondent, dated January 26, 2008

CL Ex. 3 – Certified mail documents, various dates

CL Ex. 4 – Email from Terri R. Clark-Schultheiss to HIC, dated June 12, 2008

CL Ex. 5 – Contract between Complainant and Dave Nelson Construction, dated April 23, 2010

CL Ex. 6 – Cancelled checks, various dates

CL Ex. 7 – Letter from University of Maryland Mediation Clinic to Terri R. Clark Schultheiss, dated November 12, 2008

¹ A threshold question in this case is whether the Respondent received timely notice of the hearing. If the Respondent was properly notified of the hearing, the case could proceed in his absence. A Notice of Hearing was mailed to the Respondent by certified and regular mail on October 12, 2010 to the Respondent's address of record with the MHIC. The Notice of Hearing sent by certified mail was returned to the Office of Administrative Hearings as "unclaimed." The Notice of Hearing sent by regular mail was not returned by the U.S. Postal Service. Fund Ex. 1. I therefore conclude that due notice was sent to the Respondent. See Md. Code Ann., Bus. Reg. §§ 8-312(h) (2010).

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

GF Ex. 1 – Notice of Hearing, dated October 12, 2010, with certified mail documents

GF Ex. 2 – MHIC Licensing History, dated February 9, 2010

GF Ex. 3 – MVA address record, dated February 9, 2011

GF Ex. 4 – Home Improvement Claim Form, dated May 22 2011

GF Ex. 5 – Letter from MHIC to the Respondent, dated October 31, 2008

The Respondent failed to appear for the hearing and offered no exhibits for admission into evidence.

Testimony

The Claimant testified on his own behalf . The Fund did not call any witnesses.

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 home improvement contractor licensed by the MHIC.
2. On July 24, 2007, the Claimant and the Respondent entered into a contract (Contract) to re-shingle the roof, install siding, and install all new windows at the Claimant's home at 8733 Oxwell Lane, Laurel Maryland.
3. Regarding the siding work, the Contract provided that the Respondent would:
 - Cover entire house with Tyvek house wrap
 - Install all necessary vinyl trims (color TBD and starter strip
 - Cover all wood work with white aluminum
 - Install D-4 vinyl siding (color TBD)
 - Install new vinyl louvered shutters at windows where existing shutters are (color TBD)
 - Install new 5" gutters attached with hidden hangers, and all necessary down spouts
4. The agreed-upon Contract price was \$30,200.00.

5. On August 20, 2007, the Claimant and the Respondent revised the Contract to include a change order providing that ½" plywood would be installed on the roof prior to the re-shingling. The agreed-upon cost of the change order was \$2,650.00

6. The Claimant paid the Respondent a total, in various installments, of \$30,500.00 under the Contract and the change order.

7. In late August 2007, the Respondent satisfactorily completed the roof work called for in the Contract and change order.

8. Despite long unexplained delays, in November 2007, the Respondent satisfactorily completed the window installations called for in the Contract

9. At the time the window installation was completed, the Respondent had not begun work on the siding.

10. For several months, beginning in November 2007, the Claimant repeatedly called and wrote to the Respondent in an effort to persuade him to perform the siding work called for in the Contract. At first, the Claimant was told that the Respondent would return and install the siding, but was later told by the Respondent or his employees to stop contacting the Respondent.

11. The Claimant never returned to the Claimant's home after installing the windows and never performed any siding work as provided in the Contract.

12. On April 27, 2010, the Claimant's contracted with Dave Nelson Construction (Nelson), a contractor licensed by the MHIC, to perform the siding work specified in the Contract with the Respondent. In addition, the Claimant and Nelson contracted for one item not included in the original contract with the Respondent, namely the installation of certain roof vents. The contract price agreed to by Nelson and the Claimant was \$16,820.00. The amount of the contract price attributable to the roof vents is \$650.00.

13. The Claimant paid Nelson a total of \$16,820.00.
14. Of the total amount the Claimant paid to Nelson, \$16,170.00 was for work substantially identical to the siding work specified in the Contract between the Claimant and the Respondent.
15. Nelson completed the siding work in late April and early May 2010.

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) (Supp. 2010). *See also* COMAR 09.08.03.03B(2). The loss must "arise from an unworkmanlike, inadequate, or incomplete home improvement." Md. Code Ann., Bus. Reg. § 8-401 (2010). The Claimant bears the burden to prove each of the above elements by a preponderance of the evidence. Md. Code Ann., Bus. Reg. § 8-407(e) (2010); COMAR 09.01.02.16C; COMAR 09.08.03.03A(3). For the following reasons, I find that the Claimant has met his burden, establishing his entitlement to an award from the Fund.

In this case, it is undisputed that the Respondent simply abandoned the project and refused to perform the siding work he had contracted to do. The Claimant made diligent and repeated efforts to contact the Respondent, going so far as to personally appear at his place of business. The Claimant was either ignored or lied to or rebuffed until he felt it necessary to file the instant complaint and claim with the MHIC.²

As a result of the Respondent's unworkmanlike performance, the Claimant is potentially eligible for an award from the fund. 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

² With the help of the MHIC, the Claimant attempted to resolve the matter through mediation with the Mediation Clinic of the University of Maryland School of Law. The Respondent refused to respond to the Mediation Clinic's communications and, therefore, a mediation was never scheduled. Cf. Ex. 7.

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.

COMAR 09.08.03.03B(3)(c).

The Claimant presented evidence (which was not refuted) from a licensed home improvement contractor that the cost to perform the siding work included in the Contract was \$16,170.00.³ Using the formula set forth in COMAR 09.08.03.03B(3)(c), I calculate the Claimant's actual loss as follows:

Amount Paid to the Respondent	\$30,500.00
Amount required to complete work	<u>+\$16,170.00</u>
	\$46,670.00
Less amount of original contract	<u>-\$32,850.00</u>
Amount of Loss	\$13,820.00

Based on the above calculations, I find that the Claimant's actual loss is \$13,820.00 and that the Claimant is entitled to compensation from the Fund in that amount.

CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$13,820.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-405(a) and (e)(5) (Supp. 2010); COMAR 09.08.03.03B(3)(c).

³ The Claimant actually paid Nelson \$16,820.00, but \$650.00 of that amount was for work not included in the original Contract with the Respondent. I therefore do not consider the additional \$650.00 payment in calculating the Claimant's actual loss.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$13,820.00; and

ORDER that the Respondent be 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(a) (2010); and

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

May 3, 2011
Date Decision Issued


David Hofstetter
Administrative Law Judge

DII/bs
122475

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FILE EXHIBIT LIST

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The Respondent failed to appear for the hearing and offered no exhibits for admission into evidence.

PROPOSED ORDER

WHEREFORE, this 5th day of July 2011, 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.

Joseph Tunney

*Joseph Tunney
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION