

IN THE MATTER OF THE CLAIM OF	*	BEFORE MARINA L. SABETT,
BRIGITTE GREENBERG,	*	AN ADMINISTRATIVE LAW JUDGE
CLAIMANT	*	OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	*	OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	*	OAH Case No.: DLR-HIC-02-10-35734
FOR THE ALLEGED ACTS OR	*	MHIC Case No.: 08 (75) 893
OMMISSIONS OF DAVID B.	*	
BARKLEY,	*	
t/a OMEGA CONSTRUCTION AND	*	
REMODELING	*	

* * * * *

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 October 1, 2008, Brigitte Greenberg (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$31,110.25 for actual losses allegedly suffered as a result of a home improvement contract with David B. Barkley (Respondent), t/a Omega Construction and Remodeling. On September 17, 2010, the MHIC ordered a hearing to allow the Claimant to prove her claim.

On November 10, 2010, the Office of Administrative Hearings (OAH) mailed notice of the hearing to the Respondent by certified and regular mail to 7527 Main Street, Sykesville,

Maryland 21784, his last business address of record on file with the MHIC. Md. Code Ann., Bus. Reg. § 8-312(d) (2010). The notice advised the Respondent of the time, place, and date of the hearing. The U.S. Postal Service returned a receipt for the certified mail to the OAH indicating that it had been claimed by Cheryl Barkley on November 12, 2010. The U.S. Postal Service did not return the regular mail to the OAH.

“If, after due notice, the person against whom the action is contemplated does not appear, nevertheless the Commission may hear and determine the matter.” Md. Code Ann., Bus. Reg. § 8-312(h) (2010). Since notice had been provided to the Respondent, I directed the hearing to proceed in the Respondent’s absence.

I held a hearing on March 4, 2011 at the OAH (Wheaton) 2730 University Boulevard, West, Wheaton, Maryland 20902. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010). Jessica Berman Kaufman, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR or Department), represented the Fund. The Claimant represented herself. The Respondent failed to appear after due notice to his addresses of record.

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.

ISSUE

Did the Claimant 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 Claimant's behalf:

- | | |
|-----------------|---|
| Claimant Ex. 1 | Unexecuted contract between the Claimant and Respondent |
| Claimant Ex. 2 | August 10, 2006 Building plans and specifications and Compliance Certificate submitted by the Respondent to Montgomery County Department of Permitting Services to obtain permit approval for the renovation of the Claimant's home and approval documentation for same |
| Claimant Ex. 3 | Photograph of outside of subject property in the fall of 2007 |
| Claimant Ex. 4 | Proposal of work performed by Morrisey Contracting Group (MHIC# 0196994) |
| Claimant Ex. 5 | February 14, 2011 MHIC licensing information for Brian Morrisey |
| Claimant Ex. 6 | Billing Invoice from Morrisey Contracting Group in the amount of \$1047.00 |
| Claimant Ex. 7 | Various Home Depot and Lowe's receipts for materials purchased by Claimant totaling \$407.87 to finish incomplete home improvement for which Claimant contracted with Respondent, with attached notes regarding use/installation of same |
| Claimant Ex. 8 | Various Home Depot and Lowe's receipts for materials purchased by Claimant totaling \$2582.62 to finish incomplete home improvement for which Claimant contracted with Respondent |
| Claimant Ex. 9 | Lowe's product description for materials purchased by Claimant in the amount of \$946.00 to finish incomplete home improvement for which Claimant contracted with Respondent |
| Claimant Ex. 10 | Standard Supplies receipt for materials purchased by Claimant in the amount of \$66.94 to finish incomplete home improvement for which Claimant contracted with Respondent |
| Claimant Ex. 11 | February 6, 2008 Executed proposal with A.C.& R. Insulation Co., Inc. in the amount of \$ 1,388.00 to finish incomplete insulation improvement for which Claimant contracted with Respondent |
| Claimant Ex. 12 | February 8, 2008 letter to Montgomery County, Md., Environmental Protection, Construction Codes from Claimant |

advising that Arnold Electric Co., Inc (Master Electrician # ME1560 and Electrical Contractor # EB1730) was replacing the Respondent to finish incomplete home improvement for which Claimant contracted with Respondent, with attached invoices and receipts for Arnold Electric to complete such work totaling \$2960.63

- Claimant Ex. 13 August 1, 2008 letter from Claimant to Blake & Wilcox, Inc authorizing Blake & Wilcox to have the plumbing permit transferred to them, with attached proposals and invoices totaling \$ 2,600.00
- Claimant Ex. 14 January 7, 2008 Executed service order/invoice between Claimant and Duker Industries (MD HVAC # 55894) totaling \$3,500.00
- Claimant Ex. 15 March 20, 2006 Executed agreement between the Claimant and Respondent for labor and material to be furnished by the Respondent to Claimant for the sum of \$134,160.00
- Claimant Ex. 16 December 29, 2009 Executed contract between the Claimant and University Painters for labor in the amount of \$1105.00 and paint in the amount of \$150.00-\$250.00, with attached cancelled checks in the amount of \$1186.62 and an invoice for Duron paint in the amount of \$160.86
- Claimant Ex. 17 June 23, 2008 Executed contract between the Claimant and Gutter Helmet for materials and labor totaling \$3750.00
- Claimant Ex. 18 March 9, 2011 letter from Claimant to ALJ Marina Sabett enclosing copies of seven check imprints made out to Omega Construction
- Claimant Ex. 19 March 29, 2011 letter from Claimant to ALJ Sabett enclosing a copy of a check in the amount of \$44,720.00.

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1: November 10, 2010 Notice of Hearing
- Fund Ex. 2: September 17, 2010 Hearing Order, with attached Home Improvement Claim Form (9/7/08) and letter from Claimant to MHIC amending claim (8/19/10)
- Fund Ex. 3 February 14, 2011 MHIC licensing information for the Respondent
- Fund Ex. 4 November 7, 2008 letter to Respondent regarding Claimant's claim

I admitted no exhibits on behalf of the Respondent.

Testimony

The Claimant testified on her own behalf and did not present any other witnesses. The Fund presented argument. No one testified on behalf of the Respondent.

FINDINGS OF FACT

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

1. At all times relevant to this matter, the Respondent was a licensed home improvement contractor under MHIC license number 05-51578.
2. On March 20, 2006, the Claimant entered into a contract with the Respondent to perform various improvements to Claimant's house located at 10409 Edgewood Avenue, Silver Spring, MD 20901 (subject property). Under the contract, the Respondent was to raise the Claimant's roof and construct a second level to include a new stairway system, master bedroom suite, two standard bedrooms and a standard bathroom.
3. Specifically, the Respondent agreed to provide a soaking tub, a shower, a double bowl vanity and a toilet in the master bath and a tub/shower unit, a pedestal sink and a toilet in the standard bathroom. The Respondent further agreed to construct a walk-in closet, a linen closet and two (2) standard closets and to install premium vinyl tile in bathrooms and hardwood flooring throughout the remainder of the addition. All electrical, plumbing, HVAC, insulation, interior millwork, painting, gutters and downspouts were to be included. The demolition was to include the existing two (2) bathrooms and related walls to open up the entire section of the kitchen and create an all-purpose area with hardwood flooring.

4. The contract price was \$134,160.00. The Claimant paid the Respondent \$44,720.00 on March 27, 2006. The Claimant made additional payments as follows: \$13,416.00 (electrical draw) on May 5, 2007; \$13,416.00 (framing draw) on May 27, 2007; \$2,500 (HVAC dual system) on May 30, 2007; \$9,208.00 (change order ½ HVAC rough-in) on May 31, 2007; \$750.00 (dumpsters) on June 18, 2007; \$13,857.25 (plumbing and shingles) on July 13, 2007; and \$6,708.00 (HVAC 2nd half) on July 30, 2007; Accordingly, the Claimant paid to the Respondent \$104,575.25 under the contract.
5. Work began in accordance with the contract in the spring of 2007. In the fall of 2007, the Claimant was informed by the Respondent that his business was in bankruptcy and the work on Claimant's property could not be completed.
6. The Respondent had completed the framing of second floor of the home but had left it open to the elements. The Respondent had also left various drywall, interior millwork, insulation, demolition, plumbing, electrical and HVAC work incomplete
7. By advising the Claimant that due to bankruptcy he could no longer complete the work for which he had contracted, the Respondent unequivocally abandoned the contract for work to be performed at the subject property, leaving the Claimant no other recourse other than to contract with companies to finish the incomplete renovation.
8. Morrissey Group Contracting (MHIC # 0196994) performed various demolition, drywall and plumbing fixture installation services to complete the work left incomplete by the Respondent for which the Claimant paid \$1,047.00. The Claimant paid an additional amount of \$2,582.62 for materials to complete this work.

9. A.C.& R. Insulation Co., Inc. insulated the subject property for \$1,388.00, which included labor and materials.
10. Arnold Electric Co., Inc. (ME1560 and EB1730) was approved by Montgomery County to finish the electrical work left unfinished by the Respondent under the contract, including installing ground wires, bathroom fixtures, blank plates over junction boxes and a smoke detector. The Claimant paid \$2,960.63 for such work to be completed.
11. Blake and Wilcox, Inc. was the plumbing contractor to which the plumbing permit for the subject property was transferred in order to finish the work left incomplete by the Respondent, including connecting faucets and sinks, ensuring proper installation of the master bath whirlpool tub and other bath fixtures. The Claimant paid \$2,600.00 for such work to be completed.
12. Duker Industries completed the HVAC work left unfinished or incorrect by the Respondent, including installing new 220 line from the panel box, a thermostat and breaker configurations. The Claimant paid \$3,500.00 for such work to be completed.
13. University Painters completed the interior painting left incomplete by the Respondent. The Claimant documented that she paid to University Painters \$1,186.62 for such work to be completed.
14. Gutter Helmet (MHIC license # 48622) installed new gutters and downspouts that the Respondent had failed to install and provide. The Claimant paid \$3,750.00 for such work to be completed.
15. The new contractors performed the same work that the Respondent had originally agreed to perform for which the Claimant had to pay a total of \$19,014.87 to complete and/or correct the work.

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 not met her burden and that she is not entitled to an award from the Fund.

First, the Respondent was a licensed home improvement contractor at the time she entered into the contract with the Claimant. Second, the Claimant paid the Respondent \$104,575.25 under a home improvement contract. Third, the uncontroverted evidence presented by the Claimant demonstrates that the Respondent performed an inadequate and/or incomplete home improvement. Nonetheless, the required calculations show that the Claimant suffered no actual monetary loss as a result of the Respondent’s acts or omissions.

The Claimant testified to the numerous deficiencies in the Respondent’s work, including but not limited to, an incomplete exterior, unfinished plumbing and fixtures, unfinished electrical work and fixtures, an incomplete HVAC system, and incomplete interior walls and millwork. As a result of the Respondent’s failure to perform the work in accordance with the contract, the Claimant had to secure the services of other contractors to perform the work. She presented documentary evidence, primarily through invoices and proposals that detailed with specificity what the Respondent had failed to do and what the respective licensed contractor had to do in order to properly complete the Respondent’s work.

As a result of the Respondent's failure to complete the work under the contract, the Claimant was potentially eligible for an award from the fund. I now turn, however, to the MHIC's regulations, which offer three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). One of those formulas, as follows, is the 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 unrefuted evidence from licensed home improvement contractors that the cost to complete and/or re-construct the contract work would be \$19,014.87. 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	\$104,270.25
Amount Paid to Correct and Complete Work	+ \$ 19,014.87
	<u>\$ 123,285.12</u>
Amount of Original Contract	- \$ 134,160.00
Amount of Actual Loss	\$ 0

Pursuant to the applicable formula for the calculation of actual loss, this cost of repair and completion, \$19,014.87, should be added to the amount the Claimant paid to the Respondent under the original contract, which is \$104,270.25. The sum of those two figures totals \$123,285.12. The original contract price was \$134,160.00, which when subtracted from \$123,285.12 results in a negative number, theoretically leaving the Claimant ahead by approximately \$11,000.00. Although it was understandably stressful for the Claimant to have to essentially act as her own general contractor to find other contractors to complete the work left

incomplete by the Respondent, the Claimant has suffered no actual monetary loss. Accordingly, the Claimant has failed to present sufficient evidence to prove that she sustained an actual loss as the result of the Respondent's acts and omissions.

CONCLUSIONS OF LAW

I conclude that the Claimant has not sustained an actual loss as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2010).

RECOMMENDED ORDER

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

ORDER that the Claimant's claim against the MHIC Fund be **DISMISSED**; and

ORDER that the records and publications of the Maryland Home Improvement

Commission reflect this decision.

June 27, 2011
Date Decision Issued


Marina L. Sabett
Administrative Law Judge

MLS/
#123329

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FILE EXHIBIT LIST

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- Fund Ex. 5 August 28, 1987 Order, *In Re Goodman*, Case No. 86-B-1700, Ch. 7 (Bankr. D. Md.)

I admitted no exhibits on behalf of the Respondent.

PROPOSED ORDER

WHEREFORE, this 1st day of August 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.

Marilyn Jumalon

*Marilyn Jumalon
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION