

IN THE MATTER OF THE CLAIM	* BEFORE HENRY R. ABRAMS,
OF MATTHEW D. SHAPIRO,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT,	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	* OAH NO.: DLR-HIC-02-12-27709
FOR THE ALLEGED ACTS OR	* MHIC NO.: 10 (05) 1520
OMISSIONS OF JAMES J. WOLOHAN,	*
T/A WINDSOR CONSTRUCTION	*
GROUP, INC.,	*
RESPONDENT	*

* * * * *

PROPOSED DECISION

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

STATEMENT OF THE CASE

On April 26, 2011, Matthew D. Shapiro, (Claimant), filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$28,266.00 for actual losses allegedly suffered in connection with a home improvement contract between the Claimant and James J. Wolohan, t/a Windsor Construction Group, Inc.

Respondent).¹ On June 28, 2012, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On May 28, 2013, the OAH mailed copies of a Notice of Hearing (Notice) by certified mail to the Respondent at the following street addresses: 408 Great Falls Road, Rockville, Maryland, 20850, and 2005 Adams Hill Road, Vienna, Virginia, 22182.² The 408 Great Falls Road address was the Respondent's address of record with the Motor Vehicle Administration. The copy of the Notice addressed to 408 Great Falls Road, Rockville, Maryland, 20850 was returned undelivered. The Respondent signed for delivery of the copy of the Notice addressed to 2005 Adams Hill Road, Vienna, Virginia, 22182.³

In the Notice, the OAH advised the Respondent that a hearing on the Claimant's claim was scheduled for August 8, 2013, commencing at 10:00 a.m., at Wheaton South, 11002 Viers Mill Road, Suite 408, Wheaton, Maryland 20902. The Notice further advised the Respondent that failure to attend the hearing could result in an unfavorable decision against him. The Respondent did not request a postponement.

On August 8, 2013, at 10:00 a.m., I convened the hearing at the appointed location. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010 & Supp. 2013).⁴ Niki McCormally, Assistant

~~Attorney General, was present on behalf of the Fund. Kathleen Wright, Esquire, Ethridge, Quinn,~~

Kemp, McAuliffe, Rowan & Hartinger, was present representing the Claimant, who was also

¹ In the Hearing Order issued by the MHIC and sent to Mr. Wolohan at his Vienna, Virginia address, the MHIC identified the claim as filed by the Claimant as a result of losses he allegedly incurred due to the conduct of James J. Wolohan, t/a Halsey Home Corporation. (See June 25, 2012 Hearing Order, attached to GF Ex. 2, further identified in the Exhibit List, below.) Halsey Home Corporation was one of Mr. Wolohan's two trade names registered with the MHIC; the other was Windsor Construction Group, Inc. (See GF Ex. 8, further identified in the Exhibit List, below.) Mr. Wolohan's contract with the Claimant was in the name of Windsor Construction Group, Inc., and was signed by Mr. Wolohan as President. (See CL Ex. 2, further identified in the Exhibit List, below.)

² The hearing was originally scheduled for April 11, 2013, but was postponed at the Claimant's attorney's request due to a scheduling conflict.

³ See GF Ex 11, further identified in the Exhibit List, below.

⁴ Unless otherwise indicated, Title 8, Subtitle 4 of the Business Regulations article, as amended from time to time, shall be referred to as the Act.

present. Neither the Respondent nor anyone authorized to represent him appeared. After waiting for more than twenty minutes, I commenced the hearing.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department of Labor, Licensing and Regulation, 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 & Supp. 2013), Code of Maryland Regulations (COMAR) 09.01.03; 09.08.02; and 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:

- CL Ex. 1 April 19, 2011 letter from the MHIC to the Claimant
- CL Ex. 2 July 23, 2009 contract (Contract) between the Claimant and the Respondent, together with July 23, 2009 Addendum and copy of July 23, 2009 check from the Claimant to the Respondent for \$28,266.00

- ~~CL Ex. 3 August 11, 2009 letter from the Respondent to the Claimant~~
- CL Ex. 4 August 7, 2009 Windsor Construction Group, Inc. Bankruptcy Petition
- CL Ex. 5 October 2, 2009 letter from Harvey S. Jacobs to the Respondent
- CL Ex. 6 January 6, 2012 Chapter 7 Trustee's Final Account and Distribution Report re: the Respondent

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

- GF Ex. 1 December 27, 2012 Notice of Hearing,
- GF Ex. 2 January 10, 2013 memorandum from Sandra L. Sykes re: Undeliverable Mail, with attachments

- GF Ex. 3 January 24, 2013 memorandum from Sandra L. Sykes re: Undeliverable Mail, with attachments
- GF Ex. 4 March 19, 2013 certified mail letter from Ms. McCormally to Mr. Wolohan, with attachments
- GF Ex. 5 April 17, 2013 Notice of Hearing
- GF Ex. 6 May 28, 2013 Notice of Hearing, sent to the Respondent at 408 Great Falls Road, Rockville, Maryland, 20850 and 2005 Adams Hill Road, Vienna, Virginia, 22182
- GF Ex. 7 June 11, 2013 memorandum from Sandra L. Sykes re: Undeliverable Mail, with attachments
- GF Ex. 8 MHIC licensing record re: the Respondent
- GF Ex. 9 January 21, 2013 Affidavit of Thomas Marr, IV
- GF Ex. 10 Transmittal from the MHIC to the OAH, together with June 25, 2012 MHIC Hearing Order and the Claimant's April 23, 2011 Home Improvement Claim Form 10, 2013
- GF Ex. 11 May 28, 2013 Notice of Hearing with certified mail receipts

Testimony

The Claimant and his wife, Ms. Laurie Shapiro, testified in support of the Claim.

The Fund presented no 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 licensed home improvement contractor, holding MHIC license number 01-83848.
2. At all relevant times, the Claimant owned a home located at 533 Brent Road, Rockville, Maryland, 20850.
3. In 2009, the Claimant and his wife decided to remodel their home.

4. The Claimant and his wife obtained a construction loan to cover the cost of the remodeling. The Construction loan would convert into a permanent loan upon completion of the remodeling.

5. Pursuant to the terms of the Claimant's construction loan, the contractor would need to front the costs of construction prior to reimbursement and would be reimbursed once the lender was provided proof that the work for which reimbursement was sought had been completed. The Claimant and his wife met with the Respondent and explained this requirement to him and he assured them that he had the financial reserves to perform as required.

6. On July 23, 2009, the Claimant entered into a contract (Contract) with the Respondent whereby the Respondent agreed to remodel the Claimant's home for \$282,667.00. The Contract required the Claimant to pay the Respondent ten percent (10%) of the total contract price as a down payment. The Claimant paid the Respondent \$28,266.00 by way of a check dated July 23, 2009. The Respondent cashed the check.

7. Paragraph 10.2 of the Contract entitled the Claimant to terminate the Contract in the event the Respondent filed for bankruptcy. Paragraph 19 of the Contract required the parties to arbitrate any contract disputes.

8. ~~The Respondent never commenced any work pursuant to the Contract. On August 7,~~
2009, the Respondent filed a bankruptcy petition in the Sothern Division of the United States District Court for the District of Maryland.

9. At some point after filing the bankruptcy petition the Respondent indicated a willingness to proceed with the Contract. However, the Claimant did not believe the Respondent had the financial wherewithal to proceed and did not wish to face further financial losses working with the Respondent.

10. On October 2, 2009, the Claimant wrote the Respondent terminating the Contract due to the Respondent's bankruptcy petition and demanding a full refund of the down payment. The Respondent did not answer the letter or refund the deposit.

11. Thereafter, the Claimant filed a claim for the full down payment in the Respondent's bankruptcy proceeding, but never recovered any portion of the down payment. The Respondent's bankruptcy proceeding was ultimately converted to a chapter 7 liquidation proceeding whereby the Claimant received nothing for his claim.

12. The Respondent never refunded any portion of the down payment.

13. The Claimant subsequently contracted with another licensed Maryland contractor to remodel the Claimant's home, for a total price of \$310,540.00. That contractor completed the remodeling.

14. On April 19, 2011, the MHIC wrote to the Respondent indicating that unless the Respondent proceeded to arbitrate the Claimant's claim within 21 days, the MHIC would deem the arbitration clause waived and would itself proceed to adjudicate the claim. The Respondent never agreed to arbitrate.⁵

15. At all relevant times the Claimant owned fewer than three dwellings. He was not an ~~employee, officer or partner of the Respondent nor an immediate relative of any of his partners,~~ officers or employees.

16. The Claimant filed his claim with the MHIC less than three years after entering into the Contract with the Respondent. The Claimant has not filed a claim for reimbursement or damages in any other forum and has not recovered for his alleged loss from any source.

17. The Claimant's actual loss is \$28,266.00.

⁵ The Claimant never independently sought to arbitrate.

DISCUSSION

The Claimant asserts that the Respondent failed to perform any aspect of the home improvement contract between the parties. As a result, the Claimant asserts he is entitled to reimbursement for the \$28,266.00 down payment he paid to the Respondent, the equivalent of which was, he states, was neither rendered in services as contracted for, nor otherwise recovered or received in any fashion from the Respondent.

An owner bears the burden to prove his claim against the Fund by a preponderance of the evidence. Act, § 8-407(e); COMAR § 09.08.03.03A(3); Md. Code Ann., State Gov't § 10-217 (2009). For the reasons stated below, I find that the Claimant met his burden of proof.

An owner must prove a number of elements to recover compensation from the Fund. The owner must prove "an actual loss that results from an act or omission by a licensed contractor." Act, § 8-405(a). *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." Act, § 8-401.

In addition, an owner must prove that at all relevant times: the owner owned fewer than three dwelling places; (b) the work at issue concerned the owner's personal residence in Maryland; (c) the owner was not an employee, officer or partner of the contractor or the spouse or other immediate relative of the contractor or the contractor's employees, officers or partners; (d) the work at issue did not involve new home construction; (e) the owner did not unreasonably reject the contractor's good faith effort to resolve the claim; (f) any remedial work was done by licensed contractors; (g) the owner complied with any contractual arbitration clause before seeking compensation from the Fund; (h) there is no pending claim for the same loss in any court of competent jurisdiction and the owner did not recover for the actual loss from any source; and (i) the owner filed the claim with the MHIC within three years of the date the owner knew or

with reasonable diligence should have known of the loss or damage. Act, §§ 8-405(c), (d), (f), and (g); 8-408(b)(1) and (2).

There is no dispute that the Claimant met each of the above elements. The Respondent was a licensed home improvement contractor; and the work concerned remodeling the Claimant's primary residence. The Respondent entered into a home improvement contract with the Claimant, took \$28,266.00 from the Claimant as a down payment and then abandoned the Contract without doing any work or refunding any portion of the down payment. This constitutes an actual loss that results from an act or omission by a licensed contractor.

In addition, the Claimant owned fewer than three dwelling places; the parties were neither related nor associated in business; the Claimant did not file any other action to recover for the Respondent's acts or omissions; and the Claimant filed his claim within three years of the date of the Contract. Further, the Claimant engaged a licensed contractor to remedy the Respondent's omissions.

I conclude that the Claimant has demonstrated eligibility for reimbursement from the Fund. Having found eligibility, 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 offers an appropriate measurement in this case:

"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."

COMAR 09.08.03.03B(3)(a).

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

Signature on File

November 5, 2013
Date Decision Mailed

Henry R. Abrams
Administrative Law Judge

HRA/tc
#145969

Using this formula, the Claimant's actual loss is \$28,266.00. This is the amount the Claimant paid the Respondent which the Respondent never repaid despite abandoning the contract without performing any work.

However, the Claimant is entitled to only a portion of his actual loss from the Fund. Pursuant to Md. Code Ann., Bus. Reg. §8-405(e)(1) and (5) (Supp. 2013), the maximum recovery from the Fund is limited to the lesser of \$20,000.00 or the amount paid by or on behalf of the Claimant to the Respondent. The Claimant paid \$28,266.00 to the Respondent, which is more than the maximum recovery permitted. Hence, the Claimant is entitled to reimbursement in the amount of \$20,000.00 from the Fund.

CONCLUSIONS OF LAW

I conclude as a matter of law that the Claimant sustained an actual loss of \$28,266.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2010); 8-405(a) (Supp. 2013). *See also* COMAR 09.08.03.03B(3)(a) and COMAR 09.08.03.03B(2). I further conclude as a matter of law that the Claimant's recovery from the Fund is limited to \$20,000.00. Md. Code Ann., Bus. Reg. § 8-405(e)(1) and (5) (Supp. 2013).

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(a) (2010); and

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FILE EXHIBIT LIST

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PROPOSED ORDER

WHEREFORE, this 6th day of January 2014, Panel B of the Maryland Home Improvement Commission approves the Recommended Decision 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.

W. Bruce Quackenbush, Jr.

***W. Bruce Quackenbush, Jr.
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION