

IN THE MATTER OF THE CLAIM	* BEFORE MARY R. CRAIG,
OF DANA K. MOAT,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT,	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	*
FOR THE ALLEGED ACTS OR	*
OMISSIONS OF JAMES	*
PETTYJOHN,	* OAH No.: DLR-HIC-02-13-23774
T/A BASE LINE CONSTRUCTION,	* MHIC No.: 13(90)73
RESPONDENT	*

* * * * *

PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
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DISCUSSION
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PROPOSED ORDER

STATEMENT OF THE CASE

On October 26, 2012, Dana K. Moat (Claimant), filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$2,350.00 in alleged actual losses suffered as a result of a home improvement contract with James PettyJohn, trading as Base Line Construction, (Respondent). At the hearing, I permitted the Claimant to amend the Claim to \$4,450.00.

I held a hearing on April 8, 2014 at the Hunt Valley, Maryland offices of the Office of Administrative Hearings (OAH). Md. Code Ann., Bus. Reg. §§ 8-312 (Supp. 2013), 8-407 (2010). Hope Sachs, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Claimant represented himself. The Respondent represented himself.

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 (OAH) 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.

ISSUES

- 1 Is the Claimant eligible to recover from the Fund for work performed by the Respondent for the seller of the property prior to the Claimant's purchase?
2. Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?
3. If so, what is the amount of that loss?

SUMMARY OF THE EVIDENCE

Exhibits

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

- Clmt. Ex. 1 Addenda to Sales Contract (2), January 26, 2012 and February 8, 2012
- Clmt. Ex. 2 Invoice and Completion Notification, February 24, 2012
- Clmt. Ex. 3 Receipt from Advance Drain Cleaning, May 31, 2012
- Clmt. Ex. 4 Advance Drain Cleaning Invoice, May 31, 2012

Clmt. Ex. 5 Claimant's check to Advance Drain Cleaning, June 8, 2012

Clmt. Ex. 6 Photographs A-F

Clmt. Ex. 7 Proposal, Mark & Buttons C/S Inc., March 18, 2014

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

Fund Ex. 1 - Notice of Hearing, February 6, 2014

Fund Ex. 2 MHIC License History

Fund Ex. 3 Letter from HIC to Respondent, November 7, 2012, with copy of Claim

The Respondent offered no exhibits for admission into evidence.

Testimony

The Claimant testified on his own behalf.

The Fund offered no witnesses.

The Respondent testified on his own behalf.

PROPOSED 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 103129.
2. The Respondent and the Claimant did not enter into any contract for repairs to 703 Green Park Road, Reisterstown, Maryland 21136 (the Property) at any time.
3. At the time of the repairs at issue in this case, the Property was owned by AHMSI (Seller), having been acquired by AHMSI through a foreclosure proceeding.
4. On January 23, 2012, the Claimant and the Seller entered into a sales contract, pursuant to which the Claimant agreed to buy the Property from AHMSI in "as is" condition.¹

¹ The sales contract was not offered into evidence.

5. The Claimant intended to finance the purchase of the Property with a Veterans Administration (VA) loan.

6. The VA conducted an inspection of the structural and mechanical systems at the Property on January 25, 2012.

7. At the time of the inspection, some of the copper plumbing pipes had been removed from the Property, and there was an active roof leak in the attic near the chimney.

8. The VA would not loan the Claimant the funds he needed to close on the purchase of the house unless repairs were made prior to closing.

9. The Claimant wanted to use VA financing, so he requested that the Seller make the repairs listed on the VA inspection report.²

10. The Seller agreed with the Claimant that the Seller would perform, at its expense, certain repairs to the Property, including the following: replace and repair all plumbing pipes so that the Claimant could test all plumbing fixtures, pipes and drains for proper operation; and have a roofer evaluate and make any necessary repairs to the roof.³ Clmt. Ex. 1.

11. On January 26, 2012, the Claimant and the Seller entered into an Addendum to their sales contract whereby the Seller agreed to make the repairs described in Finding of Fact 10 at the Seller's expense. Clmt. Ex. 1.

12. On or about February 24, 2012, Keller Williams Real Estate (Keller), the real estate agent for the Seller, hired the Respondent to perform work on the Property. Keller paid the Respondent to do the following work: \$2,100.00 to "replac[e] 240' of missing ¾ inch copper water lines and fittings in the basement [of the Property]" and, "after installation, pressurize the

² The VA inspection report was not offered into evidence.

³ The inspection disclosed other necessary repairs, none of which is at issue in this case.

water lines to determine if there are additional hidden damages”; and \$120.00 to” re-sea[1] the flashing around the chimney.” Clmt. Ex. 2.

13. The Respondent performed work at the Property, and Keller paid the Respondent for the work on behalf of the Seller.

14. The VA re-inspected the Property, which passed the inspection.⁴

15. The Claimant purchased the Property from the Seller after February 2012 and before May 31, 2012.

16. At the end of May 2012, the pipes in the basement leaked and the roof leaked in the area of the chimney when it rained.

17. The Claimant called his home warranty company, which sent Advance Drain Cleaning to the Property on May 31, 2012.

DISCUSSION

As an applicant for an award from the Fund, the Claimant is the moving party and has the burden of proof by a preponderance of the evidence to demonstrate that he is entitled to recover. COMAR 09.08.03.03A(3); Md. Code Ann., State Gov’t § 10-217 (2009).

1. *Is the Claimant eligible for a Fund award?*

In order to recover from the Fund, the Claimant must satisfy the statutory eligibility requirements. 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. 2013).⁵ The Claimant did not contract with the Respondent for home repair work,

⁴ The second VA inspection report was not offered into evidence.

⁵ It is undisputed that the Respondent was at all relevant times a licensed home improvement contractor. *See* COMAR 09.08.03.03B(2).

raising the issue of whether the Claimant is eligible for recovery from the Fund. For the following reasons, I find that the Claimant is eligible for compensation on the facts of this case.

The statute defines the term "owner" to include "a homeowner, tenant, or other person who buys, contracts for, orders, or is entitled to a home improvement." Md. Code Ann., Bus. Reg. § 8-101(k) (2010). At the time of the hearing and when he filed the claim against the Fund, the Claimant was the record owner of the Property. However, the repairs were made at the direction of the Seller's agent, purportedly to fulfill the terms of the Addendum to the agreement between the Seller and the Claimant and in furtherance of the Claimant's purchase of the Property. I conclude that the Claimant was "entitled" to home repairs as the contract purchaser of the Property.

The difficulty with the Claimant's case is that, while the Claimant had an agreement with the Seller, he had no agreement with the Respondent. It was the Seller's real estate company who hired the Respondent. The work that the Respondent agreed to perform was described in the agreement between Keller and the Respondent. Clmt. Ex. 2.

There are material differences between the scope of work in the Respondent's agreement with Keller and the scope of work in the Claimant's agreement with the Seller. For example, with respect to the roof leak, the Respondent agreed to re-seal the flashing around the chimney. Clmt. Ex. 2. He did not agree to "make all necessary repairs" to the roof, as specified in the agreement between the Claimant and the Seller. Clmt. Ex. 1.

For these reasons, I conclude that the Claimant is only entitled to measure the Respondent's performance based on the Respondent's agreement with Keller. He cannot impose upon the Respondent all of the Seller's obligations to the Claimant, some of which the Respondent did not agree to perform. The Seller paid the Respondent \$210.00 to re-seal the area

around the chimney; presumably, the Respondent would have been paid more than this nominal amount if he were required to make "all necessary repairs" to the leaky roof. According to the Claimant's estimate, the cost to make all necessary repairs to the roof is estimated to be \$2,350.00. Clmt. Ex. 7. The Claimant did not prove that the Respondent was required to "make all necessary repairs" to the roof.

The scope of work in the Mark & Buttons C/S estimate obtained by the Claimant on March 18, 2014 may be what is necessary to eliminate the leak in the roof, but it is not what the Respondent agreed to do for the Seller; nor is it what the Seller paid the Respondent to do. Clmt. Ex. 7. Permitting the Claimant to recover this item from the Fund, which automatically makes the Respondent liable to repay the Fund, places the Respondent in the position of covering a liability which rightly belongs with the Seller, if any party other than the Claimant must bear the cost to repair the roof. The Claimant may or may not have a claim against the Seller for breach of the Addendum to Sales Contract (Clmt. Ex. 1), but he cannot claim against the Fund for work beyond that which the Respondent undertook to provide.

The Claimant argued that he indirectly paid the Respondent because he is paying for the Property every month through his mortgage. The Claimant also argued that the Respondent indirectly did the work for him or on his behalf, because the VA would not approve the loan he chose to use to purchase the house unless the plumbing and roof leak were repaired to the VA's satisfaction. These arguments do not change my view of the law.

The Claimant agreed to purchase the Property, which the Seller owned through foreclosure, in "as is" condition. The Claimant did not offer the parties' January 23, 2012 sales contract into evidence, so I do not know what the conditions of the sales contract were. However, the evidence shows that the Claimant wanted to finance the purchase with a VA loan,

and that the VA inspection found numerous items which the VA required to be repaired before the VA would agree to fund the closing. The Seller agreed to make some repairs as outlined in the Addendum to Sales Contract signed by the Seller and the Claimant.

The Seller's real estate company paid the Respondent to perform some repairs at the Property. There is no evidence in the record that the cost of those repairs had any effect on the purchase price of the Property. The Claimant's payments to his financial institution are in the amount that the Claimant agreed to pay for financing, and are unaffected by the Seller's agreement with the Respondent.

2. *The Claimant did not prove that the Respondent's work was deficient.*

I conclude that the Claimant failed to prove that he sustained an actual loss compensable by the Fund as a result of the Respondent's acts or omissions. Hence, the Claimant is not entitled to any award from the Fund.

The Respondent made repairs to the Property in February 2012. According to the Claimant, in May 2012, a pipe burst in the basement, causing a flood. The Claimant called his home warranty company, which sent Advance Drain Cleaning to inspect the damage to the pipes and basement.

The Claimant testified that the worker from Advance Drain Cleaning told him that the pipe joints in the area of the leak were not soldered properly, causing the leak. The invoice presented by the Claimant as his exhibit 4 seems to contain a statement to that effect, although the handwriting is difficult to decipher. The Claimant also presented photographs of the pipes, which he testified showed improperly soldered joints. Clmt. Ex. 6A-D. In addition, the Claimant submitted a page that he printed from the internet showing what he testified a proper plumbing joint should look like. Clmt. Ex. 6E.

On cross-examination by counsel for the Fund, the Claimant testified that he thinks that the person from Advance Drain Cleaning who came to the Property and wrote Claimant's Ex. 4 was a licensed plumber, but he was not sure of that fact. I have no information in this record to support the Claimant's testimony that the person from Advance Drain Cleaning was qualified to express any opinion about the quality of the Respondent's work or the cause of the leak. I have, therefore, given Claimant's Ex. 4 and his testimony about the Advance Drain Cleaning employee no weight.

Furthermore, the Claimant did not offer any evidence from a licensed plumber or anyone else qualified as an expert in the field of plumbing sufficient to meet his burden of proof that the Respondent's plumbing work was defective. The Claimant testified that he looked up the proper way to solder a pipe joint on the internet, and that he has done some of his own plumbing over the years. I do not believe that the Claimant's limited plumbing experience and the print-out from the internet met the Claimant's burden of proving that the plumbing joints were improperly soldered by the Respondent or someone hired by the Respondent.

I note that several cold weather months passed between the time when the Respondent did work on the pipes and the time when the pipes burst. The Claimant offered no explanation for how he could rule out the effect of the cold winter weather from February 2012 through the Spring as a cause of the defect in the pipe joints. The Claimant has the burden of proof, and I conclude that he did not meet it with respect to the plumbing issue.

The Claimant also complained about the leak in his roof. According to the Claimant, he went into the attic of the house after settlement and saw a black area near the chimney where the roof was actively leaking. He testified that he called Fick Roofers, whose employee told him that the chimney was the source of the leak. According to the Claimant, Fick also told him that

someone had smeared roof tar around the chimney flashing, but that was not the proper way to repair the leak. The Claimant did not offer a report or statement from Fick Roofing into evidence. I have given the Claimant's testimony about Fick's opinion no weight because it is not corroborated by anything in writing from Fick, and I have no information about the training or experience of the Fick employee. Again, the Claimant has no experience in roofing.

The Claimant offered a 2014 proposal from Mark & Buttons setting forth work to be done to repair the chimney. However, the Claimant did not offer anything from Mark & Buttons regarding the results of their roof inspection or what they found to be inadequate in the Respondent's work. I do not know whether the condition of the leak changed in the time between closing and the Mary & Buttons inspection. For those reasons, I have given their proposal no weight.

In summary, the Claimant had the burden of proving misconduct on the part of the Respondent. He failed to meet his burden of proof. I, therefore, conclude that the Claimant failed to prove that he is entitled to any award from the Fund. As I have reached that conclusion, it is unnecessary for me to address the amount of any Fund award.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant is eligible to recover from the Fund because he was entitled to have repairs made to the house as a condition of his purchase from the Seller. Md. Code Ann., Bus. Reg. §§ 8-101(k) (2010), 8-405 (Supp. 2013).

I further conclude that, in any event, the Claimant has not sustained an actual and compensable loss as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401 (2010), 8-405 (Supp. 2013).

PROPOSED ORDER

I **PROPOSE** that the Maryland Home Improvement Commission deny the Claimant's claim; and

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

Signature on File

June 27, 2014
Date Decision Issued

Mary R. Craig
Administrative Law Judge

MRC/kc
#150005

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FILE EXHIBIT LIST

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