

IN THE MATTER OF THE CLAIM OF	* BEFORE GERALDINE A. KLAUBER,
DAYLE THRASHER	* AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND HOME	* OF THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND	* OF ADMINISTRATIVE HEARINGS
FOR THE VIOLATIONS OF	* OAH NO.: DLR-HIC-02-09-43062
RICHARD P. JENKINS, t/a A	* MHIC NO.: 07 (75) 2222
CARPENTRY COMPANY, LLC	*

* * * * *

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 January 30, 2007, Dayle Thrasher (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$8,000.00 for an actual loss allegedly suffered as a result of home improvement work performed by Richard P. Jenkins, t/a A Carpentry Company, LLC (Respondent).

A hearing was held on August 31, 2010, at the Office of Administrative Hearings (OAH), Hunt Valley, Maryland before Geraldine A. Klauber, Administrative Law Judge (ALJ), on behalf of the MHIC. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(c)(2)(i) (2010). Richard D. Lebowitz, Esquire, represented the Claimant. Matthew Lawrence, Assistant Attorney General,

Department of Labor, Licensing and Regulation (DLLR), represented the Fund. The Respondent failed to appear after due notice to his address of record.¹

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the procedural regulations of the DLLR, and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2010); Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02, and 09.08.03; COMAR 28.02.01.

ISSUE

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

SUMMARY OF THE EVIDENCE

Exhibits

The Fund submitted the following exhibits, which were admitted into evidence:

Fund #1 - DLR HIC Licensing History for Respondent

Fund #2 - May 24, 2007 Claim Form

Fund #3 - June 3, 2010 Notice of Hearing

Fund #4 - April 21, 2007 Employment Agreement with Independent Contractor

The Claimant submitted the following exhibits, which were admitted into evidence:

Cl. #1 - January 21, 2007 contract between the Claimant and the Respondent

Cl. #2 - Copies of checks from the Claimant for payment on the contract

Cl. #3 - Photographs of work performed by the Respondent; February 1, 2007 contact between the Claimant and the Respondent

Cl. #4 - March 15, 2007 e-mail from Respondent to the Claimant

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 June 3, 2010, to the address that the MHIC had on record for the Respondent. On June 10, 2010, the Respondent signed the certified mail receipt. I therefore conclude that due notice was sent to the Respondent. See Md. Code Ann., Bus. Reg. §§ 8-312(h) (2010).

- Cl. #5 - MHIC Complaint Form with attached Claim Form
- Cl. #6 - Arbitration Contact Information
- Cl. #7 - January 25, 2007 Inspection Report from George Pilat Home Inspection Co.
- Cl. #8 - Regal Bank & Trust Loan Statement
- Cl. #9 - July 13, 2010 Contract between the Claimant and Richard Lebowitz, Esq.
- Cl. #10 - Cancelled check from Claimant to Richard Lebowitz

Testimony

The Claimant testified in support of the claim. No additional witnesses were offered.

FINDINGS OF FACT

Having considered the evidence, I make the following findings of fact 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 with the MHIC.
2. At all times relevant to the subject of the hearing, the Claimants owned the property known as 3604 Chapman Road, Randallstown, Maryland (the Property).
3. On January 21, 2007, the Claimant contracted with the Respondent to renovate the basement of her home by installing drywall for two rooms, laying flooring, and updating electrical work. The contract provided for the installation of ceramic tile, with the Claimant to purchase the necessary materials for the installation of the tile. (Cl. #1 and Cl. #5)
4. The total contract price was \$7,500.00.
5. The terms of the contract required that, in the event of a dispute between the parties to the contract, the dispute must be referred to arbitration.
6. On February 1, 2007, the Claimant entered into an addendum to the contract with the Respondent. The addendum called for the Respondent to "point-up" existing drywall and

stairwell to match the rest of basement and add new material to close the existing step risers for carpeting to be installed in the future.

7. The cost of the additional work was \$950.00, bringing the total contract price to \$8,450.00.

8. The Claimant paid the Respondent \$8,000.00.²

9. At the time the Claimant entered into the contract, the Respondent represented that he and his crew would complete the work within four weeks from the date the work commenced.

10. The Respondent failed to perform any of the work and subcontracted it out to Honeydew Handyman Services.

11. The subcontractors started the work on January 29, 2007. The subcontractors showed up for four weeks and worked approximately four hours per day.

12. The subcontractor installed some of the drywall but failed to complete all of the work called for in the contract.

13. In March 2007, the Claimant contacted the Respondent to complain that the work performed was unsatisfactory and incomplete.

14. By e-mail dated March 15, 2007, the Respondent admitted that he was responsible for the work and would take the necessary steps to correct the problems. The Respondent removed Honeydew Handyman Services from the job and sent his friend, Douglas Cash, to perform the work. Mr. Cash is not a licensed home improvement contractor.

15. After several weeks, Mr. Cash had not done any work so the Claimant removed him from the job.

16. On or about April 24, 2007, the Claimant filed a complaint with the MHIC.

² The cancelled checks presented by the Respondent show the following payments: \$2,500.00 check dated January 29, 2007, \$2,500.00 check dated January 22, 2007, \$2,000.00 check dated February 5, 2007, and February 4, 2007 check in the amount of \$1,000.00 that the Claimant cashed in order to pay the subcontractors.

17. On April 24, 2007, George Pilat Home Inspection Co. performed an inspection of the Claimant's basement.
18. The work done by the Respondent was unworkmanlike and incomplete. The electric work performed by the Respondent was unsafe. All of the work performed by the Respondent needed to be removed and replaced.
19. George Pilat Home Inspection Co. estimated the cost of repair and replacement as \$12,400.00 (10,000.00 + 2,000.00 demolition + 400.00 trash removal).
20. On April 21, 2007, the Claimant entered into a contract with Alex's Home Improvements to repair and complete the work performed by the Respondent.
21. The Claimant paid Alex's Home Improvements \$5,100.00 for the labor. The Claimant purchased the materials.
22. On May 24, 2007, the Claimant filed a claim with the MHIC.
23. In June 2007, the Claimant attempted in good faith to arbitrate the dispute with the Respondent through the U.S. Arbitration and Mediation of the Northeast, Inc. The Respondent failed to cooperate in the arbitration process and the matter was never arbitrated.

DISCUSSION

Section 8-405(a) of the Business Regulation article provides that an owner may recover compensation from the Guaranty Fund, "for an actual loss that results from an act or omission by a licensed contractor[.]" 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). The Claimant bears the burden of proving the amount of the actual loss.

The Claimant has established through her testimony and the documentary evidence that she suffered an actual loss as a result of the Respondent's unworkmanlike home improvement.

The photographs submitted into evidence establish the many deficiencies with the Respondent's work. *See* Cl. #21. Furthermore, the inspection done by George Pilat Home Inspection Co. and the results of which were documented on April 25, 2007 corroborated the Claimant's position that the Respondent's work was totally unsatisfactory and needed to be torn out and replaced. (Cl. #7) The Respondent failed to appear to dispute any of the Claimant's contentions.

Although the Claimant presented sufficient evidence to establish that the work performed by the Respondent was unsatisfactory and needed to be replaced, the evidence that she presented regarding the actual loss was disjointed and made it difficult to calculate the true amount of her actual loss. The contracts between the Claimant and the Respondent totaled \$8,450.00. On the Home Improvement Claim Form (Cl. #5), the Claimant lists the amount of her claim as \$8,000.00 and indicates that she paid the Respondent \$9,000.00 toward the contract. On the Complaint Form submitted to the MHC, the Claimant states that she paid \$7,950.00 for the Respondent's services. The cancelled checks submitted into evidence by the Claimant establish that she paid the Respondent \$8,000.00 towards the \$8,450.00 contract.

The Claimant had another contractor, Alex's Home Improvements, complete and repair the work. She paid the contractor \$5,100.00 for his labor and purchased the materials herself at the Home Depot. The Claimant submitted a packet of receipts from the Home Depot, some of which date back to February 2007, some date back to May 2007 and some were duplicates. The Claimant provided no testimony to clarify to what specific work the receipts correspond. After reviewing the submitted receipts, and based on my calculations as well as the calculations performed by the Fund, I have concluded that the Claimant purchased \$3,267.00 in materials toward the repair and replacement of the Respondent's work. The Claimant also submitted a receipt for \$2,001.17 for tile to be used for flooring. I have not included the cost of the tile in calculating the Claimant's actual loss because the contract between the Claimant and the

Respondent specifically provided that the Claimant was to purchase all materials associated with the installation of the new ceramic tiles. The Claimant also included her attorney fees and consequential damages such as storage and interest accrued on her home equity line of credit. Attorney fees and consequential damages are statutorily excluded from recovery from the Fund and cannot be included in the calculation of the Claimant's actual loss. Md. Code Ann., Bus. Reg. § 8-405(e)(3)(2010).

As to the appropriate award in this case, the Fund agreed that the Claimant is entitled to an award from the Fund. The Fund asserted that in this case, COMAR 09.08.03.03B.3(c) governs the calculation of the award from the Fund. This provision states:

(c) 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 measurements accordingly.

Applying the formula set forth in COMAR 09.08.03.03B (3)(c), I have calculated the Claimant's actual loss as follows:

Amount paid on the original contract	\$8,000.00
Plus cost to repair the work	<u>8,367.00</u>
	16,367.00
Less the original contract	<u>- 8,450.00</u>
Actual loss	\$7,917.00

The actual loss suffered by the Claimant is \$7,917.00. Accordingly, recovery from the Fund in that amount is appropriate.

CONCLUSION OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Claimant has sustained an actual loss in the amount of \$7,917.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401 and 8-405(b) (2010).

RECOMMENDED ORDER


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

ORDER that the Claimant be awarded \$7,917.00 from the Maryland Home Improvement Commission Guaranty Fund; 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 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.

November 17, 2010
Date Decision Mailed



Geraldine A. Klauber
Administrative Law Judge

GAK/fe
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FILE EXHIBIT LIST

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PROPOSED ORDER

WHEREFORE, this 9th day of February 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