

IN THE MATTER OF THE CLAIM OF:  MICHAEL MILLER & MARYLOU KNIGHT  AGAINST THE MARYLAND HOME IMPROVEMENT GUARANTY FUND  FOR THE ALLEGED ACTS OR OMISSIONS OF DAVID B. BARKLEY, t/a OMEGA CONSTRUCTION & REMODELING	* BEFORE DOUGLAS E. KOTEEN,  * AN ADMINISTRATIVE LAW JUDGE  * OF THE MARYLAND OFFICE  * OF ADMINISTRATIVE HEARINGS  * OAH No. DLR-HIC-02-10-18509  * MHIC No. 08 (05) 1510  *
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**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 June 18, 2008, Michael A. Miller and Marylou Knight (Claimants) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of actual losses allegedly suffered as a result of a home improvement contract with David B. Barkley, t/a Omega Construction and Remodeling (Respondent).

I held a hearing on August 19, 2010 at the Office of Administrative Hearings (OAH), 11101 Gilroy Road, Hunt Valley, Maryland 21031. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010). Eric B. London, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), represented the Fund. The Claimants were present and represented themselves. The Respondent failed to appear after due notice to his address of record.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the DLLR, and the Rules of Procedure of the OAH 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; 09.08.02; 09.08.01; 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. Contract between Claimants and Respondent, dated March 15, 2006;
- CL Ex. 2. Cancelled check no. 0945, dated March 15, 2006; Cancelled check no. 2087, dated March 21, 2006; Cancelled check no. 5051811634, dated March 28, 2006; and Cancelled check no. 1919, dated March 28, 2006; and
- CL Ex. 3. Letter from Leslie John Williams, Esquire, to Respondent, dated September 8, 2006.

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

- GF Ex. 1. Notice of Hearing, dated June 2, 2010, for hearing of August 19, 2010;
- GF Ex. 2. Memo to Legal Services from OAH, dated June 23, 2010; Notice of Hearing, dated June 2, 2010, for hearing of August 19, 2010; Hearing Order from MHIC, dated May 19, 2010, with attachments; and Regular U.S. mail envelope, postmarked, June 2, 2010, marked Not Deliverable as Addressed;
- GF Ex. 3. Memo to Legal Services from OAH, dated June 8, 2010; Notice of Hearing, dated June 2, 2010, for hearing of August 19, 2010; Hearing Order from MHIC, dated May 19, 2010, with attachments; and Certified mail envelope, postmarked, June 2, 2010, marked Not Deliverable as Addressed;
- GF Ex. 4. Maryland Department of Assessments and Taxation (MDAT), Taxpayer Services Division, General Information for Omega construction and remodeling, dated August 10, 2010; Trade name Approval Sheet for Respondent, dated November 8, 2002; and Trade Name Application for Respondent, dated November 8, 2002;
- GF Ex. 5. Affidavit of Lynn Michelle Escobar, dated October 5, 2009;
- GF Ex. 6. MDAT Real Property Data Search, dated July 15, 2010;
- GF Ex. 7. Email from Eric London, Esquire, to Respondent, dated August 10, 2010;
- GF Ex. 8. Notice of Hearing, dated August 11, 2010, for hearing of August 19, 2010;
- GF Ex. 9. DLLR Licensing History, dated August 17, 2010;

- GF Ex. 10. MHIC Hearing Order, dated May 19, 2010;  
GF Ex. 11. Home Improvement Claim Form, with attached statement, dated January 4, 2008, filed June 18, 2008; and  
GF Ex. 12. Letter from MHIC to the Respondent, dated August 26, 2008.

Testimony

Claimant Michael Miller testified on behalf of the Claimants. The Respondent failed to appear for the hearing and no witnesses testified on his behalf. The Fund did not call any witnesses.

**FINDINGS OF FACT**

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

1. The Respondent was originally licensed as a home improvement contractor on December 30, 1997. His most recent license was scheduled to expire on August 26, 2009, but the Respondent was emergency suspended on or about November 8, 2007.
2. On March 15, 2006, the Claimants and the Respondent entered into a contract to construct a one-story addition to the Claimants' existing residence in Baltimore, Maryland, to include a family room with a wet bar, kitchen pantry, hall, entrance foyer, bathroom, screened porch, pressure-treated deck, and closets. The contract also provided for renovation of an existing bathroom and the stairs in the living room. In addition, the contract included construction of a three-car garage, installation of a concrete driveway, and demolition of an existing shed and garage. The contract also provided for ceramic tile flooring in the kitchen and bathroom, carpeting throughout the addition, vinyl siding on exterior walls, and roofing shingles. (CL Ex. 1). The contract further provided for the Respondent to install a gas fireplace and a hot tub, which were to be provided by the Claimants.
3. The agreed upon contract price was \$136,250.00. The contract called for the work to begin within approximately eight weeks and to be completed within an additional twenty-four weeks. The contract also provided that the Respondent would be responsible for the building

permit and all trade permits and inspections. The contract included a clause that allowed the Claimants to exit the contract before construction begins if difficulties arose in the design phase. (CL Ex. 1).

4. The Claimants made total payments to the Respondent in the amount of \$40,875.00, at the times set forth below:

March 15, 2006	\$17,250.00
March 21, 2006	\$10,000.00
March 28, 2006	\$ 8,165.00
March 28, 2006	<u>\$ 5,460.00</u>
<b>Total</b>	<b>\$40,875.00</b>

5. The Respondent failed to obtain any permits for the home improvement project and failed to begin work under the contract.

6. Claimant Miller made several attempts to contact the Respondent to inquire about when the work would begin, but was unable to reach him directly. Claimant Miller spoke with John Nielsen, the Respondent's salesman, but never heard from the Respondent with regard to any plans for the work to begin. As a result, Claimant Miller finally contacted the Respondent on August 8, 2010, and informed him of his intent to cancel the contract due to the Respondent's failure to perform any work under the contract. He further requested that the Respondent refund all of the money the Claimants paid for the project.

7. On September 8, 2010, the Claimants' attorney sent a follow-up letter to the Respondent confirming the Claimants' intent to cancel the contract due to the Respondent's failure to perform any work or other obligations under the contract. Counsel also requested that the Respondent immediately return the \$40,875.00 that the Claimants paid him under the contract. (CL Ex. 3).

8. The Respondent failed to perform any work under the contract and never returned any of the Claimants' funds.

9. The Claimant's actual loss is \$40,875.00.

10. On June 2, 2010, the OAH sent notices of hearing to the Respondent by regular and certified U.S. mail to his last known address of record, which included a street address and a post office box. These notices were returned as "Not Deliverable as Addressed." (GF Ex. 2, 3).

11. MHIC investigators researched the Respondent's address through the Motor Vehicle Administration (MVA), Maryland Department of Assessments and Taxation (MDAT), and MHIC records. The address they discovered for the Respondent through these various sources included the same street address, but did not include the post office box. (GF Ex. 4, 5, 6).

12. The OAH sent new hearing notices to the Respondent on August 11, 2010 by regular and certified U.S. mail to the Respondent's corrected address, which excluded the post office box. These hearing notices were not returned. (GF Ex. 8).

13. Counsel for the Fund also sent an email to the Respondent on August 10, 2010, to his last known email address, and attached a copy of the hearing notice. (GF Ex. 7).

14. The Respondent failed to appear for the scheduled hearing at the OAH in Hunt Valley, Maryland on August 19, 2010.

## DISCUSSION

### Legal Framework

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) (2010); 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." Md. Code Ann., Bus. Reg. § 8-401 (2010). A contractor may not abandon or fail to perform, without justification, a home improvement contract. Md. Code Ann., Bus. Reg. § 8-605(1) (2010). For the following reasons, I find that the Claimants have proven their eligibility for

compensation from the Fund.

The record reflects that the Fund met the notification requirements for the hearing when it sent hearing notices to the Respondent at his last known address of record. Md. Code Ann., State Gov't § 10-208 (2009) and Md. Code Ann., Bus Reg. § 8-312(d), (h) (2010). Accordingly, I ordered that the hearing proceed in the Respondent's absence.

Incomplete Work/Abandonment of Contract

The Respondent was a licensed home improvement contractor at the time the Claimants contracted with him to perform home improvement work at their residence. (GF Ex. 1). The Claimants entered a contract with the Respondent on March 15, 2006 which called for him to perform extensive home improvement work. The Claimants paid the Respondent \$40,875.00 within two weeks of when the contract was executed. (CL Ex. 2). The Respondent's work was incomplete because he failed to obtain the required permits and abandoned the job without performing any work under the contract. (CL Ex. 1, 3). Despite the Claimants' repeated efforts to contact the Respondent and have him perform the job, the Respondent abandoned the project and failed to refund any monies to the Claimants.

The contract called for the work to begin within eight weeks of execution of the contract and to be completed within an additional twenty-four weeks. After six months, the Respondent had failed to obtain any permits, take any steps to begin the work, or even respond to the Claimants' inquiries. As a result, the Claimants had their attorney send the Respondent a letter, notifying him of their desire to cancel the contract and obtain a full refund of the monies they had paid for the home improvement work under the contract. (CL Ex. 3). The Respondent failed to respond, perform any work, or refund the money.

I conclude that the Respondent failed to complete and abandoned the home improvement contract that he executed with the Claimants. Md. Code Ann., Bus. Reg. §§ 8-401; 8-605 (2010).

As a result, the Claimants are entitled to recover compensation from the Fund due to the acts and omissions of the Respondent. Md. Code Ann., Bus. Reg. § 8-405(a) (2010).

Calculation of Actual Loss

As I have determined that the Claimants are eligible for compensation from the Fund, I shall consider the amount to which they are entitled. The MHIC regulations set forth the formulas to be used to measure the amount of a claimant's actual loss. COMAR 09.08.03.03B(3). The following formula is appropriate to calculate the amount of compensation the Claimants are entitled to recover where the Respondent has abandoned a home improvement contract:

(a) 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).

Using the formula set forth in COMAR 09.08.03.03B(3)(a), the Claimants' actual loss is \$40,875.00, the amount they paid to the Respondent when he failed to perform any work under the contract. Although the Claimants' actual loss is \$40,875.00, the statute limits recovery from the Fund to a maximum of \$20,000.00 for the acts or omissions of one contractor. Md. Code Ann., Bus. Reg. § 8-405(e)(1) (2010). Therefore, the Claimants shall be awarded \$20,000.00 from the Fund based on the Respondent's abandonment of the home improvement contract. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405, 8-605 (2010).

CONCLUSION OF LAW


Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Claimants have sustained an actual loss in excess of \$20,000.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2010). I further conclude that the maximum amount which a claimant can receive for a claim against the Fund for the acts

or omissions of one contractor is \$20,000.00. Md. Code Ann., Bus. Reg. § 8-405(e)(1) (2010). Accordingly, the Claimants are entitled to reimbursement from the Fund in the amount of \$20,000.00.

**RECOMMENDED ORDER**

I **RECOMMEND** that the Maryland Home Improvement Commission **ORDER** that the Claimants be awarded \$20,000.00 from the Maryland Home Improvement Guaranty Fund. I further **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 (10%) as set by the Commission. Md. Code Ann., Bus. Reg. § 8-411 (2010). Finally, I **ORDER** that the records and publications of the Maryland Home Improvement Commission reflect this decision.

November 15, 2010  
Date Decision Mailed

  
\_\_\_\_\_  
Douglas E. Koteen  
Administrative Law Judge

DEK/ch  
# 118094



IN THE MATTER OF THE CLAIM OF: \* BEFORE DOUGLAS E. KOTEEN,  
MICHAEL MILLER & MARYLOU \* AN ADMINISTRATIVE LAW JUDGE  
KNIGHT \* OF THE MARYLAND OFFICE  
AGAINST THE MARYLAND HOME \* OF ADMINISTRATIVE HEARINGS  
IMPROVEMENT GUARANTY FUND \*  
FOR THE ALLEGED ACTS OR \* OAH No. DLR-HIC-02-10-18509  
OMISSIONS OF DAVID B. BARKLEY \* MHIC No. 08 (05) 1510  
t/a OMEGA CONSTRUCTION & \*  
REMODELING \*

\* \* \* \* \*

**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.***

***Marilyn Jumalon***

***Marilyn Jumalon  
Panel B***

**MARYLAND HOME IMPROVEMENT COMMISSION**