

IN THE MATTER OF THE CLAIM OF	*	BEFORE BRIAN ZLOTNICK,
DERRICK AND LORRAINE JOHNSON	*	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-02-08-39496
DAVID B. BARKLEY, T/A OMEGA	*	MHIC NO.: 08 (05) 834
CONSTRUCTION & REMODELING	*	

\* \* \* \* \*

**RECOMMENDED DECISION**

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

**STATEMENT OF THE CASE**

On February 6, Derrick and Lorraine Johnson (Claimants) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$18,647.20 for actual losses suffered as a result of home improvement work performed by David B. Barkley t/a Omega Construction & Remodeling (Respondent).

I held a hearing on April 27, 2009, at the Office of Administrative Hearings' Wheaton location in Wheaton, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(c)(2) (2004 & Supp. 2008). Jessica Berman-Kaufman, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), represented the MHIC Fund. The Claimants represented

themselves. The Respondent failed to appear after proper notice of the hearing was sent to him at his address of record.<sup>1</sup>

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 Office of Administrative Hearings. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2004 & Supp. 2008), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02.01; and 28.02.01.

### **ISSUE**

Did the Claimants 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 Claimant submitted the following exhibits that were admitted in evidence:

- Cl. #1 - July 28, 2008 E-mail from the Respondent to the Claimants
- Cl. #2 - Home Improvement Claim Form
- Cl. #3 - Claimants' typed time-line of the events with the Respondent
- Cl. #4 - August 2, 2006 contract with the Respondent
- Cl. #5 - March 9, 2007 invoice from the Respondent with attached cancelled checks from the Claimants, dated July 31, 2006 and August 2, 2006
- Cl. #6 - April 11, 2007 Change Order with attached cancelled check from the Claimants, dated April 12, 2007

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<sup>1</sup> Notices were sent to the Respondent's address of record with the MHIC, by both certified and regular mail. The certified and regular mail were returned "unclaimed" by the Respondent. See Fund Ex. #1. Therefore, at the hearing I concluded that the Respondent had received proper notice of the hearing and he failed to appear. Accordingly, I proceeded with the hearing without his presence. Md. Code Ann., Bus. Reg. § 8-312(h) (2004).

- Cl. #7 - August 16, 2007 letter from the Respondent to the Claimants
- Cl. #8 - August 31, 2007 Change Order with attached cancelled check from the Claimants, dated September 4, 2007
- Cl. #9 - October 26, 2007 E-mail from Scott Newsome to the Claimants
- Cl. #10 - October 3, 2007 letter from the Respondent to the Claimants
- Cl. #11 - November 1, 2007 contract with W.E. Groomes with attached cancelled checks from the Claimants, dated November 9, 2007 and December 20 and 21, 2007
- Cl. #12 - October 30, 2007 contract with Rogers Contracting with attached cancelled checks from the Claimants, dated October 31, 2007 and December 6, 2007
- Cl. #13 - November 24, 2007 Change Order from Rogers Contracting with attached cancelled check from the Claimant, dated November 24, 2007
- Cl. #14 - December 5, 2007 Change Order from Rogers Contracting with attached cancelled check from the Claimants, dated December 6, 2007
- Cl. #15 - December 5, 2007 Invoice from All Star Waste and Recycling
- Cl. #16 - January 14, 2008 Invoice from Robert's Plumbing and Heating
- Cl. #17 - February 14, 2008 Invoice from Robert's Plumbing and Heating
- Cl. #18 - December 4, 2007 Invoice from J.M. Fletcher
- Cl. #19 - January 11, 2008 Invoice from C.A. Niglio & Son

The Fund submitted the following exhibits that were admitted in evidence:

- Fund #1 - Notice of Hearing, dated December 10, 2008, with attached certified mail receipt and Hearing Order.
- Fund #2 - DLLR transmittal form to OAH, with attached Hearing Order
- Fund #3 - Licensing history for Respondent through DLLR
- Fund #4 - Letter from MHIC to Respondent, dated March 25, 2008, with attached Claim Form

No exhibits were admitted in to evidence on behalf of the Respondent.

## Testimony

The Claimants testified on their own behalf.

No additional testimony was presented by the Fund or 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 the subject of this hearing, the Respondent was a licensed home improvement contractor.<sup>2</sup>
2. On August 2, 2006, the Claimants and Respondent entered into a contract (Contract) to have the Respondent construct several additions on the Claimant's residence. The scope of the work to be performed included: construct an entry room off of the kitchen and dining room with a half-bathroom, pantry and adequate space for a freezer; construct a basement level fitness and storage room; and construction of pressure treated deck above the new storage room. The Respondent was responsible for the following: plans and permits; site preparation and excavation; concrete/masonry work; roofing, wall and floor framing; construction of all exterior and interior walls; installation of windows and doors; completion of all plumbing, heating and air conditioning and electrical work in accordance with code.
3. Additional terms of the Contract required the Respondent to clean up and remove all debris arising from the construction work.
4. The total cost of the Contract was \$79,986.00.
5. As required by the terms of the Contract, the Claimants made deposit payments of \$15,000.00 on July 31, 2006 and \$997.20 on August 2, 2006 to the Respondent. (Claim

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<sup>2</sup> D.L.R records indicate that the Respondent's license is currently suspended. See GF Ex. #3

- Ex. 5). On April 12, 2007, the Claimants made a change order payment of \$450.00 to the Respondent (Claim Ex. 6). On September 4, 2007, the Claimants made another change order payment of \$2,200.00 to the Respondent (Claim Ex. 8).
6. The total amount paid by the Claimants to the Respondent was \$18,647.20.
  7. Between the period of August 2006 and July 2007, the only work performed by the Respondent was the drafting of the plans for the addition and the submission of those plans for Montgomery County approval.
  8. In September 2007, the Claimants made repeated efforts to obtain a start date from the Respondent regarding the construction of their addition but the Respondent never responded to their inquiries. On September 30, 2007, the Claimants sent an E-mail to the Respondent inquiring about the start date but the Respondent never replied.
  9. On October 3, 2007 the Respondent sent the Claimants a letter that indicated that it could not complete the Contract as it was going out of business on October 11, 2007. (Claim Ex. 10).
  10. On October 11, 2007, the Claimant received a voice mail message from the Respondent who informed the Claimant that he could not complete the contract because of financial constraints.
  11. After October 11, 2007, the Respondent performed no further work on the contract.
  12. After the Respondent abandoned the contract, the Claimant hired and paid W.E. Grooms Custom Concrete, Inc., (W.E. Grooms) to perform the excavation work of the Contract. The Claimants paid W.E. Grooms \$22,769.71 for their labor and paid \$1,729.74 for supplies. (Claim Ex. 11).

13. The Claimants signed a contract with Rogers Contracting (Rogers) on October 31, 2007 to complete the Contract and paid them a total of \$31,230.00. (Claim Ex.s 12, 13 & 14).
14. The Claimants paid All Star Waste and Recycling \$478.77 for the disposal of debris from the worksite. (Claim Ex. 15).
15. The Claimants paid Roberts Plumbing a total of \$4,620.00. (Claim Ex.s 16 & 17)
16. There is no value for the work performed by the Respondent.

### **DISCUSSION**

Pursuant to Business Regulation Article §§ 8-405(a) and 8-407(c)(1), to recover compensation from the Fund, the Claimants must prove, by a preponderance of the evidence, that they incurred an actual loss, which resulted from a licensed contractor's acts or omission. Business Regulation Article § 8-401 defines an "actual loss" as "the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement."

I agree with the characterization of this matter by the Fund's representative as a "straight-forward abandonment case." As such, the Claimants have met their burden, by proving that the Respondent failed to perform any of the work required under the Contract and that the Claimants incurred an actual loss.

The Claimants testified and provided documentation establishing the Contract terms, the Respondent's delays and non-performance, and the specific amounts that the Claimants paid to the Respondent. The Respondent did not appear and therefore, did not dispute any of the Claimants' evidence, and the Fund's representative acknowledged that the evidence clearly established the Claimants' entitlement to an award from the Fund under COMAR 09.08.03.03B(3)(a), which provides as follows:

B. Measure of Awards from Guaranty Fund.

(3) Unless it determines that a particular claim requires a unique measurement, the Commission shall measure actual loss as follows:

(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.

The Claimants paid the Respondent \$18,647.20; therefore, the Claimants are entitled to an award of \$18,647.20.

**CONCLUSIONS OF LAW**

I conclude that the Claimants have sustained an actual loss in the amount of \$18,647.20 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2004).

**RECOMMENDED ORDER**


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

**ORDER** that the Claimants be awarded \$18,647.20 from the Maryland Home Improvement 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 (2004); and

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

July 21, 2009  
Date Decision Mailed

  
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Brian Zlotnick  
Administrative Law Judge

BMZ//  
#106960

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**EXHIBIT LIST**

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No exhibits were admitted in to evidence on behalf of the Respondent.

PROPOSED ORDER

*WHEREFORE, this 28th day of August 2009, 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**