

IN THE MATTER OF THE CLAIM	* BEFORE JOY L. PHILLIPS,
OF WILLIE and SAMIRA JONES,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANTS,	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	* OAH NO.: DLR-HIC-02-13-46504
FOR THE ALLEGED ACTS OR	* MHIC NO.: 13 (90) 305
OMISSIONS OF CLAIBORNE L.	*
STUBBS, t/a BRISTOLL	*
PLANTATION LANDSCAPING,	*
RESPONDENT	*

* * * * *

PROPOSED DECISION

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

STATEMENT OF THE CASE

On February 20, 2013, Willie and Samira Jones (Claimants) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$9,937.25 for actual losses allegedly suffered as a result of a home improvement contract with Claiborne L. Stubbs, trading as Bristoll Plantation Landscaping (Respondent). On June 12, 2013, the Claimants amended their claim to \$8,994.25.

I convened a hearing on April 18, 2014 at the Cecil County Administration Building, Elkton, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312 (2010) and 8-407 (Supp. 2013). Jessica B. Kaufman, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Claimants represented themselves. Charles L. Scott, Jr., Esquire, represented the Respondent.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, 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. 2013), Code of Maryland Regulations (COMAR) 09.01.03; 09.08.02; and 28.02.01.

ISSUE

Did the Claimants 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 Fund's behalf:

- Fund Ex. 1 Notice of Hearing, dated February 19, 2014
- Fund Ex. 2 Transmittal, undated, Claim Form, dated February 6, 2013, and Hearing Order, dated November 14, 2013
- Fund Ex. 3 Licensing information inquiry regarding the Respondent, printed March 25, 2014
- Fund Ex. 4 Letter to the Respondent from MHIC, dated March 13, 2013, with attachment
- Fund Ex. 5 Letter to the Respondent from MHIC, dated June 13, 2013, with attachments
- Fund Ex. 6 Licensing information inquiry regarding Ryan Holt, printed March 25, 2014

I admitted the following exhibits on the Claimants' behalf, unless otherwise noted:

- Claimants Ex. 1 Drawing of patio, undated
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- Claimants Ex. 3 Photographs a through w
- Claimants Ex. 4 Contract with the Respondent, dated May 31, 2011
- Claimants Ex. 5 Not admitted
- Claimants Ex. 6 Change order, dated July 5, 2011

Claimants Ex. 7 Invoice from the Respondent, dated July 27, 2011

Claimants Ex. 8 Order confirmation e-mailed to the Claimants, dated May 30, 2011

I admitted the following exhibits on behalf of the Respondent:

Respondent Ex. 1 Contract, dated May 26, 2011
Respondent Ex. 2 Change order, dated July 5, 2011
Respondent Ex. 3 E.P. Henry Catalog
Respondent Ex. 4 Warranty from the Respondent
Respondent Ex. 5 Invoice from Curtis Reed, dated July 19, 2011
Respondent Ex. 6 & 7 Hand-drawn diagrams of patio

Testimony

The Claimants testified and presented no additional testimony.

The Respondent testified on his own behalf and presented the testimony of Steven Ciprani.

The Fund did not present the testimony of any 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 under MHIC license number 01-42479. The Respondent's corporate license number was 05-42478.
2. In March 2011, the Claimants negotiated with the Respondent to build a large stone patio, sitting wall and built-in bench, deck, gazebo and built-in grill outside of their home (Contract). The Contract price was \$40,778.00.¹
3. The parties engaged in a written change order on May 31, 2011, which called for the addition of two lights and a seat top, for a total price of \$780.00. A second written change order occurred on July 5, 2011, calling for an increase in the patio size. The price

¹ This price reflects a 6% discount that the Respondent offered the Claimants for reasons that were not disclosed during the hearing.

of this change order was \$952.00, but was reduced to \$810.00. A third written change order was dated July 27, 2011 and involved some landscaping, which was provided free of charge.

4. With the written change orders, the Contract price was \$42,368.00.
5. As part of the Contract, the Claimants were responsible for purchasing the grill that would then be installed by the Respondent in a stone cabinet that the Respondent would build.
6. The Claimants discussed with the Respondent that they wanted to purchase a grill that came with two components: doors that opened to the space underneath the grill top and two drawers that would be installed in one end of the cabinet, adjacent to the doors. The Respondent did not include these components in his plans when he drew up the plans and the Contract. Consequently, they were not covered by the Contract that was signed by the Claimants.
7. The grill cabinet contemplated by the Contract and built by the Respondent was six feet long, the standard size for grill construction. To accommodate the grill drawers, the grill cabinet would have to have been nine feet long.
8. When the Respondent's crew discovered the grill components and brought to the attention of the supervisor that the components would not fit in the grill cabinet that had been built, the Respondent offered the Claimants one of two resolutions: his crew would build an extension onto the grill cabinet that would be long enough to accommodate the grill drawers and he would not charge the Claimants for the extension because he knew it would look like it was added on after the fact or he could tear down and rebuild the grill cabinet, building it long enough to accommodate the components, with a new nine-foot

long stone countertop, at an additional cost to the Claimants. The Claimants chose the first option.

9. The Respondent installed the grill doors on the front of the grill cabinet, added an extension to the grill cabinet, and installed the grill drawers in the new extension, at no cost to the Claimants. The countertop for the extension was made from extra slate tiles and did not match the six-foot countertop on the main grill cabinet.
10. The Contract called for posts to be installed under the deck. The posts were not to be wrapped with aluminum, but were designed to be left as bare wood. After the deck was built, the Claimants decided they wanted the posts to be wrapped and they discussed this with Curtis Reed, one of the Respondent's subcontractors who worked on the Claimants' patio. After discussion with the Respondent, who declined to perform the wrapping job, Mr. Reed completed the post wrapping job and sent the Claimants an invoice for the work. The Claimants paid Mr. Reed \$1,050.00 for the post wrapping job. When the aluminum wrapping later began to warp and pucker, Mr. Reed offered to return the Claimants' payment to them.
11. The Claimants paid a total of \$41,587.32 to the Respondent and the Respondent considered them to have paid the Contract in full.

DISCUSSION

A homeowner 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). *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." Md. Code Ann., Bus. Reg. § 8-401 (2010). 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).

In March 2011, the Claimants hired the Respondent to build a large stone patio, built-in bench, gazebo, deck and built-in grill at their home. Initially, they met with the Respondent to discuss their plans and desires for the project. The Respondent drew up a plan and Contract, which the Claimants signed on May 31, 2011. The Contract (Respondent Ex. 1) specifically called for a six-foot long grill cabinet to be built out of stone. The measurements are included in the Contract and the sketch that accompanied the Contract shows that the cabinet would be six feet long, the standard size for grill cabinets. The grill that the Claimants purchased was also the standard size and fit into the cabinet without a problem. However, the Claimants also wanted a two-drawer unit to be installed, but neither the Contract nor the sketch for the cabinet accounted for those drawers. The Claimants also wanted doors to be installed on the front of the cabinet and, despite the fact that installing the doors was not included in the Contract price, the Respondent had his workers install the doors at no extra charge. Ultimately, the Respondent created an add-on to accommodate the drawers. This cabinet add-on is not flush with the larger grill cabinet and the countertop is made of leftover tiles, diminishing the aesthetics of the cabinet.

The Claimants have two central complaints with the job performed by the Respondent: They are not satisfied with the grill cabinet add-on that was built to accommodate the grill drawers because the add-on cabinet looks like an afterthought and the countertop is made of slate tiles rather than being one long countertop extended across the entire grill. Second, they are not satisfied with the aluminum wrapping around the deck posts installed by Curtis Reed because the

aluminum began to warp and became full of unsightly holes within months after the wrapping was installed. They had some minor complaints, as well, which I have set forth below. I will address each issue separately.

The Claimants testified that the Respondent knew about the grill components before entering into the Contract, even alleging that the grill components had arrived at the home and the Respondent had looked at the components before the Contract was signed. In support of their position, the Claimants submitted a copy of the May 30, 2011, e-mail confirmation of the grill purchase. (Claimant Ex. 8.) The e-mail confirmation shows that they purchased a two-drawer storage unit and access doors when they ordered the grill. Their testimony that they showed the e-mail confirmation to the Respondent prior to signing the Contract to make sure they would fit into the cabinet is believable, but their assertion that the grill arrived prior to the date of the Contract, May 31, 2011, only one day after they ordered it, is not. The Claimants said that upon learning that the grill cabinet was not long enough to accommodate the drawers, the Respondent said that he had forgotten about them. Generally, the Claimants were unclear on the dates of their discussions with the Respondent about the grill cabinet.

The Respondent testified that he did not know about the grill components before the Contract was signed or before the grill cabinet was built but that he agreed to build the add-on to accommodate the drawers at no extra charge just to make the Claimants happy. He was seventy-five percent of the way through the job at that point, but had only been paid one-third of the price, so he wanted to keep the Claimants happy in order to receive full payment, he said.

The Respondent's job supervisor, Steven Ciprani, testified that he knew nothing about the grill components until they were unpacked at the home midway through the construction, but that he was not present during the first meeting the Claimants had with the Respondent, when the

plans for the job were discussed. Mr. Ciprani was convincing that he would have remembered something like planning for a nine-foot grill instead of the standard six-foot grill. He was very clear in his recollection of the conversations he had with the Claimants after the grill components were discovered at the home. In contrast, the Respondent's account that the grill components were never discussed prior to the Contract date is not believable. During this portion of his testimony, he did not look at me and he was very unclear on dates. In contrast, at other times during his testimony, the Respondent looked directly at me and was very clear with details. Ms. Jones' testimony that the Respondent's first response upon being confronted with the components was, "I forgot" followed by an apology was believable, particularly given the fact that the Claimants ordered the grill and drawers before the Contract was signed, as evidenced by the e-mail confirmation, and given the Respondent's willingness to build the add-on cabinet at no extra charge. When Mr. Ciprani was confronted with the grill drawers, he knew immediately that they would not fit under the grill countertop or in the cabinet due to the thickness of the stones used to build the grill cabinet. He developed two options, one that would cost the Claimants money, but would look aesthetically pleasing once built, and one that would not cost the Claimants money, but would look like an add-on and would not be as aesthetically pleasing. The Claimants chose the latter option and now complain that it is not aesthetically pleasing because it looks like the add-on that it is.

Having listened to all of the testimony, I am convinced that the Claimants discussed with the Respondent the grill components but that the Respondent forgot to discuss it with his job supervisor, Steven Ciprani and forgot to include them in the Contract. What matters for purposes of reviewing the Claimants' claim is what is in the Contract. All parties concede that the Contract called for the standard size grill cabinet, that is, one that is six feet long. It was built

out of 10" thick stone, leaving insufficient space for two doors and drawers to fit under the grill top. The drawing that accompanied the Contract, introduced by both parties, is made on a grid of squares, each square representing two feet. It is readily apparent the grill was to be six feet in length. Thus, the Contract, which is what governs in this matter, does not call for the extended grill cabinet to be built. The Respondent agreed to build the add-on cabinet, but did not charge the Claimants for it. The Claimants cannot now seek reimbursement from the Fund for work that was not covered under the Contract and for which they were not charged.

The second major complaint involved aluminum wrapping around the deck posts. The parties agreed that the wrapping was not covered under the Contract. Rather, after the deck was built, the Claimants decided they did not like the look of bare wooden posts. They talked to Curtis Reed, one of the Respondent's sub-contractors, about wrapping the posts. Mr. Reed discussed the request with the Respondent, who declined to perform the job, but told Mr. Reed he could do it if he wanted to. Mr. Reed performed the job and sent the Claimants an invoice for \$1,050.00, which the Claimants paid. The invoice contained only Mr. Reed's name and address and looks nothing like the invoices provided by the Respondent. A few months after the wrapping was installed, it started to warp, pucker and blister. Photos of the wrapping show it to be unsightly. The Respondent and Mr. Reed made some inquiries about the aluminum wrapping and learned that the manufacturers had changed some chemical used in the treated lumber posts and that chemical was reacting negatively with the aluminum wrapping.

The post wrapping was not included in the Contract nor did the Claimants enter into a change order with the Respondent to do the wrapping. The evidence shows that Mr. Reed contracted with the Claimants personally to install the wrapping. He billed them for his work separately from the Respondent and offered to return their money when the wrapping began to

warp. The Claimants have not established a basis for a claim against the Respondent simply because Mr. Reed was a sub-contractor on the job. The claim fails both because the job was not included in the Contract or in a change order and because the Respondent did not hire Mr. Reed to perform the post wrapping job and is therefore not responsible for it.

Ms. Jones also complained that the grill is rusting and no longer looks aesthetically pleasing, which she believes breaches the Respondent's warranty. The Respondent argued that he was not responsible for the grill rusting because the Claimants bought it themselves. The Respondent is correct: the Claimants purchased the grill and thus, the Respondent is not responsible for any rust that has occurred on it as there is no proof that it rusted due to poor workmanship by the Respondent. Mr. Ciprani testified that the stone construction used to create the grill cabinet does not create a watertight seal that is intended to keep all water out of the grill; hence, a high quality grill is necessary to prevent rust from occurring. As to the Claimants' request that the Respondent be compelled to honor the Contract warranty, this is not the forum for a warranty claim.

The Claimants also complained that the grill is slightly off kilter on the countertop. Mr. Ciprani explained in detail why he lined up the grill countertop how he did, which was to maximize aesthetics from the perspective of a person standing on the patio rather than looking down from the deck. The Claimants failed to show that it was installed in an unworkmanlike manner. The Claimants also complained that a safety railing on the stairs fell off and that even after the Respondent replaced that railing once, it fell off again. This is a legitimate complaint, but the Claimants failed to show the cost for repairing or replacing the railing, and thus, no reimbursement can be made. Finally, the Claimants said that the gazebo should have extended

further than it did. They offered no details for this claim nor did they offer evidence to show the cost for repair or replacement.

The Claimants failed to show that they sustained an actual loss compensable by the Fund as a result of the Respondent's acts or omissions. Accordingly, the Claimants are not entitled to reimbursement from the Fund. Md. Code Ann., Bus. Reg. § 8-405(d) (Supp. 2013).

CONCLUSIONS OF LAW

I conclude that the Claimants have not sustained an actual and compensable loss as a result of the Respondent's acts and omissions and are not entitled to any reimbursement from the Fund. Md. Code Ann., Bus. Reg. §§ 8-401 (2010) and 405 (Supp. 2013).

PROPOSED ORDER

I **PROPOSE** that the Maryland Home Improvement Commission **DENY** the Claimants' claim; and

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

Signature on File

July 2, 2014
Date Decision Issued

Joy L. Phillips
Administrative Law Judge

JLP/
150272

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