

IN THE MATTER OF THE CLAIM	* BEFORE RACHAEL BARNETT,
OF PETER E. WEINCEK,	* 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 KENNETH BURR,	*
T/A BURR BUILDING &	* OAH No.: DLR-HIC-02-15-26032
REMODELING,	* MHIC No.: 15 (05) 708
RESPONDENT	*

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On April 24, 2015, Peter Weincek (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$20,000.00 in alleged actual losses suffered as a result of a home improvement contract with Kenneth Burr, trading as Burr Building and Remodeling.

I held a hearing on January 8, 2016 at the Office of Administrative Hearings, located in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).¹ The Claimant represented himself and requested to amend the claim to add his company,² Hawks Hollow, LLC, as a co-claimant. The Respondent failed to appear for the hearing. Kris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund and did not object to the addition of the co-claimant. I ordered that Hawks Hollow, LLC would be added as a co-claimant, provided that the OAH received notarized power of attorney from the Claimant within five business days; OAH received the document timely on January 14, 2016.

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 (2014), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02, and 28.02.01.

ISSUES

1. Did the Claimant sustain an actual loss compensable by the Fund as a result of any acts or omissions committed by Burr Building and Remodeling?
2. 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 - Construction contract, September 23, 2013

¹ Unless otherwise noted, all citations of the Business Regulation Article hereinafter refer to the 2015 Replacement Volume.

² Mr. Weincek is the sole member of Hawks Hollow, LLC.

- Clmt. Ex. 2 - Job Profitability Detail, undated
- Clmt. Ex. 3 - Letter to Respondent, March 30, 2014
- Clmt. Ex. 4 - Black and white photographs of work with typewritten descriptions of inadequacies, April 2014
- Clmt Ex. 4a - Color copies of the photographs, received at the OAH on January 14, 2016
- Clmt. Ex. 5 - Receipt for appliances, December 3, 2013

I did not admit any exhibits on the Respondent's behalf.

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1 - Memorandum re: undeliverable mail with attached undeliverable mail, January 5, 2016
- Fund Ex. 2 - Affidavit of Hubert Lowery, November 6, 2015
- Fund Ex. 3 - License status of Respondent, December 21, 2015
- Fund Ex. 4 - Hearing Order, July 29, 2015
- Fund Ex. 5 - Home Improvement Claim Form, April 24, 2015

Testimony

The Claimant testified.

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 4555751.
2. The Claimant purchased a single unattached home located at 3613 Edgewood Avenue, Baltimore, Maryland for \$78,643.00 for purposes of renovating and reselling; or "flipping."

3. On September 23, 2013, the Claimant and the Respondent entered into a contract to renovate the home.³ The contract stated that work would begin on or before October 1, 2013 and would be completed by January 1, 2014.

4. The contract includes an attachment which listed the work to be performed as follows:

- obtain all permits and inspections as needed,
- replace roof on house and garage with three tab shingles,
- replace all windows and wrap in metal as needed,
- repaint exterior of house,
- install two new garage doors and one entry door to garage, install new front slab and set of Bilco doors to basement,
- replace gutters on the house,
- back porch - repaint "as needed" and replace screen,
- front porch - replace white rails and paint remainder of porch,
- basement – install new half bath, repair drop ceiling, paint as needed around bar, relocate staircase to the basement in the other direction,
- install carpet in finished room,
- first floor:
 - remove walls as needed for new layout with enlarged kitchen and master suite,
 - install new hardwood floors in dining room, living room, and kitchen,
 - install carpet in the bedroom and tile in the bathroom,
 - install washroom in the back room,

³ 3613 Edgewood Avenue was an investment property owned by Hawks Hollow, LLC. The Claimant is the sole owner of Hawks Hollow, LLC.

- add new cabinets with granite countertops for new layout,
- add recessed lights and repair electric “as needed,”
- repair drywall and paint customer choice of colors,
- first floor bathroom – install three-piece bath, tile shower walls and floor,
- second floor:
 - install two three-piece bathrooms, back to back,
 - add framing as needed for new layout,
 - install carpet in three bedrooms, hall and stairs,
 - repaint (location not specified),
 - repair drywall as needed,
- general:
 - HVAC – install new duct work, furnace and a/c as needed per code,
 - electric – install new electric as needed for new layout with 200 amp service,
 - install new lighting as needed, outlet and switches,
 - plumbing – install new plumbing for three full bathrooms and one half bath, one kitchen with washer/dryer hookup,
 - framing – remove walls and add walls as needed for new layout, and
 - painting – customer to pick paint colors.

5. The original agreed-upon contract price was \$82,300.00.

6. On November 13, 2013, the parties agreed to a contract change order, which

reduced the contract price by \$7,800.00 and the following changes occurred:

- Respondent will not be installing a new HVAC system or duct work,

- Respondent will have the old unit serviced only if any other work needs to be done it will be at owner's cost, and
 - Respondent will not be relocating basement staircase, existing staircase stays.
7. On September 25, 2013, the Claimant paid the Respondent \$10,000.00.
 8. On October 25, 2013, the Claimant paid the Respondent \$10,000.00.
 9. On October 30, 2013, the Claimant paid the Respondent \$10,000.00.
 10. On November 14, 2013, the Claimant paid the Respondent \$12,200.00.
 11. On December 5, 2013, the Claimant paid the Respondent \$10,000.00.
 12. On December 30, 2013, the Claimant paid the Respondent \$10,000.00.
 13. The Respondent continued to work on the home until February 2014.
 14. On March 30, 2014, the Claimant sent the Respondent a letter, requesting that the Respondent complete work on the home by April 15, 2014.
 15. The Respondent failed to complete work on the home by April 15, 2014.
 16. In May 2014, the Claimant sold the home to Trusted Home Buyers for \$125,000.00.

DISCUSSION

Respondent's Failure to Appear

Section 8-312 of the Business Regulation Article provides that the MHIC shall give the person against whom the action is contemplated an opportunity for a hearing. Md. Code Ann., Bus Reg. § 8-312(a). On October 9, 2015, the OAH mailed a Notice of Hearing (Notice) to the Respondent at the address provided by the Department on the appeal form submitted to the OAH.⁴ The certified mail was returned to the OAH unclaimed. On December 8, 2015, Mr. King

⁴ 15247 New Windsor Road, New Windsor, Maryland 21776.

notified the OAH of two additional addresses for the Respondent.⁵ On December 10, 2015, the OAH mailed Notices to these addresses. The certified mail was returned unclaimed from both addresses. Each of the Notices advised the Respondent that a hearing on the Claimant's claim against the Fund was scheduled for January 8, 2016 at 9:30 AM at the OAH, 11101 Gilroy Road, Hunt Valley, Maryland 21031. The address on the initial Notice is the Respondent's address of record according to records of the Motor Vehicle Administration. As such, it is presumed that the Respondent received adequate notice of the hearing.

On January 8, 2016, I convened the hearing in accordance with the Notices. The Respondent, however, failed to appear for the hearing. After waiting approximately fifteen minutes to give the Respondent an opportunity to appear for the hearing, he still failed to appear. Since the Respondent received due notice of the hearing, I conclude that he was afforded an opportunity to participate in the hearing, but failed to appear. Accordingly, I found it appropriate to proceed in the Respondent's absence.

Merits of Claimant's Claim

The Claimant has the burden of proving the validity of his claim by a preponderance of the evidence. Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3). "[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true." *Coleman v. Anne Arundel Cty. Police Dep't.*, 369 Md. 108, 125, n. 16 (2002), quoting Maryland Pattern Jury Instructions 1:7 (3rd. ed. 2000).

An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor." Bus. Reg. § 8-405(a). *See also* COMAR

⁵ P.O. Box 403, New Windsor, Maryland 21776 and 15247 New Windsor Road, New Windsor, Maryland 21776.

09.08.03.03B(2) (“actual losses . . . incurred as a result of misconduct 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.” Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has not proven eligibility for compensation.

The Claimant asserts that the Respondent failed to complete several items in the contract. The Claimant enumerated the incomplete nature of the job by referencing the incomplete tasks in each area of the home. For example, the Claimant testified that the Respondent failed to install a medicine cabinet in a bathroom, to complete the electrical work, hook up a sink, and to hook up the washer and dryer. The Claimant produced a series of labeled pictures that show what the Claimant perceives to be deficiencies in the work, including a picture of a tiled floor with the notation, “Gap between trim and flooring.” There is no measurement of the gap and it is not visually apparent to me. Another note below a picture of an electrical box states, “Incorrectly installed light switch, box should be inside the wall and plate flush with wall.” The pictures themselves do not prove the case. In order to understand if and how the pictured work was inadequate, a professional opinion is essential. However, the Claimant did not produce any inspection report, written estimate, or expert testimony to explain the alleged deficiencies. Absent persuasive evidence, I cannot conclude exactly to what extent the work on the home was inadequate to satisfy the contract.

After the Claimant was unable to convince the Respondent to return to the job, the Claimant made the prompt decision to sell the home. The Claimant testified that he was making payments to the lender and was “out of money.” I have no reason to doubt this testimony. The home was an investment for the Claimant, after all. The Claimant acknowledged that he did not pay another contractor to complete the work on the home that the Respondent was supposed to

do, nor did the Claimant obtain any estimates on what it would cost to complete the same work. Rather, the Claimant sold the house on an “as is” basis for \$125,000.00. Clearly, the Claimant suffered a financial loss when he sold the home; however, the amount of the loss is not compensable.

The Claimant’s recovery is limited to his actual loss and the Claimant bears the burden of proving the actual loss. The Claimant asserts that he should be compensated \$20,000.00, the maximum amount permitted for recovery. The only support for this claim is the Home Improvement Claim Form (GF #5), on which the Claimant wrote that it would cost \$73,562.10 to repair, replace or complete the work done by the original contractor. The form has the words “PROVIDE PROOF” written in bold. No proof of the estimate was attached to the form. Furthermore, at the hearing, the Claimant did not provide any estimate of what it would have cost to complete the Respondent’s work, nor did the Claimant call an expert witness to offer an opinion on this matter. In summary, the Claimant failed to present any evidence of the actual loss he suffered, which could have included a credible estimate to complete the work or an accounting of restoration work, had the Claimant had additional work performed. See Bus. Reg. § 8-401. Therefore, the Claimant failed to establish that Respondent performed unworkmanlike, inadequate or incomplete home improvements.

I thus find that the Claimant is not eligible for compensation from the Fund.

PROPOSED CONCLUSION OF LAW

I conclude that 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, 8-405 (2015).

RECOMMENDED ORDER


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

ORDER that the Maryland Home Improvement Guaranty Fund deny the Claimant's claim; and

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

March 10, 2016
Date Decision Issued

RAB/dlm
#161074

Signature on File 

Rachael Barnett
Administrative Law Judge