

IN THE MATTER OF THE CLAIM OF * BEFORE NANCY E. PAIGE,
JEFFREY S. HARRIS * AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND HOME * OF THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND * OF ADMINISTRATIVE HEARINGS
FOR THE ALLEGED ACTS OR * OAH NO.: DLR-HIC-02-09-09636
OMISSIONS OF DAVID B. BARKLEY * MHIC NO.: 08 (05) 955
T/A OMEGA CONSTRUCTION & *
REMODELING, INC.

* * * * *

RECOMMENDED DECISION

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STATEMENT OF THE CASE

On April 29, 2008, Jeffrey S. Harris (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$23,349.00 for actual losses allegedly suffered as a result of a home improvement contract with David B. Barkley, T/A Omega Construction & Remodeling, Inc. (Respondent or Omega).

I held a hearing on October 28, 2009 at the Office of Administrative Hearings (OAH), 2730 University Boulevard, West. Wheaton, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(c)(2)(i) (Supp. 2009). Peter Martin, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Claimant represented himself. 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 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), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02.01; 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. #1. July 8, 2005 Agreement

Cl. #2. July 8, 2005 Check for \$21,599.00

Cl. #3. September 7, 2005 Change Order

Cl. #4. September 12, 2005 Check for \$1,650.00

Cl. #5. Undated Omega specifications

Cl. #6. October 3, 2007 letter from Omega to Claimant

Cl. #7. December 22, 2005 letter from Omega to Claimant

Cl. #8. October 20, 2009 letter from Miller & Weese Construction, Inc., to Claimant, with attachments

Cl. #9. December 1, 2006 Building Permit

Cl. #10. July 2, 2007 Notice of Hearing, Montgomery County Board of Appeals

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

GF #1. July 13, 2009 Notice of Hearing

- GF #2. October 27, 2009 Licensing History
- GF #3. October 5, 2009 Affidavit of Lynn Michelle Escobar
- GF #4. October 26, 2009 Maryland Department of Assessments and Taxation Real Property Data Search
- GF #5. May 8, 2008 letter to Respondent from HIC

Testimony

The Claimant testified on his own behalf.

The Fund did not call 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 01-70346.
2. On July 8, 2005, the Claimant and the Respondent entered into a contract to construct a two-story addition to the Claimant's home. The contract stated that work would begin within six weeks and would be completed within twenty-four weeks.
3. The original agreed upon contract price was \$113,800.00.
4. On July 8, 2005, the Claimant paid the Respondent \$21,599.00.
5. On September 7, 2005, the parties agreed to a change order in the amount of \$1,650.00. On September 12, 2005, the Claimant paid the Respondent the full amount of the change order.
6. On October 3, 2007, the Respondent notified the Claimant that it would be unable to perform the contract because it was going out of business for financial reasons.

7. The Respondent prepared some preliminary plans, but performed no construction work on the contract.
8. The Claimant hired another contractor who completed the contract, at a price of \$126,600.00. The plans prepared by the Respondent were of no value and were replaced by the new contractor.
9. The Claimant's actual loss is \$23,249.00.

DISCUSSION

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) (Supp. 2009). *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 (2004). For the following reasons, I find that the Claimant has proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time he and the Claimant entered into a contract to construct a two-story addition to the Claimant's home. The Respondent abandoned the project before doing any construction and the Claimant hired another contractor, who completed the addition, including necessary plans, at a substantially greater cost.

MHIC's regulations provide that, "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). Although the Respondent prepared some preliminary plans, they were of no value to the Claimant, and while the Claimant has paid a higher price to have the work done by another contractor, he is only claiming the amount he paid to the Respondent. (Since his loss is above the Fund limit, it would make no difference to

his recovery if the loss were calculated on the basis of the higher price for completion.) The Claimant paid the Respondent \$23,249.00 for which he received no value.¹ I will therefore recommend an award of \$20,000.00, the maximum permitted. Md. Code Ann., Bus. Reg. § 8-401 (Supp. 2009).

CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual loss of \$23,249.00 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 Maryland Home Improvement Guaranty Fund award the Claimant \$20,000.00; and

ORDER that the Respondent is 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 Maryland Home Improvement 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.

January 4, 2010
Date Decision Mailed


Nancy E. Faige
Administrative Law Judge

NHP/
110560

¹ The original claim was slightly higher, but was revised at the hearing. The claim included an amount paid for a survey, which was actually done.

PROPOSED ORDER

WHEREFORE, this 29th day of January 2010, 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