

IN THE MATTER OF THE CLAIM OF:	* BEFORE NEILE S. FRIEDMAN,
DOUGLAS E. VEACH,	* ADMINISTRATIVE LAW JUDGE,
CLAIMANT,	* MARYLAND OFFICE OF
AGAINST THE MARYLAND HOME	* ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND,	* OAH No. DLR-HIC-02-08-29474
FOR THE ALLEGED ACTS OR	* MHIC No. 07 (90) 1861
OMISSIONS OF DAVID B. BARKLEY,	*
t/a OMEGA CONSTRUCTION &	*
REMODELING	*

\* \* \* \* \*

**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 September 18, 2007, Douglas E. Veach (Claimant) filed a claim with the Maryland Home Improvement Guaranty Fund (Fund) for reimbursement for actual losses suffered as a result of home improvement work performed by David B. Barkley, t/a Omega Construction & Remodeling (Respondent).

I conducted a hearing on May 5, 2009, at the Department of Agriculture in Annapolis, Maryland, on behalf of the Maryland Home Improvement Commission (MHIC). Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(c)(2)(i) (2004 & Supp. 2008). Eric B. London, Assistant

Attorney General, Department of Labor, Licensing and Regulation (DLLR), represented the Fund. Peter D. Fastow, Esquire, represented the Claimant. The Respondent failed to appear for the hearing.

Procedure in this case is governed by the provisions of the Administrative Procedure Act, the procedural regulations of DLLR, and the Rules of Procedure of the Office of Administrative Hearings (OAH), 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; 09.08.03; and 28.02.01.

Notice of the hearing was sent to the Respondent by regular and certified mail at his address of record with the MHIC. The certified mail receipts were never returned, but neither was the regular mail notice returned indicating that the Respondent was no longer located at the address of record. In addition, the HIC searched the records of the Maryland Motor Vehicle Administration, and the Respondent's driver's license records show that his address has not been changed with that agency. I therefore ruled that the hearing would proceed in the Respondent's absence. Md. Code Ann., Bus. Reg § 8-312(h) (2004).

### **ISSUE**

The issue is whether the Claimant sustained 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 offered the following exhibits, which were admitted into evidence:

1. Complaint Form, with attachments;
2. Schedule of Itemized Costs to Complete Job, with attachments.

The Fund offered the following exhibits, which were admitted into evidence:

1. Notice of Hearing;
2. Hearing Order;
3. Licensing history for Respondent;
4. Affidavit of Lyn-Michelle Escobar; and
5. Home Improvement Claim Form;
6. Letter from John Borz, Chairman, MHIC, to Respondent.

The Respondent failed to appear for the hearing and offered no exhibits for admission into evidence.

### Testimony

The Claimant testified in his own behalf. The Fund called no witnesses.

### **FINDINGS OF FACT**

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

1. The Respondent was licensed as a home improvement contractor with the MHIC at all times relevant to this matter.
2. On December 2, 2005, the Claimant contracted with the Respondent to perform extensive home improvement work at the Claimant's residence in Edgewater, Maryland.
3. The work included the following on the first floor: removal of an existing porch and foundation; installation of a new foundation and renovation of the existing living room; creation of a mudroom with closets and independent hearing; installation of a new water heater, renovation and expansion of the master bath, installation of new stairs to the second floor; removal of roofing material over shed roof and addition of new roof shingles and soffit overhang; removal of all existing siding and installation of new siding; an addition onto the roof and pillars at a concrete porch in front of house; removal and replacement of all existing windows

- and exterior doors; upgrade of electrical where appropriate; removal of paneling and transfer of the paneling to the bump out wall.
4. The work on the second floor included: removal of entire roof over the original house; bumping out the entire west wall and building a new roof over the original house plus the bump out; creation of a new full bath with closet, bedroom with closet, study, multiple storage closets, and open hallway; removal of the old chimney, and new flooring, windows and electrical.
  5. The original contract price was \$157,826.70. The work was to take six months to complete, and it was to start between May 15, 2006 and June 15, 2006.
  6. On March 17, 2006, pursuant to a change order, the Respondent agreed to perform additional foundation work for an additional \$5,000.00.
  7. On April 14, 2006, pursuant to a change order, the Respondent agreed to install additional windows for an additional \$1,750.00.
  8. The total contract price, including the change orders, was \$164,576.70.
  9. The Claimant paid the Respondent \$133,637.38 under the contract, in various installments.
  10. The Respondent did not begin work on the project until September 2006. Work was slow and sporadic. The Respondent's crew was on the job one day per week at most.
  11. The Respondent agreed that the Claimant and his wife would be able to live in the residence during construction except for a period of thirty days during which they would be required to vacate. As a result of the Respondent's incomplete work, the

Respondent and his wife were not able to live in their home from November 2006 until September 2007.

12. The Respondent agreed to reimburse the Claimant \$12,300.00 in living expenses while they were out of their home.
13. In March 2007, when the work still had not been completed, and after the Claimant had sought the intervention of the MHIC, the Respondent agreed to complete the work within sixty days. By July 2007 the work still was not complete and the Claimant's attempted communication with the Respondent was unsuccessful, with the Respondent failing to respond at all despite repeated requests from the Claimant.
14. Mechanic's liens were filed against the property by subcontractors who the Respondent failed to pay. The Respondent paid all of them, even though he had already paid the Respondent for the work performed by the subcontractors as part of the draw schedule. The amounts were: \$7,705.00 (SNS Construction for siding work) and \$6,000.00 (Hoffman for painting and trim work).
15. The Respondent's work was incomplete in that he failed to:
  - Provide bathroom plumbing fixtures as required by the contract
  - Complete finishes and miscellaneous corrective work
  - Complete plumbing including setting fixtures in bathrooms
  - Complete electric
  - Complete 2 zones for HVAC
  - Replace electrical panel cover lost during construction
  - Complete seamless aluminum gutters
  - Provide glass shower doors at 2 bathroom bathtubs
  - Provide standard lighting fixtures
  - Provide new bathroom vanities and countertops
  - Complete roof work at shed roof
  - Cap shingles at front porch overhang
  - Install fiberglass insulation and black board at demolition areas.

16. The Respondent's work was inadequate or unworkmanlike in the following particulars:
- Failure to provide adequate freeze protection
  - Failed to protect ductwork
  - Finishes were deficient
  - Inadequate and deficient roofing work, which caused water to seep in, water damage to the interior and mold
  - Failed to protect window screens.
17. After the Respondent abandoned the job, the Claimant paid other contractors and vendors, including the two subcontractors who had filed mechanic's liens, a total of \$62,249.19 to complete or correct the Respondent's incomplete, inadequate, or unworkmanlike performance.<sup>1</sup>
18. The Claimant suffered an actual loss of \$43,609.87.

### DISCUSSION

The statute provides that an owner may recover compensation up to \$20,000.00 from the Guaranty 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. 2008). The statute defines "actual loss" as "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).

COMAR 09.08.03.03B governs the calculation of awards from the Fund as follows:

B. Measure of Awards from Guaranty Fund.

(1) The Commission may not award from the Fund any amount for:

(a) Consequential or punitive damages;

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<sup>1</sup> This figure was derived from a chart of itemized costs prepared by the Claimant. I used most of his figures because they were documented at the hearing. The only costs I did not include were those that represented consequential damages and those that were not documented at the hearing. I will list the amounts I disallowed so the reader can identify the disallowed costs: \$1,710.00; \$2810.92; \$6,222.00; \$200.00; \$200.00; \$6,000.00; \$783.00.

- (b) Personal injury;
- (c) Attorney's fees;
- (d) Court costs; or
- (e) Interest.

(2) The Fund may only compensate claimants for actual losses they incurred as a result of misconduct by a licensed contractor.

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

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(c) If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant's actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to any reasonable amounts the claimant has paid or will be required to pay another contractor to repair poor work done by the original contractor under the original contract and complete the original contract, less the original contract price. If the Commission determines that the original contract price is too unrealistically low or high to provide a proper basis for measuring actual loss, the Commission may adjust its measurement accordingly.

For the reasons stated below, I find that the Claimant has established that the Respondent abandoned the home improvement contract and that as a result of these actions he has suffered an actual loss.

The undisputed evidence in this case, which is supported by the Claimant's credible testimony and the documentary evidence, establishes that the Claimant paid the Respondent a significant portion of the contract price before his crew abandoned the job. The work, expected to take a period of six months to complete, was supposed to start in May or June 2006, but it did not start until September 2006. After completing a minimal amount of work, by July, 2007, it became clear that the Respondent's crew had left the job and would never return.

In addition, the work that was completed was substandard and dangerous in that the roof leaked, causing mold and water damage, ductwork was unprotected, finishes were deficient and window screens were unprotected. The Claimant and his wife were forced to live outside their

home for almost a year as a result of the slow and shoddy job. Furthermore, they were forced to pay subcontractors who the Respondent had failed to pay, as required by the contract, because they had filed mechanic's liens against the property.

The Claimant tried multiple times to contact the Respondent regarding the home improvement, without success. Indeed, in March 2007, after the Claimant had sought the intervention of the MHIC, the Respondent agreed to complete the job within sixty days, but again he reneged.

The Claimant did hire other contractors to complete the work, at a cost of \$62,249.19. Those contractors completed the contract.

Accordingly, pursuant to COMAR 09.08.03.03B(3)(c), the appropriate measure to calculate the Claimant's recovery from the Fund is:

Amount paid to/on behalf of the Respondent	\$133,637.38
Cost to correct/complete the work	+\$62,249.19
Total	\$195,886.57
Amount of original contract	<u>-152,276.70<sup>2</sup></u>
Actual Loss	\$43,609.87

The statute limits Fund recovery to \$20,000.00 for the acts or omissions of one contractor and, therefore, that is the amount the Claimant is entitled to receive from the Fund. Md. Code Ann., Bus. Reg. § 8-405(e)(1) (Supp. 2008).

#### **CONCLUSION OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Claimant has sustained an actual loss of \$43,609.87 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2004). I further conclude that the maximum

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<sup>2</sup> The total contract price includes the change orders and excludes amounts paid to the Claimant as living expenses for being forced to live outside his home.



amount that 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) (Supp. 2008). The Claimant, therefore, is 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 Claimant be awarded \$20,000.00 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 (10%) 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 6, 2009  
Date Decision Mailed

  
Neile S. Friedman  
Administrative Law Judge

NSF/gr  
# 106583

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5. Home Improvement Claim Form;
6. Letter from John Borz, Chairman, MHIC, to 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**