

IN THE MATTER OF THE CLAIM OF	* BEFORE ROBERT F. BARRY,
CHRISTOPHER J. PORTER	* AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND HOME	* OF THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND	* OF ADMINISTRATIVE HEARINGS
FOR THE ALLEGED VIOLATIONS OF	* OAH NO.: DLR-HIC-02-09-24033
DAVID BARKLEY T/A	* MHIC NO.: 08 (05) 1507
OMEGA CONSTRUCTION AND	*
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 25, 2008, Christopher J. Porter (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement for actual losses allegedly suffered as a result of a home improvement contract with David Barkley t/a as Omega Construction and Remodeling (Respondent).

I held a hearing on November 4, 2009 at the Office of Administrative Hearings, Suite 205, 2730 University Boulevard, West, Wheaton, Maryland 20902. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(c)(2)(i) (2004 & Supp. 2009). Hope Sachs, 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 of Labor, Licensing and Regulation, and the Rules of Procedure of the Office of Administrative Hearings 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**

The Fund submitted the following exhibits, which I admitted into evidence:

- FUND #1 - Memorandum, from the OAH to Legal Services, August 21, 2009, with attached Notice of Hearing and Hearing Order, with notice of unclaimed certified mail from the United States Postal Service (USPS)
- FUND #2 - Affidavit of Lynn Michelle Escobar, Investigator, MHIC, October 5, 2009
- FUND #3 - Respondent's MHIC licensing history, November 2, 2009
- FUND #4 - Letter from John Borz, Chairman, MHIC, to the Respondent, October 1, 2008, with attached copy of the Claimant's claim

The Claimant submitted the following exhibits, which I admitted into evidence:

- CLAIM #1 - Agreement (Home Improvement Contract), November 3, 2006, between the Claimant and the Respondent
- CLAIM #2 - Scope of Work

CLAIM #3A - Canceled check, November 3, 2006, from the Claimant to the Respondent, for \$10,000.00

CLAIM #3B - Canceled check, November 3, 2006, from the Claimant to the Respondent, for \$10,041.80

CLAIM #4 - The Claimant's miscellaneous correspondence

### Testimony

The Claimant testified at the hearing. The Respondent did not appear at the hearing. The Fund did not present any witnesses.

### **FINDINGS OF FACT**

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

1. When the Respondent signed a contract with the Claimant to perform home-improvement work on the Claimant's residence, and continuing until the Claimant dismissed the Respondent, the Respondent was licensed as a home improvement contractor and salesman by the MHIC under registration number 01-70346. The MHIC suspended the Respondent's registration on an emergency basis on November 8, 2007.
2. At all times relevant to the subject of this hearing, the Claimant lived with his family at 305 Marvin Road, Silver Spring, Maryland 20901.
3. On November 3, 2006, the Claimant and the Respondent entered into a home-improvement contract to have the Respondent, in anticipation of the birth of the Claimant's first child, construct an addition to the Claimant's home for \$100,209.00.
4. The contract indicated that work would begin within approximately six weeks and end within an additional twenty-four weeks.
5. On November 3, 2006, the Claimant paid the Respondent a deposit of \$20,041.80 via two personal checks.

6. The Respondent retained Eric (last name unknown), a draftsman, to prepare drawings and obtain a building permit for the home-improvement project. Between January and March 2007, Eric prepared the drawings, obtained the permit, and met with the Respondent.

7. When work had not begun as scheduled, the Claimant, in January 2007, sent e-mails to John Nielsen, one of the Respondent's employees, expressing his concerns and his desire to have the addition completed before the birth of his child in May 2007.

8. On February 23, 2007, the Claimant met with Mr. Nielsen and the Respondent, who indicated that work would begin within three weeks.

9. When work again had not begun as scheduled, the Claimant, in mid-March 2007, exchanged e-mails with Eric, who indicated that the Respondent had not paid him the \$2,700.00 that he was owed.

10. In March 2007, the Claimant spoke with and exchanged e-mails with a neighbor who expressed his own frustration with the Respondent's performance on a home-improvement contract.

11. On March 22, 2007, through a letter from his attorney, the Claimant dismissed the Respondent. The Claimant, through his attorney, unsuccessfully sought to obtain a refund from the Respondent.

12. The Claimant had a different contractor build an addition that, although based on Eric's drawings, was a different version of the plan for the addition.

13. At some point, the Respondent filed for bankruptcy; however, the Respondent's wife registered Burchfield Homes, ostensibly a builder of new homes, with the State, using the same address that the Respondent had provided to the MHIC.

14. The MHIC has received at least twenty other claims against the Fund based on the Respondent's conduct.

15. As of September 25, 2009, the Respondent held a Maryland driver's license with an address of 7527 Main Street, Sykesville, Maryland 21784.

16. On July 31, 2009, the OAH sent a Notice of Hearing to the Respondent by certified mail and first-class mail to 7527 Main Street, Sykesville, Maryland 21784, the Respondent's last address of record with the MHIC. The USPS returned the certified mailing as unclaimed, but did not return the first-class mailing.

### **DISCUSSION**

#### **The Respondent's Notice of Hearing**

The MHIC is required to send a hearing notice to a licensee or person at least 10 days before the hearing by certified mail to the business address of the licensee on record with the MHIC. Md. Code Ann., Bus. Reg. § 8-312(d) (2004). If, after due notice, the person against whom the action is contemplated does not appear, nevertheless the Commission may hear and determine the matter. Md. Code Ann., Bus. Reg. § 8-312(h) (2004). In this case, the Respondent has not been licensed by the MHIC since his registration was suspended on November 8, 2007. The USPS returned the certified mailing of the Respondent's Notice of Hearing to his last address of record in Sykesville as unclaimed; however, the USPS did not return the first-class mailing. Additionally, the Motor Vehicle Administration's records show the same Sykesville address for the Respondent, and the Respondent's wife has registered a new-home building business with the State, using the same address. I have no doubt at all that the Respondent was aware of this proceeding, and simply declined to claim the certified mailing. Therefore, it is appropriate for me to determine this claim against the Fund even in the Respondent's absence.

## Claim

A home 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) (2004 & Supp. 2009). An “actual loss” is defined as “the costs of restoration, repair, replacement, or completion that arise from . . . incomplete home improvement.” Md. Code Ann., Bus. Reg. § 8-401 (2004). A claimant has the burden of proof at a Fund hearing. Md. Code Ann., Bus. Reg. § 8-407(e)(1) (2004 & Supp. 2009). In the circumstances presented here, the Claimant has the burden to establish that the Respondent either abandoned or failed to perform the home improvement contract, without justification. Md. Code Ann., Bus. Reg. §8-605(1) (2004). The MHIC may deny a claim if it finds that the claimant unreasonably rejected good faith efforts by the contractor to resolve the claim. Md. Code Ann., Bus. Reg. § 8-405(d) (2004 & Supp. 2009).

At the hearing, the Fund agreed with the Claimant that the Respondent had abandoned or failed to perform, without justification, the home improvement contract, and that the Claimant had suffered an actual loss. I agree. The Claimant and the Respondent agreed that work on the contract would begin approximately six weeks after the contract was signed on November 3, 2006, and would be completed within approximately six months of the start. The Respondent did not perform any work on-site between November 2006 and March 2007. The only work performed on the contract was done by Eric, who prepared drawings and obtained a building permit. The Claimant, who learned that Eric had not been paid by the Respondent and that a neighbor of his had serious problems with the Respondent, dismissed the Respondent. The Respondent, by failing to perform any on-site work and by not beginning work as agreed in the contract, abandoned the home improvement contract, without justification.

The Award From the Fund

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

**B. Measure of Awards from Guaranty Fund.**

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

- (a) Consequential or punitive damages;
- (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:

- (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 Fund agreed that the Claimant was entitled to recover the full amount that he paid to the Respondent, without a deduction for the \$2,700.00 of work performed by Eric, because the Claimant did not get the value of that work as part of his contract with another home-improvement contractor. I agree that the Claimant is entitled to recover the full amount that he paid to the Respondent, except that his recovery is limited by statute to \$20,000.00.<sup>1</sup> Md. Code Ann., Bus. Reg. § 8-405(e)(1) (2004 & Supp. 2009).

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<sup>1</sup> The Claimant's ultimate award from the Fund is also limited by the statutory provision that limits the recovery of all claimants against one licensee to \$100,000.00. Md. Code Ann., Bus. Reg. § 8-405(e)(2) (2004 & Supp. 2009).

**CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude that the Claimant sustained an actual loss of \$20,041.80 as a result of the Respondent's acts and omissions, and that he is entitled to recover \$20,000.00 from the Fund. Md. Code Ann., Bus. Reg. § 8-401 and 8-405(a) and (e) (2004 & Supp. 2009).

**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 remain 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.

February 2, 2010  
Date Decision Mailed

#111346

  
Robert F. Barry  
Administrative Law Judge



PROPOSED ORDER

*WHEREFORE, this 16th day of March 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.*

*Marilyn Jumalon*

*Marilyn Jumalon  
Panel B*

**MARYLAND HOME IMPROVEMENT COMMISSION**