

IN THE MATTER OF THE CLAIM OF	*	BEFORE KIMBERLY A. FARRELL,
JEFFREY TORRI	*	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-02-08-39558
OMISSIONS OF DAVID B. BARKLEY	*	MHIC NO.: 08 (75) 1771
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 February 20, 2005, Jeffrey Torri (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$41, 552.00 for actual losses allegedly suffered as a result of home improvement work performed by David Barclay t/a Omega Construction & Remodeling (Respondent).

I held a hearing on April 22, 2009, at the Office of Administrative Hearings' (OAH) Wheaton office. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(c)(2)(i) (2004 & Supp. 2008). Kris King, 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 (2004 & Supp. 2008), 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 acts or omissions of the Respondent?

SUMMARY OF THE EVIDENCE

Exhibits

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

- CLMT #1 Contract between the Claimant and the Respondent, dated March 16, 2006
- CLMT #2 Photocopy of front and back of check from the Claimant payable to the Respondent in the amount of \$36,552.00, dated March 16, 2006
- CLMT #3 Change Order, dated August 13, 2006
- CLMT #4 Photocopy of front and back of check from the Claimant payable to the Respondent in the amount of \$5,000.00, dated August 20, 2006
- CLMT #5 Letter from the Respondent to the Claimant, dated October 3, 2007
- CLMT #6 MHIC Complaint Form, dated February 5, 2008, received at the MHIC February 20, 2008
- CLMT #7 Circuit Court of Maryland Case Information printout for tort case #290384V, involving the Claimant and the Respondent, among others
- CLMT #8 Settlement Agreement between the Claimant and Birchfield Homes, Inc.

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

- FUND #1 Notice of Hearing, Hearing Order, and attachments, returned to the OAH by the United States Postal Service as unclaimed
- FUND #2 Printout from the Department regarding the Respondent's licensing history
- FUND #3 Affidavit of Hubert Lowery, dated April 21, 2009
- FUND #4 Printout from the records of the Maryland Department of Assessments & Taxation

shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor.

(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.

COMAR 09.08.03.03B(3).

In this case, I used the first option. The Respondent inspected the property. He also arranged for project plans to be drawn, but the Claimant derived no benefit from any of this. When the Respondent wrote to the Claimant to advise of the closure of the business, the letter stated that the Respondent was sure the Claimant could pay the designer and obtain the plans, but even that turned out to be wrong. The Claimant was unable to purchase the plans even if he wanted to do so because the designer was gone. Any work done is so *de minimis* as to effectively qualify as no work at all.¹ Consequently, I find that use of the formula found in COMAR 09.08.03.03B(3)(a) is appropriate.

The claimants paid the Respondent by two checks totaling \$41,552.00. The Respondent then abandoned the contract without doing any work. The Business Regulation Article caps recovery for any individual Claimant for the acts or omissions of any one contractor at \$20,000.00. Md. Code Ann., Bus. Reg. § 8-405(e)(1) (Supp. 2008). Accordingly, it is

¹ The Claimant did have work done by another contractor, including work that was included in the original contract and work that was not, but the Claimant was not able to build the master bedroom suite as planned because of the money lost to the Respondent. Given the facts of the case, I find that the formula in COMAR 09.08.03.03B(3)(a) represents the best fit.

immaterial for purposes of this analysis whether the \$3,000.00 recovery made in the lawsuit against Birchfield Homes should be credited against the total loss or not. Either way, the Claimant's actual loss would be in excess of the \$20,000.00 he is entitled to recover from the Fund. For all these reasons, I recommend that the Claimant be awarded \$20,000.00 from the MHIC Fund.

CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual loss in excess of the \$20,000.00 maximum amount the Claimant may recover from the Fund 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 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 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 16, 2009
Date Decision Mailed


Katherine A. Farrell
Administrative Law Judge

KAF
Document #106808

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FILE EXHIBIT LIST

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- FUND #4 Printout from the records of the Maryland Department of Assessments & Taxation
- FUND #5 MHIC Claim Form, dated February 5, 2008, received at the MHIC February 20, 2008
- FUND #6 Correspondence from the MHIC to the Respondent, dated April 25, 2008

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.

Rossana Marsh

*Rossana Marsh
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION