

CLAIM OF TROY CONKLIN,	* BEFORE NEILE S. FRIEDMAN,
CLAIMANT	* AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND HOME	* OF THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND,	* OF ADMINISTRATIVE HEARINGS
REGARDING THE ALLEGED ACTS AND	*
OMISSIONS OF RAYMOND TAVENNER,	*
T/A TERAPIN DECKING LLP,	* OAH No.: DLR-HIC-02-15-10865
RESPONDENT	* COMPLAINT No.: 14 (75) 909

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On July 2, 2014, Troy Conklin (Claimant) filed a claim for reimbursement from the Guaranty Fund (Fund) with the Maryland Home Improvement Commission (Commission). The claim alleged that Raymond Tavenner t/a Terrapin Decking LLP (Respondent), performed unworkmanlike and inadequate home improvement that resulted in an actual loss of \$5,920.00. On March 12, 2015, the Commission issued a Hearing Order and forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On September 11, 2015, I convened a hearing in Bel Air, Maryland. Md. Code Ann., Bus. Reg. § 8-407 (2015).¹ The Claimant represented himself. Kris King, Assistant Attorney General, and the Office of the Attorney General, represented the Fund.

Despite notice from the Office of Administrative Hearings (OAH) having been sent to his last known address of record, neither the Respondent nor anyone acting on his behalf appeared at the hearing or requested a postponement. The Notice of Hearing was sent through the United States Postal Service via regular and certified mail to the Respondent at 407 Crest Lane, Westminster, MD 21157. The certified mail was returned as not deliverable as addressed. However, the regular mail was *not* returned. And, a State Department of Assessments and Taxation Real Property Data Search computer printout, offered in evidence by the Commission, established the 407 Crest Lane address as Respondent's current residential address. Having determined that proper notice was sent, I proceeded with the hearing in the Respondent's absence. *See* Md. Code Ann., Bus. Reg. § 8-312(h) (2015); Code of Maryland Regulations (COMAR) 09.01.02.09.

The contested case provisions of the Administrative Procedure Act, the Commission's Hearing Regulations, and the OAH's Rules of Procedure 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 and 09.08.03; and COMAR 28.02.01.

ISSUES

The issues are: (1) whether the Claimant incurred costs for restoration, repair, replacement, or completion that arose from the Respondent's unworkmanlike, inadequate, or

¹ All subsequent citations to the Business Regulation Article are only to sections, unless otherwise noted.

incomplete home improvement;² and, if so, (2) what is the amount of the Claimant's compensable actual loss.

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits for the Claimant:

Claimant #1: Timeline

Claimant #2: Proposal, May 11, 2007

Claimant #3: Photographs.

Claimant #4: Complaint Form, undated

Claimant #5: Email, March 13, 2014

Claimant #6: Letter to Claimant, May 30, 2014

Claimant #7: Estimate, June 4, 2014

Claimant #8: Home Improvement Claim form, June 5, 2014

Claimant #9: Letter to HIC Investigator, June 5, 2014

Claimant #10: Estimate, August 31, 2015

I admitted the following exhibits for the Fund:

GF #1: Memorandum to Fund re: Undeliverable mail, with attachments, July 1, 2015

GF #2: Hearing Order, March 12, 2015

GF #3: Print-out from the HIC regarding the Respondent's license

GF #4: Real Property Data Search

GF #5: Home Improvement Claim Form, June 5, 2014

GF #6: Letter to the Respondent, July 8, 2014

² A "'home improvement' means [] the addition to or alteration, conversion, improvement, modernization, remodeling, repair, or replacement of a building or part of a building that is used or designed to be used as a residence[.]" Section 8-101(g)(2)(i).

Testimony

The Claimant testified for himself.

The Fund did not offer witnesses.

FINDINGS OF FACT

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

1. The Commission licensed the Respondent as a home improvement contractor continuously beginning February 27, 2003. The Respondent's license expired on February 27, 2013.
2. The Claimant owns a single-family home in Bel Air, Maryland.
3. On May 11, 2007, the Claimant and Respondent entered into a home improvement contract. The Respondent agreed to install on the Claimant's house a 16 x 25 foot deck with a landing and steps. The deck's rails were to be constructed of white vinyl with black balusters and hand-caps. The Claimant agreed to pay \$17,500.00 to the Respondent for the new deck.
4. By about May 25, 2007 the Respondent completed the work on the deck.
5. The Claimant paid \$17,500.00 to the Respondent for the deck.
6. In April 2013 the Claimant first noticed that the rail system was failing because it was wobbly and wood was escaping from the bottom of some of the railings.
7. The rail system was not constructed of a solid vinyl. It was constructed of primed pine wood that was wrapped on three sides in polyvinyl chloride (PVC), with the round balusters secured by the PVC-wrapped wood. The rails were attached to posts.
8. Primed pine wood has a limited life span and should not be used on an outside deck because it will rot when exposed to moisture over time.

9. The Respondent had drilled holes into the PVC-wrapped wood to create resting places for the black upright balusters; this allowed water to enter the railing system and further caused the wood to rot.
10. By April 2013 the wood used in the railing system was rotting. The rot was so significant that the rails started to come apart from the posts to which they were attached. Since April 2013 and continuing until the date of the hearing in this matter, the deterioration has spread to many more sections of the deck railing so that the entire rail system needs to be re-built. The deck is unsafe to use in its current condition.
11. Beginning in April 2013, and continuing into September 2013, the Claimant attempted to reach the Respondent by telephone four or five times. The Respondent first indicated he would see what he could do; later he told the Claimant that he was no longer in his own business, and that the product was no longer under warranty. Eventually, the Respondent stopped taking the Claimant's calls.
12. The cost to replace the defective railing is \$5,920.00. The Claimant has not yet had any repairs done.

DISCUSSION

General Law

Under Section 8-405(a), the Commission may compensate an "owner . . . for an actual loss that results from an act or omission by a licensed contractor[.]" Under COMAR 09.08.03.03B(2), compensation is "only . . . for actual losses . . . incurred as a result of misconduct by a licensed contractor." "Actual loss" is "the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Section 8-401.

COMAR 09.08.03.03B governs the measurement of actual loss:

- (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.

...

(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.

(b) If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, the claimant's actual loss 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.

Under Section 8-405(g), a claim must be brought against the Fund within 3 years after the claimant discovered or, by use of ordinary diligence, should have discovered the loss or damage. The Claimant bears the burden of proof to establish the validity of the claim. COMAR 09.08.03.03A (3).

The Claimant has satisfied his burden in this case. He testified credibly as to the facts set forth in the Findings of Fact above; the Respondent was not present to provide any evidence in opposition. Moreover, the Claimant offered detailed photographs and other documentation that corroborated his testimony. The Claimant explained that, on May 11, 2007, he and Respondent entered into a home improvement contract, the specific terms of which required the Respondent

to install a new deck with railings to be constructed of white vinyl with black balusters and hand-caps. The Claimant agreed to pay \$17,500.00 to the Respondent for the new deck, and he paid the Respondent in full.

The Claimant further explained that, by about May 25, 2007 the Respondent completed the work on the deck, and it looked like a professional, competent job. However, after six years, in April 2013, the Claimant first began to notice that the railing system was failing because the railings were wobbly, and he could see pieces of wood falling down and out of PVC wrapping. He was surprised to see pieces of wood inside the PVC because his contract with the Respondent had required the railings to be constructed out of weather-resistant vinyl, not wood wrapped in PVC. After he took apart sections of the railing that were failing, and opened up the PVC wrapping, he discovered that the wood around which the PVC was wrapped was rotting.

This is when the Claimant, after research, discovered that the wood the Respondent had used for the railing was primed pine wood. Primed pine wood has a limited life span and should not be used on an outside deck because it will rot when exposed to moisture over time. He also discovered that the round balusters used in the railings were also secured by the PVC-wrapped pine wood. The Respondent had drilled holes into the PVC-wrapped wood to create resting places for the black upright ballusters; this allowed additional water to enter the railing system and further caused the wood to rot.

The Claimant further noted that, by April 2013 the wood used in the rail system was rotting in such a significant way that the rails started to come apart from the posts to which they were attached. Also, as the Claimant stated, since April 2013 and continuing until the date of the hearing in this matter, the deterioration has spread to many more sections of the deck railing so that the entire railing system needs to be rebuilt. Photographs confirmed that the deck is unsafe to use in its current condition.

The Claimant testified that, beginning in April 2013, and continuing into September 2013, the Claimant attempted to reach the Respondent by telephone but he was non-responsive. Eventually, the Respondent stopped taking the Claimant's calls.

The Claimant offered into evidence two proposals, in the same general price range, from contractors to replace the railing system. One in particular, that by MHIC licensed contractor Handcraft Homes, was very useful in that it explained and described in detail, using photographs, the problems with the way the Respondent constructed the railings. These explanations were consistent with the Claimant's, and lent credibility to the Claimant's testimony. This contractor estimated that the cost to remove the rotten wood, and to reinstall the railings using a PVC substrate instead of the wood substrate, would be \$5,920.00.³ I find it reasonable to rely on this estimate.

I will note that the Claimant has shown that he could not have discovered the faulty construction methods used by the Respondent because the wood substrate was hidden from view by the PVC wrapping and the handcaps. I am satisfied that, by use of ordinary diligence, he could not have discovered any problems until the wood started rotting and the railing system started failing, as it did, six years after the Respondent constructed the deck. Accordingly the Claimant is not barred by any statute of limitations in this case. Section 8-405(g).

The Amount of the Claimant's Actual Loss

As described above, "actual loss" is "the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Section 8-401. The total cost to repair or complete the results of the Respondent's inadequate and unworkmanlike home improvement was \$5,920.00.

³ The other estimate, of \$5,026.99, was unclear in that it contained an unexplained provision that an additional \$1,500.00 might be required to replace the railing post sleeves.

Also as described above, when a homeowner "has solicited ... another contractor to complete the contract," actual loss is measured by subtracting the original contract amount from the sum of the amount paid to the original contractor plus a reasonable amount to repair the original contractor's poor work. Based on the findings discussed above, the Claimant's actual loss is \$5,920.00 ($\$17,500.00 + \$5,920.00 = \$23,420.00 - \$17,500.00 = \$5,920.00$).

CONCLUSIONS OF LAW

I conclude that the Claimant has sustained a compensable actual loss of \$5,920.00 as a result of the acts and omissions of the Respondent. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405(e)(5), 8-405(g) (2015).

PROPOSED ORDER

I **PROPOSE** the following:

- A. The Maryland Home Improvement Commission **ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimant \$5,920.00.
- B. The Maryland Home Improvement Commission **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(a) (2015).
- C. The records and publications of the Maryland Home Improvement Commission reflect this decision.

Signature on File

October 16, 2015
Date Decision Issued

Neile S. Friedman
Administrative Law Judge

NSF/kkc
#158719

PROPOSED ORDER

WHEREFORE, this 20th day of November, 2015, 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.

Jeffrey Ross

***Jeffrey Ross
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION