

IN THE MATTER OF THE CLAIM OF * BEFORE HENRY R. ABRAMS,
SHARON J. MORRIS * 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-IIIC-02-09-24003
OMISSIONS OF JAMES L. SIMMONS * MHIC NO.: 06 (90) 2736

* * * * *

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 January 29, 2008, Sharon Morris (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$20,328 for actual losses allegedly suffered as a result of a home improvement contract with James L. Simmons (Respondent).

I held a hearing on June 9, 2010, at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010). Eric B. London, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Claimant represented herself. Paul M. Weiss, Esquire, represented the Respondent, who was present. The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, and the OAH's Rules of Procedure 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. Ex. 1 – Proposal from the Respondent to the Claimant, dated August 31, 2004;
- Cl. Ex. 2 – Cover letter for proposal from the Claimant, dated August 4, 2004, together with July 23, 2004 proposal;
- Cl. Ex. 3 – Marked copy of proposal from the Respondent to the Claimant, dated July 21, 2004;
- Cl. Ex. 4 – Letter from home inspector John J. Heyn to the MHIC dated May 20, 2008, together with attached, undated photographs of the Claimant's multi-unit dwelling;
- Cl. Ex. 5 – Photograph of the Claimant's kitchen floor, undated;
- Cl. Ex. 6 – Photograph of the Claimant's basement, undated;
- Cl. Ex. 7 – Photograph of the Claimant's floor molding, undated;
- Cl. Ex. 8 – Contract agreement between the Claimant and All-N-One Home Improvement Co., dated January 21, 2008.

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

- G.F. Ex. 1 – Notice of Hearing from OAH, dated March 25, 2010;
- G.F. Ex. 2 – Notice of Hearing from OAH, dated January 13, 2010;
- G.F. Ex. 3 – Hearing Order from DLLR, dated June 11, 2009;
- G.F. Ex. 4 – MHIC's licensing history concerning the Respondent, dated March 10, 2010;
- G.F. Ex. 5 – The Claimant's altered MHIC Home Improvement Claim Form, dated July 18, 2007;

G.F. Ex. 6 - Letter from the MHIC to the Respondent, dated February 25, 2008;

G.F. Ex. 7 - The Claimant's original MHIC Home Improvement Claim Form of the MHIC, dated July 18, 2007.

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

Resp. Ex. 1 -- Photograph of the Claimant's indoor pipes, undated;

Resp. Ex. 2 Photograph of the Claimant's bathroom base plates, undated;

Resp. Ex. 3 -- Draw Check List and Certificate of Payment/Disbursement Request Schedule C; signed by the Claimant November 30, 2004;

Resp. Ex. 4 -- Draw Check List and Certificate of Payment/Disbursement Request Schedule C, signed by the Claimant January 20, 2005;

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Resp. Ex. 6 -- Draw Check List and Certificate of Payment/Disbursement Request Schedule C, signed by the Claimant January 20, 2005;

Resp. Ex. 7 -- Draw Check List and Certificate of Payment/Disbursement Request Schedule C, signed by the Claimant April 12, 2005;

Resp. Ex. 8 -- Draw Check List and Certificate of Payment/Disbursement Request Schedule C, signed by the Claimant January 20, 2005;

Resp. Ex. 9 Photograph of the Claimant's kitchen floor, undated.

Testimony

The Claimant testified on her own behalf.

The Respondent testified on his own behalf and presented the testimony of Nathaniel Maker, Home Inspector for the Department of Housing and Community Development (DCHD).

The Fund presented no 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 01-21297.

2. The Claimant owns a multi-unit dwelling at 3608 Woodbine Road, Baltimore, Maryland, 21207. The Claimant resides in an upstairs unit.
3. The Claimant participated in a program administered by the office of the Baltimore City Rehabilitation Services (BCRS). BCRS provides loans to homeowners for home repairs under certain conditions. The funds are available primarily for emergency repairs and are to be used for a participant's residence only. Pursuant to the program, the homeowner contracts for the needed repairs. If BCRS approves the terms of the negotiated contract BCRS loans the funds required. Both the homeowner and a representative of BCRS must certify that authorized work has been satisfactorily completed before payment will be made. Repayment of the loan is forgiven under certain circumstances.
4. On August 31, 2004, the Respondent submitted a four-page written proposal to the Claimant detailing plumbing, heating, electrical, carpentry and related work the Respondent proposed to do in various areas of the Respondent's basement, first floor, second floor and attic. The total cost for the proposed repairs was \$19,360.00. The Claimant signed the proposal (the Contract) on August 31, 2004. (Claimant Ex. 1) BCRS approved the Contract.
5. The Respondent did the work called for by the Contract in a timely fashion. The Respondent submitted six draw requests for payment for work done pursuant to the Contract. Each such request required the signature of the Claimant and a BCRS representative before payment was authorized. Each draw request contained a clause which provided that the signatory "certifi[ed] to the best of my (our) knowledge, information and belief... that all articles and materials have been furnished and installed and the work has been satisfactorily completed in accordance with the contract." (Resp. Exs. 3 -- 8)

6. The Respondent finished his work pursuant to the Contract on or about January 12, 2005. The Respondent's work was warranted for one year. The Respondent was paid in full for the work done pursuant to the Contract.
7. The Claimant first contacted the Respondent in January 2008 regarding alleged defective workmanship regarding the Claimant's furnace. The Claimant did not call any other alleged defects to the Respondent's attention before filing her claim.
8. The Claimant demanded \$20,328.00 to repair the allegedly unworkmanlike and incomplete work performed by the Respondent pursuant to the Contract.

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) (2010). *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 (2010).¹ The owner bears the burden to prove her claim. Md. Code Ann., Bus. Reg. § 8-407(e)(1); COMAR 09.03.03.A(3). For the following reasons, I find that the Claimant failed to meet this burden.

To prove her claim, the Claimant relied primarily on the May 20, 2008 inspection report authored by John Heyn, which purported to identify defective or incomplete work performed by the Respondent. Attached to the Heyn Report is a set of twenty-six photographs, twenty-five of which allegedly memorialize the precise defects or incomplete work described more generally in

¹ Because of the way I decided this case, I do not need to determine whether, assuming the Claimant did prove the Respondent's responsibility for defects, the Claimant did or will suffer an actual loss, given that she borrowed the funds to pay the Contract price and may never be required to repay those funds.

Mr. Heyn's written report.² (Cl. Ex. 4) The Claimant submitted an additional three photographs she took which she contended reflected additional defects caused by the Respondent.

Mr. Heyn's report alone does not establish the Claimant's case, for two reasons. First, Mr. Heyn did not have the Contract before him in alleging defective or incomplete work attributable to the Respondent. Mr. Heyn relied on the Claimant to identify the work performed or to be performed by the Respondent. As discussed in greater detail below, the Claimant admitted that much of the allegedly defective or incomplete work ascribed to the Respondent in Mr. Heyn's report was not in the Contract and was not performed by the Respondent. Second, although Mr. Heyn stated in his report that the defects were due to the Respondent's poor workmanship, Mr. Heyn did not inspect the work until three years after the work was done. Mr. Heyn did not state in his report or testify as to the basis for his conclusion that the work was defective, and no evidence was introduced regarding: his credentials as a home inspector; whether he believed the one year warranty provided by the Respondent was unreasonable; if so, why; and, if not, whether the allegedly defective work arose during that first year.

The Claimant was questioned about each of the photographs attached to Mr. Heyn's report. There are thirteen pages of photographs, numbered one through thirteen, and two photographs (A and B) per page. (See Cl. Ex. 4) The Claimant admitted that photograph 1A does not show any defect. She also admitted that the Contract did not involve any of the work giving rise to 15 of the 25 alleged defects reflected in the Heyn photographs: 1B; 2A; 2B; 4A; 4B; 5A; 5B; 6A; 6B; 7A; 7B; 8A; 9A; and 10B.³ In addition, the Claimant could not identify whether the work reflected in photographs 3B and 13A was attributable to the Respondent. The Claimant did

² Photograph A on page 1 merely depicts a fixture installed by the Respondent; it does not purport to represent a separate defect in his work.

³ Photographs 4A and 5B relate to the Claimant's claim that the Respondent removed but failed to return certain fixtures from the Claimant's house. The evidence established that the Contract required the permanent removal of these fixtures.

not prove that the Respondent caused any loss as to any of these matters. Thus, the Claimant is not entitled to recover anything in connection with these alleged defects.

The Contract called for the Respondent to replace the sagging floor in the Claimant's bathroom on the second floor. The Claimant admitted that the Respondent did replace the sagging floor. Relying on photograph 11A, however, the Claimant alleged that the Respondent's work was defective because the floor continued to sag. This is not apparent from the photograph. In any event, the Claimant admitted that the floor did not start to sag until three years after the Respondent had completed his work, and she introduced no evidence that the Respondent's one year warranty did not bar this claim or that the Respondent's work was responsible for this. Consequently, the Claimant failed to prove any loss arising out of this matter.

The Claimant also asserted that the Respondent failed to install base plates properly around the plumbing pipes extending from the sink to the floor in her second floor bathroom. However, both photograph 11A and a photograph introduced by the Respondent clearly show that the base plates were properly installed. They lay flat against the floor and there is no indication of any damage (leakage or the like) around them. (See Cl. Ex. 4, photograph 11A, and Resp. Ex.2)

Photograph 11B purports to show unrepaired ceiling damage. The Claimant admitted that she could not say whether the work reflected in photograph 11B was covered by the Contract, and, if so, whether it discloses any defect. As a result, the Claimant did not prove any loss arising out of this matter.

The Contract required the Respondent to do certain electrical work. Photograph 12A is of a new electric service panel installed by the Respondent which serviced, among other things, a front porch light on which the Respondent worked. The Claimant alleged that the Respondent's electrical work in connection with the front porch light was defective, as the light eventually

stopped working. However, the Claimant admitted that the light was working when the Respondent completed the job and did not stop working until approximately February 2010. The Claimant failed to meet her burden in attributing this failure to the Respondent. She did not introduce any evidence that the work was defective when done, and I cannot reasonably infer that the failure of the fixture to work after five years of proper operation is attributable to work done five years earlier.

Photograph 12B and Claimant's Exhibit 6 concern a sump pump installed by the Respondent. The Claimant alleged that the installation was defective because, despite the fact that the sump pump operated for several years, the floor in the basement was always damp. Further, alleged the Claimant, the sump pump eventually stopped operating. The Claimant did not introduce any evidence that the Respondent's work, rather than the sump pump itself, was defective. The sump pump was separately warranted, but the Respondent did not make a warranty claim against the manufacturer. As a result, I find that the Claimant failed to meet her burden of proof showing that any problem with the ability of the sump pump to pump water out of the basement was a result of the Respondent's installation.

Photograph 13B deals with the attic furnace. The Respondent claimed the furnace leaked and was to be replaced by the Respondent. The Contract made clear, however, that the Respondent was only to replace the condensate pipe on the furnace, which he did. The leaking stopped after the condensate pipe was replaced but the furnace again began to leak sometime more than a year after the Respondent finished the job. The Claimant did not introduce any evidence that the replaced condensate pipe was responsible for the renewed leak.

Claimant's Exhibit 5 is a photograph of tile installed by the Respondent on the Claimant's kitchen floor. It shows cracks in a small number of floor tiles. The Claimant testified, however, that these cracks showed up years after installation and she failed to introduce any

evidence excluding the possibility that the cracks were caused by owner abuse. Given the time differential between the installation and occurrence of the cracks, I am unwilling to infer that the cracks resulted from defective workmanship in the installation of the tiles.⁴

In addition, as to each of the above and all the remaining defects alleged, I accept the testimony of Mr. Maker that the Respondent was not responsible. I find the testimony of Mr. Maker credible and compelling. He was at all relevant times a building rehabilitation technician for Baltimore City, assigned to the BCRS program. His job included the responsibility to inspect the work of contractors on his projects to ensure that all work was done in a workmanlike manner. His approval was required before program funds were disbursed as to those projects. Prior to this job as a rehabilitation technician, Mr. Maker was an architectural draftsman for the City. As a result of both these positions, Mr. Maker was in a far better position to judge the quality and completeness of the Respondent's work than was the Claimant.

Mr. Maker oversaw the Respondent's work on the Claimant's home. Mr. Maker relied on other City inspectors to inspect the Respondent's mechanical and plumbing work, while Mr. Maker assumed direct responsibility for inspecting all the rest. Based on those inspections he was satisfied that the Respondent's work was complete and performed in a workmanlike fashion. Mr. Maker also made sure that the Claimant understood the nature of Respondent's work and what was required by the Contract, and that the Claimant was satisfied with the quality of the work before he signed off on the Respondent's draw requests. (See Resp. Exs.3-8)

Even if the Claimant had established that some of the alleged defects were the Respondent's responsibility, she still could not prevail. Claimants are required by regulation to

⁴ Claimant's Exhibit 7 shows holes under the base molding in one of the rooms of the house. The testimony of the Claimant and the Respondent established these were pre-existing holes, the repair of which was not part of the Contract.

give licensees an opportunity to repair defects and complete their work before claimants may recover from the Fund. See Md. Code Ann., Bus. Reg. § 8-405(d).

In this case, the Claimant did not even notify the Respondent of alleged problems with his work until approximately three years after the job was concluded and, even then, only asked him to repair the leaking furnace. Because the Respondent was not afforded any opportunity to review and, if necessary, repair anything else, the Fund cannot be asked to pay for other possible repairs.

Consequently, I find that the Claimant has not met her burden of proof in this action to prove that she sustained an actual loss as a result of the Respondent's acts or omissions.

CONCLUSIONS OF LAW

I conclude that the Claimant has not sustained any actual loss as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2010).

RECOMMENDED ORDER

I **PROPOSE** that the Maryland Home Improvement Commission:

ORDER, that the Claimant's Fund claim be **DENIED**; and

ORDER, that the records and publications of the Maryland Home Improvement

Commission reflect this decision.

September 2, 2010
Date Decision Issued


Henry R. Abrams
Administrative Law Judge

HKA:fe
#114745

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SHARON J. MORRIS	* AN ADMINISTRATIVE LAW JUDGE
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FILE EXHIBIT LIST

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- Resp. Ex. 9 - Photograph of the Claimant's kitchen floor, undated.

PROPOSED ORDER

WHEREFORE, this 27th day of October 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.

Rossana Marsh

*Rossana Marsh
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION