

**CLAIM OF MARK SUTTON
AGAINST THE MARYLAND
HOME IMPROVEMENT
GUARANTY FUND FOR THE
ALLEGED ACTS AND
OMISSIONS OF GREGORY
GOSS, T/A G. J. GOSS
CONTRACTING, INC.
(RESPONDENT)**

* **BEFORE WILLIAM C. HERZING,**
* **AN ADMINISTRATIVE LAW JUDGE**
* **OF THE MARYLAND OFFICE OF**
* **ADMINISTRATIVE HEARINGS**
* **OAH No. DLR-HIC-02-08-40316**
* **MHIC No. 07 (75) 2133**
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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 August 28, 2007, Mark Sutton (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of losses allegedly suffered as a result of home improvement work performed by Gregory Goss, T/A G. J. Goss Contracting, Inc. (Respondent).

William C. Herzing, Administrative Law Judge, heard the above-captioned case on June 25, 2009, on behalf of the MHIC, pursuant to Md. Code Ann., Bus. Reg. §§ 8-312(a) (2004) and 8-407(c)(2)(i) (Supp. 2008).¹

¹ All further references to the Business Regulation Article will be to the 2004 Replacement volume and the 2008 Supplement unless otherwise indicated.

Kris King, Assistant Attorney General, represented the Fund. The Claimant and the Respondent appeared without representation.

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 (2004 & Supp. 2008), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02.01; and 28.02.01.

ISSUE

The issue is whether the Claimant sustained an actual loss compensable by the Maryland Home Improvement Guaranty Fund because of the acts or omissions by the Respondent/Contractor.

SUMMARY OF THE EVIDENCE

Exhibits

The Claimant presented ten exhibits, the Respondent offered three, and the Guaranty Fund submitted five documents which were admitted into evidence. An Exhibit List is attached.

Testimony

The Claimant and the Respondent testified on their own behalf. The Fund did not offer any witness testimony.

FINDINGS OF FACT

After considering all of the evidence presented, I find by a preponderance of the evidence that:

1. On March 20, 2004, the Claimant entered into a contract with the Respondent to remove and replace the roof on his residence located at 12807 Ponderosa Drive, Glen Arm, Maryland, 21057. The contract also included installation of four Velux skylights.
2. The contract price was \$14,097.00.

3. Work was completed in May 2004.
4. In September 2004, a skylight on the Claimant's residence leaked causing damage to the interior ceiling and drywall.
5. On October 5, 2004, the Claimant filed a complaint, in the District Court of Maryland for Baltimore County, against the Respondent for repair of the skylight. The Respondent repaired the roof and skylight and the Claimant dismissed the complaint.
6. The Claimant's roof was damaged during a storm on April 16, 2007. A tree fell on the roof, shattered a skylight and put a hole in the roof.
7. The Claimant made a claim under his homeowner's policy for damage to his roof as a result of the storm.
8. Erie Insurance Exchange paid the Claimant \$1,667.00, less a \$500.00 deductible for the loss. The repairs included replacement of the roof and the damaged skylight.
9. In May 2007, the Respondent inspected the Claimant's roof. At that time there was a hole in the roof, leaves and branches on the roof and in the gutters and rotted wood on a roof overhang.
10. The Respondent was licensed as a home improvement contractor at all times relevant to this proceeding.

DISCUSSION

Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 establishes the Fund to compensate homeowners for actual losses sustained by them due to unworkmanlike performance by licensed contractors.

Md. Code Ann., Bus. Reg. § 8-401 defines actual loss:

In this subtitle, "actual loss" means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.

COMAR 09.08.03.03B(3) establishes the methods for determining actual loss:

(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 under 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, 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.

The burden of proof to establish the unworkmanlike performance of the Respondent, as well as the actual loss incurred as a result of that conduct, rests with the Claimant. Md. Code Ann., Bus. Reg. § 8-407(c)(1). In order to be successful in his claim against the Fund, the Claimant must prove that the Respondent's work was performed in an unworkmanlike, inadequate or incomplete manner. The Claimant testified that on March 20, 2004, he contracted with the Respondent to replace his roof and install four skylights. One of the skylights leaked in September 2004 causing damage to the interior of the Claimant's residence. After the Claimant filed a court complaint against the Respondent in October 2004, the Respondent repaired the skylight and the Claimant dismissed the complaint.

The Claimant contended that he noticed water leaking into the interior of his home in January 2007. He claimed that despite repeated calls, the Respondent did not make any attempt to repair the leaks. However, the only evidence of the Claimant's attempt to contact the

Respondent was a letter he wrote to the Respondent, dated April 30, 2007. I find it significant that the letter was sent after April 16, 2007, when the Claimant's roof and a skylight were damaged when a tree fell on the roof during a storm. The Claimant made a claim for damages against his homeowner's policy and Erie Insurance Exchange paid \$1,667.00 to repair the roof and skylight.

The Claimant contended that one of the skylights still leaked and caused damage to the interior walls of his home.² The Claimant's case was premised upon his testimony that the continued leak into the interior of his home showed that the Respondent improperly installed the skylight. However, I cannot simply make that assumption. The Claimant's testimony regarding the location of the leak was vague and inconsistent. He stated the leak was near the fireplace and dining room but he was not certain where the skylight was located in relation to those rooms. The Claimant also testified that the leaking skylight was caulked, which he maintained is contrary to the installation instructions. He presented photographs which depicted the caulk around the skylight and flashing (Claimant Exhibit 9D, 9E) but he did not present any testimony or written report by a contractor or an expert to show that the Respondent's work was substandard. He did not present any expert testimony to verify that the Respondent's work was deficient or that the skylight was not installed correctly.

The Claimant testified that he used the cost to replace the skylight damaged in the storm as the basis for his present claim against the Fund. The replacement of that skylight included repair of roofing plywood and shingles. There was no evidence that such repairs were necessary to correct the leak or to repair the Respondent's defective work. Not only was there was no

² Photographs of the interior damage (Claimant Exhibits 7 and 9A, B, C and F) were not admitted because they were evidence of consequential damages. Md. Bus. Reg. Art. § 8-405(e)(3).

evidence that the leak was from an improperly installed skylight, there was no evidence or expert opinion that the skylight needed to be replaced.

In contrast to the Claimant's lack of evidence regarding the Respondent's poor workmanship, the Respondent presented credible evidence of other sources for the leak. He testified that he went to the Claimant's home in May 2007 and saw stains in the room that was under the location of a hole in the Claimant's roof and not in the area of the skylight. His photographs (Respondent Exhibit 1) document the hole in the roof, as well as a large amount of leaves and branches on the roof and in the rain gutters, as well as rotted wood on the edge of the roof overhang. The Respondent further testified that, even if the instructions called for a caulk free installation, caulk would not cause the skylight to leak.

The Claimant has simply relied on his statements that the interior leak was caused by the Respondent's improper installation of the skylight. He failed to obtain an inspection of the Respondent's work or an expert opinion of another contractor that the work was lacking. Thus, there is no basis for me to conclude that total replacement of the skylight is necessary to correct poor workmanship by the Respondent. Therefore, the Claimant has failed to establish an actual loss.


CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Claimant has not established that he sustained an actual loss under section 8-401 of the Business Regulation Article as a result of the Respondent's inadequate performance of the contract. Therefore, the Claimant is not entitled to reimbursement from the Maryland Home Improvement Guaranty Fund pursuant to section 8-405 of the Business Regulation Article and COMAR 09.08.03.03B(3)(c).

RECOMMENDED ORDER

On the basis of the foregoing Findings of Fact, Discussion and Conclusions of Law, I
RECOMMEND that the Maryland Home Improvement Commission **ORDER** that the Claim of
Mark Sutton be **DISMISSED**; and
ORDER that the records and publications of the Maryland Home Improvement
Commission reflect this decision.

September 18, 2009
Date



William C. Herzing
Administrative Law Judge

107792

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EXHIBIT LIST

Claimant's Exhibits

1. Claimant's contract with the Respondent
2. Respondent's business card
3. Claimant's letter to the MHIC, May 7, 2007
4. MHIC Complaint Form
5. Respondent's letter to the Claimant, April 25, 2006
6. Claimant's letter to the Respondent, April 30, 2007
7. Not admitted
8. Loch Raven Remodeling & Home Improvements Co., Inc. invoice
9. D and E - two photographs showing caulking on a skylight
10. District Court of Maryland Complaint

Guarantee Fund Exhibits

1. Notice of Hearing and certified mail green cards
2. Hearing Order
3. Licensing History of the Respondent

4. Home Improvement Claim Form, received August 28, 2007
5. Letter to the Respondent, October 27, 2007 from John Borz, Chairman of the Maryland Home Improvement Commission

Respondent Exhibits

1. Twenty one photographs of the Claimant's roof
2. Erie Insurance Company Estimate
3. Letter to the Respondent from Jonathan Clark, Esquire, June 23, 2009

PROPOSED ORDER

WHEREFORE, this 29th day of October 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