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| IN THE MATTER OF THE CLAIM OF | * BEFORE WILLIAM SOMERVILLE, |
| STEVE & DEBBIE HARTMAN | * AN ADMINISTRATIVE LAW JUDGE |
| AGAINST THE MARYLAND HOME | * OF THE MARYLAND OFFICE |
| IMPROVEMENT GUARANTY FUND | * OF ADMINISTRATIVE HEARINGS |
| FOR VIOLATIONS ALLEGED | * |
| AGAINST FRANCIS MOYNIHAN, T/A | * OAH NO.: DLR-HIC-02-10-28740 |
| F. A. MOYNIHAN BUILDING, LLC. | * MHIC NO.: 08 (90) 1224 |

* * * * *

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 November 17, 2008, Steve and Debbie Hartman (Claimants) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of funds for actual losses suffered as a result of home improvement work performed by a company for which Francis Moynihan (Respondent) held an MHIC license.

I held a hearing on February 18, 2011 at a State office building in Westminster, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(c)(2)(i) (2010). Eric B. London, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. Debbie Hartman represented herself. The Respondent failed to appear.

The Respondent was properly notified at his last known address but he failed to appear. The absence of the Respondent was addressed as a preliminary matter and the hearing proceeded without the Respondent. Md. Code Ann., Bus. Reg. §8-312(h).

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, 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 & Supp. 2010), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02.01; and 28.02.01.

ISSUE

Did the Claimants 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 offered by the Claimants:

1. Contract document with attachments, 2-19-07
2. Checks and receipts
3. Packet of three photographs
4. Notice of Disapproval, 9-7-07
5. Remedial Contractor contract document, 11-1-07

I admitted the following exhibits offered by the Fund:

1. Notice and Hearing Order
2. Notice of Hearing and mail receipts
3. Affidavit, 2-11-11

4. Licensing History
5. Hearing Order
6. Claim Form, 8-6-08
7. Note, 1-5-09
8. Letter, 1-29-09

Testimony

One Claimant (Debbie Hartman) testified in the Claimants' case.

The Fund called no witnesses.

FINDINGS OF FACT

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

1. At all times relevant, the Respondent was the MHIC license holder for F. A. Moynihan Building, LLC (the company).
2. On February 19, 2008, the Claimants and the company entered into a contract. The Claimants were to pay \$30,952.00 and the company was to perform home improvement work on the Claimants' residence. The company was to construct a fifteen foot by fifteen foot addition onto the house, including excavation work, foundation work, framing, roofing, siding, electrical work, heating, ventilation and air conditioning work, insulation, drywall work, trim work and painting, as more fully set forth in the contract document. (Claimants' Ex. 1.)
3. Soon after construction began, the parties amended the agreement such that the Claimants would pay an additional \$500.00 and the company would install a half-moon-shaped window.
4. The project progressed. The Claimants paid the full contract amount.

5. On September 7, 2007, a county construction inspector failed the grading around the addition. Although the contract documents called for all work to be “in accordance with State and county laws”, and although the contract documents specifically required the company to backfill and grade the site “in order to have positive fall away from existing house and new addition,” the grading had no “positive fall away from the addition” as required by the county building code and the terms of the contract. The poor grading, or lack thereof, caused water to pool in the crawl space under the addition.
6. Immediately after the project failed the grading inspection, the Claimants telephoned the Respondent and explained that the grading needed to be remedied. The Respondent demanded another \$6,900.00 to do that required grading. The parties did not come to an agreement. That conversation was the Claimants’ last contact with the Respondent.
7. On November 1, 2007, one Claimant entered into a contract with a remedial contractor. The Claimant was to pay \$9,003.52 and the remedial contractor was to do the required grading around the addition, install a 5 foot by 3 foot landing and steps by the exterior door on the addition, repair some drywall blemishes, do some interior painting, install some rosette trim in the existing house, adjust and re-caulk an exterior door on the addition, level a floor, and install carpet in the addition, replace sections of gutter on the existing house and on the south wall of the addition, and remove trash and debris.
8. As of December 12, 2007, the Claimant had paid the remedial contractor \$2,250.00 toward the price of the work.
9. On August 6, 2008, the Claimants filed a claim against the Fund.

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), 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). A claimant has the burdens of production and persuasion to establish the “inadequate, incomplete or unworkmanlike” work product of the contractor, as well as to establish the cost of the “actual loss.” Md. Code Ann., Bus. Reg. § 8-407.

In the instant case, the Claimants have demonstrated an instance in which the company performed work under the Respondent’s MHIC license¹ which was inadequate, unworkmanlike, or incomplete home improvement work. (Finding of Fact 5.) The result of some of the work was not suitable for its intended purpose, not what was required by the contract, not done to workmanlike standards in the industry, and not a completed home improvement job.²

The Claimants not only need to prove the inadequate, incomplete, or unworkmanlike work product but they must also prove the cost to correct it. The problem with the Claimants’ proof of “actual loss” is that it is not clear with regard to the cost to remedy the grading. The remedial contract they offer jumbles together items of work that were not contemplated in the original contract with other items including remedial work done on the grading of the site. The remedial contract mixes “apples and oranges” and does not specify costs to remedy those items contemplated by the original contract that were substandard. Their evidence does not separate

¹ The Respondent, as the MHIC license holder, is responsible to make sure the project is adequate, complete, and workmanlike. See COMAR 09.08.01.04B.

² These phrases reflect legal definitions of “inadequate,” “unworkmanlike,” and “incomplete.”

out costs for re-grading, for instance, from costs for work not contemplated in the original agreement. The remedial contract called for a Claimant to pay one amount, \$9,003.52, but the remedial contractor was to do the required grading around the addition (contemplated by the original contract), install a 5 foot by 3 foot landing and steps by the exterior door on the addition (not contemplated by the original contract), repair some drywall blemishes (possibly contemplated by the original contract), do some interior painting (contemplated by the original contract), install some rosette trim in the existing house (not contemplated by the original contract), adjust and re-caulk an exterior door on the addition (possibly contemplated by the original contract), level a floor and install carpet in the addition (not contemplated by the original contract), replace sections of gutter on the existing house (not contemplated by the original contract), replace gutter on the south wall of the addition (possibly contemplated by the original contract), and remove trash and debris (not contemplated by the original contract). Based upon the remedial contract, I have no way to know, or to calculate, the cost of restoration, repair, replacement, or completion that arose from substandard items in the original contract. I cannot guess or speculate.

In this particular case, however, there is some evidence from which I can calculate an actual loss amount. The Respondent asked for an additional \$6,900.00 to bring the grading up to standards. (Finding of Fact 6.) I can conclude that the Respondent would have remedied the grading for that amount. Therefore, I can conclude that of the remedial contract charge of \$9,003.52, \$6,900.00 of that amount would have been attributable to the grading. I can properly conclude that the figure of \$6,900.00 can be attributed to a cost to remedy the grading.

Having determined that the Claimants have shown that the Respondent is responsible for unworkmanlike, inadequate, or incomplete home improvement work with regard to the grading, further analysis of an amount of "actual loss" is appropriate. A claimant may not be compensated for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1). Unless a claim requires a unique measurement, actual loss is measured by one of the three following formulas:

(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 measurements accordingly.

COMAR 09.08.03.03B(3).

In the instant case, I applied the third option. The Fund argued that actual loss calculation method "c" above would apply, based upon the evidence offered in this case. I agree. Based on the credible evidence offered, as described above, I calculate Claimants' actual loss using the formula in COMAR 09.08.03.03B(3)(c) as follows:

\$31,452.00 paid toward original contract price (including change orders)
+\$ 6,900.00 cost to repair and complete work contemplated by original contract
-\$31,452.00 original contract price
\$ 6,900.00 actual loss

The "actual loss," as that term is defined in the statutory scheme, is \$6,900.00.

CONCLUSIONS OF LAW

I conclude that the Claimants have proven that they have sustained an "actual loss" of \$6,900.00 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 Claimants be awarded \$6,900.00 from the Maryland Home Improvement Guaranty Fund; and further

ORDER that the Respondent be deemed 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 (2010); and further

ORDER that the records and publications of the Maryland Home Improvement Commission reflect this decision.

May 19, 2011
Date Decision Mailed



William J. D. Somerville III
Administrative Law Judge

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FILE EXHIBIT LIST

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8. Letter, 1-29-09

PROPOSED ORDER

WHEREFORE, this 26th day of July 2011, 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