

IN THE MATTER OF THE CLAIM * BEFORE SONDRAL SPENCER,
OF KESTER OSUJI * 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-02-10-31455
OMISSIONS OF EMMANUEL * MHIC NO.: 08(75)338
FAPOHUNDA T/A ROTEC *
CONSTRUCTION FIRM, INC. *

* * * * *

RECOMMENDED DECISION

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STATEMENT OF THE CASE

On February 4, 2008, Kester Osuji (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$46,720.00 for actual losses allegedly suffered as a result of a home improvement contract with Emmanuel Fapohunda, t/a Rotec Construction Firm, Inc. (Respondent).

I held a hearing on March 9, 2011, at the Office of Administrative Hearings in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010). Eric London, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Claimant represented himself. The Respondent represented himself.

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) 09.01.03.01-09.01.03.10; 09.08.02.01-09.08.02.02; and 28.02.01.01-28.02.01.27.

ISSUES

Is the Claimant eligible to make a claim against the Fund and if so, 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 – Email from the Respondent to the Claimant, July 5, 2006, with attached estimate

Cl. Ex. 2 – Fax from the Respondent to the Claimant, October 5, 2006, with attached contract, September 18, 2006

Cl. Ex. 3 – Email from the Respondent to the Claimant, October 31, 2006

Cl. Ex. 4 – Copies of ten cancelled checks, December 2006

Cl. Ex. 5 – Email from the Respondent to the Claimant, January 6, 2007, with attached invoice, January 7, 2007

Cl. Ex. 6 – Two emails from the Respondent to the Claimant, January 18, 2007

Cl. Ex. 7 – Email from the Claimant to the Respondent, January 23, 2007

Cl. Ex. 8 – Series of emails between the Claimant and the Respondent, February 12 and February 13, 2007

Cl. Ex. 9 – Series of emails between the Claimant and the Respondent, February 12 and February 13, 2007

Cl. Ex. 10 – Series of emails between the Claimant and the Respondent, January 18, 2007 and February 6, 2007

Cl. Ex. 11 – Receipt from PAL Mfg. Corp., February 21, 2007

Cl. Ex. 12 – Series of emails between the Claimant and the Respondent, February 13 and February 21, 2007

Cl. Ex. 13 – Email from the Claimant to the Respondent, February 22, 2007

Cl. Ex. 14 – Email from the Respondent to the Claimant, February 28, 2007, with attached completion schedule

Cl. Ex. 15 – Series of emails between the Claimant and the Respondent, July 9 and July 10, 2007

Cl. Ex. 16 – Series of emails between the Claimant and the Respondent, July 11 and July 16, 2007

Cl. Ex. 17 – Email from the Claimant to the Respondent, April 10, 2007

Cl. Ex. 18 – Series of emails between the Claimant and the Respondent, July 17, 2007

Cl. Ex. 19 – Agreement between the Claimant and the Respondent, November 4, 2007

Cl. Ex. 20 – Maryland Home Inspection Services inspection report, January 13, 2008

Cl. Ex. 21 – Estimate, Tyree Contracting, Inc., December 17, 2007

Cl. Ex. 22 – Contract between Tyree Contracting, Inc., and the Claimant, January 27, 2008, with attached cancelled checks

Cl. Ex. 23 – Inspection Report from John J. Heyn, April 16, 2009, with attached photographs

Cl. Ex. 24 – Building permit issued February 15, 2007

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

Fund Ex. 1 – Notice of Hearing, November 19, 2010

Fund Ex. 2 – Hearing Order, August 25, 2010

Fund Ex. 3 – Respondent's licensing information, March 7, 2011

Fund Ex. 4 – Home Improvement Claim Form, received February 8, 2008

Fund Ex. 5 – Letter to the Respondent from the MHIC, March 28, 2008

The Respondent did not offer any exhibits.

Testimony

The Claimant testified and presented the testimony of John J. Heyn, who was accepted as an expert in the field of home inspections.

The Fund did not present any witnesses.

The Respondent testified on his own behalf and did not present any additional 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. The Respondent's license expired on June 14, 2009, and it has not been renewed.
2. On October 5, 2006, the Claimant and the Respondent entered into a contract to renovate property owned by the Claimant at 2101 Chelsea Terrace, Baltimore, Maryland, which consisted of at least two apartments.
3. The property at 2101 Chelsea Terrace, Baltimore, Maryland is not the Claimant's primary residence. The Claimant has never lived at 2101 Chelsea Terrace.

4. The Claimant's primary residence is in New York. The Claimant also owns five rental properties in New York, another property in Georgia and rental and commercial property in Philadelphia, Pennsylvania.
5. At the time of the contract and currently, the Claimant owned more than six dwelling places.

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) (Supp. 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). In this case, I will not reach the issue of whether the Claimant has proven eligibility for compensation from the Fund.

The Business Regulation Article imposes certain technical requirements and limitations on claims against the Fund. In particular, section 8-405 provides, in pertinent part;

(f) Excluded claimants. –

- ...
- (2) An owner may make a claim against the Fund only if the owner:
 - (i) resides in the home as to which the claim is made; or
 - (ii) does not own more than three residences or dwelling places.

Md. Code Ann., Bus. Reg. § 8-405(f)(2) (Supp. 2010).

In this case, the Claimant testified that he did not live at and does not live in the house at 2101 Chelsea Terrace. It was an investment property that he intended to renovate and then rent. Although the Claimant stated that he intended to keep one of the apartments for his use, I find that not credible in light of the number of other residences that the Claimant identified. According to the Claimant, he has residences in New York, Georgia and Philadelphia,

Pennsylvania. The Claimant described his New York residence as his primary one.

Accordingly, I find that the Claimant did not reside at 2101 Chelsea Terrace and did not intend to make the property his primary residence. Therefore, the Claimant does not meet the terms of section 8-405(f)(2)(i).

As to section 8-405(f)(2)(ii), the statute does not say whether the prohibition against owning more than three dwelling places applies as of the time of the home improvement contract, the time of filing the claim, or the time of the hearing. In this case, however, based on the Claimant's testimony, it is clear that the Claimant owned at least six properties at the time of the contract, at the time he filed a claim and at present.

Consequently, I find that the Claimant is an excluded claimant and that the Claimant's claim must be dismissed. Md. Code Ann., Bus. Reg. § 8-405(f)(2) (Supp. 2010). For this reason, I need not reach the issue whether the Claimant met his burden to prove an actual loss within the meaning of section 8-405(a) of the Business Regulation Article.

CONCLUSIONS OF LAW

I conclude that the Claimant is an excluded claimant and may not maintain a claim against the Maryland Home Improvement Commission Guaranty Fund. Md. Code Ann., Bus. Reg. § 8-405(f)(2) (Supp. 2010).

RECOMMENDED ORDER

I PROPOSE that the Maryland Home Improvement Commission:

ORDER that the Claimant's claim against the Maryland Home Improvement Guaranty Fund on account of the acts or omissions of the Respondent be dismissed; and

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

April 22, 2011
Date Decision Mailed

A black rectangular redaction box covering the signature of the Administrative Law Judge.

Sondra L. Spencer
Administrative Law Judge

122091

PROPOSED ORDER

WHEREFORE, this 3rd day of June 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.

J. Jean White

J. Jean White
Panel B

MARYLAND HOME IMPROVEMENT COMMISSION