



STATE OF MARYLAND

DLLR

DEPARTMENT OF LABOR, LICENSING AND REGULATION

Maryland Home Improvement Commission
500 N. Calvert Street, Room 306
Baltimore, MD 21202-3651
Stanley J. Botts, Commissioner

**The Maryland Home
Improvement Commission**

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**BEFORE THE
MARYLAND HOME IMPROVEMENT
COMMISSION**

**v. Michael C. Geiger
t/a Geigerland Contracting Corporation
(Contractor)
and the Claim of
Jerome Sommerville
(Claimant)**

MHIC No.: 08 (05) 467

FINAL ORDER

WHEREFORE, this March 21, 2011, Panel B of the Maryland Home Improvement

Commission ORDERS that:

- 1. The Findings of Fact set forth in the Proposed Order dated December 6, 2010 are AFFIRMED.**
- 2. The Conclusions of Law set forth in the Proposed Order dated December 6, 2010 are AFFIRMED.**
- 3. The Proposed Order dated December 6, 2010 is AFFIRMED.**
- 4. This Final Order shall become effective thirty (30) days from this date. During the thirty (30) day period, any party may file an appeal of this decision to Circuit Court.**

Andrew Snyder
**Andrew Snyder, Chairperson
PANEL B**

MARYLAND HOME IMPROVEMENT COMMISSION

PHONE: 410.230.6309 • FAX: 410.962.8482 • TTY USERS, CALL VIA THE MARYLAND RELAY SERVICE
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MARTIN O'MALLEY, GOVERNOR • ANTHONY G. BROWN, LT. GOVERNOR • ALEXANDER M. SANCHEZ, SECRETARY

IN THE MATTER OF THE CLAIM OF	* BEFORE STUART G. BRESLOW
JEROME J. SOMMERVILLE	* 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-02-09-09015
OMISSIONS OF MICHAEL C. GEIGER,	* MHIC NO.: 08 (05) 467
T/A GEIGERLAND CONTRACTING	
CORPORATION	

* * * * *

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 June 20, 2008, Jerome J. Sommerville (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$9,233.89 for actual losses allegedly suffered as a result of a home improvement contract with Michael C. Geiger, trading as Geigerland Contracting Corporation (Respondent).

I held a hearing on June 24, 2010¹ at the Carroll County Office Building, 225 N. Center Street, Westminster, Maryland 21157. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010).²

¹ The case was originally scheduled for January 13, 2010, but was postponed, without objection, as a result of a conflict with a hearing in the Circuit Court for Baltimore County involving the Claimant's attorney.

² Throughout this Recommended Decision, the 2010 Replacement Volume to the Maryland Annotated Code's Business Regulation Article will be referred to as the Business Regulation Article.

Peter Martin, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. Wayne S. Goddard, Esquire, represented the Claimant, who was present. The Respondent was present and represented himself.

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 (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 Contract between Claimant and Respondent to remodel existing basement, dated December 1, 2006
- Cl. Ex. #2 Contract between Claimant and Respondent to remodel master bath, dated December 1, 2006
- Cl. Ex. #3 Journal Entry of work on the property, December 4, 2006 through December 23, 2006
- Cl. Ex. #4 Four checks payable to Geigerland, two in the amount of \$2,500.00 each, dated December 4, 2006; one in the amount of \$3,939.00, dated December 6, 2006, and one in the amount of \$2,500, dated December 18, 2006
- Cl. Ex. #5 Adjustment for Claimant-supplied items for the master bath contract, undated
- Cl. Ex. #6 Adjustment for Claimant-supplied items for the basement remodel contract, undated

- Cl. Ex. #7 Photographs A-D showing the alignment of plumbing wall fixtures, undated
- Cl. Ex. #8 Photographs of both projects, A-W, undated
- Cl. Ex. #9 Letter from Claimant and Susan Sommerville to Respondent, dated December 28, 2006
- Cl. Ex. #10 Fax from Respondent to Claimant, dated January 2, 2007
- Cl. Ex. #11 Letter from Wayne S. Goddard, Esquire, to Respondent, dated February 1, 2007
- Cl. Ex. #12 Letter from John J. Heyn, JJH Consultant, to Claimant and his wife, dated February 28, 2007
- Cl. Ex. #13 Invoice from Brothers Hearth and Home, dated February 16, 2007
- Cl. Ex. #14 Invoice from Superior Installation, dated February 27, 2007
- Cl. Ex. #15 Invoice from Mercer Carpet One, dated April 28, 2007
- Cl. Ex. #16 Proposal from Alcap Construction, Inc., dated June 22, 2010
- Cl. Ex. #17 Summary of Damages and Request for Award, undated
- Cl. Ex. #18 Letter from the Respondent to the Claimant and his wife, dated June 19, 2007

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

- Fund Ex. #1 Notice of Hearing, dated September 3, 2009
- Fund Ex. #2 Letter from OAH to the Claimant, his attorney and the Respondent, dated November 3, 2009
- Fund Ex. #3 Notice of Hearing, dated April 15, 2010
- Fund Ex. #4 Licensing History of Respondent, dated May 3, 2010
- Fund Ex. #5 June 30, 2008 letter from John Borz, Chairman of the Maryland Home Improvement Commission, to Respondent, with attached claim of Claimant

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

- Resp. Ex. #1 January 5, 2007 note of Respondent

- Resp. Ex. #2 Job Progress/Payment Report, undated
- Resp. Ex. #3 Notice of Lien and Petition, from Respondent to Claimant, dated April 27, 2007 with attachments from the United States Postal Service
- Resp. Ex. #4 Letter from Respondent to William Banks, State of Maryland Dept. of Licensing, dated July 10, 2008
- Resp. Ex. #5 Letter from the Respondent to the Claimant and his wife, dated June 19, 2007
- Resp. Ex. #6 Invoice from Carroll Electric Service, Inc. to Respondent for bathroom work changes, dated January 9, 2007
- Resp. Ex. #7 Invoice from Carroll Electric Service, Inc. to Respondent for basement wiring work order changes, dated January 9, 2007
- Resp. Ex. #8 Check from Respondent to Carroll Electric Service, Inc., dated February 12, 2007
- Resp. Ex. #9 Electrical Permit, dated January 3, 2007

Testimony

The Claimant testified and presented John J. Heyn, JJH Consultant, who was admitted as an expert in residential construction and cost estimating, as a witness on his behalf.

The Respondent testified on his own behalf

The Fund did not present any 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 01-2955
2. On December 1, 2006, the Claimant and the Respondent entered into two contracts, one to remodel an existing basement and the second to remodel the master bath in his home.

The contract for remodeling the basement was scheduled to start by December 5, 2006

and be completed by December 23, 2006. The contract for the master bath remodel did not have a start or completion date.

3. The original agreed upon contract price for the basement remodel was \$7,665.00
4. The original agreed upon contract price for the master bath was \$8,000.00 less five percent discount if both projects were done together.
5. On December 4, 2006, the Claimant paid the Respondent \$2,500.00 as a first installment on the basement remodeling project. The Claimant made a further payment of \$3,939 for this project on December 6, 2006. The Claimant has not made any further payments to the Respondent on this project.
6. On December 4, 2006 the Claimant paid the Respondent \$2,500.00 which was followed by another check for \$2,500.00 on December 18, 2006 for the master bath remodeling project. The Claimant has not paid the Respondent anything further on this project.
7. The Claimant was given a five percent discount on the master bath remodeling project since both contracts were scheduled to be performed at the same time.
8. The total price for both contracts, less the discount was \$15,265.00.
9. At the start of the basement remodeling project, the Respondent had limited access to the work area because there was concrete work being performed outside the home that restricted the Respondent's access to the work area.
10. The work on both projects began on December 4, 2006.
11. Shortly after starting the projects, there were numerous change orders requested and agreed to by the parties that resulted in the Claimant supplying purchased items for which he received a credit from the Respondent.

12. Some of these items purchased by the Claimant, including blower fans for the fireplace and the faucet for the tub, were not the correct items for the projects, thereby slowing the progress of the projects.
13. The vanity that was ordered and purchased by the Claimant was ordered incorrectly and had to be re-ordered, resulting in a delay in its installation.
14. The Claimant advised the Respondent's subcontractor, Carroll Electric Service Inc., to perform work that was not included in either contract and without consulting the Respondent. The work was completed and charged to the Respondent who paid the invoices. (See Resp. Ex. # 6,7 and 8).
15. The working relationship between the Claimant and the Respondent deteriorated as a result of the Claimant's belief that the jobs were not progressing as anticipated and the Respondent's belief that the Claimant was interfering with the progress of the jobs as a result of change orders and failure to provide the correct owner-supplied materials in a timely manner.
16. As a result of the dispute between the parties, the parties agreed to meet and establish a path forward to complete both projects and for the Claimant to pay for the work provided in both contracts.
17. A letter was sent to the Respondent by the Claimant and his wife on December 28, 2006 (Cl. Ex. #9), outlining what the Claimant believed to be the agreement of the parties.
18. The Respondent replied to the Claimant's letter by fax on January 2, 2007 with an attached letter. (Cl. Ex. #10).
19. Neither party agreed to the other party's proposal.

20. The Respondent appeared at the Claimant's home with an electrical inspector on January 5, 2007 to begin performing certain punch list items identified in his January 2, 2007 fax and letter to the Claimant. The Claimant denied the Respondent and the electrical inspector from Carroll County entry to his home.
21. The Claimant refused entry on January 5, 2007 because he believed that he would be charged additionally for the work performed by the Respondent for the punch list items that were already part of the existing contracts. The inspector was present on that day to conduct an electrical inspection as evidenced by his log. (Resp. Ex. #9).
22. The faucet and the drain in the master bath do not align properly. This is not a punch list item and will require removal of tile and resetting of plumbing fixtures to fix the problem. The Respondent did not intend to fix this problem in his response to the Claimant of January 2, 2007.
23. The Claimant did not list the stone facing as an item that required repair or replacement in his letter to the Respondent of December 28, 2006. The Claimant now claims that forty square feet of stone facing on the fireplace must be demolished and replaced.
24. There are numerous punch list items that need to be repaired in the basement, other than the stonework around the fireplace. Once these have been completed, it will be necessary to repaint the basement which was estimated by Claimant's expert, Mr. Heyn, to cost \$1,638.00.
25. Contractors that are called to provide proposals to complete work that remains unfinished from another contractor normally charge a higher price.

26. Although the last work performed on either project by the Respondent took place in late December 2006, Alcap's proposal to repair the work was sent to the Claimant nearly three and one-half years later.

27. The Respondent did not abandon both projects. He was prevented from completing the work by the Claimant's refusal to allow the Respondent access to the work site.

28. Any damage to carpet in the basement caused by the Respondent is a consequence of the work performed on the site.

DISCUSSION

Pursuant to Business Regulation Article §§ 8-405(a) and 8-407(e)(1), to recover compensation from the Fund, the Claimant must prove, by a preponderance of the evidence, that he incurred an actual loss, which resulted from a licensed contractor's acts or omission. Business Regulation Article § 8-401 defines an "actual loss" as "the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." For the reasons set forth below, I conclude that the Claimant has met this burden, by proving that the Licensee failed to perform a workmanlike job and that the Claimant incurred an actual loss, entitling him to an award of \$1,662.00

Both the Claimant and the Respondent blamed each other for the failure of these projects. There is a lot of animosity between the parties as a result of the failure to complete both projects and it is apparent that each party has suffered as a result. In this case, both parties share some of the responsibility for the failure of these projects.

The basement remodel project started off poorly when it became apparent that access to the area would be limited due to ongoing work being performed outside the basement. This

caused the Respondent to move materials in a way other than expected. Communication was another problem from the outset. Changes to the basement remodel contract and the master bath remodel contract occurred almost immediately after the contracts were signed. Items that were to be supplied by the Respondent were now being supplied by the Claimant who sought credits for these items. The fireplace blower fans were not ordered correctly by the Claimant nor was the faucet for the tub.

When it appeared that the parties were no longer able to work effectively with each other, a meeting was scheduled for December 28, 2006 to review what needed to be completed in order for the Respondent to receive the balance of the payments due under both contracts.

The Claimant believed he had agreement on a list of items that needed to be completed by the Respondent. The list consisted of thirty-six items involving the basement remodeling project, seven items for the master bath remodeling project and three miscellaneous items. He sent the list to the Respondent believing that the Respondent had previously agreed to its terms at the face-to-face meeting.

The Respondent, however, did not agree to the terms contained in the December 28, 2006 letter. Instead, he replied with his fax of January 2, 2007 in which he provided a list of charges for various trades and agreement to perform certain of the punch list items. It was unclear in the document whether the hourly charges included for various trades were for additional work or for the punch list items. The Claimant was adamant that he did not want to pay more for work he believed was already under the terms of the contracts and did not respond to the fax. Additionally, he did not seek clarification from the Respondent whether the hourly trade charges would be for the punch list items or for additional work on the projects. The Respondent testified that the work on the punch list items could have been completed in eight hours. While

the January 2, 2007 response from the Respondent is confusing. it could have been easily resolved by the Claimant by asking the Respondent whether the punch list items he agreed to perform would result in an increased cost. Apparently, he never asked the question and merely assumed that they would.

Punch list items are typically identified towards the end of a contract to determine what items need to be completed before the project is deemed finished. The Respondent was never given the chance to complete the punch list items he included in his January 2, 2007 fax. When he returned to the Claimant's home with an electrical inspector, he was denied access. A claimant may not unreasonably reject good faith efforts by the contractor to resolve the claim. Md. Code Ann., Bus. Reg. § 8-405(d). I found that the Respondent tried on January 5, 2007 to begin working on the punch list items without additional charge for these items. This date corresponded to the same date offered by the Claimant in his letter of December 28, 2006. (Cl. Ex. #9). Having denied access, I find that the Claimant unreasonably rejected the good faith efforts of the Respondent to complete the projects. Had I determined that the Respondent was going to charge extra to complete the punch list items, I would have found that the Claimant did not unreasonably restrict access to his home. Punch list items are part of the original contract and the contractor must not charge extra for work he is already contracted to perform.

Having found that the Claimant acted unreasonably on the punch list items, I also find that the Respondent did not agree to perform certain items that were on the list of items that the Claimant identified as being in need of repair. In particular, I am referring to the misalignment of the shower faucet with the tub faucet that is depicted in photograph 7A. The installation is clearly unworkmanlike and the Claimant's expert, Mr. Heyn, agreed. The Respondent did not

agree to perform the repairs on this item, which would require significant plumbing work as outlined in Alcap Construction Inc.'s proposal of June 22, 2010.

The Claimant's expert, Mr. Heyn stated that the stonework on the fireplace was not performed in a workmanlike manner. He claimed the stone was installed unevenly and pointed to photographs A and B in his report as evidence. (Cl. Ex. #12). He did not testify that the stonework was unsafe or caused a safety hazard. The Respondent testified that the stone was uneven by design and it was installed properly. Notable is the fact that the Claimant did not list the stonework in any of the punch list items he included in his letter of December 28, 2006. One would think that if the Claimant had a dispute with the way the stonework looked it would have been mentioned in his letter. The letter was intended to provide a path forward for the completion of the project. If the Respondent agreed to every item in the Claimant's December 28, 2009 letter, the Claimant would have been obligated to pay the balance of the outstanding payments and the stonework would have remained a non-issue. If the stonework was an issue with the Claimant, it would have been included in the letter. It was not.

I also find it notable that the proposal to correct the alleged deficiencies in the Respondent's work was submitted by a contractor nearly three and one-half years after the last work performed by the Respondent on these projects. (Cl. Ex. #16). The Claimant's expert testified, and I find, based on his expert testimony, that contractors who perform repair work from another contractor generally charge more for their services. Since so much time has elapsed between the time that the Respondent was on the work site and the date of the report, the work areas may not have been the same as they were when the Respondent stopped working on them. The estimate for the cost of repair may have been further increased by a deterioration of the work areas since December 2006.

Having found eligibility for compensation, I now turn to the amount of the award, if any. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1). The Claimant requested that the fund pay for carpeting in the basement that was replaced at the expense of the Claimant. The total cost of the carpet was \$4,141.89. The replacement of the carpeting was not included in either contract as part of the scope of work. The Claimant argues that the Respondent should be responsible for this cost since he ruined the carpet when he performed the basement remodel project. The Respondent counters that the carpet was to be removed by the Claimant before the job was to start and, therefore, he cannot be held responsible for that cost. Regardless of who is at fault, the cost of replacing the carpet is considered consequential damages and, therefore, is not recoverable from the Fund.

I now turn to the amount of the award. 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 measurement accordingly.

COMAR 09.08.03.03B(3). In this case, I used the third option because the Claimant obtained a proposal from Alcap Construction, Inc. to complete the job and also retained an expert in residential construction and estimating to price the cost for completing work under the contracts. COMAR 09.08.03.03B(3)(c). As previously stated, only the work under the contract that was not in the punch list of the Respondent and which would not be considered punch list work is included in the determination of actual loss. This work includes the rework of the master bath plumbing and associated tile work along with painting. The amount estimated by Alcap Construction, Inc. for this work is \$3,850.00. The basement work that needs to be completed after all of the punch list items have been completed would include repainting the entire room. Mr. Heyn estimated this work to cost \$1,638.00. I accept his calculation based on his expertise in the residential construction estimating business. Therefore, the total cost to repair the items, not including the punch list items that the Respondent agreed to perform, totals \$5,488.00.

Using the above formula, I calculate the Claimant's' actual loss as follows:

\$ 11,439.00	Amount the Claimant paid the Respondent for the contracts
+ 5,488.00	Amount required to repair/replace the Respondent's Work
\$ 16,927.00	Total amounts paid or to be paid by the Claimant
<u>- 15,265.00</u>	Contract price for both contracts
\$ 1,662.00	The Claimant's actual loss

I disagree with the Fund's recommendation of an actual loss of \$5,797.31 because I found that the Respondent has established that he was prepared to finish punch list items for no additional cost and was prevented from doing so by the action of the Claimant. The remaining items that are included in my calculation of actual loss were a result of items that were not listed in the Respondent's fax of January 2, 2007. Those items should have been included at no additional cost to the Claimant.

CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual loss of \$1,662.00 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 Maryland Home Improvement Guaranty Fund award the Claimant \$1,662.00 and

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) (2010); and

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

September 14, 2010
Date decision mailed



Stuart G. Breslow
Administrative Law Judge

SGB/bs
116361

IN THE MATTER OF THE CLAIM OF * BEFORE STUART G. BRESLOW
 JEROME J. SOMMERVILEE * AN ADMINISTRATIVE LAW JUDGE
 AGAINST THE MARYLAND HOME * OF THE MARYLAND OFFICE
 IMPROVEMENT GUARANTY FUND * OF ADMINISTRATIVE HEARINGS
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 OMISSIONS OF MICHAEL C. GEIGER, * MHIC NO.: 08 (05) 467
 T/A GEIGERLAND CONTRACTING
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FILE EXHIBIT LIST

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- Fund Ex. #4 Licensing History of Respondent, dated May 3, 2010
- Fund Ex. #5 June 30, 2008 letter from John Borz, Chairman of the Maryland Home Improvement Commission, to Respondent, with attached claim of Claimant

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

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- Resp. Ex. #9 Electrical Permit, dated January 3, 2007

PROPOSED ORDER

WHEREFORE, this 6th day of December 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