

IN THE MATTER OF THE CLAIM OF	*	BEFORE KIMBERLY A. FARRELL,
KIRK A. MALONE, CLAIMANT	*	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-02-08-41168
OMISSIONS OF GLENN COOPER, SR.,	*	MHIC NO.: 08 (75) 583
T/A G. COOPER CONSTRUCTION &	*	
MAINTENANCE COMPANY,	*	
RESPONDENT	*	

* * * * *

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 April 28, 2008, Kirk A. Malone (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$12,000.00 for actual losses allegedly suffered as a result of home improvement work performed by Glenn Cooper, Sr., t/a G. Cooper Construction & Maintenance Company (Respondent).

I held a hearing on June 30, 2009, at the Office of Administrative Hearings (OAH), 11101 Gilroy Road, Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(e)(2)(i) (2004 & Supp. 2008). Kris King, Assistant Attorney General, Department of Labor,

Licensing and Regulation (Department), represented the Fund. The Claimant represented himself as did the Respondent.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, and the Rules of Procedure of the OAH 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

Did the Claimant 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 on the Claimant's behalf:

- CLMT #1 Contract between the Claimant and the Respondent, dated March 16, 2007
- CLMT #2 MHIC Complaint Form, dated September 17, 2007
- CLMT #3 Jackson Contractors Inc. (Jackson) statement regarding work performed by Respondent, dated March 17, 2008
- CLMT #4 Contract between the Claimant and Jackson, dated April 12, 2008
- CLMT #5 Photocopies of checks and receipts regarding payment by the Claimant to the Respondent

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

- FUND #1 OAH file copy of Notice of Hearing
- FUND #2 OAH file copy of Hearing Order, dated October 23, 2008
- FUND #3 MHIC licensing information for the Respondent
- FUND #4 Home Improvement Claim Form, received by the MHIC on April 28, 2008
- FUND #5 Copy of letter from the MHIC to the Respondent

The Respondent did not offer any exhibits for consideration.

Testimony

The Claimant and the Respondent testified.

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 73545.
2. The Claimant owned a property at 935 Rose Street, Baltimore, Maryland. The property had been gutted by fire. The Claimant desired to restore the house and then rent it out.
3. To that end, the Claimant and the Respondent entered into a contract on March 16, 2007, calling for the Respondent to perform interior framing including a new stairwell, partial installation of an exterior wall, installation of three exterior doors and hardware, installation of eight replacement windows, repairing a damaged roof, installing new plumbing, electrical, and HVAC, installing drywall and finish, installing all interior carpentry, and painting. The contract stated that work would begin March 12, 2007, and would be completed 180 days from the start date.
4. Prior to this home improvement project, the Claimant and the Respondent were friends.
5. The original agreed upon contract price was \$40,000.00
6. The Claimant paid the Respondent \$12,000.00 on March 22, 2007, and another \$12,000.00 on June 12, 2007.
7. Work started promptly, but stopped sometime after the second payment.
8. Much of the agreed upon work was not done by the Respondent.
9. The Claimant tried to contact the Respondent by telephone, but the Respondent would not respond.

10. The Claimant filed a complaint with the MHIC September 17, 2007.
11. MHIC personnel facilitated a meeting between the Claimant and the Respondent in December of 2007.
12. At that meeting the parties agreed that the date for completing the job would be extended to March of 2008 and the Respondent would return to the job.
13. The Respondent did not return to the job and work was not completed by March of 2008.
14. In April of 2008, the Claimant asked Jackson to prepare a report estimating the value of the work performed by the Respondent. Jackson estimated that the Respondent had performed approximately \$12,000.00 worth of work, but added without elaboration that the work was not up to code and did not meet the contract specifications.
15. The Claimant and Jackson entered into a contract on April 12, 2008, for Jackson to take over the Rose Street project. The total contract price was \$24,715.00. The Jackson contract called for a lot of extra work not covered in the contract between the Respondent and the Claimant. The costs for the contract are not broken down.

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. 2008). *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 (2004). For the following reasons, I find that the Claimant has not proven eligibility for compensation.

There is abundant evidence that the Respondent was a licensed home improvement contractor at the time he and the Claimant entered into the contract. There is also evidence that the Respondent left the project incomplete. As is often the case in home improvement hearings, and perhaps particularly the case when a friendship has been ruined over a business proposition, the parties disagreed about almost everything. The parties agreed that they had entered into a contract in March of 2007, and that the project was to be completed in 180 days. They also agreed that the Claimant paid the Respondent a total of \$24,000.00 in two equal payments.

From there the testimony was widely divergent. The Claimant asserted that work stopped immediately after the second payment. The Respondent countered that he had continued to work at the site until November of 2007, although at a slowed pace because he was owed money. I did not find either party credible on this point. I do not believe the work came to a dead stop upon the Claimant making the second payment. He did not make any such statement in his complaint form, dated September 17, 2007. He was complaining at that time about the work not being finished, but makes no mention of the work having stopped months ago. The Claimant was driven to get the property rehabilitated so that he could rent it out and begin making money from it. The Claimant wanted the MHIC to intervene earlier in the process, but was advised that he had to give the Respondent the full 180 days allotted in the contract before complaining about non-performance. The problems were apparently building over the summer. I also don't believe that the Respondent was diligently working all summer and into the fall, slowing down in the last weeks or months, because if that were so, the Claimant would not have been trying to file a complaint with the MHIC before September of 2007.

At the December meeting, the parties agreed that the project deadline would be extended until March of 2008. The parties now report having wildly different understandings about the

details of the meeting. The Claimant alleged that he thought the Respondent would complete the entire job and would then be paid the \$16,000.00 remaining on the contract. The Claimant offered no reason to believe that the Respondent would agree to such an unattractive prospect - personally assuming the costs of the renovation in the hope that in the future they would come to agree on everything and payment in full would be forthcoming. The Respondent alleged that he was supposed to receive an \$8,000.00 draw within a week after the December meeting and then would resume work. He also did not offer any support for his position. With the Claimant already complaining about having paid far more than he should have for work done, it does not seem plausible the Claimant would have agreed to such a sizeable draw. Further, the Respondent testified that when he did not receive the expected money, he never tried to contact the Claimant to see what was happening. If the Respondent genuinely believed he was going to get \$8,000.00 and it did not materialize, he would have invested in some type of follow-up.

The Respondent's testimony about the December meeting was vague and unconvincing. On the other hand, he testified that the Claimant at some point began telling him that the entire job should not cost more than \$24,000.00 and that he (the Claimant) did not intend to pay any more money but expected the job to get done. I did find the Respondent credible when he testified about the conversation. The Claimant's denial of having made the statement was not persuasive.

Much of the testimony from both the Claimant and the Respondent was straightforward and the differences were more ones of individual perspective rather than fact versus fiction. There were points in the hearing, however, where I found a change in demeanor, including voice inflection and volume, eye contact, and lack of clarity in the information being conveyed, that

lead me to believe both the Claimant and the Respondent were deliberately embellishing or lying.

Even if I were to get past the problems of credibility and find that the Respondent acted in a manner that would justify Fund reimbursement, the Claimant has not provided sufficient evidence to prove that he suffered an actual loss. 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). Accordingly, the Claimant is not entitled to any award for the money he potentially lost being unable to rent out his property for an extended period of time.

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, the third option is the appropriate formula. The problem is that the Claimant has failed to provide evidence of the reasonable amounts paid to another contractor *to repair poor work done by the Respondent and complete the original contract.*

The first step of the third formula is to determine the amount paid to the Respondent under the original contract. That amount is \$24,000.00. To that I am to add the amount paid to another contractor to repair poor work done by the Respondent and complete the original contract. The Claimant paid Jackson \$24,715.00, but that figure was to repair allegedly poor work done by the Respondent, complete the original contract, and also to do a considerable amount of additional work not included in the original contract. The Jackson contract included the following items, none of which were part of the original contract: build new steps and a landing on the rear exterior, install four new kitchen cabinets, install a 60" counter top with end caps, install a new stainless steel sink with faucets and a sprayer, install ¼" sub-floor on all floors, install VCT floor tiles in the kitchen and bathroom, install hardwood flooring on the first floor and second floor hallway only, install carpet in two bedrooms and the living room. The Respondent's contract obligated him to "repair" the damaged roof; the Jackson contract called for installation of a new rubber roof. The Claimant explained that he thought repairing the roof would result in replacement of the roof. Even if that is indeed what he expected, it is far from clear that the Respondent was obligated to put a new roof on the Rose Street property.

Although the Claimant provided a statement of the total contract price with Jackson, he did not provide any breakdown so that I could separate the items the Respondent was obligated to perform under the original contract from the new elements. Without such a breakdown I am unable to calculate the Claimant's actual loss, if he has any. There was a statement from Jackson that the Respondent's work was worth only \$12,000.00 and was not up to code, but I give the document very little weight. It contained no specific information regarding alleged code violations, and was prepared by a company who benefitted from minimizing any work accomplished by the Respondent. The Claimant did not call any witness from Jackson to testify

in support of the statement. Also, Baltimore City never issued any notice of code violations for the Respondent's work.

The Fund pointed out that with \$16,000.00 remaining on the original contract of \$40,000.00 (after \$24,000.00 was paid to the Respondent), and \$24,715.00 paid to Jackson, the Claimant ultimately paid \$8,715.00 more than he originally bargained for. The Claimant's actual loss, if any, would be \$8,715.00 minus the dollar amount attributable to the improvements not included in the original contract. When asked by the Fund how he knew the extra work was not worth about \$8,700.00, the Claimant stated that he just did not think so, but he acknowledged several times during the hearing that this whole area was not his field. Other than the Jackson contract, the Respondent submitted no estimates.

The Claimant has not demonstrated an actual loss. The evidence presented does not allow for a proper calculation of actual loss under COMAR. The Claimant argued that he and his wife were placed under stress by the Respondent's actions and by having to go through the MHIC's procedures to try to effect recovery. He stated that he was asking for justice and that he wanted the Respondent to admit what had gone wrong in this transaction. He also alluded to the monies lost when the Rose Street property could not be rented out for much longer than expected. He felt the Respondent abandoned the contract, costing him time and money, and he wanted the Respondent to bear the responsibility of that failure, but, as discussed above, it is not clear that the Claimant suffered any actual loss. It follows that no award should be recommended.

CONCLUSIONS OF LAW

I conclude that the Claimant has not proven that he sustained an actual loss as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2004).


RECOMMENDED ORDER

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

ORDER that the Claimant's claim against the MHiC Fund be **DISMISSED**; and

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

September 18, 2009
Date Decision Mailed


Kimberly A. Farrell
Administrative Law Judge

KAF
Document #108201

PROPOSED ORDER

WHEREFORE, this 28th 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.

J. Jean White

*I. Jean White
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION