

<b>CLAIM OF ROBERT J. ORR</b>	<b>* BEFORE LAURIE BENNETT,</b>
<b>AGAINST THE MARYLAND HOME</b>	<b>* AN ADMINISTRATIVE LAW JUDGE</b>
<b>IMPROVEMENT GUARANTY FUND,</b>	<b>* OF THE MARYLAND OFFICE</b>
<b>REGARDING THE ALLEGED ACTS</b>	<b>* OF ADMINISTRATIVE HEARINGS</b>
<b>AND OMISSIONS OF DAVID BARKLEY,</b>	<b>* OAH NO.: DLR-HIC-02-09-09657</b>
<b>T/A OMEGA CONSTRUCTION AND</b>	<b>* MHIC NO.: 08 (90) 84</b>
<b>REMODELING,</b>	<b>*</b>
<b>RESPONDENT</b>	<b>*</b>

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**RECOMMENDED DECISION**

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**STATEMENT OF THE CASE**

On June 13, 2008, Robert J. Orr (Claimant) filed a claim with the Maryland Home Improvement Commission (Commission) Guaranty Fund (Fund) for reimbursement of the actual losses he allegedly suffered as a result of the acts and omissions of David Barkley, t/a Omega Construction and Remodeling (Respondent). On March 16, 2009, after investigation, the Commission issued a Hearing Order and forwarded the case to the Office of Administrative Hearings (OAH).

On December 15, 2009, I conducted a hearing on the claim at the OAH's offices in Hunt Valley, Maryland. Md. Code Ann., Bus Reg. § 8-407(a) (Supp. 2009) (incorporating the hearing

provisions of Business Regulation Article § 8-312 (2004)). Assistant Attorney General Jessica Kaufman appeared on the Fund's behalf, and the Claimant represented himself. Despite adequate notice from OAH, neither the Respondent nor anyone acting on his behalf appeared at the hearing or requested a postponement. Accordingly, I conducted the hearing in the Respondent's absence. *See* Md. Code Ann., Bus Reg. § 8-312(h); Code of Maryland Regulations (COMAR) 09.01.02.09.

The contested case provisions of the Administrative Procedure Act, Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009); the Commission's Hearing Regulations, COMAR 09.01.03, 09.08.02.01 and 09.08.03; and OAH's Rules of Procedure, COMAR 28.02.01, govern procedure in this case.

### **ISSUES**

Did the Claimant sustain an actual loss as a result of the Respondent's acts or omissions and, if so, what amount is the Claimant entitled to recover from the Fund?

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

The Claimant submitted the following exhibits, which I admitted into evidence:

- Clmt Ex. 1. Contract and architectural drawings
- Clmt Ex. 2. Cancelled checks; itemized list of credits
- Clmt Ex. 3. Series of emails, ending with an email from the Claimant on February 1, 2006
- Clmt Ex. 4. Series of emails, ending with an email from the Claimant on April 10, 2006
- Clmt Ex. 5. Home Improvement Claim Form, with attachments
- Clmt Ex. 6. Annotated photographs A through X

- Clmt Ex. 7. Section of PVC pipe
- Clmt Ex. 8. Clump of tile adhesive
- Clmt Ex. 9. Letter, dated March 14, 2007, from Andrew T. Orr, Esquire, with attachments

The Fund submitted the following documents, which I admitted into evidence:

- Fund Ex. 1. Notice of Hearing, dated August 13, 2009; Memorandum, dated September 1, 2009, from OAH; unclaimed certified mail addressed to the Respondent
- Fund Ex. 2. Transmittal, undated; Hearing Order, dated March 16, 2009; Home Improvement Claim Form, received by the MHIC on June 9, 2008
- Fund Ex. 3. The Respondent's Licensing History
- Fund Ex. 4. Letter from the MHIC to the Respondent, dated June 20, 2008, enclosing the Claimant's Home Improvement Claim Form

### Testimony

The Claimant testified on his own behalf as an expert in architecture and in residential construction. The Fund did not present any witnesses.

### **FINDINGS OF FACT**

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

1. The Claimant and his wife own and live in residential property known as 34 East 25<sup>th</sup> Street, Baltimore, Maryland 21218.
2. On August 26, 2005, the Respondent and the Claimant entered into a home improvement contract totaling \$42,900.00. The contract called for the Respondent to renovate the second and third floors of the Claimant's residence, including the following activities:

preparing the site by performing specified demolition; wall framing; plumbing; removing and installing HVAC; installing electrical; constructing walls; constructing two shower enclosures; installing trim and millwork; installing cabinets; painting; installing flooring; and cleaning up.<sup>1</sup>

3. At the time the Respondent and the Claimant entered into a contract, the Respondent was licensed by the MHIC to provide home improvement services. His license was set to expire on August 26, 2009. On November 8, 2007, the MHIC suspended the Respondent's license on an emergency basis. On April 8, 2008, in an unrelated matter, the MHIC paid a home improvement Fund claim made against the Respondent.
4. During the course of the Respondent's work, the Claimant agreed to purchase the following items, which the contract called for the Respondent to supply:

Door knobs	\$ 122.40
Replacement shower tile	\$ 522.02
Replacement shower title	\$ 166.37
Broken light bulb replacement	\$ 8.00
Paint for repairing stairway wall treads and landing	\$ 84.09
Replacement for damaged blind	\$ 62.22
Dryer vent	\$ 13.97
TOTAL	\$979.07

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<sup>1</sup> The work is described in significant detail in the contract. Clmt. Ex. 1.

5. The Respondent agreed to credit the amount of these purchases against the fourth draw on the payment schedule. Thus, instead of owing the Respondent \$8,580.00 on the fourth draw, the Claimant owed only \$7,600.93.
6. The Claimant has paid the Respondent \$37,730.00.
7. The Respondent's home improvement work resulted in the following defects:
  - As to the third floor bathroom, tile was initially installed with the finished side adhered to the wall; newly install tiles were chipped and misaligned; shower walls were uneven and improperly angled; grout lines were uneven; large wall joints were filled unevenly with grout; adhesive was squeezed out between tiles; a drain cover and drainage pipe were filled with plaster and grout; grout was stained and pitted from debris after the contractor broke a fixture and caused a leak; water pooled in low areas of the shower, causing staining to the grout; the shower floor was not properly sloped for drainage; the shower trap in the ceiling of laundry room was clogged with construction debris and solidified plaster; multiple nails driven through the waterproof membrane at the base of shower destroyed its waterproofing; rusty nails and wood debris were cast into the concrete shower floor; wood pieces were nailed over the cement backer board and waterproof membrane and then cast into the concrete shower floor; inferior 1/8" luan wall-board was nailed inside of the waterproof membrane; water penetrated the tile and back board through cracks; the shower shelf was enclosed with low density fiberboard, which deteriorates when exposed to moisture, instead of cementitious backer board; drywall corner beads were not used on the door frame; walls were not framed plumb or square (Clmt. Exs 6a, b, c, d, e, f, g, h and k; 7)

- As to a third floor bedroom, at least one window was not framed plumb or square (Clmt. Ex. 6j)
- Drywall was left unfinished around the escutcheon under the sink (Clmt. Ex. 6p)
- As to the third floor hallway, trim was cut unevenly and roughly and left unfinished; corner trim was constructed to an incorrect dimension and was not aligned with surrounding trim; trim was improperly made from medium density fiberboard (MDF), an inferior product to wood; nail holes and damaged MDF boards were left unsanded, unplugged and unfinished; trim nails were driven into the baseboard molding and punctured telephone and cable wires; wood floors were damaged after Respondent left them unprotected despite Claimant's repeated requests to protect them (Clmt. Ex. 6l, n, o, t, and v)
- As to the second floor laundry room, wood trim was cut uneven and rough and left unfinished; one trim board has an unsightly knot (Clmt. Ex. 6m)
- As to the second floor back room, MDF was used for baseboards instead of wood (Clmt. Ex 6q)
- As to the second floor bathroom; tiles are loose and the tile grout is deteriorating and yellowing; the tile is uneven; thick areas of caulk around the tub are peeling; the MDF baseboard is deteriorating; quarter rounds were not used in the baseboard (Clmt. Ex 6r and s)
- As to the stairway, treads and landings were damaged when the Respondent left them unprotected during construction despite Claimant's repeated requests that the Respondent cover them (Clmt. Ex. 6u)

- As to the hallways, the walls were damaged from nails and tape, from the workers writing notes on the walls, and from dirt and floor adhesive splatters; the damage was not repaired or covered with paint (Clmt. Ex. 6w)
  - As to first floor kitchen, waste pipes were broken or installed incorrectly, resulting in first floor flooding that damaged the walls (Clmt. Ex. 6x)
8. MDF and low density fiberboard are inappropriate for application in a bathroom because they absorb moisture, expand and break apart.
  9. The industry standard in a bathroom is to install cementitious backer board under tile instead of a medium or low density fiberboard.
  10. One-eight inch luan is an inappropriate application under bathroom tile.
  11. The Claimant incurred or expects to incur the following expenditures, including payment to licensed home improvement contractors, to fix the defects the Respondent caused:

Custom Concepts By Greenwalt	\$ 3,022.00
Dyanmo Electric, LLC	\$ 45.00
Kohler	\$ 90.25
Jensen Plumbing	\$ 700.00
Anne Sacks Tile	\$ 1,266.69
Mike McGuire (contractor)	\$ 2,770.00
Felix Leybengrub (contractor)	\$ 800.00
Residential Telephone and Wiring Company	\$ 85.00
Tile Master	\$ 1,651.00

Gem Construction	\$ 4,640.00
<b>TOTAL</b>	<b>\$15,069.94</b>

(Claimant Ex. 5. Summary of Amounts Paid or Payable.)

12. The Respondent also incurred the following consequential damages:

Sears	\$ 89.99
Lady Baltimore Floors	\$ 700.00
Felix Leybengrub	\$ 800.00
Residential Wiring Company	\$ 85.00
<b>TOTAL</b>	<b>\$1,674.99</b>

13. On August 13, 2009, the OAH issued a notice of hearing to the Respondent advising him that the hearing would convene on December 15, 2009 at 9:30 a.m. at the OAH's offices at 11101 Gilroy Road, Hunt Valley, Maryland 21031. The OAH sent the notice via first class and certified mail to the Respondent's address of record, which is 3527 Main Street, Sykesville, Maryland 21784." The United States Postal Service returned the certified mail marked "unclaimed" and it did not return the first class mail.

### DISCUSSION

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 omissions. Md. Code Ann., Bus Reg. §§ 8-405(a) and 8-407(c)(1) (Supp. 2009). "Actual loss" means the "the cost[ ] of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." *Id.* § 8-401 (2004).



The Claimant described in detail the defects in the Respondent's work. I find his testimony credible because it is supported by photographs that make the defects obvious, even to the untrained eye, and because the Claimant is an expert in architecture and in residential construction. Clmt. Ex 6a-x; *see*, Finding of Fact 7. Moreover, the Respondent did not appear to protest the Claimant's testimony. Accordingly, I find that the Claimant performed unworkmanlike home improvement.

The next inquiry is the value of the Respondent's loss. The applicable regulation provides in pertinent part as follows:

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)(c). A claimant, however, is not eligible for reimbursement of consequential or punitive damages, personal injury, attorney's fees, court costs, or interest.

COMAR 09.08.03.03B(1).

The Claimant incurred consequential damages. He paid Sears to fix an air conditioner that the Respondent broke during demolition. He paid Lady Baltimore Floors to repair floors that the Respondent damaged by not adequately covering them during the work. Likewise, he paid Felix Leybengrub, a home improvement contractor, to repair walls and stair treads that the Respondent damaged. Finally, he paid Residential Telephone Wiring Company to replace cable and telephone wiring that the Respondent cut when he secured molding with trim nails. The Claimant is ineligible for reimbursement of these expenses, which total \$1,674.99.

After excluding the consequential damages, the Claimant's actual loss is \$10,879.01, calculated as follows:

\$ 37,730.00	Amount the Claimant paid the Respondent
<u>979.07</u>	Credits
\$ 38,709.07	Total
\$ 15,069.94	Amount required to repair/replace the Respondent's Work
<u>\$ 53,779.01</u>	Total
<u>\$ 42,900.00</u>	Minus contract price
\$ 10,879.01	The Claimant's actual loss

### **CONCLUSIONS OF LAW**

I conclude, as a matter of law, that the Claimant has proven, by a preponderance of the evidence, that he incurred an actual loss, as a result of the Respondent's unworkmanlike home improvement work, entitling the Claimant to an award of \$10,891.01 from the Fund. Business Regulation Article §§ 8-401 (2004), 405(a) (Supp. 2009), 407(e)(1) (Supp. 2009); COMAR 09.08.03.03B(3)(c).


### **RECOMMENDED ORDER**

Upon due consideration, I **RECOMMEND** that the MHIC **ORDER** as follows:

1. The Claimant is awarded \$10,879.01 from the Maryland Home Improvement Guaranty Fund, for the actual losses he sustained as a result of the Respondent's unworkmanlike home improvement work;
3. The Respondent is ineligible for an MHIC license, under Business Regulation Article § 8-411(a), until the Fund is reimbursed for the full amount of the award paid pursuant to its Order, plus annual interest of at least ten percent (10%); and
4. The records and publications of the MHIC reflect this decision.

February 18, 2010  
Date Decision Mailed

LB/ #110320

  
Laurie Bennett  
Administrative Law Judge

PROPOSED ORDER

*WHEREFORE, this 23rd day of March 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.*

*J. Jean White*

*I. Jean White  
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION