

IN THE MATTER OF THE CLAIM OF	*	BEFORE RICHARD O'CONNOR,
MATTHEW POGGI	*	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-02-08-39460
OMISSIONS OF DAVID B. BARKLEY,	*	MHIC NO.: 08 (75) 850
T/A OMEGA CONSTRUCTION &	*	
REMODELING	*	
* * * * *		

**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 December 10, 2007, Matthew Poggi (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$76,649.00 for actual losses allegedly suffered as a result of home improvement work performed by David B. Barkley, t/a Omega Construction & Remodeling (Respondent).

I held a hearing on April 30, 2009, at the Office of Administrative Hearings in Wheaton, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(c)(2)(i) (2004 & Supp. 2008). Eric B. London, Assistant Attorney General, Department of Labor, Licensing and Regulation

(Department), represented the Fund. The Claimant represented himself. The Respondent failed to appear after proper notice to his address of record.

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 (2004 & Supp. 2008); Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02.01; and COMAR 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:

- Clt. Ex. 1. Time Line
- Clt. Ex. 2. Contract between the Claimant and the Respondent, dated July 24, 2007
- Clt. Ex. 3. Copies of six checks written to the Respondent
- Clt. Ex. 4. Letter from the Respondent to the Claimant, dated October 3, 2007
- Clt. Ex. 5. Memo from Regan Contracting, LLC, to the Claimant, undated
- Clt. Ex. 6A-D. Four photographs of unfinished work
- Clt. Ex. 7. Photograph of tile floor and edge of pool

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

- GF Ex. 1. Notice of Hearing, dated December 10, 2008
- GF Ex. 2. Hearing Order, dated September 5, 2008

- GF Ex. 3. The Respondent's licensing history with the MHIC, dated March 16, 2009
- GF Ex. 4. Affidavit of Steven Smitson, dated March 18, 2009
- GF Ex. 5. Home Improvement Claim Form, dated December 10, 2007
- GF Ex. 6. Letter from the MHIC to the Respondent, dated January 23, 2008
- GF Ex. 7. Architectural plans for the Claimant's residence, dated June 8, 2007
- GF Ex. 8. Contract between the Claimant and Regan Contracting, LLC, dated November 24, 2007

### Testimony

The Claimant testified in support of his claim.

The Fund presented no testimony.

### **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 01-70346.
2. On July 24, 2007, the Claimant and the Respondent entered into a contract to convert the garage of the Claimant's home into a breakfast room and install an Endless Pool (a small pool with a continuous current) in the existing sunroom. The contract included all electrical, plumbing, heating, ventilation, air conditioning, flooring, framing, painting, millwork, finishing, and clean-up. The contract stated that work would begin within three weeks after issuance of a building permit and would be completed ten to twelve weeks thereafter.
3. The contract price was \$122,580.00. Change orders for \$1,952.59 for smoke detectors and \$7,150.00 for radiant heat were later added, bringing the total to \$131,682.59.

4. The Claimant paid the Respondent \$70,392.59 under the contract.
5. The Respondent did some framing, some rough-in plumbing, and some rough-in electrical work. The value of the Claimant's work was \$14,100.00 (Cl. Ex. 5).
6. The Respondent stopped work on the project the last week of September 2007. Telephone calls from the Claimant and his architect were not returned.
7. On October 10, 2007, the Respondent informed the Claimant that he was going out of business and seeking bankruptcy protection. He did not refund any of the Claimant's money.
8. On November 24, 2007, the Claimant executed a contract with Regan Contracting, LLC (Regan) to perform the same work that the Respondent had agreed to do under the original contract. The Claimant paid Regan \$137,939.00 under the second contract.

### DISCUSSION

The Office of Administrative Hearings sent notices to the Respondent on December 10, 2008, at his address of record on file with the MHIC, informing him that the hearing in this case would be held on April 30, 2008. Notices were sent by both first-class and certified mail. The certified copy of the notice was returned unclaimed, but the first-class copy was not returned and is presumed to have been delivered to the Respondent. Since the Respondent failed to appear after receiving proper notice of the hearing, the matter proceeded in his absence. COMAR 09.02.01.09.

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 proven eligibility for compensation.

First, the Respondent was a licensed home improvement contractor at the time he and the Claimant entered into the contract. Second, the Respondent performed an incomplete home improvement, abandoning the job after doing very little work despite collecting substantial sums from the Claimant.

As is often the case with home improvement contracts, the agreement between the Claimant and Respondent was front-loaded with payments to the contractor. The contract called for a twenty percent deposit (\$24,516.00) due at signing, then three payments of ten percent each (\$12,258.00) at the completion of framing, plumbing rough-in, and electrical rough-in. The Respondent collected these payments even though neither the plumbing nor the electrical rough-ins were actually complete.<sup>1</sup> Additionally, the Respondent collected \$7,150.00 for radiant heat that was not supplied, and \$1,957.59 for smoke detectors, although the latter were shown in the plans for the project and should have been included in the contract. In total, the Claimant paid the Respondent \$70,392.59 before much work was actually done.

When the Respondent abandoned the job and declared bankruptcy, he refunded no money to the Claimant. The Claimant hired Regan to complete the contract, which essentially required starting over, since the framing put up by the Respondent was not in accordance with the plans and had to be removed. To remove the framing and complete the contract, Regan charged

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<sup>1</sup> The Claimant complained that the Respondent did not use pressure-treated lumber for framing, as called for in the architect’s plans. The contract does not specify pressure-treated wood; it merely requires that the framing conform to the building code.

\$137,939.00. To Regan's credit, the Claimant testified that the job was completed satisfactorily and that he is very happy with the Endless Pool and other renovations.

The Claimant is clearly eligible for compensation, so I now turn to the amount of the award. 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 measurement accordingly.

COMAR 09.08.03.03B(3). In this case, I used the third option, since the Respondent did some work and the Claimant hired Regan to complete the contract. The calculations are as follows:

Paid under the original contract:	\$70,392.59
Plus amount paid to complete the contract:	<u>+137,939.00</u>
	\$208,331.59
Less original contract price:	<u>-131,682.59</u>
Actual loss:	\$76,649.00

Section 8-405(e)(1) of the Business Regulation Article, Annotated Code of Maryland (Supp. 2008), limits an award from the Fund to a single claimant to \$20,000.00. Therefore, the Claimant is entitled to an award of that amount.

### **CONCLUSIONS OF LAW**

I conclude that the Claimant has sustained an actual loss of \$76,649.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2004). I further conclude that the Claimant is entitled to an award of \$20,000.00 from the Fund. Md. Code Ann., Bus. Reg. § 8-405(e)(1) (Supp. 2008).

### **RECOMMENDED ORDER**


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

**ORDER** that the Claimant be awarded \$20,000.00 from the Maryland Home Improvement Guaranty Fund; and

**ORDER** that the Respondent be ineligible for a Maryland Home Improvement Commission license until he 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 (2004)); and

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

July 24, 2009  
Date decision mailed

  
Richard O'Connor  
Administrative Law Judge

# 106967

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**FILE EXHIBIT LIST**

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PROPOSED ORDER

*WHEREFORE, this 28th day of August 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.*

*Rossana Marsh*

*Rossana Marsh  
Panel B*

**MARYLAND HOME IMPROVEMENT COMMISSION**