

IN THE MATTER OF THE CLAIM * **BEFORE JAMES W. POWER,**
OF ROGER AND BETTY BELLARIN * **AN ADMINISTRATIVE LAW JUDGE**
AGAINST THE MARYLAND HOME * **OF THE MARYLAND OFFICE**
IMPROVEMENT GUARANTY FUND * **OF ADMINISTRATIVE HEARINGS**
FOR THE VIOLATIONS OF * **OAH NO.: DLR-HIC-02-10-38952**
JAMES DELAPP, T/A * **MHIC NO.: 08 (75) 909**
JAMES P. DELAPP *

* * * * *

RECOMMENDED DECISION

STATEMENT OF THE CASE
 ISSUES
 SUMMARY OF THE EVIDENCE
 FINDINGS OF FACT
 DISCUSSION
 CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On September 7, 2010, Roger and Betty Bellarin (Claimants) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$48,275.00 for actual losses suffered as a result of the acts or omissions made by James Delapp, t/a James P. Delapp (Respondent).

I conducted a hearing on December 2, 2010 at the Worcester County Public Library in Ocean City, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(c)(2) (2010). Eric London, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), represented the MHIC Fund. The Claimants were present and represented by Susan J. Land,

Esquire. The Respondent passed away by the time of the hearing, but his estate was notified of the claim and the hearing. No one appeared on behalf of the estate.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the procedural regulations of DLLR, and the Rules of Procedure of the Office of Administrative Hearings (OAH). Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2010); Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02, and 09.08.03; and COMAR 28.02.01.

ISSUE

Did the Claimants sustain an actual loss compensable by the Fund as a result of the acts or omissions of the Respondent?

SUMMARY OF THE EVIDENCE

Exhibits

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

Fund Ex. #1	Notice of Hearing
Fund Ex. #2	MHIC Licensing Printout
Fund Ex. #3	Hearing Order
Fund Ex. #4	Complaint
Fund Ex. #5	Letter to Respondent
Fund Ex. #6	Investigative Notes

The Claimants submitted the following exhibits into evidence:

Cl. Ex. #1	Register of Wills Records
Cl. Ex. #2	Contract with Respondent
Cl. Ex. #3	Photographs
Cl. Ex. #4	Inspection Report
Cl. Ex. #5	Proposal from Robert Mitrecci
Cl. Ex. #6	Receipts from Home Depot and Lowes
Cl. Ex. #7	Letter from Ocean City Permit Department
Cl. Ex. #8	Letter from Ocean City Permit Department
Cl. Ex. #9	Complaint Form
Cl. Ex # 10	Estimate from Joseph Mitrecci

Testimony

The Claimant, Betty Bellarin, testified on her own behalf.

The Fund did not present any witnesses.

FINDINGS OF FACT

I find the following 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 license number 3181131 t/a James P. Delapp.
2. On June 13, 2006, the Claimants and the Respondent entered into a contract for the Respondent to renovate the Claimants' residence at 156 Sunshine Avenue in Ocean City. The contract price was \$48,200.00 and the contract contained an arbitration clause. The Claimants paid the full amount. The scope of the work is incorporated from the contract, Cl. Ex. #2.
3. The house had decks on both ends. The Respondent was to remove the decks and build an enclosed room on both ends of the house and finish the rooms with doors and windows, as well as finish the roof over the new rooms.
4. The contract called for the Respondent to demolish the old decks, install concrete pads under the new rooms, build a walkway and install windows and doors.
5. The Respondent did some work, but stopped all work by June 2007. In July 2007, the Claimant, Betty Bellarin, went to the Respondent's business to inquire about the job. At that time, the Respondent told her to leave his property.
6. The living room door was installed in a crooked manner and windows were not caulked.
7. The trim along the eaves was not done, allowing the attic to remain open to the elements.

8. The Respondent failed to obtain all the permits required but still did the work. Some of the work done by him also failed inspection. This included missing drip edge skylight extension not done, sliding door not sealing properly, leakage at door, missing joist hangers, improper flashing, roof over bump out not sealed, missing front rail stair. Siding on the new enclosures was not done properly.
9. The Respondent cut holes in the roof for sky lights and vents, but never installed them, leaving holes in the roof. One vent was installed, but vented into the attic instead of outside.
10. The Respondent failed to install gutters and down spouts.
11. Outside shutters were not installed.
12. The front bathroom was not properly vented.
13. The front door was improperly hung and is leaking, causing damage to the inside floor.
14. On October 16, 2007, the Claimants filed a complaint with the MHIC.
15. In the fall of 2007, the Claimants attempted to file a Guaranty Fund claim with the MHIC. The MHIC investigator, Mr. Banks, told the Claimants that they could not file a claim because the contract contained an arbitration clause. The Claimants were not given or allowed to fill out a claim form.
16. The Claimants filed for arbitration and paid the arbitration fee to the American Arbitration Association (AAA).
17. In February 2008, the Respondent passed away. An estate was opened and the Claimants filed a claim against the estate on June 26, 2008. The claim was never paid due to insolvency of the estate.

18. The Claimants paid \$8,229.29 to Lowes and Home Depot in an effort to complete the work. It will cost an additional \$52,348.00 to fix and complete the work done by the Respondent.

19. The estate never responded to the arbitration request.

20. On September 7, 2010, the Claimants were allowed to file a Guaranty Fund Claim with MHIC.

21. The estate was notified by the MHIC of the claim and the hearing. No one appeared at the hearing to represent the estate.

DISCUSSION

Maryland law provides that an owner may recover compensation from the Guaranty 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). Section 8-401 of the Business Regulation article defines “actual loss” as “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). The burden of proof to establish the unworkmanlike or inadequate home improvement and any actual loss suffered is on the Claimant. Md. Code Ann., Bus. Reg. § 8-407(e)(1) (Supp. 2010).

Before addressing the issue of poor or incomplete work, there are two preliminary issues that must be addressed.

The first involves the three year statute of limitations found at COMAR 09.08.03.02G. There are two ways to obtain an award from the Fund. One is by way of direct proof at an administrative hearing. This requires the claimant to file a claim and prove at a hearing the basis

of an award. For these types of claims, the three year period prevents contractors from facing stale or very old claims, since the first notice they would have of a claim is the Fund claim.

However, there is another avenue to obtaining an award and that is through a collateral proceeding like a civil action or arbitration award. In these cases, the award is not based on proof at an administrative hearing, but on some other fact finding process, such as a civil trial or arbitration proceeding. The homeowner need only present the judgment or arbitration award to the MHIC, which in turn makes the award based on these collateral proceedings.

The MHIC investigator told the Claimants that the three year statute of limitation runs from the end of the arbitration proceedings. A contractor cannot complain about an old claim since he has been notified and given the chance to defend the claim through the other proceedings. Therefore, the Claimants in this case are not barred from an award, even though their claim was filed beyond the three year time limit from the end of the work, which was June 2007.

The second issue involves the arbitration clause, which stays the MHIC proceedings. COMAR 09.08.03.03 reads.

E. Compulsory Binding Arbitration. When a contract between a Claimant and a contractor requires that all contract disputes be submitted to binding arbitration, the claimant shall either:

- (1) Submit their dispute to binding arbitration as required by the contract; or
- (2) Provide evidence to the Commission that the claimant has made good faith efforts to bring the dispute to binding arbitration which the contractor has either rejected or not responded to. The Commission shall then give the contractor written notice that, if the contractor does not agree to binding arbitration, the Commission will consider the compulsory arbitration clause to be void and process the claimant's claim pursuant to this chapter.

In this case, the Claimants were forced by Mr. Banks to participate and pay for arbitration, which the Respondent's estate never accepted. After months of delay, the AAA

eventually decided that there would be no arbitration and the Claimants were allowed to proceed with their claim. Therefore, the Claimants are not barred in this case by the arbitration clause since the Respondent's estate never accepted arbitration.

With respect to the work done by the Respondent, the evidence overwhelmingly shows that the Respondent failed to do all the work and the work he performed was very poor. The contract called for extensive renovations of the house. Two decks were to be removed and enclosed additions added. New windows and siding, as well as doors were to be installed.

The Respondent failed to obtain permits for some of the work. Much of the work he did was not done correctly and failed inspection. Ms. Bellarin testified that she is on the verge of not being able to live in the house because Ocean City officials have cited so many deficiencies in the work.

The photographs submitted by the Claimants show holes in the roof and places where skylights or vents were supposed to be installed. These were left open and one vent actually vents into the attic instead of outdoors.

The Claimant obtained an estimate from Mr. Joseph Mitrecci, who stated that this was the worst project he had ever seen. He explained that there may very well be more damage behind the siding, such as rotted wood and the house is close to being uninhabitable. He gave two estimates for the repairs, one from several years ago and a current estimate. Based on present labor and materials the cost to fix and complete the work is \$52,349.00. This amount does not include the \$8,229.25 that the Claimants paid for Lowes and Home Depot to finish some of the work.

COMAR 09.08.03.03B states in pertinent part

Measure of Awards from Guaranty Fund.

(1) The Commission may not award from the Fund any amount for:

- (a) Consequential or punitive damages;
- (b) Personal injury;
- (c) Attorney's fees;
- (d) Court costs; or
- (e) Interest.

(3) Unless it determines that a particular claim requires a unique measurement, the Commission shall measure actual loss as follows:

(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.

The appropriate section to use is section (c). It will cost a total of \$60,577.25 to finish the work called for in the contract and redo the work done by the Respondent (\$8,229.25 plus \$52,349.00).

Amount paid to Respondent	\$48,200.00
Amount needed to finish/repair	<u>\$60,577.25</u>
	\$108,777.25
Minus contract price	48,200.00
Actual Loss	\$60,577.27

This amount must be reduced to the statutory maximum of \$20,000.00.

CONCLUSIONS OF LAW

For the reasons discussed above, I conclude that the Claimants have established by a preponderance of the evidence that the Respondent abandoned and poorly performed home improvement work and that the Claimants suffered an actual loss compensable by the Guaranty Fund. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405(e)(1) and 8-407(e)(1) (2010 & Supp. 2010).

RECOMMENDED ORDER

I **RECOMMEND** 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 records and publications of the Maryland Home Improvement Commission reflect this decision.¹

December 21, 2010
Date Decision Mailed



James W. Power
Administrative Law Judge

JWP/tc
#118929

¹ In light of the Respondent's death there is no issue about future licensing.

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PROPOSED ORDER

WHEREFORE, this 10th day of February 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.

Joseph Tunney

*Joseph Tunney
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION