

IN THE MATTER OF THE CLAIM OF:	*	BEFORE WAYNE A. BROOKS,
JAMES S. POTTS,	*	ADMINISTRATIVE LAW JUDGE,
CLAIMANT,	*	MARYLAND OFFICE OF
AGAINST THE MARYLAND HOME	*	ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND,	*	OAH No. DLR-HIC-02-08-39545
FOR THE ALLEGED ACTS OR	*	MHIC No. 08 (05) 954
OMISSIONS OF DAVID B. BARKLEY,	*	
1/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 January 2, 2008, James S. Potts (Claimant) filed a claim with the Maryland Home Improvement Guaranty Fund (Fund) for reimbursement for actual losses suffered as a result of home improvement work performed by David B. Barkley, 1/a Omega Construction & Remodeling (Respondent).

I conducted a hearing on April 28, 2009, at the Largo Government Center in Largo, Maryland, on behalf of the Maryland Home Improvement Commission (MHIC), Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(c)(2)(i) (2004 & Supp. 2008). Matthew Lawrence, Assistant

Attorney General, Department of Labor, Licensing and Regulation (DLLR), represented the Fund. The Claimant was self represented. The Respondent failed to appear for the hearing.

Notice of the hearing was sent to the Respondent by regular and certified mail at his address of record with the MHIC. The certified mail receipts were returned as unclaimed, but the regular mail notice was not returned. In addition, the HIC searched the records of the Maryland Motor Vehicle Administration, and the Respondent's driver's license records show that his address has not been changed with that agency. I therefore ruled that the hearing would proceed in the Respondent's absence. Md. Code Ann., Bus. Reg § 8-312(h) (2004).

Procedure in this case is governed by the 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 (2004 & Supp. 2008); Code of Maryland Regulations (COMAR) 09.01.03; 09.08.02; 09.08.03; and 28.02.01.

### **ISSUE**

The issue is whether the Claimant sustained an actual loss compensable by the Fund as a result of the acts or omissions of the Respondent.

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

The Claimant offered the following exhibits, which were admitted into evidence:

1. Agreement, dated May 25, 2007, with attachments;
2. Contractors Invoice, undated;
3. Letter from Respondent to Claimant, dated October 3, 2007; and
4. Letter from Respondent to Claimant, dated August 3, 2007.

The Fund offered the following exhibits, which were admitted into evidence:

1. Licensing history for Respondent;
2. Notice of Hearing and Hearing Order; and
3. Home Improvement Claim Form, dated January 2, 2008.

No exhibits for admission were offered on behalf of the Respondent.

Testimony

The Claimant testified in his own behalf. The Fund called no witnesses.

**FINDINGS OF FACT**

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

1. The Respondent was licensed as a home improvement contractor with the MHIC at all times relevant to this matter.
2. On May 25, 2007, the Claimant contracted with the Respondent to perform extensive home improvement work at the Claimant's residence in Ft. Washington, Maryland.
3. The work included the following: construction of a two-level addition to the east side of the existing house (24' x 26') with garage on first level and Great Room on second level, with floor line of addition raised as necessary to provide approximately eight foot ceilings on each level; installation of carpet and built-in shelving in Great Room; all plumbing, electrical, and HVAC work; installation of a gable roof, with twenty-five-year asphalt shingles, and brick veneer with faux stone accents on exterior walls, and the great room with vaulted ceilings; and installation of (nine) Anderson low-E argon gas insulated windows on the second level to match scheme on existing home.
4. The original contract price was \$119,920.00. The work was to take twenty-four weeks to complete, and it was to start eight weeks from the signing of the contract, which was signed on May 25, 2007.

5. The Claimant paid the Respondent \$12,000 at the signing of the contract, and another \$12,000 on or about August 13, 2007 for the first installment under the terms of the contract for the design and permit application.
6. The Respondent completed the application for the permit and submitted it to the local government's planning office on or about August 13, 2007. The application was placed under review and the approval was delayed because of potential environmental issues.
7. On October 3, 2007, the Respondent sent the Claimant a letter advising that his company would be unable to complete the work because it was forced to go out of business.
8. The Claimant suffered an actual loss of \$12,000.

### **DISCUSSION**

The statute provides that an owner may recover compensation up to \$20,000.00 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. 2008). The statute 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 (2004).

COMAR 09.08.03.03B governs the calculation of awards from the Fund as follows:

#### B. 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.

(2) The Fund may only compensate claimants for actual losses they incurred as a result of misconduct by a licensed contractor.

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

...

(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.

For the reasons stated below, I find that the Claimant has established that the Respondent abandoned the home improvement contract and that as a result of these actions he has suffered an actual loss.

The undisputed evidence in this case, which is supported by the Claimant's credible testimony and the documentary evidence, establishes that the Claimant paid the Respondent \$24,000 before he abandoned the job. The work, expected to take a period of twenty-four weeks to complete, was supposed to start in August 2007, after the application for permit was submitted and approved. The design and application was completed and submitted for approval on August 13, 2007, but the application was delayed because of environmental concerns. Before the environmental issues could be addressed, the Respondent went out of business and no further work was performed on the Claimant's project.

Although the Claimant had to subsequently expend additional funds for a plan to address the environmental issues, the Claimant recognized that the Respondent performed some work by completing the design and application for the permit process. But at this point, the Claimant is only seeking reimbursement for the initial deposit of \$12,000.00.

Accordingly, pursuant to COMAR 09.08.03.03B(3)(b), the appropriate measure to calculate the Claimant's recovery from the Fund is:

Amount paid to/on behalf of the Respondent	\$24,000.00
Value of work performed	-\$12,000.00
Total	\$12,000.00
Actual Loss	\$12,000.00

The statute limits Fund recovery to \$20,000.00 for the acts or omissions of one contractor and that is within the amount the Claimant is entitled to receive from the Fund. Md. Code Ann., Bus. Reg. § 8-405(e)(1) (Supp. 2008).

#### **CONCLUSION OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Claimant has sustained an actual loss of \$12,000.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2004). The Claimant, therefore, is entitled to reimbursement from the Fund in the amount of \$12,000.00.

#### **RECOMMENDED ORDER**


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

**ORDER** that the Claimant be awarded \$12,000.00 from the Maryland Home Improvement Guaranty Fund; and

**ORDER** that the Respondent be 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 (10%) 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 14, 2009  
Date Decision Mailed  
#106790

  
Synne A. Brooks  
Administrative Law Judge

IN THE MATTER OF THE CLAIM OF:	*	BEFORE WAYNE A. BROOKS,
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**Exhibit List**

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The Fund offered the following exhibits, which were admitted into evidence:

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2. Notice of Hearing and Hearing Order; and
3. Home Improvement Claim Form, dated January 2, 2008.

The Respondent failed to appear for the hearing and offered no exhibits for admission into evidence.



PROPOSED ORDER

*WHEREFORE, this 31st 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**