

IN THE MATTER OF THE CLAIM OF	*	BEFORE STEPHEN J. NICHOLS,
ERIC J. SHERMER	*	AN ADMINISTRATIVE LAW JUDGE
AGAINST THE	*	OF THE MARYLAND OFFICE
MARYLAND HOME IMPROVEMENT	*	OF ADMINISTRATIVE HEARINGS
GUARANTY FUND ON ACCOUNT OF	*	
HOME IMPROVEMENT WORK	*	
UNDERTAKEN BY	*	OAH NO.: DLR-HIC-02-09-29607
DAVID B. BARKLEY, T/A	*	MHIC NO.: 09 (05) 204
OMEGA CONSTRUCTION & REMODELING	*	

\* \* \* \* \*

**RECOMMENDED DECISION**

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

**STATEMENT OF THE CASE**

This case arose because of a complaint filed by Eric J. Shermer (Claimant) with the Maryland Home Improvement Commission (MHIC) against David B. Barkley, t/a Omega Construction & Remodeling (Respondent). The complaint asserts that the Claimant entered into a contract with the Respondent for the performance of home improvement work at his residence and that the Respondent's performance of the work was incomplete and inadequate.

On September 2, 2008, the Claimant filed a claim with the MHIC seeking to recover \$27,943.03 from the Home Improvement Guaranty Fund (Fund). On August 3, 2009, the MHIC issued an order for a hearing on the claim against the Fund.

On March 2, 2010, the above-captioned case was heard before Stephen J. Nichols, Administrative Law Judge (ALJ), on behalf of the MHIC. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(c)(2)(i) (Supp. 2009). The hearing was conducted at the Administrative Law Building located in Hunt Valley, Maryland. The Claimant represented himself. Jessica Berman Kaufman, Assistant Attorney General, Office of the Attorney General, Department of Labor, Licensing & Regulation, represented the Fund. The Respondent failed to appear at the hearing.

On February 17, 2009, the Office of Administrative Hearings (OAH) had mailed notice of the hearing to the Respondent by certified and regular mail to his last address of record on file with the MHIC. The notice advised the Respondent of the time, place, and date of the hearing. Md. Code Ann., Bus. Reg. § 8-312(d) (2004).<sup>1</sup> The U.S. Postal Service has not returned the certified mail or the regular mail to the OAH.

Before the MHIC issued its order for a hearing on the claim, the Respondent's status as a corporate entity with the Maryland Department of Assessments and Taxation was forfeited. The Respondent's MHIC license expired on August 26, 2009. "If, after due notice, the person against whom the action is contemplated does not appear, nevertheless the Commission may hear and determine the matter." Md. Code Ann., Bus. Reg. § 8-312(h) (2004). As notice options have been exhausted and the Respondent no longer exists as a corporation or holds a MHIC license, the ALJ directed the hearing proceed in the Respondent's absence.

---

<sup>1</sup> "The hearing notice to be given to the person shall be sent at least 10 days before the hearing by certified mail to the business address of the licensee on record with the Commission." Md. Code Ann., Bus. Reg. § 8-312(d) (2004).

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department of Labor, Licensing and Regulation, and the OAH Rules of Procedure govern the procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009); Code of Maryland Regulations (COMAR) 09.01.03, COMAR 09.08.02.01; COMAR 28.02.01.

### **ISSUES**

The issues are whether the Claimant sustained an "actual loss" compensable by the Fund as the result of an act or omission of the Respondent under a home improvement contract within the meaning of section 8-401 of the Business Regulation Article of the Annotated Code of Maryland, and if so, the amount of the award.

### **SUMMARY OF THE EVIDENCE**

#### **A. Exhibits**

The following items were admitted into the record:

Fund Exhibit #1 – Copy of a Notice of Hearing (two pages)

Fund Exhibit #2 – Copy of a Transmittal letter and a copy of an Order for Hearing (three pages)

Fund Exhibit #3 – Dept. of Labor, Licensing & Regulation I.D. Registration Inquiry on the Respondent, dated February 22, 2010 (seven pages)

Fund Exhibit #4 – Copy of a letter from the MHIC to the Respondent and a copy of a Home Improvement Claim Form (two pages)

Fund Exhibit #5– Dept. of Labor, Licensing & Regulation I.D. Registration Inquiry on Robert N. Raphael, dated February 22, 2010 (three pages)

Claimant Exhibit #1 – Copy of a MHIC Complaint Form, dated June 9, 2008, with attachments (twenty-four pages)

Claimant Exhibit #2 - Copy of a Home Improvement Claim Form, dated August 29, 2008, with attachments (fourteen pages)

Claimant Exhibit #3 – Copy of a Final Cost & Draw Schedule, copy of an Omega Construction & Remodeling Change Order, copy of a check, and a copy of an Estimate from RNR, Inc., dated December 11, 2007 (four pages)

No other exhibits were admitted into evidence.

B. Testimony

The Claimant testified on his own behalf and presented Robert N. Raphel as his witness.

No other witnesses were called to testify.

**FINDINGS OF FACT**

After considering all of the testimony and exhibits, the ALJ finds, by a preponderance of the evidence, the following to be fact:

1. At all times relevant, the Respondent was a home improvement contractor licensed with the MHIC under contractor license number 01-70346 and 05-51578 (trade name).
2. At all times relevant, the Claimant owned and lived at the residence located at 419 Edgemere Drive, Annapolis, Maryland (the property).
3. On August 5, 2006, the Claimant and the Respondent entered into a home improvement contract for the Respondent to build a two-level addition to the existing house at the property. The lower level was to consist of an unfinished basement on a monolithic concrete slab. The upper level was to include a dining room, extra room, hallway, master bedroom, master bathroom, and a walk-in closet. The Respondent was to completely finish the master bedroom, master bathroom and the walk-in closet and the remainder of the upper level would be partially finished, with the Claimant responsible for flooring, trim and painting.
4. The original contract price for the work was \$78,240.00. Under the draw schedule to the contract, the Claimant agreed to pay for the home improvement work in ten installments:  
  
20% - due when the contract was signed as a deposit

- 10% - due when the design was complete and a building permit was obtained
- 10% - due when framing was complete
- 10% - due when electrical rough-in was complete
- 10% - due when HVAC rough-in was complete
- 10% - due when plumbing rough-in was complete
- 10% - due when drywall was hung
- 10% - due when siding was complete
- 5% - due when painting was complete
- 5% - due when project was complete and addition was occupied

5. On June 14, 2007, the Claimant and the Respondent entered into a Change Order adding new roof shingles, siding, gutters and shutters at a price of \$15,140.20. On August 10, 2007, the Claimant and the Respondent entered into a Change Order adding a new water heater and a laundry room rough-in at a price of \$1,450.00. On September 21, 2007, the Claimant and the Respondent entered into a Change Order replacing a neo-angle shower with a 5' by 3' rectangular fiberglass shower unit at a price of \$1,248.00. On September 24, 2007, the Claimant and the Respondent entered into a Change Order adding a 5' vinyl patio door and wooden barrier at a price of \$1,108.18.

6. The total contract price for the work, including the change orders, was \$97,186.38.

7. Work on the home improvement project progressed slowly. The Respondent kept asking for payments in advance of the draw schedule for the home improvement project.

8. The Claimant paid \$74,200.20 to the Respondent for his work at the property. This was accomplished by a series of nine checks drawn against the Claimant's checking account at the Bank of America. The Respondent negotiated and cashed those checks.

9. On or about September 19, 2007, the Claimant gave the Respondent a check in the amount of \$7,824.00. After this payment, the Respondent discontinued working at the property and the Claimant lost all communication with the Respondent.

10. On October 12, 2007, in an attempt to have the work restarted, the Claimant drove to the Respondent's office address in Sykesville, Maryland. During the office visit, the Claimant

was informed that the Respondent was not able to complete the work at the property and was going out of business due to a court judgment.

11. At the time the Respondent ceased working at the property, approximately 60% to 65% of the work had been completed.

12. In order to complete the home improvement project, the Claimant hired the following: RNR, Inc., a licensed general contractor; R & D Industries, Inc., a licensed roofing contractor; Osenburg Electric, LLC, a licensed electrician; and Harford Insulation. The following amounts were paid by the Claimant in order to have work performed within the scope of home improvement work the Respondent was obligated to have performed at the property:

<u>Amount:</u>	<u>Paid To:</u>	<u>For:</u>
\$ 1,880.55	RNR, Inc.	labor and materials - doors and windows
\$ 818.00	RNR, Inc.	miscellaneous work (HVAC rough-in, move wiring, reinstall framing, clean up in preparing for sheetrock installation)
\$ 1,600.00	Harford Insulation	labor and materials - install insulation
\$ 690.00	RNR, Inc.	labor and materials to install a sediment filter fence required by building inspector
\$18,000.00	RNR, Inc.	labor and materials to install soffits, shutters, gutters, downspouts, and siding.
\$ 5,215.00	R & D Industries, Inc.	roof shingling on the addition and existing house at the property
\$ 3,640.00	Osenburg Electric, LLC	electrical rough-ins and wiring
\$ 5,033.66	RNR, Inc.	labor to install doorknobs, door stops, subfloor, floor, and baseboard, window sills, shelving, vanity, vanity top, toilet, mirror, run basement exhaust fan and dry vent to outside, etc.
\$ 700.00	RNR, Inc.	labor to install sheetrock and patch holes
\$ 2,100.00	Osenburg Electric, LLC	upgrade electric service to 400 amps.
\$ 300.00	RNR, Inc.	labor for cutting out hole and reinstalling paneling and trim around electrical panel

## DISCUSSION

In 1985, the Maryland General Assembly enacted legislation that first established the Fund. By this means, the legislature sought to create a readily available pool of money from which homeowners could seek relief for losses sustained at the hands of incompetent or unscrupulous home improvement contractors. Md. Code Ann., Bus. Reg. §§ 8-401 to 8-411 (2004 & Supp. 2009). Under this statutory scheme, licensed contractors are assessed for the monies that subsidize the Fund. Homeowners who are victimized by the actions of licensed contractors may recover their “actual losses” from this pool of money, subject to a \$20,000.00 limitation on the claim of any one aggrieved homeowner because of the work of any one contractor. Md. Code Ann., Bus. Reg. § 8-405(e)(1).<sup>2</sup> A homeowner is authorized to recover from the Fund when he or she sustains an actual loss that results from an act or omission by a licensed contractor. Md. Code Ann., Bus. Reg. § 8-405(a). When the Fund pays money to a homeowner as a result of the faulty performance of a home improvement contractor, the responsible contractor is obligated to reimburse the Fund. Md. Code Ann., Bus. Reg. § 8-410. The MHIC may suspend the license of any such contractor until he or she fully effectuates reimbursement. Md. Code Ann., Bus. Reg. § 8-411.

An action against the Fund does not correspond to a civil claim (in an administrative setting) against an individual contractor for breach of contract. Recovery against the Fund is based on “actual loss” as defined by statute and regulation. “[A]ctual 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. “By employing the word

---

<sup>2</sup> Effective October 1, 2008, section 8-405(e)(1) of the Business Regulation Article was amended raising the limit of recovery from the Fund from \$15,000.00 to \$20,000.00. Section 2 in Chapter 272 of House Bill 409 that raised the recovery limit reads: “[t]his Act shall be construed to apply to any claim pending before the Maryland Home Improvement Commission for which the Commission has not issued a final decision prior to the effective date of this Act.”

'means,' as opposed to 'includes,' the legislature intended to limit the scope of 'actual loss' to the items listed in section 8-401." *Brzowski v. Md. Home Improvement Comm'n*, 114 Md. App. 615, 629, 691 A.2d 699, 706 (1997). "The Fund may only compensate for actual losses [Claimant] incurred as a result of misconduct by a licensed contractor." COMAR 09.08.03.03B(2).

The Respondent did not complete his obligations under the terms of the home improvement contract. After he had obtained payments in advance of the draw schedule, the Respondent ceased working on the home improvement project and abandoned his work on the addition. After he abandoned the work, subsequent events demonstrated that the Respondent's work had been inadequate. The Respondent did not provide for sufficient electrical voltage in the addition and the Claimant had to engage Osenburg Electric, LLC, to upgrade the electrical service to 400 amps in order to pass the local county electrical inspection. The Respondent had also failed to provide a sediment filter fence required for the home improvement project. After RNR, Inc., started working on the home improvement project, a sediment filter fence was installed in order to meet local county building inspection requirements. The evidence of the Respondent's inadequate performance and abandonment of the work is uncontradicted.

The Claimant arranged for other licensed home improvement contractors including: RNR, Inc., a licensed general contractor; R & D Industries, Inc., a licensed roofing contractor; Osenburg Electric, LLC, a licensed electrician; and Harford Insulation to complete work that had not been performed.

Because of the Respondent's "misconduct" described above, the Claimant has established an entitlement to reimbursement on his claim against the Fund, COMAR 09.08.03.03B(2); Md. Code Ann., Bus. Reg. § 8-401. COMAR 09.08.03.03B(3) sets forth the various formulas for determining an "actual loss" as follows:



(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 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)(a) and COMAR 09.08.03.03B(3)(b) do not apply to the matter *sub judice*. The ALJ will calculate the Claimant's "actual loss" in accordance with COMAR 09.08.03.03B(3)(c). The calculations follow:

\$74,200.20	Payments made to the Respondent
<u>+ \$39,977.21</u>	Cost to complete and repair the work
\$114,177.41	(Expenditure Subtotal)
<u>- \$97,186.38</u>	Contract Price
\$16,991.03	Actual Loss

The Claimant has an "actual loss" of \$16,991.03. Md. Code Ann., Bus. Reg. § 8-401.

The Claimant, therefore, is entitled to reimbursement from the Fund in the amount of \$16,991.03.

**CONCLUSIONS OF LAW**

Based on the foregoing Findings of Fact and Discussion, the ALJ concludes as a matter of law that the Claimant has sustained an "actual loss" as a result of the Respondent's acts or omissions in the amount of \$16,991.03. Md. Code Ann., Bus. Reg. § 8-401 (2004); COMAR 09.08.03.03B(3).

**RECOMMENDED ORDER**

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Maryland Home Improvement Commission:


ORDER, that the Claimant be awarded \$16,991.03 from the Maryland Home Improvement Guaranty Fund to compensate him for "actual losses" sustained by the "acts and omissions" of the Respondent under section 8-409 of the Business Regulation Article of the Annotated Code of Maryland; and further,

ORDER, that the Respondent be ineligible for any MHIC license until the Respondent reimburses the Maryland Home Improvement Guaranty Fund for all monies disbursed under this Order plus annual interest of ten percent (10%), pursuant to section 8-411 of the Business Regulation Article of the Annotated Code of Maryland; and further,

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

May 4, 2010  
Date Decision Mailed

SJN:sn  
#112299v1

  
Stephen J. Nichols  
Administrative Law Judge

PROPOSED ORDER

*WHEREFORE, this 24th day of May 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.*

*Andrew Snyder*

*Andrew Snyder  
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION

