

IN THE MATTER OF THE CLAIM * **BEFORE D. HARRISON PRATT,**
OF JOHN H. MACKLIN * **ADMINISTRATIVE LAW JUDGE,**
AGAINST THE MARYLAND HOME * **THE MARYLAND OFFICE**
IMPROVEMENT GUARANTY FUND * **OF ADMINISTRATIVE HEARINGS**
FOR THE ALLEGED ACTS OR * **OAH NO.: DLR-HIC-02-10-24765**
OMISSIONS OF MARK B. * **MHIC NO.: 09 (75) 300**
GOLDSBOROUGH, t/a *
GOLDSBOROUGH DESIGN BUILD *

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RECOMMENDED DECISION

STATEMENT OF THE CASE
 ISSUE
 SUMMARY OF THE EVIDENCE
 FINDINGS OF FACT
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 CONCLUSION OF LAW
 RECOMMENDED ORDER

STATEMENT OF THE CASE

On January 5, 2009, John H. Macklin (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$46,062.08 for losses allegedly suffered as a result of a home improvement contract with Mark Goldsborough, trading as Goldsborough Design Build (Respondent).

I held a hearing on October 21, 2010, at the Office of Administrative Hearings in Wheaton, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010). Eric London, Esquire, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department),

represented the Fund. R. Manny Montero, Esquire, represented the Claimant, who was present at the hearing. The Respondent was present at the hearing and represented himself.

Procedure in this case is governed by the Administrative Procedure Act, the procedural regulations of the Department, and the Rules of Procedure of the Office of Administrative Hearings. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2010); Code of Maryland Regulations (COMAR) 09.01.03.01-.10; 09.08.02.01-.02; and 28.02.01.01-.27.

ISSUE

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

SUMMARY OF THE EVIDENCE

Exhibits

The Claimant offered the following exhibits, which I admitted into evidence except as noted:

- Clt. Ex. 1 Environmental Report from Environmental Solutions, Inc. (ESI), June 13, 2007
- Clt. Ex. 2 Inspection Report from ESI, September 4, 2007
- Clt. Ex. 3 Not offered
- Clt. Ex. 4 Letter from attorney Jude Wikramanayake to attorney William Schroeder and Architect Thomas Manion, August 31, 2007
- Clt. Ex. 5 Letter from attorney Jude Wikramanayake to Architect Thomas Manion and the Respondent, June 28, 2007
- Clt. Ex. 6 & 7 Not offered

- Cl. Ex. 8 Home improvement contract between the Claimant and the Respondent, June 23, 2005 (the contract)¹
- Cl. Ex. 9 Damages worksheet
- Cl. Ex. 10 Letter from Manion and Associates, Architects, to the Claimant and Respondent, November 4, 2006
- Cl. Ex. 11 Invitation to Bid with project description prepared by Thomas Manion, Architect (part of the contract)

The Fund offered the following documents that I admitted without objection from the parties:

- Fund Ex. 1. Notice of Hearing, July 19, 2010
- Fund Ex. 2. Hearing Order, July 30, 2009
- Fund Ex. 3. The Respondent's licensing history with the MHIC
- Fund Ex. 4. Home Improvement Claim Form, January 2, 2009
- Fund Ex. 5. Letter from the HIC to the Respondent, February 5, 2009
- Fund Ex. 6. Change Order #30 to the contract, November 17, 2006
- Fund Ex. 7. Damages Worksheet (not the same as Cl. Ex. 9)

The Respondent offered the following documents:

- Resp. Ex. 1. Letter from the Respondent's office manager to the Claimant's attorney (not admitted but part of the record)
- Resp. Ex. 2. Copies of various checks from the Claimant to the Respondent, letters from the Respondent to the Architect, Change Order #27, and two invoices

¹ The contract consists of Claimant's exhibit #8 and Claimant's exhibit #11, the Invitation to Bid, which contains the specifications. The contract, Claimant's exhibit 8, indicates that there are 42 pages of specification. Claimant's exhibit #11 has but 22 pages. The discrepancy was not explained.

Testimony

The following witnesses testified on behalf of the Claimant:

1. Vinny Gigliotti, owner of ESI, Certified Indoor Environmentalist
2. The Claimant

The Respondent testified on his own behalf. The Fund did not call any witnesses.

FINDINGS OF FACT

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

1. At all times relevant to the subject of this matter, the Respondent was a licensed home improvement contractor under MHIC license numbers 01-33913 and 05-121409.
2. On June 29, 2005, the Claimant and the Respondent entered into a contract for and addition to the Claimant's house, including a basement extension, an office extension on the second floor, replacement of wood paneling and trim, and the addition of an accessory three-car garage. The contract and the specifications were developed by the Claimant and his architect, Thomas Manion, AIA (Manion). The contract stated that work would begin on approximately June 27, 2005 and would be substantially complete on approximately April 19, 2006. The contract called for payments to be made to the Respondent on a payment schedule and as approved by the architect.
3. The original contract price was \$1,417,379.00. There were numerous change orders during the performance of the contract, bringing the total contract price over \$1,800,000.00.
4. During the relationship between the Claimant and the Respondent, there were several disputes concerning what was included in the contract. In the spring

of 2006, the Claimant ended the relationship with the Respondent. The performance of the contract was substantially complete at that time, although disputes between the parties continued.

5. In the summer of 2007, the Claimant noticed an odor of mildew and/or mold upon entering the basement under the garage. He called the Respondent who came to inspect the garage. The Respondent believed that the problem was not his to resolve because he had suggested to the Claimant, before the completion of the project, that some sort of ventilation system should be put in place and this was not part of the contract. When the Respondent went to the property in 2007 he offered to resolve the problem in the garage for an additional payment by the Claimant. The Respondent's offer was contained in Change Order #30. The Claimant declined this offer, believing that it was the Respondent's responsibility pursuant to the contract.

6. There was no sump pump installed in the garage during the building project.

7. Also in the summer of 2007, the Claimant discovered that there was mold on the walls of the wine cellar located in the basement of the home. The mold had also migrated to several pieces of clothing stored in the wine closet.

8. On June 13, 2007, Vinny Gighotti, owner of ESI and a Certified Indoor Environmentalist, conducted an environmental inspection of the garage. He conducted an inspection of the wine cellar in September 2007. Although there was a sump pump pit in the wine cellar, there was no sump pump.

9. The Claimant notified the Respondent about the problem in the wine cellar. The Respondent came to view the wine cellar but by the time he came the Appellant had another contractor working to resolve the issue. The time between when the Respondent was notified of the problem in the wine cellar and his visit to the home to inspect the problem was four or five days.

10. Based on recommendations by ESI, the Claimant hired Pure First to resolve the mold problems in the wine cellar. Pure First extended a water discharge line from the sump pit in the wine cellar. The discharge line ran under a deck on the back of the house. To extend the line, Pure First had to remove the deck, take up the patio, extend the line, and then rebuild the patio and the deck. Because the patio was too flat, the new patio had to be installed with a pitch so that water would drain.

11. Based upon recommendation by ESI, the Appellant hired Disaster Restoration Services (DRS) to resolve the mold and mildew problem in the garage. DRS removed dry wall from the storage area under the garage, treated the cinderblock walls, added new drywall and installed a ventilation and heating system.

12. Had the work described in Change Order #30 (HIC Ex. #6) been completed it would have prevented the mold and mildew problems in the garage.

13. During the period in question, the Claimant had a homeowner's insurance policy. The insurance company paid for the resolution of some of the problems experienced by the Claimant.

14. The architect is currently holding \$8,244.00 in his escrow account. This money is for the installation of certain windows and is to be released to the Respondent when this portion of the contract has been completed. Because of the dispute between the parties, the architect has not paid over these funds.

15. The contract contains a clause titled "Arbitration." Pursuant to this clause, the parties went to "mediation" in an attempt to resolve their dispute. The mediation was not successful. The clause does not comport with HIC regulations.

DISCUSSION

A homeowner 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) (2010). *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 (2010).

The Claimant alleges unworkmanlike performance by the Respondent in two areas, the garage and the wine cellar.

The Garage

The complaint concerning the garage is that the Respondent should have established some form of ventilation system to prevent the formation of mold and mildew. ESI has shown clearly what the problems were. There was mold on the sheet rock and the cabinets in the storage area under the garage. According to Mr. Gigliotti, who was accepted as an expert environmentalist, the problem was caused by increased moisture in the cinder block walls, a lack of ventilation in the storage area, the air being insufficiently conditioned, the cinder blocks above the footers having no weep holes, and waterproofing on the walls improperly applied.

Additionally, the flagstone patio outside the garage was at the same level as the doors to the storage area, allowing water to go under the doors. He noticed that there was a sump pump pit in the storage area but no sump pump. The sump pump crock (or pit) had about 10 inches of standing water, adding to the moisture in the area. He also noticed that there was a sprinkler head approximately six inches from one of the outside walls.

Mr. Gigliotti was asked to recommend the manner in which these problems could be resolved. He recommended the following actions:

1. Remove contaminated drywall and cabinets, decontaminate and reinstall drywall;
2. Properly waterproof the walls and floor in the storage room;
3. Install a sump pump and discharge line from the sump crock;
4. Place weep holes in each cinder block cavity;
5. Improve drain tile around the outside walls;
6. Install an air filtration and/or conditioning system;
7. Remove and reinstall the patio so that it slopes away from the building.

Based on ESI's recommendation, the Appellant hired Pure First to complete the remedial work and DSR to decontaminate. After the work was completed, ESI issued a Post Clearance Verification Certificate.

In his defense, the Respondent testified that a ventilation system for the garage storage area was not part of the contract and that he and the Claimant discussed early on the need for such a system. The work proposed by the Respondent is contained in Change Order #30, which the Respondent proposed to complete, but for an additional charge of \$10,968.00. Claiming that a ventilation system was part of the original contract, the Appellant refused to authorize the work listed in the Change Order.

I have reviewed quite thoroughly the contract documents submitted by the Claimant (Claimant's Exhibits 8 and 11) and I find no mention of a ventilation system that is to be installed in the storage area under the garage. I note with significance that not all of the contract documents have been presented to me. The Home Improvement Contract (Claimant Exhibit #8) refers to "plans" and "specifications." The Claimant identified his exhibit #11 as the specifications. Addendum A to the contract, attached to Claimant's Exhibit #8, indicates that several documents make up the contract and it lists documents that have not been presented to me, e.g. schematics by Manion & Associates dated June 10, 2005, certain documents dated March 21, 2005, and certain documents dated March 14, 2005. As stated, no schematics or "plans" were submitted, and in my review of the documents that were submitted, I saw no mention of a ventilation system for the garage storage area. Furthermore, I have no evidence that such a system would be routinely installed in such cases.

Therefore, the Claimant, who has the burden of proof, has failed to show that he sustained an actual loss as a result of any work done or omitted with regards to the garage.

The Wine Cellar

On September 4, 2007, ESI inspected the Appellant's wine cellar. Mr. Gigliotti confirmed that there were molds on the dry wall and the clothing stored within the room. According to Mr. Gigliotti, the mold was caused by the high moisture content in the foundation wall (water migrating through the foundation) resulting in moist drywalls. The wine cellar also had a sump pump pit but no sump pump. Also, a drainage line from the sump pit discharged too close to the outside wall. There was standing water in the sump pit.

ESI recommended the following remedial actions for the wine cellar:

1. Decontaminate the area;

2. Remove and replace contaminated drywall;
3. Waterproof the sump pit and foundation walls;
4. Extend the drainage pipe to discharge further away from the outside wall.

Based on recommendation from ESI, the Appellant hired Bob Fox to perform the remedial work. In order to extend the drainage pipe, the deck on the back of the house had to be removed and reinstalled. This deck work was completed by Good Hands Home Improvement.

The Respondent testified that he was prepared to resolve the problems in the wine cellar but was precluded from doing so because the Claimant gave him insufficient time to respond. The Respondent acknowledges that he had perhaps four or five days after being notified by the Claimant of the problem and that when he did go to inspect the problem the Claimant already had another contractor doing the remedial work. The Respondent has not denied that he was responsible for resolving the issues in the wine cellar and his statement that he was willing to fix the problems convinces me that he is responsible.

I find that the Respondent did have sufficient opportunity to address the problems in the wine cellar. He may not have been able to begin work within the four or five days after being notified, but he certainly could have made arrangements to be on site to inspect the damages within that time.

The Claimant has shown that he sustained an actual loss as a result of the Respondent's work in the wine cellar. The Claimant paid Good Hands Home Improvement \$1,500.00 to remove and replace the deck and to waterproof the wine cellar. The Claimant has also shown that he paid A-1 Waterproofing \$250.00 to extend the drainage pipe further away from the side of the house, something I find that Respondent should have done initially.

I disagree with the Claimant that the cost for the services of ESI should be considered in calculating his loss. Although it is true that the problems had to be identified before they could be resolved, the costs for the inspections, testing and recommendations of ESI, I find, were consequential damages and should not be considered in calculating any loss. Md. Code Ann., Bus. Reg. § 8-405(e)(3) (2010).

The Amount of the Loss

The MHIC's regulations offer three formulas for measurement of a claimant's 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 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).

The Claimant here did hire another contractor, actually several other contractors.

The payments to other contractors that may be legitimately used in calculating the

Claimant's loss are those payments to Good Hands, \$1,500.00 and to A-1 Waterproofing, \$250.00, or a total of \$1,750.00. The correct measure of an award from the Fund is provided by COMAR 09.08.03.03B(3)(c), set forth above. The calculations are as follows:

\$1,417,379.00	paid under the contract ²
+ 1,750.00	to complete the contract
\$ 1,419,129.00	
-1,417,379.00	original contract price
\$ 1,750.00	actual loss.

CONCLUSION OF LAW

I conclude as a matter of law that the claimant has sustained an actual monetary loss in the amount of \$1,750.00. Md. Code Ann., Bus. Reg. § 8-405(e)(3) (2010); COMAR 09.08.03.03B(3)(c).

RECOMMENDED ORDER

On the basis of the foregoing Findings of Fact and Conclusions of Law, I

RECOMMEND that the Maryland Home Improvement Commission:


ORDER that the Claimant be awarded the sum of \$1,750.00 from the Maryland Home Improvement Guaranty Fund; and further,

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 (2010); and further

² I have used the original contract price. Using a price including the cost of change orders would not change the outcome.

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

January 18, 2011
Date Decision mailed


D. Harrison Pratt
Administrative Law Judge

DHP/rbs
119619

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FILE EXHIBIT LIST

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PROPOSED ORDER

WHEREFORE, this 9th day of March 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.

J. Jean White

***I. Jean White
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION