

IN THE MATTER OF THE CLAIM	* BEFORE THOMAS G. WELSHKO,
OF EDWARD DEBUS	* 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-02-10-43982
OMISSIONS OF JAMES WILSON T/A	* MHIC NO.: 09(90)88
CJR HOMES CORP.	*

\* \* \* \* \*

**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 February 2, 2009, Edward DeBus (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$12,239.00 for actual losses allegedly suffered as a result of a home improvement contract he entered with James Wilson, t/a CJR Homes Corp. (Respondent).

I held a hearing on February 25, 2011, at the offices of the Carroll County Health Department in Westminster, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010). Eric B. London, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Claimant represented himself, and the Respondent also represented himself.

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 (2009 & Supp. 2010), Code of Maryland Regulations (COMAR) 09.01.03.01 – 09.01.03.10; 09.08.02.01 – 09.08.01.02; and 28.02.01.01 – 28.02.01.27.

### **ISSUE**

Did the Claimant sustain an actual loss compensable by the Fund because of the Respondent's acts or omissions?

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

I admitted twelve exhibits on behalf of the Claimant and eight exhibits on behalf of the Fund. I did not admit any exhibits on behalf of the Respondent. (I have attached a complete Exhibit List as an Appendix to this decision.)

#### **Testimony**

The Claimant testified on his own behalf. The Respondent did not testify or call any witness. The Fund also 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 hearing, the Respondent was a licensed home improvement contractor under MHIC license number #01-91360. (Fund Ex. 2.)

2. On October 9, 2006, the Claimant and the Respondent entered into a \$49,098.00 contract (Contract) in which the Respondent agreed to build a three-car detached garage at the Claimant's Westminster, Maryland home. (Cl. Ex. 1.)

3. Specifically, the Contract called for the Respondent to perform the following work:<sup>1</sup>

- Obtain applicable permits;
- prepare the site;
- excavate, backfill and rough grade;
- install foundation – foundation block walls to be a minimum of 24" above the ground;
- frame exterior walls and the garage roof and provide wall sheathing;
- install 30-year Tampko or equivalent roof shingles to match the existing house as close as possible, install a roll ridge vent as needed, install seamless aluminum gutters and downspouts and install a brick front;
- install Alcoa Meadowbrook double siding, soffits to white 12" center vent with aluminum fascia and a brick front; and
- install Symington double-hung vinyl windows with insulated glass, 9 lite 3/0 x 6/8 exterior door (to be painted), and three white Clopay 1000 garage doors with 1" polystyrene insulation measuring 9' x 8' with torsion springs and exterior locks.

(Test. Cl.; Cl. Ex. 12.)

4. The Claimant and the Respondent agreed that the exterior walls of the garage would remain unfinished, and that the Respondent would only be responsible for installing a conduit in the garage's concrete slab foundation to allow a future electrical installation. (Cl. Ex. 12.)

5. The Claimant paid a total of \$44,098.00 to the Respondent by means of the Claimant's down payment of \$6,000.00 on October 11, 2006, and a series of draws that the Claimant made between October 25, 2006 and January 18, 2007, totaling \$38,098.00. (Test. Cl.; Cl. Ex. 8.)

6. The Respondent began work in October 2006. He continued performing work sporadically from December 2006 to August 2007. (Test. Cl.)

7. In August 2007, the Respondent stopped work on the garage before completing the Contract.

8. The Respondent's failure to return to complete the contracted work prompted the Claimant to file complaints with the Respondent, the Better Business Bureau, and, ultimately, the MHIC. (Cl. Exs. 2 – 5.)

9. In December 2007, the Respondent indicated to the Claimant that everything was fine, and he would be completing the garage. A month later, on January 30, 2008, the Respondent filed for Chapter 7 bankruptcy protection. He was discharged from bankruptcy on July 7, 2008. (Test. Cl.; Cl. Ex. 7.)

10. The Respondent never did any additional work on the garage after August 2007. (Test. Cl.)

11. The following conditions existed at the Claimant's residence as of January 2008:

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<sup>1</sup> In most instances, I have paraphrased the contract terms for the sake of conciseness.

- The Respondent failed to perform any rough grading;
- the Respondent did not bring the foundation block walls to a minimum of 24" above the ground;
- the Respondent installed siding that is not secured from row to row (vertically), is cut too short on the top and is bulging, warped or dimpled in some areas;
- the Respondent did not install any soffit, fascia or gutters;
- the Respondent installed brick front in an amateurish manner – it is not square vertically or horizontally, the mortar is the wrong color, there are waves in it as it rises vertically and it is not properly secured to the interior sheathing;
- the Respondent failed to frame two large double windows on the second floor – he essentially nailed 2 x 4s to the exterior sheathing and inserted the windows into the opening;
- the Respondent installed a 2' x 4' framed door into a 2' x 6' structure and broke the exterior brick mold and left side of the entire door frame, necessitating the replacement of the door; and
- the Respondent did not supply or install the three garage doors.

(Test. Cl.; Cl. Exs. 2 and 3A - N.)

12. The Respondent did not install an entry pad or remove trash and debris, but there is no provision in the Contract for these items. (Cl. Ex. 12.)

13. The Claimant has obtained estimates or had work performed by contractors, other than the Respondent, to complete items in the Contract that the Respondent either did not complete or completed poorly. The cost of this remedial work is broken down as follows:

### Items Needing Correction or Completion

Item	Contractor	Cost	Completed or Estimate?
Replace brick front	Brothers Services	\$3,500.00	Estimate
Replace entry door and install entry stairs	Brothers Services	\$1,054.00	Estimate
Repair and replace siding	Brothers Services	\$7,999.00	Estimate
Install soffit, fascia and gutters	Brothers Services	\$861.00	Estimate
Install three garage doors	Master Aluminum Products	\$1,899.00	Completed
Install seamless gutters	Superior Seamless Gutters	\$326.00	Completed
Regrade front	Mirfin Excavating & Paving	\$1,600.00	Completed
	Total:	\$17,239.00	

(Test. Cl.; Cl. Ex. 10.)

14. The Claimant's actual loss is \$12,239.00. (Cl. Exs. 10 and 12.)

### DISCUSSION

The Claimant has shown that he is entitled to reimbursement from the Fund. He sustained an actual loss because the Respondent (1) failed to complete a number of items listed in the Contract or (2) completed certain items poorly, and the Respondent's acts and omissions compelled the Claimant to seek estimates from other contractors to have the Contract completed properly. I reject the Fund's argument that the siding repair and replacement is unnecessary because the flaws in the Respondent's siding

work are only aesthetic and not functional. My reasons for these conclusions are set out below.

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. 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 burden of proof to establish a valid claim against the Fund rests with the Claimant. Md. Code Ann., Bus. Reg. § 8-407(e)(1) (2010). Additionally, a respondent contractor found to have caused an actual loss must reimburse the Fund for any money it has paid to compensate a claimant or claimants for that loss, plus annual interest as set by law. Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2010).

I find that the Claimant has proven eligibility for compensation.

There is no dispute that the Respondent held a valid contractor's license on October 9, 2006, when he entered the Contract with the Claimant. There is also no dispute that the Claimant is an owner and that there is no impediment barring him from recovering from the Fund (too many homes owned, a family relationship to the Respondent, *etc.*) Md. Code Ann., Bus. Reg. § 8-405(f) (2010).

Consequently, I will shift my focus to whether the Claimant has shown that the Respondent provided an inadequate home improvement. The evidence presented by the Claimant overwhelming shows that the Respondent's work was both inadequate and incomplete. The Claimant engaged the Respondent to build a three-story garage at his Westminster, Maryland property. After ten months of work, the Claimant had a non-

functional garage shell. The foundation was shaky—not rising the required 24 inches above the ground as specified in the Contract. The garage had no doors, there is no fascia or soffit, and the second-floor windows were framed with 2 x 4s. The brick work on the front of the garage was not square either horizontally or vertically—and the Respondent's worker used the wrong color mortar to secure the bricks. (The Claimant testified that worker was the Respondent's 70-year-old father.) Additionally, the Respondent broke part of the door frame while installing the exterior door and installed siding that was not secured from row to row vertically, was cut too short on the top and was bulging, warped or dimpled.

The Respondent's failure to do any more work after August 2007 prompted the Claimant to call the Better Business Bureau and to file a complaint with the MHIC. In December 2007, four months after he stopped work, the Respondent promised the Claimant he would come back to complete the Contract. A month later, though, the Respondent declared Chapter 7 bankruptcy. The Claimant explained that he listed himself as one of the Respondent's creditors, but because the Respondent had no assets, he could not recover anything from him. The Respondent was discharged from bankruptcy on July 7, 2008.

The Respondent's bankruptcy discharge left the Fund as the Claimant's only recourse to recover damages resulting from the Respondent's poor and incomplete work. Although the Contract price for the garage was \$49,098.00, the Claimant only paid the Respondent \$44,098.00 (by means of a down payment and three draws that gave issued to the Respondent while he was still performing the work). The Claimant withheld the final \$5,000.00 draw based on the Respondent's slow progress.



After the Respondent's bankruptcy discharge, the Claimant obtained estimates to have remedial work performed by other contractors or he actually paid them to do that work. He obtained estimates from Brother Services to replace the brick front (\$3,500.00), replace the entry door and install entry steps (\$1,054.00), repair and replace siding (\$7,999.00) and install soffit, fascia and gutters (\$861.00). He paid Master Aluminum Products \$1,899.00 to install the three garage doors (with hardware), Superior Seamless Gutters \$326.00 to install seamless gutters and Mirfin Excavating & Paving \$1,600.00 to re-grade the front. The Claimant paid other contractors to install an entry pad and remove debris, but these items were not in the Contract, and the Claimant did not list them in his claim against the Fund. I find all items other than entry pad installation and debris removal are necessary to complete the Contract in a workmanlike manner and, therefore, will rely on the total of the amounts (\$17,239.00) provided by the Claimant as the basis for computing the Claimant's actual loss.

The Fund did not dispute any of the items that the Claimant listed except the \$7,999.00 estimate for siding repair and replacement. The Fund argues that the siding only serves a decorative purpose and any flaws in it do not impair the functionality of the garage structure as a whole. I disagree.

The Claimant testified that because the siding is not secured properly, or is poorly positioned, it might not do what it is designed to do—protect the interior of the garage from the elements. Moreover, the Claimant contends that the siding is now *falling off* the garage. I find the Claimant's testimony reliable, and I view his opinion about the necessity of siding repair and replacement as one that a non-expert can give. I agree that the siding in this instance serves more than a decorative function; it is there

to provide a layer between the outside and the garage walls and sheathing. More importantly, the siding is a specifically-listed Contract item, so, even assuming its function were only decorative, it is still something that the Respondent had the obligation to install and install properly.<sup>2</sup>

The MHIC's regulations offer three formulas for measurement of a claimant's actual loss, COMAR 09.08.03.03B(3). One of those formulas, as follows, offers an appropriate measurement here:

"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)(c).

Using the formula prescribed in COMAR 09.08.03.03B(3)(c) my computation of the Claimant's actual loss is as follows:

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<sup>2</sup> I doubt that the Fund would make a similar argument if painting walls were an item listed in an interior home improvement contract, and a contractor failed to paint them. Painting, like siding installation, serves both aesthetic and functional purposes; its functional purpose is to seal walls from deterioration caused by heat, humidity and normal wear and tear.

\$44,098.00	Amount paid by the Claimant to or in behalf of the Respondent
<u>+17,239.00</u>	Reasonable cost of correction
61,337.00	
<u>-49,098.00</u>	Original contract price
\$12,239.00	<b>Actual loss by the Claimant</b>

Therefore, I will recommend that the Fund reimburse the Claimant \$12,239.00 for actual losses that he suffered because of the Respondent's poor and incomplete work, which constitutes "an act or omission" under sections 8-401 and 8-405(a) of the Business Regulation Article.

**CONCLUSIONS OF LAW**

I conclude that the Claimant has sustained an actual loss as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2010).

**RECOMMENDED ORDER**

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

**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimant \$12,239.00; and

**ORDER** that the Respondent is 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 as set by the Maryland Home Improvement Commission. Md. Code Ann., Bus. Reg. § 8-411(a) (2010); and

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

May 4, 2011  
Date Decision Issued



Thomas G. Welshko  
Administrative Law Judge

DOCS#122051

IN THE MATTER OF THE CLAIM	* BEFORE THOMAS G. WELSHKO,
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CJR HOMES CORP.	*

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**FILE EXHIBIT LIST**

**Claimant's Exhibits:**

1. Respondent's MHIC license information and late 2007 e-mails
2. July 2008 Complaint Form and Supplementary details
3. Photographs 3A – 3N.
4. January 2009 Claim Form
5. July 2007 – May 2008 Better Business Bureau Complaint
6. Respondent's January 2008 Bankruptcy Filing
7. Respondent's July 2008 Bankruptcy Discharge
8. Claimant's Invoices and Proof of Payment to the Respondent (2006 – 07)
9. Summary of Costs to Repair and Complete
10. 2008 Estimates for Completion of the Respondent's contract
11. Claimant's Actually Incurred Completion Costs
12. October 9, 2006 Contract between the Claimant and the Respondent

Respondent's Exhibits:

The Respondent did not offer any exhibits.

Guaranty Fund's Exhibits:

1. December 16, 2010 Notice of Hearing
2. January 12, 2011 Undeliverable Mail Notice (Certified Mail Refused)
3. February 11, 2011 Affidavit of Michelle Escobar
4. January 19, 2011 licensing record for the Respondent
5. December 2, 2010 Hearing Order
6. February 2, 2009 MHIC Claim Form
7. March 3, 2009 Notice from the MHIC to the Respondent concerning the filing of the Claimant's Claim
8. Photographs A - C

IN THE MATTER OF THE CLAIM OF  
EDWARD DEBUS

v.

JAMES WILSON  
t/a CJR HOMES CORP.

\* MARYLAND HOME  
IMPROVEMENT COMMISSION

\* MHIC CASE NOS. 09 (90) 88

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**PROPOSED ORDER**

WHEREFORE, this 18<sup>TH</sup> day of July, 2011, Panel B of the Maryland Home Improvement Commission ORDERS that:

1) The Findings of Fact of the Administrative Law Judge are Amended as follows:

A) The Claimant's actual loss is \$11,913.00.

2) The Conclusions of Law of the Administrative Law Judge are Amended as follows:

A) The amount found by the Administrative Law Judge for the reasonable cost to correct the Respondent's work, \$17,239.00, contains a duplicated cost for installation of gutters. The cost of repair found by the Administrative Law Judge (Finding of Fact No. 13) includes both an estimate in the amount of \$861.00 from Brothers Services to install "soffit, fascia, and gutters," and also a receipt from Superior Seamless Gutters in the amount of \$326.00 for installation of "seamless gutters." The Commission finds that, in determining the reasonable cost of repair, the \$326.00 cost of gutter installation should be deducted from the \$861.00 estimate provided by Brothers Services.

B) Pursuant to the formula set forth in COMAR 09.08.03.03B(3)(c), the correct measure of the Claimant's actual loss is as follows:

Amount paid to Respondent	\$44,098.00
Reasonable cost to repair	+ <u>\$16,913.00</u>
Subtotal	\$61,011.00
Less original contract price	- <u>\$49,098.00</u>
Actual Loss	\$11,913.00

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3) The Recommended Order of the Administrative Law Judge is Amended as follows:

A) The Claimant is Awarded \$11,913.00 from the Home Improvement Guaranty Fund.

4) Unless any party 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, any party then has an additional thirty (30) day period during which they may file an appeal to Circuit Court.

***Joseph Tunney***  
Chairperson - Panel B  
Maryland Home Improvement Commission