

**The Maryland Home
Improvement Commission**

* **BEFORE THE**
* **MARYLAND HOME IMPROVEMENT**
* **COMMISSION**

v. Paul H. Chretien
t/a California Builders, Inc.
(Contractor)
and the Claim of
Robin Downing
(Claimant)

* **MHIC No.: 09 (75) 985**
*
*

FINAL ORDER

**WHEREFORE, this March 21, 2011, Panel B of the Maryland Home Improvement
Commission ORDERS that:**

- 1. The Findings of Fact set forth in the Proposed Order dated October 25, 2010 are AFFIRMED.**
- 2. The Conclusions of Law set forth in the Proposed Order dated October 25, 2010 are AFFIRMED.**
- 3. The Proposed Order dated October 25, 2010 is AFFIRMED.**
- 4. This Final Order shall become effective thirty (30) days from this date. During the thirty (30) day period, any party may file an appeal of this decision to Circuit Court.**

Andrew Snyder
Andrew Snyder, Chairperson
PANEL B

MARYLAND HOME IMPROVEMENT COMMISSION

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MARTIN O'MALLEY, GOVERNOR • ANTHONY G. BROWN, LT. GOVERNOR • ALEXANDER M. SANCHEZ, SECRETARY

IN THE MATTER OF THE CLAIM OF * BEFORE MARY R. CRAIG,
ROBIN M. DOWNING * 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-02-09-46612
OMISSIONS OF PAUL H. CHRETIEN t/a * MHIC NO.: 09 (75) 985
CALIFORNIA BUILDERS, INC.

* * * * *

RECOMMENDED DECISION

STATEMENT OF THE CASE
ISSUE
SUMMARY OF THE EVIDENCE
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CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On June 23, 2009, Robin M. Downing (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$42,468.25 for actual losses allegedly suffered as a result of a home improvement contract with Paul H. Chretien, t/a California Builders, Inc. (Respondent).

I held a hearing on May 20 and June 28, 2010 at the Hunt Valley, Maryland offices of the Maryland Office of Administrative Hearings (OAH).¹ Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010). Kris King, Assistant Attorney General, Department of Labor, Licensing and

¹ The OAH scheduled the case for a January 20, 2010 hearing, however, the case was postponed because counsel for the Respondent had a previously scheduled court commitment.

Regulation (Department), represented the Fund. The Claimant represented herself. Nicholas Andrews, Esquire, McCarthy Wilson LLP, represented the Respondent, who was present.

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

ISSUE

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

SUMMARY OF THE EVIDENCE

Exhibits

See the Exhibit List attached to this Recommended Decision.

Testimony

The Claimant testified and presented the testimony of Steve Martin, Abacus Remodeling, Inc. The Respondent testified. The Fund presented no 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 3809453; he has held the license since 1992 and has been actively engaged in the home improvement business during that time.
2. The Claimant is employed by the federal government. In the course of her work duties, the Claimant administers large government contracts. She is familiar with contract terms and their meanings.

3. The Claimant owns and resides in a ranch style, single family house (House) located at 3930 Kincaid Terrace, Kensington, Maryland.
4. The Claimant wanted to have the House remodeled, so she hired John Thomas, an architect and President of American Room Additions, to draw plans for major renovations. (Thomas Plans).
5. On May 9, 2008, the Claimant and the Respondent entered into a written contract whereby the Respondent agreed to perform construction at the House for \$95,000.00. The project involved removing the roof of the existing structure, constructing a new second story with a new roof and windows, and performing major demolition of the first floor including interior walls, fireplace brickwork, appliances, kitchen cabinets, bathroom fixtures, flooring, electrical wiring and existing windows.
6. Paragraph 3 of the Contract provided the following terms of payment:

Terms of Payment: Purchaser agrees to the following draw schedule: \$3,500.00 or 3% (whichever is greater) partial deposit of the contract price with a signed and/or executed contract. Balance of 10% deposit due upon completion and delivery of three (3) complete sets of constructions plans/blueprints; and elimination of all contract contingencies, if any. 30% due a minimum of ten (10) work days prior to start of construction. 35% due when ridge beam and/or rafters/tresses are set. 20% due when shell structure is under shingled roof & windows/doors are set (siding, exterior trim, fascias, & soffits not included); and 5% due upon final completion and Purchaser's final inspection. Purchaser is subjected to a 2% per month service charge for non-compliance with this schedule. Purchaser assumes all responsibility for securing financing & making payments in accordance with the above reference (sic) payment schedule. CALIFORNIA may accept modified payment schedule from lending institution; however, the service charge will remain in effect. Failure to make timely payments in accordance with the above referenced payment schedule may, at the option of CALIFORNIA, result in work stoppage. Purchaser also agrees to pay attorney's fees of 33% of any amount due CALIFORNIA under this contract if placed in the hands of an attorney for collection.

7. The Respondent refused to construct the addition according to the Thomas Plans. The Claimant agreed to have the Respondent draw a new set of plans and specifications.
8. The Respondent completed and delivered to the Claimant three complete sets of construction plans/blueprints on July 8, 2008. (Approved Plans). The Claimant initialed and dated the Approved Plans, indicating that she accepted them. The Respondent agreed to perform construction work in accordance with the Approved Plans; he never agreed to perform according to the terms of the Thomas Plans.
9. An inspector with Montgomery County, Maryland reviewed and approved the Approved Plans prior to issuing the construction permit. On July 28, 2008, Montgomery County issued a permit for the construction of a second story addition to the House, based on the Approved Plans. The next day the Claimant wrote the Respondent an email stating that she was dissatisfied that the "process" had taken so long and providing him with a list of six things that she insisted he accomplish within a week.
10. The Claimant made the following payments to the Respondent under the Contract:
 - \$3,500.00 paid May 9, 2008 when the parties signed the Contract;
 - \$35,000.00 paid August 6, 2008 (balance of 10% deposit and 30% payment due 10 days prior to starting work); and
 - \$35,000.00 paid September 18, 2008 (ridge beam draw).
11. On August 7, 2008, the Claimant and the Respondent entered into a change order (Additional Work Authorization), amending the Contract to require the Respondent to add height to the existing first floor walls prior to installing the second floor family room addition. The total contract price increased by \$4,000.00 to \$99,000.00.
12. On August 7, 2008, the Respondent gave the Claimant a handwritten receipt stating as follows:

Received of Robin Downing the balance of a 10% deposit and the 28% (\$35,000) start work 10 days prior to start of construction draw on the Calif. Bldrs agreement to put a 2nd story on her residence in Kensington, MD.

13. The Respondent started working on the House on September 8, 2008.

By September 17, 2008, the Respondent had removed the existing roof, framed a new second floor (interior and exterior), set the roof and covered it, and framed the chimney.

14. On September 18, 2008, the Respondent gave the Claimant a handwritten receipt stating "received of Robin Downing \$35,000 – for the ridge beam draw."

15. The Respondent was due a payment of 20% (Fourth Installment) when the shell structure of the House was under a shingled roof and the windows as well as doors were set (excluding siding, exterior trim, fascias and soffits).

16. The Claimant became worried that the Respondent had not ordered the windows or siding for the House. On October 8, 2008, she called the Roof Center, a supplier, and asked whether the Respondent had ordered the siding. When she received a negative response from the manager at the Roof Center, she believed that the Respondent had not ordered the siding. The Claimant emailed the Respondent, demanding to know why he had not ordered the siding from the Roof Center and demanding that he refund her \$30,000.00 of the \$35,000.00 she had paid on September 18, 2008. The Claimant informed the Respondent that she would finish the project herself.

17. The Respondent replied to the Claimant by email, stating that the Roof Center was not the supplier that he intended to use to order the siding. The Respondent insisted that he had performed according to the Contract; he accused the Claimant of wrongful termination and advised her that he would be leaving the job site.

18. The Respondent told the Claimant that he wanted assurance that she would make the Fourth Installment when the shell structure of the House was under a shingled roof and the windows and doors were set. The Respondent requested the Claimant put the balance due him into escrow and indicated that he would complete the job if she did so. The Claimant refused, insisting that she would not make the payment until the Respondent repaired all punch list items.

19. Paragraph 4 of the Contract provides as follows:

It is agreed that all cash funds owed, including those to be owed in the future in case of addendums/addenda or extras to this original contract shall be escrowed in advance by purchaser in a special escrow bank account designated for disbursements to California Builders, Inc. on which both parties (sic) signatures are required for any withdrawals, as progress payments to California Builders, Inc. for work performed under this contract as outlined in Paragraph 3 above.

20. The Respondent installed the windows, but refused to perform any further work on the House after November 5, 2008 because the Claimant refused to agree to pay him according to the Contract.

21. The Claimant and the Respondent exchanged many emails regarding the Contract after it was signed. The Claimant told the Respondent that he was "full of shit," and a "piece of scum," threatened to "sue [him] from here to kingdom come" and to contact her attorney, Montgomery County and Angie's List.² The Claimant threatened to make the Respondent's "life a living hell," and to have his MHIC license revoked. The Claimant told the Respondent that she got rid of her neighbors and their dogs, so she was certain that she could have the MHIC take his license away. The Respondent did not use profanity or threaten the Claimant; his emails were professional at all times.

DISCUSSION

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) (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). For the following reasons, I find that the Claimant has not proven eligibility for compensation.³

The Claimant entered into a written contract with the Respondent on May 9, 2008 containing an explicit payment schedule. Although she made the first three payments called for by the Contract, the Claimant became concerned that the Respondent was getting ahead of her, payment-wise. She felt that, although she had paid the Respondent \$73,500.00 – or 75% of the total due – the Respondent had, in her estimation, only performed 33% of the work required under the Contract. The Claimant concluded well after she signed the Contract that the payment schedule was unfair to her.

The Claimant's anxiety heightened when she called the supplier that she thought was providing the siding for her House and learned that the Respondent had not ordered it from that company. Although the Respondent assured the Claimant that he had not intended to order the siding from that particular supplier and that he would finish her project, the seeds of distrust had been planted in the Claimant's mind. She began making unreasonable demands of the

² Angie's List is a website on which members post comments about contractors and others. <http://www.angieslist.com/angieslist>. Negative comments about the Respondent on the website could have a deliterious effect on his reputation and business.

³ It is undisputed that the Respondent was a licensed home improvement contractor at all relevant times.

Respondent and refused to adhere to the terms of the Contract regarding payment.

Despite repeated attempts by the Respondent to obtain adequate assurance from the Claimant that she would make future payments required by the Contract, the Claimant refused to do so.⁴ The Respondent asked the Claimant to place the balance due in escrow, a right provided to him under paragraph 4 of the Contract, but again the Claimant refused. The Claimant thereby breached the Contract, and the Respondent was legally excused from performing any further under the Contract. *Weiss v. Sheet Metal Fabricators, Inc.*, 206 Md. 195 (1955). The Respondent's failure to perform the balance of the work under the Contract was not due to any error or omission of the Respondent; it was entirely the result of the Claimant's refusal to adhere to the payment and escrow terms of the Contract.⁵

The Claimant testified that, although she signed the Contract containing specific payment provisions, she did so after the Respondent told her not to worry about the Contract, and that she could pay the draw amounts whenever she wanted to. I find the Claimant's testimony incredible on this point for a number of reasons. First, it does not make any sense that the Respondent, a contractor who required the Claimant to sign a written agreement before proceeding with the work, would tell her she could pay him whenever she chose. Doing so would place the Respondent totally at the mercy of the homeowner. The Respondent has held a home improvement license since 1992; he is experienced enough to know the importance of a written contract.

⁴ As to the Claimant's contention that the Respondent's work was defective, the Claimant breached the Contract by refusing to honor the payment terms. If she had not done so, the Respondent would have had the opportunity and obligation to correct any defects in his performance before being entitled to the final payment. Because of the Claimant's breach, the Respondent was legally justified in refusing to perform any further work on the House.

⁵ Through his attorney, the Respondent made numerous offers to the Claimant in an effort to resolve the dispute; the Claimant, through her attorney, rejected all those offers. The MHIC may deny a claim where a claimant has rejected the contractor's good faith efforts to resolve the dispute. Md. Code Ann., Bus. Reg. § 8-405(d) (2010).

Second, the Claimant is employed by the federal government and, in the course of her employment, by her own admission, she administers multi-million contracts. As someone who is familiar with contract administration, the Claimant knows that a written agreement controls the relationship between the parties. I do not believe that she signed the Contract believing that she could pay the Respondent whenever she wished.

Third, the parties' conduct refutes the Claimant's testimony. The Respondent gave the Claimant receipts for two of the payments, referring to the terms of the Contract. This course of conduct refutes the Claimant's testimony that she could pay the Respondent whenever she thought he was entitled to money.

Finally, the Respondent credibly denied the Claimant's version of the events. His testimony is consistent with the documentary evidence in the record and I accept his testimony over the Claimant's, which is not supported by anything in the record, other than her self-serving writings. Furthermore, the Respondent was thoughtful, dispassionate and professional throughout the dispute and at the hearings; the Claimant was at times agitated and unreasonable. The Claimant and the Respondent engaged in many email exchanges about the construction project. The Claimant's emails started out calmly, focusing on the details of the work. As the project progressed, however, her emails took on an increasingly strident tone. In order to get her way, the Claimant threatened the Respondent with litigation, bad publicity, and harmful postings on the internet. The Claimant bragged that she knew how to win, claiming that she had gotten rid of neighbors who bothered her. The Claimant became rude, profane and bullying. At times she insisted that the Respondent answer her demands for information about insignificant items, such as an extension cord she claimed was missing.

In contrast, throughout the email exchanges and during his attendance at the hearings in this case, the Respondent remained calm, focused on the project, and professional. The Claimant became agitated at times during the hearing, arguing over insignificant points with the same emphasis as the main issues.

I conclude that the Claimant adopted an adversarial stance against the Respondent when she could not get him to agree to modify the payment terms of the Contract to suit her. Once the Respondent refused her unlawful demands and walked away from the job, the Claimant adopted a win-at-any-cost attitude toward him. I further conclude that the Claimant's animus toward the Respondent caused her to testify about the Contract and the Respondent's performance in a manner calculated to place him in the worst possible light. I, therefore, have given the Claimant's testimony no weight on the points disputed by the Respondent.

The Claimant contended that the Respondent agreed to build the addition in accordance with the Thomas Plans. I reject that assertion for the following reasons. The Claimant agreed to have the Respondent create substitute plans. (Approved Plans). The Claimant indicated her assent by initialing those plans before the work began. The Claimant testified that she thought it was unnecessary to have new plans created, but she did not deny that she agreed to pay for the Approved Plans or that she signed them. I conclude that the Respondent agreed to construct the renovation according to the Approved Plans, not the Thomas Plans.

The Claimant is undoubtedly very upset that the Respondent left the incomplete project at her House, causing her to have to hire another contractor to complete the project. She clearly believes that the payment terms of the Contract left her exposed to potential loss if the Respondent did not complete the project to her satisfaction. Unfortunately for the Claimant, however, the Respondent adhered to the terms of the Contract while she did not. Consequently, I

find that the Claimant has not met her burden of proof in this action to prove that she sustained an actual loss as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405(a) (2010). *See also* COMAR 09.08.03.03B(2).


CONCLUSIONS OF LAW

I conclude that the Claimant has not sustained any actual loss as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405(a) (2010).

RECOMMENDED ORDER

I **PROPOSE** that the Maryland Home Improvement Commission:
ORDER, that the Claimant's Fund claim be **DENIED**; and
ORDER, that the records and publications of the Maryland Home Improvement Commission reflect this decision.

September 17, 2010
Date decision mailed


Mary R. Craig
Administrative Law Judge

MRC/bs
116675

IN THE MATTER OF THE CLAIM OF * BEFORE MARY R. CRAIG,
ROBIN M. DOWNING * 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-02-09-46612
OMISSIONS OF PAUL H. CHRETIEN t/a * MHIC NO.: 09 (75) 985
CALIFORNIA BUILDERS, INC.

* * * * *

FILE EXHIBIT LIST

I admitted the following exhibits on the Claimant's behalf:

- CL 1 Contract between California Builders, Inc. and the Claimant, May 9, 2008
- CL 2 Addendum to May 9, 2008 contract between the Claimant and the Respondent (typed and handwritten versions)
- CL 3 Additional work authorization signed by the Claimant August 6, 2008
- CL 4 Architect's drawing for renovations to the Claimant's house
- CL 5 Construction drawings prepared by the Respondent for renovations to the Claimant's house
- CL 6 The Claimant's check 3162
- CL 7 Photographs (A through U) of the Claimant's House before and during construction
- CL 8 Emails exchanged between the Respondent and the Claimant
- CL 9 Not admitted
- CL 10 Photographs
- CL 11 Photographs

- CL 12 Photographs
- CL 13 Photographs
- CL 14 Emails exchanged between the Claimant and the Respondent
- CL 15 Photographs
- CL 16 Letter from Nathan I. Finklestein, Esquire, to the Respondent
- CL 17 Letter from Mr. Finklestein to the Respondent
- CL 18 Montgomery County Inspection document
- CL 19 Email from Jim McCullough to the Claimant, January 6, 2010
- CL 20 Photographs (A through L) of the condition of the Claimant's House after the Respondent ceased work
- CL 21 Letter from Thomas S. Rand, Jr., Esquire, to Mr. Finklestein, November 14, 2008
- CL 22 The Claimant's receipts from Kinkos and Hardware City
- CL 23 Emails exchanged between Mr. Rand and Mr. Finklestein
- CL 24 MCP Masonry invoices
- CL 25 Dick's Hauling and Trash Removal receipt and the Claimant's check
- CL 26 Photographs
- CL 27 Demolition and Framing Contract, Abacus Remodeling, December 8, 2008
- CL 28 Abacus Remodeling, Inc. invoice 1002
- CL 29 The Claimant's check 3189
- CL 30 Abacus Remodeling, Inc. invoice 993
- CL 31 The Claimant's check 3195
- CL 32 Abacus Remodeling, Inc. invoice 1002
- CL 33 Photographs

I admitted the following exhibits on the Fund's behalf:

- GF 1 Notice of Hearing
- GF 2 MHIC Hearing Order, December 30, 2009
- GF 3 Record from MHIC regarding the Respondent's license status, May 19, 2010
- GF 4 Claim, received by MHIC June 23, 2009
- GF 5 Return receipt for mailing

I admitted the following exhibits on the Respondent's behalf:⁶

- R 1 Emails exchanged between the Claimant and the Respondent
- R 2 Emails exchanged between the Claimant and the Respondent
- R 3 The Claimant's handwritten notes to the Respondent, October 17, 2008
- R 4 Email from Mr. Rand to Mr. Finkelstein, November 22, 2008
- R 13 Construction drawings initialed by the Claimant August 5, 2008

⁶ The Respondent did not offer his pre-marked exhibits 5 through 12 for admission into evidence.

PROPOSED ORDER

WHEREFORE, this 25th day of October 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