

IN THE MATTER OF THE CLAIM	* BEFORE SONDRAL. SPENCER,
OF NORMA SHEARER-	* AN ADMINISTRATIVE LAW JUDGE
DIGENNARO,	* OF THE MARYLAND OFFICE
CLAIMANT,	* OF ADMINISTRATIVE HEARINGS
AGAINST THE MARYLAND HOME	* OAH NO.: DLR-HIC-02-14-09037
IMPROVEMENT GUARANTY FUND	* MHIC NO.: 12(05) 1152
FOR THE ALLEGED ACTS OR	*
OMISSIONS OF DAVID FLEMING,	*
T/A PENINSULA BUILDING GROUP,	*
LTD	*
RESPONDENT	*

* * * * *

RECOMMENDED DECISION

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STATEMENT OF THE CASE

On April 15, 2012, Norma Shearer-Digennaro (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement for actual losses suffered as a result of a home improvement contract with David Fleming, trading as Peninsula Building Group, LTD (Respondent).

I held a hearing on June 23, 2014 at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010 & Supp. 2013). Peter

Martin, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. Michael Moran, Esq., represented the Claimant. The Respondent failed to appear at the hearing.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, 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 & Supp. 2013), Code of Maryland Regulations (COMAR) 09.01.03; 09.08.02; 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

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

- Cl. Ex. # 1 Contract and Change Order Summary; Payment Schedule Summary; Expenses
- Cl. Ex. # 2 Contract between the Claimant and the Respondent, dated March 24, 2011 and signed March 28, 2011
- Cl. Ex. # 3 Unsigned Revised Contract between the Claimant and the Respondent, dated October 6, 2011
- Cl. Ex. # 4 Additional Work Authorizations, dated July 29, 2011, August 18, 2011, and October 6, 2011
- Cl. Ex. # 5 Thirteen Cancelled Checks
- Cl. Ex. # 6 Photographs
- Cl. Ex. # 7 Photographs
- Cl. Ex. # 8 Emails between the Claimant and the Respondent
- Cl. Ex. # 9 Photographs

- Cl. Ex. # 10 Handwritten list and Home Depot receipts
- Cl. Ex. # 11 Handwritten list and Lowes receipts
- Cl. Ex. # 12 Handwritten list and Walmart receipts
- Cl. Ex. # 13 Receipt from Maisel Bros., Inc.
- Cl. Ex. # 14 Receipts from Tom Casson's Nursery, Inc.
- Cl. Ex. # 15 Receipt from Allied Building Products Corp.
- Cl. Ex. # 16 Proposal from Eney's Electric, LLC
- Cl. Ex. # 17 Job Invoice from J.T. Waterworks, Inc.
- Cl. Ex. # 18 Handwritten calculations and Just Cabinets receipt
- Cl. Ex. # 19 Invoice from Long Fence
- Cl. Ex. # 20 Ion Construction Proposal
- Cl. Ex. # 21 Ion Construction Proposal
- Cl. Ex. # 22 Admiral Home Improvements Contract; Two checks
- Cl. Ex. # 23 Photographs
- Cl. Ex. # 24 Photographs
- Cl. Ex. # 25 Photographs
- Cl. Ex. # 26 Photographs
- Cl. Ex. # 27 Photographs
- Cl. Ex. # 28 Photographs
- Cl. Ex. # 29 Typed List of Work Deb and Ion Will Do in New Addition, October 25, 2011
- Cl. Ex. # 30 Steve Klitsch's Resume
- Cl. Ex. # 31 Creative Concepts Remodeling, Inc. License
- Cl. Ex. # 32 January 13, 2013 Letter to the Claimant from Creative Concepts Remodeling, Inc.

Cl. Ex. # 33 December 13, 2012 Repair and Improvement Proposal from Creative Concepts Remodeling, Inc.

The following exhibits were admitted into evidence on behalf of the MHIC Fund:

Fund Ex. # 1 May 13, 2014 Hearing Notice and March 12, 2012 Hearing Order mailed to Respondent by certified mail and returned marked "unclaimed"

Fund Ex. # 2 June 2, 2014 Letter to the Respondent from the MHIC and signed certified mail receipt from the Respondent

Fund Ex. # 3 Affidavit of William Banks, Jr., confirming the Respondent's address

Fund Ex. # 4 MHIC printout

Fund Ex. # 5 Respondent's Licensing History

Fund Ex. # 6 April 15, 2012 Home Improvement Claim Form

Fund Ex. # 7 January 20, 2014 Letter from Claimant to the MHIC with attachments

Fund Ex. # 8 Two November 6, 2013 Letters from the MHIC to the Respondent with attachments

Fund Ex. #9 June 17, 2014 Memorandum from the MHIC

The Respondent failed to appear at the hearing; no exhibits were submitted into evidence on his behalf.

Testimony

The Claimant testified on her own behalf and presented the testimony of Charles Steven Klitsch, who testified as an expert in home remodeling.

The Fund did not present any witnesses. The Respondent failed to appear and did not present any witnesses at the hearing

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. The Respondent's license expired on May 30, 2012.

2. On March 28, 2011, the Claimant and the Respondent entered into a contract to build a 27' W x 28' D x 8' H family room addition over a crawl space with a reverse A gable roof to the Claimant's home. The contract price was \$31,275.00.
3. The scope of the work was as follows:
 - New addition finished floor level with existing house floor (owner will specify type of flooring prior to construction)
 - Install footings
 - Foundation to match existing foundation
 - Relocate and reconnect existing AC unit
 - Construct exterior walls
 - Remove and reinstall existing French doors
 - Install three windows
 - Install insulation
 - Construct fireplace rough opening
 - Construct a walk-in closet with a door opening to attach to rear wall of existing house
 - Install two skylights in the roof
4. The contract specified that the Claimant would perform the following work:
 - Install exterior siding
 - Finish drywall and paint
 - Complete interior trim and paint
 - Finish flooring
5. On July 29, 2011, the Claimant and the Respondent executed an additional work authorization to demolish, breakup, remove, and properly dispose of concealed poured and reinforced concrete porch, support walls, and footings. The authorization also included an underground feed for the shed and garage. The cost of the additional work was \$1,500.00.
6. On August 18, 2011, the Claimant and the Respondent executed another additional work authorization to upgrade the HVAC system and tie it into the addition. The cost of the additional work was \$8,850.00.
7. The total contract price with the original and additional work was \$41,625.00.

8. The Respondent worked on the project from August 6, 2011 until August 23, 2011. During that time, the Respondent installed footing, the foundation, and subflooring.
9. As of September 8, 2011, the Claimant paid the Respondent \$25,200.00.
10. The Respondent did not do any work on the project between August 23, 2011 and October 6, 2011.
11. On October 6, 2011, the Claimant and the Respondent expanded the scope of the work to include the following:
 - Change original house addition to include two bedrooms with closets, one full bath with small linen closet, one family/living area and one kitchenette with wet/dry sink, hall closet and pantry
 - Supply and install additional ¾" subfloor
 - Supply and install a white acrylic bath tub and surround, a white standard height toilet, lid and hardware, a white 24" vanity, vanity top, medicine cabinet with mirror, exhaust fan and light, light over vanity and waterproof light over bath tub
 - Supply and install kitchenette sink, disposal and single lever faucet
 - Supply and install a tank-less, gas-fired hot water heater to replace existing water heater
 - Supply and install upgraded main house sump pump
 - Upgrade electric and required circuitry to code
 - Supply and install all electrical wiring, switches, devices, wall plates, smoke/CO detectors to code, one bathroom exhaust fan/light, one vanity light fixture, fluorescent closet lighting, flush ceiling lighting, recessed light fixtures and ceiling fans, three exterior light fixtures, one phone line, one television line and one computer line
 - Supply back-up generator
 - Remove entire roof and install new roof
 - Supply and install insulation in the attic of existing house
 - Install a concrete service entrance ramp, step and white vinyl safety railing
 - Supply and install carpet and padding
12. The cost of the revised contract was \$40,900.00. The total contract price as of October 6, 2011 was \$82,525.00.
13. By March 2012, the Claimant had paid a total of \$72,100.00 to the Respondent on the \$82,525.00 contract.

14. The Respondent sporadically worked on the contract from October 6, 2011 through March 2012. During that time, the Respondent completed the framing, installed insulation, completed the roof on the addition and original structure, and installed windows.
15. The Claimant refused to make any payments after March 2012 because the contract was not completed. Between March 2012 and May 2012, the Claimant and the Respondent continued to discuss the completion of the project and the final payment.
16. The Respondent did not perform any work under the contract after March 2012.
17. As of March 2012, the following work needed to be completed or corrected by the Respondent:
 - Exterior walls not straight
 - Doors not installed
 - Electrical panel not installed
 - Hot and cold water lines not installed
 - Kitchen base cabinets not secured to wall
 - Redo bathroom
 - Complete tile work
 - Fix buckling floor boards
 - Countertops not installed
 - Windows need caulking and screens
18. The value of the work performed by the Respondent was approximately \$32,000.00 and the cost to complete the contracts as written is \$34,972.87.
19. The Claimant's daughter and son-in-law completed the project with materials purchased by the Claimant.

DISCUSSION

I. Notice of the hearing

A threshold question in this case is whether the Respondent received timely notice of the hearing. If the Respondent was properly notified of the hearing, the case could proceed in his absence.

A Notice of Hearing was mailed to the Respondent by certified and regular mail on May 13, 2014 to the address (2116 Riverview Road, Baltimore, MD 21221) that the MHIC had on record for the Respondent. The regular mail was not returned and the certified mail was returned as “unclaimed.” On June 2, 2014, an Assistant Attorney General mailed the Notice of Hearing and the Hearing Order by certified and regular mail to the Respondent to the same Riverview Road address. The regular mail was not returned and the certified mail was received by the Respondent on June 18, 2014. Thus, I find that the Respondent received proper notice of the hearing and failed to appear. Accordingly, the case properly proceeded in his absence, adequate notice having been given. *See*, Md. Code Ann., Bus. Reg. §§ 8-312(h) (2004).

II. The law

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.2013). *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 proven eligibility for compensation.

First, the Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant.

Bus. Reg. § 8-405(e)(1) and (5) (Supp. 2013). The Claimant's actual loss exceeds the \$20,000.00 maximum award. Therefore, I recommend that the Fund award the Claimant for an actual loss sustained in the amount of \$20,000.00.¹

CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual loss of \$20,000.00 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 \$20,000.00; 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.

Signature on File

September 16, 2014
Date Decision Mailed

Sondra L. Spencer
Administrative Law Judge

SLS/cmh
#151323

¹ The governing statute provides that the "[MHIC] may not award . . . more than \$20,000.00 to one claimant for acts or omissions of one contractor . . ." The MHIC's regulations provide that it may not award more than \$15,000.00 in such circumstances. Compare Md. Code Ann., Bus. Reg. § 8-405(e)(1)(Supp. 2013) with COMAR 09.08.03.03D(2)(a). The difference between the statute and the regulation constitutes a conflict, as a result of which I am bound to follow the statute. *Thanner Enterprises v. Balt. Cnty.*, 414 Md. 265, 276 (2010).

Second, the Respondent failed to complete the work outlined in the contract and performed work in an unworkmanlike manner despite being paid all but \$10,000.00 on an \$82,525.00 contract. All of the evidence presented by the Claimant – both documentary and testimonial – was uncontroverted. In addition, the Claimant presented an expert witness, whose testimony supported the documentary evidence. Although there was some confusion about the scope of the contracts as they related to the interior and exterior of the addition, the expert's analysis of the Respondent's work and his assessment of what the Respondent did not complete were not disputed. The Respondent failed to complete the work required under the contracts and some of the work he performed was unworkmanlike. According, the Claimant is entitled to a Fund award.

III. Actual loss

Having found eligibility for compensation, I now turn to the amount of the award, if any. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1). MHIC's regulations offer three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). None of those formulas are appropriate in this case and, therefore, I have applied a unique formula because the Claimant did not pay the entire contract amount and the contract was completed by the Claimant's son-in-law and daughter:

Amount paid to contractor under contract	\$72,100.00
Value of the work done by contractor	<u>- 32,000.00</u>
TOTAL	\$40,100.00

The maximum recovery from the Fund is limited to the lesser of \$20,000.00 or the amount paid by or on behalf of the Claimant to the Respondent. Md. Code Ann.,

PROPOSED ORDER

WHEREFORE, this 10th of October 2014, Panel B of the Maryland Home Improvement Commission approves the Recommended Decision 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