

IN THE MATTER OF THE CLAIM	* BEFORE MARINA LOLLEY SABETT,
OF KRISTY A. WALLMO,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT,	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	* OAH NO.: DLR-HIC-02-12-35129
FOR THE ALLEGED ACTS OR	* MHIC NO.: 12 (05) 116
OMISSIONS OF DAVID R. WOLFF,	*
T/A DAVID R. WOLFF	*
CONSTRUCTION, INC.,	*
RESPONDENT	*

* * * * *

RECOMMENDED DECISION

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STATEMENT OF THE CASE

On December 16, 2011, Kristy A. Wallmo (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement for actual losses allegedly suffered as a result of a home improvement contract with David R. Wolff, t/a David R. Wolff Construction, Inc. (Respondent).

I held a hearing on April 29, 2013 at the Wheaton Park Office Complex, 11510 Georgia Avenue, Suite 190, Wheaton, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010 &

Supp. 2012). Hope Sachs, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), represented the Fund. The Claimant represented herself. Neither the Respondent nor any representative appeared for the hearing on his behalf.

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. 2012), Code of Maryland Regulations (COMAR) 09.01.03.01; 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

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

- Cl. Ex. 1 Home Improvement Contract with the Respondent, March 11, 2010
- Cl. Ex. 2 Estimate from the Respondent, April 2, 2009, with attachments
- Cl. Ex. 3 Invoices and cancelled checks to Respondent
- Cl. Ex. 4A-E Printed photographs
- Cl. Ex. 5A E-mail from the Claimant to the Respondent, June 24, 2011, with attached letter
- Cl. Ex. 5B E-mail from the Claimant to the Respondent, July 8, 2011
- Cl. Ex. 5C E-mail from the Respondent to the Claimant, July 11, 2011
- Cl. Ex. 5D E-mail from the Claimant to the Respondent, July 13, 2011
- Cl. Ex. 6 Letter from the Office of Consumer Protection to the Respondent, August 2, 2011
- Cl. Ex. 7 Letter from the Office of Consumer Protection to Jerry Hovis, October 14, 2011
- Cl. Ex. 8 Letter from the Office of Consumer Protection to Jerry Hovis, March 19, 2012
- Cl. Ex. 9 Letter from Joe Cherry, Twin Advantage Home Improvements, to Whom It May Concern, August 2, 2011, with Estimate
- Cl. Ex. 10 Invoice from Banner Home Solutions and cancelled check, October 26, 2011
- Cl. Ex. 11 Edgewater Tile & Granite invoice and cancelled checks
- Cl. Ex. 12 David Farrell Glass and Mirror, LLC, estimate and cancelled check
- Cl. Ex. 13 Invoice from Select Floors, Inc., and cancelled check
- Cl. Ex. 14 Proposal for James E. Flynn, Inc., and cancelled checks
- Cl. Ex. 15 Estimate from A. Dean Electric and cancelled checks
- Cl. Ex. 16 Invoice from Hubrig Heating and Cooling and cancelled check

- Cl. Ex. 17 Invoice from Foam InSEALators of MD & VA and cancelled check
- Cl. Ex. 18 Invoice from Twin Advantage Home Improvements with cancelled checks
- Cl. Ex. 19 Explanation of the claim

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

- Fund Ex. 1 Memo from Sandra Sykes to Legal Services, February 20, 2013, with returned mail
- Fund Ex. 2 Memo from Sandra Sykes to Legal Services, February 20, 2013, with returned mail
- Fund Ex. 3 Memo from Sandra Sykes to Legal Services, February 14, 2013, with returned mail
- Fund Ex. 4 Memo from Sandra Sykes to Legal Services, December 26, 2012, with returned mail
- Fund Ex. 5 Memo from Sandra Sykes to Legal Services, December 26, 2012, with returned mail
- Fund Ex. 6 Memo from Sandra Sykes to Legal Services, December 26, 2012, with returned mail
- Fund Ex. 7 Affidavit of Thomas Marr, IV, January 31, 2013, with attachments
- Fund Ex. 8 Home Improvement Commission Information regarding the Respondent
- Fund Ex. 9 Letter from the DLLR to the Respondent, December 27, 2011, with attachments

Testimony

The Claimant testified on her own behalf and presented the testimony of Gerald (Jerry)

Hovis.

No other testimony was presented.

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 #96884.
2. On March 16, 2010, the Claimant and Jerry Hovis entered into a contract with the Respondent in which the Respondent was to build a two-story addition to the Claimant's home in exchange for the sum of \$123,240.00 (Contract). (Cl. Ex. 1).
3. The Contract incorporated an estimate laying out the scope of work. (Cl. Ex. 2). The scope of work included the following: heating and cooling; masonry-footings and block work; plans, permits and engineering; demolition/removal of all existing interference and trash; floor coverings-hardwood floor system; interior wall tile; floor framing with

plywood subfloor; wall framing – interior wall framing; framing-roof system with plywood and overhangs; wall framing – exterior; roofing, flashing, and shingles on roof; vinyl siding; interior walls – drywall, durock, tape and mud; windows and trim – new windows for addition; electrical and lighting – labor and materials; insulation; exterior trim and decks – moldings and soffit; millwork and trim – baseboards, closet shelving and access panels; plumbing materials and labor allowance; painting-one coat of primer and two coats of paint; interior doors and trim; cleanup and restoration; roofing – flashing, gutters and downspouts; and includes 750 sq. ft. of new living space, including ¾ bath, laundry room and master suite. (Cl. Ex. 2, pp. 1-2).

4. The Contract indicated that construction would begin approximately May 1, 2010 and be completed around September 3, 2010. The Contract was “performance-based”, breaking up the payment of \$123,240.00 into six installments. (Cl. Ex. 1, pp.1-2).
5. Although various work was completed under the Contract, the Respondent ultimately abandoned the work in June 2011, which was the last time that the Respondent did any work under the Contract.
6. The Claimant attempted to contact the Respondent on numerous occasions via email, registered mail and phone to find out if he intended to finish the long-overdue work under the Contract. In response, the Respondent only sent one e-mail on July 11, 2011, in which he stated that he was “throwing as much money as I can afford towards your project” and that “I said I am not leaving you and I’m not.” Cl. Ex. 5A- Ex. 5C. Despite this July 11, 2011 e-mail, the Respondent never contacted nor responded to further contact from the Claimant regarding completion of the work under the Contract. Cl. Ex. 5D.

7. As of July 17, 2011, the Claimant had paid \$117,435.00 to the Respondent under the Contract. Cl. Ex. 3.
8. At that time, the following items of work remained unfinished at the Claimant's house: installation of siding on the entire addition, completion of the master bath, including installation of tile, shower door and all fixtures such as toilet, vanity, shower head, faucet handles and lighting; installation of wood floor in the master closet; completing the laundry room, including venting the dryer to the outside; completion of plumbing, electrical and HVAC work sufficient to pass Montgomery County inspections; and sealing the crawl space under the new addition.
9. In order to complete the work that the Respondent had abandoned under the Contract, the Claimant paid a total of \$31,568.25 to various contactors all of whom were licensed or otherwise acting under the auspices of an MHIC license.
10. Specifically, Joe Cherry of Twin Advantage Home Improvement (Twin Advantage), who oversaw or otherwise directed the work that needed to be done to correct or complete the work under the Contract, had his MHIC license at all times relevant to this case.
11. Banner Home Solutions (Banner) (to whom the Claimant paid \$8,740.00 for installation of the siding and downspouts that should have been installed under the Contract –Cl. Ex. 10) also had an MHIC license at all times relevant to this matter.
12. In addition to paying Banner \$8,740.00, the Claimant paid the following for completion or repair of various work that should have been completed or otherwise done properly under the Contract: \$3,680.00 for completion of the tile and other work in the master bath and laundry (Cl. Ex. 11); \$1,029.35 for completion of shower stall and various fixtures (Cl. Ex. 12); \$1,238.52 for installation of wood flooring in the master closet, moldings

and related tasks (Cl. Ex. 13); \$3,865.00 for installation of various fixtures, valves and traps in the bathrooms and transfer of gas line permit and running of gas line to the dryer (Cl. Ex. 14); \$7,900.00 to complete electrical work (Cl. Ex. 15); \$592.00 for completion of the HVAC work (Cl. Ex. 16); \$1,310.50 for completion of the insulation (Cl. Ex. 17); and \$3,212.88 for the various labor and services of Twin Advantage to complete or repair the various projects under the Contract.

13. The total amount that the Claimant had to pay to repair or complete the work under the Contract was \$31,568.25.
14. By letter dated October 14, 2011, the Maryland Office of Consumer Protection (Consumer Protection) notified Jerry Hovis that in response to the complaint he lodged about the Respondent, Consumer Protection had contacted Mr. Wolff who verified that he was significantly in debt and without resources to complete the Claimant's job. Cl. Ex. 7. The letter further suggested that Mr. Hovis and/or the Claimant file a complaint with the MHIC. Id.
15. On December 16, 2011, the Claimant filed a claim for reimbursement from the MHIC Guaranty Fund for the losses the Claimant suffered as a result of the Respondent's conduct.

DISCUSSION

The Respondent's Failure to Appear

Neither the Respondent nor anyone authorized to represent the Respondent appeared at the hearing.

On February 20, 2013, the OAH mailed a Notice of Hearing (Notice) and a copy of the June 22, 2012 MHIC Hearing Order (Hearing Order) by certified and first class mail to the

Respondent's address of record at 302 Prettyman Drive, Apt. 11205, Rockville, MD 20850. The Notice advised the Respondent of the time, place and date of the hearing. The United States Postal Service (USPS) returned both as undeliverable as addressed. Fund Ex. 1 and Ex. 2. Thomas Marr, IV, an investigator for the MHIC, verified in a personal affidavit dated January 13, 2013, that based on his review of active MVA records, this was the last home address of record for the Respondent. Fund Ex. 7. Additionally, on December 12, 2012, the Notice for the April 29, 2013 hearing as well as the Hearing Order were sent by certified and first class mail to the Respondent's last business address of record on file with the MHIC (10410 Kensington Pkwy, Suite 214, Kensington, MD 20895) and to the last home address that the Respondent put on file with the MHIC (300 Prettyman Drive, Rockville, MD 20850). Each of these mailings was either returned as "Unclaimed Moved" (certified mail to Kensington Pkwy address, Fund Ex. 3) or "undeliverable as addressed" (Fund Ex. 4, 5 and 6). Additionally, on December 27, 2011, the MHIC had sent a letter to the Respondent's last business address of record on Kensington Pkwy informing him of the Claimant's claim against him. Fund Ex. 9.

The Respondent failed to update his address information with the MHIC, as he is required to do within ten days of any such address change. COMAR 09.08.01.11. The MHIC went the additional step of searching the MVA records for an additional address of record. Fund Ex. 7. Although all copies of the Notice and Hearing Order that were sent to three different addresses of record were returned as stated above, I find that the Respondent is "deemed to have had a reasonable opportunity to know of the fact of service." Md. Code Ann., State Gov't § 10-207(c). Consequently, I directed that the hearing proceed in the Respondent's absence pursuant to section 8-312(h) of the Business Regulation Article, section 10-209 of the State Government Article, and COMAR 09.01.02.07 and .11.

The Merits

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. 2012). *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). In the instant case, I find that the Claimant proved an actual loss based on the acts or omissions of the Respondent and that the Claimant is entitled to the statutory limit of \$20,000.00 in compensation from the Fund for the reasons that follow.

There is no question that the Respondent, who held an MHIC license at all times relevant to this matter, abandoned his obligation to build a two-story addition to the Claimant’s home per the Contract that he entered into with the Claimant and Jerry Hovis on March 16, 2010. Cl. Ex. 1 and Cl. Ex. 2. The work was to begin on approximately May 1, 2010, and be completed by approximately September 3, 2010; however, as of July 2011, the Claimant had paid \$117,435.00 of the \$123,240.00 total price under the Contract, and still needed to invest another \$31,568.25 to repair or otherwise complete the inadequate home improvement of the Respondent. Although the Respondent indicated in a July 11, 2011 e-mail to the Claimant that it was not his intent to abandon work under the Contract, the Claimant never heard from the Respondent after that date, even when the Claimant attempted, yet again, to contact the Respondent after that time. By letter dated October 14, 2011, Consumer Protection informed Jerry Hovis that the Respondent was significantly in debt and without resources to complete the job. Cl. Ex. 7.

The Claimant credibly testified and the Contract showed that the two-story addition was to have a new master bedroom and bath, a laundry room, various electrical, plumbing and HVAC

upgrades to accommodate the new addition, various millwork and finishes, new windows, hardwood floors and insulation installed on the inside, as well as roofing, siding, flashing, and gutters installed on the outside. Cl. Ex. 1, 2 and 4A-E. Unfortunately, the Respondent left many tasks unfinished or performed them in an unworkmanlike manner.

Accordingly, the Claimant hired Joe Cherry of Twin Advantage, who oversaw or otherwise directed the work that needed to be done to correct or complete the work under the Contract, and who the Claimant had verified was licensed by the MHIC at all times relevant to this case. The Fund did not dispute that Mr. Cherry was licensed by the MHIC. Mr. Cherry represented to the Claimant that all of the subcontractors that he hired/recommended for the Claimant's project had MHIC licenses in any event. Independent of Mr. Cherry's representation, the Claimant verified that Banner (to whom the Claimant paid \$8,740.00 for installation of the siding and downspouts that should have been installed under the Contract –Cl. Ex. 10) also had an MHIC license at all times relevant to this matter. The Fund did not dispute that the various subcontractors used by Mr. Cherry and/or the Claimant held MHIC licenses.

In addition to paying Banner \$8,740.00, the Claimant paid the following for completion or repair of various work that should have been completed or was completed improperly by the Respondent under the Contract: \$3,680.00 for completion of the tile and other work in the master bath and laundry (Cl. Ex. 11); \$1,029.35 for completion of shower stall and various fixtures (Cl. Ex. 12); \$1,238.52 for installation of wood flooring in the master closet, moldings and related tasks (Cl. Ex. 13); \$3,865.00 for installation of various fixtures, valves and traps in the bathrooms and transfer of gas line permit and running of gas line to the dryer (Cl. Ex. 14); \$7900.00 to complete electrical work (Cl. Ex. 15); \$592.00 for completion of the HVAC work (Cl. Ex. 16); \$1,310.50 for completion of the insulation (Cl. Ex. 17); and \$3,212.88 for the

various labor and services of Twin Advantage to complete or repair the various projects under the Contract. (Cl. Ex. 18).

The total amount that the Claimant had to pay to repair or complete the work under the Contract was \$31,568.25.

I now turn to the amount of the award for which the Claimant is eligible. Preliminarily, it should be noted that 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). It should also be noted that 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., Bus. Reg. §8-405 (e)(1) and (5) (Supp. 2012).

With this in mind, MHIC regulations offer three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). The appropriate formula in this case is as follows:

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).

Applying that formula here, the Claimant paid \$117,435.00 of the \$123,240.00 total price under the Contract. The Claimant needed to invest an additional \$31,568.25 to repair or otherwise complete the inadequate home improvement of the Respondent.

When the \$31,568.25 that the Claimant paid to repair/complete the Respondent's work under the Contract is added to the \$117,435.00 that she paid to the Respondent, the total is \$149,003.25. When the amount of the Contract at issue, \$123,240.00, is subtracted from the amount that the Claimant paid to the Respondent and for repair work, the difference is \$25,763.25. The calculation is as follows:

\$117,435.00	Amt. Claimant Paid Respondent for Work Per the Contract
<u>+ 31,568.25</u>	<u>Amt. Claimant Paid to Repair/Complete Work Per the Contract</u>
\$149,003.25	Total
<u>-\$123,240.00</u>	<u>Amount of the Contract</u>
\$ 25,763.25	Actual Loss

Although the actual loss in this case is \$25,763.25, the Claimant is entitled to only a portion of her actual loss from the Fund. 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, as stated above. Md. Code Ann., Bus. Reg. §8-405 (e)(1) and (5). Accordingly, in the instant case the Claimant is entitled to reimbursement in the amount of \$20,000.00 from the Fund.

CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual/compensable 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;

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

July 24, 2013
Date Decision Mailed

;
Marina L. Sabett *her*
Administrative Law Judge

MLS/h
#143439

PROPOSED ORDER

WHEREFORE, this 30th day of September 2013, 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.

Marilyn Jumalon

***Marilyn Jumalon
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION