

IN THE MATTER OF THE CLAIM	* BEFORE SONDRAL SPENCER,
OF TOYE E. DARBY,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT,	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	* OAH NO.: DLR-HIC-02-13-14153
FOR THE ALLEGED ACTS OR	* MHIC NO.: 12(75)1349
OMISSIONS OF	*
KENNETH MOORE, T/A,	*
K & K CUSTOM CONSTRUCTION,	*
LLC,	*
RESPONDENT	*

* * * * *

RECOMMENDED DECISION

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STATEMENT OF THE CASE

On February 22, 2013, Toye E. Darby (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$12,500.00 for actual losses allegedly suffered as a result of a home improvement contract with Kenneth Moore, t/a, K & K Custom Construction, LLC (Respondent).

I held a hearing on July 17, 2013, at the Office of Administrative Hearings (OAH), 11101 Gilroy Road, Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010). The

Claimant represented herself. The Respondent represented himself. Kris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund.

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; 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 Business card of Ray Caputo, K & K Custom Construction, LLC
- CL. Ex. 2 Photo of Respondent's home with work partially completed, rear view
- CL. Ex.3 Photo of Respondent's home with work partially completed, side view
- CL. Ex.4 Copy of \$5,000.00 and \$7,000.00 checks Claimant paid Respondent, dated August 10, 2011 and August 18, 2011, respectively
- CL. Ex.5 Design plans for the construction by K & K Custom Construction, LLC, dated June 6, 2012
- CL. Ex.6 Estimate of construction costs by Forbes Home Improvement and Construction, Inc. at \$15,500.00, dated July 7, 2012

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

- GF Ex. 1 Notice of Hearing, dated April 29, 2013
- GF Ex. 2 Hearing Order from the MHIC, dated April 8, 2013
- GF Ex. 3 Licensing information of Respondent, dated July 15, 2013

- GF Ex. 4 Home Improvement Claim Form signed by the Claimant, dated February 22, 2013
- GF Ex. 5 Letter from the MHIC to the Respondent, with attachment, dated February 25, 2012
- GF Ex. 6 Letter from Baltimore City Housing Department to Claimant, dated February 24, 2012

No exhibits were offered on behalf of the Respondent.

Testimony

The Claimant testified on her own behalf.

The Fund did not present any witnesses.

The Respondent did not testify. He called Kevin Moore as a witness.

FINDINGS OF FACT

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

1. The Respondent was a licensed home improvement contractor effective August 23, 2011.
2. The Respondent was not a licensed home improvement contractor at the time of the initial contract signing with the Claimant, but he was licensed when most work was done on the Claimant's property.
3. On August 10, 2011, the Claimant and the Respondent entered into a contract (Contract). The Contract included the building of a sunroom, with a deck attached to the sunroom.¹ The Contract contained an arbitration clause. The Contract did not contain a start or finish date.²
4. The original agreed-upon contract price was \$15,000.00.
5. On August 10, 2011, the Claimant paid the Respondent \$5,000.00 and the Respondent started construction of the sunroom.

¹ No written contract was ever produced by either party.

² The Claimant has no recollection of the arbitration clause or of the presence, or lack thereof, of a start date. The Claimant claims she never received a copy of the Contract after she signed it.

6. The Contract provided that the Claimant would purchase all materials. Upon the Respondent's receipt of the materials, the Claimant paid the Respondent \$7,000.00 on August 18, 2011.
7. Sometime in August 2011, the Claimant notified the Respondent of a dirt delivery to fix the grade of her yard (Dirt Project). The Respondent advised the Claimant that work pursuant to the Contract could not be continued until the Dirt Project was completed.
8. At the time the Respondent was working at the Claimant's house, he was also building a house next to the Claimant. The Respondent began building the house next door prior to entering into the Contract.
9. The Respondent completed building the house next door to the Claimant before the Dirt Project was completed.
10. The Respondent never returned to the Claimant's home to perform work after the Dirt Project was completed.
11. In February 2012, after being contacted by the Claimant, the Respondent discussed completing the job.
12. In March 2012, the Claimant was notified by the Baltimore City Housing Authority that the Respondent had not pulled construction permits for the work at her house. The Claimant was instructed to cease all work and to pay fines.
13. After the Claimant notified the Respondent about the lack of a permit and the fines, the Respondent drew up drawings and applied for a permit in March 2012. The Respondent never obtained a permit to perform home improvement work at the Claimant's residence.
14. The Claimant made several attempts to contact the Respondent after March 2012 but the Respondent did not answer her communications.

15. The Claimant hired Forbes Home Improvement and Construction to install a sunroom and deck at a cost of \$15,500.00.
16. The Claimant's actual loss is \$12,500.00.

DISCUSSION

The Merits of the Claim

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 (2013). 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 that substantial work occurred under the Contract. The Respondent only lacked a license for a period of thirteen days (August 10-23, 2011), a time frame that involved only the delivering of supplies. Important here too is that the business card provided to the Claimant at time of the Contract did indeed have a license number, and therefore the Claimant believed that the Respondent was a licensed home improvement contractor at the time of the Contract. The Respondent's witness, Kevin Moore, also testified that he was under the impression the company was licensed and that the Respondent was just waiting for the physical copy of the license. After the licensing date of August 23, the Respondent engaged in the substantial portion of the contracted work, and thus he fulfills the licensing aspect required by the Fund.

Second, there is no dispute that the deck and sunroof were not completed by the Respondent. At the hearing, the Respondent appeared sincere in his apologies for the incomplete job; however, he argued that the Claimant should not be entitled to a Fund award because it was

the Claimant's fault for the substantial delays. The Respondent further maintained that the work done by Forbes was different from the original contract. With respect to the delay argument, I find this argument unpersuasive because the Respondent never obtained the proper permits and thus, could not have legally performed the work until he obtained them. Any delay caused by the Claimant was insubstantial compared to starting construction without the required permits. Additionally, the work performed by the Respondent had to be dismantled because there was no permit.

I conclude that the Claimant has presented extensive, credible evidence of an incomplete work performed by the Respondent. The Respondent did not dispute that the work was incomplete. The Respondent's argument that the work performed by Forbes was different from the Contract is unsuccessful because I cannot compare the Contract to the Forbes' contract. The Respondent opined that a copy of the Contract was in his mother's house. Absent the original written contract, I cannot conclude that the Forbes's contract exceeded the scope of the Contract.

The Fund asserted that the Claimant should be entitled to an award to cover the costs of the monies paid to Respondent and I must agree. As a result, the next issue is to determine the amount of the Claimant's actual loss. 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). The applicable regulation, however, provides in pertinent part 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).

Amount paid to the Respondent	\$12,000.00
Amount paid to Forbes	\$15,500.00
Total	\$27,500.00
Original Contract Amount	\$15,000.00
Actual Loss	\$12,500.00

Under Business Regulation § 8-405(e)(5) (Supp. 2012), the amount of an award to a claimant is limited to the amount the claimant paid the contractor whose work was inadequate, incomplete, or unworkmanlike. Accordingly, I recommend an award to the Claimant in the amount of \$12,000.00.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Claimant suffered an actual loss of \$12,500.00 and is entitled to be compensated in the amount of \$12,000.00 as a result of the acts or omissions of the Respondent. Md. Code Ann., Bus. Reg. §§ 8-401 (2010), 8-405(e)(5) (Supp. 2012); COMAR 09.08.03.03B(3)(c).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$12,000.00; 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, 2013
Date Decision Mailed

/Sondra L. Spencer
Administrative Law Judge

SLS/emh
#144474

PROPOSED ORDER

WHEREFORE, this 23rd day of October 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.

Andrew Snyder

*Andrew Snyder
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION