

<p>IN THE MATTER OF THE CLAIM</p> <p>OF PATRICK M. MADDEN,</p> <p>CLAIMANT</p> <p>AGAINST THE MARYLAND HOME</p> <p>IMPROVEMENT GUARANTY FUND</p> <p>FOR THE ALLEGED ACTS OR</p> <p>OMISSIONS OF CHUNG YI ,</p> <p>T/A CHUNG YI CONSTRUCTION</p> <p>AND DESIGN,</p> <p>RESPONDENT</p>	<p>* BEFORE BRIAN ZLOTNICK,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>* OAH NO.: DLR-HIC-02-15-07570</p> <p>* MHIC NO.: 14 (90) 844</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p>
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PROPOSED DECISION

STATEMENT OF THE CASE
SUMMARY OF EVIDENCE
ISSUE
PROPOSED FINDINGS OF FACT
RULING ON MOTION TO DISMISS
DISCUSSION
PROPOSED CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On or about September 25, 2014, Patrick M. Madden (Claimant) filed two claims¹ with the Maryland Home Improvement Commission (MHIC or Commission) Guaranty Fund (Fund) for reimbursement of \$16,207.50 for actual losses suffered as a result of home improvement work performed by Chung Yi, t/a Chung Yi Construction and Design (Respondent).

¹ The Claimant had a contract, dated September 9, 2013, for the construction of a lower deck by the Respondent at a cost of \$4,100.00. After completion of that contract, the Claimant entered into a second contract, dated November 4, 2013, with the Respondent for the construction of an upper deck and penthouse at a cost of \$8,465.00.

I held a hearing on June 2, 2015, at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimant represented himself and the Respondent was represented by Patrick Ewing, Esquire. Eric B. London, Assistant Attorney General, represented the Fund.

The Respondent made a Motion to Dismiss (Motion) at the outset of the hearing. After allowing the Claimant and the Fund an opportunity to respond to the Motion, I deferred ruling on the Motion until the issuance of this decision.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department of Labor, Licensing and Regulation (DLLR), and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014), 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 behalf of the Fund:

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| Fund #1 | Notice of Hearing, dated April 21, 2015 |
| Fund #2 | Hearing Order, dated February 12, 2015 |
| Fund #3 | Licensing history for the Respondent |
| Fund #4 | Letter from the MHIC to Respondent, dated October 8, 2014, with attached Home Improvement Claim Forms, marked received by the MHIC on September 25, 2014 |

I admitted the following exhibits on behalf of the Claimant:

- Cl. #1 E-mail from Respondent to Claimant, dated June 12, 2013
- Cl. #2 Baltimore City building permit requirements
- Cl. #3 Deck Construction Guide based on the 2006 International Residential Code
- Cl. #4 E-mail from Respondent to Claimant, dated September 19, 2013
- Cl. #5 Contract for the rooftop deck and penthouse, dated November 4, 2013
- Cl. #6 Respondent's response to March 21, 2014 complaint, with attached Baltimore City permit; March 20, 2014 e-mail; and November 1, 2013 contract
- Cl. #7 October 31, 2014 letter from Respondent's attorney to MHIC, with attached December 21, 2013 letter and e-mails
- Cl. #8 Photographs of rear deck taken in December 2013, with notations from Claimant
- Cl. #9 Photographs of rooftop deck and penthouse taken in December 2013, with notations from Claimant
- Cl. #10 Contract with Longridge Contracting for replacement of lower deck, dated September 7, 2014
- Cl. #11 Contract with Longridge Contracting for replacement of upper deck and penthouse, dated September 7, 2014

I admitted the following exhibits into evidence on behalf of the Respondent:

- Resp. #1 E-mails from Claimant to Respondent, dated from October 7, 2013 to October 9, 2013
- Resp. #2 E-mail exchange between Respondent and Claimant, dated June 14, 2013
- Resp. #3 Photograph of deck stairs
- Resp. #4 Practical Engineering article, February 2005
- Resp. #5 Baltimore City Building, Fire and Related Codes, 2015
- Resp. #6 Excerpt from International Residential Code, 2012
- Resp. #7 Excerpt from International Residential Code, 2012

- Resp. #8 Affidavit of George A. Bealefeld, III, dated June 1, 2015, with attached photographs
- Resp. #9 Lumbar invoice, dated September 11, 2013
- Resp. #10 Copy of cancelled check from Claimant to Respondent in the amount of \$4,232.50, dated November 4, 2013, for the upper deck
- Resp. #11 Copy of cancelled check from Claimant to Respondent in the amount of \$4,100.00, dated October 14, 2013, for the lower deck
- Resp. #12 E-mail exchange between Respondent and Claimant, dated November 7, 2013 and March 21, 2014

Testimony

The Claimant testified on his own behalf and presented the testimony of Patrick Schuler, Contractor.

The Respondent testified on his own behalf, and was accepted as an expert in home construction, remodeling and home improvement

The Fund did not present any testimony.

PROPOSED FINDINGS OF FACT

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

1. At all times relevant to the subject matter of this hearing, the Claimant owned 702 South Linwood Avenue (the Property).
2. In September 2013, the Claimant and the Respondent entered into an oral contract to rebuild the deck attached to the lower portion of the Property (lower deck) at a cost of \$4,100.00.
3. The lower deck was completed in early October 2013. The Claimant e-mailed the Respondent, on October 7, 2013 and October 9, 2013, stating that the deck is a solid build and that the deck looks good; however, he noticed a few items regarding the deck stairs that need to be addressed. (Resp. #1).

4. On October 14, 2013, the Claimant paid the Respondent \$4,100.00 for completing work on the lower deck. (Resp. #11).
5. The lower deck was constructed in accordance with the 2012 International Construction Code and it met or exceeded Baltimore City code requirements. (Respondent's testimony).
6. The Claimant then hired the Respondent to renovate an existing upper deck/penthouse attachment to the Property (upper deck). On November 4, 2013, the Respondent entered into a written contract with the Claimant to renovate the upper deck for a total amount of \$8,465.00. The contract specified that the Claimant shall pay the Respondent 50% of the contract price (\$4,232.50) before work commenced on the upper deck. (Cl. #5).
7. On November 4, 2013, the Claimant paid the Respondent the 50% payment of \$4,232.50.
8. The Respondent hired Patrick Shuler, Jr., to assist with the upper deck project. Work on the upper deck began in November 2013, with the majority of work performed by Mr. Shuler.
9. On November 22, 2013, the Respondent contacted the Claimant and requested payment of the remaining balance for the upper deck because work on that contract had been completed. The Claimant declined to pay the remaining balance and indicated to the Respondent that the work was not completed. (Claimant's testimony).
10. The work performed on the upper deck project was constructed in an unworkmanlike manner. (Respondent's proffer).
11. At the request of the Claimant, a meeting between him and the Respondent was held on December 20, 2013 at the Property. At this meeting the Claimant requested a refund of his deposit for the upper deck, but the Respondent wanted an opportunity to remedy the work. The Claimant gave the Respondent a conditional second chance, which required a

written statement from the Respondent that detailed how he would correct the issues with the upper deck. (Claimant's testimony).

12. On December 21, 2013, the Respondent drafted a letter and hand-delivered it to the Property and this letter was received by the Claimant. The December 21, 2013 letter expressed the Respondent's desire to correct the poor work performed on the upper deck project. The December 21, 2013 letter described in detail how the Respondent would remedy the issues involved with the upper deck. After the Claimant received the December 21, 2013 letter, his next step was to file a complaint with the MHIC in February 2014. (Cl. #7 and Claimant's testimony).
13. The Respondent and the Claimant communicated by e-mail after delivery of the December 21, 2013 letter and the Respondent indicated that he would return to fix the upper deck when the weather improved. (Respondent's testimony).
14. On March 20, 2014, the Respondent e-mailed the Claimant indicating that he was shocked that the Claimant filed a complaint against him. The Respondent reiterated in this e-mail that he wanted to make the upper deck contract right by the Claimant and that the Claimant had earlier stated that when the weather warmed up he expected the Respondent to make this contract right. (Resp. #12).
15. The Claimant responded to the March 20, 2014 e-mail with the following e-mail to the Respondent, dated March 21, 2014:

I am truly surprised you are shocked. When we met on December 20, 2013, I requested you to refund the \$8,322.50 I provided you. You wanted an opportunity to make it right and you were going to contact me shortly after January 1st with a written plan. You failed to contact me, therefore the Complaint. Based on [Respondent's] past and current performance, I do not trust that you or your employees can make it right. The path to resolution is for you to provide me with a certified check for \$8,322.50.

(Resp. #12).

16. The Respondent left his equipment at the Property after the December 2013 meeting, with the intention of returning to fix the upper deck. The Claimant never asked the Respondent to return to the Property to correct his work. (Respondent's testimony).
17. On September 7, 2014, the Claimant entered into a contract with Longridge Contracting, Inc., for the reconstruction of the lower deck for \$4,525.00. (Cl. #10).
18. On September 7, 2014, the Claimant entered into a contract with Longridge Contracting, Inc. (Longridge), for reconstruction of the upper deck and penthouse for a total of \$15,915.00. (Cl. #11).
19. The Respondent did not obtain permits for his work on the lower deck.

RULING ON MOTION TO DISMISS

At the outset of the hearing the Respondent presented the Motion. The Motion contained the following two arguments:

- (1) The claims should be dismissed pursuant to Md. Code Ann., Bus. Reg. § 8-405(d) because the Claimant rejected the Respondent's good faith efforts to resolve the claim; and
- (2) The administrative proceedings against the Respondent should be stayed pending the resolution of the Respondent's bankruptcy proceeding, as he filed a Chapter 7 Bankruptcy petition on March 6, 2015.

I will address part one of the Motion in the Discussion section of this decision as it pertains to a substantive issue for MHIC claims, but I will address part two of the Motion at this time.

In the Motion, the Respondent cited 11 U.S.C. § 362 for the proposition that the MHIC was precluded from proceeding against the Respondent in this matter since the Respondent was protected by his filing of a Chapter 7 petition in bankruptcy. However, 11 U.S.C.A § 362(b)(4)

makes clear that the protection the Respondent seeks is not available under certain circumstances, and this case presents such a circumstance. Section 362(b)(4) provides that the filing of a petition for bankruptcy does not operate as a stay as follows:

...
(b) (4) The filing of a petition under § 301, 302, or 303 of this title, or of an application under § 5(a) (3)... does not operate as a stay

...
(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section of the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a monetary judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police and regulatory powers.

11 U.S.C.A. § 362(b)(4).

Since the matter at hand is an action/proceeding by the MHIC, a regulatory body, to enforce its police and regulatory powers in the matter of home improvement contractors/licenses, it clearly falls within the types of actions not protected under section 362.

First, I note that there is no evidence that the Respondent has sought an order from the Bankruptcy Court to stay these proceedings. As the United States District Court held in *In re First Federal Corporation*, 42 B.R. 682 (Bankr. W.D. Va. 1984), the issue of whether an administrative proceeding should be stayed is a question for the Bankruptcy court; it is not a question I am empowered to decide.

Second, even if this were a question that I was obliged to decide, it appears clear that this proceeding is not barred by, or subject to, stay under the bankruptcy laws. It is well settled under Maryland law that the filing of a petition in bankruptcy does not protect petitioners from all legal actions. The United States Bankruptcy Court for the District of Maryland case of *In re Michael Goodman*, No. 86-B-1700 (Bankr. D. Md. Aug. 28, 1987) (Order Granting Relief From Stay)

holds that automatic stay in bankruptcy cases is not applicable to proceedings by homeowners to recover claims from the Maryland Home Improvement Guaranty Fund. In a similar case, the United States District Court for the District of Maryland held that the Maryland Racing Commission's police and regulatory power to suspend a debtor's license as a horse trainer was not barred by or stayed under the bankruptcy code. See *In re Christmas*, 102 B.R. 447 (Bankr. D. Md. 1989). Judges in several other similar cases have agreed. See *In re Internationale Resort and Beach Club*, 36 B.R. 189 (Bankr. D. S.C. 1983) (plaintiff's claim to recover from South Carolina vacation time sharing recovery fund was action by governmental unit to enforce the unit's police or regulatory power and was not subject to bankruptcy court's jurisdiction or to automatic bankruptcy stay); *In re County Fuel Co.*, 29 B.R. 534 (Bankr. D. Md. 1983) (Department of Energy's enforcement proceeding was action by a governmental unit to enforce its police or regulatory powers and not subject to automatic stay in bankruptcy law); *In re Lare*, 23 B.R. 545 (Bankr. D. Md.), *aff'd* 24 B.R. 959 (D. Md. 1982) (criminal proceeding against debtor for failing to obtain contractor's license and for failure to pay subcontractors not enjoined because state's motivation was enforcement of police and regulatory powers). These cases all uniformly uphold the MHIC's position that the Respondent's bankruptcy proceeding has no effect on the MHIC's ability to take action against the Respondent's license.

The 1983 case of *In Re Internationale Resort and Beach Club* indicates that a proceeding to seek recovery from a state "Guaranty Fund" like the MHIC Guaranty Fund is similarly unaffected by the Respondent's bankruptcy proceeding. I also note that the home improvement law does address the Guaranty Fund's ability to recover reimbursement from a contractor who is in bankruptcy. See Md. Code Ann., Bus. Reg. § 8-410(e) (2015) ("... the Commission is a creditor of the contractor for the amount paid from the Fund.")

Because I find no basis for restricting either the MHIC's ability to prosecute the Respondent for regulatory violations, or the Claimant's ability to seek recovery from the Guaranty Fund, I find that the above captioned case shall not be stayed and I am not precluded from issuing a proposed decision in this matter. Accordingly, the Motion is denied regarding the Respondent's request to stay this proceeding due to his March 2015 bankruptcy filing.

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) (2015). *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 (2015). A claim may be denied if "the claimant unreasonably rejected good faith efforts by the contractor to resolve the claim." Md. Code Ann., Bus. Reg. § 8-405(d) (2015).

The Claimant has the burden of proof at a hearing to establish entitlement to recovery from the Fund. Md. Code Ann., Bus. Reg. § 8-407(e)(1) (2015).

The Claimant asserts that the Respondent's construction of the lower and upper decks was done in an unworkmanlike manner. He asserted that the lower deck was made in violation of the International and Baltimore City Construction Codes. The Claimant argued that the lower deck was not anchored in notched wood footings as required by code and that the Respondent's use of a bolt system to anchor the deck to the home is unstable and unworkmanlike. He further asserted that the lower deck's stairs were less than 36 inches wide and in violation of Baltimore City Code. The Respondent countered that galvanized bolts, which he used to anchor the lower deck, are stronger than using notched wood footings. The Respondent further asserted that the

lower deck was constructed in a manner that surpassed the requirements of the 2012 International Residential Code, which is the standard used for construction.

I gave the Claimant's assertions less weight than those assertions made by the Respondent, as the Claimant is not a licensed contractor and has no expertise in the field of home construction. The Claimant argued that the MHIC inspector and the Longridge contractor made him aware of the deficiencies of the Respondent's construction of the lower deck; yet, the Claimant did not present either the MHIC inspector or a contractor from Longridge to provide expert testimony regarding the workmanship of the lower deck. Longridge's recommendation to remove the entire lower deck and replace it with a new one is discounted by their pecuniary interests in securing a contract to build a deck for the Claimant. Again, without a written report or expert testimony from Longridge, I give their assertion of poor workmanship very little weight. Finally, when the Claimant was questioned during cross-examination regarding the basis of his opinion that the Respondent's work on the lower deck did not comply with code, he answered that his only basis was his comparison of his deck to his neighbors' decks.

Mr. Schuler testified on cross-examination that he remembered the lower deck stairs measuring 30 inches wide. However, there are no pictures of the stairs with a measuring tape to accurately reflect that the stairs were less than 36 inches wide and in violation of Baltimore City Code. Additionally, the Respondent constructed the lower deck stairs without risers to accommodate the Claimant's request to be able to park his car under the deck and to provide ventilation for the heating and air conditioning system located behind the deck stairs.

Furthermore, the Respondent, accepted as an expert in home construction, remodeling and home improvement, provided detailed testimony regarding the methods he used in constructing the lower deck and that those methods exceeded industry standards. Accordingly, I find that the Claimant has failed to meet his burden to establish that the Respondent's

construction of the lower deck was unworkmanlike, and thus is not entitled to an award from the Fund.

Regarding the upper deck and penthouse, it is uncontroverted that the Respondent's performance of this contract was unworkmanlike and below industry standards. The Respondent asserted that he hired Mr. Schuler to do much of the work for the upper deck and penthouse and that his work was far below the Respondent's standards. However, I find that the Claimant unreasonably rejected the Respondent's request to remedy the deficiencies in the upper deck and penthouse. The Respondent met with the Claimant on December 20, 2013 and asked for a second chance to make this contract right, and the Claimant decided to give him a chance to fix the upper deck if the Respondent provided him with a written plan that addressed this matter. Curiously, the Claimant filed a complaint with MHIC in February 2014, because he claimed that the Respondent did not provide him with that requested plan. However, the Claimant admitted during this case that he received the Respondent's December 21, 2013 letter that detailed his plan to remedy the issues with the upper deck and penthouse. The Claimant simply refused to ask the Respondent to come back to the Property to remedy the upper deck and penthouse contract. After the Claimant filed a complaint against the Respondent with the MHIC in February 2014, the Respondent e-mailed the Claimant on March 20, 2014, and again reiterated his desire to repair and correct the issues involved with the upper deck and penthouse. Additionally, the Respondent left his equipment at the Property, as he intended to return after winter to remedy the issues with the upper deck and penthouse. Yet, the Claimant responded to that e-mail with a March 21, 2014 e-mail, stating that he no longer trusted the Respondent's work and that the only resolution to the matter would be a complete refund of the Claimant's payment to the Respondent. Accordingly, I find the Claimant's denial of the Respondent's request for an opportunity to remedy the upper deck and penthouse contract was unreasonable.

PROPOSED CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Claimant has not sustained an actual loss compensable by the MHIC Fund as a result of the Respondent's alleged acts and omissions regarding his construction of the lower deck. I also conclude that the Claimant is not entitled to reimbursement from the Fund for the Respondent's work on the upper deck and penthouse contract because he unreasonably rejected good faith efforts by the Respondent to resolve the claim." Md. Code Ann., Bus. Reg. §§ 8-405(d) and 8-407(e)(1) (2015). For the reasons stated above, I do not recommend an award. Md. Code Ann., Bus. Reg. §§ 8-401 and 8-405 (2015); COMAR 09.08.03.03B(3)(c).

RECOMMENDED ORDER

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

ORDER that the Claimant's September 25, 2014 Home Improvement Claims for the lower deck contract and the upper deck/penthouse contract be **DENIED** and **DISMISSED**; and,

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

Signature on File

August 27, 2015
Date Decision Issued

Brian Zlotnick
Administrative Law Judge

BMZ/emh
#157854

PROPOSED ORDER

WHEREFORE, this 27th day of October, 2015, 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.

Marilyn Jumalon

***Marilyn Jumalon
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION