

IN THE MATTER OF THE CLAIM OF	*	BEFORE WILLIAM SOMERVILLE,
LARRY L. JONES	*	AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND HOME	*	OF THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND	*	OF ADMINISTRATIVE HEARINGS
FOR VIOLATIONS ALLEGED	*	
AGAINST JOHN McMAHON, VII, T/A	*	OAH NO.: DLR-HIC-02-15-30487
AEDAN CONSTRUCTION SERVICES,	*	MHIC NO.: 15 (75) 264
LLC	*	

* * * * *

RECOMMENDED DECISION

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STATEMENT OF THE CASE

On May 10, 2015, Larry L. Jones (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of funds for actual losses suffered as a result of home improvement work performed by John F. McMahon VII t/a Aedan Construction Services LLC (Respondent).

I held a hearing on December 3, 2015, at a county office building in Largo, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).¹ Kris King, Assistant Attorney

¹ Unless otherwise noted, all citations of the Business Regulation Article hereinafter refer to the 2015 Replacement Volume.

General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Claimant represented himself. The Respondent represented himself.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, and the Rules of Procedure of the Office of Administrative Hearings 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, 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 acts or omissions of the Respondent, and if so, in what amount?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits offered by the Claimant:

1. Packet of photographs (8 ½ X 11)

I admitted the following exhibits offered by the Fund:

1. Notice of Hearing and Hearing Order
2. License history document
3. Claim Form, 5-10-2015
4. Note from MHIC, 6-1-2015

I admitted the following exhibits offered by the Respondent:

1. Invoice document, 6-27-14
2. Diagram of project
3. Packet of photographs

Testimony

The Claimant testified in the Claimant's case. The Respondent testified in the Respondent's case. The Fund called the Claimant to testify in its case.

FINDINGS OF FACT

Upon considering demeanor evidence, testimony, and other evidence offered, I find the following facts by a preponderance of the evidence:

1. At some point in February 2013, the Claimant and the Respondent discussed a patio project at the Claimant's residence. At that time, the parties discussed these terms: the Claimant would pay \$2,550.00 and the Respondent would grade, gravel, form, and pour a concrete patio with 3,000 psi concrete along the back of the Claimant's residence. The concrete pad or pads would be shaped roughly as set forth in Part A and Part B of the Respondent's diagram. (Respondent Ex. 2, sketched at the hearing in this matter.) The patio would consist of about 492 square feet, roughly 4 inches thick. At that time, the Respondent left a business card with the Claimant, and on the back of the card was a rough estimate or proposal with rough dimensions of the patio and a price. The Claimant did not pay any money.
2. No formal written contract document was produced.
3. On or about March 19, 2013, the Respondent's MHIC license expired. It was not renewed.
4. On or about November 14, 2013, the Claimant sent to the Respondent \$1,600.00 in money orders as a down payment or deposit on the work.
5. On or about May 29, 2014, the Respondent went to the Claimant's residence and graded the patio area, put down stone, and installed some concrete forms.

6. On June 26, 2014, the Claimant and the Respondent spoke by telephone. The Claimant did not object to the layout of the concrete forms. The Claimant asked the Respondent for an additional 6 foot by 18 foot patio area (108 square feet) to be added to the project, roughly as set forth on Part C of the Respondent's diagram. (Respondent Ex. 2, sketched at the hearing in this matter.) The Respondent said that the change would increase the price.
7. On the morning of June 27, 2014, the Respondent, his son, and another employee arrived at the Claimant's residence. The Respondent began pouring the concrete pad or pads.
8. On that day, at around noon, the Claimant arrived at his residence to monitor progress. At that time, the Respondent presented the Claimant with an invoice, #823502, on which the original price of \$2,550.00 was written, the deposit of \$1,600.00 was noted, an additional charge of \$450.00 was noted representing the additional 6 x 18 foot pad area, a payment of \$500.00 on that date was noted, and an outstanding balance of \$900.00 was noted. Both the Respondent and the Claimant signed the document.
9. That evening when the Claimant returned from work to his residence, the patio pads were installed, the forms were gone, and the Claimant was dissatisfied. He believed that the Respondent was obligated to bring in some top soil to back fill around the edges of the concrete patio. He also believed that the pads were not 4 inches thick in some spots.
10. On or about June 29 or 30, 2014, the Respondent returned to the site in an effort to collect the final payment. The Respondent spread a pile of topsoil that the Claimant had previously had delivered. The soil delivery truck had run over, and cracked off, a corner of the concrete pad.
11. On May 10, 2015, the Claimant filed with the MHIC a claim against the Fund for \$5,178.00.

DISCUSSION

Burdens

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); *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. A claimant has the burdens of production and persuasion to establish the “inadequate, incomplete or unworkmanlike” work product of the licensed contractor, as well as to establish the cost of the “actual loss.” Md. Code Ann., Bus. Reg. § 8-407.

A trier of fact can properly accept all, some, or none of the evidence offered. *Sifrit v. State*, 383 Md. 116, 135 (2004); *Edsall v. Huffaker*, 159 Md. App. 337, 341-43 (2004).

Allegations, Arguments, and Analysis

In the instant case, the Claimant argues, among other things, that when the original \$1,600.00 was paid, the Respondent was not licensed by the MHIC. The Fund argues, among other things, that the contract in this case did not exist until *after* the Respondent’s license had expired. The Respondent argues that the evidence “speaks for itself.”

The statutory and regulatory schemes that govern this case require that a contractor be a licensed contractor before the Fund will cover a transaction. As noted above, 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) and (b). In addition, another code section, Md. Code Ann., Bus. Reg. § 8-402(1), contemplates actions against a licensed contractor, and Md. Code Ann., Bus. Reg. § 8-404(a) requires that licensed contractors pay into the Fund. Moreover, the MHIC interprets the statute in its agency regulations as follows: “The

Fund may only compensate claimants for actual losses they incurred as a result of misconduct by a licensed contractor.” COMAR 09.08.03.03B(2).

In the instant case, when the Respondent and the Claimant finally entered into a contract on November 14, 2013, (Finding of Fact 4), the Respondent was not a licensed contractor. A contract generally does not exist until there is an offer by one party, an acceptance by another, and consideration. *B-Line Medical, LLC v. Interactive Digital Solutions, Inc.*, 209 Md. App. 22, 46 (2012) (citing *Peer v. First Fed. Sav. & Loan Ass'n*, 273 Md. 610, 614 (1975)). In rare occasions, when a seal is used on a contract document, the law imputes consideration into the transaction. *County Com'rs of Carroll County v. Forty West Builders, Inc.*, 178 Md. App. 328, 384 - 86 (2008). In the instant case, there was no formal document on which the parties placed their seals, and there was no consideration tendered until months after the Respondent had lost his MHIC license.² (Findings of Fact 2 and 4.) Because the Respondent was not a licensed contractor when the contract was formed or performed, any of the Respondent's acts or omissions under that contract are not covered by the Fund. COMAR 09.08.03.03B(2).³

Cost to Correct

The Claimant not only needs to prove the inadequate, incomplete, or unworkmanlike work product, Md. Code Ann., Bus. Reg. § 8-401, of an MHIC licensed contractor, Md. Code Ann., Bus. Reg. § 8-405(a), but he must also prove the cost to correct it. Md. Code Ann., Bus. Reg. § 8-407.

Even if I had concluded in this case that the Respondent was both licensed and responsible for “unworkmanlike, inadequate, or incomplete” home improvement work under the statute, the evidence regarding the amount of the loss was insufficient. The Claimant was not

² In addition, there was no evidence of a change in position to a party's detriment, based upon reliance on a promise, which might allow -- in equity court -- a promissory estoppel to arise. *Pavel Ent. Inc. v. A.S. Johnson Co., Inc.*, 342 Md. 143, 164 - 67 (1996).

³ I need not further address whether the work performed was “inadequate, incomplete or unworkmanlike.”

sure of the original costs. The Claimant's and the Respondent's numbers differed. The Claimant did not offer credible evidence from a remedial contractor regarding the costs to repair and restore. There was no credible opinion evidence of the scope of the project that might need to be restored. On the basis of the evidence before me, a calculation of "actual loss" would be mere speculation. Based upon the record in this case, a trier of fact cannot accurately calculate an "actual loss" pursuant to COMAR 09.08.03.03B.

CONCLUSIONS OF LAW

I conclude that the Claimant has not proven by a preponderance of the evidence that he has sustained a compensable "actual loss" as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401.

RECOMMENDED ORDER

I **PROPOSE** that the Maryland Home Improvement Commission:
ORDER that the case be **DISMISSED**, and further
ORDER that the records and publications of the Maryland Home Improvement Commission reflect this decision.

February 24, 2016
Date Decision Mailed

Signature on File

William J. D. Somerville III
Administrative Law Judge

WS/emh
#160590

PROPOSED ORDER

WHEREFORE, this 13th day of April, 2016, 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.

Jeffrey Ross

***Jeffrey Ross
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION