

IN THE MATTER OF THE CLAIM	*	BEFORE KIMBERLY A. FARRELL,
OF HOWARD HOROWITZ & KARIN	*	AN ADMINISTRATIVE LAW JUDGE
LEFF,	*	OF THE MARYLAND OFFICE
CLAIMANTS,	*	OF ADMINISTRATIVE HEARINGS
AGAINST THE MARYLAND HOME	*	OAH NO.: DLR-HIC-02-12-28286
IMPROVEMENT GUARANTY FUND	*	MHIC NO.: 11 (75) 779
FOR THE ALLEGED ACTS OR	*	
OMISSIONS OF CHARLES JENSEN,	*	
T/A JENSEN BROTHERS	*	
CONTRACTORS, INC.,	*	
RESPONDENT	*	

* * * * *

RECOMMENDED DECISION

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RECOMMENDED ORDER

STATEMENT OF THE CASE

On January 11, 2012, Howard Horowitz and Karin Leff, (Claimants), filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$27,600.00 for actual losses allegedly suffered as a result of a home improvement contract with Charles Jensen, trading as Jensen Brothers Contractors, Inc. (Respondent). After input from the MHIC regarding certain aspects of the claim, the Claimants

revised their claim amount to \$21,760.00. That is the amount of the claim that was transmitted by the MHIC to the Office of Administrative Hearings (OAH) for hearing.

A hearing on the merits was scheduled for April 9, 2013. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010 & Supp. 2012). On April 8, 2013, Respondent called the OAH and left a message on a docket specialist's voice mail. In the message, the Respondent advised that his father suffered a stroke and that he (the Respondent) was driving to his father's location in a Midwest state. He requested a postponement based on this medical emergency. The message was not heard by anyone at OAH until the next day, the day of the hearing. Contacted by a docket specialist on April 9, 2013, Charles Jensen reiterated that he was at that moment driving to be with his father. He was advised that he would be required to document his father's hospitalization by mailing or faxing appropriate supporting materials to OAH.

Because the message was sent so late and so close to the hearing, both of the Claimants and the Assistant Attorney General (AAG) representing the Fund, Hope Sachs, appeared for the hearing. Due to the Respondent advising that there was a medical emergency involving family, I postponed the case.

Several days passed with no documentation from the Respondent. To be clear about my expectations, I sent correspondence dated April 16, 2013, to the Respondent reiterating that he was required to produce documentation supporting the postponement he had obtained. I further advised that a failure to promptly provide the documentation would reflect poorly on him. No documentation was ever provided regarding the asserted medical emergency.

The hearing was reset for May 23, 2013. I held a hearing on that date. The Claimants appeared again on that date representing themselves. Hope Sachs, AAG, Department of Labor, Licensing and Regulation (Department), appeared on behalf of the Fund. Tom Jensen appeared

for the hearing to represent the Respondent. Tom Jensen is the Respondent's brother and is a partner in the Respondent's business, Jensen Brothers Contracting, Inc.¹

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 Fund's behalf:

- FUND #1 Notice of Hearing, dated December 27, 2012; Hearing Order, dated July 3, 2012; Notice of Hearing (Rescheduled) dated April 12, 2013
- FUND #2 Department records for the Respondent
- FUND #3 Letter from the HIC to the Respondent, January 17, 2012

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

- CLMT #1 Original contract for home improvement, February 5, 2009 and Addendum, August 4, 2009
- CLMT #2 Various types of documents detailing payment history
- CLMT #3 Abbreviated Form of Agreement Between Owner and Architect, December 31, 2007
- CLMT #4 Proposal from Rod Miller, Inc., Heating & Air Conditioning, December 14, 2007; Email from Michael Leahy, April 9, 2013
- CLMT #5 Genna's Construction LLC, invoice, December 31, 2010

¹ At the time of the hearing, I believed that it would be necessary for Tom Jensen to provide a Power of Attorney to OAH authorizing him to represent the corporation. I provided him with the proper form and set a deadline of May 31, 2013, 4:00 p.m., by which time the form was to be at OAH, directed to my attention. Tom Jensen never provided the form to OAH; however, in reviewing the substantive law and OAH policy after the hearing, I realized that because he is a *principal* in the corporation, rather than an authorized employee representative, he is not required to provide the documentation I solicited. Md. Code Ann., State Gov't § 9-1607.1(a)(4)(i) and (b).

- CLMT #6 Santos Custom Painting & Construction, Inc. contract, October 5, 2010, and attachments
- CLMT #7 Santos Custom Painting & Construction, Inc. contract, October 15, 2010
- CLMT #8 Patriot Electrical Technicians, LLC, job invoice, August 22, 2012
- CLMT #9 Printouts of pictures

The Respondent did not offer any exhibits.

Testimony

Each of the Claimants testified.

Tom Jensen testified on behalf of the Respondent.

The Fund did not call any additional witnesses.

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 # 01 7883.
2. On February 5, 2009, the Claimants and the Respondent entered into a contract for a major home improvement project. The work to be performed included demolishing parts of the house and rebuilding with substantial changes. Every floor of the house, from the basement to the attic, was included in the project. There was also exterior work, including the replacement of all windows, and installation of siding and insulation.
3. The contract stated that work would begin on or about March 1, 2009, and would be completed by six months from the date the work commenced.
4. The original agreed upon contract price was \$222,000.00. Over time there were change orders to the original contract. Some of these change orders were written and some were oral. In addition to the change orders, there was a formal written addendum to the contract. It was dated August 4, 2009, although it may have been accepted at a later

date, because the payment due upon signing was paid on September 16, 2009. The addendum was for \$8,800.00.

5. Initially the work performed by the Respondent was excellent and the Claimants were pleased.

6. Even though the contract was not wrapping up on time, the Claimants entered into an additional contract with the Respondent regarding the project.

7. Over time, however, work became more sporadic and less workmanlike.

8. When work first commenced, there were a number of workers on the site each day. As time passed, fewer and fewer workers reported to the site. Towards the end, often only one person, Tom Jensen, would appear to perform work.

9. A small portion of the delay, perhaps three weeks or so, was attributable to the Claimants' efforts to comply with County regulations and to work on zoning issues. The lion's share of the delay was the fault of the Respondent.

10. During this time, the Claimants pointed out deficiencies and repeatedly expressed their frustration at the slow pace of work.

11. Some of the problems involved work that was not done at all. Some of the problems involved unworkmanlike performance. For example, it was important to the Claimants that the heating and cooling zones be clearly defined and separately controlled. This was made very clear to the Respondent; however, the work performed by the Respondent did not result in clearly defined zones with separate controls. Once the heating and cooling work was performed incorrectly, it was difficult for the Claimants to even find a contractor to offer an estimate to correct the work, because it is complicated

and difficult to go back, locate the problems, and re-work the entire system once it has been installed.

12. Another problem involved the interpretation of a portion of the contract that said, in effect, any room touched by construction had to be repainted by the Respondent.² The Claimants understood this clause to mean that the entire room had to be painted. The Claimants had hired an architect to assist in designing the renovation and in managing the contract and relationship with the Respondent. The architect had recommended the Respondent to the Claimants. The architect confirmed that the usual interpretation of the contract provision was that the entire room had to be repainted under these circumstances and that the Respondent had abided by that interpretation in the past, but for this one contract, the Respondent insisted that spot-painting satisfied the painting requirement.

13. Exterior painting was also problematic. Only one coat of paint had been applied where the contract called for two coats. There were also issues with the exterior caulking. Later, the architect confirmed that only one coat of paint had been applied where the contract called for two.

14. Also, the siding itself buckled in some areas.

15. There were various problems with a portico that was built. The lines were not plumb. When some of the masonry work was done by a subcontractor, writing on the material, not intended to be visible when the work was finished, was visible. The Claimants and the Respondent agreed that the portico needed to be made plumb and that it needed prep work done, including sanding, before painting could properly take place.

² The contract language was "all rooms affected by new work to be painted in full."

When the painters came, they painted, without any of the agreed-upon straightening or preparatory work having been performed.

16. The original contract defined a payment schedule based on certain construction benchmarks. The Respondent consistently requested earlier payments or “down payments” or partial payments before the contractual benchmarks were reached.

17. The contract contained substantial penalties in the event that the contract was not finished on time. The Claimants and their architect tried to use waiver of the penalties as a negotiating tool to spur the Respondent to complete more work.

18. The Claimants, who were living in the basement of the home while work was ongoing, grew weary of the extremely slow pace of progress and the deteriorating quality of the work performed. They frequently engaged in in-person and email discussions with the Respondent and with their architect.

19. Eventually, when work was not completed by August of 2010, one and one-half years after work started, the Claimants told the Respondent to leave the home.

20. When the Respondent left the job there were leaks in the master bedroom and in the basement.

21. Tom Jensen was on the scene at the time. He advised that the Respondent wanted to continue work.

22. The Claimants declined this suggestion and initiated steps to terminate the contract as provided in the complicated agreement between the Claimants, the architect, and the Respondent.

23. The Respondent stopped responding to any communication from the architect or from the Claimants. The Respondent did not respond to attempts to get him to participate in winding up the contract or in termination procedures.

24. The Claimants paid the Respondent a total of \$206,000 on the initial home improvement contract. As signed, it called for the Claimants to pay the Respondent \$222,000.00. As adjusted by the parties, it ended up being for \$218,100.00. The original contract addenda price was \$8,800.00, of which the Claimants paid \$5,640.00. In all, the Claimants paid the Respondent \$211,640.00.

25. The Claimants obtained estimates from or contracted with other MHIC licensed companies to correct and/or complete work called for in the two contracts between the Respondent and the Claimants.

26. The Claimants' actual loss is in excess of the statutory maximum recovery available from the Fund.

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) (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). For the following reasons, I find that the Claimant has proven eligibility for compensation: the Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimants and the Respondent performed unworkmanlike, inadequate or incomplete home improvement.

The Claimants in this matter started out with a relationship with the architect who was to guide and oversee the entire home renovation. The architect recommended the Respondent to the Claimants. The Claimants then researched the Respondent, including visiting homes where the Respondent had performed work. They were satisfied with what they saw and entered into a contract with the Respondent.

Initially things moved at a good pace and the work was regularly approved. As time went on, the Claimants were sufficiently satisfied with the progress and quality of the work that they entered into a second home improvement contract, referred to as an addendum, for additional work. Not long after that things began to slowly unravel. Gradually, over time, the work slowed down. Fewer and fewer workers appeared on the scene. The work that was performed lacked the high quality of the initial work. Friction developed over the unexplained delays. The Claimants were patient as the months dragged on with them living in the basement, but they came to have an increasing number of disagreements with the Respondent about the project.

The architect began expressing concern, observing that the Respondent, with whom the architect had worked before, appeared to be struggling and was in a precarious financial position. The Claimants identified the straw that broke the camel's back in this situation as the Respondent's insistence on doing only spot painting or touch-up work when the contract clearly called for entire rooms to be painted. The architect agreed that the contract should be interpreted in the manner the Claimants believed and added that the Respondent had interpreted the clause in the past to be that the whole room had to be painted if any part qualified for painting. The project had dragged on for three times longer than anticipated by the contract. The Respondent was not offering any explanation for the delay, the lack of workers, the lack of progress, and the

downward spiral of the quality of the work. Agreements reached between the Claimants and the Respondent as an attempt by the Claimants to compromise or to get as much as they reasonably could when it was clear they were going to take a loss anyway met with failure because the Respondent or the Respondent's sub-contractors failed to abide by the agreed upon conditions. The painting of the portico when it was out-of-plumb and its surface was not adequately prepared is an example.

The Respondent did not say much by way of defense. Tom Jensen did not disagree with much put forth by the Claimants and he did not offer any explanation for the Respondent's failures except to say that the economy went bad and it was difficult to get workers.

Tom Jensen did maintain that not all of the delay was the Respondent's fault, a proposition the Claimants agreed with, although they estimated the zoning problems only held up work for about three weeks of the extra year delay. He also brought up the unfortunate suggestion that there may have been some less than completely accurate information conveyed to the zoning department to facilitate approval for construction or construction not in exact compliance with requirements. Tom Jensen was trying to sully the Claimants with this revelation, but as testimony and cross-examination from both sides came out, the credible evidence was that if there was anything improper about what was done, the Respondent was as active in the impropriety as the Claimants.

Tom Jensen also initially protested that the Respondent did not abandon the job, but rather the Respondent was ejected from the site. As the hearing went on, it appeared that Tom Jensen was unaware of some of the events and communication or attempts at communication that went on after the termination proceedings started. As the Claimants put it, the Respondent took

himself out of the process by failing over and over to respond to attempts at communication.

The Claimants are entitled to compensation for actual losses.

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).

The appropriate measurement in this case is found in COMAR 09.08.03.03B(3)(c):

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.

Here, the amount paid to the Respondent is \$211,640.00, which represents \$206,000.00 paid on the original contract plus \$5,640.00 paid on the addendum. To that is added the reasonable amounts the Claimants have paid or will have to pay to another contractor to repair the Respondent's poor work and to complete the original contract. That number is a little more elusive.

The Claimants presented receipts for work done by Patriot Electrical Technician, LLC (\$289.00), Santos Custom Painting & Construction, Inc. (\$18,057.00 for interior and exterior paint work and preparation; \$1,750 for gutter work), and Genna's Construction LLC (\$11,778.81). The Claimants also offered two items to address the heating and cooling zone problems. They offered a pre-construction proposal from Rod Miller, Inc., dated December 14, 2007, which proposed to provide material and labor to properly zone the home's heating and

cooling. Needless to say, the house was smaller before the renovation at issue in this case and six years have passed, so the proposal is no doubt lower than the costs would be today. Also, the Claimants were quite credible in explaining that it is easier to get contractors interested in zoning from scratch, rather than in coming to try to fix up some other contractor's ineffective attempt. The Claimants also presented a recent email from Michael Leahy. Because the job would be so complicated, Mr. Leahy provided a full page explanation of what he found to exist in the Claimants' home and said that his "best guess" at efforts to remedy the problems ranged from \$2,000.00 or more for materials and somewhere between \$3,000.00 and \$8,500.00 for labor. He did not want to invest more effort in a specific proposal unless the Claimants were genuinely interested in pursuing the project. The Fund used \$5,000.00 for the number it put in its calculations. It acknowledged that it was no better a number than others, but was the low end of Mr. Leahy's guesstimate. Certainly \$5,000.00 is well supported by the evidence and I adopt that figure as well. And I note that even using this relatively conservative number, the calculations of actual loss by the Claimants will exceed the maximum possible recovery, so there is no point in fretting over whether a larger number should be used.

Plugging all these numbers into the formula leads to the following: \$211,640.00 (amount paid to the Respondent) plus \$36,863.81 (sum of receipts listed above plus \$5,000.00 for heating and cooling expenses) totals \$248,503.81. That figure less \$226,900.00, the original and addendum contract prices (\$222,000.00 minus the parties' \$3,900.00 adjustment plus the addenda total of \$8,800.00), leads to a finding that the Claimants proved an actual loss in this case of \$21,603.81. However, the Claimants are entitled to only a portion of their actual loss from the Fund. Pursuant to Maryland Code Annotated, Business Regulation §8-405 (e)(1) and (5) (Supp. 2012), 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 Claimants to the Respondent. Hence, the Claimants are entitled to reimbursement in the amount of \$20,000.00 from the Fund.

CONCLUSIONS OF LAW

I conclude that the Claimants have sustained an actual loss in excess of their compensable loss. Their compensable loss is \$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 Claimants \$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

August 13, 2013
Date Decision Mailed

Kimberly A. Farrell
Administrative Law Judge

KAF/kkc
Document #144165

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FILE EXHIBIT LIST

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

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CLMT #8 Patriot Electrical Technicians, LLC, job invoice, August 22, 2012
CLMT #9 Printouts of pictures

The Respondent did not offer any exhibits.

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