

IN THE MATTER OF THE CLAIM * BEFORE YOLANDA L. CURTIN,
OF EMMA JEAN FLETCHER- * AN ADMINISTRATIVE LAW JUDGE
SCOTT * OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME * OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND * OAH NO.: DLR-HIC-02-10-37880
FOR THE ALLEGED ACTS OR * MHIC NO.: 07 (90) 2426
OMISSIONS OF JAMES W. SMITH,
T/A SIR WESLEY IMPROVEMENTS
LLC

* * * * *

RECOMMENDED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On May 6, 2009, Emma Jean Fletcher-Scott (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$138,000.00 for actual losses allegedly suffered as a result of a home improvement contract with James W. Smith. *Va* Sir Wesley Improvements, LLC (Respondent).

I held a hearing on March 15, 2011, at the Largo Government Center in Largo, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010). Hope Sachs, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department or DLLR), represented the Fund. The Claimant represented herself and the Respondent represented himself.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the DLLR, 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 (2009 & Supp. 2010), Code of Maryland Regulations (COMAR) 09.01.03.01-09.01.03.10; 09.08.02.01-09.08.01.02; and 28.02.01.01-28.02.01.27.

ISSUES

1. Did the Claimant unreasonably refuse to allow the Respondent to complete the home improvement contract; and if not,
2. 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 #1 | Contract between Claimant and Respondent, with balance sheet and additional work sheets |
| CL #2 | DLLR license search inquiry; permits; inspection results |
| CL #3 | Copies of checks |
| CL #4 | Home Depot invoices and receipts |
| CL #5 | Fund Claim and correspondence between Claimant and DLLR |
| CL #6 | Correspondence between Claimant and Scottsdale Insurance Company |
| CL #7 | Letter from David Branch, Esquire, to Claimant; Letter from Marwan E. Porter, Esquire, to Claimant |
| CL #8 | Correspondence between Claimant and Better Business Bureau |
| CL #9 | Inspection Correction Order; Letter from Claimant to Sarah Bouldin-Carr |

- CL #10 HomeTrust Inspection Report, dated February 16, 2011
- CL #11 Estimates
- CL #12 Receipts and invoices
- CL #13 Photographs
- CL #21¹ CD of video taken of construction
- CL #22 – 31 Photographs

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

- Resp. #1 August 23, 2006 Contract between Claimant and Respondent, with attached Payment Terms
- Resp. #2 Additional Work sheets, with attachments
- Resp. #3 Letter from Respondent to Claimant, with attachments
- Resp. #4 Invoices and Proposals

I admitted the following exhibits on the Fund's behalf

- Fund #1 Hearing Notice
- Fund #2 DLLR Hearing Order
- Fund #3 DLLR licensing history for the Respondent
- Fund #4 MHIC letter to the Respondent, with attached Fund Claim

Testimony

The Claimant testified on her own behalf and she also presented the testimony of Jacqueline Wade.²

The Respondent testified on his own behalf.

¹ The Claimant pre-marked all of her exhibits and she did not offer any exhibits numbered 14 – 20.

² The Claimant asked Ms. Wade only one question about a meeting in which she was allegedly present involving the Respondent. When Ms. Wade responded that she could not recall the meeting, the Claimant did not ask any further questions, and neither the Respondent nor the Fund asked Ms. Wade any questions.

The Fund did not present any testimony.

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 contractor under MHIC license #3377477.
2. The Claimant and the Respondent entered into a contract to have the Respondent build an addition on the Claimant's residence to include a master bedroom and bath, new kitchen, powder room, and garage. The work was to commence on November 1, 2006 and conclude on April 1, 2007.
3. The work to be performed included: demolition (tearing out existing kitchen and walls, and digging out existing concrete patio and cross space); framing; masonry; tearing out portion of existing roof and replacing it with a new one; installing electrical, plumbing, new windows and doors, flooring and air and heat.
4. The cost of the contract was \$82,000.000 and under the terms of the contract the Claimant was required to make the following scheduled payments: a deposit of \$6,500.00; a first draw payment of \$45,000.00 upon completion of concrete, framing and roof; a second draw payment of \$20,500.00 for completion of rough plumbing, air and heat, and electrical; and a final payment of \$10,000.00 when the job was completed.
5. Under the terms of the contract, if the Claimant did not make the second draw payment as set forth in the contract, the Respondent reserved the right to discontinue work until the second payment was made.

6. On September 6, 2006, the Claimant paid the Respondent \$6,500.00 as required by the terms of the contract, and a week later, on September 13, she paid the Respondent \$45,000.00 for the concrete, framing and roof, which was completed.
7. The Respondent commenced work on the contract and sometime after the work commenced, the Claimant asked the Respondent to do some additional work that was not included in the contract. The Respondent agreed to perform the work, which would end up costing the Claimant an additional \$11,959.70. The parties agreed that the payment for additional work performed would be paid at the time the second draw payment was made.
8. On or about December 21, 2006, the Respondent completed the installation of the rough plumbing, air and heat, and electrical. At that time, he requested that the Claimant make the 2nd draw payment of \$20,500.00.
9. The Claimant was unable to make the full second draw payment. She asked the Respondent to accept \$11,000.00 as a payment and to allow her more time to obtain the rest of the funds. The Respondent agreed to accept the \$11,000.00 and he continued to work on the project, including performing some of the additional work the Claimant had requested the Respondent to perform.
10. As of January 2007, the Claimant owed the Respondent a total of \$18,747.00, which included the balance of the second draw (\$9,500.00) and the cost of the additional work performed (\$9,247.00).
11. On January 18, 2007, the Claimant made a payment on the contract in the amount of \$7,800.00. She informed the Respondent that she would have the balance of the money owed (\$10,947.00) paid by early February 2007.

12. The Respondent agreed to wait to be paid until February but informed the Claimant that the work on the project would stop until the Claimant made the payment.
13. On February 7, 2007, the Claimant called the Respondent and told him to come to her home to settle the outstanding balance. When the Respondent arrived, the Claimant began to point out deficiencies she noticed in the work that he had performed on the project. After about a forty-five minute discussion, the Respondent inquired about the payment and the Claimant informed the Respondent that she did not have the payment.
14. On February 7, 2007, the Respondent told the Claimant that he would correct any problems with the work when the weather improved and also upon completion of all the work, but that he would not continue to perform the work until the Claimant paid the outstanding balance. The Claimant informed the Respondent that she would have the monies to him within ten days because she was expecting a tax refund.
15. As of February 21, 2007, the Claimant had not made the payment she promised to make to the Respondent. When he called the Claimant to inquire about the payment, she informed the Respondent that she had obtained the services of an attorney because she was dissatisfied with his work.
16. On February 21, 2007, the Respondent sent a letter to the Claimant informing her that she had breached the terms of the contract by not making her scheduled draw payments. He further informed the Claimant that if she wanted the job finished she was required to pay the entire balance on the contract or place the money in escrow to ensure that funds were available to cover the cost of the work.
17. The Claimant did not respond to the Respondent's letter. In an attempt to get paid and finish the work, the Respondent had an attorney attempt to work out the matter; however,

neither the Claimant nor her attorney responded to any of the requests made by the Respondent or his attorney.

18. When the Respondent stopped working on the project, he left at the Claimant's residence tools that he was using to perform work on the project.
19. As the Respondent completed work on the contract, he made full payment to all the subcontractors he had hired to help him with the job.
20. On May 6, 2009, the Claimant filed a claim with 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) (2010). *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). A claim for recovery can be denied, however, if a claimant unreasonably rejects good faith efforts by the contractor to resolve the claim. Md. Code Ann., Bus. Reg. § 8-405(d) (2010).

The burden of proof to establish the unworkmanlike, inadequate or incomplete home improvement and any actual loss suffered is on the Claimant. Md. Code Ann., Bus. Reg. § 8-407(e)(1) (2010). For the reasons discussed below, I find that the Claimant has failed to meet her burden.

The Claimant alleges that the work that was done by the Respondent was inadequate. She supports her claim with pictures depicting work done by the Respondent, permit inspections that state that some work was deficient, and estimates from different contractors who may or

may not be licensed by the MHIC and who have offered to redo work performed by the Claimant.

The Respondent argues that he performed approximately seventy-five percent of the work on the contract, but that he stopped working when the Claimant failed to meet her financial obligation under the terms of the contract. He also contends that he told the Claimant he was more than willing to correct any work that required correction once all the work was completed. He further testified that shortly after he told the Claimant that he would stop all work on the contract until he received payment or that payment was placed in escrow, the Claimant terminated the contract and hired an attorney, who refused to respond the Respondent's request to resolve the matter.

The Fund argues that the Claimant failed to present credible and reliable evidence to support a finding that the Respondent's work was deficient. Specifically, the Claimant did not present any expert testimony to establish that any work performed was in fact deficient. Further, the Fund contends that even if some of the work was deficient, the Claimant unreasonably rejected the Respondent's good faith efforts in attempting to finish the contract and correct any deficiencies. Thus, the Fund opposes any recovery in this matter.

While some of the pictures and documentary evidence reflect incomplete work, it is undisputed by all the parties that the work was incomplete, not because the Respondent abandoned the work, but because the work stopped due to the Claimant's failure to make the required payment as set forth in the contract.

The evidence in this matter establishes that the Claimant and the Respondent entered into a contract to have the Respondent build an addition to the Claimant's residence. As the work progressed, the Claimant made some additional requests for work to be performed that increased

her costs. As a result of the increased costs, the Claimant had some financial difficulties and could not make the full second draw payment on the original contract and, consequently, after repeated requests for payment, the Respondent stopped working on the contract. At the time the Respondent stopped working, seventy-five percent of the work had been completed.

The Claimant testified that she brought to the Respondent's attention some concerns she had with the Respondent's work. The Respondent testified that he agreed with the Claimant that some of the work required correction, but that the corrections would occur once all the work was completed and the weather improved. The Claimant does not dispute that the Respondent agreed to make corrections to the work. She testified, however, that she became dissatisfied with the Respondent's work and the amount of money she had paid for the work and decided to hire an attorney and find other contractors to complete the work.

The Claimant's reasons for terminating the contract are not valid ones. The Respondent had been performing work on a consistent basis and had agreed to correct any problems once the work was completed. As required by the terms of the contract, he rightfully requested that the Claimant pay the balance of the contract either to him or to an escrow account when the Claimant failed to make full-payment on the second draw and continued to promise that payment was forthcoming, but payment was not made. Her actions in terminating the contract were unreasonable in light of the Respondent's good faith efforts of performing the work, continuing to work on the contract when the Claimant failed to make the full second draw payment, and agreeing to correct any work once all the work was completed.

Accordingly, I find that the evidence in this case does not support a finding that the Claimant suffered an actual loss as a result of the Respondent's conduct. Instead, I find that the evidence supports a finding that the Respondent's conduct throughout his dealings with the

Claimant establishes that he was agreeable to finish the contract and to correct any deficiencies in his work; however, the work was not finished or corrected because the Claimant failed to make the required payment and she unreasonably rejected the Respondent's good faith efforts.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Claimant has not established that she sustained an actual loss as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. § 8-401 (2010). Therefore, the Claimant is not entitled to reimbursement from the Maryland Home Improvement Guaranty Fund. Md. Code Ann., Bus. Reg § 8-405 (2010).

RECOMMENDED ORDER


I RECOMMEND that the Maryland Home Improvement Commission:

ORDER that the Claimant is not entitled to an award from the Maryland Home Improvement Guaranty Fund; and

ORDER that the Claimant's claim against the Maryland Home Improvement Commission Guaranty Fund be dismissed; and

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

May 23, 2011
Date Decision mailed


Yolanda L. Curtin
Administrative Law Judge

YLC/
#123167

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FILE EXHIBIT LIST

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³ The Claimant pre-marked all of her exhibits and she did not offer any exhibits numbered 14 – 20.

PROPOSED ORDER

WHEREFORE, this 5th day of July 2011, 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.

Joseph Tunney

*Joseph Tunney
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION