

CLAIM OF GIOVANNI R. LANZA	* BEFORE MARLEEN B. MILLER,
AGAINST THE MARYLAND HOME	* AN ADMINISTRATIVE LAW JUDGE
IMPROVEMENT GUARANTY FUND,	* OF THE MARYLAND OFFICE
REGARDING THE ALLEGED ACTS	* OF ADMINISTRATIVE HEARINGS
AND OMISSIONS OF DAVID B.	*
BARKLEY T/A OMEGA	* OAH NO.: DLR-HIC-02-08-38528
CONSTRUCTION & REMODELING,	* MHIC NO.: 08 (05) 917
THE RESPONDENT	*

* * * * *

RECOMMENDED DECISION

STATEMENT OF THE CASE
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RECOMMENDED ORDER

STATEMENT OF THE CASE

On or about December 19, 2007, Giovanni R. Lanza (the Claimant) filed a claim (the Claim) with the Maryland Home Improvement Commission (the MHIC or the Commission) Guaranty Fund (the Fund) for reimbursement of the actual losses he allegedly suffered as a result of the acts and omissions of David B. Barkley t/a Omega Construction & Remodeling (the Respondent). After investigation, the Commission issued a September 5, 2008 Hearing Order and forwarded the case to the Office of Administrative Hearings (OAH) on September 29, 2008.

On April 8, 2009, I conducted a hearing on the Claim at OAH's office in Wheaton,

Maryland, pursuant to the Maryland Annotated Code's Business Regulation Article¹ § 8-407(a) (incorporating the hearing provisions of Business Regulation Article § 8-312). Assistant Attorney General Matthew A. Lawrence appeared on the Fund's behalf, and the Claimant represented himself.

Despite adequate notice from OAH, neither the Respondent nor anyone acting on his behalf appeared at the hearing or requested a postponement.² Accordingly, I conducted the hearing in the Respondent's absence. *See* Business Regulation Article § 8-312(h); Code of Maryland Regulations ("COMAR") 09.01.02.09.

The contested case provisions of the Administrative Procedure Act, Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2004 & Supp. 2008); the Commission's Hearing Regulations, COMAR 09.01.03, 09.08.02.01 and 09.08.03; and OAH's Rules of Procedure, COMAR 28.02.01, govern procedure in this case.

ISSUES

Did the Claimant sustain an actual loss as a result of the Respondents' acts or omissions and, if so, what amount is the Claimant entitled to recover from the Fund?

SUMMARY OF THE EVIDENCE

Exhibits

The Claimant submitted the following documents, which I admitted into evidence as the exhibits numbered below:

1. Agreement between the Claimant and the Respondent, dated April 16, 2006

¹ Throughout this Recommended Decision, the 2004 Replacement Volume and the 2008 Supplement to the Maryland Annotated Code's Business Regulation Article will be collectively referred to as the Business Regulation Article.

² On December 10, 2008, the OAH sent hearing notices by certified and first class mail to the Respondent's last known address, his address of record with the Commission. The certified mailing was returned "unclaimed," but the United States Postal Service did not return the first class mailing as undeliverable.

2. Checks paid by the Claimant to the Respondent
3. Change Order #2, dated October 14, 2006
4. Letter from the Respondent to the Claimant, dated October 3, 2007

The Fund submitted the following documents, which I admitted into evidence as the exhibits numbered below:

1. The Respondent's licensing history
2. Notice of unclaimed certified mail, with Notice of Hearing and Hearing Order
3. The Claim, filed December 19, 2007

The Respondent submitted no documents for admission into evidence.

Testimony

The Claimant was the only witness who testified at the hearing.

FINDINGS OF FACT

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

1. At all relevant times, the Respondent was a licensed home improvement contractor, License # 3592652. The Commission suspended the Respondent's license, on an emergency basis, effective November 8, 2007.
2. In the summer of 2006, the Claimant found the Respondent's company on the internet. Shortly thereafter, the Claimant met at his home with one of its employees, Greg Morman, to discuss the design and construction of an addition (the Work) to the Claimant's home at 8507 Garland Avenue, in Takoma Park, Maryland (the House).
3. On August 16, 2006, the Claimant and the Respondent entered into a contract (the Contract) for the following Work to be performed on the House, at a total cost of \$195,000.00:
 - Preparation of plans;

- Site prep and excavation;
- Acquisition of and payment for all necessary permits.
- Renovation of the Property to accommodate the addition;
- Bumping the House out six feet in a "seamless" manner;
- Construction of a 2,520 square foot addition; and
- Provision of a five-year warranty.

4. The Respondent obtained only a sediment permit and repeatedly delayed his completion of the design aspects of the Work until, on October 3, 2007, the Respondent's father delivered a letter to the Claimant, advising him that the Respondent's company would be ceasing operations on October 11, 2007.

5. The Claimant did not hire a replacement contractor to perform the Work provided for under the Contract.

6. The Claimant made the following payments to the Respondent, none of which were refunded:

August 5, 2006	\$ 750.00
August 15, 2006	58,275.00
October 17, 2006	<u>15,000.00</u>
TOTAL PAID	\$74,025.00

DISCUSSION

Pursuant to Business Regulation Article §§ 8-405(a) and 8-407(e)(1), to recover compensation from the Fund, the Claimant must prove, by a preponderance of the evidence, that he incurred an actual loss, which resulted from a licensed contractor's acts or omission. Business Regulation Article § 8-401 defines an "actual loss" as "the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home

improvement.”

I agree with the characterization of this matter by the Fund’s representative as a “straight-forward abandonment case.” As such, the Claimant has met his burden, by proving that the Respondent failed to perform any of the Work required under the Contract and that the Claimant incurred an actual loss.

The Claimant testified and all provided documentation establishing the Contract terms, the Respondent’s delays and non-performance, and the specific amounts that the Claimant paid to the Respondent. The Respondent did not appear to place any of the Claimant’s evidence in dispute, and the Fund’s representative acknowledged that the evidence clearly established the Claimant’s entitlement to an award from the Fund under COMAR 09.08.03.03B(3)(a), which provides as follows:

B. Measure of Awards from Guaranty Fund.

(3) Unless it determines that a particular claim requires a unique measurement, the Commission shall measure actual loss as follows:

(a) If the contractor abandoned the contract without doing any work, the claimant’s actual loss shall be the amount which the claimant paid to the contractor under the contract.

The Claimant paid the Respondent \$74,025.00, far in excess of the \$20,000.00 maximum award that any individual may obtain from the Fund. See Business Regulation Article § 8-405(e)(1). Therefore, the Claimant is entitled to that maximum amount.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Claimant has met his burden of proving that he incurred an actual loss as a result of the Respondent’s abandonment of the Work. Business Regulation Article §§ 8-405(a) and 8-407(e)(1). The total amount of that loss is in excess of the Fund’s cap of \$20,000.00. Business

Regulation Article § 8-405(e)(1), and the Claimant is therefore entitled to an award of that maximum amount from the Fund.

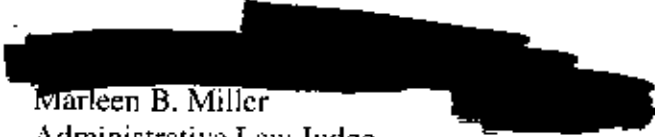
RECOMMENDED ORDER

Upon due consideration, I **RECOMMEND** as follows:

1. The **MHIC ORDER** that the Claimant, Giovanni R. Lanza, be awarded \$20,000.00 from the **MHIC Fund**, for the actual losses he sustained as a result of the Respondent's incomplete home improvement work;
2. The Respondent, David B. Barkley t/a Omega Construction & Remodeling, be ineligible for an **MHIC license**, under **Business Regulation Article § 8-411(a)**, until the Fund is reimbursed for the full amount of the award paid pursuant to its Order, plus annual interest of at least ten percent (10%); and
3. The records and publications of the **MHIC** reflect this decision.

July 6, 2009
Date Decision Mailed

MBM/rbs
105547


Marleen B. Miller
Administrative Law Judge

CLAIM OF GIOVANNI R. LANZA
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND,
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FILE EXHIBIT LIST

The Claimant's Exhibits

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The Fund's Exhibits

1. The Respondent's licensing history
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3. The Claim, filed December 19, 2007

The Respondent's Exhibits

None.

PROPOSED ORDER

WHEREFORE, this 31st day of August 2009, 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