

IN THE MATTER OF THE CLAIM * BEFORE WILLIAM SOMERVILLE,
OF * AN ADMINISTRATIVE LAW JUDGE
RODNEY K. MAYER * OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME * OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND *
FOR VIOLATIONS ALLEGED *
AGAINST JOHN R. WOOD T/A * OAH NO.: DLR-HIC-02-10-30687
RESIDENTIAL REMODELERS * MHIC NO.: 08-(90)-978

* * * * *

RECOMMENDED DECISION

STATEMENT OF THE CASE
 ISSUE
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 FINDINGS OF FACT
 DISCUSSION
 CONCLUSIONS OF LAW
 RECOMMENDED ORDER

STATEMENT OF THE CASE

On June 8, 2009, Rodney K. Mayer (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 R. Wood t/a Residential Remodelers (Respondent).

I convened a hearing on September 29, 2010, at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312 and 8-407 (2010). Eric B. London, Assistant Attorney General, Department of Labor, Licensing and Regulation, 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 of Labor, Licensing and Regulation, 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.

ISSUE

Did the Claimant sustain an “actual loss” compensable by the Fund as a result of the acts or omissions of the Respondent?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits offered by the Claimant:

1. Copies of checks
2. Photograph of the shed door
3. Photograph of the “cut out”
4. Photographs of the top and bottom of shed doors
5. Remedial contract document

I admitted the following exhibits offered by the Fund:

1. Notice of Hearing
2. Hearing Order & Notice of Hearing
3. Licensing History
4. Claim Form, 6-4-09
5. Letter, 6-12-09
6. Photograph of the “cut out”

7. Complaint form with an attachment, 10-26-07
8. Photograph of doorway
9. Letter, received 4-11-08
10. Letter, 6-24-09.

The Respondent offered no additional exhibits.

Testimony

The Claimant testified. The Respondent testified.

FINDINGS OF FACT

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

1. At all times relevant, the Respondent was an MHIC license holder trading as Residential Remodelers.
2. On or about May 31, 2006, the Claimant and the Respondent entered into a verbal contract in which the Claimant would pay \$7,075 and the Respondent would design and construct at the Claimant's residence a tool shed with a grape arbor attached.
3. The design included "cut outs" in 2 x 8 arbor beams that hung over the area of the shed's doors. The shed doors were two, 30-inch, solid-core, heavy birch doors that required three hinges because of their weight. They were designed to swing out under the two-inch "cut outs" in the arbor beams.
4. Work was completed and the Claimant paid the final payment to the Respondent on or about June 14, 2006.
5. In May or June 2007, the Claimant hit one shed door with his lawn tractor and tore it off of at least one hinge. At about that same time, when one door began to rub or to bind at

the arbor beam cut out, the Claimant would force the door into the cut out; as a result, the veneer on the top of the door began to pull away from the door.

6. In July 2007, the Claimant telephoned the Respondent and asked the Respondent to give an estimate for work on the front door of the Claimant's residence and on a closet door in the house. He also mentioned to the Respondent that he had hit the shed door with his tractor and that it needed repair. The Claimant also expressed that he believed that before he hit a door, one shed door would not open fully because the 2 x 8 arbor beam had swelled and caused the top of the shed door to bind at the arbor beam.
7. The Respondent responded that he did not believe that he was responsible for the shed door repairs.
8. On October 26, 2007, the Claimant filed with the MHIC a complaint against the Respondent.
9. On May 22, 2009, the Claimant received a proposal from a remedial contractor to repair the shed doors. The remedial contract called for removing the remaining door and, among other things, replacing both shed doors with a single, five-foot wide, solid-core birch door for \$3,124.66.
10. On June 4, 2009, the Claimant filed a claim against the MHIC Fund for \$3,124.66.

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 claimant has the burdens of production and

persuasion to establish the “inadequate, incomplete or unworkmanlike” work product of the contractor, as well as to establish the amount of the “actual loss”. Md. Code Ann., Bus. Reg. § 8-407.

The Claimant argues that the design of the shed doors swinging out under the cut outs in the arbor beams was inadequate. He argues that the implementation of that design was unworkmanlike. He argues that use of hollow-core interior doors on the shed was unworkmanlike and inadequate.¹

The Respondent argues that the design, construction, and materials were not inadequate and were not unworkmanlike. He argues that the Claimant caused the door problem when he hit the door with a lawn tractor. He also argues that if the arbor beam and the door did actually bind, then the Claimant denied him a reasonable opportunity to remedy the door-binding problem by simply shaving some more wood out of the cut out on the beam. In the instant case, the Claimant has not demonstrated that the Respondent performed inadequate or unworkmanlike home improvement work.

“Unworkmanlike” means “not in a workmanlike manner.” The Court of Appeals has defined “workmanlike manner” as that term applies to building and construction contracts. In *Gaybis v. Palm*, 201 Md. 78, 85 (1952) the Court held, “The obligation to perform with skill and care is implied by law and need not be stated in the contract.” That rule was reaffirmed in *Worthington Construction Company v. Moore*, 266 Md. 19, 22 (1972). In *K & G Construction Co. v. Harris*, 223 Md. 305, 314 (1960), the Court compared the express standard “workmanlike manner” with the implied standard of performance discussed in the

¹ The Claimant testified that the doors were hollow-core, interior doors and suggested that they were not appropriate for exterior doors on a shed. I did not find that hollow-core doors were installed.

Gaybis case. The *Harris* court cited the *Gaybis* case for authority that the "workmanlike-manner" wording was equivalent to the "skill-and-care" wording in the *Gaybis* case.

In B.A. Garner, *A Dictionary of Modern Legal Usage*, 582 (1987) the author defines "workmanlike" as "characteristic of or resembling [that of] (sic) a good workman: businesslike." In essence "unworkmanlike" means that all of the steps, phases, or processes of the particular home improvement work that are required by industry standards might have been done, but not done with the requisite skill and care.

"Inadequate" as used in the statutory scheme, *see* Md. Ann. Code Bus. Reg. §§ 8-311(a)(10) and 8-401, means that the home improvement work was done with all of the steps, phases, or processes required by industry standards but the result does not equal what is required by the contract or is not suitable to the case or occasion. *See Black's Law Dictionary* 61 (4th ed. 1957).

The design of the doors swinging out into the cut outs in the arbor beams has not been shown to be inadequate or unworkmanlike. The design worked well for both doors for a long time before the time that the Claimant alleges that one door began to bind. For a long time after the project was completed, there was no allegation of swelling of the beams or binding. There was no expert evidence that most skilled home improvement contractors would have cut the cut outs in the beam a little deeper to allow for more swelling of the beam. There was no expert evidence that most home improvement contractors would have anticipated substantial swelling of one arbor beam. There was no expert evidence that the use of cut-out design on a grape arbor violated an industry standard, or otherwise resulted in shoddy work. The beam was not a weight-bearing structure that should not have cut outs; the beam was merely part of a grape arbor. The design was such that it was easily and inexpensively serviced, if necessary, by simply shaving or

deepening the cut out, if substantial swelling were to have occurred. The design appeared to be executed with skill and care, the work was not shoddy, and the design was clever.

With regard to the doors, the heavy, solid-core birch shed doors were adequate and suitable to the case or occasion. The Claimant's contention that the doors were hollow-core interior doors was false. Damage done to the doors was done by the Claimant. He hit one door with the lawn tractor and he forced a door under an arbor beam when he knew it was binding. There was no expert opinion evidence that a heavy, solid-core birch door was inadequate or unsuitable as an exterior shed door. Moreover, the Claimant's evidence with regard to what the remedial contractor proposed demonstrated that a heavy, solid-core birch door was entirely appropriate for a shed. On the basis of the evidence presented, I cannot determine that the doors supplied by the Respondent were inadequate for the purpose for which they were used.

CONCLUSIONS OF LAW

I conclude that the Claimant has not demonstrated that he sustained an actual loss. Md. Code Ann., Bus. Reg. § 8-401 (2010).

RECOMMENDED ORDER

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

ORDER that the Claimant's case be **DISMISSED**; and further

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

December 27, 2010
Date Decision Mailed



William J. D. Somerville III
Administrative Law Judge

WS/
118327

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FILE EXHIBIT LIST

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PROPOSED ORDER

WHEREFORE, this 10th day of February 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.

Marilyn Jumalon

*Marilyn Jumalon
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION