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| IN THE MATTER OF THE CLAIM OF | * BEFORE GERALDINE A. KLAUBER, |
| DONALD G. KITCHEN | * AN ADMINISTRATIVE LAW JUDGE |
| AGAINST THE MARYLAND HOME | * OF THE MARYLAND OFFICE |
| IMPROVEMENT GUARANTY FUND | * OF ADMINISTRATIVE HEARINGS |
| FOR THE VIOLATIONS OF | * OAH NO.: DLR-HIC-02-10-24943 |
| JOHN MENACHO, t/a | * MHIC NO.: 09 (90) 133 |
| CHESAPEAKE DESIGN AND | * |
| LANDSCAPE, INC. | * |

* * * * *

RECOMMENDED DECISION

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

STATEMENT OF THE CASE

On February 4, 2009, Donald Kitchen (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$22,053.46 for an actual loss allegedly suffered as a result of home improvement work performed by John Menacho, t/a Chesapeake Design and Landscape, Inc. (Respondent).

A hearing was held on January 21, 2011, at the Office of Administrative Hearings (OAH), Hunt Valley, Maryland, before Geraldine A. Klauber, Administrative Law Judge (ALJ), on behalf of the MHIC. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(c)(2)(i) (2010). The Claimant represented himself. Eric London, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), represented the Fund. The Respondent represented himself.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the procedural regulations of the DLLR, and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2010); Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02, and 09.08.03; COMAR 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?

SUMMARY OF THE EVIDENCE

Exhibits

The Fund submitted the following exhibits, which were admitted into evidence:

Fund #1 - November 12, 2010 Notice of Hearing

Fund #2 - Affidavit of Lynn-Michelle Escobar

Fund #3 - December 13, 2010 Notice of Hearing

Fund #4 - Hearing Order

Fund #5 - Licensing History of Respondent

Fund #6 - Home Improvement Claim Form

Fund #7 - March 3, 2009 letter from MHIC to the Respondent

The Claimant submitted the following exhibits, which were admitted into evidence:

Cl. #1 - May 9, 2007 contract between the Claimant and the Respondent

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Cl. #3 - July 23, 2008 MHIC Complaint Form submitted by the Claimant with attached typed statement and photographs

Cl. #4 - Eleven photographs taken by the Claimant of work performed by the Respondent

CI. #5 – The Claimant’s summary of charges; April 6, 2010 contract between the Claimant and Designscape, LLC; April 6, 2010 check from the Claimant to Designscape, LLC in the amount of \$8,904.69; two additional invoices from Designscape and two checks from the Claimant to Designscape, LLC

CI. #6 – Report of Robert I. Vitek, Designscape, LLC with attached photographs, MHIC licenses; ICPI Concrete Paver Installer Certification; National Concrete Masonry Association Segmental Retaining Wall Installer Certification

CI. #7 – Maryland Department of Assessment and Taxation (MDAT) tax information regarding Chesapeake Design and Landscape, LLC

Testimony

The Claimant, the Claimant’s wife, Jennifer Kitchen, and Robert Vitek, owner of Designscape, LLC, testified in support of the claim. The Respondent testified in response to the claim. The Fund did not present the testimony of any witnesses.

FINDINGS OF FACT

Having considered the evidence, I make the following findings of fact 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 with the MHIC.
2. At all times relevant to the subject of this hearing, the Respondent had a business partner, Robert Bennett, who acted on behalf of the Respondent.
3. At all times relevant to the subject of the hearing, the Claimant owned the property known as 5614 Catoclin Ridge Drive (the Property).
4. On or about May 12, 2007, the Claimant contracted with the Respondent to construct a retaining wall and patio around the swimming pool on the Property. The contract specifically called for the following work:

- Tear out and dispose of all materials (concrete, wood, etc.)

- Supply and install E.P. Henry Coventry Wall in 6 and 3 inch mix (Customers choice of color) in area of old wall to include steps to new patio in customer's choice of style.
- Supply and install new patio, walk and landing in customer's desired pavers. Layout to be decided by customer.
- Run all appropriate conduit and drainage
- Bring to fine grade and seed

5. The total contract price was \$18,723.00.

6. The Respondent subsequently agreed to install a walkway for an additional \$2,799.00.¹

7. The Claimant paid the Respondent a total of \$21,522.00.

8. The Respondent began work on the project on approximately July 13, 2007, and completed the work in approximately two weeks.

9. On July 29, 2007, a heavy rain caused soil behind the retaining wall to leach through the retaining wall and wash into the swimming pool. The rain water pooled on the patio surface.

10. The Claimant called the Respondent to report the problem. In early August 2007, the Respondent addressed the issue by removing soil from behind the wall and replacing it with gravel. The Respondent also placed landscape fabric against the wall.

11. In approximately February 2008, the longest part of the wall began to lean toward the swimming pool and the wall separated at the corner. Several of the wall capstones became loose.

12. During the winter of 2007-2008, the Claimant made numerous attempts to contact the Respondent by telephone, but the Respondent failed to respond to the Claimant's messages.

13. On May 19, 2008, the Claimant contacted the Respondent by telephone and the Respondent informed the Claimant that all of his workers were gone and that he would not be doing any more work on the wall.

¹ The Claimant did not include the amount paid for the walkway in the calculation of the actual loss.

14. In May 2008, the Claimant received an estimate of \$22,053.46 from a contractor to repair and replace the Respondent's work. At that time, the Claimant could not afford to have the work done and did not enter into a contract.

15. On February 4, 2009, the Claimant filed a claim with the MHIC.

16. In January 2010, the retaining wall collapsed onto the pool deck.

17. In January 2010, the Claimant obtained Robert I. Vitek of Designscape, LLC to come inspect the work performed by the Respondent and provide an estimate for repair and replacement of the patio and retaining wall.

18. The patio constructed by the Respondent was 45 feet in length and had just a 2-inch drop in elevation from the house to the opposite end and no elevation change from side to side. Industry standards call for at least a 2% slope (2-inch drop for every 8-foot span) for proper drainage, which in this case means a required 11-inch change in elevation from the house to the opposite end of the patio. The inadequate slope constructed by the Respondent resulted in the inadequate drainage of water from the patio.

19. According to industry standards, segmental retaining walls are generally installed with a small horizontal setback between units, creating a wall batter, which compensates for slight lateral movement of the segmental retaining wall due to earth pressure. The retaining wall installed by the Respondent had an inadequate setback.

20. The Respondent failed to provide for adequate soil reinforcement behind the retaining wall by installing a product such as Geogrid.²

21. The drain pipe installed by the Respondent should have been placed at the bottom of the retaining wall to provide for adequate drainage away from the structure. The Respondent had not installed the drainage pipe at the bottom of the wall.

² Geogrid is a fishnet-like product that is placed in the soil and reinforces the soil to prevent it from pressing against the retaining wall.

22. The Respondent failed to follow industry standards for interlock paving and segmental retaining wall installation. The Respondent constructed the corners of the retaining wall with straight vertical lines (stack joints) instead of overlapping them, causing the joints to separate.

23. On April 6, 2010, the Claimant entered into a contract with Designscape, LLC to remove and replace the patio and retaining wall constructed by the Respondent. The total contract price was \$22,288.00.³

DISCUSSION

Section 8-405(a) of the Business Regulation article provides that an owner may recover compensation from the Guaranty Fund, "for an actual loss that results from an act or omission by a licensed contractor[.]" 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). The Claimant bears the burden of proving the amount of the actual loss.

The Claimant has established that he suffered an actual loss as a result of the Respondent's unworkmanlike home improvement. The Respondent testified and presented photographs that documented the failure of a retaining wall and patio constructed by the Respondent. The Claimant established that shortly after the Respondent completed construction in July 2007, during a heavy rainfall, a significant amount of soil washed through the retaining wall onto the patio. The Respondent tried to remedy the problem by removing some dirt from behind the wall and replacing it with gravel. The Respondent also installed landscaping fabric against the wall. Despite this attempt at repair, the wall continued to fail and during the winter months, it began to lean toward the pool. The Claimant made many unsuccessful attempts during the winter of 2008 to contact the Respondent. The Respondent did not respond to the Claimant

³ The original contract estimated \$960.00 for excavation and \$19,418.00 to rebuild the wall and patio. The Claimant eventually had to pay Designscape an additional \$1,910.00 for excavation and \$620.00 for drain channels.

until May 2008, when he informed the Claimant that he had no workers and no further repairs would be made. In July 2008, the Claimant obtained an estimate for repair of the wall from Hardscape, a licensed contractor. The estimate was for \$22,053.46 and the Claimant could not afford to have the repairs done at that time. The wall completely failed and collapsed onto the patio in January 2010.

The Claimant presented testimony from Robert I. Vitek of Designscape, LLC to explain the deficiencies in the Respondent's construction of the retaining wall and patio. Although not offered by the Claimant as an expert witness, I found the Respondent's qualifications added credibility to his opinions. Mr. Vitek is certified by the Interlocking Concrete Paving Institute (ICPI) as a concrete installer and he is also certified by the National Concrete Masonry Association (NCMA) as a segmental retaining wall installer. Mr. Vitek referred to the NCMA and ICPI standards when analyzing the Respondent's workmanship. Mr. Vitek explained that the patio as constructed by the Respondent was not in accordance with industry standards because the ICPI standards in the EP Henry Contractor Technical Guide require at least a 2% slope for proper drainage. The patio constructed by the Respondent was 45 feet in length but had just a 2-inch drop in elevation from the house to the opposite end of the patio and there was no elevation from side to side of the patio. He explained that according to industry standards, a patio with the dimensions of the Claimant's patio requires an 11-inch change in elevation from the house to the end of the patio. Due to the improper slope, rainwater collected on the patio. Regarding the construction of the retaining wall, Mr. Vitek explained that according to industry standards, segmental retaining walls, such as the Claimant's, require a small horizontal setback between units to create a batter wall and compensate for any lateral movement of the wall due to earth pressure. In addition to not preparing a proper setback for the wall, the Respondent failed to reinforce the soil behind the wall, failed to place drainage stone deep enough below the top of the

wall and failed to properly place the drain at the bottom of the wall to provide for drainage away from the structure. The Claimant and his witness presented ample photographs that illustrated the described deficiencies and supported their testimony.

The Respondent did not dispute any of the Claimant's contentions regarding the quality of the work performed. The Respondent argued that he was unaware of the home improvement contract with the Claimant and that he was not responsible for any of the work performed. In support of this assertion, the Respondent pointed to the fact that the Claimant made some of the payments directly to Mr. Bennett and not Chesapeake Design and Landscape. According to the Respondent, he has become estranged from Mr. Bennett over the course of the past two years and had very limited contact with him.

Although I find the Respondent's testimony regarding his fractured relationship with his business partner to be credible, that rift does not absolve him from responsibility for the unworkmanlike home improvements performed in this case. The MHIC license number under which the work was performed was assigned to the Respondent. The Respondent does not contend that Mr. Bennett had no authority to act on behalf of Chesapeake Design and Landscape. Section 8-405(b) of the Business Regulation Article provides that "for purposes of recovery from the Fund, the act or omission of a licensed contractor includes the act or omission of a subcontractor, salesperson, or employee of the licensed contractor, whether or not an express agency exists." Therefore, I find that the Claimant has sustained the burden of proof and established that due to the unworkmanlike, inadequate home improvement, he has sustained an actual loss.

The Claimant presented evidence that allows for the calculation of actual loss. The Claimant entered into a contract with Designscape, LLC on April 6, 2010 to replace the work performed by the Respondent. The cost of excavation totaled \$2,870.00, the cost to rebuild the

wall and patio totaled \$19,418.00 and the drain channels cost an additional \$620.00, totaling \$22,288.00. The Claimant paid Designscape, LLC in full for the work performed.

The Fund agreed that the Claimant is entitled to an award from the Fund and asserted that COMAR 09.08.03.03B.3(c) governs the calculation of the award from the Fund. This provision states:

(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 measurements accordingly.

Applying the formula set forth in COMAR 09.08.03.03B(3)(c), I have calculated the

Claimant's actual loss as follows:

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| Amount paid on the original contract | \$18,723.00 |
| Plus cost to repair the work | <u>+\$22,288.00</u> |
| Less the original contract | <u>-\$41,011.00</u> |
| Actual loss | \$22,288.00 |

Although according to the formula set forth in COMAR, the Claimant's actual loss totals \$22,288.00, Section 8-405(e) of the Business Regulation Article places limitations on the amount that a claimant can recover from the Fund. The statute prohibits the MHIC from awarding from the Fund "more than \$20,000 to one claimant for acts or omissions of one contractor" and "an amount in excess of the amount paid by or on behalf of the claimant to the contractor against whom the claim is filed." Md. Code Ann., Bus. Reg. § 8-405(e)(1) and (5) (Supp. 2010).

Therefore, based on the statutory limitations, the Claimant's actual loss is limited to \$18,723.00.

CONCLUSION OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Claimant has sustained an actual loss in the amount of \$18,723.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401 and 8-405(b) and (c) (2010 & Supp. 2010).

RECOMMENDED ORDER


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

ORDER that the Claimant be awarded \$18,723.00 from the Maryland Home Improvement Commission Guaranty Fund; and

ORDER that the Respondent be 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 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.

February 15, 2011
Date Decision Mailed



Geraldine A. Klauber
Administrative Law Judge

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PROPOSED ORDER

WHEREFORE, this 21st day of March 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.

Andrew Snyder

***Andrew Snyder
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION