

IN THE MATTER OF THE CLAIM	* BEFORE JUDITH JACOBSON,
OF JOEL MALDONADO,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	*
FOR THE ALLEGED ACTS OR	*
OMISSIONS OF ZACHARY	*
ANDERSON, T/A ANDERSON'S	* OAH No.: DLR-HIC-02-15-25806
LANDSCAPE CONSTRUCTION,	* MHIC No.: 14 (75) 1201
RESPONDENT	*

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On April 10, 2015, Joel Maldonado, (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$23,409.47 in alleged actual losses suffered as a result of a home improvement contract with Zachary Anderson, trading as Anderson's Landscape Construction, (Respondent).

I held a hearing on November 9, 2015 at the offices of the Frederick County Department of Social Services, Frederick, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e)

(2015).¹ The Claimant represented himself. The Respondent appeared and was represented by Scott Hartinger, Esquire. The Fund was represented by Jessica Kaufman, Assistant Attorney General, Department of Labor, Licensing and Regulation.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, 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 (2014), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02, and 28.02.01.

ISSUES

Did the Claimant sustain an actual loss compensable by the Fund as a result of any acts or omissions committed by the Respondent, and if so, what is the amount of that loss?

SUMMARY OF THE EVIDENCE

Exhibits

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

- Cl. Ex. # 1 - 26 Photographs with captions
- Cl. Ex. # 2 - Home Improvement Proposal, Mariner Homes, February 11, 2013, with addendum and notes
- Cl. Ex. # 3 - Agreement, Claimant and Respondent, February 3, 2012
- Cl. Ex. # 4 - Cost Breakdown; Receipt and Invoice, Home Depot, March 2013; Invoices, Handyman On Call, February 17, 2013

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

- Resp. Ex. # 1 - Three pages of photographs

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. # 1 - Notice of Hearing, September 3, 2015
- Fund Ex. # 2 - Transmittal; Hearing Order, July 29, 2015; Claim Form, received April 10, 2015

¹ Unless otherwise noted, all citations of the Business Regulation Article refer to the 2015 Replacement Volume.

Fund Ex. # 3 - Licensing Information, October 28, 2015

Fund Ex. # 4 - Letter from MHIC to the Respondent, April 10, 2015; Claim Form, received April 10, 2015

Fund Ex. # 5 - Progress Invoice with notes, December 3, 2012; Checks, one date illegible, May 11, 2012, July 11, 2012 September 6, 2012, October 22, 2012, December 9, 2012; Notes, September 28, 2012 with illegible rectangle; Change Order, with note, September 6, 2012

Testimony

The Claimant testified on his own behalf and presented testimony from his wife, Sarah Fritz-Maldonado. The Respondent testified on his own behalf. No testimony was presented for the Fund.

PROPOSED 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 numbers 01-83470 (individual license) and 05-121433 (corporate license).
2. On February 3, 2012, the Claimant and the Respondent entered into a contract for work on the Claimant's home, including replacing windows in the basement, first floor and second floor; altering the ceiling height in the master bedroom, creating new bedrooms, installing a new roof, replacing exterior vinyl siding, and creating a new decorative gable roof.
3. The contract stated that work would begin within one week of permit issuance, and the work would be substantially completed in approximately three to four months.
4. The original agreed-upon contract price was \$98,174.00.
5. Four subsequent change orders added \$36,573.38 to the original price.
6. The total contract price was \$134,747.38.

7. The original contract's first required payment of \$32,724.00 was due when the agreement was signed; the Claimant made the payment in full on February 9, 2012.

8. The original contract's second required payment of \$32,725.00 was due when construction material was delivered; the Claimant made the payment in full on July 11, 2012.

9. The original contract's final payment of \$32,725.00 was due when the work was substantially completed. As of January 2013, the Claimant paid \$15,000.00 toward this amount.

10. The total cost for the four change orders was \$36,573.38; the Claimant paid that cost in a timely manner.

11. The Claimant's total payment to the Respondent as of January 2013 on the original contract and the four change orders was \$117,022.38.

12. The Respondent did much of the work in the original contract and the change orders, but as of January 2013, the work was incomplete: there was missing exterior siding, and there was work to do on the roofing and on certain columns.

13. In January 2013, the Respondent notified the Claimant that he had stopped working on the house and would not finish the work until the Claimant made further payments.

14. In February 2013, the Claimant refused to make further payments and told the Respondent that he should remove his equipment and not come back to the site.

15. The Claimant solicited another contractor, Mariner Homes, for the completion of the work, but then he decided to do the work himself with the help of a handyman service, using supplies he bought from Home Depot.

16. The Claimant's work with the handyman service essentially finished the work in the original contract and the change orders.

17. The Claimant's cost to complete the contract and change order work was \$5,384.47, consisting of \$1,430.00 paid to Handyman On Call for work and \$3,954.47 paid to Home Depot for supplies.

DISCUSSION

Legal Framework

The Claimant has the burden of proving the validity of his claim by a preponderance of the evidence. Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3). "[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true." *Coleman v. Anne Arundel Cty. Police Dep't.*, 369 Md. 108, 125, n. 16 (2002), quoting Maryland Pattern Jury Instructions 1:7 (3rd. ed. 2000).

An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor." Bus. Reg. § 8-405(a). *See also* COMAR 09.08.03.03B(2) ("actual losses . . . incurred as a result of misconduct 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." Bus. Reg. § 8-401. The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. There are no *prima facie* statutory impediments barring the Claimant from recovering compensation from the Fund (being related to the Respondent, recovering damages from the Respondent in a court proceeding, owning more than three residential properties, etc.). Md. Code Ann., Bus. Reg. §§ 8-405(f)(1) and (2) (2015).

For the following reasons, I find that the Claimant has not proven eligibility for compensation.

Contract and Payment

The Respondent and the Claimant signed the original contract on February 3, 2012. Under the terms of that contract, the Respondent agreed to perform work on the Claimant's home, including replacing windows in the basement, first floor and second floor; altering the ceiling height in the master bedroom, creating new bedrooms, installing a new roof, replacing exterior vinyl siding, and creating a new decorative gable roof. The price of the contract was \$98,174.00. Work was to begin within one week of permit issuance, and it was expected that the work would be substantially completed in approximately three to four months.

The Claimant promptly paid the Respondent the first two required payments on the contract, \$32,724.00 and \$32,725.00. A final required payment of \$32,725.00 was due when the work on the original contract was substantially completed.

The Claimant and Respondent subsequently agreed to four change orders.² The total cost of the change orders was \$36,573.38, which was promptly paid in full by the Claimant.

The Claimant did not pay the final payment on the original contract in full. He did pay the Respondent \$15,000.00 more than the first two contract payments and the payments for the change orders. The total amount the Claimant paid the Respondent was \$117,022.38.

Work Performed by the Respondent

The Respondent did much of the work in the original contract and change orders but, as of January 2013, the Respondent notified the Claimant that he would not finish the work without further payments. The Claimant refused to make more payments. In February 2013, the Claimant told the Respondent to remove his equipment and not come back.

² At the hearing, the Claimant and Respondent mentioned a dispute over payment for some plumbing work. There was no evidence that this work was included in the original contract or the change orders, and it was unclear if the Claimant was to pay the Respondent or the plumber. For these reasons, I have not considered it here.

Basis for Claim

The Claimant asserted that the quality of the Respondent's work was poor, especially the trim around the windows and doors, the drywall, and the wall repairs; the Claimant provided photographs to support this assertion. The Claimant's statements and photographs are not reliable evidence of poor workmanship. To show that the work was unworkmanlike, it would be necessary for the Claimant to present evidence from someone qualified to give an opinion on the workmanship, such as another home improvement contractor or an inspector.

The Claimant also asserted that the Respondent was responsible for incomplete work. The Respondent did not dispute that the work under the contract and the change orders was not completed, but he argued that the claim was barred because the Claimant improperly prevented him from completing the work. If a contractor's good faith efforts to complete work are unreasonably rejected by a claimant, the claim against the Fund is barred. Bus. Reg. § 8-405(d); COMAR 09.08.03.02D(3)(c).

I find that the Respondent did not make good faith efforts to complete the work.

The Respondent demanded payment from the Claimant as a requirement for the work to be finished. Under the original contract, the Claimant was required to make a first payment, of \$32,724.00, when the agreement was signed, and he made that payment on February 9, 2012. The Claimant was required to make a second payment, of \$32,725.00, when the material was delivered, and he made that payment on July 11, 2012. All the payments due on the four change orders, totaling \$36,573.38, were paid in a timely manner. The amount outstanding in January 2013 was the final payment in the original contract, \$32,725.00 to be paid "on substantial completion of all work under [the] contract." (Cl. Ex. # 3). The Claimant paid \$15,000.00 toward the final payment but did not make the final payment in full.

The Respondent argued that he was due the full final payment because the work under the contract was substantially completed in January 2013. This argument is not supported by the facts. Photographs from January 31, 2013 clearly show the absence of exterior siding. The Respondent acknowledged that he also had not finished work on the roofing and columns.

The Respondent asserted that it would have taken him less than a week to finish the siding, another day to complete the columns, and one more day to do the roofing. It is apparent, however, that significant work was yet to be done. It was unreasonable for the Respondent to demand payment before the work was substantially completed. He did not make a good faith effort to complete the work, and the claim for incomplete work is not barred.

The Claimant has shown that the Respondent's home improvement work was incomplete.

The Completion of the Work

Although the Claimant obtained a bid from another contractor, Mariner Homes, to complete the work, he ultimately decided to do the work himself with the help of a handyman service, using supplies he bought from Home Depot. The Claimant testified that he and the handyman service essentially finished the work described in the original contract and in the change orders. The reliability of that testimony was not challenged by the Respondent or the Fund.

Computation of Recoverable Amount

Having found eligibility for compensation, I now turn to the amount of the award, if any, to which the Claimant is entitled. MHIC regulations provide three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3).

The first formula applies when the contractor did not do any work under the contract and is therefore not applicable to this case. COMAR 09.08.03.03B(3)(a).

The second formula applies when the contractor did work under the contract and the claimant did not solicit another contractor to complete the contract, so the work on the contract was not completed at the time of the claim. COMAR 09.08.03.03B(3)(b). When the work remains incomplete, this formula provides a way to determine the actual loss by comparing the value of the contractor's work to the amount the claimant paid the contractor. Because the work under the contract in this case was completed, I find that the second formula is not applicable.

The third formula applies to situations in which the contractor did work under the contract and the claimant solicited another contractor to complete the contract. The formula computes the actual loss as the amount the claimant paid to the original contractor, added to any reasonable amount the claimant paid to complete the work under the original contract (with change orders), less the original contract price. COMAR 09.08.03.03B(3)(c).

Although the Claimant initially solicited Mariner Homes, to complete the Respondent's contract, the Mariner Homes proposal, for the price of \$33,750.00, was not accepted by the Claimant. Moreover, the Mariner Homes proposal is not useful in determining the cost to complete the contract work because the work in the Mariner Homes proposal was not itemized.

I find that it is appropriate to apply the third formula using the amount paid by the Claimant to the handyman service and to Home Depot for the completion of the work. The value of the Claimant's labor is not considered in these calculations because it was unpaid.

The amount paid under the original contract with change orders was \$117,022.38.

The total amount the Claimant paid Home Depot and Handyman On Call to complete the work was \$5,384.47.³

³ The Claimant presented receipts from Handyman On Call for \$1,430.00, and from Home Depot for \$2,679.47. (Cl. Ex. # 4). The Claimant testified that there were additional receipts from Home Depot that were illegible or lost. Neither the Respondent nor the Fund challenged the testimony that the Claimant's total costs were \$5,384.47.

The sum of the amount paid to the Respondent and the cost to complete the work is \$122,406.85. When this sum is subtracted from the total contract price, \$134,747.38, the balance is negative. There is not actual loss under the applicable MHIC regulations.

The reason for this outcome is that the Claimant saved money because the Respondent did not finish the contract: the Claimant would have paid more to the Respondent than he paid to complete the work with materials from Home Depot and the handyman service.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has not sustained an actual and compensable loss as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guarantee Fund deny the Claimant's claim; and

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

Signature on File

January 12, 2016
Date Decision Issued

Judith Jacobsen
Administrative Law Judge

JJ/dlm
#160105