

IN THE MATTER OF THE CLAIM OF  
ROGER L. BROWN  
AGAINST THE MARYLAND HOME  
IMPROVEMENT GUARANTY FUND  
FOR THE ALLEGED ACTS OR  
OMISSIONS OF JAY D. BRECHBIEL, II,  
T/A DACOR LIGHTING & CABINETRY,  
INC.

\* BEFORE RICHARD F. ROTHENBURG,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\* OAH NO.: DLR-HIC-02-09-01781  
\* MHIC NO.: 07 (75) 1700  
\*

\* \* \* \* \*

**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 25, 2008, Roger L. Brown (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$4,573.10 for actual losses allegedly suffered as a result of home improvement work not performed by Jay Brechbiel, t/a as Dacor Lighting and Cabinetry (Respondent).

I held a hearing on August 3, 2009 at the Washington County Free Library, 100 South Potomac Street, Hagerstown, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(c)(2)(i) (2004 & Supp. 2008). Gina M. Serra, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund.

The Claimant represented himself. The Respondent failed to appear after due notice to his address of record.

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 (2004 & Supp. 2008), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02.01; and 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**

I admitted the following exhibits, on the Claimant's behalf, all part of a packet of documents collectively designated as Claimant's Exhibit 1:

- Brief Summary of Attached Documentation
- Condensed Details of Events with Respondent
- Home Improvement Claim Form, dated February 22, 2008
- Detail of Events with Dacor Lighting
- Letter to Carol Brown, dated December 4, 2006
- Results for Active Licensed Home Improvement
- Dacor Lighting and Cabinetry, Change Order Agreement, dated October 6, 2006
- Project Details Quote for the Claimant by the Respondent

- Estimate by G.A. Miller Lumber Co., dated December 22, 2006
- Installed Sales Contract between Claimant and Miller Lumber, undated

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

1. Hearing Notice
2. Hearing Order and Hearing Notice returned as undeliverable
3. Hearing Order
4. Affidavit of Lynn-Michelle Escobar, dated May 21, 2009
5. Respondent's HIC licensing history
6. Record of Zabasearch for Respondent conducted by HIC
7. HIC Claim Form filed by Claimant on February 25, 2009

There were no exhibits admitted on the Respondent's behalf.

#### Testimony

The Claimant testified.

#### **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 number 3454061.
2. On October 6, 2006, the Claimant and the Respondent entered into a contract to furnish and install kitchen cabinets and counter. The contract stated that work would begin on or about November 3, 2006 and would be completed by mid-November 2006.
3. The original agreed upon contract price was \$27,235.80.

4. On or about October 6, 2006, the Claimant paid the Respondent a deposit of \$9,235.80, using a credit card.
5. On November 2, 2006, the Respondent informed the Claimant that the cabinets were in and the second deposit of \$9,000.00 was required. The second payment was made using a different credit card.
6. The Respondent informed the Claimant that he would be at the Claimant's home on November 3, 2006, to install the cabinets. The Claimant's wife waited at home all day, but the Respondent failed to appear.
7. The Claimant's wife contacted the Respondent, who said he had scheduling problems, and re-scheduled the installation for November 17, 2006. The Claimant's wife again waited at home, but the Respondent never appeared.
8. The Claimant called the Respondent, who said that the installers had gone deer hunting and he re-scheduled the installation for December 1, 2006.
9. On November 20, 2006, the Claimant called the Respondent and demanded that the cabinets be stored in his garage. At this point, the Respondent admitted he had been untruthful and he had not ordered the cabinets; however, he stated he would overnight a check to the cabinet manufacturer on November 22, 2006.
10. Even though the Respondent assured the Claimant he would be there to install the cabinets on December 1, 2006, he failed to do so for the third time.

11. The Claimant contacted the cabinet manufacturer and was told that the cabinets had never been released to be manufactured because of the Respondent's account standing.
12. On December 1, 2006, the Claimant notified the Respondent that he decided to have another contractor install the cabinets because he had breached their contract and knowingly deceived him and abandoned the project.
13. On December 1, 2006, the Claimant called the two credit card companies and filed with each a dispute of charges.
14. The Claimant contracted with another lumber company to perform the work that the Respondent failed to do and paid the contractor \$31,808.90.
15. Both credit card companies removed the charge from the Claimant's account and, as of the date of the hearing, have not reinstated them.
16. The Claimant filed a claim with the HIC for \$4,573.10, which is the difference between what he contracted to pay the Respondent and what he paid the new contractor to do the work the Respondent failed to perform.

### **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) (Supp. 2008). *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 (2004). For the following reasons, I find that the Claimant has failed to prove eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time he and the Claimant entered into the contract. The Claimant entered into a contract with the Respondent in October 2006 to remodel his kitchen and paid him a \$9,235.80 down payment using a credit card. About a month later, after being informed that the cabinets had arrived, the Claimant paid the Respondent another payment of \$9,000.00 using a different credit card. The Respondent never performed the home improvement, and the Respondent later learned that the cabinets had not even been ordered.

The Claimant then informed the two credit card companies and the charges were removed from the Claimant's account. The Claimant subsequently obtained another contractor who performed the work for \$4,573.10 more than he would have paid had the Respondent performed the work.

I now turn to the amount of the award, if any. A claimant may not be compensated for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1). Unless a claim requires a unique measurement, actual loss is measured by one of the three following formulas:

(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.

(b) If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor.

(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 measurement accordingly.

COMAR 09.08.03.03B(3). In this case, none of the three payment options apply. In all three options, the measurement of the loss is calculated using an amount paid to the contractor. In this case, while the Claimant paid an amount to the contractor, the payment was, in essence, returned to him when the credit card companies removed the charge from his account. The Claimant's situation is the same as if he contracted with the Respondent and did not advance the Respondent any monies and after a time when the Respondent did not perform, the Claimant obtained the services of a new contractor whose charges were more. The claim for the increase of the price from the new contractor does not meet any of the payment criteria noted above. As noted by the Fund's representative, this was not the type of situation that was intended for reimbursement.

#### **CONCLUSIONS OF LAW**


I conclude that the Claimant has not sustained an actual loss as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2004).

**RECOMMENDED ORDER**

I **PROPOSE** 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 records and publications of the Maryland Home Improvement Commission reflect this decision.

September 11, 2009  
Date Decision Mailed

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Richard F. Rothenburg  
Administrative Law Judge

RFR/fe  
# 107984



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**FILE EXHIBIT LIST**

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There were no exhibits admitted on the Respondent's behalf.

PROPOSED ORDER

*WHEREFORE, this 27th day of October 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.*

*Rossana Marsh*

*Rossana Marsh  
Panel B*

**MARYLAND HOME IMPROVEMENT COMMISSION**