

IN THE MATTER OF THE CLAIM OF	* BEFORE UNA M. PEREZ,
WALTER BARNES	* AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND HOME	* OF THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND	* OF ADMINISTRATIVE HEARINGS
FOR THE ALLEGED ACTS OR	* OAH NO.: DLR-HIC-02-08-46265
OMISSIONS OF RENEE GORDON, t/a	* MHIC NO.: 08 (75) 26
W.E.R.C. CONSTRUCTION, 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 April 11, 2008, Walter Barnes (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$18,352.00 for actual losses allegedly suffered as a result of home improvement work performed by Renee Gordon, t/a W.E.R.C. Construction, Inc. (Respondent)<sup>1</sup>.

I held a hearing on July 14, 2009, at the Office of Administrative Hearings (OAH), 11101 Gilroy Road, Hunt Valley, Maryland 21031. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(c)(2)(i) (2004 & Supp. 2008). Eric B. London, Assistant Attorney General, Department of

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<sup>1</sup> The claim form identifies the Respondent as "WERC-Women Entrepreneurs Redevelop." A contract admitted in evidence more fully states the trade name as W.E.R.C. Construction, Inc. See Cl. Ex. #2.

Labor, Licensing and Regulation, represented the Fund. The Claimant represented himself. The Respondent failed to appear after reasonable notice to her address of record.

At the hearing, the Fund raised the issue of whether the Claimant was an “excluded claimant” pursuant to section 8-405(f)(2)(ii) of the Business Regulation Article, Annotated Code of Maryland, because he owned more than three dwelling places. I held the record open for ten days to afford the Fund the opportunity to present evidence on this point. I advised the parties that any documents submitted would be marked and admitted as a Fund exhibit.

On July 20, 2009, the Fund filed a Post Hearing Brief, with attached documentation from the State Department of Assessment and Taxation (SDAT) Real Property Data Search website. I am treating the Fund’s Post Hearing Brief as a Motion for Summary Decision (Motion) on the issue of the Claimant’s entitlement to make a claim against the Fund. The Claimant did not submit any documents or otherwise file any response to the Motion; consequently, the record closed fifteen days<sup>2</sup> after the Fund’s Motion was filed, or August 7, 2009.

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 OAH 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.

### **ISSUES**

1. Is the Claimant entitled to make a claim against the Fund?
2. If so, did the Claimant sustain an actual loss compensable by the Fund as a result of the acts or omissions of the Respondent?

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<sup>2</sup> See COMAR 28.02.01.16B(4)(a) and COMAR 28.02.0102B(5).

## SUMMARY OF THE EVIDENCE

### Exhibits

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

- Cl. Ex. #1     The Respondent's Estimate for home improvement work to 1809 Dukeland Street, Baltimore City, March 13, 2006
- Cl. Ex. #2     Contract for Company's Services re: 1809 N. Dukeland Street, April 2006
- Cl. Ex. #3     Copy of the front and back of the Claimant's check 1136, April 18, 2006
- Cl. Ex. #4     Copies of stubs for the Claimant's checks 1150, June 19, 2006, and 1194, October 21, 2006
- Cl. Ex. #5     Copy of the front and back of the Claimant's check 1194, October 21, 2006
- Cl. Ex. #6     Mustard Seed Renovations, estimate for repairs to 1809 N. Dukeland Street, May 2, 2007
- Cl. Ex. #7     Copies of stubs for the Claimant's checks 1351, 1360, 1381, 1389, 1390, and 1429, October 2007 through May 2008
- Cl. Ex. #8     Copies of the front and back of the Claimant's checks 1351, 1360, 1381, 1389, and 1390, October 2007 through December 2007

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

- GF Ex. #1     Notice of Hearing, March 19, 2009
- GF Ex. #2     Affidavit of Lynn-Michelle Escobar, May 21, 2009
- GF Ex. #3     The Respondent's Licensing History, June 18, 2009
- GF Ex. #4     Hearing Order, October 23, 2008
- GF Ex. #5     Home Improvement Claim Form, April 11, 2008
- GF Ex. #6     Letter from MHIC to the Respondent, April 17, 2008

GF Ex. #7 Fund's Post Hearing Brief, July 20, 2009, attaching printouts from SDAT Real Property Data Search website

The Respondent was not present so no exhibits were offered on her behalf.

**Testimony**

The Claimant testified on his own behalf, and presented no other witnesses. The Fund did not present any witnesses.

**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 01-86050. Her license expired in June 2007 and has not been renewed.
2. On or about April 18, 2006, the Claimant and the Respondent entered into a contract to perform certain work at a house located at 1809 N. Dukeland Street, in Baltimore City.
3. The scope of work was to partially gut the top floor, reconfigure the top floor, bedrooms, bathroom and closets, rewire the entire house, install plumbing fixtures and a washer and dryer, hang doors, hang and finish drywall, paint the interior, and other items. The contract stated that work would begin on April 15, 2006 and would be completed on July 15, 2006.
4. The Claimant did not reside at 1809 N. Dukeland Street. His intention was to renovate the property and then sell it.
5. In April 2006, the Claimant also owned houses at 1707 and 1805 N. Dukeland Street. He did not reside in either of those properties.

6. All of the payments made by the Claimant to the Respondent were drawn upon the checking account of The Investment Partners, LLC. The Claimant is the sole member of the LLC. The address imprinted on the checks was 305 Round Table Drive, Fort Washington, Maryland 20744. This was the Claimant's residence in April 2006. He sold this property in August 2006.
7. In 2006, the Claimant also owned a property at 1811 Braddish Avenue, in Baltimore City. He did not reside there.
8. The Claimant still owns the properties at 1707, 1805, and 1809 N. Dukeland Street, and the property at 1811 Braddish Avenue.
9. The Claimant currently owns and resides at 5035 Strawbridge Terrace, in Perry Hall. He bought this property in September 2008.
10. The Claimant owned five dwelling places in April 2006.
11. The Claimant currently owns five dwelling places.

### **DISCUSSION**

#### **The Respondent's Failure to Appear**

On March 19, 2009, the OAH mailed a Notice of Hearing to the Respondent at 619 Hampton Park Boulevard, Suite F, Capitol Heights, Maryland 20743, her current address of record with the Maryland Motor Vehicle Administration (MVA).<sup>3</sup> The Notice was sent by first-class mail and also by certified mail, return receipt requested. The U.S. Postal Service returned the first-class mailing as "moved, not forwardable" on or about March 24, 2009. The OAH file does not contain information as to whether the certified mailing was claimed. Regardless, neither the Respondent nor anyone authorized to represent her appeared at the hearing.

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<sup>3</sup> This was also the Respondent's address of record with the MHIC.

I concluded that the Respondent was provided with reasonable written notice of the hearing, since the Notice was sent by first-class mail to her MVA address of record and by certified mail to the same address. Md. Code Ann, State Gov't § 10-208 (2004). Pursuant to that provision and section 8-312 of the Business Regulation Article, I proceeded with the hearing in the Respondent's absence. Md. Code Ann, Bus. Reg. § 8-312(h) (2004); State Gov't § 10-208(b)(6) (2004).

#### Summary Decision

The Rules of Procedure applicable to the OAH permit an administrative law judge to grant summary decision if the judge finds that "there is no genuine issue of material fact and [the moving] party is entitled to prevail as a matter of law." COMAR 28.02.01.16D (2). This regulation is substantially similar to both Maryland Rule 2-501 and Rule 56 of the Federal Rules of Civil Procedure.

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Commodity Futures Trading Commission v. Noble Wealth Data Information Services, Inc.*, 90 F. Supp. 2d 676, 684 (D. Md. 2000) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). The nonmoving party "may not rest upon the mere allegations or denials of the adverse party's pleading," Fed. R. Civ. P. 56(c), but must come forward with "specific facts showing that there is a genuine issue for trial." *Commodity Futures Trading*, 90 F. Supp. 2d at 684, (citing *Matsushita Electronic Indus. v. Zenith Radio Co.*, 475 U. S. 574, 586 (1986)). In deciding a motion for summary judgment, or summary decision, the evidence, including all inferences therefrom, is viewed in the light most favorable to the non-moving party. *Natural Design, Inc. v. Rouse Co.*, 302 Md. 47, 62 (1984).

Applicable Law

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). In this case, I will not reach the issue whether the Claimant has proven eligibility for compensation from the Fund.

The Business Regulation Article imposes certain technical requirements and limitations on claims against the Fund. In particular, section 8-405 provides, in pertinent part;

(f) Excluded claimants. –

- ...
- (2) An owner may make a claim against the Fund only if the owner:
- (i) resides in the home as to which the claim is made; or
  - (ii) does not own more than 3 dwelling places.

Md. Code Ann., Bus. Reg. § 8-405(f)(2) (Supp. 2008).

In this case, the Claimant testified that he did not and does not live in the house at 1809 N. Dukeland Street. It was an investment property that he intended to renovate and then sell to another investor or a first-time home buyer. Therefore, the Claimant does not meet the terms of section 8-405(f)(2)(i).

As to section 8-405(f)(2)(ii), the statute does not say whether the prohibition against owning more than three dwelling places applies as of the time of the home improvement contract, the time of filing the claim, or the time of the hearing. In this case, however, based on the Claimant’s testimony and the SDAT records, it is clear that the Claimant owned five properties at the time of the contract in April 2006, at least four at the time he filed the claim in April 2008, and five at present.

At the hearing, the Claimant testified as follows about his ownership of the several properties in 2006. He owned and lived in the house at 305 Round Table Drive in Fort Washington. He thought he had sold that house in early 2006. He purchased the house at 1811 Braddish Avenue sometime in 2006 and still owns it. He owned 1805 N. Dukeland Street in 2006 and still owns it; he thought he purchased it before 1809 N. Dukeland Street, the subject property. He owned 1707 N. Dukeland Street in 2006 and still owns it. He bought his current residence, 5035 Strawbridge Terrace, in Perry Hall, in September 2008. The Claimant was not certain of the exact dates he purchased and sold the various properties.

According to the SDAT records, the Claimant bought his residence in Fort Washington in June 2003, and sold it in August 2006. GF Ex. #7, internal exhibits 1 and 2. He purchased 1811 Braddish Avenue on November 15, 2005, and still owns it. *Id.*, internal exhibit 3. He purchased 1805 N. Dukeland Street on January 3, 2006 and still owns it. *Id.*, internal exhibit 4. This evidence shows that the Claimant owned these three properties<sup>4</sup> in addition to 1809 N. Dukeland Street in April 2006. As noted above, the Claimant testified credibly that he also owned 1707 N. Dukeland Street in 2006 and that he still owns it. This makes a total of five dwelling places.

At the time of filing the claim in April 2008, the Claimant gave his address as 14 Treeway Court, Apt. 4B, Towson, MD 21286. GF Ex. #5. Based on the SDAT record showing that the Claimant sold his personal residence in Fort Washington in August 2006, and the Claimant's testimony that he purchased his current residence in Perry Hall in September 2008, a reasonable inference is that he was between homes in April 2008. Nonetheless, he still owned four dwelling places as of that time. Finally, based on his testimony that he purchased his current personal residence in September 2008, the Claimant currently owns five dwelling places.

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<sup>4</sup> Except for the Fort Washington residence, which was owned jointly with the Claimant's wife, the properties were owned by the Claimant individually.



When a motion for summary disposition is filed, the nonmoving party “may not rest upon the mere allegations or denials of the adverse party’s pleading,” Fed. R. Civ. P. 56(e), but must come forward with “specific facts showing that there is a genuine issue for trial.” *Commodity Futures Trading*, 90 F. Supp. 2d at 684 (citing *Matsushita Electronic Indus. v. Zenith Radio Co.*, 475 U. S. 574, 586 (1986)). Although the Fund’s Post Hearing Brief was not captioned as such a motion, it clearly asserted that the Claimant is ineligible to make a claim against the Fund under section 8-405(f)(2) of the Business Regulation Article and therefore is not entitled to a monetary award. GF Ex. #7, at 2.

The Claimant did not submit any additional evidence to create a dispute of material of fact on the question of whether he owned more than three dwelling places at the time of the contract or at any other relevant time. Consequently, I find that he is an excluded claimant, that the Fund is entitled to judgment as a matter of law, and that the Claimant’s claim must be dismissed. Md. Code Ann., Bus. Reg. § 8-405(f)(2) (Supp. 2008); COMAR 28.02.01.16D(2). For this reason, I need not reach the issue whether the Claimant met his burden to prove an “actual loss” within the meaning of section 8-405(a) of the Business Regulation Article.

#### **CONCLUSIONS OF LAW**

I conclude that the Claimant is an excluded claimant and may not maintain a claim against the Maryland Home Improvement Commission Guaranty Fund. Md. Code Ann., Bus. Reg. § 8-405(f)(2) (Supp. 2008).

**RECOMMENDED ORDER**

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

**ORDER** that the Claimant's claim against the Maryland Home Improvement Guaranty Fund on account of the acts or omissions of the Respondent be dismissed; and

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

September 3, 2009  
Date Decision mailed



Una M. Perez  
Administrative Law Judge

UMP/kkc  
# 107870

IN THE MATTER OF THE CLAIM OF	* BEFORE UNA M. PEREZ,
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W.E.R.C. CONSTRUCTION, INC.	
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**FILE EXHIBIT LIST**

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PROPOSED ORDER

*WHEREFORE, this 29th 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.*

*J. Jean White*

*J. Jean White*

*Panel B*

**MARYLAND HOME IMPROVEMENT COMMISSION**