



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Robert F. McDonnell
Governor

Gordon N. Dixon
Director

James S. Cheng
Secretary of
Commerce and Trade

October 23, 2012

VIA UNITED PARCEL SERVICE ("UPS")

Richard H. Nguyen, Esq.
6402 Arlington Blvd. Suite 371
Falls Church, Virginia 22042

Maggie Luu and Tri Luu
2216 S. Nelson Street
Arlington, Virginia 22206

American Investments Real Estate Corporation
t/a Kibra Construction
2238-C Gallows Road
Vienna, Virginia 22182

Re: File No. 2012-01119
In the matter of Virginia Contractor Transaction Recovery Fund
Claim of Maggie and Tri Luu (Claimants) and American Investments
Real Estate Corporation, t/a Kibra Construction (Regulant)

Dear Mr. Nguyen, Mr. and Mrs. Luu and American Investments Real Estate Corporation
t/a Kibra Construction:

Enclosed is a copy of the Final Order issued in this case.

As provided by Rule 2A:2 of the Supreme Court of Virginia, you have thirty (30) days from the date of service (the date you actually received this decision or the date it was mailed to you, whichever occurred first) within which to appeal this decision by filing a Notice of Appeal with Gordon N. Dixon, Secretary of the Board. In the event this decision is served on you by mail, three (3) days are added to that period.

Sincerely,

A handwritten signature in black ink, appearing to read "Kristin Marie Clay".

Kristin Marie Clay
Hearings Officer
Board Administrative Proceedings Section

Enclosure

IN THE
COMMONWEALTH OF VIRGINIA
BOARD FOR CONTRACTORS

Re: In the matter of the Virginia Contractor Transaction Recovery Act claim of
Maggie Luu (Claimant) and American Investments Real Estate Corporation,
t/a Kibra Construction (Regulant)

American Investments Real Estate Corporation, t/a Kibra Construction
Arlington, VA 22209

File Number 2012-01119
License Number 2705056570

FINAL OPINION AND ORDER

On July 11, 2012, the Summary of the Informal Fact-Finding Conference ("the Summary") and notification of the Board for Contractors ("the Board") June 5, 2012 meeting, was mailed, via United Parcel Service ("UPS"), to Maggie and Tri Luu ("Luu") and to American Investments Real Estate Corporation, t/a Kibra Construction ("Kibra Construction"), at the address of record. The claimants' mail was delivered. The regulant's mail was delivered.

On July 23, 2012, the Department received a request from the Luu's counsel to have their case heard at the next Board meeting.

On October 3, 2012, the Summary and notification of the Board's October 23, 2012 meeting was mailed via UPS to Luu and Kibra Construction, at the address of record. The claimants' mail was delivered. The regulant's mail was delivered.

On October 23, 2012, the Board met and reviewed the record, which consisted of the claim file, the transcript and exhibits from the Informal Fact-Finding Conference ("IFF") and the Summary. Luu did appear at the Board meeting in person. Kibra Construction did not appear at the Board meeting in person or by counsel or by any other qualified representative.

The Board adopts the Claim Review, which contains the facts regarding the recovery fund claim in this matter, and rejects the Summary. The Claim Review and Summary are incorporated as a part of this Order. The Board finds there is language in the order that supports the conclusion that the court found that the conduct of Kibra Construction involved improper or dishonest conduct.

The Board **ORDERS** that this claim be approved for payment in the amount of 20,000.00

Pursuant to 54.1-1123(B), payments may be reduced on a prorated basis based upon the number of claims received.

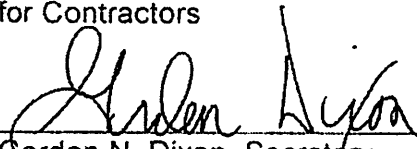
AS PROVIDED BY RULE 2A:2 OF THE SUPREME COURT OF VIRGINIA, YOU HAVE THIRTY (30) DAYS FROM THE DATE OF SERVICE (I.E. THE DATE YOU ACTUALLY RECEIVED THIS DECISION OR THE DATE THE DECISION WAS MAILED TO YOU, WHICHEVER OCCURRED FIRST) WITHIN WHICH TO APPEAL THIS DECISION BY FILING A NOTICE OF APPEAL, SIGNED BY EITHER YOU OR YOUR COUNSEL, WITH GORDON N. DIXON, SECRETARY OF THE BOARD FOR CONTRACTORS. IN THE EVENT THAT THE DECISION WAS SERVED ON YOU BY MAIL, THREE (3) DAYS SHALL BE ADDED TO THE THIRTY (30) DAY PERIOD.

SO ORDERED:

Entered this 23rd day of October, 2012.

Board for Contractors

BY: _____


Gordon N. Dixon, Secretary

**IN THE
COMMONWEALTH OF VIRGINIA**

BOARD FOR CONTRACTORS

Re: Maggie and Tri Luu (Claimants) and American Investments Real Estate Corporation t/a Kibra Construction (Regulant)

**File Number: 2012-01119
License Number: 2705056670**

SUMMARY OF THE INFORMAL FACT-FINDING CONFERENCE

On March 15, 2012, the Notice of Informal Fact-Finding Conference ("Notice") was mailed, via United Parcel Service ("UPS"), to Maggie and Tri Luu ("Claimants") and American Investments Real Estate Corporation, t/a Kibra Construction ("Regulant"). The Notice included the Claim Review, which contained the facts regarding the recovery fund claim. The claimants' mail was delivered. The regulant's mail was delivered.

On April 18, 2012, an Informal Fact-Finding Conference ("IFF") was convened at the Department of Professional and Occupational Regulation.

The following individuals participated at the IFF: Maggie and Tri Luu, Claimants; Victoria S. Traylor, Staff Member; and Deborah L. Tomlin, Board Member.

Neither American Investments Real Estate Corporation t/a Kibra Construction, Regulant, nor anyone on its behalf appeared at the IFF.

RECOMMENDATION

Based upon the evidence and the IFF, the following is recommended regarding the recovery fund claim:

During the IFF, the claimants provided testimony to supplement the record. The claimants stated they entered into a contract with the regulant for the construction of an addition to their home.

The claimants provided the regulant a deposit in the amount of \$25,000.00 and a payment of \$17,000.00 totaling \$42,000.00.

The claimants were notified by Arlington County that no permit had been issued due to the regulant providing them a bad check in the amount of \$1,499.64. The claimants contacted the regulant regarding the bad check and were advised that he would take

care of the matter. The regulant failed to pay the permit fees, which the claimants paid.

The claimants stated that regulant removed their roof and applied the plywood. The claimants informed the regulant that due to the heavy rains and no roof, the interior of the house was flooding, their possessions were damaged, and mold developed in the basement. The claimants stated the only work performed by the regulant on the project was installing the plywood, which deteriorated due to exposure to the elements, and a few windows were installed. The regulant never returned to complete the work. The claimants testified that the regulant intentionally violated the statewide building code by knowing a bad check had been issued to the county and not correcting the matter¹.

On October 22, 2010, in the Circuit Court of Arlington County, Maggie Luu and Tri Luu obtained a judgment against American Investments Real Estate Corporation d/b/a Kibra Construction, in the amount of \$466,940.02 plus interest. As a default judgment, all of the facts alleged in the complaint to the court are deemed to be true. Upon reviewing the record, it is evident the claimants have been financially harmed by the regulant; however, it appears the claimants' claim does not meet the statutory requirements for reimbursement.

"Improper or dishonest conduct" is defined in §54.1-1118 of the *Code of Virginia* as, "...includes only the wrongful taking or conversion of money, property or other things of value which involves fraud, material misrepresentation or conduct constituting gross negligence, continued incompetence, or intentional violation of the Uniform Statewide Building Code (§ 36-97 et seq.). The term 'improper or dishonest conduct' does not include mere breach of contract." [Emphasis added]

The claimants' complaint includes only one count, breach of contract. Upon reviewing Count 1, it does not appear the court found that the regulant wrongfully took and or converted the claimants' funds during the course of the project, or that its actions were fraudulent in nature. The above referenced definition of "improper or dishonest conduct" specifically indicates that any violation of the Uniform Statewide Building Code ("USBC") must be intentional. In reference to the violation of the statewide building code as alleged in the complaint, the court does not make any indication that the regulant's submission of a bad check to obtain a permit and subsequent receipt of stop work order by the local building authorities was intentional. It is my opinion that the regulant's actions do not arise to more than mere breach of contract.

¹ Paragraph 14 of the complaint states in part, "Defendant breached the Contract when it used a bad check to pay Arlington County for a building permit...resulting in a violation of the Virginia Uniform Statewide Building Code Section 109..." Review of section 109 of the 2009 USBC, titled "Construction Documents", includes but is not limited to sections involving submittal of documents, site plan documents, engineering details, examination of documents, expediting the approval process, approval of construction documents, and phased approval. There does not appear to be a reference to the payment of permit fees or the failure to pay permit fees as a violation of the USBC in the Section 109

The Board may only approve claims where the final judgment order and/or facts purported in the complaint to the court in cases of default judgments, include factual findings or legal conclusions that would indicate the court found the regulant's conduct to be improper or dishonest as defined in the Code. It is my opinion that the order and complaint lacks any such factual findings or legal conclusions.

While it is clear the regulant is indebted to the claimants, they have experience a financial hardship, and that the work performed was not done in a workmanlike manner, the Board must uphold the statutory requirements of the Virginia Contractor Transaction Recovery Fund.

Therefore, I recommend the recovery fund claim be denied.

By:


Deborah L. Tomlin
Board Member

Board for Contractors

Date:

7/11/2012

CLAIM REVIEW

TO: Board for Contractors

FROM: Victoria S. Traylor
Legal Analyst

DATE: March 5, 2012

RE: In the matter of Virginia Contractor Transaction Recovery Act Claim of
Maggie Luu and Tri Luu (Claimants) and American Investments Real Estate
Corporation, t/a Kibra Construction (Regulant)
File Number: 2012-01119

BACKGROUND

On October 22, 2010, in the Circuit Court of Arlington County, Maggie Luu and Tri Luu obtained a judgment against American Investments Real Estate Corporation d/b/a Kibra Construction, in the amount of \$466,940.02 plus interest.

A claim in the amount of \$466,940.02 was received by the Department of Professional and Occupational Regulation on October 11, 2011.

CLAIM FILE INFORMATION

Section 54.1-1120(A) requires the claimant to obtain a final judgment in a court of competent jurisdiction in the Commonwealth of Virginia against any individual or entity which involves improper or dishonest conduct.

The Order does not state in basis for the award.

In the First Amended Complaint, Count I, Breach of Contract, states in part "...resulting in violation of the Virginia Uniform Statewide Building Code"

Section 54.1-1120(A) also requires the transaction occurring during a period when such individual or entity was a regulant and in connection with a transaction involving contracting.

The claimants entered into a written contract with the regulant for the remodeling of their residence.

The Board issued a Class A, License Number 2705056570 to American Investments Real Estate Corporation t/a Kibra Construction on September 19, 2000.

The license was permanently revoked on December 17, 2004.

Section 54.1-1120(A)(1) provides whenever action is instituted against a regulant by any person, such person shall serve a copy of the process upon the Board.

The Board for Contractors was not served prior to the claim being filed.

Section 54.1-1120(A)(2) states a copy of any pleading or document filed subsequent to the initial service process in the action against a regulant shall be provided to the Board.

The Board for Contractors did not receive pleadings and/or documents prior to the claim being filed.

Section 54.1-1120(A)(3) requires a verified claim to be filed no later than (12) twelve months after the judgment becomes final.

A judgment was entered on October 22, 2010. The claim was received on October 11, 2011.

Section 54.1-1120(A)(4) states the claimant shall be an individual whose contract with the regulant involved contracting for the claimant's residence.

The claimants entered into a written contract with the regulant for the remodeling of their residence.

Section 54.1-1120(A)(5) prohibits recovery when the claimant is an employee of such judgment debtor, vendor of such judgment debtor, another licensee, the spouse or child of such judgment debtor nor the employee of such spouse or child, or any financial or lending institution nor anyone whose business involves the construction or development of real property.

On the Claim Form, the claimant was asked: Are you a vendor of the regulant (contractor)? Are you an employee, spouse or child of the regulant (contractor) or an employee of such spouse or child? Do you hold, or have you ever held, a Virginia Class A or Class B State Contractor's license or registration? Do you operate as a financial or lending institution? Does your business involve the construction or development of real property? Claimant answered, "No".

Section 54.1-1120(A)(6) states no directive from the fund shall be entered until the claimant has filed with the Director's Office a verified claim containing the following statements: (a) that the claimant has conducted debtor's interrogatories to determine whether the judgment debtor has any assets which may be sold or applied in satisfaction of the judgment; (b) a description of the assets disclosed by such interrogatories; (c) that all legally available actions have been taken for the sale, or application of the disclosed assets and the amount realized therefrom; and (d) the balance due the claimant after the sale or application of such assets.

Debtor's interrogatories were not conducted as the regulant failed to appear.

Section 54.1-1120(A)(7) states a claimant shall not be denied recovery from the Fund due to the fact the order for the judgment filed with the verified claim does not contain a specific finding of "improper and dishonest conduct." Any language in the order that supports the conclusion that the court found that the conduct of the regulant involved improper or dishonest conduct may be used by the Board to determine eligibility for recovery from the Fund.

The Order does not state the basis for the award.

In the First Amended Complaint, Count I, Breach of Contract, states in part "... resulting in violation of the Virginia Uniform Statewide Building Code"

In the First Amended Complaint, the claimants assert they entered into a contract with the regulant for the construction of an addition and the remodeling of their residence on or about February 7, 2003. The project completion date was three (3) months.

The claimants provided the regulant with a down payment of \$25,000.00 and an additional \$17,000.00 during the course of construction.

The regulant failed to complete the work specified in the contract, failed to complete the work in a workmanlike manner, and failed to complete the work by the completion date.

The regulant issued a bad check in the amount of \$1,499.64 to Arlington County for building permit fees, which is a violation of the Virginia Uniform Statewide Building Code.

In June 2003, the regulant ceased work on the house leaving it in an uninhabitable condition. The house was left with no roof and only a tarp for protection, resulting in substantial water and mold damage.

The claimants made repeated attempts to contact the regulant regarding the completion of the project or a refund of their money. The regulant has failed to complete the work and retained the claimants' funds.

Furthermore, the claimants have incurred additional costs restoring the house to the condition it was in prior to contracting with the regulant and/or completing the work.

SECTION 54.1-1120(B) requires if the regulant has filed bankruptcy, the claimant shall file a claim with the proper bankruptcy court. If no distribution is made, the claimant may then file a claim with the Board.

On the Claim Form, the claimant was asked if, to their knowledge, the regulant had filed for bankruptcy? In response to this question, the claimant responded, "No".

SECTION 54.1-1123(C) excludes from the amount of any unpaid judgment any sums representing interest, or punitive or exemplary damages.

The Claim does not include interest or damages.