

IN THE MATTER OF THE CLAIM * BEFORE THOMAS G. WELSHKO,
OF NINA YUDITSKAYA * 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-02-10-24483
OMISSIONS OF MICHAEL BALIN, T/A * MHIC NO.: 08(90)1184
WITH FLYING COLORS PAINTING *
AND WALLCOVERING CO. *

* * * * *

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 January 18, 2009, Nina Yuditskaya (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$1,379.09¹ for actual losses allegedly suffered as a result of a home improvement contract with Michael Balin, t/a With Flying Colors Painting and Wallcovering Co. (Respondent).

I originally convened a hearing on November 22, 2010 at the Office of Administrative Hearings in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg.

¹ On February 27, 2009, the Claimant sent an e-mail to the MHIC, in which she amended her claim to \$759.09.

§§ 8-312, 8-407 (2010). Peter Martin, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Claimant represented herself. Gary M. Anderson, Attorney-at-Law, represented the Respondent. At the outset of the hearing, the Respondent indicated that since his first language was Russian and his grasp of English was limited, he needed a Russian language interpreter to participate in the hearing. I called CTS Language Link (CTS) and requested that it provide a Russian language interpreter to interpret by telephone. CTS provided the interpreter, but she had a difficult time hearing the proceedings by speakerphone. After approximately one and a half hours, I determined that CTS's telephone interpretation services were inadequate for this proceeding. Consequently, I continued the hearing to secure the services of an in-person Russian language interpreter. The parties agreed on Wednesday, January 6, 2011 as the new hearing date.

On Wednesday, January 6, 2011, I reconvened the hearing in Hunt Valley, Maryland. The Claimant represented herself, Gary M. Anderson, Attorney-at-Law, represented the Respondent, and Hope M. Sachs, Assistant Attorney General, represented the Fund.

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 (2009 & Supp. 2010), Code of Maryland Regulations (COMAR) 09.01.03.01 – 09.01.03.10; 09.08.02.01 – 09.08.01.02; and 28.02.01.01 – 28.02.01.27.

ISSUE

Did the Claimant sustain an actual loss compensable by the Fund because of the Respondent's acts or omissions?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted eight exhibits on behalf of the Claimant and four exhibits on behalf of the Fund. I did not admit any exhibits on behalf of the Respondent. (I have attached a complete Exhibit List as an Appendix to this decision.)

Testimony

The Claimant testified on her own behalf, and the Respondent testified on his own behalf. The Fund did not call 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 #01-72119. (Fund Ex. 2.)

2. On July 25, 2007, the Claimant and the Respondent entered into a \$6,200.00 contract (Contract) in which the Respondent agreed perform bathroom and toilet room renovation work at the Claimant's Owings Mills, Maryland home. (Cl. Ex. 1.)

3. Specifically, the Contract called for the Respondent to complete the following work:

Bathroom

- Prepare walls for installation [of] tile and install tile to ceiling;

- remove old tile floor and install new tile;
- install Jacuzzi² and shower pan, shower door;
- install vanity;
- all plumbing job;
- install fan filter³ and 1 reset light on the ceiling;
- install 2 lights above vanity;
- install door 28" (door included); [and]
- paint ceiling and door.

Toilet [Room]

- Remove old wallpaper;
- prepare walls for new wallpaper;
- paint ceiling, baseboard [and] door;
- wallpapering 14 s/r (wallpaper excluded); and
- tile glue, drywall, doors [and] paint included.

(Test. Cl; Cl. Ex. 1.)

4. The Claimant was to supply the Respondent with wallpaper for installation, but the Respondent ultimately purchased the wallpaper himself. (Test. Resp.)

5. After the parties negotiated the Contract, they agreed to a change order for the Respondent to install crown molding at a cost of \$440.00 for labor and \$94.00 for

² As noted in the Statement of the Case, the Respondent's ability to communicate in English is limited. This may account for misspellings in the Contract. For example, The Respondent spelled Jacuzzi as "Jakuzi" and vanity as "venity." I have corrected the Respondent's spelling in making the above-noted Findings of Fact.

³ The word "filter" looks like "hitter" on the Contract. However, the Claimant testified that the Respondent was to install a fan filter.

material. They also agreed to drop wallpapering from the Contract. This made the revised Contract price \$6,334.00. (Cl. Ex. 8.)

6. On July 25, 2007, the Claimant paid the Respondent a \$2,000.00 deposit. She did not make any additional payments to the Respondent. (Test. Cl and Resp.; Cl. Ex. 2.)

7. The Respondent cut tiles for the bathroom in the Claimant's bedroom, which caused damage to the bedroom floor. (Test. Cl.)

8. The Respondent completed work on August 24, 2007, but the Claimant was dissatisfied with most of that work. The Claimant proposed that the Respondent repair those items but he refused. (Test. Cl.; Cl. Ex. 3.)

9. The following conditions existed at the Claimant's residence in late August 2007:

- The Jacuzzi installed by the Respondent collapsed, because the Respondent failed to provide appropriate supports for it.
- The shower pan drain pipe fell through the floor because the Respondent also failed to provide proper supports for it.
- The wall tile installed by the Respondent was uneven.
- The Respondent did not install a shower door, crown molding, vanity or lights above the space for the vanity.
- The Respondent removed the bathroom floor tile, but he did not install new tile.

(Test. Cl.; Cl. Ex. 4.)

10. After the Respondent left the Claimant's home, the Claimant had her boyfriend perform remedial work and hired other contractors to perform remedial work

as well to correct items not installed or poorly installed by the Respondent. (Test. Cl.; Cl. Exs. 4 and 5.)

11. Soon after the Respondent stopped work, the Claimant's boyfriend replaced the shower pan.⁴ (Test. Cl.)

12. The Claimant hired Slava's Custom Furniture and Design to supply and install a vanity in the bathroom at a cost of \$380.00.⁵ (Test. Cl.)

13. On January 16, 2008, the Claimant purchased wall tile from Vega Bathroom - Kitchen - Tile (Vega) costing a total of \$461.30. (Cl. Ex. 5.)

14. On December 3, 2008, the Claimant obtained an estimate of \$3,800.00 from Liberty Home Improvement, LLC (Liberty) to complete work left incomplete by the Respondent and to replace those items he poorly installed. (Test. Cl.; Cl. Ex. 4.)

15. Liberty agreed to perform the following work:

- Remove old tile (wall) [and] install new tile – need to remove and install 50 tiles of the wall;
- remove old tile and install new tile on top of the tub;
- install shower door (\$689.29 paid);
- repaint crown [sic] moldings in the bathroom (\$150.00 paid);
- install 1 towel bar and 2 towel rings (\$150.78 paid);
- remove wall paper of the toilet room (\$600.00 paid);
- paint toilet room;
- fix hardwood floor under bathroom door;

⁴ I found the Claimant's testimony confusing here because she also indicated Liberty also installed a shower door at a cost of \$689.29. See Finding of Fact 14.

⁵ I based this finding on the Claimant's testimony. However, she did not provide a date for when Slava's Custom Furniture installed the vanity. I nevertheless find her testimony credible based on her straightforward demeanor.

- reground 75% of the bathroom walls;
- adjust the door under the tub; and
- make new additional support for tub along the wall.

(Cl. Ex. 4.)

16. Installation of a towel bar and towel rings were not part of the Claimant's contract with the Respondent. (Cl. Exs. 1 and 4.)

17. The Claimant did not get Liberty to perform all of the work specified in the December 3, 2008 contract. Instead, she took a piecemeal approach and had Liberty install a shower door (cost: \$689.29), crown moldings (cost: \$150.00), and towel bar and towel racks (cost: \$150.27) and remove wallpaper in the toilet room (\$600.00). (Cl. Ex. 4.)

18. The Claimant did not sustain an actual loss. (Cl. Exs. 1 and 4.)

DISCUSSION

The Claimant has not shown that she is entitled to reimbursement from the Fund because she has not proven any actual loss. My reasons for this conclusion are set out below.

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. 2010). 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 (2010). I find that the Claimant has not proven eligibility for compensation.

The burden of proof to establish a valid claim against the Fund rests with the Claimant. Md. Code Ann., Bus. Reg. § 8-407(e) (2010). Additionally, a respondent contractor found to have caused an actual loss must reimburse the Fund for any money he has paid to compensate a claimant or claimants for that loss, plus annual interest as set by law. Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2010).

There is no dispute that the Respondent held a valid contractor's license on July 25, 2007, when he entered the Contract with the Claimant. Furthermore, the Claimant has proven that the Respondent performed an inadequate and an incomplete home improvement. For example, the Jacuzzi installed by him collapsed, because the supports for it were inadequate. Similarly, the shower pan piping fell through the bathroom floor, again, because the Respondent failed to install it properly. His wall tile installation was uneven, and although the Respondent removed the bathroom floor tile, he did not install new tile. The Respondent did not install a shower door, crown molding, vanity or lights above the space for the vanity. The Claimant had another major complaint: the Respondent used her bedroom to saw tile, but he had inadequate covering for her floor. Consequently, he damaged that floor.⁶ Nevertheless, the cost of repairing the floor (\$620.00) was a consequential item that she could not recover from the Fund. COMAR 09.08.03.03B(1).

The Claimant's testimony and supporting evidence was confusing at times. There were many change orders not put in writing. Even those that the parties put in writing are ambiguous. Consequently, it has been difficult determining the scope of the original

⁶ The Claimant had asked him to perform this work in her basement, but the Respondent refused, citing the extra effort it would take to transport the tile from the basement to bathroom.

contract. A careful review of the record indicates that the final contract price was \$6,334.00.

Even using the most favorable costs proven by the Claimant to determine actual loss, the Claimant has fallen short in doing so. The Claimant's evidence in support of her claim were two contracts she either entered or obtained to have remedial work performed either to complete items left incomplete by the Respondent or poorly installed by him. The first contract was from Slava's Custom Furniture and Design to install a bathroom vanity at a cost of \$380.00. The second was a December 2008 contract from Liberty Home Improvements, Inc. to have the bulk of the remedial work performed at a cost of \$3,800.00. This contract included towel bar and towel ring installation that were not part of the Respondent's contract with the Claimant. Liberty broke down the cost of this item as \$150.78, which would reduce the cost to repair and replace the items in the original contract to \$3,649.22. The Claimant also bought wall tile from a tile supplier, Vega, costing \$461.30. I infer that the Claimant or a friend installed this tile in a do-it-yourself effort.⁷ This brings the total cost of repair to \$4,110.52.

The MHIC's regulations offer three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). One of those formulas, as follows, offers an appropriate measurement here:

"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

⁷ Nevertheless, the Claimant has taken a piecemeal approach to the Liberty contract and has only had a limited number of the items listed in the contract performed. The cost of the items that the Claimant had performed was \$1,586.07.

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)(c).

Using the formula prescribed in COMAR 09.08.03.03B(3)(c) my computation of the Claimant's actual loss is as follows:

\$2,000.00	Amount paid by the Claimant to or in behalf of the Respondent
<u>+4,110.52</u>	Reasonable cost of correction ⁸
6,110.52	
<u>-6,334.00</u>	Original contract price
-0-	No actual loss by the Claimant

The Claimant argues, though, that the shower door (\$600.00) should be removed from the original contract along with the wallpaper (\$400.00). The Claimant also asserts that the towel bar and towel rings are part of the original contract as "accessories."

The Fund maintains that the Claimant suffered no actual loss, as the amount to correct is less than the total she would have had to pay the Respondent under his contract. The Respondent adopts a similar view, but adds the defense that he was justified in not completing the contract because of the Claimant's refusal to pay him the

⁸ This would assume wallpaper removal (costing \$600.00) had some relationship to the Respondent's contract. As noted, the parties agreed that wallpapering would be removed from the July 25, 2007 contract.

balance of what she owed him. I reject this defense based on the Respondent's refusal to correct the work he already did.

I accept the Fund's approach. As there is no evidence of a change order removing the shower door from the Respondent's contract, I conclude that it still was part of it. Although it is true that wallpapering, costing \$400.00, was removed from the Respondent's contract, a change order substituted crown molding at a total cost of \$534.00. This led to a net increase in the contract price from \$6,200.00 to \$6,334.00. Additionally, there is no provision for accessories in the Respondent's contract.

The Claimant's claim, therefore, is denied and dismissed.

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 (2010).


RECOMMENDED ORDER

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

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

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

March 29, 2011
Date Decision Issued


Thomas G. Welshko
Administrative Law Judge

DOCS#120981

IN THE MATTER OF THE CLAIM	*	BEFORE THOMAS G. WELSHKO,
OF NINA YUDITSKAYA	*	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-02-10-24483
OMISSIONS OF MICHAEL BALIN, T/A	*	MHIC NO.: 08(90)1184
WITH FLYING COLORS PAINTING	*	
AND WALLCOVERING CO.	*	

* * * * *

FILE EXHIBIT LIST

Claimant's Exhibits:

1. July 25, 2007 contract
2. July 25, 2007 deposit check
3. August 26, 2007 letter from the Respondent to the Claimant
4. December 3, 2008 Liberty Home Improvements contract
5. January 26, 2008 tile invoice from Vega
6. February 27, 2009 amended claim (by e-mail)
7. 2007 and 2009: Photographs A – BB
8. Undated contract addendum

Respondent's Exhibits:

The Respondent did not offer any exhibits.

Guaranty Fund's Exhibits:

1. September 15, 2010 and November 30, 2010 Notices of Hearing
2. October 7, 2010 licensing record for the Respondent
3. February 3, 2010 MHIC Notice and Claim Form
4. April 2, 2009 Claim Amendment

PROPOSED ORDER

WHEREFORE, this 26th day of April 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.

Marilyn Jumalon

*Marilyn Jumalon
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION