

IN THE MATTER OF THE CLAIM	*	BEFORE EILEEN C. SWEENEY,
OF ELIJAH FREEMAN AND	*	AN ADMINISTRATIVE LAW JUDGE
KAVITA FREEMAN,	*	OF THE MARYLAND OFFICE
CLAIMANTS,	*	OF ADMINISTRATIVE HEARINGS
AGAINST THE MARYLAND HOME	*	OAH NO.: DLR-HIC-02-12-27687
IMPROVEMENT GUARANTY FUND	*	MHIC NO.: 10(90)1600
FOR THE ALLEGED ACTS OR	*	
OMISSIONS OF WILBUR GRAY T/A	*	
GRAY'S HOME REMODELING &	*	
HOME IMPROVEMENT,	*	
RESPONDENT	*	

* * * * *

RECOMMENDED DECISION

STATEMENT OF THE CASE
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FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On October 28, 2010, Elijah Freeman and Kavita Freeman (Claimants),¹ filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$12,300.00 for actual losses allegedly suffered as a result of a home improvement contract with Wilbur Gray t/a Gray's Home Remodeling & Home Improvement

¹ I will refer to the Claimants individually by name and collectively as the Claimants.

(Respondent). On or about August 24, 2011, the Claimants amended the amount of their claim to \$5,000.00.²

I held a hearing on February 21, 2013 at the Office of Administrative Hearings (OAH), 11101 Gilroy Road, Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010 & Supp. 2012). The Claimants represented themselves. The Respondent represented himself. Kris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2012), Code of Maryland Regulations (COMAR) 09.01.03; 09.08.02; and 28.02.01.

ISSUE

Did the Claimants file a timely claim for an actual loss compensable by the Fund?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on the Claimants' behalf:

CL Exs.1-2 Photographs

CL Ex. 3A-E Photographs

CL Ex. 4A-D Photographs

CL Ex. 5A-C Photographs

CL Ex. 6 Photograph

~~CL Ex. 7A-B Photographs~~

² Ms. Freeman's August 24, 2011 letter to the MHIC indicates that the amount was reduced in order to be eligible for what counsel for the Fund described as the Fund's "small claims" process. Although the Claimants contended that they later again amended the amount to \$12,300.00, they were unable to produce any documentation to that effect.

- CL Exs. 8-9 Photographs
- CL Ex. 10 July 2, 2007 Remodeling Proposal (Contract)
- CL Ex. 11A July 4, 2007 "Contract"³
- CL Ex. 11B July 2007⁴ Addendum (First Addendum)
- CL Ex. 11C Undated Addendum (Second Addendum)
- CL Ex. 12 July 4, 2004 cancelled check from Ms. Freeman to the Respondent in the amount of \$2,300.00
- CL Ex. 13 July 23, 2004 cancelled check from Ms. Freeman to the Respondent in the amount of \$2,829.81
- CL Ex. 14 July 20, 2007 receipt from Lowe's Home Center (Lowe's); July 19, 2007 receipt from The Home Depot (Home Depot); July 18 and 19, 2007 receipts from Lowe's; July 24, 2007 Invoice and receipt from T-STATS HVAC Supply (T-STATS)
- CL Ex. 15 September 30, 2008 Contract for Services Agreement from Sprout Construction, Inc. (Sprout Construction)
- CL Ex. 16 June 17, 2010 report from Edgar M. Williams, Inspector, HomeSure Inspections⁵

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

- Resp. Exs. 1-7 Photographs

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

- Fund Ex. 1 November 16, 2012 Memorandum to Legal Services from the OAH, with attached October 3, 2012 Notice of Hearing, June 22, 2012 Hearing Order, and returned certified mailing received by the OAH on November 16, 2012
- Fund Ex. 2 Licensing information
- Fund Ex. 3 October 28, 2010 Home Improvement Claim Form; November 10, 2010 letter from the MHIC to the Respondent

³ Although this exhibit is labeled "Contract," it appears to be, instead, a receipt for a \$2,300.00 payment on July 4, 2007 and a statement of the balance ("\$2,669.81 not including plumbing for the vanity"). (CL Ex. 11A.)

⁴ The exact date was not noted in the document.

⁵ CL Ex. 17 was not admitted into evidence.

- Fund Ex. 4 August 24, 2011 letter from Ms. Freeman to the MHIC; August 29, 2011 letter from the MHIC to the Respondent
- Fund Ex. 5 June 30, 2010 Complaint Form, with attached June 25, 2010 letter from the Claimants to the MHIC

Testimony

The Claimants testified on their own behalf.

The Respondent testified on his own behalf.

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 #4253870.
2. On July 4, 2007, the Claimants⁶ and the Respondent entered into a Contract for the Respondent to remodel a bathroom in the home owned by the Claimants, including performing the following work:
 - Remove all fixtures and tile from the wall
 - Install new fixtures and a new tub
 - Install wall tiles in the tub area only
 - Remove floor down to the joists
 - Install new subfloor and 12" X 12" floor tiles
 - Install one 24" X 36" window
 - Install one exhaust fan

⁶ Although the Contract dated July 2, 2007 was signed only by Ms. Freeman, subsequent Addendums indicate that both Claimants were parties to it.

- Install one vanity
 - Install one GFCU⁷ electrical outlet
3. The Contract did not state when work would begin and be completed.
 4. The original agreed upon Contract price was \$4,376.75.⁸ This price included an “economy” vanity only. If the Claimants selected a more expensive vanity, they would have to pay for the difference in cost.
 5. The Respondent began work on July 11, 2007.
 6. Sometime in July 2007, the Respondent had to modify the plumbing in the bathroom to accommodate the new vanity. Specifically, the hot and cold water lines for the vanity had to be moved back 4 ¾” into the wall so that the vanity could fit flush against the wall and work correctly.
 7. Sometime in July 2007,⁹ the parties entered into an Addendum to the Contract providing for an additional cost of \$160.00 for modifying the plumbing to accommodate the new vanity.
 8. Sometime subsequent to the date of the original Contract, the Respondent performed work relating to the removal of an HVAC blower motor and the installation of a new one, including reinstalling all wiring as found. The parties subsequently entered into an Addendum providing for the following additional work and materials at the listed costs:¹⁰

⁷ Neither party explained this acronym.

⁸ For unexplained reasons, the Contract states, “The original price for this was \$3,680.75. With additional work and fixtures the new price is \$4,376.75.” (CL Ex. 10.)

⁹ See footnote 4.

¹⁰ The document was undated.

- Remove one [illegible] HVAC blower motor and install new one \$230.00
- Install one blower harness 47.00
- Cost of Motor 88.58
\$365.50

9. The Claimants paid the Respondent an additional \$200.00 for a more expensive vanity, as agreed.¹¹

10. The Respondent completed the work under the Contract on or about July 23, 2007.

11. The Claimants made the following payments to the Respondent”

July 4, 2007	\$2,300.00
July 23, 2007	<u>2,829.81</u>
Total:	\$5,129.81 ¹²

12. The day after the Respondent completed the work, the Claimants observed grout falling from the shower wall and that the tile on the shower wall was separating. They contacted the Respondent, who promptly fixed that problem.

13. One to two days after completion, the Claimants observed uneven drywall from which the toilet tissue holder began to dangle.

14. Two to three days after completion, the Claimants noticed that the grout between the ceramic tiles on the bathroom floor had started to displace.

¹¹ It is not clear when that payment was made.

¹² The original Contract price (\$4,376.75) plus the addendum amounts (\$160.00 and \$365.50) plus the additional vanity cost (\$200.00) equals \$5,102.25. Neither party explained the discrepancy between that amount and the amount paid.

The Claimants also submitted into evidence receipts for purchases made by them in 2007 for items that Ms. Freeman testified she understood to be included in the Contract price; however, for reasons discussed below, I did not consider those expenses in reaching my decision.

15. Almost immediately after work was completed, the Claimants observed that the new aluminum tub installed by the Respondent had two scratches on it over which he had applied white paint and that there was a dent in the faucet. When Ms. Freeman asked the Respondent about the scratches, he stated that it was nothing, she should not worry about it, and it was a common occurrence.

16. Almost immediately after work was completed, the Claimants observed that the drain in the tub did not operate properly – when Ms. Freeman turned the faucet on, water would collect in the tub and took approximately twenty minutes to drain.

17. Almost immediately after work was completed, the Claimants also observed that the floor tiles were loose and did not extend to the wall to the left of the vanity, there was a gap between the vanity and the wall, the wall tiles were not flush with each other, the exhaust fan made a loud noise when it is turned on,¹³ the wall and ceiling where the Respondent dry-walled was uneven, cracked, and/or buckled, the HVAC register was not against the wall, and the Respondent did not install base trim between the floor and the drywall.

18. On June 30, 2010, the Claimants filed a complaint with the MHIC against the Respondent.

19. On October 28, 2010, the Claimants filed a claim with the MHIC Fund for reimbursement of \$12,300.00 for actual losses allegedly suffered as a result of the home improvement contract with the Respondent.

20. On August 24, 2011, the Claimants amended the amount of their claim to \$5,000.00.

¹³ As discussed below, the Claimants were later advised that the Respondent also improperly installed an exhaust fan in the rear shower wall instead of in the ceiling.

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.2012). *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). For the following reasons, I find that the Claimants have not proven eligibility for compensation.

In this case, the Claimants contended that the Respondent performed an unworkmanlike and/or inadequate home improvement based on numerous defects in the remodeling work done by him on their bathroom.

The Respondent denied that his work was shoddy and contended that any defective conditions arose from other causes after he completed the job. He further contended that he fixed the defect of which he was notified (*i.e.*, the ceramic tile in the tub).

The Fund did not dispute that the Respondent performed an inadequate home improvement. Nonetheless, the Fund recommended against an award from the Fund because the Home Improvement Claim Form was untimely filed.

For the following reasons, I agree with the Fund that the Claimant is barred by the statute of limitations from recovery from the Fund.

A home improvement claim must be “brought against the Fund within 3 years after the claimant discovered or, by use of ordinary diligence, should have discovered the loss or damage.” Md. Code Ann., Bus. Reg. § 8-405(g) (Supp. 2011); *see also* COMAR 09.08.03.03B(2).

The Court of Appeals has analyzed the question of when a litigant is put on notice of a problem for statute of limitation purposes and held that the running of limitations commenced

“when petitioners first discovered that their respective driveways had been damaged”

Lumsden v. Design Tech Builders, Inc., 358 Md. 435, 440 (2000). The Court further elaborated:

The statute of limitations begins to run when claimants gain knowledge sufficient to put them on inquiry notice generally when they know, or should know, that they have been injured by a wrong. From that date forward, a claimant will be charged with knowledge of facts that would have been disclosed by a reasonably diligent investigation, regardless of whether the investigation has been conducted or was successful.

Id. at 452.¹⁴

The contract in this case is dated July 4, 2007, with subsequent July 2007 addendums.

Ms. Freeman testified that the Respondent completed the job on July 11, 2007, but in a June 30, 2010 Complaint Form filed with the MHIC, she indicated that the Respondent began work on that date and completed it on July 23, 2007. The Claimant filed a claim against the Fund on October 28, 2010.

Ms. Freeman testified that the following defects existed shortly after the Respondent completed his work on July 23, 2007, which were not remedied by the Respondent:

- uneven drywall from which the toilet tissue holder began to dangle
- displaced grout between the ceramic tiles on the bathroom floor
- two scratches on the new aluminum tub installed by the Respondent over which he applied white paint
- a dent in the faucet
- poor drainage in the tub
- loose floor tiles
- no floor tiles extending to the wall to the left of the vanity

¹⁴ *Lumsden* dealt with a civil case, rather than an administrative proceeding, but it is instructive nevertheless.

- a gap between the vanity and the wall
- uneven wall tiles
- a loud, noisy exhaust fan
- uneven, cracked, and/or buckled wall and ceiling where the Respondent dry walled
- HVAC register was not flush against the wall
- missing molding/base trim between the floor and the wall and on the side of the sink
- missing cement backer board for sink
- remaining old window

Photographs taken by Ms. Freeman right after the work was completed in 2007, or taken on February 17, 2008, clearly showed crumbling or deteriorating grout between the floor tiles; a mark or dent in the tub; a scratch in the faucet; water backed up or slowly draining in the tub; large gaps in the molding around the bathroom lock; uneven plaster and/or drywall on the wall; a crack in the wall; chips and dents in the drywall; uneven tile on the wall; and a vent that is not flush with the wall.¹⁵

¹⁵ I note that although Ms. Freeman testified about and the photographs also show a lack of molding/base trim between the floor and the wall and on the side of the sink; however, my review of the Contract shows no agreement by the Respondent to install molding and the Claimants presented no expert testimony that the standard of care required the installation of such molding. The Claimants also presented a photograph which Ms. Freeman testified showed the side of the sink, missing a cement backer board; however, my review of the Contract shows no agreement by the Respondent to install a cement backer board and the Claimants presented no expert testimony that the standard of care required such an installation.

The Claimants also submitted into evidence a photograph, which they contended showed that the Respondent failed to take out an old window when he installed the new one, as agreed; however, the additional window shown in the photograph appears to be, as the Respondent contended, a storm window. Indeed, the proposed contract from Sprout Construction submitted into evidence by the Claimants refers to the removal of a "storm window from exterior of bathroom window." (CL. Ex. 15.)

The Claimants also submitted a June 17, 2010 inspection report from Edgar M. Williams, HomeSure Inspections indicating that Mr. Williams observed numerous defective conditions.¹⁶

Nonetheless, the Claimants' own testimony and exhibits established that the Claimants knew or should have known of those conditions at least as of July 31, 2007. On cross-examination by the Fund, Ms. Freeman testified that the problems with the bathroom "all appeared immediately," *i.e.*, "in July 2007." Mr. Freeman's testimony essentially corroborated his wife's. He added that when they would iron downstairs, "stuff" crumbled down from the tile and grout above, and that the plumbing began to leak around the tub area within a short period of time. He also described the faulty drywall and testified that he believed the crack in the wall occurred during demolition of the old bathroom by the Respondent. Ms. Freeman acknowledged, however, that she did not file a claim against the Fund until October 28, 2010.

Moreover, Mr. Williams did not testify and insufficient evidence was provided as to his qualifications with regard to home improvements. Thus, I cannot rely upon Mr. Williams' opinion as to the only defects for which the Claimants had a potentially timely claim, *i.e.*, the alleged improper location of the bath vent fan as determined by Mr. Williams in June 2010.¹⁷

¹⁶ The report indicated the following:

1. The floor tiles are loose. Either inadequate support allows movement to loosen the tiles or inadequate mastic or glue was used. . . .
2. No base trim was installed. . . .
3. The floor tiles do not extend to the wall to the left of the vanity. There is a gap between the vanity and the wall. . . .
4. The bath vent fan should have been installed in the ceiling, not in a makeshift side mount. . . .
5. The new bath window was installed without taking out the old window. . . .
6. There are dents in the tub and on the faucet spout. . . .
7. The wall and ceiling drywall finishing is very poor. . . .
8. The [tub] tiles are not flush with each other. . . .
9. The HVAC register is not against the wall. . . .
10. Even though the plumbing and electrical were modified, it does not appear that proper permits were obtained.

(CL Ex. 16.)

¹⁷ The other relevant defects did not require expert testimony to establish unworkmanlike and/or inadequate home improvements, as they were obvious to the average layperson.

For the same reason, I cannot rely upon Mr. Williams' opinion that permits for the plumbing and electrical work should have been obtained. (He does not mention in his report the absence of a cement backer board).

Thus, the evidence showed that the Claimants discovered the relevant defective conditions in the bathroom more than three years before they filed their October 28, 2010 claim against the Fund. The Claimants gave no explanation for the delay other than that they were not put on notice by the Contract that they had the right to file such a claim or that they were required to do so within a certain period of time. Unfortunately, that lack of information in the Contract is no excuse for failing to file by the three-year deadline.

CONCLUSIONS OF LAW

I conclude that the Claimants did not file a timely claim for an actual loss compensable by the Fund. *Lumsden v. Design Tech Builders, Inc.*, 358 Md. 435 (2000); Md. Code Ann., Bus. Reg. § 8-405(g) (Supp. 2012); *see also* COMAR 09.08.03.03B(2). Thus, they are not entitled to compensation from the Fund. Md. Code Ann., Bus Reg. §§ 8-401 and 8-405(a) (2010 & Supp. 2012); COMAR 09.08.03.03B(2).

RECOMMENDED ORDER

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

ORDER that the claim of the Claimants against the Fund, filed October 28, 2010, be **DISMISSED**; and

IN THE MATTER OF THE CLAIM	* BEFORE EILEEN C. SWEENEY,
OF ELIJAH FREEMAN AND	* AN ADMINISTRATIVE LAW JUDGE
KAVITA FREEMAN,	* OF THE MARYLAND OFFICE
CLAIMANTS,	* OF ADMINISTRATIVE HEARINGS
AGAINST THE MARYLAND HOME	* OAH NO.: DLR-HIC-02-12-27687
IMPROVEMENT GUARANTY FUND	* MHIC NO.: 10(90)1600
FOR THE ALLEGED ACTS OR	*
OMISSIONS OF WILBUR GRAY T/A	*
GRAY'S HOME REMODELING &	*
HOME IMPROVEMENT,	*
RESPONDENT	*

* * * * *

FILE EXHIBIT LIST

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

- CL Exs.1-2 Photographs
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- CL Ex. 4A-D Photographs
- CL Ex. 5A-C Photographs
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I admitted the following exhibits on the Respondent's behalf:

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

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- Fund Ex. 5 June 30, 2010 Complaint Form, with attached June 25, 2010 letter from the Claimants to the MHIC

¹⁸ CL Ex. 17 was not admitted into evidence.

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

Signature on File

April 9, 2013
Date Decision Mailed

Eileen C. Sweeney
Administrative Law Judge

ECS/emh
#140898

**IN THE MATTER OF THE CLAIM
OF ELIJAH and KAVITA FREEMAN
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR ALLEGED VIOLATIONS OF
WILBUR GRAY,
t/a GRAY'S HOME REMODELING
& HOME IMPROVEMENT**

* **MARYLAND HOME
IMPROVEMENT COMMISSION**

* **MHIC CASE NO. 10 (90) 1600**

* * * * *

FINAL ORDER

WHEREFORE, this 20TH day of November, 2013, Panel B of the Maryland

Home Improvement Commission ORDERS that:

1) The Findings of Fact of the Administrative Law Judge are Amended as follows:

A) The Commission takes official notice of the fact that its records reflect that the Claimants initially filed a complaint against the Respondent on June 30, 2010, and that the Claimants were first provided with a Home Improvement Guaranty Fund claim form on or about October 13, 2010.

B) Based upon review of the record in this matter, the Commission finds that the Respondent failed to include in his contract with the Claimant notices concerning the Home Improvement Commission and Home Improvement Guaranty Fund required by statute and regulation. (Cl. Ex. 10, 11A-C). The Respondent failed to include his Commission license number, as required under Business Regulation Article, §8-501(c)(1) (i). The Respondent failed to include a notice that gives the telephone number and web site of the Commission, as required under Business Regulation Article, §8-501(c)(1)(viii). The Respondent failed to include a notice that specifies the protections available to consumers through the Commission's Guaranty Fund, as required under Business Regulation Article, §8-501(c)(1)(ix) and COMAR 09.08.01.26.

C) The Commission finds that the Respondent's failure to provide the notices required by law concerning the Commission and the protections available to consumers through the Commission's Guaranty Fund was the direct and proximate cause of the Claimants' delay in filing their complaint and Guaranty Fund claim.

2) The Conclusions of Law of the Administrative Law Judge are Amended as follows:

A) The Commission concludes that the filing of the Claimants complaint on June 30, 2010 constitutes a constructive filing of their Guaranty Fund claim in a timely manner, in light of the Respondent's failure to provide to the Claimants the notices required by law.

A) COMAR 09.08.03.03B(3) provides that the Commission may determine that a particular claim requires a unique measure of actual loss.

B) Based on review of the record in this matter and the findings above, the Commission concludes that this claim requires a unique measure of actual loss, pursuant to the Commission's authority under COMAR 09.08.03.03B(3). The Commission concludes that the fair and reasonable measure of the Claimants' actual loss in this matter is \$2,550.00.

3) The Recommended Order of the Administrative Law Judge is Amended as follows:

A) The Claimants are Awarded \$2,550.00 from the Home Improvement Guaranty Fund.

B) Pursuant to Business Regulation Article, §8-411(a), any home improvement licenses held by the Respondent shall be Suspended at such time as any money is paid from the Home Improvement Guaranty Fund under this Order, and the Respondent shall then be ineligible for any home improvement license until such time as the Home Improvement Guaranty Fund has been reimbursed. The Respondent shall also be liable for 10% annual interest on any unreimbursed balance owed to the Fund.

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Claim of Elijah & Kavita Freeman
November 20, 2013
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4) This Final Order shall become effective thirty (30) days from this date. During the thirty (30) day period, any party may file an appeal of this decision to Circuit Court.

Andrew Snyder _____
Chair - Panel B
Maryland Home Improvement Commission