

IN THE MATTER OF THE CLAIM	* BEFORE MICHAEL R. OSBORN,
OF TIMOTHY EAGAN, JR.,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT,	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	* OAH NO.: DLR-HIC-02-13-07938
FOR THE ALLEGED ACTS OR	* MHIC NO.: 11 (90) 399
OMISSIONS OF JOHN E. SMAIL,	*
T/A UNIVERSAL DESIGNS,	*
RESPONDENT	*

* * * * *

RECOMMENDED DECISION

STATEMENT OF THE CASE
ISSUE
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DISCUSSION
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RECOMMENDED ORDER

STATEMENT OF THE CASE

On January 20, 2011, Timothy Eagan, Jr. (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$5,050.00 for actual losses allegedly suffered as a result of a home improvement contract with John Smail t/a Universal Designs (Respondent). On January 27, 2012, the Claimant amended the claim to \$5,000.00.

I held a hearing on June 24, 2013 at the St. Mary's County Library in Leonardtown, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010 & Supp. 2012). Eric B. London,

Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Claimant represented himself. The Respondent failed to appear after notice was sent to him at 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 (2009 & Supp. 2012), Code of Maryland Regulations (COMAR) 09.01.03; 09.08.02; and 28.02.01.

ISSUE

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

SUMMARY OF THE EVIDENCE

Exhibits

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

- CL Ex. 1 Explanation of complaint
- CL Ex. 2 Homeowner/Contractor Agreement, May 7, 2010
- CL Ex. 3 Contract with Universal Designs, May 5, 2010
- CL Ex. 4 E-mail to the Claimant's wife from the Respondent, May 3, 2010
- CL Ex. 5 E-mail to the Respondent from Brandi (Claimant's wife), May 6, 2010
- CL Ex. 6 E-mail to the Respondent from the Claimant and his wife, July 8, 2010
- CL Ex. 7 Cancelled check, posting date July 13, 2010
- CL Ex. 8 Appraisal of Real Property done by Mark Johnson, as of June 2, 2010
- CL Ex. 9a-u Photographs
- CL Ex. 10 Estimate from Feicht Contracting, LLC, October 1, 2010
- CL Ex. 11 Circuit Court of Maryland Case Information
- CL Ex. 12 Handwritten figures regarding expenses, composed during break at hearing

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

- Fund Ex. 1 Notice of Hearing, March 18, 2013
- Fund Ex. 2 Memo from Sandra Sykes to Legal Services, April 11, 2013, with unclaimed mail
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- Fund Ex. 9 Letter to the Respondent from the DLLR, February 13, 2012
- Fund Ex. 10 Contract with Universal Designs, May 5, 2010

No documents were admitted on the Respondent's behalf.

Testimony

The Claimant testified on his behalf and called his wife, Brandi Eagan, as a witness.

No one testified on behalf of the Respondent or the Fund.

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 #01-89314.
2. In May 2010, the Claimant and his wife, with mortgage lending assistance from the U.S. Department of Housing and Urban Development (HUD), agreed to purchase an existing home in Mechanicsville, Maryland. The home the Claimant and his wife agreed to purchase required improvements to be habitable. HUD mortgage financing assistance included the cost of the home as well the cost of improvements to make the home habitable. M&T Bank was the mortgagee.
3. The Claimant selected the Respondent as the home improvement contractor to repair the home, and began a course of both verbal and e-mail conversations with the Respondent. These conversations included the work required to make the home habitable and to conform to HUD mortgage loan assistance standards, and the method by which appliances, fixtures, and cabinets would be selected. The Claimant and the Respondent

agreed as part of the contract that the Claimant would locate and price appliances, fixtures, and cabinets and communicate them to the Respondent, who would incorporate the appliances, fixtures, and cabinets into the contract.

4. On May 5, 2010, the Respondent submitted a contract to the Claimant that included work to be performed throughout the home. The contract did not identify the specific appliances, fixtures and cabinets to be installed, but did include a provision that “[c]ustomer to pick all appliances, lighting fixtures, and bathroom fixtures, based on builders grade pricing.”
5. On May 6, 2010, the Claimant sent an e-mail to the Respondent in which he requested that the Respondent revise the proposed contract into sections that reflected a room-by-room breakdown of the work to be performed and the cost of the work in each room. The Claimant also identified the specific brand, model, and price of a bath vanity and wall cabinet, a toilet, a washer and dryer, a refrigerator, a range, a microwave, and a dishwasher, and the location at which the Claimant had found these items for the Respondent to install.
6. On May 7, 2010, the Respondent submitted a contract segregated into sections that reflected the total budget for work, broken down by the cost of each room or area of the house. The revised contract provided, generally, the appliances, lighting, and fixtures to be installed in specific rooms of the house. The contract included renovation or repair of the crawl space, drain lines, roof, windows, electrical fixtures and smoke detectors, and holes in the drywall. In the bathroom, the contract included repair to drain lines and water lines, and installation of a new tub, toilet, wall cabinet, mirrors, and fixtures. In the kitchen, the contract included some sanding and painting of a door and the windows;

installing a new refrigerator, dishwasher, washer, dryer, microwave, and new lighting fixtures. The specific appliances, fixtures and cabinets selected by the Claimant to be purchased by the Respondent for installation in each room were not described in the contract.

7. On May 10, 2010, the Claimant and his wife signed the contract as proposed by the Respondent. Claimant Exhibit 3, and Fund Exhibit 10, details the work to be performed by the Respondent throughout the Claimant's home. The total contract price was \$19,100.00, with completion due sixty days from the start of the work.
8. The contract included two draws by the Respondent, with \$9,550.00 due before work would begin, and \$9,550.00 due on completion. By verbal agreement between the Claimant and the Respondent, no money was due under the contract and no work was to be performed until the home purchase went to settlement, as no funds to renovate the home would be available until then.
9. Payments made to the Respondent under the contract were made through checks issued by the mortgagee, M&T Bank, to the Claimant, with HUD approval and oversight. On July 8, 2010, M&T Bank sent a check of \$9,550.00 to the Claimant, which the Claimant countersigned and mailed to the Respondent. The Respondent deposited this check on July 13, 2010.
10. On approximately July 27, 2010, the Respondent started work on the Claimant's home. The Respondent worked an average of two days a week, one to two hours each time, for the first six weeks.
11. At the end of September 2010 the Claimant called the Respondent to inquire why progress on the renovations was so slow. The Respondent replied that he needed more

money to continue work. The Claimant replied that no more money was due under the contract until completion. The Respondent did a small amount of work following this conversation. Through October 2010, the Claimant made several unsuccessful efforts to convince the Respondent to complete the work. These efforts included a chance meeting at a local grocery store during which the Respondent turned and walked away. Following several unsuccessful efforts to convince the Respondent to return to the property to complete the work, and following conversations with the loan officer at M&T Bank and a HUD official, the Claimant contacted the Respondent and told him not to return to the property.

12. During the course of the Claimant's efforts to convince the Respondent to complete the work, the Claimant also requested the Respondent return \$5,050.00 of the initial payment because none of the appliances identified by the Claimant and his wife had been purchased. The Respondent did not return any money, as requested, and did not deliver any appliances to the home.
13. Work completed by the Respondent before he was discharged by the Claimant included repair of leaking plumbing in the laundry room, installation of a new light fixture in the dining room, installation of new light fixtures in two guest bedrooms, and installation of a new ceiling fan in the master bedroom. Work the Respondent started, but did not complete, included: installation of a bathroom exhaust fan; installation of bathroom electrical switches and outlets, installation of shower fixtures; installation of shower tile; and installation of bathroom window casings. The Respondent installed a badly scratched plate glass mirror in the bathroom. The Respondent covered the kitchen floor with plastic. The

Respondent did not perform any other work or purchase any appliances, fixtures, or cabinets.

14. Following discharge of the Respondent by the Claimant, a HUD inspector estimated the cost to complete the work under the contract, and the cost to repair work poorly done by the Respondent, was \$19,100.00.
15. The Claimant spent \$9,791.59 for appliances, vapor barriers, flooring, insulation, cabinets, plumbing fixtures, light fixtures, smoke detectors, caulking, door and window casings, drywall finishing supplies, and paint and paint finishing supplies to complete work on the home. The Claimant used credit cards for all the purchases. With the exception of the bathroom, the Claimant and his wife supplied the labor to complete the renovations.¹
16. At approximately the end of October 2010, the Claimant paid \$896.00 to Feicht Contracting, LLC to complete work in the bathroom. The total spent by the Claimant to complete the work left unfinished by the Respondent, and to replace the badly scratched bathroom mirror, was \$10,687.59.
17. By the end of October 2010, work on the home was complete, and HUD issued a certificate of occupancy. The Claimant and his wife then moved into the home.
18. At the completion of work by the Claimants, M&T Bank issued a check in the amount of \$9,550.00, made payable to the Claimant and his wife.
19. The majority of work performed under the contract by the Respondent was incomplete. Installation of a badly scratched bathroom mirror was

¹ The Claimant also paid Empire Flooring to install hardwood floors, but did not have any receipts for the work to submit as evidence and did not recall how much he paid Empire Flooring for the work. The Claimant also paid to have new vinyl flooring installed in the kitchen, but had no receipt to submit as evidence and no recollection how much he paid for this new vinyl flooring.

unworkmanlike. The value of the work actually performed by the Respondent was \$4,500.00.²

20. The Claimant provided the Respondent a reasonable opportunity to complete work on the contract, and the Respondent failed to do so. The Respondent abandoned the contract without justification.

DISCUSSION

Respondent's Failure to Appear

The record reflects that the Fund met the notice requirements for the hearing. The OAH sent hearing notices to the Respondent at his last known addresses on record with the MHIC by regular and certified mail. The notice sent by certified mail to the Respondent's address in Mechanicsville, Maryland was returned to the OAH, unclaimed. The notice sent by regular mail to that same address was not returned. Neither the Respondent nor anyone authorized to represent the Respondent appeared for the scheduled hearing on June 24, 2013.

The statutory provisions governing disciplinary proceedings against MHIC licensees state that notice shall be sent by certified mail to "the business address of the licensee on record with the Commission." Md. Code Ann., Bus. Reg. § 8-312(d) (Supp. 2012). The notice procedures applicable to disciplinary proceedings also apply to claims against the Fund. Md. Code Ann., Bus. Reg. § 8-407(a) (2010). A claim against the Fund can be joined with a disciplinary proceeding based on the same facts. Md. Code Ann., Bus. Reg. § 8-408(a) (2010).³

² I derived this figure from the demand the Claimant made to the Respondent to return \$5,050,000 of the \$9,550.00 paid to the Respondent after the Claimant concluded the Respondent was not going to complete the work. The Claimant also represented to the MHIC on his January 20, 2011 claim form that the value of work performed by the Respondent on the contract was \$4,500.00.

³ Unless otherwise noted, all references to the Annotated Code of Maryland, Business Regulation Article, are to the version published in the 2010 Replacement Volume.

The evidence establishes that the OAH properly sent the hearing notices in this case by certified and regular mail to the Respondent's address of record on file with the MHIC, as required by section 8-312(d) of the Business Regulation Article. Therefore, I find that the Respondent was properly notified of the hearing. Consequently, I determined that the hearing would proceed in the Respondent's absence under section 8-312(h) of the Business Regulation Article, section 10-209 of the State Government Article, and Code of Maryland Regulations (COMAR) 09.01.02.07. Md. Code Ann., State Gov't § 10-209 (2009); Md. Code Ann., Bus. Reg. § 8-312(d), (h) (Supp. 2012).

The Claim

A homeowner is authorized to recover from the Fund when he or she sustains an actual loss that results from an act or omission by a licensed contractor. Md. Code Ann., Bus. Reg. § 8-405(a) (Supp. 2012). When the Fund pays money to a homeowner as a result of the faulty performance of a home improvement contractor, the responsible contractor is obligated to reimburse the Fund. Md. Code Ann., Bus. Reg. § 8-410. The MHIC may suspend the license of such contractor until the contractor fully effectuates reimbursement. Md. Code Ann., Bus. Reg. § 8-411.

Recovery against the Fund must be based on an "actual loss" as defined by statute and regulation. "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. "By employing the word 'means,' as opposed to 'includes,' the legislature intended to limit the scope of 'actual loss' to the items listed in section 8-401." *Brzowski v. Md. Home Improvement Comm'n*, 114 Md. App. 615, 629 (1997) (for an award to be paid from the Fund based on a court ruling or arbitration, the court or arbitrator's decision must contain express finding of fault on part of the contractor and a dollar value of the actual loss). "The Fund may

only compensate for actual losses [Claimant] incurred as a result of misconduct by a licensed contractor.” COMAR 09.08.03.03B(2). At a hearing on a claim, the claimant has the burden of proof. Md. Code Ann., Bus. Reg. § 8-407(e)(1). A contractor is prohibited from abandoning a home improvement contract without justification. Md. Code Ann., Bus. Reg. § 8-605(1).

First, the Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant.

Second, the Respondent performed incomplete and unworkmanlike work under the home improvement contract. The Respondent installed a few light fixtures and got started on a small number of other renovations, but was so slow in getting anything done that the Claimant had to repeatedly contact the Respondent to inquire when work would resume. The Respondent installed a badly scratched bathroom mirror that had to be replaced. The Respondent, though not due any additional money under the contract, tried to convince the Claimant that the Claimant would have to pay the Respondent more money for the Respondent to resume work. The Claimant refused, and eventually instructed the Respondent not to return to the property. The Claimant was unable to move into the home until HUD issued a certificate of occupancy, which the Claimant could not obtain until renovations were completed. The Claimant used his own money to purchase the appliances, fixtures, cabinets and supplies needed to complete the work and completed the renovations himself, with the help of his wife. The Claimant hired the bathroom work completed at a cost of \$896.00.

The Claimant made no argument that he was entitled to be compensated by the Fund for the value of his labor in completing the renovations. His only claim for the cost of any labor was the labor element of the money paid to Feicht Contracting, LLC to complete the bathroom.

The Fund argued that the Claimant had given the Respondent every opportunity to complete work under the contract, and that the Respondent failed to do so. The Fund argued that the Respondent abandoned the contract without justification. The Fund did not take issue with the several thousand dollars spent by the Claimant on new appliances, fixtures, cabinets and supplies needed to complete the work. The Fund argued that using the formula under COMAR 09.08.03.02B(3)(c), applicable to compensation by the Fund when a contractor begins but does not complete work and another contractor must be hired to do the work, that the Claimant is entitled to an award of \$1,317.59.

Because of the Respondent's incomplete and unworkmanlike work described above, I find that the Claimant has established an entitlement to reimbursement on his claim against the Fund. COMAR 09.08.03.03B(2); Md. Code Ann., Bus. Reg. § 8-401.

COMAR 09.08.03.03B(3) sets forth the following formulas for determining an "actual loss":

(3) Unless it determines that a particular claim requires a unique measurement, the Commission shall measure actual loss as follows:

(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 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.

Under section 8-401 of the Business Regulation Article, actual loss means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement. None of the measurements under COMAR 09.08.03.03B(3)(a) through (c) apply to the circumstances of this case. The Fund's argument as to the actual loss incurred by the Claimant is not an accurate reflection of the actual loss.

The Claimant borrowed \$19,100.00 to renovate the home. The value of the work done by the Respondent was \$4,500.00. The Claimant purchased all of the appliances, fixtures, and materials needed to complete the contract, and provided the labor himself to complete the work. He hired a contractor to complete the bathroom. To complete the renovations the Claimant spent \$10,867.59.

Therefore, I conclude the "actual loss" incurred by the Claimant requires a "unique measurement" that takes into account the original contract price, the value of the work done by the Respondent, and the cost to the Claimant to complete the work. That calculation is as follows:

Original contract price	\$19,100.00
Minus value of work by the Respondent	<u>\$ 4,500.00</u>
	\$14,600.00
Minus cost to complete the work	<u>\$10,867.59</u>
Actual loss	\$ 3,732.41

Viewed from a different perspective, it cost the Claimant \$19,100.00 in funds borrowed from M&T Bank to get \$15,367.59 worth of work (\$10,867.59 plus \$4,500), a difference of \$3,732.41 (\$19,100.00 minus \$15,367.59). This is the Claimant's actual loss.

CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual/compensable loss of \$3,732.41 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 award the Claimant \$3,732.41; and

ORDER that the Respondent is ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Guaranty Fund for all monies disbursed under this Order plus annual interest of at least ten percent as set by the Maryland Home Improvement Commission. Md. Code Ann., Bus. Reg. § 8-411(a) (2010); and

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

Signature on File

September 20, 2013
Date Decision Mailed

Michael Osborn
Administrative Law Judge

MO/kkc
#143575

<p>IN THE MATTER OF THE CLAIM</p> <p>OF TIMOTHY EAGAN, JR.,</p> <p>CLAIMANT,</p> <p>AGAINST THE MARYLAND HOME</p> <p>IMPROVEMENT GUARANTY FUND</p> <p>FOR THE ALLEGED ACTS OR</p> <p>OMISSIONS OF JOHN E. SMAIL,</p> <p>T/A UNIVERSAL DESIGNS,</p> <p>RESPONDENT</p>	<p>* BEFORE MICHAEL R. OSBORN,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>* OAH NO.: DLR-HIC-02-13-07938</p> <p>* MHIC NO.: 11 (90) 399</p> <p>*</p> <p>*</p> <p>*</p>
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FILE EXHIBIT LIST

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No documents were admitted on the Respondent's behalf.

PROPOSED ORDER

WHEREFORE, this 23rd day of October 2013, Panel B of the Maryland Home Improvement Commission approves the Recommended Decision 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.

Joseph Tunney

*Joseph Tunney, Chairman
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION