

IN THE MATTER OF THE CLAIM
OF TONY SHORT,
CLAIMANT,
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF JOHN BOONE,
T/A BOONE REMODELING,
RESPONDENT

* BEFORE TARA K. LEHNER,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No: DLR-HIC-02-16-10673
* MHIC No: 13 (05) 203
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PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
PROPOSED FINDINGS OF FACT
DISCUSSION
PROPOSED CONCLUSION OF LAW
PROPOSED ORDER

STATEMENT OF THE CASE

On February 19, 2016, the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) received a claim form from Tony Short (Claimant), requesting \$46,378.93 for actual losses he alleged he suffered as a result of a home improvement contract with Michael Boone, trading as Boone Remodeling (Respondent). On April 4, 2016, the Office of Administrative Hearings (OAH) received the transmittal of the case from the MHIC.

On November 1 and 29, 2016, I held a hearing at the Tawes State Office Building, Department of Natural Resources, 580 Taylor Avenue, Annapolis, Maryland. Md. Code Ann.,

Bus. Reg. §§ 8-312(a), 8-407(e) (2015).¹ The Claimant represented himself. The Respondent was present and was represented by Timothy F. Talbot, Esquire. Sarah E. Keogh, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund, which did not send an individual to act as a party representative.

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 (2014 & Supp. 2016); Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02, and 28.02.01.

ISSUES

- 1) Is the claim barred by section 8-405(g) of the Business Regulations Article of the Maryland Code; and if not
- 2) Did the Claimant sustain an actual loss compensable by the Fund as a result of the acts or omissions of the Respondent?

SUMMARY OF THE EVIDENCE

Exhibits

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

- GF Ex. 1 Hearing Notice, August 8, 2016
- GF Ex. 2 Undeliverable Mail notice, August 29, 2016; Hearing Notice, August 8, 2016; Hearing Order, March 31, 2016 with enclosed materials
- GF Ex. 4² MHIC Transmittal with Hearing Order, March 31, 2016, with Claimant's Claim Form, received by MHIC February 19, 2016
- GF Ex. 5 Letter To Whom It May Concern from David R. Finneran, Executive Director, MHIC, October 5, 2016

¹ All citations to the Business Regulation Article (Bus. Reg.) are to the 2015 Volume.

² The Fund pre-marked its exhibits and opted not to use what it had pre-marked as GF Ex. 3 at the hearing.

- GF Ex. 6 Letter to Respondent from David L. Brown, Investigator, MHIC, February 26, 2016, with Claimant's Claim Form and information
- GF Ex. 7 Claimant's Complaint Form, received by MHIC August 15, 2012
- GF Ex. 8 Letter to Claimant from Mr. Brown, December 20, 2012
- GF Ex. 9 Letter to Whom It May Concern from Mr. Finneran, November 9, 2016
- GF Ex. 10 Letter to Whom It May Concern from Mr. Finneran, November 3, 2016
- GF Ex. 11 Letter to Whom It May Concern from Mr. Finneran, November 3, 2016
- GF Ex. 12 Letter to Whom It May Concern from Mr. Finneran, November 3, 2016

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

- CL Ex. 1 Bid Summary, signed December 7, 2011
- CL Ex. 2 Drawing, specifications, and photographs (undated)
- CL Ex. 3 Table of payments, covering December 7, 2011 through August 10, 2012
- CL Ex. 4 Cancelled checks dated December 11, 2011; April 10, May 3, and May 16, 2012
- CL Ex. 5 Cancelled check dated May 17, 2012
- CL Ex. 6 Documentation of material purchases
- CL Ex. 7 Bay Stoves invoice and receipt, page from credit card statement
- CL Ex. 8 Email correspondence between Claimant and Respondent, August 6-10, 2012
- CL Ex. 9 Letter to S. Wollman, March 4, 2013
- CL Ex. 10 S. Keingraber invoices, February 20 and 28, 2013
- CL Ex. 11 Jose Zavala Landscape and Construction contract, with signatures dated March 4 and 10, 2014
- CL Ex. 12 Punch list, undated

- CL Ex. 13 Table of expenditures December 7, 2011 through July 5, 2014
- CL Ex. 14 Documentation of expenditures
- CL Ex. 15 Color photographs, pages numbered 1-54
- CL Ex. 16 Anne Arundel County building permit, issued March 19, 2012
- CL Ex. 17 Anne Arundel County Permit Status, Permit Fees, and Inspection History printouts
- CL Ex. 18 Inspection sticker, June 4, 2014
- CL Ex. 19 Deck Construction Guide, 2015 International Residential Code
- CL Ex. 20 DuPont Flashing Systems Installation Guidelines

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

- Resp. Ex. 1 Letter to Claimant from Stacie J. Wollman, Esquire, August 15, 2012
- Resp. Ex. 2 Emails between Respondent and Claimant, July 3-16, 2012

Testimony

The Claimant and Respondent both testified. Stacie Wollman, Esquire, testified on behalf of the Respondent.

PROPOSED FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. Beginning on December 8, 2003, and continuing through December 8, 2011, the Respondent was a licensed home improvement contractor under MHIC license Ex. 01-86715. (GF Ex. 5).
2. On December 7, 2011, the Claimant and the Respondent entered into a contract which called for the Respondent to build a garage, sunroom and a deck at the Claimant's primary residence and only home owned in Maryland (Contract). (CL Ex. 1).

3. The total cost of the Contract was \$83,743.00. *Id.*
4. On or around May 16, 2012, the Respondent told the Claimant that he would not be able to finish the work under the contract for the Contract price. The Respondent and the Claimant reached an oral agreement that the Claimant would purchase materials for the completion of the project and that the Respondent would perform additional labor for items above and beyond the original contract to reimburse the Claimant for these additional costs. (T. Claimant and Respondent).
5. On July 3, 2012, the Respondent told the Claimant that he would not install the fireplace, and would not pay to have it installed by another contractor. (Resp. Ex. 2).
6. On July 11, 2012, the Claimant was aware that the following items under the contract were outstanding: tile for the sunroom floor, deck trim around the spa, electrical work, speaker wire and outlet installation, fireplace installation, and drywall work. (Resp. Ex. 2).
7. In late July/early August 2012, the Respondent removed his equipment from the worksite. (T. Claimant).
8. Between August 8 and 12, 2012, the Respondent would not answer the Claimant's phone calls. (T. Claimant; CL Ex. 8).
9. On August 6, 2012, the Claimant was aware the following work still needed to be completed under the contract: drywall, tiling of the sunroom floor, speaker wire, electrical work, fireplace installation, and storm door installation. The Claimant was also aware that the Respondent did not install the roof correctly and it needed to be repaired to prevent the infiltration of water. (CL Ex. 8).
10. On August 10, 2012, the Claimant observed the roof leaking and told the Respondent. (CL Ex. 8).

11. On August 14, 2012, the Respondent met with the Claimant and his wife at the Claimant's home. (T. Claimant and Respondent). The Respondent refused to perform any additional work under the contract. (T. Claimant).

12. On August 15, 2012, the MHIC received a complaint from the Claimant against the Respondent's license. (T. Claimant; GF Ex. 7). David Brown, an Investigator with MHIC, was assigned to the complaint. (T. Claimant). The Claimant included with his complaint photographs that he had taken of the incomplete and inadequate work by the Respondent. (T. Claimant; CL Ex. 15). These pictures document: missing tile for sunroom; non-installation of the fireplace; sunroom windows installed without flashing; cracked roof shingles, with missing flashing and sealant, and exposed nail heads; water leaking into the sunroom during a rain storm; a missing gutter downspout; a gutter downspout that terminates on another roof instead of at the ground; siding that is overlapping in some places and cut short in other places; holes in the drywall; missing speaker wire; lack of trim and excess caulking on the deck; irregular placement of deck boards, risers, treads and railings; inadequate deck support; a garage door not meeting the ground when closed; and the gas fireplace not installed.

13. On August 15, 2012, the Respondent's attorney, Stacie J. Wollman, Esquire, contacted the Claimant to discuss resolving all outstanding issues regarding the contract work. (Resp. Ex. 1).

14. On October 24, 2012, a meeting occurred between the Claimant, his wife, the Respondent, Ms. Wollman, and Mr. Brown. (T. Claimant, Respondent and Wollman). At the meeting, the Claimant was aware that many items under the contract needed to be repaired and/or completed by the Respondent. (T. Claimant; CL Ex. 12). The Claimant knew there were issues with the deck step treads, the step risers, the step landing, the deck posts, the deck trim,

and the deck support. *Id.* He also believed that the three-season room windows were not installed properly. *Id.* He also knew of issues with the installation of the: siding, gutters, electrical, lighting, speaker wire, insulation, garage doors, and drywall. *Id.* He knew there were leaks from the roof that was installed by the Respondent, and that drywall and particle board had been damaged as a result of these leaks. *Id.* He also knew the following items still needed to be installed: storm door, fireplace, drywall, paint, tile, trim in three-season room, and trim around the spa deck. *Id.*

15. After the October 24, 2012 meeting, the Claimant never heard from the Respondent, or anyone representing the Respondent, again. (T. Claimant).

16. The Respondent's phone number, and his business address, remained the same from December 2011 through the date of the hearing. (T. Respondent).

17. On February 20 and 28, 2013, the Claimant hired Sean Keingraber, an unlicensed contractor, to repair roof work completed by the Respondent. (T. Claimant; CL Ex. 10; GF Ex. 10).

18. On March 10, 2014, the Claimant hired Jose Zavala Landscaping and Construction (Zavala), an unlicensed contractor, to repair and complete the work under the Contract with the Respondent. (T. Claimant; GF Ex. 9).

19. On February 19, 2016, the Claimant filed a claim with the MHIC. (GF Ex. 4).

DISCUSSION

Uncontested Background

The Claimant and the Respondent entered into a Contract for the Respondent to build a garage, sunroom and a deck at the Claimant's home. The Respondent began the work under the Contract, and, as of May 7, 2012, the Claimant had paid the Respondent all of the money in accordance with the Contract price. On or around May 16, 2012, the Respondent told the

Claimant that he would not be able to finish the work under the Contract for the agreed upon price; the Respondent had run out of money to pay his subcontractors and to pay for the outstanding materials he needed to complete the Contract work.

In the interest of completing the Contract work, the Claimant and the Respondent reached an oral agreement that the Claimant would pay the Respondent's subcontractors directly and would purchase materials for the completion of the project. In exchange for this, the Respondent agreed to perform additional labor for items above and beyond the original Contract scope of work, including the addition of another set of stairs off the deck. Based on this agreement, the Claimant then made numerous purchases of materials that were necessary for the Respondent to complete the original and modified scope of work.

In July and August 2012, the relationship between the Claimant and the Respondent deteriorated. In July, the parties came to an impasse regarding whether the original Contract scope of work included the installation of a gas fireplace in the sunroom, and the Respondent definitively told the Claimant via email that he was not going to install, or be responsible for paying a subcontractor to install, the fireplace. (Resp. Ex. 2). Additionally, the parties disagreed about how to install the tile floor in the sunroom and whether the Respondent was responsible for completing some electrical work. *Id.* The Claimant also raised concerns regarding missing deck trim and electrical work for the spa, the installation of speaker wire and outlets, and some drywall work. *Id.* The Claimant then went on an extended vacation. When the Claimant returned home in early August 2012, he observed that the Respondent had removed all of his equipment from the Claimant's home. He testified that, at that time, he was concerned that the Respondent would not return to complete the Contract work.

The Claimant called the Respondent; however, the Respondent did not return his calls. (See CL Ex. 8; T. Claimant). On August 6, 2012, the Claimant emailed the Respondent demanding that the Respondent come to the home and complete the project, listing the following items as outstanding: the installation of some drywall; the tiling of the sunroom floor; the installation of speaker wire and other electrical wiring; some roofing work to prevent water leakage; the installation of the fireplace; and the installation of a storm door. (CL Ex. 8). On August 10, 2012, he again emailed the Respondent, demanding that he come and complete the work. *Id.* He also noted in this email that water was leaking into the home, caused by the inadequate roofing work by the Respondent. *Id.*

On August 14, 2012, the Respondent met with the Claimant and his wife at the Claimant's home. The Claimant testified that he demanded that the Respondent make repairs, such as to the leaking roof and windows, and that he complete the work that was not finished. Both parties testified that the Respondent stated that he would not perform any additional work at the Claimant's home. The Claimant testified that at that time he understood that he would never see the Respondent again.

That next day, on August 15, 2012, the Claimant filed a complaint against the Respondent with the MHIC. He included photographs with his complaint, and offered the same photographs as Claimant's Exhibit 15, pages 1-40. The Claimant explained that these pictures, taken in or prior to August 2012, document what he believes to be incomplete and/or inadequate work by the Respondent.³ These pictures document: missing tile for sunroom; non-installation of the fireplace; sunroom windows installed without flashing; cracked roof shingles, with missing

³ In this decision, I list the deficiencies alleged by the Claimant; however, because I recommend the denial of an award based on the untimely filing of the Claim with the Fund, I do not reach the determination as to whether the Claimant proved that the Respondent's work is incomplete, inadequate or unworkmanlike.

flashing and sealant, and exposed nail heads; water leaking into the sunroom during a rain storm; a missing gutter downspout; a gutter downspout that terminates on another roof instead of at the ground; siding that is overlapping in some places and cut short in other places; holes in the drywall; missing speaker wire; lack of trim and excess caulking on the deck; irregular placement of deck boards, risers, treads and railings; inadequate deck support; a garage door not meeting the ground when closed; tile floor not installed in the sunroom; and the gas fireplace not installed. David Brown, an Investigator with the MHIC, was assigned to investigate the Claimant's complaint.

The October 24, 2012 meeting

Mr. Brown contacted the Respondent and his attorney, Stacie Wollman. The parties agreed to meet with Mr. Brown on October 24, 2012, to discuss the outstanding issues.

All parties agree that the Claimant presented a list of items that he believed needed to be addressed by the Respondent.⁴ The Claimant testified that he believes that the meeting concluded with an agreement by the Respondent that he would hire another licensed contractor to repair and/or complete the work. The Respondent testified that he is sure he never agreed to hire anyone to perform additional work at the home. Ms. Wollman also testified that the parties did not reach any agreement or resolution of the issues at this meeting, and that she did not recall the Respondent offering to hire another licensed contractor to complete the work. Her understanding was that it was then up to the Claimant as to whether he would file a claim against the Fund. Neither party subpoenaed Mr. Brown to testify at this hearing.

⁴ The Claimant testified that the list he presented that day was substantively similar to Claimant Exhibit 12.

After the October 24, 2012 meeting

The Claimant testified that after the October 24, 2012 meeting, he waited for the Respondent to contact him with the name of the new contractor. He stated that, "after considerable time passed," he tried to contact Ms. Wollman and the Respondent. He stated that the Respondent's phone number and email address were no longer in service. He also testified that Ms. Wollman did not return his numerous phone calls.

As discussed above, the Respondent's position is that he did not agree to hire another contractor. He testified that he had no contact with the Claimant after the meeting in October 2012. He admitted that his email address was closed; however, he stated that the phone number listed on the Contract is his personal cell phone number and demonstrated at the hearing that this number is still operational today. Ms. Wollman testified that she had no recollection of the Claimant calling her and she had no records confirming that he made these calls to her.

On December 20, 2012, Mr. Brown sent a letter to the Claimant providing him with a blank MHIC Fund claim form. (See GF Ex. 8).

The Claimant testified that he mailed a letter to Ms. Wollman on March 4, 2013. (See Cl, Ex. 9). The letter stated that the Claimant was still awaiting a response by the Respondent as to how the Respondent intended to address the outstanding issues. *Id.* Ms. Wollman testified that she does not recall receiving this letter. All parties agree that the Respondent never responded to this letter.

In February 2013, the Claimant hired Sean Keingraber to repair the roof. On March 10, 2014, the Claimant hired Jose Zavala Landscaping and Construction (Zavala) to repair and complete the work under the Contract with the Respondent. Records offered by the Fund

document that Sean Keingraber and Zavala were never licensed by the MHIC. On February 19, 2016, the Claimant filed a claim with the MHIC.

Analysis

Section 8-405(g) of the Business Regulations article of the Maryland Code states that “[a] claim shall 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.” See also COMAR 09.08.03.02G (“A claim may not be brought against the Fund after 3 years from the date that the claimant discovered, or by exercise of ordinary diligence should have discovered, the loss or damage.”).

A claimant has the burden of proving the validity of his or her claim by a preponderance of the evidence. Md. Code Ann., State Gov’t §10-217 (2014); COMAR 09.08.03.03A(3). “[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true.” *Coleman v. Anne Arundel Cty. Police Dep’t.*, 369 Md. 108, 125 n.16 (2002), quoting Maryland Pattern Jury Instructions 1:7 (3rd ed. 2000).

The Fund and the Respondent both asserted that the Claim was untimely. I agree. The bases for the Claimant’s Claim are: (1) the Respondent did not finish certain portions of the Contract work; and (2) for many portions of the work the Respondent did complete, the construction was done in an inadequate and unworkmanlike manner. However, for each and every item the Claimant asserts was unfinished or inadequate, the evidence clearly demonstrates that the Claimant knew of the deficiency of that item no later than October 2012. Three years from October 2012 is October 2015. The Fund, however, did not receive the Claimant’s claim form until February 2016.

With regard to the allegedly incomplete work, the Claimant alleged at the hearing that the Respondent did not install the storm door, the fireplace, the tile and trim in the sunroom, trim around the deck spa, outlets and lighting on the deck, and speaker wiring. The Claimant also alleged that the drywall work, the painting of the walls, and the placement of insulation in the garage was not done by the Respondent as per the Contract. On or before the October 24, 2012 meeting, the Claimant was well aware that all of this work was not completed by the Respondent; the list of outstanding items the Claimant gave the Respondent at that meeting included all of the above-listed unfinished items. (See CL Ex. 12). Also, both parties testified that in August 2012, the Respondent definitively told the Claimant that he would not perform any additional work under the Contract.

With regard to the allegedly inadequate work, the Claimant testified at the hearing that the Respondent completed the following items in an unworkmanlike manner: the roof, deck, siding, garage door and windows. With regard to the roof, gutter and siding installation, the pictures the Claimant took and submitted with his complaint to the MHIC in August 2012 document all of the alleged inadequacies, including the torn shingles, the exposed nail heads, the missing down spouts, the buckling siding, and, most importantly, the existence of water leaks into the home. With regard to the deck installation, the August 2012 photographs also document the uneven step treads and risers, the spacing between deck boards, the missing trim, railings and plugs, and the potentially inadequate deck support. Additionally, the Claimant included each of these concerns regarding the deck in the list he gave the Respondent at the October 2012 meeting. The fact that the garage door was not closing properly is also documented in the August 2012 pictures and the October 2012 list. Finally, the alleged inadequate installation of the windows was also documented by the Claimant in the August 2012 pictures, and he testified at

the hearing that he told the Respondent that the windows were leaking at the meeting on August 14, 2012.

At the hearing, the Claimant was asked if he could recall any deficiency he discovered with regard to the Respondent's work any time after 2012. After giving the Claimant minutes to think about his answer, the Claimant testified that he could not think of anything that he discovered after 2012.

The Claimant asserts that he delayed filing his claim because he was waiting for the Respondent to act on his promise to find and hire a new contractor. He argues that the three year period within which he could file his claim against the Fund should not have begun to run until it became clear to the Claimant that the Respondent would not complete the job. The Claimant argues that this is sometime after he sent the letter to Ms. Wollman on March 4, 2013.

Problematic for the Claimant, however, is that the Claimant's assertion that this promise was made by the Respondent is not supported by any corroborating evidence. Neither the Claimant, nor Ms. Wollman, recall the Respondent making this promise at any time, and there is no written agreement to this effect. Ostensibly, if the promise was made, Mr. Brown could have testified about it because he was present at the meeting; however, the Claimant did not subpoena Mr. Brown to testify at the hearing. Instead, the recollections of three individuals are in evidence, two of whom state that this agreement was never made. Each witness testified clearly and specifically as to their recollections; I have no evidence that suggests any witness was lying or less credible than the others. Often, when individuals negotiate, there are misconceptions as to whether there is a meeting of the minds. I do not doubt that the Claimant believed that the Respondent made this offer to hire a new contractor; however, there is no proof that the Respondent in actuality did agree to do so.

As discussed above, it is the Claimant's burden to prove his eligibility to recover from the Fund, including that his Claim was timely filed. The evidence presented in this case does not prove that it more likely true than not true that the Respondent agreed to hire a new contractor.⁵ The evidence in the record clearly demonstrates that the Claimant knew of all of the deficiencies and incomplete work no later than October 24, 2012; thus, the three year limitations period of section 8-405(g) began to run on or before that date. The Claim, filed on February 19, 2016, was filed more than three years after October 2012, and was untimely.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant is not entitled to an award from the Fund because the Claim was filed over three years after the date he discovered that the Respondent performed incomplete and inadequate work. Md. Code Ann., Bus. Reg. § 8-405(g) (2015); COMAR 09.08.03.02G.

PROPOSED ORDER

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

ORDER that the Claimant is ineligible for an award from the Maryland Home Improvement Guaranty Fund; and

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

Signature on File

February 1, 2017
Date Decision Mailed

Tara K. Lehner
Administrative Law Judge

TKL/sw
165564

⁵ I do not reach the question as to whether any agreement by the Respondent to hire a new contractor to fix and complete the Contract work would have modified the three year limitations period contained in section 8-405(g).

PROPOSED ORDER

WHEREFORE, this 3rd day of April, 2017, 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.

Andrew Snyder

***Andrew Snyder
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION