

IN THE MATTER OF THE CLAIM	* BEFORE THOMAS G. WELSHKO,
OF ERICA MURPHY,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	* OAH No.: DLR-HIC-02-14-09046
FOR THE ALLEGED ACTS OR	* MHIC No.: 13 (90) 285
OMISSIONS OF JAMES REXRODE,	*
T/A REXRODE REMODELING,	*
RESPONDENT	*

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On December 17, 2012, Erica Murphy (Claimant), filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$6,000.00¹ in alleged actual losses suffered as a result of poor performance of a home improvement contract by James Rexrode, t/a Rexrode Remodeling (Respondent).

On October 6, 2014, I held a hearing in this matter at the Department of Agriculture Building in Annapolis, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2010 &

¹ The Claimant's original claim was for \$6,000.00; on March 25, 2013, she filed an amended claim with the Fund in which she reduced her claim to \$5,500.00.

Supp. 2014). The Claimant and Respondent appeared without representation. Assistant Attorney General Peter Martin, 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 (2014), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02, and 28.02.01.

ISSUES

1. Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?
2. If so, what is the amount of that loss?

SUMMARY OF THE EVIDENCE

Exhibits

The Claimant offered four exhibits, the Respondent did not offer any exhibits, and the Fund offered four exhibits. I admitted all the exhibits offered by the parties. (I have attached a complete Exhibit List as an Appendix to this decision.)

Testimony

The Claimant testified on her own behalf. The Respondent testified on his own behalf. The Fund called the Claimant as an adverse witness.

PROPOSED FINDINGS OF FACT

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

1. The Respondent was a licensed home improvement contractor under MHIC number 01-91999. (Fund Ex. 2.)

2. The Claimant owns a rental property located on Chelsea Terrace in Baltimore City. (Test. Cl.; Cl. Ex. 1.)

3. The Chelsea Terrace property is a row home that is connected to other homes. (Test. Cl.; Cl. Ex. 1.)

4. In the early fall of 2011, the Chelsea Terrace property sustained storm damage. (Test. Cl.)

5. On October 21, 2011, the Claimant entered into \$3,250.00 contract with the Respondent to have roofing work done on the Chelsea Terrace property to repair damage caused by the storm. (Cl. Ex. 1.)

6. The October 21, 2011 contract called for the Respondent to perform the following work at the Chelsea Terrace property:

Lay over existing roof and front porch with MB base sand surface glass fiber mat. Install new app modified touchdown rubber membrane with smooth surface. Seal around skylight, pipes and chimney. Re-flash wall connecting [the] house to neighbor's house. Tear off material on front parapet wall 4 ft. high by 13 ft. wide and installed new rubber touchdown material.

(Cl. Ex. 1.)

7. The Claimant paid the Respondent the full contract price of \$3,250.00 on November 8, 2011. (Test. Cl.; Cl. Ex. 1.)

8. On November 14, 2011, the Claimant entered into a \$4,850.00 contract with the Respondent to have additional work performed at her Chelsea Terrace property. (Test. Cl.; Cl. Ex. 3.)

9. The November 14, 2011 contract called for the Respondent to perform the following work at the Chelsea Terrace property:

- Rear kitchen: drywall repairs to ceiling and walls. Prime/seal walls and ceiling, reset ceiling fan and light.

- Sunroom: install drywall to walls (3) and ceiling. Mud and sand. Install one quarter Ivan underlayment on floor and vinyl floor tile, install new base molding.
- 2nd floor hall: mud damaged area/sand.
- 2nd floor master bedroom: drywall repairs to ceiling – remove mold in closet. Mud and sand.
- Exterior: remove shingle roof on sunroom and replace with new 25-year shingle. Install new OSB plywood [in] undamaged areas.

(Cl. Ex. 3.)

10. The Claimant paid the Respondent in full for the work that he performed under the November 14, 2011 contract. (Test. Cl.; Cl. Ex. 3.)

11. Both the main roof and sunroom roof on the Chelsea Terrace residence began leaking in June 2012. (Test. Cl.)

12. When she began noticing leaks in the main and sunroom roofs, the Claimant called the Respondent's cellular telephone number in an effort to alert him about this problem. The Respondent never answered the Claimant's repeated calls. (Test. Cl.)

13. When she could not reach the Respondent by cellular telephone, the Claimant called the Respondent's home telephone number. The Respondent's mother answered, and referred the Claimant to the Respondent's brother, Dan, whom she identified as the individual who actually performed the roofing work under the contracts. (Test. Cl.)

14. When she spoke with the Respondent's brother, Dan, he was unreceptive to the Claimant's complaints. He insisted that the roofing work that he did had no defects and refused to perform any additional work. (Test. Cl.)

15. The roofs continued to leak, so, on August 25, 2012, the Claimant entered into a \$5,500.00 contract with R. M. Garhart and Sons (Garhart contract), to perform roofing and other

work at the Chelsea Terrace property. R. M. Garhart and Sons (Garhart) is a licensed home improvement contractor. (Test. Cl.; Cl. Ex. 4.)

16. The Garhart contract called for the following work to be done at the Chelsea Terrace property:

Fabricot. Galvanized metal panels to install over top of parapet walls to overlap metal panels that are existing over top right of [unintelligible] sidewall (brick) approx 20 ft. linear. Remove gutter, build out over home and install new 6 ft. gutter wrap two reci 2nd floor windows above [unintelligible] roof. Caulk window, trim and paint up second floor brick wall above shed roof as need to stop water penetration (only) not for aesthetics. Prepare drywall in rec room and kitchen ready for owner to paint.

(Cl. Ex. 4.)

17. On August 29, 2012, the Claimant paid Garhart the full \$5,500.00 for the work that company performed at the Chelsea Terrace property. (Test. Cl.; Cl. Ex. 4.)

18. There is no longer any water leakage at the Chelsea Terrace property. (Test. Cl.)

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. 2014). *See also* COMAR 09.08.03.03B(2) (“actual losses . . . incurred as a result of misconduct by a licensed contractor”). 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 conclude that the Claimant has not proven eligibility for compensation from the Fund

The Respondent was a licensed home improvement contractor at the time he entered into the two relevant contracts with the Claimant. There are no statutory impediments barring the Claimant from recovering from the Fund. She is not related to the Respondent, and does not have

a pending court case against him. Although the property in question is one that the Claimant rents to tenants and is not her primary residence, the Claimant only owns her residence and the subject property. She does not own more than three properties, which would bar her from recovering actual losses from the Fund. Md. Code Ann., Bus. Reg. § 8-405(f)(2)(ii).

The Claimant contends that she is entitled to recover actual losses from the Fund because she needed to hire another contractor to remediate the Respondent's poor workmanship. The Claimant testified that leaks developed in the main roof and sunroof the Chelsea Terrace property as a result of storm damage. She explained that she needed to hire a contractor to address this leakage problem, so she searched for roofing contractors using Angie's List. She found the Respondent through this search. The information contained in Angie's List convinced the Claimant that the Respondent had the necessary skills to do roofing work that would stop the water leakage and to repair related interior damage caused by that leakage. Consequently, she entered into two separate contracts with the Respondent. The first contract, for \$3,250.00, called for the Respondent to make repairs to the main roof. The second contract, for \$4,850.00, called for the Respondent to repair interior damage throughout the house, and to remove and replace the sunroom roof.

The Claimant further testified that the Respondent completed the work required by the contracts, and she paid him in full. In June 2012, however, she noted that the roof leakage resumed. This prompted her to call the Respondent to determine if he could remediate the problem.

The Claimant explained that when she attempted to call the Respondent on his cellular telephone, it went repeatedly unanswered. She then called the Respondent's home number and spoke with the Respondent's mother. The Respondent's mother told the Claimant that the Respondent's brother, Dan, did the work and that she should speak with him. Dan came to the

phone, and the Claimant explained to him that the leakage problem had recurred. According to the Claimant, Dan was “ignorant, dismissive and insulting.” He maintained that all of the work was properly done and refused even to consider making any additional repairs to the roofs. Furthermore, the Claimant testified that Dan told her that his brother, the Respondent, had left the company and “dumped all of this on me.”

Having received no satisfaction from Dan or the Respondent, the Claimant entered into a \$5,500.00 contract with Garhart in August 2012 to correct the leakage problem. Garhart’s estimator told the Claimant that the Respondent had used improper flashing techniques. He also advised that the windows needed to be wrapped to prevent additional leakage. (According to the Claimant, Edward Bardoff, an insurance adjuster with Leizure Associates, Inc., reached a similar conclusion when he inspected the Respondent’s work pursuant to a homeowner’s claim that she filed – see Cl. Ex. 2.) Garhart completed the contracted work, and the Claimant paid for it in full. The Claimant asserted that since Garhart did that work, the water leakage has stopped. Accordingly, the Claimant seeks the \$5,500.00 that she paid to Garhart from the Fund, an amount that she asserts constitutes her actual loss.

The Respondent testified that he never learned about the Claimant’s complaints about the roofing work until the Claimant filed her claim with the Fund. The Respondent contended that this failure to communicate deprived him of the opportunity to inspect the roof to assess whether his company was at fault for the continued leakage.² He averred that he would have taken the Claimant’s calls if he had received them.

Apart from communication issues, according to the Respondent, his brother Dan believed that the water leakage that the Claimant experienced in June 2012 was caused by

² On cross-examination by the Fund’s counsel, the Respondent admitted that he was out-of-town for an extended period when the Claimant was speaking with his brother, but he denied ever leaving the company.

brickwork problems. Moreover, upon his review of the Garhart contract, he discovered “three or four items” that were not in either of his contracts with the Claimant, the most significant of which was window-wrapping. Flashing and gutters were also not part of his contracts with the Claimant. Furthermore, the Respondent asserted that \$5,500.00 to repair his work was “extreme.” He asks that I recommend that the Fund deny the Claimant’s claim.

The Fund also contends that the Claimant’s claim should be denied. It maintains that it is not possible to compare the work called for in the Respondent’s two contracts with that called for in the Garhart contract to compute the Claimant’s actual loss.

The Fund first notes that there does not appear to have been any impediment to the Respondent returning to the Claimant’s property. Therefore, the Fund does not sanction the Respondent’s (or his brother Dan’s) refusal to return to the property to assess the cause of the renewed leakage.

The Respondent’s recalcitrance aside, the Fund suggests that the Claimant did not firmly establish poor workmanship on the Respondent’s part. There might have been an issue with the flashing, but even Garhart’s estimator wrote on the August 25, 2012 contract that the two roof sections “appear to be in good shape.” The Fund emphasizes that the Claimant bears the burden of establishing poor workmanship, and she only offered nebulous proof in this regard.

Even assuming that the Claimant had decisively shown that the Respondent’s poor workmanship caused the leakage to return, the Fund argues that she has not proven what her actual loss would be. The two contracts that the Claimant entered into with the Respondent do not contain references to wrapping the windows, for example, which is a major component of the Garhart contract. In addition, the Garhart contract calls for the repair of interior damage; the cost of repairing interior items would constitute non-compensable consequential damages with respect to a claimant receiving compensation from the Fund. Furthermore, the Garhart contract

does not break down the costs of roof repair versus interior repair. Therefore, without figures being broken down, there is no way to compute the Claimant's actual loss.

I agree with the Respondent and the Fund. The Claimant offered very little evidence to support her contention that the Respondent installed her roof poorly. Mr. Bardoff issued a report on July 26, 2012 that had photographs attached to it, but it is difficult to decipher his handwriting. It appears that he blames poor flashing work for the leakage. Nevertheless, Mr. Bardoff did not testify at the hearing, so his qualifications for assessing what caused the water leakage in 2012 remain unknown. Similarly, Garhart's estimator determined that window-wrapping and the installation of galvanized metal panels over the parapet walls would be necessary to correct the renewed water leakage. Yet, these items were not in either of the Respondent's contracts. To emphasize, Garhart's estimator found nothing wrong with the two roof sections. It appears that the Claimant did not give the Respondent a blanket mandate to discover the cause of all leakage and to offer repair solutions for every leakage issue. She only asked the Respondent to repair the main roof and to remove and reinstall the sunroom roof as a means of correcting the leakage.

Even if the Claimant had shown poor workmanship by the Respondent, the Fund correctly asserts that I could not measure any actual loss that the Claimant might have sustained using the evidence that the Claimant presented. COMAR 09.08.03.03B(1) states that the Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. MHIC's regulations provide three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). The following formula offers an appropriate measurement to determine the amount of actual loss in this case:

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 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).

In addition to repairing the two roofs and adding galvanized metal panels over the parapet walls, the Garhart contract also calls for Garhart to “caulk window, trim and paint up second floor brick wall above shed roof as need to stop water penetration (only) not for aesthetics. Prepare drywall in rec room and kitchen ready for owner to paint.” The drywall work clearly relates to *consequential damages* because it involves repair work for areas affected by the roof leakage other than the roof itself. See *CR-RSC Tower I, LLC v. RSC Tower I, LLC*, 429 Md. 387, 411 – 13 (2012). The caulking, painting and trim work were not in the Respondent’s contracts. There is no way to subtract the cost of these ancillary items from the Garhart contract because the Garhart estimator did not itemize costs. The lack of itemization in the Garhart contract inures to the detriment of the Claimant. Without itemization, there can be no side-by-side analysis of the costs associated with the Respondent’s contracts and the Garhart contract. For this reason, I cannot compute whatever actual loss the Claimant might have sustained. For all of the reasons recited above, I recommend that the MHIC deny and dismiss the Claimant’s claim.

PROPOSED CONCLUSION OF LAW

I conclude as a matter of law that the Claimant has not sustained an actual and compensable loss as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401 (2010), 8-405 (Supp. 2014).

PROPOSED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund **DENY AND DISMISS**
the Claimant's claim; and further,

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

Signature on File

December 3, 2014
Date Decision Issued

Thomas G. Welshko
Administrative Law Judge

TGW/tc
152978

<p>IN THE MATTER OF THE CLAIM</p> <p>OF ERICA MURPHY,</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 JAMES REXRODE,</p> <p>T/A REXRODE REMODELING,</p> <p>RESPONDENT</p>	<p>* BEFORE THOMAS G. WELSHKO,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>* OAH No.: DLR-HIC-02-14-09046</p> <p>* MHIC No.: 13 (90) 285</p> <p>*</p> <p>*</p> <p>*</p>
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FILE EXHIBIT LIST

Claimant's Exhibits:

1. October 21, 2011 contract with the Respondent
2. July 26, 2012 Leizure and Associates assessment
3. November 14, 2011 contract with the Respondent
4. August 25, 2012 contract with R. M. Garhart and Sons

Respondent's Exhibits:

The Respondent did not offer any exhibits.

Fund's Exhibits:

1. June 16, 2014 Notice of Hearing
2. October 6, 2014 MHIC Licensing Certification for the Respondent
3. December 17, 2012 Claim Form
4. March 25, 2013 Amended Claim