

<p>IN THE MATTER OF THE CLAIM</p> <p>OF REGINA GAMBLE,</p> <p>AGAINST THE</p> <p>MARYLAND HOME</p> <p>IMPROVEMENT GUARANTY FUND</p> <p>FOR THE VIOLATIONS OF</p> <p>WALTER GILMORE, III , T/A</p> <p>TAGCRETE CONCRETE, LLC</p>	<p>* BEFORE JENNIFER M. CARTER JONES,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>* OAH NO.: DLR-HIC-02-16-37528</p> <p>* MHIC NO.: 14 (05) 748</p> <p>*</p> <p>*</p>
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RECOMMENDED DECISION

STATEMENT OF THE CASE
SUMMARY OF EVIDENCE
ISSUE
DISCUSSION
CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On or about May 20, 2016, Regina W. Gamble (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC or Commission) Guaranty Fund (Fund) for reimbursement of \$14,671.00 for actual losses suffered as a result of home improvement work performed by Walter Gilmore, III, t/a Tagcrete Concrete, LLC (Respondent). The MHIC transmitted the Claimant’s appeal to the Office of Administrative Hearings on November 29, 2016.

I held a hearing on April 19, 2017, at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimant and the Respondent represented themselves. Hope Sachs, Assistant Attorney General, represented the Fund.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the Office of Administrative Hearings (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; COMAR 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 behalf of the Fund:

- Fund #1 OAH Notice of Hearing, dated January 13, 2017
- Fund #2 Licensing history for the Respondent
- Fund #3 Letter from the Department of Labor, Licensing and Regulation (DLLR) MHIC to the Respondent, dated May 31, 2016, with attached Home Improvement Claim Form, marked received by the HIC on May 20, 2016

I admitted the following exhibits on behalf of the Claimant:

- Cl. #1 Contract between the Claimant and the Respondent, signed by the Respondent, but not the Claimant, with an original date of July 18, 2013 and a "change" date of August 21, 2013; email correspondence between the Claimant and the Respondent, dated August 2 and August 3, 2013; Copy of the Contract signed by the Claimant; check from the Claimant to the Respondent for \$7,000.00, dated July 18, 2013; and, check from the Claimant to the Respondent for \$11,300.00, dated August 15, 2013
- Cl. #2 Text messages between the Claimant and the Respondent, for dates including October 18, 2013 through November 20, 2013
- Cl. #3 Letter from the Claimant to the Respondent, dated November 16, 2013
- Cl. #4 Better Business Bureau (BBB) of Greater Maryland Complaint Activity Report, regarding a complaint the Claimant filed with the BBB against the Respondent and Proposal from Affordable Home Improvements, dated December 4, 2013

- Cl. #5 Complaint filed with the MHIC, dated January 10, 2014, with attached Complaint Explanation Continuation written by the Claimant and Photographs of the Claimant's pool area
- Cl. #6 Letter from the MHIC to the Claimant, dated February 14, 2014, with attached Order from the MHIC to the Respondent, dated January 29, 2014
- CL #7 Emails between the Claimant and the MHIC for dates including March 21, 2014 through April 8, 2014
- CL #8 Letter from the MHIC to the Claimant, dated April 28, 2013; Claim Form and explanation, dated May 14, 2016; and, photographs of the Claimant's pool area
- CL #9 Proposal from ID & J Multiple Services, LLC (IDJ), dated June 30, 2014; Home Improvement Contract between the Claimant and IDJ, dated April 16, 2014 and signed by the Respondent on May 30, 2014, check from the Claimant to IDJ for \$5,100.00; and, two Service Receipt from IDJ, dated June 20, 2014
- CL #10 Letter from the MHIC to the Respondent, dated May 31, 2016, with attached Claim Form and explanation, dated May 14, 2016

I admitted the following exhibit into evidence on behalf of the Respondent:

- Resp. #1 Text messages between the Respondent and the Claimant for dates including September 11, 2013 through November 20, 2013

Testimony

The Claimant and the Respondent testified on their own behalf.

The Fund did not present any testimony.

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 Claimant owned 2503 Lazy Acres Road (the property).
2. As of July 2013, the property included an existing wooden or wood-like deck, concrete patio and pool in the back of the home.

3. On or about July 19, 2013, the Respondent entered into a contract with the Claimant (the contract) to remove her existing concrete patio and install a 1,216-square-foot stamped, or imprinted, concrete patio. The concrete was to be poured four inches thick.

4. The Contract contained the following relevant provisions:

STARTING DATE AND COMPLETION TIME: No date is provided unless specifically set forth herein.

...

APPEARANCE: The imprinted concrete process is intended to achieve a rustic effect. Some variations in finish, texture, shading, stamping depth along with other irregularities are likely to occur and are part of the individuality of the installation. These variations will not alter the owner's or contractor's obligations hereunder.

...

REPRESENTATIONS: No representations, understandings, promises, options or warranties, oral or written, express or implied, have been made by either [the Respondent] . . . unless the same appears in the terms of the front of this contract.

(CL #1)

5. Stamped concrete is a decorative alternative to plain concrete. The goal of stamped concrete is to create a tinted pattern in the concrete, in this case, resembling natural stone.

6. Concrete stamping yields the appearance of varied depths, imprints/indentations and hues to approximate how stone would appear in nature.

7. The process for installation of a stamped concrete patio is as follows:

- a. Pour concrete
- b. Stamp the stone pattern into the concrete
- c. Add the release (color) agent to the stamped concrete
- d. Power wash the excess release agent from the stamped concrete
- e. Acid wash the stamped concrete and seal it

8. The estimated total price for the installation of the stamped patio under the contract was \$19,440.00.
9. The Claimant paid the Respondent \$7,000.00 on July 18, 2013, which served as a down payment for commencement of the patio installation.
10. Around the time the Claimant contracted with the Respondent to install the patio, she also contracted with another contractor, Franklin Bauserman (Franklin), to install a deck. Franklin was installing the deck around the same time the Respondent was installing the patio.
11. On or about July 29, 2013, the Respondent demolished the concrete of the Claimant's existing patio. Before beginning the demolition, the Respondent placed a white fabric over a portion of the Claimant's pool to prevent getting concrete into the pool.
12. On August 15, 2013, the Claimant paid the Respondent \$11,300.00.
13. On August 16, 2013, the Respondent laid a portion of the concrete.
14. On or about August 21, 2013, the Parties agreed to increase the scope of the Respondent's work by extending the stamped concrete patio to the area around the pool. The agreed cost for this change was \$8,008.00.
15. The Claimant and the Respondent amended the July 19, 2013 contract to reflect the change.
16. On September 7, 2013 (a little over two weeks after the Respondent poured the first installation of the concrete), the Respondent returned to the property and poured the concrete around the Claimant's pool.
17. When all of the poured concrete dried, the concrete around the pool was not the same color or texture as the concrete comprising the rest of the patio.

18. On September 9, 2013, the Claimant contacted the Respondent and complained about the two different concrete colors.
19. In response to the Claimant's complaint about the different colored concrete, on or about September 11, 2013, the Respondent returned to the property and removed the concrete around the pool with the intent to replace it with concrete that matched the rest of the patio.
20. On or about September 19, 2013, the Claimant had her pool inspected by a representative of Peed's Pool Service (Peed's), who advised the Claimant that she needed to have the pool coping replaced.
21. The Claimant had to have the pool coping replaced before the Respondent could re-pour the concrete around the pool.
22. The Claimant advised the Respondent that he could resume work on the patio after Peed's had replaced the coping.
23. The Respondent worked on at least one other job while he was waiting for the Respondent to have her pool coping replaced.
24. On October 16, 2013, Peed's completed the work on the Claimant's pool.
25. On October 18, 2013, the Claimant sent the Respondent a text message stating the following: "Good morning. Thank you for your patience. The pool service have [sic] completed their work. We are ready to move forward with the concrete and deck projects." (CL #2)
26. The Respondent did not respond to the Claimant's October 18, 2013 text message and on October 21, 2013, she sent the Respondent another text message inquiring if the work on the patio would resume that week.

27. On that same date, the Respondent replied to the Claimant's text message that he may return to work on the Claimant's patio that week, but he was currently finishing a job in Gaithersburg, Maryland. The Respondent told the Claimant he would resume her job when he had completed the Gaithersburg job.
28. On October 28, 2013, the Respondent notified the Claimant by text message that he was not able to obtain the concrete to resume the job that Friday, but that he was calling to schedule it for "this week." (CL #2)¹
29. On November 4, 2013, after she had not heard from the Respondent, the Claimant sent a text message to the Respondent and asked when he planned to return and complete the patio.
30. On that same date, the Respondent replied to the Claimant's text message and informed her he had intended to return the previous Friday, but the rain prevented continued work on the patio. He stated that he planned to return that Thursday.
31. It rained on Thursday, November 7, 2013. The Respondent sent the Claimant a text message advising her that he was unable to work on the patio because of the rain that day. The Claimant responded to the Respondent's text message with "Ok thanks." (Cl. #2)
32. As of November 16, 2013, there was a gap between the Claimant's fence and the installed portion of the stamped concrete patio. Additionally, the dimensions of the installed portion of the stamped concrete patio did not line up with the Claimant's deck.
33. The Claimant paid a rental fee of \$2,120.00 for a temporary fence to secure the area where the patio was being installed.

¹ It is unclear if the Respondent meant the following week.

34. On November 16, 2013, the Claimant sent a letter to the Respondent, via certified mail, asserting he had failed to perform the installation of the stamped concrete patio in accordance with the Contract.

35. In her November 16, 2013 letter, the Claimant requested from the Respondent reimbursement of \$18,300.00 for the amount she paid the Respondent for work on the stamped concrete patio, \$4,700.00 for the replacement of her pool coping, \$2,120.00 for the cost of the rental fence, and \$3,270.00 for the replacement of a vinyl pool liner.

36. On November 20, 2013, the Respondent sent a text message to the Claimant stating the following:

I had concrete order for yesterday and today but obviously canceled since I received your letter. Don't know if you want to meet at the site to discuss or if that is that. However I'm not here to argue but to try and resolve. Let me know. Thanks.

(Resp. # 1)

37. The Claimant did not respond to the Respondent's November 20, 2013 text message.

38. The Respondent did not return to the property to complete any more work on the stamped concrete patio.

39. As of November 20, 2013 the Claimant's stamped concrete patio was in the following condition:

- The edge of the stamped concrete did not line up with the edge of the new deck floor
- The installation of the concrete was incomplete near the pool
- There was a gap between a portion of the stamped concrete and the fence
- There were some pieces of dropped hardened concrete on some areas of the stamped concrete pad
- There were some stains on and cracks in the stamped concrete pad

- Some of the areas of the stamped concrete were faded
 - There were materials and debris left on the Property
40. On December 4, 2013, Affordable Home Improvements gave the Claimant a Proposal for \$19,945.00 to complete the installation of a concrete patio
41. On June 30, 2014, IDJ gave the Claimant a proposal to install the patio around the Respondent left incomplete. The Claimant paid IDJ \$11,493.00 to install the patio around the pool.

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) (2015).² *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. A claim may be denied if “the claimant unreasonably rejected good faith efforts by the contractor to resolve the claim.” Md. Code Ann., Bus. Reg. § 8-405(d).

The Claimant has the burden of proof at a hearing to establish entitlement to recovery from the Fund. Md. Code Ann., State Gov’t §10-217 (2014); COMAR 09.08.03.03A(3).

There is no dispute that the Claimant entered into a contract with the Respondent to install a stamped concrete patio on the Property, including around the Claimant’s pool. There is also no dispute that the Claimant paid the Respondent \$18,300.00 and the Respondent did not finish installing the patio around the pool.

² Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume.

The Claimant argues the portion of the stamped concrete patio the Respondent did install was not workmanlike. Particularly, the Claimant testified that a portion of the stamped concrete lacked adequate indentation and that the pattern was diminished in several areas. She also asserts because the Respondent failed to apply the sealant to the stamped patio, dirt and water were able to penetrate the concrete, resulting in discolorations and stains. According to the Claimant, the stamped portion of the patio also had multiple cracks. Furthermore, the Claimant testified that when the Respondent initially installed the concrete around the pool, he dropped bits of concrete on the stamped section of the concrete, which permanently marred the stamped concrete.

The Claimant also asserts that the Respondent did not properly install the stamped concrete portion of the patio because it did not line up with the edge of the deck as she expected. Specifically, patio was shorter than the deck on one side and longer than the deck on the other. Additionally, according to the Claimant, the Respondent did not extend the length of the deck to meet the property fence, which resulted in a 2-foot gap between the edge of the patio and the fence. The Claimant also testified that the Respondent failed to remove a significant amount of tools and debris he left on her property. In support of her testimony, the Claimant submitted pictures of the patio area.

The Claimant testified that the Respondent told her that the patio installation project would be completed within four weeks of the contract date; however, the Respondent often failed to show up to work on the patio and offered insufficient reasons such as working on a new job or inclement weather. As a result of the consistent delays, the Claimant testified that she had to pay to extend the rental of a temporary fence to keep the worksite and pool secure during the patio installation at a cost of \$2,120.00.

The Claimant also asserts that the Respondent failed to properly protect her pool during the installation of the concrete, resulting in a ripped pool liner and damaged coping around the

edge of the pool. The Claimant testified that she paid \$4,700.00 to replace the pool coping and, although she has not yet replaced the pool liner, it will cost her \$3,270.00 to do so.

Ultimately, because the Respondent did not install the stamped patio in a workmanlike manner, and because the Respondent failed to complete the installation within a reasonable timeframe, the Claimant testified that she chose to terminate the contract with the Respondent and to seek another contractor, IDJ, to complete the installation of the stamped patio at an additional expense of \$11,493.00.

The Respondent disagrees with the Claimant that he completed the installation of the initial portion of the stamped patio in an unworkmanlike fashion. To that end, the Respondent testified that the nature of stamped concrete is such that there are areas where the stamped indentations are less pronounced than other areas of the concrete to give it a natural appearance. Furthermore, concrete is susceptible to cracking in any form, therefore, the cracks depicted in the photographs presented by the Claimant are the natural result of exposure to outdoor elements. The Respondent further testified that the Claimant was aware of the potential variations in appearance of the stamped concrete because the contract specifically notified her that some irregularities, including variations in the depth of the stamps and cracks, could occur and did not absolve her of her obligation under the contract.

The Respondent also asserts that he properly installed the patio according to the dimensions agreed upon in the contract. Although he did not dispute the Claimant's assertion that the patio did not align with the edges of the Claimant's deck or reach the fence, he argued that any deficiency could not be attributed to his work. According to the Respondent, another contractor, Franklin, was installing a new deck for the Appellant during the same period when he was installing the patio. In fact, testified the Respondent, the last day the Respondent was on the property, Franklin was still in the process of installing the deck. The Respondent suggested that

it was the deck, not the patio, which was measured incorrectly. Furthermore, the Respondent testified that when he began the patio project, he measured the property with the Claimant, and there were large retaining timbers abutting the fence, which he believed would remain after the completion of the patio. According to the Respondent, the removal of the timbers accounted for the gap between the patio and the fence.

Regarding the spilled hardened concrete on the stamped portion of the patio, the Respondent testified that all of those concrete pieces would have washed away if he had the opportunity to power wash the patio. The Respondent further explained that although he had installed the stamped portion of the patio, he had not completed the final steps of the patio installation, including power washing the patio, when the Claimant terminated their contract.

The Respondent concedes that the concrete he initially installed around the pool was a different color than the rest of the patio concrete, but he asserted that he promptly returned to remove the pool concrete with the intent to replace it with a matching color. After the Respondent removed the concrete, the Claimant advised him that she needed to have her pool coping replaced by Peed's before he could re-pour the concrete around the pool. Therefore, he waited to hear from the Claimant before he resumed work on the installation of the patio around the pool.

Approximately one month later, on October 18, 2013, the Claimant contacted the Respondent and advised him that Peed's had replaced the coping and the Respondent could return to finish the installation of the stamped patio around the pool. At that time, testified the Respondent, he was working on another job, but had every intention to return to the Claimant's property to finish the patio job as soon as possible. Although the Respondent encountered a few problems with ordering concrete and inclement weather, the Respondent maintained that he finally was able to order the concrete and was prepared to return to the Claimant's property to

finish the job, when he received her November 16, 2013 letter terminating her contract with the Respondent and requesting reimbursement of the \$18,300.00 she paid him, \$4,700.00 for the replacement of the pool coping, \$2,120.00 for the cost of the temporary fence, and \$3,270.00 for the replacement of the pool liner.

Despite the Claimant's letter, the Respondent testified that he remained interested in addressing the Claimant's concerns. In support of that testimony, he submitted a copy of a November 20, 2013 text message he sent to the Claimant after he received her November 16, 2013 letter, in which the Respondent offered to meet the Claimant at the property to discuss the project and resolve any issues.

Furthermore, the Respondent asserts that he never assured the Claimant the project would be complete within four weeks. To the contrary, the contract included a provision that specifically stated that the Respondent guaranteed neither a start time nor a completion time for the installation of the patio. The Respondent also testified that he did not agree to pay the Claimant for the cost of the pool coping or the pool liner and again pointed to the contract that states that "[n]o representations, understandings, promises, options or warranties, oral or written, express or implied, have been made by [the Respondent] . . . unless the same appears in the terms of the front of this contract."

Ultimately, the Respondent argues that he installed the Claimant's patio in a workmanlike fashion within a reasonable period of time and he remained prepared to complete the patio project and remedy any deficiencies despite receiving the Claimant's November 16, 2016 letter advising him that she was terminating the contract.

For reasons that follow, I conclude the Claimant is not entitled to compensation from the Fund. First, the Claimant has failed to meet her burden of proving the Respondent completed the installation of her patio in an unworkmanlike fashion. Although the Claimant submitted

photographs indicating that the installed portion of the patio contained variations in the stamp depth, and cracking, as the Respondent asserts, the contract clearly states that such variations and cracking are common in stamped concrete and not a basis for termination of the contract.

Similarly, the Claimant did not prove the Respondent installed the patio with improper measurements or dimensions. According to the Respondent's un rebutted testimony, Franklin, another contractor, was installing a deck at the same time the Respondent was installing the patio, and was working on the deck the last time the Respondent was on the property. I find it reasonable to conclude that Franklin may have installed the deck in a manner that did not meet the edges of the patio. Even if I determined that the Respondent installed the patio in a manner that did not measure up with the deck, the Claimant did not prove the Respondent's installation was inconsistent with the dimensions outlined in the contract. The Respondent was adamant the Claimant walked with him while he measured the property before he began the patio installation and the size of the patio was commensurate with his actual measurements and those enunciated in the contract.

I also disagree with the Claimant's position that the Respondent did not act diligently to complete the patio in a reasonable amount of time. The parties initially entered into the contract on July 18, 2013, and the Respondent began to install a portion of the patio on August 16, 2013. On August 21, 2013, after the parties agreed to extend the patio to the area around the pool, the Respondent poured the concrete around the pool on September 7, 2013. Of course, due to the differentiation in the colors of the concrete, the Respondent had to demolish and remove the concrete around the pool, which he did promptly, two days after the Claimant contacted him and advised him the concrete areas were different colors. According to the Respondent, he was prepared to return to the property to re-install the pool concrete when the Respondent asked that he hold off on that re-installation until her pool company had an opportunity to replace the pool

coping, which was not complete until October 18, 2013. Between October 18, 2013 and November 16, 2013, the Respondent represented that he had another job to complete, there were a couple of problems ordering concrete, and a couple of days when he was prevented installing the concrete due to rain.

I agree with the Respondent that the amount of time between when the Claimant advised him he could restart the project on October 18, 2013, and November 16, 2013, when the Claimant terminated the contract, was not unreasonable in light of the intervening factors. It was the Claimant that put the completion of the patio project on hold to allow her pool company to replace the coping. It is certainly reasonable that the Respondent took another job while he was waiting for the Claimant's pool company to finish its work. It is also entirely conceivable that inclement weather made it impossible for the Respondent to complete the project on a couple of occasions. Accordingly, I find that the Respondent did not leave the patio project incomplete; rather, he was prevented from the completion of the patio as a result of the Claimant's November 16, 2013 termination letter. I find that letter to have been unreasonable and premature as the preponderance of the evidence supports the conclusion that the Respondent was prepared to return to the property and complete the project as of that date.

The only aspect of the Respondent's work the Claimant proved was unworkmanlike is the original installation of the concrete around the pool that differed in color from the rest of the concrete patio. The Respondent, however, addressed the inadequate concrete by immediately removing it upon complaint. The Respondent, therefore, displayed a willingness to work with the Claimant to ensure the patio was installed properly. Accordingly, I conclude when the Respondent sent the Claimant a text message on November 20, 2013, requesting to meet with the Claimant and resolve her dispute, the Respondent made a good faith effort to resolve the claim, which the Claimant refused.

Ultimately, the Claimant's claim must be denied because the Respondent did not complete the patio installation in an unworkmanlike manner, he was not responsible for the incompleteness of the project and the Claimant unreasonably refused the Respondent's good faith effort to resolve her dispute.

CONCLUSIONS OF LAW

I conclude that the Claimant is not entitled to reimbursement from the Fund because she did not sustain an actual loss resulting from an act or omission of the Respondent. Md. Code Ann., Bus. Reg. §§ 8-401 and 8-405(a) (2015); COMAR 09.08.03.03B(2). I further conclude that the Claimant unreasonably rejected good faith efforts by the contractor to resolve the claim." Md. Code Ann., Bus. Reg. §§ 8-405(d) and 8-407(e)(1) (2015).

RECOMMENDED ORDER

I PROPOSE that the Maryland Home Improvement Commission:

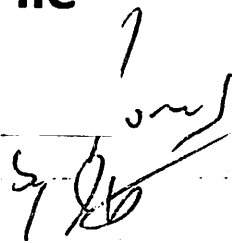
ORDER that the Maryland Home Improvement Guaranty Fund not award the Claimant reimbursement; and

ORDER that the records and publications of the Maryland Home Improvement Commission reflect the Department's final decision.

Signature on File

July 18, 2017
Date Decision Issued

Jennifer M. Carter Jones
Administrative Law Judge



JCJ/emh
#168977

PROPOSED ORDER

WHEREFORE, this 21st day of August, 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.

Joseph Tunney

***Joseph Tunney
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION