

**IN THE MATTER OF THE CLAIM OF
PHYLLIS REILLY,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF JOSEPH MEMMEL, JR.,
T/A JJM HOME IMPROVEMENTS, INC.,
RESPONDENT**

*** BEFORE LORRAINE E. FRASER,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: DLR-HIC-02-17-18406
* MHIC No.: 15 (05) 538
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PROPOSED DECISION

**STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
PROPOSED FINDINGS OF FACT
DISCUSSION
PROPOSED CONCLUSIONS OF LAW
RECOMMENDED ORDER**

STATEMENT OF THE CASE

On June 27, 2016, Phyllis Reilly (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$19,009.56 in actual losses allegedly suffered as a result of a home improvement contract with Joseph Memmel, Jr., trading as JJM Home Improvements, Inc. (Respondent).

I held a hearing on September 7, 2017, at the Department of Natural Resources in Annapolis, Maryland. Md. Code Ann., Bus. Reg. § 8-407(e) (2015). Derek Hills, Esquire, represented the Claimant, who was present. Erik London, Assistant Attorney General,

Department of Labor, Licensing, and Regulation (Department), represented the Fund. The Respondent represented himself.

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 govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2017); Code of Maryland Regulations (COMAR) 09.01.03; COMAR 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

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

- Claimant 1 Contract between the Claimant and the Respondent, 1/9/14
- Claimant 2 Cancelled checks paid to the Respondent: \$9,360.00 on 1/9/14; \$9,000.00 on 2/7/14; \$8,000.00 on 2/21/14; \$2,101.00 on 5/8/14
- Claimant 3 Additional Work Authorization, 5/8/14
- Claimant 4 Quote 20 20 Technologies, 1/9/14
- Claimant 5 Proposal from Toepfer Construction Co., Inc., 6/23/15
- Claimant 6 Estimate from Integrity Home Pro, 9/9/15
- Claimant 7 Estimate from AAction Home Repairs & Restoration, Inc., 3/30/16
- Claimant 8 Proposal from Glenn Construction, 3/23/16
- Claimant 9 Proposal from Noonan Construction, 4/7/16
- Claimant 10 Resume for Kevin A. Moore, CMI, ACI; Inspection report, 8/9/17
- Claimant 11 Estimate Value of Contractor's Work (attachment to Claim form)

- Claimant 12 Complaint Form with attachments, 10/17/14
- Claimant 13 Photographs (41) taken by the Claimant during construction in 2014
- Claimant 14 Emails, 2/9/14, with attached photographs
- Claimant 15 Respondent's response sent to MHIC
- Claimant 16 Claimant's rebuttal sent to MHIC, 2/13/15
- Claimant 17 Not admitted
- Claimant 18 Order history for cabinets, 2014
- Claimant 19 Claimant's response to the Respondent, 7/23/16
- Claimant 20 Claimant's written statement
- Claimant 21 Refrigerator Owner's Manual, specifically installation instructions on p. 5

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

- Respondent 1 Respondent's second response to claim, 7/23/16

I admitted the following exhibits on behalf of the Fund:

- Fund 1 Notice of Hearing, 7/3/17
- Fund 2 Hearing Order, 6/9/17
- Fund 3 Licensing History for the Respondent, 7/31/17
- Fund 4 Home Improvement Claim Form, 6/27/16
- Fund 5 Letter to the Respondent from MHIC, 7/7/17

Testimony

The Claimant testified in her own behalf and presented the testimony of: Kevin A. Moore, K. Moore & Associates, LLC, accepted as an expert in home inspection; the Respondent; and Richard Yeager, Project Manager for the Respondent.

The Respondent testified in his own behalf and presented the testimony of Richard Yeager.

The Fund did not present any witnesses.

PROPOSED 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 01-41729.

2. On January 9, 2014, the Claimant and the Respondent entered into a contract to remodel her kitchen, including demolition; electrical and plumbing work; installing drywall, cabinets, trim, counter tops, a tile backsplash, and vinyl flooring; and painting. The contract stated that work would begin on February 3, 2014. The contract did not give a completion date.

3. The original agreed-upon contract price was \$28,103.00. There was one change order for an additional \$358.71. The total contract price was \$28,461.71.

4. Between January and May 2014, the Claimant paid the Respondent a total of \$28,461.00.

5. During February through April 2014, the Respondent performed the work under the contract. When the Respondent stopped working at the Claimant's home, the work under the contract was substantially complete.

6. During construction, the Claimant repeatedly complained about the color of the finish on the cabinets. The Respondent attempted to supply new cabinet doors and skins (for the sides of the cabinets) to address the Claimant's complaints; however, she was not satisfied.

7. The Respondent's employees installed the top blind corner cabinet without covering the hole where the door was removed. The cabinet on the adjacent wall is not flush

with the blind cabinet but spaced several inches away. As a result, there is a gap and items can fall out of the blind cabinet, into a gap between the cabinets, and onto the counter below.

8. The Respondent's employees damaged one of the cabinet doors and one of the skins, leaving a scratch in the surface of the wood on each piece.

9. The Respondent's employees damaged the laminate countertop when installing it. As a result, there is an obvious gap in the laminate along the seam where the two pieces meet.

10. The Respondent's employees did not finish installing toe molding at the base of the cabinets.

11. The cost to repair the hole in the blind cabinet is \$175.00.

12. The cost to repair the damaged skin is \$100.00. No estimate was provided to repair the cabinet door.

13. The cost to replace the laminate countertop is \$1,222.61.

14. The cost to replace the top corner blind cabinet is \$845.00.

15. The cost to install the toe molding is \$234.96.

16. The Claimant's actual loss is \$2,576.86.

DISCUSSION

In this case, the Claimant has the burden of proving the validity of her claim by a preponderance of the evidence. Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3).¹ "[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 (3d ed. 2000)).

¹ As noted above, "COMAR" refers to the Code of Maryland Regulations.

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 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.” Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. The Respondent performed unworkmanlike, inadequate or incomplete home improvements on some items under the contract, although the majority of the work was complete and workmanlike.

The Claimant’s expert, Mr. Moore, testified that overall the Respondent’s work was done to industry standards. Mr. Moore then identified the items he found defective and not meeting standards. He described the defects as primarily cosmetic flaws requiring minor touch ups. He stated that the vinyl floor was damaged in the corner but that the damage could be covered by toe molding. He said that toe molding was missing and should be installed as stated in the contract. He testified the damaged countertop was a material defect and must be replaced. He stated that stain imperfections and scratches in the cabinets should be repaired and could be refinished on site. He said that the top corner cabinet had a particle board core and should be replaced to match the others with a plywood core. He stated that there was dead space to the left of the corner cabinet, that one could reach in, around, and out of the opening in the bottom of the dead

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

space and that the opening should be closed. He said that the cabinet around the refrigerator should be modified so that the refrigerator was vented properly and fully functional.

The Respondent stated that blind cabinets are installed the way his employees installed the one in the Claimant's kitchen. He stated he attempted to satisfy the Claimant regarding the finish on the wood but that he could not please her. He explained that there are natural variations in wood and the stain finish. He said the refrigerator fits in the opening. He agreed the toe molding was incomplete. He estimated it would cost \$100.00 to replace the scratched skin on the side of the cabinet. He estimated it would cost \$175.00 to cover the hole in the blind cabinet. He said he did not recall seeing the seam in the countertop. He agreed that installing the countertop was in his contract but claimed that Johnson's Lumber must have installed it because they attempted to fix the seam.

Mr. Yeager testified that he attempted to satisfy the Claimant regarding the finish on the wood and that he ordered different doors and skins multiple times but she did not accept any of them. He stated there was vent space around the refrigerator. He said it would be easy to fix the hole in the blind cabinet. He stated he did not remember touching the countertop and that Ray, the employee on the job site, told him they did not touch the countertop.

The Claimant testified that she was not told about variations in the wood finish by the Respondent's salesperson, Mr. Anderson, and that he said the coffee stain would give a consistent color. She stated that she discussed her appliances and gave the dimensions to Mr. Anderson. She said she asked that all of the ends on the cabinets be flush ends. She agreed that the Respondent had replaced five doors and one cabinet. She said the scratch on the cabinet door occurred when an employee dropped a tool and the scratch on the skin on the side of the cabinet occurred when an employee fell off of a ladder. She stated that Mr. Yeager and Ray lifted the

countertop onto the cabinets and installed it. She said after installation she saw their employee kneeling on the countertop painting the window.

I find the Respondent's employees installed the countertop and did so improperly. The Claimant specifically testified that Mr. Yeager and Ray installed the countertop, while Mr. Yeager claimed to not recall touching the countertop. Installing the countertop was included in the Respondent's contract. Moreover, the Johnson's Lumber contract for the countertop specifically states that installation is not included. Finally, in emails, a Johnson's Lumber employee told the Claimant to contact her installer to determine if the cabinets were level and that another Johnson's employee loosened the installation screws because they were too tight in an attempt to correct a problem with a corner popping up. Thus, the evidence shows the Respondent's employees installed the countertop.

I find Mr. Moore's testimony was credible and specific regarding the defects in the Respondent's work. I accept his testimony regarding the repairs required to be made with one exception. I am not convinced based on the evidence before me that the Respondent is at fault for the inability to open the refrigerator door all the way. The Claimant stated she gave Mr. Anderson the dimensions of her appliances; however, she did not testify that she gave him the manufacturer's installation specifications. The cabinets frame the refrigerator closely giving it a built in look. Thus, it is likely that the Claimant gave Mr. Anderson the dimensions of the refrigerator and not the installation specifications that require more clearance for ventilation and opening the door fully.

Therefore, I find that the Claimant is eligible for compensation from the Fund but for less than the amount she listed on her claim.

Having found eligibility for compensation, I must determine the amount of the Claimant's actual loss and the amount, if any, that the Claimant is entitled to recover. The Fund

may not compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest. Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1). MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work. COMAR 09.08.03.03B(3).

In this case, the Respondent performed some work under the contract, and the Claimant intends to retain other contractors to complete or remedy that work. Accordingly, the following formula appropriately measures the Claimant's actual loss:

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).

All of the estimates the Claimant submitted into evidence are for the complete removal and replacement of the entire kitchen. Only the estimate from Toepfer Construction contains line item estimates for individual items. However, there is no evidence before me showing that complete removal and replacement of the entire kitchen is required. The Claimant's expert did not testify that complete removal and replacement of the entire kitchen was necessary to correct the Respondent's work; rather, Mr. Moore said there were minor items to fix. Mr. Moore identified the following six items he found in need of correction. I agree with Mr. Moore's opinions on what items need repair and address each item and the cost of repair below.

- 1) Damaged corner of vinyl flooring and missing toe molding. Mr. Moore testified that the damage to the corner of the vinyl flooring could be covered by toe molding, which was missing. Toepfer Construction estimated the cost to install the toe

- molding is \$234.96. I find the Respondent is responsible for the \$234.96 cost to install the toe molding.
- 2) Damaged countertop. Mr. Moore stated that the damaged countertop must be replaced. Toepfer Construction estimated the cost to replace the laminate countertop is \$1,222.61. I find the Respondent is responsible for the \$1,222.61 cost to replace the laminate countertop.
 - 3) Stain imperfections and scratches in the cabinets. Mr. Moore said stain imperfections and scratches in the cabinets should be repaired and could be refinished on site. The Claimant did not offer any estimates for repairing and refinishing the cabinets. The Respondent estimated the cost to replace the scratched skin on the side of the cabinet is \$100.00. There was no testimony or documentary evidence regarding the cost of fixing the scratch in the cabinet door or the cost of replacing the scratched cabinet door. I find the Respondent is responsible for the \$100.00 cost to replace the scratched skin.
 - 4) Replacing the top corner blind cabinet. Mr. Moore stated that the top corner cabinet had a particle board core and should be replaced to match the others with a plywood core. The quote from 20 20 Technologies states the cost of the top corner blind cabinet is \$845.00. I find the Respondent is responsible for the \$845.00 cost to replace the top corner blind cabinet.
 - 5) Gap between the corner blind cabinet and the adjacent cabinet. Mr. Moore said that there was dead space to the left of the corner cabinet, that one could reach in, around, and out of the opening in the bottom of the dead space and that the opening should be closed. The Claimant did not offer any estimates for covering the hole on the blind cabinet. The Respondent estimated the cost to cover the hole on the blind

cabinet is \$175.00. I find the Respondent is responsible for the \$175.00 cost to cover the hole on the top corner blind cabinet.

- 6) Installation of the cabinets around the refrigerator. Mr. Moore stated that the cabinet around the refrigerator should be modified so that the refrigerator was vented properly and fully functional. However, as discussed above, the Claimant did not testify that she gave the Respondent the manufacturer's installation specifications for the refrigerator. Thus, I cannot find the Respondent is responsible for the cost of correcting the cabinets around the refrigerator. Moreover, the Claimant did not offer an estimate for the cost of correcting the cabinets around the refrigerator.

The Claimant's actual loss is calculated as follows:

Amount paid under original contract	\$28,461.00
Amount to repair the work	+2,577.57
Original contract price	<u>-\$28,461.71</u>
Actual loss	\$2,576.86

The Business Regulation Article caps a claimant's recovery at \$20,000.00 for acts or omissions of one contractor, and provides that a claimant may not recover more than the amount paid to the contractor against whom the claim is filed. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a). In this case, the Claimant's actual loss is less than the amount paid to the Respondent and less than \$20,000.00. Therefore, the Claimant is entitled recover her actual loss of \$2,576.86.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$2,576.86 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is entitled to recover that amount from the Fund. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$2,576.86; 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 ten percent (10%) as set by the Maryland Home Improvement Commission;³ and

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

Signature on File

November 29, 2017
Date Decision Issued

Lorraine E. Fraser
Administrative Law Judge



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³ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 2nd day of February, 2018, 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