

<p>IN THE MATTER OF THE CLAIM</p> <p>OF KELLY MARCHETTI,</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 CHARLES SIMPSON,</p> <p>T/A SUREBUILT HOMES &</p> <p>RESTORATION CO. LLC,</p> <p>RESPONDENT</p>	<p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p>	<p>BEFORE LORRAINE E. FRASER,</p> <p>AN ADMINISTRATIVE LAW JUDGE</p> <p>OF THE MARYLAND OFFICE</p> <p>OF ADMINISTRATIVE HEARINGS</p> <p>OAH No.: DLR-HIC-02-17-02759</p> <p>MHIC No.: 16 (90) 1222</p>
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PROPOSED DECISION

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

STATEMENT OF THE CASE

On November 14, 2016, Kelly Marchetti (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$9,880.00¹ in alleged actual losses suffered as a result of a home improvement contract with Charles Simpson, trading as Surebuilt Homes & Restoration Co. LLC (Respondent).

¹ During the hearing, the Claimant amended her claim to \$10,374.00. Neither the Respondent nor the Fund objected to her amending her claim. The Respondent was not prejudiced by the amendment of the claim amount during the hearing. COMAR 09.08.03.02C.

I held a hearing on May 18, 2017, at the Talbot County Public Library in Easton, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimant represented herself. Andrew Brouwer, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Respondent represented himself. At the end of the hearing, I left the record open until June 2, 2017, in order to allow the Claimant to submit two additional documents, Claimant 14 and 15, which were received on May 24, 2017.

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. 2016); 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:

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| Claimant 1 | Contract, signed October 2013 |
| Claimant 2 | Three photographs of shower under construction, taken 9/12/14 |
| Claimant 3 | Photograph of cracked tile, taken 4/5/16 |
| Claimant 4 | Two photographs of missing grout on shower floor, taken 4/5/16 |
| Claimant 5 | Two photographs: one of wood framing, one of standing water under shower bench, taken April 2016 |
| Claimant 6 | Two photographs: one of shower bench without moisture barrier, one of moisture in mud pan, taken April 2016 |
| Claimant 7 | Photograph of crack in mud pan, taken May 2017 |
| Claimant 8 | Photograph of uneven mud pan, taken May 2017 |
| Claimant 9 | Two photographs of area where bench was removed, taken April 2016 |
| Claimant 10 | Two photographs: one showing tile removed, one showing mud pan |
| Claimant 11 | Estimate from P.E. Moore & Associates to repair shower, 4/27/16 |
| Claimant 12 | Letter from James M. Darling, JMD Mechanical, 5/5/17 |

- Claimant 13 Email to the Respondent from the Claimant, 4/5/16
Claimant 14 Estimate from P.E. Moore & Associates re: no sign of damage, settling, or cracking to the house's foundation, 5/12/17
Claimant 15 Photograph of Red Guard label

The Respondent did not offer any exhibits into evidence.

I admitted the following exhibits on behalf of the Fund:

- Fund 1 Hearing Order, 1/20/17
Fund 2 Notice of Hearing, 3/2/17
Fund 3 Letter to the Respondent from the MHIC, 12/7/16; Home Improvement Claim form, received 11/14/16
Fund 4 Licensing history for the Respondent
Fund 5 Licensing history for P.E. Moore & Associates

Testimony

The Claimant testified in her own behalf.

The Respondent's son, Charles Simpson, Jr., testified.

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 99763.
2. In October 2013, the Claimant and the Respondent entered into a contract to, among other things, renovate the master bathroom in her home.²
3. The original agreed-upon contract price for the entire job was \$54,900.00. The contract price for the master bathroom was \$15,000.00.
4. Work began on the project in November 2013. The master bathroom was the last piece of the project and that work was complete in November 2014. The Respondent did not

² The work on the master bathroom is the only work at issue in this case.

perform the work himself. The Respondent's son was on site some of the time. Other employees of the company performed the actual work.

5. The Claimant paid the Respondent the full \$54,900.00.

6. In September 2014, during work on the shower, the Claimant asked the Respondent's son why there were gaps in the green board at the seams. The Respondent's son stated that the gaps would not be a problem because they would be covered with tile.

7. A plumber hired to install the plumbing in the master bathroom discovered the plumbing parts on the job site were not the correct ones for the job and did not have a required anti-scald feature. The Respondent's employees asked the plumber to use the incorrect parts but he refused. The Respondent's employees also told the plumber that they had obtained a plumbing permit for the job, which the plumber later discovered was false.

8. About six months after the work on the master bathroom was complete, the Claimant began noticing problems with the work. At some point thereafter, the Claimant contacted the Respondent to fix the problems.

9. The grout in the corner of the custom built shower bench was cracked, the grout in the shower floor was cracked and missing pieces, and a tile on the shower wall was cracked or scratched. When the Respondent's son removed the top of the shower bench to repair it, there was no moisture barrier underneath and the wood frame was very wet. Black mold was visible on the wall where the bench had been. There was standing water on the floor under the bench. After the shower floor was removed, problems with the mud pan underneath were revealed. The mud pan was wet and not even – it had dips and bumps – and water did not flow toward the drain. The mud pan had a long crack in it.

10. The Respondent's son removed the cracked or scratched shower wall tile, and two adjacent tiles. He sprayed the mold with an antimicrobial spray and told the Claimant to leave a

fan running to dry out the wood. He did not remove the wet wood or the cement board to see if there was water or moisture behind it. He told the Claimant he would use Red Guard to repair the shower floor, saying it would even the floor and fill in the crack.

11. The Claimant questioned whether the Respondent's son's proposed plan to fix the shower would correct the problems and sought other opinions.

12. On April 5, 2016, the Claimant told the Respondent to stop work at her home.

13. On April 27, 2016, P.E. Moore & Associates estimated the cost of fixing the Claimant's shower to be \$10,374.00.

14. The Claimant's actual loss is \$10,374.00.

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). "[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)).

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);³ *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."

³ Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume.

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. The Respondent did not personally perform any of the work at the Claimant's home. The Respondent's son was on the jobsite some of the time and at some point became the project's manager. Other employees of the Respondent performed the actual work. The Respondent agreed that the problems identified with the shower in the findings of fact above needed to be corrected. The Respondent's son agreed to fix the problems with the shower. The Claimant decided against allowing the Respondent's son to fix the shower and obtained an estimate from another contractor.

The issue in this case is whether the Claimant unreasonably rejected a good faith effort by the Respondent to repair the problems with the shower. A claim against the Fund may be denied if a claimant unreasonably rejects a contractor's good faith efforts to resolve the claim. Md. Code Ann., Bus. Reg. § 8-405(d) (2015). I find that the Claimant's rejection of the Respondent's son's proposed repair was reasonable. The Respondent's son testified that he was not the original project manager; however, the master bathroom was the last work performed. Thus, the Respondent's son was the project manager at the time the work in the master bathroom was performed. The Respondent's son should have been supervising the work performed by the other employees and should have ensured that a plumbing permit was obtained. The Claimant showed the Respondent's son a concern she had with the gaps in the green board, but he dismissed those concerns. The Respondent's employees told the plumber that they had obtained a plumbing permit when they had not and asked the plumber to use the improper parts they had

at the site. When the Respondent's son removed the shower bench, it was revealed that the bench had been built of wood with no moisture barrier between the wood and the tile. The wood and the wall were wet and the wall had visible mold. The Respondent's son's proposed solution was to spray the mold with anti-microbial spray and tell the Claimant to keep a fan on the wood to dry it out. He did not remove any of the cement board to check for water or moisture. He did not remove and replace the wet wood. When the Respondent's son removed the shower floor, the mud pan underneath was cracked, uneven, had standing water, and water did not flow toward the drain. The Respondent's son's proposed solution was to paint the mud pan with Red Guard, which he claimed would fill in the crack and even out the bumps and dips.

The Claimant presented pictures showing the mold and the degree to which the mud pan was not even. There were obvious dips and bumps in the mud pan, as well as a large crack. She presented a letter from the plumber regarding the missing permit and the Respondent's employees' request that he just use the parts they had even though they were incorrect. She obtained an estimate from another contractor, P.E. Moore, who recommended removing the entire shower to check the condition of the studs and subfloor for mold. P.E. Moore also recommended removing and replacing the entire mud pan so that the cracks, unevenness, and drainage flow could be corrected. P.E. Moore's estimate to repair the shower was \$10,374.00.

I find the Claimant's concerns and P.E. Moore's estimate to be reasonable. The poor workmanship by the Respondent's employees caused the problems with the shower, which allowed water to seep into areas where it should not have been. That seeping water caused the wood frame bench to be saturated with water and allowed mold to grow on the wall. However, the Respondent's son did not remove any additional material to inspect for additional water damage to the wood underneath and he did not remove and replace the wet wood. He just sprayed the visible mold and told the Claimant to dry the area with a fan. In addition, the

Respondent's son's proposal to paint on Red Guard would not be sufficient to correct the significant deficiencies in the mud pan's drainage. The Respondent's son's proposed repairs were not good faith efforts at a complete repair. The Claimant was not required to allow the Respondent's son to preform obviously inadequate repairs. Thus, I find that the Claimant is eligible for compensation from the Fund.

Having found eligibility for compensation I now turn to the amount of the award, if any, to which the Claimant is entitled. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1). 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).

The Claimant's actual loss is calculated as follows:

Amount paid under original contract	\$15,000.00
Amount to repair the work	+10,374.00
Original contract price	<u>-15,000.00</u>
Actual loss	\$10,374.00

Pursuant to the applicable law, the maximum recovery from the Fund is limited to the lesser of \$20,000.00 or the amount paid by or on behalf of the Claimant to the Respondent. Md. Code Ann., Bus. Reg. § 8-405(e)(1), (5) (2015). The Claimant paid \$15,000.00 to the

Respondent, which is greater than her actual loss of \$10,374.00 computed using the formula in COMAR 09.08.03.03 B(3)(c). Accordingly, the Claimant is entitled to reimbursement of \$10,374.00. Md. Code Ann., Bus Reg. § 8-405(a) (2015).

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$10,374.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03 B(3)(c).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$10,374.00; 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 as set by the Maryland Home Improvement Commission;⁴ and

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

Signature on File

August 4, 2017
Date Decision Issued

Lorraine E. Fraser
Administrative Law Judge

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⁴ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 12th day of September, 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.

Sachchida Gupta

***Sachchida Gupta
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION