

<p>IN THE MATTER OF THE CLAIM</p> <p>OF MICHELE MCCUTCHEN,</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 GARY STOLTZ,</p> <p>T/A STOLTZ & SONS, INC.,</p> <p>RESPONDENT</p>	<p>* BEFORE HARRIET C. HELFAND,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>*</p> <p>*</p> <p>*</p> <p>* OAH No.: DLR-HIC-02-16-25326</p> <p>* MHIC No.: 16 (05) 236</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 April 1, 2016, Michele McCutchen (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$13,628.60¹ in alleged actual losses suffered as a result of a home improvement contract with Gary Stoltz, trading as Stoltz & Sons, Inc. (Respondent).²

¹ At the close of the hearing, the Claimant noted that although she believed the Respondent had been overpaid by \$13,628.60, her claim was actually \$8,653.00, the amount of her out-of-pocket loss. I considered the Claimant to have amended her initial claim to reflect this amount.

² The Respondent also appears to have gone by the name "Stoltz Development & Construction Corporation."

I held a hearing on January 11, 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 represented herself. Hope Sachs, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. After waiting over fifteen minutes for the Respondent or someone to represent him, I proceeded with the hearing. Code of Maryland Regulations (COMAR) 28.02.01.23A.³

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); 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:

- Cl. #1 Contract, dated June 17, 2015
- Cl. #2 Contract, dated May 14, 2015
- Cl. #3 MHIC Complaint Form, dated August 17, 2015
- Cl. #4 Order, dated September 1, 2015⁴

³ Notice of the hearing was mailed to the Respondent at the address of record by regular and certified mail on September 30, 2016, COMAR 09.08.03.03A(2), and each was returned, one as "refused" and the other as "no mail receptacle."

⁴ The Order is in the form of a letter from the MHIC to the Respondent.

- Cl. #5 Letter from MHIC to Claimant, dated September 22, 2015
- Cl. #6 Letter from MHIC to Claimant, with attachments, dated October 14, 2015
- Cl. #7 Proposal from DECK Creations, LLC, dated September 18, 2015; Invoice from Envy Custom Contracting, LLC, dated August 17, 2015
- Cl. #8 New Order, Safeguard Properties, LLC, Insurance Loss Department, dated August 4, 2015; Letter from MHIC to Respondent, dated April 11, 2016
- Cl. #9 Letter from Claimant to Respondent, dated July 25, 2016; mailing receipts, dated July 28, 2016
- Cl. #10 Letter from MHIC to Claimant, dated August 11, 2016
- Cl. #11 Bank Statement, Bank of America, Acct # ****6529
- Cl. #12 Check #0092, dated June 17, 2015; Invoice from Respondent, dated June 18, 2015; Check #0093, dated June 26, 2015, with notations
- Cl. #13 Photographs

I admitted the following exhibits on behalf of the Fund:

- Fund #1 Memorandum, OAH, dated November 1, 2016; Notice of Hearing, dated September 30, 2016; Hearing Order, MHIC, dated August 11, 2016; Returned certified mail, returned October 20, 2016
- Fund #2 Respondent's MHIC licensing record
- Fund #3 Letter from MHIC to Respondent, dated April 11, 2016; MHIC Claim Form, dated April 1, 2016

The Respondent did not appear, and did not offer any exhibits.

Testimony

The Claimant testified in her own behalf.

The Fund did not present any testimony.

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 4561305. The Respondent's license expired March 10, 2016.

2. On April 15, 2015, the Claimant's home in Baltimore, Maryland, sustained substantial damage from a fire that originated at the house next door to the Claimant. The primary location of the damage to the Claimant's home was the side facing the neighbor's home. The fire melted the siding on the Claimant's home, destroyed the deck, fence, and the under-hang of the front door, and caused windows to shatter.

3. As a result of the fire damage, the Claimant filed a claim with her homeowner's insurance company. The insurance company approved the amount of \$31,872.00 for repairs to the home. The insurance company initially authorized payment of \$20,115.70 into the Claimant's mortgage account to finance the cost of the repair.

4. On June 17, 2015, the Claimant and the Respondent entered into a contract (Contract) to repair the damage done to her home from the fire. The Contract was based on an estimate submitted by the Respondent to the Claimant on May 14, 2015.

5. The work to be performed pursuant to the Contract included the construction of a six-foot fence; a deck; the replacement of all of the siding on the home; replacement of six windows; replacement of soffit, fascia, gutters, and downspouts; repair of the under-hang of a door; and four lights.

6. The Contract was to be completed by September 17, 2015.⁵
7. The original agreed-upon contract price was \$31,872.00. A later change added \$225.00 onto the contract price, for a total of \$32,097.00. The cost of the contract was to be paid in three installments; 1/3 on the date of signing the contract; 1/3 at the beginning of the work; and 1/3 at the completion of the work.
8. On June 17, 2015, the Claimant paid the Respondent \$10,624.00, and on June 26, 2015, the Claimant paid the Respondent \$9,424.00, for a total of \$20,048.00.
9. The Respondent began the work by placing a dumpster in the yard and stripping the siding from the entire house.
10. The Respondent worked approximately five days in June 2015, and worked less than ten days in July 2015.
11. At the end of July 2015, the Respondent asked the Claimant for more money, stating that he had exhausted the funds she had already paid. He requested that the Claimant make the final payment, even though the work had not been completed.
12. The Claimant told the Respondent that the bank would not disburse the funds until an inspection was performed.
13. In August 2015, the Respondent did not return to work on the home.
14. An inspection was undertaken that revealed that the Respondent had only completed 20% of the work specified in the Contract. The completed work primarily consisted of the demolition.
15. The Respondent had stripped the siding from the entire house and left it exposed, with the exception of having placed Tyvek® on the side closest to the fire. Only three windows had been installed, but had they had not been insulated or framed. No gutters were installed.

⁵ The Respondent verbally asserted to the Complainant that the work would be completed by July 31, 2015.

16. The Respondent left material all over the Claimant's yard; the dumpster damaged the Claimant's lawn.

17. In September 2015, the Claimant hired DECK Creations, LLC (DECK) to construct the fence and the deck. The Claimant paid DECK \$5,300.00 for completing the fence and \$6,250.00 for the deck.

18. In August 2015, the Claimant hired Envy Custom Contracting, LLC (Envy) to install three windows, insulate and frame six windows, install siding, soffit, fascia, three exterior lights, and insulate and close the rear walkout overhang. The Claimant paid Envy \$6,703.00 for the work performed.

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).⁶ “[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)).

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);⁷ *see also* COMAR 09.08.03.03B(2) (“actual losses . . . incurred as a result of misconduct by a

⁶ As noted above, “COMAR” refers to the Code of Maryland Regulations.

⁷ Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume.

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 inadequate and incomplete home improvements. The Respondent performed far less of the Contract than agreed, and then abandoned the project after demanding more compensation. The photographs of the home offered by the Claimant show extensive destruction and warping. The deck and fence were ruined and the siding was essentially melted from the frame of the house. Although the Respondent removed the siding, he left the house completely unfinished, with Tyvek® visible in the areas where it was partially installed. Nothing contracted for was even near completion, despite the Claimant having fulfilled her portion of the contract by promptly paying her deposit and first payment. Despite this, the Respondent claimed to have depleted his funds, and left the project unfinished. In addition to deserting the project, the Respondent left material strewn about the property, along with a dumpster, which was unsightly and, further, damaged the Claimant’s lawn.

The Claimant offered the Respondent multiple chances to complete the repairs; however, the Respondent never availed himself of the opportunities either to perform the work under the Contract or clean up the disarray. As a result, the Claimant was forced to hire DECK and Envy to complete the project, and by necessity, paid for the completion partially from her own funds, as the cost exceeded the amount funded by her homeowner’s insurance.

I thus 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).

In this case, the above-formula is calculated as follows:

Amount paid to Respondent		\$20,048.00
Amount paid to complete Contract	+	<u>20,780.00</u>
Total		\$40,828.00
Amount of Contract	-	<u>31,872.00</u>
Actual Loss		\$ 8,956.00 ⁸

⁸ This figure, which exceeded the amended Claim, was proposed by the Fund. After reviewing the evidence, I believe it more accurately reflects the Claimant's actual loss than the amended Claim.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$8,956.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(c).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$8,956.00 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 (10%) as set by the Maryland Home Improvement Commission;⁹ and

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

Signature on File

March 9, 2017
Date Decision Issued

Harriet C. Helfand
Administrative Law Judge

HCH/sw
#166172

⁹ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

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PROPOSED ORDER

WHEREFORE, this 19th 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