

<p><b>IN THE MATTER OF THE CLAIM</b></p> <p><b>OF CHRISTOPHER HORNACK,</b></p> <p><b>CLAIMANT</b></p> <p><b>AGAINST THE MARYLAND HOME</b></p> <p><b>IMPROVEMENT GUARANTY FUND</b></p> <p><b>FOR THE ALLEGED ACTS OR</b></p> <p><b>OMISSIONS OF MARK LUGENBEEL,</b></p> <p><b>T/A T.C.M. IMPROVEMENT LLC,</b></p> <p><b>RESPONDENT</b></p>	<p><b>* BEFORE TRACEY JOHNS DELP,</b></p> <p><b>* AN ADMINISTRATIVE LAW JUDGE</b></p> <p><b>* OF THE MARYLAND OFFICE</b></p> <p><b>* OF ADMINISTRATIVE HEARINGS</b></p> <p><b>* OAH No.: DLR-HIC-02-17-19212</b></p> <p><b>* MHIC No.: 16 (90) 451</b></p> <p><b>*</b></p> <p><b>*</b></p>
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**PROPOSED DECISION**

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

**STATEMENT OF THE CASE**

On April 3, 2017, Christopher Hornack (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$40,000.00 in actual losses allegedly suffered as a result of a home improvement contract with Mark Lugenbeel, trading as T.C.M. Home Improvement LLC (Respondent).

I held a hearing on November 27, 2017, at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland.<sup>1</sup> Md. Code Ann., Bus. Reg. § 8-407(e) (2015). The Claimant

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<sup>1</sup> The case was originally scheduled to be heard on September 25, 2017, but was postponed in advance of the hearing date at the request of the Respondent.

represented himself. Hope Sachs, 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 OAH 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.....

**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 the Claimant's behalf:<sup>2</sup>

- CL. Ex. 1 - Letter from Respondent to Claimant, signed by Respondent and Claimant, undated; Banking Information form, signed by Respondent and Claimant, undated; Contract, signed by Respondent and Claimant, undated
- CL. Ex. 2 - Bank of America, Funds Transfer Request Authorization, April 28, 2015
- CL. Ex. 3 - Photograph, April 2015
- CL. Ex. 4 - Photograph, June 2015
- CL. Ex. 5 - Photograph, April 2015
- CL. Ex. 6 - Photograph, undated
- CL. Ex. 7 - Photograph, June 2015
- CL. Ex. 8 - Photograph, April 2015
- CL. Ex. 9 - Photograph, April 2015

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<sup>2</sup> CL. Ex. 22 was marked and identified only; it was not accepted as evidence. For completion of the record, it is contained within the file; however, I did not consider it in reaching my decision. See COMAR 28.02.01.22C.

- CL. Ex. 10 - Photograph, June 2015
- CL. Ex. 11 - Building Permit, issued April 1, 2015
- CL. Ex. 12 - Lowe's receipt, March 21, 2015; Page 5 of 5 Home Depot receipt, undated; Baylight Custom Builders receipt, March 24, 2015; American Express statement with HHGregg purchase, November 28, 2014
- CL. Ex. 13 - Photograph, May 2015
- CL. Ex. 14 - Photograph, May 2015
- CL. Ex. 15 - Photograph, June 2015
- CL. Ex. 16 - Photograph, June 2015
- CL. Ex. 17 - Photograph, June 2015
- CL. Ex. 18 - Photograph, June 2015
- CL. Ex. 19 - Photograph, undated
- CL. Ex. 20 - R.E. Michel Company receipt, June 9, 2015
- CL. Ex. 21 - Lowe's quote with receipt, April 11, 2016; Lowe's Installation Services Customer Contract with receipt, May 20, 2016; Home Depot Order Confirmation, March 9, 2016; Lowe's order information, April 25, 2016; Lowe's receipt, April 11, 2016; Lowe's receipt, May 20, 2016; Lowe's receipt, May 21, 2016; Lowe's receipt, May 21, 2016; Proposal, Baylight Custom Builders, October 8, 2015
- CL. Ex. 23 - Proposal, Keith Wilhelm Contracting, LLC, September 15, 2015
- CL. Ex. 24 - Better Business Bureau Online Complaint, July 8, 2015; Better Business Bureau Arbitration fee refund, March 14, 2016
- CL. Ex. 25 - Email from Respondent to Claimant, June 5, 2015; Letter from Respondent to Claimant, sent electronically, June 10, 2015

I admitted the following exhibits on the Respondent's behalf:<sup>3</sup>

- Resp. Ex. 1 - Kitchen plans, June 2015
- Resp. Ex. 2 - Photograph, July 25, 2015

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<sup>3</sup> Resp. Ex. 4 was marked and identified only; it was not accepted as evidence. For completion of the record, it is contained within the file; however, I did not consider it in reaching my decision. See COMAR 28.02.01.22C.

Resp. Ex. 3 - Photograph, July 25, 2015

Resp. Ex. 5 - Scope of Work with deposit information, Bishop Electrical, Inc., June 8, 2015; Electrical Permit, June 8, 2015

Resp. Ex. 6 - Proposal with deposit information and contract acceptance, P&M Plumbing & Contracting, June 8, 2015; Plumbing Permit, June 8, 2015

Resp. Ex. 7 - Invoice, Walt's Mechanical Services, LLC, June 8, 2015; Scope of Services with deposit information, May 4, 2015

I admitted the following exhibits on behalf of the Fund:

GF Ex. 1 - Notice of Hearing, September 25, 2017, with attached letter from OAH

GF Ex. 2 - Respondent's MHIC Licensure Information, printed September 20, 2017

GF Ex. 3 - Letter to Respondent from MHIC, April 12, 2017, with Home Improvement Claim Form attached

#### Testimony

The Claimant testified in his own behalf and presented the testimony of his wife, Carolyn Bergamo.

The Respondent testified in his 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 01-91887.

2. At all times relevant, the Claimant and his wife were the owners of a home on Cuckold Point Road in Sparrows Point, Maryland.

3. In spring of 2015, the Claimant was seeking to renovate and add square footage to his home; he was renting a house next door to his property.

4. Prior to meeting the Respondent, the Claimant performed some demolition of the home, including the removal of some drywall and flooring. The Claimant also purchased a front door, sliding door, windows, and a kitchen appliance package.

5. Sometime prior to April 28, 2015, the Claimant and the Respondent signed an undated contract (Contract) for renovations and a second story addition to the home.

6. The work under the Contract was to include, among other things, framing, plumbing, electrical work, heating and air-conditioning, dry-walling, painting, siding, and roofing.

7. The agreed-upon contract price was \$170,000.00, with payments to be made during a series of project phases. An initial deposit of \$57,000.00 was required for the Respondent to begin Phase I. Phase I involved finishing a portion of the home (kitchen, bedroom, and bathroom) so the Claimant and his wife could live in the home while the project continued to completion, as well as beginning some framework for the next phase.

8. On April 28, 2015, the Claimant electronically transferred a \$57,000.00 deposit to the Respondent to begin Phase I.

9. The Contract does not provide estimated completion dates for the project phases; however, the entire project was estimated to be completed in three months.

10. Work under the Contract began approximately one week after the April 28, 2015 electronic transfer. The Claimant was unhappy with the work pace and quality.

11. The Claimant's landlord has experience hanging drywall. The landlord was anxious for the Claimant to vacate his rental property so that he could reside there again, beginning July 1, 2015. For that reason, and with the Claimant's permission, the landlord visited the Claimant's home on June 5, 2015. Thereafter, the landlord called the Claimant to advise him

of concerns he observed, specifically drywall being hung which the landlord believed would conceal wiring before electrical inspections could be performed. At the request of the Claimant, the landlord ordered work to stop. All Contract work stopped.

12. Later on June 5, 2015, the Claimant and Respondent met at the home; the Respondent left the meeting because the Claimant was screaming at him.

13. The Respondent sent emails to the Claimant on June 5 and 10, 2015, expressing a desire to continue work on the project.

14. Sometime thereafter, the Respondent received a letter in the mail from the Claimant's attorney advising the Respondent to stay away from the Claimant's property.

## DISCUSSION

### *Positions of the Parties*

The Claimant alleged the Respondent performed unworkmanlike, inadequate, and incomplete work. The Respondent argued he would have completed the project on time had the Claimant not ordered him away from the job, and the Claimant is responsible for some delay. The Respondent disputed that his work was unworkmanlike, arguing that different contractors approach projects differently. The Fund argued the Claimant failed to meet the burden of proof.

The Contract does not state an anticipated completion date for Phase I. According to the Claimant, the oral understanding between the Claimant and the Respondent was a completion date three to four weeks from April 28, 2015. The Respondent testified that had he been allowed to continue Phase I, it would have been completed by the date he understood to be the Phase I deadline, July 1, 2015.

### Applicable Law

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);<sup>4</sup> 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.

As owner, the Claimant has the burden of proving the validity of his 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)). Under this standard, if the supporting and opposing evidence is evenly balanced on an issue, the finding on that issue must be against the party who bears the burden of proof. *Id.* For the following reasons, I find that the Claimant has failed to meet this burden and has failed to prove eligibility for compensation.

### Witness Credibility

In its closing argument, the Fund pointed out that the central issue in this case is credibility. In considering the credibility of witnesses, I am troubled by testimony from the Claimant and Mrs. Bergamo. Both the Claimant and Mrs. Bergamo testified that their HVAC system went missing from the home, and the Claimant accused the Respondent of theft. To the

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<sup>4</sup> Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume of the Maryland Annotated Code.

contrary, the Respondent testified he met the Claimant to discuss the inadequacy of the home's HVAC unit due to increasing the home's square footage, the need for a larger HVAC unit, as well as removal of the existing HVAC unit. Unlike his hearing testimony, in his complaint to the Better Business Bureau (BBB), the Claimant wrote "[the Respondent] said he would be taking our existing HVAC unit and placing it in another property which would defray the cost of buying us a new one." (CL. Ex. 24.) Clearly there was no theft; the Claimant's BBB complaint acknowledged that the Respondent's intentions were to repurpose the HVAC system in an effort to defray costs. The Claimant and Mrs. Bergamo's testimony and the Claimant's contradictory statement to the Better Business Bureau adversely affect my assessment of their credibility in this case, as a whole.

The Respondent provided a logical chronology of tasks actually performed – from dumpster delivery around May 4, 2015; to interior demolition May 4 through 11, 2015; to interior framing and deck railing removal in order to accommodate the second story addition beginning around May 11, 2015; to staircase temporary relocation around May 18, 2015; to siding removal as well as exterior door and window installations around May 29, 2015. Additionally, the Respondent testified that a center beam installation took place in order to support the addition, the water heater was relocated, and a new electrical panel box was constructed. While the Claimant argued there was not a sufficient number of crew members on the job, the Respondent testified the crew members assigned were appropriate for the tasks at hand. There was no evidence that the number of workers was outside of the Respondent's normal procedures or industry standards. Likewise, the Claimant argued Respondent Exhibits 5 through 7 are the Respondent's after-the-fact attempts to give a false appearance he was working diligently on the project. I cannot make such an inference. In fact, Respondent Exhibit 7 indicates that a \$10,500.00 deposit was made by the Respondent to Walt's Mechanical Services,



LLC on May 4, 2015, long before difficulties arose between the Claimant and Respondent. And while Respondent's Exhibits 5 and 6 appear to show deposits to vendors on June 8, 2015, there was no evidence the timeframe for subcontractor payment was outside of the Respondent's normal procedures or industry custom. The Respondent's testimony was credible; it was logical and supported by the evidence.

**Unworkmanlike, Inadequate, or Incomplete Home Improvement**

The Claimant failed to prove that the Respondent produced unworkmanlike, inadequate, or incomplete home improvement.

***Construction Complaints***

The Claimant testified his landlord has familiarity with drywall work and had concerns about drywall being hung which would have concealed electrical work that had not yet passed inspection. However, the Respondent testified the project had not progressed to the point when county inspections were appropriate. The landlord's one-time observation is insufficient evidence that the drywall installation observed would have prevented county inspectors from performing a proper inspection of the premises or that the project was ready for county inspection.

Mrs. Bergamo testified that a hole cut in the roof was done unnecessarily and caused water damage due to rainfall. The Respondent testified the hole was necessary for the second story addition and did not result in water damage. Mrs. Bergamo testified that she and the Claimant were responsible for covering the hole with a tarp and placing buckets under the hole to catch rain water to prevent rain damage. The Respondent testified that his crew placed the tarp and buckets at the residence. The Claimant Exhibit 18 photograph of water pooling on the floor does not, in and of itself, prove water damage occurred. There is insufficient evidence that the hole cut in the roof was improper or caused damage.

The Claimant complained copper piping was replaced with PVC. The Respondent replied that because plumbing was re-routed within the home, and copper and PVC should not be mixed, the copper was replaced with PVC piping. I gave the Claimant's assertions less weight than those made by the Respondent, as the Claimant is not a licensed contractor and has no expertise in the field of home construction. Accordingly, there is insufficient evidence that replacement of copper piping and use of PVC piping was improper.

The Claimant expressed concerns regarding a structural support beam added to the first floor and whether the beam was level. The Respondent explained the beam was added after the Respondent consulted with an engineer about proper methods to brace the home for the addition. The Claimant did not introduce any evidence which would show this beam was unnecessary, not level, or installed inappropriately.

The Claimant complained the Respondent was reusing insulation, which the Claimant stated adversely impacted its quality level; however, no expert testimony was offered on that issue.

### ***Construction Progress***

The Claimant asserted that work progressed at a slow and unreasonable pace. However, Claimant Exhibits 4 and 6 show the Respondent hung all exterior doors and first floor windows. Claimant Exhibits 13, 14, and 15 show some wood and drywall materials purchased by the Respondent inside the Claimant's home. Respondent Exhibits 5, 6, and 7 are electrical, plumbing, and mechanical subcontractor proposals and invoices. Respondent Exhibits 5, 6, and 7 document the Respondent's deposits (which total \$35,000.00) made to the electrical, plumbing, and mechanical subcontractors. The testimony and exhibits are evidence that the Respondent was steadily working towards completion of Phase I.

The Contract does not clearly identify which party is responsible for the purchase of certain materials. For example, the Contract provides that the Claimant is responsible for the kitchen layout and ordering kitchen cabinets within two weeks of the project start date, April 28, 2015. It is unclear which party is responsible for buying the cabinets. The Claimant asserted the kitchen cabinets and countertops are included in the Contract price. The Respondent stated he contracted to "install new kitchen per layout provided by [Claimant]." (CL. Ex. 1.) The Respondent argued the word "install" means just that. The Claimant purchased windows, doors, and a kitchen appliance package before he met the Respondent. The Respondent advised that just as the Contract states he is to install windows, but was not responsible for the purchase of windows, he is to install a kitchen, but was not responsible for the layout, cabinets, and countertops. The Contract states "[l]abor and base building materials will be provided to complete this job." (CL. Ex. 1, p. 4.) The Respondent testified that kitchen cabinets and countertops are not considered base building materials. The Claimant argued the kitchen cabinets and countertops were included in the \$57,000.00 deposit price; however, I cannot make that assumption. Respondent's Exhibits 5, 6, and 7 show the Respondent paid \$35,000.00 to subcontractors. Claimant's Exhibits 13, 14, and 15 show wood and drywall materials purchased by the Respondent inside the Claimant's home. In addition, the Claimant, Mrs. Bergamo, and the Respondent testified T.C.M. Improvement LLC performed work in the house; therefore, labor expenses were accruing. Upon review of the documented expenses, and without clarity from the Contract, I cannot conclude the kitchen cabinets and countertops were included in the \$57,000.00 deposit price.

There was some testimony that a subcontractor assisted the Claimant and Mrs. Bergamo with the creation of a kitchen layout; however, the Contract clearly states the Claimant is responsible for the kitchen layout and ordering kitchen cabinets within two weeks of the project

start date, April 28, 2015. The Claimant did not order cabinets and he provided no explanation for his failure to do so. During the project, the Claimant and Respondent communicated via text and email. The Claimant did not introduce any evidence that would demonstrate he was somehow frustrated or unable to order cabinets due in any part to the actions of the Respondent. Therefore, I cannot attribute the delay in ordering cabinets to anyone other than the Claimant.

The Claimant stated Phase I would be complete three to four weeks from April 28, 2015. The Respondent testified that Phase I was scheduled to be completed July 1, 2015. Although the parties disagree when Phase I was scheduled for completion, the Claimant never ordered kitchen cabinets for installation by the Respondent and, thus, is responsible for some project delay. Then, on June 5, 2015, the Claimant demanded the Respondent stop Contract work.

On June 5, 2015, the Respondent emailed the Claimant to advise his intent to complete the Contract. (CL. Ex. 25.) Later that same day, the Claimant and Respondent met at the home, but according to the unrebutted testimony of the Respondent, the Respondent left the meeting because the Claimant was screaming at him. On June 10, 2015, the Respondent emailed the Claimant to express his interest in completing the project. Thereafter, the Respondent received a letter in the mail from the Claimant's attorney advising him to stay away from the Claimant's property. The Claimant did not provide a satisfactory explanation why the Respondent's June 5 and 10, 2015 offers were rebuked. I understand the Claimant believes the Respondent's work was unsuitable, but he failed to provide evidence of unworkmanlike, inadequate, or incomplete work at the hearing. After careful consideration of the evidence and weighing witness credibility, discussed above, I find the Claimant unreasonably rejected good faith efforts by the Respondent to resolve the claim. *See Md. Code Ann., Bus. Reg. § 8-405(d).*

**PROPOSED CONCLUSIONS OF LAW**

Based upon the foregoing Proposed Findings of Fact and Discussion, 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. I also conclude that the Claimant is not entitled to reimbursement from the Fund for the Respondent's work because he unreasonably rejected good faith efforts by the Respondent to resolve the claim. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(2). For the reasons stated, I do not recommend an award.

**RECOMMENDED ORDER**

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

**ORDER** that the Maryland Home Improvement Guaranty Fund deny the Claimant's claim; and

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

**Signature on File**

January 5, 2018  
Date Decision Issued

Tracey Johns <sup>DM</sup>  
Administrative Law Judge

TJD/dlm  
#171115v2

**PROPOSED ORDER**

***WHEREFORE, this 5<sup>th</sup> 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***