

IN THE MATTER OF THE CLAIM
OF ASTER TESEMA,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF ZEWDU
HAILEYESUS,
T/A Z & S CONSTRUCTION, LLC,
RESPONDENT

* BEFORE KERWIN A. MILLER, SR.,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: DLR-HIC-02-18-07522
* MHIC No.: 17 (90) 502
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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 February 24, 2017, Aster Tesema (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$4,000.00 in actual losses allegedly suffered as a result of a home improvement contract with Zewdu Haileysus, trading as Z & S Construction, LLC (Respondent).

I held a hearing on June 14, 2018 at 1400 McCormick Drive, Largo, Maryland 20774. Md. Code Ann., Bus. Reg. § 8-407(e) (2015). The Claimant represented herself.¹ Nicholas

¹ The Claimant was aided by the services of an Amharic interpreter.

Sockolow, Assistant Attorney General, Department of Labor, Licensing, and Regulation (Department), represented the Fund. After waiting twenty minutes for the Respondent or the Respondent's representative to appear, I proceeded with the hearing. Code of Maryland Regulations (COMAR) 28.02.01.23A.²

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. 2017); 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 have attached a complete Exhibit List as an Appendix.

Testimony

The Claimant testified on her own behalf.

The Respondent did not appear for the hearing and no witnesses testified on his behalf.

The Fund called no witnesses.

² Notice of the hearing was mailed to the Respondent at the address of record by regular and certified mail on March 19, 2018, COMAR 09.08.03.03A(2), and was not returned as unclaimed or undeliverable as of the date of the hearing. Additionally, the Respondent mailed correspondence to the OAH on March 26, 2018 confirming receipt of the March 19, 2018 notice. Applicable law permits me to proceed with a hearing in a party's absence if that party fails to attend after receiving proper notice. COMAR 28.02.01.23A. I determined that the Respondent had received proper notice, and proceeded to hear the captioned matter in his absence.

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 home improvement contractor licensed by the MHIC.
2. At all times relevant, the Claimant lived in a residence located at 1745 Keokee Street, Hyattsville, Maryland.
3. On October 5, 2016, the Claimant and the Respondent entered into a contract for home improvement work (Contract). The Contract provided that the Respondent would:
 - Build a horizontal addition to make a kitchen with more space, including an expansion of the existing deck. This work was to be done according to the given work plan³, as well as Maryland norms and regulations. The total quoted price for this work was \$16,400.00.
 - Build a vertical addition to make three bedrooms, one full bathroom and sink according to given work plan and permit. The total quoted price for this work was \$38,600.00.
4. The Contract also provided that the Respondent would:
 - Perform all plumbing, electrical, mechanical and kitchen work.
 - Provide marble countertop, all cabinets according to the given plan, second floor design work, and all floor work for the kitchen floor.
5. The total agreed-upon Contract price was \$55,000.00.⁴
6. The Claimant paid the Respondent \$18,000.00 on October 5, 2016 for work to be performed under the Contract.

³ The work plan was not presented at the hearing but the Claimant testified that she provided it to the Respondent.

⁴ The Claimant testified that it was her understanding that the Contract price was \$58,000.00 but that claim was unsupported by the credible evidence before me.

7. The Respondent began work on the Contract on or about October 19, 2016. He came out to the Claimant's home approximately five times to perform some demolition work before completing a small portion of the deck expansion before quitting the project with no explanation.
8. The Respondent did not perform any other work under the Contract.
9. The value of the demolition and partial deck expansion work performed by the Respondent was \$1,000.00.
10. The Respondent refunded the Claimant \$13,000.00 and kept \$5,000.00.

DISCUSSION

In this case, the Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Md. Code Ann., Bus. Reg. §8-407(e)(1) (2015); 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);⁵ *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.

⁵ Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume of the Maryland Annotated Code.

The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. For the reasons discussed below, I find that the Respondent performed unworkmanlike, inadequate or incomplete home improvements.

The Respondent agreed to perform extensive home improvement work at the Claimant's residence, as set forth in the Findings of Fact. The Claimant wanted to expand her kitchen and build an addition to her home. The only work that the Respondent performed under the Contract was some demolition work and a small portion of the deck expansion. The photographs of the demolition and partial deck expansion (Claimant's #7a-p) support the Claimant's testimony that the value of the work performed by the Respondent was \$1,000.00. No other evidence or expert testimony was presented by any party regarding the value of the demolition and partial deck expansion performed by the Respondent under the Contract.

By failing to do any work under the Contract other than some demolition and a partial deck expansion, I conclude that the Respondent's performance was unworkmanlike, inadequate, and incomplete.

It is uncontested that the Claimant paid the Respondent \$18,000.00 on the Contract. It is also undisputed that the Respondent ultimately refunded \$13,000.00 to the Claimant, keeping \$5,000.00. The Claimant testified that the Respondent came out to the home approximately five times but failed to complete the work under the Contract before quitting the project without explanation.

I thus find that the Claimant is eligible for compensation from the Fund.

Having determined that the Claimant has shown that the Respondent was responsible for unworkmanlike, inadequate, or incomplete home improvement work with regard to the project, further analysis of an amount of "actual loss" is appropriate. A claimant may not be compensated for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest.

COMAR 09.08.03.03B(1). Unless a claim requires a unique measurement, actual loss is measured by one of the three following formulas:

(a) If the contractor abandoned the contract without doing any work, the claimant's actual loss shall be the amount which the claimant paid to the contractor under the contract.

(b) If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor.

(c) 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 measurements accordingly.

COMAR 09.08.03.03B(3).

In the instant case, I am applying the second option. Based on the credible evidence offered, as described above, I calculate the Claimant's actual loss using the formula in COMAR 09.08.03.03B(3)(b) as follows:

\$18,000.00	paid toward the two original contract price
<u>-\$13,000.00</u>	refund to Claimant by Respondent
\$5,000.00	amount retained by the Respondent
<u>-\$1,000.00</u>	value of demolition work and partial deck expansion
\$4,000.00	actual loss

In this case, the contractor abandoned the contract after only performing a small fraction of the work. The Claimant initially paid the Respondent \$18,000.00 on the Contract and the Respondent ultimately refunded the Claimant \$13,000.00 of that amount after performing some

work valued at \$1,000.00. Accordingly, the Claimant is entitled to reimbursement from the Fund in the amount of \$4,000.00, the balance of the amount paid to, but not refunded by, the Respondent under the contract, minus the value of the work performed by the Respondent. *Id.* § 8-405(e)(5); COMAR 09.08.03.03B(3)(b).

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$4,000.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3). I further conclude that the Claimant is entitled to recover that amount from the Fund.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$4,000.00; 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;⁶ and

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

Signature on File

September 10, 2018
Date Decision Issued

Kerwin A. Miller, Sr.
Administrative Law Judge

KAM/cmg
#175695

⁶ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

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APPENDIX: FILE EXHIBIT LIST

Claimant's Exhibits:

1. Z Companies, LLC Home Improvement Contract, September 25, 2016
2. Contractual Agreement, undated
3. Check #138 to Z Companies, LLC, October 5, 2016
4. Contractor License Control #4906849, September 26, 2016
5. Certificate of Liability Insurance, October 4, 2016
6. Contractor License Control #4906880, September 26, 2016
7. Photos of Home, undated
 - a. Exterior of Home
 - b. Exterior of Home
 - c. Exterior of Home
 - d. Exterior of Home
 - e. Exterior of Home
 - f. Backyard
 - g. Deck
 - h. Exterior of Home
 - i. Deck
 - j. Deck/Backyard
 - k. Exterior of Home
 - l. Deck
 - m. Deck
 - n. Interior of Home
 - o. Interior of Home
 - p. Interior of Home

8. Document from Respondent, undated
9. Clarence Mobley Associates, PC Proposal, October 12, 2016
10. District Court Judgment, May 2, 2017

Fund Exhibits:

1. Notice of Hearing, March 19, 2018
2. Hearing Order, February 14, 2018
3. The Respondent's Licensing Record, June 5, 2018
4. Correspondence to the Respondent, March 3, 2017
5. Notice of Hearing Signed and Dated by the Respondent, March 22, 2018
6. Photograph of Completed Work by Unidentified Company, undated

The Respondent did not submit any documents into evidence.

PROPOSED ORDER

WHEREFORE, this 10th day of October, 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.

Bruce Quackenbush

***Bruce Quackenbush
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION