

IN THE MATTER OF THE CLAIM
OF JAMESON BOOKER,
CLAIMANT,
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF MARK CARTHORNE,
T/A DILIGENCE HOME
IMPROVEMENT, LLC,
RESPONDENT

* BEFORE SUSAN H. ANDERSON,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: DLR-HIC-02-19-01143
* MHIC No.: 18 (75) 504
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PROPOSED DECISION

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STATEMENT OF THE CASE

On August 7, 2018, Jameson Booker (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$30,450.00 in actual losses allegedly suffered as a result of a home improvement contract with Mark Carthorne, trading as Diligence Home Improvement, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015). On January 4, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on May 9, 2019 at the County Office Building in Largo, Maryland. Bus. Reg. § 8-407(e). Shara Hendler, Assistant Attorney General, Department of Labor, Licensing, and Regulation (Department), represented the Fund. The Claimant represented himself. After waiting fifteen minutes for the Respondent or the Respondent's representative to appear, I proceeded with the hearing in his absence. Code of Maryland Regulations (COMAR) 28.02.01.23A.

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. 2018); 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 the compensable loss?

SUMMARY OF THE EVIDENCE

Exhibits

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

- Clmt. Ex. 1 - Estimate from Diligence Home Improvement, LLC, March 29, 2016
- Clmt. Ex. 2 - Copies of checks, April 2, 2016 and April 5, 2016
- Clmt. Ex. 3 - Photograph of unfinished basement at the Claimant's property taken by the Respondent in approximately April 2016
- Clmt. Ex. 4 - Text messages between the Claimant and the Respondent spanning September 6, 2017 through November 22, 2017
- Clmt. Ex. 5 - October 12, 2017 statement from the Claimant with narrative of events (no pictures attached)

Clmt. Ex. 6 - Case Information Sheet, District Court of Maryland for Prince George's County – Criminal, printed April 18, 2019

I admitted the following exhibits on behalf of the Fund:

Fund Ex. 1 - Hearing Order, January 4, 2019

Fund Ex. 2 - Notice of Hearing, April 26, 2019

Fund Ex. 3 - Home Improvement Claim Form, received August 7, 2018

Fund Ex. 4 - MHIC Licensing History of the Respondent, April 26, 2019

Testimony

The Claimant testified.

The Fund presented no 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 4708505.

2. On or about March 29, 2016, the Claimant and the Respondent entered into a contract to construct a two bedroom basement apartment in the unfinished basement of an investment property the Claimant owns at 809 Cedar Heights, Capitol Heights, Maryland (Contract). The Claimant does not reside there, nor does he own any other properties in Maryland.

3. The original agreed-upon Contract price was \$50,102.00.

4. On April 2, 2016, the Claimant paid the Respondent \$15,450.00 by check; on April 5, 2016, the Claimant paid the Respondent an additional \$15,000.00 by check.

5. The Respondent did not complete any meaningful work on the project; over the period of a few days in 2016, he merely broke up some dirt to expose a pipe in the floor and moved some concrete pieces into a corner. The Respondent did no more work on the project.

6. In September, October, and November 2017, the Claimant and the Respondent exchanged a series of text messages, with the Claimant asking when work would begin and the Respondent offering excuse after excuse as to why he could not get to the job right away. Finally, in either November or December 2017, the Claimant filed criminal charges against the Respondent for failure to perform on the contract.

7. On July 16, 2018, the Respondent pled guilty to the charge of failure to perform on a contract and received a supervised probation before judgement. The disposition did not include a restitution order.

DISCUSSION

I. Notice to the Respondent

The statutory provisions governing disciplinary proceedings against MHIC licensees state that notice of the proceeding shall be sent by certified mail to “the business address of the licensee on record with the Commission.” Md. Code Ann., Bus. Reg. § 8-312(d). These same notice procedures apply to proceedings involving claims against the Fund. Md. Code Ann., Bus. Reg. § 8-407(a). The purpose of the notice requirement is to provide a measure of due process.

The MHIC’s business address of record for the Respondent is 1700 Rockville Pike, Suite 400, Rockville, MD 20852. On March 13, 2019, the OAH sent the Respondent a Notice of Hearing (Notice), advising that the hearing was scheduled for 10:00 a.m. on May 9, 2019, at the County Office Building in Largo, Maryland. The Notice was sent to the Respondent at his address of record by both first-class mail and certified mail. Both the certified mail and the first-

class mailing were returned to the OAH marked, "Return to Sender, Not Deliverable as Addressed, Unable to Forward."

On April 26, 2019, Shara Hendler, Assistant Attorney General for the Department, notified the OAH of an alternate address for the Respondent. That same day, the OAH sent the Respondent Notices, via certified and first-class mail, to his business address of record and to the newly-provided address of 10719 Lester Street, Silver Spring, MD 20902. On May 7, 2019, the certified mail to the business address of record was returned to the OAH marked, "Return to Sender, Not Deliverable as Addressed, Unable to Forward." On May 20, 2019, the certified mail to the Lester Street address was returned to the OAH marked, "Return to Sender, Attempted – Not Known, Unable to Forward;" on May 22, 2019, the first-class mail to the Lester Street address was also returned to the OAH with the same notation. The Notice sent via first-class mail to the Respondent's business address of record was not returned.

The Respondent is obligated to keep the MHIC apprised of his current address. *See* Md. Code Ann., Bus. Reg. § 8-309 (requiring a licensee to notify the MHIC of a change of address within ten days). Notice of the hearing was sent to the Respondent at the MHIC's last known address for the Respondent as well as to a newly-discovered address by first-class and certified mail. The method of notice to the Respondent was reasonably calculated to provide him with notice of the hearing and I conclude that the Respondent received proper notice of the hearing. Md. Code Ann., State Gov't § 10-209 (2014); *Board of Nursing v. Sesay*, 224 Md. App. 432 (2015). Therefore, the hearing proceeded in the Respondent's absence. Md. Code Ann., Bus. Reg. §§ 8-312(d), (h), 8-407.

II. Merits of the Claim

Relevant Law

The Maryland General Assembly created the Fund to provide an available pool of money from which homeowners could seek relief for losses sustained at the hands of incompetent or unscrupulous home improvement contractors. Md. Code Ann., Bus. Reg. §§ 8-401 to 8-411. A homeowner is authorized to “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); *see also* COMAR 09.08.03.03B(2). The statutes governing the Fund define “actual loss” as “the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” Md. Code Ann., Bus. Reg. § 8-401.

At a hearing on a claim, a claimant has the burden of proof. Md. Code Ann., Bus. Reg. § 8-407(e)(1); COMAR 09.08.03.03A(3). The claimant’s burden is by a preponderance of the evidence. Md. Code Ann., State Gov’t § 10-217. To prove something by a “preponderance of the evidence” means “to prove that something is more likely so than not so[.]” when all of the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002). For the reasons explained below, I find that the Claimant has proven eligibility for compensation from the Fund.

The Respondent Abandoned the Contract Without Doing Any Work

The Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimant. Fund Ex. 4. The Claimant explained that he paid the Respondent \$30,450.00 up front based upon the Respondent’s representation that he needed money in order to obtain the necessary permits and purchase materials for the project. The

Claimant had never entered into a contract of this nature before and did not realize that this was not standard practice in the industry.

The Claimant testified that the Respondent performed no material work under the Contract. His testimony was supported by documents in the record, including a photograph showing the condition of the basement after the Respondent had dug into the dirt around a pipe in the floor and moved some concrete pieces to the corner. (Clmt. Ex. 3.) The Claimant's unrefuted testimony is that the basement remains in that condition, i.e., completely unfinished, as the Respondent never returned to perform any of the work outlined in the Contract. The record in the criminal case buttresses the Claimant's testimony, as it reflects that the Respondent pled guilty to failure to perform on a contract in this matter. The Claimant presented compelling, uncontested evidence showing that the Respondent performed no work under the Contract. In addition, there are no statutory impediments to the Claim. Md. Code. Ann., Bus. Reg. §§8-405(c), (d), (f), and (g), 8-408(b)(1).

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

The Amount of Claimant's Actual Loss

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. In this case, the Respondent abandoned the Contract without doing any work. The Claimant originally indicated on his Home Improvement Claim Form that he valued the work performed by the Respondent at \$500.00. However, at the

hearing on the matter, the Claimant clarified that the only work the Respondent performed was to dig up some dirt around a pipe in the basement floor and move some concrete pieces to a corner. The Claimant explained that he simply “guessed” at the value of this work. However, it is clear from the photograph showing the current status of the work and a review of the Contract that this “work” actually has no value. Simply digging around a pipe and moving concrete does not represent a completion of any material term of the Contract. Because I find that no actual work was performed, I find that the evidence shows the Respondent abandoned the Contract. The attorney for the Fund agreed and indicated in her closing argument the evidence shows the Respondent abandoned the Contract without justification.

Accordingly, the following formula appropriately measures the Claimant’s actual loss: “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.” COMAR 09.08.03.03B(3)(a). Using this formula, the actual loss sustained by the Claimant was the full amount he paid to the Respondent, \$30,450.00.

However, the Business Regulation Article caps a claimant’s recovery at \$20,000.00 for acts or omissions of one contractor. Bus. Reg. § 8-405(e)(1); COMAR 09.08.03.03D(2)(a). In this case, the Claimant’s actual loss of \$30,450.00 exceeds \$20,000.00. Therefore, the Claimant’s recovery is limited to \$20,000.00. Bus. Reg. § 8-405(e)(1); COMAR 09.08.03.03D(2)(a).

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual loss of \$30,450.00 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)(a). I further conclude that the Claimant is entitled to recover \$20,000.00 from the Fund.

RECOMMENDED ORDER

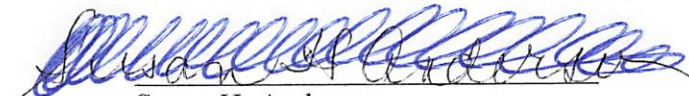
I **RECOMMEND** that the Maryland Home Improvement Commission:

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$20,000.00; 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;¹ and

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

June 7, 2019
Date Proposed Decision Issued



Susan H. Anderson
Administrative Law Judge

SHA/da
179750

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

PROPOSED ORDER

WHEREFORE, this 18th day of July, 2019, 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.

W. Bruce Quackenbush

***W. Bruce Quackenbush
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION