

IN THE MATTER OF THE CLAIM
OF HYACINTH MORGAN,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF ALCIDES BARBOSA,
T/A AB REMODELING &
CONSTRUCTION, INC.,
RESPONDENT

* BEFORE MICHAEL D. CARLIS,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: DLR-HIC-02-18-36603
* MHIC No.: 18 (75) 779

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PROPOSED DECISION

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STATEMENT OF THE CASE

On May 10, 2018, Hyacinth Morgan (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (Commission)¹ Guaranty Fund (Fund) for an actual loss of \$2,500.00 arising out of a home improvement contract² with Alcides Barbosa, trading as AB Remodeling & Construction, Inc. (Respondent). On July 30, 2018, the Commission ordered a

¹ The Commission is part of the Department of Labor, Licensing, and Regulation (Department). Md. Code Ann., Bus. Reg. § 2-108(a)(15) (2015).

² A "home improvement contract" includes a "written agreement between a contractor and an owner for the contractor to perform a home improvement." Md. Code Ann., Bus. Reg. § 8-101(h) (Supp. 2018). An "owner" includes a "homeowner." *Id.* § 8-101(k). A "home improvement" includes an "improvement . . . [or] . . . remodeling . . . of a . . . part of a building that is used . . . as a residence . . ." *Id.* § 8-101(g)(1)(i).

hearing to allow the Claimant an opportunity to prove her Claim. On November 21, 2018, the Commission transmitted the case to the Office of Administrative Hearings (OAH) to conduct a hearing.

On March 29, 2019, I held a hearing at the OAH in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimant represented herself. The Respondent represented himself. Eric B. London, Assistant Attorney General, and the Office of the Attorney General, represented the Fund.

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); Code of Maryland Regulations (COMAR) 09.01.03; COMAR 28.02.01.

ISSUES

The issues are:

- A. Whether the Claimant sustained an actual loss compensable by the Fund as a result of the Respondent's acts or omissions; and, if so,
- B. What is the amount of that loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits offered by the Claimant:

Claimant Ex. 1: Agreement between the Claimant and Respondent, dated May 1, 2017;

Claimant Ex. 2: Check, written by the Claimant to the Respondent, dated May 1, 2017;

Claimant Ex. 3: Receipt from the Montgomery County Department of Permitting Services (Permitting Services), with payment date on May 10, 2017, with attached Building Permit; and

Claimant Ex. 4: Electronic communication exchanges between the Claimant and Respondent, from March 2, 2016, through February 18, 2018.

The Respondent offered no exhibits.

I admitted the following exhibits offered by the Fund:

Fund Ex. 1: Notice of Hearing, dated January 3, 2019;

Fund Ex. 2: Notice of Hearing, dated February 19, 2019;³

Fund Ex. 3: Hearing Order, dated November 21, 2018;

Fund Ex. 4: The Respondent's licensing history;

Fund Ex. 5: Home Improvement Claim Form, dated May 6, 2018;

Fund Ex. 6: Letter from the Commission to the Respondent, dated May 21, 2018; and

Fund Ex. 7: Complaint Form, dated December 31, 2017, with an attachment.

Testimony

The Claimant and Respondent testified for themselves. The Fund offered no witnesses.

PROPOSED FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. At all relevant times, the Respondent was a licensed home improvement contractor.
2. On May 1, 2017, the Claimant and Respondent entered into a home improvement contract (Contract) for the renovation of the basement at 10213 Haywood Drive in Silver Spring (Property), including an awning over an exterior door and a large egress window in the basement bedroom.
3. Under the Contract, the Claimant agreed to make five payments of \$5,500.00 each to the Respondent during the course of the home improvement. The Respondent agreed to start work on May 3, 2017.

³ The notices were mailed to the Respondent at two different addresses.

4. On May 1, 2017, the Claimant paid the Respondent a deposit of \$2,500.00 to acquire permits and purchase materials.

5. On May 2, 2017, the Claimant signed an unidentified paper that Respondent requested be signed in order to obtain the permit. The Claimant requested a copy of what she had signed but was not given a copy.

6. On May 3, 2017, the Respondent requested that the Claimant meet him at the Property. Upon the Claimant's arrival, the Respondent introduced her to an individual, not identified by name at the hearing, he said was a friend and engineer. The Claimant inquired about the need for an engineer, but did not get a satisfactory response.

7. The Claimant told the Respondent she did not agree to have an engineer provide any services under the Contract.

8. The Claimant gave the Respondent a check for \$3,000.00 toward the contract price on May 3, 2017. On or about this time, the Respondent told the Claimant she would have to pay an additional \$600.00 for engineer work if she wanted the awning. The Claimant declined. The Claimant told the Respondent an engineer was not necessary for the home improvement and that she had made a drawing, which included the awning and egress window, he could use to obtain the permit.

9. The Respondent agreed to meet with the Claimant to review her drawing on May 4, 2017. When the Respondent failed to attend that meeting, the Claimant began to have second thoughts about the Respondent's reliability to perform under the Contract, and she notified him she had placed a hold on the \$3,000.00 check.

10. On May 8, 2017, when the Claimant telephoned the Respondent about the home improvement, which the Respondent had not yet begun, the Respondent was angry and upset because the Claimant had placed a hold on the \$3,000.00 she had given him on May 3rd. Nonetheless, they agreed to meet later that day.

11. The Respondent did not keep the appointment with the Claimant on May 8, 2017.

12. On May 10, 2017, the Claimant applied to Permitting Services for the permit for the home improvement. Permitting Services issued the permit to her on May 11, 2017. The permit covered the full renovation of the basement, including the "roof cover" and an egress window.

13. The Claimant and Respondent agreed to meet on May 12, 2017. It was raining that day, and when the Respondent arrived, he refused to meet with the Claimant inside her residence. The Respondent told the Claimant he would talk with her outside. Because it was raining, the Claimant refused to meet with the Respondent outside; they used text messaging to communicate. The Respondent told the Claimant he no longer could work for her because she stopped payment on the \$3,000.00 check.

14. During the meeting on May 12th, the Claimant requested that the Respondent return the \$2,500.00 she had given him on May 1st. The Respondent refused, telling her the time he had spent meeting with her and going to the permit office cost him \$600.00 and the engineer cost \$1,900.00.

15. As of May 12, 2017, and through the date of the hearing, the Respondent had not performed any work on the home improvement.

16. At the time of the hearing, the Respondent had not returned any part of the \$2,500.00 the Claimant paid him on May 1, 2017.

17. The Claimant is not the spouse or an immediate relative of the Respondent, is not an employee, officer, or partner of the Respondent, and is not an immediate relative of an employee, officer, or partner of the Respondent.

18. The Claimant does not own more than three residences.

DISCUSSION

Summary of the Parties' Cases

The Claimant

The Claimant testified to the facts that I have listed above. Most of her testimony was corroborated through the exhibits. Neither the Fund nor the Respondent offered any evidence to refute her testimony or to challenge her exhibits. The Claimant argued she was entitled to an award from the Fund of \$2,500.00 because that is the amount she paid to the Respondent, and the Respondent did no work under the Contract.

The Respondent

The Respondent testified his engineer said it would cost \$600.00 for a drawing that included the awning to submit to Permitting Services. The Respondent testified he did not charge the Claimant for that drawing because the Claimant said she did "not want to do it."

The Respondent also testified that "the county" always requires an engineer's drawing when a home improvement includes the installation of a large egress window. According to the Respondent, the engineer was at the Property for two or two and one-half hours on May 3, 2017, taking measurements. He testified the engineer made two drawings: one for the general basement renovation and the other for the egress window.

The Respondent testified he told the Claimant she needed to pay him only \$2,500.00 to get permits before he could start on the home improvement. He testified he went to the "county" on the same or the next day after the Claimant paid him \$2,500.00. He testified the county told

him he needed an engineer's drawing. The Respondent testified he told the Claimant he needed an engineer to get the permit, and that is why he called her on May 3rd to meet with him at the Property.

The Fund

The Fund argued the Claimant satisfied all the technical requirements for an award from the Fund. The Fund also argued the Claimant received nothing of value under the Contract from the Respondent: no engineer's drawings, no engineer's report, no permit, and no work performed. The Fund argued the Respondent abandoned the Contract, and the correct measure of actual loss is \$2,500.00 under COMAR 09.08.03.03B(3)(a).

Analysis

Legal context

The Claimant has the burden of proof 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)).

Actual loss "means 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 (2015). A homeowner may receive compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor." *Id.* § 8-405(a); *see also* COMAR 09.08.03.03B(2) (The "Fund . . . compensates claimants for actual losses . . . incurred as a result of misconduct by a licensed contractor.").

Was there an incomplete home improvement?

There is no dispute between the parties that no work on the home improvement had been done. However, the Respondent did engage in some activity in preparation for performance of the home improvement. The Contract contains the following provisions:

- Install new egress window in bedroom adjacent to bathroom. (to include cover and well) county approval required.
- New exterior door in basement on the Darrel [S]treet side of the property to include: retaining wall, rail, stairs, drain, awning, screen, lead way to gate, driveway and porch (county approval)

Claimant Ex. 1.

The Respondent testified he went to Permitting Services two times. He testified at the first visit he was told he needed a drawing from an engineer to obtain the necessary permit. He testified he and his engineer met with the Claimant at the Property on May 3, 2017. The Respondent also testified it took about one week to receive the engineer's drawings, and when he took them to Permitting Services, he was told a permit had already been issued to the Claimant.

Although I agree with the Respondent that his time meeting with the Claimant and going to Permitting Services were in preparation for work commencing on the home improvement, the Claimant received nothing of value from these meetings nor was any remodeling undertaken. The Respondent admitted he did not start work on the basement and never provided the Claimant with an engineer's drawing or report. In addition, he offered no evidence of any bill from or money paid to an engineer for any work related to the home improvement. Moreover, I cannot accept as truthful the Respondent's testimony that Permitting Services told him an engineer's drawing of the remodeling plan was required for a permit, because the Claimant obtained a permit without the services of an engineer. Grievant Ex. 3.

Accordingly, based on the above discussion, I do not find the Respondent's meetings with the Claimant and visits to Permitting Services or any work an engineer might have done for

the Respondent to have been work of any value to the Claimant or to have been work in the performance of the home improvement, as that term is defined at section 101(g) of the Business Regulation Article.

Did the Respondent Abandon the Contract?

According to the Claimant's testimony, the Respondent declared his clear intention no longer to perform under the Contract on May 12, 2017. The Respondent did not refute that testimony. At the time the Respondent withdrew from the Contract, he had not started the remodeling of the basement. Accordingly, I find the Respondent abandoned the home improvement without having done any remodeling of the basement.

What is the Claimant's Actual Loss?

COMAR 09.08.03.03B addresses the measure of awards from the Fund. Regulation .03B(3) provides as follows: "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." There was no dispute among the parties at the hearing that the Claimant paid the Respondent \$2,500.00. There was also no dispute among the parties that the Respondent did not return any of the \$2,500.00 to the Claimant. Accordingly, I find the Claimant incurred an actual loss of \$2,500.00.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$2,500.00 as a result of the Respondent's abandonment of the contract without doing any work of value. Md. Code Ann., Bus. Reg. §§ 8-401 and 8-405(a); COMAR 09.08.03.03B(3)(a).

RECOMMENDED ORDER

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

1. The Maryland Home Improvement Guaranty Fund award the Claimant \$2,500.00;
2. 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;⁴ and
3. The records and publications of the Maryland Home Improvement Commission reflect this decision.

Signature on File

June 25, 2019
Date Proposed Decision Issued

Michael D. Carlis
Administrative Law Judge

MDC/da
#180594

⁴ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii)(2); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 24th 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