

IN THE MATTER OF THE CLAIM	* BEFORE STEPHEN W. THIBOEAU,
OF LUCY EZEANOLUE,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	*
FOR THE ALLEGED ACTS OR	*
OMISSIONS OF JOSHUA PERSKY,	*
T/A PERSKY CUSTOM BUILDERS,	* OAH No.: LABOR-HIC-02-23-11477
LLC,	* MHIC No.: 22 (75) 278
RESPONDENT	*

* * * * *

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 November 1, 2021, Lucy Ezeanolue (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)¹ Guaranty Fund (Fund) for reimbursement of \$15,000.00 for actual losses allegedly suffered as a result of a home improvement contract with Joshua Persky, trading as Persky Custom Builders LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2022).² On April 10, 2023, the MHIC issued a

¹ The MHIC is under the jurisdiction of the Department of Labor (Department).
² Unless otherwise noted, all references to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

Hearing Order on the Claim. On April 20, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On July 19, 2023, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Mackenzie Read, Assistant Attorney General for the Department, represented the Fund. The Claimant was self-represented.

After waiting fifteen minutes for the Respondent or the Respondent's representative to appear, I proceeded with the hearing. Applicable law permits me to proceed with a hearing in a party's absence if that party fails to attend after receiving proper notice. Code of Maryland Regulations (COMAR) 28.02.01.23A. On May 19, 2023, the OAH provided a Notice of Hearing (Notice) to the Respondent by United States mail. COMAR 28.02.01.05C(1). The Notice stated that a hearing was scheduled for July 19, 2023, at 9:30 a.m., at the OAH. COMAR 09.08.03.03A(2). The Notice further advised the Respondent that failure to attend the hearing might result in "a decision against you."

The United States Postal Service did not return the Notice to the OAH. The Respondent did not notify the OAH of any change of mailing address. COMAR 28.02.01.03E. The Respondent made no request for postponement prior to the date of the hearing. COMAR 28.02.01.16. I determined that the Respondent received proper notice, and I proceeded to hear the captioned matter. COMAR 28.02.01.05A, C.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021); 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 offered by the Claimant:

- Clmt. Ex. 1 - Contract between the Claimant and the Respondent, June 3, 2021
- Clmt. Ex. 2 - Check for \$15,000.00 from the Claimant to the Respondent, June 3, 2021
- Clmt. Ex. 3 - MHIC Complaint Form filed by the Claimant, August 30, 2021
- Clmt. Ex. 4 - Five photos of the current condition of the Claimant's basement, taken by the Claimant, June 2023

I admitted the following exhibits offered by the Fund:

- Fund Ex. 1 - Notice of Hearing, May 19, 2023, and MHIC Hearing Order, April 10, 2023
- Fund Ex. 2 - MHIC Licensing History for the Respondent, printed June 22, 2023
- Fund Ex. 3 - Letter from the MHIC to the Respondent, November 19, 2021, with attached MHIC Claim Form

The Respondent did not offer any exhibits.

Testimony

The Claimant testified and did not present other witnesses.

The Respondent and 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 5417311.

2. On June 3, 2021, the Claimant and the Respondent entered into a contract to for a full renovation of the Claimant's basement at her property at 4 Stable Court, Owings Mills, Maryland (Contract).

3. The original agreed-upon Contract price was \$45,000.00.

4. On June 3, 2021, the Claimant paid the Respondent \$15,000.00 towards the Contract.

5. The Respondent was scheduled to begin work on the Contract at the beginning of July 2021.

6. The Respondent declared bankruptcy on July 7, 2021.

7. The Claimant attempted to contact the Respondent multiple times from July 7, 2021 to July 25, 2021 to determine whether any work would be performed on the Contract. The Claimant did not receive a response from the Respondent.

8. On or about July 25, 2021, the Claimant received a letter from the Respondent's bankruptcy attorney instructing her not to contact the Respondent regarding the Contract.

9. The Respondent never performed any work on the Contract.

DISCUSSION

The Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Bus. Reg. § 8-407(e)(1); State Gov't § 10-217; COMAR 09.08.03.03A(3). To prove a claim by a preponderance of the evidence means to show that it is "more likely so than not so" when all the evidence is considered. *Coleman v. Anne Arundel Cnty. Police Dep't*, 369 Md. 108, 125 n.16 (2002)

An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor." Bus. Reg. § 8-405(a) (Supp. 2022); *see also* COMAR 09.08.03.03B(2) ("The Fund may only compensate claimants for actual losses . . .

incurred as a result of misconduct by a licensed contractor.”). “[A]ctual 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.

In this case it is undisputed that the Respondent was a MHIC licensed contractor who contracted with the Claimant for a full basement renovation. The total amount of the Contract was \$45,000.00, of which the Claimant paid a total of \$15,000.00 toward the contract in June 2021. However, the Respondent never started any work on the Contract, and declared bankruptcy a month later. Indeed, the current condition of the Claimant’s basement is the same as it was at the time she signed the Contract, with absolutely no work being done on the Contract. Therefore, the Respondent performed unworkmanlike, inadequate, or incomplete home improvements. Specifically, the Respondent performed an incomplete home improvement for the Claimant, as the Respondent never did any work under the Contract as agreed. I thus find that the Claimant is eligible for compensation from the Fund.

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) (Supp. 2022); 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. 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). Here, because the Claimant paid \$15,000.00 to the Respondent on the Contract, and the Respondent abandoned the Contract without doing any work, the Claimant's actual loss is the \$15,000.00 she paid to the Respondent.

Effective July 1, 2022, a claimant's recovery is capped at \$30,000.00 for acts or omissions of one contractor, and a claimant may not recover more than the amount paid to the contractor against whom the claim is filed.³ Bus. Reg. § 8-405(e)(1), (5) (Supp. 2022); COMAR 09.08.03.03B(4). In this case, the Claimant's actual loss is equal to the amount paid to the Respondent and less than \$30,000.00. Therefore, the Claimant is entitled to recover her actual loss of \$15,000.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$15,000.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2022) ; COMAR 09.08.03.03B(3)(a). I further conclude that the Claimant is entitled to recover that amount from the Fund. Bus. Reg. § 8-405(e)(1), (5) (Supp. 2022); COMAR 09.08.03.03B(4).

RECOMMENDED ORDER

I RECOMMEND that the Maryland Home Improvement Commission:

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$15,000.00; 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

³ On or after July 1, 2022, the increased cap is applicable to any claim regardless of when the home improvement contract was executed, the claim was filed, or the hearing was held. *See Landsman v. MHIC*, 154 Md. App. 241, 255 (2002) (explaining that the right to compensation from the Fund is a "creature of statute," these rights are subject to change at the "whim of the legislature," and "[a]mendments to such rights are not bound by the usual presumption against retrospective application").

under this Order, plus annual interest of ten percent (10%) as set by the Maryland Home Improvement Commission;⁴ and

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

September 22, 2023
Date Decision Issued

Stephen W. Thibodeau.

Stephen W. Thibodeau
Administrative Law Judge

SWT/ds
#207397

⁴ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 22nd day of December, 2023, 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.

J Jean White

I Jean White

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***