

IN THE MATTER OF THE CLAIM	* BEFORE RICHARD O'CONNOR,
OF THY NGUYEN,	* ADMINISTRATIVE LAW JUDGE,
CLAIMANT	* THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	*
FOR THE ALLEGED ACTS OR	*
OMISSIONS OF PAUL ERVIN,	*
T/A ERVIN'S LANDSCAPING,	* OAH No.: LABOR-HIC-02-23-14540
RESPONDENT	* MHIC No.: 23 (75) 409

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On January 19, 2023, Thy Nguyen (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC)¹ Guaranty Fund (Fund) for reimbursement of \$35,000.00 for actual losses allegedly suffered as a result of a home improvement contract with Paul Ervin, trading as Ervin Landscaping (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2023).² On May 10, 2023, the MHIC issued a Hearing Order on the claim and on May 22, 2023, forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

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

On August 21, 2023, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Jonathan Phillips, Assistant Attorney General, represented the Fund. The Claimant participated without representation. The Respondent did not appear for the hearing.

After waiting eighteen minutes for the Respondent or a 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 July 28, 2023, the OAH provided a Notice of Hearing (Notice) to the Respondent by United States mail (both certified and first class) to the Respondent's business address on record with the MHIC.³ Bus. Reg. § 8-312(d); COMAR 28.02.01.05C(1). The Notice stated that a hearing was scheduled for August 21, 2023, at 9:30 a.m., at the OAH in Hunt Valley, Maryland. 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 did not request a 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 above-captioned matter. Bus. Reg. § 8-312(h); 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 & Supp. 2023); COMAR 09.01.03; COMAR 28.02.01.

³ The OAH sent notices to the Respondent at an incorrect address on June 29, 2023. Those notices were not returned undelivered, and the OAH received a returned certified mail "green card" signed by Kristen Ervin.

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 into evidence the following exhibits offered by the Claimant:

- Clt. Ex. 1. Payment record and copies of checks, November 29, 2021, to March 30, 2022.
- Clt. Ex. 2. Contract with the Respondent, November 29, 2021.
- Clt. Ex. 3. Barter Saves ledgers, November 2021 and March 2022.
- Clt. Ex. 4. Estimate from Blue Collar Scholars, LLC, September 12, 2022.
- Clt. Ex. 5. Contract with MGS Construction LLC, June 23, 2023.
- Clt. Ex. 6. Emails from MGS Construction LLC to the Claimant, August 20 and 21, 2023.
- Clt. Ex. 7. Transcripts of text messages between the Claimant and the Respondent, November 25, 2021, to August 31, 2022.
- Clt. Ex. 8. Fourteen photographs, taken in December 2021 and August 2023.
- Clt. Ex. 9. Proposal from Montgomery Decks, June 23, 2023.

I admitted into evidence the following exhibits offered by the Fund:

- Fund Ex. 1. Notice of Hearing, June 29, 2023.
- Fund Ex. 2. Hearing Order, May 10, 2023.
- Fund Ex. 3. Home Improvement Claim Form, received January 19, 2023.
- Fund Ex. 4. The Respondent's licensing history with the MHIC, produced October 5, 2022.

Testimony

Only the Claimant testified.

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 01-11779.
2. On June 23, 2021, the Claimant and the Respondent entered into a contract whereby the Respondent agreed to perform the following home improvements at the Claimant's residence:
 - Build a block and stone retaining wall about seventy-five feet long and two and one-half feet high along the bottom of the backyard slope, including ten columns and two sets of steps.
 - Install drains behind all the walls and a drain along the lower sunken patio wall steps.
 - Fill in behind part of the wall with topsoil and sod.
 - Build a patio of paver stones, to include a fireplace.
 - Build a sixteen-by-twenty-four-foot Trex deck on the back of the house.
 - Build a twelve-by-eight-foot Trex deck adjacent to the larger deck, with steps leading to the patio.
 - Install an under-deck ceiling with a gutter and downspout system.
 - Install counters on the decks.
 - Build a wall at one end of a deck and cover it with stone veneer.
3. The original contract price was \$120,000.00.
4. Agreed-upon additions to the scope of the work increased the contract price to \$127,889.00. The additional \$7,889.00 was for expanding the patio and purchasing more materials for the wall and patio.
5. The contract did not specify which party was responsible for obtaining the necessary permits.
6. Of the original \$120,000.00 contract price, \$70,000.00 was to be paid in cash and \$50,000.00 was to be paid by the Claimant's deposits into the Respondent's Barter Saves account.

7. Of the additional \$7,889.00, \$5,889.00 was to be paid in cash and \$2,000 to the Respondent's Barter Saves account.
8. Both the Claimant and the Respondent have Barter Saves accounts. The Claimant barter dental services and the Respondent barter landscaping services.
9. Barter Saves is an enterprise by which members can trade or barter services to each other. The services are given a cash value and can be paid for by transfers from the recipient's Barter Saves account. Accounts are replenished by cash deposits or by transfers from another account.
10. Transfers through the Barter Saves system are the equivalent of cash.
11. The Claimant paid the Respondent \$52,555.00 in cash and \$35,334.00 in barter under the contract, a total of \$87,889.00.
12. The Respondent started work on the retaining wall and patio shortly after the contract was executed.
13. The Respondent built the retaining wall by excavating a shallow trench, filling it with gravel, placing blocks⁴ on the gravel, and installing stone veneer over the blocks.
14. The Respondent built the patio by installing paver blocks over gravel and sand.
15. The Respondent did not build a fireplace as called for in the contract.
16. The Respondent installed inadequate drainage for the retaining wall.
17. The Respondent filled the area behind the wall with topsoil, grass seed, and sod.
18. The Respondent finished the retaining wall and patio, except for the fireplace, by June 2022.
19. By mid-July 2022, neither the Claimant nor the Respondent had been able to submit an application to Montgomery County for a permit to build the decks. The Claimant

⁴ The blocks are often called cinderblocks.

believed that a licensed home improvement contractor needed to prepare and file the application, and the Respondent believed that an architect or engineer would have to prepare the plans, which would be the Claimant's responsibility.

20. The parties mutually agreed to terminate the project after completion of the patio (i.e., installing the fireplace) without proceeding with construction of the decks.

21. At that point, the Claimant had paid the Respondent \$87,889.00 in cash and barter. He did not make any additional payments.

22. The parties disagreed about the value of the work the Respondent had completed.

23. The Respondent did no more work after June 2022 and never installed the fireplace.

24. The parties ceased communication in August 2022.

25. Shortly thereafter, the retaining wall began tilting forward because of inadequate drainage and improper construction.

26. As the wall tilted, the soil behind it moved forward, dislodging the patio paving stones.

27. On September 12, 2022, the Claimant received an estimate of \$35,000.00 from Blue Collar Scholar, LLC, to rebuild the wall and patio.

28. On July 25, 2023, MGS Construction LLC (MGS) proposed to rebuild the wall and patio for \$31,517.67.

29. MGS is a subsidiary of Montgomery Decks, an MHIC-licensed home improvement contractor.

30. The Claimant accepted MGS's proposal and paid that company \$31,517.67 to replace the retaining wall and patio in 2023.

31. MGS built a new retaining wall by digging a two-foot-deep trench and pouring a concrete foundation, putting blocks on the foundation and filling the blocks with concrete and reinforcing bars (rebar), then installing stone veneer.

32. MGS's construction of the wall included adequate drainage.

33. The Claimant's contract with MGS did not include a fireplace or any work that was outside the scope of the contract with the Respondent.

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); Md. Code Ann., 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).

A homeowner 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. 2023); *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. 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. 2023); COMAR 09.08.03.03B(1). For the following reasons, I find that the Claimant has proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant and performed work under the contract. There are no statutory impediments to the Claimant's recovery. The claim was timely filed, there is no pending court

claim for the same loss, and the Claimant did not recover the alleged losses from any other source. Bus. Reg §§ 8-405(g), 8-408(b)(1) (2015 & Supp. 2023). The Claimant resides in the home that is the subject of the claim. *Id.* § 8-405(f)(2) (Supp. 2023). The parties did not agree to submit their disputes to arbitration. *Id.* §§ 8-405(c), 8-408(b)(3) (2015 & Supp. 2023). The Claimant is not a relative, employee, officer, or partner of the Respondent, and is not related to any employee, officer, or partner of the Respondent. *Id.* § 8-405(f)(1) (Supp. 2023).

The Claimant did not unreasonably reject good faith efforts by the Respondent to resolve the claim. *Id.* § 8-405(d) (Supp. 2023). By the time the inadequacy of the construction of the wall and patio became obvious, the Claimant and Respondent had terminated the contract and ceased communication. The Respondent had built a wall that failed almost immediately; the wall and patio required replacement; and the Claimant correctly believed that the Respondent was not the proper contractor to undertake repairs.

The Respondent performed unworkmanlike, inadequate, and incomplete home improvements. The Respondent's construction methods for the wall were woefully inadequate. The Claimant did not present expert testimony on the proper method of building a retaining wall, but did offer MGS's note detailing the problems with the Respondent's installation (Cit. Ex. 6). A major defect was lack of a proper foundation. MGS found that the Respondent had excavated a trench only about two inches deep, then installed "a bit of gravel" to support the blocks. The Respondent used "aftermarket silicone" as adhesive for the blocks and included no weep holes in the wall to alleviate hydrostatic pressure. Additionally, the Respondent's drainage system used the wrong materials and was improperly placed, causing water to flow toward the retaining wall.

The photographs in Claimant's Exhibit 8 clearly show that the wall was leaning over, that the patio pavers were migrating toward the wall as the soil moved, and that all the Respondent's

work required replacement. One photograph from August 2023 shows the "bit of gravel" and dirt that the Respondent had used for the foundation of the wall.

I thus find that the Claimant is eligible for compensation from the Fund. The claim in this case does not encompass any amount for the decks or for the Respondent's failure to complete the fireplace. Rather, the claim is solely for the funds the Claimant expended to have MGS replace the Respondent's faulty work.⁵

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 MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work.

The Respondent performed some work under the contract, and the Claimant has retained another contractor to remedy that work. Accordingly, the following formula appropriately measures the Claimant's actual loss:

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 measurement accordingly.

COMAR 09.08.03.03B(3)(c).

As mentioned in the Findings of Fact, the Claimant and Respondent disagreed about what, exactly, the Claimant had paid for with his \$87,889.00. In text messages, the Claimant

⁵ The Claimant claimed \$35,000.00 on the Home Improvement Claim Form because at the time he prepared it, Blue Collar Scholars' estimate of \$35,000.00 was the only proposal the Claimant had received.

expressed the belief that the patio and wall accounted for one-half of the contract price, and the decks the other half. He felt that he was due a refund of \$20,000.00.

In response, the Respondent pointed out that the contract called for an initial deposit of \$40,000.00, a second \$40,000.00 payment "after hardscape," and the final \$40,000.00 "after deck frame." Therefore, according to the Respondent, the "hardscape" – i.e., the wall and patio – constituted two-thirds of the original contract price.⁶ Additionally, the \$7,889.00 added to the contract price was for materials and labor on the wall and patio.

This issue was not resolved before the parties ended the contract. The Claimant made no effort to seek a refund, but he did not explicitly agree with the Respondent's argument. Nevertheless, the Respondent's position on this point is supported by the contract. I find that the contract price for the retaining wall, patio, fill dirt, and related work was \$87,889.00, and that the Claimant paid that amount to the Respondent for that work. Accordingly, the calculations under COMAR 09.08.03.03B(3)(c) are as follows:

\$87,889.00 paid to the Respondent; plus
+31,517.67 paid to MGS to repair the Respondent's poor work; equals
\$119,406.67 less
-87,889.00 the original contract price (for the wall and patio); equals
\$31,517.67 actual loss.

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.⁷ Bus. Reg. § 8-405(e)(1), (5) (Supp. 2023); COMAR 09.08.03.03B(4). In this case, the Claimant's actual loss is equal to the amount paid to the

⁶ Of course, the price of the hardscape included a fireplace that was never delivered. However, the Claimant is not seeking recovery for this breach of the contract, so it is not an issue for calculating an award.

⁷ 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).

Respondent but is more than \$30,000.00. Therefore, the Claimant's recovery is limited to \$30,000.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$30,000.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2023); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is entitled to recover \$30,000.00 from the Fund.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$30,000.00; 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;⁸ and

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

November 8, 2023
Date Decision Issued

ROC/ds
#208136

Richard O'Connor

Richard O'Connor
Administrative Law Judge

⁸ 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***