

IN THE MATTER OF THE CLAIM
OF ELIZABETH S. ORCHARD,
CLAIMANT,
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF
EDWARD MORENO, T/A
BUILDERS & MORE, INC¹.
RESPONDENT

* BEFORE JOHN T. HENDERSON, JR.
* ADMINISTRATIVE LAW JUDGE
* THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH NO.: DLR-HIC-02-13-17660
* MHIC NO.: 11 (90) 977
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RECOMMENDED DECISION

STATEMENT OF THE CASE
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RECOMMENDED ORDER

STATEMENT OF THE CASE

On January 15, 2012, Elizabeth S. Orchard (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$49,239.16 for actual losses allegedly suffered as a result of a home improvement contract with Edward Moreno, t/a Builders & More, Inc., (Respondent).²

¹ The company's corporate status was forfeited by the State of Maryland on October 7, 2002.

² Edward Moreno is deceased. He died on June 1, 2014. I will interchangeably refer to the decedent as the Respondent or the Estate.

I held a hearing on September 15, 2014 at the Office of Administrative Hearings (OAH), 10400 Connecticut Avenue, Suite 208, Kensington, Maryland 20895.³ Jessica Berman Kaufman, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), represented the Fund. The Claimant appeared and represented herself. No one appeared to represent the Respondent's estate or company.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the DLLR, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2014), Code of Maryland Regulations (COMAR) 09.01.03; 09.08.02; and 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, how much is the Claimant entitled to receive from the Fund?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted exhibits on behalf of the Claimant as follows:

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| CL. 1. | Business card of Respondent |
| CL. 3 ⁴ | Job Proposal from the Respondent for work to be completed by August 30, 2010 |
| CL. 4 | Construction plans/blueprints |

³ A hearing was originally scheduled by OAH for October 21, 2013. On October 16, 2013, the Respondent was granted a postponement by the OAH Clerk due to his recovering in a rehabilitation hospital from surgery since October 5, 2013. A second hearing was scheduled for April 24, 2014. Again on the Respondent's request, that hearing was postponed by the OAH clerk on April 10, 2014, due to the Respondent recovering from a below the knee amputation. A third hearing was scheduled for June 30, 2014. The OAH clerk allowed the Respondent to participate and provide testimony at the hearing via telephone since he remained at the rehabilitation hospital. On June 30, 2014, I was advised prior to convening the hearing that the Respondent had died. I postponed the hearing to allow his son, Robert Moreno (the Son), who I spoke with over the telephone, an opportunity to secure a representative for his father's estate and/or the company to defend the matter. The Son provided a mailing address for notice to the Estate of his father. The hearing was re-scheduled finally to September 15, 2014.

⁴ The Claimant did not offer her exhibit two into evidence.

- CL. 5 Cashed check paid to the order of the Respondent from the Claimant in the sum of \$10,000.00 dated July 31, 2010
- CL. 6 Contract between the Appellant and the Respondent dated August 6, 2010
- CL. 7 Letter from the Respondent to the Appellant dated August 19, 2010
- CL. 8 Invoice from the Respondent listing a balance due of \$3,000.00, undated
- CL. 9 Cashed check payable to the order of the Respondent from the Claimant dated August 12, 1010
- CL. 10 Cashed check payable to the order of Expert House Movers, Inc., from the Claimant in the sum of \$3,500.00 dated August 12, 2010
- CL. 11 Confirmation of contract between parties dated August 18, 2010
- CL. 12 Job proposal from the Respondent dated August 19, 2010
- CL. 13 Email from Doug Williams to the Respondent dated November 18, 2010
- CL. 14 Contract between the Claimant and the Respondent dated August 20, 2010
- CL. 15 Cashed check from the Claimant payable to the order of the Respondent in the sum of \$2,000.00 dated August 20, 2010
- CL. 16 Check from the Claimant payable to the order of the Respondent in the sum of \$2,000.00 dated August 20, 2010
- CL. 17 Voided contract between the Claimant and the Respondent dated August 27, 2010
- CL. 18 Montgomery County Government Development Standards for R-60 Zone revised November 30, 2011
- CL. 19 Letter from the Respondent to the Claimant dated October 11, 2010
- CL. 20 Letter from the Claimant to the Respondent dated October 17, 2010
- CL. 21 Claimant's summary of claim against the Respondent
- CL. 22 Estimate from Joya Construction and Plumbing dated October 28, 2010
- CL. 23 Not admitted
- CL. 24 Invoice from Expert House Movers of Maryland, Inc., dated June 22, 2011; Contract dated October 14, 2010; cashed check from the Claimant payable to the order of Expert House Movers in the sum of \$1,600.00 dated October 25, 2010
- CL. 25 Department of Permitting Services Inspection Disapproval dated November 2, 2010
- CL. 26 Photographs a-g

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

- Fund Ex. 1 OAH Notice of Hearing dated July 2, 2014; OAH memo dated July 28, 2014 reporting undeliverable mail to the Estate; OAH Notice of Hearing dated April 16, 2014; OAH Notice of Hearing dated October 22, 2013; OAH memo dated November 19, 2013 reporting undeliverable mail to the Respondent; OAH Notice of Hearing dated July 2, 2013; OAH Memo dated July 23, 2013 reporting undeliverable mail to the Respondent; HIC Hearing Order dated May 3, 2013
- Fund Ex. 2 DLLR transmittal to OAH regarding the Appeal; HIC Hearing Order dated May 3, 2013; HIC claim form signed by the Claimant dated January 15, 2012

- Fund Ex. 3 DLLR ID Registration regarding the Respondent
- Fund Ex. 4 Affidavit of Thomas Marr, HIC Investigator dated September 23, 2013
- Fund Ex. 5 Letter from DLLR to the Respondent regarding the complaint dated February 9, 2012; complaint dated January 15, 2012

Testimony

The Claimant testified on her own behalf. Her daughter, Paulina Orchard, testified as her witness.

There was no testimony presented on behalf of the Fund.

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 contractor's license number 01-50741. There was no corporate registration number.

2. On or about July 31, 2010, the Claimant and Respondent signed a contract which provided that the Respondent would do home improvement work on Claimant's home located at 6620 Popular Avenue, Takoma Park, Maryland. Specifically, the Claimant hired the Respondent to construct a basement apartment within her home. The contract required the Respondent to do home improvement work as follow:

- 1. Framing
 - (a) Complete per plans
 - (b) Level rear, install beam and frame lower exterior walls
 - (c) Remove front porch; reframe deck level; install 2x2 pickets; 4" O.C. with top and bottom rails
- 2. Strip exterior siding, wrap house with Tyvek. Install siding (color TBD)
- 3. Insulation
 - (a) Install per code, estimate
- 4. Exterior; clear weeds; trim, remove front tree; clear construction debris
- 5. Install windows (provided by owner)
- 6. Drywall per code; Durarock in bath area

7. Paint; caulk, prime; finish paint
8. Trim and door TBD estimate
9. Exterior paint white semi-gloss caulk and seal as needed (trim/doors) to be determined
10. Tile tub area and bath floor; Labor only; tile (provided by owner)
11. (a) Install kitchen cabinet labor
(b) Install kitchen floor labor

3. The total contract price was \$19,900.00. The work was to be completed by August 30, 2010. On July 31, 2010, the claimant paid the Respondent \$10,000.00 as a deposit on the contract. The Respondent cashed the check. The contract also provided for the following:

RIGHT TO STOP WORK: Contractor shall have the right to stop work if payments are not made when due under this Contract, and may keep the job idle until all payments have been received or, as a result of Owner(s) default. Contractor may pursue Contractor's remedies under the Default provision(s) of this Contract.

4. On August 3, 2010, the Respondent told the Claimant that the construction of the basement apartment required an eight-foot ceiling to comply with county code regulations; and that it was necessary to raise the home from its foundation to construct the additional ceiling height. The Claimant and the Respondent entered into a verbal agreement to raise the house at an additional cost of \$10,000.00

5. On August 6, 2010, the Respondent entered into a subcontract with Expert House Movers of Maryland, Inc. (EHM) to raise the home from its foundation in order to construct the eight-foot ceiling in the basement. The subcontract price was \$8,500.00. The Claimant entered into a contract with the Respondent to be responsible for paying the \$8,500.00 to raise the home from its foundation.

6. On August 12, 2010, the Claimant paid the Respondent two checks (numbered 2924 and 2925) each in the sum of \$3,500.00 to be applied toward the August 6, 2010 subcontract to raise the house. The Respondent cashed both checks.

7. On August 14, 2010, the Claimant and Respondent met at the home to discuss the need to have additional foundation block work and the construction of a loft.

8. On August 18, 2010, the Claimant and the Respondent entered into an addendum contract which provided that the Claimant's house be move-in ready of as August 30, 2010. It required work to be completed and completely functional.

9. On August 19, 2010, the Respondent wrote the Claimant a letter to advise, among other things, that the project was fourteen days delayed. He also provided the Claimant with an invoice reporting a balance due to the Respondent of \$3,000.00.

10. The Claimant and the Respondent met on August 19, 2010 and entered into a second addendum contract which required the construction of a loft on the second floor of the Claimant's home. The cost to construct the loft was computed as follows:

Framing	\$3,000.00
Installation	<u>\$ 575.00</u>
Total	\$3,575.00

11. On August 20, 2010, the Claimant and Respondent entered into a third contract addendum to construct a new block foundation at the home at a cost of \$8,500.00. The Claimant paid the Respondent a check (no. 2930) in the sum of \$2,000.00 as a deposit to be applied toward the building of the new foundation. The Respondent cashed the check.

12. The Respondent did some work on the property such as installing approximately ten out of fourteen windows, cutting out some lighting fixtures, gutting the basement, digging footings, cutting tree branches, pouring cement and inserting rebar to construct the footings.

13. On August 27, 2010, the Claimant and the Respondent had a meeting to discuss problems with building permits. The meeting resulted in the Respondent unilaterally terminating

all contracts with the Claimant. He ceased all work on the home. There were no payments due by the Claimant to the Respondent under the contracts as of that date.

14. On August 28, 2010, the Respondent returned to the Claimant's home. He removed all of his tools from the premises and abandoned the work site.

15. On October 11, 2010, the Respondent wrote a letter alleging the Claimant refused to speak with her. He also requested that the Claimant sign a Montgomery County Application for Residential Building Permit and return it to the Respondent.

16. On October 17, 2010, the Claimant wrote the Respondent a letter, mailed by USPS Priority Mail, stating, among other things, the following:

I have allowed four weeks since your termination of all contracts on August 27, 2010, for you to provide written notice of your intent to complete the work. I have not received any notice from you during this allotted time. Therefore, I have gone forward with other contractors to complete the work.

You shall no longer be involved in any matters concerning the above property, including any dealings with Montgomery County regarding applications for permits.

....

17. The United States Postal Service (USPS) reported the letter delivered on October 19, 2010, to the Respondent's address of record.

18. On November 18, 2010, the Claimant received a report from Doug Williams, (Williams) an architect with the Mangan Group. Williams advised that the loft, to be constructed according to the plans of the Respondent, was not possible. It would not meet the definition of a habitable space according to the building code, due to the limitations of the existing space. The Claimant decided not to pursue the loft construction. The Claimant did not pay the Respondent any money toward the loft construction.

19. The total amount of all contracts the Claimant had with the Respondent, not including the cost of constructing a loft, was \$38,400.00.⁵

20. The Claimant paid the following amounts to and/or on behalf of the Respondent:

Deposit on July 31, 2010	\$10,000.00
August 6, 2010 subcontract to raise house	\$ 7,000.00
Addendum Contract to Build foundation	<u>\$ 2,000.00</u>
Total Paid	\$19,000.00

21. The Claimant paid to EHM \$3,414.00 to lower the house back on its foundation.

DISCUSSION

Respondent's Failure to Appear

Section 8-312(a) of the Business Regulation Article provides that the Commission shall give the person against whom the action is contemplated an opportunity for a hearing. Md. Code Ann., Bus. Reg. § 8-312(a) (Supp. 2014). The statutory provisions governing disciplinary proceedings against MHIC licensees state that notice shall be sent by certified mail "at least 10 days before the hearing by certified mail to the business address of the licensee on record with the Commission." *Id.* § 8-312(d). The procedures for notice applicable to disciplinary proceedings also apply to claims against the Fund. *Id.* at § 8-407(a) (Supp. 2014).

On July 2, 2014, OAH sent a Notice by certified and first class mail to the Estate of Edward Moreno, at the address provided by his son, c/o Robert Moreno, P.O. Box 204, Damascus, Maryland 20872. On July 28, 2014, the OAH received from the USPS the certified mailing receipt (green card) and the Notice of Hearing as unclaimed.

⁵ The loft was no longer a construction project. Money was not paid toward its construction. It will not be included in the total contract cost.

Under section 8-312 of the Business Regulation article, “[i]f, after due notice, the person against whom the action is contemplated does not appear . . . the Commission may hear and determine the matter.” Md. Code Ann., Bus. Reg. § 8-312(h) (Supp. 2014). Based upon the record before me, I am satisfied that OAH properly notified the Respondent’s estate of the date, time, and location of the scheduled September 15, 2014 hearing, as well as the issues to be presented. Accordingly, when no one appeared to represent the Respondent, his company and/or his estate after fifteen minutes of the scheduled hearing start time, I directed that the hearing proceed in the Respondent’s absence. Md. Code Ann., Bus. Reg. § 8-312(h) (Supp. 2014); COMAR 09.01.02.07E.

Amending the Claim

The Claimant’s Home Improvement Claim Form (Claim), sought \$49,239.16. At the hearing, she amended her claim to \$46,320.00. COMAR 09.08.03.02 regulates amending claims before the commission, as follows:

- C. Amending of Claims. Once a verified claim has been filed with the Commission, the claimant may not amend the claim unless the claimant can establish to the satisfaction of the Commission that either the:
 - (1) Claimant did not know and could not have reasonably ascertained the facts on which the proposed amendment is based at the time the claim was filed; or
 - (2) Claimant’s proposed amendment would not prejudice the contractor whose conduct gave rise to the claim.

COMAR 09.08.03.02. The amendment amounts to a difference of \$2,919.16 less than the original claim. I find that the claim as amended does not prejudice the Respondent.

Legal Framework

In 1985, the Maryland General Assembly enacted legislation that first established the Fund. By this means, the legislature sought to create a readily available pool of money from

which homeowners could seek relief for actual losses sustained because of an unworkmanlike, inadequate, or incomplete home improvement performed by a licensed home improvement contractor. Md. Code Ann., Bus. Reg. §§ 8-401 to 8-411 (2010 & Supp. 2014).⁶ Under this statutory scheme, licensed contractors are assessed fees which subsidize the Fund. Homeowners who sustain losses by the actions of licensed contractors may seek reimbursement for their “actual losses” from this pool of money, subject to a maximum of the lesser of \$20,000.00 or the amount paid by or on behalf of the claimant to the contractor on the claim of any one aggrieved homeowner because of the work of any one contractor. Md. Code Ann., Bus. Reg. § 8-405(e)(1) and (5) (Supp. 2014). A homeowner is authorized to recover from the Fund when he or she sustains an actual loss that results from an act or omission by a licensed contractor. Md. Code Ann., Bus. Reg. § 8-405(a) (Supp. 2014). When the Fund pays money to a homeowner as a result of an actual loss caused by a licensed contractor, the responsible contractor is obligated to reimburse the Fund. Md. Code Ann., Bus. Reg. § 8-410. The MHIC may suspend the license of any such contractor until he or she reimburses the Fund in full with annual interest as set by law. Md. Code Ann., Bus. Reg. § 8-411.

Recovery against the Fund is based on “actual loss” as defined by statute and regulation. “[A]ctual 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. “By employing the word ‘means,’ as opposed to ‘includes,’ the legislature intended to limit the scope of ‘actual loss’ to the items listed in section 8-401.” *Brzowski v. Md. Home Improvement Comm’n*, 114 Md. App. 615, 629 (1997). “The Fund may only compensate [claimants] for actual losses incurred as a result of misconduct by a licensed contractor.”

⁶ Unless otherwise noted, all references to the Annotated Code of Maryland, Business Regulation Article are to the version published in the 2010 Replacement Volume.

COMAR 09.08.03.03B(2). "At a hearing on a claim, the claimant has the burden of proof." Md. Code Ann., Bus. Reg. § 8-407(e)(1).

The Merits of the Case

The Respondent failed to perform the home improvement contracted for on July 31, 2010 and as contracted within the several addendums. However, the Claimant has not met her burden of proof that she has an actual loss. For the reasons stated below, I find that she is not eligible for compensation.

First, there is no dispute that the Respondent held a valid contractor's license in 2010 when he entered into the Contract with the Claimant. There is also no dispute that the Claimant is an owner and that there is no procedural impediment barring her from recovering from the Fund. Md. Code Ann., Bus. Reg. § 8-405(f) (Supp. 2012).

Second, the Respondent did perform an unworkmanlike, inadequate, and incomplete home improvement. He accepted payments from the Claimant totaling \$19,000.00 for the incomplete home improvement.

At the hearing, the Claimant testified about the many questionable business practices she encountered in dealing with the Respondent. The most egregious was the failure of the Respondent to get the necessary building permits to complete construction of the loft and raising the ceiling in the basement to construct the apartment. In fact, the Claimant discovered that it was not possible to secure a permit to complete the loft due to particular problems with raising the roof to the appropriate height. She also discovered that she was unable to receive a building permit to construct a new foundation which would raise the ceiling height of her basement, due to zoning prohibition. When she confronted the Respondent on August 27, 2010 about her

discoveries concerning the lack of building permits for the project, the Respondent became angry and unilaterally terminated all contracts with the Claimant on that day.

The Claimant called her daughter as her witness who corroborated the permitting information and the Respondent's reaction to the questions about securing the building permits. It is clear the Claimant did not have a good working relationship with the Respondent.

The Respondent's letter to the Claimant dated October 11, 2010 was an attempt on his part to get the Claimant to sign a permit application. He wrote that it never was his intent not to finish the project. He also seemed to be placing the blame of permitting failure on the shoulders of the Claimant. His efforts are disingenuous since the evidence shows that he unilaterally terminated the contract with the Claimant on August 27, 2010 and retrieved his tools and materials the next day. He also did not have a contractual justification to terminate the contracts since the Claimant did not owe money to him on August 27, 2010.

A claim may be denied if the Claimant unreasonably rejects good faith efforts by the Respondent to resolve the claim. Md. Code Ann., Bus. Reg. § 8-405(d) (Supp. 2014). That is not the case here. The Claimant made every reasonable effort to have a successful home improvement, to include determining if the proper building permits were acquired. The Respondent failed to secure them. He unilaterally terminated all contracts and walked off the job without contractual right. I find there were no good faith efforts by the Respondent to resolve this claim.

The preponderance of the evidence shows the Respondent did not complete the home improvement work for which he was contracted. The Claimant paid the Respondent \$19,000.00 toward the total contract price of \$38,400.00. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest.

COMAR 09.08.03.03B(1). MHIC's regulations offer three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3) sets forth the various formulas for determining an "actual loss" as follows:

(3) Unless it determines that a particular claim requires a unique measurement, the Commission shall measure actual loss as follows:

(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 measurement accordingly.

COMAR 09.08.03.03B(3)(a) does not apply to the facts as found, as the Respondent did some work on the property such as installing approximately ten out of fourteen windows, cutting out some lighting fixtures, gutting the basement, digging footings, cutting tree branches, pouring cement and inserting rebar to construct the footings. The photographs submitted into evidence clearly show the house in stages of major construction. In addition, COMAR 09.08.03.03B(3)(b) does not apply to the facts as found since the Claimant presented no evidence showing the value of the work completed by the Respondent. There is no dollar amount submitted into evidence that allows me to compute an actual loss under 3(b). As the first two possibilities are foreclosed, I will evaluate the instant claim of an "actual loss" in accordance with COMAR

09.08.03.03B(3)(c). The Claimant testified and submitted evidence that she paid to EHM \$3,414.00 to lower the house back on its foundation in 2011.⁷ In order to determine the Claimant's actual loss from the evidence in this record, the following calculations apply:

\$ 19,000.00	Payments made to the Respondent by Claimant
<u>\$ 3,414.00</u>	Cost to repair, replace, or complete the work paid to EHM
\$ 22,414.00	(Expenditure Subtotal)
<u><\$ 38,400.00></u>	Less the original contract price
\$ 00.00	Actual Loss

The Claimant does not have an "actual loss." Her total expenditure of \$22,414.00 is less than the original contract price of \$38,400.00. The Respondent performed some of the work but the Claimant did not submit any proof that the value of the work actually performed was less than what she paid the Respondent to do it. It is clear the Claimant received some work from the Respondent for which she paid \$19,000.00; and work from EHM for which she paid \$3,414.00.

The Fund recommended that the claim be denied due to the failure of the Claimant to meet the burden of proof of an actual loss, for the reasons I state herein. I find that the Claimant has not sustained her burden of demonstrating an actual loss. Having found no eligibility for compensation, this matter is concluded.

⁷ The Claimant contracted with an unlicensed contractor named Joya Construction and Plumbing (Joya) after the Respondent abandoned the job. According to the Claimant, she paid Joya \$8,000.00. However, Joya also abandoned the job and did not complete the contracted work. The Claimant could not produce documents to corroborate her claims of payment to Joya. The Fund has no record that Joya is a licensed contractor in the State of Maryland. The Fund is not authorized to pay claims relating to incomplete or unworkmanlike performance of an unlicensed contractor. The Joya claim is not considered.

CONCLUSIONS OF LAW

I conclude that the Claimant has not sustained an actual loss as a result of any acts and omissions of the Respondent. Md. Code Ann., Bus. Reg. § 8-401 (2010); Md. Code Ann., Bus. Reg. § 8-405(a) (Supp. 2014); COMAR 09.08.03.03B(3)(c).

RECOMMENDED ORDER

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

ORDER that the Claimant's Claim of an actual loss be **DENIED**.

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

Signature on File

December 15, 2014
Date Decision Issued

John T. Henderson, Jr.
Administrative Law Judge

D.J.
J.

JTH/cj
#153452