IN THE MATTER OF THE	*	**BEFORE ROBERT F. BARRY,**
CLAIM OF	*	**AN ADMINISTRATIVE LAW JUDGE**
BRIAN AND EVE HEHN,	*	**OF THE MARYLAND OFFICE**
AGAINST THE HOME	*	**OF ADMINISTRATIVE HEARINGS**
IMPROVEMENT GUARANTY FUND	*	
FOR THE ALLEGED ACTS	*	
OR OMISSIONS OF	*	**OAH No.: LABOR-HIC-02-19-37822**
SJAUNNA GARFINKEL,	*	**MHIC FILE No.: 19 (90) 117**
TRADING AS	*	
MARYLAND COMPLETE HOME	*	
IMPROVEMENTS, LTD	*	

* * * * * * * * * * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On March 4, 2019, Brian and Eve Hehn (Claimants)[1] filed a claim with the Maryland Home Improvement Commission (Commission) against the Home Improvement Guaranty Fund (Fund) for reimbursement for an actual loss allegedly suffered as a result of a home improvement

[1] The Hehns are husband and wife who together own the home at issue in this decision and who both signed the home improvement contract. Ms. Hehn filed the claim against the Fund only in her name. At the beginning of the hearing, I added Mr. Hehn as a proper party to this case based on his joint ownership of the home and his being a party to the home improvement contract.

contract with Sjaunna Garfinkel, trading as Maryland Complete Home Improvements, Ltd. (Respondent). Md. Code Ann., Bus. Reg. §§ 8-405(a), 8-406 (2015).[2]

On November 12, 2019, the Commission issued a Hearing Order; on November 15, 2019, the Commission transmitted the case to the Office of Administrative Hearings (OAH). Md. Code Ann., Bus. Reg. § 8-407(c)(2)(i). The OAH postponed hearings scheduled for March 26, 2020 and July 2, 2020 due to the COVID-19 pandemic and the inability to conduct in-person hearings at the OAH.

On November 18, 2020, I held a hearing at the OAH in Hunt Valley, Maryland. The Claimants represented themselves. The Respondent, who participated by speakerphone, represented herself. Code of Maryland Regulations (COMAR) 28.02.01.20B (an administrative law judge may conduct any part of a hearing by audio means). Andrew Brouwer, Assistant Attorney General, Department of Labor (Department), represented the Fund. I continued the hearing to December 1, 2020 for the parties to submit additional documentation. On December 1, 2020, I conducted the remainder of the hearing remotely via videoconference. *Id.*

The contested-case provisions of the Administrative Procedure Act; the Department's and the Commission'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. 2020); COMAR 09.01.03, 09.08.02.01B and COMAR 28.02.01.

ISSUES

1. Did the Claimants sustain an actual loss arising from the Respondent's incomplete performance of a home improvement contract?

2. If so, what, if any, compensation may the Claimants recover from the Fund?

[2] Unless otherwise noted, all references to the Business Regulation Article cite the 2015 Replacement Volume.

3. Did the Claimants unreasonably reject the Respondent's good-faith efforts to resolve the claim?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits into evidence for the Claimants:

CLAIM. #1 - Home Improvement Claim Form, with Supporting Information:

- Summation
- Statement of Account, June 26, 2018
- Home Improvement Contract
- Scope of Work
- Emails between the Claimants and the Respondent, April 4-5, 2018
- Email from IKEA to the Complainants, April 22, 2018
- Emails between the Claimants and the Respondent regarding the Baltimore City Department of Housing & Community Development, May 7, 2018
- Search Results – Permit Number COM2018-65896 (Plumbing)
- Emails between the Claimants and the Respondent, May 7, 9, and 10, 2018; emails between the Respondent and Pablo Henriquez (plumber), April 25, 2018, May 2, 6-7, and 9, 2018
- Emails (Flooring) May 11, 15, and 18, 2018

CLAIM. #2 - Emails (Additional Plumbing), May 24, 27, and 29-30, 2018

CLAIM. #3 - Emails (Update) June 1, 5, 8, 16, 20-21, and 26-27, 2018

CLAIM. #4 - Emails (Project Updates), July 5 and 9, 2018;

Emails (Stop Sending Workers), July 22, 2018 (with the Respondent's response to the Commission)

CLAIM. #5 - Photographs of the Claimants' kitchen and basement on July 29, 2018

CLAIM. #6 - Proposal, Highlandtown Construction, January 19, 2019

CLAIM #7 - Summary of Payments by the Claimants to the Respondent;

Explanation of Highlandtown Construction's proposal;

Photograph of the Claimants' kitchen;

Proof of payment to Anchor Waterproofing, LLC, April 24, 2020

CLAIM #8 - Summary of Payments by the Claimants to Joseph Laricci III, trading as Joe's Home Improvement, and his employees

I admitted the following exhibits into evidence for the Respondent:

RESP. #1 - Letters from the Commission to the Respondent or the Claimants, July 31, 2018, August 17, 2018, September 28, 2018, January 3, 2019, and November 12, 2019

RESP. #2 - Home Improvement Contract; Scope of Work

RESP. #3 - Respondent's responses to the Commission, undated, with emails between the Claimants and the Respondent (Stop Sending Workers), July 22, 2018

RESP. #4 - Ticket – Miss Utility, with emails between Miss Utility and the Respondent, April 23 and 25, 2018; emails between the Claimants and the Respondent, April 25, 2018 and May 7, 2018; emails between the Respondent and Pablo Henriquez (plumber), April 25, 2018, May 2, 6-7, and 9, 2018

RESP. #5 - Emails between the Claimants and the Respondent, April 1, and 4-7, 2018

RESP. #6 - Emails between the Claimants and the Respondent (IKEA -Kitchen), April 11, 2018, with drawings; emails between the Claimants and the Respondent (Hehn Template), May 7, 2018

I admitted the following exhibits into evidence for the Fund:

FUND #1 - Hearing Order, November 12, 2019

FUND #2 - Notice of Hearing for November 18, 2020

FUND #3 - Notice of Hearing for July 2, 2020

FUND #4 - Notice of Hearing for March 26, 2020

FUND #5 - Letter from the Commission to the Respondent, January 3, 2019, with Home Improvement Claim

FUND #6 - Respondent's licensing history with the Commission, October 16, 2020

FUND #7 - Emails between the Claimants and Mr. Brouwer, November 23, 2020, with the Commission's licensing history for Joseph Laricci III, trading as Joe's Home Improvement, November 23, 2020

FUND #8 - Letter from the Commission, November 23, 2020, concerning the Commission's licensing history for "Joe Coleman"

Testimony

The Claimants and the Respondent testified.

The Fund did not present any witnesses.

FINDINGS OF FACT

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

1. The Respondent has been licensed by the Commission as an individual home improvement contractor under registration number 01-110034 since September 18, 2015; her current license expires September 18, 2021. (FUND #6).

2. The Respondent operates under the trade name of Maryland Complete Home Improvements, Ltd., an entity that is licensed by the Commission as a corporate home improvement contractor under registration number 05-132785. (FUND #6).

3. In early 2018 the Claimants purchased a home on Smith Avenue in Baltimore with plans to remodel the basement as a rental property with its own entrance before the end of the year.

4. On April 6, 2018, the Claimants and the Respondent entered into a written agreement, whereby the Respondent agreed to remodel the basement of the Claimants' home as a rental unit with its own entrance and to remodel the kitchen on the main floor of the home at a cost of $38,947.00. (CLAIM. #1).

5. The estimated start date for the work was April 25, 2018 and the estimated completion date was June 1, 2018. (CLAIM. #1).

6. The contract contained language stating "time is NOT of the essence." (CLAIM. #1).

7. The scope of work included framing, flooring, insulation, drywall, moving the existing kitchen on the main floor to the basement, installing a bathroom in the basement, plumbing, and electrical work. (CLAIM. #1).

8. The Claimants paid the Respondent a deposit of $12,982.00 in two installments: $4,000.00 on April 6, 2018 and $8,982.00 on April 11, 2018. (CLAIM. #7).

9. The Claimants and the Respondent later agreed that the Respondent would perform additional work: assembling kitchen cabinets (purchased by the Claimants from IKEA) for $3,600.00 and performing additional plumbing work for $2,000.00. (CLAIM #7).

10. The Claimants paid the Respondent $2,000.00 for additional plumbing on June 2, 2018 and $3,600.00 for assembling then kitchen cabinets on June 25, 2018.

11. Between April 6, 2018 and July 22, 2018, the Respondent performed some work on the home improvement contract, including an inspection by Miss Utility; demolition work on the main floor of the Claimants' home; removal of the existing kitchen; assembly and temporary installation of kitchen cabinets on the main floor, plumbing work in the basement, and the framing of one doorway in the basement.

12. During this period, the Respondent had problems with her subcontractors and employees. Her preferred electrician moved out of the Baltimore area and her laborers had personal or family medical issues.

13. On May 7, 2018, the Baltimore City Department of Housing and Community Development informed the Respondent that she needed to submit a floor plan and sketch for the proposed work on the interior of the Claimants' home. (CLAIM. #1).

14. The Respondent never submitted the required drawings to the Baltimore City Department of Housing and Community Development and never obtained the required permit to perform work on the interior of the Claimants' home.

15. The Claimants' home came under the jurisdiction of the Commission for Historical and Architectural Preservation (CHAPS), which had to approve changes to the exterior of the Claimants' home, specifically regarding egress for the basement rental unit.

16. The Claimants and the Respondent discussed but never finalized plans for installing a Bilco door for egress for the basement rental unit to satisfy any concerns CHAPS might have, but the Respondent never sought approval for any plans from CHAPS.

17. At some point, water infiltrated the Claimants' basement after some steady rain.

18. On June 9, 2018, Pablo Henriquez, the Respondent's plumbing subcontractor, obtained a permit to perform plumbing work in the Claimants' basement. (RESP. #4).

19. On July 5, 2018, the Claimants, frustrated with the lack of progress, proposed a schedule for completion of the home improvement contract by August 15, 2018. (CLAIM. #4).

20. On July 22, 2018, with the Respondent having performed little or no additional work, the Claimants ordered the Respondent to stop sending workers to their home. (CLAIM. #4).

21. On July 30, 2018, the Claimants filed a complaint with the Commission against the Respondent. (RESP. #3).

22. The Respondent submitted a written response to the Commission, explaining that as of July 22, 2018, she thought she "had everything lined up to motor through this job." (RESP. #3).

23. As of July 22, 2018, the Respondent did not have the additional required permits and she did not have an electrician subcontractor. The Respondent had attempted to hire the Claimants' neighbor, who was an electrician, but then determined that the neighbor did not have the required license to perform electrical work in Baltimore.

24. To support their claim against the Fund, the Claimants solicited a proposal to complete the work from a licensed home improvement contractor, Highlandtown Construction. (CLAIM. #6).

25. Highlandtown Construction's proposal was for a total of $41,430.00 and included three items that were not included in the Claimants' contract with the Respondent: installation of a sump pump to address water infiltration in the basement; a small roof repair to resolve a problem that arose during the Respondent's work on the kitchen on the main floor; and carpet on the basement floor. (CLAIM. #6).

26. The Claimants entered into an agreement with a licensed home improvement contractor, Joseph Laricci III, trading as Joe's Home Improvement, to complete the work specified in the Claimants' contract with the Respondent on a time and materials basis. (CLAIM. #8).

27. The Claimants paid Mr. Laricci a total of $40,702.00. (CLAIM. #8).

DISCUSSION

Fund Claim

A homeowner "may 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). An "'actual loss' means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." *Id.* § 8-401. The Commission may not award from the Fund an amount for consequential damages, *id.* § 8-405(e)(3), which are losses that result indirectly from any unworkmanlike, inadequate, or incomplete home improvement. The Commission may deny a claim if it finds that "the claimant unreasonably rejected good-faith efforts by the contractor to resolve the claim." *Id.* § 8-405(d).

A claimant has the burden of proof at a Fund hearing. *Id.* § 8-407(e)(1). In the circumstances presented here, the Claimants have the burden to establish that: (1) the Respondent performed an incomplete home improvement; (2) the Claimants had an actual loss due to the costs of completing the home improvement; and (3) the Claimants did not unreasonably reject the Respondent's good-faith efforts to resolve the claim. As explained below, I find that the Claimants met their burden of proof as to the three elements of their claim against the Fund.

Incomplete Home Improvement

The Claimants, the Respondent, and the Fund agree that the Respondent failed to complete the home improvement contract. The Claimants and the Fund argued that the Respondent was responsible for the incompletion. The Respondent argued that she was not to blame for the incompletion, but instead it was due to circumstances beyond her control, such as changes to the scope of work, delays caused by water infiltration in the Claimants' basement, and the availability of subcontractors and employees. The Respondent also asserted that the Claimants failed to give her a chance to complete the home improvement contract, initially by ordering her not to send any workers to their home after July 22, 2018 and then after the Claimants filed their claim against the Fund. Because the parties agree that the Respondent failed to complete the home improvement contract, the controlling issue is whether the Claimants rejected the Respondent's good-faith efforts to complete the home improvement contract.

Respondent's Good-Faith Efforts to Resolve the Claim

The Commission may deny a claim if it finds that "the claimant unreasonably rejected good-faith efforts by the contractor to resolve the claim." Md. Code Ann., Bus. Reg. § 8-405(d). By statute, the Commission shall review a claim and any response to it and may investigate the claim. *Id.* § 8-407(c)(1). Based on its review and any investigation, the Commission may set the

matter for a hearing or dismiss the claim if the claim is, in pertinent part, legally insufficient. *Id.* § 8-407(c)(1), (2)(ii). The Commission's regulations provide that a Commission hearing board, upon consideration of the claim, any response from the contractor, and any response by the claimant to the contractor's response, "may dismiss a claim as legally insufficient if the claimant has unreasonably rejected good-faith efforts by the contractor to resolve the claim." COMAR 09.08.03.02D(3)(c). That regulation indicates that a claimant's unreasonable rejection of good-faith efforts by the contractor to resolve the claim makes the claim legally insufficient.

The cited statute and regulation, neither of which mentions a hearing, create some ambiguity whether the issue of unreasonable rejection of good-faith efforts is for the Commission to decide before referring a claim for a hearing, or part of a contested-case hearing. I find that the statute itself provides sufficient authority for me to review whether the Claimants rejected good-faith efforts by the Respondent to resolve the claim, and to dismiss the claim if they did. As in this case, the resolution of the unreasonable rejection of good-faith efforts issue is likely to require testimony and credibility determinations. In cases where a hearing board cannot decide the of good-faith efforts issue on written submissions, the issue can only be resolved at a hearing.

The Respondent asserted that as of July 2018 she was still prepared to complete the home improvement contract. She cited language in the home improvement contract that stated "time is NOT of the essence" to suggest that the Claimants' concerns about the lack of progress were not legally cognizable or at least inconsistent with the contract. That language, of course, is contradicted by the other language in the contract – the estimated completion date of June 1, 2018. The issues for purposes of a claim against the Fund are the contractor's good faith and the claimant's reasonableness, both of which go in favor of the Claimants.

By July 22, 2018, the Respondent had performed hardly any of the work specified in the home improvement contract. She consistently made excuses for not moving the project along, not obtaining required permits, and not having necessary subcontractors or employees. There is no evidence of good faith in the Respondent's efforts to complete the home-improvement contract or to resolve the Claimants' claim against the Fund. Moreover, even if I were to find that the Respondent acted in good-faith and just was overwhelmed by circumstances beyond her control, the Claimants certainly acted reasonably in wanting to move on from the Respondent, who had performed very little work on the home improvement contract and was two months past the estimated date of completion without permits, a licensed electrician, or any realistic prospect of completing the contract.

Actual loss due to the costs of restoration, repair, or replacement

COMAR 09.08.03.03B, which governs the calculation of awards from the Fund, provides, in pertinent part, as follows:

> B. Measure of Awards from Fund.
>
> . . .
>
> (2) The Fund may only compensate claimants for actual losses they incurred as a result of misconduct by a licensed contractor.
>
> (3) Unless it determines that a particular claim requires a unique measurement, the Commission shall measure actual loss as follows:
>
> . . .
>
> (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.

(4) The Commission may not award from the Fund an amount in excess of the amount paid by or on behalf of the claimant to the contractor against whom the claim is filed.

To support their claim against the Fund, the Claimants solicited a proposal to complete the work from a licensed home improvement contractor, Highlandtown Construction. The proposal, which included three items that were not included in the Claimants' contract with the Respondent, was for a total of $41,430.00. The Claimants did not have Highlandtown Construction do any work on their home; instead they entered into an agreement with a licensed home improvement contractor, Joseph Laricci III, trading as Joe's Home Improvement, to complete the work specified in the Claimants' contract with the Respondent on a time and materials basis. The Claimants paid Mr. Laricci a total of $40,702.00. (The Highlandtown Construction proposal is helpful because it supports the reasonableness of the amount the Claimants paid to Mr. Laricci.)

Based on the regulatory formula, I am recommending an award under COMAR 09.08.03.03B(3)(c):

Amount Paid to the Respondent -	$18,582.00
Plus	
Amount paid by the Claimant to complete -	$40,702.00
Subtotal -	$59,284.00
Less	
Amount of contracts[3] -	$44,547.00
Claim	$14,737.00

[3] This amount includes the original contract amount of $38,947.00 and the two additional agreements for $3,600.00 (installation of kitchen cabinets) and $2,000.00 (additional plumbing).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude:

(1) the Claimants suffered an actual loss as a result of the Respondent's acts and omissions, specifically her incomplete performance of a home improvement. Md. Code Ann., Bus. Reg. § 8-401;

(2) the Claimants are entitled to recover an award of $14,737.00 from the Fund. Md. Code Ann., Bus. Reg. § 8-405(a); COMAR 09.08.03.03B(3);

(3) the Claimants did not unreasonably reject the Respondent's good-faith efforts to resolve the claim. Md. Code Ann., Bus. Reg. § 8-405(d).

RECOMMENDED ORDER

I RECOMMEND that the Maryland Home Improvement Commission:

ORDER that the Claimants be awarded $14,737.00 from the Home Improvement Guaranty Fund; and

ORDER that the Respondent remain 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 at least ten percent (10%) as set by the Commission, Md. Code Ann., Bus. Reg. §§ 8-410(a)(1)(iii), 8-411(a); and

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

March 1, 2021
Date Decision Issued

Robert F. Barry
Administrative Law Judge

RFB/dlm
#190763

PROPOSED ORDER

WHEREFORE, this 9th day of June, 2021, 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.

Lauren Lake

Lauren Lake
Panel B
MARYLAND HOME IMPROVEMENT COMMISSION