

**IN THE MATTER OF THE CLAIM
OF SHAWN ROSENZWEIG
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR ALLEGED VIOLATIONS OF
MATTHEW REGAN
t/a REGAN CONTRACTING, LLC**

*** MARYLAND HOME
* IMPROVEMENT COMMISSION**

*** MHIC CASE NO. 09 (90) 1311**

*** * * * ***

FINAL ORDER

WHEREFORE, this 2ND day of September, 2014, Panel B of the Maryland

Home Improvement Commission ORDERS that:

1) The Findings of Fact of the Administrative Law Judge are Amended as follows:

A) Based upon review of the record, including additional evidence submitted into the record, the Commission finds that the Respondent last performed work on at the Claimant's property on or about May 11, 2008. In addition to the Claimant's statement, under penalty of perjury, on the complaint and claim forms, the Claimant has provided documentation in the form of e-mail correspondence between the Claimant and the Respondent contractor. The record contains several e-mails between the parties during the period May-June 2008, which indicate that the Respondent was still performing work on the project in May 2008.

2) The Conclusions of Law of the Administrative Law Judge are Amended as follows:

A) The Commission Panel concludes as a matter of law that the Guaranty Fund claim filed by the Claimant on May 11, 2011 was filed within the 3 year limitation period under Business Regulation Article, §8-405(g), Annotated Code of Maryland.

B) Pursuant to the formula set forth in COMAR 09.08.03.03B(3)(c), the correct calculation of the Claimant's actual loss is as follows:

● Amount paid to Respondent (Finding of Fact 5)	\$160,585.00
● Reasonable cost to correct Respondent's Work (Finding of Fact 13)	<u>\$ 39,867.84</u>
● Total	\$200,452.84
● Less original contract price	<u>-\$160,585.00</u>
● Actual Loss	\$ 39,867.84

C) Pursuant to Business Regulation Article, §8-405(e)(1), Annotated Code of Maryland, the maximum Home Improvement Guaranty Fund award which may be issued by the Commission is limited to \$20,000.00.

3) The Recommended Order of the Administrative Law Judge is Amended as follows:

A) The Claimant is Awarded \$20,000.00 from the Home Improvement Guaranty Fund.

B) Pursuant to Bus. Reg. Art. §8-411(a), any home improvement licenses held by the Respondent shall be Suspended at such time as any money is paid from the Home Improvement Guaranty Fund under this Order, and the Respondent shall be ineligible for any home improvement license until such time as the Home Improvement Guaranty Fund has been reimbursed. The Respondent shall be liable for 10% annual interest on any unreimbursed balance owed to the Guaranty Fund.

4) This Final Order shall become effective thirty (30) days from this date. During the thirty (30) day period, any party may file an appeal of this decision to Circuit Court.

Andrew Snyder

Chair - Panel B

**MARYLAND HOME IMPROVEMENT
COMMISSION**

IN THE MATTER OF
Shawn
~~SEAN~~ ROSENZWEIG,

CLAIMANT,

AGAINST THE

MARYLAND HOME IMPROVEMENT

COMMISSION GUARANTY FUND

FOR THE ACTS OR OMISSIONS

OF MATTHEW REGAN,

t/a REGAN CONTRACTING, LLC,

RESPONDENT

* BEFORE LATONYA B. DARGAN,

* AN ADMINISTRATIVE LAW JUDGE

* OF THE MARYLAND OFFICE

* OF ADMINISTRATIVE HEARINGS

* OAH Case No.: DLR-HIC-02-13-09000

* MHIC Case No.: 09 (90) 1311

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RECOMMENDED DECISION

STATEMENT OF THE CASE
ISSUE
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On May 11, 2011, the Claimant filed a claim for reimbursement from the Maryland Home Improvement Commission (MHIC or Commission) Guaranty Fund (Fund) for actual monetary losses allegedly suffered as a result of the acts or omissions of the Respondent. On January 30, 2013, the Commission ordered a hearing to give the Claimant the opportunity to establish entitlement to an award from the Fund.

On September 5, 2013, I conducted a hearing at the Maryland Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010 &

Supp. 2013). Tora A. Mahoney, Esquire, represented the Claimant, who was present. Matthew Lawrence, Assistant Attorney General, Department of Labor, Licensing and Regulation, represented the Fund. The Respondent did not appear, nor did anyone appear on his behalf. I noted for the record that a copy of the OAH hearing notice was sent to the Respondent and to his attorney of record, Matt Angotti, Esquire, via both certified mail-return receipt requested and regular first class mail. The certified mail return receipt for the copy of the notice sent to Mr. Angotti was signed for on April 2, 2013 and returned to the OAH on April 3, 2013. The regular mail copy of the notice sent to Mr. Angotti was not returned to the OAH as undeliverable by the United States Post Office.¹ Neither Mr. Angotti, nor anyone acting on his behalf, contacted the OAH to advise that he was no longer the Respondent's attorney. Accordingly, I found that the Respondent was notified of the hearing, he failed to appear, and I proceeded with the hearing in his absence. Md. Code Ann., Bus. Reg. § 8-312(h); Md. Code Ann., State Gov't § 10-209; and, COMAR 09.01.02.07.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department of Labor, Licensing and Regulation, 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. 2013), Code of Maryland Regulations (COMAR) 09.01.03; 09.08.02; and 28.02.01.

ISSUE

Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?

¹ The Respondent's copies of the notice were returned to the OAH marked as "unclaimed" (certified mail copy) and "returned to sender, attempted – not known, unable to forward" (regular mail copy).

SUMMARY OF THE EVIDENCE

Exhibits

A complete exhibit list is attached as an appendix.

Testimony

The Claimant testified and presented the following witnesses: Mitchell Brodie, whom I accepted as an expert in custom bathroom installation; Kenneth Erickson, whom I accepted as an expert in plumbing.

No one testified on behalf of the Respondent and the Fund did not present any witnesses.

FINDINGS OF FACT

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

1. At all relevant times, the Respondent was licensed as a home improvement contractor with the MHIC, under registration number 91714.
2. On March 10, 2007, the Claimant and the Respondent entered into a contract for the Respondent to perform certain home improvements at the Claimant's residence located at 3210 Hunting Tweed Drive, Owings Mills, Maryland (Property).
3. The original contract price was \$137,600.00, and the original estimated length for completion of the work was approximately 18 weeks.
4. The scope of work under the contract included:
 - the demolition and reconstruction of the master bedroom suite, complete with a walk-in closet and additional clothes closet
 - installation of new bedroom windows
 - installation of a fireplace in the master bedroom suite
 - installation of carpet in the new bedroom and closets
 - the demolition and reconstruction of the master bathroom
 - installation of a jetted tub in the bathroom

- installation of a linen closet in the bathroom
 - installation of two vanities in the bathroom
 - installation of new tile bathroom floor
 - installation of new tile shower with two seats
 - installation of standard toilet in its own room within master bathroom
 - installation of ceiling lights in both rooms, the closets, halls and over the mirrors in the bathroom
 - installation of a custom cable railing system for the stairways
5. The Claimant paid the Respondent a total of \$160,585.00 under the contract, which includes the cost of various change orders.
 6. The Respondent began work at the Property on or around March 22, 2007. He last did any work at the Property sometime in November 2007.
 7. Sometime in fall 2007, the Claimant noticed problems with the bathroom installation and the fireplace. Specifically, the newly-installed shower was leaking, as were the bathroom faucets. The fireplace control module melted, and the fireplace vent was not properly venting and cooling.
 8. The Claimant attempted to contact the Respondent via e-mail, telephone, and text messages throughout November and December 2007, to get the Respondent to return to the Property and examine the problems, but the Respondent was non-responsive.
 9. The Claimant did not have any contact with the Respondent after November 2007.
 10. On or around April 12, 2010, the Claimant entered into a contract with JEHM Tile Contractors (JEHM), MHIC registration no. 69138, for JEHM to repair the master bathroom, including the demolition and reconstruction of the shower and tub.
 11. On or around April 21, 2010, the Claimant contracted with Erickson Plumbing, LLC, to repair the leaking faucets.

12. On or around May 26, 2010, the Claimant contracted with Acme Stove Co. of Rockville, Maryland to replace/repair the fireplace.
13. The Claimant paid other contractors a total of \$39,867.84 to correct the work performed by the Respondent.
14. On May 11, 2011, the Claimant filed a claim with the Fund, seeking reimbursement of the amounts paid to correct the Respondent's work.

DISCUSSION

An owner 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) (Supp. 2013). *See also* COMAR 09.08.03.03B(2). 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 (2010). Recovery against the Fund is proper, however, only if the claim is “brought against the Fund within 3 years after the claimant discovered or, by use of ordinary diligence, should have discovered the loss or damage.” Md. Code Ann., Bus. Reg. § 8-405(a) and (g) (Supp. 2013).

The Fund acknowledged that the Claimant demonstrated the Respondent's work was inadequate and unworkmanlike. It nevertheless argued that the Claimant's claim is barred by the statute of limitations articulated in the Business Regulations Article. Specifically, the Claimant testified that he first noticed problems with the Respondent's work shortly after the work was completed in November 2007, and he spent November and December 2007 trying to contact the Respondent and get him to return to the Property and address the problems. According to the Claimant, he did not have any interactions with the Respondent after November 2007.

The Claimant countered the Fund's argument by urging me to take into consideration the claim form, which was admitted as Fund Exhibit 3. The claim form identifies the “date work

done by the contractor” as “3/22/07 – 5/11/08.” (*Id.*) The Claimant argued that since the last time the Respondent or anyone associated with him did work at the Property was on or around May 11, 2008, a claim filed on May 11, 2011 is not time-barred.

I am not persuaded by the Claimant’s argument. In his direct testimony, he indicated that the Respondent was wholly unresponsive to the concerns he raised about the work in fall 2007, and the Respondent did not answer the Claimant’s e-mails, telephone calls, or text messages throughout the remainder of 2007. On cross-examination, the Claimant testified that the last day the Respondent did any work at the Property was in November 2007, and he first noticed problems with the construction shortly after work was completed. I cannot explain why the claim form indicates the Respondent did work in May 2008, but I do not find that date to be credible based on the Claimant’s testimony. I find that it is more likely than not the Respondent completed work at the Property in November 2007 and neither he nor anyone associated with him returned to perform any repairs after that time.

It is well-settled that timeliness is jurisdictional; if an action is not filed within the required time frame, then no jurisdiction is acquired and the action must be dismissed. *Walbert v. Walbert*, 310 Md. 657 (1987). In *Lumsden v. Design Tech Builders, Inc.*, 358 Md. 435 (2000), the Court of Appeals analyzed the question of when a litigant is put on notice of a problem for statute of limitation purposes. *Lumsden* dealt with a civil case rather than an administrative proceeding, but it is nevertheless instructive.

The Plaintiffs in *Lumsden* had driveways installed. Their driveways subsequently began peeling and scaling. At first, the likely cause of the problems appeared to be chemicals used in de-icing and snow removal. Some months later, the Plaintiffs learned that the problem was more likely due to issues with the original installation and composition of the concrete itself.

The Plaintiffs filed suit three years and one month after the original discovery of the driveway problems. Their cases were dismissed for lack of timely filing at both the district and circuit court levels, and the Plaintiffs appealed, arguing that the three-year statute of limitations did not begin to run when they discovered the problems with their driveways, but rather it began running when they found out that the likely specific cause was the faulty concrete.

The Court disagreed, holding that the running of limitations commenced “when petitioners first discovered that their respective driveways had been damaged and not . . . when they discovered the purported cause of the damage.” *Id.* at 440. The Court further elaborated:

The statute of limitations begins to run when claimants gain knowledge sufficient to put them on inquiry notice generally when they know, or should know, that they have been injured by a wrong. From that date forward, a claimant will be charged with knowledge of facts that would have been disclosed by a reasonably diligent investigation, regardless of whether the investigation has been conducted or was successful.

Id. at 452.

The *Lumsden* Court went on to discuss the reasons behind statutes of limitation:

By creating a limitations period, the legislature determined that a plaintiff should have only so long to bring his action before he is deemed to have waived his right to sue and to have acquiesced in the defendant's wrongdoing. Limitations statutes therefore are designed to (1) provide adequate time for diligent plaintiffs to file suit, (2) grant repose to defendants when plaintiffs have tarried for an unreasonable period of time, and (3) serve society by promoting judicial economy.

Id. at 442.

In this case, the Claimant began noticing problems with the Respondent's work in November 2007. It is clear that he suspected there was something wrong with how the Respondent performed the work, as he attempted to contact the Respondent throughout the remainder of the year to get him to assess the issues. Accordingly, the Claimant should have filed a claim with the Fund no later than November 2010. A claim filed in May 2011 is time-barred.

CONCLUSIONS OF LAW

I conclude as a matter of law that the Claimant sustained an actual loss, but not a compensable loss, as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2010) and § 8-405(a) and (g) (Supp. 2013); *Lumsden v. Design Tech Builders, Inc.*, 358 Md. 435 (2000); *Walbert v. Walbert*, 310 Md. 657 (1987).

RECOMMENDED ORDER

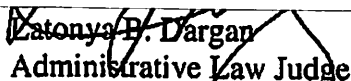
I **PROPOSE** that the Maryland Home Improvement Commission:

ORDER that the claim of Shawn Rosenzweig against the Maryland Home Improvement Guaranty Fund be **DENIED**; and

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

Signature on File

December 4, 2013
Date Decision Mailed


Administrative Law Judge

LBD/kkc
#146455

IN THE MATTER OF
SEAN ROSENZWEIG,
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AGAINST THE
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COMMISSION GUARANTY FUND
FOR THE ACTS OR OMISSIONS
OF MATTHEW REGAN,
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RESPONDENT

*** BEFORE LATONYA B. DARGAN,**
*** AN ADMINISTRATIVE LAW JUDGE**
*** OF THE MARYLAND OFFICE**
*** OF ADMINISTRATIVE HEARINGS**
*** OAH Case No.: DLR-HIC-02-13-09000**
*** MHIC Case No.: 09 (90) 1311**

* * * * *

APPENDIX

I admitted the following exhibits for the Claimant:

- Cl. Ex. 1: April 12, 2010 Proposal and contract, JEHM Tile Contractors
- Cl. Ex. 2: Photographs
- Cl. Ex. 3: Mitchell Brodie's June 6, 2010 demolition report
- Cl. Ex. 4: April 21, 2010 Proposal, Erickson Plumbing LLC
- Cl. Ex. 5: Undated inspection report, Erickson Plumbing LLC
- Cl. Ex. 6: March 10, 2007 Contract, with attached addenda
- Cl. Ex. 7: Change Order list, prepared by Regan Contracting, LLC
- Cl. Ex. 8: Photocopies of cashed checks
- Cl. Ex. 9: March 9, 2010 Selection sheet, Chesapeake Tile & Marble, Inc.
- Cl. Ex. 10: Photocopies of cashed checks
- Cl. Ex. 11: Photocopies of cashed checks

- Cl. Ex. 12: Not Admitted
- Cl. Ex. 13: Not Admitted
- Cl. Ex. 14: Photocopies of cashed checks
- Cl. Ex. 15: June 8, 2010 Invoice, Mirror Crafters, Inc.
- Cl. Ex. 16: Photocopies of cashed checks
- Cl. Ex. 17: May 26, 2010 Proposal, Acme Stove Co. of Rockville
- Cl. Ex. 18: May 28, 2010 Invoice, Acme Stove Co. of Rockville
- Cl. Ex. 19: April 5, 2010 Invoice, A Service Company, Inc.
- Cl. Ex. 20: July 6, 2010 Invoice, A Service Company, Inc.
- Cl. Ex. 21: Photographs
- Cl. Ex. 22: December 2, 2008 and June 30, 2010 Job invoices, Michael Bennett
- Cl. Ex. 23: Photocopies of cashed checks
- Cl. Ex. 24: June 10, 2010 E-mail from Gregory Wall to Mitchell Brodie, regarding Jeffers Stone, with attached cashed checks
- Cl. Ex. 25: April 9, 2010 Proposal, Hercules Fence
- Cl. Ex. 26: Photographs
- Cl. Ex. 27: Itemized list of payments to contractors

I admitted the following exhibits for the Fund:

- Fund Ex. 1: The Respondent's MHIC Registration and licensing history
- Fund Ex. 2: Thomas Marr's April 24, 2013 Affidavit
- Fund Ex. 3: May 11, 2011 Home Improvement Claim Form

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