

IN THE MATTER OF THE CLAIM	* BEFORE SONDRAL SPENCER,
OF KIMBERLY GOSWELLEN,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT,	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	* OAH NO.: DLR-HIC-02-11-29788
FOR THE ALLEGED ACTS OR	* MHIC NO.: 09 (75) 1462
OMISSIONS OF ROGER WAYLAND	*
PARSLEY,	*
T/A R.W.P. HOME IMPROVEMENT,	*
RESPONDENT	*

* * * * *

RECOMMENDED DECISION

STATEMENT OF THE CASE
ISSUE
SUMMARY OF THE EVIDENCE
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RECOMMENDED ORDER

STATEMENT OF THE CASE

On November 5, 2009, Kimberly Goswellen (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$20,497.00 for actual losses allegedly suffered as a result of a home improvement contract with Roger W. Parsley (Respondent).

I held a hearing on April 11, 2012, at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010 & Supp. 2011). Kris

King, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Claimant represented herself. The Respondent represented himself.

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. 2011), Code of Maryland Regulations (COMAR) 09.01.03.01; 09.08.02.01; 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?

SUMMARY OF THE EVIDENCE

Exhibits

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

- Clam. Ex. 1A - photograph showing workers working
- Clam. Ex. 1B - photograph showing area where work in progress
- Clam. Ex. 1C - photograph of wall not properly finished
- Clam. Ex. 1D - photograph showing baseboard not level with floor
- Clam. Ex. 1E - photograph of area under range hood
- Clam. Ex. 1F - photograph showing insecure molding
- Clam. Ex. 1G - photograph showing area of damage to wall not fixed and floor not installed correctly
- Clam. Ex. 1H - photograph showing basement closet
- Clam. Ex. 1I - photograph of full basement closet

- Clam. Ex. 1J - photograph showing crawl space under basement steps
- Clam. Ex. 1K - photograph showing wall condition around electrical outlet
- Clam. Ex. 1L - photograph showing "new" shower head
- Clam. Ex. 1M - photograph showing basement shower being torn apart
- Clam. Ex. 1N - photograph showing drain pipe not connected to shower causing sewage odor
- Clam. Ex. 1O - photograph showing no cover on junction boxes behind wall Respondent had built
- Clam. Ex. 1P - photograph showing junction box with no cover
- Clam. Ex. 1Q - photograph showing insecure recessed lighting
- Clam. Ex. 1R - photograph showing peeling paint
- Clam. Ex. 1S - photograph showing plastic piece on top of ceramic tile
- Clam. Ex. 1T - photograph showing plastic piece removed because mold is growing under it
- Clam. Ex. 1U - photograph showing duct tape around pipe in upper bathroom
- Clam. Ex. 2 - R.W.P. Roofing & Siding Invoice, dated November 9, 2008
- Clam. Ex. 3 - Copies of front and reverse of checks # 289, 290, 300, 304, 308, 325 and front of check 3325313 all made out to the Respondent
- Clam. Ex. 4 - Claimant's list of problem in upper main bathroom, kitchen, basement bathroom and laundry room
- Clam. Ex. 5 - Environmental Citations and Order to the Claimant for trash accumulation, dated February 3, 2009
- Clam. Ex. 6 - Handwritten letter to Roger from the Claimant, dated March 27, 2009, with response from the Respondent
- Claim. Ex. 7 - Handwritten letter to the Claimant from the Respondent, dated May 5, 2009
- Claim. Ex. 8 - Handwritten letter to the Claimant from the Respondent, dated December 3, 2009

Claim. Ex. 9 - LandAmerica Property Inspection Services – Property Inspection Report, inspection date April 7, 2009

Claim. Ex. 10 - Mike Nelson, receipt for demolishing wall (temp) cap sewer line and removing toilet to access drain in wall.

Claim. Ex. 11 - List of Claimant's actions during period April 1 – 7 (no year provided)

Claim. Ex. 12 - D.B. Lentz & Co., Inc. Estimate, undated

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

Fund Ex. 1 - Memorandum to Legal Services from Sandra Sykes, dated November 29, 2011, with attached copy of returned Hearing Information and certified mail receipts

Fund Ex. 2 - DLR licensing information for the Respondent, dated April 10, 2012

Fund Ex. 3 - Claimant's Home Improvement Claim, dated November 5, 2009

Fund Ex. 4 - Letter to the Respondent from John Bora, MHIC, dated December 1, 2008

The Respondent did not offer any exhibits for admission into evidence.

Testimony

The Claimant testified on her own behalf.

The Respondent testified on his own behalf.

The Fund did not present any witnesses.

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 # 4126559.
2. On November 9, 2008, the Claimant and the Respondent entered into a contract for the Respondent to do the following: reframe all walls, ceiling, and bulkhead in the basement; install new electrical throughout the basement; install basement drywall, finish the

drywall, and paint; reframe rear of basement for laundry room and install plumbing for washer; reframe basement bathroom; install bathroom plumbing, electrical, drain lines, toilet, and sink; install bathroom drywall and paint; install vinyl rug in bathroom; install new carpet and padding in the family room; install all new trim work; reframe the stair rail and drywall.

3. In a separate contract also executed on November 9, 2008, the Claimant and the Respondent agreed that the Respondent would replace three exterior doors; remove the kitchen cabinets, sink, exhaust fan, and ceiling fan, resurface the walls, paint, and install new cabinets, countertops, sink, faucets, exhaust fan, dishwasher, plumbing, and vinyl floor cover; remove and replace shower doors and insert in bathroom, install new bathroom cabinet sink and faucets; remove toilet; resurface and repaint walls; and reinstall the toilet.
4. Neither contract contained dates during which the work would be done or completion dates.
5. The original agreed-upon contract price was \$36,500.00 (this total includes the Claimant's obligation under both November 9, 2008 contracts).
6. The Respondent did work in the Claimant's home beginning in January 2009.
7. On January 9, 2009, the Respondent and the Claimant entered into a third contract for additional work, including: the removal of the circuit breaker box and the installation of a new one; replacement of an electrical wire in the basement; replacement of a gas pipe in the basement; relocation of a trunk line in the basement. The additional cost under the contract was \$1,600.00.

8. On January 20, 2009, the Respondent and the Claimant entered into a fourth contract for additional work, including: replacing electrical and plumbing work, installing recessed lighting, additional work on the front door, additional trim work, removal of bulkhead, additional flooring, an additional cabinet, and a new sewer pipe. The additional cost under the contract was \$3,125.00.
9. The Claimant made the following payments to the Respondent: check for \$3,000.00 (dated December 26, 2008); check for \$9,000.00 (dated December 26, 2008); check for \$2,000.00 (dated January 16, 2009); check for \$9,000.00 (dated January 21, 2009); check for \$3,000.00 (dated January 21, 2009); check for \$2,750.00 for HVAC work not documented in any contract (dated January 30, 2009); check for \$1,600.00 (dated February 10, 2009); and a check for \$4,000.00 (dated March 13, 2009). The Claimant paid the Respondent a total of \$34,350.00.
10. During the course of the Respondent's work, the Claimant observed numerous problems with the workmanship. For example, she noticed places where the molding was not level with the floor, improper installation of flooring, improper space between the kitchen cabinets and the wall, missing caulk around the second floor bathroom tub, peeling paint in the upstairs bathroom, unsecured kitchen countertops, and unfinished walls. In addition, some tasks were never completed, such as hanging the cabinet above the refrigerator and painting the laundry area. The basement bathroom also had a strong sewage odor.
11. The Claimant became aware that the Respondent had not obtained permits for the work because he did not believe that any permits were needed. In addition, she learned that the Respondent's brother, who had done the plumbing work, was not a licensed plumber.

12. The Claimant raised concerns about workmanship in March and April 2009 after she had brought neighbors in to show them the Respondent's work. The Respondent was offended by the criticism of his work and left the work site with no indication that he planned to return to finish the work.
13. The Claimant and Respondent agreed to meet on April 2, 2009, to go over the Claimant's concerns, but the Respondent did not show up until after the meeting was to have concluded. The Claimant and the Respondent disagreed about how to handle the remaining work and the money owed under the contract, and the Claimant asked the Respondent to return her house key.
14. On April 3, 2009, the Respondent called and left a voicemail for the Claimant explaining that he would fix the problems but would need to be paid that day. The Claimant returned his call and said that she did not believe he was capable and would not pay him anything more. The Respondent responded that he would sue the Claimant for the rest of the money.
15. On April 7, 2009, the Claimant hired a home inspector to evaluate the condition of the home. The inspector documented numerous problems, including:
 - A drain pipe in the laundry room that did not slope properly,
 - The absence of a P trap in the laundry washer box drain,
 - Absence of a seal or connector between the PVC pipe connection (from the basement shower and sink) drain into the cast iron sanitary pipe at the hub, allowing sewer gas into the basement;
 - Improperly installed dishwasher drain hose (inserted into a PVC pipe and held in place with duct tape; no P trap)

- No visible P trap in basement shower drain, causing strong sewer gas odor;
- Second floor bathroom sink drain was connected with duct tape,
- Numerous electrical system problems, such as frayed wiring, failure to install bonding screw as required, failure to connect earth or cold water pipe ground wire to the panel as required, failure to label breaker, wires left exposed, cracked/missing circuit breaker face, double-tapped breakers, two 14-gauge wires installed on a 20-amp breaker, and open junction boxes with exposed wires in basement ceiling and behind basement bathroom wall, representing a safety hazard.

16. The Claimant obtained an estimate from another contractor, D.B. Lenz & Co., Inc., to correct the problems in the basement bathroom and remodel the main bathroom, as well as making other repairs to the work by the Respondent per the Claimant's request. The estimate was \$20,540.00.
17. The Claimant's actual loss is \$13,665.00, calculated as follows: the total amount paid to the Respondent (\$34,350.00) plus the estimate to complete and repair the work (\$20,540.00), for a total of \$54,890.00, minus the amount owed to the Respondent under the contract (\$41,225.00), for an actual loss figure of \$13,665.00.

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. 2011). *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). For the following reasons, I find that the Claimant has proven eligibility for compensation.

First, the Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant.

Second, the Respondent performed unworkmanlike, inadequate and incomplete home improvement. The Claimant observed and documented a number of problems with the work that was performed, from peeling paint to inadequate plumbing that caused sewer gases in the basement to dangerous errors in electrical work. The Respondent testified that he believed the work was done properly and that any incomplete work was due to the Claimant’s refusal to let him finish the job. However, the Claimant provided photographs of the poor workmanship, including unfinished walls, baseboards that were not level, improper installation of flooring, leaking showerhead, disconnected shower drain pipe, and peeling paint, as well as an inspection report from a home inspector that noted plumbing and electrical problems with the work the Respondent had done. She repeatedly sought to have the Respondent resolve the problems rather than fire him from the job; however, the Respondent was uncooperative. Accordingly, the Claimant is eligible for compensation.

Having found eligibility for compensation, I now turn to the amount of the award. 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). One of those formulas, as follows, offers an appropriate measurement in this case:

“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).

Under this formula, the Claimant’s actual loss is \$13,665.00. This is calculated as follows: the total amount paid to the Respondent (\$34,350.00) plus the estimate to complete and repair the work (\$20,540.00), for a total of \$54,890.00, minus the amount owed to the Respondent under the contract (\$41,225.00), for an actual loss figure of \$13,665.00.

CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual, compensable loss of \$13,665.00 as a result of the Respondent’s acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2010).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$13,665.00; 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 at least ten percent as set by the Maryland Home Improvement Commission. Md. Code Ann., Bus. Reg. § 8-411(a) (2010); and

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

Signature on File

July 3, 2012
Date Decision Mailed

Sondra L. Spencer
Administrative Law Judge

#135828/**

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FILE EXHIBIT LIST

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The Respondent did not offer any exhibits for admission into evidence.

PROPOSED ORDER

WHEREFORE, this 20th day of September 2012, 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.

Francisca Acosta
Francisco Acosta
Commissioner Panel B

MARYLAND HOME IMPROVEMENT COMMISSION