

<p>IN THE MATTER OF THE CLAIM</p> <p>OF LASHAWN KNOWLES,</p> <p>CLAIMANT</p> <p>AGAINST THE MARYLAND HOME</p> <p>IMPROVEMENT GUARANTY FUND</p> <p>FOR THE ALLEGED ACTS OR</p> <p>OMISSIONS OF STEVEN BROWN,</p> <p>T/A EXCEL SERVICES,</p> <p>RESPONDENT</p>	<p>* BEFORE MARINA LOLLEY SABETT,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>*</p> <p>*</p> <p>*</p> <p>* OAH No.: DLR-HIC-02-15-35196</p> <p>* MHIC No.: 10 (05) 1090</p>
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PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
PROPOSED FINDINGS OF FACT
DISCUSSION
PROPOSED CONCLUSION OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On August 10, 2012, LaShawn Knowles (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$19,733.00 in alleged actual losses suffered as a result of a home improvement contract with Steven E. Brown, trading as Excel Services (Respondent). The matter was delegated to the Office of Administrative Hearings (OAH) for an evidentiary hearing on the merits.

I held a hearing on April 29, 2016,¹ at the Prince George's County Office Building, 1400 McCormick Drive, Largo, Maryland 20774. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimant represented herself. Niknaz M. McCormally, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. After waiting 20 minutes for the Respondent or someone to represent him, I proceeded with the hearing.² COMAR 09.01.03.05A, 28.02.01.23A.

The contested case provisions of the Administrative Procedure Act, the MHIC procedural 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); COMAR 09.01.03, 09.08.02.01B; COMAR 28.02.01.

ISSUES

1. Did the Claimant sustain an actual loss compensable by the Fund as a result of any acts or omissions of the Respondent?
2. If so, what is the amount of that loss?

¹ The hearing was initially scheduled for February 11, 2014. Neither the Claimant nor the Respondent appeared at that hearing; accordingly, the presiding administrative law judge (ALJ) recommended that the Claim be dismissed. Code of Maryland Regulations (COMAR) 09.01.03.05A, 28.02.01.23A. The Claimant then filed written exceptions to the recommended dismissal, COMAR 09.01.03.09, 28.02.01.23C, stating that she was unable to attend the scheduled hearing because she was ill and providing supporting documentation. On October 9, 2015, the Chair of the HIC found that the Claimant had established good cause for her failure to appear, and ordered that the matter be remanded to the OAH for a hearing.

The remanded hearing was scheduled for February 16, 2016. Notice of the hearing was mailed to the Respondent at the address of record by certified mail on December 1, 2015, COMAR 09.08.03.03A(2), but returned unclaimed. It was postponed due to inclement weather. The remanded hearing was again rescheduled for April 29, 2016, and a notice of the hearing again was mailed to the Respondent at the address of record by certified mail on March 8, 2016. That notice was returned unclaimed on March 30, 2016. The notice sent by regular mail was not returned.

² See footnote one above. Also, the Fund presented evidence that the Respondent is deceased; however, the Respondent's address of record was the principal residence of the Respondent's wife at the time such notices were sent. Fund Ex. 4.

SUMMARY OF THE EVIDENCE

Exhibits

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

- Clmt. Ex. 1 - Printout of search for licensed home improvement contractors, dated August 6, 2009
- Clmt. Ex. 2 - Estimate, dated May 4, 2009 (3 pages)
- Clmt. Ex. 3 - Contract, dated August 7, 2009 (2 pages)
- Clmt. Ex. 4 - Cancelled U.S. Postal Service Federal Credit Union (USPSFCU) check number 4210430 for \$15,000.00, dated August 6, 2009 (2 pages)
- Clmt. Ex. 5 - Excel Family, Inc., invoice number 1420 for \$25,660.75, dated August 5, 2009 (2 pages)
- Clmt. Ex. 6 - Maddox, Inc., boundary survey plat with invoice for \$600.00 and cancelled check for same amount, all dated July 7, 2009 (3 pages)
- Clmt. Ex. 7 -
 - Requirements for Above-ground Swimming Pool
 - Minimum Plan Submission Requirements for Residential Projects and Residential In-ground Swimming Pools
 - Blank Prince George's County Department of Environmental Resources (PGCDER) Application for Electrical Permit form with hand-drawn marking
- Clmt. Ex. 8 - PGCDER Minimum Plan Submission Requirements for Residential Projects (2 pages)
- Clmt. Ex. 9 -
 - Maryland-National Capital Park and Planning Commission (M-NCPPC) Notice to Applicants for Woodland Conservation Ordinance Letters of Exemption, dated May 20, 2005
 - Printout of Maryland Department of Assessments and Taxation (MDAT) real property data search, dated June 26, 2009
 - Printouts of schematic drawings for non-diving pools, dated August 5, 2009
 - Aerial photograph showing elevations (2 pages)
- Clmt. Ex. 10 - James A. Marx invoice for \$40.00, dated September 19, 2009, with handwritten notations
- Clmt. Ex. 11 -
 - PGCDER receipt for permit fees totaling \$105.00, dated September 30, 2009
 - PGCDER Application for Plan Examination and Permit, dated September 21, 2009, approved for structural and site engineering on September 30, 2009, approved by M-NCPPC on August 24, 2009
 - Cancelled USPSFCU check number 1169 for \$105.00, dated September 30, 2009

- Clmt. Ex. 12 - PGCDER receipt for permit fees totaling \$175.00, with cancelled USPSFCU check number 1168 for same amount, both dated August 24, 2009
- Clmt. Ex. 13 - • PGCDER receipt for permit fees totaling \$120.00, with cancelled USPSFCU check number 1170 for same amount, both dated September 30, 2009 (2 pages)
• PGCDER Application for Plan Examination and Permit, dated September 21, 2009, approved by DPW&T and Permits on August 24, 2009, approved by M-NCPPC on August 21, 2009
• Final location plat, dated May 12, 2000
• Prince George's County Department of Public Works & Transportation receipt for \$120.00, dated September 30, 2009
- Clmt. Ex. 14 - City of Bowie building permit for gazebo, issued April 6, 2011, with receipt for \$15.00 (2 pages)
- Clmt. Ex. 15 - Installation instructions for Viking Pools Rockport pool (8 pages)
- Clmt. Ex. 16 - • Specifications for reinforced concrete masonry retaining walls approved by PGCDER on August 24, 2009 (2 pages)
• Survey plat approved for soils and grading, approved by M-NCPPC on August 24, 2009
- Clmt. Ex. 17 - MHIC information regarding arbitration (2 pages)
- Clmt. Ex. 18 - Email to Respondent from Claimant and husband, attaching Alternative Solutions, LLC, Agreement to Arbitrate and Arbitration Rules, dated February 24, 2012 (11 pages)
- Clmt. Ex. 19 - • Copy of large envelope addressed to Respondent in Salisbury, Maryland, from Claimant, with Salisbury certified mail label, stamped "Return to sender unable to forward" on June 13, 2012, and return receipt with no delivery shown (2 pages)
• Copy of large envelope from Claimant, with Hebron, Maryland certified mail label, stamped unclaimed or refused and return to sender on June 16, 2012, with handwritten notation "Refused Return to Sender" and return receipt showing no delivery (2 pages)
• Copy of large envelope addressed to Respondent in Fruitland, Maryland, from Claimant, with Fruitland certified mail label, marked unclaimed with notice on June 12, 18, and 27, and return receipt with no delivery shown (2 pages)
• Receipt for postage to Hebron, Salisbury, and Fruitland, totaling \$47.40, dated June 9, 2012
- Clmt. Ex. 20 - Email Demand for Arbitration, second request - for pool installation sales agreement #1420, with attachments, dated June 7, 2012 (14 pages)
- Clmt. Ex. 21 - Letter to Respondent from Claimant, dated June 7, 2012, attaching Demand for Arbitration (3 pages)

Clmt. Ex. 22 - MHIC Complaint, dated March 12, 2010

Clmt. Ex. 23 - MHIC Order to Respondent, dated March 23, 2010

Clmt. Ex. 24 - Letter to Claimant from M. Escobar, MHIC, dated April 20, 2010

Clmt. Ex. 25 - Copies of nine (9) color photographs of Claimant's property (9 pages)

The Respondent did not attend the hearing and offered no exhibits into evidence.

I admitted the following exhibits into evidence on behalf of the Fund:

- Fund Ex. 1 -
 - OAH hearing notices, dated December 1, 2015, and envelope and copy of MHIC Hearing Order, dated March 8, 2016 (5 pages)
 - Copy of Respondent's MHIC Contractor/Salesman License, Registration, or Certificate, showing expiration August 17, 2011
- Fund Ex. 2 - Remand Order, dated October 9, 2015
- Fund Ex. 3 - MHIC licensing printout, dated April 25, 2016 (5 pages)
- Fund Ex. 4 - Affidavit of David Finneran, MHIC, dated April 26, 2016, with attached obituary of Respondent, online funeral guest book entry, and printout of SDAT Real Property search, dated April 21, 2016 (5 pages)
- Fund Ex. 5 - Affidavit of David Brown, MHIC, dated April 26, 2016, with attached MVA driving record information for Respondent and Respondent's wife, dated April 25, 2016 (3 pages)
- Fund Ex. 6 - MHIC Home Improvement Claim Form, dated August 10, 2012

Testimony

The Claimant testified and presented the testimony of her husband, Curtis Knowles.

The Respondent did not attend the hearing or testify, and no one testified on his behalf.

The Fund presented no testimony.

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 49788. Specifically, the Respondent was licensed on September 25, 2007, until it expired on August 17, 2009. The license was

renewed on August 23, 2009, until suspended on August 17, 2011, because of multiple homeowner complaints to the MHIC against the Respondent.

2. On August 10, 2009, the Claimant and the Respondent entered into a contract to build the Claimant an above-ground swimming pool at her home (Contract) at 17407 Russet Drive, Bowie, Maryland, 20716 (Home). Clmt. Ex. 3.

3. The original agreed-upon contract price was \$ 25,660.75. *Id.*

4. By check dated August 6, 2009, the Claimant paid the Respondent \$ 15,000.00, which was described as a deposit under the Contract. Clmt. Ex. 4.

5. The remaining balance under the Contract was \$ 10,660.75, and was to be broken down into two remaining payments: the first was to be paid upon delivery of the pool shell, and the second and final payment was to be paid upon completion of the pool installation, plumbing and electrical. Clmt. Ex. 3.

6. Despite repeated requests by the Claimant to perform work under the Contract, the Respondent never performed *any* work under the Contract and the Claimant never received any products to which she was entitled under the Contract.

7. The Claimant applied and directly paid for various permits and surveys necessary for the installation of the pool. The permits and associated fees, taxes and decking were the responsibility of the Claimant under the Contract. *Id.*

8. Other than the initial deposit of \$15,000.00, the Claimant paid no additional sums to the Respondent.

DISCUSSION

In this case, the Claimant has the burden of proving the validity of her claim by a preponderance of the evidence. Md. Code Ann., State Gov't §10-217 (2014); COMAR

09.08.03.03A(3).³ “[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true.” *Coleman v. Anne Arundel Cty. Police Dep’t.*, 369 Md. 108, 125, n. 16 (2002), quoting Maryland Pattern Jury Instructions 1:7 (3rd. ed. 2000).

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) (2015).⁴ See also COMAR 09.08.03.03B(2) (“actual losses . . . incurred as a result of misconduct by a licensed contractor”). Actual loss “means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” Bus. Reg. § 8-401. 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 to build her a pool. The Claimant gave to the Respondent the sum of \$15,000.00 as a deposit on that contract, which was entered into on August 10, 2009. Despite the Respondent’s obligation to sell and install a pool and related equipment, the Respondent never performed any of the work or provided any of the services under the Contract. Indeed, the Claimant never saw the Respondent or his representatives again after the Contract was entered into and the \$15,000.00 was given to the Respondent.

The uncontroverted evidence in this case is that the Respondent failed to perform any of his responsibilities under the Contract. Thus, I find that the Claimant is eligible for compensation from the Fund.

³ As noted above, “COMAR” refers to the Code of Maryland Regulations.

⁴ Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume.

Having found eligibility for compensation I now turn to the amount of the award, if any, to which the Claimant is entitled. 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 provide three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). The following formula offers an appropriate measurement to determine the amount of actual loss where, as here, the Respondent abandoned the Contract without doing any work.

"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." COMAR 09.08.03.03B(3)(a). Pursuant to the Business Regulation Article, the maximum recovery from the Fund is limited to the lesser of \$20,000.00 or the amount paid by or on behalf of the Claimant to the Respondent. Bus. Reg. § 8-405 (e)(1), (5). Accordingly, the Claimant is entitled to reimbursement from the Fund in the amount of \$15,000.00, the amount actually paid to the Respondent. Bus. Reg. § 8-405 (e)(5); COMAR 09.08.03.03B(3)(a). While I understand that the Claimant has paid for various permits and surveying fees, and has incurred additional expenses related to the Respondent's failure to perform under the Contract, the MHIC is prohibited from awarding 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." COMAR 09.08.03.03B(4). Indeed, the amount that the Claimant incurred for permits and associated fees, which were the responsibility of the Claimant under the Contract in any event, are not a part of the amount that can be reimbursed to the Claimant by the Fund. As the Claimant has only shown that the money she disbursed to the Respondent was \$15,000.00, reimbursement from the Fund must be limited to that amount. *Id.*

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$15,000.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(a), (4).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$15,000.00;

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 (10%) as set by the Maryland Home Improvement Commission;⁵ and

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

Signature on File

July 21, 2016
Date Decision Issued

Marina Lolley Sabett
Administrative Law Judge

MLS/kkc
162797

⁵ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 23rd day of August, 2016, 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.

Michael Shilling

***Michael Shilling
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION

