

<p>IN THE MATTER OF THE CLAIM</p> <p>OF FREDDIE R. MARTINEZ,</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 ERIC MAYHEW,</p> <p>T/A EJ MAYHEW LLC,</p> <p>RESPONDENT</p>	<p>* BEFORE MARINA L. SABETT,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>* OAH NO.: DLR-HIC-02-12-32198</p> <p>* MHIC NO.: 11 (05) 873</p> <p>*</p> <p>*</p> <p>*</p>
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RECOMMENDED DECISION

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STATEMENT OF THE CASE

On April 11, 2011, Freddie R. Martinez (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$24,944.51 for actual losses allegedly suffered as a result of a home improvement contract with Eric Mayhew, t/a EJ Mayhew LLC (Respondent).

I held a hearing on June 3, 2013, at the Office of Administrative Hearings (OAH), 11101 Gilroy Road, Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010 & Supp. 2012). Niki McCormally, Assistant Attorney General, Department of Labor, Licensing and

Regulation (Department), represented the Fund. The Claimant represented himself. The Respondent failed to appear after due notice to his address of record.

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 Office of Administrative Hearings govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2012); Code of Maryland Regulations (COMAR) 09.01.03; 09.08.02; and 28.02.01.

ISSUES

Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions? If so, what is the amount of the loss?

SUMMARY OF THE EVIDENCE

Exhibits

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

- Cl. Ex.1 Color photograph of garage shell, undated
- Cl. Ex. 2 Color photograph of frame of porch extension, undated
- Cl. Ex. 3 Color photograph of garage shell, undated
- Cl. Ex. 4 Color photograph of unfinished footer, undated
- Cl. Ex. 5 Letter to Claimant from John L. Schneider, P.E., Engineering & Construction Consultant, July 6, 2011, with attached copies of three cancelled checks payable to: John L. Schneider, July 6, 2011, in the amount of 300.00; Director of Finance Howard Co., July 6, 2011, in the amount of \$120.68; BGE, July 7, 2011, in the amount of \$293.19
- Cl. Ex. 6 Color photograph of unfinished garage rafter, undated
- Cl. Ex. 7 Color photograph of unfinished garage rafter, undated
- Cl. Ex. 8 Color photograph of garage opening, undated

- Cl. Ex. 9A, B Color photograph of garage grading, undated
- Cl. Ex. 10 Color photograph of garage door, undated
- Cl. Ex. 11 E-mail from Respondent to Claimant, October 18, 2010, with attached invoices and statements dated August 4, 2010, August 20, 2010, and October 18, 2010
- Cl. Ex. 12 Copies of four cancelled checks payable to Respondent: August 4, 2010, in the amount of \$2,300.00; August 11, 2010, in the amount of \$3,000.00; August 21, 2010, in the amount of \$6,000.00; and August 26, 2010, in the amount of \$7,000.00
- Cl. Ex. 13 Contract between Claimant and Stephen Ferranti, Ferranti Remodeling, August 2, 2011, with attached Proposal, July 22, 2011
- Cl. Ex. 14 Receipts for materials
- Cl. Ex. 15 Promissory Note between Claimant and Stephen Ferranti, Ferranti Remodeling, December 19, 2011
- Cl. Ex. 16 Invoice from Solution Electronics, March 11, 2013, with attached Howard County Permit, March 25, 2013; copies of two cancelled checks payable to Dan Parr: April 3, 2013, in the amount of \$500.00; May 5, 2013, in the amount of \$1,000.00
- Cl. Ex. 17 Color photographs of finished garage, windows, roof, porch, and porch steps
- Cl. Ex. 18 Invoice from Respondent to Claimant, August 4, 2010
- Cl. Ex. 19 Copies of five cancelled checks payable to: Stephen Ferranti, December 16, 2011, in the amount of \$1,250.00; December 2, 2011, in the amount of \$2,300.00; March 1, 2013, in the amount of \$3,000.00; BGE, December 6, 2011, in the amount of \$227.23; Cash, December 9, 2011, in the amount of \$1,200.00

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

- GF Ex. 1 Notice of Hearing, January 18, 2013
- GF Ex. 2 Hearing Order, August 8, 2012, with attached Claim Form, dated April 11, 2011
- GF Ex. 3 Licensing Information for the Respondent, printed April 8, 2013
- GF Ex. 4 Home Improvement Claim Form with attached narrative, January 12, 2011
- GF Ex. 5 Licensing Information for Stephen Ferranti, printed May 30, 2013

Testimony

The Claimant testified on his own behalf and presented the fact and expert testimony of Edward Ackerman, Howard County Building Inspector, and the fact testimony of Stephen Ferranti, Contractor, Ferranti Remodeling. The Fund did not present any witnesses. As the Respondent failed to appear, no testimony was offered on his behalf.

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 # 01-101879. GF Ex. 3.
2. As memorialized by two invoices dated August 4, 2010, and August 20, 2010, the Claimant and the Respondent entered into a contract in August 2010 (Contract), in which the Respondent would build a garage addition to the Claimant's existing home, repair the roof and place new shingles on the Claimant's home, and build and install a porch and bay window on the Claimant's home. Cl. Ex. 11. In exchange for the Respondent's materials and services, the Claimant would pay to the Respondent the sum of \$27,234.00. Id.
3. By the end of September 2010, work under the Contract stopped. The work was incomplete and much of the work done was inadequate and unworkmanlike. Specifically, the issues included the following: no attachments from the foundation to the walls of the garage; the foundation wall of the garage was not high enough to avoid water coming in (below

grade); the garage door area was the incorrect size and would not support a garage door; the rafters of the garage were incorrect; the sizing of the doors and windows were the not standard size and framed incorrectly; the roof repair and shingle placement were incomplete --plastic covered the plywood sheeting; the porch was incomplete and the bow window was not installed. Cl. Ex. 1-4.

4. As of October 18, 2010, the Claimant had paid to the Respondent \$18,300.00 under the Contract. Cl. Ex. 11 and Cl. Ex. 12. The Claimant paid an additional \$474.51 directly to Lafarge for a gravel delivery, which amount the Respondent was supposed to have paid under the Contract. The Respondent indicated to the Claimant that he would reimburse the Claimant the \$474.51 that the Claimant paid directly out of pocket, as it was a cost that the Respondent was to cover; however, the Respondent did not reimburse the Claimant that amount. Accordingly, the Claimant paid \$18,774.51 to the Respondent under the Contract.
5. The Claimant tried to contact the Respondent on numerous occasions to complete the work, including going to the Respondent's home. In October and November 2010, the Respondent sent some of his men to put more plastic on the unfinished roof to stop the leaking. In May 2011, the Respondent sent a new construction crew chief to evaluate what needed to be done to complete the work under the Contract; however, no further work was completed under the Contract by the Respondent, despite the Claimant's repeated requests that the Respondent do so.

6. In order to complete and/or repair the incomplete, inadequate and unworkmanlike work performed by the Respondent under the Contract, the Claimant contracted with Stephen Ferranti, MHIC license number 87592-01, on August 2, 2011, in the amount of \$11,350.00. This amount included labor only, as the Claimant agreed to provide any needed materials. The contract specifically excluded installation of the "Bow Window." Cl. Ex. 13.
7. Mr. Ferranti fixed the foundation issues, put in proper anchor bolts, reframed the windows and doors in the garage to standard size, installed the windows and doors, built the porch, finished and fastened the new garage roof into the existing roof, repaired and resingled the existing roof, and finished and sided the garage.
8. The Claimant also spent \$8,474.88 in materials to complete the work that should have been completed by the Respondent under the Contract. Cl. Ex. 14.
9. The Claimant also paid \$3,000.00 to a licensed electrician to have the electrical work in the garage completed as it should have been completed by the Respondent under the Contract. Cl. Ex. 16.
10. Accordingly, in addition to the \$18,774.51 that the Claimant already paid to the Respondent under the Contract, the Claimant had to pay an additional \$22,824.88 (\$11,350.00 to Mr. Ferranti, \$8,474.88 for materials and \$3,000.00 for electrical work) for a total of \$41,599.39 to complete or

repair the work that should have been performed by the Respondent under the Contract.

11. Despite the sums expended by the Claimant to complete and repair the unfinished and inadequate/unworkmanlike home improvement begun by the Respondent, the Claimant still did not have a bow window installed (as he would have had under the Contract) in an effort to curtail the additional costs he had to incur. The cost of such bow window was itemized as \$1,732.00 in the Contract. Cl. Ex.11.

DISCUSSION

The Respondent's Failure to Appear

Neither the Respondent nor anyone authorized to represent the Respondent appeared at the hearing.

On January 18, 2013, the OAH mailed a Notice of Hearing (Notice) and a copy of the June 22, 2012 MHIC Hearing Order (Hearing Order) by certified and first class mail to the Respondent's address of record at 5754 Lichenbard Circle, New Market, MD 21774. The Notice advised the Respondent of the time, place and date of the hearing. The OAH received a card from the United States Postal Service (USPS), which was executed by Lori Mayhew on January 19, 2013, acknowledging receipt of the Notice and Hearing Order. The January 19, 2013 receipt of service card is part of the file maintained by the OAH in this case.

If the Respondent has moved, he has failed to update his address information with the MHIC, as he is required to do within ten days of any such address change. COMAR 09.08.01.11. Accordingly, there is no indication that the Respondent had any other address other than the New Market address. The person who signed for the Notice and Hearing Order had the

same last name as the Respondent. Moreover, on February 6, 2013, Terence Garvey, Esquire, sent a notice to the OAH that a case under Chapter 7 had been filed on January 30, 2013, in the Southern Division of the United States Bankruptcy Court for the District of Maryland for Eric Mayhew as the debtor. Consequently, I directed that the hearing proceed in the Respondent's absence pursuant to section 8-312(h) of the Business Regulation Article, section 10-209 of the State Government Article, and COMAR 09.01.02.07 and .11.

The Merits

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.2012). *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 reasons that follow, I find that the Claimant has proven eligibility for compensation in the amount of \$16,097.39.

The Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimant. GF Ex. 3. The Contract provided for the addition of a garage, porch, and bow window, as well as for the repair and reshingling of the roof on the Claimant's existing home. Cl. Ex. 11 and Cl. Ex. 18.

Contrary to the Contract, however, and as described in some detail by the Claimant, the Claimant's fact/expert witness, Howard County Building Inspector Mr. Ackerman, as well as the Claimant's fact witness, contractor Mr. Ferranti, the Respondent left the job woefully incomplete with various structural deficiencies in the work already completed. Specifically, there were no attachments from the foundation to the walls of the garage, the foundation wall of the garage was built below grade, the garage door area was the incorrect size and would not support a garage door,

the rafters of the garage were incorrect, and the sizing of the doors and windows of the garage were the not standard size and framed incorrectly. Moreover, the roof repair and shingle placement on the existing house were incomplete --plastic covered the plywood sheeting, the porch was incomplete and the bow window was not installed. As testified to by both Mr. Ackerman and Mr. Ferranti, in order to finish the job begun by the Respondent, the various structural defects had to be corrected before work on the garage could continue. As testified to by the Claimant, the incomplete garage construction, roof repair and porch construction left the Claimant's house a serious eyesore, as documented by pictures of the house after the Respondent abandoned the project at the end of September 2010. See Cl. Exs. 1-4. Accordingly, I find that the Respondent performed an unworkmanlike, inadequate and incomplete home improvement for which the Claimant suffered an actual loss; therefore, the Claimant is eligible for compensation from the Fund. Md. Code Ann., Bus. Reg. § 8-405(a) (Supp.2012). *See also* COMAR 09.08.03.03B(2).

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, at least in part:

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).

Applying that formula here, the Claimant paid to the Respondent \$18,774.51 of the \$27,234.00 total price under the Contract. The Claimant needed to invest an additional \$22,824.88 (\$11,350.00 to Mr. Ferranti, \$8,474.88 for materials, and \$3,000.00 for electrical work) to complete or repair the work that should have been properly performed under the Contract by the Respondent. Cl. Ex. 14.

When the \$22,824.88 that the Claimant paid to repair/complete the Respondent's work under the Contract is added to the \$18,774.51 that he paid to the Respondent, the total is \$41,599.39. When the amount of the Contract at issue, \$27,234.00 is subtracted from the amount that the Claimant paid to the Respondent and for repair work, the difference is \$14,365.39. The calculation is as follows:

\$ 18,774.51	Amt. Claimant Paid Respondent
+ 22,824.88	Amt. Claimant Paid to Repair/Complete
\$ 41,599.39	Total
- \$ 27,234.00	Amount of the Contract
\$ 14,365.39	Actual Loss (subtotal)

Although the actual loss under the formula above is \$14,365.39, the Claimant is entitled to additional compensation given that no bow window was installed as it should have been under the Contract, the cost of which was itemized in the Contract as \$1,732.00. Cl. Ex. 11.

Accordingly, under COMAR 09.08.03.03B(3), which allows for a unique measurement of damages in order to properly reflect an actual loss, I find that the Claimant is entitled to compensation from the Fund in the amount of \$16,097.39, which is \$14,365.39 (the amount of the actual loss under the general applicable formula in this circumstance under COMAR 09.08.03.03B(3)(c)), plus \$1,732.00 (the cost to purchase and install a bow window as itemized in the Contract). Cl. Ex. 11. At the hearing, the Fund recommended that the Claimant was

entitled to \$18,774.51, the maximum amount of recovery in this case, given that the Claimant had yet to install the bow window and had to pay \$8,474.88 out of pocket for materials, which costs were included in Contract.¹ While I agree that the Claimant is entitled to additional compensation for the bow window, I do not agree that the costs for materials should be taken into consideration again, as such costs were already taken into consideration and used in the calculation under COMAR 09.08.03.03B(3)(c) above. Accordingly, in the instant case I find that the Claimant is entitled to reimbursement in the amount of \$16,097.39 from the Fund.²

CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual/compensable loss of \$16,097.39 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 16,097.39; 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

¹ Pursuant to Md. Code Ann., Bus. Reg. §8-405 (e)(1) and (5) (Supp. 2012), 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, which is \$18,774.51 in the instant case.

² The governing statute provides that the "Commission may not award . . . more than \$20,000.00 to one claimant for acts or omissions of one contractor . . ." The Commission's regulations provide that it may not award more than \$15,000.00 in such circumstances. *Compare* Md. Code Ann., Bus. Reg. § 8-405(e)(1), *with* COMAR 09.08.03.03D(2)(a). The difference between these two enactments constitutes a conflict, as a result of which I am bound to follow the statute. *Thanner Enters. v. Balt. Cnty.*, 414 Md. 265, 276 (2010).

ORDER that the records and publications of the Maryland Home Improvement

Commission reflect this decision.

Signature on File

August 29, 2013
Date Decision Mailed

NH

Marina L. Sabett
Administrative Law Judge

MLS/lh
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