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| IN THE MATTER OF THE CLAIM OF    | * BEFORE ANN C. KEHINDE,            |
| RICHARD C. RUDOLPH               | * AN ADMINISTRATIVE LAW JUDGE       |
| AGAINST THE MARYLAND HOME        | * OF THE MARYLAND OFFICE OF         |
| IMPROVEMENT GUARANTY FUND        | * ADMINISTRATIVE HEARINGS           |
| FOR THE ALLEGED ACTS OR          | * OAH NO.: DLLR-HIC-02-13-25915     |
| OMISSIONS OF JAMIE CHERWATY, t/a | * <i>MHIC CASE NO.: 12 (90) 477</i> |
| J & J HOME RENOVATIONS,          | *                                   |
| RESPONDENT                       | *                                   |

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**RECOMMENDED DECISION**

STATEMENT OF THE CASE  
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RECOMMENDED ORDER

**STATEMENT OF THE CASE**

On June 6, 2012 and September 21, 2012, Richard C. Rudolph (Claimant) filed claims with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (GF) for reimbursement of \$16,768.00 and \$9,301.55, respectively, for actual losses allegedly suffered as a result of a home improvement contract with Jamie Cherwaty, t/a J&J Home Renovations (Respondent).

On June 3, 2014, this matter was scheduled for a hearing on the merits at the Cecil County Administration Building, 200 Chesapeake Blvd., Elkton, MD 21921. The Claimant was present and represented himself. Hope Sachs, Assistant Attorney General, represented the MHIC-GF. The Respondent Contractor was present and represented herself.

At the beginning of the hearing, the Claimant inquired as to whether both claims would be addressed during the hearing. As neither the MHIC-GF nor the Respondent Contractor had information regarding the June 6, 2012 claim, the hearing on the merits was postponed and a pre-hearing conference was held. A Pre-Hearing Conference Report and Order (Pre-Hearing Order) was issued on June 6, 2014. The parties timely filed their Amended Complaint and Response as required by the Pre-Hearing Order.

I held a hearing on Tuesday, July 22, 2014, at the County Administration Building. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2012). The Claimant represented himself.<sup>1</sup> Hope Sachs, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Respondent<sup>2</sup> was present and represented by David Beste, Esquire.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, 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. 2014); 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?

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<sup>1</sup> The Claimant offered a Limited Power of Attorney (POA) and requested that his son (who was named in his Limited POA) be allowed to represent him during the hearing on the merits. However, a non-attorney may not be granted the right to practice law without a license in an administrative proceeding. The Claimant is not a corporation. See, Md. Code Ann., State Gov't § 9-1607.1.

<sup>2</sup> The MHIC license was issued to Jamie Cherwaty although her husband, John Cherwaty does almost all of the home improvement work. For ease of reference, unless otherwise specified, Respondent may refer to either Mr. or Mrs. Cherwaty.

## SUMMARY OF THE EVIDENCE

### Exhibits

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

1. August 6, 2012 Email from Donald Troy to Claimant
2. Undated and unsigned Roofing Report for 1156 Appleton Road, Elkton, Maryland<sup>3</sup>
3. Photograph of installation on dead valley portion of roof
4. Photograph of missing baffles on roof
5. Photograph of baffles after roof torn off
6. Photograph of ridge portion of roof – discolored insulation
7. Photograph of dead valley where the two roofs meet<sup>4</sup>
8. Exhibit not admitted (for identification only)<sup>5</sup>
9. Undated Amended Complaint<sup>6</sup>
10. June 7, 2010 Contract between Respondent and Claimant
11. Exhibit not admitted (for identification only)<sup>7</sup>
12. Exhibit not admitted (for identification only)<sup>8</sup>
13. September 21, 2010 Invoice
14. May 19, 2012 Sales Order, Byler's Store
15. June 7, 2012 check #8190 in the amount of \$916.47 to Byler's Store

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<sup>3</sup> Mr. Lang testified that he wrote the letter based on what Scott Manning observed on the roof.

<sup>4</sup> I gave very little weight to the pictures because they were taken by the Claimant in February of 2012, and Mr. Lang had difficulty identifying aspects of the pictures. For example, Mr. Lang was uncertain if Cl. Ex. #7 was how the roof looked before it was replaced or afterwards.

<sup>5</sup> Undated and unsigned letter from P.J. Fitzpatrick, Inc.

<sup>6</sup> The Claimant later offered a copy of the dated Amended Claim Form (see Cl. Ex. #25).

<sup>7</sup> Although the Claimant argued that this inspection report should be admitted because the contract he had with the Respondent was based on it, I sustained the Respondent's objection to its admission because it was unclear who wrote it, it appears to be an excerpt from a longer document, and it was not referred to or incorporated in the contract which was executed several months later according to the stipulation of the parties.

<sup>8</sup> Both the Respondent and MHIC-GF objected to what the Claimant offered as Cl. Ex. #12 – a proposal submitted by the Respondent, dated May 1, 2010. The objection was sustained as the relevant document was the contract which was executed more than one month later.

16. June 8, 2012 Invoice from J & A HVAC
17. June 9, 2012 check #8191 in the amount of \$200.00 to J & A HVAC
18. June 9, 2012, ledger showing labor to finish and install cherry cap onto knee wall
19. September 17, 2011 Invoice from Delaware County Supply Company
20. July 12, 2012 check #8090 to DC Contracting and Property Management in the amount of \$4,620.00; July 20, 2012 check #106 in the amount of \$5,750.00
21. February 8, 2012 check #8126 to P.J. Fitzpatrick in the amount of \$800.00; April 19, 2012 check #8168 to PJ Fitzpatrick in the amount of \$15,808.00
22. December 10, 2011 Invoice from P.J. Fitzpatrick for roof repairs
23. Emails between Respondent and Claimant on December 7, 15, 17, 2010, January 13, 2011, February 23, 24, 25, 2011, April 5, 6, 10, 11, 2011
24. September 2, 2011 email from Claimant to Respondent
25. June 13, 2014 Amended Claim
26. November 7, 2011 letter with two drawings
27. April 5, 2011 email from Claimant regarding dining room light<sup>9</sup>
28. April 12, 2011 email from Claimant regarding painter
29. Respondent's advertisement
30. Nine checks (numbers 8012, 8016, 8020, 8029, 8036, 8038, 8048, 8056 and 8064) by Claimant
31. Copies of permits obtained by initial contractor

I admitted the following exhibits on behalf of the Respondent

1. December 7, 2010 email between Respondent and Claimant
2. Addition drawings

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<sup>9</sup> This document was again offered by the Claimant as Cl. Ex. #30 but then removed as duplicative.

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

1. March 6, 2014 Notice of Hearing
2. Respondent's Licensing History
3. October 4, 2012 letter from MHIC to Respondent, with attached Claim Form, dated September 21, 2012

Testimony

The Claimant testified and elicited testimony from:

1. Dwayne Troy, DC Contracting;
2. John Lang, Warranty/Installation Manager, J.P. Fitzpatrick;
3. Rick Wyre, Building Inspector, Cecil County Government;

The Respondent testified and elicited testimony from:

1. Rusty Aleshire
2. John David Cherwaty

**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 101464.
2. Prior to June 2012, the Claimant hired Joseph Marslett to build two additions on his house at 1156 Appleton Road, Elkton, Maryland. Mr. Marslett did the excavation work and pulled the building permit for the additions. Bill Morton constructed the additions. Mr. Morton does not have a license. There were numerous problems with Mr. Morton's work and his work did not pass inspection by the Cecil County building inspectors. The cantilevered section between the existing back porch roof and the dining room/great room addition had the wrong pitch. Siding was removed from the house in August 2009 and left exposed to the elements until February 2010. There was poor

workmanship and code violations in the rafters over the bedroom addition and the roof line of the addition did not match the roof line of the existing house. The foundation for the addition did not match the foundation of the existing house.

3. On June 12, 2010, the Claimant and the Respondent entered into a contract to finish and/or fix certain aspects of the prior contractor's work. The contract provided that the work would begin on June 14, 2010, and would be completed within two months of the date of the contract. The contract also provided for a one year limited warranty.

4. The specific areas of the contract that are at issue in this case are:

- a. Three problem spots in the areas where the new roof met the existing roof;
- b. The installation of a knee wall in the front dining room with three columns to be selected by the Claimant;
- c. The installation of switches, outlets and canisters;
- d. The installation of drywall on all walls and ceilings of the additions and the painting of the walls and trim; and
- e. The installation "at no charge any other items not mentioned in contract if owner purchases materials."

5. The total contract price was \$49,850.00 and was paid in full by the Claimant.

6. On September 20, 2010, the Respondent informed the Claimant that workers would return to do final touch up of the painting, install the counter top in the powder room, the top on the knee wall with the pillars, and the chandelier, once the Claimant had purchased those items.

7. Sometime prior to September 20, 2010, the Claimant told the Respondent that he wanted to install an electric or gas fireplace. The Claimant did not advise the Respondent

that it would need the construction of a “dog box<sup>10</sup>” or any major utility connection. On an unspecified date, the Claimant then gave the Respondent the dimensions of the fireplace; the size of the fireplace dictated that it would need a “dog box” constructed in order to house the fireplace and a platform built to support the fireplace. The Respondent ripped out the siding and framed and constructed a “dog box.” The Respondent is not licensed to connect a gas fireplace.

8. On December 7, 2010, the Claimant sent the Respondent an email stating that the fireplace should be available in the next few weeks and the columns and knee wall work could be done in January 2011. The Claimant also informed the Respondent that there were areas of painting that needed to be touched up.

9. The last date that the Respondent performed any work on the Claimant’s property was April 10, 2011.

10. On February 8, 2012, the Claimant contracted with P.J. Fitzpatrick to remove and replace the entire roof. P.J. Fitzpatrick provides a life-time warranty for its roofing work. The Claimant paid P.J. Fitzpatrick \$16,768.00.

11. On June 12, 2012, the Claimant filed a Claim Form with the MHIC-GF in the amount of \$16,768.00.

12. Sometime prior to June 2, 2012, the Claimant hired Donald Troy, Jr., from DC Contracting to re-finish all of the drywall in both additions, paint the walls and ceilings and the trim. The Claimant paid DC Contracting \$9,950.00 for this work. Part of the total included \$850.00 for the installation of new ¼ round trim along all of the new flooring in the additions. Installation of ¼ round trim was not part of the contract the Claimant had with the Respondent.

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<sup>10</sup> A dog box is a “bumpout” or an extension without a foundation built to house the fireplace. A picture is included (but was not admitted as an exhibit) in the Claimant’s Response.

13. On September 21, 2012, the Claimant filed a Claim Form with the MHIC-GF in the amount of \$9,301.55.

14. On June 13, 2014, the Claimant filed an Amended Claim Form with the MHIC-GF in the amount of \$27,559.61.

### 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) (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). A claimant may not recover an amount in “excess of the amount paid by or on behalf of the claimant to the contractor against whom the claim is filed.” Md. Code Ann., Bus. Reg. § 8-405(e)(5) (2012). For the following reasons, I find that the Claimant has not proven eligibility for compensation.

The Claimant attempted to prove that the work performed by the Respondent was unworkmanlike, inadequate or incomplete through his own testimony and that of his witnesses. The Claimant’s first witness, Mr. Troy, testified that the installation of the drywall, the finishing of the drywall, and the painting, all involved poor workmanship. However, I give no weight to Mr. Troy’s observations for three reasons. First, Mr. Troy is not a licensed home improvement contractor in Maryland. Second, there were no pictures to corroborate the work Mr. Troy opined was of poor quality. Third, Mr. Troy emphasized that his work made the walls and ceilings the best in the county. However, the issue is not whether Mr. Troy does a superior job to other drywall installers and painters but whether the job performed by the Respondent was workmanlike. It is interesting that in the Claimant’s earlier emails to the Respondent, he refers



to areas of paint that need to be touched up, but once he received Mr. Troy's emails then the "touch ups" become "globs of paint" in some areas and no paint in other areas.

The Claimant paid DC Contracting \$9,950.00 for this work. The Claimant's September 21, 2012 Claim Form was for \$9,301.55 which represents the amount the Claimant paid Mr. Troy minus \$850.00 that was for the installation of new ¼ round trim that was outside the scope of the original contract. As the Claimant has not proved by a preponderance of the evidence that the drywall, painting and trim work performed by the Respondent was unworkmanlike, inadequate or incomplete, the Claimant is not entitled to \$9,301.55.

Similarly, I cannot give any weight to Mr. Lang's testimony for two reasons. First, Mr. Lang's company (P.J. Fitzpatrick) replaced the entire roof because his company gives a lifetime guaranty which was not part of the contract the Claimant had with the Respondent. Mr. Lang testified that his company goes far above and beyond the minimum standards because they are responsible for what might happen to the Claimant's roof forty years from now. Second, Mr. Lang also testified that he had no idea on what part of the roof the Respondent contractor worked; therefore, he was unable to give an opinion as to whether the Respondent did a workmanlike, adequate and complete job on the roofing work or whether another contractor was responsible for the problems Mr. Lang's company identified. Further, although the Claimant attempted to identify the part of the roof the Respondent was responsible for, I do not find his testimony persuasive because Mr. Lang did not agree with the Claimant's assertions. For example, the Claimant asked Mr. Lang if what he saw from the outside (the lack of baffles that would allow for air circulation) resulted in an extreme case of air stagnation which then led to sweating/dripping on the interior and peeling drywall tape. Mr. Lang testified he did not observe the interior but from what he saw on the outside, he would not construe the lack of air circulation as an "extreme case."

The Claimant paid P.J. Fitzpatrick \$16,768.00. On June 12, 2012, the Claimant filed a Claim Form with the MHIC-GF in the amount of \$16,768.00. As the Claimant has failed to prove by a preponderance of the evidence that the Respondent's work on the roof was incomplete, inadequate or unworkmanlike, the Claimant is not entitled to \$16,768.00.

The Claimant's June 13, 2014 Amended Claim Form is in the amount of \$27,559.61. The amount claimed for the drywall/painting and the roofing work was \$26,069.55. The difference of \$1,490.06 is for the installation of the gas fireplace and the installation of a gas line as well as the building of a platform for the fireplace and hearth and the hookup of gas and electric lines. The Claimant contends that paragraph 42 of the contract between him and the Respondent required the Respondent to build a platform for the gas fireplace, install a gas line and hookup the fireplace to the gas and electric lines. Paragraph 42 of the contract reads as follows:

Contractor agrees to install at no charge any other items not mentioned in contract if owner purchases materials.

After carefully considering the parties' arguments, I disagree that the contract required the Respondent to build a platform for the gas fireplace, install a gas line, and hookup the fireplace to the gas and electric lines, for several reasons. First, the wording of paragraph 42 is vague but it is clear that the work necessary to "install" and connect a working gas fireplace goes far beyond installation. Building a platform for the gas fireplace (as was building a "dog box") goes beyond installing materials. Further, running a gas line and hooking up the fireplace to the gas and electrical lines requires licenses that the Claimant knew the Respondent did not possess and therefore she would not be capable of "installing." Finally, this paragraph has to be read in the context of the entire contract which contemplated the work being done within two months of the signing of the contract. Therefore, while it might be reasonable for the Respondent to hang a mirror that the Claimant purchased during the time the Respondent was working on the additions

(even if a mirror was not specified in the contract), it would be unreasonable to expect the Respondent to wait over six months for the Claimant to purchase a gas fireplace and then install it.

Therefore, I conclude that because the Respondent did not have any obligation to “install” a gas fireplace for the Claimant, the Claimant is not entitled to an award of \$1,490.06.

**CONCLUSIONS OF LAW**

I conclude that the Claimant has not proven by a preponderance of the evidence that he sustained an actual loss of \$27,559.61 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:

**DISMISS** the Claimant’s claim; and

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

**Signature on File**

October 20, 2014  
Date decision mailed

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Ann C. Kehinde  
Administrative Law Judge

AGK/cj  
#152333