

**The Maryland Home
 Improvement Commission**

**v. Nourhan Kailian
 t/a Appleby Window Systems
 (Contractor)
 and the Claim of
 Patricia Butler
 (Claimant)**

* **BEFORE THE**
 * **MARYLAND HOME IMPROVEMENT**
 * **COMMISSION**
 *
 * **MHIC No.: 12 (75) 485**
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FINAL ORDER

WHEREFORE, this 24th day of February, 2015, Panel B of the Maryland Home

Improvement Commission ORDERS that:

- 1. The Findings of Fact set forth in the Proposed Order dated June 24, 2014 are AFFIRMED.**
- 2. The Conclusions of Law set forth in the Proposed Order dated June 24, 2014 are AFFIRMED.**
- 3. The Proposed Order dated June 24, 2014 is AFFIRMED.**
- 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.**

Joseph Tunney
**Joseph Tunney, Chairperson
 PANEL B**

MARYLAND HOME IMPROVEMENT COMMISSION

PHONE: 410-230-6309 • FAX: 410-962-8482 • TTY USERS, CALL VIA THE MARYLAND RELAY SERVICE
 INTERNET: WWW.DLLR.MARYLAND.GOV • E-MAIL: MHIC@DLLR.STATE.MD.US

IN THE MATTER OF THE CLAIM
OF PATRICIA V. BUTLER,
CLAIMANT,
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND,
FOR THE ALLEGED ACTS OR
OMISSIONS OF NOURHAN K. KAILIAN,
T/A APPLEBY SYSTEMS, INC., and
APPLEBY WINDOW SYSTEMS,
RESPONDENT

* BEFORE RICHARD O'CONNOR,
* ADMINISTRATIVE LAW JUDGE,
* THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: DLR-HIC-02-13-20922
* MHIC No.: 12 (75) 485
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PROPOSED DECISION

STATEMENT OF THE CASE
ISSUE
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PROPOSED FINDINGS OF FACT
DISCUSSION
PROPOSED CONCLUSION OF LAW
PROPOSED ORDER

STATEMENT OF THE CASE

On May 21, 2012, Patricia V. Butler (Claimant), filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$34,125.00 for alleged actual losses suffered as a result of a home improvement contract with Nourhan K. Kailian, trading as Appleby Systems, Inc. (Respondent).

I held a hearing on February 25, 2014 at the Office of Administrative Hearings in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. § 8-312 (Supp. 2013) and § 8-407 (2010). Niki

McCormally, Staff Attorney, Department of Labor, Licensing and Regulation (Department), represented the Fund. Brian M. Spem, Esquire, represented the Claimant. John Kailian, president and co-owner of Appleby Systems, Inc., who is also licensed by the MHIC, represented the Respondent. Md. Code Ann., State Gov't § 9-1607.1(a)(4)(i) (2009).

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. 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?

SUMMARY OF THE EVIDENCE

Exhibits

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

- Cl. Ex. 1. Invoice with payment schedule, June 9, 1997.
- Cl. Ex. 2. Letter from Gregory T. Styles of G-Crew Home Improvement to the Better Business Bureau, October 10, 2011.¹
- Cl. Ex. 3. Report from EHI Mold Remediation, Inc., July 26, 2013; Analysis Report by SanAir Technologies Laboratory, July 25, 2013.
- Cl. Ex. 4. Copies of three checks to EHI Mold Remediation, Inc., August 19, 20, and 29, 2013.

¹ Cl. Ex. 2 was admitted for the limited purpose of establishing a timeline of events. The opinions contained in the letter have not been considered.

- Cl. Ex. 5. Invoice from USAir Duct and A/C, LLC, October 16, 2013.
- Cl. Ex. 6. Letter from the Claimant to Baltimore County Building and Inspections, November 17, 2011; Building Permit Processing Cash Slip Receipt, September 8, 1997; Details of Permit # B317302, printed August 10, 2012.
- Cl. Ex. 7. True test copy of Details of Permit # B317302, printed February 11, 2014.
- Cl. Ex. 8. Seven color photographs of the area where the roof of the patio enclosure² attaches to the house.
- Cl. Ex. 9. Seven color photographs of the interior of the patio enclosure.
- Cl. Ex. 10. Nine color photographs of the floors of the patio enclosure and the adjoining house.
- Cl. Ex. 11. Four color photographs of a wall, two windows, and a sliding glass door.
- Cl. Ex. 12. Report and proposal from Workman's Pyramid Builders, February 3, 2014.

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

- Resp. Ex. 1. Contract between the Claimant and the Respondent, May 22, 1997.
- Resp. Ex. 2. Building Permit, September 8, 1997.

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

- Fund Ex. 1. Notices of Hearing, July 2, 2013 and October 24, 2013.
- Fund Ex. 2. Transmittal; Hearing Order, May 14, 2013; Claim Form, May 21, 2012.
- Fund Ex. 3. Letter from the MHIC to the Respondent, June 4, 2012.
- Fund Ex. 4. MHIC licensing history for Nourhan K. Kailian, August 19, 2013; MHIC licensing history for John Kailian, February 10, 2014.

² The Claimant referred to the structure built by the Respondent as a "sunroom," whereas the Respondent's witness called it a "patio enclosure." Because the Respondent's witness was accepted as an expert in patio enclosures, I shall refer to the structure by that name.

Testimony

The Claimant testified on her own behalf and presented the testimony of Anthony Workman, who was accepted as an expert in home rehabilitation.

The Respondent presented the testimony of Robert Lingenfield, who was accepted as an expert in aluminum and vinyl patio enclosures.

PROPOSED FINDINGS OF FACT

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

1. At all times in 1997 relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC license number 01-21654. The Respondent's individual license expired in 2012, but Appleby Systems, Inc., or Appleby Window Systems remains licensed under license number 05-11145.
2. On May 22, 1997, the Claimant and the Respondent entered into a contract whereby the Respondent agreed to build an approximately ten feet by eleven feet rectangular patio enclosure attached to the Claimant's existing house. The contract stated that work would begin on July 22, 1997 and would be completed by September 22, 1997.
3. The contract price was \$10,600.00, which the Respondent paid.
4. The Respondent built the patio enclosure as called for in the contract. However, the Claimant was not happy with the structure, so the Respondent extended the front of the enclosure about two additional feet, without charge. The Claimant was satisfied with the larger patio enclosure.
5. The patio enclosure is made of vinyl, aluminum, and glass, and sits about four feet off the ground outside the Claimant's master bedroom. It is supported by posts resting on

concrete footers. A sliding glass door connects the patio enclosure and the master bedroom, and the roof of the enclosure is attached to the house at the fascia board.

6. The fascia board is a piece of wood attached to the roof trusses that extends under the roof eaves along the front of the soffit, which lies between the fascia board and the exterior wall of the house. (See Claimant Exhibit 9.)

7. The roof of the patio enclosure is covered by aluminum and has a one-in-twelve pitch away from the house.

8. The Respondent installed flashing and sealant along the area where the roof of the enclosure meets the fascia board, to prevent water from leaking between the two structures.

9. The Respondent provided a one-year warranty on workmanship to the Claimant.

10. The Respondent used the patio enclosure with no problems for thirteen years.

11. Sometime between 1997 and 2010, a rain gutter was installed on the fascia board of the house above the roof of the patio enclosure, where no gutter had previously been. (See Claimant Exhibit 8.) Nails supporting the gutter pierced the flashing that the Respondent had installed.

12. Between 1997 and 2010, the sealant that the Respondent had installed around the flashing deteriorated, which was normal wear for sealants manufactured at that time.

13. In late 2010, the Claimant discovered spots of water damage on the wall outside the master bedroom in the patio enclosure, behind a chair and a sofa.

14. By 2011, there was extensive water damage to the wall between the master bedroom and the patio enclosure, the floor of the enclosure, and the floor joists beneath the enclosure.

15. After the Claimant complained, Robert Lingenfield, an employee of the Respondent, inspected the patio enclosure in 2011.

DISCUSSION

A homeowner 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 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.” Md. Code Ann., Bus. Reg. § 8-401 (2010). For the following reasons, I find that the Claimant has not proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. Although Nourhan Kailian’s individual license has expired, it was in effect in 1997, and the Respondent company is still licensed, and is now owned and operated by John Kailian.

In presenting evidence in support of her claim, the Claimant brought up, and spent considerable time on, certain matters that are not relevant to the claim. First, she contended that the Respondent never obtained a final inspection of the patio enclosure from the Baltimore County Department of Permits and Development Management. The evidence on this point is not conclusive, but lack of a final inspection does not show that the Respondent’s workmanship was poor. The Claimant implies that the sunroom would not have passed final inspection, but the evidence does not establish this implication as a fact.

Second, the Claimant presented considerable evidence that after the water leakage was discovered, her home was afflicted by mold, and she spent several thousand dollars having the

mold remediated and the air ducts cleaned. As set forth above, section 8-401 of the Business Regulation Article defines "actual loss" as the "the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Remediation of mold is not restoration, repair, replacement, or completion of the Respondent's home improvement work, and under section 8-405(a) a claimant may recover from the Fund only for an actual loss. Additionally, section 8-405(e)(3) of the Business Regulation Article prohibits recovery for consequential damages, which would include mold remediation. Thus, even if the Claimant proved that the Respondent's work was inadequate, she would be unable to recover from the Fund the money she spent for mold remediation.

On the other hand, the Respondent also produced a smokescreen that obscured the real issue in this case, by suggesting that skylights in the Claimant's roof caused the water leak at issue. The evidence shows that the Claimant has many skylights in the roof of her house, although none were in the patio enclosure. The evidence also establishes that one or more of these skylights leaked sometime in the past. Nevertheless, there is no specific and persuasive evidence that the skylights were the source of the water that leaked down the wall between the master bedroom and the enclosure.

Based on the photographs that the Claimant introduced and the testimony of two expert witnesses, there is no real doubt that the water leaked into the structure from the joint between the roof of the patio enclosure and the fascia board of the existing house. Mr. Workman, testifying for the Claimant, acknowledged that he has no experience building patio enclosures like this one. He expressed the opinion that the roof of the enclosure should have been attached to the house under the soffit. However, he did not really testify that failure to do so was poor workmanship; he simply opined that perhaps it should have been done that way. Mr. Workman

also stated that the cause of the water leak was "possibly" a breakdown of the original sealant. He said that the area could be re-sealed, but it "would not last forever."

Mr. Workman further described the necessary repairs as taking the roof off the enclosure, taking the gutter off the house, building a new roof attached to the house under the soffit, replacing the floor and some of the joists of the enclosure, and replacing all damaged drywall and trim. He estimated \$24,000.00 as the cost of these repairs.

The Respondent's expert, Mr. Lingenfield, worked for the Respondent between 1999 and 2013, and has installed hundreds of patio enclosures, the last of which he personally worked on in 2011. He testified that he inspected the Claimant's enclosure in 2011 and found that a gutter had been installed above its roof after the structure was erected. The nails supporting the gutter had pierced the flashing that the Respondent had installed to prevent leaks, and water was flowing into the nail holes and down the wall behind the soffits. Mr. Lingenfield was quite unequivocal about his testimony, offering a clear explanation of what had happened, without any guesswork.

Mr. Lingenfield also rebutted Mr. Workman's opinion that the roof should have been attached to the house under the soffit, testifying that doing it that way would lower the slope of the roof so much that water would not run off effectively.

In summary, the situation described by the witnesses and the photographs is this: the roof of the house is covered with shingles, the edge of which extends over a gutter.³ The gutter and the roof of the patio enclosure are both attached to the fascia board, with the gutter above the

³ Mr. Workman testified that the shingles may not extend far enough over the gutter to ensure that water drips off the shingles and into the gutter. If this is the case, the water would run back down the underside of the shingles, then down the fascia board and possibly into the soffit and wall.

roof. The joint between the roof of the enclosure and the fascia board was originally sealed with flashing and sealant, but the flashing was pierced by the nails holding the gutter, and the sealant deteriorated over time.

Mr. Lingenfield testified that the sealants in use in 1997 were expected to last about ten years, after which the area would have to be re-sealed. The Respondent's work carried a one-year warrant, and it is not realistic to expect him to return after ten years and apply sealant again. Mr. Workman testified that he tells his customers that he will return and re-seal after a year, but beyond that, the homeowner must find another solution. Based on this evidence, I conclude that failure of the sealant after twelve or thirteen years is not poor workmanship by the Respondent.

I also conclude that the leak is of relatively recent origin. If the leak had been present since 1997, or even within a few years thereafter, it certainly would have become noticeable before 2010. Drywall, wood trim, flooring, and paint are all very susceptible to water damage and will show it as it occurs. It is unrealistic to believe that the patio enclosure had been leaking for years while the Claimant continued to enjoy it.

Although the claim in this case is not barred by the statute of limitations⁴ because the Claimant did not discover the water damage until 2010, the passage of time severely limits the Claimant's ability to prove that the Respondent is responsible for the leak. At the time the claim was filed, fifteen years had passed since the Respondent built the sunroof. In the meantime, a gutter was installed, the roof may have been replaced,⁵ and the sealant deteriorated. Any of these intervening causes could have enabled water to penetrate the patio enclosure, and the evidence

⁴ "A claim shall be 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(g) (2010).

⁵ The Claimant testified that "it's been a while" since the roof was replaced.

establishes that it was more likely than not that installation of the gutter caused the leak. The Claimant has not provided any substantial evidence that the Respondent's workmanship was poor or inadequate, or that the water leak discovered in 2010 resulted from the original construction of the patio enclosure. I thus find that the Claimant is not eligible for compensation from the Fund.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has not shown by a preponderance of the evidence that she sustained an actual and compensable loss as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401 (2010), 8-405 (Supp. 2013).

PROPOSED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund deny the Claimant's claim filed May 21, 2012; and

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

Signature on File

May 20, 2014
Date Decision mailed

Richard O'Connor
Administrative Law Judge

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