

IN THE MATTER OF THE CLAIM	* BEFORE TARA K. LEHNER,
OF SARAH A. EAST,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	* OAH No.: DLR-HIC-02-13-43683
FOR THE ALLEGED ACTS OR	* MHIC No.: 13 (05) 1124
OMISSIONS OF LEE ROSE,	*
T/A OSPREY BAY BUILDING AND	*
DEVELOPMENT, LLC,	*
RESPONDENT	*

* * * * *

PROPOSED DECISION

STATEMENT OF THE CASE
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DISCUSSION
PROPOSED CONCLUSION OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On July 25, 2013, Sarah A. East (Claimant), filed a claim (Complaint) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$9,415.34 in alleged actual losses suffered as a result of a home improvement contract with Lee Rose, trading as Osprey Bay Building and Development, LLC (Respondent).

I held a hearing on July 30, 2014, at the Office of Administrative Hearing's (OAH) Kensington, Maryland office. Md. Code Ann., Bus. Reg. § 8-312 (Supp. 2013) and § 8-407

(2010). Jessica B. Kaufman, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), appeared and represented the Fund. The Claimant also appeared and represented herself. The hearing was scheduled to begin at 10:00 a.m. At 10:20 a.m., neither the Respondent, nor anyone claiming to represent him, appeared at the hearing location. The Notice of Hearing containing the date, time and location of the hearing was mailed to all parties, including the Respondent, via Certified Mail, on May 9, 2014. The Return Receipt signed by "Lee Rose" was received by OAH on May 13, 2014. The OAH received no request for postponement of the hearing. I determined that the Respondent was properly notified but failed to appear for the hearing. As a result, I found it appropriate to proceed in the Respondent's absence.

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 (OAH) 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.

ISSUES

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

SUMMARY OF THE EVIDENCE

Exhibits

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

- Clmt. Ex. 1 - Contract, dated April 9, 2012, between Claimant and Respondent
- Clmt. Ex. 2 - Change Order #1, signed April 12, 2012, with attached schematic drawings

- Clmt. Ex. 3 - Letter, dated December 5, 2012, from the Better Business Bureau of Greater Maryland to the Claimant
Clmt. Ex. 4 - Proposal & Agreement, dated July 1, 2013, by General Home Improvement, LLC
Clmt. Ex. 5 - Photographs A through M

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

- Fund Ex. 1 - Notice of Hearing with attached Return Receipt for Lee Rose.
Fund Ex. 2 - HIC Claim Form, received July 25, 2013, and MHIC Hearing Order
Fund Ex. 3 - MHIC Contractor Registration and Professional License History
Fund Ex. 4 - Letter, dated August 5, 2013 to Respondent, with Claim Form attached

The Respondent did not admit any exhibits because he did not take part in the hearing.

Testimony

The Claimant testified and presented the testimony of Fred Vestal. The Respondent did not present any witness testimony because he did not take part in the hearing. The Fund did not present any 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 4183803.
2. At all relevant times, the Claimant owned the home located at 5225 Pooks Hill Rd., Unit 1404, Bethesda, Maryland. The Claimant purchased the home with the intention of it being her primary residence once the kitchen and bathrooms were remodeled. She moved into the home in 2012.
3. At all relevant times, the Claimant owned another home in Annapolis, Maryland. This home was an investment property and a rental. She owned no other homes in Maryland.

4. At all relevant times, the Claimant was not an employee, officer or partner of the Respondent, nor an immediate relative of the Respondent, his spouse or any of his partners, officers or employees.

5. On April 9, 2012¹, the Claimant and the Respondent entered into a contract to completely renovate the Claimant's kitchen at her then recently purchased home at 5225 Pooks Hill Rd., Unit 1404, Bethesda, Maryland. The scope of work included: demolition and disposal of existing cabinets, countertop, appliances, and sink; assembling and installing 14 Ikea cabinets and associated hardware; setting and installing built-in and free-standing appliances, including dishwasher, refrigerator and range; modifying wall cabinets to accept duct and grille for passive air vent, extending the wall vent to the front panel, and providing and installing grille and duct; wall repair and preparation of walls as "paint ready," including wall repair from electrical, HVAC and plumbing work; and demolition of existing pantry, header and shelves, the patching of the drywall, and preparation of walls as "paint ready." The contract stated that work would begin on a date to be determined and that substantial completion of the work would be done within thirty working days.

6. The original agreed-upon contract price was \$10,392.60.

7. A Change Order was executed on April 12, 2012, changing the payment schedule, but not the payment amount.

8. On April 10, 2012, the Claimant paid the Respondent \$3,429.58. On April 23, 2012, the Claimant paid the Respondent \$6,443.41.

¹ The Contract is dated April 9, 2012. The Claimant signed the contract on April 11, 2012 and the Respondent signed it April 17, 2012.

9. The Ikea cabinets arrived mid-May, 2012. The demolition work began May 15, 2012. The plumbing work began June 28, 2012. The last day any work was done at the home was July 11, 2012.

10. As of July 11, 2012, the Respondent did not complete the work under the contract and abandoned the job. The Ikea cabinets were installed covering a HVAC vent, and were not modified to provide for the passive flow of air from this vent, as was required by the Contract. The cabinet kickboards and molding were not installed. The Soft Close hinges purchased for the cabinets were not installed on half of the cabinets. The drywall in the kitchen was left with holes and other areas were rough and uneven and were not "paint ready." The ceiling where the pantry was demolished was not patched, nor was it placed in a "paint ready" condition.

11. Much of the work the Respondent did complete was inadequate. The range was installed in such a way that it stuck out beyond the countertop. The dishwasher was installed without necessary screws or kickplate, and fell forward when opened. The Ikea cabinets were installed incorrectly, resulting in a gap at the ceiling and the standard kickboards not fitting. The refrigerator was not installed level.

12. On or about July 11, 2012, the Respondent ceased coming to the Claimant's home. The Claimant attempted to make contact with the Respondent on multiple occasions to have him return to the job and finish the work. She emailed and called him and his employees repeatedly, but the Respondent never responded.

13. The Claimant also contacted the Better Business Bureau (BBB). In a letter dated December 5, 2012, the BBB informed the Claimant that the BBB was unable to resolve her complaint against the Respondent.

14. The Claimant hired General Home Improvement, LLC (GHI), to repair and complete the Respondent's unfinished work under the contract. The contract between the Claimant and GHI provided for replacing and resetting the countertop, resetting the dishwasher, modifying the cabinets that covered the HVAC vent, leveling the refrigerator, repairing the drywall and ceiling, resetting the cabinets to reach the ceiling, installing the missing Soft Close hinges on the cabinets, and installing cabinetry kickboards. The original contract amount was \$9,935.00; however, the Claimant and GHI agreed to amend the contract to delete the resetting of the cabinets. Alternatively, molding was installed at the top of the cabinets to reach the ceiling, and the kickboards were resided and installed. Additionally, the Claimant and GHI agreed to modify the countertops, rather than replace them. These amendments to the scope of work reduced the contract price by \$3,267.00 to \$6,668.00. GHI completed the work under the contract with the Claimant.

15. The Claimant filed her claim with the MHIC less than three years after entering into the Contract with the Respondent. The Claimant has not filed a claim for reimbursement or damages in any other forum and has not recovered for her loss from any source.

16. The Claimant's actual loss is \$6,148.39.

DISCUSSION

An owner bears the burden to prove her claim against the Fund by a preponderance of the evidence. Md. Code Ann., Bus. Reg. § 8-407(e) (2010); COMAR § 09.08.03.03A(3); Md. Code Ann., State Gov't § 10-217 (2009). 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. 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).

In addition, an owner must prove that at all relevant times: the owner owned fewer than three dwelling places; (b) the work at issue concerned the owner’s personal residence in Maryland; (c) the owner was not an employee, officer or partner of the contractor or the spouse or other immediate relative of the contractor or the contractor’s employees, officers or partners; (d) the work at issue did not involve new home construction; (e) the owner did not unreasonably reject the contractor’s good faith effort to resolve the claim; (f) any remedial work was done by licensed contractors; (g) the owner complied with any contractual arbitration clause before seeking compensation from the Fund; (h) there is no pending claim for the same loss in any court of competent jurisdiction and the owner did not recover for the actual loss from any source; and (i) the owner filed the claim with the MHIC within three years of the date the owner knew or with reasonable diligence should have known of the loss or damage. Md. Code Ann., Bus. Reg. §§ 8-405(c), (d), (f), and (g); 8-408(b)(1) and (2).

There is no dispute that the Respondent was a licensed home improvement contractor, and that the Respondent entered into a home improvement contract with the Claimant for a kitchen renovation at 5225 Pooks Hill Rd., Unit 1404, Bethesda, Maryland. In addition, the preponderance of the evidence is that the Claimant owned fewer than three dwelling places. She owned one other home in Annapolis, Maryland that she used as a rental property. It is also clear from the evidence that: at all relevant times, the Claimant was not an employee, officer or partner of the Respondent, nor an immediate relative of the Respondent, his spouse or any of his partners, officers or employees; the Claimant did not recover for the Respondent’s acts or omissions from any other source, and there are no actions or claims pending in any court of

competent jurisdiction; and the Claimant filed her claim within three years of the date of the Contract.

The Claimant testified that she purchased the home as her primary residence, but that she had not moved into the home yet when she entered into the contract with the Respondent. Her intention was to remodel the kitchen and bathrooms before she moved in. Ultimately, during the time of the work by the Respondent, the Claimant did move into the home. I find that this meets the requirements of Md. Code Ann., Bus. Reg. §§ 8-405(f)(2)(i).

The contract entered into between the Claimant and the Respondent in April of 2012 provided that the Respondent would do the following work in the Claimant's kitchen: demolition and disposal of existing cabinets, countertop, appliances, and sink; assembling and installing 14 Ikea cabinets with associated hardware; setting and installing built in and free-standing appliances, including dishwasher, refrigerator and range; installing and modifying wall cabinets to accept duct and grille for passive air vent, extending the wall vent to the front panel, and providing and installing grille and duct; wall repair and preparation of walls as "paint ready," including wall repair from electrical, HVAC and plumbing work; and demolition of existing pantry, header and shelves, the patching of the drywall, and preparation of walls as "paint ready." The contract stated that work would begin on a date to be determined and that substantial completion of the work would be done within thirty working days. The agreed-upon contract price for this work was \$10,392.60.²

The Claimant testified about the events surrounding this contract and the work performed according to it. The Claimant recalled, and the hand-written notes on her copy of the contract corroborate, that she paid the Respondent \$3,429.58 on April 10, 2012, and an

² A Change Order was executed on April 12, 2012, changing the payment schedule, but not the payment amount.

additional \$6,443.41 on April 23, 2012. She recalled that the Ikea cabinets arrived mid-May, 2012, and that the Respondent began the demolition work on May 15, 2012. She also recalled that the plumbing work began June 28, 2012, and that the last day anyone from the Respondent's company came to her house to perform any work was July 11, 2012. She testified that she called the Respondent and his employees on multiple occasions after July 11, 2012, and left voice mail messages, but that no one from the Respondent's company ever returned her calls. She also testified that she sent multiple emails, but that no one from the company responded to her emails either. She recalled that one day she called multiple employees of the Respondent, and that every single one of the phone voice mailboxes was full.

The Claimant also testified regarding how the work was performed. The Claimant explained how some of the work was never completed, including: the drywall and the ceiling in the kitchen was never patched and/or repaired, and were left with large holes and with rough and uneven patches, thus rendering them unpaintable; the dishwasher's kickplate was never installed; the Ikea cabinets were installed covering a HVAC vent, and the cabinet modification contemplated in the contract to provide for the passive flow of air from this vent was never installed; the cabinet kickboards and molding were not installed; some of the electrical outlet covers were not installed; and over half of the Soft Close hinges for the cabinets were not installed. The photographs admitted into evidence confirmed these deficiencies. In addition, she testified and submitted pictures to support her contention that much of the work that was completed was left as if it was completed, yet was actually in need of repair and/or was never properly constructed, including: the range was not installed flush with the counters; the refrigerator was not level; the dishwasher was installed without necessary screws, and fell forward when it was opened; the cabinets were installed too low and not flush with the ceiling, as

well as too close to the floor; the installed outlet covers were crooked and not sufficiently sized to cover the holes in the walls; and the drywall and ceiling were not prepared in a way that made them “paint-ready.”

The Claimant testified that she sought the services of GHI, a MHIC licensed contractor, to complete the work in her kitchen and to repair the inadequate work of the Respondent. The Claimant elicited testimony from Fred Vestal³, the employee of GHI, who came to the Claimant’s home to assess and evaluate the work that needed to be done to complete the Claimant’s kitchen remodel. Mr. Vestal testified regarding his observations of the work performed by the Respondent. Mr. Vestal confirmed the Claimant’s contentions, specifically that the dishwasher fell when opened and did not have the kickplate installed. Also, the range was not installed to be flush with the countertops. The refrigerator was not level and the HVAC vent was blocked by the cabinets. The cabinets were installed in a way that created a gap at the ceiling and caused the cabinet kickboards to be too large to fit between the cabinets and the floor. The ceiling and walls were not ready to be painted due to the holes and uneven drywall.

Mr. Vestal prepared a scope of work based on the issues he identified. He and the Claimant agreed on a contract price for this work of \$9,935.00. Ultimately, however, while performing the work, Mr. Vestal explained that he and the Claimant agreed that instead of resetting the cabinets, a more economical fix would be to purchase and install molding for the top of the cabinets and to resize the kickboards. This change of the contract resulted in a reduction of \$772.00 from the original contract price. Mr. Vestal also stated that he and the Claimant agreed that rather than replacing the countertop, a more economical fix would be to install a piece of metal between the range and the countertop. This change of the contract

³ The Claimant did not offer Mr. Vestal as an expert witness, so I simply rely on his testimony as a fact witness.

resulted in a reduction of \$2,495.00 from the original contract price. He and the Claimant both testified that the final contract price for all work completed by GHI, was \$6,668.00.

I find that the Claimant was very organized and specific in her testimony, having significant recollection about dates and events. This organization, as well as her self-correcting of her testimony when she realized she had made a previous error, supports my impression that she was a very credible witness. Her exhibits, as well as Mr. Vestal's testimony, also corroborated her version of the events, increasing the reliability of it. Mr. Vestal was similarly credible. He explained clearly the work that was necessary to fix the errors and omissions left by the Respondent. He was forthright in disclosing the deletions of work from the original contract. I find their testimony regarding the work that was left unfinished, as well as the quality and nature of the work that was completed, is true and accurate.

Based upon the Claimant's and Mr. Vestal's credible and uncontroverted testimony and exhibits, I find, by a preponderance of the evidence, that the Respondent did not complete all of the work required by the contract, and much of the work the Respondent completed was left in an inadequate and/or unworkmanlike state.

I also find that the work completed by GHI, is the same work contemplated by the original contract between the Claimant and Respondent.

It is unnecessary for me to have expert testimony to assist me in these findings because the nature of the work done by the Respondent and General Home Improvement, LLC, and the deficiencies alleged are such that a lay person can evaluate. Expert testimony is only required when the evidence presented and being considered is outside of the ordinary layperson's knowledge. *Titan Custom Cabinet, Inc. v. Advance Contr., Inc.*, 178 Md. App. 209, 229 (2008).

Because I conclude that the Respondent performed incomplete, unworkmanlike and inadequate work, I find that the Claimant is eligible for compensation for her actual loss for the Respondent's errors and omissions from the Fund. 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 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 . . . 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).

As stated above, I find that GHI performed work to repair the inadequate work done by the Respondent, as well as to complete the work as contemplated in the contract between the Claimant and the Respondent. Therefore, the formula as applied in this case is as follows:

Claimant Paid Respondent:	\$9,872.99
Contract - General Home Improvement, LLC	+\$6,668.00
Contract – Respondent	<u>- \$10,392.60</u>
Total	\$6,148.39

Pursuant to the Business Regulation Article, the maximum recovery from the Fund under these circumstances is \$9,872.99, the amount paid by the Claimant to the Respondent. Md. Code Ann., Bus. Reg. §8-405 (e)(5) (Supp. 2013). However, in applying the formula cited above, the Claimant is entitled to reimbursement from the Fund for her actual loss in the amount of \$6,148.39.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$6,148.39 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401 (2010), 8-405 (Supp. 2013); COMAR 09.08.03.03B(2).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$6,148.39; 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 (10%) 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

August 18, 2014
Date Decision Issued

Tara K. Lehner J
Administrative Law Judge

TKL/tc
151049

<p>IN THE MATTER OF THE CLAIM</p> <p>OF SARAH A. EAST,</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 LEE ROSE,</p> <p>T/A OSPREY BAY BUILDING AND,</p> <p>DEVELOPMENT, LLC,</p> <p>RESPONDENT</p>	<p>* BEFORE TARA K. LEHNER,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>* OAH No.: DLR-HIC-02-13-43683</p> <p>* MHIC No.: 13 (05) 1124</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p>
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FILE EXHIBIT LIST

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

- Clmt. Ex. 1 - Contract, dated April 9, 2012, between Claimant and Respondent
- Clmt. Ex. 2 - Change Order #1, signed April 12, 2012, with attached schematic drawings
- Clmt. Ex. 3 - Letter, dated December 5, 2012, from the Better Business Bureau of Greater Maryland to the Claimant
- Clmt. Ex. 4 - Proposal & Agreement, dated July 1, 2013, by General Home Improvement, LLC
- Clmt. Ex. 5 - Photographs A through M

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

- Fund Ex. 1 - Notice of Hearing with attached Return Receipt for Lee Rose.
- Fund Ex. 2 - HIC Claim Form, received July 25, 2013, and MHIC Hearing Order
- Fund Ex. 3 - MHIC Contractor Registration and Professional License History
- Fund Ex. 4 - Letter, dated August 5, 2013 to Respondent, with Claim Form attached

The Respondent did not admit any exhibits because he did not take part in the hearing.

PROPOSED ORDER

WHEREFORE, this 26th of September 2014, Panel B of the Maryland Home Improvement Commission approves the Recommended Decision 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.

W.M. Bruce Quackenbush, Jr.
William Bruce Quackenbush, Jr.
Panel B

MARYLAND HOME IMPROVEMENT COMMISSION