

IN THE MATTER OF THE CLAIM
OF MARGARET M. REILLY
CLAIMANT,
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF KENNETH MOORE,
t/a K&K CUSTOM CONTRUCTION,
LLC
RESPONDENT

* BEFORE STUART G. BRESLOW,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: DLR-HIC-02-14-18709
* MHIC No.: 13 (05) 445
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PROPOSED DECISION

STATEMENT OF THE CASE
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DISCUSSION
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RECOMMENDED ORDER

STATEMENT OF THE CASE

On January 14, 2014, Margaret M. Reilly (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$22,246.05 for actual losses allegedly suffered as a result of a home improvement contract with Kenneth Moore, t/a K&K Custom Construction, LLC (Respondent).

The parties were each sent a Notice of Hearing by the Office of Administrative Hearings (OAH) to appear on November 5, 2014 for the scheduled hearing at 10:00 a.m. which I held at

the Department of Agriculture, 50 Harry S. Truman Parkway, Annapolis, Maryland 21401. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407 (2010 & Supp. 2014).

Peter Martin, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), represented the Fund. The Claimant was present and represented herself. The Respondent, after waiting more than fifteen minutes, failed to appear for the hearing. The Notice of Hearing was sent to the Respondent's address of record with the Motor Vehicle Administration by both certified and first class mail. The copy of the Notice of Hearing that was sent by certified mail was returned as unclaimed. The Notice of Hearing sent by first class mail was not returned.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department of Labor Licensing and Regulation (DLLR), MHIC, and the Office of Administrative Hearings (OAH) Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (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?

SUMMARY OF THE EVIDENCE

Exhibits

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

- Claimant Ex. 1: Advertising statement of Respondent with copy of MHIC license number 129423 and insurance renewal binder from Platte Insurance Agency
- Claimant Ex. 2: Copy of two checks in the amount of \$17,078.18 each from Claimant to Respondent, dated May 29, 2012 and July 10, 2012

- Claimant Ex. 3: Contract between the Respondent and the Claimant, dated May 29, 2012
- Claimant Ex. 4: Correspondence by email from Claimant to Respondent along with documentation indicating that the emails were undelivered to Respondent beginning October 5 through October 22, 2012, including a copy of a letter with signed return receipt from Claimant to Respondent, dated October 22, 2012 is included in the package
- Claimant Ex. 5: Complaint Form MHIC, filed by Claimant against Respondent, dated October 22, 2012
- Claimant Ex. 6: Letter from Claimant and Patrick Reilly to Respondent, dated March 20, 2013 along with certified receipt that the letter was unclaimed
- Claimant Ex. 7: Citation Payment Form, MHIC in the amount of \$2,500.00 against Respondent, June 18, 2013
- Claimant Ex. 8: Letter from Claimant and Patrick Reilly to MHIC, dated December 28, 2013 along with undated Claim Form
- Claimant Ex. 9: Home Improvement Estimate, Unicorp, dated March 15, 2013
- Claimant Ex. 10: JJM Homes Estimate to construct two closets and bathroom doors, in the amount of \$5,950.00
- Claimant Ex. 11: Contract with Benfield Remodeling LLC to provide labor for bathroom in the amount of \$3,500.00
- Claimant Ex. 12: Purchased materials from Home Depot and Loews for Benfield Remodeling to use for the bathroom in the amount of \$1,860.00
- Claimant Ex. 13: PAZ LLC HVAC unit proposal in the amount of \$4,200.00, dated April 10, 2010
- Claimant Ex. 14: Invoice from Metropolitan Exteriors, Inc., in the amount of \$625.00 to repair the roof, dated September 26, 2014
- Claimant Ex. 15: Flooring proposal from Pasadena Floors in the amount of \$5,924.00, dated July 15, 2013
- Claimant Ex. 16: Building Permit from Anne Arundel County for the construction of a second story addition and bath over attached garage, issued February 23, 2012

Claimant Ex. 17: Claimant's Calendar of Events from May 29, 2012 through February 21, 2014 plus calculation of loss

Claimant Ex. 18: Photographs of the addition, March 2013

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

GF Ex. 1: Notice of Hearing, with Hearing Order, dated July 28, 2014

GF Ex. 2: Letter from John Papavasiliou, Assistant Commissioner, MHIC To Whom it May Concern, Licensing History of Respondent, dated October 29, 2014

GF Ex. 3: Affidavit of William Banks, Jr., dated September 2, 2014

GF Ex. 4: Letter from Kevin Niebuhr, Investigator, MHIC to Respondent with Claim of Claimant, dated February 21, 2014

GF Ex. 5: Licensing History of Respondent, generated November 3, 2014

Testimony

The Claimant, Margaret M. Reilly, testified on her own behalf. There was no testimony offered on behalf of the Fund or the Respondent.

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 licensed by the MHIC as a home improvement contractor, License No. 08-102725. The Respondent's license expired on August 23, 2013.
2. On May 29, 2012, the Claimant and the Respondent entered into a contract (Contract) for the construction of an addition over the Claimant's garage to include a computer room, bath and sitting room (Project).
3. The total cost to construct the Project pursuant to the Contract was \$51,234.54. The Claimant paid the Respondent \$17,078.18 upon execution of the Contract.

4. Pursuant to the terms of the Contract, work was to commence on July 9, 2012 and the Respondent anticipated that work to complete the Project would take ninety days from the start of the work. Work on the Project began on July 9, in accordance with the Contract terms.
5. Delivery of lumber for the Project and the demolition of the roof of the garage took place the following day. In accordance with the terms of the Contract, the Claimant provided another payment to the Respondent in the amount of \$17,078.18 on July 10, 2012.
6. Work on the Project was slow, but was proceeding until September 2012 when the Claimant became concerned about the failure of the Respondent to order a front window and grills for the other windows. The Claimant also mentioned in her telephone messages to the Respondent that the tarp on her roof had blown off and needed to be secured. She called the Respondent numerous times and left messages for him to return her calls, but the Respondent failed to return any of her calls. Emails sent to the Respondent's email address were returned as being undeliverable.
7. On October 15, 2012, the Claimant wrote a letter to the Respondent at his address explaining her concern about the work that needed to be completed and the Respondent's failure to return her calls, email messages and faxes. She did not receive a response to this letter.
8. On October 22, 2012, the Claimant followed up her letter of October 15 with a letter listing four major items that needed to be completed and demanding that the work be performed within five days. The letter was sent certified mail, return receipt requested. It was received by the Respondent as indicated by his signature on the return receipt.

9. On October 22, 2012, the Claimant filed a Complaint with the MHIC as a result of the Respondent's failure to complete the Project and his refusal to return any of her messages.
10. The Respondent did respond to the Claimant by telephone on October 23, 2012, explaining that his absence from the Project was due to his daughter's recent hospitalization. Although the Respondent was scheduled to inspect a footing on October 26, 2012, the Respondent failed to appear for the inspection on that date.
11. On November 5, 2012, the Respondent finally met with the Claimant and he promised that the Project would be completed by the end of November, 2012. He also requested that the Claimant withdraw the complaint she filed with the MHIC. The Claimant refused to withdraw the complaint.
12. Sporadic work continued during November and December 2012, but there was no direct communication with the Respondent.
13. Several building inspections related to the Project failed, including plumbing and framing, but they eventually passed inspection.
14. On February 28, 2013, the Respondent requested the third payment under the Contract. The Claimant never provided the Respondent with this payment because the Contract terms provide for this payment after the drywall has been painted. There was no insulation or drywall in the ceiling; therefore, the payment was not due. The Claimant never received any further communication from the Respondent after this date.
15. On March 20, 2013, the Claimant requested that the Respondent participate in arbitration in accordance with the terms of the Contract, but the Respondent never responded to this

request and the certified letter requesting arbitration was returned to the Claimant as unclaimed.

16. As a result of an investigation conducted by the MHIC, a civil penalty was imposed on the Respondent in the amount of \$2,500.00 for violations arising out of the Respondent's performance under the Contract.
17. On January 14, 2014, the Claimant filed a claim against the Fund for actual losses incurred as a result of the failure of the Respondent to complete the Project pursuant to the terms of the Contract.
18. The Claimant engaged other Maryland licensed contractors to complete the Project.
19. On March 15, 2013, the Claimant received a quotation from Unicorp Home Energy Services, Inc. to perform work to partially complete the Project. The total amount of the quotation was \$14,845.00, which was paid by the Claimant.
20. The Claimant received a quotation from JJM Homes in the amount of \$5,950.00 to construct two closets and provide two bathroom doors which was part of the Project. This was the lowest quotation the Claimant received for this work, but the work has yet to be completed.
21. The Claimant contracted with Benfield Remodeling LLC for the labor to complete the bathroom. The total amount for this work was \$3,500.00 which was paid by the Claimant.
22. The materials used by Benfield were purchased by the Claimant from Home Depot and Lowes. The total cost paid by the Claimant for these materials was \$1,860.00.

23. The Claimant hired Paz LLC to install the HVAC system that was specified in the Contract. The system was installed and the Claimant paid a total of \$4,200.00 for this work.
24. A ridge vent on the roof that was part of the Project was installed improperly by the Respondent. The Claimant hired Metropolitan Exteriors, Inc. to fix the roof ridge vent at a cost of \$625.00 which was paid by the Claimant.
25. The Claimant hired Pasadena Floors to install flooring that was not performed by the Respondent under the terms of the Contract for the Project. The Claimant changed the specification in the Contract to include hardwood flooring instead of carpeting which was specified in the Contract. The total cost for the work performed by Pasadena Floors was \$5,924.00. It is unknown what the value of the carpet would have been had the Claimant requested a quotation to perform the work that was specified in the Contract.

DISCUSSION

Applicable Law

Section 8-405 of the Business Regulation Article provides that an owner may recover compensation of up to \$20,000.00 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 (Supp. 2014). Section 8-401 defines “actual loss” as “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). Maryland law provides that a claim against the Fund may be denied if the claimant has “unreasonably rejected good faith efforts by the contractor to resolve the claim.” Md. Code Ann. Bus. Reg. § 8-405(d).

If I determine that the Claimant has suffered an actual loss, COMAR 09.08.03.03B governs the calculation of an award from the Fund:

B. Measure of Awards from Guaranty Fund.

(1) The Commission may not award from the Fund any amount for:

- (a) Consequential or punitive damages;
- (b) Personal injury;
- (c) Attorney's fees;
- (d) Court costs; or
- (e) Interest.

(2) The Fund may only compensate claimants for actual losses they incurred as a result of misconduct by a licensed contractor.

(3) Unless it determines that a particular claim requires a unique measurement, the Commission shall measure actual loss as follows:

(a) 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.

(b) If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor.

(c) 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.

Analysis

The Claimant entered into the Contract with the Respondent on May 29, 2012. Work began on the Project on July 9, 2012, and by July 10, 2012, the Claimant had paid the

Respondent a total of \$34,156.36 under the terms of the Contract. According to the Contract, the Project should have been completed within ninety days of when the work began or by mid-October 2012. The Project was never completed by the Respondent despite numerous requests made by the Claimant, by phone, text, fax and certified mail. It was not until after October 22, 2012, when the Claimant filed a complaint with the MHIC and the Respondent was placed on notice of the complaint, that he responded to the Claimant. In a meeting with the Claimant on November 5, 2012, the Respondent promised that work on the Project would be completed by the end of November, but also requested at the same meeting that the complaint the Claimant filed with the MHIC be withdrawn. Work was never completed and the complaint filed with the MHIC was never withdrawn.

During the fall of 2012, work was performed by several subcontractors of the Respondent but the Respondent never returned to the Project site. Several inspections initially failed but were eventually approved for the work completed, included the plumbing, electrical, HVAC duct work, framing, and upper floor insulation. There was a considerable amount of work left to be done, but the work was never completed by the Respondent. On February 28, 2013, despite not completing work required for the third payment under the Contract, the Respondent requested payment in the amount of \$8,539.09. The Claimant never paid this amount or any further payment to the Respondent for work performed by the Respondent on the Project.

Despite repeated requests over many months for the Respondent to complete the Project in accordance with its terms, the Respondent failed to complete the Project and abandoned it. Having been left with an incomplete Project, the Claimant endeavored to complete the Project by hiring licensed Maryland contractors to complete the job.

The Claimant hired Unicorp Home Energy Services (Unicorp) to obtain and install the siding for the Project. The work performed by Unicorp was exactly as specified in the Contract with the Respondent. The Claimant paid Unicorp \$14,845.00 for this work. Although the Claimant has yet to construct two closets with shelf, closet rod, and two bathroom doors, the Claimant obtained an estimate from JJM Homes in the amount of \$5,950.00 to perform this work. This was the lowest estimate obtained for this work that was also specified in the Contract.

The labor to install ceramic flooring, vanities, faucets, and a shower enclosure was performed by Benfield Remodeling LLC in the amount of \$3,500.00. The materials used by Benfield were purchased directly by the Claimant from Lowes and Home Depot in the total amount of \$1,860.80. The HVAC system was obtained and installed by Paz LLC for the amount of \$4,200.00. Finally, the Claimant hired Metropolitan Exteriors to fix and install a ridge vent in the roof in the amount of \$625.00

All of these charges were incurred as a result of the Respondent's failure to complete the Project. None of the work performed by the contractors hired to complete the work deviated from the specifications of the work that was to be performed under the Contract. There was, however, one contractor whose work did not correspond to the work that was to be performed under the Contract. This work involved the work performed by Pasadena Flooring (Pasadena).

The flooring in the Contract specified carpeting and the flooring that Pasadena installed was hardwood. The Claimant did not obtain an estimate of what the cost would have been had Pasadena installed carpeting in accordance with the specifications in the Contract rather than hardwood. Therefore, because I am unable to determine the carpeting value and since hardwood flooring would likely result in a different cost than carpeting would, the Claimant has failed to

prove the value of any loss as a result of the Respondent's failure to install carpeting in accordance with the Contract specifications.

In order for the Claimant to establish an actual loss, she must prove that the costs she incurred to complete the Project were a result of unworkmanlike, inadequate or incomplete home improvement on the part of the Respondent.

Having reviewed the record, I find that the Respondent failed to perform the Contract in accordance with its terms and abandoned the Project before it was completed. Therefore, I have determined that the Claimant did sustain an actual loss as a result of the Respondent's failure to complete the Project in accordance with the Contract terms.

COMAR 09.08.03.03B(3)(c) provides the formula for calculating an award from the Fund for this particular loss. The formula requires that to the amount paid under the Contract, \$34,156.36, one must add the amount to repair and complete the Project. Excluding the hardwood flooring installed by Pasadena Flooring for the reasons previously stated, the Claimant has incurred or will incur the following expenses to complete the Project in accordance with the terms of the Contract:

Paz, LLC	\$4,200.00
Benfield Remodeling	\$3,500.00
JM Homes	\$5,950.00
Unicorp	\$14,845.00
Metropolitan Ext.	<u>\$ 625.00</u>
Total	\$30,980.00

Adding the amount paid to the Respondent (\$34,156.36) plus the amount to complete the Project (\$30,980.00) yields a total figure of \$65,137.16. From this amount, the Contract price must be deducted resulting in a total actual loss of \$13,902.62. The Fund does not disagree with this calculation and supports an award to the Claimant in the amount of \$13,902.62.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$13,902.62 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2010 & Supp. 2014).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$13,902.62; 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

January 15, 2015
Date Decision Issued

Stuart G. Breslow
Administrative Law Judge

SGB/cj
#153951

PROPOSED ORDER

WHEREFORE, this 2nd day of March 2015, 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.

Marilyn Jumalon

*Marilyn Jumalon
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION