

**IN THE MATTER OF THE CLAIM  
OF SAM SYDNEY,  
CLAIMANT  
AGAINST THE MARYLAND HOME  
IMPROVEMENT GUARANTY FUND  
FOR THE ALLEGED ACTS OR  
OMISSIONS OF MICHAEL MCINTOSH,  
T/A MCINTOSH CONSTRUCTION, LLC,  
RESPONDENT**

**\* BEFORE LORRAINE E. FRASER,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\* OAH No.: DLR-HIC-02-16-19366  
\* MHIC No.: 13 (05) 67  
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**PROPOSED DECISION**

**STATEMENT OF THE CASE  
ISSUES  
SUMMARY OF THE EVIDENCE  
PROPOSED FINDINGS OF FACT  
DISCUSSION  
PROPOSED CONCLUSION OF LAW  
RECOMMENDED ORDER**

**STATEMENT OF THE CASE**

On December 11, 2012, Sam Sydney (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$32,192.00 in alleged actual losses suffered as a result of a home improvement contract with Michael McIntosh, trading as McIntosh Construction, LLC (Respondent).

I held a hearing on March 2, 2017, at the Department of Natural Resources in Annapolis, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimant represented himself. Kris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. After waiting fifteen minutes for the Respondent or

someone to represent him to appear, I proceeded with the hearing in his absence. Code of Maryland Regulations (COMAR) 28.02.01.23A.<sup>1</sup>

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, 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 (2014 & Supp. 2016); COMAR 09.01.03; COMAR 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:

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| Claimant 1 | Contract with the Respondent, 7/21/11  |
| Claimant 2 | Contract with Premier Lifts, Inc., 7/7/11  |
| Claimant 3 | Cancelled checks paid to the Respondent: \$18,545.00, 7/23/11; \$414.00, 1/11/12; \$22,255.00, 1/18/12; \$11,482.00, 2/23/12; \$14,483.00, 3/1/12  |
| Claimant 4 | Letter from Jose Blanco, Blanco's Masonry, 5/4/12  |
| Claimant 5 | Notice to Owner of Intention to Claim a Mechanic's Lien or a Bond Claim or a Trust Relationship Claim, 5/21/12; invoice from Southern Pacific Supply, 4/3/12   |
| Claimant 6 | Letter from Premier Lifts, Inc., 11/7/16; contract with Premier Lifts, 7/7/11; letter from Premier Lifts, 11/5/12; cancelled check \$2,260.00, 7/23/12; contract with Premier Lifts, 7/3/12; invoice from Premier Lifts, 10/10/12; receipt from Premier Lifts, \$9,040.00, 8/22/12   |
| Claimant 7 | Invoice from DeStefano Construction Consultants, 7/23/12; contract with DeStefano, 6/29/12; emails between the Claimant and DeStefano, 7/27/12; invoice from Johnson Lumber, 4/23/12; invoice from Fichtner Services Central, Inc., 7/31/12; receipt from Fichtner Services Central, 8/6/12; invoice from Fichtner Services Central, 7/26/12; receipt from Fichtner Services Central, 7/26/12; cancelled checks paid to Curtis DeStefano, \$1,200.00; 6/29/12; \$1,200.00, 7/23/12, and \$2,400.00, 8/13/12; cancelled check paid to Cross |

<sup>1</sup> Notice of the hearing was mailed to the Respondent at the address of record by certified mail on December 21, 2016, COMAR 09.08.03.03A(2), was signed for as received, and was not returned unclaimed.

- Electrical Contractors, Inc., \$800.00, 8/14/12; cancelled check paid to Whalen Heating & Cooling, Inc., \$1,500.00, 9/17/12; cancelled checks paid to M.C. Hoeckler \$1,000.00, 10/22/12; \$1,000.00, 11/2/12; \$300.00, 11/7/12; and \$1,300.00, 11/13/12
- Claimant 8** Contract with Tim Campbell, 8/10/12; cancelled checks paid to Tim Campbell \$4,000.00, 6/20/12; \$1,450.00, 8/14/12; \$1,450.00, 8/15/12; \$3,600.00, 8/20/12; \$500.00, 8/22/12; \$1,669.00, 9/4/12; \$2,640.00, 9/10/12; and \$2,325.00, 9/20/12
- Claimant 9** Six photographs taken after the Respondent stopped work, taken in June 2012
- Claimant 10** MHIC Complaint Form, 7/12/12
- Claimant 11** Letter to the Respondent from the Claimant, 7/25/13; letter to the Claimant from MHIC, 6/24/13; letter to MHIC from the Claimant, 8/19/13; letter to the Respondent from MHIC, 9/6/13

The Respondent did not offer any exhibits into evidence.

I admitted the following exhibits on behalf of the Fund:

- Fund 1** Notice of Hearing, 12/21/16; certified mail receipts signed on behalf of the Respondent and the Claimant
- Fund 2** Hearing Order, 6/17/16
- Fund 3** Affidavit of David Brown, 3/1/17
- Fund 4** The Respondent's licensing history, 3/1/17
- Fund 5** State Department of Assessments and Taxation Real Property Search, 3/1/17
- Fund 6** MHIC Home Improvement Claim Form, 12/11/12
- Fund 7** Letter to the Respondent from MHIC, 1/7/13

### Testimony

The Claimant and his wife, Ellyn Sydney, testified.

No witnesses testified for the Respondent or the Fund.

### 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 01\*97891. The Respondent's license expired on May 20, 2012.
2. On July 21, 2011, the Claimant and the Respondent entered into a contract to build a garage addition with an elevator. The contract stated that work would begin on September 1, 2011 and would be completed by November 15, 2011.

3. The original agreed-upon contract price was \$74,182.00.
4. On July 23, 2011, the Claimant paid the Respondent \$18,545.00 (deposit).
5. On January 11, 2012, the Claimant paid the Respondent \$414.00 (permit application).
6. In January 2012, the Respondent began work under the contract.
7. On January 18, 2012, the Claimant paid the Respondent \$22,255.00 (draw #2).
8. On February 23, 2012, the Claimant paid the Respondent \$11,482.00 (elevator, part of draw #3).
9. On March 1, 2012, the Claimant paid the Respondent \$14,483.00 (remainder of draw #3).
10. The Claimant paid the Respondent a total of \$67,179.00.
11. The Respondent stopped performing work under the contract in March 2012.
12. After the Respondent stopped performing work, the Claimant and his wife attempted to contact the Respondent but were unable to do so.
13. In March 2012, the Claimant's wife contacted Premier Lifts, Inc., to ask when the elevator was going to be delivered and learned that the company had not started building the elevator because the Respondent's check was rejected by the bank for insufficient funds.
14. In May 2012, the Claimant received letters from one of the Respondent's subcontractors and one of his suppliers stating that the Respondent had not paid them.
15. The Claimant paid Premier Lifts, Inc., a total of \$22,600.00 for the elevator and its installation, work that was part of the original contract with the Respondent.
16. The Claimant paid Tim Campbell a total of \$17,634.00 to complete work on the addition, work that was part of the original contract with the Respondent. Mr. Campbell's work

included cutting and repairing holes in walls, building new walls and ceilings, installing drywall, insulation, doors, and vents, and trimming windows.

17. The Claimant paid Fichtner Services Central, Inc., a total of \$560.00 for gutters and downspouts, work that was part of the original contract with the Respondent.

18. The Claimant paid Cross Electrical Contractors, Inc., at least \$800.00 for electrical work that was part of the original contract with the Respondent.<sup>2</sup>

19. The Claimant paid Whalen Heating and Cooling, Inc., a total of \$1,500.00 for air conditioning, work that was part of the original contract with the Respondent.

20. The Claimant paid M.C. Hoeckler for painting, work that was not identified as part of the original contract with the Respondent.

21. The Claimant paid DeStefano Construction Consultants for construction consulting services, work that was not identified as part of the original contract with the Respondent.

22. The Claimant paid \$43,094.00 to complete the work identified in the original contract with the Respondent.

23. The Claimant's actual loss is \$36,091.00.

24. On July 25, 2013, the Claimant attempted to contact the Respondent in order to submit his claim to arbitration with the Respondent. The Respondent did not respond to the Claimant's attempts to contact him.

### DISCUSSION

In this case, the Claimant has the burden of proving the validity of his claim by a preponderance of the evidence. Md. Code Ann., State Gov't §10-217 (2014); COMAR

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<sup>2</sup> There is evidence that the balance owed for electrical work under the original contract was \$991.00; however, the Claimant only submitted documentation showing that \$800.00 was paid.

09.08.03.03A(3).<sup>3</sup> “[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true.” *Coleman v. Anne Arundel Cty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002) (quoting *Maryland Pattern Jury Instructions* 1:7 (3d ed. 2000)).

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) (2015);<sup>4</sup> *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.” Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant and when he performed work on the Claimant’s home. The Respondent’s license expired on May 20, 2012, after he ceased performing work at the Claimant’s home.

The Respondent performed unworkmanlike, inadequate or incomplete home improvements. The Respondent began work on the garage addition and elevator at the Claimant’s home in January 2012. The Claimant paid the Respondent \$67,179.00 of the total \$74,182.00 contract price by March 1, 2012. However, when the Respondent ceased all work at the Claimant’s home in March 2012 much of the work remained incomplete. The incomplete work included cutting and repairing holes in walls; building new walls and ceilings; installing

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<sup>3</sup> As noted above, “COMAR” refers to the Code of Maryland Regulations.

<sup>4</sup> Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2016 Replacement Volume.

drywall, insulation, doors, and vents; trimming windows; purchasing and installing the elevator; installing electric and air conditioning; and installing gutters and downspouts. The Respondent did not respond to the Claimant's attempts to contact him to complete the work or participate in arbitration. Thus, I find that the Claimant is eligible for compensation from the Fund.

Having found eligibility for compensation I now turn to the amount of the award, if any, to which the Claimant is entitled. 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 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 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).

The Claimant's actual loss is calculated as follows:

Amount paid under original contract	\$67,179.00
Amount paid to complete the work	<u>+43,094.00</u>
	110,273.00
Original contract price	<u>-74,182.00</u>
Actual loss	\$36,091.00

Pursuant to the applicable law, 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. Md. Code Ann., Bus. Reg. § 8-405(e)(1), (5) (2015). The actual loss computed above is \$36,091.00,

which exceeds \$20,000.00. Accordingly, the Claimant is entitled to the maximum reimbursement from the Fund of \$20,000.00. *Id.* § 8-405(e)(1).

**PROPOSED CONCLUSION OF LAW**

I conclude that the Claimant has sustained an actual and compensable loss of \$20,000.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(c).

**RECOMMENDED ORDER**

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

**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimant \$20,000.00; 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 ten percent (10%) as set by the Maryland Home Improvement Commission;<sup>5</sup> and

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

**Signature on File**

May 23, 2017  
Date Decision Issued

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Lorraine E. Fraser  
Administrative Law Judge



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<sup>5</sup> See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.



**PROPOSED ORDER**

***WHEREFORE, this 10<sup>th</sup> day of July, 2017, 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.***

***Sachchida Gupta***

***Sachchida Gupta  
Panel B***

**MARYLAND HOME IMPROVEMENT COMMISSION**