

**The Maryland Home  
Improvement Commission**

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**BEFORE THE  
MARYLAND HOME IMPROVEMENT  
COMMISSION**

**v. Alex Martinez  
t/a Martinez Concrete Restoration &  
Construction Inc.**

\*

**MHIC No.: 14 (90) 218**

**(Contractor)**

\*

**and the Claim of  
Lorraine Distasio**

\*

**(Claimant)**

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**FINAL ORDER**

**WHEREFORE, this 16<sup>th</sup> day of March 2017, Panel B of the Maryland Home**

**Improvement Commission ORDERS that:**

- 1. The Findings of Fact set forth in the Proposed Order dated November 17, 2016 are AFFIRMED.**
- 2. The Conclusions of Law set forth in the Proposed Order dated November 17, 2016 are AFFIRMED.**
- 3. The Proposed Order dated November 17, 2016 is AFFIRMED.**
- 4. This Final Order shall become effective thirty (30) days from this date.**
- 5. 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**

IN THE MATTER OF THE CLAIM  
 OF LORRAINE DISTASIO,  
 CLAIMANT,  
 AGAINST THE MARYLAND HOME  
 IMPROVEMENT GUARANTY FUND  
 FOR THE ALLEGED ACTS OR  
 OMISSIONS OF  
 ALEX A. MARTINEZ, T/A  
 MARTINEZ CONCRETE  
 RESTORATION & CONSTRUCTION,  
 INC.,  
 RESPONDENT

\* BEFORE JOHN T. HENDERSON, JR.,  
 \* ADMINISTRATIVE LAW JUDGE  
 \* THE MARYLAND OFFICE  
 \* OF ADMINISTRATIVE HEARINGS  
 \* OAH NO.: DLR-HIC-02-16-13728  
 \* MHIC NO.: 14 (90) 218  
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**RECOMMENDED 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 October 6, 2014, Lorraine Distasio (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$27,640.00 for actual losses allegedly suffered as a result of a home improvement contract with Alex A. Martinez, t/a Martinez Concrete Restoration & Construction, Inc. (Respondent).

A hearing was held on August 17, 2015 before Administrative Law Judge William Somerville, who issued a proposed decision on November 16, 2015.

On April 18, 2016, the MHIC issued a Remand Order (remand) for the purpose of scheduling a *de novo* hearing on the merits of the claim. The remand was issued because the Respondent did not attend the August 17, 2015 hearing due to his not receiving notice of the hearing.

I held a hearing on July 8, 2016, at the Office of Administrative Hearings (OAH), 10400 Connecticut Avenue, Suite 208, Kensington, Maryland 20895. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). Hope Sachs, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), represented the Fund. The Claimant appeared and represented herself. The Respondent appeared and represented himself.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the DLLR, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2016); Code of Maryland Regulations (COMAR) 09.01.03; COMAR 09.08.02; 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, how much is the Claimant entitled to receive from the Fund?

### SUMMARY OF THE EVIDENCE

#### Exhibits

I admitted exhibits on behalf of the Claimant as follows:

- Cl. Ex. 1: Narrative written by the Claimant
- Cl. Ex. 2: Contract between the Claimant and the Respondent dated July 16, 2010

- Cl. Ex. 3: Email from the Claimant to DLLR dated October 18, 2013; carbon check number 2692 drawn on the Chevy Chase Bank; Chevy Chase bank statement for the period ending August 17, 2010; carbon check number 2123, drawn on the Bank of America dated July 27, 2010, in the sum of \$2,100, payable to the order of MCRC; Claimant's bank statement showing check number 2123 in the sum of \$2,100 paid by bank on July 28, 2010; carbon check number 2127, drawn on the Bank of America dated August 9, 2010, payable to the order of MCRC; Claimant's bank statement showing check number 2127 in the sum of \$4,667.93 paid by bank on August 10, 2010; carbon check number 2128, drawn on the Bank of America dated September 4, 2010, in the sum of \$5,000.00, payable to the order of MCRC, Inc.; Claimant's bank statement showing check number 2128 in the sum of \$5,000.00 paid by bank; Potomac Valley Brick, order acknowledgment dated June 1, 2011, in the sum of \$290.78, for modular face brick; Chase Freedom account statement showing purchases from June 29 and 30, 2011, July 1 and 21, 2011; emails between the Claimant and Respondent dated October 4 and 5, 2011; credit card account activity statement showing purchase of \$55.53; email from SaltWaterPoolParts.com to the Claimant dated May 26, 2012; Aqua Supercenter order acknowledgement dated May 20, 2012 in the sum of \$50.08 for pool parts; Ritz Camera sales receipt in the sum of \$27.86 dated June 7, 2012;
- Cl. Ex. 4: DLLR Complaint Form dated August 26, 2013
- Cl. Ex. 5: Emails between the Respondent and the Claimant dated May 24 and 26, 2011, October 4, 5 and 21, 2011
- Cl. Ex. 6: Emails from the Respondent to the Claimant dated September 25, 2011 and October 4, 2011
- Cl. Ex. 7: Email from the Claimant to the Respondent undated, regarding meeting of October 9, 2011
- Cl. Ex. 8: Explanation of photographs one through forty-six
- Cl. Ex. 9: Forty-seven photographs of Claimant's construction site
- Cl. Ex. 10: Proposal from Wilcoxon Construction, Inc. dated August 16, 2015
- Cl. Ex. 11: Proposal from Metropolitan Exteriors dated June 15, 2016
- Cl. Ex. 12: Proposal from East Coast Landscape Design dated July 11, 2014

I admitted exhibits on behalf of the Respondent as follows:

- Resp. Ex. 1: Project timeline prepared by the Respondent
- Resp. Ex. 2: Contract between the Claimant and Respondent dated July 16, 2010; the Respondent's estimate to the Claimant dated June 8, 2010 for pool deck repairs; the Respondent's invoice dated July 26, 2010 to the Claimant for driveway replacement; the Respondent's invoice to the Claimant dated September 2, 2010, for bond beam repairs
- Resp. Ex. 3: Invoice from Pool Service Company dated September 8, 2010; letter from Pool Service Company to the Respondent dated September 23, 2010; Lafarge concrete delivery ticket for September 1, 2010 first pour; Lafarge concrete delivery ticket for September 3, 2010 second pour (two); check from the Claimant numbered 2692 dated July 16, 2010, in the sum of \$9,337.88, and payable to MCRC; check from the Claimant numbered 2123 dated July 27, 2010, in the sum of \$2,100.00 and payable to MCRC; check from the Claimant numbered 2127 dated August 9, 2010, in the sum of \$4,667.93 and payable to MCRC, Inc.; check from the Claimant numbered 2128 dated August 4, 2010, in the sum of \$5,000.00 and payable to MCRC, Inc.
- Resp. Ex. 4: The Respondent's contractor's license from DLLR, with expiration date of July 13, 2011; copy of money order from the Respondent to the Claimant in the sum of \$400.00 dated September 23, 2013
- Resp. Ex. 5: Google Map aerial photograph of the Claimant's home

I admitted exhibits on behalf of the Fund as follows:

- GF Ex. 1: Notice of Hearing dated June 2, 2016
- GF Ex. 2: MHIC Hearing Order dated April 22, 2016
- GF Ex. 3: Respondent's License History, as of July 7, 2016
- GF Ex. 4: Letter from MHIC to the Respondent dated February 12, 2015; MHIC Home Improvement Claim Form dated September 29, 2014

### Testimony

The Claimant testified on her own behalf. Her life partner, John Scarborough, testified as her witness.

The Respondent testified on his own behalf and did not produce other witnesses.

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 contractor's license number 01-90913, and trading as Martinez Concrete Restoration & Construction, Inc., having corporate license number 05-123571.

2. The Claimant's home (the home) is located at 6207 Swords Way, Bethesda, Maryland 20817. She shares the home with Mr. Scarborough.

3. On June 8, 2010, the Claimant met with the Respondent at the home where the Respondent provided an estimate to replace the Claimant's concrete pool deck.<sup>1</sup>

4. The specific scope of constructing a new pool deck is identified within the estimate the Respondent provided on June 8, 2010 and listed as follows:

- Demolition, remove concrete
- Provide gravel per ton, #57 gravel for substrate
- Install pool edge custom forms; coping edge
- Provide concrete, 3000 psi' colored concrete pigment, pool edges and boarder and . . . phase on all colors
- Waste disposal
- Install French drains—Replacement of the pool drains underneath the concrete
- Customer must drain pool down at least 1 ft.

(Resp. Ex. 2.)

5. The agreed upon color of the concrete was beige, pre-mixed by the concrete company, with a rose/reddish tint color, and also pre-mixed by the concrete company.

6. On July 16, 2010, the Claimant and Respondent signed a contract for the home improvement. The contract price was \$18,673.75 and the Claimant paid a down payment of \$9,337.88.

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<sup>1</sup> The pool deck is an area that surrounds the in-ground swimming pool of the home and is made from concrete.

7. The Respondent told the Claimant that the job would take approximately three weeks to complete.<sup>2</sup>

8. On August 9, 2010, the Claimant paid the Respondent \$4,667.93 by personal check toward the pool deck work.

9. On September 3, 2010, the Respondent poured the pool deck with new concrete and the Claimant paid the Respondent \$5,000.00.

10. The temperatures rose rapidly, causing the concrete to dehydrate and crack due to the ambient heat.

11. The Respondent offered to repair the cracks by cutting and resealing them with joint compound.

12. The Claimant wanted the concrete removed and replaced.

13. The Claimant and the Respondent agreed to stop any new concrete pouring until the spring of 2011, since the concrete was not drying without cracking when the outside temperature was ninety degrees or above.

14. On September 4, 2010, the Respondent left for Texas for another job and returned on October 4, 2010. There was no work done by the Respondent on the Claimant's project during that one-month period.

15. On May 25, 2011, the Respondent informed the Claimant that he would close his business after he finished with the Claimant's home improvement due to financial issues. He requested from the Claimant a \$2,000.00 advance against \$3,732.42 owed to him.

16. The Claimant did not pay the advance.

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<sup>2</sup> On July 28, 2010, the Claimant and Respondent contracted separately to have her driveway replaced with concrete. The cost of the driveway work was \$3,479.99. There is no evidence of a claim relating to the contract for the driveway work that began on August 6, 2010. The total cost for the pool deck and driveway was \$22,153.74.

17. On June 11, 2011, pursuant to an agreement with the Claimant, the Respondent removed and replaced the cracked pool deck and did not charge the Claimant for the new concrete pour.

18. The June 11, 2011 concrete pour resulted in more cracking due to dehydration of the concrete.

19. On June 18, 2011, Mr. Scarborough informed the Respondent, on behalf of the Claimant, that the home improvement work was unacceptable. The Respondent advised the Claimant and Mr. Scarborough that he needed to travel to Texas due to his mother being gravely ill and requested cash assistance to travel. The Claimant offered the Respondent a \$400.00 loan, which he accepted.

20. On July 13, 2011, the Respondent's licenses expired.

21. On November 8, 2011, the Respondent returned to the Claimant's home to pick up his equipment and clean up debris. He also pressure washed dirt and concrete splatters from the walls of the pool. No other work was performed by the Respondent after that date.

22. The Respondent notified the Claimant he would not return to finish any necessary repairs.

23. The Claimant did not unreasonably reject any good faith efforts by the Respondent to correct any unacceptable work.

24. The Claimant paid the Respondent a total of \$18,673.75 for the July 16, 2010 contract to construct the pool deck.

25. The cost to make the pool deck repairs, consisting of filling and repairing the cracked concrete, is \$2,500.00, plus \$1,300.00 to apply a surface stain, for a total cost of \$3,800.00.<sup>3</sup>

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<sup>3</sup> The estimate for making the pool deck repairs is from the testimony of the Respondent as the Claimant did not provide evidence of repair or replacement costs of the pool deck.



## DISCUSSION

In 1985, the Maryland General Assembly enacted legislation that first established the Fund. By this means, the legislature sought to create a readily available reserve of money from which homeowners could seek relief for actual losses sustained because of an unworkmanlike, inadequate, or incomplete home improvement performed by a licensed home improvement contractor. Md. Code Ann., Bus. Reg. §§ 8-401 to 8-411 (2015). Under this statutory scheme, licensed contractors are assessed fees, which subsidize the Fund. Homeowners who sustain losses by the actions of licensed contractors may seek reimbursement for their “actual losses” from this pool of money, subject to a maximum of the lesser of \$20,000.00 or the amount paid by or on behalf of the claimant to the contractor. Md. Code Ann., Bus. Reg. § 8-405(e)(1) and (5). A homeowner is authorized to recover from the Fund when he or she sustains an actual loss that results from an act or omission by a licensed contractor. Md. Code Ann., Bus. Reg. § 8-405(a). When the Fund reimburses a homeowner as a result of an actual loss caused by a licensed contractor, the responsible contractor is obligated to reimburse the Fund. Md. Code Ann., Bus. Reg. § 8-410. The MHIC may suspend the license of any such contractor until he or she reimburses the Fund in full with annual interest as set by law. Md. Code Ann., Bus. Reg. § 8-411.

Recovery against the Fund is based on “actual loss” as defined by statute and regulation. “[A]ctual 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. “By employing the word ‘means,’ as opposed to ‘includes,’ the legislature intended to limit the scope of ‘actual loss’ to the items listed in section 8-401.” *Brzowski v. Md. Home Improvement Comm’n*, 114 Md. App. 615, 629 (1997). The Fund may only compensate claimants for actual losses incurred as a result of misconduct by a licensed contractor. COMAR

09.08.03.03B(2). At a hearing on a claim, the Claimant has the burden of proving the validity of her claim by a preponderance of the evidence. Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3). "[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 (3rd. ed. 2000).

First, there is no dispute that the Respondent held a valid contractor's license in 2010 when he entered into the contract with the Claimant. Md. Code Ann., Bus. Reg. § 8-405(a). Second, there is also no dispute that the Claimant is the owner of the home and that there is no procedural impediment barring her from recovering from the Fund. Md. Code Ann., Bus. Reg. § 8-405(a), (f). The next issue is whether the Respondent performed an unworkmanlike, inadequate, or incomplete home improvement, and if so, whether he made good faith efforts to resolve the claim. A claim may be denied if the Claimant unreasonably rejects good faith efforts by the Respondent to resolve the claim. Md. Code Ann., Bus. Reg. § 8-405(d).

The Claimant and Respondent entered into a contract for the Respondent to pour and construct a new concrete pool deck and to replace pool drains in a thirty-year-old concrete pool. The original contract of July 16, 2010 for the pool deck replacement totaled \$18,673.75.

From the evidence offered by all parties and witnesses, I conclude that the Respondent performed the work as contracted for (the pool deck), but performed it in an unworkmanlike, inadequate and incomplete manner. The Respondent poured the concrete pool deck during less than optimum temperature conditions, which resulted in the newly poured concrete cracking due to dehydration and the extreme heat. The Claimant also complained that the agreed upon color of the concrete was not correct. The Respondent did agree to re-pour the pool deck, and did so

in June, 2011 without charge to the Claimant. However, that re-pour resulted in more cracking due to dehydration and ambient heat.

The Respondent did not dispute that he poorly performed the concrete pool deck work for the Claimant. He testified that the ambient high temperatures were a contributing factor in the concrete cracking, yet, it appears he did not properly plan for the weather before he made the decision to pour the pool deck on two separate occasions. In any event, he concedes that the work was not his best.<sup>4</sup>

Although the Claimant did not reject any good faith efforts of the Respondent to correct the unacceptable work on the pool deck, the Respondent, on November 8, 2011, finally abandoned any further attempts to make repairs and notified the Claimant that he would not return to perform any more repairs. On November 8, 2011, he returned to the home, cleaned the construction debris and removed all of his tools from the Claimant's home.

The Claimant did suffer an actual loss due to the acts or omissions of the Respondent. I find that the Respondent did home improvement work pursuant to the July 16, 2010 contract, but performed the work in an unworkmanlike, inadequate and incomplete manner.

Although I find that the Claimant suffered an actual loss, I do not have evidence from the Claimant of what it would cost to make the repairs or replace the concrete pool deck. No estimate was provided by the Claimant for me to use as a basis to make an award,<sup>5</sup> although it was clear from the Claimant's testimony that she would like repairs made to the pool deck. The only evidence I have to consider as a basis to make an award comes from the testimony of the Respondent, who opined that it would cost \$2,500.00 to make the pool deck repairs, consisting

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<sup>4</sup> The Respondent had a series of unfortunate events in 2010 and 2011. His mother, who resided in Texas, fell ill requiring his returning to her in the middle of the home improvement. The Respondent returned to the project after his mother's death on October 20, 2011. The Respondent was also faced with his contractor's licenses expiring and his business financially failing, ultimately causing its closure.

<sup>5</sup> The Claimant offered into evidence proposals for the complete restoration of her swimming pool, which was not an obligation of the Respondent pursuant to the July 16, 2010 contract; and a proposal to construct the pool deck with pavers instead of concrete, which, again, was not the Respondent's agreed upon obligation.

of filling and repairing the cracks, plus \$1,300.00 to apply a surface stain, for a total of \$3,800.00. The Fund recommends that amount as an award to the Claimant.

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 offer three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3)(c) sets forth the relevant formula for determining an "actual loss" in this matter, as follows:

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

\* \* \*

(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.

I will evaluate the claim under COMAR 09.08.03.03B(3)(c). The following calculations apply:

|                         |   |
|-------------------------|---|
| \$ 18,673.75            | Total payments made to the Respondent by the Claimant pursuant to the July 16, 2010 contract to construct the pool deck |
| <u>\$ 3,800.00</u>      | Plus cost in evidence to make repairs   |
| \$ 22,473.75            | (Expenditure Subtotal)  |
| < <u>\$ 18,673.75</u> > | Less the original July 16, 2010 contract price  |
| \$ 3,800.00             | Actual Loss   |

The Claimant has an "actual loss" of \$3,800.00. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405(a). The MHIC may not award from the Fund more than \$20,000.00 to one claimant for acts

or omissions of one contractor or 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)(1), (5) (2015). The claim does exceed that limit, therefore, the claim is limited to \$3,800.00.

**CONCLUSIONS OF LAW**

I conclude that the Claimant has sustained an actual loss of \$3,800.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405(a) (2015); COMAR 09.08.03.03B(3)(c).

**RECOMMENDED ORDER**

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

**ORDER** that the Claimant sustained an actual loss; and

**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimant \$3,800.00; and

**ORDER** that the Respondent is ineligible for a Maryland Home Improvement Commission license until he reimburses the Guaranty Fund for all monies disbursed under this Order plus annual interest of at least ten percent as set by the Maryland Home Improvement Commission; and

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

**Signature on File**

October 6, 2016  
Date Decision Issued

John T. Henderson, Jr.  
Administrative Law Judge

JTH/emh  
#164676

**PROPOSED ORDER**

***WHEREFORE, this 17th day of November, 2016, 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.***

***J. Jean White***

***I. Jean White  
Panel B***

**MARYLAND HOME IMPROVEMENT COMMISSION**