

**The Maryland Home
 Improvement Commission**

**v. Dale Seek
 t/a Mystical Gardens
 (Contractor)
 and the Claim of
 Jean Craft Comolli
 (Claimant)**

* **BEFORE THE**
 * **MARYLAND HOME IMPROVEMENT**
 * **COMMISSION**
 *
 * **MHIC No.: 14 (90) 228**
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FINAL ORDER

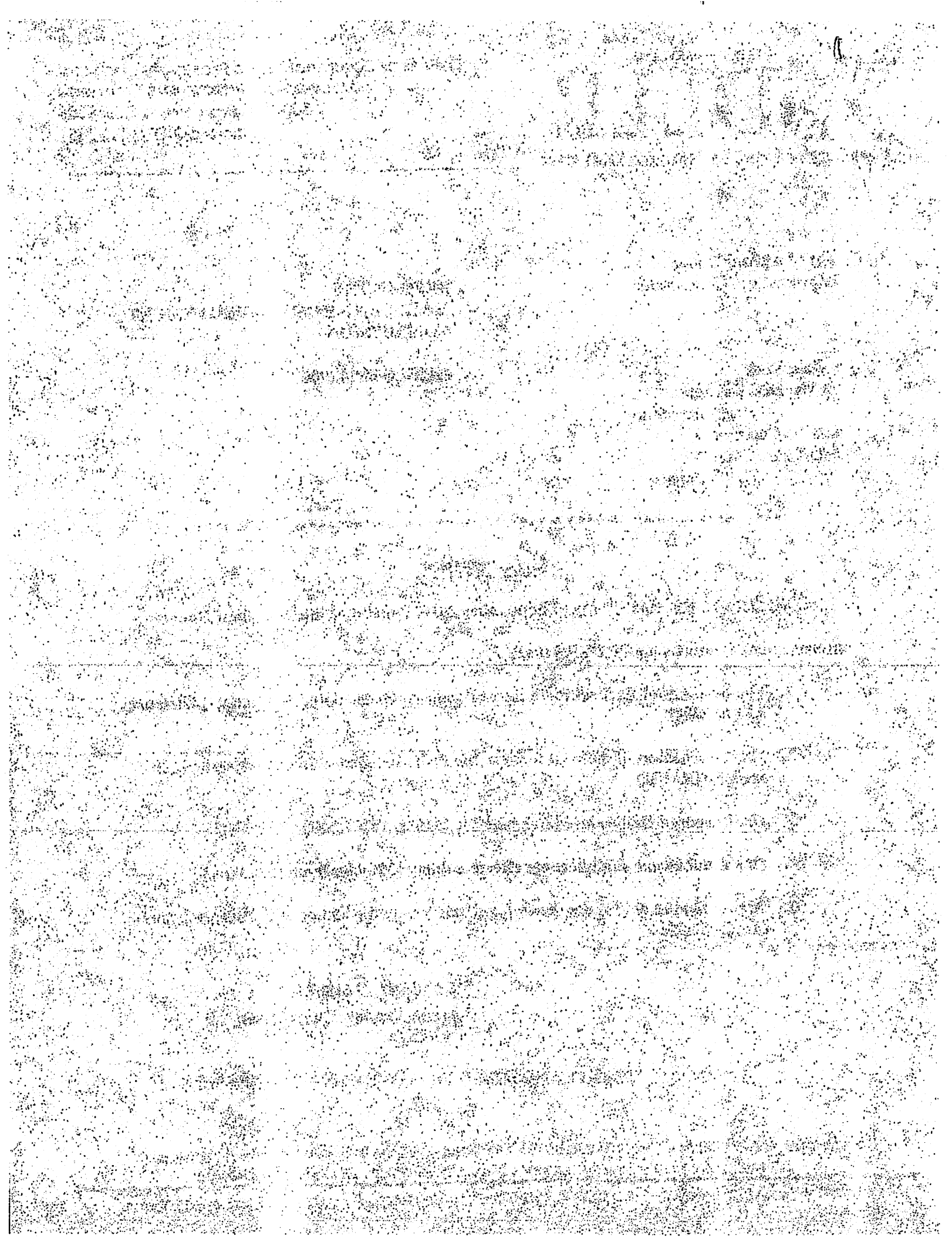
**WHEREFORE, this 9th day of September 2016, Panel B of the Maryland Home
 Improvement Commission ORDERS that:**

- 1. The Findings of Fact set forth in the Proposed Order dated February 1, 2016 are AFFIRMED.**

- 2. The Conclusions of Law set forth in the Proposed Order dated February 1, 2016 are AFFIRMED.**
- 3. The Proposed Order dated February 1, 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 JEAN CRAFT COMOLLI,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF DALE W. SEEK,
T/A MYSTICAL GARDENS
LANDSCAPING CO.,
RESPONDENT

* BEFORE RACHAEL BARNETT,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: DLR-HIC-02-15-15432
* MHIC No.: 14 (90) 228
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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 July 24, 2014, Jean Craft Comolli, (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$19,700.00 in alleged actual losses suffered as a result of a home improvement contract with Dale W. Seek, trading as Mystical Gardens Landscaping Co. (Respondent).

I held a hearing on September 10, 2015 at the Office of Administrative Hearings, located in Kensington, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).¹ The Claimant represented herself. Patricia McKenzie, Esquire, represented the Respondent, who was present. Hope Sachs, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund.

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 (2014), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02, and 28.02.01.

ISSUES

1. Is the Claimant's claim barred by the limitations period found in section 8-405(g) of the Business Regulation Article?
2. If the Claimant's claim is not barred by the limitations period, did the Claimant sustain an actual loss compensable by the Fund as a result of any acts or omissions committed by Dale W. Seek?
3. 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 with Mystical Gardens Landscaping Co., November 28, 2009
- Clmt. Ex. 2 - Contract with Mystical Gardens Landscaping Co., December 20, 2010
- Clmt. Ex. 3 - Cleared check from the Claimant to the Respondent, November 29, 2009
- Clmt. Ex. 4 - Cleared check from the Claimant to the Respondent, May 24, 2010
- Clmt. Ex. 5 - Cleared check from the Claimant to the Respondent, June 10, 2010
- Clmt. Ex. 6 - Cleared check from the Claimant to the Respondent, August 17, 2010
- Clmt. Ex. 7 - Cleared check from the Claimant to the Respondent, September 6, 2010

¹ Unless otherwise noted, all citations of the Business Regulation Article hereinafter refer to the 2015 Replacement Volume.

- Clmt. Ex. 8 - Cleared check from the Claimant to the Respondent, September 13, 2010
- Clmt. Ex. 9 - Cleared check from the Claimant to the Respondent, October 2, 2010
- Clmt. Ex. 10 - Cleared check from the Claimant to the Respondent, February 25, 2011
- Clmt. Ex. 11 - Complaint filed by the Claimant with MHIC, August 8, 2013
- Clmt. Ex. 12 - Written statement, undated

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

- Resp. Ex. 1 - Contract between Mystical Gardens Landscaping Co. and the Complainant, September 6, 2010
- Resp. Ex. 2 - Letter from the Complainant to the Respondent, August 16, 2014

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1 - Cover letter, dated July 8, 2015, from the OAH to "Legal Services" stating that the attached documents were returned as unclaimed mail, with the following attachments:
 - Notice of Hearing, June 11, 2015
 - Hearing Order, April 22, 2015
 - Important information about your hearing, undated
 - Blank request for accommodation form
 - Certified mail, return to sender, June 11, 2015

Testimony

The Claimant testified and presented the testimony of Ray Murdock, licensed contractor, and Dan Condon, homeowner's fiancé.

The Respondent testified.

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 27829.
2. On November 28, 2009, the Claimant and the Respondent entered into a contract for \$17,000. The contract stated that work would begin on December 5, 2009 and would be completed by January 20, 2010. The contract included the following home improvements:
 - Install two floor drains and extend pipe out towards road,

- Install concrete footing for retaining wall, install retaining wall with a masonry stone veneer,
 - Install concrete and flagstone steps,
 - Install lower flagstone patio with planting beds,
 - Install black rails,
 - Mulch all beds,
 - Install low-volt lights,
 - Install lights in wall, and
 - Remove trash from the side of the house.
3. On November 29, 2009, the Claimant paid the Respondent a deposit of \$5,650.00.
 4. On December 20, 2010, the Claimant and the Respondent entered into another

contract, with no balance due, to complete the following work:

- Build a patio,
 - Build mulching beds and mulch the beds,
 - Lay one load of blue stone over the existing blue stone curved driveway,
 - Coat the block inside wall with natural stone looking veneer (concrete),
 - Cover the concrete steps with flagstone,
 - Install rails adjacent to the steps,
 - Apply sod over existing sod in backyard, and
 - Install vent.²
5. On May 24, 2010, the Claimant paid the Respondent \$4,000.00.
 6. On June 10, 2010, the Claimant paid the Respondent \$1,650.00.

² The carbon copy admitted into evidence as Claimant Ex. 2 is only partially legible on the last line of the work specified, which permits only a cursory understanding of the last element of work to be done.

7. On August 17, 2010, the Claimant paid the Respondent \$3,000.00.
8. On September 6, 2010, the Claimant paid the Respondent \$4,000.00.
9. On September 13, 2010, the Claimant paid the Respondent \$1,000.00.
10. On October 2, 2010, the Claimant paid the Respondent \$5,000.00.
11. The Respondent last performed work on the Claimant's home in 2010.
12. On February 25, 2011, the Claimant paid the Respondent \$2,000.00. On the memorandum portion of the check, the Claimant wrote "loan." This was the only check with such a notation.
13. The Claimant filed her Claim for \$19,700.00 on a Home Improvement Claim Form that is both hand-dated and date stamped as received on July 24, 2014.

DISCUSSION

In this case, 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).

An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor." Bus. Reg. § 8-405(a). *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 not proven eligibility for compensation.

Statute of Limitations

The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. There are no *prima facie* statutory impediments barring the Claimant from recovering compensation from the Fund (being related to the Respondent, recovering damages from the Respondent in a court proceeding, owning more than three residential properties, etc.). Md. Code Ann., Bus. Reg. §§ 8-405(f)(1) and (2) (2015).

A significant obstacle stands in the way of the Claimant's recovering compensation from the Fund. Section 8-405(g) of the Business Regulation Article states, "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." The Claimant was dissatisfied with the Respondent's work throughout the duration of the contract, hence the second contract at no additional cost. However, the Claimant continued to pay the Respondent to perform work on her property.

The Respondent last performed work on the Claimant's property in 2010, and the Claimant admits that she never saw him again after February 2011. By May 2011, well into the time when outdoor construction jobs are performed in the Maryland area, the Claimant knew or should have known that the Respondent would not be returning to remedy what she believed were deficiencies in the work performed. Despite the Claimant's belief that the Respondent performed inadequate work on her property, she did not file a claim against the Fund for the work completed in 2010, until July 24, 2014, more than three years later. The Claimant failed to bring her claim against the Fund within three years after the Claimant discovered, or by use of ordinary diligence, should have discovered what she believed was a loss or damage to her

property. She is therefore barred from recovery through the Fund under § 8-405(g) of the Business Regulation Article.

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 sustained an actual and compensable loss of \$19,700.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guarantee Fund deny the Claimant's claim; and

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

Signature on File

December 4, 2015
Date Decision Issued

Rachael Barnett
Administrative Law Judge



RAB/da
#159549

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