

<p>IN THE MATTER OF THE CLAIM</p> <p>OF NIMA MOHAMMADI,</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 KENNETH BURR,</p> <p>T/A BURR BUILDING AND</p> <p>REMODELING,</p> <p>RESPONDENT</p>	<p>* BEFORE RICHARD O'CONNOR,</p> <p>* ADMINISTRATIVE LAW JUDGE,</p> <p>* THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>*</p> <p>*</p> <p>*</p> <p>* OAH No.: DLR-HIC-02-15-25795</p> <p>* MHIC No.: 14 (75) 614</p> <p>*</p>
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STATEMENT OF THE CASE

On June 1, 2014, Nima Mohammadi (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$20,000.00 in alleged actual losses suffered as a result of a home improvement contract with Kenneth Burr, trading as Burr Building and Remodeling (Respondent).

I held a hearing on November 12, 2015 at the Department of Natural Resources in Annapolis, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).¹ The Claimant participated without representation. The Respondent failed to appear for the hearing after receiving proper notice. Kris King, 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. Did the Claimant sustain an actual loss compensable by the Fund as a result of any acts or omissions committed by the Respondent?
2. If so, what is the amount of that loss?

SUMMARY OF THE EVIDENCE

Exhibits

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

- Clmt. Ex. 1. Contract with the Respondent, June 13, 2013.
- Clmt. Ex. 2. Contract Change Order, August 15, 2013; Contract Change Order, August 21, 2013; annotated payment schedule; copies of four checks from the Claimant to the Respondent totaling \$75,000.00.
- Clmt. Ex. 3. Final Notice, November 16, 2013.
- Clmt. Ex. 4. E-mails between the Claimant and the Respondent, September 30 to November 18, 2013.

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

- Clmt. Ex. 5. Summary of expenses to complete the contract; receipts from The Home Depot, December 21, 2013 to April 16, 2014; invoice from A&J Electric Company, Inc., April 2, 2014; Job Bid from Ehrhardt Brothers Quality Plumbing, Inc., January 21, 2014; invoice from Ehrhardt Brothers Quality Plumbing, Inc., March 26, 2014; invoice from Aerotech Gutter Service, January 8, 2014; Equipment Installation Proposal from CES Heating & Cooling, December 23, 2013; invoices from Bayside Electric Co. Inc., February 6, 2014 and April 9, 2014; invoice from Caceda Properties LLC, April 22, 2014; Revised Proposal, January 19, 2014, and invoice, March 25, 2014, from Vertex Carpentry.
- Clmt. Ex. 6. IRS form 1099-MISC from Persia, LLC to the Respondent, 2013.
- Clmt. Ex. 7. The Claimant's log of work done on the property, September 26 to November 16, 2013.
- Clmt. Ex. 8. Twenty-nine photographs of unfinished work, November 21, 2013.
- Clmt. Ex. 9. Nine photographs of completed work, June 2014.

I admitted the following exhibits into evidence on behalf of the Fund:

- Fund Ex. 1. Notice of Hearing, September 30, 2015.
- Fund Ex. 2. Hearing Order, July 29, 2015.
- Fund Ex. 3. The Respondent's licensing history with the MHIC.
- Fund Ex. 4. Real Property Data Search, November 10, 2015.
- Fund Ex. 5. Affidavit of Hubert Lowery, November 6, 2015.
- Fund Ex. 6. Home Improvement Claim Form, received June 1, 2014.
- Fund Ex. 7. Letter from the MHIC to the Respondent, June 24, 2014.

Testimony

The Claimant testified in support of his claim. No other testimony was offered.

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 01-08431. The MHIC suspended the Respondent's license on March 13, 2015.

2. The Respondent lives at 15247 New Windsor Road, New Windsor, Maryland 21776.

3. The Claimant is a real estate investor. He and his wife own a corporation known as Persia, LLC, which, at all relevant times, owned a single-family home at 110 Nunnery Lane, Catonsville, Maryland. Other than his residence, the Claimant did not own any additional residential property in Maryland at the time.

4. On June 13, 2013, the Claimant and the Respondent entered into a contract to completely renovate the house at 110 Nunnery Lane inside and out, including roofing, siding, windows, gutters, doors, porches, sidewalks and driveway, electrical, plumbing, heating, ventilating and air conditioning (HVAC), gutting and remodeling the kitchen and bathroom, renovating every room in the house, building a powder room, installing appliances furnished by the Claimant, trim and painting, and finishing the project so the house would be ready for sale.

5. The contract stated that work would begin on July 1, 2013 and would be completed by October 8, 2013. The contract included a provision that \$100.00 would be deducted from the contract price for every day after October 8, 2013 that the project was not finished.

6. The original contract price was \$85,000.00.

7. On August 7, 2013, the Claimant and Respondent agreed on a change order to the contract, adding installation of trim or wrapping to all windows, and framing and drywall for a room in the basement. The change order also reduced the width of the new driveway by three feet. The net result of the change order was to add \$310.00 to the contract price.

8. On August 21, 2013, the Claimant and the Respondent executed another change order, whereby installation of hardwood flooring was removed from the contract, resulting in a decrease of \$2,300.00 in the contract price.

9. The final contract price was \$83,010.00.²

10. The Claimant paid the Respondent \$75,000.00 under the contract.

11. The Respondent started work on the project on June 21, 2013.

12. The Respondent and some subcontractors worked fairly steadily through the summer, but by mid-September 2013 it was obvious that the contract deadline for completion would not be met.

13. The Claimant started calling and e-mailing the Respondent to prod him to work at a faster pace. The Respondent usually did not return telephone calls or respond to e-mails.

14. On October 1, 2013, the Respondent sent an e-mail to "All Customers" letting them know that he would complete all projects, but completions would be delayed.

15. The last day the Respondent worked on the project was November 11, 2013, when the interior painting was completed. Painting was the only work the Respondent did after October 29, 2013.

² The Claim Form (Fund Ex. 6) uses \$2,132.00 as the net deduction for the change orders, resulting in a final contract price of \$82,868.00. Findings of Fact 6 through 9, above, are based on the evidence presented at the hearing, *i.e.*, the Claimant's testimony and the change orders themselves. There are some cryptic annotations to the payment schedule in Claimant's Ex. 2 relating to a vanity and tile, but the Claimant testified at the hearing that the correct final price was \$83,010.00.

16. On November 16, 2013, the Claimant sent the Respondent a "Final Notice" because the contract was not complete and the Respondent was not doing any work on the project. The Claimant offered to re-negotiate the \$100.00 per day deduction for unfinished work if the Respondent would finish the work by the end of November.

17. The Respondent replied on Monday, November 18, 2013 with a list of work that had been done since October 2nd, and further stated that he would not be coming to the project at all that week.

18. When the Respondent had not done any more work on the project or contacted the Claimant by November 25, 2013, the Claimant filed a complaint with the MHIC.

19. The Respondent abandoned the contract after November 11, 2013.

20. In March or April 2014, an attorney contacted the Claimant on behalf of the Respondent, inquiring about the Claimant's losses resulting from the contract. The Claimant told the attorney what his monetary losses were.

21. The attorney later told the Claimant that the Respondent had no money and could not pay any restitution. The Claimant did not receive any money from the Respondent and never heard from him again.

22. At the time the Respondent abandoned the contract on November 11, 2013, the job was incomplete and was riddled with poor workmanship. At least the following items were not finished or were inadequately done:

- Some doors and all the window trim had not been replaced;
- The staircase bannister and upstairs railing were incomplete;
- The powder room was not finished;
- Electrical plates and switches were missing;
- The bathroom had no vanity, countertop, sink, faucets, or toilet, and the Respondent left an opening in the wall of an adjacent bedroom;
- Porches had not been renovated;
- Lights were missing;

- No HVAC unit was installed, and the necessary ductwork and registers were not in place;
- The utility room was incomplete;
- The electrical work was incomplete, and what the Respondent had installed was incorrect. Wires were left dangling and the electrical panel had to be moved because it was installed incorrectly.
- Plumbing was incomplete;
- The kitchen had no faucet, and the appliances were not hooked up;
- The room in the basement had been framed, but not drywalled; and
- Debris was left on the porches.

23. The Claimant spent \$5,822.73 to purchase materials that the Respondent was responsible for under the contract, including bathroom fixtures, electrical supplies, a door and lock set, utility room fixtures, and material to complete the front and back porches.

24. The Claimant paid A&J Electric Company, Inc., \$425.00 to complete the low-voltage electrical work (cable and telephone) for which the Respondent was responsible under the contract.

25. The Claimant paid Ehrhardt Brothers Quality Plumbing, Inc., \$6,312.00 to complete the plumbing and install fixtures in the bathroom, powder room, kitchen, basement, and utility room. The Respondent was responsible for this work under the contract.

26. The Claimant paid Aerotech \$1,600.00 to install new gutters. The Respondent was responsible for this work under the contract.

27. The Claimant paid CES Heating and Cooling \$5,100.00 for the HVAC system. The Respondent was responsible for this work under the contract.

28. The Claimant paid Caceda Properties LLC \$6,300.00 to renovate the porches, finish the bannister and railing, install drywall, and haul away trash. The Respondent was responsible for this work under the contract.

29. The Claimant paid Vertex Carpentry \$4,898.00 to install trim on all the windows, install a back door, and perform other minor trim work. The Respondent was responsible for this work under the contract.

30. The Claimant paid Bayside Electric Co., Inc., \$3,105.00 to repair and replace the Respondent's faulty electrical work and complete the high-voltage electrical installation.

31. In total, the Claimant paid \$33,482.73 to complete the contract after the Respondent abandoned the job.

DISCUSSION

The Respondent's Failure to Appear

Section 8-312 of the Business Regulation Article, entitled "Hearings," states, in pertinent part, as follows:

(a) Except as otherwise provided in § 10-226 of the State Government Article, before the Commission takes any final action under § 8-311 of this subtitle, or if requested under § 8-620(c) of this title, it shall give the person against whom the action is contemplated an opportunity for a hearing before the Commission or, as provided under § 8-313 of this subtitle, a hearing board.

(b) The Commission shall give notice and hold the hearing in accordance with Title 10, Subtitle 2 of the State Government Article.

....

(d) The hearing notice to be given to the person shall be sent at least 10 days before the hearing by certified mail to the business address of the licensee on record with the Commission.

....

(h) If, after due notice, the person against whom the action is contemplated does not appear, nevertheless the Commission may hear and determine the matter.

Md. Code Ann., Bus. Reg. § 8-312.

Although the above statute applies to disciplinary proceedings against licensees, the MHIC uses the same procedures for hearings involving claims against the Fund, such as this

case. These procedures ensure, as much as possible, that a contractor against whom a claim is filed is made aware of the date, time, and place of the hearing.

The notices in this case went to the Respondent's residential address, since he was no longer licensed by the MHIC and had no obligation to maintain a business address with the agency.³ Hubert Lowery of the MHIC checked the records of the Maryland Motor Vehicle Administration and found that the Respondent's home address is 15247 New Windsor Road, New Windsor, Maryland 21776 (Fund Ex. 5). The OAH sent notices to that address by certified mail and by first-class mail on September 30, 2015. The notice sent by certified mail was returned unclaimed, but the copy sent by first-class mail was not returned undelivered by the U.S. Postal Service (Fund Ex. 1). From all of this information, I concluded that the Respondent received actual notice of the hearing and chose not to attend. Therefore, the hearing proceeded in the Respondent's absence. Md. Code Ann., Bus. Reg. § 8-312(h).

The Merits of the Case

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 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

³ The Respondent's license was suspended on March 13, 2015 and expired on August 6, 2015 (Fund Ex. 3).

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.

The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant and at all times while performing work under the contract. The last day anyone in the Respondent’s employ worked on the project was November 11, 2013, about sixteen months before the Respondent’s license was suspended.

The Respondent performed unworkmanlike, inadequate, and incomplete home improvements, as proved by the Claimant’s testimony, the photographs of the Respondent’s unfinished work (Clmt. Ex. 8), and the many invoices and receipts showing the Claimant’s expenses to complete the project (Clmt. Ex. 5).

The Claimant is eligible for compensation from the Fund under section 8-405(f) of the Business Regulation Article, which states as follows:

(f)(1) A claim against the Fund based on the act or omission of a particular contractor may not be made by:

- (i) a spouse or other immediate relative of the contractor;
- (ii) an employee, officer, or partner of the contractor; or
- (iii) an immediate relative of an employee, officer, or partner of the contractor.

(2) An owner may make a claim against the Fund only if the owner:

- (i) resides in the home as to which the claim is made; or
- (ii) does not own more than three residences or dwelling places.

Md. Code Ann., Bus. Reg. § 8-405(f). Although the Claimant did not reside in the home, he did not own more than three residences.

The Claimant also did not prevent the Respondent from returning to the property to complete the contract. The Claimant’s e-mails between September 30 and November 16, 2013

show increasing frustration that the Respondent, his employees, and his subcontractors had essentially stopped working on the project (Clmt. Ex. 4). The only work that had been done after the end of October was that two workers finished the interior painting on November 11th. That evening the Claimant e-mailed the Respondent expressing his unhappiness, but received no reply. When no further work was performed by November 16th, the Claimant sent the Respondent a "Final Notice" (Clmt. Ex. 3) threatening legal action if the Respondent did not reply by November 20th. The notice offered to re-negotiate the \$100.00 daily late fee if the Respondent would agree to complete the project by November 30, 2013.

The Respondent replied by e-mail on November 18, 2013, saying that he had not stopped work but that he "will not be at your property this week at all." (Clmt. Ex. 3.) He listed all the work allegedly done recently, but except for the painting, everything on the list had been completed by October 29, 2013. The Respondent stated that he would be happy to fulfill the contract, but did not offer to complete the work by November 30th.

The Claimant responded by e-mail the same day, then never heard from the Respondent again until an attorney contacted him in March or April 2014. Even then the Respondent did not offer to finish the job or make restitution.

Having found eligibility for compensation, I now turn to the amount of the award to which the Claimant is entitled. According to COMAR 09.08.03.03B(1), the Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest, none of which are claimed in this case. The 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 paid \$33,482.73 for electrical work, plumbing, HVAC, carpentry, materials, and other items that the Respondent was responsible for under the contract. Applying this figure to the regulation set forth above provides the following calculation:

\$75,000.00 paid to the Respondent; plus
+33,482.73 spent to complete the contract; equals
\$108,482.73 minus
-83,010.00 the original contract price; equals
\$25,472.73 actual loss.

The Business Regulation Article limits the maximum recovery from the Fund to the lesser of \$20,000.00 or the amount paid by or on behalf of the Claimant to the Respondent. Bus. Reg. § 8-405(e)(1) and (5). The actual loss computed above exceeds \$20,000.00 by \$5,472.73. Accordingly, the Claimant is entitled to reimbursement from the Fund of only a portion of his actual loss, *i.e.*, \$20,000.00. Bus. Reg. § 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.

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 at least ten percent (10%) as set by the Maryland Home Improvement Commission;⁴ and

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

Signature on File

January 27, 2016
Date Decision Issued

Richard O'Connor
Administrative Law Judge

RC/ej
#160364

⁴ See Md. Code Ann., Bus. Reg. § 8-410(a); COMAR 09.08.01.20.